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### Reconciling Privacy and Speech in the Era of Big Data: A Comparative Legal Analysis

Ronald J. Krotoszynski Jr.  
*University of Alabama - School of Law, rkrotoszynski@law.ua.edu*

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**Reconciling Privacy and Speech in the Era of Big  
Data: A Comparative Legal Analysis**

Ronald J. Krotoszynski, Jr.

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RECONCILING PRIVACY AND SPEECH IN THE ERA OF BIG  
DATA: A COMPARATIVE LEGAL ANALYSIS

RONALD J. KROTOSZYNSKI, JR.\*

ABSTRACT

*In both the United States and the nations of Western Europe, significant constitutional commitments safeguard both expressive freedom (including freedom of speech and of the press) and also a generalized constitutional right of privacy. With some regularity, however, these rights will come into conflict, as the protection of one right can be achieved only at the cost of abridging or denying the other. When a government official or public figure objects to the publication of an embarrassing photograph, perhaps taken by an invasive paparazzo, it is simply not possible to fully vindicate both a newspaper's interest in publishing the photograph and the subject's interest in privacy. Although generalizations often oversimplify complex legal, cultural, and moral understandings, it nevertheless remains true that European courts tend to place greater relative emphasis on safeguarding privacy than do courts in the United States. Thus, the standard narrative posits that the United States gives an absolute priority to speech, over vindication of privacy interests, whereas European law tends to discount the importance of*

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\* John S. Stone Chair, Professor of Law, and Director of Faculty Research, University of Alabama School of Law. With thanks to the editors of the *William & Mary Law Review* for inviting me to participate in this wonderful Symposium. This Article reflects the benefit of very helpful comments and suggestions offered incident to workshops hosted by the law faculties at the University of Miami School of Law, the Michigan State University College of Law, and the University of Washington School of Law. Thanks also to the University of Alabama Law School Foundation for its generous support of this research project through a summer research grant. This Article constitutes part of a larger, book-length project; Oxford University Press will be publishing *Privacy Revisited: A Global Perspective on the "Right to Be Let Alone"* in 2016. Finally, the usual disclaimer applies: any errors or omissions are my responsibility alone.

*expressive freedom in favor of more reliably safeguarding privacy. At one level of analysis, this standard account gets things right—protected speech is both wider and deeper on this side of the Atlantic than in contemporary Europe. This standard account, however, underestimates the European commitment to protecting expressive freedom; the European commitment to safeguarding privacy does not, and will not, invariably override free speech. A comparative legal analysis also demonstrates that privacy is far from dead in the United States. Going forward, the challenges presented by the advent of “Big Data” and society-wide government surveillance programs increasingly will require both the United States and Europe to see privacy as an essential condition for safeguarding speech. Democratic self-government presupposes an ongoing dialogue among citizens, but an open dialogue about government simply cannot exist in a surveillance state. In the brave new world of PRISM and secret government manipulation of metadata, we must recognize that privacy and speech are fundamentally complementary, rather than competing, human rights. Moreover, this is a lesson that comparative legal analysis can teach.*

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## INTRODUCTION

Since its landmark decision in *New York Times Co. v. Sullivan*, the Supreme Court of the United States has been remarkably vigilant in safeguarding the First Amendment's protection of freedom of speech and freedom of the press.<sup>1</sup> In an important series of cases, the Justices extended the right of fair criticism of public officials to reach not only public figures, but even private figures who become enmeshed in matters of public concern.<sup>2</sup> As a general proposition, a media defendant may be liable for money damages only if a plaintiff can show that a false statement of fact concerning a public official, a public figure, or a person involved in a matter of public concern was made with actual malice, that is, with either knowledge of falsity or with reckless indifference to the truth or falsity of the assertion.<sup>3</sup>

But, the constitutionalization of the law of tort—and by implication, the displacement of privacy—only begins with the actual malice standard. Even if a plaintiff prevails at trial, a media defendant is entitled to a close review of the factual basis of the verdict on appeal;<sup>4</sup> only if the plaintiff has proven the case with clear and convincing evidence may the adverse verdict against the press entity stand.<sup>5</sup> This appellate review of “constitutional facts” provides yet another layer of protection to media defendants—and another roadblock against recovery that a plaintiff must successfully overcome.

Of course, the protection of speech and the press in the United States extends well beyond the demanding standard for establishing liability for libel under the law of defamation. The protection also encompasses the right to engage in outrageous parody, which exists,

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1. 376 U.S. 254 (1964).

2. *See, e.g.,* *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69 (1986); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

3. *Sullivan*, 376 U.S. at 279-80.

4. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 498-501 (1984) (requiring that appellate courts independently review issues of constitutional fact in defamation cases brought against media defendants by public officials and persons involved in matters of public concern).

5. *Gertz*, 418 U.S. at 342-43 (requiring “clear and convincing” evidence of malice in order for public officials, public figures, and persons involved in matters of public concern to prevail against a media defendant).

at least in part, to inflict emotional harm on its subjects.<sup>6</sup> Protected speech also includes public protest designed to be intentionally invasive and offensive; provided that the speech activity is otherwise lawful, the fact that it violates basic notions of human decency and privacy does not determine whether it enjoys constitutional protection.<sup>7</sup> The contemporary First Amendment even protects objectively false speech—at least in the absence of some concrete harm associated with its dissemination.<sup>8</sup> Thus, the First Amendment not only requires constitutional protection of false speech,<sup>9</sup> but also creates a zone of protection for outrageous and offensive speech.

Given the one-sided, speech-favoring outcomes of the *New York Times Co. v. Sullivan*, *Hustler Magazine, Inc. v. Falwell*, and *Snyder v. Phelps* line of cases, it should not be particularly surprising that other polities, also sharing a serious constitutional commitment to protecting expressive freedom, have chosen not to follow the U.S. approach to reconciling free speech with other constitutional values, including privacy, dignity, and personal honor. In much of Western Europe, in fact, concerns rooted in protecting personal privacy and dignity routinely take precedence over claims associated with freedom of speech and the press.

The European Court of Human Rights (ECHR), seated in Strasbourg, France, hears and decides cases brought by individuals against signatories to the European Convention for the Protection of Human Rights and Fundamental Freedoms, commonly referred to as the European Convention on Human Rights (European Convention).<sup>10</sup> The European Convention is an instrument created by the Council of Europe, an entity that includes not only all twenty-

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6. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

7. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011).

8. *See United States v. Alvarez*, 132 S. Ct. 2537, 2543-44, 2547-49 (2012) (holding that false speech that does not cause any independent harm is protected under the First Amendment).

9. *See id.* at 2545 (“The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.”).

10. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, 224 [hereinafter European Convention].

eight member states of the European Union (EU),<sup>11</sup> but many others as well.<sup>12</sup>

The ECHR creates and enforces a kind of pan-European law that signatory states and the Court of Justice of the European Union, the EU's highest juridical entity, generally will follow in their own jurisprudence.<sup>13</sup> As Chief Justice John L. Murray, of Ireland, noted,

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11. As of July 1, 2013, the European Union has twenty-eight member nations. *See EU Member Countries*, EUROPA, [http://europa.eu/about-eu/countries/member-countries/index\\_en.htm](http://europa.eu/about-eu/countries/member-countries/index_en.htm) [<http://perma.cc/Z26K-3VYD>] (last visited Mar.22, 2015) (noting that “[t]he union reached its current size of 28 member countries with the accession of Croatia on 1 July 2013” and providing a list of member states along with the year of their entry into the European Union) (emphasis omitted).

12. The Council of Europe currently has forty-seven member states, encompassing a population of over 820 million persons. *See The Council of Europe in Brief*, COUNCIL OF EUROPE, <http://coe.int/en/web/about-us/who-we-are> [<http://perma.cc/Y3SX-ZG3A>] (last visited Mar. 22, 2015). In addition, six nations—Canada, Holy See, Israel, Japan, Mexico, and the United States—hold official “observer status.” *The Council of Europe and Non-Member States*, COUNCIL OF EUROPE, <http://hub.coe.int/en/the-council-of-europe-and-non-member-states/> [<http://perma.cc/5ZFP-E54A>] (last visited Mar. 4, 2015).

13. *See* Charter of Fundamental Rights of the European Union, art. 51, 2000 O.J. (C 364) 1, 8, 21 (providing the EU will respect rights recognized in the European Convention); Consolidated Version of the Treaty on European Union, art. 6(2), 1997 O.J. (C 340) 145, 153 (“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”). These formal provisions simply codified the preexisting practices of the Court of Justice of the European Union, which declared its intention to follow the precedents of the ECHR many decades ago. *See* Case 4/73, *Nold v. Comm’n*, 1974 E.C.R. 491, 507 (“In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.”); Case 26/69, *Stauder v. City of Ulm, Sozialamt*, 1969 E.C.R. 419, 425 (holding that rights secured under the European Convention are “enshrined in the general principles of Community law and protected by the Court”); *see also* Joined Cases 44/87 & 227/88, *Hoechst AG v. Comm’n*, 1989 E.C.R. 2859, 2923 (holding that European Convention rules on procedural due process apply to investigations for price fixing); Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727, 3744-45 (“[F]undamental rights form an integral part of the general principles of the law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States are unacceptable in the Community; and that, similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.”); Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103, 1105 (1986) (discussing the creation of a “judge-made



“Since the mid-1990s in particular, the Court of Justice [of the European Union] has increasingly looked to the European Convention on Human Rights for inspiration as to the nature and scope, or even existence, of fundamental rights in Community law, having recognized the preeminent position of the Convention by 1991.”<sup>14</sup> He added, “In doing so, the Court of Justice [of the European Union] has adopted a somewhat deferential position to the Strasbourg Court in the interpretation of fundamental rights that are contained in the Convention.”<sup>15</sup>

Strictly speaking, all signatories to the European Convention are bound to implement the decisions of the ECHR.<sup>16</sup> So too, the European Union will, as a general matter, follow decisions of the ECHR in interpreting and applying the EU’s governing treaties, statutes, and regulations.<sup>17</sup> The European Union is in the process of becoming a signatory to the European Convention, and in consequence, directly subject to the jurisdiction of the ECHR.<sup>18</sup> In sum, the decisions of

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higher law of fundamental human rights, culled from the constitutional traditions of the Member States and international agreements such as the European Convention on Human Right (ECHR”). The Court of Justice of the European Union has specifically noted that Article 8, which protects privacy, constitutes part of basic legal principles of the European Union. See Case C-62/90, *Comm’n v. Fed. Republic of Ger.*, 1992 E.C.R. I-2575, I-2609.

14. John L. Murray, *The Influence of the European Convention on Fundamental Rights on Community Law*, 33 *FORDHAM INT’L L.J.* 1388, 1394-95 (2010) (footnotes omitted).

15. *Id.* at 1395.

16. See *id.* at 1397.

17. *Id.* The European Union is in discussions with the Council of Europe to become a full member and presumably accede to the European Convention. See *The Council of Europe and the European Union: Different Roles, Shared Values*, COUNCIL OF EUROPE, <http://hub.coe.int/web/coe-portal/european-union> [<http://perma.cc/BBQ5-S2JU>] (last visited Mar. 4, 2015). In May of 2007, the Council of Europe and the European Union formalized their relationship through a joint Memorandum of Understanding. See Memorandum of Understanding Between the Council of Europe and the European Union (May 23, 2007), available at <http://perma.cc/8L4S-RGSU>. In relevant part, the Memorandum provides that “[t]he Council of Europe will remain the benchmark for human rights, the rule of law, and democracy in Europe,” and “[t]he European Union regards the Council of Europe as the Europe-wide reference source for human rights.” *Id.* Consistent with these principles, “[i]n the field of human rights and fundamental freedoms, coherence of Community and European Union law with the relevant conventions of the Council of Europe will be ensured.” *Id.*

18. See Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, Strasbourg art. 17(2), May 13, 2004, C.E.T.S. No. 194 (amending Article 59 of the European Convention to provide that “[t]he European Union may accede to this Convention”). Protocol 14 went into effect on June 1, 2010. *Protocol 14 Enters into Force*, ECHR BLOG (Jun. 1, 2010), <http://echrblog.blogspot.com/2010/06/protocol-14-enters-into-force.html> [<http://perma.cc/CZ6M-8FDJ>]

the ECHR constitute a body of pan-European law that is meant to express and embody the contemporary human rights practices of the signatory states.<sup>19</sup>

Careful consideration of how the ECHR has attempted to reconcile privacy and speech provides a useful alternative baseline for considering how to resolve conflicts between these rights. Moreover, as all democratic societies struggle with how best to control and constrain the potential ill effects of Big Data and the new surveillance technologies that make effective use of Big Data possible, the question of how to integrate privacy and speech is more pressing than ever. Alexander Meiklejohn famously argued that free speech constitutes an essential condition for the maintenance of democratic self-government.<sup>20</sup> I would argue, in turn, that privacy is integral to maintaining effective protection for the freedom of speech; it is difficult to posit democratic self-government in the absence of meaningful privacy rights (at least against the government).<sup>21</sup>

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(noting that “[t]oday, a bit over six years after it was opened for ratifications, Protocol 14 finally entered into force” and observing that Protocol 14 “opens up the possibility of EU accession to the [European Convention]”).

19. See Murray, *supra* note 14, at 1397.

20. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22-27, 88-89 (1948); see also *infra* Part II. Meiklejohn argues that “unabridged freedom of public discussion is the rock on which our government stands.” MEIKLEJOHN, *supra*, at 20.

21. See MEIKLEJOHN, *supra* note 20, at 70 (arguing that “public intelligence” is a key element of creating a citizenry capable of effective self-government). A surveillance state produces a profound chilling effect on freedom of political inquiry. Meiklejohn posits that “[w]e are saying that the citizens of the United States will be fit to govern themselves under their own institutions only if they have faced squarely and fearlessly everything that can be said in favor of those institutions, everything that can be said against them.” *Id.* at 91. Bold inquiries into the first principles of governing institutions and ideologies simply will not exist in a surveillance state.

The specter of “Big Brother” watching<sup>22</sup> will undoubtedly have profound implications for the exercise of expressive freedoms—indeed for the very idea of democracy itself.<sup>23</sup> If a population is to engage in a process of democratic self-government, it must be capable of free and unimpeded collective discussions related to government.<sup>24</sup> The loss of privacy, however, could either impede or preclude these conversations—conversations integral to the process of democratic self government.

This Article proceeds in three main parts. Part I considers the important ways in which the standard narrative—the United States is all about speech whereas Europe is all about privacy—gets things right. Highly salient points of conflict exist between U.S. and European approaches to reconciling privacy and speech; these differences are real and cannot simply be ignored. For example, neither false speech nor speech designed to humiliate or embarrass its subject enjoys the same level of constitutional solicitude in Europe as in the contemporary United States. Moreover, these disagreements include not only differences in substantive legal doctrine, but also important methodological differences in adjudicating human rights claims. At a general level of analysis, interests rooted in privacy, dignity, and personal honor often take priority over vindicating free speech and press claims in the decisions of the ECHR.

