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# The Polysemy of Privacy

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# The Polysemy of Privacy

RONALD J. KROTOSZYNSKI, JR.\*

*“The Polysemy of Privacy” considers the highly protean nature of the concept of “privacy,” which extends to myriad disparate legal interests, including nondisclosure, generalized autonomy interests, and even human dignity. For a concept of such central importance to many systems of protecting fundamental rights, its precise contours are surprisingly ill defined. This lack of determinate meaning is not limited to the concept of privacy in the United States; virtually all legal systems that utilize privacy (or its first cousin, “dignity”) have difficulty reducing the concept into specific, carefully delineated legal interests. In some respects, privacy means everything—and nothing—at the same time. Moreover, even in those contexts where one can identify privacy at a relatively choate, rather than highly abstract, level of jurisprudential analysis, the right of privacy often comes into direct conflict with other fundamental rights. For example, commitments to freedom of speech and to a free press often conflict with privacy interests; these conflicts, in turn, force courts to secure one interest only at the price of undermining another. In the United States, unlike in the wider world, protecting privacy interests through tort law generally will give way to advancing concerns associated with securing expressive freedoms. This Article considers some of the causes and effects of the privileging of expressive freedom over privacy/dignity in U.S. constitutional law and suggests that comparative legal analysis of the concept of privacy might help us to better understand both what privacy does mean and also what it should mean.*

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## INTRODUCTION: POLYSEMY AND PRIVACY

Sometimes we use the same word to indicate different things. For example, in standard American English, the word “play” can carry several meanings, including a noun (a theatrical production or a single round in a sporting event) or a verb (a diverting activity, often associated with children). Even though spelled and pronounced identically, the word simply means different things in different contexts. “Ball” is another example of a polysemous word; it can refer to a spherical object, a formal dance, or, more generically, a good time (i.e., “we had a ball last night”).

Like “play” and “ball,” the concept of “privacy” can be used to refer to multiple legal concepts. Privacy can refer to an autonomy interest; that is to say, the right to do or refrain from doing something. In the United States, the right to terminate a pregnancy is an aspect of a constitutional right of privacy that relates mainly to autonomy interests.<sup>1</sup> But this is hardly the only way one might conceptualize the idea of privacy. Indeed, it arguably is a rather odd construction of the word, given that privacy in nonlegal contexts usually denotes seclusion or nondisclosure, rather than more generalized autonomy interests.

In fact, privacy logically can and does refer to an interest in not disclosing personal information; the historical roots of the right of privacy in the United States relate to this aspect of the concept. Warren and Brandeis, in their iconic article in the *Harvard Law Review*,<sup>2</sup> argued that the common law of torts should protect an interest in nondisclosure of certain true but embarrassing personal information.<sup>3</sup> Although the law of defamation traditionally provided an economic recovery only for the dissemination of damaging but *false* information, Warren and Brandeis argued that the law of tort also should provide a recovery for the dissemination of *true* information that was harmful to personal or business interests in the absence of some significant public interest supporting disclosure of the information.<sup>4</sup> Their argument proved persuasive, and most states recognized a right to recover damages associated with the public disclosure of private facts.<sup>5</sup>

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1. See *Roe v. Wade*, 410 U.S. 113 (1973); see also *Griswold v. Connecticut*, 381 U.S. 479 (1965).

2. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

3. See *id.* at 205–14.

4. See *id.* at 211–19.

5. See Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1892–95 (2010) (discussing the incorporation of privacy torts in various states during the period 1899 to 1940). Richards and Solove note that “by 1940, privacy had been recognized in only a distinct minority of U.S. jurisdictions—by common law in twelve states (California, Colorado, Georgia, Illinois, Kansas, Kentucky, Louisiana, Missouri, New Jersey, North Carolina, Pennsylvania, and South Carolina) and by statute in only two others (New York and Utah).” *Id.* at 1895. After publication of William Prosser’s pathbreaking 1941 treatise and subsequent iconic law review article on the four distinct torts of privacy, WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (1st ed. 1941); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960), many more jurisdictions adopted privacy torts. See Richards & Solove, *supra*, at 1901 (“In the little more than two decades since the publication of his first torts treatise in 1941, Prosser’s conception of tort privacy had become

These examples—privacy as autonomy and privacy as nondisclosure—also highlight an important distinction in the use of the concept in both the United States and Europe: whether legitimate privacy interests primarily implicate protection of “privacy” (however defined) against the government, against other private citizens, or against *both* the government and other citizens. In other words, is privacy something we demand from the government or something we demand from each other and private corporations? To be clear, a fully theorized understanding of privacy should encompass protection against both the government and private actors that unduly seek to compromise a reasonable interest in either autonomy or nondisclosure. Yet, I think that a tendency exists in the contemporary United States to think about privacy primarily as running against the government, rather than against other citizens and private corporations.

Although the proposition is contestable, I want to suggest that, in the contemporary United States, most citizens understand privacy interests to implicate both nondisclosure and autonomy rights against the government; by way of contrast, privacy law does relatively little to protect citizens against each other or against corporations that seek to collect and sell personal information that arguably fits within the scope of the Warren and Brandeis concerns.<sup>6</sup> In the contemporary European Union, on the other hand, privacy concerns are as much about securing personal information from other private interests, including both other citizens and corporations, as they are about autonomy claims against the government.<sup>7</sup>

The Fourth Amendment, for example, serves as a general framing device for privacy discourse in the United States; police officers may not search an

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a majority doctrine.”).

6. In fact, the situation is even worse than this preliminary assessment would suggest; even in those circumstances where state courts or state legislatures act to create privacy protections that limit—or even prohibit—the disclosure of personal information, the First Amendment, and more specifically the commercial speech doctrine, make the validity of such privacy protection open to serious constitutional doubts. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2668–72 (2011); see also *infra* notes 37–45, 137–39, and accompanying text.

7. See, e.g., Francesca Bignami, *European Versus American Liberty: A Comparative Privacy Analysis of Antiterrorism Data Mining*, 48 B.C. L. REV. 609, 681 (2007) (“True, European privacy law promotes interpersonal respect among individuals. But it also protects privacy against the state.”); Michael L. Rustad & Sandra R. Paulsson, *Monitoring Employee E-mail and Internet Usage: Avoiding the Omniscient Electronic Sweatshop: Insights from Europe*, 7 U. PA. J. LAB. & EMP. L. 829, 866 (2005) (“European countries have formulated an all-encompassing cultural and legal response to privacy-based actions as compared to the United States, which continues to delineate a sharp distinction between private and public workplaces.”); Yohei Suda, *Monitoring E-mail of Employees in the Private Sector: A Comparison Between Western Europe and the United States*, 4 WASH. U. GLOBAL STUD. L. REV. 209, 248 (2005) (“Overall, Europe considers the right to privacy, including data protection, to be fundamental, even in the workplace.”); Flora J. Garcia, Comment, *Bodil Lindqvist: A Swedish Churchgoer’s Violation of the European Union’s Data Protection Directive Should Be a Warning to U.S. Legislators*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1205, 1206 (2005) (“The different approaches to privacy in the United States and the European Union are deeply rooted in traditions much broader than the concept of privacy, such as the role of government in private life, the role of the press, and the freedoms that are afforded to the media generally.”).

individual's home, person, or effects without a warrant, and no warrant may issue except upon a showing of probable cause.<sup>8</sup> The Supreme Court of the United States has exhibited an amazing talent for finding exceptions and exemptions from the general warrant requirement,<sup>9</sup> but Fourth Amendment jurisprudence is not the most relevant consideration for immediate purposes. Instead, the most immediately relevant point is that the Fourth Amendment helps to frame the culture's expectation of privacy as an interest running against the state.<sup>10</sup> The generalization of privacy via the rubric of substantive due process did nothing to alter this focus on government, rather than private entities, as the principle threat to a generalized interest in personal autonomy and self-definition.

One last introductory point merits attention: even if legislators and state court judges charged with updating the common law of torts<sup>11</sup> wished to protect privacy with respect to public disclosure of private facts, the First Amendment would present a substantial obstacle to the project.<sup>12</sup> A robust doctrine of protection for speech and press rights, arising under both the Free Speech and Free Press Clauses

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8. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

9. *See, e.g.*, *New York v. Belton*, 453 U.S. 454 (1981); *Terry v. Ohio*, 392 U.S. 1 (1968). *But cf.* *United States v. Jones*, 132 S. Ct. 945 (2012) (holding that a law enforcement officer's placement of a GPS tracking device on a private car constitutes a “search” of private property under the Fourth Amendment and requires a warrant); *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that if police obtain evidence in violation of the Fourth Amendment, such evidence must be categorically excluded from the trial of the defendant in order to deter future Fourth Amendment violations).

10. *See, e.g.*, *Jones*, 132 S. Ct. at 950 n.3 (“Whatever new methods of investigation may be devised, our task, at a minimum, is to decide whether the action in question would have constituted a ‘search’ within the original meaning of the Fourth Amendment. Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.” (emphasis omitted)).

11. *See* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 3–5, 12–23, 35–43, 81–83, 164–71 (1982) (arguing that courts should use their traditional common law powers, “the common law function,” to “update” the law, including areas governed by statutes, at least in circumstances where a particular statute has fallen into “desuetude,” i.e., when the law in question no longer “fits the legal landscape” and is “out of phase with the [legal] topography”). As Judge Calabresi explains, “the judicial common law would attach to statutory rules that are out of phase just as much as to common law precedents or doctrines.” *Id.* at 166. To be clear, Judge Calabresi acknowledges that the task of legal updating is properly shared by both courts and legislatures; a problem arises, however, when legislatures fail to regularly update laws that have ceased to play any useful role in the governance of contemporary society. *See id.* at 2–7.

12. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2668–72 (2011) (rejecting a privacy-based justification for a Vermont law protecting the confidentiality of physicians' prescription data by prohibiting the distribution of this information for marketing purposes and instead holding that the First Amendment protects the sale of such information to pharmaceutical companies for their use in targeted marketing efforts called “detailing”).

of the First Amendment, has gone a great way toward obliterating both judicial and legislative efforts to secure privacy rights against nongovernmental actors.<sup>13</sup>

Just as *New York Times Co. v. Sullivan*<sup>14</sup> radically limited the scope of defamation law in the United States in the service of creating a more robust marketplace of ideas, the same doctrine has also limited the ability of states to impose money damages for the disclosure of truthful information that causes harm. This makes sense, obviously enough: if public disclosure of false information enjoys a constitutional license, how could one withhold protection for disclosure of truthful but embarrassing information? The constitutionalization of tort law remains an important structural limit on any efforts to secure privacy rights against nongovernmental actors. Moreover, the Supreme Court's First Amendment jurisprudence remains very much a work in progress, as demonstrated by the Court's recent decision in *Snyder v. Phelps*.<sup>15</sup>

But the U.S. indifference to privacy as an interest in need of protection from private actors goes well beyond the limits flowing from *Sullivan*; even in instances where no serious constitutional right to publish confidential information exists,<sup>16</sup> neither Congress nor state legislatures seem much inclined to act. Accordingly, the surreptitious collection of private information regarding web surfing habits, or medical records, is generally legal. If a person uses a web search engine such as Explorer or Firefox in the United States, the company providing that web browser may collect and store a user's searches. So too, a commercial website such as Amazon, Ebay, or Facebook, may generally collect, bundle, and sell information collected from users of the company's site.

In the United States, under the state action doctrine, any rights of privacy arising under the Fourth Amendment or the Due Process Clauses simply have no application with respect to private companies.<sup>17</sup> Although Congress or a state legislature could enact positive legislation protecting privacy interests in these contexts, such legislation generally does not exist. To a degree that likely seems

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13. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 532–35 (2001) (citing and applying precedents limiting the scope of tort law to provide financial recoveries for the dissemination of information, even false information, pertaining to public officials, public figures, and matters of public concern).

14. 376 U.S. 254 (1964).

15. 131 S. Ct. 1207 (2011). *Phelps* holds that highly targeted protest, aimed at inflicting maximum emotional harm, is nevertheless protected speech and cannot serve as the basis of imposing tort liability for intentional infliction of emotional distress or intrusion upon seclusion (a privacy tort) if the speech activity at issue addresses a matter of public concern and otherwise takes place lawfully. See *id.* at 1215–20. But see *id.* at 1222 (Alito, J., dissenting) (“Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.”).

16. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (holding that *Sullivan* does not privilege publication of false information about a matter that does not constitute a matter of public concern or involve a public official or public figure and that a state may impose tort liability on a standard of fault lower than *Sullivan*'s “actual malice” standard).

17. See generally Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302 (1995) (discussing and critiquing the United States Supreme Court's theories of state action).

remarkable to European eyes, privacy interests against nongovernmental entities are regulated, if at all, by the marketplace.

