



---

Fall 2016

## Speech, Privacy and Dignity in France and in the U.S.A.: A comparative analysis

Ioanna Tourkochoriti

*National University of Ireland Galway, School of Law*

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Ioanna Tourkochoriti, *Speech, Privacy and Dignity in France and in the U.S.A.: A comparative analysis*, 38 Loy. L.A. Int'l & Comp. L. Rev. 217 (2024).

Available at: <https://digitalcommons.lmu.edu/ilr/vol38/iss2/5>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# Speech, Privacy and Dignity in France and in the U.S.A.: A comparative analysis

IOANNA TOURKOCHORITI<sup>1</sup>

## I. INTRODUCTION

The divide between France and the United States on the balancing between freedom of expression and privacy rights was recently revived in reference to evolutions concerning the freedom of expression on the Internet. The recent decision of the Court of Justice of the European Union (CJEU) spurred a lot of controversy in the United States (U.S.) by recognizing a “right to be forgotten.”<sup>2</sup> The CJEU held that a person can request a search engine to remove from its results elements that concern them.<sup>3</sup> The lawsuit was filed at the request of a person who wanted Google’s search engine to omit, in its searches concerning him, results associating him with a real-estate auction connected with attachment proceedings for the recovery of social security debts.<sup>4</sup> The U.S. legal world saw the decision as having the potential to divide the Internet.<sup>5</sup> In general, prohibiting access to facts that exist in public documents would most likely be considered unconstitutional in the U.S., even if the request comes from the person concerned.<sup>6</sup> Google interpreted the CJEU decision as obliging it to remove search results from its European sites only. Nevertheless, in June 2015 the French data protection authority, known by its French acronym, CNIL, ordered Google to remove links

---

1. Faculty Member, School of Law, National University of Ireland Galway. Ph.D, E.H.E.S.S.- Paris, L.L.M. Université Panthéon – Assas, Paris II, M.A., E.H.E.S.S.- Paris, L.L.B. (four-year program) Athens Law School. The Author would like to thank Frederick Schauer, Mark Tushnet and Olivier Cayla for comments and suggestions on issues discussed in the paper..

2. Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD)*, EUR-Lex 62012CJ0131 ¶ 99, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1448492173799&uri=CELEX:62012CJ0131>

3. *Id.*

4. *Id.*

5. Jonathan Zittrain, *Don't Force Google to Forget*, N.Y. TIMES, May 14, 2014, available at [http://www.nytimes.com/2014/05/15/opinion/dont-force-google-to-forget.html?\\_r=0](http://www.nytimes.com/2014/05/15/opinion/dont-force-google-to-forget.html?_r=0).

6. *Id.*

from its database entirely, across all locations.<sup>7</sup> In March 2016, the CNIL ordered Google to pay a fine of 100,000 euros for failing to remove requests on the basis of the right to be forgotten from global results.<sup>8</sup> The CNIL adopted an expansive interpretation of the ruling which applies to all of Google's domains and not, as Google contends, only to the company's regional domains in Europe.<sup>9</sup> Google has refused so far, and the dispute is likely to arrive to courts soon.<sup>10</sup> If upheld, the French regulator's order would mean that Americans are prevented from having access to material that is legal in the U.S., as Jonathan Zittrain has pointed out.<sup>11</sup>

This controversy stems from the consolidated status of the law in France, and more generally in Europe, that gives primacy to the protection of the right to privacy when it conflicts with the right to freedom of expression. The recent decision of the CJEU<sup>12</sup> recognizing the right to be forgotten emphasizes an attitude, which already exists in the case law concerning press freedoms on the two sides of the Atlantic. This article analyzes the long history of the balancing between speech and the right to privacy in France and the U.S.A. It aims to show that there exists a deeply rooted divide that has long origins in the state of the law. The origins of the divide lie in the particular importance of freedom of expression in the U.S. constitutional order, which sees its abuses as acceptable. They also lie in the low valuation of informational privacy. Although freedom of expression is a liberty that can be abused according to the dominant conception in the U.S., French law accepts limitations in order to protect other competing rights, like the right to privacy.<sup>13</sup> This article

7. CNIL Orders Google to Apply Delisting on All Domain Names of the Search Engine, CNIL (June 12, 2015), available at <http://www.cnil.fr/english/news-and-events/news/article/cnil-orders-google-to-apply-delisting-on-all-domain-names-of-the-search-engine/>.

8. See Aoife White, Google Fined by French Privacy Agency for not Removing Global Results, BLOOMBERG TECHNOLOGY March 24<sup>th</sup> 2016, available at <http://www.bloomberg.com/news/articles/2016-03-24/google-fined-by-french-privacy-agency-for-leaving-personal-links>.

9. See Mark Scott, *France Wants Google to Apply 'Right to Be Forgotten' Ruling Worldwide or Face Penalties*, N.Y. TIMES (June 14, 2014), <http://bits.blogs.nytimes.com/2015/06/12/french-regulator-wants-google-to-apply-right-to-be-forgotten-ruling-worldwide/>.

10. Farhad Manjoo, *'Right to be Forgotten' Online Could Spread*, N.Y. TIMES, Aug. 5, 2015, available at <http://www.nytimes.com/2015/08/06/technology/personaltech/right-to-be-forgotten-online-is-poised-to-spread.html?smid=tw-share>.

11. *Id.*

12. Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos*, see supra note 1.

13. EMBASSY OF FRANCE IN WASHINGTON, D.C., FRENCH LEGISLATION ON PRIVACY (Dec. 2, 2007), available at <http://ambafrance-us.org/spip.php?article640>.

will present the history of the protection of freedom of expression in France and in the U.S. as well as of the right to privacy to help understand the more recent controversies on these issues.

### A. *Speech and Privacy in France and the U.S.*

#### 1. Freedom of expression in France: an activity which can be abused.

Freedom of expression is protected in France by Article 11 of the *Declaration of the Rights of Man and of the Citizen*.<sup>14</sup> The Declaration has a constitutional value, after the famous decision of the *Conseil Constitutionnel* of July 16, 1971,<sup>15</sup> which interpreted the reference to it in the Preamble of the current Constitution (of 1958) as integrating it into the “bloc of constitutionality.”<sup>16</sup> Article 11 reads: “the free communication of thoughts and opinions is one of the most precious rights of man. [A]ny citizen must thus, speak, write and publish freely, except what is tantamount to abuse of this liberty as determined by Law.”<sup>17</sup> This special reference to freedom of expression means that the right must enjoy special protection since the general formula of Article 4 of the *Declaration*<sup>18</sup> was considered insufficient.<sup>19</sup> If freedom of expression is considered a special human activity as manifestation of the human intellect, the wording of Article 11 reveals a “moderately liberal” ideological foundation, which accepts the possibility of limitations in case of “abuse.”<sup>20</sup> All members of the Constituent Assembly agreed on the need to refer explicitly to this possibility. A different conception seems to underlie the First Amendment of the United States Constitution, according to which: “[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the

---

14. DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN [DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN] (Fr. 1789).

15. Conseil constitutionnel [CC] [Constitutional Court] decision no. 71-44, July 16, 1971, Rec. 29 (Fr.).

16. LOUIS FAVOREU, *LES GRANDES DÉCISIONS DU CONSEIL CONSTITUTIONNEL*, 267 (Paris, Dalloz, 10th ed. 1999).

17. DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN, *supra* note 11.

18. *Id.* (“Liberty consists in being able to do anything that does not harm others : thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law.”)

19. JEAN MORANGE, *LA LIBERTÉ D'EXPRESSION*, 17 (Paris, Presses universitaires de France, 1st ed. 1993).

20. STÉPHANE RIALS, *LA DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN* 248-49 (Paris, Hachette, 1988).

press.”<sup>21</sup> The French positivist approach indicates trust towards the legislator for the realization of this liberty and its limitations, and the perception of the necessity for a regulation of the forum of ideas and of civil society more generally. The American formulation indicates distrust towards the legislator and a conception of the forum of ideas as beyond government intervention. Article 11 of the French Declaration indicates a general spirit of “legicentrism” and a will to socialize the rights of the individual.<sup>22</sup> The law as instrument of collective sovereignty will allow the development of the liberty of everyone reconciling it with the power of all. Freedom of the press is regulated in France by a Law (since July 19<sup>th</sup> 1881) enacted during the 3rd Republic.<sup>23</sup> Since the moment of regularization of the institutional life of the state, this law has been modified several times.<sup>24</sup>

The law criminalizes “the offense to the President of the Republic” (art. 26), “the defamation and insult towards courts, tribunals, armies” (art. 30), “the defamation of a minister on the basis of his function” (art. 31), “members of the parliament, public officials, agents of public authority, citizens charged with the service or the public mandate, juries, witnesses” (art.31), “defamation and racial insult” (art. 32, 33), “the denial of crimes against humanity” (art. 24 bis), “the praise of war crimes” (art. 48-2), “the incitement to a crime not followed with effects” (art. 24), and “the seditious cries and songs” (art. 24). In the U.S., the First Amendment, according to the Supreme Court, protects the same activities after the famous case *New York Times v. Sullivan*<sup>25</sup> and the *overbreadth doctrine*.<sup>26</sup> According to Law No. 89-25 of January 17, 1989,<sup>27</sup>

21. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964); see Madison, 4 Elliot’s Debates on the Federal Constitution (1876), 571.

22. CODE CIVIL [C CIV.] art. 11 (Fr.)

23. MARCEL GAUCHET, LA RÉVOLUTION DES DROITS DE L’HOMME [THE RIGHTS OF MAN’S REVOLUTION] 178 (Paris: Gallimard eds., 1989).

24. Loi du 29 juillet 1881 sur la liberté de la presse [Law of July 29, 1881 freedom of the press], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 4, 2010.

25. *New York Times Co.*, 376 U.S. at 254.

26. Whose essence is that the state went too far and that its legitimate interests can be promoted without violating the domain of the protected liberty, cf. Martin H. Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031, 1031-1049, 1035 (1984).

27. Loi 86-1067 du 30 Septembre 1986 relative à la liberté de communication [Law 86-1067 of September 30, 1986 on freedom of communication], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 1, 1986 p. 11755, [http://www.legifrance.gouv.fr/affichTexteArticle.do?jsessionid=97956B03839D300ED0BB16B3B13C2B45.tpdjo02v\\_1?cidTexte=JORFTEXT000000512205&idArticle=LEGIARTI000006274708&dateTexte=20110702&categorieLien=id#LEGIARTI000006274708](http://www.legifrance.gouv.fr/affichTexteArticle.do?jsessionid=97956B03839D300ED0BB16B3B13C2B45.tpdjo02v_1?cidTexte=JORFTEXT000000512205&idArticle=LEGIARTI000006274708&dateTexte=20110702&categorieLien=id#LEGIARTI000006274708) (Fr.) [hereinafter FREEDOM OF COMMUNICATION].

the criteria which can justify a limitation of freedom of audiovisual communication are, among others, "the respect of human dignity, of the liberty and the property of others, the pluralist character of expression of the currents of thought and opinion."<sup>28</sup>

Although the *Declaration* does not recognize *expressis verbis* the right to receive information, the Constitutional Council recognized it as a corollary to freedom of expression and associated it to the idea of pluralism of the currents of expression upon examining constitutionality of a law limiting media concentration and assuring financial transparency and pluralism.<sup>29</sup> This decision assigns to article 11 of the *Declaration*, on the basis of a teleological interpretation, the meaning of guaranteeing "the pluralism of journals of political and general information" as an "objective of constitutional value."<sup>30</sup> For the Council, "the free communication of thoughts and opinions, guaranteed by article 11 of the *Declaration of the Rights of Man and of the Citizen* of 1789, would not be effective if the public was not in position to dispose a sufficient number of publications of various tendencies and characters."<sup>31</sup> The Council expresses concern against free market imperatives: "the objective to realize is that the readers who are the essential receivers of the liberty proclaimed by article 11 of the *Declaration* of 1789 are in position to exercise their free choice, without private interests or public powers that could make them the object of a market."<sup>32</sup> This concern reappears in later decisions of the Conseil Constitutionnel concerning the liberty of audiovisual communication,<sup>33</sup> which concerns the receivers more than the diffusers, then liberty of reception.<sup>34</sup> For the Council, freedom of audiovisual communication would not be effective if the public did not dispose, in the public sector as well as in the private sector, programs that guarantee the expression of tendencies of different character in the respect of the imperative of honesty of information.<sup>35</sup> The right to information was recognized as a fundamental liberty of considerable con-

---

28. *Id.* (The same law institutes the French Conseil Supérieur de l'Audiovisuel, an authority with competences close to the ones of the FCC.)

29. Conseil Constitutionnel [CC][Constitutional Court] decision No. 84-181DC, Oct. 10-11, 1984, Rec. 73 (Fr.).

30. Constitutional Court 84-181 DC, *supra* note 29, at 8.

31. *Id.*

32. *Id.* at 8/21-9/21.