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22. GEORGE ORWELL, 1984, at 2 (1949); *see also* GARY BRUCE, *THE FIRM: THE INSIDE STORY OF THE STASI* 106-161 (2010) (discussing the history of Stasi operations in East Germany); JOHN O. KOEHLER, *STASI: THE UNTOLD STORY OF THE EAST GERMAN SECRET POLICE* 9-10, 18-21 (1999) (discussing the reach of Stasi power and the harsh results when the Stasi learned of intentions to leave East Germany). As Koehler puts it, “Like a giant octopus, the Stasi’s tentacles probed every aspect of life.” KOEHLER, *supra* at 9. Moreover, “Stasi officers knew no limits and had no shame when it came to ‘protecting the party and the state.’” *Id.* East Germany’s effort to construct an effective police state were minutely detailed and highly successful. *See id.* at 8-9 (“To ensure that the people would become and remain submissive, East German communist leaders saturated their realm with more spies than had any other totalitarian government in recent history.”); *id.* at 9 (noting that if one adds up full-time Stasi officers, regular Stasi informers, and part-time Stasi informers, “the result is nothing short of monstrous: one informer per 6.5 citizens”). To be clear, I would not argue that current efforts by governments in democratic states to collect metadata are the equivalent of the Stasi’s domestic spying efforts. On the other hand, the collection and storage of such mass quantities of data plainly create troubling possibilities for efforts to control and manipulate the population that ought to give reasonable observers at least some pause.

23. *See infra* Part III.

24. MEIKLEJOHN, *supra* note 20, at 88-89.

Part II considers the ways in which U.S. and European human rights law share some important, but underappreciated, common ground. Privacy is far from dead in the United States, and European human rights law includes significant protection for the freedom of speech. In some important respects, the standard account fails to acknowledge adequately the fact that American and European law share common animating goals and purposes—notably including recognition of the inextricable link between protection for freedom of speech and the process of democratic self-government. Thus, it would be incorrect to conclude that only points of conflict exist between the United States and Europe on the relevant salience of privacy and speech. Part II also posits that protecting free speech does not invariably and inevitably preclude any legal protection for privacy or human dignity in the United States. Thus, the European approach places significant value on the importance of freedom of expression, and the United States sometimes limits speech to safeguard privacy interests.

Finally, Part III considers the problem of Big Data<sup>25</sup> and the challenges that will have to be addressed successfully in order to protect privacy and speech going forward into the future. The ability of government and private entities to amass vast quantities of data has obvious, and negative, implications for the prospects of securing privacy interests. Perhaps less obvious, however, is that this same ability to collect, analyze, and manipulate metadata could also have a significant chilling effect on the exercise of expressive freedoms as well. Part III argues that contemporary European efforts to control both governmental and private use of metadata merit careful consideration in the United States.

In sum, this Article seeks to identify both points of agreement and also points of conflict in the privacy jurisprudence of the United States and Europe. In so doing, a better understanding of the values that undergird both privacy and speech should result.

This exercise also will demonstrate that, although privacy and speech are often presented as conflicting values, in the era of Big Data, protecting privacy might prove to be an essential condition for

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25. For a discussion of the meaning of Big Data and the challenges it poses to privacy, innovation, and democracy itself, see Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1905-11 (2014), and Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 B.C. L. REV. 93, 93-99 (2014).

safeguarding the exercise of free speech rights. Despite a tendency to think of privacy and speech as conflicting values, we should be open to the possibility that technology will require us to think of them as essentially complementary values instead.

#### I. EUROPE AND PRIVACY: EXPLORING SALIENT POINTS OF CONFLICT WITH THE UNITED STATES

It is easy, obvious even, to identify important points of difference in the European and U.S. approaches to defining and protecting privacy. First, a significant methodological difference distinguishes judicial enforcement of privacy rights in Europe from the baseline approach in the United States. In Europe, the doctrine of proportionality generally requires that a court, after finding that a fundamental right (including privacy) has been breached, must then balance the degree of the infringement against the state's justifications for enacting the regulation.<sup>26</sup> Although this doctrine is often unfamiliar to U.S. law professors and lawyers, it is commonplace in the wider world.<sup>27</sup> As Professors Huscroft, Miller, and Webber observe, in the global context, "[t]o speak of human rights is to speak of proportionality."<sup>28</sup> Simply stated, establishing that a right secured by the European Convention has been abridged or denied is a necessary, but not sufficient, condition for establishing a valid constitutional claim.

Second, and no less important, privacy rights in Europe are significantly *broader* in scope than in the United States. This reflects the fact that privacy is a positive right as well as a negative right.<sup>29</sup> But it also reflects significant doctrinal differences about the

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26. See Grant Huscroft et al., *Introduction to PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, AND REASONING* 1, 1-4 (Grant Huscroft et al. eds., 2014) (discussing the concept of proportionality in constitutional adjudication and its tremendous importance to the adjudication of human rights in many national and international legal systems).

27. *Id.* at 1.

28. *Id.*

29. See *Söderman v. Sweden*, App. No. 5786/08, at 22 (Eur. Ct. H.R. 2013), <http://hudoc.echr.coe.int/webservices/content/pdf/001-128043?TID=mpdiodvsxq> [<http://perma.cc/LM63-8BZG>] (holding that Article 8 "does not merely compel the state to abstain" from violations, but also "in addition to this primarily negative undertaking, there are positive obligations inherent in an effective respect for private or family life"). Thus, in order to comply with European Convention obligations, a signatory state's "obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals

conditions under which a person may hold a “reasonable expectation of privacy”—for example, in Europe, it is quite plausible to be private in public places.<sup>30</sup>

Third, and finally, in European jurisprudence, both courts and legislatures have shown a greater willingness to adopt and enforce (often strictly) mandatory civility norms that protect not only ordinary citizens but also public officials and public figures.<sup>31</sup> Rather than leveling everyone down to the position of the average, ordinary person, mandatory forms of politesse have been democratized and extended to each and every person within the community.<sup>32</sup> This approach means that, at least in theory, everyone is deserving of dignity, respect, and personal honor;<sup>33</sup> but, it imposes significant limitations on speech and press rights with respect to public officials, public figures, and private persons involved in matters of public concern.<sup>34</sup>

#### A. *Balancing and Proportionality*

In many foreign legal systems, the scope of rights are never categorical. Instead, rights are held only contingently and courts must balance a law or policy that burdens or denies a protected right against the government’s rationale for enacting and enforcing the law or policy on the facts presented.<sup>35</sup> In general, permissible

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between themselves.” *Id.*

30. See *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 41, 66.

31. See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1194 (2004).

32. *Id.* at 1165, 1194-95.

33. See *Von Hannover*, 2004-VI Eur. Ct. H.R. at 71 (“The Court reiterates the fundamental importance of protecting private life from the point of view of the development of every human being’s personality.” (emphasis added)); *id.* (“The Court considers that anyone, even if they are known to the general public, must be able to enjoy a ‘legitimate expectation’ of protection of and respect for their private life.” (emphasis added)); see also James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1319-21, 1344, 1358-59, 1384 (2000) (noting that European law places greater relative emphasis on interests related to personal honor, dignity, and civility and enforces these cultural norms through positive law).

34. See *Von Hannover*, 2004-VI Eur. Ct. H.R. at 71-72.

35. AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 32, 131-133 (Doron Kalir trans., Cambridge Univ. Press 2012) (2010); see Huscroft et al., *supra* note 26, at 1 (noting that many national legal systems, including “courts in continental Europe, the United Kingdom, Canada, New Zealand, Israel, and South Africa,” as well as

limitations on rights must be prescribed by law and necessary in a democratic society.<sup>36</sup> This is the standard metric used to delimit the scope of all rights protected under the European Convention.<sup>37</sup> Consistent with this approach, establishing that a fundamental right, like privacy, has been abridged is a necessary, but not sufficient, predicate for successfully obtaining judicial relief. After a plaintiff (or applicant, to use the ECHR's preferred nomenclature) establishes that a breach has occurred, the burden then shifts to the government to establish that the balancing exercise favors upholding the impugned law or policy rather than invalidating it.

One should be careful to note that this balancing exercise occurs only *after* a plaintiff has successfully invoked a particular right. As a preliminary matter, a person seeking the protection of a right secured under the European Convention must first successfully assert that a breach of that right has taken place. For example, in *Botta v. Italy*, the ECHR found that the applicant, Botta, had failed to successfully state a cognizable privacy claim, and accordingly, the court did not engage in proportionality analysis.<sup>38</sup> Botta, who was physically disabled, claimed that Italy had failed to adequately protect his ability to access and enjoy places of public accommodation, such as beaches operated by private concessionaires.<sup>39</sup>

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"treaty-based legal systems such as the European Court of Human Rights" all utilize proportionality analysis when adjudicating human rights claims). It bears noting that significant variations exist among and between legal systems with respect to the definition and application of the proportionality doctrine; accordingly "it is not clear that the different uses are mere variations on a common concept." Huscroft et al., *supra* note 26, at 3.

36. See *R. v. Oakes*, [1986] 1 S.C.R. 103, 135-40 (Can.). *Oakes* provides a classic explication of the proportionality principle and has been widely adopted in jurisdictions beyond Canada. See Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803, 804-07 (2004). As Jackson observes, "Canada has played a particularly influential role in the transnational development of proportionality testing in constitutional law." *Id.* at 804.

37. See Huscroft et al., *supra* note 26, at 1 ("It is no exaggeration to claim that proportionality has overtaken rights as the orienting idea in contemporary human rights law and scholarship."); see also DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 163-68 (2004) (arguing that courts should focus less on the elucidation and definition of substantive rights and more on the application of the proportionality principle).

38. *Botta v. Italy*, App. No. 21439/93, 26 Eur. H.R. Rep. 241, 247 (1998) (noting the ECHR's observation in its preliminary decision that "[i]n effect, the applicant [Botta] is complaining of an interference with his private life and personal development caused by the State's failure to adopt the measures necessary to rectify omissions on the part of the concessionaires private beaches").

39. *Id.* at 242-43, 246. Italy actually maintained a law requiring that persons with disabilities enjoy access to public accommodations, including beaches, but pre-existing contracts to

Article 8(1) of the European Convention provides that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”<sup>40</sup> However, this right is limited by operation of Article 8(2), which states that:

There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>41</sup>

In order to invoke Article 8 successfully, Botta had to claim an interest falling within the scope of protection. The ECHR squarely rejected Botta’s Article 8 claim, holding that

the right asserted by Botta, namely the right to gain access to the beach and the sea at a place distant from his normal place of residence during his holidays, concerns interpersonal relationships of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant’s private life.<sup>42</sup>

Because Botta failed to state a claim falling within the rubric of Article 8’s protection, the ECHR did not have to engage in proportionality analysis to determine if Italy’s failure to ensure access to privately operated beaches was prescribed by law and demonstrably necessary in a free and democratic society.<sup>43</sup>

In the specific context of privacy claims, scope of coverage questions often arise in public or commercial settings. For example, does a lawyer have an Article 8 claim with respect to his client files?<sup>44</sup> Does a person teaching religion in a state-sponsored, but

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operate beach facilities were exempted from this obligation. *See id.* at 244.

40. European Convention, *supra* note 10, art. 8(1).

41. *Id.* art. 8(2).

42. *Botta*, 26 Eur. H.R. Rep. at 258.

43. *See id.*

44. *See Niemetz v. Germany*, 251 Eur. Ct. H.R. 23, 33 (1992).



religiously affiliated, secondary school have a privacy interest in not being discharged because of his marital status?<sup>45</sup> Although the provision of professional services and employment in state-supported schools might not initially seem to implicate “respect for [one’s] private and family life,”<sup>46</sup> in both instances, the ECHR found that the claims at bar fell within the scope of Article 8’s coverage.<sup>47</sup> However, even though the concept of one’s private life “is a broad term not susceptible to exhaustive definition,”<sup>48</sup> the concept of privacy is not infinite in scope.<sup>49</sup>

In sum, the scope of application of a particular right presents an essential—and quite mandatory—first step in establishing a valid claim under the European Convention. Only after the applicant meets this initial threshold will the ECHR proceed to ascertain whether the restriction or abridgement at issue is “in accordance with the law,” in pursuance of a legitimate aim, and “necessary in a democratic society.”<sup>50</sup> The balancing exercise is crucial to determining whether the claimant will prevail, but it constitutes the second part of a two-step analysis.

In the United States, by way of contrast, such balancing tends to occur, but usually before a violation has been held to exist.<sup>51</sup> In the

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45. *Fernández Martínez v. Spain*, App. No. 56030/07, at 3-6, 28-30 (Eur. Ct. H.R. 2014), <http://hudoc.echr.coe.int/webservices/content/pdf/001-145068?TID=Iwclecsgaf> [<http://perma.cc/9JBC-97M8>].

46. European Convention, *supra* note 10, at art. 8(1).

47. See *Fernández Martínez*, App. No. 56030/07, at 29 (holding that “there is no reason of principle to consider why the notion of ‘private life’ should be taken to exclude professional activities”); *Niemetz*, 251 Eur. Ct. H.R. at 33-34 (“There appears, furthermore, to be no reason of principle why this understanding of the notion of ‘private life’ should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.”); *id.* at 34 (“More generally, to interpret the words ‘private life’ and ‘home’ as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities.”).

48. *Fernández Martínez*, App. No. 56030/07, at 15.

49. See *Botta v. Italy*, App. No. 21439/93, 26 Eur. H.R. Rep. 241, 257-58 (1998) (finding that Article 8 is not applicable in the context of a claim that Italy had an Article 8 obligation to enact broader protections for disabled persons to access places of public accommodation).

50. See *Niemetz*, 251 Eur. Ct. H.R. at 35 (setting forth and analyzing each of these elements after *Niemetz* had successfully invoked the protection of Article 8).

51. See *Jackson*, *supra* note 36, at 803 (noting that “[i]f you have not heard of [the proportionality doctrine], that is because the concept has received far more elaboration and evaluation outside the United States”).

context of free speech, for example, child pornography<sup>52</sup> and obscenity<sup>53</sup> are said to exist outside the scope of “the freedom of speech” protected by the First Amendment’s Free Speech Clause. Political speech, however, is said to rest at the very heart of the First Amendment.<sup>54</sup> Implicit in this dichotomy is a hidden balancing exercise that measures the social value of child pornography and obscene speech and finds that the government interest in suppressing this speech—including adoption and enforcement of criminal sanctions for the creation, distribution, or possession of such material—overbears whatever social value this speech arguably might possess.<sup>55</sup>

Although formally presented as a form of categorical protection—speech either falls within or outside the scope of the First Amendment’s Free Speech Clause—the underlying logic relies on a kind of utilitarian social balancing.<sup>56</sup> In Europe, this balancing is overt and direct, and occurs automatically after a litigant has successfully invoked the constitutional free speech guarantee.<sup>57</sup> Moreover, even

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52. See generally *Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 458 U.S. 747 (1982). For an analysis and critique of the categorical exclusion of nude images of children from any First Amendment protection, see Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 925-26 (2001); and Amy Adler, *The Perverse Law of Child Pornography*, 103 COLUM. L. REV. 209, 213 (2001) [hereinafter Adler, *Perverse Law of Child Pornography*].

