FRAGILE MERCHANDISE:
A COMPARATIVE ANALYSIS OF THE PRIVACY RIGHTS FOR PUBLIC FIGURES

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ABSTRACT

Over a century after Warren and Brandeis first presented the right to U.S. jurists for their consideration, privacy has become a central player in U.S. law. But nations around the world, in particular the common and civil law nations of Europe that share similar legal cultures with the United States, are grappling with how best to strike a balance between the competing rights of privacy and freedom of expression—both of which are critical to the functioning of democratic society. Existing literature has not fully drawn from this reservoir of international experience to inform the debate about U.S. privacy rights. This Article addresses this omission by using comparative case studies from the United States, the United Kingdom, France, and Germany to analyze areas of convergence and divergence in privacy rights. The focus of each case study will be the right of privacy afforded to public figures, particularly those at the cusp of the classic definition, i.e., involuntary or temporary public figures. Though some semblance of a bright-line rule has evolved for voluntary public figures, involuntary public figures in the United States are accorded spotty protection varying by jurisdiction. Lacking guiding Supreme Court precedent, this has led to divergent practice especially regarding the definition of "public interest," which is fundamental to defining the limits of freedom of expression. Thus, this Article draws from the comparative analysis to build a proposal for a clarifying definition of the public interest that helps delineate privacy rights, as well as arguing for the adoption of a graduated structure of privacy protections for public figures along the lines of the German and European Court of Human Rights models.

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Introduction

Should a politician's sex life be protected under privacy law? Is it in the public interest? How far does the media's freedom of expression extend, and does it include the right to report on a mother of octuplets?[1] Does a heroic firefighter deserve to have a longstanding drug addiction exposed? Answers to these questions depend on the legal system in which one resides, though many jurisdictions themselves often give contradictory answers. Once rather parochial

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[1] *Octuplets Mom Spurning Offer Of Free Care?*, CBS NEWS, Feb. 20, 2009, http://www.cbsnews.com/stories/2009/02/20/earlyshow/main4815110.shtml (last visited Mar. 17, 2009).

understandings of privacy are now being reinterpreted in the face of two contemporary forces. The first is the emergence of both international treaties[2] and national laws that have increasingly recognized a right to privacy.[3] Second is increasing rates of privacy violations, facilitated by new advanced surveillance technologies.[4] As a result of these dual factors, privacy rights are constantly being challenged in legal systems around the world.

We live in a time in which the very definition of privacy itself is being rewritten, often in a conflicting fashion. In an era in which the willingness of millions of people to sacrifice their personal privacy online is made manifest by the explosion in social networking, Facebook.com recently faced a wave of criticism from its 175 million users and backed down from proposed changes to its user agreement that would have made it nearly impossible to delete user profiles and protect private information.[5] And while a growing number of people are choosing to broadcast every intimate detail of their lives through blogs, other more infrequent users face privacy violations due to court rulings requiring YouTube.com to hand over information about its clients' viewing habits.[6] Thus, while some individuals wish to promote their freedom of expression even at the expense of their privacy, many others do not. Despite this disparity, the current U.S. legal regime often maximizes freedom of expression at the expense of privacy in most circumstances. And at the same time technology has made it easier than ever to breach the

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[2] *See for example* Human Rights Consultation Comm., Vict., Report: Rights, Responsibilities and Respect § 13(a) (2005); Human Rights Act, 2004, AUST. CAP. TERR. Laws A2004-5 § 12(a). *See also An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights, Human Rights Act*, 1988, c. 42 (Eng.), *in* 7 HALSBURY'S STATUTES OF ENGLAND AND WALES 528 (4th ed. 2001), Sch. 1, Pt. 1, art. 8. *Cf* Anthony Lester, *Parliamentary Scrutiny of Legislation under the Human Rights Act 1998*, 33 VICTORIA U. WELLINGTON L. REV. 1, 3 (2002) (noting that the New Zealand Bill of Rights Act 1990 contains no reference to privacy).

[3] *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 04, 1950, ETS No. 5, 213 UNTS 222, art. 8 [hereinafter ECHR].

[4] *See A Chronology of Data Breaches*, PRIVACY RIGHTS CLEARINGHOUSE, http://www.privacyrights.org/ar/ChronDataBreaches.htm#2009 (last visited Mar. 17, 2009).

[5] Alan Cowell, *Facebook Withdraws Changes in Data Use*, N.Y. TIMES, Feb. 18, 2009, *available at* http://www.nytimes.com/2009/02/19/technology/internet/19facebook.html?hp (last visited Feb. 18, 2009).

[6] *Google must divulge YouTube log*, BBC NEWS, July 3, 2008, *available at* http://news.bbc.co.uk/2/hi/technology/7488009.stm (last visited Feb. 19, 2009).

increasingly shear veil of privacy, whether by media, private investigation, workplace monitoring, or surveillance. As a result, the debate about how best and when to protect privacy in a digital world, as encapsulated by the Facebook and YouTube sagas, is playing out in courtrooms around the world with widely varying results. For example, while there remains a near consensus in common and civil law nations alike that the privacy rights of private figures who stay entirely out of the public eye trumps freedom of expression in most instances, the same cannot be said for the amorphous group of involuntary public figures.

Depending on the legal system involved, public figures can include everyone from a President or the CEO of Sony, to Captain Chesley Sullenberger of U.S. Airways Flight 1549 that crash landed safely in the Hudson River,[7] to both the perpetrator and victim of rape. The Parliamentary Assembly of the Council of Europe on the right to privacy[8] defines public figures

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[7] Robert McFadden, *Pilot Is Hailed After Jetliner's Icy Plunge*, N.Y. TIMES, Jan. 15, 2009, *available at* http://www.nytimes.com/2009/01/16/nyregion/16crash.html (last visited Feb. 19, 2009).

[8] Resolution 1165 (Jun. 26, 1998) of the Parliamentary Assembly of the Council of Europe on the Right to Privacy reads in pertinent part: "4. The right to privacy, guaranteed by Article 8 of the European Convention on Human Rights, has already been defined by the Assembly in the declaration on mass communication media and human rights, contained within Resolution 428 (1970), as 'the right to live one's own life with a minimum of interference'; 5. In view of the new communication technologies which make it possible to store and use personal data, the right to control one's own data should be added to this definition; 6. The Assembly is aware that personal privacy is often invaded, even in countries with specific legislation to protect it, as people's private lives have become a highly lucrative commodity for certain sectors of the media. The victims are essentially public figures, since details of their private lives serve as a stimulus to sales. At the same time, public figures must recognize that the special position they occupy in society - in many cases by choice - automatically entails increased pressure on their privacy; 7. Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain; 8. It is often in the name of a one-sided interpretation of the right to freedom of expression, which is guaranteed in Article 10 of the European Convention on Human Rights, that the media invade people's privacy, claiming that their readers are entitled to know everything about public figures 9. Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts; 10. It is therefore necessary to find a way of balancing the exercise of two fundamental rights, both of which are guaranteed by the European Convention on Human Rights: the right to respect for one's private life and the right to freedom of expression; …14. The Assembly calls upon the governments of the member states to pass legislation, if no such legislation yet exists, guaranteeing the right to privacy containing the following guidelines, or if such legislation already exists, to supplement it with these guidelines: (i) the possibility of taking an action under civil law should be guaranteed, to enable a victim to claim possible damages for invasion of privacy; (ii) editors and journalists should be rendered liable for invasions of privacy by their publications, as they are for libel; (iii) when editors have published information that proves to be false, they should be required to publish equally prominent corrections at the request of those concerned; (iv) economic penalties should be envisaged for publishing groups which systematically invade

as "persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain."[9] In Japan on the other hand, public figures are very narrowly defined to include only those individuals who have very prominent positions and are able to substantially influence society—a very small group mostly limited to top corporate executives and leading politicians.[10] Arguably the social value of information regarding the private lives of such public figures is critical when it has the potential for public enlightenment or is inherent to the public interest (such as regarding the President or Prime Minister's health).[11] The same utility is not as immediately apparent when considering coverage about the drug addiction of a heroic fire fighter leading to his suicide.[12] Yet in some jurisdictions, such as the United States, both have been equally protected under First Amendment freedom of expression grounds.[13] Though, this is certainly not the case in all common and civil law jurisdictions. In an age increasingly defined in part by a media bent on satiating public curiosity about every aspect of

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people's privacy; (v) following or chasing persons to photograph, film or record them, in such a manner that they are prevented from enjoying the normal peace and quiet they expect in their private lives or even such that they are caused actual physical harm, should be prohibited; (vi) a civil action (private lawsuit) by the victim should be allowed against a photographer or a person directly involved, where paparazzi have trespassed or used 'visual or auditory enhancement devices' to capture recordings that they otherwise could not have captured without trespassing; (vii) provision should be made for anyone who knows that information or images relating to his or her private life are about to be disseminated to initiate emergency judicial proceedings, such as summary applications for an interim order or an injunction postponing the dissemination of the information, subject to an assessment by the court as to the merits of the claim of an invasion of privacy; (viii) the media should be encouraged to create their own guidelines for publication and to set up an institute with which an individual can lodge complaints of invasion of privacy and demand that a rectification be published." Resolution 1165 of the Parliamentary Assembly of the Council of Europe (June 26, 1998).

[9] *Id.* at para. 7.

[10] No name given v. Kuni, 35 KEISHU 84 (Sup Ct., April 16, 1981).

[11] *See for example Obama's Health Summary*, MSNBC, May 29, 2008, http://firstread.msnbc.msn.com/archive/2008/05/29/1076277.aspx (last visited Mar. 17, 2009).

[12] David Andreatta, *Coming Down From Hero High*, TIMES-PICAYUNE, Mar. 21, 2002.

[13] U.S. CONST. amend. I.

the lives of public figures of all kinds, a more just balance must be struck between freedom of expression and the individual's right to privacy.[14]

Despite the presence of guiding international law on the subject, privacy rights have not converged in Europe and the United States, though there has been increasingly intra-European convergence. Many nations agree in principle that the individual's right to privacy is a human right recognized in international treaties including the 1948 Universal Declaration of Human Rights, and the 1966 International Covenant on Civil and Political Rights.[15] But it is answering what constitutes infringement of this right that cultural differences begin to arise. Breaches of privacy may constitute spying, taping conversations, taking pictures, and publicizing information in the press about an individual's private life, depending on the jurisdiction.[16] Thus, despite its acknowledged importance, the concept of individual privacy varies greatly across cultures—British paparazzi are commonly through to be among the most intrusive in the world,[17] while in New Zealand celebrities enjoy relative privacy.[18] For example, consider the vague Greek right of privacy, in particular that "one's private life is considered to be the space set by the person itself within which he is considered to enjoy his private and family activities uninterrupted and

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[14] *French Legislation on Privacy, Embassy of France in the United States*, http://ambafrance-us.org/spip.php?article640 (last visited Feb. 17, 2009).

[15] Universal Declaration of Human Rights of 1948. GA Res. 217A (III), UN Doc. A/810, at Art. 12 (1948) (stating that "No one shall be subject to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of law against such interference or attacks"); International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21st Sess., U.N. GAOR, art. 17, U.N. Doc. A/6456 (1966).

[16] *Public Figures and Right of Privacy in Greek Private Law*, http://www.ucl.ac.uk/laws/global_law/publications/institute/docs/karakostas.pdf (last visited Feb. 17, 2009).

[17] *See generally* WIBKE EHLERS, THE RIGHT TO PRIVACY AND PUBLIC FIGURES (2004).

[18] Although the New Zealand Privacy Act 1993 does not define privacy as such, there is a common understanding of the meaning in New Zealand as Professor Ruth Gavison generalizes: "Our interest in privacy is related to our concern over accessibility to others…the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which *we are the subject of others attention*." New Zealand's Privacy Act 1993, Privacy Amendment Act 1993, Privacy Amendment Act 1994, http://www.privacy.org.nz/slegisf.html; EHLERS, *supra* note 17.

without intrusions by third parties."[19] And these differences, especially between the United States and Europe, are growing ever more divergent. As one commentator has stated:

> In the law of privacy…the contrast between Europe and the United States is stark and is growing starker. In the name of dignity, Europeans have aggressively tried to guarantee that individuals control all uses and appearance of their names and images. Nothing of the kind is true in the United States.[20]

The United States should learn from the experience of other nations around the world that have struck the balance between privacy and freedom of expression in markedly different, and often more equitable, ways. Germany, for example, has developed a tripartite structure for public figures with a temporal sliding scale of privacy protections that is wholly absent from U.S. jurisprudence.[21] A comparative analysis of the right to privacy for public figures is thus justified since many nations, particularly those in Europe, are grappling with the same problems as the United States of intrusive media outlets, internet saturation, and ever evolving bodies of law.

Yet little agreement exists about the bounds of privacy protections within Europe, though there is growing convergence through the European Court of Human Rights. Depending on the jurisdiction involved, privacy rights may include protection against: (1) the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities; (2) the publicizing of a public facts of a sensitive nature (such as criminal behavior); and/or (3) intrusive media attention in all but public functions and topics.[22]

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[19] *See also* P. D. DAGTOGLOU, CONSTITUTIONAL LAW, PRIVATE LIBERTIES 324 (1991); *and* A. MANESIS, CONSTITUTIONAL RIGHTS 229-30 (1982). For the proposed definitions in Greek and foreign literature see generally MICHAELIDES-NOUAROS, THE INVIOLABLE OF PRIVATE LIFE AND THE FREEDOM OF THE PRESS (1983). This right is also enshrined in the Greek Constitution which provides for one's freedom to develop his personality as he wishes. GREEK CONST., art. V.

[20] J Whitman, *The neo-Romantic Turn*, *in* P LEGRAND AND R MUNDAY (EDS.), COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 330 (2003).

[21] It should be noted that privacy protections are not the same as privacy rights. Walking down the street in London, a person does not have their privacy protected given the ubiquitous CCTV cameras, but they do still have privacy rights. The same scenario is true in reference to national identification cards in other European nations.

[22] EHLERS, *supra* note 17.

Debate rages over whether a new tort of invasion of privacy should be created in Britain,[23] about the categorization of public figures in Germany, and the extent to which the private lives of public figures will continue to be protected in France. But to a greater or lesser degree across common and civil law nations the search for sensational stories about voluntary public figures, those that seek the attention, and involuntary public figures, those who do not, has impacted the privacy protections for all public figures. What makes European legal systems such an interesting comparative case study to the United States in this regard is the overarching role that the European Court of Human Rights plays in tying together these diverse approaches to privacy protections. What is slowly emerging is a common set of rights to privacy in Europe that are highly relevant to the United States as it balances privacy rights in a changing world.

Nations around the world, in particular those of Europe that share similar legal cultures with the United States such as the United Kingdom but also Germany and to a lesser extent France due to the role of judge-made law in these civil law systems, are grappling with how best to strike a balance between the competing rights of privacy and freedom of expression. Such balancing is imperative since both rights are critical to the functioning of democratic society. Yet existing literature has not fully drawn from this reservoir of international experience to inform the debate about privacy rights in the United States. This Article addresses this omission by using comparative case studies from the United States, the United Kingdom, France, and

[23] If a new tort of invasion of privacy is created in the United Kingdom by the courts or an Act of Parliament, it would do well to take note of the proposals of Australia, another common law nation that has grappled with this vary issue, including: (1) "the statute should identify its objects and purposes and contain a non-exhaustive list of the types of invasion that fall within it; and (2) the statute should provide that where the court finds that there has been an invasion of the plaintiff's privacy, the Court may, in its discretion, grant any one or more of the following: (a) damages, including aggravated damages, but not exemplary damages; (b) an accounting of profits; (c) and injunction; (d) an order requiring the defendant to apologize to the plaintiff; (e) a correction order; (f) an order for the delivery up and destruction of material; (f) a declaration; and (g) other remedies or orders that the court thinks appropriate." *Invasion of privacy*, CONSULTATION PAPER 1 NEW SOUTH WALES LAW REFORM COMMISSION (May 2007) [hereinafter New South Wales Commission] (setting out the arguments whether or not New South Wales should institute a statutory tort for invasion of privacy).

Germany to analyze areas of convergence and divergence in privacy rights. The focus of each case study will be the right of privacy afforded to public figures, particularly those at the cusp of the classic definition, i.e., involuntary or temporary public figures. This is because there is relatively more agreement as to the extent of privacy protections that should be afforded to Presidents and private citizens—the gray area are those people in between. Though some semblance of a bright-line rule has evolved for voluntary public figures, involuntary public figures in the United States are accorded spotty protection depending on the jurisdiction involved. Lacking guiding Supreme Court precedent, this has led to divergent practice especially regarding the definition of "public interest," which is fundamental to defining the limits of freedom of expression. Thus, what follows is a summary of existing privacy rights across both common and civil law nations that embody the full spectrum of freedom of the press and privacy rights, and a proposal for a clarifying definition of the public interest and public figures that would help delineate privacy rights going forward. In particular, we will argue for adopting a system of graduated privacy rights for public figures along the lines of the German and European Court of Human Rights models set out below.

This Article analyzes cross-cultural conceptions of privacy doctrines relating to public figures focusing on the United States and Europe in an effort to propose a more nuanced approach to U.S. privacy law that incorporates lessons from other legal regimes. Part I defines the elements of privacy in which this article primarily deals, i.e., those relating to voluntary and involuntary public figures. Part II then begins the comparative case study with an examination of the development and current state of U.S. privacy rights for public figures. Next, Part III focuses on the right to privacy for public figures in the United Kingdom as it is also a common law system sharing many similarities with U.S. law, but paying particular notice to the interplay

between the British Courts and recent ECHR jurisprudence. The analysis then moves from common to civil law nations, focusing on French and German privacy law. Part IV investigates French privacy law, which is illustrative of the greater protection that civil law systems generally give to the privacy of public figures in contrast with the common law system of the United Kingdom, or even the United States that traditionally protects privacy more robustly than other common law systems. Part V evaluates German privacy jurisprudence dealing with public figures, notably the tripartite structure for the privacy rights of public figures that is better defined than the French model. Finally, Part VI then summarizes European approaches to privacy protections through the lens of the European Court of Human Rights privacy cases, and combines it with other domestic European approaches in a proposal for how U.S. courts may better balance the right to privacy with freedom of expression in a rapidly changing world. Throughout we will investigate how the shared cultural fascination with celebrity in Europe and the United States operates to inform and impact the development of privacy laws. In conclusion, there is no one ideal way for privacy law to develop as each nation must strike the balance between the public's right to know and the individual's right to privacy in keeping with its own history and culture. But this comparative analysis does offer guidance for how a robust privacy law may coexist with a free, investigative press so vital to the proper functioning of democratic civil society through better defining the public interest by preferencing informed debate of public matters over infotainment, and a graduated set of privacy rights for public figures.

I. Defining Privacy Rights in Cultural Context

Privacy is a vast concept, made more so by unique cultural considerations in both common and civil law jurisdictions. It encompasses (among much else) freedom of thought, of bodily integrity, solitude, information integrity, freedom from surveillance, and the protection of

reputation, and personality.[24] But these protections vary a great deal by legal regime—the privacy of involuntary public figures in public places is respected by the ECHR, while such individuals would have no such protection in U.S. courts. And the debate over privacy goes beyond the application of legal rules in the courts. Many of the foremost U.S. legal scholars of the twentieth century—Roscoe Pound, Paul Freund, Erwin Griswold, Carl J. Friedrich, William Prosser, Laurence Tribe—have wrestled with the meaning and scope of privacy.[25] But there has been more agreement on the extent of disagreement rather than a movement towards a uniform set of first principles. Consider the various understandings and interpretations of privacy that has evolved in the context of U.S. jurisprudence alone, including:

> 1) Tort privacy (Warren and Brandeis's original privacy);
> 2) Fourth Amendment privacy (relating to warrantless governmental searches and seizures);
> 3) First Amendment privacy (a "quasi-constitutional" privacy existing when one individual's free speech collides with another individual's freedom of thought and solitude);
> 4) Fundamental-decision privacy (involving fundamental personal decisions protected by the Due Process Clause of the Fourteenth Amendment, often necessary to clarify and "plug gaps" in the original social contract);
> 5) State constitutional privacy (a combination of the four species above, but premised upon distinct state constitutional guarantees yielding distinct hybrids).[26]

To the extent that any agreement has been forthcoming at the most basic level, privacy is generally that which is asserted by individuals against the demands of a curious and intrusive society.[27] In this conceptualization, the main enemy of privacy is community, especially a curious community practicing robust freedom of expression. The more invasive the community norms, and as we will see the more advanced the technology, the less privacy may flourish.

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[24] *See generally* Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087 (2002) (providing an historical analysis of privacy and arguing for pragmatic solutions to determining privacy protections). These rights can be broken down into the following categories: (1) the right to be let alone; (2) limited access to the self; (3) secrecy; (4) control of personal information; (5) personhood; and (6) intimacy. *Id.*

[25] *See generally* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335 (1992).

[26] *Id.* at 1340.

[27] *See generally* Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989).

Defining privacy by way of conceptualizing the intrusiveness of community norms, though, is by no means the exclusive interpretation of privacy. Other neutral definitions are also prominent. Ruth Gavison, for example, has defined privacy as a gradient that varies in three dimensions: secrecy, anonymity, and solitude. She believes that an individual's loss of privacy can be objectively measured "as others obtain information" about him, "pay attention to him, or gain access to him."[28] Without privacy, "the pressure to live up to the details of all (and often conflicting) social norms would become literally unbearable; in a complex society, schizophrenic behavior would become the rule rather than the formidable exception it already is."[29] Such a neutral conception of privacy has advantages. It is useful, for example, in the cross-cultural analysis of privacy, because it creates an object of analysis that is independent of the various perceptions of the cultures at issue.[30] This is critical since there is such great differentiation as to how different countries manage the privacy of their citizens.[31] Thus, Gavison's privacy spectrum with the addition of a fourth variable of cultural media intrusiveness will be used in this Article, taking special note of anonymity relating to the private lives of public figures.

Determining an objective, empirically-based metric of privacy is difficult at best given that a "right to privacy" has been taken to include a number of interests that converge and diverge around the world. In countries that may be characterized by low-government-involvement, such as the United States and Japan, the government assumes a "hands-off" role

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[28] Froelich v. Adair, 213 Kan. 357, 360, 516 P.2d 993, 997 (1973); *see also* Hazlitt v. Fawcett Publications, Inc., 116 F. Supp. 538, 544 (D. Conn. 1953). Post, *supra* note 27, at 958.
[29] ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 429 (1968); Post, *supra* note 27, at 958.
[30] Post, *supra* note 27, at 959.
[31] Sandra J. Milberg, et al., *Information Privacy: Corporate Management and National Regulation*, 11(1) ORGANIZATIONAL SCIENCE 35-57 (2000) (arguing from a sample of 19 countries that most regulatory approaches to information privacy, corporate management of personal data, and consumer reactions are affected foremost by a country's cultural values).

allowing injured individuals to petition the courts to redress their privacy grievances.[32] This is especially true in the United States, where freedom of expression is accorded such importance that some have argued it is analogous to a property right.[33] In light of the American culture's captivation with celebrity, this is no accident. This interpretation, though, can be contrasted with the high-government-involvement nations of continental Europe, such as Sweden which licenses and regulates personal data,[34] or even Japan.[35] Doubtless such state protection for the acquisition and dissemination of information is an essential element of empowering civil society in a democracy.[36] But the pertinent question is how best to go about doing this while still respecting privacy rights and navigating the fear of government so prevalent in the United States.

Countries around the world strike this balance between protection of individual privacy and promoting an informed, public debate in many varied ways that flex as perceived national emergencies grow or fade.[37] In many parts of Europe for example, personal identification cannot be collected without the consumer's permission; employers cannot read their workers' private email (in contrast to the United States where employees surrender much of their right to privacy when they enter and use company property); personal information cannot be shared across

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[32] *See, e.g.*, Susan J. Becker, *The Immorality of Publicly Outing Private People*, 73 OR. L. REV. 159, 204 (1994) (describing the personal costs of a closeted lifestyle in relation to publicly revealing sexual orientation).

[33] Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1 (1997) (arguing that the right of publicity is sufficiently analogous to other types of property to justify the current practice of allowing the economic benefits flowing from the cachet of fame to be considered the property of the celebrity persona).

[34] *Id.* Another example is Belgium in 1995, which legalized prohibitions on the reuse of personal data and led to a judgment against the major financial institution involved.

[35] In Japan, the 2003 Personal Data Protection Law requires civil institutions to disclose the purpose of gathering information and prohibits institutions with databases from using the information in them in a manner other than for its original purpose. But, the Japanese media is excluded from this law. 2003 Personal Data Protection Law (Jp.); *see also Privacy Law and Policy Reporter*, http://www.austlii.edu.au/au/journals/PLPR/2003/40.html (last visited Apr. 19, 2009).

[36] A. Michael Froomkin, *The Death of Privacy?*, 52(5) STAN. L. REV. 1461, 1463 (2000) (noting that the best way to maintain optimal privacy in the digital age is not to share information in the first place).

[37] Emmanuel Gross, *The Struggle of a Democracy Against Terrorism-Protection of Human Rights: The Right to Privacy Versus the National Interest –The Proper Balance,* 37 CORNELL INT'L L.J. 27-93 (2004) (stating that a violation of privacy aimed at preventing a terrorist attack on innocent people has a worthy purpose that accords with the values of Judaism and democracy, both of which recognize the necessity of reducing standards of protection of individual rights in times of crises and emergency).

companies without express consent; and some European nations can even veto a parent's choice for their baby's name for the sake of preserving dignity.[38] Wiretapping is 130 times more common in the Netherlands than in the United States, while in Germany every citizen and long term resident must register his or her address with the German police.[39] These examples underscore the different approaches to privacy evident in European jurisprudence.

Much of these differences in attitudes towards privacy rights may be attributed to the underlying cultural traditions at work. The United States justice system's disinclination to be perceived of as censoring the press may be traced to the historic fear of big government.[40] This has led to a privileged place for the media in U.S. law that it enjoys to this day. Privacy law has similarly evolved in Britain, but through common law which is often preferred over Parliament leading to a much more nuanced and less robust set of privacy protections than that found in other common or civil law systems. While in France, the rights-based tradition illustrated through the Codes has created one of the strongest rights to privacy in the world. A significant part of this divergence is the difference between common and civil law justice systems. For example, Anglo-U.S. privacy law has developed incrementally primarily through common law, while in France Article 9 of the 1970 French Civil Code gave birth to modern French privacy law nearly in its entirety. As a result, privacy reform has been primarily driven through the courts in the common law nations, while civil law countries are far more likely to amend code provisions. The latter is a democratic process in which political coalitions can catalyze reform out of whole cloth. The former is inherently undemocratic, and more incremental. These

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[38] Rob Sullivan, *'La difference' is stark in EU, U.S. privacy laws*, MSNBC, Oct. 19, 2006, *available at* http://www.msnbc.msn.com/id/15221111/ (arguing that privacy protections in Europe are more robust than in the United States and noting that these rights in Europe, and many others, stem from the 1995 European Union Directive on Data Privacy mandating the passage of national privacy laws).