33. Conseil Constitutionnel [CC][Constitutional Court] decision No. 86-217DC, Sep. 18, 1986, Rec. 141 (Fr.).

34. LOUIS FAVOREU, *LES GRANDES DÉCISIONS DU CONSEIL CONSTITUTIONNEL*, 267 (10th ed. 1999).

35. Conseil Constitutionnel [CC][Constitutional Court] decision No. 86-217DC, Sept. 18, 1986, Rec. 141 (Fr.).

stitutional value.

The concern to make this liberty effective and to reconcile it with other objectives of constitutional value, like the safeguard of the public order and the protection of the rights of others, justifies the institution of an independent administrative authority imposing a regime of prior authorization for any service of audiovisual communication. The *Conseil Supérieur de l'Audiovisuel*, an independent administrative authority, has the authority, according to the September 30, 1986 law to supervise, along with the judiciary, the fairness of information transmitted.<sup>36</sup> The Conseil oversees the respect by the media of human dignity, the liberty and property of others, the necessities of pluralism and of the expression of currents of thought and opinion, the safeguard of the public order, the needs of national defense, the requirements of the public service, the constraints inherent in the mediums of mass communication, and the necessity to develop a national industry of audiovisual production.<sup>37</sup> According to the Conseil Constitutionnel, the right to receive information is an "objective of constitutional value" on the basis of a teleological interpretation.<sup>38</sup> This means that its content is defined by the legislator. The right to receive information is a natural right of man, which can cede before another fundamental right like the right to privacy.<sup>39</sup>

The European Convention of Human Rights (ECHR) protects the passive and active aspect of the right to freedom of expression,<sup>40</sup> which

36. Loi 86-1067 du 30 Septembre 1986 relative à la liberté de communication [Law 86-1067 of September 30, 1986 on freedom of communication], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 1, 1986 p. 11755, [http://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=97956B03839D300ED0BB16B3B13C2B45.tpdjo02v\\_1?cidTexte=JORFTEXT000000512205&idArticle=LEGIARTI000006274708&dateTexte=20110702&categorieLien=id#LEGIARTI000006274708](http://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=97956B03839D300ED0BB16B3B13C2B45.tpdjo02v_1?cidTexte=JORFTEXT000000512205&idArticle=LEGIARTI000006274708&dateTexte=20110702&categorieLien=id#LEGIARTI000006274708) (Fr.) [hereinafter FREEDOM OF COMMUNICATION].

37. *Id.*

38. Conseil Constitutionnel [CC][Constitutional Court] decision No. 84-181DC, Oct. 11, 1984, Rec. 73 (Fr.).

39. Constitutional Court 86-217DC, *supra* note 33.

40. European Convention on Human Rights., art. 10, Sept. 3, 1953 (Article 10 of the ECHR reads as follows:

Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.).

France signed<sup>41</sup> and ratified.<sup>42</sup> It is directly applicable in France on the basis of Article 55 of the French Constitution.<sup>43</sup> Article 10 of the ECHR protects the freedom of expression and foresees “duties and responsibilities” for its exercise.<sup>44</sup> The Convention instituted an effective control of compliance with its dispositions in the European Court of Human Rights, which examines individual appeals.<sup>45</sup> The European Court plays a preeminent role in the process of elaborating a European *jus commune*,<sup>46</sup> showing a judiciary activism, which makes the balance lean more on the side of effectiveness than on the side of subsidiarity. It thus occupies a central place in parallel to the law of the European Union, original and secondary, in the process of the emergence of a European Constitutional law.<sup>47</sup>

The European Court of Human Rights has been elaborating on a liberal interpretation of freedom of expression. For the court, freedom of expression belongs to the press to communicate ideas and information on the questions largely debated in the public arena, like the ones that concern other sectors of public interest.<sup>48</sup> To its function, which consists of diffusing these ideas, can be added the right of the public to receive them.<sup>49</sup> This formula is frequently met in the case law of the court. In reference to the “indispensable role” of the press as a “watch-dog,” the expression is used to designate the task of information and control that belongs to the press concerning all questions of public

41. *Chart of signatures and ratifications of Treaty 005*, COUNCIL OF EUROPE, <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures> (last updated Nov. 24, 2015).

42. *Id.*

43. 1958 CONST. art. 55 (Fr.); *See Lingens v. Austria*, App. No. 9815/82, HUDOC, ¶42 (Eur. Ct. H.R., July 8, 1986), <http://hudoc.echr.coe.int/eng?i=001-57523>.

44. Eur. Conv., *supra* note 40, at art. 10; For a short presentation of the recent case-law concerning freedom of expression cf. Jean-François Flauss, *La Cour Européenne des droits de l'homme et la Liberté d'expression* [*The European Court of Human Rights and Freedom of Expression*], in *LA LIBERTÉ D'EXPRESSION AUX ETATS-UNIS ET EN EUROPE*, 97-136 (Élisabeth Zoller, Dalloz eds., 2008); Françoise Tulkens, *La liberté d'expression et le droit au respect de la vie privée, Rapports de la conférence de Strasbourg* [*Freedom of expression and the right to privacy, Reports of the Strasbourg Conference*], Eur. Consult. Ass., DH-MM, 2000 19 (Sep. 23, 1999) at  
[http://www.coe.int/t/dghl/standardsetting/media/doc/dh-mm%282000%29007\\_FR.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/dh-mm%282000%29007_FR.asp).

45. , Eur. Conv., *supra* note 26, at art. 32; *Cf.* Panayotis Voyatzis, *La liberté d'expression devant la Cour Européenne des Droits de l'Homme* [*Freedom of Expression in the European Court of Human Rights*] (1999) (unpublished Ph.D. dissertation, University of Paris) (on file with Staats- und Universitätsbibliothek Hamburg Carl von Ossietzky).

46. *Id.* at art. 32.

47. *Id.* at 342.

48. *Lingens v. Austria*, *supra* note 43.

49. *Id.*



interest.<sup>50</sup> The court held thus that the discussion of pending judicial proceedings, in a journal, when they concern a question of public interest like health, is protected.<sup>51</sup> The publication of information relative to the British secret services, as they figured in a book whose content had already been largely disclosed, is protected.<sup>52</sup> Following the U.S. Supreme Court, the European Court considers that freedom of expression is protected not only for information and ideas favorably accepted or considered as inoffensive or indifferent, but also for those who “offend, shock or disturb the State or any sector of the population.”<sup>53</sup> Although the court is generally influenced by the U.S. Supreme Court, it is less protective of freedom of expression. It protects reputation independently from the quality of the person, e.g., when politicians<sup>54</sup>, doctors<sup>55</sup>, or businessmen<sup>56</sup> are concerned. In addition, Holocaust denial is not protected.<sup>57</sup>

## 2. *Usus: abusus*. The libertarian conception of freedom of expression in the legal order of the United States.

Although freedom of expression is considered an important liberty, whose “abuse” must be limited, in France, it enjoys a privileged status in the United States. This conception is reflected in the First Amendment of the Federal Constitution, which states that “Congress shall make no law. . . abridging the freedom of speech or of the press,”<sup>58</sup> The formulation, contrary to the enunciation in the text of Article 11 of the

50. *Observer & Guardian v. United Kingdom*, App. No. 13585/88, HUDOC, ¶59 (Eur. Ct. H.R., Nov. 26, 1991), <http://hudoc.echr.coe.int/eng?i=001-57705>.

51. *Sunday Times v. United Kingdom*, App. No. 6538/74, HUDOC, ¶65 (Eur. Ct. H.R., Apr. 26, 1979), <http://hudoc.echr.coe.int/eng?i=001-57584>.

52. *Observer & Guardian v. United Kingdom*, *supra* note 45, (Pettiti, J. concurring.)

53. *Handyside v. United Kingdom*, App. No. 5493/72, HUDOC, ¶49 (Eur. Ct. H.R., Dec. 7, 1976), <http://hudoc.echr.coe.int/eng?i=001-57499>.

54. *Dalban v. Romania*, App. No. 28114/95, HUDOC, Eur. Ct. H.R. (Sept. 28, 1999), <http://hudoc.echr.coe.int/eng?i=001-58306>.

55. *Bergens Tidende & Others v. Norway*, App. No. 26132/95, HUDOC, Eur. Ct. H.R. (May 02, 2000), <http://hudoc.echr.coe.int/eng?i=001-5879>. *Selistö v. Finland*, App. No. 56767/00, Eur. Ct. H.R. (Nov. 16, 2004), <http://hudoc.echr.coe.int/eng?i=001-67475>.

56. *Steel & Morris v. United Kingdom*, App. No. 68416/01, Eur. Ct. H.R. (Feb. 15, 2005), <http://hudoc.echr.coe.int/eng?i=001-68224>

57. *Lehideux & Isorni v. France*, App. No. 55/1997/839/1045, Eur. Ct. H.R. (Sept. 23, 1998), <http://hudoc.echr.coe.int/eng?i=001-58245>; *Chauvy & Others v. France*, App. No. 64915/01, Eur. Ct. H.R. (June 29, 2004), <http://hudoc.echr.coe.int/eng?i=001-61861>; *Garaudy v. France*, App. No. 65831/01, Eur. Ct. H.R. (June 24, 2003), <http://hudoc.echr.coe.int/eng?i=001-23829>.

58. U.S. CONST. amend. I.

French Declaration, is the result of a debate that considered some abuses of freedom of expression inevitable.<sup>59</sup> Alexis de Tocqueville had underlined the difference in the approach of freedom of the press in the United States in relation to France: According to the American conception, “in this question, therefore, there is no medium between servitude and extreme license; in order to enjoy the inestimable benefits which the liberty of the press ensures, it is necessary to submit to the inevitable evils which it engenders.”<sup>60</sup> Wanting to obtain the first while escaping the latter is an illusion for Tocqueville.<sup>61</sup> Does “no law” mean in reality that the protection of this liberty is absolute? Although there have been individual justices that have put forward such an approach, the U.S. Supreme Court has never adopted such an extreme position.<sup>62</sup>

The primacy of freedom of expression is the result of ideas already existing in the founding era in combination with elements of the social context of the second half of the twentieth century. The Supreme Court consolidated a doctrine in favor of a strict protection of freedom of speech after 1964. The reluctance of the Supreme Court to protect privacy, when it is violated by the press, an agent of civil society, and the diligence of the same jurisdiction to protect this same liberty when State agents violate it, echoes the doctrine of State action. This doctrine expresses the distrust towards State intervention in civil society and the concern to protect liberty against violations by the State.<sup>63</sup> The U.S. Supreme Court case law, focusing on the protection of the negative aspect of liberty, is reluctant to accept what is considered in Europe as the horizontal effect of the protection of rights (*effet tiers* in French, *Drittenwirkung* in German). According to the doctrine, the State is not legiti-

---

59. *Fellows v. Nat'l Enquirer, Inc.*, 721 P.2d 97 (1986) (quoting JONATHAN ELLIOT, ELLIOT'S DEBATES: THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 571 (4th ed. 1876)) (James Madison “Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in that of the press. It has accordingly been decided . . . that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding the proper fruits.”).

60. ALEXIS DE TOCQUEVILLE, *DE LA DEMOCRATIE EN AMERIQUE* 123 (1835).

61. *Id.* at 9

62. *Time, Inc. v. Hill*, 385 U.S. 374, 400 (1967) (Black, J., concurring).

63. Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT'L J. CONST. L. 79 (2003); Charles L. Black, Jr., *The Supreme Court 1966 Term*, 81 HARV. L. REV. 69 (1967); Louis Michael Seidman & Marc V. Tushnet, *The State Action Paradox*, in REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 49-71 (1996); Robert Glennon & John E. Novak, *A Functional Analysis of the Fourteenth Amendment* “State Action Requirement”, 1976 SUP. CT. REV. 221, 221-261; MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* 161-195 (2008); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 548 (Vicki Been et al. eds., 3rd ed. 2009).

mized to intervene in private relations to enforce the respect of constitutional rights by private actors.<sup>64</sup> As Mark Tushnet notes, the intuition underlying the doctrine is that the government “can inflict *more* harm than private actors” or “a different and *more* troubling kind of harm.”<sup>65</sup>

The doctrine has been criticized as inconsistent,<sup>66</sup> since federal and state statutes can apply constitutional norms to private conduct. According to the Supreme Court, in cases of discrimination and rights that trigger heightened scrutiny, Congress has more authority to act under §5 of the Fourteenth Amendment.<sup>67</sup> Thus, the doctrine seems superfluous since the relation between the legislation and the Constitution can be better described by the identification of the substantial rights that a majority cannot violate.<sup>68</sup> Mark Tushnet proposes to distinguish among three types of interests: those which cannot be limited by an agency of the government, those which can be limited only by the legislatures, and others which can be limited only following the approval of an instance of the state, including the federal judiciary.<sup>69</sup>

Despite criticisms in cases of conflict between two individual rights, freedom of expression and privacy, the Supreme Court shows an *ex ante* understanding against “state action.” This understanding, where the Court seems to legitimize the protection of the right, like the right to privacy, only when it is violated by state agents, has been criticized.<sup>70</sup> Commentators emphasize that when the Supreme Court is called to decide if the limitation of a right constitutes a violation of the Fourteenth Amendment of the Federal Constitution, the question concerns the right’s compatibility to the Constitution of a legal system that tolerates its violation.<sup>71</sup> If the right is protected by the Amendment, the Court should decide in favor of a state duty to protect the right to the detri-

---

64. MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS, JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW*, 172 (Princeton University Press, 2008).