In sum, the legal concept of privacy in the United States is narrowly defined as implicating rights against the state, and important questions regarding nondisclosure with respect to nongovernmental actors remain largely unanswered by either legislatures or courts. The fact that U.S. law does not comprehensively or reliably protect all aspects of privacy does not mean, however, that other polities must ask the same questions about privacy—or give the same answers.<sup>18</sup>

For example, the European Court of Human Rights, in the context of privacy rights, has expressly held that signatories to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”) have a duty to protect European Convention rights from *private*, nongovernmental forms of abridgement:

The Court recalls that although the object of Article 8 [the right of privacy] is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life.<sup>19</sup>

Thus, the European Court of Human Rights does not rely on the concept of state action to strictly limit the scope of rights secured under the European Convention; the relative weakness of U.S. privacy law protections against nongovernmental actors simply does not hold true in other democratic nations committed to securing the rule of law and the protection of fundamental human rights.<sup>20</sup>

To be clear, I am not suggesting that the U.S. approach is self-evidently wrong or misguided. Instead, my point is a more limited one: consideration of how other nations’ legal systems address privacy issues could help us to better understand and appreciate with greater specificity and clarity the relevant issues involved and the viability of various approaches to safeguarding the “right to be let alone.”<sup>21</sup>

This Article considers the polysemous nature of privacy and attempts to unpack and identify substantive, procedural, and cultural issues essential to securing privacy interests effectively. Part I begins with an analysis of the protean nature of privacy and attempts to identify, with some particularity, some of the interests that the concept properly encompasses and the limited scope of protection that these interests presently enjoy in the United States.<sup>22</sup> Part II then takes up the importance of the public/private dichotomy to securing privacy rights; this Part argues that

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18. *See, e.g.,* X & Y v. Netherlands, App. No. 8978/80, 8 Eur. H.R. Rep. 235, 239–40, ¶ 23, 241, ¶ 27, 242, ¶ 30 (1985) (holding that Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms may require signatory states to adopt “measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves”).

19. *Id.* at 239.

20. *See infra* notes 97–117 and accompanying text.

21. Warren & Brandeis, *supra* note 2, at 193.

22. *See infra* notes 30–57 and accompanying text.

privacy law in the United States would benefit significantly if U.S. lawmakers and judges were to think more carefully and consistently about the problem of private power being used to burden—or even abridge—privacy interests.<sup>23</sup> At the same time, however, the cultural salience of privacy might constitute an inhibiting factor in using statutes and judicial decisions to protect privacy more robustly against nongovernmental actors.

The Article considers the impact of the First Amendment’s Free Speech and Press Clauses on the potential scope of privacy protections in Part III. Simply put, even if the U.S. federal government or particular state governments attempted to better secure privacy interests against abridgment by nongovernmental actors, the First Amendment would impose serious limitations on the scope of such legal reforms.<sup>24</sup> Part III also examines the radically different baseline that prevails in contemporary Europe with respect to these issues and questions. Under the jurisprudence of the European Court of Human Rights, privacy interests in Europe can and often do take precedence over the exercise of expressive freedoms.<sup>25</sup> These boldly contrasting approaches demonstrate quite clearly that the U.S. approach does not represent the only potential means of accommodating a strong commitment to expressive freedoms with a concomitant and equally robust commitment to protecting privacy interests.

Part IV analyzes the possible benefits of using alternative nomenclature that is more communitarian than “privacy” to safeguard privacy interests.<sup>26</sup> More specifically, this Part considers the German approach to securing privacy interests, an approach generally framed in terms of securing “human dignity” and “free development of the personality,” rather than “privacy” as such.<sup>27</sup> This Part posits that adopting more communitarian legal constructs might be conducive to securing broad, group-based legal protection for privacy interests. At the same time, however, in the United States, the use of privacy in lieu of broader, more communitarian legal concepts probably is not a mere accident of history. Moreover, Part IV proposes that a group-based approach to securing privacy interests might be less viable in a polity, like the United States, that features a pervasive distrust of government as a central part of its political identity.<sup>28</sup>

Finally, this Article concludes by accepting and embracing the polysemous nature of privacy.<sup>29</sup> The Conclusion nevertheless cautions that the potentially infinite breadth of the concept of privacy can endanger the successful protection of the interests it seeks to safeguard. Polysemy, in itself, is not necessarily a bad thing, but imprecision in the definition of a fundamental human right can and will make its enforcement significantly more difficult; in addition, imprecision or vagueness in the contours of a fundamental human right presents real difficulties for reliably securing that right globally. By considering the disaggregated legal interests, issues, institutions, and cultural factors associated with defining and protecting privacy—

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23. See *infra* notes 58–78 and accompanying text.

24. See *infra* notes 79–98 and accompanying text.

25. See *infra* notes 99–117 and accompanying text.

26. See *infra* notes 118–62 and accompanying text.

27. See *infra* notes 118–39 and accompanying text.

28. See *infra* notes 140–62 and accompanying text.

29. See *infra* notes 163–66 and accompanying text.



and doing so in an overtly comparative legal analysis—we will stand a much better chance of effectively securing these important interests from both governmental and nongovernmental threats.

#### I. PRIVACY AS NONDISCLOSURE, AUTONOMY, AND DIGNITY

In their seminal 1890 law review article, Samuel D. Warren and Louis D. Brandeis posited that the law of tort should provide some measure of protection against the public disclosure of private facts.<sup>30</sup> They argued that “the right to be let alone” should enjoy formal legal protection and suggested that “[o]f the desirability—indeed of the necessity—of some such protection, there can, it is believed, be no doubt.”<sup>31</sup>

After surveying the law of property and copyright, Warren and Brandeis argued that a reasonable extension of then-existing law could create a zone of protection against the disclosure of private facts.<sup>32</sup> In the end,

[t]hese considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone.<sup>33</sup>

Thus, recognizing a right against the publication of private facts without permission provides legal protection akin to “the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed.”<sup>34</sup>

From a European perspective, however, the notion that disclosure of private facts without permission might give rise to liability is entirely quotidian. Once an incident of aristocratic privilege, the protection of personal honor and dignity later democratized so that, in theory, all persons are potentially deserving of honor and respect. Such protection is a baseline principle of the civil law of Germany and France (and has been for a very long time).<sup>35</sup>

As Professor James Q. Whitman puts the matter, in Europe, legal systems tended to level everyone up, whereas in the United States, we have “leveled down.”<sup>36</sup> Moreover, “[t]o say that America has absolutely no law of civility is to say too much. But to say that in general America has no law of civility—especially as compared with a country like Germany—is to make the right generalization.”<sup>37</sup>

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30. See Warren & Brandeis, *supra* note 2, at 193–96.

31. *Id.* at 193, 196.

32. See *id.* at 197–206.

33. *Id.* at 205.

34. *Id.*

35. See James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 *YALE L.J.* 1279 (2000) (discussing the protection of personal honor in the civil law of France and Germany and contrasting this protection with the approach in the United States).

36. See *id.* at 1285, 1319–21, 1344, 1358–59, 1387 (emphasis omitted).

37. *Id.* at 1384 (emphasis omitted).

In contrasting U.S. and German law on the protection of honor with respect to personal insult, Whitman observes that “[t]his is a body of law that shows, in many of its doctrines, a numbness to free-speech concerns that will startle any American.”<sup>38</sup>

In thinking about the protection of privacy in transatlantic terms, I think a key distinction that must be addressed is the utter absence of mandatory civility norms in the United States. Under the Free Speech Clause of the First Amendment, one is free in the United States to engage in targeted insult, with the aim of “assassinating” the character of a public official or public figure, with complete legal impunity.<sup>39</sup> One is equally free to drop the f-bomb in a public school board meeting with parents and even children present<sup>40</sup> or to wear a jacket emblazoned with “Fuck the Draft” in a public courthouse.<sup>41</sup> Whether one attempts to fix liability on a theory of defamation, intentional infliction of emotional distress, or even invasion of privacy, in the United States the claim will fall to concerns about ensuring the public debate regarding public officials, public figures, and matters of public concern is “uninhibited, robust, and wide-open.”<sup>42</sup>

Indeed, the Supreme Court has specifically held that government may not prohibit or punish publication of truthful information of public concern, even if that information was not lawfully secured in the first instance.<sup>43</sup> In invalidating the application of a federal law that prohibited publication of unlawfully taped telephone conversations, the Supreme Court explained that, in the context of defamation, “neither factual error nor defamatory content, nor a combination of the two, sufficed to remove the First Amendment shield from criticism of official conduct.”<sup>44</sup> The Justices “[thought] it clear that parallel reasoning requires the conclusion that a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”<sup>45</sup>

Although the precise scope of a “matter of public concern” is not entirely clear, in *Bartnicki v. Vopper*, the Supreme Court thought it virtually self-evident that a dispute about a public school district’s negotiations with a teachers union fell within the scope of the category: “[t]he months of negotiations over the proper level of compensation for teachers at the Wyoming Valley West High School were

38. *Id.* at 1312.

39. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52–55 (1988); see also *infra* note 150 (discussing Larry Flynt’s stated motives in publishing a fake Campari ad in *Hustler* magazine).

40. See *Rosenfeld v. New Jersey*, 408 U.S. 901, 902–03 (1972) (Burger, C.J., dissenting) (The majority vacated and remanded for reconsideration, where the New Jersey Supreme Court, in *State v. Rosenfeld*, 303 A.2d 889 (N.J. 1973), held the remark was protected because it did not and was not likely to incite a breach of the peace.); see also *Gooding v. Wilson*, 405 U.S. 518 (1972) (overturning conviction for use of opprobrious language to a police officer).

41. See *Cohen v. California*, 403 U.S. 15 (1971); see also Ronald J. Krotoszynski, Jr., *Cohen v. California: “Inconsequential” Cases and Larger Principles*, 74 TEX. L. REV. 1251 (1996).

42. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

43. *Bartnicki v. Vopper*, 532 U.S. 514, 532–35 (2001).

44. *Id.* at 535.

45. *Id.*

unquestionably a matter of public concern, and respondents were clearly engaged in debate about that concern.”<sup>46</sup> As Justice Stevens, writing for the *Bartnicki* majority, explained, “That debate may be more mundane than the Communist rhetoric that inspired Justice Brandeis’ classic opinion in *Whitney v. California*, but it is no less worthy of constitutional protection.”<sup>47</sup>

Thus, even a brief and somewhat cursory analysis of the impact of the First Amendment’s free speech and free press guarantees immediately establishes the difficulty, if not outright impossibility, of securing a broad-based right of privacy as nondisclosure, even if U.S. legislatures or courts were inclined to create such protection. In the post-*Sullivan* era, the “right to be let alone” has little doctrinal bite; it essentially protects against the disclosure of private facts that do not relate to a public official, a public figure, or a matter of public concern. By definition, however, almost anything that a newspaper or a television station wishes to report is a “matter of public concern,” else why would the media outlet seek to report on the matter in the first place? In sum, the First Amendment seriously limits the ability of government to secure personal privacy as nondisclosure.

The European Court of Human Rights and the European Court of Justice, as well as domestic constitutional courts, such as Germany’s Bundesverfassungsgericht (Federal Constitutional Court), have been much more sympathetic to the protection of personal information with respect to all citizens, including public officials and public figures, than has the Supreme Court of the United States.<sup>48</sup> In cultures that believe that all persons have an inherent right to the protection of personal honor and dignity, securing privacy as nondisclosure is not merely an important but rather an *essential* project.<sup>49</sup> By way of contrast, however, in a place like the United States, which really lacks any legal recognition of mandatory civility norms,<sup>50</sup> it should not be surprising that privacy as nondisclosure receives so little formal legal protection.

One also should note that the protection of *false* statements of fact makes U.S. law radically out of step with most of the world. In places like Germany and Japan, the law of libel permits recovery for the publication of true statements that damage personal reputation in the absence of a countervailing public interest in dissemination of the information.<sup>51</sup> In other words, before *Sullivan* even enters the

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46. *Id.*

47. *Id.* (citation omitted).

48. *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1999, 101 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 361 (Ger.) (“Princess Caroline”) (finding that the publication of some contested photos of the Princess would violate her privacy rights under the German constitution but refusing to enjoin the publication of others), *overruled in part by* Von Hannover v. Germany, App. No. 59320/00, 40 Eur. H.R. Rep. 1 (2005) (holding that the German court’s ruling was insufficiently protective of the Princess’s privacy rights under Article 8 of the European Convention).

49. *See, e.g.*, Campbell v. MGN Ltd., [2004] UKHL 22, [2004] 2 A.C. (H.L.) 457 (appeal taken from Eng.).

50. *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1213, 1219–20 (2011).

