All Quiet on the Domestic Front
The Household Exemption, Private and Public Spheres, and Social Media: The Third Theater of the Privacy Wars

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ABSTRACT

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- In 1995, the European Union adopted the *Data Protection Directive*, the principal statute governing data privacy within the E.U. In its so-called *Household Exemption*, the Directive excludes "natural persons [acting] in the course of a purely personal or household activity" from any legal obligation to abide by data protection laws in the E.U., an inconsequential exemption in 1995 that has since become a key cog in the debate over individual privacy. Technological innovation over the past twenty years has radically expanded the private individual's capacity for processing personal data, affording natural persons many of the powers previously restricted to professionals and corporations. Problems have arisen from the misinformed view that those new powers of the individual should fall under the Household Exemption. The common thread is a misconception of what constitutes the sphere of private life that the Exemption is meant to protect. At the crux of the matter is a lack of definition as to what constitutes a *purely personal or household activity* in this age of increased individual processing power. In this paper, I shall take a deep dive into the history of the Household Exemption's formation, ultimately proving the Exemption's sole focus to be the protection of the individual's private life. With that insight in mind, I shall examine the ways in which the Exemption has come to be misinterpreted, finishing with a suggested modification of the Household Exemption intended to remove all interpretive doubt. While not propounded to be a decisive, flawless resolution of the issue, I hope that my proposal and the underlying work, at a minimum, add an original and unique historical perspective to the discourse.

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Abbreviations

CFR ..... Charter of Fundamental Rights of the European Union

CJEU .....Court of Justice of the European Union

DPD.....Data Protection Directive

EC ..... European Council

ECHR..... European Convention on Human Rights

EComm .....European Commission

ECtHR..... European Court of Human Rights

EESC..... European Economic and Social Committee

EP .....European Parliament

GDPR..... General Data Protection Regulation

ICCPR..... International Covenant on Civil and Political Rights

SCOTUS ..... Supreme Court of the United States

UDHR .....Universal Declaration of Human Rights

WP29.....Article 29 Data Protection Working Party

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Introduction

In 1995, the European Union adopted the *Data Protection Directive*, the principal statute governing data privacy within the E.U.[1] Twenty years later, the Directive is finally undergoing revision, and a new *General Data Protection Regulation* is set to replace it later this year.[2] Attempting to quantify the growth of the information society in that time period borders on the impossible. In 1995, the World Wide Web featured fewer than 20,000 websites;[3] today, that number nears an even billion.[4] In 1995, about five million E.U. citizens – 1.4% of the total E.U. population – used the Internet at all;[5] today, 99.9% have access to high-speed broadband connections and 70% use the Internet regularly.[6] In 1995, Mark Zuckerberg was eleven years old and a decade away from founding Facebook in his dorm room; in 2014, social networking services (SNS)[7] are ubiquitous, and Facebook counts more than 1.2 billion active users.[8]

The intervening twenty years since the adoption of the DPD have seen the Internet grow at an unprecedented pace, revolutionizing the scale and ease of global communication. In the

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[1] EC and EP, *Directive 95/46/EC*. Hereafter, Directive or DPD.

[2] For the latest version, see: EP, *Report on the Proposal*.

[3] BBC News, "Internet."

[4] Netcraft, "April 2014 Web Server Survey."

[5] Population of the fifteen E.U. Member States in 1995 drawn from UN, *Replacement Migration*, 85. Percentage of Internet users among that population (~1.366%) drawn from OECD, "Graph 5.8."

[6] Broadband figure from EComm, "2013 Digital Agenda Scoreboard," and usage figure from EComm, *Commission Staff Working Document: Digital Agenda*, 76. Regular Internet usage is defined by the Commission as at least once per week.

[7] *Social networking services* or *SNS* encompass all of the online social environments commonly referred to as *social media* or *social networks*. A more official definition is "online communication platforms which enable individuals to join or create networks of like-minded users" (WP29, *Opinion 5/2009*, 4). Within this paper, all four terms shall be used interchangeably. Furthermore, Facebook, by far the largest SNS, shall serve as a representative of all social networks. While certain observations in this paper are unique to Facebook, the majority can and should be applied to every social networking site.

[8] Facebook, "Company Info."

past decade alone, online social networks have burst onto the scene, conduits for constant, instantaneous exchanges of information amongst individuals the world over. These rapid technological advances have radically altered the ways in which we connect with other people, resulting in great social benefit – such as wider access to information and learning and more avenues for uninhibited free expression – and one very great social detriment: an insidious assault on the individual's right to privacy.

Social Networking Services and Individual Privacy

SNS have brought publishing power to the masses,[9] and the masses are obsessed. Users create expansive personal profiles; take and upload photographs and videos; comment on current events and their interests; and share it all with friends, groups, and, often, the world at large. On Facebook alone, people share more than 500 Terabytes of data – the equivalent of 350 million five-megapixel photographs – and create roughly 2.3 billion pieces of unique content every single day.[10]

The extent of that sharing – the audience for each piece of information – operates like a digital loudspeaker, broadcasting everything from the mundane (e.g., a news article) to the incredibly personal (e.g., details about a relationship, financial deal, or medical treatment), and all to an audience far wider than imagined. A 2013 study by data scientists from Facebook and Stanford University revealed that "social media users consistently underestimate their audience size for their posts, guessing that their audience is just 27% of its true size."[11]

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[9] The term *publishing power* is borrowed from WP29, *Statement*, 3.
[10] Smith, "Social Networks;" Statistic Brain, "Social Networking Statistics."
[11] Bernstein, Bakshy, Burke, and Karrer, "Quantifying the invisible audience," 21.

While the unauthorized divulgence of others' personal information is no invention of the web,[12] social networks have streamlined the process, exacerbating the effects that sharing personal information has on an individual's privacy. Though the average person may not comprehend its full ramifications, the shift in scale has not gone wholly unnoticed: according to a recent Pew Research Center survey, 58% of Facebook users dislike it when others post content about them or pictures of them without asking permission; 43% dislike it when others see posts or comments that were not meant for their eyes; and 39% dislike the "[t]emptation or pressure to share too much info about [themselves]."[13]

No matter the medium, the publication of personal information entails a complex interplay of human rights. The right to free expression protects, to a certain extent, the activities of individuals who share information. However, the privacy rights of the individuals whose information is shared are equally important. Both rights are found in a multitude of national constitutions and have been recognized as fundamental since their inclusion in the *Universal Declaration of Human Rights* of 1948. Article 19 of the UDHR declares not only the freedoms of opinion and expression but also, more explicitly, the freedom to "impart information and ideas through any media and regardless of frontiers."[14] Article 12 affirms protections for one's privacy, correspondence, and reputation.[15] Neither is absolute; when the pair conflict in their application to a particular situation, a compromise must be forged to ensure their mutual observance. In practice, however, the weight afforded each fundamental right has been less than

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[12] For example, gossip long predates the Internet age.

[13] Quotation is from Smith, "6 New Facts About Facebook." Figures attained by combining the *Strongly Dislike* and *Somewhat Dislike* figures from Pew Research Center, "Survey Questions," 3.

[14] UN, *Universal Declaration*.

[15] Ibid.

equal, a trend exacerbated by the aforementioned extension of publishing power to the masses and the inability of privacy law to keep pace.[16]

Protections for Online Privacy: The European Example

Nowhere is this failure more evident nor of greater import than in the European Union, which accounts for 56% of global Internet traffic and whose citizens enjoy the world's most stringent privacy protections.[17] In drafting the Data Protection Directive, the European Commission assigned unprecedented weight to data privacy, asserting the fundamentality of the right. As Spiros Simitis, the former Hessian Data Protection Commissioner and chair of the Council of Europe's Data Protection Experts Committee, proclaimed in a 1994 speech:

> Contrary to most other documents and nearly for the first time in the history of the Community, the Commission in its draft [of the DPD] said that the need for the Directive is based on the need to protect human rights within the Community. This is why, when we speak of data protection within the European Union, we speak of the necessity to respect the fundamental rights of the citizens.[18]

The Directive more than adequately protected these rights in the 1995 online climate, and, had technology remained frozen in its early-1990s state, there would be no reason to think about revising it today. But, fortunately, technology has advanced, and much of the DPD must be updated to reflect that.

The current Directive predates the explosion of information sharing on the World Wide Web and thus understandably targets professionals, corporations, and E.U. Member States (MS) – actors who, at the time of the DPD's enactment in 1995, had the power to disseminate personal

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[16] Privacy law's failure to keep pace with technological innovation is a recurring theme within Frank La Rue's recent report on State surveillance and privacy (La Rue, *Surveillance*, ¶ 50; 75).

[17] TeleGeography, "Global Internet Map 2012."

[18] Cate, *Privacy*, 42, quoting Spiros Simitis, "Information Privacy and the Public Interest" (lecture, Annenberg Washington Program, Washington, D.C., October 6, 1994).

data to a large audience. In its so-called *Household Exemption*, the Directive excludes "natural persons [acting] in the course of a purely personal or household activity" from any legal obligation to abide by data protection laws in the E.U., an inconsequential exemption in 1995 that has since become a key cog in the debate over individual privacy.[19] Technological innovation over the past twenty years has radically expanded the private individual's capacity for processing personal data, affording natural persons many of the powers previously restricted to professionals and corporations. Problems have arisen from the misinformed view that those new powers of the individual should fall under the Household Exemption. The faulty rationale coalesced out of several distinct misunderstandings, the most conspicuous of which shall be addressed later on. The common thread is a misconception of what constitutes the sphere of private life that the Exemption is meant to protect. At the crux of the matter is a lack of definition as to what constitutes a *purely personal or household activity* in this age of increased individual processing power. Though several attempts have been made to clarify the correct scope of the Exemption – most notably by the Court of Justice of the European Union (CJEU) in its ruling in *Lindqvist* – the guidance has been largely ignored in drafts of the new GDPR.

Modernizing Privacy Law: Reformation and Formalization

The time is ripe for a formalization of the Exemption's contemporary scope and, more broadly, a clarification of the bounds of the private sphere in a modern, Web-driven society. The process of revising the Directive, begun in early 2012, has garnered a great deal of press – especially since Edward Snowden brought the scale of State mass surveillance to the world's attention, turning data privacy into the topic *du jour*. While the increased attention is a huge net

[19] EC and EP, *Directive 95/46/EC*, § 3 ¶ 2.

positive for privacy rights, it has precipitated one unfortunate consequence: pressure on lawmakers to push through a GDPR with strengthened protections against State surveillance has relegated issues like the Household Exemption to the back burner. These other sections of the Directive are important and in dire need of the same vigorous scrutiny applied to curbing mass surveillance. Until that happens, the fundamental rights of E.U. citizens shall remain in flux.

While less overtly ominous than the Orwellian overtones of widespread State surveillance, the massive amount of content created by private individuals (data sharers) and containing information about others (data subjects) is no less a menace to privacy rights. The stakes of a failure to address the Household Exemption could not be higher: by next year, it is estimated that more than 60% of all digital data stored in databases – a figure roughly equivalent to the total amount of data currently in existence – will be created by individuals on social media.[20,21] Protection from State surveillance and corporate misuse of data have been painted as the two major "fronts" in the "privacy wars," but a battle plan blind to the great third threat is doomed to defeat.[22] Its flank left unprotected, personal privacy shall die not at the hand of some treacherous government or greedy corporation but by an act of person-on-person betrayal.

To avoid such an ignominious end, the legislative bodies of the E.U. must conduct a careful, *complete* revision of the Directive that ensures respect for the fundamental human rights of citizens. The current Household Exemption is not explicit enough in its protections of private life, its outdated, unclear language inadequate for dealing with an information-dissemination apparatus as irrepressible and nebulous as SNS. Every day, hundreds of millions of individuals process personal data using SNS, and hundreds of millions more interact and share by way of

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[20] Smith, "Social Networks."
[21] Tucker, "Has Big Data Made Anonymity Impossible?"
[22] NYT Editorial Board, "A Second Front in the Privacy Wars."

other forums, such as personal web pages or message boards. As the birthplace of privacy legislation and the site of the first data protection statutes in the early 1970s, Europe has long been the bellwether of privacy attitudes and regulations.[23] Given its position at the forefront of the global privacy discourse and the tendency exhibited by a plurality of non-E.U. States to follow the European lead on privacy legislation, it is imperative that the Commission amends the Household Exemption to better define its scope. Europe must act the vanguard before its antiquated data law and the insidious misunderstandings engendered by it find further crystallization in privacy frameworks outside of the E.U.[24]

In this paper, I shall take a deep dive into the history of the Household Exemption's formation, ultimately proving the Exemption's sole focus to be the protection of the individual's private life. With that insight in mind, I shall examine the ways in which the Exemption has come to be misinterpreted, finishing with a suggested modification of the Household Exemption intended to remove all interpretive doubt. While not propounded to be a decisive, flawless resolution of the issue, I hope that my proposal and the underlying work, at a minimum, add an original and unique historical perspective to the discourse.

The Current Legal Regime for Data Protection and Privacy in the E.U.

In an attempt to quantify the exponential growth of the data-sharing population since the creation of the E.U.'s current data law, this paper began with a few statistics on the proliferation of the information society since the Directive's 1995 enactment. Despite that massive expansion

[23] Cate, *Privacy*, 32.

[24] See: Greenleaf, "Global Data Privacy Laws," 6. Greenleaf specifically highlights the Directive, describing it as "the most influential international instrument" for data privacy since 1995.

of its sphere of influence, the text of the DPD has remained unchanged, growing further outdated with each new innovation to the way personal data is shared across Europe.

