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

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Ronald J. Krotoszynski, Jr.[718*]

Abstract

The standard account of the relationship between privacy and speech posits that privacy and speech constitute restive neighbors lacking good fences – essentially conflicting, rather than complementary, rights. And, as Robert Frost observed, "good fences make for good neighbors." In many circumstances, privacy and speech do present conflicting human rights values that courts must reconcile. However, if one posits that freedom of speech merits constitutional protection primarily because of its role in facilitating democratic self-government, then privacy and speech actually possess a necessary and inescapable connection. Simply put, a surveillance state may be many things, but it will not be a functioning participatory democracy; a society without privacy cannot be fundamentally democratic in nature. Alexander Meiklejohn forcefully argued that the best rationale for protecting speech arises from its integral relationship to the project of democratic self-government. Speech has value, and merits protection, because democratic self-government cannot exist without it. Strictly speaking, Meiklejohn never wrote about privacy and its relationship to democratic self-government. However, the logic of his position clearly would support extending constitutional protection to privacy as well as to speech. This Chapter argues that a strong and important linkage exists between privacy and democracy. Indeed,

718 * John S. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law. With thanks and appreciation to the faculty of the University of Uppsala School of Law – and particularly professors Anna-Sara Lind, Inger Österdahl , and Jane Reichel – for inviting me to participate in this project. I also wish to acknowledge the thoughtful and constructive comments that other participants provided to me on an earlier draft of this Chapter; my contribution reflects the benefit of their insights. As always, any and all errors or omissions are my responsibility alone.

one of the best rationales for affording privacy protection is privacy's relationship to self-government. Accordingly, we should think of privacy and speech as essentially complementary, rather than conflicting, human rights. As Frost observed, "Before I built a wall I'd ask to know/What I was walling in or walling out/And to whom I was like to give offense." So too, in thinking about privacy and speech, we should take care to focus careful attention on how these two rights work together to facilitate democracy. Moreover, we must avoid the potential trap of viewing their relationship exclusively through the lens of those instances in which these rights conflict and require courts to engage in careful line drawing and balancing.

1. Introduction

The contributions to this book analyze and consider the relationship between "Freedom of Speech, the Internet, Privacy, and Democracy." In thinking about the interrelationship of these important and interconnected interests, it strikes me that it is relatively commonplace to view privacy and speech as essentially conflicting, rather than complementary, human rights. And, it is certainly true that, in both the United States and in Europe, judges must hear and decide cases that pit privacy and speech against each other; vindication of one right comes only at the price of undermining the other. In many important respects, the standard account of privacy and speech proves out – rather than working together to serve common goals and objectives, these rights point in radically different directions.

1.1 Privacy and Speech in Conflict

Landmark judicial decisions, in both the U.S. and Europe, present privacy and speech as conflicting rights. To provide a concrete example, it is simply not possible to publish – and not to publish – photographs of Princess Caroline.[719] Or photographs of the German actor Bruno Eyron (who plays police superintendent Balko on German television) in connection with factually accurate newspaper reporting regarding the actor's arrest for cocaine possession at the Munich Oktoberfest in 2004.[720] Or to permit and simultaneously prohibit a highly offensive, intentionally targeted protest of the

719 *Von Hannover v. Germany* (No. 1), Application No. 59320/00, 40 Eur. H.R. Rep. 1 (2005) (decided June 24, 2004). But cf. *Von Hannover v. Germany* (No. 2), Applications No. 40660/08 & 60641/08 (decided Feb. 7, 2012) [available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001109029#{%22itemid%22:[%220011090 29%22]}] (last accessed September 4, 2014). Von Hannover No. 1 sustained a privacy claim regarding photographs of Princess Caroline taken while she and her children were in public places; in Von Hannover No. 2, however, the ECHR found that publication of photographs of Princess Caroline were protected speech and press activity under Article 10. Strictly speaking, however, in Von Hannover No. 2 the ECHR purported simply to apply the doctrinal framework from Von Hannover No. 1 and did not formally resile from its reasoning in its earlier decision. The fact remains that Von Hannover No. 2 appears to adopt a more press-friendly stance in balancing privacy (protected under Article 8) and speech/press rights (protected under Article 10) than the ECHR's first decision in 2004.

720 *Axel Springer AG v. Germany*, Application No. 39954/08 (decided Feb. 7, 2012) [available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001109034#{%22itemid%22:[%220011090 34%22]}] (last accessed September 5, 2014).

funeral of a deceased U.S. marine.[721] In these contexts, the vindication of one interest requires undermining the other.

In Europe, where both domestic and transnational legal systems take quite seriously the importance of protecting human dignity, personal honor, and reputation, privacy and speech would seem to exist in a particularly adversarial relationship.[722] Because all persons, including incumbent politicians, public figures, and persons involved in matters of public concern, possess a right to demand respect for their privacy, courts in Europe must carefully weigh whether the public interest justifies publication of photographs that present individuals in an unflattering or compromising light – or which reveal embarrassing personal information to the general public.[723]

In the United States, by way of contrast, the primacy of speech over privacy generally means that when these interests come into conflict, free speech claims will prevail. It would be an overstatement to say that human dignity, personal honor, and reputation enjoy no legal protection in the United States, but these interests are routinely subordinated in order to advance the free speech project.[724] As Chief Justice John Roberts, Jr., has explained, "[a]s a Nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[725]

In the age of the Internet, these questions have become only more pressing and more difficult. A blog post can reach a global audience from the instant the author posts it to the web; this fact makes the protection of dignitarian interests difficult, perhaps even impossible. Courts in speech-favoring jurisdictions like the United States are not much inclined to enforce foreign judgments that require information to be removed from the web.[726]

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721 See *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) ("Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to "special protection" under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt.").