[39] *Id.*

[40] Interview with Lawrence M. Friedman, Stanford Law Professor, Stanford, CA, Apr. 15, 2009.

fundamental differences between common and civil law societies are very resistant to change, putting arguments about the convergence of the two systems aside.[41] Thus, given these underlying differences and in an effort to promote reform for U.S. privacy law, this Article focuses on a case analysis approach rather than statutory reform.[42] Though, the difficulty with such an approach is that comprehensive reform is needed urgently as technology continues to challenge privacy protections, which is why we argue for a guiding Supreme Court precedent.

"You have zero privacy…Get over it," said Scott McNealy, Chief Executive Officer of Sun Microsystems.[43] This remark highlights the fact that as technology improves so too does its potential to curtail privacy protections in everyday life. Consider the case of a young Korean woman who refused to clean up after her dog soiled a subway train.[44] Her behavior was captured by a passenger with a digital camera and within days of the incident she was universally labeled the "Korean dog shit girl."[45] What in times past would have been confined to a small area or village is now, thanks to advancing technology, broadcast to ever larger audiences. This does not change the fact that the woman's behavior was deplorable. But it does highlight how the ubiquitous blogosphere, telecommunications, surveillance, and a fascination with celebrity culture combines to challenge basic privacy rights. To take another contemporary example, the U.S. Federal Bureau of Investigation has decided to expand its collection of DNA evidence already including some 6.7 million Americans to include millions more people who have been

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[41] *See for example* Katja Funken, *The Best of Both Worlds - The Trend Towards Convergence of the Civil Law and the Common Law System* (July 2003), *available at* SSRN http://ssrn.com/abstract=476461 or DOI: 10.2139/ssrn.476461.

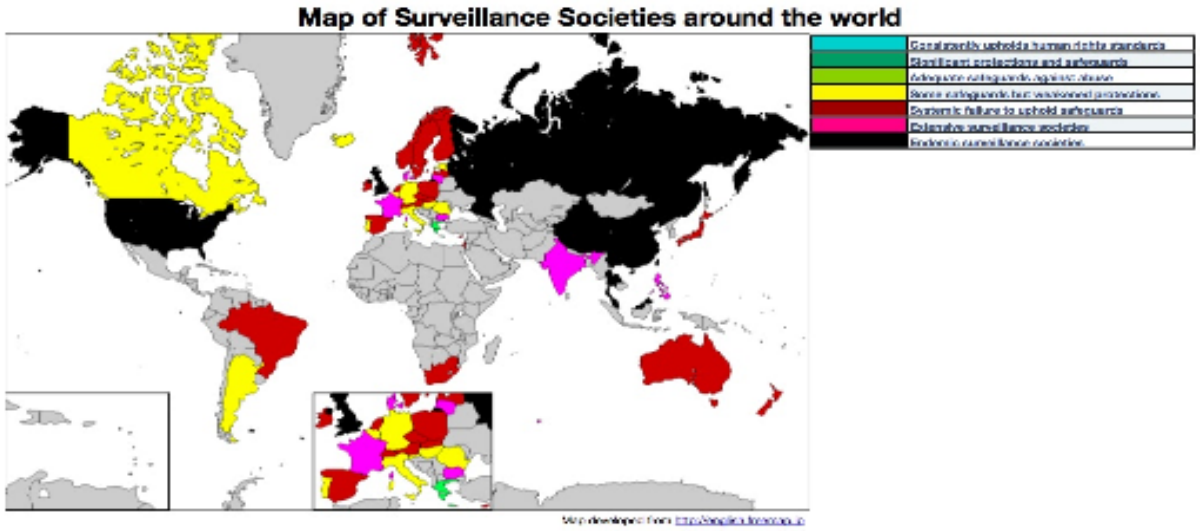
[42] Though at the same time, while there are significant cultural differences between the United States and Europe, globalization is catalyzing the convergence of privacy doctrines.

[43] Polly Sprenger, *Sun on Privacy: 'Get Over It*,' WIRED, Jan. 26, 1999, http://www.wired.com/politics/law/news/1999/01/17538 (last visited Apr. 12, 2009).

[44] Daniel E. Solove, *Of Privacy and Poop: Norm Enforcement Via the Blogosphere*, CONCURRING OPINIONS, June 30, 2005, http://www.concurringopinions.com/archives/2005/06/of_privacy_and_1.html (last visited Apr. 19, 2009).

[45] *Id.*

arrested or detained but not yet convicted of any crime.[46] This episode adds to fears that the United States is gradually becoming a surveillance society in which privacy takes a backseat to the public safety. As technology continues to improve, and absent more robust privacy protections, this problem will only come into sharper relief.



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In summary, there are many cultural reasons for the divergence in privacy rights around the world. Europeans distrust corporations more than government, unlike U.S. citizens, which prefers that private actors sue one another rather than rely on the state for help. Such intercultural disagreements have lead to intercontinental tensions in the past,[48] and have greatly

[46] Solomon Moore, *F.B.I. and States Vastly Expand DNA Databases*, N.Y. TIMES, Apr. 18, 2009, *available at* http://www.nytimes.com/2009/04/19/us/19DNA.html?hpw (last visited Apr. 19, 2009).
[47] *The 2007 Privacy International Rankings*, http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-559597 (last visited Apr. 19, 2009).
[48] Sullivan, *supra* note 38 (arguing that there are three prominent examples of these disagreements: (1) "A post-Sept. 11 data sharing agreement that provided U.S. authorities with 34 pieces of information on each airline passenger entering the country on flights from Europe was ruled illegal earlier this year by the European Supreme Court. The dispute threatened to ground all flights into the U.S. from Europe until the U.S. Department of Homeland Security and the European Union announced a settlement on Oct. 6; (2) U.S. anti-terrorism officials are mining data from the Belgium-based Society for Worldwide Interbank Financial Telecommunications (SWIFT), which regulates most international banking transactions. Belgian officials opened an immediate investigation. Such data mining would be considered illegal under Belgian law; and (3) in the late 1990s, e-commerce between Europe and the U.S. almost came to a halt after the EU's Data Protection Directive barred transfer of data to countries without comprehensive privacy protection laws. By EU standards, the U.S. falls far short of the requirements. Two years of negotiations ended in a "safe harbor" agreement promising privacy controls on E.U. data that flows into the U.S. Complaints about the system persist, however, from both sides.").

influenced the development of privacy laws in the United States and Europe. Thus, it is important to understand the cultural phenomena at the heart of the divergence in privacy law, and how these phenomena are animating the debate about privacy rights. To this end, the next Part begins by analyzing both the development and current state of privacy protections for public figures in U.S. jurisprudence.

II. The Right of Privacy for Public Figures in the United States

Before it is possible to apply the lessons from other jurisdictions that have considered the appropriate level of privacy to afford to public figures to the U.S. context, it is first essential to lay out the current state of U.S. privacy law to establish a foundation for discussion. What follows is a brief summary of the development of U.S. privacy law generally. We then move on to a discussion of the right to privacy of both voluntary and involuntary public figures. Much of this is a story not of privacy itself, but of the bounds of freedom of expression enjoyed by the media that in turn impacts privacy. Consequently, the discussion will center on prominent cases dealing with media rights in the United States through the lens of sociological jurisprudence.[49]

A. Development of U.S. Privacy Law

> Privacy**,** as idea and reality, is the creation of modern bourgeois society. It was above all a creation of the nineteenth century. The 'privacy' of the nineteenth century middle class home has, in part, broken down in the late-twentieth century. People still have private space; and it is an article of faith for the middle class that each child needs its own room. But that room, and the whole house, has been invaded by the media.[50]

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[49] We evoke sociological jurisprudence here since this Article primarily deals with the interplay of cultural and legal norms in defining privacy rights. *See generally* Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24(8) HARV. L. REV. 591 (1911) (discussing how the primary schools of jurisprudence may be broken down into analytical, historical, and philosophical enquires).

[50] Lawrence M. Friedman, *Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History*, 30 HOFSTRA L. REV. 1093, 1127 (2002).

In the early nineteenth century, President Andrew Jackson was the epitome of a popular idol in an era prior to the birth of pervasive celebrity as we know it today.[51] Though this ubiquitous pop culture status now includes politicians as well as both famous and infamous entertainers alike, what has not changed in the preceding 175 years is America's fascination with public figures of all stripes fed in turn by an increasingly intrusive media.[52] The desire to learn more about these figures has led to the right of privacy clashing with the First Amendment.[53] It is this need to strike an appropriate balance between these conflicting tensions that has engaged U.S. courts and prominent legal scholars for more than a century.

The roots of privacy lay in common law since the U.S. Constitution is explicitly silent on the matter.[54] Modern U.S. privacy law began with Louis Brandeis and Samuel Warren's famous 1890 article, *The Right to Privacy*.[55] In it, they urged courts to consider whether privacy, "the right to be left alone," and "the right to one's personality,"[56] should be protected in the face of what they termed "yellow journalism,"[57] today what we might call "infotainment."[58] Even in the late nineteenth century, Brandeis and Warren were concerned about the rate of technological change that was already further challenging colloquial notions of privacy—an issue that has

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[51] Kwall, *supra* note 33, at 1.
[52] *See for example* Joo-Hyun Lee, *Measuring the intrusiveness of advertisements: scale development and validation*, JOURNAL OF ADVERTISING, June 22, 2002, available at http://www.allbusiness.com/marketing-advertising/advertising/246299-1.html (last visited Apr. 20, 2009) (summarizing the literature on media intrusiveness as it has increased over the twentieth century).
[53] *Id.*
[54] Maria Sguera, *The Competing Doctrines of Privacy and Free Speech Take Center Stage After Princess Diana's Death*, 15 N.Y.L. J. HUM. RTS. 205, 207 (1998).
[55] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
[56] *Id.* at 207.
[57] Jessica E. Jackson, *Sensationalism in tshe Newsroom: Its Yellow Beginnings, the Nineteenth Century Legal Transformation, and the Current Seizure of the American Press*, 19 ND J. L. ETHICS & PUB POL'Y 789. *See also* W. JOSEPH CAMPBELL, YELLOW JOURNALISM: PUNCTURING THE MYTHS, DEFINING THE LEGACIES 1 (2001) (laying out nineteenth-century reporting practices).
[58] For a critique of infotainment, see *The Limits of Infotainment*, STABROEK NEWS, Mar. 14, 2009, http://www.stabroeknews.com/2009/editorial/03/14/the-limits-of-infotainment/ (last visited Mar. 16, 2009).

come into ever sharper relief with the birth of the Information Age.[59] For the first time, in the late nineteenth century pictures could be taken without sitting for them, leaving those so 'violated' without recourse in contract or trust.[60] Thus tort compensation was originally justified for those so offended.[61] However, Brandeis and Warren ultimately concluded that privacy law should include an exception to this blanket prohibition for the publication of any matter of "public or general interest" without explicitly defining the term.[62] Instead, they reasoned that privacy law should protect those people whose affairs were of no interest to the larger community, i.e., private figures.

From this early conception of the right of privacy, four distinct torts evolved: (1) intrusion upon one's solitude or seclusion; (2) public disclosure of private facts; (3) publicity that places someone in a false light; and (4) appropriation of one's likeness or name for another's benefit.[63] Consistent with this understanding, the function of the common law tort of invasion of privacy developed to protect the "subjective" interests of individuals against "injury to the inner person."[64] In other words, the goal of privacy law became to provide redress for "injury to [a] plaintiff's emotions and his mental suffering,"[65] and to regulate the publicizing of private life.[66] The elements of the modern invasion of privacy tort are described by the *Restatement* in the following manner:

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[59] This invasion brought about by swift and far-reaching technological change has led some to question what constitutes a 'public figure' in cyberspace. *See* E. Casey Lide, *ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 OHIO ST. J. ON DISP. RESOL. 193, 220 (1996) (noting the increasing unpredictability of many cyberspace defamation cases regarding public figures).

[60] This is analogous to contemporary debates surrounding the profusion of technologies allowing ever more private looks into peoples' lives, such as eavesdropping on cell phone conversations, to infrared cameras, helicopters, and even satellite imagery.

[61] Warren & Brandeis, *supra* note 55, at 211.

[62] *Id.*

[63] RESTATEMENT (SECOND) OF TORTS § 652A-E (1976).

[64] Emerson, *The Right of Privacy and Freedom of the Press,* 14 HARV. C.R.-C.L. L. REV. 329, 333 (1979).

[65] Post, *supra* note 27, at 958.

[66] *Id.* at 978.

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.[67]

It is part (b) referencing the principle that breaches of privacy are only warranted when in the public interest that is at the heart of the matter as was argued by Warren and Brandeis, which will be returned to below. To be actionable in an invasion of privacy tort case, a communication must be regarding "a matter concerning the private life of another" and the matter must be "of a kind that would be highly offensive to a reasonable person."[68] There is a distinction to be made, though, between the regulation of information and the regulation of communicative acts. This is seen in *Brents v. Morgan*,[69] which was the first decision to recognize the invasion of privacy tort in the state of Kentucky and a seminal case in the evolution of U.S. privacy law.

Brents v. Morgan was the first early U.S. case dealing with the fundamental question of what news is legitimate to the public interest that is of such paramount importance to delineating the privacy rights of public figures. The facts of the case are these. In 1926 in the town of Lebanon, Kentucky, W.R. Morgan, a veterinarian, owed a debt of $49.67 to George Brents, a garage mechanic. Brents was unsuccessful in recovering the debt, and in frustration finally put up a sign in the window of his garage publicizing the dispute. This case thus explicitly involves the last element of the disclosure tort, being that a plaintiff must demonstrate that a defendant's communication "is not of legitimate concern to the public."[70] The requirement is also termed the "privilege to report news," which is discussed below,[71] and is the single most important distinction between the intrusion and public disclosure branches of the invasion of privacy tort.

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[67] RESTATEMENT (SECOND) OF TORTS § 652D (1977).
[68] *Id.*
[69] 221 Ky. 765, 299 S.W. 967 (1927).
[70] RESTATEMENT (SECOND) OF TORTS § 652D (1977); Post, *supra* note 27, at 996.
[71] Virgil v. Time, Inc., 527 F.2d 1122, 1128 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976).

The former seeks to regulate all highly offensive violations, while the latter permits information to be freely disseminated if the information at issue is "newsworthy."[72] This iteration is seconded by Brandeis and Warren when they assert "the right to privacy does not prohibit any publication of matter which is of public or general interest."[73] Ultimately the Court held that in *Brents*, the matter at issue was not in the public interest—the garage owner injured the veterinarian by an unwarranted invasion of his right of privacy. Thus in this beginning stage of U.S. jurisprudence on the subject, the public interest did not trump privacy concerns;[74] at least initially, courts gave significant deference to injured plaintiffs in privacy cases, just as courts continue to do in Japan, Germany, and France today.

Building off of *Brents*, Hamberger *v. Eastman*, decided in 1964, officially recognized the tort of invasion of privacy.[75] The precise privacy law tort at issue in *Eastman* required a plaintiff to allege that a defendant has intentionally intruded upon the plaintiff's solitude or seclusion in a manner that would be highly offensive to a reasonable person.[76] The court noted that violation of the rules of decency damages a person by discrediting his identity and injuring his personality. This denies the chance for a person to become "complete."[77] In so doing, the privacy tort has gradually devolved the authority of enforcement into the hands of private litigants, who suffer both mental and dignitary harm.[78] From the beginning, therefore, the task of the common law has been to balance the importance of maintaining individual information preserves against the

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[72] Post, *supra* note 27, at 996.
[73] Warren & Brandeis, *supra* note 55, at 214.
[74] Similarly to *Brents*, in *Pavaesich v. New England Life Insurance Co.*, the court fleshed out the same tension when it held decades earlier that "the truth may be spoken, written, or printed about all matters of a public nature, as well as matters of a private nature in which the public has a legitimate interest." 122 Ga. 190, 50 S.E. 68, 74 (1905).
[75] 106 N.H. 107, 206 A.2d 239 (1964).
[76] Post, *supra* note 27, at 960.
[77] *Id.* at 963.
[78] In *Eastman*, for example, the husband was rendered impotent by the discovery of an eavesdropping device in the marital bedroom, while his wife was made 'frigid.' *Id.* at 964.

public's general interest in information.[79] This battle has played out in the courts given the U.S. common law system, and so it is on the development of U.S. privacy case law relating to freedom of expression that we turn to next.

B. The Birth of Robust First Amendment Protections for the Media in U.S. Case Law

This conflict between the right to privacy of public figures and the public's right to know began to regularly play out in the courts by the 1960s. The *New York Times Co. v. Sullivan*[80] and later the *Hustler Magazine v. Falwell*[81] cases, for example, saw the courts support a robust interpretation of the First Amendment and impose heavy burdens of proof on plaintiffs seeking to challenge free speech.[82] In *Sullivan*, the U.S. Supreme Court first brought libel law within the scope of the First Amendment.[83] The Court held that the First Amendment prohibits a public official from recovering damages for a defamatory statement relating to his or her official conduct unless the official proves that the statement was made with "actual malice."[84] This in turn is defined as "knowledge that [the statements] were false or reckless disregard" by the defendant.[85] The *Sullivan* Court reasoned that the First Amendment's central meaning was the nation's "profound…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

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[79] *Id.* at 997.
[80] 376 U.S. 254 (1964).
[81] 485 U.S. 46 (1988). In this case the Court held that an advertisement parody of conservative religious leader Jerry Falwell was constitutionally protected. The advertisement suggested that Falwell had a "drunken incestuous rendezvous with his mother in an outhouse." The Court found the statement so unbelievable that it "could not reasonably have been interpreted as stating actual facts about the public figure involved." Donna R. Euben, *An Argument for an Absolute Privilege for Letters to the Editor After* Immuno Ag V. Moor-Jankowski, 58 BROOKLYN L. REV. 1439, 1455 (1993).
[82] Sguera, *supra* note 54, at 352.
[83] Euben, *supra* note 81, at 1439.
[84] 50 Am. Jur. 2d Libel 33 (1995) (noting that to prevail when actual malice is required, the plaintiff must demonstrate that the author knew that the statements were false, entertained serious doubts about the truthfulness of the publication, or was highly aware of the probable falsity of the statement). *See* Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 ND J. L. ETHICS & PUB POL'Y 595 (2005).
[85] Euben, *supra* note 81.

sometimes unpleasantly sharp attacks on government."[86] Consequently the *Sullivan* line of cases granting this privilege implicitly recognizes that knowledge of *who* is acting is an essential and constitutionally protected element of public debate, and so is in the public interest.[87]

Following *New York Times v. Sullivan*, the Supreme Court wrestled with the problems of defining the extent to which the law of libel should be subject to constitutional limitations and the level of protection that media defendants should be afforded.[88] Protection for defendants under *Sullivan* is triggered by the plaintiff's status, yet the underlying assumption in the case is the necessity for the public to freely engage in spirited discussion, though exactly what constitutes "public issues" was left undefined. For example, in *Curtis Publishing Co. v. Butts*[89] and *Associated Press v. Walker*,[90] the Court extended the actual malice standard to cases involving newly minted "public figures." Similar to *Sullivan, Butts* and *Walker* recognized that the controversies giving rise to the alleged libels were matters of substantial public interest. In 1971, however, a plurality of the Court in *Rosenbloom v. Metromedia, Inc.*[91] shifted its emphasis away from the plaintiff and focused instead on the nature of the controversy. *Rosenbloom* extended the *Sullivan* rule to any publication involving a matter of public interest, even where

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[86] In *Rosenbloom v. Metromedia, Inc.,* a divided Court ruled that the *Sullivan* knowing-or-reckless standard applied to private plaintiffs as well. John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 352 & n.166 (1996). Justice Brennan, in his plurality opinion, relied on the political-speech theory to justify *Rosenbloom.* He reasoned that because the first amendment protects all speech that promotes "self-governance," the Court must extend the maximum protection to any material "of public or general interest" without regard to the "prior anonymity or notoriety" of the subjects of the discussion. *Id.* at 359. Prior to *Rosenbloom*, the publisher had to decide whether an individual was a public figure; after *Rosenbloom*, the publisher had to decide whether the story was a matter of public interest. *See generally* James P. Naughton, *Gertz and the Public Figure Doctrine Revisited*, 54 TUL. L. REV. 1053 (1980).

[87] Lawrence P. Gottesman , *The Intelligence Identiteis Protection Act of 1982: An Assessment of the Constitutionality of Section 601(c)*, 49 BROOKLYN L. REV. 479, 510 (1983).

[88] Naughton, *supra* note 86, at 1057.

[89] 388 U.S. 130 (1967).

[90] 393 S.W.2d 671, 674 (1965).

[91] 403 U.S. 29 (1971).

the plaintiff was a private individual.[92] With this precedent, the Court almost fully subsumed individual plaintiff's right to recover in favor of the media defendant's right to inform.

By 1974 though, the Court had again shifted its standard. In *Gertz v. Robert Welch, Inc.* the Court rejected the *Rosenbloom* "public interest" test and returned to a system based on the plaintiff's status.[93] While acknowledging that public figures must prove actual malice to recover libel damages, the *Gertz* majority held that private plaintiffs needed to show only negligence. By ruling out strict liability, the Court "constitutionalized" virtually all libel actions involving media defendants. Yet the distinction between public and private plaintiffs meant that the level of protection afforded media defendants often would be lower than it had been under *Rosenbloom*. Cases decided after *Gertz* indicate that the public figure test has become firmly entrenched, and that the earlier emphasis on events is now of secondary concern to the Court.[94]

Writing for the Supreme Court in *Gertz*, Justice Brennan rested his holding on two principal factors: (1) the overriding need to protect the free exchange of ideas so that political and social changes desired by the public could be brought about; and (2) the fear that the law of libel as then applied by many states would lead to "self-censorship."[95] In the Court's view, most state libel laws invariably hindered public discussion by requiring critics of official conduct to bear the burden and expense of proving the truth of their criticisms.[96] In order to lessen the deterrent effect inherent in the strict liability standard, the Court fashioned a federal rule that prohibits a public official from recovering damages for a libel relating to his official conduct unless he proves that the falsehood was published with a narrow definition (encompassing

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[92] Naughton, *supra* note 86, at 1054.
[93] 418 U.S. 323 (1974).
[94] Naughton, *supra* note 86, at 1054.
[95] Most *Gertz*'s critics agree that media defendants fear three things regarding public figure news: (1) the possibility of incorrectly guessing plaintiff's status; (2) the difficulty of proving that a false statement of fact relating to a private individual was a reasonable, *i.e.*, non-negligent mistake; and (3) the expenditure of considerable time and money to defend a libel action. *Id.* at 1078.
[96] *Id.* at 1079.

reckless disregard) of actual malice.[97] Justice Brennan argued that the privilege accorded the media corresponded to the immunity long enjoyed by public officials.[98] Because the official must be unafraid to advance the common good, he should be insulated from liability for what he says in his official capacity.[99] Similarly, because the public must be capable of understanding and criticizing government, Brennan argued the media should enjoy a parallel immunity so that critics may be unafraid to challenge their elected representatives.[100]

Except for the few whose general fame and notoriety make them "public" for virtually all purposes, such as politicians, limited purpose (also termed involuntary or temporary depending on the jurisdiction) public figures have two things in common: (1) they became involved in a public controversy, however loosely defined; and (2) as a result of that involvement must permit some degree of media intrusion. In many instances even the most tangential relationship to a matter of public interest will convert a private person into a public figure**.**

Despite early success, lawsuits for violation of the right to privacy have not had a deleterious effect on media coverage. For example, in the 1967 case *Times, Inc. v. Hill*[101] a family that was taken hostage had their lower-court verdict set aside by the Supreme Court in a 5-4 decision in which Justice Harlan dissented stating that the inherent dangers of a free press included "a severe risk of irremediable harm to individuals involuntarily exposed to [publicity] and powerless to protect themselves against it."[102] This state of affairs changed though in the 1980s when courts began to weigh what was popularly seen as the media's overstepping of First Amendment protections for both voluntary and involuntary public figures alike.[103]

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[97] *Id.*
[98] *Id.* at 1058.
[99] *Id.*
[100] *Id.*
[101] 385 U.S. 374 (1967).
[102] *Id.* at 410 (Harlan, J., concurring in part and dissenting in part); Sguera, *supra* note 54, at 352.
[103] W. John Moore, *Press Clipping*, 22 NAT'L. J. 3086 (1990).

C. The Status of Voluntary Public Figures in U.S. Law

County Commissioners, Mayors, Governors, and Presidents are all public officials, and thus, may now find almost no solace from invasion of privacy laws in U.S. courts.[104] The political importance of disseminating full information about such individuals has lead courts to view them as being completely within the public's eye.[105] In other words, the Speaker of the House's sexual exploits are in theory a matter of public concern effecting their moral authority to lead—those of neighborhood pharmacist are not. The underlying philosophy of this principle is that of the expropriation of private property, for "public men, are, as it were, [are] public property"[106] in the United States. That is why privacy concerns for public figures are overridden in so many instances for the sake of political accountability, and more broadly the public interest.

Courts have reached this conclusion with regard to so-called "voluntary public figures" since, in the words of the *Restatement*:

> One who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment, cannot complain when he is given publicity that he has sought, even though it may be unfavorable to him…The legitimate interest of the public in [such an] individual may extend beyond those matters which are themselves made public, and to some reasonable extent may include information as to matters that would otherwise be private.[107]

Entertainers, professional sports figures, and corporate executives all fall into the voluntary public figure category and hold almost as limited a claim to a right of privacy as do public

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[104] The term "public official" is generally considered to include not only important federal officials, both elected and appointed, but also state and local officeholders as well as candidates.

[105] *See, e.g.,* Kapellas v. Kofman, 1 Cal. 3d 20, 36-38, 459 P.2d 912, 922-24, 81 Cal. Rptr. 360, 370-71 (1969); Stryker v. Republic Pictures Corp., 108 Cal. App. 2d 191, 194, 238 P.2d 670, 672 (Ct. App. 1952). Post, *supra* note 27, at 997.

[106] Beauharnais v. Illinois, 343 U.S. 250, 263 n.18 (1952); *see also* Mayrant v. Richardson, 10 S.C.L. (1 Nott & McC.) 347, 350 (S.C. 1818). Post, *supra* note 27, at 997.