The Directive is the primary legal instrument ensuring respect for E.U. citizens' data privacy rights, but protections for private life and – as a subset thereof – personal data also exist in the Council of Europe's *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* and the three fundamental human rights treaties governing the E.U.: the *International Covenant on Civil and Political Rights*; the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; and the *Charter of Fundamental Rights of the European Union*. While the Directive's status as *lex specialis* makes it the authority on data privacy matters within the E.U., those four texts remain significant; since they are binding on every Member State, each informs the European data privacy climate.

However, to assert the fundamentality of data privacy based solely off of the fact that a legal document lists it as such would be both a logical fallacy and a great injustice to the true foundations of the right. Since the Snowden revelations of June 2013, privacy has entered the public discourse to an unprecedented extent, but many of its defenders rely on a series of chilling hypotheticals and an unquestioning conviction that privacy trumps all because . . . privacy. Even the news media are not immune to the trend: the first page of results of a search for "data privacy" across *New York Times* articles results in a multitude of ominous warnings but exactly zero mentions of *why* the right is so critical.[25]

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[25] Google search for *data privacy site:nytimes.com* executed in Firefox using the Disconnect Search browser extension on December 17, 2013. The articles returned – all accessed via the newspaper's website – were:

- Kanter, James, "Europe Moves to Shield Citizens' Data," *New York Times*, October 17, 2013, http://www.nytimes.com/2013/10/18/technology/europe-moves-to-put-online-data-beyond-us-reach.html.

Fundamental human rights are obligations deriving from that which makes us human, not from that which is written in human rights instruments. The documents are not rights in and of themselves but mere indices, often with an underappreciation of their own historical underpinning. Any attempt to appraise or hierarchize human rights, as this paper endeavors to do with privacy, must be firmly grounded in an understanding of the rights' true fundamentality – not simply within a legal framework but as reinforcing something elemental to one's humanity.

The Legal Scope of Privacy: the Private Sphere and Private Life

It is easy to assert that the rights to privacy and data privacy are designed to protect the individual's private life, but exactly what is meant by *private life* varies greatly across academic

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- Scott, Mark, "Europe Urges U.S. to Handle Data Privacy With Care," *New York Times*, November 27, 2013, http://www.nytimes.com/2013/11/28/business/international/europe-urges-us-to-handle-data-privacy-with-care.html.
- Singer, Natasha, "Group Presses for Safeguards on the Personal Data of Schoolchildren," *New York Times*, October 13, 2013, http://www.nytimes.com/2013/10/14/technology/concerns-arise-over-privacy-of-schoolchildrens-data.html.
- Rotenberg, Marc, "Protecting Data Privacy," *New York Times*, November 4, 2013, http://www.nytimes.com/2013/11/06/opinion/protecting-data-privacy.html.
- Singer, Natasha, "Data Protection Laws, an Ocean Apart," *New York Times*, February 2, 2013, http://www.nytimes.com/2013/02/03/technology/consumer-data-protection-laws-an-ocean-apart.html.
- Sengupta, Somini, "No U.S. Action, So States Move on Privacy Law," *New York Times*, October 30, 2013, http://www.nytimes.com/2013/10/31/technology/no-us-action-so-states-move-on-privacy-law.html.
- Singer, Natasha, "Deciding Who Sees Students' Data," *New York Times*, October 5, 2013, http://www.nytimes.com/2013/10/06/business/deciding-who-sees-students-data.html.
- Hakim, Danny, "Europe Aims to Regulate the Cloud," *New York Times*, October 6, 2013, http://www.nytimes.com/2013/10/07/business/international/europe-aims-to-regulate-the-cloud.html.
- O'Brien, Kevin J, "Firms Brace for New European Data Privacy Law," *New York Times*, May 13, 2013, http://www.nytimes.com/2013/05/14/technology/firms-brace-for-new-european-data-privacy-law.html.

disciplines and depends heavily on the context.[26] Within this paper, references to *public* and *private* refer to *public* and *private life*, the two complementary spheres of social interaction that comprise the totality of the human audience.[27] This paper's reference definition of *private life* – and, therefore, what is to be considered private and fall within the private sphere – is borrowed from the *Oxford Dictionary of English*, which defines private life as "a person's personal relationships, interests, etc., as distinct from their public or professional life."[28] While his ultimate conception of the *public sphere* is far more overtly political and caught up in defining the bourgeois political society, Jürgen Habermas's brief overview of the rise of the public-private binary is helpful in further delineating the two spheres of human sociality discussed herein.[29]

In *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society*, Habermas traces the earliest considerations of *public* and *private* to Ancient Greece, where "the sphere of the *polis*, which was common (*koine*) to the free citizens, was strictly separated from the sphere of the *oikos* . . . [in which] each individual is in his own realm (*idia*)."[30] In the Greek system, only free, propertied males could own and exert control over an *oikos*, but the underlying theory can be extrapolated to the more liberal, modern society. As

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[26] See, e.g.: boyd, "Taken Out of Context," 16-21.

[27] To further clear up some of the core terms within this paper: *public* (as a noun) and *the public sphere* are synonymous, and *public life* is the portion of an individual's life that takes place in those arenas. Similarly, *private* (also as a noun) and *the private sphere* are synonymous, with *private life* representing the portion of the individual's life that takes place in the private sphere, or, to emphasize the complementary nature of the terms, the portion that does not take place in the public.

[28] *Oxford Dictionary of English*, s.v. "private life," accessed April 18, 2014, http://www.oxfordreference.com/view/10.1093/acref/9780199571123.001.0001/m_en_gb0662990. The establishment of *professional* as an antonym of *private* is problematic and shall be addressed in full later on; for now, the salient comparison is *private* and *personal* against *public*.

[29] To make it abundantly clear, Habermas's complex spheres – his political and sociological division of the world into a public and private sphere – play no role in this paper. Those terms have different meanings here; see note 27 above.

[30] Habermas, *Structural Transformation*, 3.

Habermas recounts, in Ancient Greece it was the individual's "private autonomy . . . on which their participation in public life depended. . . . Status in the *polis* was therefore based upon status as the unlimited master of an *oikos*."[31] Through the construction of a private sphere and the exercise of control over that sphere, men were granted status as citizens and allowed to participate in public discourse. The notion of control over one's individual *realm* as a necessary foundation for independent, self-determined personhood is echoed in many modern theories of privacy, used to differentiate the private sphere, in which an individual has control, from the public, where they have little.

Among modern theories, the object of that control is generally the discourse concerning one's personhood. In his seminal 1967 work, *Freedom and Privacy*, Alan F. Westin defines privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[32] Highlighting the fundamentality of privacy, James Q. Whitman quotes the renowned legal scholar Charles Fried's proclamation that "a threat to privacy seems to threaten our very integrity as persons"[33] and then notes the widespread agreement "that privacy is . . . fundamental to our 'personhood.'"[34] Retaining control over the public discourse that bridges the private and public spheres is critical to maintaining what Westin termed *personal autonomy*: a basic human need deriving from "a fundamental belief in the uniqueness of the individual, in his basic dignity and worth as a . . . human being, and in the need to . . . safeguard his sacred individuality."[35] How that individuality is represented in the public sphere – how the self is presented to others – impacts the public

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[31] Ibid.
[32] Westin, *Privacy and Freedom*, 7.
[33] Fried, "Privacy," 477.
[34] Whitman, "Two Western Cultures," 1153.
[35] Westin, *Privacy and Freedom*, 33.

interactions one has, which, in turn, inform either the preservation, evolution, or destruction of personal identity.

More apposite to this paper's focus on European privacy protections, in 1954 the *Bundesgerichtshof*, the highest German court, handed down a decision in which it made a "direct reference to the constitutionally guaranteed duty to respect the claimant's dignity and to not infringe a free development of his person. Thus, the Federal Supreme Court clearly redefined the perception of privacy and settled the acknowledgment of 'a right of personality.'"[36] Three decades later, the *Bundesgerichtshof* expanded that protection of personhood to encompass personal data in its famous *Census Judgment*:

> In its 'Census' opinion, the Constitutional Court stated that the duty to respect the individual's dignity and his freedom to develop his personality must, especially in view of technologies allowing a processing of an ever greater amount of personal data, be complemented by a 'right to informational self-determination.' Individuals should, in other words, have the right to determine who can use their data, for what purpose, on what conditions, and for how long. Only then, the Court added, would individuals be able to freely form, express, and defend their opinions. The Court concluded that the more personal privacy is curtailed, the more individuals will gradually give up their constitutional rights. Informational self-determination, the Court stated, must therefore be seen and treated as an elementary precondition of a democratic society. Both its existence and functioning depend, thus, on the capacity of citizens to autonomously act and participate in society, a capability irrevocably linked to the knowledge and control of their personal data.[37]

Concretized in the language of human rights, the right to informational self-determination (ISD) is the legal embodiment of Westin's emphasis on maintaining control over one's public discourse. The Directive and forthcoming Regulation are enforceable protections upholding that right, designed "to empower an individual with the tools necessary to regulate what personal

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[36] Simitis, "Privacy," 1991.

[37] Ibid., 1997-8. For further reading on the *Census Judgment* and the right to informational self-determination, see: Hornung and Schnabel, "Data protection" and Eberle, "Informational Self-Determination."

information is disseminated to the public."[38] They protect the data subject, providing control over one's public image and preserving Westin's *personal autonomy*.[39]

As a means of gaining a greater understanding of the ambit of privacy – a right so fundamental as to deserve its own binding E.U. Regulation – and, therefrom, of the precise extent of what European privacy laws must protect, the *travaux préparatoires* (preparatory work) of the ICCPR, ECHR, Charter, and the Directive shall be consulted extensively. The *travaux* offer invaluable insight into both the originally intended scope of the right and the interconnected ecosystem of treaty protections for privacy, the latter underscoring the importance of examining the entire body into which a new law – in this case, the forthcoming GDPR – must fit.

It also must be noted that, while protections for personal data are more apparently apposite to individual privacy as influenced via the World Wide Web, the old-fashioned right to privacy verges on equal relevance and importance. The *lex specialis* / *generalis* hierarchy likely reserves a measure of superiority for data privacy laws, but a recent U.N. General Assembly resolution blurs the line between the two rights. The text, unanimously adopted without a vote, "*Calls upon* all States . . . To respect and protect the right to privacy, including in the context of digital communications" and, in addition, "*Affirms* that the same rights that people have offline must also be protected online, including the right to privacy."[40] As of yet, no U.N. treaty has identified a separate right to data privacy. The resolution is an affirmation that personal data falls under the umbrella of the right to privacy, thereby assuming identical protections and limitations and eliminating the need (on the U.N. scale, at least) for a data-specific right.[41]

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[38] Santolli, "The Terrorist Finance Tracking Program," 566.
[39] Whitman, "Two Western Cultures," 1161.
[40] UN, "The Right to Privacy in the Digital Age," § 4(a); 3.
[41] The precise ordering of and separation between the two rights (privacy and data privacy) within each of the hierarchies in which they might possibly be ranked (broad versus narrow

Turning to History: Consulting the *Travaux Préparatoires*

The International Covenant on Civil and Political Rights

> ***Article 17***
>
> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

Beginning with the broadest of the binding treaties,[42] the ICCPR affirms that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy" and that "[e]veryone has the right to the protection of the law against such interference."[43] Coinciding with the 1948 adoption of the UDHR, the first attempt to include a right to privacy in the drafting of the ICCPR failed to gain traction.[44] However, by 1953, all doubt as to its fundamentality had vanished. As recounted in the official *travaux*, "[I]t was argued that the covenant would suffer a serious omission if it failed to include an article on such an *elementary* right as the right to privacy."[45] The basis for the right was drawn from the protections for privacy in "the constitutions or laws of

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scope; general versus specific language; intra- versus inter-continental application; practicable versus impracticable enforcement; etc.) is far beyond the scope of this paper. Suffice it to declare that the topical scope of this paper – the destruction of privacy on the World Wide Web – is concerned with the whole of the right to data privacy *and* the corresponding subsection of the right to privacy. There is very little legal distinction between the two, so the rights shall be treated herein as interchangeable coequals.

[42] In geographical scope, at least.

[43] UN, *International Covenant*, § 17.

[44] Bossuyt, *Guide to the "Travaux Préparatoires" of the ICCPR*, 339. Inclusion of a protection for privacy was first proposed by Australia at the second session of the Drafting Committee in 1948, but it was rejected by a margin of three votes to two, with three abstentions.

[45] Ibid., 340, emphasis mine.

most, if not all, countries" as well as from Article 12 of the UDHR.[46] The drafters knew that the broad, imprecise language of the non-binding UDHR would not suffice for incorporation into the legally binding ICCPR, but, forced toward universality by the need for the ICCPR to be "applicable to all legal systems of the world,"[47] they restricted the Covenant's privacy protection to "a general rule, leaving the exceptions thereto and the methods of application to the legislation of each contracting State."[48]

The European Convention on Human Rights

> ***Article 8***
>
> (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.

