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 is 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

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.

-Richard Stolley, Founder and Managing Editor of People Magazine

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Should a politician’s sex life be protected under privacy law? Is it in the public interest? How far does freedom of expression extend? Should it include the right to report on a mother of octuplets, or Tiger Woods marital problems? 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 understandings of privacy are now being reinterpreted in the face of two contemporary forces. The first is the emergence of both international treaties and national laws that have increasingly recognized a right to privacy, which is often compromised in the name of e-commerce or security. Second is a greater degree of privacy violations, facilitated by new advanced surveillance technologies that are feeding the appetites of people who want to know more about public figures of all types. As a result of these factors, privacy rights are being challenged in legal systems around the world, often with varying results both between and within jurisdictions. This Article argues that due to advancing technology facilitating the public’s fascination with celebrity, legal jurisdictions in the United States and Europe are reinterpreting privacy rights leading to divergent definitions of both public figures and the public interest. This is in turn adversely impacting personal privacy in the United States as well as the legal environment of newspapers in particular and multinational businesses such as Google generally. Potential reasons for this divergence are analyzed, including America’s deep commitment to free speech, different understandings of the public interest, and most critically varying legal cultures.

4 David Andreatta, Coming Down From Hero High, TIMES-PICAYUNE, Mar. 21, 2002.
6 See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 UNTS 222, art. 8 [hereinafter ECHR].
7 See for example Privacy and Britain’s courts, ECONOMIST, Mar. 7, 2002; and Edward Wyatt & Tanzina Vega, Stage Set for Showdown on Online Privacy, N.Y. TIMES, Nov. 10, 2010, at B1.
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. Yet defining privacy in a comparative cultural context is exceedingly difficult. To the extent that any agreement has been forthcoming, privacy is generally that which is asserted by individuals against the demands of a curious and intrusive society. As Merton argues, without privacy, “the pressure to live up to the details of all (and often conflicting) social norms would become literally unbearable.” 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 the more advanced the technology, the less privacy may flourish.

Advancing technology is causing societies around the world to rethink the bounds of privacy rights. For example, technology has made it easier than ever to breach the increasingly shear veil of privacy, whether by media, private investigation, workplace monitoring, or surveillance, leading to a regulatory showdown in the United States. Simultaneously, the very definition of privacy is being rewritten, often in conflicting fashions. 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 faced a wave of criticism from its more than 500-million users and backed down from proposed changes to its user agreement that would have made it more difficult to protect private information. Yet other more infrequent Internet users also face privacy violations online, such as when the Southern District of New York ordered YouTube.com to hand over information about its clients’ viewing habits. 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. As a result, the debate about how best and when to protect privacy in a digital world, as encapsulated by the

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10 See infra p. 8.
12 ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 429 (1968); Post, supra note 11, at 958.
13 See for example Wyatt & Tanzina, supra note 7.
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. Yet in open societies, people can feel that they have a right to know a great deal about all public figures. But what is a public figure, and how far does the public’s right to know go in limiting their privacy rights?

Countries around the world draw the line between privacy and the public’s right to know in varying ways, with U.S. and European views becoming increasingly divergent. Depending on the legal system involved, public figures can include everyone from the CEO of Sony, to Captain Chesley Sullenberger of U.S. Airways Flight 1549 that crash landed safely in the Hudson River, to both the perpetrator and victim of rape.\(^\text{16}\) The Parliamentary Assembly of the Council of Europe on the right to privacy\(^\text{17}\) defines public figures 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.”\(^\text{18}\) 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.\(^\text{19}\) Arguably the social value of information regarding the private lives of such public figures is critical when it has the potential for public enlightenment on an important matter (such as regarding the President or Prime Minister’s health).\(^\text{20}\) The same utility is not as immediately apparent when considering publicity about rape victims. Yet in some jurisdictions, like the United States, both have been equally protected.\(^\text{21}\)

\(^{16}\) 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). See also See Forsher v. Bugliosi, 608 P.2d 715, 726 (Cal. 1980) (“Our decision in Briscoe was an exception to the more general rule that ‘once a man has become a public figure, or news, he remains a matter of legitimate recall to the public mind to the end of his days.’”).

\(^{17}\) Resolution 1165 of the Parliamentary Assembly of the Council of Europe (June 26, 1998).

\(^{18}\) Id. at para. 7.

\(^{19}\) No name given v. Kuni, 35 KEISHU 84 (Sup Ct., April 16, 1981).


\(^{21}\) U.S. CONST. amend. I.
Beyond providing spotty protections to individuals, differing privacy laws also impact the legal environment of businesses operating across jurisdictions. 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 United States fell short of the requirements. It took two years of negotiations for the conflict to be resolved, though complaints about the system persist. More recently, several Google executives were convicted in an Italian court for violating the privacy of a child who was shown being bullied in a video posted to Google Video. This has led Google to call for the adoption of global privacy standards. While the business of newspapers is also being affected with increasing financial costs to papers that publicize the private lives of public figures without justification.

I argue below that the reason for such diverging privacy rights, despite the public’s shared fascination with celebrity across cultures, is due to differing legal cultures. For example, some argue that European judges can be “elitist” in their views about what the bounds of the public’s right to know. Consider Von Hannover v. Germany, when Princess Caroline of Monaco complained that the publication by various German magazines of photographs of her in daily life violated her privacy rights. There, even though Princess Caroline is a very public person, the Court still found that her privacy had been breached. The case’s outcome would have likely been far different in a U.S. court. In an age increasingly defined in part by a media bent on satiating public curiosity the lives of public figures, a just balance should be struck.

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25 See for example 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”).

26 A brief empirical assessment of differing approaches to tabloid reporting will underscore the similar approaches to sensationalized reporting at work in the United States and the United Kingdom, despite the differing privacy laws at work in each country. See infra p. 11.

27 Telephone interview with Lawrence M. Friedman, Professor of Law, Stanford Law School, Nov. 6, 2009.

28 Von Hannover v Germany 59320/00 (2005) 40 EHRR 1.
between freedom of expression and the individual’s right to privacy. But if anything, views on privacy in the United States and Europe are growing more not less divergent. As Whitman argues, “In the law of privacy…the contrast between Europe and the United States is stark and is growing starker.”

Thus, nations around the world 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. These cases were chosen as these jurisdictions share similar popular cultures, but with varying legal cultures being from a mix of common and civil law nations making it easier to identify both reasons for the divergence of privacy law and to find areas of common ground. The focus of each case study is 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. Such an outcome would begin to bridge the growing divide in privacy laws, protecting privacy, satisfying the public’s right to know about events in the public interest, and providing businesses increased certainty.

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

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31 See for example Catherine Hancock, Origins of the Public Figure Doctrine in First Amendment Law, 50 N.Y.L. SCH. L. REV. 81 (2005); and Darby Green, Almost Famous: Reality Television Participants as Limited-Purpose Public Figures, 6 VAND. J. ENT. L. & PRAC. 94 (2003).
approach to U.S. privacy law that incorporates lessons from other similar legal regimes. Part I defines the elements of privacy relating to voluntary and involuntary public figures. Part II then examines the development and current state of U.S. privacy rights for public figures. Part III focuses on the right to privacy for public figures in the United Kingdom, paying particular attention to the interplay between British Courts and ECHR jurisprudence. Part IV then investigates French privacy law, which is illustrative of the greater protection that civil law systems. Part V evaluates German privacy jurisprudence dealing with public figures, notably the tripartite structure for the privacy rights of public figures. Finally, Part VI summarizes European approaches to privacy protections through the lens of the European Court of Human Rights privacy cases, concluding with a proposal for how U.S. courts may better balance the right to privacy with freedom of expression in a rapidly changing world.

I. Defining Privacy Rights in Cultural Context

Privacy is a vast concept encompassing (among much else) freedom of thought, of bodily integrity, solitude, information integrity, freedom from surveillance, and the protection of reputation, and personality. But as has been shown there is not one definition, or even one scheme for privacy globally. “We’re not even sure what the gold standard [for privacy] is,” according to Merri Beth Lavagnino, Chief Privacy Officer for Indiana University. 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. But there has been more agreement on the extent of disagreement 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);

33 Interview with Merri Beth Lavagnino, Chief Privacy Officer, Indiana University, Bloomington, IN, Oct. 16, 2010.
34 See generally Ken Gormley, One Hundred Years of Privacy, 1992 Wis. L. Rev. 1335 (1992).
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).  

But even these iterations are by no means the exclusive interpretations 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. Such a neutral conception of privacy has advantages. It is useful, for example, in the cross-cultural analysis of privacy, because it creates an independent object of analysis. But determining an objective, empirically-based metric of privacy is difficult. In countries that may be characterized by low-government-involvement, such as the United States and Japan, the government assumes a “hands-off” role allowing injured individuals to petition the courts to redress their privacy grievances. 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. This interpretation, though, can be contrasted with the high-government-involvement nations of continental Europe, such as Sweden, which licenses and regulates personal data, or even Japan. The open question is how to empower civil society while still respecting privacy rights.