722 See James Q. Whitman, "The Two Western Cultures of Privacy: Dignity Versus Liberty," 113 *Yale L.J.* 1151, 1153–64 (2004). Whitman observes that "[c]ontinental privacy protections are, at their core, a form of protection of a right to *respect* and *personal dignity*". *Ibid*. at 1161 (emphasis in the original).

723 See *Sciacca v. Italy*, Application No. 50774/99, 43 Eur. H.R. Rep. 400 (2006) (decided Jan. 11, 2005) (holding that the release and subsequent publication of a criminal defendant's arrest photograph, or mug shot, violated Article 8); See *Tammer v. Estonia*, Application No. 41205/98, 37 Eur. H.R. Rep. 857 (2003) (decided Feb. 6, 2001)) (holding that the use of disparaging Estonian-language adjectives to describe a person active in Estonian politics as a bad parent and a home wrecker was not protected by Article 10 and that the government's imposition of liability advanced important privacy values safeguarded by Article 8).

724 James Q. Whitman, "Enforcing Civility and Respect: Three Cultures," 109 *Yale L.J.* 1279, 1384 (2000) ("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."). Whitman observes that German law protecting personal honor and reputation constitutes "a body of law that shows, in many of its doctrines, a numbness to free-speech concerns that will startle any American". *Ibid*. at 1312.

725 *Snyder v. Phelps*, 131 S. Ct. (2011) at 1220.

726 In this respect, the practical impact of the Court of Justice of the European Union's (CJEU) recent Google Spain decision, which recognized a "right to be forgotten" under the EU's data protection regulations, might prove to be limited; one need only search the web from a U.S.-based database in order to obtain unredacted search results. *See Google Spain SL v. AEPD*, Case C-131/12, [2014] E.C.D.R. 260 (May 13, 2014).

Conflicts between legal systems regarding the appropriate metes and bounds of expressive freedom, on the one hand, and human dignity, on the other, will become only more frequent going forward. Accordingly, the need to find shared values – common ground – is more important than ever. However, finding common ground between the United States and Europe on the proper accommodation of speech and privacy will be easier said than done.[727]

1.2 The Critical Need to Move Beyond the Traditional Understanding of Privacy and Speech as Intrinsically Conflicting Rights

If one approaches the question from the vantage point of the traditional narrative that speech and privacy are intrinsically opposing rights, the prospects for finding a shared understanding of how to accommodate both interests would seem bleak. A good starting point, it seems to me, would involve a theory that relates privacy and speech in a way that reduces their oppositional nature. Must privacy and speech inevitably conflict with each other? Or, is it possible to reconceptualize these rights in such a way as to make them work together?

In thinking about this important question, I cannot offer a simple or easy answer. Indeed, if the question could be easily resolved, courts in the U.S. and Europe would already have found and claimed this jurisprudential common ground. Moreover, in this short Chapter, I cannot realistically offer a complete or comprehensive proposal on the best way forward. With these important caveats, it seems plausible to posit that a necessary relationship exists between privacy and speech insofar as both are necessary to facilitate the project of democratic self-government. This shared relationship to self-government could provide an excellent theoretical starting point for establishing a mutually acceptable transnational resolution of these conflicting rights.

In addressing these important questions, I will draw on the iconic writings of Alexander Meiklejohn, whose work on freedom of expression seems especially relevant to the issues associated with speech, privacy and democracy.[728] Many legal scholars credit Meiklejohn with identifying and developing the theory that free speech merits constitutional protection primarily because of its inextricable relationship to democracy.[729] Although Meiklejohn never expressly addressed the relationship of privacy and democracy, his arguments about the integral relationship of speech and democracy would seem to apply with full and equal force to *privacy* and democracy. In the balance of this Chapter, I will sketch Meiklejohn's theory of free speech, demonstrate how these arguments have potential relevance with respect to privacy, and show how,

727 See Ronald J. Krotoszynski, "The Polysemy of Privacy," 88 *Ind. L.J.* 881, 899–906, 916–18 (2013).

728 See Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper & Brothers, 1948).

729 See Kenneth L. Karst, "Equality as a Central Principle in the First Amendment," 43 *U. Chi. L. Rev.* 20, 24–25 (1975) (associating the democratic self-government theory of free speech with Meiklejohn and praising his "eloquent defense of the freedom of political expression").

in some important ways, privacy and speech constitute complementary, rather than conflicting, human rights.

In the era of Big Data, both government and corporate entities have the ability to gather, store, and manipulate vast quantities of personal data.[730] Programs like PRISM raise the specter of a modern-day surveillance state. Indeed, as the Court of Justice of the European Union (CJEU) recently has held,[731] merely collecting and storing digital data inhibits citizens from expressing their thoughts and ideas freely – in other words, such practices have a "chilling effect" on the exercise of expressive freedoms.[732] If speech is integral to democracy and, in turn, privacy in the form of intellectual freedom is integral to speech, then privacy constitutes a necessary condition for the maintenance of democratic self-government. Thus, just as freedom of speech is a necessary condition for the creation and maintenance of a polity capable of democratic self-government, and merits constitutional protection as a result, privacy also merits – indeed requires – protection because it too is a necessary condition for the flourishing of democratic self-government.