Adopted in 1950, the ECHR partially mitigates the generalizations plaguing intercontinental instruments by expanding and clarifying the limitations of the right to privacy; however, in what is likely the primary legal precedent for the Household Exemption, the treaty indirectly exempts individual violations of another's privacy, focusing solely on State interference with the individual's right. Article 8 of the ECHR asserts that "[e]veryone has the

[46] Ibid., 339. See also, generally: Greenleaf, "Global Data Privacy Laws."
[47] Bossuyt, *Guide to the "Travaux Préparatoires" of the ICCPR*, 339-40.
[48] Ibid., 340.

right to respect for his private . . . life" and that "[t]here shall be no interference by a public authority with the exercise of this right."[49]

Drafting of the Convention began in 1949, and Article 12 of the UDHR was again cited as the starting point for negotiations.[50] With a mandate to pay attention to the ongoing work of the UN, many early drafts of the ECHR contained an article on privacy effectively identical to that of the UDHR.[51] The next phase of drafting required a more precise definition for each right,[52] and, as privacy still lacked one of adequate detail, a placeholder for an article on privacy was set aside.[53] The United Kingdom, which had tried and failed to strike the privacy paragraph completely out of the first ECHR draft,[54] now proposed a new version with an unprecedented wrinkle: "Everyone shall have the right to freedom from *governmental* interference with his privacy."[55] The British innovation was then modified by a conference of senior drafting officials into its ultimate expression of "interference by a public authority" and, though the draft ECHR was to undergo several more rounds of scrutiny before its adoption, the wrinkle raised no

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[49] CoE, *ECHR*, § 8.

[50] CoE, "Preparatory Work on Article 8," 2. The first draft of the Convention guaranteed the "inviolability of his private life . . . in accordance with Article 12 of the United Nations Declaration."

[51] Ibid., 4 § 5; 4-5 § 7. The honour/reputation phrase is noticeably absent, but that is outside of this paper's scope.

[52] Ibid., 6 § 10.

[53] CoE, *Committee of Experts*, 188.

[54] CoE, "Preparatory Work on Article 8," 2 § 3.

[55] CoE, *Committee of Experts*, 202, emphasis mine. Interestingly, while the English translation of the placeholder reads, "Art. . . . On privacy. . . ," the original French text only provides for an "Art. . . . Concernant liberté de domicile et correspondance. . . ," literally an article concerning the liberty of the home and correspondence (both sets of suspension points from the original texts). It would be difficult to try to read a general right to privacy into those two specific protections for the home and correspondence, which are typically enumerated *in addition to* the general right (e.g., as in the UDHR). Therefore, while the U.K. delegation invented a new privacy-limiting wrinkle, they simultaneously reintroduced the broader, stronger UDHR protection of the right.

eyebrows high enough to seek change.[56] That simple qualifying phrase profoundly altered the purview of the article: instead of protecting against interference with privacy perpetrated by any type of actor, its scope is limited to State action, exempting the behavior of legal and natural persons and approximating the effect of the Household Exemption.

Such a limitation is noticeably absent from the ICCPR's article on the right to privacy – an uncharacteristic instance of discord between the two treaties[57] – but not for lack of attention to the matter, its omission coming only after much diligent deliberation. While the drafters of the ECHR incorporated the British wrinkle without any documented debate,[58] their counterparts at the U.N. carefully considered the implications of exempting private individuals.

In 1953, during the 9th Session of the U.N. Commission on Human Rights, the Philippines proposed for inclusion in the ICCPR an article dealing with the right to privacy and worded almost identically to the rejected Australian proposal of five years prior. The discussion

[56] CoE, "Preparatory Work on Article 8," 9 § 15-16. It is worth noting that the U.K. also proposed limiting the protection for free expression embodied in ICCPR § 19 to "governmental interference" – twice in the same clause, no less – in its comments of 4 January, 1950 to the U.N. Secretary-General (CoE, "Preparatory Work on Article 8," 6-8 § 8). This predates the British comment on the ECHR's right to privacy and suggests that, instead of being anti-privacy (or perhaps pro-free expression for non-governmental entities), it is more likely that the U.K.'s quarrel concerned international interference with non-State action, generally. This is supported by the discourse of the U.N. Commission on Human Rights in its 9th Session (1953) regarding the Anglo-Saxon objection to the broad scope of the ICCPR's privacy article, quoted in the following section's discussion of the Covenant. It should also be noted that the freedom of expression – codified in Article 10 of the ECHR and often the foil of privacy – is the only other article in the Convention that limits actionable violation to State interference.

[57] CoE, "Preparatory Work on Article 8," 9. In the words of the Council of Europe: "[T]here is no such close affinity between Article 8 of the Convention and Article 17 of the draft [ICCPR] . . . as exists between most of the other Articles of Section I ['Rights and freedoms'] of the Convention and the corresponding Articles of the draft Covenant."

[58] Ibid., 9 § 15-16.

centered on the phrase "arbitrary and unlawful interference,"[59] a slight revision of the failed 1948 version's protection against "unreasonable interference."[60] The new formulation was interpreted as protecting the individual "against acts not only of public authorities, but also of private persons," its repetition of the ECHR's exact term ("public authority") presumably a direct censure of the Convention's restricted scope of application.[61] The United Kingdom again found itself petitioning for the exemption of non-State interference, this time as part of a coalition of common law States: Australia, the U.K., and the United States all argued that the Covenant's privacy article "should be confined to imposing restraints on governmental action and should not deal with acts of private individuals, which were a matter for municipal legislation."[62] Their protest was founded on fears that "the article as formulated might be construed as requiring changes to be made in existing rules of private law . . . [raising] considerable difficulties particularly for countries with Anglo-Saxon legal traditions."[63] However, this argument for a type of Household Exemption from the ICCPR's privacy article was undermined when several States, including Australia and the U.K., "pointed out that the article, which was couched in general terms, merely enunciated principles, leaving each State free to decide how those principles were to be put into effect."[64] The United States briefly submitted an amendment that, among other changes, restricted illegal interference to "public authorities,"[65] but it was quickly withdrawn.[66] The Commission on Human Rights unanimously adopted the unrestricted version,[67]

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[59] Bossuyt, *Guide to the "Travaux Préparatoires" of the ICCPR*, 341.
[60] Ibid., 339.
[61] Ibid., 341.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid., 343.
[66] Ibid., 343.
[67] By a vote of 12-0, with four abstentions. See: ibid., 345.

and then, seven years later, in the final vote on the individual article, the Third Committee of the UNGA followed suit.[68]

The Charter of Fundamental Rights of the European Union

> *Article 7*
>
> **Respect for private and family life**
>
> Everyone has the right to respect for his or her private and family life, home and communications.

A half-century passed between the formulation of the ECHR and ICCPR and the proclamation of the Charter of Fundamental Rights of the European Union, and, thanks to the explosive pace of technological development in the intervening years, neither of the older treaties' privacy protections aged particularly well. Determining the Charter's position within the legal framework influencing the GDPR is complex: as a modern text specific to the E.U., it would seem more relevant than its ancestors; however, the Charter explicitly subordinates itself to the ECHR, a small hurdle to surmount. The subordinating clause reads as follows:

> In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.[69]

Because a right to privacy already exists in the ECHR, the wider scope of the Charter's corresponding right – particularly its lack of a limit to State-perpetrated interference – would

[68] By a vote of 70-0, with three abstentions: the U.S., the U.K., and Cuba, which was going through a period of intense political turnover at the time of the 1960 vote. See: ibid., 842-50.

[69] EP, EC, and EComm, *Charter of Fundamental Rights*, § 52 ¶ 3.

seem effectively worthless, its legal import indistinguishable from that of its 1950 counterpart.[70] However, on closer examination, the supersession of the Convention's privacy article is incomplete.

That the drafters of the Charter chose not to retain the restrictive second paragraph of the ECHR's privacy right has profound implications in light of the subordinating clause reproduced above. The "meaning and scope" of the CFR's *right* are indeed the same as those of the Convention's, but the meaning and scope of its "*permissible limitations*" to that right – to borrow a term from the ECHR's *travaux préparatoires* – are not.[71] In their relation of the incorporation of the British wrinkle into the draft privacy article, the official *travaux* delineate the function of the article's first paragraph as a "statement of the right itself" and that of its second paragraph as a "statement of permissible limitations."[72] Erring on the side of over-explanation, this means that the wrinkle, which opens the second paragraph of the Convention's article, is *not* part of the fundamental right protected by the ECHR and, derivatively, that the Charter is not bound to maintain its meaning and scope.

The counterclaim is that, while the British wrinkle may not be part of the ECHR's "right itself," it does appear to inform the scope of the right and should therefore be replicated faithfully as part of the scope of the Charter's. Supporting this claim is the official explanation of the right to privacy's basis under the CFR, written by the same E.U. body that drafted the Charter and to which "due regard" must be paid by Member States and the CJEU.[73] The explanatory text

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[70] Why the Charter's drafters did not simply copy the corresponding rights verbatim from the ECHR is an interesting question, given that their new formulations retain all of the functionality of the old.

[71] CoE, "Preparatory Work on Article 8," 6 fn. 3, emphasis mine.

[72] CoE, "Preparatory Work on Article 8," 6 fn. 3.

[73] EP, EC, and EComm, *Charter of Fundamental Rights*, 391. This section of the Preamble was added in the 2007 text that replaced the original Charter upon the Treaty of Lisbon's entry

acknowledges the primacy of the ECHR's privacy article on account of the subordinating clause, but it simultaneously serves to highlight – presumably unintentionally – the clause's confusing structural ambiguity. It is unclear whether the clause is intended to transpose only the meaning and scope of the "right itself" or those of the encompassing article, as well. The process as understood by the drafters of the Charter reads as follows:

> "The rights guaranteed in Article 7 [the CFR's privacy right] correspond to those guaranteed by Article 8 of the ECHR. . . . In accordance with [the Charter's subordinating clause], the meaning and scope of [the CFR's privacy] right are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR.[74]

On the surface, the reasoning appears sound, but, upon closer inspection, it begins to come apart at the seams. "The rights guaranteed in Article 7" are the rights to respect for private and family life, the home, and communications; "those guaranteed by Article 8 of the ECHR" are effectively identical,[75] and the article's second paragraph is clearly not among them. It is a qualification of the rights enumerated in the preceding paragraph and not a right in and of itself. In other words: there is no human right to a limitation on the right to privacy. Furthermore, the explanatory text's interpretation of a corollary foisting the limitations of the ECHR's article on its own Article 7 is unfounded. The subordinating clause says nothing about a requirement to transpose the meaning and scope of the permissible limitations of a right – just the meaning and scope of the right itself. The U.K. delegation, the inventor of the limitation to the ECHR's right, intended it to be a part of

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into force. The official *Explanations* begin with an assertion that "[t]hey have no legal value and are simply intended to clarify the provisions of the Charter" (EC, *Charter: Explanations*, 3), but the 2007 adaption suggests otherwise. If Union courts and MS must now pay attention to the explanations, they must have *some* legal import.

[74] EC, *Charter: Explanations*, 25.

[75] From the explanatory text: "To take account of developments in technology the word 'correspondence' has been replaced by 'communications'" (ibid).

the first paragraph before the Conference of Senior Officials unceremoniously shifted it down.[76] This demotion suggests a hierarchy within the purview of the ECHR's privacy right: on the first tier, outlining the scope of the right itself are extensions to private and family life, the home, and correspondence; on the second tier, the British wrinkle delimits only the scope of the permissible limitations. Moreover, the Charter, as a primary source of Union law,[77] is unquestionably permitted to provide "more extensive protection" for the right to privacy, in this case by removing a previously enshrined limitation on the right.

> *Article 8*
>
> **Protection of personal data**
>
> 1. Everyone has the right to the protection of personal data concerning him or her.
>
> 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
>
> 3. Compliance with these rules shall be subject to control by an independent authority.

The Charter follows its privacy article with one concerning the fundamental right to the protection of personal data, a first among international human rights treaties. The explanatory text traces the article's lineage from the ECHR's privacy article, Convention 108, and, primarily, the Directive.[78] Though perhaps an inconsequential innovation in light of the corresponding expansion of privacy's scope – which, as previously mentioned, now unquestionably covers personal data privacy and protection issues – the separation and emphasis placed on protecting

[76] CoE, "Preparatory Work on Article 8," 6 § 10.
[77] EP, "Sources and Scope of European Union Law."
[78] EC, *Charter: Explanations*, 26.

personal data hammers home the importance of that specific branch of privacy within the EU. The weight accorded to personal data by the Charter is even more significant in light of the Charter's increasing influence within the European human rights infrastructure. As the European Commission asserted in an April 2014 report on the Charter's application, "the importance and prominence of the E.U. Charter continues to rise[, and] the Court of Justice of the E.U. increasingly applies the Charter in its decisions."[79] Viviane Reding, vice president of the European Commission, took it a step further: "I could imagine that one day citizens in the Member States will be able to rely directly on the Charter – without the need for a clear link to E.U. law."[80]

Council of Europe Convention 108 on Data Protection

> **Article 1 – Object and purpose**
>
> The purpose of this convention is to secure in the territory of each Party for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him ("data protection").[81]

The Council of Europe's *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* presents a unique case within the web of privacy treaties. Though soon to be joined by the forthcoming GDPR, Convention 108 is currently the

[79] EComm, "Fundamental Rights," 1.
[80] Ibid.
[81] CoE, *Convention 108*.

sole legally binding international instrument strictly concerned with data protection.[82] Upon the Convention's 1981 ratification by the CoE, the Commission of the European Community – the precursor to the modern E.U.'s European Commission – submitted an official recommendation that all Community Member States ratify the Convention.[83] Every State complied, and, today, the treaty is binding upon all E.U. Members, as well as the Union as a whole.[84]

For this paper's purposes, there is not much of special note in the body of Convention 108 as it currently stands; it contains no Household Exemption or anything similar. However, even more hopelessly outdated than the Directive, the Convention is currently undergoing a parallel process of modernization and revision. Much is being done to harmonize the Convention with the forthcoming Regulation.[85] Among numerous other amendments – and underscoring the urgency of the concerns addressed in this paper – drafts of the modernized Convention 108 contain a Household Exemption suffering from the same definitional ambiguities that plague the Directive's.[86]

While drafts of the GDPR do not count the Convention among its foundational texts, there are consistent allusions to the importance of other "international commitments" or, more explicitly, to "legally binding conventions or instruments with respect to the protection of

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[82] EUAFR and CoE, *Handbook*, 16. The Charter of Fundamental Rights is legally binding, but its focus is far beyond data protection alone; data protection is restricted to the bounds of its eighth article. The Data Protection Directive is not a legally binding instrument; it is an instruction, addressed to E.U. Member States, charging each to implement the Directive's provisions within its own legal framework. Interestingly – and not without controversy – the Regulation removes much of that latitude, acting as a binding text on its own, irrespective of State implementation. A deeper discussion of the implications of this switch is, while fascinating, well outside of the scope of this paper.