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

35 Id. at 1340.
37 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).
39 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).
40 Id.
42 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).
In many parts of Europe for example, personal identification cannot be collected without permission; employers cannot read their workers’ private email (in contrast to the United States); and personal information cannot be shared across companies without express consent. Some European nations can even veto a parent’s choice for their baby’s name for the sake of preserving dignity. 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.

Yet little agreement exists about the bounds of privacy protections even 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. Debates rage over whether a new tort of invasion of privacy should be created in Britain, 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 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 both U.S. jurisprudence and global business.

Nor has the presence of guiding international law on the subject caused privacy rights to converge. 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. But it is answering what

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44 Sullivan, * supra* note 22.
45 Id.
47 See 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).
48 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
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.\textsuperscript{49} Thus, despite its acknowledged importance, the concept of individual privacy varies greatly across cultures—British paparazzi are commonly thought to be among the most intrusive in the world,\textsuperscript{50} while in New Zealand celebrities enjoy relative privacy.\textsuperscript{51} For example, consider the vague Greek right of privacy: “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 without intrusions by third parties.”\textsuperscript{52}

Each year since 1997, the U.S.-based Electronic Privacy Information Center and the U.K.-based Privacy International have undertaken a survey of global privacy. The Privacy and Human Rights Report surveys developments in 70 countries, assessing the state of surveillance and privacy protection in publishing the following map:

\begin{center}
\textbf{Figure 1: World Privacy Map}\textsuperscript{53}
\end{center}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{world_privacy_map.png}
\caption{Map of Surveillance Societies around the world}
\end{figure}


\textsuperscript{50} \textit{See generally} EHLERS, supra note 46.

\textsuperscript{51} \textit{Id.}


Much of these differences in attitudes towards privacy rights may be attributed to the underlying legal traditions at work. Consider the difference in media coverage during just one day between a U.S. and U.K. tabloids. On February 11, 2011, for example, the British tabloid The Sun featured no fewer than 16 articles on celebrity antics ranging from stories about breakups, injuries, drug problems, vacation plans, as well as spreads on “Today’s Celebrity Photos” and a special “Hottest Women of the Week” section. While on February 11 the U.S. magazine People boasted similar stories ranging from LeAnn Rimes’ wedding plans, to an exclusive on Ashton Kutcher and Demi Moore’s vacation, along with ‘Style Watch,’ and a section on what stars are buying at the grocery store. This comparison helps highlight the fact that British, and for that matter European popular culture generally, is fundamentally similar to American tastes insofar as our shared fascination with celebrity. Tabloids in either country reflect the relative popularity of stars and trends. Thus, instead of privacy protections differing due to societal tastes, I argue that it is rather the underlying legal cultures at work that explain this divergence, especially the attitude of judges. As we will see, while certain judges in Europe are all too ready to declare that the public does not have a right to know about the private lives of celebrities like the Princess of Monaco, or even in some cases leading politicians like Chancellor Angela Merkel, judges in the United States have not drawn similar lines due in large part to robust First Amendment protections. As Friedman has remarked, “The German public wants to know it all about celebrities just as the U.S. public does. But U.S. courts seem to feel that if the public has a right to know, then they should know. While in Germany courts have found that the right to be entertained is no reason by itself to allow something to be published about a public figure.”

But while differing legal cultures are an important factor for explaining divergent privacy rights, so too are even more fundamental legal constraints and historical traditions. For example, 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. This has led to a privileged place for the media in U.S. law that it enjoys to this day. Privacy in Britain has evolved through common law leading to a nuanced and less robust set of privacy protections than that found in other systems. While in France, the rights-based tradition illustrated through the Codes has created one of the strongest

56 See infra p. 65.
57 Friedman, supra note 27.
58 ld.
rights to privacy in the world. Thus, 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. 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.\(^{59}\) In an effort to promote reform for U.S. privacy law in an era of rapidly advancing technology, this Article focuses on a case analysis approach rather than statutory reform.

“You have zero privacy…Get over it,” said Scott McNealy, Chief Executive Officer of Sun Microsystems.\(^{60}\) 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.\(^{61}\) 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.”\(^{62}\) 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 arrested or detained but not yet convicted of any crime.\(^{63}\) This adds to fears that the United States is gradually becoming a surveillance society in which privacy takes a backseat to the public safety.\(^{64}\) As technology continues to improve, and absent more robust privacy protections, this problem will only come into sharper relief.


\(^{62}\) Id.


\(^{64}\) See for example Charlie Savage, U.S. Tries to Make it Easier to Wiretap the Internet, N.Y. TIMES, Sep. 27, 2010, at A1.
In summary, widely differing cultural traditions have led to divergent understandings of privacy rights around the world. Such intercultural disagreements have lead to tensions and business disputes in the past, and likely will continue to unless common ground is found. To this end, the next Part analyzes both the development and current state of privacy protections for public figures in U.S. jurisprudence.

II. This Just In: The Right of Privacy for Public Figures in the United States

Before it is possible to conduct a comparative analysis of the privacy rights of public figures, 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. I then focus on the right to privacy for both voluntary and involuntary public figures. This discussion centers on prominent cases dealing with media rights in the United States through the lens of sociological jurisprudence.

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.

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. 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

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65 Sullivan, supra note 22.
66 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).
67 Lawrence M. Friedman, Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History, 30 Hofstra L. Rev. 1093, 1127 (2002).
68 Kwall, supra note 39, at 1.
public figures of all stripes fed in turn by an increasingly intrusive media.\textsuperscript{69} The desire to learn more about these figures has led to the right of privacy clashing with the First Amendment.\textsuperscript{70} 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.\textsuperscript{71} Modern U.S. privacy law began with Louis Brandeis and Samuel Warren’s famous 1890 article, \textit{The Right to Privacy}.\textsuperscript{72} In it, they urged courts to consider whether privacy, “the right to be left alone,” and “the right to one’s personality,”\textsuperscript{73} should be protected in the face of what they termed “yellow journalism,”\textsuperscript{74} today what we might call “infotainment.”\textsuperscript{75} 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 come into ever sharper relief with the birth of the Information Age.\textsuperscript{76} 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. Tort compensation was originally justified for those so offended.\textsuperscript{77} 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.\textsuperscript{78} Instead, they reasoned that


\textsuperscript{70} Id.

\textsuperscript{71} Maria Sguera, \textit{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).

\textsuperscript{72} Warren & Brandeis, \textit{ supra} note 9.

\textsuperscript{73} Id. at 207.


\textsuperscript{76} This invasion brought about by swift and far-reaching technological change has led some to question what constitutes a ‘public figure’ in cyberspace. \textit{See} E. Casey Lide, \textit{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).

\textsuperscript{77} Warren & Brandeis, \textit{ supra} note 9, at 211.

\textsuperscript{78} Id.
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. 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. 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.” In other words, the goal of privacy law became to provide redress for “injury to [a] plaintiff’s emotions and his mental suffering,” and to regulate the publicizing of private life. The elements of the modern invasion of privacy tort include publicizing material that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public. It is part (b) that is at the heart of the matter according to Warren and Brandeis, which will be returned to below. 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*, 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 an 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, Morgan owed a debt to Brents. Brents was unsuccessful in recovering the debt, and in frustration put up a sign publicizing the dispute. This case thus explicitly involves the last element of the disclosure tort, which is also termed the “privilege to report news.” Ultimately the Court held in *Brents* that the matter at issue was not in the public interest. Thus in this beginning stage of U.S. jurisprudence on the subject, privacy trumped the public interest.

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81 *Post*, supra note 11, at 958.
82 *Id.* at 978.
83 *Restatement*, supra note 79, at § 652D.
84 221 Ky. 765, 299 S.W. 967 (1927).
85 *Restatement*, supra note 79, at § 652D; *Post*, supra note 11, at 996.
86 Virgil v. Time, Inc., 527 F.2d 1122, 1128 (9th Cir. 1975), cert. denied, 425 U.S. 998 (1976). *See also* Warren & Brandeis, *supra* note 9, at 214 (arguing that “the right to privacy does not prohibit any publication of matter which is of public or general interest.”).
87 *See* 122 Ga. 190, 50 S.E. 68, 74 (1905).
Initially then, U.S. 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. The precise privacy law tort at issue in Eastman required a plaintiff to allege that a defendant had intentionally intruded upon the plaintiff’s solitude or seclusion in a manner that would be highly offensive to a reasonable person. The court noted that such a violation damages a person by discrediting his identity, denying the chance for a person to become “complete.” In so doing, the privacy tort has gradually devolved the authority of enforcement into the hands of private litigants. From the beginning, therefore, the task of the common law has been to balance the importance of maintaining individual information preserves against the public’s general interest in information. This battle has played out in courtrooms across the United States, notably in cases relating to freedom of expression that I turn to next.