51. *See* RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 101–18, 155–64 (2006); *see also* Ronald J. Krotoszynski, Jr., *Defamation in the Digital Age: Some*

picture, U.S. law devalues privacy by protecting the disclosure of truthful statements that degrade or embarrass the subject, even in the absence of a particularly good reason for protecting the disclosure. When one adds *Sullivan* and *Bartnicki* to the equation, the balance in favor of publication becomes tremendously skewed in favor of vindicating the interests of the press and would-be voyeurs as opposed to “the right to be let alone.”

Indeed, if publication of private facts is really little different than a physical assault in its potential emotional and psychological effects on the subject (victim?),<sup>52</sup> taxing the entire social cost of such publication against the subjects seems highly questionable. Yet, this is precisely how the First Amendment’s mandate affects the ability of both the federal and state governments to provide a right of recovery for violations of privacy interests.

Finally, it bears repeating that a general legal culture uninterested in securing privacy interests undoubtedly helps to explain the lack of constitutionally permissible statutory general privacy protections. Even though legislative action to secure privacy with respect to public officials and public figures and regarding matters of public concern has been significantly curtailed under the First Amendment, substantial privacy protections could be, but have not been, enacted in the United States. In other words, the “Wild West” legal and political culture generally does not provide privacy protections even when the First Amendment would not stand in the way.

Consider, for example, the common practice of web browsers and websites collecting (“mining”) data from those using the websites. The First Amendment would not impose any serious barrier to a law requiring mandatory disclosure of such practices, regulation of the practices (including a ban on data mining without the subject’s overt and voluntary consent), or even a flat ban on such practices.<sup>53</sup>

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*Comparative Law Observations on the Difficulty of Reconciling Free Speech and Reputation in the Emerging Global Village*, 62 WASH. & LEE L. REV. 339, 348–50 (2005) [hereinafter Krotoszynski, *Defamation in the Digital Age*].

52. See Warren & Brandeis, *supra* note 2, at 205–07.

53. *But cf. Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2668, 2672 (2011) (invalidating, notwithstanding a strong privacy-based justification for the statute, a Vermont law that protected the privacy of physician and patient prescription data by prohibiting the sale of such data to pharmaceutical companies for marketing purposes). To be sure, Justice Anthony Kennedy, writing for the *Sorrell* majority, did credit the general importance of protecting privacy interests. *See id.* at 2672. Even so, however, he squarely rejected Vermont’s privacy defense, noting that when seeking to safeguard privacy interests, “the State cannot engage in content-based discrimination to advance its own side of the debate.” *Id.* On the other hand, Justice Stephen Breyer, writing in dissent and joined by Justices Ruth Bader Ginsburg and Elena Kagan, found that Vermont’s desire to protect the privacy of physicians’ prescribing practices constituted a significant government interest. *See id.* at 2682 (Breyer, J., dissenting) (“And this Court has affirmed the importance of maintaining ‘privacy’ as an important public policy goal—even in respect to information already disclosed to the public for particular purposes (but not others).”). He also found that Vermont’s statute was sufficiently narrowly tailored to survive First Amendment judicial scrutiny. *See id.* at 2683 (“The record also adequately supports the State’s privacy objective.”); *id.* (“[T]he statute serves a meaningful interest in increasing the protection given to prescriber privacy.”). Justice Breyer, however, was merely writing in dissent, whereas Justice Kennedy wrote for the 6-3 *Sorrell* majority. *See id.* at 2658–59.

Congress has not enacted such a law, nor have most state legislatures. As a consequence, data mining and resale of personal information gathered from the use of web browsers and websites is regulated, if at all, by the market itself.<sup>54</sup> This provides even more evidence of privacy as nondisclosure's relative lack of cultural salience in the contemporary United States.

The U.S. population's general distrust of government and government institutions no doubt provides at least a partial explanation for this lack of privacy protection through the civil and criminal law—and also helps to explain the absence of mandatory civility norms more generally.<sup>55</sup> If one believes that government routinely abuses its powers, permitting government to create and enforce mandatory forms of politesse could be deeply unsettling. A government empowered to decide when offensive speech “goes too far” could use this authority to systematically squelch speakers and viewpoints that it finds disagreeable or troublesome (whether or not the particular modality of the speaker's expression actually transgresses generally held notions of privacy, dignity, or civility).<sup>56</sup> By deploying the First Amendment to disallow mandatory civility norms, in the service of safeguarding privacy and even human dignity, this risk of abuse of discretionary government power can be, and is, completely avoided. But at what cost? I do not suggest that the U.S. approach is wrong or misguided; my point is a more limited one. We should be careful to weigh both the benefits and costs of disallowing legal protections for privacy, dignity, and personal honor rather than

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54. Some commentators, such as Professor Fred Cate, argue that reliance on the market and competition will ensure adequate protection of personal data and also meaningful choice for consumers. See Fred H. Cate, *The Changing Face of Privacy Protection in the European Union and the United States*, 33 IND. L. REV. 173, 223–24, 231 (1999). This claim is open to doubt. For market-based privacy protections to be effective substitutes for regulatory protections, two conditions would first have to exist. First, consumers would have to be actively engaged and make some effort to obtain information about privacy policies and then use this information when deciding which browsers or websites to patronize. Second, even if consumers could be relied upon to use information about privacy policies to shape their online behavior, the policies themselves would need to be readily available and written in easy-to-understand language. Neither condition appears to exist in the contemporary United States.

55. See *Phelps*, 131 S. Ct. at 1220.

56. See Ronald J. Krotoszynski, Jr., *Questioning the Value of Dissent and Free Speech More Generally: American Skepticism of Government and the Protection of Low-Value Speech*, in DISSENTING VOICES IN AMERICAN SOCIETY 209, 213, 215–19 (Austin Sarat ed., 2012) [hereinafter Krotoszynski, *Questioning the Value of Dissent*] (arguing that pervasive distrust of government better explains U.S. free speech theory and practice than other, more purposive theories of the First Amendment); see also Ronald J. Krotoszynski, Jr., *The Shot (Not) Heard 'Round the World: Reconsidering the Perplexing U.S. Preoccupation with the Separation of Legislative and Executive Powers*, 51 B.C. L. REV. 1, 28–34 (2010) [hereinafter Krotoszynski, *The Shot (Not) Heard 'Round the World*] (positing that pervasive mistrust of government explains both structural and substantive limitations on the scope of government power in the United States and noting that other polities do not exhibit this same level of skepticism toward the government and its institutions).

simply and reflexively accepting their absence as a necessary cost of securing the freedom of speech and the press.<sup>57</sup>

It also bears noting that the U.S. approach, which utilizes a broad prophylactic ban on government efforts to enforce mandatory civility norms, represents a radical break with the prevailing legal approach in the wider global legal community. Even if, after careful consideration of the merits, the United States decides to stick to its guns, this disjunction with prevailing standards in other democratic polities will certainly produce legal frictions, and these conflicts of values will arise with greater regularity in our more globalized marketplace of ideas.

## II. PRIVACY AND THE PUBLIC/PRIVATE DICHOTOMY

Professor Owen Fiss has cautioned repeatedly that in thinking about expressive freedom in the United States all too often we frame the project solely in terms of vigilance against government efforts at censorship.<sup>58</sup> He persuasively argues that we risk the vibrancy of the marketplace of ideas if we permit private corporations to exercise unlimited censorial powers through the use of unregulated market power.<sup>59</sup> If Google, for example, were to block a particular website, this form of private censorship might well prove far more effective at limiting access to the information and ideas contained on the website than would a government law or

57. See JON L. MILLS, *PRIVACY: THE LOST RIGHT* (2008).

58. See Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1412–16 (1986); Owen M. Fiss, *Silence on the Street Corner*, 26 SUFFOLK U. L. REV. 1, 1–3 (1992); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 787–91 (1987). As Fiss states the proposition, “The state should be allowed to intervene, and sometimes even required to do so, . . . to correct for the market.” Fiss, *Why the State?*, *supra*, at 791.

59. See Fiss, *Why the State?*, *supra* note 58, at 794 (“In another world things might be different, but in this one, we will need the state.”); Fiss, *Free Speech and Social Structure*, *supra* note 58, at 1415 (“Just as it is no longer possible to assume that the private sector is all freedom, we can no longer assume that the state is all censorship.”). To be clear, Professor Fiss does not repose reflexive faith in the state as a force for good; instead, he suggests that we should not simply assume that all exercises of private power to regulate the marketplace of ideas will reliably advance the project of democratic self-governance. As he explains his point, “it [is] fair to say that in a capitalist society, the protection of autonomy will on the whole produce a public debate that is dominated by those who are economically powerful.” *Id.* at 1412. Accordingly,

[t]he market—even one that operates smoothly and efficiently—does not assure that all relevant views will be heard, but only those that are advocated by the rich, by those who can borrow from others, or by those who can put together a product that will attract sufficient advertisers or subscribers to sustain the enterprise.

*Id.* at 1412–13. From this vantage point, government interventions in the market can enhance rather than degrade the marketplace of ideas by countering the ill effects of a monopoly or oligopoly of voices. See, e.g., Fiss, *Silence on the Street Corner*, *supra* note 58, at 3 (“Most radicals do not have the funds to buy airtime, the networks are reluctant to sell airtime to them anyway, spokespersons for the underprivileged do not have the capital to buy a newspaper or television station, and coverage of protest activities is circumscribed by the economic imperatives that drive the privately-owned media and today enfeeble public broadcasting.”).

regulation imposing criminal or civil penalties for disseminating or reading the content.

Notwithstanding Professor Fiss's cogent arguments in favor of rethinking the free speech project in terms of greater regulation of private power over the marketplace of ideas, most U.S. lawyers, judges, academics, and citizens think of rights almost exclusively as running against the state rather than against nongovernmental actors (such as publicly traded corporations). This same phenomenon exists with respect to privacy rights: in the United States, we tend to think of privacy rights running against the state rather than against each other.<sup>60</sup>

To be sure, some statutory provisions secure privacy rights in limited contexts. The Health Insurance Portability and Accountability Act of 1996 (HIPAA),<sup>61</sup> for example, contains provisions that protect the confidentiality—and therefore the privacy—of a patient's medical records.<sup>62</sup> But a law cannot change cultural habits and concerns (or, in the case of privacy, a lack of concern). In practice, HIPAA's privacy rule simply reduces to a new patient being furnished with a sheet of paper from her medical care provider stating the HIPAA privacy protection rule but then immediately asking for a general release so that the provider may communicate with medical insurance companies, and others, to obtain benefits on behalf of the patient. Virtually all patients simply sign this form, thereby waiving a substantial portion of their HIPAA rights. Physicians' offices do not invite discussion or negotiation about the content or scope of these waivers. Although I have never personally tested the proposition, one suspects that if a would-be patient were to refuse to sign the waiver form as written, she would probably be denied service.

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60. *But cf.* X and Y v. Netherlands, App. No. 8978/80, 8 Eur. H.R. Rep. 235, 239–41, ¶¶ 21–27 (1985) (holding that the privacy rights guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms include protection against *private* behavior that burdens or transgresses Article 8 because signatory states have a duty to secure Convention rights within society generally and not simply a duty not to violate them directly through government action). In fact, many European nations, including Germany, maintain legal systems under which the state itself not only must refrain from violating fundamental human rights but which *require* the state to promote respect for these interests within society more generally. *See* Krotoszynski, *Defamation in the Digital Age*, *supra* note 51, at 349–50 (discussing the German doctrine of secondary effect and the Basic Law's (Grundgesetz) application to purely private interactions between nongovernmental entities); *see also* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986) (discussing and distinguishing legal systems that observe constitutional rights solely in negative terms, i.e., as running solely against the state itself, and legal systems that recognize and enforce “positive” constitutional rights, i.e., rights that the state has an affirmative duty to secure for its citizens).

61. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified at 42 U.S.C. § 1301 *et seq.*) (codified at various points as amendments or additions to the Social Security Act). For a skeptical overview of HIPAA's effectiveness at securing patient privacy, see Brian Zoeller, Note, *Health and Human Services' Privacy Proposal: A Failed Attempt at Health Information Privacy Protection*, 40 BRANDEIS L.J. 1065 (2002).

62. For a discussion of the privacy protections that the HIPAA privacy rule provides, see *Health Information Privacy*, U.S. DEP'T HEALTH & HUMAN SERVICES, <http://www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/index.html>.

To be clear, one should not understate the value of HIPAA or other statutory protections of privacy interests against nongovernmental actors; rather, the point is that even when legislative bodies in the United States act to convey privacy protections by statute, these statutory rights often lack cultural salience and quickly morph into relatively meaningless forms of legal boilerplate.