[83] EComm, *Commission Recommendation*, § 2 ¶ 1.

[84] EUAFR and CoE, *Handbook*, 17.

[85] Greenleaf, "'Modernising' Data Protection Convention 108," 4-5; 8-9; 11.

[86] Consultative CC 108, *Propositions of Modernisation*, § 3 ¶ 1bis. "This Convention shall not apply to data processing carried out by a natural person for the exercise of purely personal or household activities."

personal data."[87] Regardless of the absence of a specific reference, the Regulation's drafters are certainly aware of the concurrent process underway at the CoE. The latter's incorporation of a Household Exemption – copied almost verbatim from the Directive, no less – can only be read as an endorsement of the Exemption's current wording, further crystallizing the interpretive confusion.

The GDPR's excision of all specific reference to the Convention is interesting in light of the Directive's heavy reliance thereupon. Highlighting the close relationship, the DPD explicitly cites the influence of Convention 108 in its preamble, providing that "the principles . . . contained in this Directive . . . give substance to and amplify those contained in the [Convention]."[88] In a testament more to the lightning pace of technological innovation than to any particular fault of either instrument, the DPD, intended to update an already-antiquated Convention 108, was out of date itself shortly after its inauguration.

[87] EP, *Report on the Proposal*, Amendment 137.
[88] EC and EP, *Directive 95/46/EC*, ¶ 11.

Approaching the Now: The Directive and the Household Exemption

That the Directive is outdated is no great secret, but the extent of its limitations is only appreciable when presented against the immense expansion of ways in which individuals' data must now be protected. In a 2011 survey ordered by the Commission, 74% of Europeans saw disclosures of personal information as "an increasing part of modern life" and did not feel that they have complete control over their online data, while 72% feared that they "give away too much personal data online."[89] Chief among the innovations propelling this worrying trend toward increased data obligations is the online social network, which has revolutionized the ways in which we share data. The exponential growth of the online population is only the most quantifiable aspect of this revolution; far more damaging to individual privacy are spikes, largely driven by social media, in the amount and type of data we share, the scope the audience with whom we share it, and the ease with which others can access that data.

However, it would be remiss to blame all of this on SNS and release the authors of the Directive from any culpability for the present situation: the radical alteration of the data sharing landscape was well underway by 1995. Certainly by the time of the Directive's 1998 entry into force, in the midst of the dot-com bubble, there were already concerns over the extent to which the nascent Internet empowered individuals to share personal data.

In their seminal 1998 book entitled *None of Your Business: World Data Flows, Electronic Commerce, and the European Privacy Directive*, Peter P. Swire and Robert E. Litan thoroughly examined the legal implications of the Directive and found Internet privacy to be of "great long-term significance to the overall success of data protection efforts."[90] In what was

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[89] EComm, *Special Eurobarometer 359*, 16; EComm, "How Will the Data Protection Reform Affect Social Networks?"

[90] Swire and Litan, *None of Your Business*, 64.

already "a world of pervasive personal computers" with forecasts of continued escalation in the "number and power of [data] processors," the authors acknowledged that it was "far from clear that there [was] any workable way to implement data protection laws on the Internet."[91]

The Directive

The Directive's express purpose is to regulate the ways in which *data processors* may *process* the *personal data* of E.U. *data subjects*. The text is written in general terms to afford extensive protection to individuals' data privacy, but its heavy reliance on jargon does no favors to laypeople wishing to learn about their rights. *Personal data* does not refer specifically to electronic data but to any type of information about a *data subject*, "an identified or identifiable natural person."[92] That encompasses everything from the most mundane (e.g., one's waist size, favorite color, or desire to visit San Francisco) to the most compromising (e.g., an explicit photograph; bank, healthcare, or telephone record; or deeply personal secret), regardless of whether the subject is explicitly identified by name or merely "can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity."[93] Only if personal data is completely and irreversibly anonymized may it be *processed* by *data processors*. *Processing* is to perform "any operation or set of operations . . . upon personal data, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or

[91] Ibid., 70; 65; 64.
[92] EC and EP, *Directive 95/46/EC*, § 2(a).
[93] Ibid.

combination, blocking, erasure or destruction,"[94] and *data processors* include, among other entities, corporations, public agencies, and, most relevant to this paper, natural persons.[95] In theory, any action carried out by an individual on the personal data of another would seem to warrant regulation under the Directive. If Barbara takes a photograph of Kevin (recording), transfers it to her computer (organization; storage), opens a program to crop the image (retrieval; consultation; alteration; use), and uploads it to her Facebook account (organization; storage; disclosure), she has performed at least ten operations on Kevin's personal data. However, in practice, most of – if not all – Barbara's actions would be excluded from Directive scrutiny by virtue of a brief but significant clause known as the Household Exemption.

The Household Exemption

> *Article 3*
>
> **Scope**
>
> 2. This Directive shall not apply to the processing of personal data:
>
> — by a natural person in the course of a purely personal or household activity.

The Household Exemption is a one-line limitation on the Directive's scope that places certain processing activities of natural persons outside of the DPD's jurisdiction – more precisely, activities *purely personal* in nature or of a *household* variety. What those adjectives entailed in the early-1990s is unclear – what makes an activity *purely personal*? What is a *household* activity? – and two decades of technological innovation have only further obscured

[94] Ibid., § 2(b).
[95] Ibid., § 2(e).

their intended scope. However, by looking at both its initial conception and its interpretation by the Court of Justice of the European Union, a clear picture emerges of what the Exemption seeks to protect.

The Directive itself provides very little insight as to the types of activities intended for exemption, its preamble listing only "correspondence and the holding of records of addresses" as examples of "exclusively personal or domestic" processing.[96] While not a list of explicitly exempted activities, the Article 29 Data Protection Working Party (WP29)[97] recently provided several examples of the types of processing undertaken by natural persons in the early-1990s, illustrating what the Exemption *might* have sought to safeguard: maintaining an address book on a home computer; possession of the bank, health, or school records of family members; storing individuals' contact details on a basic mobile phone; or mentioning friends or coworkers within a personal diary.[98] The salient detail connecting all of these undertakings is that they are activities of private life, occurring within the private sphere. The Exemption's focus on activities in the private sphere is important for two main reasons: one, the Exemption's original focus was the protection of that private sphere and not of any activity that went beyond the private and entered the public sphere, as it has recently come to be interpreted; and, two, the individual's ability to transcend that private-public boundary in 1995 was but a fraction of what it is today.

The Directive was not designed to be a static document; not only did the drafters seek to protect against contemporary threats to privacy, they used deliberately broad language to enable the DPD to anticipate and adapt to future developments. Aware of the magnitude of the changes occurring within the information society – case in point, the first draft of the Directive predates

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[96] Ibid., ¶ 12.

[97] The independent advisory body established by the DPD to issue opinions and track implementation of the Directive.

[98] WP29, *Statement*, 2.

the public unveiling of the World Wide Web by nine months[99] – the drafters acknowledged that the ongoing metamorphosis was making it "considerably easier" to process personal data. One of the most impactful and immediately tangible advances in processing technology was the World Wide Web, which, among the countless other benefits afforded by a universal information network, allowed natural persons unprecedented power to execute, in particular, one type of processing regulated by the DPD: *disclosure by transmission, dissemination or otherwise making available*.

Prior to the World Wide Web, there were not many options open to a natural person wishing to share information with a large number of people. They could have printed and distributed fliers, used an auto dialer to reach the masses by telephone, or paid a newspaper or television company to relay their message. Exercising one's free expression rights in the public sphere was expensive, time-consuming, and required a lot of effort. That all changed with the invention of the Web and subsequent explosion of the online population, which dramatically alleviated the burden. It did not happen over night, but over time the Web emerged as a medium through which large populations could be reached simultaneously and at relatively low cost.[100] Processing personal data by disclosure became even easier and more widely achievable with the rise of social media platforms – a movement colloquially termed "Web 2.0." As a further distillation of the Web's fertile environment for free expression, social networks create a perfect storm of privacy concerns: they facilitate far more social connections between friends, acquaintances, and strangers than could be achieved offline; they discourage anonymization,[101]

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[99] First draft: November 5, 1990; Public unveiling: August 23, 1991.

[100] The price of access has long kept marginalized populations off of the Web, but costs continue to decrease and, as evidenced by the growth in the online populations of underserved areas, universal access is on the horizon.

[101] E.g., Facebook's requirement that users sign up with their real name.

allowing for the cultivation of extensive profiles of real personal data; and they act as a megaphone for free expression, encouraging user-generated content and its dissemination to a wide audience.

In the international human rights regime, privacy and the freedom of expression are often painted as incompatible and pitted against one another, but, in the case of the Household Exemption, the conflict does not even enter the equation. A look at the two relevant sections of the Directive shall prove that the document as a whole places privacy firmly above free expression.[102] An examination of the Directive's *travaux préparatoires* shall underscore the general primacy of privacy while also affirming that the Household Exemption was intended solely as a protection of the private sphere. Finally, an analysis of the CJEU's opinion in the *Lindqvist* case shall confirm the private sphere as the Exemption's exclusive focus.

The Sphere of Private Life: The Sole Focus of the Household Exemption

The Directive and the Primacy of Privacy over Free Expression

> *[D]ata protection may be a subject on which you can have different answers to the various problems, but it is not a subject you can bargain about.*[103]
>
> — Spiros Simitis

The Directive – the first authoritative text – is a groundbreaking legal document in many ways, but most important and enduring is its novel averment of the importance of privacy in

[102] Recall the severely limited scope of Article 9.

[103] Cate, *Privacy*, 42, quoting Spiros Simitis, "Information Privacy and the Public Interest" (lecture, Annenberg Washington Program, Washington, D.C., October 6, 1994). Simitis's comment concerns the draft Directive, but the pertinent principles survived the deliberative phase and were incorporated into the final version.

relation to other fundamental rights. Upon adoption of the DPD in 1995, the Commission was fully aware of the incompatible relationship between privacy and free expression and, as evidenced in several key sections of the text, came down firmly on the side of privacy. That preference has far-reaching implications, both for the purpose of properly weighting competing rights obligations in this paper's assessment of the household exemption and, more broadly, for the future of privacy legislation in Europe.

In his 1997 book entitled *Privacy in the Information Age*, Fred H. Cate examines the Directive's declaration of what he terms "the primacy of the human right to privacy."[104] His analysis begins with the above quote from Spiros Simitis, which speaks to the DPD's inflexible stance on the preeminence of privacy – in weighing competing rights, data protection is off the bargaining table. In support of Simitis's proposition, Cate specifically focuses on the first and ninth of the Directive's thirty-four articles for his defense of privacy's precedence. Here follows the relevant section of the first:

> Article 1
>
> *Object of the Directive*
>
> 1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.

Cate commences with the observation that "the [Directive]'s terms, and the process from which it resulted, reflect a commitment to privacy as a basic human right, on par with the rights of self-determination, freedom of thought, and freedom of expression."[105] However, I believe

[104] Ibid., 43.
[105] Cate, *Privacy*, 42.

that the terms of the DPD do more than merely place privacy on par with other fundamental rights.[106] The first article is notable not only for its pronouncement of the fundamentality of data privacy but also for the Commission's inclusion of the qualifier *in particular*. The phrase generally refers to either specificity or specialness, with significant legal consequences hanging in the balance of that interpretation. A qualifier of specificity simply identifies in greater detail the exact boundaries of a term, but one of specialness implies superiority, a hierarchy in which the qualified term outranks the unqualified. The French copy of the Directive makes it clear that the Commission intended *in particular* to indicate the latter. The French text employs *notamment*, in the sense of *notably* or *that which merits special note*, instead of *particulièrement* or the Anglicization *en particulier*.[107] It is therefore evident that the Commission intended to place data privacy in a special category and, in so doing, emphasize its essential role in the preservation of personhood – a relationship that we will shortly analyze in greater depth.

Cate underscores this interpretation of the first article with a detailed look at the ninth, which reads as follows:

> Article 9
>
> *Processing of personal data and freedom of expression*
>
> Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.

[106] Cate's conclusion, to be discussed momentarily, contradicts his opening statement. In it, he touts the preeminence of privacy and, in fact, goes further in his trumpeting of privacy than this author finds comfortable.

[107] EC and EP, *Directive 95/46/CE*. Within the context of the Directive, the French text also uses *notamment* to prioritize privacy over other rights in the second, ninth, and tenth recitals of the preamble.