B. Extra, Extra: Read all about it! The Birth of Robust First Amendment Protections for the Media in U.S. Case Law

The conflict between the 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 and later the Hustler Magazine v. Falwell 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. In Sullivan, the U.S. Supreme Court first brought libel law within the scope of the First Amendment. There, 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 statement was made with “actual malice.” The Sullivan Court reasoned that the First

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89 Post, supra note 11, at 960.
90 Id. at 963.
91 Id. at 964.
92 Id. at 997.
94 485 U.S. 46 (1988). See also 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) (noting that in this case the Court held that an advertisement parody of conservative religious leader Jerry Falwell was constitutionally protected, since the statement “could not reasonably have been interpreted as stating actual facts about the public figure involved.”).
95 Sguera, supra note 71, at 352.
96 Euben, supra note 94, at 1439.
97 50 Am. Jur. 2d Libel 33 (1995) (stating 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
Amendment’s manifested 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 sometimes unpleasantly sharp attacks on government.” 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.

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. 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 and Associated Press v. Walker, 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. 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 the plaintiff was a private individual. 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

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98 John O. McGinnis, The Once and Future Property-Based Vision of the First Amendment, 63 U. Chi. L. Rev. 49, 352 & n.166 (1996) (arguing that in Rosenbloom v. Metromedia, Inc., a divided Court ruled that the Sullivan knowing-or-reckless standard applied to private plaintiffs as well). See also James P. Naughton, Gertz and the Public Figure Doctrine Revisited, 54 Tul. L. Rev. 1053, 1053 (1980) (arguing that 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).


100 Naughton, supra note 98, at 1057.


102 393 S.W. 2d 671, 674 (1965).

103 403 U.S. 29 (1971).

104 Naughton, supra note 98, at 1054.
plaintiff’s status. 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.  

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; and (2) the fear that the law of libel as then applied by many states would lead to “self-censorship.” In the Court’s view, most state libel laws hindered public discussion by requiring critics of official conduct to bear the burden and expense of proving the truth of their criticisms. 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 or she proves reckless disregard. Justice Brennan argued that the privilege accorded the media corresponded to the immunity long enjoyed by public officials. 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. Similarly, because the public must be capable of understanding and criticizing government, Brennan argued the media should enjoy a parallel immunity so that citizens may be unafraid to challenge their elected representatives.

Except for the few whose general fame and notoriety make them “public” for virtually all purposes, “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. For example, in the 1967 case

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106 Naughton, *supra* note 98, at 1054.  
107 *Id.* at 1078.  
108 *Id.* at 1079.  
109 *Id.*  
110 *Id.* at 1058.  
111 *Id.*  
112 *Id.*
Times, Inc. v. Hill\textsuperscript{113} 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.”\textsuperscript{114} This state of affairs changed in the 1980s when courts began to reconsider the media’s perceived overstepping of First Amendment protections for both voluntary and involuntary public figures.\textsuperscript{115}

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

County Commissioners, Mayors, Governors, and Presidents are all public officials, and so may find only limited solace from invasion of privacy laws in U.S. courts. The political importance of disseminating full information about such individuals has led courts to view them as being within the public’s eye.\textsuperscript{116} In other words, the Speaker of the House’s sexual exploits are in theory a matter of public concern—those of a 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”\textsuperscript{117} in the United States.

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...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.\textsuperscript{118}

Consequently 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

\textsuperscript{113} 385 U.S. 374 (1967).
\textsuperscript{114} Id. at 410 (Harlan, J., concurring in part and dissenting in part); Sguera, supra note 71, at 352.
\textsuperscript{117} 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).
\textsuperscript{118} RESTATEMENT, supra note 79, at §652D. See also R. SLACK, LIBEL, SLANDER, AND RELATED PROBLEMS 410-11 (1980).
public officials. Some have argued that this is due to the American celebrity/entertainment society in which the (apparent) barriers between the leaders and the led break down, feeding an insatiable curiosity about celebrities that has turned into something close to a right to know everything about public figures. The Restatement Second though rejects this view, arguing that even the best known persons have some privacy protection. 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.” The convergence of these two factors destroys the invasion of privacy tort in the Brandeis and Warren sense for voluntary public figures—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.

But there still exists a limited right for voluntary public figures to only have issues of “legitimate interest” be publicized. 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 involving the child prodigy William Sidis who may have been among the smartest people ever to have lived, boasting a documented IQ 100 points higher than Einstein. Sidis had slipped into obscurity until he was featured in a 1937 “Where Are They Now” sketch in The New Yorker. Even though Sidis avoided all publicity for over 20 years, the court concluded that Sidis could not recover for invasion of privacy, because the “public interest in obtaining information” overrode “the individual’s desire for privacy.” The court reached its conclusion since Sidis was once a public figure whose early accomplishments were a matter of public record. In other

\begin{enumerate}
\item[120] Friedman, supra note 67, at 1127.
\item[121] Id. at 1115.
\item[123] Id.
\item[124] Friedman, supra note 67, at 1126.
\item[125] Post, supra note 11, at 997.
\item[126] See infra pp. 43 & 57.
\item[127] 113 F.2d 806 (2d Cir.), cert. denied, 311 U.S. 711 (1940).
\item[128] Id. at 809; Post, supra note 11, 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) (holding that 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).
\end{enumerate}
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.\footnote{See infra p. 60.} In essence, the Sidis Court held that the public has a right to inquire into the significance of public persons and events independent of when they happened.\footnote{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, \textit{supra} note 50, at 1126 (holding that “bodysurfing was a matter of legitimate public interest.”).} Although the case is now more than 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, unlike the German, French, and Japanese legal systems.\footnote{See for example Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931); and Privacy and the news media, http://www.runet.edu/~wkovarik/class/law/1.6privacy.html (last visited Apr. 19, 2009).} 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 secrets. It is perhaps for this reason that the “right of privacy” never made much headway in its original sense.\footnote{Friedman, \textit{supra} note 67, at 1128.} 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 nations, but the legal protections are starkly different in that many European public figures enjoy privacy rights in spite of their celebrity.\footnote{Id.} 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. The issue, to the extent that one still exists, often focuses on a person’s status. These 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.\footnote{Sguera, \textit{supra} note 71.}

\section*{D. The Status of Involuntary Public Figures in U.S. Law}

\footnote{\textit{See infra} p. 60.\textit{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, \textit{supra} note 50, at 1126 (holding that “bodysurfing was a matter of legitimate public interest.”).\textit{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, \textit{supra} note 50, at 1126 (holding that “bodysurfing was a matter of legitimate public interest.”).\textit{See for example} Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931); and Privacy and the news media, http://www.runet.edu/~wkovarik/class/law/1.6privacy.html (last visited Apr. 19, 2009).\textit{Friedman, \textit{supra} note 67, at 1128.\textit{Id.}\textit{Sguera, \textit{supra} note 71.}}
In the United States today those who commit crimes become “persons of public interest,” as do acquitted murders, pregnant pre-pubescent teenagers, and Siamese twins. Even individuals who associate with these accidental public figures themselves forego privacy protections. One explanation for this unfortunate fact is the need for informed 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 of teen pregnancy. This can be contrasted with other areas of private life that now have increased protection, such as the safeguards surrounding the release of medical information in the Health Insurance Portability and Accountability Act (HIPAA). 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. Police officers, for example, are almost invariably classified as public officials in the United States. The category includes not only those who seek to influence public affairs, but also those who attract media attention by success in their careers or avocations. 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. And as with voluntary public figures, publicity that is unconnected to a newsworthy event may nevertheless give the right for the media to publicize facts about an involuntary public figure that would otherwise be private. The Restatement, however, does not explain why the private lives of involuntary public figures should be subject to “authorized

136 230 S.C. 330, 95 S.E.2d 606 (1956) (holding 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.”).
137 Sguera, supra note 71.
140 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.”)
141 See, e.g., 388 U.S. at 154.
143 Post, supra note 11, at 1002.
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 unrelated events decades after the fact.\textsuperscript{144} This begs the question as to 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 information falling “within the scope of legitimate public concern,” and often is interpreted by publishers and broadcasters as being “in accordance with the mores of the community.”\textsuperscript{145} In other words, news is whatever the majority in a community says it is. As the Court in\textit{Gertz} states:

\begin{quote}
We express no comment on whether or not the newsworthiness of the matter printed will always constitute a complete defense...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 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.\textsuperscript{146}
\end{quote}

Consequently in\textit{Gertz}, the Court seems to be 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 a sociological jurisprudential philosophy with regards to defining the privacy protections for public figures. News, then, is culturally variable. What is worthy of front-page news status in\textit{The Daily Mirror} can be very different from\textit{The Washington Post}. What is proper becomes a matter of community mores.\textsuperscript{147} 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

\textsuperscript{144} See Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 302 (Iowa 1979),\textit{cert. denied}, 445 U.S. 904 (1980); Post,\textit{supra} note 11, at 1002.

\textsuperscript{145} \textit{RESTATEMENT},\textit{supra} note 79, at § 652D; Sguera,\textit{supra} note 71.

\textsuperscript{146} Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.),\textit{cert. denied}, 311 U.S. 711 (1940).