65. *Id.* at 177.

66. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW*, 552 (New York: Aspen, 2009).

67. *Cf. City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) (holding that Congress has only remedial authority and not substantive in enforcing the clauses of the Bill of Rights under the Clause of the 14<sup>th</sup> Amendment) in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 721-722 (2003), and *Tennessee v. Lane*, 541 U.S. 509, 1978 (2004) (the Court held that Congress has more authority under §5 of the Fourteenth Amendment when types of discrimination and rights submitted to heightened scrutiny are at stake such as issues of discrimination.) For an analysis see CHERMERINSKY, *supra* note 60, at 289.

68. TUSHNET, *supra* note 64, at 183.

69. *Id.* at 184.

70. Robert Glennon & John E. Novak, *A Functional Analysis of the Fourteenth Amendment “State Action Requirement*, 1976 SUP. CT. REV. 221 (1976).

71. *Id.* at 230.

ment of the protection of third persons' rights.

The First Amendment initially applied only to the Federal Congress. Many of the state Constitutions contained clauses protecting freedom of the press against the legislative branch, which inspired the First Amendment upon elaboration of the Federal Bill of Rights. The fact that the First Amendment became directly applicable to state legislatures on the basis of the Fourteenth Amendment<sup>72</sup> contributed, essentially, to the evolution of the doctrine of strict protection.<sup>73</sup>

During the 19<sup>th</sup> century, freedom of expression did not enjoy a special protection.<sup>74</sup> While state laws limited freedom of expression, federal regulation of freedom of expression was not very dense.<sup>75</sup> The strict protection is a recent development, which took place in the second half of the 20<sup>th</sup> century, when the Supreme Court realized that a doctrine of strict protection for freedom of expression was more compatible with the premises of the Declaration of Independence<sup>76</sup> This is due to historical developments, which led the Supreme Court to refer to principles already existing during the founding era and to propose a different narrative concerning the proper doctrine for this freedom. During the *New Deal*, the understanding of the role of the government changed, which led to the separation of democratic theory from the model of unregulated activity under capitalism<sup>77</sup> Limitations of economic liberty became acceptable since it was clear that unequal distribution of wealth and power threaten the survival of the economic system and democratic theory became associated with market regulation<sup>78</sup> At this moment, the idea that freedom of expression should be an exceptional liberty began to emerge.<sup>79</sup> The new legitimacy recognized that federal power to regulate

72. See U.S. Const. amend. XIV, § 1 (According to the first paragraph

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.)

73. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

74. DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* (1997); Norman L. Rosenberg, *Another World: Freedom of Press in the Eighteenth Century*, in 16 *REVIEWS IN AMERICAN HISTORY* 554-559 (Johns Hopkins University Press 1988); see generally Alexis J. Anderson, *The Formative Period of First Amendment Theory, 1870-1915*, in 24 *AM. J. LEGAL HIST.* 56-75 (1980).

75. RABBAN, *supra* note 74.

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

77. G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 *MICH. L. REV.* 299 (1996), 308.

78. White, *supra* note 77, at 308.

79. G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech*

the "free market" went together with the increase in consideration of the political aspects of freedom of expression, and should remain apart from state intervention. The fragmented legitimization of state intervention, only to assure the survival of the market, accentuated the absence of legitimacy concerning the regulation of the "market-place of ideas."<sup>80</sup> American libertarianism during the Founding Era, recognized the protection of freedom of expression when an alteration of economic libertarianism was accepted in view of assuring the exercise of economic liberty.

The Supreme Court considers a series of major speech cases starting in 1919. The court's decisions during the First World War upheld restrictions applying the "clear and present danger" test against discourse that "will bring about the substantive evils that the Congress has a right to prevent," as a question of "proximity and degree."<sup>81</sup> This criterion was criticized by Alexander Meiklejohn,<sup>82</sup> for whom the First Amendment implies a conception of limited government that could not even prevent substantive evils caused by expression, even if Congress would have the power to prevent it in other circumstances. For Meiklejohn, the criterion was overbroad and ineffective, having the potential to limit minority opinions.<sup>83</sup> The criterion, initially used to justify limitations to freedom of expression, has the potential to function protectively. The great dissenters, Justice Holmes, who introduced it, and Justice Brandeis<sup>84</sup>, put forward a theory of privileged protection for speech by adding another element, the "serious" character of the danger.<sup>85</sup> The Court adheres progressively to this theory, protecting freedom of symbolic expression<sup>86</sup> and participation in public reunions,<sup>87</sup> and by developing a

---

in *Twentieth-Century America*, 95 MICH. L. REV. 299 (1996); BRUCE ACKERMAN, *WE THE PEOPLE I: FOUNDATIONS* 124 (Harvard University Press 1991).

80. White, *supra* note 77, at 307.

81. *Schenck v. United States*, 249 U.S. 47 (1919), *see also Frohwerk v. United States*, 249 U.S. 204 (1919).

82. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 43-44 (Harper Press, 1st ed. 1960).

83. *Id.* at 45.

84. One of the co-writers of the article, which founded the right to privacy in the United States.

85. *Abrams v. United States*, 250 U.S. 616 (1919), *Gilbert v. Minnesota*, 254 U.S. 325 (1920), *Gitlow v. New York*, 268 U.S. 652 (1925), *Whitney v. California*, 274 U.S. 357 (1927).

86. *Stromberg v. California*, 283 U.S. 359 (1931) (holding unconstitutional California Penal Code § 403a, which criminalized displaying a red flag in a public place or in a meeting place (a) "as a sign, symbol or emblem of opposition to organized government" or (b) "as an invitation or stimulus to anarchistic action" or (c) "as an aid to propaganda that is of a seditious character.").

87. *De Jonge v. Oregon*, 299 U.S. 353 (1937).

formal principle against any *a priori* restraint against speech.<sup>88</sup> In *Thornhill v. State of Alabama*<sup>89</sup>, concerning worker manifestations outside factories, the Court ruled that regardless of their peaceful character, freedom of expression and the press are fundamental rights, and that free debate is a necessary condition for any democratic government. Later, the “clear and present danger” criterion will be used to protect the right of students not to participate in the raising of the national flag,<sup>90</sup> the right to public propaganda of minority religions,<sup>91</sup> and the right to criticize judicial decisions.<sup>92</sup> During this period it was accepted that the First Amendment does not protect commercial speech, defamation, and the unauthorized revelation of private information.<sup>93</sup> Soon the conception of “political” speech was enlarged when the Supreme Court expanded the protected categories of speech by adopting a system of controls that justices like Black and Douglas called “absolute.”<sup>94</sup>

The Cold War and the period of McCarthyism were steps backwards for freedom of expression. The criterion of “clear and present danger” became ineffective for the protection of subversive advocacy in a period of crisis, despite the dissident opinions of justices Black and Douglas.<sup>95</sup> During the 1960s, the Supreme Court elaborated a theory of special protection for free speech in *New York Times Co. v. Sullivan*<sup>96</sup>, *Time Inc. v. Hill*<sup>97</sup> and *Brandenburg v. Ohio*.<sup>98</sup> The first two cases are points of reference for modern freedom of expression analysis, and will be presented on later. The third case modifies the criterion for limiting speech as only “advocacy directed to inciting or producing imminent lawless action and . . . is likely to incite or produce such action committed.”<sup>99</sup> Propaganda of violence or of illegal action is constitutionally protected if it is not likely to lead to violent acts. The Court also ruled in favor of the right to information against *a priori* restraint, concerning the publication of confidential documents pertaining to national security.<sup>100</sup>

---

88. *Near v. Minnesota*, 283 U.S. 697 (1931).

89. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

90. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

91. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

92. *Bridges v. California*, 314 U.S. 252 (1941).

93. *Barber v. Time Inc.*, 159 S.W.2d 291 (Mo.1942).

94. *Dennis v. United States*, 341 U.S.494 (1951).

95. *Id.*

96. *New York Times Co. v. Sullivan*, 376 U.S. at 271.

97. *Time, Inc. v. Hill*, 385 U.S. 374, 387 (1967) (concerning false light privacy.)

98. *Brandenburg v. Ohio*, 395 U.S. 444 (1969)(concerning Ku Klux Klan meetings).

99. *Id.* at 447.

100. *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring); *United States v. Washington Post Co.*, 446 F.2d 1327, 1329 (D.C. Cir. 1971) (known as Pentagon Papers, where in a *per curiam* decision the Court, repeating that all *a priori* restriction to freedom

During the New Deal, acceptance of government intervention for economic freedom led to the Supreme Court's drawing a distinction between "economic liberty" and "political" liberties in order to assure stricter protection for the latter.<sup>101</sup> Despite accepting state intervention for the limitation of economic liberty in view of assuring the survival of a threatened economic system, liberties seen as having a political dimension are always protected in reference to the idea of liberty within the Declaration of Independence. Elaboration of these jurisprudential constructions was essential to circumscribe the intrusive potentiality of a government mechanism, which would be from now on extended.<sup>102</sup> This conception is reflected by the doctrine of *United States v. Carolene Products Co.*, where legislation that limits rights guaranteed by the Bill of Rights or violates the democratic process must submit to strict scrutiny; whereas, regulation of economic activity can enjoy a presumption of constitutionality, provided that it finds a rational foundation on the knowledge and experience of the legislator.<sup>103</sup> If the Supreme Court can defer issues of economic regulation to the legislative branch, the liberties seen as non-economic, but concerning democratic theory, are from now on strictly protected. This system of bifurcated control incarnated two central presuppositions of the new case law: unregulated economic activity pragmatically limits (1) the liberty of a significant number of market actors and (2) the centrality of the fundamental premises of modern liberty, when these premises could be associated to the ends of democratic theory.<sup>104</sup>

During the period of repudiation in *Lochner*, the Supreme Court established a doctrine of strong protection against legislative regulation of First Amendment freedoms seen as "preferred freedoms." Since 1937, all decisions that posed a "preferred" position for the rights consecrated by the First Amendment arrived at this conclusion when underlining the primordial significance of democratic theory as a characteristic defining American civilization.<sup>105</sup> According to this cultural

---

of expression is considered as suspect, judged that in this specific case the government did not succeed to justify the necessity of such a restriction).

101. White, *supra* note 77, at 314.

102. *Id.* at 328.

103. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (in the famous footnote four: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

104. G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 308 (1996).

105. *Id.* at 327-328.

conception, American society would be considered a society founded on liberty, opposed to tyranny and arbitrariness, and representative of rationality and truth in the world.<sup>106</sup> Freedom of expression was now associated with the idea of creative self-fulfillment and equality, and the liberty of the human agent to determine her own destiny. Alexander Meiklejohn's work, *Free Speech and its Relation to Self Government*,<sup>107</sup> had significant influence as it underlines the importance of freedom of expression for democracy by associating it with the assemblies of municipal councils practiced in New England since the founding era, and distinguishing civic responsibility from economic preference. Thomas Emerson later insisted on individual fulfillment as a basis for protecting freedom of expression.<sup>108</sup> He enlarged the domain of protected expression when including all literary and artistic expression disseminated with a pecuniary cause, and weakened the sector of commercial expression. As a result, later cases protected symbolic speech in the cases of flag burning,<sup>109</sup> against the draft,<sup>110</sup> and in neo-Nazi group marches,<sup>111</sup> justified freedom of expression in reference to individual autonomy.

According to the Supreme Court, when the government restricts speech because of its communicative impact, even when the speech falls within an exception, e.g., hate speech, limiting speech can be impermissible viewpoint discrimination.<sup>112</sup> The United States has signed the International Convention on Elimination of All Forms of Racial Discrimination (signed under the auspices of the United Nations), and according to Article 4, the States are obliged to take legislative measures, even of a punitive nature, in order to prevent or limit various forms of hate speech, with reservations concerning any right guaranteed by the Federal Constitution.<sup>113</sup>

The distinction between "economic" rights and "political" rights is not always very clear. The Court initially excluded commercial speech

106. *Id.* at 309.

107. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (Harper Press, 1st ed. 1960).

108. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (Random House, 1970).

109. *Texas v. Johnson*, 491 U.S. 397, 416 (1989), *United States v. Eichman*, 496 U.S. 310, 318, 110 S.Ct. 2404 (1990).

110. *Cohen v. California*, 403 U.S. 15 (1971).

111. *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978); *Skokie v. Nat'l Socialist Party*, 69 Ill. 2d 605 (1978).

112. *R. A. V. v. St. Paul*, 505 U.S. 377 (1992). (Petitioner R.A.V. had allegedly burned a cross on a African-American family's lawn).