[107] RESTATEMENT (SECOND) OF TORTS § 652D comment e (1977); *see also* R. SLACK, LIBEL, SLANDER, AND RELATED PROBLEMS 410-11 (1980). Post, *supra* note 27, at 998.

officials.[108] A celebrity/entertainment society is one that breaks down the (apparent) barriers between the leaders and the led,[109] feeding an insatiable curiosity about celebrities that has turned into something close to a right to know everything about public figures.[110] Yet *Restatement Second* rejects this view, arguing instead that even the best known persons have some privacy protection.[111] In practice though the courts have determined that nearly anyone in which the public could conceivably be interested in is today a public figure. And nearly anything reported on regarding a public figure is by definition "newsworthy," meaning that it would likely survive a tort challenge in court. The convergence of these two factors destroys the invasion of privacy tort in the Brandeis and Warren sense for voluntary public figures[112]—it expands the general public interest exception so much that it swallows the rule. What survives of the tort of invasion of privacy is a commercial right—nobody can use your name or your image to make money without your permission.[113] But that being said, even in U.S. courts "public interest" is not entirely pervasive.

There still exists a right for voluntary public figures to only have issues of "legitimate interest" be publicized.[114] However, the field of "legitimate public concern" is far broader than promoting political accountability, which is the more common definition in French and German courts discussed below. For example, consider the 1940 *Sidis v. F-R Publishing Corp.* case[115] involving the child prodigy William Sidis who graduated from Harvard in 1916 at the age of 16.

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[108] People who fall into one of these classes voluntarily expose themselves to scrutiny and essentially waive any right to privacy, at least in matters linked to their ability to perform their public duties or perform in public. Warren & Brandeis, *supra* note 55, at 217. Sguera, *supra* note 54.
[109] Friedman, *supra* note 50, at 1127.
[110] *Id.* at 1115.
[111] RESTATEMENT (SECOND) OF TORTS § 652D, comment h (1977); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, n31 (1983).
[112] *Id.*
[113] Friedman, *supra* note 50, at 1126.
[114] Post, *supra* note 27, at 997.
[115] 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

Sidis had slipped into obscurity until he was rudely retrieved by a 1937 "Where Are They Now" sketch in *The New Yorker*. Even though Sidis avoided all publicity for over 20 years, the court nevertheless concluded that Sidis could not recover for invasion of privacy, because the "public interest in obtaining information" overrode "the individual's desire for privacy."[116] The court reached its conclusion since Sidis was once a public figure whose early accomplishments were a matter of public record, and who remained such a public person by reason of this early promise. In other words, the Court decided that 'once a public figure, always a public figure,' which is not the case in Germany through the doctrine of temporary public figures, discussed in Part V. In essence, the *Sidis* Court equated the notion of legitimate public concern with efforts to answer reasonable questions about public matters regardless of the length of time involved.[117] The public has a right, then, to inquire into the significance of public persons and events independent of when they happened.[118] In this manner *Sidis* ultimately rests on a "normative theory of public accountability," on the notion that the public *should* be entitled to freely inquire into the significance of public persons and events,[119] regardless of how long ago those events took place. Therefore, even if voluntary public figures have not "waived" their right to foreclose inquiry into

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[116] *Id.* at 809; Post, *supra* note 27, at 999. *See also* Bernstein v. National Broadcasting Co., 192 F. Supp. 817, 828 n.25 (D.D.C. 1955), *aff'd,* 232 F.2d 369 (D.C. Cir.), *cert. denied,* 352 U.S. 945 (1956) (once a person becomes a "public figure" in relation to a particular situation, publishers enjoy a privilege to report on events and use plaintiff's name). Zimmerman, *supra* note 111, at n340.

[117] Post, *supra* note 27, at 1000. On the other hand, the California Supreme Court held in *Briscoe v. Reader's Digest Association* that a plaintiff who is leading an exemplary and respectable life can bring an action for public disclosure on the basis of a story in a national magazine revealing that he has been convicted of hijacking a truck eleven years earlier. 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971). This outcome can be compared to *Sidis* a public figure was deemed accountable to the demands of public inquiry despite the passage of time and a successful quest for anonymity; in *Briscoe* the passage of time and the successful achievement of anonymity were deemed to signify that a public figure had "reverted to that 'lawful and unexciting life' led by others," so that "he no longer need 'satisfy the curiosity of the public." Post, *supra* note 27, at 1002. In *Sidis* public accountability runs roughshod over civility; in *Briscoe* civility forecloses the potential evaluation of a public person and event, and hence impedes the critical process of public accountability.

[118] Nor is this limited to child prodigies. Mike Virgil, a body surfer, had private details about his life publicized, such as how affinity for spider-eating and stair-diving, and had his case dismissed since "bodysurfing was a matter of legitimate public interest." Virgil v. Sports Illustrated, 424 F. Supp. 1286, 1289 (S.D. Cal. 1976); *see also* Virgil v. Time, Inc., 527 F.2d 1122, 1131 (9th Cir. 1975); Friedman, *supra* note 50, at 1126.

[119] Friedman, *supra* note 50, at 1001.

private aspects of their lives, *Sidis* holds that the public nevertheless has the right to scrutinize those aspects if they are relevant to the public action, however broadly such action may be defined.[120] Although the case is now nearly 70 years old, it is described here to foreshadow the growth of the public interest exception in the U.S. privacy law, especially relative to other jurisdiction discussed in Parts III through V.

For voluntary public figures, then, privacy has largely disappeared as a value, and in large part as a fact in U.S. law. And this is especially true as U.S. privacy conceptions have shifted over the course of the twentieth century towards ever less protections for public figures in a way that is foreign to the German, French, and Japanese legal systems.[121] This state of affairs breaks the link between respectability and privacy—a public figure neither has any secrets, nor does she have any right to his secrets. It is perhaps for this reason that the "right of privacy" never made much headway in its original sense. It has today for all practical purposes disappeared in regards to voluntary public figures in the United States—the spectrum of privacy rights has narrowed as the categories of public figures has become more rigid.[122] Courts have rejected the notion that people should fully respect the private domains of one another in part because U.S. society rejected it first in favor of an intrusive media. That is not to say that people do not still value privacy, but rather that social mores have changed and with them the law.

The profusion of media in contemporary U.S. society makes possible a culture of gossip by and large protected by the courts. This same culture of gossip exists in many European

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[120] Post, *supra* note 27, at 1001.
[121] For example, consider the case of *Melvin v. Reid*. In that 1931 case, the producer Dorothy Davenport Reid, a feminist filmmaker, wrote a screenplay presenting the true story of a former prostitute Gabrielle Darley who was charged with murder. When the movie came out in 1925, Mrs. Melvin (Darley) sued for $50,000 and won in California court, the court holding that: "Any person living a life of rectitude has that right to happiness which includes a freedom from unnecessary attacks on his character, social standing, or reputation." Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931); *Privacy and the news media*, http://www.runet.edu/~wkovarik/class/law/1.6privacy.html (last visited Apr. 19, 2009).
[122] Friedman, *supra* note 50, at 1128.

nations, but the legal protections are starkly different in that many European public figures enjoy privacy rights in spite their celebrity.[123] In the United States the media asserts the public's right to know, while courts generally side with First Amendment rights to avoid a chilling effect on public discourse and thus arguably preventing a flood of litigation. The issue, to the extent that one still exists, often focuses on a person's status and whether the invasion went beyond the public's right to know, thus making it an unwarranted intrusion. Such intrusions are rarely found. But if they are found to exist, shades of gray are primarily reserved for involuntary public figures, i.e., people who through no fault of their own are thrust into the public eye.[124]

D. The Status of Involuntary Public Figures in U.S. Law

In the United States today those who commit crimes, even though they do not seek publicity and actively try to avoid such attention, become "persons of public interest," [125] as do acquitted murders, pregnant pre-pubescent teenagers,[126] and Siamese twins.[127] Even individuals who associate with these accidental public figures themselves forego privacy protections. One explanation for this unfortunate fact is the need for informed political governance. Yet it is difficult to see how knowing the identity of local pregnant teenagers who do not seek nor want attention, unlike Jamie Lynn Spears for example, contributes to a public debate about the dangers

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[123] Friedman, *supra* note 40.
[124] Sguera, *supra* note 54.
[125] Victims of violent crime also have little to no protection from press publicity. An assailant shot Susan Barket, and before the culprit was caught, her name and address had been broadcast. Still, the court found that the public's right to have a free dissemination of news and information trumped Barket's concerns. Barker v. Richmond Newspapers, Inc., 14 Va. Cir. 421 (Cir. Ct. 1973); Sguera, *supra* note 54, at 358.
[126] This question is illustrated by the case of *Meetze v. Associated Press,* in which the South Carolina Supreme Court held that an article reporting the birth of a baby boy to a twelve-year-old mother was of legitimate public interest. The birth was not a public event until the Associated Press made it so, and for this reason the court's holding cannot be explained by any theory of public accountability. Instead, the court merely stated that "it is rather unusual for a twelve-year-old girl to give birth to a child. It is a biological occurrence which would naturally excite public interest." 230 S.C. 330, 95 S.E.2d 606 (1956); Post, *supra* note 27, at 1002.
[127] Sguera, *supra* note 54.

of teen pregnancy.[128] This can be contrasted with other areas of private life that now have increased protection, such as the extraordinary amount of safeguards surrounding the release of medical information in the Health Insurance Portability and Accountability Act (HIPAA).[129] HIPAA has created the curious situation in U.S. law that if a local newspaper ran a story on your neighbor's medications it would be deemed federally protected information (unless of course your neighbor was a permanent public figure such as an elected official of high office), while articles about their criminal activity may not be.

The list of those who the courts consider to be involuntary or quasi-public figures is broad in the United States, unlike in Japan for example in which the roles of public figures are limited to top corporate executives and public officials, i.e., a small strata of what in U.S. courts would be considered voluntary public figures.[130] Police officers, for example, are almost invariably classified as public officials in the United States.[131] The category includes not only those who seek to influence public affairs,[132] but also those who attract media attention by success in their careers or avocations, or by their relationships with celebrities. The plaintiff's fame or influence need not even be widespread; notoriety within a particular circle is sufficient to make a person a public figure for purposes of defamation within that circle.[133] The *Restatement* concludes that such persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public. As in the case with the

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[128] *Jamie Lynn Spears Says She's Pregnant*, ASSOCIATED PRESS, Dec. 18, 2007, *available at* http://ap.google.com/article/ALeqM5h6ByeoSmlUzSq7mytGzyf6Dq-GxgD8TK87IG0 (last visited Dec. 27, 2007).
[129] HIPPA, Pub. L. 104-191, 110 Stat. 1936.
[130] Interview with a Japanese Judge, Stanford, CA, Feb. 20, 2009.
[131] *See, e.g.,* Roche v. Egan, 433 A.2d 757, 762 (Me. 1981) ("Our research has disclosed that every court that has faced the issue has decided that an officer of law enforcement, from ordinary patrolman to Chief of Police, is a 'public official' within the meaning of federal constitutional law.")
[132] *See, e.g.*, 388 U.S. at 154 (finding a politically prominent man ex-General who was active in college campus riot a "public figure." In making its decision, the court balanced three factors to reach its conclusion: (1) the degree of public interest in the story; (2) the status of the plaintiff; and (3) the conduct of the media defendant in verifying the story).
[133] David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487 (1991).

voluntary public figure, authorized publicity is not limited to the event that itself arouses the public interest for involuntary public figures, and to some extent includes the right for the media to publicize facts about an individual that would otherwise be purely private.[134]

The *Restatement*, however, does not explain exactly why the private lives of involuntary public figures should be subject to "authorized publicity." The theory of public accountability justifies the dissemination of information necessary to assess the significance of the public events in which such persons have become embroiled, but not entirely unrelated events decades after the fact. Under this theory publicity would be actionable only when it bears "no discernible relationship" to the public events that require explanation.[135] This brings into question what exactly is "news" in regards to invasion of privacy.

i. Definition of "News" and the Scope of Legitimate Public Interest in U.S. Courts

News is broadly defined by the *Restatement* as falling "within the scope of legitimate public concern," and often is interpreted by publishers and broadcasters as acting" in accordance with the mores of the community."[136] In other words, news is whatever the majority in a community says it is. As the Court in *Gertz* states:

> We express no comment on whether or not the newsworthiness of the matter printed will always constitute a complete defense. Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency. But when focused upon public characters, truthful comments upon dress, speech, habits, and the ordinary aspects of personality will usually not transgress this line. Regrettably or not, the misfortunes and frailties of neighbors and 'public figures' are subjects of considerable interest and discussion to the rest of the population. And when such

[134] Post, *supra* note 27, at 1002.
[135] Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 302 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980); Post, *supra* note 27, at 1002.
[136] RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1976). Sguera, *supra* note 54.

> are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.[137]

Consequently in *Gertz*, the Court is saying that because U.S. citizens gossip about everyone from their neighbors to Madonna, they have a constitutional right to do so under the First Amendment, but if community mores changed, so too should the law. The Court then has already adopted sociological jurisprudential philosophy defining the privacy protections for public figures, a point which will be returned to below. As Walter Lippmann observed, "News is the chief source of the opinion by which government now proceeds."[138] Still, as the second *Restatement* suggests, news itself is culturally variable. What is worthy of front-page news status in *The Guardian* can be very different from *The Washington Post*. The *Restatement* attempts to respond to this difficulty of whether or not the publicity of nonpublic matters is of legitimate public concern by placing the question within the context of the customs and conventions of the community. In the final analysis what is proper becomes a matter of the community mores.[139] Different cultures, or sub-cultures, define public figures' right to privacy in different ways that change as society changes. What is left unclear is whether differing regional privacy values should lead to different levels of privacy rights varying by jurisdiction. But more broadly, given that that there is now a growing backlash against frequent abuses of privacy, especially regarding involuntary public figures, so too should there be a reassertion of the central place of privacy in U.S. courts.[140]

Applying the *Restatement's* test premised on sociological jurisprudence explains the contradictory South Carolina Supreme Court's holdings in *Meetze* and *Hawkins v. Multimedia,*

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[137] Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).
[138] W. LIPPMANN, LIBERTY AND THE NEWS 12 (1920); Post, *supra* note 27, at 1003.
[139] Post, *supra* note 27, at 1003.
[140] *See for example* Cowell, *supra* note 5.

Inc.[141] that upheld liability against a newspaper for disclosing the identity of a teenager father thirty years after its first holding condoning such a release of information as being within the public domain. This decision collapsed the "legitimate public concern" test with the criteria that defines whether disclosures are actionable, implying that the community mores that determine whether the disclosure of nonpublic matters is of legitimate public concern cannot be the same as the civility rules that determine whether communications are "highly offensive" disclosures of "private facts."[142] The *Restatement* tells us that the community mores at issue in the "legitimate public concern" test are instead those that identify "matters…customarily regarded as 'news.'" These mores circumscribe the scope of the press' "reasonable leeway to choose what it will tell the public."[143] As Post argues:

> The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure.[144]

So-called "authorized publicity" includes accounts of those involved in crimes, divorces, natural disasters, as well as "many other similar matters of genuine, even if more or less deplorable, popular appeal."[145] This extremely broad definition makes potentially anyone at any time fall within the public's right to know. As such, most courts uphold newspapers' right to publish whatever images they choose.[146] Consequently the *Restatement,* and in fact almost all courts

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[141] 288 S.C. 569, 344 S.E.2d 145, *cert. denied*, 479 U.S. 1012 (1986).
[142] Post, *supra* note 27, at 1005.
[143] *Id.*
[144] *Id.* at 1004.
[145] *Id.*
[146] 327 Mass. 275, 98 N.E.2d 286 (1951) (noting a slippery slope argument that any contrary conclusion would prevent the publication of pictures "of a train wreck or of an airplane crash if any of the bodies of the victims were recognizable").

interpret the "legitimate public concern" requirement as insulating media outlets from legal liability for reporting news that is uncivil and "deplorable."[147]

Consider the case of Robert O'Donnell who heroically saved an eighteen-month-old girl in Texas, only to have his marriage fall apart, a prescription drug addiction come to light, leading to O'Donnell's eventual suicide.[148] Similarly, Richard Jewell, the security guard who was acclaimed as a hero during the 1996 Atlanta Summer Olympics when he uncovered the bomb at Centennial Park, sued news organizations after he was prematurely named a suspect in the plot. Jewell asserted he was a private individual. The court found him to be a "voluntary limited-purpose public figure,"[149] and cited the *Gertz* standard:

> Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures…More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.[150]

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[147] *See, e.g.*, Cape Publications, Inc. v. Bridges, 423 So. 2d 426, 427-28 (Fla. Dist. Ct. App. 1982); Waters v. Fleetwood, 212 Ga. 161, 91 S.E.2d 344 (1956); Beresky v. Teschner, 64 Ill. App. 3d 848, 381 N.E.2d 979 (App. Ct. 1978); Bremmer v. Journal-Tribune Publishing Co., 247 Iowa 817, 827-28, 76 N.W.2d 762, 768 (1956); Costlow v. Cusimano, 34 A.D.2d 196, 311 N.Y.S.2d 92 (App. Div. 1970); Post, *supra* note 27, at 1005.

[148] Andreatta, *supra* note 12.

[149] 555 S.E.2d 175 (Ga. Ct. App. 2001).

[150] Atlanta Journal-Constitution, 555 S.E.2d at 183 (quoting Gertz, 418 U.S. at 342 & 345). The *Gertz* Court reconsidered the fact versus opinion distinction in 1967. Gertz was a lawyer representing the family of a murder victim in a lawsuit against a Chicago policeman. A John Birch Society publication alleged that Gertz was a "Leninist" and a "Communist fronter." The *Gertz* Court never addressed whether the defendant's statements alleging the plaintiff was a "Communist" was one of fact or opinion. Yet the Court alluded to the fair comment privilege's distinction between fact and opinion by seeming to provide an absolute First Amendment immunity from defamation actions for all opinions. The *Gertz* Court announced in *dicta:* "[U]nder the First Amendment there is no such thing as a false idea. However 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." Generally, courts understood this passage to mean that statements characterized as opinions were constitutionally immune from libel actions. Euben, *supra* note 81, at 1454. In the course of the *Gertz* decision, Justice Powell made some additional observations about newsworthiness as a viable judicial touchstone for distinguishing protected from unprotected speech. Use of a newsworthiness test, he wrote, would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not. McGinnis, *supra* note 86, at 353.

The trial court, which was affirmed on appeal, held that Jewell granted numerous interviews and a photo shoot, and thus rendered himself a public figure. His life is now an open book, and probably will be forever.

Nor is a misleading turn of phrase, or even the truth,[151] actionable in a defamation suit.[152] The *Gertz* fact-versus-opinion distinction was turned into a "totality of circumstances" test in the 1985 case *Ollman v. Evans*, which includes: (1) the specificity of the statement; (2) its verifiability; (3) its literary context; and (4) its public context.[153] The *Gertz* Court also attempted to refine the public figure test by drawing a distinction between "general" and "limited" public figures**.** Members of the former class would be held "public" for virtually all purposes, while the latter class, having attempted to influence public opinion in a particular controversy, would be "public" only for a limited range of issues.[154] Lee Bollinger has characterized this statement as "an unfair ploy by the Court, an avoidance maneuver by which it tries to minimize the degree to which we should care about the pain inflicted under our rules."[155] This is not the only episode

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[151] Voluntary and involuntary public figures generally cannot sue for the publication of truthful information. *E.g.*, Capra v. Thoroughbred Racing Ass'n of N. Am., Inc., 787 F.2d 463, 464-65 (9th Cir. 1986) (per curiam) (finding that participants in the federal witness protection program must prove publication of their real names was not newsworthy for their claim to survive); Virgil v. Time, Inc., 527 F.2d 1122, 1128-29 (9th Cir. 1975) (discussing the exemption from tort liability for publication of newsworthy personal information). Sarah Ludington, *Reining in the Data Traders: A Tort for the Misuse of Personal Information*, 66 MD. L. REV. 140, n137 (2006).

[152] Hyperbole, rhetoric and satirical opinions are also given strong protection by the Court. In *Greenbelt Cooperative Publishing Association, Inc. v. Bresler* the Court found the characterization of a developer's negotiating tactics as "blackmail" to be constitutionally protected because "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole" and "vigorous epithet."

[153] *Ollman v. Evans*, 471 U.S. 1127 (1985). This opinion also asserted the public's right to know as a basic for reaching the holding. "[W]e cannot forget that the public has an interest in receiving information on issues of public importance even if the trustworthiness of the information is not absolutely certain. The First Amendment is served not only by articles and columns that purport to be definitive but by those articles that, more modestly, raise questions and prompt investigation or debate. By giving weight on the opinion side of the scale to cautionary and interrogative language, courts provide greater leeway to journalists and other writers and commentators in bringing issues of public importance to the public's attention and scrutiny." *Id.* at 1130.

[154] Justice Powell asserted in *Gertz* that a person could be a limited public figure for only a limited range of issues. One reason for this balancing is that public figures are more likely to be defamed than private individuals, but they also are capable of effectively responding to and debunking whatever falsehoods about him may have been published.

[155] Jonathan Weinberg, *Broadcasting and Speech*, 81 CALIF. L. REV. 1103, n202 (1993); LEE C. BOLLINGER, IMAGES OF A FREE PRESS 87-88 (1991).

though in which the Court has avoided enumerating an exact definition of involuntary public figures and the scope of their privacy rights in the face of media coverage.

ii. Defining the Bounds of Involuntary Public Figures in U.S. Law

The Supreme Court's treatment of the privacy rights of public figures has lacked consistency, especially in regards to the Court's preoccupation with the actual malice standard when what is needed is a clearer categorization of public figures and the public interest. In *Curtis Publishing Co. v. Butts*,[156] for example, a *Saturday Evening Post* article accused university football coach Butts of fixing a football game. In considering the matter, the 1967 Court extended the *Sullivan* actual malice standard established for public officials to public figures**.** In 1974, however, the Court refused to extend the *Sullivan* actual malice standard to private figures in *Gertz.* The *Gertz* Court held that the plaintiff, an attorney, was a private rather than public figure and therefore was not bound by the *Sullivan* actual malice standard.[157] Consequently he had to prove only that the statements at issue were negligently made, since private figures lack the access that public figures and public officials have to channels of communication.

Inasmuch as the public figure cases, in particular *Hutchinson v. Proxmire*,[158] and *Wolston v. Reader's Digest Association, Inc.*,[159] both decided in 1979, rest squarely on the logic of *Gertz*, criticism of the rule is likely to continue.[160] In *Hutchinson v. Proxmire*, Professor Ronald

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[156] 388 U.S. 130 (1967) (holding that a football coach is a "public figure" and subject to *New York Times v Sullivan* standard, in the end Butts proved that the Post inadequately investigated the allegations and printed the story without taking even "elementary precautions"); McGinnis, *supra* note 86.
[157] Euben, *supra* note 81, at 1457.
[158] 443 U.S. 111 (1979).
[159] 443 U.S. 157 (1979). The Supreme Court, however, reversed. Eight Justices felt that Wolston was not a public figure, since he had not "thrust" himself into the controversy over Soviet espionage in America, but was "dragged unwillingly" into the investigation. Wolston did not speak to the press about the investigation or the contempt charge and did nothing more than was necessary to defend himself.
[160] Naughton, *supra* note 86, at 1054.

Hutchinson sued Senator William Proxmire for defamation after the Senator gave a "Golden Fleece" award to the agencies that funded the professor's research. Hutchinson was not a public figure within the meaning of *Gertz* and *Firestone*. Proxmire though had argued that Hutchinson was a public figure at least for the limited purpose of receiving federal funds for research (and that, to remain a public figure, Proxmire would have had to had 'regular and continuing' access to the media). The Court held, however, that plaintiff had attracted substantial media coverage only because of the alleged defamation. Thus to label the plaintiff a public figure would have been tantamount to allowing Senator Proxmire to create a defense through his own conduct.[161]

The Court, though, has implicitly rejected the notion of the involuntary public figure. Both *Proxmire* and *Reader's Digest* clarified the Court's belief that the media cannot alter a person's status without some active assistance by the individual. The media cannot alone transform a private individual into a public figure. Rather, *Wolston* indicates that a public figure is one who deliberately engages public attention in order to affect the outcome of some controversy by influencing public opinion. Thus the first *Rosenbloom* assumption incorrectly equates "exposure to public view" with "seeking public attention."[162] Although inconsistent, the Court has relied on this formulation of involuntary public figures in its following jurisprudence.

To illustrate the conclusion that involuntary public figures are made by the attention seeker, not the media, in *Time, Inc. v. Firestone*[163] decided prior to *Hutchinson* or *Wolston*, the Court held that a *Time* magazine article which published an account of the divorce of an heir to the wealthy Firestone family was not constitutionally protected opinion. The Court determined that the plaintiff was not a public figure because her litigation based on charges of adultery was

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[161] *Id.*
[162] 443 U.S. at 134-36 ("Clearly those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."); *Id.* at 167-68.
[163] 424 U.S. 448 (1976).

involuntary. In the majority's view, Mary Alice was not especially prominent in local society and thus was not a general purpose public figure. More importantly, she had not thrust herself into any public controversy with a view toward influencing the outcome. Consequently, these cases demonstrate that determining whether a plaintiff is a public or private figure is essential to deciding the applicable constitutional standard of protection, and that one of the primary ways to assign that classification is to inquire whether the person sought out media attention. *Gertz*, *Firestone*, *Proxmire*, and *Reader's Digest* then all indicate that the keys to the involuntary public figure test is that a person *has* become involved in a public issue—this is even more critical than *why* that person was publicized in the first place, though as is evident the manner in which publication transpired does sway courts.[164]

By emphasizing that a limited public figure must enter a public controversy *and* seek to influence the outcome, the Court in *Firestone* indicated that mere involvement in a controversy would not change a plaintiff's status. Consequently *Firestone* clarified some of the ambiguity remaining after *Gertz*. On the other hand, Justice Rehnquist's contention that the divorce proceeding was not a "public" controversy revives one of the problems that *Gertz* attempted to avoid. The *Gertz* Court rejected the public interest test partly to free trial judges from having to decide what constitutes a matter of legitimate public interest, yet *Firestone* made precisely that kind of decision. By arguing that most divorces are private matters, Justice Rehnquist engaged in *ad hoc* content analysis and in effect decided that the public had no legitimate interest in the proceeding.[165] This proposition that U.S. courts are in fact increasingly practicing the content analysis that the court explicitly avoided in *Gertz* but implicitly practiced in *Firestone* is fortified by a string of further cases analyzing exactly what constitutes the "public interest."

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[164] Naughton, *supra* note 86, at 1058.
[165] *Id.* at 1071.

iii. Defining "Public Interest" in U.S. Privacy Law

The Court has attempted to lay out the extent and limitations of the public interest in a number of cases, but has yet to define a bright line rule on how to distinguish matters inherently of general and private interest. In the 1985 case *Dun & Bradstreet*,[166] for example, a magazine published an incorrect credit report which falsely stated that defendant Greenmoss had filed for bankruptcy. The Court held that recovery by private figures in defamation suits was allowable without a showing of actual malice where the challenged speech was not in the public interest. To determine whether the statement was a matter of public interest, the Court looked to the statement's "content, form and context…as revealed by the whole record."[167] The Court found that the credit report's "form and context" was not a public matter because the report went to only five subscribers. Thus, the Court concluded, the suit did not involve a matter of public concern.[168] The question naturally begs though, what would number would have constituted a public concern—10, 50, 100, 1,000? Setting arbitrary guidelines is in many ways the nature of content analysis—what is clearly 'public' to one *en banc* panel is clearly 'private' to another. Nevertheless, courts have continued to make these determinations, but without guiding Supreme Court precedent on the topic leading to widely varying definitions that change by jurisdiction.