2. Meiklejohn's Democratic Self-Government Theory of Freedom of Expression

During the height of the Cold War, Alexander Meiklejohn courageously championed freedom of expression without regard to the politics or ideology of the speaker. In his classic book, *Free Speech and Its Relation to Self-Government*, first published in 1948, he strenuously objected to U.S. government regulations that prohibited non-citizens from speaking freely on matters of public concern while present in the United States.[733] An incredulous Meiklejohn demanded to know "[f]or what purpose does the Attorney General impose limits upon their speaking, upon our hearing?"[734] His answer: "The plain truth is that he is seeking to protect the minds of the citizens of this free nation of ours from the influences of assertions, of doubts, of questions, of plans, of principles which the government judges to be too 'dangerous' for us to hear."[735]

Because Attorney General Tom C. Clark feared that citizens "will be led astray by opinions which are alien and subversive,"[736] he sought to ban such speech. Meiklejohn

730 See Julie E. Cohen, "What Privacy Is For," 126 *Harv. L. Rev*. 1904, 1918–1927 (2013) (discussing Big Data and its myriad implications for contemporary society).

731 See *Digital Rights Ireland Ltd. v. Minister for Communications, Marine, and Natural Resources*, Joined Cases C-293/12 and C594/12 (decided April 8, 2014) [available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=404289 [http://perma.cc/54C5-A8WL]).

732 *Ibid*. at 28 (holding 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").

733 Meiklejohn, *Free Speech and Its Relation to Self-Government* (*supra* note 10) at xiii-xiv.

734 *Ibid*. at xiii.

735 *Ibid*.

736 *Ibid*.

suggested that accepting such restrictions on freedom of speech "would seem to be an admission that we are intellectually and morally unfit to play our part in what Justice Holmes has called the 'experiment' of self-government."[737] In other words, Meiklejohn posits that freedom of expression is a necessary prerequisite to democratic self-government; if citizens are not free to think, speak, and debate, they will not be capable of exercising effectively their responsibility to oversee the government and its officers.[738]

2.1 Exploring Meiklejohn's Theory of Freedom of Expression

Even for Meiklejohn, however, freedom of speech is not an absolute value. As Meiklejohn explains, "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."[739]

Accordingly, Meiklejohn argues that the freedom of speech is not an unlimited license to talk,[740] but rather an integral condition for the maintenance of democratic self-government:

> The First Amendment is not, primarily, a device for the winning of new truth, though that is very important. It is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal. When a free man is voting, it is not enough that the truth is known by someone else, or by some scholar or administrator or legislator. The voters must have it, all of them. The primary purpose of the First Amendment is, then, that all citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them. Under the compact upon which the Constitution rests, it is agreed that men shall not be governed by others, that they shall govern themselves.[741]

Thus, speech facilitates the process of deliberative self-government; accordingly, government may not proscribe or regulate it because free speech is the principal means through which the citizenry exercises its collective oversight of the government.

At the time Meiklejohn wrote these words, the idea that free speech should be protected against government regulation was a novel proposition. In the United Kingdom and most of the Continent, the doctrine of parliamentary supremacy prevailed and judicially-enforceable, entrenched human rights were not a common feature of most

737 *Ibid*. at xiv.

738 See *ibid*. at 22–27 (discussing the integral relationship between freedom of expression and the maintenance of a functioning participatory democracy).

739 *Ibid*. at 25.

740 *Ibid*. ("The First Amendment, then, is not the guardian of unregulated talkativeness.")

741 *Ibid*. at 88–89.

constitutional systems.[743] Even in the United States, the "bad tendencies" doctrine, famously reflected in Chief Justice Fred M. Vinson's majority opinion in *Dennis v. United States*,[743] held sway. Applying this doctrinal approach, a majority of the Supreme Court sustained federal laws criminalizing the advocacy of communism or membership in communist organizations against First Amendment objections.[744] Recall too that, in 1948, Germany had no Basic Law and the European Convention for the Protection of Human Rights and Fundamental Freedoms had not entered into force. In sum, Meiklejohn's theory of free speech represented a radical form of libertarianism in 1948.

In 1961, Meiklejohn authored a law review article in which he reiterated his argument and clarified certain aspects of it.[745] In particular, he took pains to emphasize that a theory of speech rooted in democratic self-government had to include protection for activities and speech necessary to make citizens prepared for and capable of engaging in the project of democratic self-government. Meiklejohn argued that "[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."[746] Moreover, "there are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express."[747] Although derivative of core political speech, these other forms of expressive activity "must suffer no abridgment."[748] Among the expressive activities that Meiklejohn had in mind are education, philosophy and the sciences, literature, and the arts.[749] On the other hand, communicative activities with no relationship to self-governance, whether direct or indirect, "are wholly outside the scope of the First Amendment."[750]

Meiklejohn defined the scope of protected ancillary speech in very broad terms. For example, its scope includes graphic sexually-explicit speech. Meiklejohn explained that "[h]ere, as elsewhere, the authority of citizens to decide what they shall write and, more fundamental, what they shall read and see, has not been delegated to any of the

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742 For a discussion of the doctrine of parliamentary supremacy (or "sovereignty"), see P.S. Atiyah & Robert Summers, "Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning," *Legal Theory, and Legal Institutions* 227–229, 267–270 (1987). For an illustrative example of this principle in action, see *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, 632 (Can.) ("It cannot be forgotten that it [the statutory Bill of Rights] is a statutory instrument, illustrative of Parliament's primacy within the limits of its assigned legislative authority, and this is a relative consideration in determining how far the language of the Canadian Bill of Rights should be taken in assessing the quality of federal enactments which are challenged under s. 1(a)."). As Atiyah and Summers explain, under the doctrine of parliamentary sovereignty, "[s]tatutes are of paramount authority, and any conflict between a statute and a judicial decision must be decided in favour of the statute". Atiyah & Summers, *supra*, at 55.