113. G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art. 4 (Jan. 4, 1969).



from strict protection.<sup>114</sup> Progressively, even this distinction between commercial and non-commercial speech faded in reference to the social value of commercial information.<sup>115</sup> Even if the advertiser's interest is purely economic, this does not disqualify him from protection under the First and Fourteenth Amendments.<sup>116</sup> The Court accepted the permissibility of time, place and manner restrictions for commercial speech.<sup>117</sup>

The protection of personal data necessitates positive state intervention. In the United States, a debate emerged on whether data should be submitted to economic liberty, to enable regulation.<sup>118</sup> Although some are in favor of data regulation, which they see as a thorny social question necessitating state intervention, American law reacts with difficulty upon a pragmatic situation and treats it ordinarily on a case-by-case basis. The protection of "informational privacy" is not sufficiently important to legitimize state constraint in view of regulating data privacy.<sup>119</sup> The creation, assembly, and communication of a piece of information are seen as the core of the First Amendment, part of expressive activity which should be protected to the detriment of the privacy rights of the persons concerned.<sup>120</sup>

For the Supreme Court, "under the First Amendment there is no such thing as a false idea,"<sup>121</sup> and the fact that some persons feel offended is not a sufficient reason to limit expression.<sup>122</sup> The Supreme Court developed various techniques to control the constitutionality of legisla-

114. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

115. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976).

116. *Id.*

117. *Id.* at 771.

118. Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1149-1221 (2005).

119. JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 197 (2001) (presents a number of instances of violation of private information by private actors exemplifying the reluctance and the delay with which the state reacts to these violations.)

120. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking about you*, 52 STAN. L. REV. 1049-1124 (2000)., Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461-1543 (2000). See also, Ioanna Tourkochoriti, *The Transatlantic Flow of Data and the National Security Exception in the European Data Privacy Regulation: In Search for Legal Protection against Surveillance*, 36 U. PA. J. INT'L L. 459-524 (2014)., Paul M. Schwartz, *The EU-US Privacy Collision: A Turn to Institutions and Procedures*, 126 HARV. L. REV. 1966, 1978-79 (2013), (discussing the U.S. approach that is largely unregulated, giving companies freedom to "try new kinds of data processing"), Paul M. Schwartz & Daniel J. Solove, *Reconciling Personal Information in the United States and European Union*, 102 CALIF. L. REV. 877, 880 (2014).

121. *Gertz v. Welch*, 418 U.S. 323, 340 (1974) ("However pernicious an opinion may seem. We depend for its correction not on the conscience of judges but on the competitions of other ideas.")

122. *Cohen*, 403 U.S. at 26.

tive limitations of freedom of expression, motivated by the normative judgment that some types of limitations of speech are more dangerous than others.<sup>123</sup> According to the Supreme Court precedent, any law that makes content distinctions suggests a possibility of censorship and is thus, by presumption, contrary to the First Amendment.<sup>124</sup> The Supreme Court typically applies “strict scrutiny” to viewpoint restrictions, which means that states must prove that the limitation must serve a compelling interest. Limitations are accepted for low social value speech like obscenities,<sup>125</sup> fighting words, slander and libel of private persons.

The Supreme Court provided the interpretation of the “central meaning” of the First Amendment in *New York Times Co. v. Sullivan*.<sup>126</sup> The case was considered to be a “happy revolution of free-speech doctrine” because it imposed stringent, almost impossible to meet, requirements of fault. The case marked the “denigration” of the defamation tort for public officials in the United States.<sup>127</sup> The case is situated in the Civil Rights era.<sup>128</sup> It concerns a defamation ruling by an Alabama court against a New York Times publication, which defended Martin Luther King and the struggle for liberty in the States of the South.<sup>129</sup> The article contained allegations of misbehavior by local police authorities when responding to student protests, and contained many inaccuracies. For Harry Kalven, an prominent First Amendment scholar, since the Alabama court’s judgment was a Southern response to the Civil Rights movement, it was prepared to pay the price for destroying a part of the common law’s defamation tort. The question of whether this price was too high should be determined in relation to its contribution to the doctrine of the First Amendment.<sup>130</sup>

For the Court, “libel can claim no talismanic immunity from constitutional limitations.”<sup>131</sup> To find a strong premise for freedom of dis-

123. Geoffrey R. Stone, *Restrictions of Speech because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1987); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992); KEITH WERHAN, *FREEDOM OF SPEECH: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 72 (2004).

124. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 65(1986).

125. *Roth v. United States*, 354 U.S. 476, 485 (1957).

126. *New York Times Co.*, 376 U.S. at 273; See ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991).

127. Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 205.

128. *New York Times Co.*, 376 U.S. at 254.

129. *Id.* at 256.

130. Kalven, Jr., *supra* note 119.

131. *New York Times Co.*, 376 U.S. at 269.

cussion of public questions, Justice Brennan uses a historic-systemic argument, where one must consider the case: against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.<sup>132</sup> The article must be constitutionally protected as it concerns one of the most significant political questions of the time. The Court rejects the control of truth as a First Amendment requirement for limiting speech otherwise considered true; it rejects harm to the reputation of public officials as justification for limiting speech.<sup>133</sup> The Court considers that “[an] erroneous statement is inevitable in free debate,” and that “it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”<sup>134</sup> The Court added, “[w]hatever is added to the field of libel is taken from the field of free debate.”<sup>135</sup> To support this point, Justice Brennan invokes structural democratic arguments: “The structure of the government dispersed power in reflection of the people’s distrust of concentrated power, and of power itself at all levels.”<sup>136</sup> He cites Madison, for whom, “[i]f we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.”<sup>137</sup> The right of free public discussion of the stewardship of public officials was thus, in Madison’s view, a fundamental principle of the American form of government. The Court concludes:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice” - that is, with knowledge that it was false or with reckless disregard of whether it was false or not.<sup>138</sup>

If the press must be free to criticize the government, the burden of proving the falsity of the alleged fact and of actual malice is reversed and imposed to the plaintiff by derogation of the principle of the common law, in conformity with State laws, according to which every person is presumed to enjoy a good reputation, which would lead to the obligation of the defender to prove the truth of his or her allegations.

---

132. *Id.* at 271.

133. *Id.* at 271, 272.

134. *Id.*

135. *Id.* at 272.

136. *Id.* at 274.

137. *Id.* at 275. (citing 4 ANNALS OF CONG. 934 (1794)).

138. *Id.* at 279-80.

### 3. The French legal order and the overprotection of privacy and human dignity

The right to privacy does not find explicit protection in the French constitutional text, nor in the U.S. Constitution. Constitutional courts proposed foundations in the Constitution for associating the right to privacy with the general concept of liberty.<sup>139</sup> This absence of explicit protection in the Constitution for the right to privacy did not prevent its strict protection in France against freedom of expression. In the United States, privacy is protected against violations coming from the State, whereas the Supreme Court is reluctant to protect the same liberty from violations coming by speech.

The Constitutional Council submitted the protection of privacy in the absence of an explicit clause to the notion of “individual liberty” in reference to Article 2 of the *Declaration of the Rights of Man and of the Citizen*,<sup>140</sup> reaffirmed in Article 66 of the *Constitution*.<sup>141</sup> This notion indicates a comprehensive conception of liberty employed often to designate liberties as a whole or the principle of liberty.<sup>142</sup> The Council, in reference to Article 66, declared, contrary to the Constitution, a law enabling public authorities to search vehicles.<sup>143</sup> The notion is that “individual liberty” is used to designate security and freedom of movement, also, secrecy and privacy. The right to privacy is recognized implicitly as a component of individual liberty.<sup>144</sup> The Council also submitted to the notion of individual liberty the protection of “inviolability of domicile,” considering contrary to the Constitution a clause of the 1984 tax law, extending the powers of search and seizure of public authorities, in relation to investigations about offenses, in private places without instructions on what is abuse of power.<sup>145</sup> The decision relative to the law

139. Conseil Constitutionnel [CC] [Constitutional Court] decision No. 94-352DC at 3.

140. Charter of Fundamental Rights of the European Union art. 2 (“the aim of every political association is the conservation of the natural and imprescriptible rights of man. These rights are liberty, property, security and resistance to oppression”).

141. Conseil Constitutionnel [CC] [Constitutional Court] decision No. 94-352DC, Jan. 18, 1995, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1995/94-352-dc/decision-n-94-352-dc-du-18-janvier-1995.10612.html> (“nobody can be arbitrarily detained. The judicial authority, guardian of individual liberty, assures the respect of this principle in the conditions foreseen by the law”).

142. Cour de Cassation [Cass.] [supreme court for judicial matters] 2e civ., May 22, 1996, D. 1996 inf. rap. 196 (Fr.). [source available at Bibliothèque Cujàs, Paris, France]

143. CC decision no. 94-352DC *supra* note 141.

144. CC decision no. 94-352DC *supra* note 141.

145. Conseil Constitutionnel [CC] [Constitutional Court] decision No. 99-419DC, Nov. 9, 1999, Rec. 16962 (Fr.) available at: <http://www.conseil-constitutionnel.fr/conseil->

of orientation and programming concerning security associates explicitly the notion of privacy to the notion of individual liberty and consecrates it explicitly as a constitutional principle.<sup>146</sup> In its decision concerning the law on the *Civil Pact of Solidarity and Cohabitation*,<sup>147</sup> the Conseil Constitutionnel held that the protection of privacy is implied in the protection of liberty guaranteed by Article 2 of the *Declaration of the Rights of Man and of the Citizen*.<sup>148</sup>

According to the dominant conception in Europe, the protection of privacy has "direct effect" in the relations between private persons. The constitutional requirement of protecting privacy can be equally enforced against private persons, as the State can, by its legislation, validate a behavior as violating the privacy of a third member of civil society by virtue of its legislation and the interpretation by the courts.<sup>149</sup>

The ECHR protects privacy in Article 8.<sup>150</sup> According to the ECHR, the privacy of public officials is protected when the information is not in relation with public office.<sup>151</sup> From an American perspective, the decision concerning what is in relation to the mandate belongs to each voter, and not to the courts.<sup>152</sup> For the same court, the privacy of a member of a European monarchy is protected when the person is in a

---

constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1999/99-419-dc/decision-n-99-419-dc-du-9-novembre-1999.11849.html. (The Pact Civil de Solidarité recognizes many of the rights and privileges accorded to married couples to two persons who decide to sign it. It has no limitations of gender for the persons who can sign it or of family proximity. A Pact can be signed among a homosexual couple, as well as among brothers and sisters.)

146. Conseil Constitutionnel [CC] [Constitutional Court] decision no. 94-352DC, Jan. 18, 1995, Rec. 1154, 1155 (Fr.).

147. Conseil Constitutionnel [CC] [Constitutional Court] decision no. 99-419DC, Nov. 9, 1999, Rec. 16962, 73 (Fr.). (The Pact Civil de Solidarité recognizes many of the rights and privileges accorded to married couples to two persons who decide to sign it. It has no limitations of gender for the persons who can sign it or of family proximity. A Pact can be signed among a homosexual couple, as well as among brothers and sisters.)

148. *Id.*

149. Conseil constitutionnel [CC] [Constitutional Court] decision no. 94-352DC, Jan. 18, 1995, Rec. 1154, 1155 (Fr.).

150. Eur. Conv. on H.R., *opened for signature* Nov. 4, 1950, art. VIII (According to this article: "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.")

151. *Tammer v. Estonia*, 2001-VII Eur. Ct. H.R. 263, 265 (concerning elements of the privacy of the wife of a public official).

152. Frederick Shauer, *Can Public Figures Have Private Lives?* in 17 THE RIGHT TO PRIVACY 293, 293-309 (Ellen Frankel Paul et al. eds., 2000).

public place if the activity is not in direct relation with public life.<sup>153</sup> The court held that Germany had violated Article 8 of the Convention by not providing the applicant the protection of privacy that France would have provided for publication of her pictures in public places in circumstances not related to public office.<sup>154</sup> From a United States perspective, the case would raise issues of accountability in how the public official spends the taxpayers' income.

The state of the law of human rights protection is defined in Europe by the case law of the ECHR, a quasi-constitutional jurisdiction that expresses a *jus commune*, the constitutional ideology dominant in Europe, and reflects the understanding of liberty dominant in Europe. Freedom of expression is protected by Article 10 of the European Convention of Human Rights, which the ECHR enforces,<sup>155</sup> and privacy is protected by Article 8. Although U.S. Supreme Court precedent has influenced the case law of the ECHR, the *ex ante* understanding for a stronger role of the State survives in the second. The privacy of public officials is protected when, according to the court, information does not relate to public office.<sup>156</sup> American scholarship stresses that the decision concerning what is in relation to the mandate assured, belongs to each voter and not to the courts.<sup>157</sup> For the ECHR, the privacy of family members of European monarchies is protected, even when the person is in a public place, engaging in an activity not directly related to public life. The court held that Germany violated Article 8 of the Convention by not providing an applicant the protection of private life that she would have enjoyed in France,<sup>158</sup> rendering the French standard for free speech versus privacy applicable throughout Europe. The court reflects that the dominant European conception of liberty and of the role of the State is marked by the ideology posterior to the French Revolution. For this reason, France is representative of Europe.

The right to privacy against the private sector is protected by numerous directives issued by the European Parliament and the Council concerning the processing of personal data and the protection of privacy

153. *Von Hannover v. Germany*, 2004-VII Eur. Ct. H.R. 1, 44 (concerning the publication of pictures of a member of a royal family in public places during activities, which according to the opinion of the Court are "private").

154. *Id.* at 73.