53. See generally *Miller v. California*, 413 U.S. 15 (1973). For a thoughtful analysis and critique of the exclusion of obscenity from First Amendment protection, see Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695 (2007); and Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005).

54. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (“At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”); *Carey v. Brown*, 447 U.S. 455, 467 (1980) (observing that speech related to self-governance and politics stands “on the highest rung of the hierarchy of First Amendment values”); *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 776 (1978) (noting that political speech rests “at the heart of the First Amendment’s protection”) (citing *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940)); Richard Fallon, *Making Sense of Overbreadth*, 100 YALE L.J. 853, 865-66 (2000) (positing that “political speech and organization lie at the heart of the First Amendment”).

55. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769-77 (2004). To be sure, some thoughtful academic commentators have questioned this categorical exclusion of sexually explicit materials from the protection of the First Amendment. See, e.g., Adler, *Perverse Law of Child Pornography*, *supra* note 52, at 210.

56. Schauer, *supra* note 55, at 1785-88, 1803-07.

57. Again, to reach the proportionality stage of analysis, a litigant must first successfully argue that the conduct or activity at issue falls within the scope of protection of Article 10—the provision of the European Convention that secures both freedom of expression and also freedom of the press. See *infra* notes 101-02 and accompanying text (discussing and

core political speech, the sort of speech that would automatically receive the most robust protection under the First Amendment, is still subject to balancing incident to proportionality analysis. Thus, no speech is categorically excluded from protection at step one (scope of coverage analysis), but neither is high value speech, such as political speech, categorically protected at step two (proportionality analysis).

### *B. Privacy as a Positive Right*

Privacy, like all rights protected under the European Convention, has both *negative* and *positive* aspects. In other words, it is not sufficient for the state to simply refrain from abridging or denying protected privacy rights. Instead, the state has an affirmative duty to secure privacy more generally within society and in interactions between nongovernmental actors.

*X and Y v. The Netherlands* provides an instructive example.<sup>58</sup> In this case, a staff member at a facility for persons with developmental disabilities sexually assaulted a young woman who resided in the group home.<sup>59</sup> The local public prosecutors declined to bring charges against the staff member accused of the assault, and at that time, Dutch law did not provide any means for the victim herself to bring criminal action.<sup>60</sup> Had the victim of the assault been legally competent to bring an action in her own name, a remedy existed

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providing the text of Article 10). In general, however, this tends to be easier to do in Europe than in the United States because finding that the constitutional guarantee applies in the abstract does not necessarily mean that the government will lose (as is quite often the case in the United States). For example, the Supreme Court of Canada has held that any activity intended to communicate a message, including even threats of violence, comes within the scope of section 2(b) of the Charter of Rights and Freedoms. *See R. v. Keegstra*, [1990] 3 S.C.R. 697, 732-33 (Can.) (“While the line between form and content is not always carefully drawn, in my opinion threats of violence can only be so classified by reference to the content of their meaning. As such, they do not fall within the exception spoken of in *Irwin Toy*, and their suppression must be justified under s. 1.”); RONALD J. KROTOSZYNSKI, JR., *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH* 54-55 (2006) (discussing the remarkably broad scope of application of section 2(b) of the Charter of Rights and Freedoms).

58. 91 Eur. Ct. H.R. (ser. A) at 6 (1985).

59. *Id.* at 8.

60. *Id.* at 9.

under Dutch law, but the relevant code provision did not permit the action to be brought by a parent or guardian on her behalf.<sup>61</sup>

The young woman and her father filed a complaint with the ECHR, which concluded that the Netherlands had violated Article 8 of the European Convention by failing to provide sufficient legal protection for the young woman's Article 8 privacy rights.<sup>62</sup> On these facts, a violation existed because the right of privacy secured by Article 8 clearly encompassed "the physical and moral integrity of the person, including his or her sexual life."<sup>63</sup>

Even though the government itself had not violated the petitioner's right of privacy, a violation nevertheless existed because

[Article 8] does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.<sup>64</sup>

On the facts presented, because the Netherlands failed to provide an effective means of legal redress to the victim of a sexual assault, the state had failed to discharge its duties under Article 8.<sup>65</sup>

Nor is *X and Y v. The Netherlands* an unusual or particularly novel decision. The concept of *drittwirkung*, or the obligation of signatory states to protect fundamental rights generally within society, is well settled and not particularly controversial.<sup>66</sup> As a leading treatise on the European Convention explains, *drittwirkung*

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61. *Id.* at 10.

62. *Id.* at 11-12.

63. *Id.* at 11, 14. To be sure, the primary focus of Article 8 "is essentially that of protecting the individual against arbitrary interference by the public authorities." *Id.* at 11. But it is not sufficient for the state simply to refrain from violating European Convention rights, including the right of privacy set forth in Article 8. Instead, signatories to the European Convention have an obligation to secure Convention rights more generally within society, including in contexts involving solely nongovernmental actors.

64. *Id.* at 11 (citations omitted).

65. *See id.* at 14.

66. *See* PIETER VAN DIJK ET AL., THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 28-30 (4th ed. 2006). For a general discussion and overview of the so-called "horizontal effect" and constitutional rights, see Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387 (2003).

involves “a positive obligation on the part of the Contracting States to take measures in order to make their exercise possible,”<sup>67</sup> including enforcement “vis á vis private third parties.”<sup>68</sup>

By way of contrast, in the United States, constitutional rights are almost exclusively negative rights; they bind the state, but have absolutely no application against nongovernmental entities that do not meet one of the various tests for state action.<sup>69</sup> If fundamental rights are to apply against nongovernmental actors, positive legislation at the federal, state, or local level would be requisite. Moreover, such legislation might itself be constitutionally objectionable if it has the effect of abridging or denying a fundamental right held by a regulated entity. For example, under existing Supreme Court precedent, a state law prohibiting discrimination against gay and lesbian persons cannot constitutionally be applied to the Boy Scouts,<sup>70</sup> and a law prohibiting discrimination based on race or ethnicity could not constitutionally be applied to the Ku Klux Klan or the Nation of Islam.<sup>71</sup>

The positive aspect of the right of privacy means that the ECHR (and European domestic courts that observe this doctrine, such as

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67. VAN DIJK ET AL., *supra* note 66, at 29-30; see DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 48-49, 368 (2d ed. 1997) (discussing the concept of *drittwirkung* in German constitutional jurisprudence implementing the Basic Law).

68. VAN DIJK ET AL., *supra* note 66, at 30; see ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 179-82 (1996) (discussing the ECHR's application of human rights obligations in contexts where state action is absent); Evert Albert Alkema, *The Third Party Applicability or "Drittwirkung" of the ECHR*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 33-45 (Franz Machter & Herbert Petzold eds., 1988).

69. See *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291 (2007); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); Gardbaum, *supra* note 66, at 388-89, 394-98, 412-16; see also David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864-65, 867-68 (1986) (discussing the paucity of positive rights in the U.S. constitutional tradition and distinguishing the U.S. approach from the continental approach, which generally embraces positive constitutional rights); Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302 (1995) (providing a comprehensive overview of the state action doctrine, including its origin and the justifications commonly used to defend it against criticisms that it creates an arbitrary limit on the scope of application of constitutional rights).

70. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 643-44 (2000); see also JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012).

71. *But see* *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

Germany's Federal Constitutional Court<sup>72</sup>) looks not only for government violations of the underlying right but also for government failures to sufficiently protect privacy in purely private contexts. In some instances, a failure to act to protect privacy against private abridgement would itself constitute a violation of Article 8(1) of the European Convention.

### *C. The Scope of Privacy Rights and Mandatory Civility Norms*

In European jurisprudence, the right of privacy has a significantly broader scope of application than in the contemporary United States. This observation applies with respect to places (more protected spaces, including public spaces), persons (less diminution of privacy rights for public officials, public figures, and persons involved in matters of public concern than in the United States), and subjects (personal information deemed worthy of constitutional protection has a broader scope in Europe).

#### *1. Privacy and Place*

In the jurisprudence of the ECHR and many signatory states, a reasonable expectation of privacy can arise while a person is in public.<sup>73</sup> As the ECHR has explained, "the public does not have a legitimate interest in knowing where [a person] 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."<sup>74</sup> In other words, the fact that

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72. See KOMMERS, *supra* note 67, at 48-50; see also Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 241, 261-64, 271-79 (1989).

73. See, e.g., *Campbell v. MGN Ltd.*, [2004] UKHL 22, 2 A.C. 457 (appeal taken from Eng.) (holding that supermodel Naomi Campbell had a reasonable expectation of privacy with respect to a photograph of her leaving a narcotics addiction treatment center in central London, despite the fact that the photograph was taken from a public sidewalk and Campbell was visible to any member of the public who happened to be passing by); *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 41, 70-73; see also N.A. Moreham, *Privacy in Public Places*, 65 CAMBRIDGE L.J. 606, 617 (2006) (arguing that under English tort law "it is possible to have an expectation of privacy in public places"). As Professor Moreham puts it, in defeating a privacy claim, "[r]ecent decisions in England and in the European Court of Human Rights ... suggest that it is no longer an answer (if it ever was) simply to say that the disclosure concerned something which took place in public." Moreham, *supra*, at 606.

74. *Von Hannover*, 2004-VI Eur. Ct. H.R. at 72. For a general discussion of the concept of

a person is visible to others on a street, sidewalk, or in a park, does not automatically defeat a privacy claim with respect to a captured image or photograph. In contrast, in the United States, when a person voluntarily appears in a public place, she generally will lack a reasonable expectation of privacy. Moreover, this lack of a reasonable privacy expectation will usually defeat efforts to seek legal protection for nondisclosure of the person's voice, image, or activity through either the civil or criminal law.

The most famous case involving this principle of being "private while in public" involved Princess Caroline of Monaco, a subject of considerable public interest in Germany.<sup>75</sup> Princess Caroline objected to the publication of a series of photographs taken in public places, such as cafes, charity events, and ski resorts.<sup>76</sup> A German national court prohibited the publication of some of the photographs at issue (particularly those featuring Princess Caroline's children),<sup>77</sup> but permitted the publication of others, in large part because Princess Caroline was a "figure of contemporary society 'par excellence.'"<sup>78</sup>

The ECHR held that Germany had violated Princess Caroline's Article 8 privacy rights, explaining that Article 8(1) mandated a broader proscription against the publication without permission of the disputed images of Princess Caroline.<sup>79</sup> The ECHR reasoned that Princess Caroline's status as a public figure, although relevant to analyzing her privacy claims, could not be entirely dispositive. Thus, even for Princess Caroline, "a zone of interaction of a person with others [exists], even in a public context, which may fall within the scope of 'private life.'"<sup>80</sup>

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being private in public, see Gavin Phillipson, *The "Right" of Privacy in England and Strasbourg Compared*, in *NEW DIMENSIONS IN PRIVACY LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 184, 185-87, 202-05 (Andrew T. Kenyon & Megan Richardson eds., 2006) (discussing *Von Hannover* and the concept of privacy while in a public place or space).

75. See *Von Hannover*, 2004-VI Eur. Ct. H.R. at 47-57 (discussing the factual and procedural background of the litigation in the German domestic courts and also before the ECHR); see also Moreham, *supra* note 73, at 607-10 (discussing *Von Hannover*).

76. *Von Hannover*, 2004-VI Eur. Ct. H.R. at 48-50.

77. *Id.* at 52.

78. See *id.* at 55-57 (discussing the Federal Constitutional Court's application of the German public figure doctrine).

79. *Id.* at 71-73 (holding the German concept of reduced privacy rights for public figures a violation of Article 8).

80. *Id.* at 66.

Although *Von Hannover* is perhaps the best known ECHR decision on being “private in public,” other cases also help to establish the general viability of such claims. A person who attempted suicide and was filmed on an English city’s closed-circuit television (CCTV) system, successfully brought an Article 8 privacy claim against the United Kingdom after the local government released both photographs and video of the incident to local print and broadcast media outlets.<sup>81</sup> Peck, the person who attempted suicide, was unable to obtain legal redress under the British law of breach of confidence (the United Kingdom’s analogue to the tort of invasion of privacy in the United States<sup>82</sup>), and accordingly, filed a complaint with the ECHR.<sup>83</sup>

In *Peck v. United Kingdom*, the ECHR held that the United Kingdom had violated Peck’s right of privacy and that the government lacked a sufficient justification for the breach.<sup>84</sup> Although the use of CCTV systems to monitor public streets and sidewalks in order to prevent crime constitutes a permissible government policy, the storage and subsequent distribution of captured images of Peck’s attempted suicide to the press violated Article 8.<sup>85</sup> On these facts, “the disclosure constituted a disproportionate and therefore unjustified interference with [Peck’s] private life and a violation of Art. 8 of the Convention.”<sup>86</sup>

Similarly, Article 8 interests come into play when government officials photograph large groups, such as participants in a public march or demonstration.<sup>87</sup> That the entire point of such exercises is

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81. See *Peck v. United Kingdom*, 2003-I Eur. Ct. H.R. 123, 149-51.

82. Moreham, *supra* note 73, at 606-07, 610-20 (discussing how the tort of breach of confidence protects a more generalized right of privacy in British law).

83. *Peck*, 2003-I Eur. Ct. H.R. at 129, 135-36.

84. See *id.* at 149-50.

85. See *id.* at 148-50.

86. *Id.* at 150.

87. See *Friedl v. Austria*, 305 Eur. Ct. H.R. (ser. B) at 20-21 (1995). Although the Austrian government settled *Friedl* before the ECHR could render a decision on the merits, the ECHR has cited with approval the European Commission on Human Rights’ decision and opinion finding that the practice of spying on protestors violated their Article 8 rights. This was so because “both the storing and release of information relating to an individual’s private life in a secret police register ... constitute an interference with the person’s right to respect for his private life.” *Id.* at 20. Despite the breach of *Friedl*’s Article 8 rights, because the complainant was not identified personally in the photographs, and because the Austrian government was engaged in legitimate law enforcement work, the Commission found that the violation was authorized by law and demonstrably necessary in a free and democratic society under Article



to draw public attention and awareness does not automatically defeat a privacy claim. This provides some sense of the potential scope of the concept of being private in public. Even if one participates in a mass rally or event, the purpose of which is to draw public attention to a particular cause or movement, Article 8 might still afford some measure of protection with respect to nondisclosure of your identity (at least with respect to the state). On the other hand, establishing a breach, as noted earlier, is not alone sufficient to obtain relief; a government may always attempt to demonstrate that the breach is lawful under Article 8(2) by showing that the government's actions were in accordance with the law (that is, prescribed by law) and demonstrably necessary in a free and democratic society (proportionality analysis favors the government).<sup>88</sup>

Even in contexts when harboring any expectation of privacy is arguably *objectively unreasonable*, such as in a police station or jail holding cell, the ECHR has found that Article 8 applies with full force.<sup>89</sup> In *PG & JH v. United Kingdom*, the ECHR found an unjustified violation of Article 8 when local police in England recorded without notice or permission the voices of two persons lawfully arrested and held at the police station.<sup>90</sup> Even though the contested recording took place in a local police station, the court held that “the recording of the applicants’ voices when being charged and when in their police cell discloses an interference with their right to respect for private life within the meaning of Article 8 § 1 of the Convention.”<sup>91</sup> Because British law did not expressly authorize surreptitious recording of persons held after arrest in a local jail, the court found that the practice was not “in accordance with the law” as required to save a practice from invalidation under Article 8(2).<sup>92</sup>

To American eyes, of course, the notion that a reasonable expectation of privacy could exist in a police station or a jail cell borders on being nonsensical. The European view, however, takes seriously the notion that *all persons*, in virtually *all contexts*, possess a right to

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8(2). *See id.* at 22-23. The key point, however, is that a person can and does possess a reasonable expectation of privacy while participating in a mass protest rally conducted in a public park or on a public street or sidewalk.