Again, the contrast with Europe seems striking. For example, European websites are far more serious about representing the private nature of the transaction. As Professor Paul Ohm notes, the European Union's (EU) data privacy regulations are "famously privacy-protective."<sup>63</sup> Undoubtedly, this greater respect for securing personal information and data is not *solely* the product of voluntary self-regulation but instead relates rather directly to the European Commission's extensive "directives" (administrative regulations) on protecting the privacy of personal information.<sup>64</sup> Even so, however, the question of the chicken and the egg remains: are privacy regulations stricter in Europe because of cultural expectations, or do the regulations themselves help to order and shape privacy expectations of individuals residing within the EU? Whatever the precise causation, European privacy protections at the EU level are much broader, and stricter, than the corresponding enactments at the federal and state level in the United States.<sup>65</sup>

Moreover, the comprehensive protection of personal honor and dignity, as significant legal concepts within the domestic tort law of many European nations, also reflects a much higher social importance for the protection of privacy interests in Europe than in the United States. In other words, Europeans seem to take far more seriously the need to secure nondisclosure rights against other citizens and nongovernmental entities than do most U.S. citizens (and the federal and state governments).

The degree of the public/private disjunction in privacy concerns remains strong in the contemporary United States. For example, the Bush administration's domestic spying program was remarkably controversial,<sup>66</sup> both average citizens and

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63. Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1704 (2010).

64. Council Directive 95/46, on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L281) 31 (EU). The European Union is currently drafting a new directive that will revise, update, and expand its privacy regulations. European Comm'n, *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)* (2011), available at <http://www.statewatch.org/news/2011/dec/eu-com-draft-dp-reg-inter-service-consultation.pdf> (proposing a new data protection regulation); see Steven C. Bennett, *The "Right to Be Forgotten": Reconciling EU and US Perspectives*, 30 BERKELEY J. INT'L L. 161, 178 (2012) (noting that the EU is revising and updating its privacy directive); Peter Swire, *Social Networks, Privacy, and Freedom of Association: Data Protection vs. Data Empowerment*, 90 N.C. L. REV. 1371, 1374 (2012) (same).

65. See Cate, *supra* note 54, at 196 ("When compared with the omnibus, centralized data protection of the EU directive and member states' national laws, U.S. privacy protection stands in stark contrast and to some observers seems to pale altogether."). For a general overview of European privacy protection regulations, see *id.* at 180–95.

66. See Ronald J. Krotoszynski, Jr., *A Man for All Seasons: Judge Frank M. Johnson Jr.*



members of Congress were greatly angered by the notion that the government might be wiretapping telephone calls between U.S. residents and citizens of another nation.<sup>67</sup> Congress conducted oversight hearings and extensive press coverage of the controversial policy reported on each new disclosure regarding the program; the program and its discovery were, in fact, front page news in the nation's leading newspapers.<sup>68</sup>

In the end, however, rather than condemn the domestic spying program or punish those responsible for it, Congress instead passed legislation in 2008 that conveyed *retroactive immunity* on telephone companies that facilitated the domestic spying program—with the support of then-Senator Barack Obama.<sup>69</sup> In other words, U.S. politicians saw more political upside in granting blanket immunity to the telephone companies that cooperated with a warrantless wiretapping program after the fact (despite the absence of any judicial safeguards for the program) than in creating mandatory new privacy protections that would force the federal executive branch to seek judicial approval for such monitoring programs or, looking at the question from the nongovernmental side of the ledger, imposing civil liability on the private telecommunications companies that voluntarily cooperated with the arguably unlawful domestic spying programs. Moreover, ostensibly “liberal” or “progressive” politicians, including the putative nominee of the Democratic Party for President, supported this approach.<sup>70</sup>

Such an outcome in Europe, if not completely unthinkable, comes very close to being so. This is not because governments in Europe are intrinsically more virtuous or have a higher regard for freedom, but rather because the political consequences of such a program would be utterly disastrous. Once again, culture informs law.

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*and the Quest to Secure the Rule of Law*, 61 ALA. L. REV. 165, 169–72 (2009); W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 FORDHAM L. REV. 1333, 1338–41 (2009).

67. See, e.g., Emily Arthur Cardy, Note, *The Unconstitutionality of the Protect America Act of 2007*, 18 B.U. PUB. INT. L.J. 171, 171–73 (2008).

68. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; see *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006); Press Release, American Civil Liberties Union, ACLU Demands Records About Warrantless Spying by National Security Agency (Dec. 20, 2005), available at <http://www.aclu.org/safefree/spying/23150prs20051220.html>.

69. See Shailagh Murray, *Obama Joins Fellow Senators in Passing New Wiretapping Measure*, WASH. POST, July 10, 2008, at A6 (noting Senate passage of “legislation to overhaul government eavesdropping rules in terrorism and espionage cases and [that] effectively granted immunity to telecommunications companies that participated in a secret domestic spying program, ending a contentious debate that has raged for more than two years” and reporting that “[a]mong the 69 senators who voted ‘yes’ on final passage was Barack Obama”).

70. See James Risen & Eric Lichtblau, *Early Test for Obama on Domestic Spying Views*, N.Y. TIMES, Nov. 18, 2008, at A17 (“As a presidential candidate, he condemned the N.S.A. operation as illegal, and threatened to filibuster a bill that would grant the government expanded surveillance powers and provide immunity to phone companies that helped in the Bush administration’s program of wiretapping without warrants. But Mr. Obama switched positions and ultimately supported the measure in the Senate, angering liberal supporters who accused him of bowing to pressure from the right.”).

Similarly, most U.S. users of commercial web browsers and Internet service providers do not think twice about the placement of cookies on their computers (including “zombie” cookies that cannot be removed or eradicated by simply clearing a web browser’s memory cache), the tracking of their searches and purchases, or other commoditization of their use of the Internet. The *Wall Street Journal* has run a series of investigative journalism pieces on privacy that document systematic and widespread privacy abuses by various segments of the web;<sup>71</sup> this muckraking, at least to date, appears to have landed with a thud. Although the Obama administration and some members of Congress have proposed an Internet users’ Bill of Rights,<sup>72</sup> including some mandatory privacy protections, nothing has happened.<sup>73</sup>

Again, in the United States, the notion of an invasion of privacy generally runs against the federal government, not so much against private companies such as Microsoft or Google. As a consequence, very little data privacy protection—even of a sort that would probably not implicate the First Amendment—exists at either the federal or state level. Instead, to a remarkable—indeed unwise—degree, in the contemporary United States we rely almost entirely on market competition to ensure even a modicum of privacy protection for our personal information, data, and Internet browsing habits.

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71. Julia Angwin, *Big Issues: Technology (A Special Report)—How Much Should People Worry About the Loss of Online Privacy?*, WALL ST. J., Nov. 15, 2011, at B7; Julia Angwin, *Latest in Web Tracking: Stealthy ‘Supercookies,’* WALL ST. J., Aug. 18, 2011, at A1; Julia Angwin & Jeremy Singer-Vine, *What They Know: A Wall Street Journal Investigation: The Selling of You*, WALL ST. J., Apr. 7, 2012, at C1; Julia Angwin & Emily Steel, *What They Know: A Wall Street Journal Investigation: Web’s Hot New Commodity: Privacy*, WALL ST. J., Feb. 28, 2011, at A1; Julia Angwin & Jennifer Valentino-DeVries, *What They Know: A Wall Street Journal Investigation: Race is On to ‘Fingerprint’ Phones, PCs*, WALL ST. J., Dec. 1, 2010, at A1; Emily Steel & Julia Angwin, *On the Web’s Cutting Edge, Anonymity in Name Only*, WALL ST. J., Aug. 4, 2010, at A1. It bears noting that the *Wall Street Journal*’s excellent investigative journalism efforts with respect to online privacy appear to be, if not unique, then very close to it. One wonders if traditional media companies that currently seek to benefit from online revenue streams have something of a conflict of interest with respect to reporting on how websites maximize revenue by minimizing users’ privacy and data protection.

72. See Hayley Tsukayama, *What’s the ‘Privacy Bill of Rights’?*, WASH. POST, Feb. 24, 2012, at A11 (describing the Obama administration’s proposal and the seven general principles that legislation embodies, including “individual control,” “transparency,” “respect for context,” “security,” “access and accuracy,” “focused collection,” and “accountability”); Jennifer Valentino-DeVries & Emily Steel, *President Pushes Privacy*, WALL ST. J., Mar. 16, 2011, at B1 (“The Obama administration plans to ask Congress Wednesday to pass a ‘privacy bill of rights’ to protect Americans from intrusive data gathering, amid growing concern about the tracking and targeting of Internet users.”).

73. See Jasmin Melvin, *Web Privacy Guarantee? Critics Remain Skeptical*, CHI. TRIB., Feb. 24, 2012, § 2, at 3; Edward Wyatt, *F.T.C. and White House Push for Online Privacy Laws*, N.Y. TIMES, May 10, 2012, at B8. To be sure, some commentators were skeptical of this legislation’s prospects for success from the beginning. See Tsukayama, *supra* note 72 (“But there are some doubts about whether comprehensive legislation will make it through Congress, particularly in an election year. There are a handful of privacy bills that have been introduced this session but have failed to gain much traction.”).

And, again, if one broadens the question and asks, “in the United States, could government act to secure privacy, dignity, and personal honor from private invasion?,” the answer would be no in many important circumstances. With respect to public officials, public figures, and information that relates to a matter of public concern, the media would have a strong claim to constitutional protection for the dissemination of this information, even if it were purloined, provided that the media entity publishing the information was not itself responsible or complicit in the theft of the information.

A contretemps involving the disclosure of Justice Antonin Scalia’s personal information, including his home address, phone number, bank, and e-mail address demonstrates just how deeply U.S. antipathy to privacy (as nondisclosure) protection seems to run. At an academic conference, Justice Scalia made public comments disparaging of the need for privacy protections;<sup>74</sup> in turn, Joel Reidenberg, a Fordham Law School professor, tasked his seminar students with using public databases to learn all that they could find about Justice Scalia.<sup>75</sup> The results were remarkable: “[a]mong its contents are Nino’s home address, his home phone number, the movies he likes, his food preferences, his wife’s personal e-mail address, and ‘photos of his lovely grandchildren.’”<sup>76</sup>

After a popular legal blog, *Above the Law*,<sup>77</sup> posted a story about the seminar students’ success in ferreting out confidential information about Justice Scalia, the Justice responded publicly to the breach of his privacy:

I stand by my remark at the Institute of American and Talmudic Law conference that it is silly to think that every single datum about my life is private. I was referring, of course, to whether every single datum about my life deserves privacy protection in law.

It is not a rare phenomenon that what is legal may also be quite irresponsible. That appears in the First Amendment context all the time. What can be said often should not be said. Prof. Reidenberg’s exercise is an example of perfectly legal, abominably poor judgment. Since he was not teaching a course in judgment, I presume he felt no responsibility to display any.<sup>78</sup>

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74. See Kashmir Hill, *What Fordham Knows About Justice Scalia*, ABOVE THE LAW (Apr. 22, 2009, 5:30 PM), <http://abovethelaw.com/2009/04/what-fordham-knows-about-justice-scalia/>. Justice Scalia mocked the notion that privacy laws should secure personal information against involuntary disclosure: “‘Every single datum about my life is private? That’s silly,’ Scalia [said].” *Id.*

75. See Kashmir Hill, *Justice Scalia Responds to Fordham Privacy Invasion!*, ABOVE THE LAW (Apr. 29, 2009, 9:52 AM), <http://abovethelaw.com/2009/04/justice-scalia-responds-to-fordham-privacy-invasion/>.

76. Hill, *supra* note 74.

77. ABOVE THE LAW, <http://abovethelaw.com>; see also Carol Beggy & Mark Shanahan, *Names*, BOS. GLOBE, May 10, 2008, at B10 (describing *Above the Law* as a “widely read legal blog”).

78. Hill, *supra* note 75.

Thus, even after a group of law students demonstrated that important personal data could easily be obtained and published from public databases, Justice Scalia stood by his guns, arguing that the law should not universally protect personal information from involuntary disclosure. This provides useful evidence of how deep the indifference (antipathy?) toward privacy rights runs in the contemporary United States.

### III. FUNDAMENTAL RIGHTS AND FUNDAMENTAL DISAGREEMENTS

Points of tangent plainly do exist about the meaning and scope of the right of privacy. Most legal systems have incorporated a set of tort rules designed to safeguard personal reputation, for example, whether denominated rules about “privacy,” “human dignity,” or even a more generalized “right to free development of the personality.”<sup>79</sup> In the United States, Canada, Australia, and Western Europe, a general consensus exists that a just society should offer some measure of protection, under the civil law, to each person’s interest in reputation, dignity, and privacy.<sup>80</sup> So far, so good—when we talk about privacy as protection of reputation and human dignity, we are speaking about a common commitment, something that, if not a universal human value, comes quite close to it.