Prior to critical examination, a thorough unpacking of that verbiage is in order. The article authorizes Member States to harmonize the data privacy requirements laid out in Chapters 2, 4, and 6 – and only those chapters – with external free expression laws. Furthermore, the authorized derogations may only exempt personal data processing performed *solely* in the pursuit of journalistic, artistic, or literary expression. The scope of the limits on privacy articulated in Article 9 is, in a word, narrow. The Directive only allows for a very select set of its provisions to be made compatible with a very select set of free expression laws; no such amenability is expected of the bulk of the Directive toward the bulk of such laws. Cate points out that only two of the three chapters listed are even "substantive," with chapter six instead concerning the administration of the Directive.[108] The inclusion of such a stringent itemization of the derogative standard says more about the multitude of conflicting obligations *not* explicitly recognized than the select few that are. In Cate's words, "By the omission of any reference to the other substantive rights from the article permitting exceptions for expressive undertakings, it is clear that the [Directive]'s drafters believe that the protection of privacy is paramount to freedom of expression."[109]

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[108] Cate, *Privacy*, 43. *Substantive* in the legal sense refers to law "defining rights and duties as opposed to giving the rules by which such things are established" (*New Oxford American Dictionary*).

[109] Ibid. This sentence continues with "and the activities of the press and other authors and artists," but I cut him off out of disagreement over his suddenly expansive view of privacy's dominance, which I find overly broad. I believe that the Directive makes clear that, while free expression in general is subordinate to privacy, instances of journalistic, artistic, and literary expression are clearly listed as possible exemptions and therefore at least equal in stature to privacy.

The Origins of the Household Exemption

The DPD's *travaux préparatoires* – the second authoritative text – prove beyond the shadow of a doubt that the protection of individual privacy is the sole focus of the Household Exemption as well as the main focus of the entire Directive. The DPD as a whole is largely concerned with protecting the privacy of the data *subject*, whereas the Exemption is designed to protect the privacy of the data *processor*, so long as that processor is a natural person. Accordingly, a pedigree of strong protections for individual privacy persists through every stage of the Directive's development, both for the data subject and, when concerning a natural person, the data processor.

In the first proposal for the Directive, drafted in 1990 by the European Commission, the Household Exemption exists in a form much different from its final iteration, one that makes explicit the drafters' intention and clarifies much of the ambiguity as to which rights it should cover. Since it does not yet contain the word *household* and to differentiate it from the version that does, the Exemption shall be referred to as the 'Household' Exemption. It reads: "This Directive shall not apply to files held by . . . an individual solely for private and personal purposes."[110] Its aim is unequivocally the protection of the individual's private sphere, as any "private and personal purposes" would clearly take place therein. The first draft's preamble trumpets the private sphere even more explicitly: "[D]ata files falling exclusively within *the confines of the exercise of a natural person's right to privacy*, such as personal address files, must be excluded" from the scope of the Directive.[111] The italicized portion is synonymous with the private sphere, and the data processor's right to privacy is clearly given as the grounds for exempting their processing activities.

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[110] EComm, *Proposal for a Council Directive*, § 3 ¶ 2(a).
[111] Ibid., ¶ 9, emphasis mine.

The European Economic and Social Committee was first to offer an opinion on the proposal,[112] applauding and reaffirming the original's commitment to "strictly protecting the privacy of the individual."[113] The 'Household' Exemption is fully endorsed and the corresponding piece of the preamble not addressed, preserving the privacy-centric basis and championing of the private sphere.[114] The only significant change is due to the Directive-wide rephrasing of *file* or *data file* as *processing of personal data*, shifting focus to the activity rather than the object.[115] In another affirmation of privacy's primacy, the proposal's exception for "the press and the audiovisual media" – which, in the proposal, only references the freedoms of information and the press – is halved, the Committee excising all mention of press freedom and further reducing the number of competing rights afforded *any* inroad on individual privacy, no matter how small.[116]

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[112] An opinion that, it should be noted, was afforded high regard in the formulation of the final, ratified Directive, it being the only text considered outside of the initial Commission proposal and subsequent amendments by the European Parliament and Council.

[113] EESC, *Opinion on the Proposal*, § 1.1. The Committee does suggest that, due to the references to the ECHR and Convention 108 in the Directive's recitals, its scope "should not be limited to the protection of privacy," but, because the Committee does not elaborate on that suggestion, it is unclear what other protections it sought (§ 2.2.1). Furthermore, the Committee hedges on that thought by applying the afore-discussed qualifier *in particular*: "It should however be emphasized that the aim of this protection is to guarantee, in the territory of each party, respect of individual rights and fundamental freedoms, and *in particular the right to privacy* with regard to the automatic processing of personal data" (§ 2.1.2, emphasis mine). In a prescient move, the Committee also suggested that *excessive effort* be removed from the proposal's definition of *depersonalize* – for some brief context, an "excessive effort in terms of staff, expenditure and time" would have been required to attach truly "depersonalized" personal data to its original host (EComm, *Proposal for a Council Directive*, § 2(b)) – because, in the Committee's words, "a processing task requiring an excessive effort today may require no effort at all next year" (EESC, *Opinion on the Proposal*, § 2.2.2.3).

[114] EESC, *Opinion on the Proposal*, § 2.2.3.1.

[115] Ibid., § 2.2.1.3.

[116] Ibid., § 2.2.16.2.

The European Parliament made the first substantive amendments to the proposal, many of which complement or extend the original's focus on individual privacy.[117] Notably, Parliament cripples the priority given to ensuring the free flow of data; strengthens the requirements for anonymizing data; drastically expands the scope of processing activities regulated; and, in contrast to the considerable changes to nearly every other part of the proposal, leaves the 'Household' Exemption virtually untouched. The original proposal requires that Member States "neither restrict nor prohibit the free flow of personal data [within the European Community] for reasons to do with the protection" of privacy,[118] a strong limitation thereon, but Parliament rejects that notion, not only calling for the reconciliation of the two competing interests but demanding "a high level of protection" for personal data.[119] In its next amendment, Parliament raises the threshold of anonymity that would have to be met for data to be considered *depersonalized*, increasing security for individual privacy at the expense of data processors.[120] In addition, three new genres of activity are added to the range of *processing* operations regulated by the Directive, continuing the expansion of privacy's dominance.[121] Despite its invention of a multitude of new exemptions coequal to the 'Household' Exemption, Parliament faithfully preserves both the latter and its explanatory companion in the Preamble. In the Exemption, *files* is erased in favor of *personal data* and *purposes* recast as *activities*,[122] and, in the Preamble, *data*

[117] It should be noted that Parliament did not consider the Economic and Social Committee's suggestions.
[118] EComm, *Proposal for a Council Directive*, § 1 ¶ 2.
[119] EP, *Minutes of Proceedings*, Part II § 19 – Amendment 11.
[120] Ibid., Amendment 12. For a brief explanation of *depersonalization*, see note 113 above.
[121] Ibid., Amendment 15.
[122] Ibid., Amendment 22; 130.

files is broadened into *data*, with neither of the changes impacting the 'Household' Exemption's overwhelming focus on the private sphere.[123]

Taking account of Parliament's amendments and the opinion of the Economic and Social Committee, the European Commission revised its original proposal. The Commission notes that the primary purpose of the new version remains ensuring "a high level of protection" for individual privacy.[124] They reemphasize that specially-protected status in quadrupling the number of times privacy is placed above the other fundamental rights and freedoms by way of the previously-analyzed qualifier *notamment*.[125] In this draft, the 'Household' Exemption's focus on the private sphere and individual privacy remains unambiguous, the wording slightly modified but the meaning wholly intact. The Preamble obscures the original proposal's clear promotion of the inviolability of the private sphere; however, the essence is unchanged, with "processing carried out by a natural person for purely private purposes" still excluded from the Directive's scope.[126] Any *purely private* activity would unquestionably fall within the private sphere. Arguably, the limits of that sphere extend *only* to purely private activities, with anything less straddling the gray boundary between private and public. Therefore, the Commission's second rendering of the Preamble's explanatory section maintains the private sphere as the ambit of the 'Household' Exemption. The Exemption itself is slightly tweaked to exclude from the Directive "the processing of personal data by a natural person in the course of a purely private

[123] Ibid., Amendment 1.
[124] EComm, *Communication to the European Parliament*, § 2.
[125] EComm, *Amended Proposal*, ¶ 2; 10; 32. The prioritization of privacy in the ninth recital of the amended proposal (¶ 9) is the only holdover from the original proposal (¶ 7).
[126] Ibid., ¶ 11.

and personal activity," effectively identical to its individual privacy-focused formulation in the original proposal.[127]

Twenty-eight months pass between the Commission's adoption of its amended proposal in October 1992 and the next iteration of the Directive, the European Council's common position of February 1995. In the Council's version, the Exemption needs no scare quotes around 'Household,' having blossomed into its ultimate form, complete with the reference to "purely personal or household" activities.[128] In fact, both the exemption and corresponding *whereas* recital are now worded exactly how they appear in the final Directive, to be ratified eight months later. It is unclear how the Council arrived at its decision to modify "purely private and personal activity" into "purely personal or household activity." In the intervening twenty-eight months, the Commission transmitted its amended proposal to the Council and Parliament; the draft was updated to accommodate changes brought about by the Maastricht Treaty, which established the current European Union; and, then . . . nothing. The official timeline documenting the Directive's progress from initial proposal to final ratification is, with the exception of the Maastricht-inspired revision, completely blank between October 1992 and February 1995.[129] A deep dive into the record of the Council's minutes during that time would no doubt provide fascinating insight into the deliberations over the Exemption's wording. However, within the scope of this paper, the salient point is not the exact path taken to arrive at "purely personal or household" but the fact that the Council arrived there without altering the Exemption's foundation and, derivatively, its meaning.

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[127] Ibid., § 3 ¶ 2.

[128] EC, *Common Position (EC) 1/95*, § 3 ¶ 2.

[129] EU, "100979 – Procedure." The post-Maastricht update did not affect the draft Directive's content; its sole purpose was to modify the draft's legal basis to reflect the foundational treaties of the newly minted EU.

The Council expressly acknowledges that it made certain amendments "to clarify or simplify the text," and it is telling that the interpretive foundation of the Exemption – namely, the instruments cited as the draft Directive's basis and the references to earlier versions within the drafting process – remain unchanged while the Exemption itself is clarified. In the run-up to its *whereas* recitals, the Council's common position gives regard to its four main foundational documents: the *Treaty establishing the European Community* (TEEC),[130] the original and amended Commission proposals, and the opinion of the Economic and Social Committee.[131] The TEEC is less important at present, as it lays out the general procedure by which a directive is issued. By contrast, the other three texts cited in the common position – along with the opinion and decision of Parliament and the common position itself – form part of that procedure for this specific Directive.

The drafting procedure for the Directive began with an original proposal by the Commission, and each subsequent text builds upon its antecedents, correcting what is incorrect, clarifying what is unclear, and preserving what is perfect. By tracking the amount, type, and significance of changes made to a particular section or idea within the Directive, it is possible to gauge the level of confidence that the drafters have in that section or idea. A section that has undergone many substantial rewrites indicates a certain ambiguity or openness to debate; an idea that has remained constant throughout the drafting process highlights not only its fundamentality, its lineage extending uninterrupted to the Directive's origins, but also its indisputability.

The Directive's central concepts and sources are laid out in the original proposal and undergo very little transformation throughout the drafting process. The protection of the right to

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[130] This is the circa-1995 name of the *Treaty on the Functioning of the European Union* (TFEU), which was amended and renamed in 2007 by the Treaty of Lisbon.

[131] EC, *Common Position (EC) 1/95*.

privacy, with reference to the ECHR, the general principles of European law, and, especially, Convention 108, is asserted in the original proposal as the Directive's main objective;[132] recalled in the Economic and Social Committee's opinion;[133] affirmed without amendment on Parliament's first reading; and strengthened in the Commission's amended proposal, with privacy garnering additional attention.[134] By the time the Council gets a say, the protection of individual privacy has been unequivocally affirmed four times as the Directive's purpose. The Household Exemption, which draws its rationale from that purpose and is designed to protect the privacy of the individual data processor, follows a similar path: it undergoes several aesthetic transformations that serve to clarify its meaning, but that meaning itself never wavers. By the time it reaches the Council, the 'Household' Exemption (as it was prior to the Council's addition of the *household* qualifier) has been indisputably confirmed four times as a protection for the individual's private sphere and right to privacy. Though the Council does rather radically alter the wording of the Exemption, it is clear that the new language is simply a refinement of the principles consistently upheld throughout the drafting process; the words may be different, but the justification for and purpose of the Household Exemption is constant.