88. *See supra* Part I.A.

89. *PG & JH v. United Kingdom*, 2001-IX Eur. Ct. H.R. 195.

90. *Id.* at 212, 217-19.

91. *Id.* at 219.

92. *Id.*

object to the recording of their image or voice without their knowledge and consent, and also to subsequent distribution of such recordings. As Professor Moreham has observed, the ECHR's jurisprudence clearly establishes that "people are not free ... to publish images of others simply because they were in a public place at the time that the image was obtained."<sup>93</sup> Moreover, attempting to defend publication of such images as protected exercises of free speech or free press rights will not necessarily alter this analysis because "freedom of expression and public interests will be weak when information or images are published solely to satisfy readers' curiosity."<sup>94</sup> Instead of a strong baseline that protects a right to publish images of public officials and public figures, the ECHR has opted for a baseline that affords even starlets, princesses, and politicians substantial discretion to decide how much of themselves and their private lives they wish to make available to the general public.

Finally, one should be careful not to overstate the scope of privacy protections. To the extent that images or information relate to the process of democratic self-government and the ability of the citizenry to hold government accountable, privacy protections can and will give way to the public interest in making the information generally available.<sup>95</sup> However, in U.S. doctrinal terms, the idea that the press may be more-or-less self-regulating regarding what constitutes a matter of public concern rings largely, if not entirely, false in the jurisprudence of the ECHR. In any given case, the subject of a news story may potentially invoke Article 8 as a basis for preventing the press from distributing either images or information about the person.<sup>96</sup>

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93. Moreham, *supra* note 73, at 609.

94. *Id.*

95. *See infra* Part II.

96. To provide a salient example, the British Royal Family invoked privacy rights protected under Article 8 in its media relations campaign following the August 2012 public release of photographs of Prince Harry, third in line to the British crown, cavorting in the nude with friendly locals in Las Vegas, Nevada. *See* John F. Burns, *Murdoch Defies a Warning, Exposing Prince Harry*, N.Y. TIMES, Aug. 25, 2012, at A7 ("It took 72 hours, but one of Britain's normally scandal-hungry tabloids finally broke ranks on Friday, defying a warning from palace officials and publishing two photographs of Prince Harry cavorting naked during a game of strip billiards in his Las Vegas hotel suite."); Adam Sherwin, *Press Warned over Pictures of Naked Prince*, INDEPENDENT (London), Aug. 23, 2012, at 4 ("St James's Palace yesterday asked British media organisations not to publish pictures of a naked Prince Harry partying in Las Vegas, despite the images being available online."); *see also* Nick McAleenan,

## 2. *Privacy and Persons*

Although the status of an individual as a public official or a public figure affects the balancing exercise between Article 8 (privacy) and Article 10 (free speech and press) rights, the ECHR has emphatically rejected the notion that public officials and public figures must forego meaningful privacy protection in order to facilitate public comment within the marketplace of ideas. *All persons* enjoy a right to enjoy respect for privacy in their personal and family life.

Thus, an Estonian woman serving as a senior aide to a government ministry enjoyed a right of privacy that encompassed legal protection from the press using derogatory terms to describe her adulterous affair with her boss, Edgar Savisaar, a prominent Estonian politician who served as Estonia's prime minister and also as Minister of the Interior.<sup>97</sup> So too, Princess Caroline of Monaco, despite appearing at numerous public events open to the view of passersby, had a right to be free of unwanted press attention.<sup>98</sup> Even the President of the French Republic, who had actively and intentionally deceived his constituents regarding his health status, enjoyed a protected right of privacy under Article 8 after his death.<sup>99</sup>

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*Prince Harry - Stripping on the Strip*, JMW (Aug. 23, 2012), <http://www.jmw.co.uk/blog/prince-harry-stripping-on-the-strip-983/> [<http://perma.cc/4G5A-4JQC>] (noting that "Clarence House has urged the UK media not to republish the pictures to protect Harry's privacy" and observing that "publication of photographs of an individual can potentially engage the right to respect for private life under Article 8 of the European Convention on Human Rights"). The U.S. muckraking website TMZ initially broke the story and provided salacious photographs. See *Prince Harry Naked Photos*, TMZ (Aug. 22, 2012) <http://www.tMZ.com/2012/08/21/prince-harry-naked-photos-nude-vegas-hotel-party/> [<http://perma.cc/F6HG-GW76>]. Under existing ECHR case law, had Prince Harry sought to block publication of these photographs in the United Kingdom—or elsewhere in Europe—he probably would have succeeded. To American eyes, however, it is nothing short of amazing that only one British newspaper—Rupert Murdoch's *Sun*—defied St. James Palace and the British Press Complaints Commission and published the actual photographs of Prince Harry. See John O'Farrell, *The Internet Rushes in Where Tabloids Fear to Tread*, INDEPENDENT (London), Aug. 25, 2012, at 31 (noting that Murdoch's *Sun* was the first, and only, newspaper in the United Kingdom to publish the photographs). Some British commentary was highly critical of the *Sun's* decision to publish the photographs. See *id.* ("Most British newspapers made the judgement that because the photos were taken in a private room without the knowledge of the subject, then the privacy of that individual should be respected. They made the important distinction between the public interest and stuff the public is interested in.").

97. See *Tammer v. Estonia*, 2001-I Eur. Ct. H.R. 263, 268-69.

98. *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 41, 69-73.

99. *Éditions Plon v. France*, 2004-IV Eur. Ct. H.R. 39, 73.

It would be wrong, however, to conclude that privacy only protects the rich and the famous. In *Egeland & Hanseid v. Norway*, two women who had been convicted for three counts of murder successfully sued for damages after local newspapers took and published photographs of them standing outside the court house in which, moments before, they had been convicted of murder.<sup>100</sup> The newspapers objected that, on the facts presented, Norway had violated their Article 10 rights to free speech and free press.<sup>101</sup>

In relevant part, Article 10 of the European Convention states:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.<sup>102</sup>

As with all other provisions of the European Convention, Article 10 also provides a savings clause that mandates proportionality analysis when a court finds a breach of rights secured by Article 10(1):

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>103</sup>

The savings clause thus requires that speech and press regulations be “prescribed by law” and “necessary in a democratic society” to advance one of the myriad government interests listed in Article 10(2).

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100. *Egeland & Hanseid v. Norway*, App. No. 34438/04, at 2 (Eur. Ct. H.R. 2009), <http://hudoc.echr.coe.int/webservices/content/pdf/001-92246?TID=qmkpkxtpeu> [<http://perma.cc/6TXG-39GD>].

101. *Id.* at 11.

102. European Convention, *supra* note 10, art. 10(1).

103. *Id.* art. 10(2).

It bears noting that protecting “reputation” and “confidences” are both expressly listed as valid predicates for laws regulating the exercise of speech and press rights.

*Egeland & Hanseid* thus presented a square conflict between the exercise of Article 10 speech and press rights, on the one hand, and, on the other, privacy rights safeguarded under Article 8. The ECHR did not find it particularly difficult to resolve this conflict and it did so decisively in favor of the privacy claim.<sup>104</sup> The court rejected the Article 10 claim, finding that Norway had permissibly weighed and resolved the subjects’ interest in privacy against the newspapers’ interest in expressive freedom.<sup>105</sup>

The ECHR reasoned that “[a]lthough the photographs had been taken in a public place and in relation to a public event ... their publication represented a particularly intrusive portrayal of B” because “[s]he had not consented to the taking of the photographs or to their publication.”<sup>106</sup> If anything, the status of an average citizen as an “ordinary” person enhances, rather than reduces, the scope of the right of privacy secured under the European Convention. The public might have a right to know about the existence of criminal proceedings, and also their resolution, but this does not mean that the public has a right to see the actual image of the accused during an unguarded moment in the print media.

In sum, in the United States, it would be unthinkable to obtain an injunction against the distribution of a book describing an active—and largely successful—campaign to deceive the public regarding the President’s health, that the heir to a hereditary monarchy could object to reporting on her public activities (accompanied by lawfully obtained photographs), or that convicted felons could prevent publication of their images in local newspapers incident to coverage of the trial proceedings and outcome. In Europe, however, a different metric applies to accommodating the rights of speech and press, on the one hand, and the right of privacy, on the other. Absent a clear need premised on a narrowly defined concept of “the public interest,” the public does not enjoy a generalized right of access to particular information or personal images; in

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104. *Egeland & Hanseid*, App. No. 34438/04 at 19-20.

105. *Id.*

106. *Id.*

many cases, privacy claims can and will trump speech and press claims.

### *3. Privacy and the Potential Scope of Protected Materials*

The scope of constitutionally protected information is considerably broader in Europe than in the United States. For example, persons facing criminal charges have successfully sought and obtained injunctions against publication of their photographs—even when the photographs were taken incident to the arrest process and while the criminal charges were pending.<sup>107</sup> Thus, as a general matter, “publication of photographs” comes within the scope of protected “private life.” Moreover, the ECHR also has sustained mandatory civility norms that prohibit the public use of insulting or opprobrious language because these rules advance privacy interests rooted in Article 8(1).<sup>108</sup>

#### *a. The Right to Control One’s Image and Personal Data*

The ECHR has recognized a broad right to control one’s image and personal data—even when a public record is involved or the information relates to a matter of public concern (or both). For example, in *Sciacca v. Italy*, the ECHR upheld an Article 8 claim when local police in Sicily released an arrest photograph without the subject’s express permission.<sup>109</sup> The local revenue police took a photograph of Sciacca incident to her arrest “on charges of criminal association, tax evasion, and forgery.”<sup>110</sup> The public prosecutor and revenue police held a joint press conference about the case; incident to this event, the police released a copy of Sciacca’s arrest photograph to media, which proceeded to publish Sciacca’s photograph in local news stories reporting on the criminal proceedings.<sup>111</sup> Sciacca’s arrest photograph appeared “four times, on December 5 and 6,

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107. See, e.g., *Sciacca v. Italy*, 2005-I Eur. Ct. H.R. 59, 68.

108. See *Tammer v. Estonia*, 2001-I Eur. Ct. H.R. 263, 263.

109. *Sciacca*, 2005-I Eur. Ct. H.R. at 66-69.

110. *Id.* at 64.

111. *Id.* at 64-65.

1998.”<sup>112</sup> In each instance, the newspapers sourced the photograph from the revenue police.<sup>113</sup>

The ECHR had no theoretical or practical qualms about holding that Sciacca had properly invoked her privacy rights under Article 8: “Regarding whether there has been an interference, the Court reiterates that the concept of private life includes elements relating to a person’s right to their picture and that publication of a photograph falls within the scope of private life.”<sup>114</sup> Moreover, the fact that Sciacca was involved in pending criminal charges—plainly a matter of public concern under U.S. law—did not alter this basic analysis: “[T]he fact that the applicant was the subject of criminal proceedings cannot curtail the scope of such protection.”<sup>115</sup>

To be sure, the ECHR noted that “[t]he present case differs from previous ones in that the applicant [Sciacca] was not someone who featured in a public context (public figure or politician) but the subject of criminal proceedings.”<sup>116</sup> This factor, however, cut *against* the ability of the print media to publish the photograph. As the ECHR explains, Sciacca’s “status as an ‘ordinary person’ enlarges the zone of interaction which may fall within the scope of private life.”<sup>117</sup> Thus, the revenue police’s decision to release Sciacca’s photograph constituted a breach of the right of privacy secured under Article 8.<sup>118</sup>

By way of contrast, in the United States, an adult accused of criminal wrongdoing would not succeed in raising a legal objection

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112. *Id.* at 65.

113. *Id.*

114. *Id.* at 68-69.

115. *Id.* at 68-69. It bears noting that the release of the photograph was not governed by any law or regulation; accordingly, the burden on Sciacca’s privacy interests was not “in accordance with the law,” a prerequisite to a successful defense of a law or policy that burdens a European Convention right. *See id.* at 69. However, even if a formal law or regulation authorized the release of the photograph by the police, Sciacca might well still have prevailed based on a proportionality analysis. *See supra* notes 100-06 and accompanying text (discussing the ECHR’s *Egeland & Hanseid* decision, which held that Article 8 required legal protection against publication of a post-conviction photograph taken on court house steps).

116. *Sciacca*, 2005-I Eur. Ct. H.R. at 68.

117. *Id.* Because Italian law did not regulate the release of mug shots, the release of Sciacca’s photograph was not “in accordance with the law.” *See id.* Mere administrative “practice” does not satisfy Article 8(2). *See id.* (holding that “the Court considers that the subject-matter was not governed by a ‘law’ that satisfied the criteria laid down by the Court’s case law, but rather by practice”).

118. *Id.* at 69 (finding “there has been a breach” of Sciacca’s privacy rights under Article 8).

to the release and subsequent publication of an arrest photograph or “mug shot.” In fact, popular entertainment web sites, such as TMZ, routinely publish particularly embarrassing celebrity mug shots to help generate traffic.<sup>119</sup> The idea that a person arrested for a criminal act could successfully assert a privacy claim against publication of a mug shot simply would not occur to most U.S. lawyers, judges, or law professors. Yet, the analysis in Europe is quite different because of the robust scope and strength of constitutional privacy protections. Even regarding a matter of public concern—pending criminal charges for tax evasion—the accused enjoys a right of privacy that must be balanced against the right of the press to report truthfully on the criminal proceedings.<sup>120</sup>

In general, European privacy law protects the ability of individuals to control the use and publication of their image and voice, personal data and information (such as medical records), and also information about personal activities and interests.<sup>121</sup> The ECHR has explained that “the protection of personal data [is] of fundamental importance to a person’s enjoyment of his or her right to respect for private life and ... domestic law must therefore afford appropriate safeguards to prevent any such disclosure as may be inconsistent with Article 8 of the Convention.”<sup>122</sup> Moreover, “[s]uch interference [with privacy] could not be compatible with Article 8 of the

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119. See Clifford S. Fishman, *Technology and the Internet: The Impending Destruction of Privacy by Betrayers, Grudgers, Snoops, Spammers, Corporations, and the Media*, 72 GEO. WASH. L. REV. 1503, 1515 n.48 (2004) (noting the high public interest in particularly unfortunate celebrity mug shots, including those of Michael Jackson, Nick Nolte, Paul Reubens, and Hugh Grant and observing that “[t]hanks to the Internet, mug shots of the famous or notorious are now also popular entertainment”); *Celebrity News: Lohan Finally Checks into Rehab, Witherspoon Pleads No Contest*, BOS. GLOBE, May 4, 2013, at B12 (reporting on TMZ’s release of a live video of actress Reese Witherspoon’s arrest for DUI in Atlanta, Georgia); see also Karen Crouse, *More Relaxed, Phelps Is Ready to Resume His Duel with Lochte*, N.Y. TIMES, July 28, 2012, at D1 (reporting on an unfortunate promotional picture released by swimmer Michael Phelps and suggesting that “[i]t may be the most unflattering mug shot since a wild-haired Nick Nolte was caught on camera after a 2002 arrest”).