155. European Convention on Human Rights, Nov. 4, 1950, 213 UNTS 221, art. 10.

156. *Tammer v. Estonia*, App. 41205/98, Eur. H.R. Rep. 263, 265-66 (2001).

157. Frederick Shauer, *Can Public Figures Have Private Lives? in 17 THE RIGHT TO PRIVACY* 293, 300-01 (Ellen Frankel Paul et al. eds., 2000).

158. *Von Hannover v. Germany*, 2004-VII Eur. Ct. H.R. 1, (concerning the publication of pictures of a member of a royal family in public places during activities "private" according to the court).

in the electronic communications sector and by Articles 7<sup>159</sup> and 8<sup>160</sup> of the European Union Charter of Rights.<sup>161</sup> The European Union directive (CE) n°95/46 of the Parliament and the Council of October 24, 1995, "On the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data,"<sup>162</sup> imposes to the member-states of the European Union to take measures protecting personal data "revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life."<sup>163</sup> The directive allows the possibility of foreseeing derogations or exemptions 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."<sup>164</sup> The directive (CE) 2002/58/EC of the European Parliament and of the Council of July 22, "concerning the processing of personal data and the protection of privacy in electronic communications (Directive on privacy and electronic communications),"<sup>165</sup> replaces directive n° 97/66 of December 15, 1997 on the same topic and aims at harmonizing the legislation of the member-states to assure similar protection of privacy concerning processing of personal data in the sector of electronic communications and to ensure the free movement of such data and of electronic communication equipment and services in the Community.

---

159. Charter of Fundamental Rights of the European Union, art. 7, 2012 O.J. (C 326/391), 397.

160. *Id.* (According to which: "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.")

161. For an analysis of the various EU Directives protecting privacy and the differences with the US protection in the same area. See Ioanna Tourkochoriti, *The Snowden Revelations, The Transatlantic Trade and Investment Partnership and the U.S.-EU Divide in Data Privacy Protection*, 36 U. ARK. LITTLE ROCK L. REV. 161, 164-171 (2014), see also, *The Transatlantic Flow of Data and the National Security Exception in the European Data Privacy Regulation: In Search for Legal Protection against Surveillance*, *supra* note 120, at 467-77.

162. 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, 31 (hereinafter "Directive 95/46/EC")

163. *Id.* at art. 8.

164. *Id.* at art. 9.

165. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (Directive on Privacy and Electronic Communications), art. 19, 2002 O.J. (L 201) 37, 47 (hereinafter "Directive 2002/58/EC").

In the same spirit of accepting a strong protection for privacy, the CJEU recently recognized the protection of a right to be forgotten against Internet search engines. The famous case *Google v. Spain*<sup>166</sup> posed the principle that a person has the right in light of the protection afforded under Articles 7 and 8 of the EU Charter of Rights to have information concerning her removed from the search results that are made available to the general public by a search engine. The case originated in the application of a Spanish national resident in Spain against a newspaper and against Google Spain and Google Inc. to remove or alter pages on which an announcement mentioning his name appeared for a real-estate auction connected with attachment proceedings for the recovery of social security debts. The Spanish courts referred this case to the CJEU for a preliminary ruling on the case. The crucial question before the court was whether it must be considered that the right to erasure and blocking of data protected by European Union legislation<sup>167</sup> and the right to object to the assembling of data that concerns a person<sup>168</sup> extend to enabling the person to address himself to search engines in order to prevent indexing of the information relating to him personally, published on third parties' web pages, invoking his wish that such information should not be known to internet users when he considers that it might be prejudicial to him.

The court held that the processing of data by search engines affects the fundamental rights to privacy and the protection of personal data since the data enables users to obtain a structured overview of the information relating to an individual that can be found on the Internet.<sup>169</sup> The effect of the interference with those rights of the data subject is heightened on account of the important role played by the Internet and search engines in modern society, which render the information contained in such a list ubiquitous.<sup>170</sup> The court thus held that "the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to

---

166. EUR-Lex 62012CJ0131 ¶ 97 (Grand Chamber of the Court of Justice of the European Union, May 13, 2014), [http://eur-lex.europa.eu/legal\\_content/EN/TXT/?qid=1448492173799&uri=CELEX:62012CJ0131](http://eur-lex.europa.eu/legal_content/EN/TXT/?qid=1448492173799&uri=CELEX:62012CJ0131).

167. 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, art. 12(b) § 5, 1995 O.J. (L 281) 31, 43 (hereinafter "Directive 95/46/EC").

168. *Id.* at art. 14.

169. *Google Spain SL v. AEPD*, *supra* note 2, at ¶ 98.

170. *Id.* at ¶ 80.



that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages and when its publication is lawful.”<sup>171</sup>

Questions of territoriality of the decision were also before the court. In particular, whether it must be considered that the European Union legislation protecting data privacy also applies to a search engine that sets up an office or subsidiary in a Member State for the purpose of promoting and selling advertising space<sup>172</sup> on the search engine, which orients its activity towards the inhabitants of that State; when the parent company designates a subsidiary located in an EU Member State as its representative and controller; or, when the office or subsidiary established in a Member State forwards to a parent company located outside the European Union, requests and requirements addressed to it both by data subjects and by the authorities with responsibility for ensuring observation of the right to data protection.

The court held that the processing of personal data that takes place in a third state, but has an establishment in a European Union Member State, is carried out in the context of the activities of that establishment if the latter is intended to promote and sell in that Member State, advertising space offered by the search engine, which serves to make the service offered by that engine profitable.<sup>173</sup> Google saw the decision as obliging it to remove search results from its European sites only. Nevertheless, the French data protection authority, known by its French acronym, CNIL, recently ordered Google to remove links from its database entirely, across all locations.<sup>174</sup> The CNIL adopted an expansive interpretation of the ruling, to which it applies all of Google's domains, not only to the company's regional domains in Europe, as Google contends.<sup>175</sup> The CNIL notes that in order to be effective, “delisting” must take place on all extensions of the search engine as the service provided by Google search constitutes a single processing.<sup>176</sup> Google has so far refused to accept this interpretation of the CJEU decision and the dispute is likely to arrive to courts soon.<sup>177</sup>

---

171. *Id.* at ¶ 88.

172. *Id.* at ¶ 20.

173. *Id.* at ¶ 55.

174. *CNIL*, *supra* note 5.

175. See Mark Scott, *France Wants Google to Apply 'Right to Be Forgotten' Ruling Worldwide or Face Penalties*, N.Y. TIMES, June 14, 2014, available at <http://bits.blogs.nytimes.com/2015/06/12/french-regulator-wants-google-to-apply-right-to-be-forgotten-ruling-worldwide/>.

176. *CNIL*, *supra* note 7.

177. Manjoo, *supra* note 10.

The right to privacy is protected by French civil law under the general category of “personality rights,” construed in order to protect elements of the personality of the subject – natural and moral, individual and social.<sup>178</sup> Continental civil law accepts an ontological unity between the person and her body.<sup>179</sup> The right to privacy is protected in French civil law by Article 9 of the Civil code, which refers to privacy as a “notion-frame.”<sup>180</sup> The law brought effective reinforcement to protection already recognized by courts.<sup>181</sup> French courts recognized the protection of the right to privacy as right to one’s image, earlier than United States courts. The first case of this type concerned the publication of the image of actress Rachel on her deathbed. For the court, “nobody can reproduce and transmit the characteristics of a person on her deathbed, without consent of the person while she is alive or the consent of her family, whatever the celebrity of this person and the extent of publicity she received.”<sup>182</sup> The first law to protect privacy foreseeing criminal responsibility dates back to May 11, 1868.<sup>183</sup> It was amended by the July 29, 1881 law on freedom of the press, which still applies.<sup>184</sup> It indirectly protects privacy, foreseeing that exoneration of the responsibility of the person who commits libel is reserved to cases where the facts do not concern privacy instituting, “a kind of strong presumption of culpability, which weighs upon the offender, when the intimate sphere of another is transgressed.”<sup>185</sup> Privacy was protected for long in reference to the general civil responsibility clause (Article 1382 of the French Civil Code).<sup>186</sup> Its contemporary status of protection was enacted by law of July 17, 1970, which inserted Article 9 in the French Civil

---

178. JEAN DABIN, *LE DROIT SUBJECTIF*, 170-171 (1952).

179. See generally JEAN CARBONNIER, *DROIT CIVIL I; LES PERSONNES: PERSONNALITE, INCAPACITES, PERSONNES MORALES* (2000).

180. CODE CIVIL [C. CIV.] art. 9 (Fr.) (According to which: “Everyone has a right to respect of his private life. . . . The court may prescribe any measures such as sequestration, seizures and others, appropriate to prevent or put an end to an invasion of personal privacy; in case of emergency those measures may be provided for by interim order.”)

181. XAVIER AGOSTINELLI, *LE DROIT A L’INFORMATION FACE A LA PROTECTION CIVILE DE LA VIE PRIVEE*, 27 (1994).

182. Trib. Civ. de la Seine, D.G. Jur. 1858 (Fr.). [source available at Bibliothèque Cujàs, Paris, France]

183. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *YALE L.J.* 1151, 1178 (2003-2004).

184. Loi du 29 juillet 1881 sur la liberté de la presse [Law of July 29, 1881 freedom of the press], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.]* [OFFICIAL GAZETTE OF FRANCE], Aug. 8, 2011.

185. Christophe Bigot, *Les exigences de l’information et la protection de la vie privée*, No. 126-II *LÉGIPRESSE* 84 (1995). [source available at Bibliothèque Cujàs, Paris, France]

186. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1382 (Fr.).

Code.<sup>187</sup> The same law foresaw criminal liability<sup>188</sup> and was replaced by Article 226-1 to 226-9 of the New Criminal Code, criminalizing the gathering, recording, and transmission of discourse in confidentiality and the image of a person, which is in a private space, as well as any relevant publication. Taking and keeping a picture of a person in a private place are criminal offenses<sup>189</sup> independent of whether the picture was published or not.

According to the case of the *Cour de Cassation*, “the finding of privacy invasion gives right to compensatory damages.”<sup>190</sup> The recognition by law in 1970 of a “right to privacy” is considered providing wider protection than general civil responsibility or professional secrecy law.<sup>191</sup> Legal sanctions follow the violation of the right whether *mens rea* exists or not. The protection of the right to privacy is detached from the traditional conditions of delictual responsibility, proof of fault, and harm.<sup>192</sup> Fault is presumed to exist once accepted that there is abuse of speech and that there is no consent of the person concerned.<sup>193</sup> The causality link and the affirmation of the existence of a violation are almost automatic. If the publication is considered as concerning private facts, the harm of the publication is presumed. American law has additional requirements for the standard of fault: a plaintiff will recover only after a balancing of all interests at stake. These interests include the public interest in the publication, the offensiveness of the publication of private facts to a “reasonable person,” and the *mens rea* of the agent.<sup>194</sup> The standard of fault required for recovery varies depending on the quality of the plaintiff, that is whether the plaintiff is a public figure or not, the proof of moral damages, and the causation link between these damages and the publication.<sup>195</sup> The U.S. Supreme Court imposes standards of fault difficult to meet, in view of the constitutional guarantee of the protection of the freedom of the press; even negligence is an “elusive”

---

187. FRENCH LEGISLATION ON PRIVACY, EMBASSY OF FRANCE IN WASHINGTON D.C. (Dec. 2, 2007) available at <http://ambafrance-us.org/spip.php?article640>.

188. CODE PÉNAL [C. PÉN.] art. 368 (Fr.).

189. FRENCH LEGISLATION ON PRIVACY, *supra* note 187.

190. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 5, 1996, Bull. civ. I, No. 94-14.798 (Fr.).

191. CODE CIVIL [C. CIV.] art. 9 (Fr.).

192. Micheline Decker, Aspects Internes et Internationaux de la protection de la vie privée en droit français, allemand et anglais, (June 29, 2000) (unpublished Ph.D. dissertation, Université Panthéon-Assas).

193. CHARLES DEBBASCH, DROIT DES MEDIAS, 952 (Daloz, 1999). [source available at Bibliothèque Cujàs, Paris, France]

194. *Id.*

195. *Id.*

standard.<sup>196</sup> In France, the finding of a violation justifies, according to the *Cour de Cassation*, the presumption of urgency and provides grounds for a preliminary injunction.<sup>197</sup>

French courts consider as belonging to “privacy” three categories of elements, corporal intimacy, private life *stricto sensu* (“in the strict sense,”) and elements of identification of a person. In reference to the first category, a person’s health, sexual preference,<sup>198</sup> nudity,<sup>199</sup> maternity,<sup>200</sup> and death<sup>201</sup> are protected. Family life, the psychological or affective relation that the person maintains with her family, whether legitimate or natural,<sup>202</sup> and the personal problems between a married couple,<sup>203</sup> are considered private facts. Reporting judiciary proceedings relative to divorce actions and publishing any information from their files is also forbidden.<sup>204</sup> Emotional life,<sup>205</sup> religious convictions,<sup>206</sup> holiday, and leisure<sup>207</sup> are equally protected. Publication of a picture of one’s residence without authorization constitutes invasion of privacy.<sup>208</sup>

196. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

197. CHARLES DEBBASCH, *supra* note 193.

198. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, June 14, 1985, D. 1991; JCP 1991, II, 21724, soc., 447, obs. A. Sériaux (Fr.). [All the cases cited in footnotes 199-223 are available in hardcopy at Bibliothèque Cujàs, Paris, France]

199. Cour d’appel [CA] [regional court of appeal] Paris, May 14, 1976, JCP 1976, 291 (Fr.). [source available at Bibliothèque Cujàs, Paris, France]

200. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Feb. 27, 1981, D. 1981, 457, obs. R. Lindon (Fr.).