\textsuperscript{147} Post,\textit{supra} note 11, at 1003.
against frequent abuses of privacy, so too should there be a reassertion of the central place of privacy in U.S. courts.\footnote{See for example Cowell, supra note 14.}

Applying the \textit{Restatement}’s test premised on sociological jurisprudence explains the contradictory South Carolina Supreme Court’s holdings in \textit{Meetze} and \textit{Hawkins v. Multimedia, Inc.}\footnote{288 S.C. 569, 344 S.E.2d 145, \textit{cert. denied}, 479 U.S. 1012 (1986) (upholding 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.).} These 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.”\footnote{Post, \textit{supra} note 11, at 1005.} The community mores at issue in the “legitimate public concern” test give the press “reasonable leeway to choose what it will tell the public.”\footnote{\textit{Id}.} The press has used this leeway to write up 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.”\footnote{\textit{Id}.} This extremely broad definition of news 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.\footnote{327 Mass. 275, 98 N.E.2d 286 (1951) (using 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”).} Consequently the \textit{Restatement}, and in fact almost all courts interpret the “legitimate public concern” requirement as insulating media outlets from legal liability for reporting news that is uncivil and even “deplorable.”\footnote{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, \textit{supra} note 11, at 1005.}

Consider the case of Robert O’Donnell who heroically saved an eighteen-month-old girl in Texas, only to have his marriage fall apart and a prescription drug addiction come to light, leading to O’Donnell’s eventual suicide.\footnote{Andreatta, \textit{supra} note 4.} 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,” and cited the Gertz standard. 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, actionable in a defamation suit. The Gertz fact-versus-opinion distinction was turned into a “totality of circumstances” test in the 1985 case Ollman v. Evans, which includes a balancing test incorporating: (1) the specificity of the statement; (2) its verifiability; (3) its literary context; and (4) its public context. 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. 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.”

This is not the only episode though in which the Court has avoided enumerating an exact definition of involuntary public figures and the scope of their privacy rights.

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, for example, a Saturday Evening Post article accused university football coach Butts of fixing a football game. In considering the matter, the 1967

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157 Atlanta Journal-Constitution, 555 S.E.2d at 183 (quoting Gertz, 418 U.S. at 342 & 345).
158 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). See also Sarah Ludington, Reining in the Data Traders: A Tort for the Misuse of Personal Information, 66 MD. L. REV. 140, n.137 (2006).
159 Ollman v. Evans, 471 U.S. 1127 (1985) (noting “we 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.”).
161 388 U.S. 130 (1967) (holding that a football coach is a “public figure” and subject to New York Times v Sullivan standard); McGinnis, supra note 98.
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. 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.

Criticism of the rule is likely to continue inasmuch as the public figure cases, in particular Hutchinson v. Proxmire, and Wolston v. Reader’s Digest Association, Inc., both decided in 1979, rest squarely on the logic of Gertz. In Hutchinson v. Proxmire, Professor Ronald 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. 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. In these decisions though, the Court 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. 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.” Although inconsistent, the Court has relied on this formulation of involuntary public figures in its subsequent jurisprudence.

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162 Euben, supra note 94, at 1457.
164 443 U.S. 157 (1979) (holding that Wolston was “dragged unwillingly” into the investigation).
165 Naughton, supra note 98, at 1054.
167 Id.
168 443 U.S. at 134-36.
To illustrate the conclusion that involuntary public figures are made by the attention seeker, not the media, in *Time, Inc. v. Firestone* the Court held that a *Time* magazine article that published an account of an expensive divorce 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 involuntary. While in the majority’s view, the plaintiff was not prominent in local society and thus was not a general-purpose public figure. 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.

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. This proposition 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.”

### iii. Defining “Public Interest” in U.S. Privacy Law

The Court has attempted to lay out both 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*, for example, a

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170. Naughton, supra note 98, at 1058.
171. *Id.* at 1071.
magazine published an incorrect credit report that falsely stated that the defendant 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.” There, the Court found that the credit report’s “form and context” was not a public matter because the report went to only five subscribers. The natural question though is what would circulation 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.

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., 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, wiretapped his telephone, hired prostitutes to entrap him into an illicit relationship, and kept him under surveillance. 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.” 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 outcome 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.

Lower courts have increasingly seemed to contradict the spirit of Supreme Court holdings by 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.,

173 Id. at 763.
174 Euben, supra note 94, at 1459.
176 Id. at 771.
177 See infra p. 60.
though Lee’s HIV positive test was published in a local newspaper, *The Daily Oklahoman*.

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. 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 happens to a definition as broad as “public interest” without guiding Supreme Court precedent—one hundred District Courts may reach as many 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,” 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 little agreement about defining the public interest, U.S. courts have been loath to hold an invasion of privacy whenever an individual seeks media attention. This principle is illustrated by a case involving a man who filed a police report stating that he thought a black panther had escaped in Los Angeles. When this was proven inaccurate, the man sued NBC for invasion of privacy. A California appellate court held that he had brought the invasion on himself, noting “there can be no privacy in that which is already public.” Though what is less clear is whether or not these individuals are limited public figures who are entitled to a right of privacy in some areas of their lives, such as involving domestic violence or a drug addiction. So far the preponderance of U.S. courts have spurned such arguments, unlike in continental Europe.

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180 Lee, 948 F.2d at 1165 (noting that both the size and nature of the claim attracted the news media). Closen, *supra* note 179, at 966.
181 Marbury v. Madison, 5 U.S. (Cranch 1) 137 (1803).
184 See *infra* p. 60.
Under an invasion of privacy approach everything comes back to newsworthiness, and thus an implicit balancing test between freedom of expression and privacy. Gradually, courts have been stretching the bounds of what it means to seek media attention. Emblematic of this trend, one court considered what degree of privacy should be afforded a person wishing to become an actor, noting in dicta: “Where…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.” 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 holding 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. Even an unknown author may be deemed a limited purpose public figure. This seems counterintuitive—if you do almost nothing to thrust yourself in the public eye, why should your privacy rights be nearly on par with a U.S. Senator?

U.S. courts though have drawn some lines to protect the publication of involuntary public figures’ private affairs. One example is when the victim is broadcast at a private moment without their consent. Another involves so-called media “ride-alongs.” 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…would say that he had no concern.” What this

185 Jacova, 83 So. 2d at 37 (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 71, at 358.
District Court then 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 divergent jurisprudence on the matter of defining the public interest.

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. Commentators have puzzled over the extent to which one must engage in purposeful activity in a public controversy before qualifying as a public figure. Justice Brennan argued in his Rosenbloom opinion that everyone is “public” in some way, if only because all of us are members of the community. 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**

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.” 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. The U.S. foundation of free speech and a free press, including the right to be voyeurs, should not be usurped. But greater privacy protections are clearly needed, especially

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193 Naughton, *supra* note 98, at 1075.
194 Id. at 1076.
196 Friedman, *supra* note 27, at 1127.
197 Sguera, *supra* note 71, at 361.
198 Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDozo ARTS & ENT LJ 273, 296 (1997) (noting that “[w]e 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.”).
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. Not everything a public figure does is naturally in the public interest—as is the law in France and Germany.

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, which is essential for autonomy. The civility rules maintained by this tort embody the obligations owed by members of a community to each other, helping to define the substance and boundaries of community life.199 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 public debate.200 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. 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,201 but on the other it gives little guidance to lower courts on defining the public interest. Content analysis in some circumstances 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 insights by considering the holdings of other courts, such as those of the United Kingdom, as well as the European Court of Human Rights. Afterwards, the civil law systems of France and Germany will be considered, focusing on how French courts have defined the public interest, and how German courts structure the privacy rights of public figures.

199 Post, supra note 11, at 1007.
200 Id. at 1008.
201 Naughton, supra note 98, 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 exist in how 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, “For a nation of secretive people, Britain is curiously casual about privacy.”

This is illustrated by the ubiquitous placement of over four million CCTV cameras in Britain, as compared with a little over 3,000 in all of New York City. This fact 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. This section investigates the evolution of U.K. privacy law and the recent role played by the ECHR in English jurisprudence, comparing key decisions to U.S. privacy law along the way.

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. 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. For purposes of this Part though, the ECHR is key to 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.”

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

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202 Privacy and Britain’s courts, ECONOMIST, Mar. 7, 2002.
206 See infra pp. 57-61.
similar to the United States in explicitly balancing freedom of expression and privacy under Article 8 of the Human Rights Act.\textsuperscript{208}

The development of additional privacy protections in English law is far from universally praised. \textit{News of the World} editor Colin Myler has lamented, “our press is less free today…based on privacy laws emanating from Europe.”\textsuperscript{209} In this case, \textit{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. Ultimately the judge accepted that sexual activity by consenting adults in private is not a legitimate target for media exposure,\textsuperscript{210} which is contrary to some U.S. courts.\textsuperscript{211} In this way, Mosley’s victory shifted the pendulum in the direction of greater privacy rights for public figures in Britain. Though, generally privacy rights are less prevalent in Britain than on the Continent, as seen in Parts IV and V.