120. See generally *Sciacca*, 2005-I Eur. Ct. H. R. 59.

121. See *Hachette Filipacchi Associés v. France*, App. No. 71111/01, at 11 (Eur. Ct. H.R. 2007), <http://hudoc.echr.coe.int/webservices/content/pdf/001-81066?TID=munkcduuhz> [<http://perma.cc/CTT7-KGR6>] (disallowing publication of photographs of a murder victim because “certain events in the life of a family must be given particularly careful protection”).

122. *Peck v. United Kingdom*, 2003-I Eur. Ct. H.R. 123, 147-48; see *Z. v. Finland*, App. No. 22009/93, 25 Eur. H.R. Rep. 371, 406-07 (1998) (holding that involuntary release of medical records in open court violates Article 8).



Convention unless it was justified by an overriding requirement in the public interest.”<sup>123</sup>

*b. Mandatory Civility Norms Limiting the Use of  
Opprobrious or Insulting Language in Public*

Just as the ECHR has protected the ability of individuals to protect (control) the use of their images, voice, and personal data, it also has upheld laws that protect the ways in which individuals are presented to the general public in the press. *Tammer v. Estonia* provides an excellent example of this principle in action.<sup>124</sup>

*Tammer* involved news stories, drawn from interviews undertaken on a voluntary basis in anticipation of publication of Vilja Laanaru’s tell-all memoir.<sup>125</sup> However, Laanaru abandoned the project after reconciling with her lover (and later husband) Edgar Saavisar.<sup>126</sup> The news stories used disparaging language to describe Laanaru,<sup>127</sup> a person highly active in Estonian politics.<sup>128</sup> Without Laanaru’s permission, an Estonian newspaper published excerpts from these interviews, including questions and answers that described her as an *abielulõhkuja* (or homewrecker) and as a *rongaema* (poor/irresponsible parent).<sup>129</sup>

Neither term, in Estonian usage, is particularly blue or scatological. The word for divorce in Estonian is *abielu lahutamine* and *abielulõhkuja* used literally means a person who brings about the dissolution of a marriage.<sup>130</sup> Estonian government websites on how to obtain a divorce use the root word repeatedly (and presumably without causing offense to those perusing the content).<sup>131</sup> In fact, incident to the *Tammer* litigation, the Estonian Supreme Court’s criminal division directly acknowledged that “the words ‘rongaema’

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123. *Peck*, 2003-I Eur. Ct. H.R. at 148.

124. 2001-I Eur. Ct. H.R. 263, 266.

125. *Id.* at 268.

126. *Id.* at 268-69.

127. *Id.* at 268-69 (providing the factual setting for *Tammer*).

128. *Id.* at 268.

129. *Id.* at 265, 269.

130. *Id.* at 270.

131. *Abielu Lahutamine*, EESTI, [https://www.eesti.ee/est/abielu\\_lahutamine](https://www.eesti.ee/est/abielu_lahutamine) [<http://perma.cc/98PS-ZNJN>] (last visited Mar. 22, 2015). For a translated version, see *Divorcing a Marriage*, EESTI, [https://www.eesti.ee/eng/abielu\\_lahutamine](https://www.eesti.ee/eng/abielu_lahutamine) [<http://perma.cc/KE9F-TH6U>] (last visited Mar. 22, 2015).

and ‘abielulõhkuja’ are not vulgar or indecent,<sup>132</sup> but nevertheless held that their use in referring to someone could be “considered as degrading that person’s honour and dignity in an improper manner,” the gravamen of a legal claim for personal insult under Estonian law.<sup>133</sup>

It bears noting that Ms. Laanaru was active in Estonian politics and worked as an aide for Edgar Savisaar, both during his tenure as Prime Minister of Estonia, and later, Minister of the Interior.<sup>134</sup> During her period of employment with Savisaar, they maintained a long-term adulterous affair.<sup>135</sup> Ultimately, Savisaar divorced his wife and married Laanaru—at which point Laanaru abandoned her plans to publish a tell-all memoir.<sup>136</sup> After Laanaru withdrew her support for the book, Ülo Russak, the journalist who was assisting Laanaru with her memoirs, decided to publish excerpts of their interviews in the daily newspaper *Eesti Päevaleht*.<sup>137</sup>

Following publication of the interview excerpts, Laanaru sued the newspaper, naming Enno Tammer, its editor, as the defendant.<sup>138</sup> She alleged a violation of Article 130 of the Estonian Criminal Code, which provides that “[t]he degradation of another person’s honour and dignity in an improper form shall be punished with a fine or detention.”<sup>139</sup> Essentially, Article 130 prohibits the publication of insults. Laanaru prevailed in the Estonian trial and appellate courts; the courts fined Tammer 220 kroons, or “ten times the ‘daily income’ rate.”<sup>140</sup>

On appeal, the Estonian Supreme Court sustained Tammer’s conviction and held that use of the disputed adjectives could support a

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132. *Tammer*, 2001-I Eur. Ct. H.R. at 272.

133. *Id.*

134. *Id.* at 268.

135. *Id.* at 267.

136. *Id.* at 268-69.

137. *Id.* at 269.

138. *Id.*

139. *Id.* at 274 (citing Article 130 of the Estonian Criminal Code).

140. *Id.* at 270. The maximum potential fine was considerably higher:

A fine is a penalty which the court can impose up to a limit of nine hundred times a person’s daily income. The “daily income” rate is calculated on the basis of the average daily wage of the defendant following deduction of taxes and taking into account his or her family and financial status.

*Id.* at 274 (quoting Article 28 of the Estonian Criminal Code).

legal claim under Article 130.<sup>141</sup> The court explained that “[i]mproper form as a legal category within the meaning of Article 130 of the Criminal Code does not only include the use of vulgar or indecent words, but also the use of negative and defamatory figurative expressions.”<sup>142</sup> The Estonian Supreme Court found that Lanaaru’s interest in her personal dignity outweighed a journalist’s interest in using these particular words as adjectives to describe her in a news story.<sup>143</sup>

After losing before Estonia’s domestic courts, Tammer initiated a case before the ECHR, arguing that his rights under Article 10 had been violated.<sup>144</sup> The ECHR easily found an abridgement of Article 10’s protection of speech and press freedoms;<sup>145</sup> it also readily found that the burden was “prescribed by law” in Article 130 of the Estonian Criminal Code,<sup>146</sup> and that the law in question furthered a legitimate government purpose (namely, protection of personal honor and reputation).<sup>147</sup> The outcome of the case then turned on proportionality analysis—whether Article 130, as applied on the facts at bar, constituted a reasonable accommodation of speech and press rights and personal privacy.

The ECHR offered many sympathetic observations about the centrality of free expression to democratic self-government, but nevertheless sustained Tammer’s conviction.<sup>148</sup> Even though “freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual’s self-fulfillment,”<sup>149</sup> and “in a democratic society” the press performs an “essential function,”<sup>150</sup> the ECHR found

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141. *Id.* at 270, 282.

142. *Id.* at 272.

143. *See id.* at 273, 281-82. (“Any objective circumstances inherent in the functioning of the press—such as consideration of newspaper space and information density, according to the appellant—being values whose scope is limited to a particular sphere, cannot be compared to such values as human dignity.”).

144. *Id.* at 274.

145. *See id.*

146. *Id.* at 275. The ECHR did express some misgivings about the broad and general wording of Article 130, but nevertheless held that “the statutory provision cannot be regarded as so vague and imprecise as to lack the quality of ‘law.’” *Id.* at 275.

147. *Id.*

148. *See id.* at 279-82.

149. *Id.* at 279.

150. *Id.* at 280.

that “[i]n the context of freedom of the press, the requirements of such protection have to be weighed in relation to the interest of the applicant as a journalist in imparting information and ideas on matters of public concern.”<sup>151</sup> On the facts at issue, Tammer’s newspaper published negative “value judgments” about Laanaru, using language that “was not necessary.”<sup>152</sup> In the court’s view, Tammer “could have formulated his criticism of Ms. Laanaru’s actions without resorting to such insulting expressions.”<sup>153</sup> According to the ECHR, Laanaru’s “private life” was not really a matter of public concern, nor did it bear upon “a matter of general importance.”<sup>154</sup> On these facts, “[t]he interference with [Tammer’s] right to freedom of expression could thus reasonably be considered necessary in a democratic society for the protection of the reputation or rights of others within the meaning of Article 10 § 2 of the Convention.”<sup>155</sup>

Thus, a newspaper was not free to use words that characterize Laanaru as a home wrecker and a bad parent because these matters did not relate to her official duties with her boss, Savisaar. Nor did her status as a person active in Estonian politics make her private life a matter of public concern. Essentially, the ECHR holds that even a person holding important government positions, and active in politics, has a right to demand privacy with respect to her personal life. The imposition of a more severe punishment *might* have altered this legal conclusion, but the fact that Estonian law permitted the imposition of *any* liability (particularly when the potential maximum fine was almost three years net wages) ought to give a reasonable observer pause. One could also make the case that a high ranking government official conducting an affair with a subordinate *does* in fact relate to a matter of public concern, given the obvious risk that such relationships might not be entirely consensual.

In the United States, it would be unthinkable that such reporting could be made the subject of civil or criminal liability. In fact, the Supreme Court has squarely rejected the idea that mandatory civility norms may be imposed—*Cohen v. California* stands for the

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151. *Id.* at 281.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 282.

proposition that government may not attempt to control the manner in which one seeks to express an idea.<sup>156</sup> Moreover, *Hustler Magazine, Inc., v. Falwell* holds that with respect to a public figure (like Ms. Laanaru), targeted efforts to humiliate or embarrass cannot constitutionally be punished—at least in the absence of an intentional or reckless false statement of fact about the subject.<sup>157</sup>

In other words, in the United States, legal efforts to mandate civility are generally inconsistent with the First Amendment.<sup>158</sup> The Supreme Court has expressly, and repeatedly, held that the government cannot punish or restrict the use of opprobrious language even when used in public meetings or to law enforcement officers.<sup>159</sup> As Professor Whitman astutely notes, “To say that America has absolutely *no* law of civility is to say too much. But to say that *in general* America has no law of civility—especially as compared with a country like Germany—is to make the right generalization.”<sup>160</sup>

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The scope of protected privacy has obvious and immediate effects on the scope of speech and press rights in Europe. First, as the preceding discussion demonstrates, the scope of protected privacy interests is significantly broader in Europe than in the contemporary United States. In myriad contexts, the ECHR has found that applicants have successfully claimed a privacy interest in circumstances in which no viable privacy claim would exist under contemporary U.S. law. The broader scope of privacy rights in European jurisprudence thus creates more potential for privacy and speech to come into conflict with each other. Second, when such conflicts arise, neither right enjoys an absolute priority. Rather, the ECHR reconciles Article 8 and Article 10 claims on a case-by-case, context-specific basis in order to ascertain which right should take precedence on a given set of facts. Third, and finally, in many cases this balancing exercise has reliably favored privacy claims over speech

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156. 403 U.S. 15, 25-26 (1971).

157. 485 U.S. 46, 52-55 (1988).

158. See Whitman, *supra* note 33, at 1285, 1319-21, 1358-59, 1387.

159. See Ronald J. Krotoszynski, Jr., *The Polysemy of Privacy*, 88 IND. L.J. 881, 889 n.40 (2013).

160. Whitman, *supra* note 33, at 1384.

and press rights even in cases brought by public officials, public figures, and persons involved in matters of public of public concern.

The ECHR's decisions make very plain that the press does not enjoy the freedom to decide for itself when publication of materials falling within the scope of Article 8's protection advances a sufficiently important public interest to justify intruding on the subject's privacy; although, as the next section will show, the ECHR appreciates the essential nexus between free speech and press rights and the project of democratic self-government. Indeed European judges tend to look favorably on statutes and regulations that set the metes and bounds of reasonable reportage. Only when a *court* concludes that a law or regulation unduly impedes the ability of the press to report on matters of public concern will free expression and freedom of the press take precedence over securing privacy, dignity, and personal honor. And without doubt, this balancing approach produces a significant chilling effect on press reportage regarding public officials, public figures, and persons involved in matters of public concern.

In sum, the standard account—which posits that privacy generally enjoys priority over speech and press rights in Europe—provides a reasonably accurate portrait of how European human rights law prioritizes these constitutional rights. The ECHR has given privacy a broad scope of application and also has insisted that signatory states enact effective legal protection for materials that fall within the zone of constitutional privacy.<sup>161</sup> Because of the broader scope of protected privacy interests in Europe, and the positive obligation of national governments to secure privacy within their jurisdictions, privacy protection in Europe would appear to be significantly more secure than in the contemporary United States. At the same time, however, the broader scope of privacy rights has direct, and quite negative, implications for the scope and vigor of expressive freedom (including both speech and press rights).

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161. To be sure, such protections exist in the United States, but as a general matter the creation of privacy rights in the United States arises primarily by operation of statute and not by operation of the Constitution itself (save for claims involving police searches and seizures, which come within the scope of the Fourth Amendment). *See* U.S. CONST. amend IV. Data protection, for example, against both private and governmental entities, is largely a question left for legislatures to address—or ignore—as they see fit. In Europe, by way of contrast, governments have not merely the discretion to protect privacy interests; they instead have a duty to take such action.

## II. IMPORTANT SHARED VALUES EXIST BETWEEN THE UNITED STATES AND EUROPE CONCERNING BOTH PRIVACY AND SPEECH

Notwithstanding the significant differences that exist between the European and American understandings of constitutional privacy, one would be mistaken to conclude that the right of privacy in Europe bears little, if any, relationship to its scrawnier American cousin. To be sure, and as the preceding Part demonstrated, privacy enjoys a broader scope of application in both European human rights theory and practice. Nevertheless, important points of agreement exist between the privacy law of the United States and Europe, including (1) the core notion that free speech and press rights cannot be completely subordinated to privacy rights and (2) that public officials, public figures, and persons involved in matters of public concern hold diminished privacy rights because of the imperative of permitting information necessary to facilitate the project of democratic self-government to circulate freely within society.