The CJEU's Affirmation of the Exemption's Focus on Privacy

In a 2003 case known as *Lindqvist*, the Court of Justice of the European Union offered an identical interpretation of the Household Exemption, affirming its purpose as a strong protection

[132] EComm, *Proposal for a Council Directive*, ¶ 7; 22.
[133] EESC, *Opinion on the Proposal*, § 1.1.1; 1.5; 2.1.3; 2.2.1.
[134] EComm, *Amended Proposal*, ¶ 9-10.

for individual privacy and, especially, the private sphere of the individual who processes personal data.[135]

In autumn 1998, Bodil Lindqvist was working as a volunteer catechist in the parish of Alseda in the south of Sweden.[136] At the same time, she was enrolled in a computer skills course, and one of her assignments was to create a website.[137] In order to help parishioners prepare for confirmation, Lindqvist decided to create web pages containing general information about herself, her husband, and seventeen of her colleagues, including, among other things: given or full names, jobs and hobbies, family circumstances, telephone numbers, and other personal information.[138] She made the pages on her personal computer at home, and, at Lindqvist's request, her site was hyperlinked from the church's website.[139] She did not obtain prior approval from any of the other individuals before posting the information to the Internet.[140] When some of them expressed dissatisfaction with their personal data being available online, Lindqvist quickly removed the offending web page.[141] However, Swedish authorities still chose to prosecute her under Sweden's domestic implementation of the DPD, the *Personal Data Act* (*Personuppgiftslagen*) of 1998. The Swedish Data Protection Authority (*Datainspektionen*) won its initial case against Lindqvist in district court (*Eksjö tingsrätt*), resulting in a fine of 4,000 Swedish kronor and a requirement that she donate a further 300 to a general Swedish fund for victims.[142] Lindqvist appealed the judgment to the Göta Court of Appeal (*Göta hovrätt*) in

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[135] CJEU, *Judgment of the Court*.
[136] CJEU, *Opinion of Advocate General Tizzano*, 6.
[137] Karlsson, "Öppen Kanal i Radio."
[138] CJEU, *Opinion of Advocate General Tizzano*, 6.
[139] CJEU, *Judgment of the Court*, ¶ 12.
[140] Ibid., ¶ 14.
[141] Ibid.
[142] Ibid., ¶ 17. The full fine of 4,300 SEK in 2000 is equal to roughly $700 USD in 2014.

Jönköping, which promptly referred seven questions to the CJEU for a preliminary ruling on the interpretation of the Directive.[143]

Among those seven questions, the Göta Court asks whether Lindqvist's actions fall within the Directive's scope – specifically, whether they are covered by Article 3§2 (which contains the Household Exemption) – and whether the Directive's privacy protections interfere with free expression or other fundamental rights and freedoms.[144] The CJEU quickly affirms that making others' personal data accessible via the World Wide Web constitutes processing and should be regulated by the Directive.[145] The question then becomes whether Lindqvist's actions should be excluded from scrutiny under one of the special exemptions listed in Article 3§2: either the exemption for activities falling "outside the scope of Community law" (first indent) or the Household Exemption (second indent).

> *Article 3*
>
> **Scope**
>
> 2. This Directive shall not apply to the processing of personal data:
>
> — in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law,
>
> — by a natural person in the course of a purely personal or household activity.

[143] Ibid., ¶ 1.
[144] Ibid., ¶ 18.
[145] Ibid., ¶ 27.

The CJEU finds that Lindqvist's actions do not fall under the first indent's exemption, citing the principle of *ejusdem generis*.[146] Since the given examples of activities falling outside the scope of Community law are all State undertakings, it is implied that the first indent was intended only to apply to and exempt State action. With the first indent sorted, the Court turns its attention to the Household Exemption.

The CJEU refers to the explanatory section of the Preamble straight away, noting its classification of "correspondence and the holding of records of addresses" as "activities which are exclusively personal or domestic."[147] Bearing those examples in mind, the Court states that the Household Exemption "must therefore be interpreted as relating only to activities which are carried out in the course of private or family life of individuals, which is clearly not the case with the processing of personal data consisting in publication on the [World Wide Web]."[148] The Court finds that Lindqvist's actions do not fall under the Household Exemption, but, more pertinently, it reaches that conclusion by citing the natural person's private sphere – which encompasses both private and family life – as the exclusive site of *purely personal or household* activities and, as a result, the exclusive determinant of exemption.[149] Furthermore, between the two exempted activities listed in the Preamble and the CJEU's exemption of pursuits in private or family life, the scope of protections under the Exemption almost perfectly parallels the scope

[146] Ibid., ¶ 43-5. *Ejusdem generis* is described in the *Oxford Dictionary of Law (7 ed.)* as follows: "[W]hen a list of specific items belonging to the same class is followed by general words (as in 'cats, dogs, and other animals'), the general words are to be treated as confined to other items of the same class (in this example, to other domestic animals)."

[147] EC and EP, *Directive 95/46/EC*, ¶ 12.

[148] CJEU, *Judgment of the Court*, ¶ 47.

[149] The exclusivity is conveyed by the word *only* in the Court's determination, quoted in the previous sentence.

of the right to privacy protected in the Charter and ECHR.[150] The mirroring is no doubt intentional, and it once again underscores the strong influence of the fundamental rights treaties on the Directive.

[150] The Charter and ECHR protect private and family life, the home, and communications/correspondence. The Household Exemption protects private and family life, household activities (such as keeping an address book), and correspondence.

Problems for the Present: Misinterpretations, Misreadings, and Misunderstandings of the Exemption and the Private Sphere

Public and Private Spheres and Expression

With the protection of the private sphere firmly established as the Household Exemption's basis, it is time to address the increasingly widespread, problematic, and erroneous attempts to expand the scope of the Exemption beyond the private sphere and into the public, eroding the Exemption's strong foundation of privacy and sabotaging the natural person's right thereto. These forays stem from good intentions – namely, the desire to protect the individual's privacy – but their true effect is damaging, with disproportionate harm to the privacy of others and the protection of a sphere that, while appearing on the surface to be private, is decidedly public.

Claims that the Household Exemption's scope has expanded since its initial construction have merit, but it is important to restrict that expansion so as to preserve the Exemption's purpose. Technological development has exponentially increased the types of processing possible for individuals, activities both purely within the private sphere and those stretching into the public. The interpretive fallacy occurs when one notices that just about every type of processing available to the individual in 1995 – recall WP29's illustrative list – would have been covered under the Exemption and so assumes that just about every type of processing available to the individual in 2014 should be covered. Many new processing capabilities do occur exclusively within the private sphere, such as private messages exchanged via social media or a photo album shared online amongst a family, and they are relatives (or simply evolutions) of the same types of processing initially protected by the Exemption. However, there are also a whole

slew of new processing powers available to natural persons that quite clearly extend past the private and into the public sphere, such as the individual's novel ability to disseminate information indiscriminately and on a massive scale. As WP29 notes, many of these processing activities new to the individual have long been available to "certain organisations, for example media or publishing companies," the actions of which might have fallen under the Article 9 exemption for journalistic, artistic, or literary expression.

In fact, more and more often, the Household Exemption is conflated with the Article 9 exemption for certain types of journalistic, artistic, or literary expression, to disastrous results for individual privacy. Recalling the earlier examination of Article 9, it permits Member States to exempt those three types of public expression in very specific, limited circumstances: the derogations may *only* concern provisions in three specific chapters of the Directive; the processing exempted must be *solely* for journalistic, artistic, or literary purposes; and, even if both of those criteria are satisfied, the derogations are legitimate "*only* if they are necessary to reconcile the right to privacy with the rules governing freedom of expression."[151] Article 9 is a narrow protection freeing certain processing activities of artists, authors, and journalists from Directive scrutiny, but, through widespread conflation, it has taken on a much more significant role in the misunderstanding of the Household Exemption.

In a report on the ongoing data protection reform, the Article 29 Working Party comments on the growing confusion:

> [Historically, the Household Exemption] has been quite distinct with regard to its scope from the exemption relating to the purposes of journalism or artistic or literary expression. However, increasingly, this is not the case. Rather than relating to individuals' correspondence or their holding of records of addresses, for example, the queries and complaints DPAs receive increasingly concern individuals' *publication* of personal data, either about themselves or about other

[151] EC and EP, *Directive 95/46/EC*, § 9.

> individuals. It would be wrong to say that all of an individual's personal online activity is being done for the purposes of journalism or artistic or literary expression. However, the advent of 'citizen' bloggers and the use of social networking sites to carry out different forms of public expression, mean that the two exemptions have become conflated.[152]

To summarize, singling out the unsound reasoning: the exemptions were distinct, with the Household Exemption protecting the private sphere of the data processor and Article 9 protecting certain types of public expression; advances in technology then made it possible for natural persons to publicly express themselves in a manner approximating the activities exempted in Article 9; since that publication can occur in the course of their *personal online activity*, it must fall somewhere in between Article 9 and the Household Exemption.

Certain types of individual free expression – such as those emanating from citizen journalists,[153] artists, and authors, who have an unprecedented ability to disseminate their work to the masses – should absolutely fall under the exemption for journalistic, artistic, or literary expression. There is no reason to discriminate against natural persons in the application of Article 9, and both the Directive and the article itself make no such distinction. However, to assert that *any* type of free expression might fall under the Household Exemption is simply nonsensical and a gross misrepresentation of the exemption's purpose.

Social Media and Balancing Rights

Social networking sites, singled out by WP29 as the principal development since the DPD's enactment, are far and away the most dynamic conduits of individual free expression. In

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[152] WP29, *Statement*, 1-2.

[153] Citizen journalism is defined as "independent reporting, often by amateurs on the scene of an event, which is disseminated globally through modern media, most often the Internet (for example, through photo- or video-sharing sites, blogs, microblogs, online forums, message boards, social networks, podcasts, and so forth)" (La Rue, *Citizen Journalism*, 17-18).

its commentary on the ongoing data protection reform, the Working Party stresses the importance of hammering out the "legal uncertainty" surrounding the interaction of social networks with the Household Exemption.[154] The perception of legal haziness stems from a desire to interpret the Exemption as balancing other fundamental rights of the individual – namely the right to free expression – against the Directive's strong protections for their right to privacy. After acknowledging "the use of social networking sites to carry out different forms of public expression" and the increasing number of complaints arising from "individuals' *publication* of personal data," WP29 draws the conclusion that the proposed Regulation must ameliorate the Directive's "anachronistic" Household Exemption,[155] which, in their mind, does not appropriately balance free expression and privacy:

> Given the scale of individuals' use of the [World Wide Web] for their personal purposes – something that is sure to increase as the next generations of 'digital natives' conduct more and more of their personal activity online – it is essential that the proposed Regulation adopts an approach to personal or household processing that . . . . [s]trikes the right balance between the protection of privacy and the right to receive and impart information.[156]

The perceived need to balance competing rights speaks to a fundamental misinterpretation of the Exemption's foundations and thrust as a strong protection for individual privacy – and *only* individual privacy. WP29 is hardly alone in basing its recommendations for the Household Exemption off of a misreading – in fact, the official *Handbook on European data protection law* asserts that the exemption of personal or household processing is because "[s]uch processing is generally seen as part of the freedoms of the private individual."[157]

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[154] WP29, *Statement*, 3.
[155] Ibid., 1-2.
[156] Ibid., 7.
[157] EUAFR and CoE, *Handbook*, 19.

The Working Party's consideration of alternative, expansive interpretations of the Household Exemption is curious in light of its recognition of the Exemption's exclusive focus on the private sphere, even in the context of social networks. In its *Opinion 5/2009 on online social networking*, WP29 acknowledges that certain uses of social media are *purely personal or household* in nature while others enter the public sphere, with the composition and size of the audience the deciding factor. In describing the former, the Working Party notes that many users of social media "operate within a purely personal sphere, contacting people as part of the management of their personal, family or household affairs. In such cases . . . the 'household exemption' applies."[158] By contrast, "[w]hen access to profile information extends beyond self-selected contacts, such as when access to a profile is provided to all members within the SNS or the data is indexable by search engines, access goes beyond the personal or household sphere."[159] This is consistent with the CJEU's decision in *Lindqvist*, which also held the size of the audience to be the determining factor in demarcating the public from the private sphere. The Court highlighted that making personal data "accessible to an indefinite number of people" is clearly not an activity "carried out in the course of private or family life" – in other words, in the private sphere.[160]

A Familiar Exemption in the Draft GDPR

Lacking any allusion to the CJEU's guidance on audience size, the Household Exemption in the initial proposal for a General Data Protection Regulation includes several major additions

[158] WP29, *Opinion 5/2009*, 3.
[159] Ibid., 6.
[160] CJEU, *Judgment of the Court*, ¶ 47.

but largely resembles its precursor in the Directive. The correspondent whereas recital and exemption are reproduced here:

> Whereas:
>
> (15) This Regulation should not apply to processing of personal data by a natural person, which are exclusively personal or domestic, such as correspondence and the holding of addresses, and without any gainful interest and thus without any connection with a professional or commercial activity. The exemption should also not apply to controllers or processors which provide the means for processing personal data for such personal or domestic activities.

> *Article 2*
>
> ***Material Scope***
>
> 2. This Regulation does not apply to the processing of personal data:
>
> (d) by a natural person without any gainful interest in the course of its own exclusively personal or household activity;

The substitution of *exclusively* for *purely* in the Exemption's text is unimportant – while it does imply a higher standard of exclusivity, the Directive's whereas recital already employs the term in its enumeration of "exclusively personal or domestic" activities. The salient change is the requirement that exempted processing activities be "without any gainful interest and thus without any connection with a professional or commercial activity."[161] The emphasis on occupational processing activities is problematic because, in tandem with the misinterpretation of *household* as implying the physical domain of the home, it engenders and emboldens the

[161] EComm, *Proposal for a Regulation*, ¶ 15.

misconception that the Exemption covers *all* individual processing that is non-professional or occurs in the course of home life.[162]

Individuals processing personal data for commercial or professional reasons are indisputably beyond the Exemption's scope, but it is easy to read into that prominent rejection of professional activities an unconditional endorsement of non-professional processing – for example, recreational use of social networking sites. Broadcasting messages to a large audience via social media is not an activity restricted to the private sphere, but, by misconstruing the Household Exemption to protect activities that are non-professional, recreational, or performed within the physical space of the home, it is sometimes read as such. Through the lens of the misconstruction, expression via social media is exempt for one of two reasons: either because it is undertaken from within a protected residential space or because it is not done for professional purposes.