743 341 U.S. 494 (1951).

744 *Ibid*. at 501–503, 508–511.

745 See Alexander Meiklejohn, "The First Amendment Is an Absolute," 1961 *Sup. Ct. Rev.* 245.

746 *Ibid*. at 255.

747 *Ibid*. at 256.

748 *Ibid*.

749 *Ibid*. at 257.

750 *Ibid*. at 258.

subordinate branches of government."[751] Each individual citizen has the right to decide "for himself to whom he will listen, whom he will read, what portrayal of the human scene he finds worthy of his attention."[752] For a polity to be capable of self-government, "the people do need novels and dramas and paintings and poems, 'because they will be called upon to vote.'"[753] Meiklejohn argued that citizens must have the courage to think; yet, "[o]ur dominant mood is not the courage of people who dare to think."[754]

Of course, we can and do value the arts, sciences, and literature as independent social goods, and not merely on a derivative basis because they help to prepare citizens to be effective overseers of their government.[755] And, yet, Meiklejohn plainly is correct to posit that an uneducated and ignorant people are unlikely to be capable of maintaining a functioning democratic government. To the extent that the "'the people need free speech' because they have decided, in adopting, maintaining, and interpreting their Constitution, to govern themselves rather than to be governed by others,"[756] the scope of free speech cannot be limited strictly to speech directly related to politics.

2.2 Robert Bork's Narrow Interpretation of Meiklejohn's Theory

To be sure, some adherents of Meiklejohn's democratic self-government theory of free speech rejected his expansion of the scope of free speech to encompass speech associated with education, the arts, literature, and the sciences. Judge Robert Bork is perhaps the most notable legal scholar who takes this position. Bork argued that only speech *directly connected* to elections, politics, and governance should have any claim on the First Amendment.[757]

Bork posited that "[t]he category of protected speech should consist of speech concerned with governmental behavior, policy, or personnel, whether the governmental unit involved is executive, legislative, judicial or administrative."[758] Constitutionally protected speech encompasses only "explicitly political speech" that relates to "how we are governed," including "a wide range of evaluation, criticism, electioneering and propaganda."[759] In Bork's view, "scientific, educational, commercial or literary expression as such"[760] all lie outside the scope of the First Amendment.

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751 *Ibid*. at 262.

752 *Ibid*.

753 *Ibid*. at 263.

754 *Ibid*.

755 See Paul G. Stern, "A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse," 99 *Yale L.J.* 925, 932–933 (1990) (arguing that Meiklejohn's extension of his theory proves both too much and too little and objecting that we value art, literature, and science as independent public goods and not merely because they facilitate democratic self-government).

756 Meiklejohn, "The First Amendment Is an Absolute" (*supra* note 27) at 263.

757 See Robert H. Bork, "Neutral Principles and Some First Amendment Problems," 47 *Ind. L.J.* 1 (1971).

758 *Ibid*. at 27-28.

759 *Ibid*. at 28.

760 *Ibid*.

Judge Bork acknowledged that some observers might object to leaving the regulation of non-political speech to the unfettered discretion of legislatures. He responded, however, that "[t]he notion that all valuable types of speech must be protected by the first amendment confuses the constitutionality of laws with their wisdom."[761] Consistent with this view, "[f]reedom of non-political speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives,"[762] an outcome that Bork characterized as "hardly a terrible fate."[763] For Bork, "the protection of the first amendment must be cut off when it reaches the outer limits of political speech."[764]

Thus, there are those who, embracing a narrow interpretation of the Meiklejohn theory, argue that political speech, and *only* political speech, should be protected under the First Amendment. On the other hand, however, I think that Meiklejohn has the better of this argument. An uneducated and illiterate population is unlikely to be capable, over the longer term, of sustaining a democracy. As I have argued elsewhere, "[e]ven if one posits the arts, sciences, and humanities as independent social goods, their relationship to democracy cannot be denied: a society of illiterates will prove incapable of democratic self-government."[765]

2.3 The Necessary Relationship of Intellectual Freedom and Democracy: From Jefferson to Meiklejohn

Meiklejohn's linkage of both education and intellectual freedom to self-government has deep roots in American political philosophy.[766] John Dewey, for example, advanced very similar arguments.[767] However, the intellectual origins of this argument stretch back in time to the U.S. Revolution of 1776. Bernard Bailyn writes that for the Revolutionary generation,

> The details of this new world were not as yet clearly depicted; but faith ran high that a better world than had ever been known could be built where authority was distrusted and held in constant scrutiny; where the status of

761 *Ibid.*

762 *Ibid.*

763 *Ibid.*

764 *Ibid.* at 27.

765 Ronald J. Krotoszynski, Jr., *The First Amendment in Cross-Cultural Perspective: A Comparative Legal Perspective on the Freedom of Speech* (New York: New York University Press, 2006) 170.

766 See generally Bernard Bailyn, The Ideological Origins of the American Revolution (Cambridge, MA: Belknap Press, 1967) 307–313, 317–319 (discussing the Revolutionary generations embrace of political equality and a society ordered on meritocratic, rather than aristocratic, principles).

767 See John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (New York, 1916) 4–11, 23–24, 81–99; John Dewey, *The Living Thoughts of Thomas Jefferson* (Greenwich, CT: Fawcett Publications, 1940) 11–23; see also Alan Ryan, *John Dewey and the High Tide of American Liberalism* (New York: Norton, 1995) 175–183. For a more general discussion of this philosophical tradition in the United States, see Diane Ravitch, "Education and Democracy," in Diane Ravitch & Joseph P. Viteritti (eds.), *Making Good Citizens: Education and Civil Society* (New Haven, CT: Yale University Press, 2001) 15, 16–27.