The ECHR's recent *Axel Springer* decision demonstrates quite clearly that privacy claims by celebrities do not routinely, or automatically, displace claims rooted in expressive freedoms, including speech and press rights. The case involved Bruno Eyron,<sup>162</sup> a German actor who portrayed a police superintendent (Kriminalhauptkommissar Stefan Balko) on *Balko*, a popular German television police drama.<sup>163</sup> At the 2004 Munich Oktoberfest, Eyron (consistently referred to as "X" in the ECHR's published decision), was arrested for possession of cocaine upon leaving a public toilet at the festival.<sup>164</sup> The German daily newspaper *Bild* published a story on September 29 reporting that "[h]e came out of

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162. See *German Papers Win Paparazzi Case in Europe*, LOCALDE (Feb. 8, 2012), <http://www.thelocal.de/20120208/40599> [<http://perma.cc/U8GF-LFFA>] ("While the court did not name the actor, *Bild*, a tabloid owned by the Axel Springer group, had published articles concerning Bruno Eyron's arrest for drug possession.")

163. *Axel Springer AG v. Germany*, App. No. 39954/08, at 3 (Eur. Ct. H.R. 2012), <http://hudoc.echr.coe.int/webservices/content/pdf/001-109034?TID=qsritlgqxa> [<http://perma.cc/A6JU-T9AK>] ("By October 2004, 103 episodes had been broadcast, the last 54 of which had starred X in the role of Superintendent Y."). The program enjoyed a significant viewership. See *id.*

164. *Id.* at 4.

the gents tapping his nose suspiciously and was arrested!”<sup>165</sup> The story proceeded to provide a factually accurate account of the actor’s arrest for possession of 0.23 grams of cocaine; it also included the actor’s photograph.<sup>166</sup>

The actor sought and obtained an injunction against republication of the article reporting on his arrest; the Hamburg Regional Court held:

[T]he article in question, which mentioned X’s name and was accompanied by photos of him, amounted to a serious interference with his right to the protection of his personality rights; the disclosure of his criminal conduct had, so to speak, resulted in his being pilloried and discredited in the eyes of the public.<sup>167</sup>

On the facts presented, “X’s personality rights prevailed over the public’s interest in being informed, even if the truth of the facts related by the daily had not been disputed.”<sup>168</sup> Thus, the German domestic courts weighed the relative importance of an actor’s right to be free of truthful, but embarrassing, media coverage against a major daily newspaper’s right to publish information about the fact of an arrest and public prosecution, and found that the actor’s interest in privacy took precedence over the rights of speech and press.

The ECHR, however, emphatically rejected this accommodation of the competing interests, ruling that as a public figure involved in a public criminal proceeding, the actor’s interest in personal privacy had to give way to the public’s interest in receiving this information. The majority explained that “the Court considers that there is no reasonable relationship of proportionality between, on the one hand, the restrictions imposed by the national courts on the applicant company’s right to freedom of expression and, on the other hand, the legitimate aim pursued.”<sup>169</sup> Although the German courts had not imposed a significant fine and had merely enjoined further coverage of the actor’s arrest, “the Court considers that, although these were

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165. *Id.* at 3.

166. *Id.* at 5.

167. *Id.* at 6-7.

168. *Id.*

169. *Id.* at 34.



lenient, they were capable of having a chilling effect on the applicant company.”<sup>170</sup>

Along similar lines, in *Éditions Plon v. France*, the ECHR rejected a permanent injunction against the distribution of a book, entitled *Le Grand Secret*, authored by Dr. Claude Gubler, a private physician, and Michel Gonod, a French journalist.<sup>171</sup> The book detailed French President François Mitterand’s treatment for cancer, with particular attention to Dr. Gubler’s role in treating the French Republic’s president.<sup>172</sup> President Mitterand died on January 8, 1996, and shortly thereafter *Le Monde* published a series of articles suggesting the President Mitterand’s medical treatment for cancer had been professionally inappropriate.<sup>173</sup> Although Dr. Gubler and Gonod initially planned to refrain from publishing *Le Grand Secret* until some months after Mitterand’s death, the media scrutiny and the implication that Dr. Gubler’s treatment was ineffective and nonstandard led them to accelerate public release of the book.<sup>174</sup>

Under the revised marketing plan, *Le Grand Secret* was to be released to the public on January 17, 1996; however, President Mitterand’s surviving widow and children immediately sought an injunction against the book’s release.<sup>175</sup> Their complaint alleged “breach of medical confidentiality [and] an invasion of President Mitterand’s privacy and injury to his relatives’ feelings.”<sup>176</sup> The trial court issued an injunction on an emergency basis on January 18, 1996, imposing a penalty of 1000 francs per book distributed.<sup>177</sup> The court explained that “[a]ll people, regardless of their rank, birth or function, have the right to respect for their private life.”<sup>178</sup> The Paris Court of Appeal upheld the injunction on March 13, 1996, and the Court of Cassation dismissed Dr. Gubler’s subsequent appeal on July 16, 1997.<sup>179</sup> Both appellate courts found that the book constituted an invasion of Mitterand’s privacy and a breach of medical

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170. *Id.*

171. 2004-IV Eur. Ct. H.R. 39, 46.

172. *Id.*

173. *Id.*

174. *Id.* at 47.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *See id.* at 48-49.

confidentiality.<sup>180</sup> Subsequent civil proceedings resulted in a judgment of 180,000 francs against the authors and publisher, payable to Mrs. Mitterand and her children, and established a permanent ban on distribution of the book.<sup>181</sup> Having exhausted its appeals within the French judicial system, Éditions Plon filed a complaint with the ECHR, alleging that the injunction and damages award violated Article 10 by unduly abridging the freedom of speech and the press.<sup>182</sup>

The ECHR rejected the reasoning of the French domestic courts and concluded:

[T]he book was published in the context of a wide-ranging debate in France on a matter of public interest, in particular the public's right to be informed about any serious illnesses suffered by the head of State, and the question whether a person who knew that he was seriously ill was fit to hold the highest national office.<sup>183</sup>

Given that Mitterand was a public official and the matter of his health was clearly a matter of public concern, "the French authorities had only a limited margin of appreciation to decide whether there was a 'pressing social need' to take the measures in question against the applicant company."<sup>184</sup> In other words, in this specific context, a strong presumption in favor of a right to publish existed and the French government had to meet a particularly high burden in order to justify the permanent censorship of the book.<sup>185</sup>

The ECHR sustained the imposition of money damages and a temporary injunction as an appropriate legal remedy for the breach of medical confidence because these measures were "based on relevant and sufficient reasons in the instant case."<sup>186</sup> However, as time passed, and "as the President's death became more distant in time,"<sup>187</sup> the Mitterand family's privacy interest diminished, and the

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180. *Id.*

181. *Id.* at 50.

182. *Id.* at 54-55.

183. *Id.* at 68-69.

184. *Id.* at 69.

185. *Id.* at 67, 69.

186. *Id.* at 71.

187. *Id.* at 72.

public's interest in a fully informed discussion of the underlying policy issues increased. This did not, perforce, wipe out the breach of confidence. However, the court reasoned that

once the duty of confidentiality has been breached, giving rise to criminal (and disciplinary) sanctions against the person responsible, the passage of time must be taken into account in assessing whether such a serious measure as banning a book—a measure which in the instant case was likewise general and absolute—was compatible with freedom of expression.<sup>188</sup>

The ECHR also thought it relevant that some 40,000 copies of the book had entered public circulation and that its content “had also been disseminated on the Internet and had been the subject of considerable media comment.”<sup>189</sup> By October 1996, when the trial court issued its final judgment in the civil liability action, the ECHR found that the “pressing social need” no longer justified the ban on distribution of the book.<sup>190</sup>

This kind of balancing certainly reflects greater solicitude for the Mitterand family's interest in protecting their privacy and preserving the confidentiality of President Mitterand's medical history than would be the case in the United States. But it would be quite wrong to suggest that the ECHR's resolution of the case disregards the central importance of President Mitterand's status as a public official or the fact that his efforts to mislead the public about his health while in office constituted an important matter of public concern.

Similarly, the ECHR has declined to vindicate the privacy interests of a politician accused of criminal wrongdoing<sup>191</sup> or criminal defendants accused of waging a terrorism campaign.<sup>192</sup> With respect to Walter Posch, an Austrian politician who objected to the use of

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188. *Id.*

189. *Id.*

190. *Id.* at 73.

191. See *Krone Verlag GmbH & Co. KG v. Austria*, App. No. 34315/96, at 2 (Eur. Ct. H.R. 2002), <http://hudoc.echr.coe.int/webservices/content/pdf/001-60173?TID=cvvviinnez> [<http://perma.cc/D8BH-PSZ4>].

192. See *News Verlags GmbH & CoKG v. Austria*, 2000-I Eur. Ct. H.R. 157, 159-60, 164 (holding that an injunction against publication of the picture of an accused Nazi allegedly involved in a letter bomb campaign in Austria violated Article 10).

his likeness in a negative newspaper story covering the allegations of official wrongdoing, the ECHR in *Krone Verlag GmbH & Co. KG v. Austria* explained that “there is little scope for restrictions on political speech or questions of public interest.”<sup>193</sup> Moreover, the court continued:

The limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance. A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of the open discussion of political issues.<sup>194</sup>

In the case at bar, the allegations related to “a matter of public concern which does not fall wholly within his private sphere.”<sup>195</sup> Having “entered the public arena,” as an active politician holding office, Posch “had to bear the consequences thereof,” which included publication of his picture in conjunction with a news story detailing the allegations of official wrongdoing.<sup>196</sup>

Although an ordinary person might successfully object to the release of a mug shot and its subsequent publication in a local newspaper,<sup>197</sup> an incumbent politician accused of criminal wrongdoing has a diminished claim on privacy and the press has an enhanced claim on its Article 10 right to report truthful information to the public. When the information directly relates to the ability of the public to participate in the project of democratic self-government, as was arguably the case in *Krone Verlag*, the appropriate balance strongly skews toward Article 10 and away from Article 8.<sup>198</sup>

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193. *Krone Verlag GmbH & Co.*, App. No. 34315/96, at 7.

194. *Id.*

195. *Id.* at 7-8.

196. *Id.* at 8. (“Thus, there is no valid reason why the applicant company should be prevented from publishing [Posch’s] picture.”).

197. See *Sciacca v. Italy*, 2005-I Eur. Ct. H.R. 59.

198. See *Krone Verlag GmbH & Co.*, App. No. 34315/96, at 7-8 (“What counts is whether this person has entered the public arena.”). Examples of voluntarily entering the public arena include holding public office or discharging public functions, participating in a public debate,

In sum, a truthful allegation of official wrongdoing by a person holding government office presents perhaps the clearest instance of facts that will justify giving Article 10 speech and press rights an absolute priority over Article 8's protection of privacy. Even if the concept of being a public officer or a public figure does not sweep as broadly in Europe as in the United States, public officer or public figure status is highly relevant in assessing a person's reasonable expectation of privacy vis á vis the press.

Moreover, the notion that a free press is essential to the functioning of a democratic polity also animates the ECHR's Article 10 decisions. The press engages in an "essential function ... in a democratic society," and it has a "duty to impart information and ideas on all matters of public interest."<sup>199</sup> Thus, a politician's interest in privacy and nondisclosure will not preclude the press from publishing his image in a story covering alleged official wrongdoing.<sup>200</sup>

The overwhelmingly press-friendly baseline established in *New York Times Co. v. Sullivan* clearly does not apply in the jurisprudence of the ECHR;<sup>201</sup> nevertheless, common ground plainly exists and directly relates to Meiklejohn's democratic deliberation theory of the freedom of speech.<sup>202</sup> To the extent that speech is demonstrably necessary to facilitate the project of democratic self-governance, privacy protections can and do give way in Europe just as they do in the United States.

To be sure, the U.S. approach is more categorical and generally confers broader protection on speech and press rights. For public officials and public figures in the United States, the imperatives of the First Amendment largely preclude meaningful privacy protections even when information demonstrably relates to a subject's private life, as opposed to public life. Indeed, even for private figures

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becoming active in a field of public concern, entering public discussions, or committing political offenses. *See id.* It also bears noting that the reportage at issue in *Krone Verlag* did not relate to Mr. Posch's private life. The ECHR explained that it "attaches particular importance to the fact that the published photographs did not disclose any details of [Posch's] private life." *Id.*

199. *Id.* at 8.

200. *See id.* ("In view of Mr. Posch's position as a politician there is no doubt that he had entered the public arena and had to bear the consequences thereof.")

201. *See generally* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

202. *See* MEIKLEJOHN, *supra* note 20, at 22-28, 88-89, 91; Harry Kalven, Jr., *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 204, 209-10, 220-21.

involved in a matter of public concern, privacy protections will generally give way to facilitating expressive freedoms.<sup>203</sup> But, for a private person or entity in the absence of a matter of public concern, statutory or common law privacy protections may be conveyed without running afoul of constitutional limitations.<sup>204</sup>

In the United States, under the First Amendment, “one man’s vulgarity is another’s lyric.”<sup>205</sup> U.S. constitutional law reflects the view that if the federal or state governments could adopt mandatory civility rules, they “might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”<sup>206</sup>

Nor may federal or state laws seek to protect personal honor, reputation, or dignity, at least with respect to public officials, public figures, and persons involved in matters of public concern—even scandalous and outrageously offensive parody enjoys full constitutional protection.<sup>207</sup> As Chief Justice Rehnquist explained in *Hustler Magazine, Inc. v. Falwell*: “At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”<sup>208</sup> This, in turn, means that even when a parody seeks to vilify its subject, the bad motive of a speaker cannot be used to justify the imposition of civil liability in the United States.<sup>209</sup> The imperative of protecting speech strictly limits the potential scope of both civil and criminal provisions aimed at promoting personal honor, dignity, and civility.<sup>210</sup>

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203. See *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974).

204. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

205. *Cohen v. California*, 403 U.S. 15, 25 (1971).

206. *Id.* at 26.

207. See *Snyder*, 131 S. Ct. at 1215-18; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51-52 (1988).

208. 485 U.S. at 50.

209. See *id.* at 53 (“Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.”).

210. See *Cohen*, 403 U.S. at 26 (holding that “we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process”). Justice Harlan explains that “because governmental officials cannot make principled distinctions in this area,” the First Amendment requires that government leave “matters of taste and style ... largely to the individual.” *Id.* at 25. For a general discussion of *Cohen* and its centrality to U.S. free speech theory and practice, see Ronald J. Krotoszynski,

In sum, in the United States, “government must remain neutral in the marketplace of ideas.”<sup>211</sup> And it must do so even in circumstances when speech imposes significant emotional costs. Moreover, “[u]nder the First Amendment, there is no such thing as a false idea,”<sup>212</sup> and “[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”<sup>213</sup> This absolutist approach to protecting free speech results, to European eyes at least, in an unsuitably low level of protection for privacy rights.

Coming at the issue from the opposite direction, however, the First Amendment *has* given way to privacy concerns, at least in some contexts. The Supreme Court has sustained proscriptions against fixed pickets of personal residences, citing the government’s interest in safeguarding privacy in the home.<sup>214</sup> As Justice O’Connor explained, “One important aspect of residential privacy is protection of the unwilling listener.”<sup>215</sup> In sustaining a ban on targeted residential pickets, she explained that a targeted picket “inherently and offensively intrudes on residential privacy” and produces a “devastating effect ... on the quiet enjoyment of the home.”<sup>216</sup>

For similar reasons, the Supreme Court also has sustained ordinances aimed at protecting the privacy of clinic personnel and patients seeking to enter and leave family planning clinics.<sup>217</sup> Writing for the *Hill v. Colorado* majority, Justice Stevens explained that “[t]he unwilling listener’s interest in avoiding unwanted communication has been repeatedly identified in our cases”<sup>218</sup> and constitutes “an aspect of the broader ‘right to be let alone’ that one of our wisest Justices characterized as ‘the most comprehensive of

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Jr., *Cohen v. California: “Inconsequential” Cases and Larger Principles*, 74 TEX. L. REV. 1251 (1996).