In the absence of a clarifying ruling, some courts have placed the onus on the location of the invasion of privacy, i.e., whether the violation occurred in public or in the victim's home. In *Nader v. General Motors Corp.*,[169] Ralph Nader, prominent consumer safety proponent, criticized the safety of General Motors' automobiles. GM interviewed Nader's friends and acquaintances to learn the private details of his life, made threatening and harassing phone calls,

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[166] 472 U.S. 749 (1985).
[167] *Id.* at 763.
[168] Euben, *supra* note 81, at 1459.
[169] 25 N.Y.2d 560 (1970).

wiretapped his telephone and eavesdropped into his conversations, hired prostitutes to entrap him into an illicit relationship, and kept him under pervasive surveillance while outside in public places. The wiretapping was a tortious intrusion, while the court held that observation "in a public place does not amount to an invasion of… privacy unless surveillance may be so overzealous as to render it actionable."[170] Nader's lawsuit against GM was ultimately decided by the New York Court of Appeals, whose opinion in the case expanded tort law to cover "overzealous surveillance." The court essentially held that the issue depended on the nature of the proof and the place at issue, a trap that many European courts have also fallen into as discussed below in Part VI.

Due to divergent practice lower courts have increasingly seemed to contradict Supreme Court holdings laying out guidelines for what constitutes public and private figures. In 1992, for example, the Supreme Court denied certiorari in *Lee v. Baptist Medical Center of Oklahoma, Inc.,*[171] though Lee's HIV positive test was published in a local newspaper, *The Daily Oklahoman*.[172] The lower court concluded that by filing a $38 million malpractice case, Lee had become a public figure, and so could not recover under an invasion of privacy tort.[173] This is in contrast to the Court's ruling in *Firestone*, and seemed to have been motivated by the size of the suit, which again raises the same question as above in *Dunn v. Bradsheet* regarding the ambiguous limits of the public interest—would the victim not have been a public figures if he had filed a $3.8 million suit, or a $380,000 suit? The mere act of filing a lawsuit may transform a victim into a public figure for one court, while others may be more concerned with the circulation of the newspaper, or the amount of damages sought. These cases highlight what

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[170] *Id.* at 771.
[171] 504 U.S. 973 (1992).
[172] Michael L. Closen, *The Decade of Supreme Court Avoidance of AIDS*, 61 ALB. L. REV. 897 (1998).
[173] Lee, 948 F.2d at 1165 (noting that both the size and nature of the claim are what attracted the news media). Closen, *supra* note 160, at 966.

happens to a definition as broad as "public interest" without guiding Supreme Court precedent—one hundred District Courts may reach one hundred different conclusions about the public interest given the same fact pattern. This inconsistency in such a vital area of the law evokes the Court's primary role of deciding "what the law is,"[174] and underscores the need for a clarifying ruling.

iv. Why Seeking Media Attention is the Death Knell of Invasion of Privacy Suits

While there has been at best a very limited degree of agreement reached about the extent of the public interest, whenever an individual seeks media attention U.S. courts have been loath to hold an invasion of privacy. This principle is illustrated by a case in which a man filed a police report stating that he thought a black panther had escaped in Los Angeles. When this was proven inaccurate after a public furor, the man sued NBC radio for invasion of privacy.[175] A California appellate court held he had brought the invasion on himself. "By his participation in what ultimately proved to be a baseless report…plaintiff became stamped with the imprint of public notoriety and renounced his right of privacy…for 'there can be no privacy in that which is already public.'"[176] Thus, if an individual seeks media attention, she does not have legal recourse on invasion of privacy grounds. Though what is less clear is whether or not these individuals are limited public figures, entitled to a right of privacy in some areas of their lives such as domestic violence or a drug addiction, or whether they are in effect open books. So far the preponderance of U.S. courts decided on the latter interpretation, while the former is predominantly the case in continental Europe, which will be demonstrated below.

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[174] Marbury v. Madison, 5 U.S. (Cranch 1) 137 (1803).
[175] 292 P.2d 600 (Cal. Ct. App. 1956).
[176] *Id*. at 603 (citing Melvin v. Reid, 297 P. at 93). *But see* Johnson v. Harcourt, Brace, Jovanovich, Inc., 118 Cal. Rptr. 370 (Ct. App. 1974) (stating "[it] would be a crass legal fiction to assert that a matter once public never becomes private again" (quoting Briscoe v. Reader's Digest Ass'n., 483 P.2d 34, 41 (Cal. 1971))). Sguera, *supra* note 54, at 357.

Under an invasion of privacy approach everything comes back to newsworthiness, and thus an implicit balancing test between freedom of expression and privacy engaged in by the courts. Gradually, courts have been stretching the bounds of what it means to seek media attention. Emblematic of this trend, one court has gotten involved on the degree of privacy that should be afforded to a person wishing to become an actor. The New York court cited in dicta:

> One traveling upon the public highway may expect to be televised, but only as an incidental part of the general scene. So, one attending a public event such as a professional football game may expect to be televised in the status in which he attends. If a mere spectator, he may be taken as part of the general audience, but may not be picked out of a crowd alone, thrust upon the screen and unduly featured for public view. *Where, however, one is a public personage, an actual participant in a public event, or where some newsworthy incident affecting him is taking place, the right of privacy is not absolute, but limited* [emphasis added].[177]

Under this rule, a patron at a local farmers' market, or a family who lost their home in a hurricane, could have their right of privacy infringed nearly as much as a famous actor. Other courts have been even bolder and held that if an incident is public record, it is in the public domain and so the media has the right to publicize that information at will.[178] Even an unknown author[179] may be deemed a limited purpose public figure.[180] This seems counterintuitive—if you do almost nothing to thrust yourself in the public eye, why should your privacy rights be almost on par with a U.S. Senator?[181]

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[177] *Jacova*, 83 So. 2d at 37 (emphasis added) (citing Gautier v. Pro-Football, Inc., 107 N.E.2d 485, 489 (N.Y. 1952) (holding that broadcast of the plaintiff's animal act at halftime of pro football game was part of entire public sporting event and, thus, was not invasion of privacy). Sguera, *supra* note 54, at 358.

[178] Poteet v. Roswell Daily Record, Inc., 584 P.2d 1310, 1311 (N.M. Ct. App. 1978). Sguera, *supra* note 54, at 358.

[179] *See, e.g.*, Ellis v. Hurst, 128 N.Y.S. 144 (Sup. Ct. 1910) (rejecting author's petition under state privacy statute to enjoin publisher from republishing the author's early pseudonymous works under the author's true name), aff'd *mem.*, 130 N.Y.S. 1110 (1911). Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT LJ 1 (1994).

[180] Netanel, *supra* note 166, at 36. For a thorough discussion on the limitations to the right of privacy of public figures, see Post, *supra* note 27, at 997-1008. An analysis of the Supreme Court's rulings regarding limitations to freedom of speech posed by the law of defamation and invasion of privacy see Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935 (1968).

[181] Clay Calvert & Robert Richards, *Defending the First in the Ninth: Judge Alex Kozinski and the Freedoms of Speech and Press*, 23 LOY. L.A. ENT. L. REV. 259, 283, 297 (2003) (arguing that Judge Kozinski believes that

Yet U.S. courts have drawn some lines to avoid the most extreme cases of protecting the publication of involuntary public figures' private affairs. One example is when the victim is broadcast at a private moment without their consent.[182] Another involves so-called media "ride-alongs," which the Supreme Court held violate privacy rights protected by the Constitution's Fourth Amendment.[183] The line, enumerated by a District Court in a case involving the unsolicited filming of a prisoner exercising, is "when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern."[184] What the District Court seems to be requiring is for a reasonable person test, rather than the classic community-based test measuring community mores preferred by the Supreme Court. This underlies the point that, although the District Court's holding is laudable, what is needed is a way for the Supreme Court to put this vague distinction into sharper relief so that there is not such great discrepancy between jurisdictions in applying a public interest test.

Some critics contend that the *Gertz* involuntary public figure standard is vague, others that the court is trying to promote self-censorship of the press.[185] Commentators have puzzled over the extent to which one must engage in purposeful activity in a public controversy before qualifying as a public figure.[186] Justice Brennan argued in his *Rosenbloom* opinion that everyone

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freedom of expression to voice opinions about like Jerry Falwell is a right that deserves protection). *See generally* Clay Calvert & Robert D. Richards, *A Pyrrhic Press Victory: Why Holding Richard Jewell Is a Public Figure Is Wrong and Harms Journalism*, 22 LOY. L.A. ENT. L. REV. 293, 310-13 (2002) (discussing the state of the involuntary public figure doctrine in defamation law in the context of whether Richard Jewell should be held to be an involuntary public figure for purposes of his defamation action against the *Atlanta Journal Constitution*).

[182] *Shulman*, 955 P.2d at 494, 497. Though the California Supreme Court did hold that the judge could instruct the jury to decide for itself whether the plaintiff should have expected that her comments remain private.

[183] Wilson v. Layne, 526 U.S. 603, 607 (1999) (citing U.S. CONST. amend. IV). Sguera, *supra* note 54, at 359.

[184] Huskey v. NBC, 632 F. Supp. 1282, 1285, 1288 (N.D. Ill. 1986).

[185] Naughton, *supra* note 86, at 1075.

[186] *Id.* at 1076.

is "public" in some way, if only because all of us are members of the community.[187] Thus though some semblance of a bright-line rule has evolved for "voluntary public figures," so-called involuntary public figures are accorded spotty protection at best that is greatly dependent on the context of the suit and the court's proclivities, not their status as a private person. At the heart of this failure is disagreement about what constitutes the public interest, which may be informed by considering the experience of other common and civil law nations and cultures that is the subject of Parts III through V.

E. Summary of U.S. Privacy Law for Public Figures

"We [are] dealing with that most fragile of merchandise, the facts about another human being . . . Privacy . . . involves a collision between the First Amendment, freedom of the press, and the Fourth and Fourteenth amendments[,] which have been interpreted to mean freedom from the press." -Richard Stolley, Founder and Managing Editor of *People* Magazine[188]

Privacy is a critical value in constitutional law, seen from *Griswold v. Connecticut* through to *Roe v. Wade* and beyond. Though, this form of privacy is in some ways the opposite of that which Brandeis and Warren envisioned—the freedom to make choices without the heavy hand of the law and to do so in an "open and notorious" manner versus "the freedom to be left alone."[189] As this Part has discussed, over the course of the twentieth century U.S. courts have gradually expanded both the definition of the public interest, and who is considered a public figure as seen when comparing *Brents v. Morgan* with *Gertz* and later the 1996 Olympic bombing case. Ultimately the burden of curbing privacy invasions must rest primarily with the press itself, as courts should not eviscerate the First Amendment to save the public humiliation of

[187] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971); Naughton, *supra* note 86, at 1076. The public-private figure distinction has also been troublesome in the private-facts tort area because it suggests that all publications about public figures – however intimate – are newsworthy. Thus the public figure test requires a two-stage analysis. First, the court had to decide whether plaintiff had been actively involved in some "public" controversy. Assuming the court found such involvement, the inquiry then turned to whether the publication related to plaintiff's activity in the controversy.

[188] Richard Stolley, Speech at National Writers' Workshop, Hartford, Conn. (Apr. 1, 1995).

[189] Friedman, *supra* note 50, at 1127.

those who end up, through no fault of their own, in newsworthy events.[190] The U.S.'s foundation of free speech and free press, including the right to be voyeurs,[191] should not be usurped, not even by the right to privacy. But greater privacy protections are clearly needed, especially for involuntary public figures. A more disciplined use of the Brennan test strengthening privacy protections for those individuals who do not seek media attention would seem to be an apt compromise, as would a more defined principle on what constitutes the public interest. More is required than simply holding that everything a public figure does is naturally in the public interest—this is not the law in France or Germany, nor should it be in the United States. Rather, those courts have set out guiding standards discussed below that U.S. courts should consider in setting out a revised public interest test.

The invasion of privacy tort should safeguard the interests of individuals in the maintenance of rules of civility. These rules enable individuals to receive and to express respect, and to that extent are constitutive of human dignity. In the case of intrusion, these rules also enable individuals to receive and to express intimacy, and to that extent are necessary for human autonomy. While in regards to both intrusion and public disclosure, the civility rules maintained by the tort embody the obligations owed by members of a community to each other, and to that extent define the substance and boundaries of community life.[192] The common law has been torn between maintaining the civility which we expect in public discourse, and giving ample "latitude" to the processes of critical evaluation that are also intrinsic to effective and informed

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[190] Sguera, *supra* note 54, at 361.
[191] Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT LJ 273, 296 (1997) ("We are truly a nation of voyeurs, and courts are more than willing to stretch the standards of newsworthiness to protect our rights to be voyeurs.").
[192] Post, *supra* note 27, at 1007.

public debate.[193] Such honest discussions are ongoing, and may be informed by the experience of the European courts that have similarly dealt with these same issues.

The U.S. Supreme Court will almost certainly continue to require both deliberate involvement in a controversy, and the attempt to influence public opinion before classifying a plaintiff as a public figure. There is some evidence, however, that the Court will tend to focus less on the nature of the controversy and more on the plaintiff's activity. In *Proxmire* and *Reader's Digest*, the Court virtually assumes that the controversies are public and thus wastes little effort deciding whether the controversies merited media attention. This shifting focus is highly desirable on the one hand because it allows the public figure test to avoid the analytical difficulties of the public interest test,[194] but it has also led to lower federal courts deciding what does and does not constitute the public interest. Thus, while courts should as much as possible avoid content analysis, as this will only increase the ambiguity surrounding privacy protections for both voluntary and involuntary public figures, in many circumstances it may be unavoidable. In these cases, a clarifying Supreme Court ruling on the public interest would be highly useful. But in the absence of such a holding, U.S. courts may gain some insights by considering the holdings of other courts, such as those of the United Kingdom since the two nations share a common law legal system, to better weigh the at times competing necessities of freedom of expression and right of privacy. Afterwards, the civil law systems of France and Germany will be considered, focusing on how the French legal system defines the public interest, and the German courts structure the privacy rights of public figures.

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[193] *Id.* at 1008.
[194] Naughton, *supra* note 86, at 1075.

III. The Right of Privacy for Public Figures in the United Kingdom

Although the United States and the United Kingdom share many facets of popular culture including a fascination with celebrity, subtle differences do exist in how and if freedom of expression and privacy are balanced in the courts. Privacy itself has a different meaning in the United Kingdom than it does in the United States. Although difficult to empirically measure, in 2002 the *Economist* noted that "for a nation of secretive people, Britain is curiously casual about privacy,"[195] as illustrated by the ubiquitous placement of over four million CCTV cameras in Britain[196] as compared with a little over 3,000 in all of New York City.[197] This comment is particularly relevant given the reluctance shown of the English Parliament and judges to recognize a general right to privacy, preferring instead to expand established torts such as breach of confidence rather than promoting the establishment of a new privacy tort.

Unlike U.S. privacy law, British privacy law is distinct due to the place of Continental European law in British Courts, especially the European Court of Human Rights. The U.K. Human Rights Act of 1998 formally incorporated the ECHR into U.K. domestic law, which has begun to alter the common law mindset of British judges more so than it has impacted French or German judges who already recognize privacy.[198] Article 8 of the ECHR establishes a right of privacy for all Europeans, which guarantees freedom of expression, both of which will be discussed further in Part V.[199] For purposes of this Part though, the ECHR is key to

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[195] *Privacy and Britain's courts*, ECONOMIST, Mar. 7, 2002.
[196] Britain is 'surveillance society,' BBC NEWS, Nov. 2, 2006, *available at* http://news.bbc.co.uk/2/hi/uk_news/6108496.stm (last visited Mar. 17, 2009) (noting that the government's information commission confirmed that Fears that "the U.K. would 'sleep-walk into a surveillance society' have become a reality.").
[197] Kevin Anderson, *You're being watched, New York!*, BBC NEWS, Mar. 11, 2002, *available at* http://news.bbc.co.uk/2/hi/americas/1865828.stm (last visited Mar. 17, 2009).
[198] *See* Anthony Lester, *Parliamentary Scrutiny of Legislation under the Human Rights Act 1998*, 33 VICTORIA U. WELLINGTON L. REV. 1, 3 (2002).
[199] ECHR, Art. 8 states: "(1) Everyone has the right for his private and family life, his home and his correspondence; (2) There shall be no interference by a public authority with the exercise of this right except such as

understanding the evolution of English privacy law since, as Lord Chancellor stated, it leaves the bench "as pen-poised . . . to develop a right of privacy."[200] But so far even the influence of the ECHR has not led to the establishment of robust privacy protections in the United Kingdom, though there is evidence discussed below that the British courts are now adopting an approach similar to the United States in explicitly balancing freedom of expression and privacy under Article 8 of the Human Rights Act.[201]

The development of additional privacy protections in English law is far from universally praised. In response to the *Max Mosley* ruling, *News of the World* editor Colin Myler lamented, "our press is less free today after another judgment based on privacy laws emanating from Europe."[202] In this case, *News of the World* had claimed that Max Mosley, who was accused of having an orgy with Nazi undertones in his home, was a public figure by virtue of his position as President of the International Automobile Federation. The case hinged on his right to keep his unconventional sex life private and the existence or not of a Nazi theme. Ultimately the judge accepted that sexual activity by consenting adults in private is not a legitimate target for media exposure,[203] in so doing placing the circumstances of the case above the status of the individual, unlike some U.S. courts. In this way, Mosley's victory shifted the pendulum in the direction of greater privacy rights for public figures in Britain and away from the public's right to know. Though, generally privacy rights are far less prevalent in Britain than on the Continent, as seen in Parts IV and V. At present, the two principles—media freedom and the right to personal

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is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." *Id.*

[200] House of Lords Deb. Vol. 583 col. 785 (Nov. 24th, 1997). Basil Markesinis et al., *Concerns and Ideas about the Developing English Law of Privacy*, INSTITUTE OF GLOBAL LAW (2008)

[201] *Human Rights Act: What the articles say*, BBC NEWS, Sep. 29, 2000, http://news.bbc.co.uk/2/hi/uk_news/946400.stm (last visited Apr. 21, 2009).

[202] *When press freedom and private life collide*, INDEPENDENT, July 25, 2008 (noting that Max Mosley's court victory over the *News of the World* was mourned as the end of "kiss-and-tell" journalism in British newspapers).

[203] *Id.*

privacy—both are recognized to a greater or lesser extent in English common law, and as a result inevitably conflict. The open question is whether this trend of recognizing greater privacy protections should continue incrementally through the courts, or be left to the British Parliament. Implicitly this argument is over the extent of the public interest, i.e., whether the private life of Max Mosley is as important to the public as that of an elected official, and how broadly public figures should be defined. In other words, the same debate over the extent of the public interest is ongoing in Britain as it is in the United States and indeed across the world. English journalists and other defenders of freedom of expression, like their U.S. counterparts, argue that the unencumbered investigation of public figures has helped to expose hypocrisy, and have enabled the poor and powerless to bring down the rich and famous. One editorial, perhaps tellingly written by a former MP, on the Max Mosley affair stated: "It's now been said, in a court of law, that editors and reporters owe a greater duty of care to those people involved in a story when they consider its publication. We need responsible journalism, and the press has had their wings clipped a little. That's not the end of the world."[204]

A. The Gradual Development of an Implicit Right of Privacy in British Law

The dispute over whether or not a right of privacy is required to provide protections for public figures in England has "consistently raged over the English landscape for the better part of thirty-five years."[205] Unlike in Continental Europe, the United Kingdom has not established an explicit right to privacy.[206] But to say that English law does not protect aspects of human privacy and personality is incorrect. David Seipp, for example, has demonstrated how such

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[204] Mark Oaten, *I know what Max Mosley has been going through*, INDEPENDENT, July 25, 2008 (arguing that just because something may be interesting to the public does not make it in the public interest).
[205] Markesinis et al., *supra* note 200, at 2.
[206] The European Convention for the Protection of Human Rights does not require the development of an independent tort of privacy. *Id.*

protection is expanding.[207] Instead of a dramatic shift in the frame of *Gertz* or even *Firestone*, the expansion of protections for public figures in Britain has been largely incremental and been by means of expanding established torts.[208] In the absence of a specific tort of privacy, the equitable remedy of confidence,[209] a variety of torts related to the intentional infliction of harm to the person,[210] and administrative law principles regarding the appropriate use of police powers,[211] all play a role in English common law in cases involving an infringement of personal privacy. But despite recent progress towards developing a more robust right to privacy in England, there have been frequent and emphatic judicial assertions that there remains no general right of privacy in English law, as the House of Lords recently confirmed in *Wainwright v. Home Office*.[212] Though, it is indeed privacy that is primarily at interest in these cases, as Lord Cottenham stated in *Prince Albert v. Strange*,[213] albeit by another name. Looking ahead, Lord Justice Mummery has said of a right of privacy that:

> As to the future I foresee serious definitional difficulties and conceptual problems in the judicial development of a "blockbuster" tort vaguely embracing such a potentially wide range of situations. I am not even sure that anybody—the public, Parliament, the Press—really wants the creation of a new tort, which could give rise to as many problems as it is sought to solve. A more promising and well trodden path is that of incremental evolution, both at common law and by statute…of traditional nominate torts pragmatically crafted as to conditions of liability, specific defences and appropriate remedies, and tailored to suit significantly different privacy interests and infringement situations.[214]

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[207] Basil S. Markesinis, *Our Patchy Law of Privacy. Time to Do Something about It*, 53(6) MODERN L. REV. 802, 805 (Nov., 1990).
[208] *See* H. Fewick & G. Phillipson, *Breach of Confidence as a Privacy Remedy in the Human Rights Act Era*, 63 MODERN L. REV. 660 (2000); Markesinis et al., *supra* note 200, at 1.
[209] *See, e.g.*, *A v. B plc* [2003] Q.B. 195; Markesinis et al., *supra* note 200, at 2.
[210] *Home Office v Wainwright* [2001] EWCA Civ. 2081, [2003] UKHL 53, 16 October 2003. Markesinis et al., *supra* note 200, at 2.
[211] *Ellis v Chief Constable Essex Police* [2003] EWHC 1321. Markesinis et al., *supra* note 200, at 2.
[212] [2003] UKHL 53, [2003] (U.K.). Markesinis et al., *supra* note 200, at 2.
[213] (1849) 1 Mac. & G.25, 47 (U.K.).
[214] Markesinis et al., *supra* note 200, at 3.

Despite Lord Mummery's assertions to the contrary, the British public is largely in favor of a new tort for the infringement of privacy according to recent public opinion polling.[215] Similarly, the British Parliament has made several pronouncements in favor of a right of privacy.[216] But so far the British common law courts favored by Mummery as the traditional bastion of the rights of Englishmen have rejected the creation of an explicit right of privacy, though by analyzing recent precedent that seems to be where the judiciary is heading.

i. Slowly Towards a Right of Privacy: Recent Jurisprudence on British Privacy Law

An independent tort protecting privacy has been rejected under various rationales in a number of recent British cases despite the requirements of Article 8 of the 1998 U.K. Human Rights Act. Rather than finding such a right, English courts have been far more willing to stretch existing legal protections, including breach of confidence. For example, consider the *Wainwright* case involving the strip searching of a family in which an expanded definition of personal privacy protection was advocated by the plaintiffs.[217] The petitioners argued for an extension of the *Wilkinson v. Downton* rule that the intentional infliction of emotional harm constitutes a form of trespass, and an additional finding by the judge that, in the wake of the Human Rights Act, an unjustified invasion of privacy could in and of itself constitute trespass to

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[215] *See The Public Interest, the Media and Privacy*, BBC SURVEY, March 2002, *available at* http://www.bbc.co.uk/guidelines/editorialguidelines/assets/research/pubint.pdf (last visited Mar. 16, 2009) (concluding that "The general public put great value and importance on media information or coverage which promotes the general good, for the well-being of all. These include the identification of wrongdoing and of the wrongdoers themselves, with the media acting as guardians of shared moral and social norms. Under these conditions, and with suitable regard to the relative severity of the individual case, individuals' privacy can be intruded upon – in extreme cases *should* be – in the name of the greater good.") Markesinis et al., *supra* note 200, at 3.

[216] *See Privacy and Media Intrusion*, FIFTH REPORT FROM THE CULTURE, SPORT AND MEDIA COMMITTEE, Session 2002-3, HC 458, Vols. I-III: "On balance, we firmly recommend that the Government reconsider their position and bring forward legislative proposals to clarify the protection that individuals can expect from unwarranted intrusion by anyone – not the press alone – into their private lives," *available at* http://www.publications.parliament.uk/pa/cm200203/cmselect/cmcumeds/458/45802.htm (last visited Mar. 17, 2009). Markesinis et al., *supra* note 200, at 3.

[217] Markesinis et al., *supra* note 200, at 3.

the person.[218] But instead of issuing a ruling explicitly related to privacy, the *Wainwright* court refused to recognize the existence of an independent tort of privacy, relying upon the progressive extension of the existing breach of confidence action to protect privacy interests.[219] This conclusion was echoed in *Gordon Kaye v. Andrew Robertson and Sport Newspapers Ltd*[220] in which an actor requested a restraining order against the publication of injuries that he had sustained in a car accident. The Court of Appeal ultimately concluded that only malicious falsehood was applicable to the circumstances of the case, having decided that no tort of privacy existed in English law.[221] Both of these decisions have been treated as authority for the proposition that English common law does not encompass a privacy tort.[222]

Wainwright and *Kaye* demonstrate that British courts are not blind to the need for privacy protections, but highlight the fact that they are unwilling to create a new tort for invasion of privacy. Commentators have suggested though that existing remedies such as confidence actions, in the absence of a tort of privacy, are inadequate to protect against intrusions upon personal privacy.[223] Yet the progression of confidentiality in English courts has marked a step forwards in ensuring basic privacy protections. Recent developments in this field include: "The absence of a need to show a pre-existing relationship of confidence where private information is involved, and the recognition that publication of private material in and of itself constitutes a 'detriment.'"[224] This change has been encouraged by the U.K. Human Rights Act, but still falls

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[218] *Id.* at 5.
[219] *Id.* at 6.
[220] [1991] FSR 62 (U.K.).
[221] Another example is *Bernstein of Leigh v. Skyviews & General Ltd* in which the plaintiff was denied a remedy in trespass for aerial over-flights and photography of his country estate. [1978] Q.B. 479 (U.K.). For discussion in a similar case, see *Spencer v. United Kingdom* [1998] 25 EHHR CD 105 (U.K.). Markesinis et al., *supra* note 200, at 8.
[222] Markesinis et al., *supra* note 200, at 7.
[223] *See* A. Morgan, *Privacy, Confidence and Horizontal Effect: "Hello" Trouble*, 62 (2) CAMBRIDGE L. J. 444 (2003).
[224] Markesinis et al., *supra* note 200, at 12.

short of privacy protections, especially for public figures, available in other European nations such as France and Germany.[225] Significant gaps remain in English privacy law, such as the fact that a person breaking into the Queen's bedroom could only be prosecuted for trespass and not invasion of privacy.