> men flowed from their achievements and from their personal qualities, not from distinctions ascribed to them at birth; and where the use of power over the lives of men was jealously guarded and severely restricted.[768]

Quite obviously, an illiterate and uneducated population would not be capable of the ongoing oversight of government that the Revolutionary generation believed to be essential to the maintenance of a well-ordered and just polity.

So too, the egalitarian sentiments of the Declaration of Independence[769] make sense *only* in the context of a polity in which citizens may effectively use the political process to maintain their equal status and can actually exercise their fundamental rights. Thomas Jefferson, a Virginia delegate to the Continental Congress, was the principal author of the Declaration of Independence; he forcefully argued that democracy was simply impossible in the absence of an educated citizenry that enjoyed unfettered intellectual freedom.

Jefferson's political philosophy had a strongly egalitarian cast; he posited that democracy could only flourish in a community of self-sufficient "yeoman Farmers" who enjoyed the right of suffrage.[770] In order for a populace to be capable of self-governance, however, Jefferson firmly believed that it must be educated. Thus, he famously argued that "the diffusion of knowledge among the people" constituted the surest "foundation … devised for the preservation of freedom, and happiness."[771] He advocated

> a crusade against ignorance; establish and improve the law for educating the common people. Let our countrymen know that the people alone can protect us against these evils, and that the tax which will be paid for this purpose is not more than the thousandth part of what will be paid to kings, priests, and nobles who will rise up among us if we leave the people in ignorance.[772]

Thus, both education and a broader and general commitment to intellectual freedom were central to Jefferson's larger theory of a functioning democratic polity.

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768 Bailyn, The Ideological Origins of the American Revolution (*supra* note 48) at 319.

769 The Declaration of Independence, para. 2 (U.S. 1776) (asserting that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").

770 See Thomas Jefferson, "Notes on the State of Virginia," reprinted in Merrill D. Peterson (ed.), *Writings* (New York, NY: Literary Classics of the U.S., 1984 (1787)) 123, 290–291 (arguing, in Query XIX, that democratic society fares best when populated by independent citizens who enjoy a modicum of real and personal property and that agricultural employment is conducive to personal virtue); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) 225–226 and 226 n. 14 (invoking "Jefferson's ideal of the 'sturdy yeoman' who would form the basis of what he considered as the ideal of a democratic society"). Jefferson wrote that "[t]hose who labour in the earth are the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue". Jefferson, *supra*, at 290–291. He possessed an equally passionate disdain for those dwelling in the cities of contemporary Europe: "The mobs of great cities add just so much to the support of pure government, as sores do to the strength of the human body." *Ibid*. at 291.

771 Letter from Thomas Jefferson to George Wythe (Aug. 13, 1786), reprinted in Merrill D. Peterson (ed.), *The Portable Thomas Jefferson* (New York: Penguin, 1975) 398, 399.

772 *Ibid*. at 399–400.

Jefferson claimed that "no one more sincerely wishes the spread of information among mankind than I do, and none has greater confidence in its effect towards supporting free & good government."[773] As I have observed previously, "Thomas Jefferson repeatedly drew the connection between education, enlightenment, and democratic self-government."[774]

In his letter to Charles Yancey, of January 6, 1816, Jefferson posits that "[i]f a nation expects to be ignorant and free, in a state of civilization, it expects what never was and will never be."[775] He explains that "[t]he functionaries of every government have propensities to command at will the liberty and property of their constituents." Accordingly, Jefferson cautions that "[t]here is no safe deposit for these but with the people themselves; nor can they be safe with them without information." Jefferson draws a clear linkage between education and the maintenance of a citizenry capable of democratic self-governance. Unlike Judge Bork, Jefferson would not consign the protection of intellectual freedom, an essential condition for an educated citizenry, to the tender mercies of incumbent politicians.

Alexander Meiklejohn's work builds on Jefferson's intellectual foundations by elaborating carefully on the necessary linkageamong education, freedom of speech, and self-government.[776] Moreover, he undertook this important work at a time when advocating genuinely free political expression was radically unpopular. In the era of the Red Scare, Joe McCarthy, and the blacklists,[777] advocating freedom of expression for communists and Nazis reflected tremendous courage and intellectual honesty.

Meiklejohn explained that "[i]n my view, 'the people need free speech' because they have decided, in adopting, maintaining and interpreting their Constitution, to govern themselves rather than to be governed by others."[778] And, "in order that to make that self-government a reality rather than an illusion, in order that it may become as wise and efficient as its responsibilities may require, the judgment-making of the people must be self-educated in the ways of freedom."[779] Meiklejohn's linkage of freedom of

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773 Letter from Thomas Jefferson to Trustees of the Lottery for East Tennessee College (May 10, 1810), reprinted in J. Jefferson Looney (ed.), *The Papers of Thomas Jefferson, Retirement Series, November 1809 to August 1810, vol. 2* (Princeton, NJ: Princeton University Press, 2005) 365–366.

774 Krotoszynski, *The First Amendment in Cross-Cultural Perspective* (*supra* note 47) 170. For a list of illustrative examples, see *ibid*. at 270 n. 255 (citing relevant letters by Jefferson on the relationship of reason, education, and the creation and maintenance of a successful democratic polity).