211. *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978).

212. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

213. *Id.* at 339-40.

214. *See Frisby v. Schultz*, 487 U.S. 474 (1988).

215. *Id.* at 484.

216. *Id.* at 486.

217. *Hill v. Colorado*, 530 U.S. 703 (2000). *But cf. McCullen v. Coakley*, 134 S. Ct. 2518, 2537-41 (2014) (invalidating a Massachusetts law that adopted broader proscriptions against pickets of abortion service providers as insufficiently tailored to pass First Amendment review).

218. *Hill*, 530 U.S. at 716.

rights and the right most valued by civilized men.”<sup>219</sup> As in *Frisby v. Schultz*, *Hill* relies on the protection and advancement of privacy as a basis for sustaining significant restrictions on speech.

Privacy also has played an important role in the development of other areas of the law involving speech and access to information. For example, in construing the scope of the Freedom of Information Act, the Supreme Court has embraced the importance of protecting privacy values.<sup>220</sup> The Justices have also sustained laws that make the unauthorized recording of private cell phone conversations the subject of civil or criminal sanctions.<sup>221</sup> Both these outcomes reflect an effort to reconcile the protection of privacy with a robust commitment to speech. These decisions, and others like them, clearly demonstrate that even the most robust commitment to facilitating expressive freedom does not necessarily imply an utter and complete absence of protection for privacy.

Other important First Amendment cases, presenting privacy issues less directly, also vindicate privacy interests at the expense of speech and press rights. For example, in *Seattle Times Co. v. Rhinehart*, the Court prohibited a newspaper from publishing truthful information obtained through the civil discovery process because permitting publication of such material would “violate the First Amendment rights of members and donors to *privacy*, freedom of religion, and freedom of association.”<sup>222</sup>

Thus, in important ways, and consistently over time, the Supreme Court has vindicated privacy interests even when doing so has the effect of limiting or abridging speech and press rights. I do not mean to overstate the degree of jurisprudential common ground shared between the United States and Europe, but I would suggest that more common ground exists than is commonly supposed.

The key to winning an Article 10 claim before the ECHR is establishing a link between the material at issue and the process of democratic self-government. Information integral to this process generally cannot be suppressed in the name of privacy—even if its release damages the subject’s dignity, personal honor, or reputation.

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219. *Id.* at 716-17 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

220. *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004).

221. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

222. 467 U.S. 20, 24-25 (1984) (emphasis added).



In an important sense then, the operative principle in delimiting the scope of expressive freedom and privacy turns out to be identical in the United States and Europe. The key difference is that Europe defines more narrowly the scope of information reasonably related to the project of democratic self-government and, in general, trusts government more reflexively to establish and enforce lines of demarcation.<sup>223</sup>

One cannot help but think that U.S. free speech scholars, like Alexander Meiklejohn<sup>224</sup> and Harry Kalven, Jr.,<sup>225</sup> would smile: the U.S. position on the necessity of protecting speech integral to democratic self-government has achieved, if not universal assent, then something very close to it. To be sure, it is unlikely that U.S. citizens would tolerate or trust government to decide what aspects of a politician's life are not suitable matters for public disclosure and debate.<sup>226</sup> As Dean Robert Post has observed, in the United States “[n]o legislation or judicial decree can advance a particular conception of the proper role of public officials as a basis for excluding information from the public discourse as ‘irrelevant.’”<sup>227</sup>

European governments have a legal obligation to protect the dignity, personal honor, and reputation of the rich and famous no less than the average and unremarkable. The European approach vests great discretion with government officials to draw and enforce lines. Indeed, the positive aspect of Article 8 essentially forces European

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223. *Cf.* *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825 (2011) (“The First Amendment embodies our choice as a Nation that, when it comes to such [political] speech, the guiding principle is freedom—the ‘unfettered interchange of ideas’—not whatever the State may view as fair.”); *Citizens United v. FEC*, 558 U.S. 310, 341 (2010) (“The First Amendment protects speech and speaker, and the ideas that flow from each.”).

224. *See* MEIKLEJOHN, *supra* note 20, at 22-27, 37-39, 88-91, 94 (arguing that the most important condition for maintaining democratic self-government is an engaged citizenry who actively oversee the government through a process of ongoing discussion and dialogue); *id.* at 37 (“In the last resort, it is not our representatives who govern us. We govern ourselves, using them. And we do so in such ways as our own free judgment may decide.”).

225. Kalven, Jr., *supra* note 202, at 204, 208-09. As Kalven states the proposition, “The [First] Amendment has a ‘central meaning’—a core of protection of speech without which democracy cannot function, without which, in Madison’s phrase, ‘the censorial power’ would be in the Government over the people and not ‘in the people over the Government.’” *Id.* at 208.

226. *See* Robert Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2090 (2001) (“I should add that for the past forty years the First Amendment has been interpreted to stand for the proposition that only the public can determine whether information is relevant or irrelevant for the evaluation of public officials.”).

227. *Id.*

governments to undertake this balancing exercise—they simply cannot default to a free fire zone that privileges any and all press disclosures regarding public officials, public figures, and matters of public concern.<sup>228</sup> To do so would put them in breach of their legal obligations under Article 8.<sup>229</sup>

Thus, the radically different role of the state in making and enforcing the distinction between matters relevant to democratic deliberation and matters irrelevant to this process explains some of the baseline differences between American and European free speech law. Unlike the European approach, the U.S. approach leaves very little discretion to elected politicians—or even to unelected federal judges—to make and enforce civility norms aimed at protecting a sphere of personal privacy. Even so, the rules in both places operate to create sufficient breathing room for democratic self-government to operate. The U.S. field of play may be broader and more open, but the European approach seeks to advance and secure the same values.

### III. THE RIGHT OF PRIVACY GOING FORWARD: CHALLENGES AND ISSUES IN THE ERA OF BIG DATA

Both the United States and Europe are going to face serious new challenges to securing privacy; many of these challenges will arise from the ability of computers to gather, sort, and deploy data in ways that compromise personal privacy. In this Part, I will sketch some of the larger issues associated with reconciling privacy and speech that will need to be addressed going forward in both societies, notably including the problems presented by Big Data and pervasive forms of government surveillance. Depending on how one draws the line demarcating the right of privacy and the rights to freedom of speech and the press, the scope of protected personal

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228. *Von Hannover v. Germany*, 2004-IV Eur. Ct. H.R. 47.

229. *Fernández Martínez v. Spain*, App. No. 56030/07, at 3-6, 28-30 (Eur. Ct. H.R. 2014), <http://hudoc.echr.coe.int/webservices/content/pdf/001-145068?TID=enqiwuikux> [<http://perma.cc/9JBC-97M8>]; *Söderman v. Sweden*, App. No. 5786/08, at 21-23 (Eur. Ct. H.R. 2013), <http://hudoc.echr.coe.int/webservices/content/pdf/001-128043?TID=mpdiodyvsxq> [<http://perma.cc/LM63-8BZG>]; *X & Y v. The Netherlands*, 91 Eur. Ct. H.R. (ser. A) at 11-14 (1985).

privacy could be radically diminished in the not-too-distant future.<sup>230</sup>

The ECHR has not addressed issues associated with metadata as clearly, or as recently, as the Court of Justice of the European Union (CJEU). The CJEU, the highest juridical body of the European Union, recognizes and incorporates the European Convention and the ECHR's precedents into its own jurisprudence.<sup>231</sup> Accordingly, the CJEU's recent decisions on the right to be forgotten and the storage and use of metadata by European Union member-state governments are highly relevant to the question of reconciling privacy and speech in this important context. They also incorporate and reflect another pan-European source of human rights jurisprudence.

In May 2014, in *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, the CJEU embraced a "right to be forgotten" on the web.<sup>232</sup> More specifically, the CJEU ruled that EU regulations on data processing apply to search engines (such as Google) and that Directive 95/46 vests the subject of information available on the Internet with the right to demand that it be deleted from search engine results.<sup>233</sup> The case arose when Mr. Costeja González, a Spanish citizen, lodged a complaint with the AEPD (the Spanish Agency for Data Protection).<sup>234</sup> González asked the AEPD to order search engine providers to alter or remove several old newspaper stories about him published in *La Vanguardia* containing personal information related to an involuntary auction of his

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230. See, e.g., *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2668-72 (2011) (rejecting a privacy-based defense of a state law that sought to limit the sale of physician prescription data in order to protect the privacy of physicians and their patients). For a thoughtful discussion of *Sorrell's* potential impact on statutory privacy protections, see Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855 (2011). Professor Bhagwat posits that, if broadly construed and applied, *Sorrell* could "have dramatic, and extremely troubling, implications for a broad range of existing and proposed rules that seek to control disclosure of personal information in order to protect privacy." *Id.* at 856.

231. See *supra* notes 10-19 and accompanying text.

232. Case C-131/12 (Ct. Justice E.U. May 13, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=22838> [<http://perma.cc/NL74-8NTW>].

233. *Id.* ¶¶ 98-99.

234. *Id.* ¶¶ 14-15.

property to satisfy an outstanding legal debt owed to the government.<sup>235</sup>

AEPD denied relief with respect to the newspaper itself but granted relief with respect to Google Spain.<sup>236</sup> The agency “took the view that it has the power to require the withdrawal of data and the prohibition of access to certain data by the operators of search engines” in circumstances when “the locating and disseminating of the data are liable to compromise the fundamental right to data protection and the dignity of persons in the broad sense.”<sup>237</sup> The agency also found that operators of search engines were engaged in data processing and liable to orders to block certain results from appearing in response to search queries.<sup>238</sup> The Spanish domestic courts affirmed the AEPD’s order.<sup>239</sup>

Google Spain appealed the adverse decisions of AEPD and the Spanish domestic courts to the CJEU.<sup>240</sup> On appeal, the CJEU found that search engines engage in data processing when generating results.<sup>241</sup> As the court explained, “the operator of a search engine ‘collects’ such data which it subsequently ‘retrieves,’ ‘records’ and ‘organizes’ within the framework of its indexing programmes, ‘stores’ on its servers and, as the case may be, ‘discloses’ and ‘makes available’ to users in the form of search results.”<sup>242</sup> Under the terms of Directive 95/46, Article 2(b), search engine operators constitute “data processors.”<sup>243</sup> This finding, in turn, has significant legal implications because Directive 95/46 requires data processors to respond to requests to delete or correct information that is “incomplete or inaccurate.”<sup>244</sup> Data processors must consider and respond to all such requests.<sup>245</sup>

The CJEU’s holding that web search engines constitute data processing operators therefore imposed significant new liabilities;

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235. *Id.*

236. *Id.* ¶¶ 16-17.

237. *Id.* ¶ 17.

238. *See id.*

239. *Id.* ¶¶ 18-19.

240. *Id.*

241. *Id.* ¶ 41.

242. *Id.* ¶ 28.

243. *Id.* ¶ 41.

244. Council Directive 95/46, art. 12(b), 1995 O.J. (L 281) 31, 42 (EC).

245. *Id.* art. 14(a).

search engine operators must ensure that their “activity meets the requirements of Directive 95/46 in order that the guarantees laid down by the directive may have full effect and that effective and complete protection of data subjects, in particular of their right to privacy, may actually be achieved.”<sup>246</sup> Accordingly, a search engine operator “must ensure, within the framework of its responsibilities, powers and capabilities, that the processing meets the requirements of Directive 95/46.”<sup>247</sup>

The CJEU’s path to recognizing a “right to be forgotten” involves the creative manipulation of Directive 95/46. As noted earlier, search engine operators incur an obligation to remove incomplete or erroneous information as a consequence of the CJEU classifying them as data processors.<sup>248</sup> In the abstract, such an obligation to correct errors or omissions should not be seen as particularly objectionable. In the United States, for example, a credit reporting service, such as Equifax, has a legal duty to correct errors on its reports when such errors are called to its attention.<sup>249</sup> If a search engine operator is disseminating erroneous information, a good argument exists that it should cease providing information that it knows to be objectively false or misleading in search results provided to search engine users. However, the CJEU did not stop at this point, and held more broadly that *truthful* and entirely *accurate* information must be subject to deletion from search engine results.<sup>250</sup> In other words, at some point, the subject of data should

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246. *Google Spain SL*, Case C-131/12, ¶ 38.

247. *Id.* ¶ 83.

248. *See id.* ¶ 62.

249. 15 U.S.C. §§ 1681-1681T (2012); see James P. Nehf, *A Legislative Framework for Reducing Fraud in the Credit Repair Industry*, 70 N.C. L. REV. 781,786-98 (1992) (providing a comprehensive overview of the Fair Credit Reporting Act (FCRA) and how it protects consumers from inaccurate or erroneous credit report information); Lea Shepard, *Toward a Stronger Financial History Antidiscrimination Norm*, 53 B.C. L. REV. 1695, 1744-49 (2012) (discussing the FCRA and its protection of consumers from inaccurate or erroneous entries on their credit history reports). The FCRA “require[s] that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information.” 15 U.S.C. § 1681(b); see Nehf, *supra*, at 786 (“Enacted in 1970 as a new title to the Consumer Credit Protection Act of 1968, the FCRA aims to protect consumers from inaccurate or obsolete information in reports that businesses use to determine a person’s eligibility for credit, employment, or insurance.”).

250. *See Google Spain SL*, Case C-131/12, ¶¶ 89-94.

have the power to suppress the dissemination of embarrassing, but dated, personal information on the Internet.<sup>251</sup>

González argued that the corrections requirements set forth in Article 12(b) and Article 14(a) should be broadly read to encompass a right “to be ‘forgotten’ after a certain time.”<sup>252</sup> The CJEU agreed with this contention and held that delivering truthful information was incompatible with Directive 95/46 when the information provided was true but “inadequate, irrelevant, or no longer relevant, or excessive in relation to those purposes and in light of the time that has elapsed.”<sup>253</sup> In such circumstances, “the information and links concerned in the list of results must be erased.”<sup>254</sup> Accordingly, under E.U. law, a “right to be forgotten” now exists, and those providing information through search engines have a legal obligation to receive, consider, and respond to requests to block access to information that subjects object to having disseminated. Moreover, the easiest and least risky response to such a request is simply to delete the objectionable search result.