The gradual construction of privacy law has left many impatient with cautious English judges, wishing the British Parliament to enact some right of privacy.[226] "The facts of the [Kaye] case," said Lord Justice Glidwell, "are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals."[227] Lord Justice Bingham echoed this sentiment, saying "This case highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens."[228] Several prominent British MPs are on record as arguing that the United Kingdom should have a privacy law as part of new safeguards against media intrusion.[229] But the reason for the slow progression and political reluctance to pass a privacy law has rested with the British press.

ii. The Role of the English Press in Inhibiting a British Right of Privacy

There are three principal arguments that are commonly evoked for how the British press has inhibited a robust right to privacy in Britain. First, privacy is difficult to define. This is true, but is not an excuse for inaction. Other nations have defined a right to privacy—in the United States by common law, and in some instances by statute; in Germany, mainly by courts

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[225] *See* H. Fenwick & G. Phillipson, *Confidence and Privacy: A Re-Examination*, CAMBRIDGE L. J. 447 (1996). Markesinis et al., *supra* note 200, at 12.
[226] Markesinis, *supra* note 200, at 806.
[227] *Id.*
[228] *Id.*
[229] *See MPs call for media privacy law*, BBC NEWS, June 16, 2003, *available at* http://news.bbc.co.uk/2/hi/uk_news/politics/2991772.stm (last visited Mar. 17, 2009) (reporting that a cross-party committee of MPs says self-regulation of the press should continue, but there should be 'modest compensation' payments.").

following court decisions and helped by specific statues such as *Kunsturhebergesetz* of 1907; in France, by relying on the very general tort provision of Article 1382 of the Civil Code and later by adding a general clause on privacy[230]; in Switzerland through a combination of statutory provisions[231]; in Europe generally by Article 8 the ECHR; and in the Canadian Provinces of Saskatchewan and British Columbia by specific statutes. Despite these attempts at definition, however vague, the status quo has not substantially changed in these jurisdictions. This includes the United States with the 1989 case *The Florida Start v. BJF*,[232] dealing with the problem of whether to publish the name of a rape victim already made public to the police.

The second common argument is that a general privacy right would inhibit investigative journalism.[233] *The Times* argued their case as follows:

> It is none the less the sincere conviction of responsible journalists, from *every type of newspaper* that *any* law to enforce ethical conduct—by attempting, for instance, to prohibit the invasion of privacy—would seriously harm the public interest. In the name of protecting the innocent, it would shelter the guilty. *Many crooked alderman would sleep easier in his bed, knowing the press was barred from making the enquiries that might bring the disgrace he deserved*...The rights of journalists—to ask questions, state facts, express opinions—are in essence no different from the rights of the citizenry at large. They rest on an identical perception of what it means to be free. Held inalienably by journalists and non-journalists alike, they constitute the right to freedom of speech itself. If that is curtailed, it is curtailed for everyone, and that would be to the detriment of democracy.[234]

But English journalists have similar ethical standards to those in other advanced nations.[235] What is more likely at issue is what was revealed in a BBC survey noting that many British journalists favor an ambiguous definition of the public interest "since such a loose definition

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[230] *See* the *Soraya* case, BGH 8.12 1964, NJW 1965, 685, and France in the *Marlene Dietrich* case, Paris 16.3. 1955, D 1955, 295; Markesinis, *supra* note 200, at 806.
[231] *See* BGE 96 II 409, art. 28 (1970) (Switz.); Swiss Law of Obligations, Obligationenrecht art. 49 (Switz.); Markesinis, *supra* note 200, at 806.
[232] 109 S. Ct. 2603 (1989). Markesinis, *supra* note 200, at 807.
[233] Markesinis, *supra* note 200, at 807.
[234] *Id.* (emphasis added).
[235] *Id.*

could be brought into play to justify [their] practice."[236] And there is also a collective action problem in that even if British journalists adopt voluntary codes of conduct that restrict infotainment-oriented reporting, there is nothing requiring the global correspondents of other news outlets reporting in London to follow suit. With such powerful interests behind the adoption of a more concrete description of the public interest, however helpful it would be to the development of British privacy law, judicial and parliamentary progress is at best difficult.

Third, there is a mistrust of judges. The former Press Council, some argue, is better suited to protect against defamation than the courts. But privacy is broader than defamation. Indeed, legislative efforts at regulating privacy law in the United Kingdom continue to be stymied by the media wishing to regulate itself through the Press Complaints Commission.[237] Such regulation should be encouraged, but without sweeping reform should not take the place of judicial or parliamentary action.

None one of these three arguments constitutes a satisfactory reason for curtailing the evolving right to privacy protections for public figures in English law. And there is evidence, as seen in the *Max Mosley* case, that English Courts are beginning to limit some aspects of the freedom of expression in favor of privacy protections. In doing so, they are implicitly saying that "everything in which the public is interested…is [not] necessarily in the legal sense public interest."[238] Thus, the courts are beginning to go down the path of defining the public interest that has so bedeviled U.S. courts since *Rosenbloom* as discussed in Part II.

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[236] BBC Survey, *supra* note 215.

[237] The Press Complaints Commission is a regulatory body for British printed newspapers and magazines, consisting of representatives of the major publishers.

[238] Robert Verkaik, *This could take the 'sting' out of journalism*, INDEPENDENT, July 25, 2008 (noting that "the record £60,000 damages in a privacy case and the estimated £700,000 costs against the *News Of The World* underlines the financial risks papers run when they decide to invade a public figure's privacy without justification").

Without a clarifying ruling or Act of Parliament, British Courts will continue to gradually develop their own brand of privacy law that may be more or less favorable to the press. A series of rulings have recently conflated being in the public eye as also being a public figure. Naomi Campbell, for example, who had lied about her drug use, had to accept that a newspaper was entitled to investigate and publish details of her rehabilitation program.[239] While in 2002 an English judge whilst explaining his ruling decided that "footballers are role models for young people and undesirable behavior on their part can set an unfortunate example" when explaining his decision against the soccer star David Beckham. There are two extremes exemplified here. One side argues that English law has developed to the point that anyone who discovers any intimate detail about a famous person can publish it with reference to the "public interest."[240] Others have argued that "invasion of privacy should, in the eyes of the law, be comparable to rape."[241] The truth doubtless lies somewhere in between. But that middle ground has proven unusually broad and elusive in England due to the gradual development of privacy law, frustrating many public figures in their attempts for judicial redress along the way.

B. The Development of Privacy Protections for Public Figures in Britain

Like the United States today in many ways, thirty years ago British common law seemed to make "little difference between those who were born to publicity, those who sought it, and those who had it thrust upon them."[242] The question is how this has changed over time, and whether that may be informative to the present U.S. situation. In a recent radio debate sponsored

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[239] Philip Hensher, *Public figures have a right to privacy*, INDEPENDENT, Apr. 27, 2005 (detailing how the Beckhams' nanny sold her story to the *News of the World* and how this episode illustrates that fame significantly diminishes privacy expectations).
[240] *Id.*
[241] *Id.*
[242] B. Markesinis, *The Right to be Let Alone v. Freedom of Speech*, *in* PUBLIC LAW 67-82 (1986), *reproduced as* chapter seventeen in FOREIGN LAW AND COMPARATIVE METHODOLOGY: A SUBJECT AND A THESIS (1997). *See also Woodward v. Hutchins* [1977] 1 WLR 760, 765 per Bridge LJ (U.K.); *Lennon v. News Group Newspapers* [1978] FSR 573 (U.K.). Markesinis et al., *supra* note 200, at 12.

by the *Independent*, one of the editors participating suggested that public figures were entitled to no privacy whatsoever. Though sounding somewhat extreme, this view now seems to be commonly accepted, as seen by the massive coverage given to the tragic death of Michael Todd, the chief constable of Greater Manchester Police who was found dead without apparent cause near Manchester in March 2008.[243]

The continuing failure to distinguish between voluntary and involuntary public figures, and to eliminate privacy protections for voluntary public figures outright, has remained a question of open and honest debate in the United Kingdom. For example, victims of sexual crimes in Britain long had to suffer extra indignations as a result of the publication of their plight. This defect was gradually limited through legislation in the United Kingdom,[244] even though it still remains active in the United States.[245] Despite progress in promoting the privacy rights of this class of involuntary public figures in Britain, to a great extent, "individuals having the status of public figures have been viewed as fair game, irrespective of how they acquired public status, the circumstances of the privacy intrusion,[246] or the link between the intrusion and the nature of the public interest in the individual concerned."[247] In this way, U.S. courts are

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[243] Daniel Trelford, *It's not always right for the press to put police chiefs under investigation*, INDEPENDENT, Mar. 17, 2008 (arguing that currently in England public figures are entitled to no privacy whatsoever); *see also Top officer sent 'worrying texts,'* BBC NEWS, Mar. 12, 2008, http://news.bbc.co.uk/2/hi/uk_news/england/manchester/7292662.stm (last visited Apr. 21, 2009).

[244] Such as section 4 of the Sexual Offences (Amendment) Act 1976 (granting anonymity to victims of rape-related offences (narrowly defined), the Criminal Justice Act 1987 and then, finally, the Sexual Offences (Amendment) Act 1991 and the related Statutory Instrument 1336/1992 of October, 1992. Sexual Offences Act, 1956, 4 Eliz. 2, ch. 69, 1 (Eng.).

[245] Markesinis et al., *supra* note 200, at 13. *E.g.*, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029; *The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S.Ct. 2603, 105 (1989).

[246] As an example, Lord Wakeham of the then Press Council was asked for comment about a television play portraying an entirely fictitious conversation of the late Princess of Wales with a psychiatrist. When asked whether this was a violation of privacy, he replied: "Diana [sic] has sacrificed her right to privacy by going on television so, I think, she is fair game to be publicly analysed." THE TIMES, May 2, 1996, at 16. Markesinis et al., *supra* note 200, at 15.

[247] *See for example* Bridge L.J.'s comments in *Woodward v Hutchins* [1977] 1 WLR 760 (U.K.): "It seems to me that those who seek and welcome publicity of every kind bearing upon their private lives so long as it shows them in a favourable light are in no position to complain of an invasion of their privacy by publicity which shows them in an unfavourable light." Markesinis et al., *supra* note 200, at 15.

actually slightly more protective of public figures than U.K. courts, especially regarding alleged public figures who have not sought out media attention.

British privacy law, in contrast to U.S., French, and German privacy law, has a less nuanced approach in its distinction between public and private figures. In the Continental European legal systems discussed below in Parts IV and V, the category of person matters less than the nature of the activity in question. In contrast to traditional English privacy law, French and German law does use a nuanced approach to distinguish between voluntary and involuntary public figures as well as the type of disclosed information. Such a context-specific approach recognizing that public figures do not sign away all of their privacy rights simply by virtue of being famous seems to be slowly emerging in Britain in post-Human Rights Act jurisprudence.[248] Indeed, "[r]ecent case law is replete with dicta to the effect that public figures, too, are entitled to have their privacy protected."[249] Lord Woolf has remarked in *A v. B plc* that:

> Where an individual is a public figure he is entitled to have his privacy respected. A public figure is entitled to a private life," but that he "should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media.[250]

Thus, even in the United Kingdom public figures are gaining privacy rights, but not to the extent that public figures enjoy such rights in Civil Law jurisdictions in Continental Europe. Thus, it may be argued that British privacy law is converging with U.S. privacy law, and one day may surpass U.S. privacy rights particularly relating to public figures, perhaps due to the influence of the ECHR. In *Campbell v. MGN Ltd*.,[251] the Master of the Rolls restated Woolf's point insofar as he said:

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[248] Markesinis et al., *supra* note 200, at 19.
[249] *Id.*
[250] *Id.*
[251] [2002] EWCA Civ 1373,¶ 41 (U.K.). Markesinis et al., *supra* note 200, at 19.

> For our part we would observe that the fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media. We do not see why it should necessarily be in the public interest that an individual, who has been adopted as a role model, without seeking this distinction, should be demonstrated to have feet of clay.[252]

Part of the evolving right of privacy for public figures in the United Kingdom may be seen by the fact that some courts have found that there is a right of privacy even in public places. In particular, the *Campbell* decision by the English Court of Appeal supports this proposition that an appearance in a public place can attract the protection of a confidence action.[253] Courts in Germany, Canada, and California have adopted similar rules, while *Peck v. UK* confirms that this approach is also now sanctioned in Article 8 litigation before the ECHR,[254] as discussed below. These decisions stand for the proposition that an intrusion into the privacy of a public figure cannot be justified simply by virtue of that intrusion occurring in a public place.[255] Thus, the British Courts are now beginning to give preference to the status of public figures alongside the circumstances in which the breach of privacy occurred, mirroring the evolution of U.S. privacy law from *Rosenbloom* to *Gertz*.

Despite this recent progress though, the anonymity of involuntary public figures, such as ex-criminals, is guaranteed only within the narrow limits of the parameters of the 1974 Rehabilitation of Offenders Act.[256] For example, a person accused but acquitted of

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[252] Markesinis et al., *supra* note 200, at 19.
[253] *Id.* at 20.
[254] *Editions Vice Versa v. Aubry* [1998] 5 BHRC 437. Cal. Civil Code § 1708.8. The statute makes it a tort to trespass or use a 'visual or auditory enhancing device'–e.g., a telephoto lens or a directional microphone–to film or record a person engaging in personal or familial activities under circumstances in which the person had a reasonable expectation of privacy. A person violating the statute is liable for up to three times the amount of special and general damages, plus punitive damages, and also may be enjoined. Markesinis et al., *supra* note 200, at 20.
[255] Markesinis et al., *supra* note 200, at 22.
[256] *Cf Briscoe v. Readers Digest Association, Inc.* 483 P.2d 34 (1971) *with Lebach*, BVerfGE 35, 202 (Germany) *translated in* B.S. MARKESINIS, THE GERMAN LAW OF TORTS 306 (2d ed 1990).

a serious crime, such as in the California case of *Melvin v. Reid*,[257] would have no protection in the British justice system. Neither would the victims or relatives of the accused. Unfortunately rape victims had to wait for the limited protections of the Sexual Offences (Amendment) Act of 1976 to protect their privacy.[258] These facts point to the necessity for a rebalancing of freedom of expression and privacy in the United Kingdom to better protect the privacy rights of involuntary public figures.

A. Balancing the Competing Interests of Privacy and Freedom of Expression in British Law

There are two primary possibilities to consider in rebalancing the competing interests of freedom of expression and privacy in English Privacy Law. The first is summarized in the U.S. case *Konisberg v. State Bar*,[259] in which Justice Black said: "I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field . . . ."[260] In other words, it is the position of many U.S. academics and judges to try to avoid explicit preferences for freedom of expression over privacy.[261] Derivations of this argument set within the British context appear to hold some sway over British judges. Besides an absolute preference for free speech then, the second approach is that of English defamation law that weighs the competing interests against one another in the contexts of the facts of each case.

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[257] 297 at 91 (1931).
[258] Sexual Offences (Amendment) Act 1976 § 4 (granting anonymity to victims of rape-related offences (narrowly defined).
[259] 366 U.S. 36, 61 (1961).
[260] *Id. See also* Hugo Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 882 (1960).
[261] *See* McKay, *The Preference for Freedom*, 34 N.Y.U.L.REV.1182 (1959); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821 (1962).

Unlike the position of U.S. defamation law, some argue that a premium is given to reputation over speech in England: "in the emerging law of 'privacy' protection one hopes that a true equilibrium will be attained."[262] The court in *Venables* adopted this approach, holding that it is a "necessary balancing exercise between the need to protect confidentiality and the need to pay proper respect to the right of freedom of expression."[263] What this means is that increasingly English courts, consistent with the *Peck* holding, are not treating freedom of expression as a trump card over other rights as is more often the case in the United States. As Markesinis puts it, "how is the administration of justice helped by newspapers printing not only every filthy detail of what the attacker did, but also the victim's photograph, name and address? . . . In these cases the public's interest to be informed should neither be unlimited nor unchecked."[264] As always then, the discussion concludes where it began, i.e., with the need to define the public interest so as to appropriately balance the competing rights of freedom of expression and privacy. And has been stated, the public interest is just as amorphous in Britain as it is in the United States.

The United Kingdom and United States are not alone in this balancing act being common law nations. The same weighing between freedom of expression and the right to individual privacy is being carried out in French and German civil law courts as well. In Britain, as in all of these legal systems, it remains to be seen how the conflict between these competing rights will be redressed, and in particular whether it be through statutory principles, as has occurred in Switzerland, or through the adoption of general principles, as in Canada.[265] What is certain is that the nature and extent of an English right to privacy remains both uncertain and untenable at present, but that the Human Rights Act as well as ECHR jurisprudence are increasingly

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[262] Markesinis et al., *supra* note 200, at 24.
[263] Op cit., ¶ 58. Markesinis et al., *supra* note 200, at 24.
[264] Markesinis, *supra* note 200, at 806.
[265] *Id.* at 24.

influencing the progression of privacy protections for public figures in England towards a regime arguably more robust than current privacy law for public figures in the United States. Whether British privacy rights will ever reach the level afforded to French citizens, however, is an entirely other matter.

IV. The Right of Privacy for Public Figures in France

In France, unlike the United Kingdom, the *Cour de Cassation* has adopted a consistent position that everyone regardless of rank, birth, fortune, present or future occupation, is entitled to a right of privacy.[266] Though infringements on this right may at times be upheld where public figures are concerned,[267] recent French cases have underscored the adoption of a graduated approach to privacy protections for public figures recognizing the difference between public figures and anonymous citizens. For example, the publication of intrusive images and information in French newspapers is more carefully controlled when it relates to 'temporary' public figures than for 'permanent' public figures.[268] ECHR case law has not had as much of an influence on French, or for that matter German law, as it has on English law since both civil law nations already have well-defined privacy rights for public figures including relatively clear statements of what constitutes the public interest.

The French legal system protects the privacy rights for public figures through civil law, criminal offenses,[269] and certain rules of professional ethics.[270] Though, in the criminal context

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[266] Civ. 1ère 23 Oct. 1990, Bull. civ., n°222 (Fr.).
[267] Markesinis et al., *supra* note 200, at 16.
[268] *See* Civ. 1ère Feb. 20, 2001, n°9823/471 (relating to the terrorist attack at RER Saint Michel Station in Paris); Markesinis et al., *supra* note 200, at 18.
[269] The offences which relate to violations of privacy derive from the Act of Parliament of July 17, 1970; as amended in 1994, they now constitute articles 226-1 to 226-9 of the new French Penal Code. Under article 226-1 of the Penal Code it is an offence, intentionally and by means of any process whatsoever, to infringe another's privacy: (1) by receiving, recording or transmitting, without the consent of their author, words uttered in private or

prosecution can only occur as a result of a complaint by the victim. Likewise, though there is a French code of conduct for the press dating from 1918, but there is no enforcement mechanism, just as is the case in the United Kingdom. Nor is there a professional press association in France like the Press Council in Germany or the Press Complaints Commission in the United Kingdom since journalism is an open profession in France—anyone can be a reporter without certification. As a result, injunctive relief and civil damages through the Civil Code, and occasionally criminal sanctions, remains the strongest bulwark for privacy protections in France.

But despite these protections, the right to privacy for even temporary, or involuntary, public figures remains context dependent in France. The importance of particular circumstances may outweigh the individual right of privacy in certain cases, just as it does in the United Kingdom and for that matter the United States. For example, French judges give weight to the focus of a photo depicting a public event and deciding whether or not the image of a plaintiff is centered upon the public event itself.[271] This phenomenon is not limited to France, but is indicative of a wider Continental European approach to privacy law. For example, in a recent Spanish case Ms. Ortiz sought a blanket ban on news organizations publishing photos or footage of her, except ones in which she appears at official functions in her role as sister of the Spanish crown princess.[272] This case highlights the similar place that involuntary public figures enjoy in Spain and the United States, which is in contrast to the privacy protections available in German law discussed in Part V. This Part reviews the development and current scope of privacy protections for public figures in French law, noting in particular the extent to which the rights of

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confidentially; or (2) by taking, recording or transmitting, without his or her consent, the picture of a person who is in a private place. French Legislation on Privacy, *supra* note 14.

[270] French Legislation on Privacy, *supra* note 14.

[271] *See* Civ. 1ère 25 Jan. 2000, *D.*2000, Somm. com., p. 270, obs. C. Caron; JCP. 2000.II.10257; Markesinis et al., *supra* note 200, at 18.

[272] Daniel Woolls, *You are a celebrity, judge tells sister of Spanish royal*, INDEPENDENT, May 16, 2008 (holding that the sister Crown Princess Letizia of Spain is a celebrity, rejecting the request from Telma Ortiz for a restraining order barring media outlets from filming her, saying she is a public figure despite her wishes.)

involuntary (temporary) public figures are distinguished from those of voluntary (permanent) public figures, as well as discussing the developed definition of the public interest that has been adopted in French courts.

A. The Development of French Privacy Law

The birth of French privacy is intertwined with *The Three Musketeers*. While writing the novel, Alexander Dumas, the author, began a love affair with a much younger Texas actress. The two posed for a series of scandalous photographs, which the photographer auctioned off.[273] Once Dumas found out, he sued in a Paris Appeals Court and won, the court finding that posing for the pictures did not surrender the couple's right to privacy. James Whitman explained that this early precedent demonstrated that "One's privacy, like other aspects of one's honor, was not a market commodity that could simply be definitively sold" in France.[274] This is in contrast to the United States, in which the press is given far greater latitude to commercialize such 'fragile merchandise,' in the words of Richard Stolley. This phenomenon is exemplified by two cases from France and the United States. In 1985, a homosexual man sued a French publication to prevent publication of a photo of him at a gay pride parade in Paris and won. In contrast, in the early 1980s, the California Supreme Court upheld the right of journalists to identify San Francisco resident Oliver Sipple as gay after he helped foil an assassination attempt on President Gerald Ford since after that event he was deemed a public figure. Sipple ultimately committed suicide over the exposure due to his family being unaware of his homosexuality prior to the

[273] Sullivan, *supra* note 38.
[274] *Id.*

media coverage.[275] Needless to say, it is far better to be a public figure in France than in the United States.

French courts have relied on several different rationales for their robust protections of privacy since the *Dumas* case. The first commonly cited reason is that the French privacy rights must be "interpreted against a backdrop of firmly entrenched personality rights," in that privacy rights are in fact part of a package of personality rights under the French Code[276] that include physical, moral, individual, and social aspects.[277] This fact may be illustrated in reference to the *Mistinguett* case, in which the actor Jeanne Mistinguett entered into a film contract for her autobiography. Explicit waivers of the actor's moral rights and her right of privacy were included in the contract.[278] The French Court held that these waivers were invalid, "[s]ince private facts or events are an extension of an individual's personality, to strip them from the individual's control is as unthinkable to the French mind as is the truncation of an artist's moral control over the destiny of his work."[279] Thus, as in the United Kingdom, French courts have developed the right of personality to extend privacy protections, but have done so much further than what has been achieved in many common law systems.

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[275] *Id.*; *see also Gay For Today*, http://gayfortoday.blogspot.com/2007/11/oliver-sipple.html (last visited Apr. 21, 2009) (reporting that "Sipple's mental and physical health sharply declined over the years. He drank heavily, gained weight, was fitted with a pacemaker, became paranoid and suicidal. On 2 February 1989, he was found dead in his bed, at the age of forty-seven. Earlier that day, Sipple had visited a friend and said he had been turned away by the Veterans' Administration hospital where he went concerning his difficulty in breathing."). The United States has made some efforts at legislative privacy, such as the Video Privacy Protection Act passed after Judge Robert Bork's video rental records were publicized during his Supreme Court nomination hearings. A series of state laws has also made it mandatory for companies to disclose some 90 million data leaks.

[276] J. Hauch, *Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris*, 68 TULANE L. REV. 1219, 1233 (1994); New South Wales Commission, *supra* note 23, at 133.

[277] H. BEVERLEY-SMITH, A. OHLY & A. LUCAS-SCHLOETTER, PRIVACY, PROPERTY AND PERSONALITY: CIVIL LAW PERSPECTIVES ON COMMERCIAL APPROPRIATION 147 (2005); New South Wales Commission, *supra* note 23, at 133.

[278] New South Wales Commission, *supra* note 23, at 133.

[279] Hauch, *supra* note 276, at 1262; New South Wales Commission, *supra* note 23, at 133.

The multifaceted concept of privacy is also often considered a type of moral property in France,[280] which echoes U.S. case law justifying privacy protections on the basis of property rights but with far greater effect.[281] For example, consider the *Dietrich* case in which Marlene Dietrich sought damages against *France-Dimanche* magazine for the unauthorized republication of her memoirs.[282] In this case, the court held that "the memories of each person's private life belong to his moral patrimony" and hence unauthorized publication, "even without malicious intent," was a breach of privacy.[283] Yet moral property and personality rights are secondary to the central place of delict in French privacy law.

i. The Role of 'Delict' in the Evolution of French Privacy Law

Protection of privacy in civil law systems like France is founded principally in the so-called 'law of delict,' which is the equivalent of the law of torts in common law systems, and extends to protect plaintiffs against invasions of personality rights and interests. However, there are varying interpretations within Europe of the law of delict. German lawyers, for example, respond to the need to bring the law of delict into line with the Basic Law of 1949[284] regarding invasions of a single right of personality that exists in three spheres (intimate, private, and individual).[285] French lawyers, on the other hand, tend to concentrate on the identification of a more specific right of personality, such as the "right to confidentiality of correspondence," "the

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[280] Hauch argues that "[a]n examination of the application of the French right to privacy in recent decisions indicates a marked tendency to treat private facts as private property." Hauch, *supra* note 276, at 1245. *See also* New South Wales Commission, *supra* note 23, at 133.
[281] Sullivan, *supra* note 38.
[282] Hauch, *supra* note 276, at 1237, citing Judgment of March 16, 1955 Cour d'appel de Paris, 1955 DS Jur, 295.
[283] BEVERLEY-SMITH ET AL., *supra* note 277, at 152, citing Judgment of March 16, 1955 Cour d'appel de Paris, 1955 DS Jur, 295. In defining the right to privacy in Article 9, the "right in one's biography" has been explicitly included. Hauch, *supra* note 276, at 1238, n.89, citing Judgment of May 15, 1970, Cour d'appel de Paris, 1970 DS Jur. 466, 468. New South Wales Commission, *supra* note 23, at 134.
[284] M REIMAN AND R ZIMMERMANN, THE OXFORD HANDBOOK OF COMPARATIVE LAW 1021 (2006).
[285] *See* K. Zweigert & H. Kötz, AN INTRODUCTION TO COMPARATIVE LAW 687 (3rd ed. 1998).

right to privacy in domestic life," or "the right to a person's name."[286] These varied attempts to define tort claims for privacy protection led to the development of explicit French statutory protections for public figures.