At present, both media freedom and the right to personal privacy are recognized to a greater or lesser extent in English common law. The open question is whether the current 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. 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 around 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 has enabled the poor and powerless to bring down the rich and famous. One editorial, perhaps tellingly written by a former Member of Parliament, stated: “We need responsible journalism, and the press has had their wings clipped a little. That’s not the end of the world.”\textsuperscript{212} But is it a significant limitation on freedom of expression?

\textsuperscript{209} \textit{When press freedom and private life collide}, INDEPENDENT, July 25, 2008 (noting that Max Mosley’s court victory over the \textit{News of the World} was mourned as the end of “kiss-and-tell” journalism in British newspapers).
\textsuperscript{210} \textit{Id.}
\textsuperscript{212} Mark Oaten, \textit{I know what Max Mosley has been going through}, INDEPENDENT, July 25, 2008 (arguing that entertainment is not the same as the public interest).
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.”213 English law does protect aspects of human privacy and personality. David Seipp, for example, has demonstrated how such protection is expanding.214 Instead of a dramatic shift in the frame of Gertz or even Firestone, the expansion of protections for public figures in Britain has been more incremental.215 In the absence of a specific tort of privacy, the equitable remedy of confidence,216 a variety of torts related to the intentional infliction of harm to the person,217 and administrative law principles regarding the appropriate use of police powers,218 all play a role in English privacy law. But there remains no independent right of privacy in English law, as the House of Lords recently confirmed in Wainwright v. Home Office.219 Though, it is indeed privacy that is primarily at interest in these cases, as Lord Cottenham stated in Prince Albert v. Strange,220 albeit by another name. Looking ahead, Lord Justice Mummery has said of a right of privacy that: “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.”221 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.222 Similarly, the British Parliament has made several pronouncements in favor of such a right.223 But so far British common law favored by Mummery as the traditional bastion of the rights of Englishmen have rejected this move, though perhaps not for long.

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213 Markesinis et al., supra note 207, at 2.
220 (1849) 1 Mac. & G.25, 47 (U.K.).
221 Markesinis et al., supra note 207, at 3.
i. Slowly Towards a Right of Privacy: Recent British Jurisprudence on Privacy

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. The petitioners argued that an unjustified invasion of privacy could in and of itself constitute trespass to the person. But the court refused, instead relying upon the progressive extension of the existing breach of confidence action to protect privacy interests. This conclusion was echoed in *Gordon Kaye v. Andrew Robertson and Sport Newspapers Ltd* 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 concluded there as well that no tort of privacy existed in English law.

Both *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 that purpose. Commentators have suggested though that existing remedies are inadequate to protect against intrusions upon personal privacy. For example, a person breaking into the Queen’s bedroom could only be prosecuted for trespass and not invasion of privacy. Yet the progression of confidentiality in English courts has marked a step forwards. 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

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224 Markesinis et al., *supra* note 207, at 3.
225 *Id.* at 5.
226 *Id.* at 6.
itself constitutes a ‘detriment.’”\(^\text{230}\) This change has been encouraged by the U.K. Human Rights Act, but still falls short of a right of privacy, especially for public figures.\(^\text{231}\)

The gradual construction of privacy law has left many impatient with cautious English judges, wishing the British Parliament to enact some right of privacy.\(^\text{232}\) “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.”\(^\text{233}\) Lord Justice Bingham echoed this sentiment.\(^\text{234}\) 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.\(^\text{235}\) But the reason for the slow progression and political reluctance to pass a privacy law rests with the British press itself, like similar lobbying efforts in the United States.\(^\text{236}\)

\section*{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, by courts and the \textit{Kunsturhebergesetz} statute; in France, by relying on the general tort provision of Article 1382 of the Civil Code\(^\text{237}\); in Switzerland through statute, like in Saskatchewan and British Columbia\(^\text{238}\); and in Europe generally by Article 8 the ECHR. Despite these attempts at definition, however vague, the status quo has not substantially changed in these jurisdictions. This includes the

\begin{itemize}
  \item \textsuperscript{230} Markesinis et al., \textit{supra} note 207, at 12.
  \item \textsuperscript{232} Markesinis et al., \textit{supra} note 207, at 12.
  \item \textsuperscript{233} Markesinis, \textit{supra} note 207, at 806.
  \item \textsuperscript{234} \textit{Id}.
  \item \textsuperscript{235} \textit{Id}.
  \item \textsuperscript{236} 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.”).
  \item \textsuperscript{238} See BGE 96 II 409, art. 28 (1970) (Switz.); Swiss Law of Obligations, Obligationenrecht art. 49 (Switz.); Markesinis, \textit{supra} note 207, at 806.
\end{itemize}
United States, as seen in the 1989 case *The Florida Start v. BJF*, dealing with the problem of whether to publish the name of a rape victim already made public to the police.\(^\text{239}\)

The second common argument is that a general privacy right would inhibit investigative journalism.\(^\text{240}\) *The Times* has argued:

> [A]ny 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…If [freedom of speech] is curtailed, it is curtailed for everyone, and that would be to the detriment of democracy.\(^\text{241}\)

But English journalists have similar ethical standards to those in other advanced nations.\(^\text{242}\) 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 could be brought into play to justify [their] practice.”\(^\text{243}\) 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, judicial and parliamentary progress is at best difficult.

Third, there is a mistrust of judges. The former British 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. 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. By doing so, they are implicitly saying that “everything in which the public is interested…is [not] necessarily in the legal sense public


\(^{240}\) Markesinis, *supra* note 207, at 807.

\(^{241}\) *Id.* (emphasis added).

\(^{242}\) *Id.*

\(^{243}\) BBC Survey, *supra* note 222.
interest.”\textsuperscript{244} Thus, the courts are beginning to go down the path of defining the public interest that has so bedeviled U.S. courts since \textit{Rosenbloom} as discussed in Part II.\textsuperscript{245}

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 with 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.\textsuperscript{246} So too with soccer star David Beckham.\textsuperscript{247} 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.”\textsuperscript{248} Others argue that “invasion of privacy should, in the eyes of the law, be comparable to rape.”\textsuperscript{249} 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.

\textbf{B. The Development of Privacy Protections for Public Figures in Britain}

Like the United States today in many ways, in Britain thirty years ago 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.”\textsuperscript{250} The question is how this has changed over time, and whether that may be informative to the present U.S. situation. In a recent debate sponsored by the \textit{Independent}, one of the editors participating suggested that public figures were entitled to no privacy whatsoever.\textsuperscript{251} This view now seems to be commonly accepted, as seen by the massive

\begin{footnotes}
\item[244] Verkaik, \textit{supra} note 25.
\item[245] See supra p. 18.
\item[246] Philip Hensher, \textit{Public figures have a right to privacy}, \textit{INDEPENDENT}, Apr. 27, 2005 (detailing how the Beckhams’ nanny sold her story to the \textit{News of the World} and how this episode illustrates that fame significantly diminishes privacy expectations).
\item[248] *Id.*
\item[249] *Id.*
\end{footnotes}
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 2008.252

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,253 even though it still remains active in the United States.254 Despite progress in promoting the privacy rights of this class of involuntary public figures in Britain, to a great extent, public figures have been viewed as fair game, irrespective of how they acquired public status, the circumstances of the privacy intrusion,255 or the link between the intrusion and the nature of the public interest in the individual concerned.256 In this way, U.S. courts are 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 a person matters less than the nature of the activity in question. In contrast to traditional English privacy law, French and German law uses 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

252 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).
255 See Markesinis et al., supra note 207, at 15.
jurisprudence. Indeed, “[r]ecent case law is replete with dicta to the effect that public figures, too, are entitled to have their privacy protected.” 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.

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 due in part to the influence of the ECHR.

Another 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. 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, 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. 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. For example, a person accused but acquitted of a serious crime, such as in the California case of *Melvin v. Reid*, would have no protection in the British justice system. Neither would the victims or relatives of the accused. These facts point to the

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257 Markesinis et al., supra note 207, at 19.
258 Id.
259 Id.
260 Id. at 20.
262 See infra p. 60.
263 Markesinis et al., supra note 207, at 22.
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*,\(^{266}\) 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 . . . .”\(^{267}\) In other words, it is the position of many U.S. academics and judges to avoid explicit preferences for freedom of expression over privacy.\(^{268}\) 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.

Unlike the position of U.S. defamation law, some argue that a premium is given to reputation over speech in England.\(^{269}\) 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.”\(^{270}\) 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. This discussion then 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. Yet the public interest is just as amorphous in Britain as it is in the United States.

The common law nations of the United Kingdom and United States are not alone in this balancing act. 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, whether through statutory principles in the mold of Switzerland, or through the adoption of general principles, as in Canada. 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 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. This, in turn, could require that businesses operating across these jurisdictions pursue varying journalist and e-commerce standards. It may even eventually curtail British cybersecurity efforts, though this has not been the case to date. Whether British privacy rights will ever reach the level afforded to French citizens, however, is an entirely other matter.