Even here, however, our ability to speak meaningfully about privacy suffers a substantial setback from the radically different baselines that inform our respective domestic legal systems’ treatment of this interest when interests associated with privacy and human dignity conflict with values associated with expressive freedoms, such as the right to free speech or to a free press. In the United States, the imperative value of freedom of speech serves as a kind of absolute trump card, and state tort law protections routinely fail when challenged on First Amendment grounds.

Consider, for example, the recent *Phelps*<sup>81</sup> decision from the Supreme Court of the United States. The Reverend Fred Phelps and members of his Westboro Baptist Church (“Westboro”) hail from Topeka, Kansas and are active proselytizers; Phelps

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79. See Paul M. Schwartz & Karl-Nikolaus Peifer, *Prosser’s Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?*, 98 CALIF. L. REV. 1925 (2010); see also GRUNDGESETZFÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 1–2 (Ger.).

80. See generally NEW DIMENSIONS IN PRIVACY LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 1–5, 11–31, 60–90, 154–183, 202–228 (Andrew T. Kenyon & Megan Richardson eds., 2006) (discussing privacy law and principles in Australia, Canada, Germany, the United Kingdom, and in Western Europe more generally); Daniel B. Garrie, Maureen Duffy-Lewis, Rebecca Wong & Richard L. Gillespie, *Data Protection: The Challenges Facing Social Networking*, 6 BYU INT’L L. & MGMT. REV. 127, 129–30, 136–41 (2010) (discussing existence of data protection regimes potentially applicable to data located on social networking sites in Australia, Canada, Germany, Sweden, the United Kingdom, and under the regulations of the European Union); Thomas J. Smedinghoff, *It’s All About Trust: The Expanding Scope of Security Obligations in Global Privacy and E-Transactions Law*, 16 MICH. ST. J. INT’L L. 1, 15–16 (2007) (noting the existence of “omnibus” privacy protection regimes in many nations, including “Canada, Japan, Argentina, South Korea, Hong Kong, and Australia”).

81. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

and his congregation firmly believe that God is punishing the United States for tolerating an increasingly licentious society. In particular, greater social and legal tolerance for sexual minorities seems to cause Phelps and his followers a tremendous degree of anxiety. In order to call attention to the imperative of arresting these cultural and legal trends, Westboro stages highly offensive targeted pickets at the funerals of deceased military personnel.<sup>82</sup>

Albert Snyder's son, Marine Lance Corporal Matthew Snyder, was killed while on active duty in Iraq; his funeral took place in Westminster, Maryland.<sup>83</sup> Phelps and six of his congregants traveled to Westminster for the specific purpose of protesting at Matthew Snyder's funeral. Brandishing signs with slogans like "God Hates the USA/Thank God for 9/11," "God Hates Fags," and "Thank God for Dead Soldiers,"<sup>84</sup> the protest took place contemporaneously with, and proximate to, Matthew Snyder's funeral services.<sup>85</sup>

Following Westboro's offensive funeral picket, Albert Snyder initiated a civil tort action seeking compensatory and punitive damages for "defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy."<sup>86</sup> The jury found for Snyder on his claims for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy, awarding \$2.9 million in compensatory damages and \$8 million in punitive damages; the federal district judge subsequently reduced the punitive damages award to \$2.1 million, but otherwise upheld the jury's verdict.<sup>87</sup> On direct appeal, the U.S. Court of Appeals for the Fourth Circuit completely invalidated the jury award, holding that the speech at issue enjoyed full protection under the First Amendment.<sup>88</sup> The U.S. Supreme Court granted review and affirmed the Court of Appeals.

Writing for the 8-1 majority, Chief Justice Roberts held that the First Amendment essentially immunizes speech in a public forum, related to a matter of public concern, from serving as the basis for tort liability. On the first point, whether the speech related to a matter of public concern, Roberts noted that "Westboro had been actively engaged in speaking on the subjects addressed in its picketing long before it became aware of Matthew Snyder, and there can be no serious claim that Westboro's picketing did not represent its 'honestly believed' views on public issues."<sup>89</sup> Having decided this issue in favor of Phelps, the remaining question was whether the First Amendment shielded Westboro's speech from civil liability for invasion of privacy.

Chief Justice Roberts found that the speech enjoyed the full protection of the First Amendment, and held that a standard for civil liability based on the

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82. *See id.* at 1213.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 1214.

87. *Id.*

88. *See Snyder v. Phelps*, 580 F.3d 206, 221–22 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011).

89. *Phelps*, 131 S. Ct. at 1217 (citing *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964)).

“outrageousness” of speech comes too close to empowering a “heckler[’s] veto.”<sup>90</sup> He explained:

Given that Westboro’s speech was at a public place on a matter of public concern, that speech is entitled to “special protection” under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>91</sup>

This outcome appears to leave little, if any, breathing room for the application of privacy torts, at least if the speech at issue falls within the rubric of a “matter of public concern,” is otherwise lawful, and takes place in a traditional public forum.

Moreover, the gravamen of both the intentional infliction of emotional distress and privacy claims relates to the *outrageousness* of the speech or the intrusion upon privacy. Chief Justice Roberts specifically rejected this legal standard, at least in this context, because “[o]utrageousness, however, is a highly malleable standard with ‘an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.’”<sup>92</sup> That a civil jury might take such a step by imposing civil liability on an unpopular speaker or group constitutes an “unacceptable” risk and, accordingly, “the jury verdict imposing tort liability on Westboro for intentional infliction of emotional distress must be set aside.”<sup>93</sup>

The Court then proceeded to disallow the imposition of liability based on the tort of intrusion upon seclusion or civil conspiracy.<sup>94</sup> Chief Justice Roberts rejected the argument that mourners at the funeral of a dead soldier constitute a captive audience and the related argument that the state has a right to protect such a captive audience from outrageous or offensive speech.<sup>95</sup>

The net effect of *Phelps* is to extend the *New York Times Co. v. Sullivan*<sup>96</sup> line of cases displacing state tort law principles to reach highly offensive, targeted

90. *Id.* at 1219; see HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 140–41, 145 (1965). Professor Kalven has generally been credited with inventing and first using the concept of the “heckler’s veto.” See Fiss, *Free Speech and Social Structure*, *supra* note 58, at 1416–17. However, the concept of a “heckler’s veto” arguably related back to Justice Douglas’s majority opinion in *Terminiello* and Justice Black’s dissenting opinion in *Feiner*. See *Feiner v. New York*, 340 U.S. 315, 326–29 (1951) (Black, J., dissenting); *Terminiello v. Chicago*, 337 U.S. 1, 4–6 (1949).

91. *Phelps*, 131 S. Ct. at 1219 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

92. *Id.* (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).

93. *Id.*

94. *Id.* at 1219–20.

95. *See id.*

96. 376 U.S. 254 (1964); see also *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991); *Hustler*, 485 U.S. 46; *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). For a thoughtful—and highly influential—discussion of the central importance of the *New York Times Co. v. Sullivan* line of cases to the project of democratic self-government, see

protests, if the speech at issue relates to a matter of public concern. More specifically, *Phelps* has the effect of extending *Hustler Magazine, Inc. v. Falwell*<sup>97</sup> to include plaintiffs who are not public officials or public figures, but whose cause of action involves liability premised on speech relating to a matter of public concern. This represents a major displacement of traditional state tort law to accommodate an “uninhibited, robust, and wide-open”<sup>98</sup> debate about public affairs.

Yet, the speech here, as Justice Alito observed in dissent,<sup>99</sup> seemed intentionally targeted to inflict maximum emotional pain, and to do so in a way that seriously intruded on a quintessentially private moment—the funeral of a deceased family member. Justice Alito argued that “[i]n order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner [Snyder].”<sup>100</sup> The question that presents itself, then, is whether a commitment to the freedom of expression requires a polity to forbear from enforcing, whether through criminal or civil law, mandatory civility norms designed to protect the privacy, dignity, and personal honor of its citizens.

To be sure, the *Phelps* majority sees this as a relatively easy question. Chief Justice Roberts claims that an open and free marketplace of ideas requires that civil juries enjoy no greater power to censor than local police or city officials:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.<sup>101</sup>

But, to a large degree, the *Phelps* majority opinion, as well as the larger *New York Times* line of precedent, seems to assume that the costs of outrageous, and even objectively false, speech must be borne by those against whom it is directed. Yet, this constitutes a very distinctly American solution to the problem of reconciling a

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Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191. Kalven famously quoted Alexander Meiklejohn, another iconic scholar of the First Amendment, as describing the *Sullivan* decision as an “occasion for dancing in the streets.” *Id.* at 221 n.125.

97. 485 U.S. at 50–51.

98. *Sullivan*, 376 U.S. at 270.

99. See *Phelps*, 131 S. Ct. at 1222–26 (Alito, J., dissenting).

100. *Id.* at 1229. But cf. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 624–32 (1990) (arguing against imposing liability for speech based on an “outrageousness” standard not because highly offensive speech has significant social value, nor because the standard is too inherently subjective, but rather because use of an “outrageousness” metric “would enable a single community to use the authority of the state to confine speech within its own notions of propriety”).

101. *Phelps*, 131 S. Ct. at 1220.

commitment to the freedom of speech and of the press, on the one hand, with a commitment to safeguarding privacy and dignity values, on the other.

Without belaboring the point, the outcome in *Phelps* would likely have been very different outside the United States. For example, the House of Lords (now the Supreme Court of the United Kingdom)<sup>102</sup> has held that supermodel Naomi Campbell, could recover damages associated with publication of a photograph of her leaving a Narcotics Anonymous meeting, in the heart of London, even though Ms. Campbell was standing on a public street, plainly visible to any passersby.<sup>103</sup> Thus, in the United Kingdom, even a public figure, standing on a public street, can possess a legally protected interest in privacy and nondisclosure.

Along similar lines, the European Court of Human Rights (“European Court”) has held that Article 8 of the European Convention protects a right of privacy held by a public official (a person in line to the throne of Monaco), in public places and while at public events.<sup>104</sup> Princess Caroline of Monaco is certainly a public figure, even if she is not a public official, yet she nevertheless has an equal claim to the protection of her privacy under the European Convention on Human Rights.

The European Court explained that the freedom of speech and the press did not have any necessary priority over the right of privacy.<sup>105</sup> Citing and quoting a resolution of the Parliamentary Assembly of the Council of Europe, the European Court noted “the importance of every person’s right to privacy, and of the right to freedom of expression, [i]s fundamental,” but also emphasized that this does *not* mean that freedom of expression must always take precedence regardless of the precise context.<sup>106</sup> Rather, because these fundamental rights “are of equal value” it is not possible simply to find that speech and press rights will routinely overbear

102. See Cassell Bryan-Low & Jess Bravin, *A U.K. Court Without the Wigs—New Supreme Bench, Patterned on America’s, Stirs Debate*, WALL ST. J., Oct. 17, 2009, at A1 (reporting that “[t]his month, the U.K. replaced its Law Lords—a committee of noblemen that served as the highest tribunal for much of Britain—with the new Supreme Court of the United Kingdom,” patterned on the Supreme Court of the United States and noting that “[f]or the first time, the U.K.’s highest court is fully separated, American-style, from Parliament and its legislative function”).

103. See *Campbell v. MGN Ltd.*, [2004] UKHL 22, [2004] 2 A.C. (H.L.) 457 (appeal taken from Eng.).

104. See *Von Hannover v. Germany*, App. No. 53920/00, 40 Eur. H.R. Rep. 1, 5–6, ¶¶ 10–17, 28–29, ¶¶ 76–78 (2005). The publication of three sets of photographs was at issue in *Von Hannover*, including photographs of Princess Caroline having lunch at a French restaurant with an actor, riding a horse, with her children, shopping, riding a bicycle, skiing, playing tennis, and at a beach. See *id.* at 5–6, ¶¶ 10–17.

105. *Id.* at 25, ¶ 58 (holding that “[t]hat protection of private life has to be balanced against the freedom of expression”); *id.* at 25, ¶ 60 (noting that the European Court of Human Rights has “had to balance the protection of private life against the freedom of expression” in several cases presenting a conflict between these interests).