The statutory evolution of French privacy law begins with the French *Code Civile* ("Civil Code") or *Napoleonic Code* of 1804, providing for all forms of delictual liability in five articles.[287] The general delictual principle, in Articles 1382 and 1383, is that everyone whose act or omission causes damage to another by "fault" must compensate the harmed person. In Article 1384(1), the Code also imposes liability on persons for harm caused by things in their use, direction or control, which since 1930 has resulted in the imposition of strict liability for certain types of privacy infringement.[288] An early case testing the boundaries of these articles within a breach of privacy case decided on general delictual principles exemplifies the underlying philosophy of French privacy law. It is also the case that is commonly seen as the birth in French law of the right to one's own image.[289]

ii. The *Rachel* Decision as the First Incarnation of French Privacy Law

The 1858 *Rachel* decision involved an action to destroy the lifelike sketches made from a photograph of the plaintiff's sister, a famous actress, taken on her deathbed expressly for the plaintiff's personal records. The French court found that the right to oppose the reproduction was absolute and that the action came under general strict liability principles, meaning that the defendant's mental state was irrelevant.[290] Specifically, the French Tribunal held that:

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[286] *Id.* at 694.
[287] New South Wales Commission, *supra* note 23, at 125.
[288] *Id.*
[289] *See generally* J. BELL, S. BOYRON, & S. WHITTAKER, PRINCIPLES OF FRENCH LAW 354-391 (1998); *see also* HUW BEVERLEY-SMITH, ANSGAR OHLY, & AGNÈS LUCAS-SCHLOETTER, PRIVACY, PROPERTY AND PERSONALITY 147 (2005).
[290] New South Wales Commission, *supra* note 23, at 125; Hauch, *supra* note 276, at 1233, citing Judgment of June 16, 1858, Trib pr inst de la Seine, 1858 DP III 62.

> No one may, without the express consent of the family, reproduce and make available to the public the features of a person on his deathbed, however famous this person has been and however public his acts during his lifetime have been; the right to oppose this reproduction is absolute; it flows from the respect the family's pain commands and it should not be disregarded; otherwise the most intimate and respectable feelings would be offended.[291]

The *Rachel* decision highlights three themes running through French privacy law. First, French courts have a tendency to find for the plaintiff without significant discussion of the reasonableness of the defendant's conduct. Second, French courts focus on the subjective emotional suffering of the plaintiff without an apparent need to prove objective offensiveness.[292] Third, the courts prefer to grant specific relief for breaches of privacy rather than award damages, unlike English courts.[293] These themes will be discussed further below as the discussion moves on to modern principles of French privacy law.

iii. Article 9 of the 1970 Civil Code: the Foundation of Modern French Privacy Law

French privacy law began with the law of delict and the *Rachel* decision, but it does not end there. It has continued to evolve in particular as a result of the amendment to Article 9 of the 1970 Civil Code to include the provision that:

> Everyone has the right to respect for his private life. Without prejudice to compensation for injury suffered, the court may prescribe any measures, such as sequestration, seizure and others, appropriate to prevent or put an end to an

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[291] BEVERLEY-SMITH, *supra* note 277, at 147.

[292] Unlike domestic courts that have heard privacy claims, the ECHR also places a great deal of importance on the subjective belief of the victim in regards to their privacy protections. For example, in *PG and JH v. the United Kingdom* the Court determined that one significant element in determining whether conduct outside of a person's home impinged on his or her right to privacy was the person's reasonable expectations regarding privacy. *PG and JH v the United Kingdom* 44787/98 [2001] Eur Court HR 550 (25 September 2001). New South Wales Commission, *supra* note 23, at 143. This provision is particularly relevant when people knowingly or intentionally involve themselves in public activities.

[293] New South Wales Commission, *supra* note 23, at 126; "This subjective view of injury, coupled with the French notion that personality rights are inalienable" have led the courts to find for the plaintiff even where there has been prior disclosure with the plaintiff's knowledge or consent. Hauch, *supra* note 276, at 1234. There must be express and specific authorization for subsequent use of previously revealed facts. *See* B. STARCK, DROIT CIVIL: INTRODUCTION 170-71 (1972).

> invasion of personal privacy; in case of emergency those measures may be provided for by interim order.[294]

While this provision is itself hardly more precise than the original French Code text, the effect of the amendment is that the notion of "fault" in relation to the various rights to a private life is now illusory—fault is found as soon as another person's privacy has not been respected.[295] In other words, a strict liability system is now in place in French privacy law. The plaintiff need not prove injury or foreseeability of harm, only that the harm itself occurred.[296] The intimacy of private life is strengthened by the article's second paragraph, which provides in addition "that a court can make an interlocutory order directing whatever steps may be necessary to put a stop to violations of this right."[297] This expansion and streamlining of privacy claims has revolutionized French privacy law, and has had an effect on the jurisprudence of courts across Europe.

Article 9 is thus not the only defense of privacy protections in the French system, but it has evolved to become the most important. Further sources of the right to privacy in French law are: international instruments, specifically the ICCPR; the ECHR; community law; and "General Principles of Law," such as those applied by the administrative courts.[298] Moreover, although not specifically mentioned in the Constitution, the *Conseil constitutionnel* (Constitutional council) has judged privacy a constitutional right under the umbrella of the right to freedom.[299] But the right to privacy enshrined in Article 9 remains the single most pervasive statute dealing with privacy. It encompasses more than a mere right to secrecy of one's private activities, because 'respect' means more than secrecy—the right extends to all aspects of an individual's

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[294] STARCK, *supra* note 278, at 171.
[295] *See generally* J. BELL, S. BOYRON & S. WHITTAKER, PRINCIPLES OF FRENCH LAW 354-91 (1998).
[296] Hauch, *supra* note 276, at 1250.
[297] French Legislation on Privacy, *supra* note 14 ("In interlocutory proceedings a judge can also take an immediate decision in advance to suspend publication, prohibit circulation or order the total or partial suppression of a publication; these latter measures are limited to the more serious infringements.").
[298] *See* E. Picard, *The right to privacy in French Law in* B. S. MARKESINIS PROTECTING PRIVACY 49, 51-52 (1999).
[299] *Id.*

spiritual and physical being.[300] In fact, Article 9 protects: "the right in one's name, one's image, one's voice, one's intimacy, one's honour and reputation, one's own biography, and the right to have one's past transgressions forgotten."[301] French case law has illustrated that Article 9 also extends to: personal health, health of close family members; private repose and leisure; parental and marital status; family life; way of life in general; intimate interpersonal relations, including relations with children and romantic attachments; inner emotions, such as suffering and despair; friendships; sexual orientation; political and religious beliefs; trade union membership; true names; and residences.[302] In general, the right to privacy entitles anyone, irrespective of rank, birth, fortune or present or future office, to oppose the dissemination of his or her picture or personal information without express consent.[303]

Among its myriad other functions, Article 9 also has three other significant traits: (1) it may be enforced by the family of the deceased;[304](2) an individual may claim a vicarious breach of privacy where a disclosure relates to a close family member;[305] and (3) every person has the exclusive power to define the boundaries of his or her private life and the circumstances under which private information may be publicly divulged, including information solely of a private nature.[306] Thus, Article 9 allows a French citizen to claim privacy rights for personal information that had been previously divulged, even where they were personally responsible for that divulgence.[307] The best known case illustrating the latter point is the *Gunther Sachs* case in which Gunther Sachs,

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[300] A Gigante, *Ice Patch on the Information Superhighway: Foreign Liability for Domestically Created Content*, CARDOZO ARTS & ENT. L. J. 523, 543(1996).
[301] Hauch, *supra* note 276, at 1238, n.89, citing Judgment of May 15, 1970, Cour d'appel de Paris, 1970 DS Jur 466, 468. *See also* Picard, *surpa* note 298, at 84.
[302] *See* Hauch, *supra* note 276, at 1246-48 & 54, n.134.
[303] French Legislation on Privacy, *supra* note 14.
[304] *See* Gigante, *supra* note 300, at 543, n.113; New South Wales Commission, *supra* note 23, at 128.
[305] New South Wales Commission, *supra* note 23, at 128.
[306] Gigante, *supra* note 300, at 543; New South Wales Commission, *supra* note 23, at 128.
[307] Hauch, *supra* note 276, at 1255, & n.182.

husband of Brigitte Bardot, sued the magazine *Liu* for publishing details of his sex life under the catchy heading "Sexy Sachs."[308] The *Cour de cassation* (final court of review in private law, commercial law, and criminal law), held that the fact the plaintiff had tolerated reports (even with tacit consent) did not signify that he had irrevocably and without limit authorized republication.[309] Commentators have argued that this prerogative under French privacy law to revoke prior consent to publication of personal information can be understood in the light of privacy rights being treated in France as analogous to moral property,[310] reaching back to the *Dumas* decision. But perhaps even more importantly, the *Gunther Sachs* case also furthered a long line of jurisprudence that has gradually protected the rights of public figures in France.

B. Modern Privacy Rights of Public Figures in France

Unlike in the United States, French public officials and public figures enjoy the same protection of their right to privacy as do private individuals, although only in relation to those aspects of their private lives not connected to the conduct of their public activities.[311] This is in contrast to common practice in the United States in which the private lives of public figure are an open book—but this is not always true as seen in the U.S. press corps' decision not to publicize then Senator Bob Dole's prior sexual exploits during the 1996 Presidential Campaign.[312] To exemplify this principle in French law, in an action brought by Aga Khan, the *Cour de cassation*

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[308] BEVERLEY-SMITH, *supra* note 277, at 152, citing Cass civ 2.1.1971, D 1971, jur, 263; New South Wales Commission, *supra* note 23, at 128.
[309] BEVERLEY-SMITH, *supra* note 277, at 152.
[310] New South Wales Commission, *supra* note 23, at 129.
[311] *Id.*
[312] Darrell M. West, *Responsibility Frenzies in News Coverage: The Case of the Hillary Clinton Lesbian Rumor*, BROWN UNIVERSITY WORKING PAPER (Oct. 2002), *available at* http://209.85.173.132/search?q=cache:W2dtsYdyOYgJ:www.insidepolitics.org/ResponsibilityFrenzies.doc+press+does+not+report+on+bob+dole+sex+life+1996+presidential+campaign&cd=9&hl=en&ct=clnk&gl=us (last visited Mar. 17, 2009).

affirmed the lack of distinction in French privacy law between public and private figures, holding that "each individual, whatever his status, his birth, his wealth, his present or future position, has the right to require respect for his privacy."[313] Gigante argues that this broad right of privacy afforded French public figures signifies that French courts often protect the disclosure of information in matters that other jurisdictions (such as the United States and the United Kingdom) would treat as issues of legitimate public interest. For example, consider the action brought by French President Valéry Giscard d'Estaing to prevent the publication of a deposed African dictator's autobiography deemed to be invasive of Giscard's privacy. In that case, the court held that:

> [P]olitical combat…to be exercised within the context of freedom of the press and freedom of information, must leave outside the field of battle any fact or event directly related to the intimacy of personal or family life; the fact that the person targeted engages in an activity of a public figure cannot authorize or justify an intrusion into what constitutes the "private life" that "each person has the right" to have respected.[314]

But this robust defense of privacy protections is not the whole story. Like other jurisdictions, there are a number of limitations to the protections allotted to public figures in France both through domestic statutes, and as a result of the ECHR.

i. Limitations and Exceptions to Privacy Protections for French Public Figures Focusing on the Public Interest

As is the case in the United States, the primary limitation on the right to privacy in France is freedom of expression, particularly through Article 10 of the ECHR. But this limitation has not resulted in a significant curtailment of privacy protections as it has in the United States through the First Amendment. That is because the *Cour de cassation* has decided that there is no

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[313] Hauch, *supra* note 276, at 1253, n.174, citing Judgment of Oct. 23, 1990, Cass civ 1re, 1990 Bull Civ I 158, No. 222.
[314] Gigante, *supra* note 300, at 545, n.123, citing Judgment of May 14, 1985, Trib gr inst 2 GP 608 (1985).

conflict between Article 9 of the Civil Code and Article 10 of the ECHR.[315] The court based its decision on the fact that Article 9 and its attendant jurisprudence are justifiable limits within the qualifications of the right to freedom of expression contained in clause 2 of Article 10 of the ECHR.[316] This clause reflects a French national character that places a high value on the free exchange of thoughts and sentiments between individuals, as well as "the development of intellectual and spiritual freedom, which may be inhibited by the public knowledge of personal communications."[317] In particular, the French author Picard points out that that "the right to criticism concerning matters of public interest has traditionally been well protected in France."[318] But at the same time, Picard notes that the public's "legitimate interest to be informed" can take precedence over an individual's right to privacy,[319] without defining under exactly what circumstances that balancing test would give these results. What is clear though is that in addition to Article 9 protections, French courts must also consider the breadth of freedom of expression guaranteed by Article 10 if they are seeking to suppress material prior to publication. In particular, Article 1 of the French Press Law of 1881 guarantees "liberty of diffusion to the printed press," and Article 11 of the Declaration of the Rights of Man of 1789 recognized in the French Constitution of 1958 recognizes "liberties of expression that may only be altered by positive law."[320]

Beyond freedom of expression, the French right of privacy is subject to three primary limitations: (1) the plaintiff's consent; (2) the rights of public order; and (3) the general public

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[315] Hauch, *supra* note 276, at 1284-86, citing Judgment of January 31, 1989, Cass civ 1re, LEXIS Pourvoi No 87-15.139.
[316] New South Wales Commission, *supra* note 23, at 130.
[317] Hauch, *supra* note 276, at 1223, *referring to* P. KAYSER, LA PROTECTION DE LA VIE PRIVÉE 9-13 (1984).
[318] Picard, *supra* note 298, at 95.
[319] *Id.* at 94.
[320] New South Wales Commission, *supra* note 23, at 134.

interest.[321] As has been shown to be the case in each jurisdiction that has examined the issue, defining the public interest has been the key to France's robust privacy protections. In essence, French courts have determined that the public interest extends primarily to political and intellectual debate, not infotainment. Beverley-Smith, Ohly, and Lucas-Schloetter summarize this position by arguing that the information must be useful, meaning necessary: "[t]he disclosure of private facts or the publication of the image must be directly linked to the [recounted] event and has to occur for the purpose of informing the public."[322] But what information is necessary, and what is infotainment?

As French case law on the subject has developed, it has become apparent that "different types of public interest may allow diverse interferences with the right to privacy,"[323] though it remains unclear exactly when the right of the public to be informed outweighs the right to privacy of the individual. For example, the French Press has been permitted to publish a list of the "hundred richest French people," based on the notion that the position of these persons in the business world deserves to be known. In its reasoning when one of these individuals brought suit, the court noted that this publication did not affect the intimacy of the private lives of these persons.[324] Other French courts have similarly permitted incursions into the private lives of wealthy individuals, such as the limited publication of personal financial information if the reporting is confined to finance and "excludes all allusion to the life and personality of the individual."[325] But is this the type of information that is "necessary" to inform the public? Knowing the financial status of others may help build a strong democracy, or then again it may be idle gossip of the type so well-protected in the United States.

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[321] Picard, *supra* note 298, at 89; New South Wales Commission, *supra* note 23, at 130.
[322] BEVERLEY-SMITH, *supra* note 277, at 177.
[323] Picard, *supra* note 298, at 94.
[324] New South Wales Commission, *supra* note 23, at 131.
[325] Hauch, *supra* note 276, at 1260-61; New South Wales Commission, *supra* note 23, at 131.

Instead of financial figures, consider the *Francois Mitterand* case, in which the author of *Le Grand Secret* was prevented from publishing his story of the illness of the former French President before he died, even though the President's health was undoubtedly within the public interest.[326] In deciding the case, the court noted that details of the President's illness involved the most intimate aspect of privacy.[327] But this interpretation ignores that the President himself issued regular bulletins regarding his health while he was alive.[328] Instead, commentators have argued that the reason that the Court ruled the way that it did was because of "the right of the subject of the invasion to reveal what he wishes about himself even if, as in this case, it was not the truth."[329] If this interpretation is accepted, then it contravenes the rationale underpinning the richest people case, since these public figures did not want this information publicized. Does knowledge about the President's health have a greater impact than details about the financial status of French masters of the universe?

These two cases exemplify the fact that the type of information at issue is often determinative in French privacy jurisprudence and turns in particular on the definition of the public interest adopted. Although definitions vary, one type of "necessary" information that courts have consistently upheld as being with the public interest is building a historical record. For instance, historical sources used by historians writing about the private lives of individuals without their consent will typically be upheld, if the facts are relevant to the historical record and "related with objectivity and without the intention to cause harm, and if they have been . . . already placed within the public domain by accounts of court records in the local press."[330] As a

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[326] New South Wales Commission, *supra* note 23, at 131.
[327] It should be noted though that in this case the defendant relied on his freedom of expression, not on the public interest. *Id.*
[328] *Id.*
[329] Picard, *supra* note 298, at 95; New South Wales Commission, *supra* note 23, at 131.
[330] Hauch, *supra* note 276, at 1258.

result, if the *Francois Mitterand* research had been published in an academic journal rather than *Le Grand Secret*, French courts would likely have upheld it. But if the goal is to inform the French citizenry and promote historical literacy, is an academic journal with limited reach a better outlet than a popular periodical? We argue in Part VI that the source of the information should not matter more than its substance. Regardless, it has been consistently maintained in French courts that any information that builds the historical record is vital to promoting the public interest if it is done through the proper means.

Yet there are even limitations on the historical sources limitation in French privacy law. The *Chaplin* case established a "fair use" exception when private facts are published for historical or critical debate. In this case, Charlie Chaplan sued *Lui* magazine for breaches of Articles 1382 and 9 of the Code. The central issue in the case was determining the degree of control a person possesses over previously revealed private facts. Here Chaplin had consented to an interview conducted by the Asa-Presse agency. Asa-Presse then proceeded to sell the rights to the article to *Liu*, which changed it from a narrative to question-and-answer format (giving the impression that Chaplin had granted *Lui* an exclusive interview). Chaplin argued that this republication without consent violated his right to privacy under Article 9 of the French Civil Code.[331]

The *Cour d'appel de Paris* (Court of Appeal of Paris) held in the *Chaplin* case that where an individual publishes private facts concerning her life "she does so in the terms which please her, and in a context chosen by her, and thus decides with complete information concerning what she will make public and the conditions under which she will do so."[332] On appeal, *Liu* magazine argued that Chaplin had to show that the defendant had "mischaracterized the private

[331] Hauch, *supra* note 276, at 1266-1269 citing Judgment of Nov 14, 1975, Cass. civ. 2e, 1976 DS Jur 421; New South Wales Commission, *supra* note 23, at 132.
[332] Hauch, *supra* note 276, at 1267, citing Judgment of Dec. 17, 1973, 1976 DS Jur. 120, 121-122.

facts in republishing them."[333] But the *Cour de Cassation* rejected this argument, holding that "the findings and conclusions [of the lower courts] do not imply that when a person has consented to the publication of facts relating to her private life she has an unlimited power to oppose the republication of those same facts."[334] In essence then, the *Cour de Cassation* found that historical or critical works of a serious nature could contain a republication of private facts without liability, whereas entertainment-oriented journalism, i.e. infotainment, could not.[335] It found that *Lui* "could make no serious pretension to scholarly status."[336] Thus, even in this early decision, the scholastic merit of the publication at issue is at the heart of French inquiries into privacy protections. As Hauch argues, "if the *Lui* article had been a Sorbonne type thesis on the effect of the artist's private life on his humor, presumably Chaplin's rights would have been trumped by free-debate-type concerns."[337] And on the question of individual rights to control the disclosure of private information, Hauch concludes that:

> Under the view of the *Lui* court, individuals have an absolute and indefeasible right to control use of private facts, even when those facts have been previously revealed. Society may 'borrow' those facts when their use is for the general public good.[338]

As these cases made clear, defining the public interest in France has continued to be elusive as it has in the United States and the United Kingdom. It is a malleable concept that has changed over the generations, in some cases expanding privacy protections, and in other instances contracting them. Recently, for example, it has been held that photographs taken in a public place of a landscape or public event that includes a crowd of people are exempt from actions for breach of privacy provided that no one is recognizable individually (or steps are taken

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[333] Hauch, *supra* note 276, at 1268; New South Wales Commission, *supra* note 23, at 132.
[334] Hauch, *supra* note 276, at 1268, citing Judgment of Dec. 17, 1973, 1976 D.S. Jur. 120, 121-122; New South Wales Commission, *supra* note 23, at 132.
[335] New South Wales Commission, *supra* note 23, at 132.
[336] Hauch, *supra* note 276, at 1268; New South Wales Commission, *supra* note 23, at 132.
[337] Hauch, *supra* note 276, at 1269.
[338] New South Wales Commission, *supra* note 23, at 133.

to obscure his or her features).[339] Yet at the same time other French courts have recently affirmed the existence of a patrimonial right to one's image, distinct from the traditional personality right to one's image.[340] Overall though French privacy law has laid out a definition of the public interest preferencing published information with scholastic merit, as opposed to infotainment-oriented articles. To understand what these legal resolutions mean for actual people on the ground, it is necessary to consider the remedies available for breach of privacy protections in France.

C. Remedies Available Under French Privacy Law

Generally the French judiciary has shown itself ready to grant injunctive relief to protect privacy even if it means curtailing freedom of expression.[341] This is in marked contrast to U.S. jurisprudence. As an example, the French Court held in the *Gerald Philipe* case that all copies of the magazine *France-Dimanche* should be seized and all posters removed from news kiosks promoting the article.[342] The Court concluded that this was an "intolerable intrusion into private life" that trumped the liberty of the press.[343] But the addition of Article 9 to the French Civil Code replaced the "intolerable intrusion" formula for injunctive relief with the notion of a "violation of the intimacy of private life."[344] Several commentators have argued that this change in language "invites the case law to distinguish from private life itself, … the intimacy thereof, that is the most secret part of private life; the violation of this latter part alone permits the courts to prescribe measures limiting the freedom of expression."[345] As a result of this change,

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[339] BEVERLEY-SMITH, *supra* note 277, at 173.
[340] *Id.* at 156.
[341] Hauch, *supra* note 276, at 1239-42.
[342] New South Wales Commission, *supra* note 23, at 134.
[343] *Id.*
[344] *Id.* at 135.
[345] Hauch, *supra* note 276, at 1243, citing I. P. KAYSER, LA PROTECTION DE LA VIE PRIVÉE 140 (1984).

violations of private life generally should be remedied by damages after trial, whereas revelations concerning "the intimate core of private life" justify pre-trial injunctive relief. The *Cour de Cassation* in particular has continued to endorse such pre-trial injunctive relief.

French courts have also become increasingly active in deterring privacy violations, including "sequester or seizure of publications, suppression of offending scenes of films or passages of books, inclusion of disclaimers, alteration of character names, and the publication of judicial decisions in or with the offending work."[346] Nor is France alone in these renewed efforts. Putting injunctive relief aside, it does not approach civil damages differently from the common law systems in the United States and United Kingdom. Once awarded, damages may take the form of publication of the judicial outcome in the offending publication, or the award of a lump sum that varies depending on whether the victim had previously divulged facts about his or her private life.[347] Though regarding civil liability, damage awards to French victims of privacy infringements do not depend on the degree of fault, as is the case with punitive damages in common law jurisdictions, but instead they vary according to the degree of harm suffered.[348] The maximum penalty for a violation of privacy in France is one year imprisonment and a fine of €300,000, depending on the status of the offender and the degree of culpability.[349] Corporate bodies may also be found criminally liable for offences against privacy and are subject to a fine five times greater than that prescribed for individuals, but no cases have yet found a corporation responsible for violations of privacy.[350] These laws not only dictate French proceedings, but influence the development of privacy doctrines in common and civil law countries alike, such as Quebec.

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[346] Hauch, *supra* note 276, at 1235; New South Wales Commission, *supra* note 23, at 135.
[347] New South Wales Commission, *supra* note 23, at 135.
[348] French Legislation on Privacy, *supra* note 14.
[349] *Id.*
[350] *Id.*

D. A Note on Quebec Privacy Law

Many of the laws of Quebec have been influenced by both French and British jurisprudence, so it is telling that in Quebec, section 5 of its Charter of Human Rights and Freedoms ("Quebec Charter") explicitly guarantees every person "a right to respect for his private life."[351] In *Gazette v Valiquette*, for example, the Quebec Court of Appeal held that the right comprises "a right to anonymity and privacy, a right to autonomy in structuring one's personal and family life, and a right to secrecy and confidentiality."[352] But even in Canada, it is "generally recognized that certain aspects of the private life of a person who is engaged in a public activity or has acquired a certain notoriety can become matters of public interest."[353] The terms "a certain notoriety" nor "public interest" were not defined in this case, and Canada, like Germany and the other common and civil law systems surveyed, continues to grapple with the scope of their meaning.

V. The Categorization of Public Figures in German Privacy Law

In contrast to French law, German privacy law has recognized a stark distinction between public and private figures, beginning with the German Basic Law.[354] It is not the purpose of this

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[351] Quebec Charter of Human Rights and Freedoms R.S.Q. ch. C-12, § 5 (2002). New South Wales Commission, *supra* note 23, at 135.
[352] *Gazette v Valiquette* [1997] RJQ 30, 36. See also *Aubry v. Éditions Vice-Versa* [1998] 1 SCR 591; *City of Longueuil v Godbout* (1997) 152 DLR (4th) 577, [97-98]; New South Wales Commission, *supra* note 23, at 135.
[353] *Aubry v. Éditions Vice-Versa* [1998] 1 SCR 591. New South Wales Commission, *supra* note 23, at 136.
[354] The relevant provisions of the Basic Law are worded as follows: Article 1 § 1—"The dignity of human beings is inviolable. All public authorities have a duty to respect and protect it"; Article 2 § 1--"Everyone shall have the right to the free development of their personality provided that they do not interfere with the rights of others or violate the constitutional order or moral law [*Sittengesetz*]"; Article 5 §§ 1 and 2—"1. Everyone shall have the right freely to express and disseminate his or her opinions in speech, writing and pictures and freely to obtain information from generally accessible sources. Freedom of the press and freedom of reporting on the radio and in films shall be guaranteed. There shall be no censorship. 2. These rights shall be subject to the limitations laid down by the provisions of the general laws and by statutory provisions aimed at protecting young people and to the obligation to respect personal honour [*Recht der persönlichen Ehre*]"; Article 6 §§ 1 and 2--"1. Marriage and the family enjoy the special protection of the State. 2. The care and upbringing of children is the natural right of parents and a duty

Part to undertake an exhaustive survey of German privacy law, but to focus on analyzing recent German jurisprudence that has drawn three sub-divisions regarding public figures, in particular when dealing with the publication of images. These include images of notable public figures (actors, scientists, heads of state, etc.), individuals who attract public attention for only a limited duration (involuntary or temporary public figures), and those who recede back into anonymity after a period of time and have their full rights to privacy restored.[355] No other civil law jurisdiction has enumerated this trichotomy approach to privacy protections, and none has given such a degree of privacy rights to former public figures who have returned to private life—though France comes the closest. As such, the German approach to privacy provides an invaluable case study that should be considered, and if effective, to emulate in the United States.