IV. In Search of the Three Musketeers: 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, or occupation, is entitled to a right of privacy. Though infringements on this right may at times be upheld where public figures are concerned, recent French cases have underscored the adoption of a graduated approach to privacy protections for public figures. 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. 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. Even these more clearly delineated definitions though may be challenged in the face of rapidly advancing technology.

271 Id. at 24.
272 See Thinq.co.uk, supra note 24.
274 Civ. 1ère 23 Oct. 1990, Bull. civ., n°222 (Fr.).
275 Markesinis et al., supra note 207, at 16.
276 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 207, at 18.
277 See generally SOLVEIG SINGLETON, PRIVACY AND HUMAN RIGHTS: COMPARING THE UNITED STATES TO EUROPE (1999).
The French legal system protects the privacy rights for public figures through civil law, criminal offenses,278 and certain rules of professional ethics.279 Though, in the criminal context 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, as in the United Kingdom there is no enforcement mechanism. Nor is there a professional press association in France like the Press Council in Germany or the Press Complaints Commission in Britain 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 the United States. An example is the focus of a photo depicting a public event.280 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 the plaintiff, the Spanish crown princess, sought a blanket ban on news organizations publishing photos or footage of her, except when she appears at official functions.281 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.282 This Part analyzes the evolution of French privacy law, focusing on defining the public interest and the graduated approach to protecting the privacy of public figures and how it may be applicable to U.S. jurisprudence.

A. The Development of French Privacy Law

The birth of French privacy is intertwined with The Three Musketeers. While writing the novel, the author Alexander Dumas began an affair with a much younger actress from Texas. The two posed for a series of scandalous photographs, which the photographer auctioned off.283

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278 French Legislation on Privacy, supra note 29.
279 Id.
280 Markesinis et al., supra note 207, at 18.
281 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 a public figure despite her wishes.)
282 See infra p. 57.
283 Sullivan, supra note 22.
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.\textsuperscript{284} 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 dichotomy is exemplified by two cases from France and the United States. In 1985, a homosexual man sued a French newspaper to prevent publication of a photo of him at a gay pride parade in Paris. He 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. Sipple ultimately committed suicide over the exposure due to his family being unaware of his homosexuality prior to the media coverage.\textsuperscript{285} 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 Three Musketeers case. The first commonly cited reason is that 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\textsuperscript{286} that include physical, moral, individual, and social aspects.\textsuperscript{287} 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. 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

\textsuperscript{284} Id.
\textsuperscript{285} Id. See also Gay For Today, http://gayfortoday.blogspot.com/2007/11/oliver-sipple.html (last visited Apr. 21, 2009). 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. See generally PrivacyRightsClearinghouse.org, Chronology of Data Breaches, Nov. 12, 2010, http://www.privacyrights.org/data-breach (last visited Nov. 13, 2010).
\textsuperscript{287} H. Beverley-Smith, A. O'hly & A. Lucas-Schloetter, Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation 147 (2005); New South Wales Commission, supra note 47, at 133.
moral control over the destiny of his work.”

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.

The multifaceted concept of privacy is also often considered a type of moral property in France, which echoes U.S. case law justifying privacy protections on the basis of property rights but with far greater effect. For example, consider the Dietrich case in which Marlene Dietrich sought damages against France-Dimanche magazine for the unauthorized republication of her memoirs. 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. 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, cite the need to bring the law of delict into line with the Basic Law of 1949 regarding invasions of the right of personality. French lawyers, on the other hand, tend to concentrate on the identification of a more specific right of personality, notably the “right to confidentiality of correspondence,” “the right to privacy in domestic life,” and “the right to a person’s name.”

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 began with the French Code Civile (“Civil Code”) or Napoleonic Code of 1804, providing for all forms of delictual liability in five

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288 Hauch, supra note 286, at 1262; New South Wales Commission, supra note 23, at 133.
289 Id. at 1245. See also New South Wales Commission, supra note 47, at 133.
290 Sullivan, supra note 22.
295 Id. at 694.
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. An early privacy case testing the boundaries of these articles exemplifying the underlying philosophy of French privacy law was the Rachel decision.

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. 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. Third, the courts prefer to grant specific relief for breaches of privacy rather than award damages, unlike English courts. 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

296 New South Wales Commission, supra note 47, at 125.
297 Id.
298 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) (noting that the case also was commonly seen as the birth in French law of the right to one’s own image).
299 New South Wales Commission, supra note 47, at 125; Hauch, supra note 26, at 1233.
301 New South Wales Commission, supra note 47, at 126. See also Hauch, supra note 286, at 1234; and B. Starck, DROIT CIVIL: INTRODUCTION 170-71 (1972).
measures, such as sequestration, seizure and others, appropriate to prevent or put an end to an invasion of personal privacy.” 302 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. 303 A strict liability system is thus now in place in French privacy law. The plaintiff need not prove injury or foreseeability of harm, only that the harm itself occurred. 304 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 consequently 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. 305 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. 306 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 spiritual and physical being. 307 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.” 308 French case law has held that Article 9 also extends to: personal health, health of close family members; private repose and leisure; parental and marital status; family life; intimate interpersonal relations, including relations with children and romantic attachments; inner emotions, such as suffering and despair; friendships; sexual orientation; political and religious beliefs; and residences. 309 In general, the right to

302 STARCK, supra note 301, at 171.
304 Hauch, supra note 286, at 1250. See also French Legislation on Privacy, supra note 29.
306 Id.
privacy entitles anyone to oppose the dissemination of his or her picture or personal information without express consent.310

Among its myriad other functions, Article 9 also has three other significant traits: (1) it may be enforced by the family of the deceased;311 (2) an individual may claim a vicarious breach of privacy where a disclosure relates to a close family member;312 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.313 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.314 The best known case illustrating the latter point is the Gunther Sachs case in which Gunther Sachs, husband of Brigitte Bardot, sued the magazine Liu for publishing details of his sex life under the catchy heading “Sexy Sachs.”315 The Cour de cassation (final court of review in private law, commercial law, and criminal law), held that the fact that the plaintiff had tolerated reports did not signify that he had irrevocably and without limit authorized republication.316 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,317 reaching back to the Three Musketeers decision. But perhaps even more importantly, the Gunther Sachs case also furthered a long line of jurisprudence that has increasingly 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 largely 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.318 But even in the United States, public figures are accorded by the press corps as seen in their decision

310 French Legislation on Privacy, supra note 29.
311 See Gigante, supra note 307, at 543, n.113; New South Wales Commission, supra note 47, at 128.
312 New South Wales Commission, supra note 47, at 128.
313 Gigante, supra note 307, at 543; New South Wales Commission, supra note 47, at 128.
314 Hauch, supra note 286, at 1255, & n.182.
316 BEVERLEY-SMITH, supra note 287, at 152.
317 New South Wales Commission, supra note 47, at 129.
318 Id.
not to publicize then Senator Bob Dole’s prior sexual exploits during the 1996 Presidential Campaign.\textsuperscript{319} To exemplify this principle in French law, in an action brought by Aga Khan, the Cour de cassation affirmed the lack of distinction in French privacy law between public and private figures, holding that “each individual, whatever his status…has the right to require respect for his privacy.”\textsuperscript{320} 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:

\begin{quote}
[\textit{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.\textsuperscript{321}
\end{quote}

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.

\textbf{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


conflict between Article 9 of the Civil Code and Article 10 of the ECHR. 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 Article 10(2) of the ECHR. 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.” In particular, the French author Picard points out that “the right to criticism concerning matters of public interest has traditionally been well protected in France.”

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, without defining under what circumstances that balancing test would give such 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 before they suppress a 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.”

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 interest. As has been shown, 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.” But what information is necessary, and what is infotainment?

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323 New South Wales Commission, supra note 47, at 130.
325 Picard, supra note 305, at 95.
326 Id. at 94.
327 New South Wales Commission, supra note 47, at 134.
328 Picard, supra note 305, at 89; New South Wales Commission, supra note 47, at 130.
329 BEVERLEY-SMITH, supra note 287, at 177.
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,” 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. 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.” But is this type of information “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 at times so well protected in the United States.

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. In deciding the case, the court noted that details of the President’s illness involved the most intimate aspect of privacy. But this interpretation ignores that the President himself issued regular bulletins regarding his health while he was alive. 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.” If this interpretation is accepted, then it contravenes the rationale underpinning the richest people case, since these public figures also 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

330 Picard, supra note 305, at 94.
331 New South Wales Commission, supra note 47, at 131.
332 Hauch, supra note 286, at 1260-61; New South Wales Commission, supra note 47, at 131.
334 Id.
335 It should be noted though that the defendant here relied on freedom of expression, not the public interest. Id.
336 Picard, supra note 305, at 95; New South Wales Commission, supra note 47, at 131.
public interest adopted. Although definitions vary, one type of “necessary” information that courts have consistently upheld as being with the public interest is a historical record. For instance, historical sources used by historians writing about the private lives of individuals without their consent will typically be upheld in court, 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.” As a 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? I argue in Part VI that the source of the information should not matter more than its substance.