106. *Id.* at 18–19, ¶ 42 (citing and quoting Resolution 1165, clause 11 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy); see also *id.* at 24–25, ¶¶ 58–60 (holding that when privacy interests conflict with free speech and free press rights, which the European Convention also expressly protects, the European Court must balance these interests against each other taking into account the purpose and proper scope of all three fundamental rights).



privacy interests.<sup>107</sup> Moreover, even celebrities and socialites “enjoy a ‘legitimate expectation’ of protection of and respect for their private life.”<sup>108</sup>

The European Court rejected the notion that the rights of free speech and a free press should control with respect to publication of the photographs at issue:

The Court considers that a fundamental distinction needs to be made between reporting facts—even controversial ones—capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions.<sup>109</sup>

Because “the sole purpose [of publishing the photographs] was to satisfy the curiosity of a particular readership regarding the details of the applicant’s private life, [publication of the photographs] cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public.”<sup>110</sup>

Given this reasoning and the limited scope of free expression and free press rights—rights limited essentially to matters directly associated with democratic self-government—it necessarily followed that Princess Caroline’s privacy claim trumped the media’s speech and press claims.<sup>111</sup> “[T]he 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.”<sup>112</sup> A mere “commercial interest” in publishing photographs and articles “must, in the Court’s view, yield to [Princess Caroline’s] right to the effective protection of her private life.”<sup>113</sup> Thus, Germany had a duty under the European Convention to provide legal protection to Princess Caroline against the German media outlets that sought to publish the photographs.<sup>114</sup>

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107. *Id.* at 19, ¶ 42 (quoting and citing Resolution 1165, clause 11 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy). The Council of Europe is the organization from which the European Court receives its mandate and judicial authority. Its membership includes virtually all nations in Western and Eastern Europe, as well as Turkey. For an excellent overview of the European Court and the European Convention, including the history, structure, organization, and procedures of the European Court, see *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 1–94 (Pieter van Dijk et al. eds., 4th ed. 2006).

108. *Von Hannover*, 40 Eur. H.R. Rep. at 27, ¶ 69.

109. *Id.* at 26, ¶ 63.

110. *Id.* at 27, ¶ 65.

111. *See id.* at 26–29, ¶ 61–78.

112. *Id.* at 28, ¶ 76.

113. *Id.* at 28, ¶ 77.

114. *See id.* at 29, ¶ 78 (holding that “in the Court’s opinion the criteria established by the domestic courts were not sufficient to ensure the effective protection of the applicant’s private life and she should, in the circumstances of the case, have had a ‘legitimate expectation’ of protection of her private life”). *Von Hannover* thus involves a positive obligation on the part of Germany to regulate private behavior more effectively to secure privacy interests in contemporary society. The European Court acknowledged this aspect of the dispute, noting that signatories to the European Convention incur legal obligations that

To be sure, it is certainly true that the European Convention contains an express clause securing a right of privacy. Article 8 provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as 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.<sup>115</sup>

In this respect, then, the European Court was working against a legal backdrop that differs from the U.S. Constitution. And, when two express constitutional rights conflict, some sort of accommodation, usually through balancing, must be made.<sup>116</sup>

Nevertheless, one would be affording too much explanatory force to text to suggest that the presence of Article 8 explains fully the differences between *Phelps*, on the one hand, and *Von Hannover*, on the other. These rules reflect deep-seated cultural values in the United States and in Europe. In the United States, a pervasive distrust of government helps to sustain a regime of near-absolute protection for the freedom of speech, whereas in the rest of the world, citizens repose more trust, more reflexively, in government and its agents, and accordingly tolerate higher levels of government regulation of speech.<sup>117</sup>

My point in discussing the displacement of tort law to advance free speech values in the United States is to demonstrate that even if we could sort out the many difficult and pressing definitional issues that plague the concept of privacy, we might well find that, once the dust settles, fundamental and irreconcilable differences remain that simply cannot be bridged. In the United States, the free speech project enjoys if not an absolute priority, then something very close to it. It is quite doubtful that the federal or state governments could enact and enforce rules that require individuals to observe mandatory civility norms. By way of contrast, provisions like Article 8 arguably require signatories of the European Convention to maintain legal rules that adequately safeguard the privacy rights not only of ordinary people, but of politicians and movie stars as well.

In this sense, then, although privacy might well be a universal value, substantial and probably insurmountable obstacles exist to working out a set of rules that would operationalize the concept transnationally. We can all agree that privacy is important and should be protected, but from that point forward, the sledding will be very heavy indeed.

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“may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.” *Id.* at 25, ¶ 57.

115. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 222, C.E.T.S. 5.

116. See AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 164–66 (2006); Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 93–97, 161–62 (2002); Aharon Barak, *Proportionality and Principled Balancing*, 4 LAW & ETHICS HUM. RTS. 1 (2010).

117. See Krotoszynski, *Questioning the Value of Dissent*, *supra* note 56, at 213, 219–29.

At the same time, however, simply agreeing to disagree seems an unacceptable solution to the problem of conflicting human rights norms, in that simply ignoring the different relevant weights and priorities will lead different jurisdictions to afford or withhold protection for speech and press that originates in one place (say the United States), but has significant effects in another (say Germany or France). A glaring, indeed compelling, need exists for clearer *shared* rules regarding both the scope of privacy (dignity) rights and also greater clarity about appropriate jurisdictional lines for enforcing those rules.

Although the claim is certainly subject to objection, rethinking and perhaps disaggregating the concept of privacy into more discrete and easily definable packets or sticks of rights might help point the way to a shared solution. Just as property is not used as a generic legal construct, free and clear of particularized applications, so too privacy is a concept that cries out for specificity regarding the precise interests the concept encompasses and also the scope of those interests. We should think about privacy not as a single thing or unitary whole, but rather as a disaggregated bundle of sticks, various and sundry discrete interests, that all in one way or another help to secure legitimate claims to autonomy, nondisclosure, and self-definition.

#### IV. THE NOMENCLATURE OF THE INDIVIDUAL AND THE COLLECTIVE: PRIVACY AS INDIVIDUAL AUTONOMY AND DIGNITY AS COMMUNITY RESPECT

Just as the public/private distinction helps to inform the framing of privacy in the United States and in Europe, the concept of autonomy as privacy, rather than human dignity, seems to reflect important cultural differences between the United States and the wider world. These differences, moreover, also seem to implicate the polity's overall trust in government to use discretionary censorial powers wisely and fairly—rather than arbitrarily and unjustly.

In general, in the United States we speak of a right of privacy, rather than a right of human dignity<sup>118</sup> or a right to the free development of the personality.<sup>119</sup> This is not accidental. Although instances exist of the U.S. Supreme Court invoking “dignity” as an aspect of constitutionally protected liberty,<sup>120</sup> these are the

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118. See GRUNDGESETZFÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 1(1) (Ger.) [hereinafter BASIC LAW].

119. *Id.* art. 2(1).

120. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (“It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”); see also Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 171–72 (2011) (noting that the Supreme Court’s “use of dignity is . . . on the rise” but cautioning that “its importance, meaning, and function are commonly presupposed but rarely articulated”). Professor Henry argues that “few concepts dominate modern constitutional jurisprudence more than dignity does without appearing in the Constitution.” *Id.* at 172. This may well be true, but the emergence of dignity as a constitutionally relevant construct in majority opinions is a recent phenomenon and it is unclear whether a majority of the Justices will continue to embrace

exceptions that prove the more general rule; rights, in the United States, for the most part belong to individuals and not groups. The nomenclature of privacy reflects a legal and cultural focus on the individual's ability to claim a sphere of autonomy—a realm of private action that cannot justly be regulated by the state.<sup>121</sup>

By way of contrast, in other industrial democracies, the conceptualization of human rights often has a more collective, or communal, cast.<sup>122</sup> This does not mean that individuals do not possess or exercise rights, but rather that rights are something that the society as a whole conveys not only to the individual but also to minority groups (whether defined by race, ethnicity, language, religion, or some other characteristic that makes a group seem “other” from the perspective of the dominant group within the society). Moreover, the recognition of group interests as constitutional interests can have important effects on the scope of rights when individuals attempt to exercise rights, such as the freedom of speech, in ways that impose significant costs on particular groups. Thus, constitutional recognition of rights as inhering in a group or community can mean a reduced scope for human rights as a means of empowering and enabling individual autonomy.

Germany provides an instructive example. Article 1 of the Basic Law provides that “[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”<sup>123</sup> This obligation is paramount and when dignity conflicts with other fundamental rights, the German Federal Constitutional Court, the highest judicial entity in Germany, will give priority to securing and advancing human dignity. This commitment to human dignity is buttressed by the right to free development of the human personality, a human right secured in Article 2 of the Basic Law.<sup>124</sup> These two rights, working in tandem, support a rich jurisprudence that secures the dignity interests of individuals, but also of *groups* within contemporary German society. The concept of dignity, not unlike “the Force” in *Star Wars* lore, plays a comprehensive animating role in German human rights

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and deploy the concept to protect discrete liberty interests. *Cf. id.* at 171, 171 n.5 (noting that Justice Brennan commonly used the term in his *dissenting* opinions). Professor Henry clearly believes, however, that the concept of dignity presently does important independent jurisprudential work in contemporary Supreme Court decisions and will likely continue to do so. *See id.* at 181 (“The Court’s repeated appeals to dignity, particularly in majority opinions, appear to parallel its greater willingness to proffer dignity as a substantive value animating our constitutional rights.”).

121. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”).

122. *See, e.g., Niemietz v. Germany*, 16 Eur. H.R. Rep. 97, 111, ¶ 29 (1992) (noting that “it would be too restrictive to limit the notion [of privacy] to an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world” and holding that “[r]espect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings”).

123. BASIC LAW, *supra* note 118, art.1(1).

124. *Id.* art. 2(1) (“Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.”).

jurisprudence: everyone has a right to dignity and all groups have a right to dignity as well.

The commitment to protecting an individual person's dignitarian interests is much broader in Germany than in the United States, which helps to provide useful perspective on the scope of dignity in German law. *All* persons, including incumbent politicians and celebrities, have an equal claim to the protection of their constitutional right to dignity. Thus, the Federal Constitutional Court upheld an injunction blocking distribution of a humor magazine that featured a parody of the German equivalent of a state governor as a rutting pig.<sup>125</sup> The cartoon, the court said, denied the incumbent politician his right to human dignity, a right that has paramount value under Germany's Basic Law.

Significantly, the concept of dignity protects both individuals and groups within German society. For example, the Federal Constitutional Court has upheld criminal prohibitions against Holocaust Denial, or the "Auschwitz Lie," because, in its view, there is simply no value in false speech about a matter of historical record.<sup>126</sup> This decision also reflects core concerns rooted in protecting the dignity of those murdered in the Holocaust, as well as their descendants.

Rejecting the defendant's claim that a commitment to respecting the freedom of speech must, of necessity, encompass the right publicly to deny the Holocaust, the Federal Constitutional Court held that false factual assertions "cannot contribute anything to the constitutionally presupposed formation of opinion" and, accordingly, do not enjoy *any* protection as "speech" under Article 5(1) of the Basic Law (the German constitutional analogue to the First Amendment).<sup>127</sup> The court explained that "[v]iewed from this angle, incorrect information is not an interest that merits protection."<sup>128</sup>

Freedom of speech in Germany does not extend to anti-Semitic speech, to antidemocratic speech, or to speech that transgresses civility norms designed to secure personal honor, reputation, and dignity.<sup>129</sup> Moreover, this protection is not limited to individuals, but extends to entire groups, such as persons serving in the

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125. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 3, 1987, 75 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 369, 1988 (Ger.) (Strauss Caricature Case), *reprinted in* 2 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT—FEDERAL CONSTITUTIONAL COURT—FEDERAL REPUBLIC OF GERMANY: FREEDOM OF SPEECH, PART 2, 420, 420–21 (D.C. Umbach ed., I. Fraser et al. trans., 1998) [hereinafter DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT]; *see* KROTOSZYNSKI, *supra* note 51, at 104–18 (discussing the balance that German constitutional law seeks to maintain between dignity and free speech and noting that, in circumstances where these interests squarely conflict with each other, safeguarding human dignity interests will trump protecting free speech).

126. *See* KROTOSZYNSKI, *supra* note 51, at 126–27. *But cf.* Lyrissa Barnett Lidsky, *Where's the Harm?: Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091, 1095–1100 (2008) (arguing that sound reasons exist for prohibiting government from proclaiming historical truths and defending such truths through criminal sanctions and arguing, from a practical perspective, that such regulations are not likely to convince those who deny the Holocaust and "may have the unintended and paradoxical consequence of strengthening the beliefs of Holocaust deniers, rather than weakening them").

127. KROTOSZYNSKI, *supra* note 51, at 127.

128. *Id.*

129. *Id.* at 93–130.

armed forces or members of a particular racial or religious group. The right to protection against outrageous verbal assault is both individual and communal.