Tripartite Classification of Privacy Protections for Public Figures in Germany

Classes of Public Figures	***Privacy Rights***	***Rationale***
Permanent Public Figures Example: Prominent politicians	Lowest-level of privacy rights, though some protections do exist while in their private homes, and regarding pictures of aging public figures	Participate in significant historical, political, social, or cultural events that are highly relevant to the public interest
Celebrity Public Figures Example: Celebrities	May invoke privacy rights within "the intimate sphere of their lives," including in the home.	Disclosing details about their private lives does not significantly add to the public interest
Temporary Public Figures Examples: Victims of violent crimes & public prosecutors	Enjoy the right to remain anonymous outside the specific event in question, and even then only for a limited period of time.	These limited public figures are only relevant to the public interest to the extent that they participated in significant community events.

primarily incumbent on them. The State community shall oversee the performance of that duty." New South Wales Commission, *supra* note 23, at 135.

[355] So-called *absolute Personen der Zeitgeschichte*, and *relative Personen der Zeitgeschichte.* Markesinis et al., *supra* note 22, at 17.

The first category of public figures in Germany is so-called "permanent" public figures. These individuals are accorded the lowest level of privacy protections, as is the case in the United States, the United Kingdom, and France, since they participate in significant historical, political, social, or cultural events that are highly relevant to most conceptions of the public interest.[356] Historical pictures, for example, are protected in Germany since they contribute to public discourse, which is an element common in both French and German law.[357] Though, aging permanent public figures retain a stronger privacy interest over their images when and if a dispute arises,[358] as they do while they are in their own homes. Yet the right to protection of private life largely stops at the front door. Outside their homes permanent public figures cannot count on privacy protections unless they are in a secluded place. This context-driven approach to privacy law has been challenged by subsequent ECHR case law, as discussed below.

The second category of public figures in Germany (which we term "celebrity public figures") is accorded more privacy protection than permanent public figures. These public figures, who are mostly celebrities, may invoke privacy rights within "the intimate sphere of their lives."[359] For example, an actress who was photographed while sun bathing in the nude had her privacy protected in Germany despite previously being featured naked in films.[360] Thus, in contrast to U.S. privacy protections for public figures, celebrity is not a blank check for completely uninhibited reporting in Germany. Even prominent public figures, including famous actors and actresses, are afforded a level of privacy for their personal lives that is unheard of in many common law jurisdictions.

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[356] Schwerdtner in MÜNCHNER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH (3rd ed. 1999). Markesinis et al., *supra* note 200, at 17.
[357] Markesinis et al., *supra* note 200, at 18.
[358] *See, e.g.*, the decision LG Berlin 19 November 1996, NJW 1997, 1155 (Ger.).
[359] Markesinis et al., *supra* note 200, at 17.
[360] OLG Hamburg AfP 1982, 41 (Dolly Dollar) (Ger.).

The third category of public figures (temporary public figures) who, by contrast, attract attention only for a limited period of time—usually due to a singular event—is broad and includes individuals who are:

> [C]losely connected to celebrities (e.g., family members, friends or lovers), who hold a public office (e.g., public prosecutors) or enter the public stage due to their profession (e.g., criminal lawyers in high-profile cases), who are involved in criminal proceedings (e.g., suspects and convicts) or who become involved in public events by mere coincidence (e.g., victims of crime, natural catastrophes or traffic accidents).[361]

These temporary public figures enjoy the right to remain anonymous in Germany outside the specific event in question. In essence, the German courts have weighed the right of the public to be informed against the degree of privacy that should be afforded temporary public figures, and have ruled that the publication of images will remain confined to the incident that brought them to the attention of the public in the first place.[362] For example, the man known as the "Cannibal of Rotenburg" who killed, dissected, and consumed his victim, succeeded in convincing the Frankfurt Higher Regional Court to issue an injunction prohibiting the distribution of a film, *Butterfly: A Grimm Love Story*, about the crime holding that it would violate Mr. Meiwes's privacy rights.[363] No U.S. court would have reached this same conclusion since in the United States involuntary (temporary) public figures have extremely limited privacy rights, especially if they sought media attention at any point.[364] Nor are there any temporal limitations on permissible breaches of privacy for involuntary public figures in the United States, like there are in Germany and France.

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[361] Markesinis et al., *supra* note 200, at 18.
[362] *Id.*
[363] Mark Landler, *Cannibal Wins Ban of Film in Germany*, N.Y. TIMES, Mar. 4, 2006, *available at* http://www.nytimes.com/2006/03/04/movies/MoviesFeatures/04cann.html?pagewanted=print (last visited Apr. 21, 2009).
[364] There are however instances where the freedom of the press is favored on the basis of the serving the need to inform the public at the expense a public figure's privacy.

These three categories emphasize the central point that German privacy law has recognized that different classes of public figures deserve different levels of privacy protections because each contributes to the public interest to varying extents. The German Chancellor, for example, is afforded far less privacy protection than a local school teacher who was caught stealing. In contrast to the German system, the U.S. President enjoys a level of privacy that is in many ways on par with both famous actors, and at times even involuntary public figures. It is exceedingly difficult to say which is empirically better—how does one measure the robustness of a privacy right? But examining the German approach to privacy protections for public figures is relevant to the U.S. privacy law since, even though it is a civil law nation, much of German privacy law is judge made. This is also true of the ECHR, which has interpreted Article 8 to develop an exceedingly strong right to privacy. Consequently, recent ECHR jurisprudence on privacy will be analyzed next, and subsequently lessons will be drawn from both it and British, French, and German precedent to develop a proposal for U.S. privacy law that would better recognize the realities of the media and a rapidly changing technological landscape going forwards.

VI. European Court of Human Rights Privacy Jurisprudence and the Convergence of European Privacy Law

English, French, and German approaches to privacy protections for public figures are now arguably converging. The most important reason for this development is the role of the European Court of Human Rights, which has heard a variety of cases from jurisdictions across

Europe relating to privacy concerns.[365] ECHR Articles 8 and 10 are the most relevant provisions guiding the evolving law of privacy for public figures in Europe. Article 8 states that:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence; and (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[366]

Whereas Article 10 provides that:

> 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. 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[367]

There is a growing ECHR jurisprudence interpreting and applying the right of privacy in Article 8 and determining how its boundaries interact with the freedom of expression under Article 10. These decisions are important to examine in their own right in a comparative analysis of privacy protections in Europe, but it is also important to note that these decisions are influencing the development of privacy law in other jurisdictions. For example, in the New Zealand case of *Nicholls v. Registrar of the Court of Appeal*, the court commented in dicta that

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[365] In particular, Articles 45 and 48 of the ECHR extend the Court's jurisdiction to all cases concerning the interpretation and application of the ECHR. Whereas Article 50 provides that when and if the ECHR finds that a decision or measure taken by a legal, or other, authority of a signatory nation is in conflict with ECHR obligations, and if the internal law of the offending nation allows only partial reparation, the plaintiff may obtain full reparation from the ECHR. Finally, Article 55 of the ECHR confirms that signatory nations must abide by the decisions of the ECHR in any case in which they are parties. Many European nations have passed legislation giving domestic force to provisions of the ECHR. *See, e.g.*, the Human Rights Act 1998 §§ 3 & 6 (U.K.). New South Wales Commission, *supra* note 23, at 137.

[366] ECHR, Art. 8.

[367] New South Wales Commission, *supra* note 23, at 138.

ECHR decisions can be important in helping develop New Zealand jurisprudence.[368] To take another example, in *Campbell v Mirror Group Newspapers Ltd*, Lord Hoffman observed that developments in human rights law catalyzed through the ECHR had prompted "a shift in the centre of gravity of the action for breach of confidence."[369] Consequently, ECHR case law, specifically under Article 8, has implications for the future development of privacy protections worldwide, influencing the approach of national courts on such issues as types of protected information, the extent and form of publication attracting a remedy, and the circumstances in which publication can be justified.[370] What follows then is an in depth analysis of prominent Article 8 ECHR case law focusing on a period between 2004 and 2005.

A. ECHR Article 8 Case Law

One primary theme to emerge from ECHR jurisprudence is the importance that the Court has placed on Article 8 protections including privacy, family life, home, and correspondence. These rights are significantly more expansive than a mere right to privacy as seen in the legal systems of common law nations, or indeed in many international accords.[371] As a result, the impact of Article 8 has been far-reaching in its scope. For instance, the ECHR has stated that "private life" in Article 8 is "a broad term not susceptible to exhaustive definition."[372] Specifically, the Court has held that Article 8 protects "a right to identity and personal

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[368] *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385, 397 (Eichelbaum CJ), cited with approval in *Hosking v Runting* [2005] 1 NZLR 1, [53] (Gault and Blanchard JJ). New South Wales Commission, *supra* note 23, at 138.

[369] Lord Hoffman went on to argue that the underlying value of the law has become less about a duty of good faith and more about "the protection of human autonomy and dignity—the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people." *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457 (Lord Hoffman). New South Wales Commission, *supra* note 23, at 138.

[370] New South Wales Commission, *supra* note 23, at 138.

[371] *Id.* at 139.

[372] *PG and JH v the United Kingdom* 44787/98 [2001] Eur Court HR 550 (25 September 2001); *Peck v The United Kingdom* 44647/98 [2003] Eur Court HR 44 (28 September 2003). New South Wales Commission, *supra* note 23, at 139.

development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature."[373] Thus, the ECHR has made Article 8 into both a powerful and a malleable tool for promoting privacy rights across Europe.

In the personal sphere, the Court has determined that Article 8 protects, among other things, gender identification, name, sexual orientation, and sexual life.[374] The ECHR has also identified interference with the right to a private life under Article 8 in the following cases: enforcement of legislation prohibiting homosexual acts committed in private between consenting males;[375] enforcement of legislation providing for a higher age of consent for homosexual men;[376] discharging male and female homosexuals and bisexuals from the military forces because of their sexuality;[377] and refusing to award custody of a child to the applicant because of his homosexuality.[378] And these are just a small sampling of the available case law. The following wide-ranging cases were heard in 2004 and 2005 alone, in each of which the Court found an Article 8 violation.

List of ECHR Article 8 Cases Resulting in Findings of Breaches of Privacy (2004-05)

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[373] *Peck* 44647/98 [2003] Eur Court HR 44. *See, for example*, *Burghartz v Switzerland*, 16213/90 [1994] Eur Court HR 2 (Feb. 22, 1994); *Friedl v Austria*, 15225/89 [1995] Eur Court HR 1 (Jan. 31, 1995); *Niemietz v Germany*, 13710/88 [1992] Eur Court HR 80 (Dec. 16, 1992); *and Halford v. the United Kingdom* 20605/92 [1997] Eur Court HR 32 (June 25, 1997).

[374] *See, for example*, *B v France*, 13343/87 [1992] Eur Court HR 40 (Mar. 25, 1992); *Burghartz v Switzerland* 16213/90 [1994] Eur Court HR 2 (Feb. 22, 1994); *Dudgeon v the United Kingdom*, 7525/76 [1981] Eur Court HR 5 (Oct. 22, 1981); and *Laskey, Jaggard and Brown v the United Kingdom*, 21627/93; 21826/93; 21974/93 [1997] Eur Court HR 4 (Feb. 19, 1997).

[375] *Dudgeon v The United Kingdom*7525/76 [1981] Eur Court HR 5 (Oct. 22, 1981): The right affected by the impugned legislation was held to protect an essentially private manifestation of the human personality. *See also Norris v Ireland* 10581/83 [1988] Eur Court HR 22 (Oct. 26, 1988); *Modinos v Cyprus* 15070/89 [1993] Eur Court HR 19 (Apr. 22, 1993). New South Wales Commission, *supra* note 23, at 139.

[376] *Sutherland v UK* 25186/94 [2001] Eur Court HR 234 (Mar. 27, 2001); *L and V v Austria* 39392/98; 39829/98 [2003] Eur Court HR 20 (Jan. 9, 2003); *S L. v Austria* 45330/99 [2003] Eur Court HR 22 (Jan. 9, 2003); *Ladner v Austria* 18297/03 [2005] Eur Court HR 57 (Feb. 3, 2005). New South Wales Commission, *supra* note 23, at 139.

[377] *Lustig-Prean and Beckett v UK* 31417/96; 32377/96 [1999] Eur Court HR 71 (Sep. 27, 1999); *Smith and Grady v UK* 33985/96; 33986/96 [1999] Eur Court HR 72 (Sep. 27, 1999), *Perkin and R v UK* 43208/98;44875/98 [2002] Eur Court HR 690 (Oct. 22, 2002) and *Beck, Copp and Bazeley v UK* 48535/99; 48536/99; 48537/99 [2002] Eur Court HR 684 (Oct. 22, 2002). New South Wales Commission, *supra* note 23, at 139.

[378] *Salgueiro Da Silva Mouta v Portugal* 33290/96 [1999] Eur Court HR 176 (Dec. 21, 1999).

- The placement of microphones by police in a private residence in order to gather evidence in a criminal investigation;[379]
- Forcing a student to shave off his beard in order to be allowed to complete his university education;[380]
- Surgical interventions on persons suspected of drug trafficking after having swallowed packets with drugs;[381]
- Use of medical reports in court proceedings that concern the applicant without his or her consent or without the intervention of a medical expert;[382]
- Retention of fingerprints and DNA samples of suspects even when no guilt had been established and when the investigation had been discontinued;[383]
- Refusal of a court to establish paternity of a still-born child and allow a change of surname and patronym from that of mother's former husband;[384]
- Absence of legal basis for interception and recording of conversations between the detainee and members of his family;[385]
- Failure of authorities to take adequate measures to protect the applicant from the effects of severe pollution in the vicinity of steelworks;[386]
- Administration of medical treatment without consent during a compulsory psychiatric confinement;[387]
- Classification of the applicant as a security risk and withdrawal of his access card for sensitive areas of an airport;[388]
- Search of a lawyer's office and seizure of privileged material;[389]
- Use in criminal proceedings of transcripts of telephone conversations recorded in the context of separate criminal proceedings;[390] and finally
- The absence of effective procedures for obtaining disclosure of information about tests carried out by servicemen.[391]

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[379] *Vetter v France* 59842/00 [2005] Eur Court HR 350 (May 31, 2005).
[380] *TIG v Turkey* 8165/03 [2005] Eur Court HR.
[381] *Komba v Portugal* 18553/03 [2005] Eur Court HR*; Bogumil v Portugal* 35228/03 [2005] Eur Court HR; New South Wales Commission, *supra* note 23, at 140.
[382] *Le Lann v France* 7508/02 [2006] Eur Court HR (Oct. 10, 2006).
[383] *S and Marper v United Kingdom* 30562/04 and 30566/04 [2007] Eur Court HR (Jan. 16, 2007).
[384] *Znamenskaya v Russia* 77785/01 [2005] Eur Court HR (June 2, 2005).
[385] *Wisse v France* 71611/01, [2005] Eur Court HR 897 (Dec. 20 2005).
[386] *Fadeyeva v Russia* 55723/00, [2005] Eur Court HR 376 (June 9, 2005).
[387] *Storck v Germany* 61603/00 [2005] Eur Court HR (June 16, 2005).
[388] *Novoseletskiy v Ukraine* 47148/99 [2005] Eur Court HR (Feb. 22, 2005).
[389] *Sallinen v Finland* 50882/99 [2005] Eur Court HR (Sep. 27, 2005).
[390] *Matheron v France* 57752/00 [2005] Eur Court HR (Mar. 29, 2005).
[391] *Roche v UK* 32555/96 [2005] Eur Court HR (Oct. 19, 2005); New South Wales Commission, *supra* note 23, at 141. *See also Kalanyos & Others v Romania* 57884/00 [2005] Eur Court HR (failure of the authorities to prevent the burning of houses belonging to Roma villagers); *MA v United Kingdom* 35242/04 [2005] Eur Court HR (deficient judicial process resulting in father's contact with his daughter being greatly minimised and negatively affected); *and Reigado Ramos v Portugal* 73229/01 [2005] Eur Court HR (22 November 2005) (measures taken to enforce a father's right of access to his child). For a complete listing see New South Wales Commission, *supra* note 23, at 141.

Consequently, to put it mildly, the ECHR has developed a robust interpretation of privacy protections based on Article 8. While these decisions have not gone so far as to eviscerate Article 10, the ECHR has clearly weighed personal privacy more heavily than freedom of expression in many instances, including in relation to public figures.

B. Prominent ECHR Cases Defining Privacy Rights for Public Figures in Both Private and Public Places

Several ECHR cases stand out from the plethora of Article 8 jurisprudence in that they specifically limit clause 2 of Article 8 by staying the police powers of states in favor of privacy considerations. Given that clause 2 was the primary check on personal privacy within Article 8, it is necessary to analyze the extent to which these cases have buttressed already strong privacy protections and consider whether these cases have gone too far. Three leading examples will be addressed in turn. Together, these cases demonstrate how far the boundaries of privacy rights have been pushed back in Europe, to the point that the privacy of involuntary public figures are protected in public places despite prevailing public safety concerns. No national jurisdiction, including France or Germany, has gone this far in protecting privacy rights to date. And more to the point, *PG and JH*, *Peck*, and *Von Hannover*, establish that everyone, even if they are known to the general public, must be able to enjoy a "legitimate expectation"[392] of protection of and respect for their private life and that "it is no longer possible to draw a rigid distinction between that which takes place in private and that which is capable of being witnessed in a public place by other persons."[393] In other words, both the victims' status,

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[392] *See Halford v. the United Kingdom*, judgment of June 25, 1997, *Reports* 1997-III, at 1016, § 45.
[393] *McKennitt & Ors v Ash & Anor* [2005] EWHC 3003 (QB), (Eady J). New South Wales Commission, *supra* note 23, at 147.

and the context of the case are now less important to the ECHR than in fulfilling the "legitimate expectation" of privacy for all public figures.

i. PG and JH v. the United Kingdom

The first ECHR case to limit the potential for national police powers to circumvent Article 8 privacy protections is *PG and JH v. the United Kingdom*.[394] In this case, the ECHR held that the use of covert listening devices by U.K. police to record the petitioner's conversations breached Article 8.[395] In its defense, the U.K. government argued that the "aural quality of the applicants' voices was not part of private life but was rather a public, external feature."[396] In addition to this rather dubious claim, the government also argued that the applicants had no expectation of privacy since they were being formally charged with a criminal offense.[397] That is to say, the United Kingdom's primary defenses included arguing that hearing the victim's voice out loud placed him in the public domain, and that they were accused criminals anyway and as such were not entitled to privacy. In response, the ECHR emphasized that "private life is a broad term not susceptible to exhaustive definition,"[398] and it further held that there is a "zone of interaction a person has with others, even in a public context, which may fall within the scope of 'private life.'"[399] Thus, the ECHR rejected both the U.K. government's claims. Instead, it determined that regardless of police necessity, the recording and analysis of taped conversations must be protected as personal data,[400] just as French courts have determined

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[394] *PG and JH v the United Kingdom* 44787/98 [2001] Eur Court HR 550 (Sep. 25, 2001). New South Wales Commission, *supra* note 23, at 142.
[395] This interference with the applicant's privacy could not be justified under Clause 2 of Article 8 as being "in accordance with the law," as there was no applicable domestic law. New South Wales Commission, *supra* note 23, at 142.
[396] *Id.* at 143.
[397] *Id.*
[398] *Id.*
[399] *Id*.
[400] *Id*.

that correspondence transmitted by means of radio waves, optical signals, etc. is likewise confidential.[401] In particular, the ECHR held that once any systematic or permanent record of material from the public domain exists, privacy considerations may arise regardless of whether or not the material had been recorded by security services in a criminal investigation.[402] The Court did not explicitly place any boundaries on this exception to Clause 2 of Article 8, but given the other precedent discussed below it seems that the Court does not foresee the need for such inhibition at this point.

ii. Peck v. The United Kingdom

Another prominent example of the ECHR limiting the right to know in regards to involuntary public figures is *Peck v The United Kingdom*,[403] in which the applicant had been filmed by CCTV on the main street of his hometown holding a knife. This case extended privacy protections for involuntary public figures to public places. The facts of the case are that Peck had attempted suicide a moment before, but this was not caught on tape. Photographs were disclosed, and the national media broadcast the footage. The appellant's face was clearly recognizable in each instance, and the thrust of the coverage was CCTV's usefulness at minimizing and detecting crime.[404] Domestically, the procedural history of the case starts at the Broadcasting Standards Commission and the Independent Television Commission found unwarranted infringement of Peck's privacy.[405] The High Court, though, rejected Peck's application by holding that the CCTV Council was acting within its authority under the Criminal Justice and Public Order Act 1994 in promoting the effectiveness of its CCTV system in

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[401] French Legislation on Privacy, *supra* note 14.
[402] *See also Rotaru v Romania* 28341/95 [2000] Eur Court HR 192 (May 4, 2000). New South Wales Commission, *supra* note 23, at 143.
[403] *Peck v The United Kingdom* 44647/98 [2003] Eur Court HR 44 (Sep. 28, 2003).
[404] New South Wales Commission, *supra* note 23, at 144.
[405] *Id.*

deterring crime.[406] In essence then, the British Court placed CCTV's usefulness in crime prevention and detection above Peck's privacy concerns stating that "[u]nless and until there is a general right of privacy recognised by English law … reliance must be placed on effective guidance being issued by Codes of practice or otherwise, in order to try and avoid such undesirable invasions of a person's privacy."[407]

Peck appealed to the ECHR alleging that the disclosure of the CCTV footage violated his Article 8 rights. The U.K. government countered that Peck's private life was already in the public domain, given that his actions took place in public and were caught on CCTV.[408] But the applicant countered that "the occurrence of an event in a public place was only one element in the overall assessment of whether there was an interference with private life, with other relevant factors being the use of the material obtained and the extent to which it was made available to the public."[409] Ultimately the ECHR agreed with the applicant, affirming its holding in *PG and JH v. the United Kingdom* that some activities occurring within the public context may still fall within the scope of "private life."[410] This was the case despite the United Kingdom's public safety Article 8, Clause 2 claim, again showing the gradual hollowing out of this Clause's effectiveness.[411] The ECHR also reiterated that once a permanent record is made of a person in a

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[406] *Id.*
[407] *Id.*
[408] *Id.*
[409] *Id.* at 145.
[410] *Id.*
[411] Specifically, the United Kingdom argued that the measures that it put into place "pursued the legitimate aim of public safety, the prevention of disorder and crime and the protection of the rights of others." New South Wales Commission, *supra* note 23, at 145. However, in determining whether the disclosure was "necessary in a democratic society in the interests of national security" the Court considered whether the measures were proportionate to the legitimate aims pursued. The Court noted that competent national authorities should strike a balance between public and private interests, but with European supervision depending on the gravity of the case at bar. New South Wales Commission, *supra* note 23, at 145. In this case, the Court weighed the nature and seriousness of the interference with Peck's private life against the interest of the State in preventing crime. Ultimately the Court found that the CCTV Council had other options open to it that it should have pursued, including masking Peck's identity or seeking consent. Thus, the ECHR found for the applicant, holding that the

public place, private life considerations may arise.[412] Overall, the Court found that the disclosure of the footage breached Peck's right to respect for his private life,[413] in an analysis heavily dependent on social need and proportionality of the response.[414] This case is noteworthy for the present purposes though for its singling out of the privacy rights for involuntary public figures, and for demonstrating the ECHR's willingness to extend privacy protections to public places despite an assertion of police power. Such an extension is in contrast to the French approach under Article 226-1.2 of the Penal Code that limits privacy protections when violations occur in public places,[415] and may be seen as currently one of the most progressive interpretations of privacy rights in the world.

In part due to the ambitious scope of the decision, the *Peck* case has echoed in court rooms the world over, demonstrating both the limitations of existing English privacy protections and the gradual development of a legitimate expectation of privacy even in public places. For example, in the New Zealand case of *Hosking & Hosking v Runting & Anor*, the Court commented that the facts in *Peck v United Kingdom* highlight the limitations with the English approach to privacy law, namely using the breach of confidence action to protect privacy interests.[416] While in *McKennitt v Ash*, Justice Eady observed that in the light of *Peck v United Kingdom* (and also *PG and JH v United Kingdom* cases):

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disclosure "constituted a disproportionate, and therefore unjustified, interference with his private life, in violation of Article 8. New South Wales Commission, *supra* note 23, at 146.

[412] New South Wales Commission, *supra* note 23, at 145.

[413] *Id.*

[414] *Id.* at 146.

[415] French Legislation on Privacy, *supra* note 14 (noting that "According to the definition developed by the courts, a private place is deemed to be a place which is not open to anyone without the permission of the person who occupies it in a permanent or temporary manner. Conversely, a place is classified as public if it is accessible to everyone, without specific permission from any person whatsoever, whether access to it is permanent and unconditional or subject to certain conditions."). However, certain breaches committed in a public place are punishable under another provision, namely article 38 of the Act of July 29, 1881. *Id.*

[416] *Hosking & Hosking v Runting & Anor* [2005] 1 NZLR 1, (Gault and Blanchard JJ). New South Wales Commission, *supra* note 23, at 146.

> [A] trend has emerged towards acknowledging a "legitimate expectation" of protection and respect for private life, on some occasions, in relatively public circumstances. It is no longer possible to draw a rigid distinction between that which takes place in private and that which is capable of being witnessed in a public place by other persons.[417]

Thus, the location of an event now matters less as the boundaries of what is considered to be the "private life" continues to expand in Europe, just as it contracts in the United States. Similarly, the privacy rights for involuntary public figures in Europe have also become more robust within the signatory nations of the ECHR. And these protections have become less encumbered by claims of police powers under clause 2, which the Court has consistently disfavored in the face of expanded privacy rights. This phenomenon limited only to ECHR cases brought against the United Kingdom and its common law system.

iii. Von Hannover v. Germany

A final recent, prominent case offering guidance on the ECHR's approach to privacy rights is *Von Hannover v. Germany*.[418] This case analyzes the boundaries of the notion of "private life" that has so vexed other courts. In this instance, Princess Caroline of Monaco complained that the publication by various German magazines of photographs of her in daily life violated her Article 8 rights.[419] Princess Caroline is a very public person. But even with her media exposure, the Court still found that her right to respect for her private life had been breached—these protections extend to a person's name and picture.[420] The ECHR went on to hold that "private life" includes "a person's physical and psychological integrity; and that Article

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[417] *McKennitt & Ors v Ash & Anor* [2005] EWHC 3003 (QB).
[418] *Von Hannover v Germany* 59320/00 (2005) 40 EHRR 1. New South Wales Commission, *supra* note 23, at 146.
[419] Von Hannover is the eldest daughter of Prince Rainier III of Monaco, and is herself the president of several charitable foundations, but does not perform any function within or on behalf of the State of Monaco or any of its institutions. The case involved the applicant's seeking to bar a number of European countries from printing photos of her private life depicting her with her family and significant others in the tabloid press. The proceedings described below were published by the Burda publishing company in the German magazines *Bunte* and *Freizeit Revue*, and by the Heinrich Bauer publishing company in the German magazine *Neue Post*.
[420] New South Wales Commission, *supra* note 23, at 147.