The potential effects of a right to be forgotten on the freedom of speech are both obvious and negative. In fact, the European Union’s Advocate General had urged the CJEU to reject this doctrine because “[i]n contemporary information society, the right to search information published on the internet by means of search engines is one of the most important ways to exercise that fundamental right [of freedom of expression].”<sup>255</sup> Moreover, “[a]n internet user’s right to information would be compromised if his search for information concerning an individual did not generate search results providing a truthful reflection of the relevant web pages but a ‘bowdlerised’ version thereof.”<sup>256</sup> The Advocate General asserted,

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251. Google has agreed to remove content from European search results based on requests from individuals for such removals. See Sam Schechner, *Google Pivots on Privacy*, WALL ST. J., May 31, 2014, at B1. Google has “unveil[ed] a Web page where Europeans can request that the company take down links tied to individuals’ names.” *Id.* Within hours of placing this page online, “the company received 12,000 requests to remove links from across Europe, an average of 20 requests a minute.” *Id.*

252. *Google Spain SL*, Case C-131/12, ¶ 89.

253. *Id.* ¶ 93.

254. *Id.* ¶ 94.

255. Opinion of Advocate General Jääskinen ¶ 131, *Google Spain SL*, Case C-131/12, <http://curia.europa.eu/juris/document/document.jsf?docid=138782&doclang=EN> [<http://perma.cc/Z7W7-3MT8>].

256. *Id.*

unsuccessfully, that “[a]n internet search engine service provider lawfully exercises both his freedom to conduct business and freedom of expression when he makes available internet information location tools relying on a search engine.”<sup>257</sup> Thus, even if the subject of information wished for truthful information currently available on the web “to be consigned to oblivion,” Directive 95/46 should not be interpreted to provide such relief.<sup>258</sup>

The CJEU did not completely ignore the free speech interest at stake. If a web search engine provider can demonstrate that “the preponderant interest of the general public” favors “access to the information in question,” then the search result need not be deleted.<sup>259</sup> In the case of the information regarding the sale of Mr. González’s property to satisfy a liability to the government, “there do not appear to be particular reasons substantiating a preponderant interest of the public”<sup>260</sup> in having access to the information; accordingly the CJEU ordered “those links to be removed from the list of results.”<sup>261</sup>

The CJEU’s recent landmark decision on data retention also favored privacy interests—although in a context that did not involve a corresponding burden on free speech or free press rights. In *Digital Rights Ireland Ltd. v. Minister for Communications, Marine, & Natural Resources*, the CJEU invalidated Directive 2006/24, which required member states to enact regulations that mandated the storage of *all* electronic communications for not less than six months and not more than two years.<sup>262</sup> As the CJEU explained, “Directive

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257. *Id.* ¶ 132.

258. *Id.* ¶ 138.

259. *Google Spain SL, Case C-131/12*, ¶ 99.

260. *Id.* ¶ 98.

261. *Id.*

262. Joined Cases C-293/12 & C-594/12, ¶ 11-16 (Ct. Justice E.U. Apr. 8, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=En&mode=lst&dir=&occ=first&part=1&cid=1061279> [<http://perma.cc/54C5-A8WL>]; see also Council Directive 2006/24, art. 6, 2006 O.J. (L105) 54, 58 (EC) (“Member states shall ensure that the categories of data specified in Article 5 are retained for periods of not less than six months and not more than two years from the date of the communication.”). It bears noting that member states were free to prescribe longer periods of retention subject to approval by the EU’s Commission. See *id.* art. 12(1) (“A Member State facing particular circumstances that warrant an extension for a limited period of the maximum retention period referred to in Article 6 may take the necessary measures. That Member State shall immediately notify the Commission and inform the other Member States of the measures taken under this Article and shall state the grounds for introducing them.”).

2006/24 lays down the obligation on the providers of publicly available electronic communications services or of public communications networks to retain certain data which are generated or processed by them.”<sup>263</sup>

Directive 2006/46 had virtually no procedural checks or safeguards regarding access to the stored data, no individualized suspicion was necessary to justify storage of a person’s electronic communications, and the regulation made no effort to tailor the data gathering and retention program to meet specific law enforcement needs.<sup>264</sup> Moreover, the CJEU noted that “it is not inconceivable that the retention of the data in question might have an effect on the use, by subscribers or registered users, of the means of communication covered by the directive and, consequently, on their exercise of freedom of expression.”<sup>265</sup> As the court explained, “Directive 2006/24 affects, in a comprehensive manner, all persons using electronic communications services but without the persons whose data are being retained being, even indirectly, in a situation which is liable to give rise to criminal prosecutions.”<sup>266</sup>

The failure to tailor the data gathering, the absence of “substantive and procedural conditions” governing access to the stored data, the lack of “any objective criterion by which the number of persons authorised to access and subsequently use the data retained,” the lack of review of access requests “by a court or by an independent administrative body,” and the long period of mandatory collection and storage all led the CJEU to find that Directive 2006/24 “has exceeded the limits imposed by compliance with the principle of proportionality.”<sup>267</sup> In consequence, the CJEU held that directive invalid and without any legal force or effect.<sup>268</sup>

The maintenance of such a massive data collection and retention program, in the words of the Advocate General’s Opinion, gave rise to “the vague feeling of surveillance,” which in turn could be “capable of having a decisive influence on the exercise by European

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263. *Digital Rights Ir. Ltd.*, Joined Cases C-293/12 & C-594/12, ¶ 16.

264. *See id.* ¶¶ 48-72.

265. *Id.* ¶ 28.

266. *Id.* ¶ 58.

267. *See id.* ¶¶ 61-62, 69.

268. *Id.* ¶ 71.



citizens of their freedom of expression and information.”<sup>269</sup> To be sure, and as the Advocate General also noted, “there is hardly any doubt that Directive 2006/24 itself constitutes an ‘interference’ with the right to privacy,”<sup>270</sup> but the program implicated more than just privacy rights. The potential chilling effect of such a program would distort the marketplace of ideas; simply put, people will not speak freely if they have good reason to believe that Big Brother is watching.<sup>271</sup>

It is undoubtedly true that privacy and speech can, and often do, call for conflicting outcomes in legal disputes.<sup>272</sup> It is simply not possible to include and also simultaneously not include a story about an involuntary government auction of property to settle an outstanding legal obligation in web search results.<sup>273</sup> Nor is it possible to provide and also not provide a twenty-year-old story that documents a person’s dabbling with New Age kinky sex.<sup>274</sup> In such cases, these human rights values are conflicting, and there is simply no way to advance both privacy and speech concurrently.

Big data programs present a very different case from the newly forged “right to be forgotten” with respect to the relationship between privacy and speech. *Both* privacy *and* speech suffer when government records and saves all of our electronic communications

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269. Opinion of Advocate General Cruz Villalón ¶ 51, *Digital Rights Ir. Ltd.*, Joined Cases C-293/12 & C-594/12, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=145562&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=625493> [<http://perma.cc/DJ5C-8VJB>].

270. *Id.* ¶ 68.

271. In fact, the Advocate General directly cited the U.S. Supreme Court’s jurisprudence on the chilling effect doctrine in its argument to the CJEU. *See id.* ¶ 52 n.46; *see also* *Wieman v. Updegraff*, 344 U.S. 183, 194-95 (1952) (Frankfurter, J., concurring) (arguing that a proscription against public university faculty members belonging to “subversive” or “Communist-front” organizations violates the First Amendment because the policy “has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice”); Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 693 (1978) (“A chilling effect occurs when individuals seeking to engage in activity protected by the [F]irst [A]mendment are deterred from doing so by government[al] regulation not specifically directed at that protected activity.”); Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1481-95 (2013) (discussing the chilling effect doctrine and its jurisprudential origins).

272. *See supra* Part II.

273. *See* *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, Case C-131/12, ¶¶ 14-17 (Ct. Justice E.U. May 13, 2014).

274. *See* Sam Schechner, *Tantric Sex Workshop Gets “Forgotten,”* WALL ST. J., July 19-20, 2014, at B4.

incident to society-wide surveillance programs—just in case they should prove useful at some indefinite point in the future. As Professor Neil Richards cogently argued “[d]emocratic societies should ... reject the idea that it is reasonable for the government to record all Internet and telephone activity with or without authorization.”<sup>275</sup> Richards is quite correct to posit that “unconstrained surveillance, especially of our intellectual activities, threatens a cognitive revolution that cuts at the core of the freedom of the mind that our political institutions presuppose.”<sup>276</sup> In this context, then, privacy and speech must be seen as complementary, rather than competing, human rights values.

*Digital Rights Ireland* reflected and incorporated this understanding, and accordingly, could provide a helpful blueprint for the United States federal courts when litigation involving PRISM and other mass surveillance programs that involve the society-wide collection and retention of electronic data appears at bar. Simply put, speech and privacy are integral to each other in important respects, and we should be careful not to miss the forest for the trees. A society without privacy will not long be a society with free speech.

Alexander Meiklejohn famously cautioned that “[p]olitical self-government comes into being only insofar as the common judgment, the available intelligence, of the community takes control over all interests, only insofar as its authority over them is recognized and is effective.”<sup>277</sup> But self-government requires an engaged and informed electorate. As Meiklejohn puts it, “When a free man is voting, it is not enough that the truth is known by someone else, by some scholar or administrator or legislator.”<sup>278</sup> Instead, “[t]he voters must have it, all of them.”<sup>279</sup> The First Amendment, from this vantage point, exists so that “all the citizens shall, so far as possible, understand the issues which bear upon our common life.”<sup>280</sup>

The freedom of thought required to sustain democratic self-government—notably including an individual and collective power to pursue ideas to their logical conclusions—requires an ability to

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275. Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1961 (2014).

276. *Id.* at 1964.

277. MEIKLEJOHN, *supra* note 20, at 69.

278. *Id.* at 88.

279. *Id.*

280. *Id.* at 88-89.

ask and answer hard questions free and clear of government control or coercion. As Richards observes, “free minds are the foundation of a free society,”<sup>281</sup> but in a surveillance state, minds are not, and cannot be, free. One cannot freely engage with the future while in abject fear of the government scrutinizing one’s past. It is not possible to look forward and backward, over your shoulder, at the same time.<sup>282</sup>

In the age of metadata, privacy constitutes a kind of precondition to speech, just as assembly constitutes a necessary antecedent activity to petitioning.<sup>283</sup> At the macro level, privacy and speech are both essential conditions for the maintenance and functioning of a democratic polity. The CJEU seems to have recognized this important link in *Digital Rights Ireland* and has acted to secure privacy in order to safeguard speech. The U.S. federal courts should strongly consider following the CJEU’s lead on this important question.

We also should be careful not to allow conflicts in discrete contexts to obscure the larger symbiotic relationship that exists between privacy and speech. *Google Spain* and *Digital Rights Ireland* provide very different vantage points on the necessary relationship between speech and privacy in the era of Big Data. *Google Spain*, to U.S. eyes at least, represents a disturbing elevation of privacy rights over the ability of would-be listeners and viewers to obtain true, nonmisleading information. May politicians and public figures seek to scrub their pasts clean of embarrassing, but truthful, incidents? Some preliminary evidence involving requests to scrub web search results suggests that the answer to this question could easily be “yes.”<sup>284</sup> The implications of this doctrine for speech related to democratic self-government are plainly bad.

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281. Richards, *supra* note 275, at 1946.

282. See Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 403-04 (2008).

283. See RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, “OFFENSIVE” PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 5-6 (2012) (noting that James Madison intentionally linked the right of assembly with the right of petition because assembly “is an antecedent activity to petitioning”).

284. See, e.g., Ruth Bender, *Google Ordered to Remove Sex Images*, WALL ST. J., Nov. 7, 2013, at B3 (reporting on a French court order requiring the removal of nine sexually explicit images of Max Mosley, who headed the Formula One racing organization); Schechner, *supra* note 251 (noting that Google recently had deleted a *Wall Street Journal* story on Greg Lindae’s involvement with a New Age “workshop” in the late 1990s).

On the other hand, *Digital Rights Ireland* reflects a clear understanding of the necessary and essential relationship of privacy to speech. To the extent that *Google Spain* should give a reasonable observer pause about its extreme privileging of privacy over speech, *Digital Rights Ireland* provides a potential road map for U.S. domestic courts grappling with how best to respond to the creation of a new surveillance state apparatus in the United States.

### CONCLUSION

In this Article, I have attempted to show how speech and press rights retain significant salience in Europe and how privacy, although embattled, retains social and legal importance in the United States. To be sure, the standard account largely gets things right: privacy, dignity, and personal honor do have broader relative salience in European jurisprudence than in the United States. But to say that privacy matters more in European human rights jurisprudence is not to say that speech and press rights will always and invariably fail in the face of privacy claims.

Similarly, the standard account of the role and importance of expressive freedoms accurately describes the general warp and weft of the accommodation of these interests when they come into conflict in the United States. In many instances post-*New York Times Co. v. Sullivan*, the U.S. Supreme Court has subordinated protecting privacy, dignity, and personal honor in order to provide broad protection to freedom of speech and press. The Justices have done so as part of a broader effort to vindicate “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>285</sup> As Chief Justice Rehnquist explained in *Hustler Magazine, Inc. v. Falwell*, “in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment.”<sup>286</sup>

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285. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); see *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (“Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to ‘vehement, caustic, and sometimes unpleasantly sharp attacks.’” (quoting *Sullivan*, 376 U.S. at 270)).

286. 485 U.S. at 53.

Thus, dignitarian concerns routinely give way to the imperatives of the First Amendment.<sup>287</sup> But to say that speech generally trumps privacy is not to say that speech *always* or *invariably* trumps privacy—and dignity—interests.

Despite these important differences, common ground exists and should not be ignored. To a degree that seems to have escaped much notice, the framing devices used in contemporary European jurisprudence generally track the language and jurisprudential logic of *Sullivan*. Public officials, public figures, and those involved in matters of public concern hold diminished privacy interests relative to purely private citizens even if the overall baseline for securing privacy and dignity is significantly higher overall in Europe than in the United States. Thus, Justice Brennan's vision of free speech as a means of facilitating democratic self-government has become an important part of the fundamental rights jurisprudence of the ECHR (and, by implication, constitutes part of the human rights law of the signatory states to the European Convention).

In sum, although we should not lose sight of the points of conflict (and they are many), we also should not fail to appreciate the significant points of tangent that exist between the U.S. and European approaches to reconciling privacy with speech. At the end of the day, the pervasive distrust of government that prevails in the United States makes broad-based mandatory civility norms unacceptable even while such rules are quite quotidian in Europe. But to a significant extent, the United States and Europe share a deep-seated commitment to safeguarding speech as an essential condition necessary for the project of democratic self-government to succeed.

So too, we should take care not to overlook the necessary relationship between privacy and speech with respect to the project of democratic self-government more generally. A surveillance state may be many things, but it cannot be a true democracy. If "We the People" are truly to superintend the institutions of government, we must have the ability to engage each other without an omnipresent state superintending our deliberative process. In many fundamental ways, privacy does not so much conflict with speech as facilitate it.

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287. *See id.* at 55 ("'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.").

In celebrating our robust jurisprudential commitment to free speech in the United States, we must not undervalue privacy—both against the government and also with respect to powerful private corporations. A society without privacy might not necessarily be a society without speech, but speech in such a society will undoubtedly be more limited, less vibrant, and substantially more circumscribed than in a society with meaningful privacy protections. At the end of the day, and in some important ways, privacy and speech constitute complementary, rather than conflicting, human rights.