The *Tucholsky* case<sup>130</sup> also helps to demonstrate the communitarian conception of the right to human dignity in Germany. A pacifist group, opposed to all forms of war and military aggression, adopted and propagated the phrase “Soldiers are Murderers” as a slogan; these protests then became the subject of a civil proceeding to suppress distribution of the group’s printed protest materials via an injunction. The phrase had been coined by Kurt Tucholsky, a writer and political satirist who had opposed the Nazi Party’s rise to power in the 1930s; his iteration of the idea was the slogan “Soldiers are Murderers.”<sup>131</sup>

The question presented for the German Federal Constitutional Court was whether the phrase “Soldiers are Murderers” constituted protected political speech or, instead, transgressed the dignity interests of those serving—and who had served—in Germany’s military ranks. The lower courts found that the phrase demeaned the dignity of those serving in Germany’s armed forces and prohibited use of the slogan in public discourse.<sup>132</sup>

The Federal Constitutional Court reversed, holding that the phrase, at least in the particular context presented, constituted protected political speech under Article 5(1) of the Basic Law.<sup>133</sup> It reached this conclusion because the phrase was not directed toward any particular soldier or group of soldiers.<sup>134</sup> “Instead, [the would-be anti-war protestors] expressed a judgment about soldiers and about the profession of soldier, which in some circumstances compels the killing of other people.”<sup>135</sup>

The Federal Constitutional Court was very clear, however, in stating that had the protestors directed the phrase at either any identifiable soldier or group of soldiers, an injunction against distribution of the speech would have been consistent with the free speech guarantee of Article 5<sup>136</sup>—and perhaps even legally required to protect

130. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 10, 1995, 93 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 266, 1996 (Ger.) (Tucholsky Case (Soldiers are Murderers Case)), reprinted in DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT, *supra* note 125, at 659.

131. *Id.* at 670; see also Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1553 (2003) (noting that the slogan “ha[s] a long pedigree in German history as it was the creation of the writer Kurt Tucholsky, an Anti-Nazi pacifist of the 1930s who was stripped of his German citizenship in 1933”).

132. For a discussion of the procedural background of the case and the lower courts’ rulings, see DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 388–89 (2d ed. 1997).

133. *Tucholsky*, 93 BVERFGE 266, reprinted in DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT, *supra* note 125, at 676 (“The statements for which the complainants were sentenced for defamation enjoy the protection of Art. 5(1), first sentence, Basic Law.”).

134. *See id.* at 676–77.

135. *Id.* at 677.

136. *Id.* (“The complainants have not through their statements that soldiers are murderers or potential murderers asserted that *particular soldiers* had in the past committed a murder. Instead, they expressed a judgment about soldiers and about the profession of soldier, which in some circumstances compels the killing of other people.” (emphasis added)). The Federal

the right of human dignity set forth in Article 1.<sup>137</sup> This is so because in Germany, the state has not merely an obligation to refrain itself from violating the Basic Law, but also has an affirmative, positive obligation to create social conditions within the polity that secure fundamental rights more generally.<sup>138</sup> Thus, it is not enough that the government itself respects the dignity of all persons; instead, the government has a duty to create a social environment in which all citizens enjoy the right to human dignity within the general community.

To be sure, the Federal Constitutional Court has repeatedly emphasized that the state itself does not possess a constitutionally cognizable interest in dignity (unlike all human beings). Even so, the state has a duty and responsibility to ensure that

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Constitutional Court explained that the convictions under review impermissibly rested on “a value judgment, not an assertion of fact.” *Id.*; see also Guy E. Carmi, *Dignity Versus Liberty: The Two Western Cultures of Free Speech*, 26 B.U. INT’L L.J. 277, 336–37 n.419 (2008) (noting the Federal Constitutional Court “went to considerable lengths to interpret the ‘soldiers are murderers’ slogan, as not having been directed at specific soldiers, or the entire German Army. It is apparent that a clear and unequivocal statement that ‘all currently enlisted German soldiers are murderers’ is fully punishable under German law”); Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549, 1573 (2004) (“[T]he Federal Constitutional Court has upheld free speech claims only when the personal insult was not targeted at any particular individual.”); Rosenfeld, *supra* note 131, at 1554 (noting that the Federal Constitutional Court afforded the phrase protection because “the statements involved amounted to constitutionally protected expressions of opinion rather than to the spreading of false facts”). One should note that the *Tucholsky* decision, and an earlier decision by a panel of the Federal Constitutional Court that reached the same conclusion, were highly controversial and politically unpopular with many German politicians, as well as the German general public. See KOMMERS, *supra* note 132, at 392–95 (discussing the highly negative reaction to the *Tucholsky* decisions and proposed federal legislation to ban the use of *Tucholsky*’s slogan).

137. See *Tucholsky*, 93 BVERFGE 266, reprinted in DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT, *supra* note 125, at 677–79 (holding that the Basic Law’s protection of human dignity and personal honor generally requires an effective remedy if a particular soldier’s personal behavior or conduct had been falsely characterized in a public statement). The outcome in this case turned on the impersonal—and non-targeted—nature of the phrase; had the phrase “Soldiers are Murderers” been of and concerning a particular soldier, or group of soldiers, the speech would not have been protected and instead the Basic Law would have required the government to provide protection of the soldiers’ dignity interest. See *supra* note 136.

138. See Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 813 (1997) (describing the doctrine of secondary effect in Germany and noting “there is effectively no difference in the standard of review applied by the Constitutional Court to purely private or public law disputes”); Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 273–74 (1989) (noting that “[u]nder the German Basic Law, however, the fact that a certain dispute of private law lies beyond where the state action line would be drawn under the United States Constitution has no particular meaning” and that “the German constitution continues to have an impact in cases in which no state action would be found under American law”); see also Krotoszynski, *supra* note 136, at 1561–62 (discussing the absence of a state action doctrine in Germany). For a very thoughtful discussion of how German constitutional theory justifies application of constitutional values to disputes between purely private parties, see Quint, *supra*, at 262–76.

public support for the institutions of government does not fall to a level that would create a risk to the survival of those institutions. Hence, although the Basic Law's free speech guarantee privileges defacing a German flag or mocking the national anthem with a parody, a point exists at which calling the symbols of the nation into scorn or contempt might run up against the Basic Law's commitment to preserving the project of democratic self-government.<sup>139</sup> When and if expressive activity reaches that point, the Federal Constitutional Court will withdraw constitutional protection from the speech in order to safeguard the institutions of democratic self-government. On the other hand, and as noted above, persons holding government offices, unlike the state itself, enjoy constitutional protection of their interest in dignity.

By way of contrast, in the United States more often than not we tend to frame human rights in terms of the individual rather than the group. For example, in the context of the Equal Protection Clause, the fact that a legislature composed primarily of white men adopts an affirmative action program benefiting women or racial minorities is quite irrelevant to the program's constitutional status; a white man who believes himself to have been disadvantaged by the program would be quite free to object to it in federal court. Simply put, equal protection rights belong to individuals, and not to groups.<sup>140</sup>

This construction of human rights as being rooted in protections for the individual, rather than for groups, also finds expression in U.S. domestic free speech law, albeit in a negative way. Not since 1952 in the *Beauharnais* case<sup>141</sup> has the Supreme Court of the United States sustained criminal group libel laws.<sup>142</sup> Prior

139. See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 7, 1990, 81 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 298, 1990 (Ger.) (German National Anthem Case), reprinted in DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT, *supra* note 125, at 450; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 7, 1990, 81 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 278, 1990 (Ger.) (Flag Desecration Case), reprinted in DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT, *supra* note 125, at 437. See generally KROTOSZYNSKI, *supra* note 51, at 117–18.

140. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (plurality opinion) (explaining that the application of skepticism, congruence, and consistency rules for equal protection review of all government race-based classifications “all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*” (emphasis in original)). Cases permitting men to challenge gender-based classifications that benefit women also reflect this approach. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) (“That this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review.”). This approach reflects the notion that fundamental rights belong to individuals, not groups, in the United States.

141. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

142. *Id.* at 261–64. Writing for the majority, Justice Felix Frankfurter explained:

In the face of this history [of racial violence in Illinois] and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and



to *Brandenburg v. Ohio*,<sup>143</sup> however, states and the federal government were free to create and enforce civil and criminal “group libel” laws. These laws permitted legal sanctions to be applied to individuals or groups who libeled a particular set of individuals based on, for example, race, religion, or gender. *Brandenburg*, however, in conjunction with *New York Times Co. v. Sullivan*,<sup>144</sup> rejected the legal underpinnings of the doctrine of group libel. The offensiveness of speech does not, as a general matter, affect its constitutionally protected status; nor does the possibility of speech creating general hostility or social unrest within the community serve as a controlling legal consideration that may overbear a free speech claim.

*Brandenburg* holds that only speech that presents an immediate risk of inciting disorder or violence may be proscribed consistently with the First Amendment,<sup>145</sup> and *New York Times Co. v. Sullivan* protects true speech virtually absolutely and affords even false speech significant protection when it relates to a public official, a public figure, or a matter of public concern.<sup>146</sup> In tandem, these two precedents make it virtually impossible to afford groups protection from targeted insult.

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by means calculated to have a powerful emotional impact on those to whom it was presented.

*Id.* at 261. He added:

It would, however, be arrant dogmatism, quite outside the scope of our authority in passing on the powers of a State, for us to deny that the Illinois legislature may warrantably believe that a man’s job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits. This being so, we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved.

*Id.* at 263.

143. 395 U.S. 444 (1969) (per curiam).

144. 376 U.S. 254 (1964).

145. See *Brandenburg*, 395 U.S. at 447 (holding that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

146. See *Sullivan*, 376 U.S. at 279–80 (“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”). This approach has the effect of affording significant constitutional protection to objectively false statements of fact. The rationale for this result is the need for adequate breathing space for a free press: “that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.* at 270. Subsequent cases have broadly construed the *Sullivan* principle to apply also to public figures and to coverage of matters of public concern that do not involve either a public official or a public figure. See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 771–77 (1986) (surveying the relevant precedents in the *Sullivan* line and discussing the application of the *Sullivan* rule in various contexts including cases involving public officials, public figures, and private figures involved in a matter of public concern).

*Hustler Magazine, Inc. v. Falwell*<sup>147</sup> removes any residual doubts about this question (particularly when read in conjunction with *Snyder v. Phelps*). In *Hustler*, the Supreme Court held protected a fake Campari ad in *Hustler* magazine that suggested the Reverend Jerry Falwell's first sexual encounter involved a drunken rendezvous in an outhouse with his mother—thus demonstrating with convincing clarity that we have no conception of personal dignity or honor in our legal system.<sup>148</sup> Chief Justice Rehnquist explained:

“Outrageousness” in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression. An “outrageousness” standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.<sup>149</sup>

This notion that intentionally outrageous speech enjoys protection, even when specifically calculated to inflict maximum emotional harm,<sup>150</sup> privileges the individual bomb-thrower over his victims. It represents a radical break from the current constitutional practice of most other industrial democracies, including Canada, France, Germany, and South Africa—all nations where the government may create and enforce group-based rights that help to advance a project of pluralism and multiculturalism.

Once again, the distrust thesis appears to offer a plausible explanation for this disjunction in both the theory and the operationalization of fundamental human rights. If one believes government to be at best inept and at worst corrupt, vesting it with the power to create and enforce group-based rights could be seen a very bad idea. Some groups, inevitably, will enjoy more robust protection than others (i.e., groups with political clout). Instead of redressing political, economic, and social inequality, the regime of group-protection will simply exacerbate the preexisting inequalities; it will magnify and amplify rather than eradicate them. Thus, from a

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147. 485 U.S. 46 (1988).

148. *See id.* at 47–48, 54–57.

149. *Id.* at 55.

150. *See Falwell v. Flynt*, 797 F.2d 1270, 1273 (4th Cir. 1986) (noting that, when asked by plaintiff's counsel, during a sworn deposition, if he was trying to harm Reverend Falwell's reputation for integrity, Larry Flynt responded that his intention was not to merely “harm” Falwell's reputation, but rather was “to assassinate it”), *rev'd sub nom.* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *see also* RODNEY A. SMOLLA, *JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL* 59–60 (1988); Boyd C. Farnum, Note, *Free Speech and Freedom from Speech: Hustler Magazine v. Falwell, the New York Times Actual Malice Standard, and Intentional Infliction of Emotional Distress*, 63 IND. L.J. 877, 877 (1988) (reporting that Flynt's motive in publishing the parody Campari ad was “to assassinate” Falwell's reputation); Post, *supra* note 100, at 605, 609–10 (same). Larry Flynt's lawyers prevailed on him to offer a better defense while testifying during the trial itself; at the trial, Flynt declined to repeat his earlier deposition testimony and instead said that he did not intend the parody to have “any effect” on Falwell's reputation. *See SMOLLA, supra*, at 138–39.