201. See Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Jan. 13, 1997, D. 1998, com. 255, obs. B. Beigner (Fr.).

202. Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., May 22, 1996, D. 1996 inf. rap. 196 (Fr) (concerning the illicit revelation of the existence of a natural child by the father shortly before his death.); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Feb. 25, 1997, Bull. civ. I, No. 141 (Fr.).

203. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Oct. 3, 1986, D. 1987 inf. rap. 137 (Fr.).

204. Loi du 29 juillet 1881 sur la liberté de la presse [Law of July 29, 1881 on freedom of the press], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], July 29, 1881, art. 39..

205. Cour d’appel [CA] [regional court of appeal] Paris, Mar. 5, 1969, JCP 1969, II, 15894, (Fr.).

206. Crim, 28 février 1874, S. 1874, p. 233 (comment by E.Naquet: The protection covers acts of worship of a person inside her home and in a public place).

207. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, May 29, 1996, *Légipresse* 1996 135 I, 122 (Fr.) (Apart from newsworthy information, narrowly conceived, and independently of whether the person is a public figure.); Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Aug. 2, 1996, *Légipresse*, no. 137-I, 155 (Fr.) (Whether the person is in a public place or not.); Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Nanterre, Sept. 10, 1997, *Légipresse* 1998 148 I, 10 (Fr.) (if the information at stake concerns her holiday, it constitutes violation of privacy.).

208. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Seine, Apr. 1, 1965, JCP 1966, II, 14572 (Fr.).

The image, a constitutive element of the person, occupies a privileged position in the protection of privacy in French law in reference to the "moral interests of the person."<sup>209</sup> Scholars are divided on the question of whether the "right to one's image" is autonomous in relation to the right to privacy.<sup>210</sup> In opposition to American law, French law mandates explicit consent of a person for any publication of her image: the publication of pictures taken without a person's knowing is held to be a violation of the "right upon one's image," whether she is in a public or in a private place<sup>211</sup> and whether the person is a public figure or not.<sup>212</sup> A public official will recover for the publication of pictures showing her in a public place concerning activities not related to office.<sup>213</sup> *Cour de Cassation* has referred to Article 9 of the Civil Code as the legal basis to protect the right to one's image, considering that the right is protected whether the person is in a public or a private place.<sup>214</sup> Before this decision, the courts considered every republication of a photograph focusing on her without her consent, even those photographs taken in a public place as violating the right to a person's image.<sup>215</sup> The publication of the person's image, taken in a "gay pride" in a guide destined to homosexuals, was seen as an "aggravating element of the harm done to the person's right to image."<sup>216</sup>

Consent of the person is required for every new publication of elements concerning her privacy, even for elements already published in

---

209. Emmanuel Dreyer, *L'Image de la Personne*, in *TRAITE DU DROIT DE LA PRESSE* 303 (Henri Blin, Albert Chavanne, Roland Drago eds., 1999). [source available at Bibliothèque Cujàs, Paris, France]

210. *Cour de cassation* [Cass.][supreme court for judicial matters] 2e civ., July 8, 1981, Bull. civ. II, No. 80-13079 (Fr.).

211. *Tribunal de grande instance* [TGI] [ordinary court of original jurisdiction] Nanterre Ord. Réf., Dec. 10, 1997, *Légipresse* 1998, I, no. 152, 75 (Fr.).

212. Bull. civ. II, No. 80-13079, *supra* note 164; *Cour de cassation* [Cass.][supreme court for judicial matters] 2e civ., Jan. 5, 1983, Bull. civ. II, No. 81-13374 (Fr.).

213. *Tribunal de grande instance* [TGI] [ordinary court of original jurisdiction] Paris, June 30, 1961, D. 1962, 208; *Tribunal de grande instance* [TGI] [ordinary court of original jurisdiction] Seine, Nov. 24, 1965, JCP 1966, II, 14521 obs. R. Lindon (Fr.); *Tribunal de grande instance* [TGI] [ordinary court of original jurisdiction] Paris, Feb. 27, 1967, D. 1967 at 450, note J. Foulon-Piganiol (Fr.); *Cour d'appel* [CA] [regional court of appeal] Paris, Mar. 5 1969, JCP 1969, II, 15894, (Fr.).

214. *Cour de cassation* [Cass.][supreme court for judicial matters] 1e civ., Dec. 12, 2000, Bull. civ. I, No. 98-17521 (Fr.), (which ruled that the publication of the image of a child "isolated from the manifestation, during which the picture was taken" without the authorization of the parents constitutes a violation of the right to privacy.)

215. *Tribunaux de grande instance* [TGI] [ordinary courts of original jurisdiction] Paris, Dec. 18, 1996, *Légipresse*, 1997 inf. act., 142, I, 69.

216. *Id.*

the past.<sup>217</sup> French law recognizes a “right to be forgotten.”<sup>218</sup> Using criminal convictions, disciplinary measures, and forfeitures of rights to which amnesty has been given entails criminal responsibility.<sup>219</sup> Scenes in a film of a criminal convict describing real life events were suppressed for the protection of the privacy of the convict’s partner.<sup>220</sup> The seizure of a book through preliminary injunction that presented facts about a minor already known to the public is justified, in that it provides a new combination of disparate information in a “passionate synthesis” which also provides to the event publicity and intensity not provided in the past.<sup>221</sup> The right to be forgotten does not cover the narration of historical events in a book known to the public from reports on judicial proceedings.<sup>222</sup>

French law foresees the possibility for a right to respond to publications, which concern the honor and the reputation of a person.<sup>223</sup> The right can be exercised in a deadline of three months following publication and by the same medium of communication.<sup>224</sup> The right to respond can be enforced through preliminary injunction.<sup>225</sup>

217. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 16-3 (Fr.).

218. Cour de cassation [Cass.] [supreme court for judicial matters] Civile 2<sup>nd</sup> Chamber, Jul. 4, 1973, application n° 72-12123 (publication of the identity of the father of the child of public figure constitutes violation of privacy even if already revealed and led to liability of newspapers). Cour de cassation [Cass.] [supreme court for judicial matters] Civile 2<sup>nd</sup> Chamber, Nov. 14, 1975, application n° 72-12123. See Roseline Letteron, “Le Droit à l’Oubli”, *Revue du Droit Public*, April-March 1996, 385.

219. See Roseline Letteron, *infra* part One.2.c.i.

220. Cour de cassation [Cass.] [supreme court for judicial matters] Civile 1st Chamber, Feb. 13, 1985, application n° 72-12123. Cour de cassation [Cass.] [supreme court for judicial matters] Civile 1st Chamber, Dec. 3, 1980, application n° 72-12123 (suppression of scenes depicting the reaction of victim’s parents in a film on murder convict to the death penalty was not sufficiently justified by court of appeals as constituting violation of privacy).

221. Cour de cassation [Cass.] [supreme court for judicial matters] Civile 1st Chamber May 18, 1972, application n° 72-12123 (Rossi, case concerning the relation of a teacher with her minor student).

222. Cour de cassation [Cass.] [supreme court for judicial matters] Civile 1st Chamber, Nov. 20, 1990, application n° 72-12123. The case has stirred debate as to what extent the “right to be forgotten” is still protected, see Catherine Costaz, “Le Droit à l’Oubli”, *Gazette du Palais*, Doctrine, 961 (1995).

223. Code civil [C. civ.] [Civil Code] art. 6 (Fr.), Yves Mayaud, *L’Abus de Droit en Matière de Droit de Réponse*, in LIBERTÉ DE LA PRESSE ET DROITS DE LA PERSONNE 5 (Jean-Yves Dupeux and Alain Lacabarats ed., Paris, Dalloz 1997). Martine Coisne and Jean Collin, *Le Droit de Réponse dans la Communication Audiovisuelle*, in LIBERTÉ DE LA PRESSE ET DROITS DE LA PERSONNE 17 (Jean-Yves Dupeux and Alain Lacabarats ed., Paris, Dalloz 1997). Jean-Paul Levy, *Pratique du Droit de Réponse dans la Presse Écrite et la Communication Audiovisuelle*, in LIBERTÉ DE LA PRESSE ET DROITS DE LA PERSONNE 31.

224. *Id.*

225. *Id.*

#### 4. The Imperfect Protection of Privacy in the United States

Since there is no explicit protection of a right to privacy in the text of the Federal Constitution, the Supreme Court justices employed various methods of interpretation to recognize it in a number of cases. The Supreme Court recognized a core of a generic right to privacy, in its spatial aspect and the making of the fundamental personal decisions concerning marriage, procreation and corporal integrity against the State.<sup>226</sup> It is reluctant, however, to protect privacy from violations by civil society actors like the press. Justice Black, a textualist, interpreted the silence of the Federal Bill of Rights as not protecting a right to privacy altogether in cases of conflict with freedom of expression, given that the latter finds explicit protection.<sup>227</sup>

The Court read a right to privacy in the Federal Constitution in *Griswold v. Connecticut*,<sup>228</sup> known as one of the most famous examples of judicial activism in constitutional interpretation. Dr. Griswold, a medical director of a family planning center in New Haven was convicted for giving information and medical advice on contraception in violation of a Connecticut statute.<sup>229</sup> Justice Douglas employed a structural argument, drawn from the totality of the Amendments, which carried a jusnaturalist reference: "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. [. . .] Various guarantees create zones of privacy."<sup>230</sup>

He cites the First Amendment, which protects freedom of association and the private character of adhering to associations,<sup>231</sup> the Third Amendment, which protects against the quartering of soldiers "in any house" in time of peace without owner's consent, and the Fourth Amendment, which affirms the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.<sup>232</sup> He also cites the Fifth Amendment, whose clause against self-incrimination enables the citizens to create a zone of privacy

---

226. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

227. *Time v. Hill*, 385 U.S. 374, 401 (1967) (Justice Black in his concurrent opinion in expressed the fear that the recognition of a right to privacy would lead to the limitation of explicitly consecrated and protected liberties like freedom of expression.)

228. *Griswold*, 381 U.S. at 486.

229. *Id.* at 480.

230. *Id.* at 484.

231. *Id.* at 482.

232. *Id.* at 484.

against the government and the Ninth Amendment.<sup>233</sup>

The right to privacy is considered “older than the Bill of Rights – older than our political parties, older than our school system.”<sup>234</sup> This foundation caused positive and negative commentary.<sup>235</sup> For its critics, the reasoning is based on an intellectual confusion between the right to privacy and the concept of individual liberty,<sup>236</sup> which should be protected in reference to autonomy or personal liberty concerning important personal decisions.<sup>237</sup> By projecting different meanings of the concept in order to create the illusion of a single referent to the notion, the court deprives it of a referent exactly as a kaleidoscope presents an image for which there is no corresponding object.<sup>238</sup>

The difficulties faced by the Court in recognizing the protection of the right to privacy by the Federal Constitution are obvious in the concurring opinions of Justices Goldberg, Harlan and White. Justice Goldberg proposes, as a foundation of the right to privacy, the Ninth Amendment conceived by James Madison “to quiet express fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.”<sup>239</sup> He invokes Justice Story’s interpretation of the Ninth Amendment, which states: “[t]his clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in a particular case implies a negation in all others; and, the converse, that a negation in particular cases implies an affirmation in all others,”<sup>240</sup> to prove that “the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.”<sup>241</sup> Justice Goldberg emphasizes that the Ninth Amendment protects implicit fundamental rights.<sup>242</sup> Although one understanding of the Ninth Amendment was that it protects the rights of the states to self-govern against the Federal

233. *Id.* at 484.

234. *Id.* at 485.

235. Cf. Scott D. Gerber, *Privacy and Constitutional Theory*, in *THE RIGHT TO PRIVACY* 164-185 (Ellen Frankel Paul et al. ed., Cambridge University Press, 2000) (for a general presentation of the reactions of the doctrine.)

236. Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 35 (1967).

237. *Id.* at 46.

238. *Id.* at 42.

239. *Griswold*, 381 U.S. at 488-89.

240. II Story, *Commentaries on the Constitution of the United States* 626-627 (5th ed. 1891) (cited in *Griswold v. Connecticut*, 381 U.S. 479, 491.)

241. *Griswold*, 381 U.S. at 491.

242. *Id.* at 491-92.