775 Letter from Colonel Charles Yancey (Jan. 6, 1816), reprinted in J. Jefferson Looney (ed.), *The Papers of Thomas Jefferson, Retirement Series, September 1815 to April 1816, vol. 9* (Princeton, NJ: Princeton University Press, 2013) 328, 330.

776 See, *e.g.*, Alexander Meiklejohn, "Education as a Factor in Post-War Reconstruction," in Cynthia Stokes Brown (ed.), *Alexander Meiklejohn: Teacher of Freedom* (Berkeley, CA: Meiklejohn Civil Liberties Institute, 1981) 185–189. For a similar argument that education is an essential prerequisite to successful democratic self-government, see Susan H. Bitensky, "Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis," 86 *Nw. U. L. Rev.* 550, 550–552, 588, 628–630 (1992).

777 See Richard M. Fried, *Nightmare in Red: The McCarthy Era in Perspective* (New York, NY: Oxford University Press, 1990). Fried accurately observes that "[b]eset by Cold War anxieties, Americans developed an obsession with domestic communism that outran the actual threat and gnawed at the tissue of civil liberties". *Ibid*. at 3.

778 Meiklejohn, "The First Amendment Is an Absolute" (*supra* note 27) at 263.

779 *Ibid*.

speech to democracy has proven highly influential and has gained general acceptance, not only in the United States, but in the decisions of foreign and transnational juridical bodies as well.

3. Privacy, Like Speech, Relates to the Process of Democratic Self-Government

The connection between privacy and speech is perhaps not self-evident, especially given the frequency with which claims arising under these human rights conflict. Nevertheless, the linkage is quite real and the syllogism connecting them appears to be valid. In a world of creeping government surveillance programs, threats to privacy are also threats to democracy itself.[780]

3.1 Speech, Cognition, and Thought

The argument begins with the observation that speech relies on cognition. Speech without thought is simply noise; it cannot communicate anything of value.[781] Thought, in turn, requires the ability freely to engage in those processes that are preliminary to the articulation and dissemination of ideas (whether political, literary, artistic, or scientific). For Meiklejohn, speech merits protection because of its inextricable relationship to the process of democratic self-government. However, the ability to formulate and articulate coherent thoughts, of any stripe, requires the time, space, and freedom to pursue reason's light wherever it may lead.[782]

Thomas Jefferson's writings are once again on point. In one of his several letters to his nephew, Peter Carr, Jefferson urged Carr to "fix reason firmly in her seat, and call to her tribunal every fact, every opinion."[783] He urged him to question all things, including even the existence of God: "Question with boldness even the existence of a god; because, if there be one, he must more approve the homage of reason, than that of blindfolded fear."[784] Jefferson urge Carr to "lay aside all prejudices on both sides, and neither believe nor reject any thing because any other person, or description of persons have rejected or

780 See Kevin D. Haggerty & Minas Samatas (eds.), *Surveillance and Democracy* (Abingdon: Routledge, 2010).

781 But see Joseph Blocher, "Nonsense and the Freedom of Speech: What Meaning Means for the First Amendment," 63 *Duke L.J.* 1423, 1425–1426 (2014). Blocher notes that, from the vantage point of the democratic self-government theory of speech, "it might not be immediately apparent how nonsense – which lacks cognitive content of any kind – can be entitled to protection". *Ibid*. at 1453–1454. Blocher nevertheless argues that nonsensical speech, at least in some contexts, merits constitutional protection; however, his examples generally involve nonsensical speech that communicates a message or serves some kind of intentional purpose. See *ibid*. at 1455–1458. Alternatively, he suggests conferring protection on nonsense as a necessary prophylactic rule needed to protect speech that possesses a meaning. See *ibid*. at 1455–1456.

782 This notion, of course, also reflects Jeffersonian thought. Jefferson believed that a human society could flourish *only* if citizens were permitted to follow reason's light, freely and without encumbrance, to whatever conclusions it led them to reach. See Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), reprinted in Peterson, *The Portable Thomas Jefferson* (*supra* note 53) at 423, 425–426.

783 *Ibid*. at 425.

784 *Ibid*.

believed it."[785] In the end, "[y]our own reason is the only oracle given you by heaven, and you are answerable not for the rightness but uprightness of the decision."[786]

Meiklejohn's overt extension of his democratic self-government theory to encompass speech related to art, literature, and the sciences very much corresponds to Jefferson's thinking. Meiklejohn argued that "the people do need novels and dramas and paintings and poems, 'because they will be called upon to vote.'"[787] Moreover, Meiklejohn posited that "[t]he primary social fact which blocks and hinders the success of our experiment in self-government is that our citizens are not educated for self-government."[788]

Meiklejohn's prescription for ameliorating this problem was idealistic – perhaps even naïve. He suggested that "[i]n every village, in every district of every town or city, there should be established at public expense cultural centers inviting all citizens, as they may choose, to meet together for the considerations of public policy."[789] The overarching objective would be "the positive purpose of bringing every citizen into active and intelligent sharing in the government of his country."[790]

3.2 The Necessary and Essential Relationship Between Privacy, Speech, and Democracy

Even if one questions the potential efficacy of Meiklejohn's proposed solution to the problem of a citizenry insufficiently enlightened to be capable of self-government, he is surely correct to draw a connection between intellectual and political freedom. This is where privacy comes to the fore. It is difficult, perhaps impossible, to posit full and free political deliberation in the absence of meaningful intellectual freedom.[791] And, yet, government surveillance often involves precisely the kinds of information that are essential to intellectual freedom – and hence present a particularly serious threat of producing a chilling effect.[792]

Professor Neil Richards has advanced this premise in a sustained and cogent fashion. Richards argues that "[i]f we care about the development of eccentric individuality and freedom of thought as First Amendment values, then we should be especially wary of surveillance of activities through which those aspects of the self are constructed."[793] From a Meiklejohnian or Jeffersonian perspective, facilitating "eccentric individuality" might not be a particularly important social goal. On the other hand, however, freedom of thought clearly possesses an essential relationship to both

785 *Ibid*. at 427.