U.S. perspective, a government empowered to declare political truths is too dangerous to be tolerated.<sup>151</sup>

The U.S. approach to free speech theory plainly reflects a prophylactic rule aimed at preventing government from using its authority to perpetuate itself. Professor Marty Redish and his coauthor, Elizabeth Cisar, have aptly noted that “[a]lthough one may of course debate the scope or meaning of particular constitutional provisions, it would be difficult to deny that in establishing their complex structure, the Framers were virtually obsessed with a fear—bordering on what some might uncharitably describe as paranoia—of the concentration of political power.”<sup>152</sup> Professor Michael Asimow concurs, noting that “[a] generalized distrust of government officials and government power is a recurrent strain in American history.”<sup>153</sup> In an earlier writing, I have observed that “[t]o a remarkable degree, Americans tend to be hostile toward government and its motives.”<sup>154</sup>

The root causes of this skepticism toward government and its agents is difficult to diagnose, but my own view is that it relates to the remarkable pluralism of the United States: “the United States was, in large measure, a nation built not on ties of religion, ethnic kinship, or even geography, but rather on immigration.”<sup>155</sup> Given that we cannot know, in general, whether our group (however defined) will command the levers of government power at any given place or time, it is entirely rational to respond by seeking to limit the power of government to impact our daily lives. By way of contrast, “[i]n a nation sharing a common ethnic, religious, and cultural heritage, trust in government might well come more naturally, and be held more readily, than in a nation built of immigrants that still features significant divisions based on race, ethnicity, religion, region, urbanization, and culture.”<sup>156</sup>

In such a place, permitting government to establish civility rules, including rules designed to protect privacy or personal honor, will raise the specter of these rules being used strategically to benefit some groups at the expense of others.<sup>157</sup>

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151. See Lidsky, *supra* note 126, at 1096–97 (arguing that protection of false speech relates to the dangers inherent in a government empowered to censor speech and declare historical truth, rather than in the objective value of false statements of fact).

152. Martin H. Redish & Elizabeth J. Cisar, “*If Angels Were to Govern*”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 451 (1991).

153. Michael Asimow, *Popular Culture and the Adversary System*, 40 LOY. L.A. L. REV. 653, 662 (2007). He adds that “[a] substantial number of Americans suspect government officials and agencies of meddlesomeness, incompetence, or corruption.” *Id.* at 663; see also GARY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 319 (1999) (suggesting that we foolishly believe that “[i]nefficiency is to be our safeguard against despotism” because we mistakenly believe “that a government unable to do much of anything will be unable to oppress us”).

154. Krotoszynski, *The Shot (Not) Heard 'Round the World*, *supra* note 56, at 28.

155. *Id.* at 31.

156. *Id.* at 33.

157. See Post, *supra* note 100, at 624–32 (arguing that permitting the imposition of tort liability based on a standard of “outrageousness” would permit empowered groups within the community to silence less empowered groups within the community through a de facto heckler’s veto and therefore should be rejected in order to ensure that all communities enjoy equal dignity under the law). I think that Professor Post has this right: if a choice must be

Moreover, the whole purpose of the First Amendment subtly shifts: rather than serving as a means of protecting speech because of its social value or worth, it serves instead as another *structural* bulwark against the perceived risk of tyranny. Speech does not merit protection because it always and invariably produces social benefits that offset its social costs, but rather because a government broadly empowered to regulate speech is also a government empowered to perpetuate itself at the expense of the citizenry.

Thus, as Professor Lyrissa Lidsky observes, “even if First Amendment theory’s faith in the fundamental rationality of public discourse is misplaced, distrust of government still may be a strong enough basis, standing alone, to warrant declaring any attempt to punish Holocaust denial unconstitutional.”<sup>158</sup> A prophylactic concern with the dangers of government censorship, rather than a belief that racist, sexist, or homophobic speech has value, arguably undergirds the U.S. approach. Moreover, as Lidsky correctly notes, “[p]ast governmental attempts to ‘prescribe what shall be orthodox’ have resulted in suppression of truth and enshrinement of error.”<sup>159</sup>

Even though no reasonable person disbelieves known historical facts, we nevertheless deny government the power to declare “truth” out of a fear that such a power would inevitably be used for crass partisan reasons; better to protect obvious falsehoods than to risk the suppression of inconvenient truths. Mandatory civility norms, designed to protect personal privacy or honor, using standards such as the offensiveness, outrageousness, or intrusiveness of speech, would create a powerful means of censoring, via the civil law, unpopular speakers and groups.<sup>160</sup> Thus, the U.S. approach reflects a profound skepticism about the ability of government to use its power to censor wisely, even if the outcome of adopting this approach permits gross intrusions on undoubtedly legitimate dignity interests.

To be clear, having Nazis march in Skokie, Illinois, to terrorize and demean Holocaust survivors is undeniably a bad thing,<sup>161</sup> the pain and mental anguish associated with such targeted and intentionally offensive speech is clearly beyond peradventure.<sup>162</sup> But the question of how speech affects group-based dignity interests is simply not relevant to contemporary First Amendment analysis.

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made between protecting only some groups within our polity (namely, those already enjoying social and political privilege) or protecting no groups, surely it is more logical to level down than to attempt to level up.

158. Lidsky, *supra* note 126, at 1097.

159. *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

160. *See Post*, *supra* note 100, at 624–25.

161. *See Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied sub nom. Smith v. Collin*, 439 U.S. 916 (1978); *cf.* RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* (1997) (arguing that protection of group-based dignitarian interests should be deemed fully consistent with a robust protection of the freedom of speech).

162. *See* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 134–35, 179–81 (1982) (arguing that “an independent tort action for racial insults is both permissible and necessary” and setting forth the proposed elements of such a cause of action); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2332 (1989) (arguing that a formalized “legal response to racist speech is required” because of “the structural reality of racism in America”); *see also* MARI J. MATSUDA, CHARLES R. LAWRENCE III,

Viewed from a global perspective, these concerns seem strikingly misplaced, if not entirely paranoid. Germany, for example, reasonably believes that a government empowered to punish those who vilify Jews and deny the Holocaust simply does not present a risk of totalitarian oppression; rather, under the German risk calculus, would-be fascists constitute the greater and more pressing risk to the existing free and democratic social order (a risk that must be checked through the use of government power). Objective facts exist, and there is little value in permitting misguided individuals to pollute the marketplace of ideas by disseminating objectively false speech, particularly when the speech at issue degrades and demeans various segments of German society.

Moreover, given the importance of making a pluralistic society function effectively, certain kinds of untruths impose significantly higher social costs than others. From this vantage point, government has an entirely legitimate, if not compelling, interest in enacting and strictly enforcing speech regulations that help to secure and maintain a well-functioning multicultural polity. To permit an individual to exercise fundamental rights in ways that impose tremendous social costs simply cannot be justified, and a democratically elected government may legitimately exercise the coercive power of the state to suppress the dissemination of such ideas.

In sum, a polity makes a critical choice when it decides whether to frame the vesting and exercise of human rights only in the individual, rather than in the individual and also the collective. A communitarian approach to the creation and enforcement of human rights will lead to very different outcomes in an important range of cases than will framing and enforcing human rights solely from the perspective of an autonomous individual. “Privacy” is a concept that reflects an individual-centric conception of rights, whereas “dignity” implicates the broader community, both with respect to the vesting of rights and also with respect to the balancing of conflicting human rights.

#### CONCLUSION

Privacy is a concept that can and does bear multiple meanings. In the United States, privacy is primarily a set of important autonomy interests that run against the state, rather than a right to proprietary control over important personal information. In thinking about the legal importance of privacy in a transatlantic context, privacy’s status as a polysemous legal construct must be taken into consideration. In a very real sense, privacy in the EU and privacy in the United States have very little to do with each other. Teasing out why this is so, and why Americans are so indifferent to the commodification of their personal data, is a question worthy and deserving of sustained consideration by legal academics on both sides of the Atlantic.

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RICHARD DELGADO & KIMBERLÈ WILLIAMS CRENSHAW, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993) (offering a variety of theoretical, philosophical, and practical arguments in favor of stronger government restrictions against hate speech). For a recent treatment of the issues and arguments favoring regulation of so-called “hate speech,” see JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2012).

At the same time, in some specific contexts, such as tort law, where a shared commitment to protecting privacy as an important social and cultural value exists, significant cultural and legal differences between the United States and Europe make creating and implementing a shared human rights vision difficult, if not impossible. In particular, the U.S. commitment to elevating expressive freedom over other important social values, such as privacy, dignity, and personal honor, renders a common approach to safeguarding privacy in the tort context a practical impossibility. The U.S. approach is not unconsidered, however; a pervasive distrust of government leads courts to disallow efforts to control speech—both through direct regulations that incorporate content or viewpoint limitations (e.g., a ban on hate speech, restrictions on minors’ access to violent video games, or depictions of animal cruelty)<sup>163</sup> and also through more indirect means, such as use of the common law of tort as applied by civil juries.<sup>164</sup>

If the current trend in the United States continues, there may in fact be precious little legal space for the use of tort law to safeguard privacy or reputational interests more generally if the offending speech relates, in any conceivable way, to a matter of public concern.<sup>165</sup> It seems equally clear, however, that in Europe the freedom of expression often loses out when the state seeks to safeguard privacy, including dignity, reputation, and personal honor. The definitional problems present a serious impediment to a transnational dialogue about privacy rights. The operational problems, on the other hand, seem to present an insurmountable obstacle to a common understanding of the right of privacy (and particularly in the tort context), unless the right is defined so abstractly as to be virtually meaningless—a mere platitude.

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163. The U.S. Supreme Court has consistently and reliably rejected government programs that rely on content- or viewpoint-based regulations of speech. *See* *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011) (rejecting a California law restricting childrens’ access to violent video games as an impermissible form of content discrimination); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (invalidating limits on access to physicians’ prescription data, adopted to curb aggressive marketing techniques by pharmaceutical representatives, because the regulations constituted content and viewpoint discrimination); *United States v. Stevens*, 130 S. Ct. 1577 (2010) (invalidating a federal law that banned depictions of animal cruelty because the law discriminated against particular content); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (plurality opinion) (invalidating a municipal ordinance against hate speech because it constituted a form of content and viewpoint discrimination). *But cf.* *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (rejecting a First Amendment challenge brought against a content-based federal law that prohibited providing “material support or resources” to a terrorist organization and holding that the statute passed strict scrutiny by advancing a compelling government interest in a narrowly tailored way). The *Humanitarian Law Project* decision constitutes the exception that proves the general rule (i.e., that content-based restrictions on speech presumptively violate the Free Speech Clause of the First Amendment).

164. *See* *Snyder v. Phelps*, 131 U.S. 1207, 1218–19 (2011) (disallowing the imposition of civil liability under state tort law where such liability would burden constitutionally protected speech); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50–51 (1988) (same).

165. *See* *Sorrell*, 131 S. Ct. at 2668, 2672 (rejecting privacy-based justifications offered by Vermont in defense of a state law banning the sale of physician prescription data to pharmaceutical companies for marketing purposes).

Moreover, this conflict in fundamental values will prove to be of more than merely academic interest.<sup>166</sup> Anyone publishing books, magazines, or newspapers, or making content available in Europe via the Internet, has cause to be concerned over the radically different accommodations of privacy, on the one hand, and expressive freedoms, on the other. Given that important cultural traits help to ground and explain these differences, coming to a common understanding will be, at best, quite difficult. If we were to abjure “privacy” and even “dignity” in favor of more discrete characterizations of the particular liberty interests at stake, we could at least begin a meaningful dialogue about our precise differences in both theory and law and why they exist.

To the extent that the use of high-sounding, but vague, human rights nomenclature permits judges, lawyers, and even ordinary citizens to talk past each other, finding common ground will be the harder for it. Polysemy is not an evil in and of itself, but when polysemy impedes the attainment of a workable system of global human rights, it becomes essential to find more definite and concrete ways of articulating the fundamental interests that we seek to protect from unreasonable or unjust government abridgment.

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166. See Timothy Zick, *Falsely Shouting Fire in a Global Theater: Emerging Complexities of Transborder Expression*, 65 VAND. L. REV. 125, 131 (2012) (observing that “[g]lobal channels of speech, press, and association have become tightly interconnected” and suggesting that “[g]lobalization, digitization, and the proliferation of media outlets blur the lines between domestic- and foreign-speech marketplaces”). Zick argues that “[p]otentially harmful domestic, expressive activities increasingly have transborder effects” and posits that “[i]n the global theater, increased interconnectivity and the compression of space and time will enhance speakers’ ability to communicate offensive and incendiary messages and to enter associations with disfavored and potentially dangerous foreign organizations.” *Id.* at 186. Obviously, the transborder effects that Zick describes will create a real and pressing need for greater efforts to reach a common understanding of how to define and enforce expressive freedoms—including speech, press, and assembly—especially in circumstances where the exercise of these expressive freedoms conflicts with other constitutional values, such as privacy and human dignity. See *id.* at 131 (“At home, abroad, and in cyberspace, citizens increasingly participate in global debates and enter relationships with aliens who are located abroad.”).