State, others believe it also protects individual rights.<sup>243</sup> Justice Goldberg stresses the second reading. This concurring opinion is significant in understanding the constitutional foundation of privacy against the state because the reference to the Ninth Amendment stresses that the liberty protected by the Fourteenth Amendment is not limited to the rights specifically mentioned in the first Eight Amendments. For Goldberg, judges determine the fundamental interests worthy of protection by referring to the "traditions and the collective conscience of the people."<sup>244</sup> The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . ."<sup>245</sup>

Justices Harlan and White propose, as foundation, the Due Process Clause of the Fourteenth Amendment.<sup>246</sup> This is because Connecticut law, "violates basic values 'implicit in the concept of ordered liberty,'"<sup>247</sup> and the latter because he thinks that the law is overbroad. Justice Harlan considers that "the due process clause of the 14<sup>th</sup> Amendment is enough in itself to consecrate a liberty which forms a 'rational continuum' with the rest of the liberties explicitly protected."<sup>248</sup> For him, judicial opinions must be guided by the teachings of history, the solid recognition of values which underlie American society, and the wise appreciation of the great roles that the doctrines of federalism and the separation of powers played by establishing and preserving the American liberties.<sup>249</sup> Two judges dissented: Justice Black, in favor of a strict textualist interpretation, refused protection,<sup>250</sup> and Justice Stewart refuted one by one

---

243. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); See also *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (Randy E. Barnett ed., George Mason University Press 1989).

244. *Griswold*, 381 U.S. at 519.

245. *Powell v. Alabama*, 297 U.S. 45, 67 (1932).

246. *Powell*, 297 U.S. at 52 (which reads: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.")

247. *Griswold*, 381 U.S. at 500 (Harlan, J., concurring).

248. *Poe v. Ullman*, 367 U.S. 497, 545 (1961) ("The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points. . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.")

249. *Griswold*, 381 U.S. at 501.

250. *Id.* at 508.

the foundations invoked in the opinion of the Court.<sup>251</sup>

Freedom to use contraceptives was affirmed in *Eisenstadt v. Baird*<sup>252</sup> on the basis of the Equal Protection Clause, as concerning individuals in general, and not only married couples.<sup>253</sup> This was the intermediary step for the Court to give its abortion opinion in *Roe v. Wade*.<sup>254</sup> In this renowned case, which recognized abortion as flowing from the right to privacy,<sup>255</sup> the Supreme Court proposed the Fourteenth Amendment as foundation.<sup>256</sup> The “compelling interests” alone can justify limitations, like the protection of health and the imperative of life at the end of the first trimester of pregnancy.<sup>257</sup> Abortion must be protected in reference to the right to privacy as a defining life decision, concerning the meaning and the exercise of moral responsibility, the meaning that the woman gives to her life.<sup>258</sup> It concerns also her physical integrity, the relation she has with her own body.<sup>259</sup>

Although the Court shows a concern to protect privacy against state violations, it does not seem willing to protect it against intrusions from civil society, when freedom of expression is at stake.<sup>260</sup> *Time Inc. v. Hill*<sup>261</sup> privileges freedom of expression over privacy, using an argument drawn from everyday life:

One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.<sup>262</sup>

251. *Id.* at 528.

252. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

253. *Id.* (“If the right of privacy means anything it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”)

254. *Roe v. Wade*, 410 U.S. 113 (1973).

255. *Id.* at 153.

256. *Id.*

257. *Id.* at 145.

258. *Id.* at 169-70.

259. *Id.*

260. Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1195-1234 (1990); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2003-2004); James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279 (1999-2000); Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087 (2000-2001); Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139 (2001).

261. *Time, Inc. v. Hill*, 385 U.S. 374, 400 (1967).

262. *Id.* at 388.

Justices Black and Douglas, in their concurring opinion, emphasized that no balancing test can take place concerning the First Amendment of the Constitution,<sup>263</sup> which expresses a specific position in favor of the high value of freedom of expression, putting forward a slippery slope argument.<sup>264</sup> Protecting privacy against freedom of expression can lead to endlessly creating new rights, which would limit those explicitly protected by the Amendments of the Federal Constitution.<sup>265</sup>

Only Justice Fortas, in his dissenting opinion, joined by Justice Clark, refuses an absolute conception of the First Amendment, considering that the right to privacy is one among other great and important values in American society, equally worthy of attention and respect by the court.<sup>266</sup> He seeks the foundation for this right in scientific commentary, Supreme Court opinions, the Common law and state legislation. He cites Judge Cooley's *Law of Torts*, which refers in 1888 to the "right to be left alone,"<sup>267</sup> the famous article of 1890 by Warren and Brandeis,<sup>268</sup> and the dissenting opinion of Judge Brandeis in *Olmstead v. U.S.*, stating the right to privacy is "the most comprehensive of rights and the right most valued by civilized men."<sup>269</sup> He cites *Boyd v. U.S.*, which refers to the intimacy of the home and of life;<sup>270</sup> *Wolf v. Colorado*, which describes immunity from searches and seizures as a protection of "the right to privacy";<sup>271</sup> *Mapp v. Ohio*, which mentions the right to privacy as a fundamental right for a free society;<sup>272</sup> and *Griswold v. Connecticut*, which refers to the right to privacy as a personal, fundamental right, which emanates from the totality of the "American Constitutional System."<sup>273</sup> For this judge, if this right emanates from the totality of the constitutional scheme and is protected against various types of invasions, it should also be protected against violations coming from speech.

Two 19th century lawyers emphasized, for the first time, the need to protect a right to privacy against the press. Samuel D. Warren and Louis D. Brandeis proposed a foundation for this right in the common law in their article "The Right to Privacy," published in the *Harvard*

---

263. *Id.* at 400.

264. *Id.*

265. *Id.* at 401.

266. *Id.* at 413.

267. *Id.* at 412.

268. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

269. Hill, 385 U.S. at 413; See *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

270. Hill, 385 U.S. at 413; See *Boyd v. United States*, 271 U.S. 104 (1926).

271. Hill, 385 U.S. at 413; See *Wolf v. Colorado*, 338 U.S. 25 (1949).

272. Hill, 385 U.S. at 413; See *Mapp v. Ohio*, 367 U.S. 643 (1961).

273. Hill, 385 U.S. at 414; See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

*Law Review* in 1890.<sup>274</sup> They suggested that the right to privacy was not unknown to American law and that a number of legal precedents had, as *ratio decidendi*, the protection of a private sphere for every individual.<sup>275</sup> The courts' explicit recognition of a right to privacy was necessary to ensure the protection of the emotional world of every human being threatened by publication of private facts.<sup>276</sup> A core of the right to be left alone was already protected by common law in the right to intellectual and artistic property, which guarantees every individual the right to determine to what extent her thoughts, sentiments and emotions will be communicated to others in protecting a similar core of "emotional needs."<sup>277</sup> The protection of the right to first publication does not concern only pecuniary interests. In the possibility to prevent publication, it is an instance of the more general right of the individual to be left alone, which derives from the principle of inviolability of personality.<sup>278</sup> By analogy, they situate the protection of this right in the general notion of property, already protected by common law. The idea underlying their reasoning is the Lockean trilogy of the protection of life, liberty and property.<sup>279</sup> They also propose limits to the right to privacy consent to the publication, and the general or public interest of the subject.<sup>280</sup> The status of an individual, deploying an activity in the public sphere, could also legitimize publication of information concerning her.<sup>281</sup>

The first attempts to apply the theory of Justice Warren and Brandeis concerning the appropriation of a person's image for commercial purposes. Courts were initially reluctant to recognize the protection of the right.<sup>282</sup> The first recognition came in 1905 by the Supreme Court of Georgia<sup>283</sup> and was promoted by the Restatement of Torts of 1939.<sup>284</sup>

274. Warren & Brandeis, *supra* note 253, at 216.

275. *Id.*

276. *Id.* at 195.

277. *Id.* at 198.

278. *Id.* at 205.

279. MARY A. GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 51 (1991).

280. Warren & Brandeis, *supra* note 205, at 199.

281. *Id.*

282. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (1902) (concerning a flour company's publication of advertising posters featuring the image of a young girl). *Id.* at 449. [The Court of Appeals of New York held that Roberson did not have a cause of action for the protection of her privacy, for the right was not recognized by the state of New York nor by common law. Dissident judges accepted Warren and Brandeis's point. The decision, was disapproved by the public and led to a New York state law protecting the right to privacy, instituting compensatory and punitive damages for the appropriation of the image or the name of a person without her written consent and for commercial profit.]

283. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 194 (1905) ("A right of privacy in

The *Restatement (Second) of Torts* systematized four types of torts, corresponding to four kinds of violations of privacy: unreasonable intrusion upon the seclusion of another,<sup>285</sup> unreasonable publicity given to the other's private life,<sup>286</sup> publicity that unreasonably places the other in a false light before the public,<sup>287</sup> and appropriation of the other's name or likeness.<sup>288</sup> The tort action of the right of privacy is not recognized in all states.<sup>289</sup> The appropriation of the image of a person for commercial purposes is protected by the legal order of the United States, and almost in the same way in France. Differences exist in the protection of the first three facets of violation of privacy in relation to the First Amendment. The action concerning the publication of private facts is developed in § 652D of the *Restatement (Second) of Torts*:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that a) would be highly offensive to a reasonable person, and b) is not of legitimate concern to the public.<sup>290</sup>

In the same spirit publicity placing person in false light as a tort cause of action is described in § 652E of the *Restatement* as follows:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b)

---

matters purely private is therefore derived from natural law." In the form of appropriation of one's image or likeness.)

284. RESTATEMENT (SECOND) OF TORTS § 652B-F (AM. LAW INST., 1977).

285. *Id.*

286. *Id.* at § 652D.

287. *Id.* at § 652E.

288. *Id.* at § 652C.

289. *Klein v. Victor*, 903 F.Supp. 1327, 1337 (E.D. Mo. 1995) (Missouri does not recognize a cause of action for "false light" invasion of privacy separate from defamation). *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 684 (Ind. 1997) (Indiana does not recognize the subtort of public disclosure of private facts). *Brunson v. Ranks Army Stores*, 73 N.W.2d 803 (1955); *Henry v. Cherry & Webb*, 73 A. 97 (1909); *Schaefer v. State Bar of Wis.*, 252 N.W.2d 343 (1977) (The right of privacy is still rejected by the last decisions in three states).

[It is presently recognized, in one form or another, in Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, and West Virginia. It has also been recognized by a federal court in Minnesota. In Colorado, Massachusetts, North Dakota, and Washington the courts, while deciding cases on other grounds, have avoided stating that the right of privacy is not recognized. In New York, Oklahoma, Utah and Virginia, the tort action is created by statute applying to the form of invasion covered by § 652C. There appear to be no holdings in Maine, Vermont and Wyoming.]

290. RESTATEMENT (SECOND) OF TORTS § 652B-F.

the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.<sup>291</sup>

This rule, providing general criteria of equilibrium between the two rights in conflict, raises questions of methodology of interpretation. It is very difficult to define what constitutes publication "highly offensive to a reasonable person." The "reasonable person" is thought to be an abstraction, representative of the normal standard of communal behavior, it is in reality an "enigma," a "generic construction without real emotions."<sup>292</sup> The legal category of "highly offensive" facts creates difficulties of interpretation concerning concepts to be determined by the judge ad hoc.<sup>293</sup> Is reasonable or unreasonable what is admissible or not in a community at a specific moment.<sup>294</sup> It expresses a value judgment which allows the legal expression of the ex ante understandings of the interpreter concerning what constitutes "publicity," "reasonable person," and "particularly offensive character." These key concepts allow perceiving the difference of appreciation of freedom of expression and of the concept of publicity in the two legal orders.

Robert Post<sup>295</sup> proposes a normative understanding of these concepts: the reasonable person is neither an empirical description of what a majority thinks, nor a prediction of majority sentiments, but an instantiation of community norms. He introduces the notion of "social" personality, constituted by the observation of "civility" rules, with which others help a person complete her self-image.<sup>296</sup> To the extent that real personalities of socialized individuals are in conformity to their social personalities, having interiorized civility rules defining their social personalities,<sup>297</sup> the term "reasonable person" in tort law can protect the emotional well-being of real plaintiffs. The notion "social personality"

291. *Id.*

292. Robert Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 961 (1989)

293. FOR AN ANALYSIS ON SIMILAR CONCEPTS WHICH DUE TO THEIR INDETERMINABILITY ALLOW FOR THE DISCRETION OF THE JUDGE OF EACH SPECIFIC CASE SEE THE COLLECTION OF ESSAYS, *LES NOTIONS A CONTENU VARIABLE EN DROIT* (Chaïm Perelman & Raymon Vander Elst eds., 1984) 46.

294. Chaïm Perelman, *LE RAISONNABLE ET LE DERAISONNABLE EN DROIT, AU-DELA DU POSITIVISME JURIDIQUE* 15 (1984).

295. Post, *supra* note 292.

296. E. GOFFMAN, *The Nature of Deference and Demeanor*, in *INTERACTION RITUAL: ESSAYS ON FACE TO FACE BEHAVIOUR* 477-78 (1967), (who presents social interactions as founded upon rules of deference and the attitude of others towards someone as rules by which every individual finds the evidence of the existence of oneself, and which constitute the factors of social cohesion).