Yet there are some limitations on historical sources in French privacy law. The Chaplin case for instance established a “fair use” exception when private facts are published for historical or critical debate. In this case, Charlie Chaplin 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 Lui, 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.

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.” On appeal, Lui magazine argued that Chaplin had to show that the defendant had “mischaracterized the private facts in republishing them.” 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

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337 Hauch, supra note 286, at 1258.
338 See infra p. 60.
341 Hauch, supra note 286, at 1268; New South Wales Commission, supra note 47, at 132.
to her private life she has an unlimited power to oppose the republication of those same facts.”

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. It found that *Lui* “could make no serious pretension to scholarly status.” 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.”

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.”

As these cases made clear, defining the public interest and public figures in France has continued to be as elusive as it has in the United States and the United Kingdom. The public interest in particular 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. 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. 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. This stands in marked contrast to both U.S. and U.K. jurisprudence on the topic. But to understand what these legal resolutions mean for actual people in daily life, it is necessary to briefly consider the remedies available for breach of privacy protections in France.

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345 Hauch, *supra* note 286, at 1269.
348 *Id.* at 156.
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.\(^{349}\) This is in marked contrast to U.S. jurisprudence. As an example, a French Court held that all copies of a magazine be seized and all posters removed from news kiosks promoting an article\(^ {350} \) due to an “intolerable intrusion into private life” that trumped the liberty of the press.\(^ {351} \) 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.”\(^ {352} \) 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.”\(^ {353} \) As a result of this change, 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. But this only scratches the surface of the types of injunctive relief that French courts have used to punish privacy violators.

French courts have also become increasingly active in deterring privacy violations, which have included orders to sequester publications, suppress scenes from films or passages in a book, and alter character names.\(^ {354} \) Nor is France alone in these renewed efforts. Putting injunctive relief aside, France 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.\(^ {355} \) 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 vary according to the degree of harm suffered.\(^ {356} \) The

\(^{349}\) Hauch, supra note 286, at 1239-42.
\(^{350}\) New South Wales Commission, supra note 47, at 134.
\(^{351}\) Id.
\(^{352}\) Id. at 135.
\(^{354}\) See Hauch, supra note 286, at 1235; New South Wales Commission, supra note 47, at 135.
\(^{355}\) New South Wales Commission, supra note 47, at 135.
\(^{356}\) French Legislation on Privacy, supra note 29.
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. 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. These laws not only shape French proceedings, but influence the development of privacy doctrines around the world, such as in Quebec.

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.” 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.” 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.” Neither the terms “a certain notoriety” nor “public interest” were defined in this case, nor 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. It is not the purpose of this 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 an effort to

357 Id.
358 Id.
362 See New South Wales Commission, supra note 47, at 135.
find common ground between the various privacy laws surveyed. Recent Germany privacy jurisprudence has focused on images, including those 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. 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, emulated.

**Tripartite Classification of Privacy Protections for Public Figures in Germany**

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

The first category of public figures in Germany is 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. Historical pictures, for example, are protected in Germany since they contribute to

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363 Markesinis et al., *supra* note 207, at 17.
364 *Id.*
public discourse, which is an element common in both French and German law.\textsuperscript{365} Though, aging permanent public figures retain a stronger privacy interest over their images when and if a dispute arises,\textsuperscript{366} as they do while they are in their homes. Yet the right to protection of private life for these public figures 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.\textsuperscript{367}

The second category of public figures in Germany (which I 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.”\textsuperscript{368} 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.\textsuperscript{369} Thus, in contrast to U.S. and U.K. privacy protections for public figures, celebrity is not a blank check for uninhibited reporting in Germany.

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:

\begin{quote}
[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).\textsuperscript{370}
\end{quote}

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.\textsuperscript{371} For example, the man known as the “Cannibal

\textsuperscript{365} Markesinis et al., \textit{supra} note 207, at 18.
\textsuperscript{366} See, e.g., the decision LG Berlin 19 November 1996, NJW 1997, 1155 (Ger.).
\textsuperscript{367} See infra p. 86.
\textsuperscript{368} Markesinis et al., \textit{supra} note 207, at 17.
\textsuperscript{369} OLG Hamburg AfP 1982, 41 (Dolly Dollar) (Ger.).
\textsuperscript{370} Markesinis et al., \textit{supra} note 207, at 18.
\textsuperscript{371} Id.
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. 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. 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.

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—additional research is required in this regard. But examining the German approach to privacy protections for public figures is relevant to 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 next be analyzed, and subsequently lessons will be drawn from both it and British, French, and German precedent to develop a proposal for U.S. privacy law and potentially a multilateral agreement on privacy rights that would better recognize the realities of the media, the demands of doing business across jurisdictions, and a rapidly changing technological landscape going forwards.

VI. The Convergence of European Privacy Law through the European Court of Human Rights

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

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…The exercise of these freedoms…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.

There is a growing ECHR jurisprudence interpreting and applying the right of privacy in Article 8 and determining how its boundaries interact with the limits of freedom of expression as provided for under Article 10. These decisions are critical to examine in their own right in a comparative analysis of privacy protections in Europe, and further afield. For example, in the New Zealand case of Nicholls v. Registrar of the Court of Appeal, the court commented in dicta that ECHR decisions can be important in helping develop New Zealand jurisprudence. 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

373 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 47, at 137.

374 ECHR, Art. 8.

375 New South Wales Commission, supra note 47, at 138.

such issues as the types of protected information, the extent and form of publication attracting a remedy, and the circumstances in which publication can be justified.\textsuperscript{377} What follows then is an in-depth analysis of prominent Article 8 ECHR privacy case law focusing on a period between 2004 and 2005, taking special note of cases defining public figures and the public interest.

\textbf{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 privacy rights seen in the legal systems of many common law nations, or indeed in many international accords.\textsuperscript{378} As a result, the impact of Article 8 has been far-reaching. Specifically, the Court has held that Article 8 protects “a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world.”\textsuperscript{379} 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.\textsuperscript{380} The ECHR has also evoked Article 8 in the following cases: enforcement of legislation prohibiting homosexual acts committed in private between consenting males;\textsuperscript{381} enforcement of legislation providing for a higher age of consent for homosexual men;\textsuperscript{382} discharging male and female homosexuals and bisexuals from the military forces because of their sexuality;\textsuperscript{383} and refusing to award custody of

\textsuperscript{377} New South Wales Commission, supra note 47, at 138.
\textsuperscript{378} Id. at 139.
\textsuperscript{383} Lustig-Prean and Beckett v UK, 31417/96; 32377/96 [1999] ECHR 71 (Sep. 27, 1999); Smith and Grady v UK, 33985/96; 33986/96 [1999] ECHR 72 (Sep. 27, 1999), Perkin and R v UK, 43208/98; 44875/98 [2002] ECHR 690
a child to the applicant because of his homosexuality.\textsuperscript{384} And these are just a small sampling of the available case law.\textsuperscript{385} Consequently, 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, perhaps in part due to the longer list of exceptions included in Article 10.

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

Several ECHR cases stand out from the glut 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, including \textit{PG and JH}, \textit{Peck}, and \textit{Von Hannover}. 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. The ECHR has established that everyone, even if they are public figures, must be able to enjoy a “legitimate expectation” of privacy.\textsuperscript{386} In other words, both the victims’ status, and the context of the case are now less important to the ECHR than in fulfilling the privacy rights for all public figures.

\textbf{i. Limiting Police Powers under Article 8: PG and JH v. the United Kingdom}

\begin{itemize}
\item \textit{See also Vetter v France}, 59842/00 [2005] ECHR 350 (May 31, 2005) (dealing with the placement of microphones by police in a private residence in order to gather evidence in a criminal investigation); \textit{Le Lann v France}, 7508/02 [2006] ECHR (Oct. 10, 2006) (dealing with the use of medical reports in court proceedings that concern the applicant without his or her consent); \textit{and Fadeyeva v Russia}, 55723/00, [2005] ECHR 376 (June 9, 2005) (Failure of authorities to take adequate measures to protect the applicant from the effects of severe pollution in the vicinity of steelworks).
\end{itemize}
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.* 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. 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.” 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. 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,” eventually rejecting 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, just as French courts have determined that correspondence transmitted by means of radio waves, optical signals, etc. is likewise confidential. 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. 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. Protecting Involuntary Public Figures: 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,* in which the applicant had been filmed by CCTV on the main street of his hometown holding a knife having attempted suicide a