786 *Ibid*.

787 Meiklejohn, "The First Amendment Is an Absolute" (*supra* note 27) at 263.

788 *Ibid*. at 263.

789 *Ibid*. at 260.

790 *Ibid*. at 261.

791 For a thoughtful and highly relevant discussion of the relationship of privacy to intellectual growth and development, see Neil M. Richards, "Intellectual Privacy," 87 *Tex. L. Rev.* 387 (2008).

792 See *ibid*. at 427–428.

793 Neil M. Richards, "The Dangers of Surveillance," 126 *Harv. L. Rev.* 1934 (2013) at 1950.

freedom of speech and democratic self-government more generally. Accordingly, Richards is surely correct to argue that "[s]hadowy regimes of surveillance corrode the constitutional commitment to intellectual freedom that lies at the heart of most theories of political freedom in a democracy."[794]

From these general principles, Richards posits that "[d]emocratic societies should prohibit the creation of any domestic surveillance programs whose existence is secret."[795] In addition, he suggests that "[d]emocratic societies should also reject the idea that it is reasonable for the government to record all Internet and telephone activity with or without authorization."[796] Professor Richards relates these proposals to a civil liberties tradition associated with James Madison and also to "First Amendment theory and American constitutionalism itself;[797] however, these policy proposals also clearly relate to Meiklejohn's and Jefferson's theories of the conditions necessary to operationalize democracy. Moreover, I believe that Meiklejohn and Jefferson both would have embraced the proposition 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."[798] And, had they been writing in the age of PRISM, Meiklejohn and Jefferson would surely also have agreed that "surveillance must be constrained by legal and social rules."[799]

Privacy is indispensable to intellectual freedom; intellectual freedom must exist if democracy is to flourish. Accordingly, privacy – particularly against the state – is no less integral to democratic self-government than the freedom of speech and a free press. Simply put, privacy constitutes an essential condition for democracy.[800] As such, any society that purports to be fundamentally democratic has an obligation to safeguard it.[801] In this important sense, then, privacy and speech are not conflicting human rights, but fundamentally complementary human rights.

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794 *Ibid*. at 1951.

795 *Ibid*. at 1959.

796 *Ibid*. at 1961.

797 *Ibid*. at 1959–1960.

798 *Ibid*. at 1964.

799 *Ibid*.

800 See generally Alan F. Westin, *Privacy and Freedom* (New York: Atheneum for the Assoc. of the Bar of the City of New York, 1967) at 23–42 (arguing that meaningful participation in a democratic polity requires the state to respect a zone of non-disclosure that protects the autonomy and intellectual freedom of individual citizens). Westin posits that "[j]ust as a social balance favoring disclosure and surveillance over privacy is a functional necessity for totalitarian systems, so a balance that ensures strong citadels of individual and group privacy and limits both disclosure and surveillance is a prerequisite for liberal democratic societies". *Ibid*. at 24.

801 Indeed, one could make a very good case that even if a particular nation's constitution lacks an enforceable bill of rights that includes express protection of privacy, the concept of democracy itself demands recognition and respect for privacy as an "implied freedom" because privacy, like speech, is intrinsic to democracy. See, *e.g.*, *Australian Capital Tele. Pty Ltd. v. Commonwealth* (1992) 177 C.L.R. 106, 136–142, 146–147, 212 (Austl.) (holding that, although the Australian Constitution lacks an express textual guarantee of freedom of speech, freedom of speech nevertheless enjoys constitutional protection as an "implied freedom" because "so far as free elections are an indispensible feature of a [democratic] society … it necessarily entails, at the very least, freedom of political discourse"); *Nationwide News Party Ltd. v. Wills* (1992) 177 C.L.R. 1, 48 ("Freedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege; it is inherent in the idea of a representative democracy."). For a relevant discussion, see Arthur Glass, "Australian Capital Television and the Application of Constitutional Rights," 17 *Sydney L. Rev.* 29 (1995).

4. Privacy and Speech: Both Conflicting and Complementary Human Rights

Contemporary discourse about the relationship of privacy and speech tends to focus on major cases, such as *Von Hannover No. 1 & No. 2*[802] and *Campbell*,[803] that squarely pit these interests against each other. Speech and press rights can and do conflict with interests related to human dignity, personal honor, and reputation. In Europe, privacy interests tend to trump speech and press rights, although the ECHR's most recent decisions in *Axel Springer* and *Von Hannover No. 2* suggest that this tribunal is reevaluating the proper balance between privacy/dignity and speech/press – at least with respect to public figures.

In the United States, by way of contrast, First Amendment interests in freedom of speech and a free press tend to override both state and federal efforts to protect human dignity and privacy. Decisions like *Sorrell v. IMS Health, Inc.*,[804] *Snyder v. Phelps*,[805] and *Hustler Magazine, Inc. v. Falwell*[806] all place a very high priority on protecting speech and press rights, giving these rights, if not an absolute priority, then something approaching it. As Chief Justice Rehnquist explained in *Falwell*, "[a]t 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."[807]

Thus, at a micro level, privacy and speech can and do conflict. And, when they do, courts must draw and enforce the boundary lines that define the border between these human rights. As Frost observes, "good fences make for good neighbors."[808] When politicians, public figures, and persons involved in matters of public concern object to publicity about matters they believe to be private, and therefore outside the scope

802 See *Von Hannover v. Germany* (Von Hannover No. 1), Application No. 59320/00, 40 Eur. H.R. Rep. 1, 26–29, paras. 63–80 (2005) (decided June 24, 2004); see also supra note 1 (discussing the 2004 and 2012 *Von Hannover* decisions).