Part of the problem is due to the misinterpretation of *household* as referring to the physical location of the processing activity. The misconception is understandable; after all, the adjective is often used to describe something intended for domestic use as contrasted with business or commercial purposes – something achievable or existing in the home, e.g., household appliances, chores, pets, products, or staff. The home as a secure, physical space integral to a natural person's right to privacy has a long lineage of special protection, from the U.S. Supreme Court (SCOTUS) to the European Court of Human Rights (ECtHR). In *Payton v. New York*, the

[162] In the latest draft of the GDPR – the *Draft European Parliament Legislative Resolution* submitted by Rapporteur Jan Philipp Albrecht of Germany, which Parliament adopted by a vote of 621 in favor and 10 against, with 22 abstentions – the qualification of *without any gainful interest* has been removed from the Exemption and Preamble, but the latter's reference to *professional or commercial activity* remains. See: EP, *Report on the Proposal*, Amendment 2; 96.

SCOTUS drew "a firm line at the entrance to the house,"[163] asserting "physical entry of the home [to be] the chief evil against which" privacy must be protected.[164] Typifying the definitional gravitation toward the physical space when *household* or *the home* are used in reference to the right to privacy, the Court, in discussing protections for "the individual's privacy in a variety of settings," held that "[in none of the settings] is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home."[165] The ECtHR, the privacy jurisprudence of which has been strongly influenced by the SCOTUS,[166] echoes the prevalence of construing *home* as *physical space*: "Article 8 of the Convention protects the individual's right to respect for his private and family life, his home and his correspondence. A home will *usually* be the place, *the physically defined area*, where private and family life develops."[167] The ECtHR develops the private-public boundary far beyond the simple physical limits of the home, but, for present purposes, all that matters is the Court's confirmation that *home* – or *household*, which the Court uses interchangeably with *the* (physical) *family home*[168] – is often understood to refer only to "the physically defined area."

Contrastingly, as evidenced by the earlier outline of its lineage, the Exemption does not use *household* in the sense of location, instead intending it to stand in for *family life*. The latter comprises part of the inviolable sphere of personal privacy protected in major international

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[163] SCOTUS, *Payton v. New York*, 590.

[164] Ibid., 585-586, quoting *United States v. United States District Court*, 407 U.S. 297, 407 U.S. 313.

[165] Ibid., 589.

[166] E.g., the ECtHR references SCOTUS's "expectation of privacy" test – from *Katz v. United States*, 389 U.S. 347 (1967) – in, *inter alia*, *Halford v. United Kingdom*, 24 Eur. Ct. H.R. 523, at ¶ 45 (1998); *P.G. and J.H. v. United Kingdom*, 2001-IX Eur. Ct. H.R. 195, at ¶ 57; *Peck v. United Kingdom*, 36 Eur. Ct. H.R. 41, at ¶ 111 (2003); *Peev v. Bulgaria*, 2007-IX Eur. Ct. H.R. 655, at ¶ 38-39; *Perry v. United Kingdom*, 39 Eur. Ct. H.R. 3, at ¶ 37 (2004); and *Von Hannover v. Germany*, 40 Eur. Ct. H.R. 1, at ¶ 51, 69, 78 (2004).

[167] ECtHR, *Moreno Gómez v. Spain*, at ¶ 53, emphasis mine.

[168] E.g., *X and Others v. Austria*, 57 Eur. Ct. H.R. 14 (2013).

human rights treaties, but *household*, instead of being correctly read as a synonym of *family life*, is often misconstrued as an antonym of *professional* (in the occupational sense). Though WP29 correctly divides social networking activities into public or private processing in its *Opinion 5/2009 on online social networking* – and, to be fair, it hints back at that correct understanding throughout its report on the Household Exemption – in the latter document the Working Party plays into the definitional confusion, consistently contrasting *purely personal or household* activities with professional activities to set up the former as a synonym of *non-professional*. For example, in relating the types of processing that typically receive scrutiny from national Data Protection Authorities, WP29 pits "private [citizens processing] personal data for their own personal or household activities" against "processing done by corporate entities or by natural persons . . . acting in a professional capacity."[169] The professional/non-professional binary is solidified in WP29's recommended amendments to the proposed GDPR's Household Exemption. The Working Party adds to the Preamble's list of "exclusively personal or domestic" processing activities the requirement that the processing be "outside the pursuit of a commercial or professional objective,"[170] and they repeatedly stress that processing "done as part of a professional activity" falls outside of the Exemption's scope.[171] The Working Party even goes so far as to include the following question in its "set of basic criteria" that national Data Protection Authorities should use in determining whether the processing activities of an individual are of a "personal or household" nature: "*Does the scale and frequency of the processing of personal data suggest professional or full-time activity?*"[172] The consequences of that mistake made the

[169] WP29, *Statement*, 1.
[170] Ibid., 10.
[171] Ibid., 7.
[172] Ibid., 4.

leap from theoretical to real when DPAs crystallized the misguided interpretation into their enforcement practices, focusing "almost exclusively" on processing of a professional nature.[173]

The misrepresentation of *purely personal or household* as *non-professional or within the physical home* is problematic for a number of reasons; most notably, such an understanding would drastically expand the scope of activities protected under the Household Exemption, with disastrous repercussions for individual privacy. Activities of the private sphere, the Exemption's correct scope, are very limited in influence and reach. They are bounded within the confines of the private sphere's constitutive domains: its sub-spheres of the individual, the family, and the circle of intimate friends. By contrast, *any* processing not done for an explicit occupational aim – any leisure or recreational activity – or taking place within the physical limits of the home could be read into the overly broad, incorrect understanding of the Exemption's scope.

Though still incorrect, that logic might have flown in 1995. Natural persons generally did not possess the means to process personal data in the public sphere – thinking specifically of mass dissemination or otherwise making data available – either from the confines of the home or outside of their professional capacity. An individual may have been able to accomplish such processing through occupational connections (e.g., if they worked for a newspaper or broadcast corporation) or if they had the financial means to engage those media enterprises to carry out the processing, but the average citizen's processing options outside of the private sphere were severely limited, if existent at all. Historically, the press has been the "prime enemy" of data privacy, but that starring role was largely a product of its access to the means for mass dissemination.[174] Now that publishing power has percolated down to the people, "this concern

[173] Ibid., 1.
[174] Whitman, "Two Western Cultures," 1161.

does not end with media exposure. Any other agent that gathers and disseminates information can also pose such dangers."[175]

Social Networks Blur the Boundary Between Public and Private

The new ways in which publishing power allows individuals to transcend the private-public boundary are only half of the data privacy problem fueled by the rise of social media. The other half is the increasing haziness of that boundary separating public from private. danah boyd's doctoral thesis, "Taken Out of Context: American Teen Sociality in Networked Publics," illuminates the ways in which social networks blur the boundary between private and public.

The most noticeable evolution is in the unprecedented access to the public sphere afforded to individuals physically situated within traditionally private spaces, such as the home. boyd interviews a girl named Amy who "relishes the opportunity to have a social life while restricted to her house."[176] Amy's desire demonstrates the separation of and widening rift between the physical and social private-public boundaries. In 1995, the boundaries ran parallel, and entry into the social public entailed a corresponding ingress into the physical; for example, leaving one's home to attend a public gathering or posting fliers in public spaces. Today, no such congruence exists, as one can enter the public discourse or act in the public sphere irrespective of physical location. Jürgen Habermas – who, earlier in this paper, provided the *polis*/*oikos* history of privacy – notes that *public* is generally understood as something "open to all, in contrast to closed or exclusive affairs."[177] Hannah Arendt echoes Habermas, arguing "that one approach to

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[175] Ibid.
[176] boyd, "Taken Out of Context," 1.
[177] Habermas, *Structural Transformation*, 1.

thinking about *public* is that which 'can be seen and heard by everybody.'"[178] Both definitions downplay the public's traditional physical limits, stressing instead publication and the socially constructed bounds of the public in the era of social media. Drawing from the discipline of new media studies, boyd cites Sonia Livingstone's equation of *public* with *audience* – another emphasis on sociality instead of physicality and an especially useful comparison in light of the CJEU's focus on the audience in *Lindqvist*.[179]

Less noticeable but with equally relevant ramifications on the private-public boundary, social networks have diluted the definition of *friendship*, clouding that once-clear sub-sphere of private life. "[T]he distinction between the private and public sphere has muddled, with users of social media broadcasting personal information to sometime strangers whom they label 'friends,'" explains Omer Tene in a recent article.[180] He continues:

> [Y]oung people do not conceive social media as a 'public' space, reflecting a shift in our understanding of the delineation of what is public and private. . . . [W]hile not 'public', Facebook is clearly not a 'private' space, at least not in the traditional sense. While apparently a closed network of friends, the concept of 'friend' on a social network is quite distinct from that in the offline world. danah boyd explains that 'because of how these sites function, there is no distinction between siblings, lovers, schoolmates, and strangers. They are all lumped under one category: Friends.' Moreover, certain information posted on social networking sites is publicly available to users and non-users alike, and is even searchable by search engines such as Google.[181]

As a subset of the grand sphere of the private, the Household Exemption is intended to protect the interactions of friends. However, social networks have drastically lowered the traditional standard of intimacy required for a relationship to make the jump from mere

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[178] boyd, "Taken Out of Context," 17, quoting Hannah Arendt, *The Human Condition*, Chicago, IL: University of Chicago Press, 1998, 50, emphasis mine.

[179] Ibid., 20, citing Sonia Livingstone, *Audiences and Publics: When Cultural Engagement Matters for the Public Sphere*, Portland, OR: Intellect, 2005.

[180] Tene, "Privacy," 15.

[181] Ibid., 24.

acquaintanceship, which is not a protected sub-sphere of individual privacy, to friendship, which is. To borrow boyd's language: with contacts on social media "lumped" into the category of *friends*,[182] it is often difficult to discern whether an individual is sharing personal data solely with intimate friends or with others from the public, at large. The former is a protected activity under the Household Exemption, but the latter, transcending the private and entering the public, is decidedly not.

Toward the Future: Shoring up the Trenches for Privacy

The increasing ambiguousness in defining social networks as exclusively public or private spaces is emblematic of the uncertainty surrounding the Household Exemption during this crucial redrafting. The current version is only intended to exclude from Directive scrutiny processing within the sphere of private life. Many advanced processing capabilities of natural persons – most notably their newfound powers of publishing and mass dissemination – are unquestionably outside of the Exemption's scope, yet too often they are incorrectly read into it.

To recall a claim made earlier in this paper: the time is now ripe for a thorough reconstruction of the Exemption. Regardless of whether individual privacy is shored up or destroyed, the current ambiguities must be ironed out. And that is the beauty of addressing the issue at this moment, in the midst of the larger redrafting process: E.U. legislators have the

[182] As social connections are termed by Facebook, Google+, and VK (formerly VKontakte). The key distinction between *friends* on Facebook or VK and, for example, *followers* on Facebook, Instagram, or Twitter is that the former type of connection requires the assent of both parties (both "friends") while the latter, by default, does not. However, Facebook, Instagram, and Twitter all provide users the option of requiring user approval for all new requests to follow, and much of the sharing on those sites occurs between individuals who each follow the other, approximating the relationship of online *friends*. Other popular sites also use terms that are identical in meaning to *friends*, such as *connections* (LinkedIn). Similarly, Google+ instructs users to arrange their contacts into *circles*, of which *friends* is a default grouping.

option of pushing the privacy needle in either direction. Should they wish to shore up the trenches, gird for battle, and go to war for privacy, they have only to respond to erroneous interpretations with a resounding affirmation of the Exemption's original intent. However, should they instead wish to cede the struggle and place liberty of action above personal privacy, it would require but a sentence to decisively exempt all personal processing activities.

While the latter option may appeal to an overzealous libertarian, it is an unlikely outcome for several reasons. Such a base subordination of privacy to other rights would be a strange direction for an instrument ostensibly designed to accomplish the opposite. Furthermore, most sources addressing the Household Exemption's scope mention the CJEU's guidance in *Lindqvist*. There is a fairly strong consensus that processing activities with an unlimited audience do not fall under the Exemption, so, at the very least, a limitation on exceptionally impersonal processing exists. Finally, the importance of the redrafting's foundations cannot be overstated. The GDPR is designed as a modernization of the Directive, an adaption of its outdated core to a contemporary context – *not* a reversal or repudiation of its substance.

At the other end of the spectrum, an unqualified affirmation of the Household Exemption's original purpose is probably also out of the question. Among other repercussions, the chilling effect such an act would have on free expression will likely ward off would-be champions of privacy.

The Exemption is therefore caught in a liminal space between the two theoretical extremes of the privacy needle. Its reliance on unspecific language – a manifestation of the drafters' desire for broad privacy protections – has backfired.

In this author's opinion, a departure from the foundations of strong privacy – from the UDHR, ECHR, and ICCPR through to the Charter, Convention 108, and Directive – would be imprudent.[183] Without sacrificing the goal of broad protection, the Exemption's language should be recast so as to clearly delineate activities of the sphere of private life as its sole focus. Strong privacy protections do not come without strings attached; tradeoffs are necessary. The right to data privacy had rarely been afforded status equal to that of other fundamental rights, let alone greater. As Cate notes, because Europe's emphasis on privacy "raises the value placed on protecting [the right], it justifies sweeping regulation . . . and considerable costs imposed on individuals. . . . [Those costs operate] as a tax on European citizens . . . justified by the high value placed upon privacy."[184]

Social networks are incredible, their prolific rise revolutionizing the ways in which we connect, interact, and live. They are already pervasive and only growing more so – the online social world is here to stay, and there is no stopping its continued growth. However, it is our duty to ensure that the growth is reasonable, responsible, and respectful of fundamental human rights and, especially, the right to privacy, which has borne and shall continue to bear the brunt of the strain.