8 is primarily intended to ensure the development, without outside interference, of every human being's personality."[421]

Such broad privacy protections as *Von Hannover v. Germany* increasingly include a social dimension.[422] For example, in this case the Court reaffirmed its holdings in *PG and JH v the United Kingdom*, and *Peck v The United Kingdom* that there is a zone of interaction of a person with others which may fall within the scope of private life."[423] Furthermore, private life in the Court's view requires the State to both abstain from interference in that life as well as the positive obligations inherent in effective respect for private or family life.[424] As the "private life" continues to expand in Europe, so too does the need to balance competing interests of an individual's right to privacy and freedom of expression enshrined in Article 10 of the ECHR.[425]

C. Public Interest (Un)defined: Balancing Article 10 Freedom of Expression with Article 8 Privacy Rights in ECHR Case Law

Unlike in the United States, there is no entitlement in Europe for the public to know everything about public figures.[426] Take how photographs are treated in ECHR case law. The ECHR has acknowledged the essential role of the media in a democratic society to provide information and promote pluralism and tolerance without which there is no "democratic society."[427] Although the media must not overstep certain bounds, in particular respect of the reputation and rights of others, its duty is nevertheless to impart information and ideas on all

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[421] *Id.* In this case, Princess Caroline had not complained of an action by the State, but a lack of adequate State protection of her private life and image under Article 8, Clause 2. The Court held that this provision "does not merely compel public authorities to abstain from interference with the rights it guarantees, but may impose positive obligations. *See also Z v Finland* 22009/93 [1997] Eur Court HR 10.
[422] Von Hannover, at ¶ 69. New South Wales Commission, *supra* note 23, at 147.
[423] Von Hannover, at ¶ 50. New South Wales Commission, *supra* note 23, at 147.
[424] See, *mutatis mutandis*, *X and Y v. the Netherlands*, judgment of Mar. 26, 1985, Series A no. 91, p. 11, § 23; *Stjerna v. Finland*, judgment of Nov. 25, 1994, Series A no. 299-B, pp. 60-61, § 38; and *Verliere v. Switzerland* (dec.), no. 41953/98, ECHR 2001-VII.
[425] Von Hannover, at ¶¶ 57-58. New South Wales Commission, *supra* note 23, at 148.
[426] Von Hannover, at ¶¶ 67-77. New South Wales Commission, *supra* note 23, at 148.
[427] *See Handyside v. the United Kingdom*, judgment of Dec. 7, 1976, Series A no. 24, p. 23, § 49.

matters of public interest.[428] What has been left explicitly unanswered so far in ECHR jurisprudence is a definition of public interest. Many of the Court's cases have turned on what the judges consider to be in the public interest, and so on what the media may report. Though consensus has not been reached on this point, some commentators note that thus far at least the ECHR seems to have adopted an interpretation of the public interest consistent with the French approach. For example, the ECHR has gone so far as to state that:

> The Court considers that a fundamental distinction needs to be made between reporting facts—even controversial ones—capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to impart[ing] information and ideas on matters of public interest …it does not do so in the latter case.[429]

Thus the ECHR has stated in dicta that news relating to the proper functioning of a democratic society is legitimate, while infotainment is not. As a result, articles that impinge on the rights of involuntary public figures who have no official functions and the coverage of which does not contribute to the growth of democratic civil society, as defined by the Court, will doubtless be disfavored by the Court. Therefore the public interest for the ECHR extends only so far as news that meaningfully contributes to important public discourse—little if any weight is given to the value of entertainment, at least to the extent that it can impinge on privacy rights. But passing by any newsstand in Europe may lead the casual observer to the opposite conclusion, illustrating the gap between the law and cultural realities in Europe. The way that this debate has been carried

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[428] Observer *and* Guardian *v. the United Kingdom*, judgment of Nov. 26, 1991, Series A no. 216, pp. 29-30, § 59, and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III. J ournalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, judgment of Apr. 26, 1995, Series A no. 313, p. 19, § 38; *Tammer v. Estonia*, no. 41205/98, §§ 59-63, ECHR 2001-I; and *Prisma Presse v. France* (dec.), nos. 66910/01 and 71612/01, 1 July 2003.

[429] Von Hanover, at ¶ 63.

out within the ECHR may be illustrated in consideration of a series of holdings relating to photographs.

Like in the United States, the freedom of expression extends to the publication of photographs and articles in Europe. But the ECHR has stated that the protection of a person's rights and reputation takes on particular importance in the area of photos.[430] The Court has held in *Von Hannover v. Germany* that the publication of the photos, "the sole purpose of which was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public."[431] This calls for a narrower interpretation of freedom of expression in Europe than that which is common in the United States, signifying that the ECHR has held that intimate photos, even about public figures, cannot be justified under freedom of speech. Rather, the Court has decided tellingly that "the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest."[432] Thus, the Court has not shied away from determining for itself which photographs further the public interest and which constitute unprotected infotainment,[433] in effect rejecting one of the *Gertz* Court's primary concerns. Illustrative of the extent to which the French, and now ECHR interpretation of the public interest has spread, the German Federal Constitutional Court came to the same conclusion

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[430] New South Wales Commission, *supra* note 23, at 148.
[431] Von Hanover, at ¶ 65.
[432] *Von Hannover*, at ¶¶ 76 & 63. New South Wales Commission, *supra* note 23, at 148.
[433] The German Court though notes that entertainment also plays a role in the formation of opinions. It can sometimes even stimulate or influence the formation of opinions more than purely factual information. Entertainment can also convey images of reality and propose subjects for debate that spark off a process of discussion and assimilation relating to philosophies of life, values and behavior models. In that respect, it fulfils important social functions . When measured against the aim of protecting press freedom, entertainment in the press is neither negligible nor entirely worthless and therefore falls within the scope of application of fundamental rights. It is only when a balancing exercise has to be done between competing personality rights that an issue arises as to whether matters of essential interest for the public are involved and treated seriously and objectively or whether private matters, designed merely to satisfy the public's curiosity, are being disseminated.

in the case, noting that the photos were not used genuinely to inform people, but merely to entertain them, consequently limiting freedom of the press in favor of privacy when the two fundamental rights conflict. As the Court stated, "Privacy…is the right to be left alone. One has the right to be left alone precisely to the degree to which one's private life does not intersect with other people's private lives.,"[434] while also noting that "he who lives in a glass house may not have the right to throw stones."[435]

In essence then, the Continental European approach to protections for public figures is converging. This is most evident when comparing the continental European civil law nations and the ECHR, but there is also evidence showing that the ECHR's rulings are having a dramatic effect on the development of English privacy law. What is more, this convergence of how to balance the privacy protections of public figures against freedom of expression is being driven by increasingly widespread agreement as to what exactly constitutes the public interest. It is an open question whether U.S. courts could or should follow the ECHR's lead in this regard. Urgent reform though is required of the currently inconsistent and muddled U.S. privacy law, especially regarding involuntary public figures. Moreover, it is essential for public and private figures alike to know the extent of privacy protections to which they are afforded so that they may alter their behavior accordingly. Thus, what follows is a proposal for how the United States may learn from the experience of the United Kingdom, France, Germany, and Europe generally through the lens of the ECHR, and potentially adopt certain measures that have worked well in these other common and civil law nations in an effort to clarify and strengthen U.S. privacy law without significantly impacting freedom of expression.

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[434] Von Hannover at conclusion.
[435] *Id.*

VII. Summary and a Proposal for Reforming U.S. Privacy Law

Delineating a clear guiding principle or rule for adequate privacy rights for public figures in the United States requires a difficult balancing between freedom of expression and the evolving right to privacy. As has been made apparent in this comparative analysis of privacy laws, nations around the world have accomplished this weighing in various ways and from different starting points. In the United States, courts, and the Supreme Court in particular, have declared that a right to privacy does exist in the U.S. Constitution,[436] but that this right gives way in many instances to a robust First Amendment. U.S. courts have rightly been loath to explicitly consider this conflict of constitutional rights, in particular since it involves placing in the hands of judges the power of deciding what constitutes the public interest, which the Court has refused to do explicitly from *Gertz* forward. But by avoiding stating a clear principle, the Supreme Court has left it to lower courts to decide for themselves what constitutes the public interest. This omission has only muddled the landscape of U.S. privacy law—by avoiding making a difficult decision about the public interest, the Court has punted to the lower courts that have predictably come to various and often contradictory results. Still, opportunities for reform of U.S. privacy law do exist. For example, the ECHR preferences news that contributes to public debate as being inherently more important to a healthy democratic society than mere infotainment, i.e., extensive reporting on the private lives of voluntary and involuntary public figures at the expense of their privacy. By adopting some proposals from European approaches to privacy rights that make sense given the unique U.S. juriculture,[437] it is possible to adopt culturally relative reform that does not sacrifice a robust First Amendment that is absolutely critical to the proper functioning of the American Republic.

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[436] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
[437] SANDRA L. BUNN-LIVINGSTONE, JURICULTURAL PLURALISM VIS-A-VIS TREATY LAW 128 (2002) (defining 'juriculture' as "an axiological and behavioral formula pertaining to the law.").

There are a number of proposals that may be enacted in U.S. privacy law by referencing the above comparative analysis of privacy protections for public figures in common and civil law jurisdictions. For example, currently, U.S. courts do not uphold privacy rights for any public figures that have sought media attention, regardless of the circumstances and timeline involved. This opens up public figures of all stripes to nearly unlimited privacy intrusions at any point after the initial news story or event. European nations, including the French and Germans, have limited the extent to which the privacy rights of involuntary public figures may be compromised, holding that intrusions may only be directly related to the event in question. While German courts have upheld a specific time dimension to privacy intrusions for involuntary public figures—a minor news story twenty years prior does not provide blanked justification for invasions of privacy today in Germany, thought it may well in the United States. There are several ways to solve this deficiency in U.S. privacy law. For example, a more disciplined use of the Brennan test limiting privacy protections only for those individuals who actively seek media attention would seem to be an apt compromise between voiding the rights of involuntary public figures and muzzling the media. But the two most urgent needed reforms are (1) adopting a revised classification for public figures with greater protections for involuntary public figures; and (2) laying down some principle, however vague, as to what constitutes the public interest. Each of these reforms shall be addressed in turn.

A. Redefining Public Figures in U.S. Privacy Law

The U.S. Supreme Court has attempted to define the extent and limitations of the public interest in a number of cases, but has yet to lay down a definitive rule on how to distinguish public and private figures, and what constitutes the public interest. There are innumerable ways to do this, many of which would be preferable over the current confused state of U.S. privacy

jurisprudence. In regards to defining public figures, the Court could adopt a variant of the German model of establishing a tripartite gradient of public figures each level of which would receive a different degree of privacy rights. A four category system may be envisioned. Category I would include elected and appointed public officials, so-called permanent public figures in the German system, who would enjoy the least privacy protections due to the recognized need for the public to know a great deal about them to ensure the proper functioning of U.S. democracy. Though the private lives of these permanent public figures would be open books, the Court could adopt a temporal doctrine limiting relevant information to some time period (for example, a shoplifting charge during a severe economic recession thirty years ago may not be pertinent to a person's candidacy today), and U.S. media outlets should adopt rigorous ethical guidelines encouraging reporters not to pursue stories that are irrelevant to larger public debates. Investigative journalism should be encouraged in any way possible over what Warren and Brandeis originally termed "yellow journalism."

Category II then would comprise prominent celebrities, entertainers, athletes, and intellectuals, who although are not directly involved in the workings of government, do occupy critical positions within civil society. Thus, they should enjoy less privacy protections than private citizens, but slightly more than Category I permanent public figures. Like in Germany, the Court should limit the right to publicize information about these individuals to the circumstances of their fame and not their private lives, unless of course they sought broader news coverage such as 'tell all' interviews. Similarly, temporal limitations should be enacted to avoid *Sidis*-type holdings recurring.[438]

[438] Indeed, the U.S. Supreme Court should reverse *Sidis* and instead adopt temporal and context limitations, especially for involuntary public figures, of the kind used in German and French courts.

Category III includes involuntary or temporary public figures, such as people who have been the victims of violent crime or participated in a newsworthy event. These people would have their privacy rights infringed in relation to the newsworthy event, but would enjoy privacy rights for all other aspects of their private lives. Moreover, the rights for intrusion of privacy with regards to the newsworthy event should be temporally limited to some reasonable time horizon depending on the circumstances of the event, ensuring that a person who has returned to his or her private life is not suddenly thrust back into the limelight without cause. There should also be some agreement that all limited purpose public figures have two things in common: (1) they became involved themselves in a public controversy; and (2) through that involvement must entertain a certain amount of media exposure. These two activities alone, however, will not convert a private person into a public figure**.** *Gertz*, *Firestone*, *Proxmire*, and *Reader's Digest* all indicate that the key to the test is *how* a person seeks to resolve the controversy, not the mere fact that they are involved in the first place. Both *Proxmire* and *Reader's Digest* in particular clarified the Court's belief that the media cannot alter a person's status without some active assistance by the individual. The media cannot alone transform a private individual into a public figure. By emphasizing that a limited public figure must enter a public controversy *and* seek to influence the outcome, the Court in *Firestone* indicated that mere involvement in a controversy would not change a plaintiff's status. Moreover, if a person chooses to subsequently disentangle themselves from the event in issue, they should be given some leeway to do so. And finally the right to publication should not extend to every aspect of the voluntary public figure's lives, but only to those that were originally impacted and which directly relate to the public's interest. The Court has so far avoided enumerating an exact definition of involuntary public figures and the scope of their privacy protections in the face of media coverage. The "limited" public figure

exception that the Court began in *Gertz* should be defined and extended to include more classes of individuals, as well as strengthening their rights to sue under invasion of privacy if the need should arise as proposed above.

Proposed Four-tier Classification of Privacy Rights for Public Figures in the United States

Classes of Public and Private Figures	***Privacy Rights***	***Rationale***
Permanent Public Figures Example: Prominent politicians	Lowest-level of privacy rights, though some protections may exist: (i) if the event was obscure (not directly relevant to the public figure's current role) and occurred in the distant past; (ii) while they are in their private homes after retirement; and (iii) regarding pictures of aging public figures	Participate in significant historical, political, social, or cultural events that are highly relevant to the public interest and so are important to the proper functioning of U.S. democracy
Celebrity Public Figures Example: Celebrities, actors, entertainers, musicians	May invoke privacy rights within "the intimate sphere of their lives," unless broader coverage was sought, and do enjoy temporal limitations on fame such that after a sufficient period of time passes such that they are no longer relevant to the public interest, their privacy rights are restored to Category III or IV levels depending on the facts of the case	Disclosing details about the private lives of celebrities does not in all instances significantly add to the public interest
Temporary Public Figures Examples: Victims of violent crimes & public prosecutors	Enjoy the right to remain anonymous outside the specific event in question, and even then only for a limited period of time	These limited public figures are only relevant to the public interest to the extent that they participated in significant community events
Private Citizens Examples: Everyone else	Enjoy privacy rights to the full extent established by the U.S. Constitution, and are not subject to limitations therein on First Amendment grounds	The lives of private citizens who do not seek media attention or participate in newsworthy events are not within the public interest

Finally, Category IV includes all other individuals, namely private citizens. These individuals should be afforded the greatest degree of privacy protections, given that the public's right to know has not been activated. If the U.S. Supreme Court were to adopt this four category system, although admittedly somewhat vague, it would provide privacy protections for many people who currently do not have them, and offer more guidance to lower courts on how they should treat different types of public figures. Limited public figures in particular would also enjoy far greater privacy protections than they are currently afforded. Disputes and circuit splits could then be litigated, and these principles refined into rules as needed.

To take an example of how this system would work, consider the line of cases deal with the registration of sex offenders. Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act in August 1994, requiring released sex offenders to register with law enforcement.[439] Most states have passed similar requirements.[440] The Supreme Court has upheld the Act on two occasions,[441] while the Hawaiian Supreme Court has struck down a state registration statute on due process grounds.[442] An alternative way to approach these cases would be for reviewing courts to apply the proposed framework above and rule former sex offenders as temporary public figures. This would recognize that these ex-criminals do have more limited privacy rights, but with good behavior they could enjoy progressively more privacy on a temporal sliding scale and eventually may be graduated from the registry. Of course though, the facts of each case are different, which pushes against adopting a rigid classification system. In this way, redefining public figures is not in itself

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[439] 42 U.S.C. 14072(a).
[440] *Sex Offender Registration: National Requirements and State Registries*, Dec. 1996, http://www.wsipp.wa.gov/rptfiles/numberof.pdf (last visited Apr. 15, 2009).
[441] *See* Smith v. Doe, 538 U.S. 84 (2003); *and* Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1 (2003).
[442] *See* State v. Bani, 36 P.3d 1255 (Haw. 2001).

sufficient to overcome the current deficiencies in U.S. privacy law. What is also required is some agreement about what constitutes the public interest.

B. Reconsidering the Public Interest

The U.S. Supreme Court adopted the beginnings of a public interest test in *Rosenbloom*. This test should be resurrected, with some modifications. In *Rosenbloom*, the Court noted the importance of a broad definition of the public interest that included both public and private actors.[443] The Court further found in dicta that freedom of expression is critical to the functioning of democracy since "The Founders . . . felt that a free press would advance 'truth, science, morality, and arts in general' as well as responsible government."[444] Other cases reinforced the judgment that the First Amendment extends to broad matters of public interest, from fixing a college football game,[445] to coverage of a court order to requiring that an African American student be permitted to enroll in the University of Mississippi.[446] Together, the Court held that these cases underscore the vitality, as well as the scope, of the "profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open."[447] Yet at the same time, as the dissent mentions, there still must be an underlying determination of what constitutes the legitimate public interest done by "courts generally and, in the last analysis, by this Court in particular."[448] This was confirmed after the *Gertz* Court rejected the public interest test partly to free trial judges from having to decide what constitutes a matter of legitimate public interest, yet *Firestone* made precisely that kind of decision. The dissent in *Rosenbloom* also notes that U.S. courts are not blessed with prescient powers, and are

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[443] 403 U.S. at 41.
[444] *Id.* at 42.
[445] Time, Inc. v. Hill, 385 U.S. 388.
[446] 388 U.S. at 130.
[447] New York Times v. Sullivan, 376 U.S., at 270-271 (emphasis added).
[448] 403 U.S. at 79.

unable to take polls to determine what constitutes the general popular public interest of a subject. But this argument does not undercut the plurality's contention that the public interest, however difficult to define, must be addressed by the courts in the absence of a Congressional statute.

Yet the Court's recognition of the necessity of at least attempting to define the public interest fell away after *Rosenbloom* with *Gertz*, in which the public figure test had become firmly entrenched and that the earlier emphasis on events is now of secondary concern to the Court. This has led to the current muddle of privacy protections that exists for public figures in that it remains the case that only issues of "legitimate interest" be publicized.[449] But the field of "legitimate public concern" is ambiguous, and far broader than promoting political accountability. Early cases such as *Sidis* expanded this already broad definition further by holding that the public has the right to scrutinize the actions of private individuals if they are relevant to the public action, however broadly such action may be defined.

The inescapable conclusion is that courts cannot help but define the public interest—the U.S. Supreme Court has done it in *Firestone*, and European courts have similarly made such determinations as warranted such as in *Von Hannover v. Germany*. The amorphous definition of the public interest that has evolved in U.S. privacy law since *Gertz* should be reigned in and reinterpreted. One way to do so is by reanimating the foundation that the Court laid down in *Rosenbloom* that, however difficult the public interest is to define, the Court must offer some guidance in this regard lest lower courts adopt their own interpretations and in the process more seriously run afoul of either privacy or First Amendment rights. Such a test would do a better job than those focusing solely on the plaintiff's status or the context involved, and could include a modified principle as that put out by the ECHR. For example, the U.S. Supreme Court could agree that the media should be afforded the highest degree of First Amendment protections when

[449] Post, *supra* note 27, at 997.

it is fulfilling its vital role of "watchdog" in a democracy by contributing to imparting information and ideas on matters of public interest. But instead of shrugging off the rest of reporting as "yellow journalism," the Court could state that some degree of infotainment does perform a valuable societal function to the degree that it entertains people and informs the citizenry of certain legitimate topics—such as the dangers of drug overdose, or teen pregnancy. Though, the Court should encourage such coverage to be limited when the public figure in question does not consent, and that such coverage be put in the broader societal context. Such news could contribute to the public debate by providing popular, illustrative case studies of how to and not to live life that are compelling, especially for younger audiences. Finally, the Court should recognize that information purporting to build the historical record is vital to promoting the public interest, but it should not matter in what publication that information is printed as it does in France. As such, the Court should adopt the reasoning in the French case *Mitterand* while avoiding *Chaplin*. In the final analysis though, what is considered to be in the public interest is defined by community mores.[450] Consequently different cultures, or sub-cultures, define public figures' right to privacy in different ways that change over time. U.S. societal norms regarding privacy are also changing. The Court has already recognized that such changing norms themselves define the right to privacy in *Gertz*, illustrating that revision is overdue. Thus, any principle adopted by the U.S. Supreme Court should be sufficiently flexible to meet the demands of an evolving society, while remaining true to democratic principles of a robust "watchdog" press that will always be essential to the proper functioning of U.S. democracy.

The U.S. press of course will be adamantly against such reforms, especially the adoption of a clearer definition of the public interest promoting investigative journalism over infotainment

[450] Post, *supra* note 27, at 1003.

that may not sell as many copies, just as the U.K. press has similarly preferred a vague definition. But if the alternative is judicial action, this may be the pressure required to accomplish long needed, enforceable ethical reforms voluntarily limiting the extent of infotainment in newsrooms.[451] This change should come from ethics reform in the press, and from the judiciary, since it is so much more difficult to enact privacy legislation through Congress. As Solove said:

> U.S. law has arisen haphazardly, in reactive fashion…The U.S. system is more fractured than other countries, so it's harder to pass broad, all-encompassing legislation. There are so many industries with well-paid lobbyists ready to pounce, the minute you propose anything of any breadth you are inundated with whiny companies that come in and shout 'Not me. not me.'…It's easier to do something pretty narrow and go after the 'now' problem and limit the amount of companies that are angry at you.[452]

Putting that rather bleak assessment of Congress aside, it is true that Congressional reform of privacy law has been difficult at best. Thus while ethical reforms are needed, the U.S. Supreme Court is the one institution that has the power to urgently reform in U.S. privacy law by drafting a clarifying principle on the public interest building off but adapting the ECHR model to meet the cultural realities of the United States, and in adopting a four category approach to public figures similarly customizing the German approach.

Other matters could also be considered, but are less immediately necessary for reform. These include reconsidering whether the location of an event matters less as the boundaries of what is considered to be "private life" expands. Similarly, the Court must grapple to what extent privacy rights are encumbered police powers, which the ECHR has consistently disfavored in the

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[451] This may be an especially apt time to propose far-reaching reforms given the current state of flux of media organizations across America as they struggle to cope with the move away from traditional advertisement-based revenue and towards online content. *Stop the press! The future of US journalism*, INDEPENDENT, Mar. 11, 2009, *available at* http://www.independent.co.uk/news/media/press/stop-the-press-the-future-of-us-journalism-1642112.html (last visited Apr. 22, 2009) (laying out possible future online scenarios to support continued investigative journalism).

[452] Sullivan, *supra* note 38.

face of expanded privacy rights. We are entering new era of privacy law, and the U.S. Supreme Court must adopt the tools necessary to craft a flexible and enduring interpretation of privacy rights upholding a robust interpretation of the First Amendment while guaranteeing the right of privacy to the fullest possible extent.

Conclusion

This comparative analysis has shown that the commonly held belief that the civil law systems in France, Germany, Japan, Switzerland, and Greece mitigate towards protecting the privacy of public figures, while the United Kingdom and the United States common law systems place freedom of expression above the need to protect the privacy of public figures, is not entirely accurate.[453] Each system is in flux, and is grappling with how best to determine the privacy rights of public figures, the proper role of a free press in promoting democracy, and above all defining the public interest. None of these systems has got it entirely right—indeed, there is not one right answer, since each culture requires a different balancing of privacy rights and freedom of expression. In the U.S. context, over a century after Warren and Brandeis presented the term to American jurists for their consideration, privacy has become and remains a central player in American law. To the extent that constitutional law was dominated by the Commerce Clause issues in the 1930s and 1940s; that the 1960s and early 1970s were a time defined in large part by equal protection and due process issues; the 1990s began an era of

[453] In Greek law, for example, following the Swiss model even politicians and prominent civil servants are entitled to have their privacy protected against violation by third parties so long as it does not involve their "honor and reputation." *Public Figures and Right of Privacy in Greek Private Law*, *available at* http://www.ucl.ac.uk/laws/global_law/publications/institute/docs/karakostas.pdf (last visited Mar. 17, 2009). According to the Athens Court of Appeal case 8908/1988, which dealt with the violation of the image of a private figure, "free journalism is not allowed to violate the right of respect to the person of persons that are not of public interest. In the case of public figures, for which readers have an interest for their private lives, the responsibility of a journalist shall be judged on the basis of other, special criteria." *Id.*

privacy.[454] To what extent the new millennium will continue to recognize privacy rights for voluntary and involuntary public figures depends entirely on whether the U.S. Supreme Court decides to adopt guiding principles, informed by the experience of other similarly situated nations, defining the public interest and the privacy rights of public figures. Such definition is vital in an era of technological innovation in which publicizing the acts, however inconsiderate, of private persons to an ever larger audience will become easier and easier. Without such a reinterpretation, inconsistent results in the lower courts will continue to sacrifice privacy on the mantle of infotainment, meaning that neither constitutional right is given its due weight. Privacy though will likely continue to be an area of constant strain in American jurisprudence, as it should be when such fundamental rights are at loggerheads. This ongoing debate is one in which the famous, infamous, and nondescript may all be publicized by the media in an effort to, at its worst, pawn fragile merchandise off on an eager entertainment-orientated society, and at its best enlighten the public discourse for the sake of a well-informed, healthy and democratic civil society.

[454] Gormley, *supra* note 25, at 1340.