803 *Campbell v. MGN Ltd*., [2004] 2 A.C. 457 (England) (holding that super-model Naomi Campbell held 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); see 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").

804 131 S. Ct. 2653 (2011). Justice Kennedy's majority opinion in Sorrell rejects 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. See *ibid*. at 2668–2672. 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". *Ibid*. at 856.

805 131 S. Ct. 1207 (2011). *Phelps* prohibited the imposition of liability based on a highly offensive, targeted protest of a deceased service member's funeral. See *ibid*. at 1217–1219. In particular, the majority held that the First Amendment prohibited the imposition of liability based on a jury finding of "outrageousness" because the standard opened up the possibility of a heckler's veto, *i.e*., the use of civil liability to censor unpopular speech and speakers.

806 *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). *Falwell* held that the First Amendment prohibits the imposition of civil liability for intentional infliction of emotional distress, even in the context of a highly offensive parody that was admittedly designed to cause severe emotional distress. See *ibid*. at 52–55.

807 *Ibid*. at 50.

808 Robert Frost, "Mending Wall," in Robert Frost, *North of Boston* (New York, 1914) 11, 12–13.

of the public domain, courts (at least in Europe) must balance the public interest in disclosure against the subject's demand that she be able to shape, if not control, how she is presented to the larger community. Thus, in the context of unwanted publicity, privacy and speech are rivals.

The Internet only exacerbates this conflict by making materials posted in one jurisdiction readily and easily available in another. Speech now routinely crosses borders and no national legal system can realistically hope to regulate effectively speech outside its borders (even if speech has material effects within its jurisdiction).[809] The need to find common ground in reconciling privacy and speech will become only more pressing, as conflicts arise from the significant differences that exist in the legal rules governing the permissible scope of speech and press coverage.

The ubiquity of government surveillance programs also makes careful consideration of the relationship of speech, privacy, and democracy a crucial project. Although Europe has taken a stronger legal position regarding the use of personal information by private entities than the United States,[810] the European Union's (EU) data storage directive, invalidated in *Digital Rights Ireland*,[811] required member states to store all electronic communications for months – perhaps even years.[812] It also bears noting that from April 2006 to April 2014, a period of eight years, EU member states were required to store all electronic communications under a program that provided virtually no safeguards regarding the information being collected, the conditions under which the information was stored, or the administrative rules and oversight governing accessing the stored data. The CJEU's decision in *Digital Rights Ireland*, invalidating Directive 2006/24, certainly advances privacy – and by implication democracy. However, the fact remains that the EU adopted this regulation and it remained in force and effect for almost a full decade.

At the risk of perhaps exhibiting an undue sense of cynicism, one also wonders what domestic security agencies in EU member states are actually doing in practice. To be sure, politicians in Europe, of all ideological stripes, readily proclaim their opposition to the creation of surveillance states. However, what politicians say, and what they actually do, often do not correspond. Are levels of government transparency in, for example, Germany or the United Kingdom, sufficient to know, with certainty,

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809 See Timothy Zick, *The Cosmopolitan First Amendment: Protecting Transborder Expressive and Religious Liberties* (New York: Cambridge University Press, 2014); see also Timothy Zick, "Falsely Shouting Fire in a Global Theater: Emerging Complexities of TransBorder Expression," 65 *Vand. L. Rev.* 125 (2012); Timothy Zick, "Territoriality and the First Amendment: Free Speech At – and Beyond – Our Borders," 85 *Notre Dame L. Rev.* 1510 (2010).

810 See EU Data Privacy Directive, EU Directive 95/46/EC.

811 *Digital Rights Ireland Ltd. v. Minister for Communications, Marine, and Natural Resources*, Joined Cases C-293/12 & C594/12 (*supra* note 13) 58–71.

812 Directive 2006/24, art. 6 (adopted April 4, 2006) ("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 adopt longer periods of retention, subject to approval by the EU's Commission. See *ibid*. 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.").

that a German or British PRISM program does not exist? We know that France has strongly decried U.S. surveillance programs while, at the very same time, maintaining similar surveillance programs itself.[813] Accordingly, it seems reasonable to ask whether the maxim "do as I say, not as I do" applies in this context (as in so many others).

At a micro level, privacy and speech can and will conflict. At a macro level, however, both privacy and speech constitute necessary elements for the creation and maintenance of a functioning democratic polity. In an age of drones and mass surveillance technology, consideration of the interrelationship between speech, privacy, and democracy will constitute an ever more important, and pressing, task.

5. Conclusion

Privacy and speech both make possible and help to sustain the process of democratic self-government. The growing specter of a global surveillance state requires that lawyers, judges, legislators, and policy makers, as well as legal academics, carefully consider the necessary connection between these human rights. To be sure, individual cases will continue to present conflicts between speech and press rights, on the one hand, and human dignity, personal honor, and reputation on the other. It is certainly true, as Robert Frost observed in *Mending Wall*,[814] that "good fences make for good neighbors." However, we must transcend the traditional narrative of privacy and speech as antagonistic, rather than complementary, human rights if we are to safeguard effectively both of these rights – and democracy itself.

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