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[183] This, taken with the rest of the strong focus on history and precedent within this paper, may be a manifestation of a subconscious, American proclivity toward common law – that is, toward the familiar.

[184] Cate, *Privacy*, 42.

Concrete Proposal[†]

Article 2.2(d) of the most recent draft Data Protection Regulation reads:

This Regulation does not apply to the processing of personal data . . . by a natural person in the course of an exclusively personal or household activity. This exemption also shall apply to a publication of personal data where it can be reasonably expected that it will be only accessed by a limited number of persons.

It should be reworded to read:

This Regulation does not apply to the processing of personal data . . . by a natural person in the course of an activity falling exclusively within the sphere of private life protected by the Charter of Fundamental Rights and other binding international treaties.

[†] Style of this section copied from WP29, *Statement of the Working Party*, 10.

Bibliography

Article 29 Data Protection Working Party (WP29). *Opinion 5/2009 on Online Social Networking*. June 12, 2009. Available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp163_en.pdf.

———. *Statement of the Working Party on Current Discussions Regarding the Data Protection Reform Package*, at "Annex 2: Proposals for Amendments Regarding Exemption for Personal or Household Activities." February 27, 2013. Available at http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2013/20130227_statement_dp_annex2_en.pdf.

BBC News. "Internet Starts to Shrink." January 2, 2002. http://news.bbc.co.uk/2/hi/science/nature/1738496.stm.

Bernstein, Michael S., Eytan Bakshy, Moira Burke, and Brian Karrer. "Quantifying the invisible audience in social networks." *Proceedings of the SIGCHI Conference on Human Factors in Computing Systems* (CHI '13): 21-30. doi:10.1145/2470654.2470658.

Bossuyt, Marc J. *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*. Dordrecht; Boston: M. Nijhoff, 1987.

boyd, danah michele. "Taken Out of Context: American Teen Sociality in Networked Publics." PhD diss., University of California, 2008. ProQuest (UMI 3353116).

Cate, Fred H. *Privacy in the Information Age*. Washington, D.C.: Brookings Institution Press, 1997.

Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (Consultative CC 108). *Propositions of Modernisation*. Strasbourg: Council of Europe, 2012. Available at http://www.coe.int/t/dghl/standardsetting/DataProtection/TPD_documents/T-PD(2012)04Rev4_E_Convention 108 modernised version.pdf.

Council of Europe (CoE). *Committee of Experts; Committee of Ministers; Conference of Senior Officials (30 March – 17 June 1950)*. Vol. 4 of *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*. The Hague; Boston: M. Nijhoff, 1977.

———. *Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*. E.T.S. No. 005. Rome: Treaty Office of the Council of Europe, 1950. Available at http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm.

———. *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108)*. E.T.S. No. 108. Strasbourg: Treaty Office of the Council of Europe, 1981. Available at http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm.

———. "Preparatory Work on Article 8 of the European Convention on Human Rights: Information Document Prepared by the Secretariat of the Commission." *Travaux Préparatoires to the Convention*. European Commission of Human Rights. DH (56) 12. August 9, 1956. Available at http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH(56)12-EN1674980.pdf.

Court of Justice of the European Union (CJEU). *Judgment of the Court*. Case C-101/01, Criminal proceedings against Bodil Lindqvist. 2003 E.C.R. I-12992.

———. *Opinion of Advocate General Tizzano*. Case C-101/01, Criminal proceedings against Bodil Lindqvist. 2002 E.C.R. I-12976.

Eberle, Edward J. "The Right to Informational Self-Determination." *Utah Law Review* 4 (2001): 965-1016.

European Commission (EComm). "The 2013 Digital Agenda Scoreboard." *YouTube* video, 2:00. Posted by DigitalAgendaEU, July 1, 2013. https://www.youtube.com/watch?v=tBVwswVWIwE.

———. *Amended Proposal for a Council Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data*. 1992 O.J. (C 311) 30.

———. *Commission Recommendation of 29 July 1981 Relating to the Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data*. 1981 O.J. (L 246) 31.

———. *Commission Staff Working Document: Digital Agenda Scoreboard 2013*. SWD (2013) 217 final. June 12, 2013. Available at https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/DAE SCOREBOARD 2013 - SWD 2013 217 FINAL.pdf.

———. *Communication from the Commission to the European Parliament Pursuant to the Second Subparagraph of Article 189 B (2) of the EC Treaty*. SEC (1995) 303 final – COD 287. February 24, 1995. Available at http://aei.pitt.edu/13838/1/sec_(95)_303_final.pdf.

———. "Fundamental Rights: Importance of EU Charter Grows as Citizens Stand to Benefit." *Press Release*. Brussels: Spokespersons' Service, 2014. Doc. IP/14/422. April 14, 2014. Available at http://europa.eu/rapid/press-release_IP-14-422_en.htm.

———. "How Will the Data Protection Reform Affect Social Networks?" *Factsheets on Data Protection Reform*. Directorate-General for Justice. Accessed March 14, 2014. Available at http://ec.europa.eu/justice/data-protection/document/review2012/factsheets/3_en.pdf.

———. *Proposal for a Council Directive Concerning the Protection of Individuals in Relation to the Processing of Personal Data*. 1990 O.J. (C 277) 3.

———. *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)*. COM (2012) 11 final. January 25, 2012. Available at http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf.

———. *Special Eurobarometer 359: Attitudes on Data Protection and Electronic Identity in the European Union*. Survey conducted by TNS Opinion & Social at the request of Directorate-General Justice, Information Society & Media and Joint Research Centre. Brussels: TNS Opinion & Social, 2011. Available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_359_en.pdf.

European Council (EC). *Charter of Fundamental Rights of the European Union: Explanations Relating to the Complete Text of the Charter*. Luxembourg: Office for Official Publications of the European Communities, 2001. Available at http://ue.eu.int/uedocs/cms_data/docs/2004/4/29/Explanation relating to the complete text of the charter.pdf.

———. *Common Position (EC) 1/95 adopted by the Council on 20 February 1995 with a View to Adopting Directive 95/. . ./EC of the European Parliament and of the Council of . . . on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data*. 1995 O.J. (C 93) 1.

European Council (EC) and European Parliament (EP). *Directive 95/46/CE du Parlement Européen et du Conseil, du 24 Octobre 1995, Relative à la Protection des Personnes*

Physiques à l'Égard du Traitement des Données à Caractère Personnel et à la Libre Circulation de ces Données. 1995 O.J. (L 281) 31.

———. *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data*. 1995 O.J. (L 281) 31.

European Court of Human Rights (ECtHR). Moreno Gómez v. Spain, 41 Eur. Ct. H.R. 40 (2005).

European Economic and Social Committee (EESC). *Opinion on the proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data, the proposal for a Council Directive concerning the protection of personal data and privacy in the context of public digital telecommunications networks, in particular the integrated services digital network (ISDN) and public digital mobile networks, and the proposal for a Council Decision in the field of information security*. 1991 O.J. (C 159) 38.

European Parliament (EP). *Minutes of Proceedings of the Sitting of Wednesday, 11 March 1992*. 1992 O.J. (C 94) 63.

———. *Report on the 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)*. Committee on Civil Liberties, Justice and Home Affairs and Jan Philipp Albrecht, Rapporteur. November 21, 2013. Available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0402+0+DOC+PDF+V0//EN.

———. "Sources and Scope of European Union Law." *Fact Sheets on the European Union*. 2014. Available at http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf.

European Parliament (EP), European Council (EC), and European Commission (EComm). *Charter of Fundamental Rights of the European Union*. 2010 O.J. (C 83) 389.

European Union (EU). "100979 – Procedure." *EUR-Lex*. Luxembourg: Publications Office of the European Union. Available at http://eur-lex.europa.eu/procedure/EN/100979.

European Union Agency for Fundamental Rights (EUAFR) and Council of Europe (CoE). *Handbook on European Data Protection Law*. Luxembourg: Publications Office of the European Union, 2014. doi:10.2811/53711.

Facebook. "Company Info." Accessed April 15, 2014. https://newsroom.fb.com/company-info/.

Fried, Charles. "Privacy." *Yale Law Journal* 77 (1968): 475-493.

Greenleaf, Graham. "Global Data Privacy Laws: 89 Countries and Accelerating." *Privacy Laws & Business International Report* 115, Special Supplement (2012): 1-14.

———. "'Modernising' Data Protection Convention 108: A Safe Basis for a Global Privacy Treaty?" *Computer Law & Security Review* 29, no. 4 (2013): 430-36. doi:10.1016/j.clsr.2013.05.015.

Habermas, Jürgen. *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society*. Cambridge, Massachusetts: MIT Press, 1991.

Hornung, Gerrit and Christoph Schnabel. "Data protection in Germany I: The population census decision and the right to informational self-determination." *Computer Law & Security Report* 25, no. 1 (2009): 84-88. doi:10.1016/j.clsr.2008.11.002.

Karlsson, Eivor. "Öppen Kanal i Radio." [In Swedish.] *Miljömagasinet* 32. Accessed October 27, 2013, via an archived version of Bodil Lindqvist's personal website: http://web.archive.org/web/20040410122402/http://biphome.spray.se/mors/.

La Rue, Frank. *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (Citizen Journalism)*. United Nations General Assembly. U.N. Doc. A/65/284. August 11, 2010.

———. *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (Surveillance)*. United Nations General Assembly, Human Rights Council. U.N. Doc. A/HRC/23/40. April 17, 2013.

Netcraft. "April 2014 Web Server Survey." Accessed April 7, 2014. http://news.netcraft.com/archives/2014/04/02/april-2014-web-server-survey.html.

New York Times Editorial Board. "A Second Front in the Privacy Wars." *New York Times*. February 23, 2014. http://www.nytimes.com/2014/02/24/opinion/a-second-front-in-the-privacy-wars.html.

Organisation for Economic Co-operation and Development (OECD). "Graph 5.8. Towards Universal Internet Use: Number of Internet Users per 100 Population, in 1994, 2001 and 2008." *Trends Shaping Education 2010*. OECD Publishing. doi:10.1787/trends_edu-2010-graph52-en.

Pew Research Center. "Survey Questions." Accessed April 16, 2014. http://www.pewresearch.org/files/2014/01/Survey-Questions_Facebook.pdf.

Santolli, Justin. "The Terrorist Finance Tracking Program: Illuminating the Shortcomings of the European Union's Antiquated Data Privacy Directive." *George Washington International Law Review* 40 (2008): 553-582.

Simitis, Spiros. "Privacy – An Endless Debate." *California Law Review* 98, no. 6 (2010): 1989-2005.

Smith, Aaron. "6 New Facts About Facebook." *Pew Research Center*. February 3, 2014. http://www.pewresearch.org/fact-tank/2014/02/03/6-new-facts-about-facebook/.

Smith, Cooper. "Social Networks Like Facebook Are Finally Going After the Massive Amount of 'Unstructured Data' They're Collecting." *Business Insider*. February 26, 2014. http://www.businessinsider.com/social-medias-big-data-future-2014-2.

Statistic Brain. "Social Networking Statistics." January 1, 2014. http://www.statisticbrain.com/social-networking-statistics/.

Supreme Court of the United States (SCOTUS). Payton v. New York, 445 U.S. 573 (1986).

Swire, Peter P. and Robert E. Litan. *None of Your Business: World Data Flows, Electronic Commerce, and the European Privacy Directive*. Washington, D.C.: Brookings Institution Press, 1998.

TeleGeography. "Global Internet Map 2012." Accessed November 3, 2013. http://www.telegeography.com/assets/website/images/maps/global-internet-map-2012/global-internet-map-2012-x.png.

Tene, Omer. "Privacy: The New Generations." *International Data Privacy Law* 1, no. 1 (2011): 15-27. doi:10.1093/idpl/ipq003.

Tucker, Patrick. "Has Big Data Made Anonymity Impossible?" *MIT Technology Review*. May 7, 2013. http://www.technologyreview.com/news/514351/has-big-data-made-anonymity-impossible/.

United Nations (UN). *International Covenant on Civil and Political Rights*. G.A. Res. 2200A (XXI). U.N. Doc. A/6316. Opened for signature December 16, 1966. 999 U.N.T.S. 171.

———. *Replacment Migration: Is It a Solution to Declining and Ageing Populations?* Population Division, Department of Economic and Social Affairs, United Nations

Secretariat. U.N. Doc. ST/ESA/SER.A/206 (2001). Available at https://www.un.org/esa/population/publications/migration/migration.htm.

———. "The Right to Privacy in the Digital Age." G.A. Res. 68/167. U.N. Doc. A/RES/68/167. 18 December 18, 2013.

———. *Universal Declaration of Human Rights*. G.A. Res. 217 (III) A. U.N. Doc. A/RES/217(III). December 10, 1948.

Westin, Alan F. *Privacy and Freedom*. New York: Atheneum, 1967.

Whitman, James Q. "The Two Western Cultures of Privacy: Dignity versus Liberty." *Yale Law Journal* 113 (2004): 1151-1221.