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388 Id.
389 Id.
390 Id.
391 Id.
392 French Legislation on Privacy, supra note 29.
393 See also *Rotaru v Romania*, 28341/95 [2000] ECHR 192 (May 4, 2000).
394 *Peck v The United Kingdom* 44647/98 [2003] Eur Court HR 44 (Sep. 28, 2003).
moment before. Photographs were disclosed, and the national media broadcast the footage. The thrust of the coverage was CCTV’s usefulness at minimizing and detecting crime.\textsuperscript{395} Domestically, the British Court placed CCTV’s usefulness in crime prevention and detection above Peck’s privacy concerns, holding 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.”\textsuperscript{396} 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. But the applicant countered that that was only one factor, “with other relevant factors being the use of the material obtained and the extent to which it was made available to the public.”\textsuperscript{397} Ultimately the ECHR agreed with the applicant, affirming its holding in \textit{PG and JH v. the United Kingdom} that some activities occurring within the public context may still fall within the scope of “private life.”\textsuperscript{398} 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.\textsuperscript{399} This case is noteworthy for the present purposes because it extended privacy protections for involuntary public figures to public places despite an assertion of police power. Such an extension is in contrast to the French approach,\textsuperscript{400} 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 \textit{Peck} case has echoed in courtrooms 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.\textsuperscript{401} Even English courts are now taking note of this trend.\textsuperscript{402} Thus, the location of an event now matters less as the boundaries of what is considered to be the “private life” continue to expand in Europe, and contracts in the United States. Similarly, the privacy rights for

\textsuperscript{395} New South Wales Commission, \textit{supra} note 47, at 144.  
\textsuperscript{396} \textit{Id.}  
\textsuperscript{397} \textit{Id.} at 145.  
\textsuperscript{398} \textit{Id.}  
\textsuperscript{399} \textit{Id.} at 146.  
\textsuperscript{400} French Legislation on Privacy, \textit{supra} note 29.  
\textsuperscript{401} \textit{See Hosking & Hosking v Runting & Anor}, [2005] 1 NZLR 1, (Gault and Blanchard JJ).  
\textsuperscript{402} \textit{McKennitt & Ors v Ash & Anor}, [2005] EWHC 3003 (QB).
involuntary public figures in Europe have also become more robust through the ECHR. Nor is this trend limited to ECHR cases brought against the United Kingdom.

iii. Defining the “Private Life”: Von Hannover v. Germany

A final recent, prominent case offering guidance on the ECHR’s approach to privacy rights is Von Hannover v. Germany. 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. There, 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. The ECHR went on to hold that “private life” includes “a person’s physical and psychological integrity; and that Article 8 is primarily intended to ensure the development, without outside interference, of every human being’s personality.”

Such broad privacy protections as Von Hannover v. Germany increasingly include a social dimension. For example, in this case the Court reaffirmed its holdings in PG and JH, and Peck that there is a zone of interaction with others that may fall within the scope of private life. 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.

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. 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. The media’s duty then is to impart

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403 Von Hannover v Germany, 59320/00 (2005) 40 EHRR 1.
404 New South Wales Commission, supra note 47, at 147.
405 Id. See also Z v Finland 22009/93 [1997] Eur Court HR 10.
406 Von Hannover, at ¶ 69.
407 Id. at ¶ 50.
408 Id. at ¶ 57-58.
409 Id. at ¶ 67-77.
information and ideas on all matters of public interest.\textsuperscript{411} What has been left explicitly unanswered so far in ECHR jurisprudence is a definition of public interest. 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 there is a distinction “between reporting facts… contributing to a debate in a democratic society…and reporting details of the private life of an individual who…does not exercise official functions. While in the former case the press exercises its vital role of “watchdog” in a democracy…it does not do so in the latter case.”\textsuperscript{412} Thus the ECHR has stated in dicta that news relating to the proper functioning of a democratic society is legitimate, while infotainment is not. Therefore the public interest for the ECHR may extend only so far as news that meaningfully contributes to important public discourse. But passing by any newsstand in Europe may lead the casual observer to the opposite conclusion, illustrating the gap between the legal and cultural realities in Europe.\textsuperscript{413} The way that this debate has been carried out within the ECHR may be illustrated in consideration of a series of holdings relating to photographs.

Like in the United States, 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.\textsuperscript{414} The Court held in \textit{Von Hannover} 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.”\textsuperscript{415} This calls for a narrower interpretation of freedom of expression in Europe than that which is common in the United States. Rather, the ECHR 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.”\textsuperscript{416} Thus, the Court has not shied away from content analysis, in effect rejecting one of the \textit{Gertz} Court’s primary concerns. Illustrative of the extent to which the French, and now ECHR interpretation of the public interest

\textsuperscript{412} \textit{Von Hanover}, supra note 403, at ¶ 63.
\textsuperscript{413} See supra p. 11.
\textsuperscript{414} New South Wales Commission, supra note 47, at 148.
\textsuperscript{415} \textit{Von Hanover}, supra note 403, at ¶ 65.
\textsuperscript{416} \textit{Id.} at 76 & 63.
has spread, the German Federal Constitutional Court came to a similar conclusion in the case. As the Court held, “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,” while also noting in dicta that “he who lives in a glass house may not have the right to throw stones.”

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. Among these effects is a limitation of police powers, which so far though has not impacted the push for enhanced cybersecurity. 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, both for individual civil liberties and to clarify the legal environment of business. 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 and indeed other nations around the world may learn from the experience of the United Kingdom, France, Germany, and Europe generally to adopt certain measures that have worked well in these other common and civil law nations in an effort to clarify and strengthen privacy law.

**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

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417 Id.
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,\textsuperscript{419} 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 \textit{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,\textsuperscript{420} 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.

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

\textsuperscript{419} See Griswold v. Connecticut, 381 U.S. 479 (1965).
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.421

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

421 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.
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

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<td>Example: Prominent politicians</td>
<td>event was obscure (not directly relevant to the public figure’s current role)</td>
<td>important to the proper functioning of U.S. democracy</td>
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<td></td>
<td>and occurred in the distant past; (ii) while they are in their private homes</td>
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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.\textsuperscript{422} Most states have passed similar requirements.\textsuperscript{423} The Supreme Court has upheld the Act on two occasions,\textsuperscript{424} while the Hawaiian Supreme Court has struck down a state registration statute on due process grounds.\textsuperscript{425} 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 sufficient to overcome the current deficiencies in U.S. privacy law. What is also required is some agreement about what constitutes the public interest.

\textbf{B. Reconsidering the Public Interest}

The U.S. Supreme Court adopted the beginnings of a public interest test in \textit{Rosenbloom}. This test should be resurrected, with some modifications. In \textit{Rosenbloom}, the Court noted the importance of a broad definition of the public interest that included both public and private actors.\textsuperscript{426} 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.”\textsuperscript{427} Other cases

\textsuperscript{422} 42 U.S.C. 14072(a).
\textsuperscript{426} 403 U.S. at 41.
\textsuperscript{427} \textit{Id}. at 42.
reinforced the judgment that the First Amendment extends to broad matters of public interest, from fixing a college football game,\footnote{Time, Inc. v. Hill, 385 U.S. 388.} to coverage of a court order to requiring that an African American student be permitted to enroll in the University of Mississippi.\footnote{388 U.S. at 130.} 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.”\footnote{New York Times v. Sullivan, 376 U.S., at 270-271 (emphasis added).} 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.”\footnote{403 U.S. at 79.} This was confirmed after the \textit{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 \textit{Firestone} made precisely that kind of decision. The dissent in \textit{Rosenbloom} also notes that U.S. courts are not blessed with prescient powers, and are 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 \textit{Rosenbloom} with \textit{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.\footnote{\textit{Post}, supra note 11, at 997.} But the field of “legitimate public concern” is ambiguous, and far broader than promoting political accountability. Early cases such as \textit{Sidis} expanded this already broad definition further by

\begin{itemize}
  \item \textit{Time, Inc. v. Hill}, 385 U.S. 388.
  \item \textit{388 U.S. at 130.}
  \item \textit{403 U.S. at 79.}
  \item \textit{Post}, \textit{supra} note 11, at 997.
\end{itemize}
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 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. 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 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. 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:

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433 Post, *supra* note 11, at 1003.
435 See for example West, *supra* note 319.
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. \(^{436}\)

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 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

\(^{436}\) Sullivan, *supra* note 22.
place freedom of expression above the need to protect the privacy of public figures, is not entirely accurate. 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. Why though is Europe converging towards a shared understanding of the limit’s right to know, while the United States remains more of an outlier? I have argued that this is due in large part to the influence of ECHR jurisprudence, which does not have the same deep commitment to free speech as is the hallmark of U.S. privacy jurisprudence. This, more than a lack of honor or dignity in one society or another, is driving the divergence, which in turn has been shown to be impacting both the business of newspapers and multinational companies like Google. Absent greater clarification regarding privacy rights across borders companies could be forced to tailor services and potentially not enter into certain markets.

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 privacy. To what extent the new millennium will continue to recognize privacy rights for voluntary and involuntary

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437 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.

438 Gormley, supra note 25, at 1340.
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. Given U.S. reluctance, both in the courts and Congress, to enact comprehensive protections the policy proposals proposed here will likely be met with suspicion—especially at a time when the need for greater security seems to be trumping privacy across many domains. Privacy 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.