297. *Id.* at 478.

serves to define the community in which the reasonable person is by referring to a total of civility rules, which give form and normative substance to the society which shares them.<sup>298</sup> Discerning and applying these rules is entrusted to a jury, a group of persons chosen as representative of the community. Thus, the question emerges whether the "reasonable" character is by definition social. Is a subjective standard concerning the person whose information is published, preferable to a standard presented as "objective," intersubjectively shared, according to the opinion of the jury or the judge of the case?<sup>299</sup> Should it concern the individual affected or the community in which she lives? The notions of "normative identity" and "social" personality have little interest for the persons who did not suffer a real humiliation by the publication and who will not sue. The common law reflects to some extent the norms of civility dominant in a community.<sup>300</sup> This approach objectifying and making abstract the concept of the reasonable person, means that American courts recognize violations of privacy more rarely than French courts. The consent of the person concerned by the publication is not as important as the standards of the community. Hypersensibility of a person concerning what information she wants to keep private is not protected in the United States. French law on the contrary requires express consent of the person for each publication of "private" information.<sup>301</sup>

"Publicity" is also submitted to socially determined variability and evaluated in relation to factors like social occasion, aim, time, and status of the person who publishes, and the audience of the revelation. The *Restatement* defines publicity as communication of information "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."<sup>302</sup> This tort aims at maintaining civility rules, which protect a "territory" of information, a plethora of information that an individual does not want to make known to others. American courts rarely protect this right.<sup>303</sup> The

298. *Id.* at 477-78.

299. Diane L. Zimmerman, *Requiem for a Heavyweight: a Farewell to Warren and Brandeis's Privacy Torts*, 68 CORNELL L. REV. 291, 299 n.32 (1983), ((despite the fact that courts seem to use the "objective" standard of a reasonable person, it is doubtful if they actually use it. The author cites *Cason v. Baskin*, 20 So.2d 243 (1944), where the Florida Supreme Court ruled that although a reasonable person could not consider that the defendant had violated the privacy of the plaintiff, and despite the fact that many persons would like publicity, to many others it is particularly embarrassing and harmful)).

300. Post, *supra* note 292, at 974.

301. FRENCH LEGISLATION ON PRIVACY, *supra* note 176, at 1.

302. RESTATEMENT (SECOND) OF TORTS § 652B-F

303. One of the few cases recognizing this right is *Melvin v. Reid*, 112 Cal. App. 285 (Cal. App. 1931). Known under the appellation the "Red Kimono case," the case involved a film's

publication of pictures of persons in public places is allowed regardless of the character of the situation. Everything that is visible in a public place can be photographed and published since this means circulating what is already public and what every person, who would be present, could see.<sup>304</sup> A famous case concerning the appreciation of the embarrassing and offensive character of the publication in relation to the objective criterion of the “ordinary sensibilities of a reasonable person” for a public figure is *Sidis v. F-R Publishing Corporation* concerning the life of a child prodigy.<sup>305</sup> The Court held that according to the community mores, “the misfortunes and frailties of neighbors and ‘public figures’ are of a considerable interest for the rest of the population.”<sup>306</sup> The only criterion which could justify recovery is the “intimate and inappropriate” character of the revelation “in a way as to outrage the notion of decency of the community.”<sup>307</sup> Courts made a “mores” test, which created a responsibility only for the publication of those events that are not tolerated by the “customs and the ordinary opinions of the community.”<sup>308</sup> For *Sidis*, the public interest of the publication at stake is to show that failure is also a part of life: this would contribute to the validation of marginalized forms of life.

The general tendency of case law is to give priority to the legitimate interest of the public. The criterion limit imposed by *Sidis* of “outrage,” in relation to the standards of the community, is rarely considered as fulfilled. Courts refused recovery to a minor whose name was pub-

---

revealing to the public of embarrassing private facts concerning the “immoral” past of a person who had tried to move on from her past. Interference with plaintiff’s rehabilitation and “the deliberate indifference of the defendant to the charity which should actuate us in our social intercourse.” However, posterior cases have held that *Melvin* prevailed because “there was the fact of exploitation on plaintiff’s private life for commercial profit in a medium—the motion picture—almost inevitably entailing a certain amount of distortion to capture the attention of the public. If the facts of the murder trial had been set forth in a collection of studies of criminal cases, a different result would be indicated.” *Barbieri v. News Journal Co.*, 56 Del. 67, 74 (Del. 1963).

304. *Gill v. Hearst Pub. Co.*, 40 Cal. 2d 224 (1953) (plaintiff photographed kissing his wife in the market saw his action rejected when the picture was published); *Stessman v. Am. Black Hawk Broadcasting*, 416 N.W.2d 685-87 (plaintiff was filmed while dining in a restaurant and film was broadcasted on a television station). However, when a picture is obtained in a private place, courts hold liability and compensatory damages are attributed.

305. *Sidis v. F-R Publ’g. Corp.*, 113 F.2d 806 (2d Cir. 1940); *cert. denied*, 311 U.S. 711 (1940) (Williams James Sidis, child prodigy in mathematics who graduated from Harvard at sixteen, had lead afterwards a life far from publicity as a clerk due to a psychological change and a posterior aversion from mathematics. His action concerned a publication of the New Yorker, on his adult life, which had a devastating effect upon Sidis and led to his early death.)

306. *Sidis*, 113 F.2d at 809.

307. *Id.*

308. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 397 (1960).



lished as the victim of sexual aggression,<sup>309</sup> to a minor who was arrested as the result of erroneous accusation by the police,<sup>310</sup> to a spectator photographer on the scene of a police intervention in circumstances which can lead the public to believe that he was involved in a criminal activity,<sup>311</sup> and to the parents of these persons seen as newsworthy.<sup>312</sup> Publication of embarrassing pictures that are humiliating and offensive to the sensibilities of the plaintiff is not protected.<sup>313</sup> Publication of pictures of minors without the consent of their parents does not lead to recovery.<sup>314</sup> Publication of sexually explicit pictures of minors might be actionable for violation of anti-pornography legislation but are not private facts if they have been published in a series of websites even without the consent of the person concerned.<sup>315</sup> Republication of a picture once the person has given her consent is not actionable.<sup>316</sup> However, publication for purposes other than the one the person has consented to is actionable.<sup>317</sup> Publication of a picture of a person's home is not actionable as an inva-

309. *Hubbard v. Journal Publ. Co.*, 69 N.M. 473, 368 P.2d. 147 (1962) (Article identified plaintiff minor as a victim of sexual aggression by her brother, also a minor sentenced by juvenile court to serve 60 days in juvenile detention home. A French law currently valid bans publication of names of victims of sexual aggression as well as of minor delinquents.)

310. *Williams v. KCMO Broadcasting Corp.*, 472 S.W. 2d 1 (Mo. Ct. App. 1971) (The court held that "the plaintiff cannot recover unless the publication is such that the defendant should realize that a person of reasonable sensibilities would be humiliated thereby. The law does not protect the overly sensitive and if a reasonable person would not be humiliated by the publicity, no recovery can be had." *Id.* at 3. "Before recovery can be had, it must be shown that publication shows a 'serious, unreasonable, unwarranted and offensive invasion of private affairs' places a heavier burden on the plaintiff than do many of the other jurisdictions." *Id.* at 4. "In the case at bar, plaintiff was involved in a noteworthy event about which the public had a right to be informed and which the defendant had a right to publicize" *Id.* at 5. A French law protecting the presumption of innocence bans publication in news broadcast of any kind of the picture of persons accused in criminal proceedings.)

311. *Jacova v. S. Radio & Television Co.*, 83 So. 2d 34 (Fla. 1955) (Plaintiff was shown in a news telecast being interviewed by the police during a raid as a suspected gambler, although he was just a bystander at a newsstand. The showing of plaintiff's picture was not an unreasonable or unwarranted invasion of privacy as a matter of law).

312. *Smith v. Doss*, 37 So.2d 118 (Ala. 1948)

313. *Neff v. Time Inc.*, 406 F.Supp. 858, 861 (1976) (publication of plaintiff's picture at football game with the zipper of his trousers open).

314. *Nelson v. Times*, 373 A.2d 1221 (Me. 1977).

315. *Doe v. Peterson*, 784 F. Supp. 2d 831 (E.D. Mich. 2011).

316. *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953), *Thayer v. Worcester Post Co.*, 284 Mass. 160, 187 N.E. 292 (1933), *Wendell v. Conduit Machine Co.*, 74 Misc. 201, 133 N.Y.S. 758 (1911).

317. *Manger v. Kree Institute of Electrolysis*, 233 F.2d 5 (2 Cir.1956), *Manville v. Borg-Warner Corp.*, 418 F.2d 434 (10 Cir.1969), *Smith v. WGN, Inc.*, 47 Ill.App.2d 183, 197 N.E.2d 482 (1964), *Myers v. Afro-American Pub. Co.*, 168 Misc. 429, 5 N.Y.S.2d 223 (1938), *affirmed*, 255 App.Div. 838, 7 N.Y.S.2d 662.

sion of privacy.<sup>318</sup> Alternately, plaintiffs would have recovered in all these cases in France.

Cases where damages were recognized include: the use of a person's "before" and "after" plastic surgery photographs by a department store,<sup>319</sup> the presentation of involuntary sterilization,<sup>320</sup> and the publication of embarrassing pictures of a wrestler on announcing news of her death.<sup>321</sup>

The second category of privacy violations is the physical intrusion in the plaintiff's solitary or private affairs.<sup>322</sup> This would also include intrusions without material entry, like telephonic interceptions.<sup>323</sup> Publications of pictures obtained through intrusions of a private place incur liability in both legal orders. The criterion of embarrassment to a "reasonable person" applies here as well. A number of states have passed legislation criminalizing eavesdropping or the recording of confidential communication.<sup>324</sup> Two types of cases of intrusion can concern the First Amendment: publication by knowing the intrusion, and publication by participating in the intrusion. Whereas in France the publication of some information obtained by intrusion is considered a violation of privacy of the persons and entails criminal responsibility.

In the United States, the publication of a piece of information obtained by intrusion is analyzed on a case by case basis. *Bartnicki v. Vopper*<sup>325</sup> held that the First Amendment protects the transmission of a discussion obtained by interception in violation of federal and state law on a question of public interest. The interception was illegal<sup>326</sup> since it was obtained without the consent of the persons participating in the conversation, and the journalists could be aware of that illegality. However, the public interest in the information precludes liability in this

318. *Jaubert v. Crowley Post-Signal*, 375 So.2d 1386, 1388 (1979).

319. *Vassiliades v. Garfinckel's*, 492 A.2d 580, 586-7 (1985). (However the surgeon's conduct had not been outrageous or reckless to justify submitting the issue of punitive damages to the jury)

320. *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 291, *cert. denied*, 444 U.S. 904 (1980). 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980).

321. *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201, 1211 (publication of nude pictures).

322. *Cf. De May v. Roberts*, 9 N.W. 146 (1881).

323. *Rhodes v. Graham*, 238 Ky. 225, 37, S.W., 2d 46 (1931).

324. See CAL. PENAL CODE § 403(a) (Bender-Moss 1921) (repealed 1933).

325. 532 U.S. 514, (2001); See Jesse Mudd, *Right to Privacy v. Freedom of Speech: A Review and Analysis of Bartnicki v. Vopper*, 41-1 BRANDEIS L.J. 179 (2002). Previous famous cases are *Pearson v. Dodd*, 410 F. 2d 710, 133 U.S. App. D.C. 279 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 947 (1969). *Accord, McNally v. Pulitzer Publ. Co.*, 352 F.2d 69, 79 n. 14 (8th Cir. 1976) (dictum).

326. Omnibus Crime Control and Safe Streets Act of 1968, §2511(1)(a), 82 Stat. 197.

case. The European Court of Human Rights issued a decision on a similar question<sup>327</sup> close to the Supreme Court's ruling, establishing that under Article 10 of the ECHR, the publication of a discussion on a question of public interest obtained through interception by persons other than those who gave publicity is protected. The case law of American courts, however, shows a wider understanding of the category "subject of legitimate public interest."<sup>328</sup>

The false light privacy tort that is recognized in the U.S. rarely leads to liability. The harm that this tort aims at restoring consists of two elements: (1) the falsification, whether it is degrading or more favorable than reality, was negligently or intentionally made as to a fact or opinion attributed to an individual, regardless of the aim, and (2) the presentation of the individual before the public. It presupposes a distinction between public identity and private identity, aiming to protect the second from an inexact presentation to the public. Contrary to the French context, American courts impose the standard of "substantial falsification,"<sup>329</sup> which is not considered fulfilled when minor errors exist in a news report. Even if this tort is very close to the defamation tort, it violates privacy by presentation of private facts in a false light, which deprives a person from control of her public image. The Supreme Court cases on this topic will be presented in the case studies analyzed later.

The protection of "informational privacy" does not seem to be a sufficiently important goal to legitimize the mobilization of the mechanism of state constraint in view of regulating data collection. A debate started on whether this data should be submitted to economic liberty, a consideration that would facilitate their regulation, or whether they should be excluded from such protection.<sup>330</sup> Although some think that data collection should be regulated, America reviews the protection of data privacy on a case-by-case basis.<sup>331</sup> Recently, the U.S. Supreme

---

327. *Radio Twist v. Slovakia*, App. No. 62207/00, Eur. Ct. H.R. (2007).

328. *Anderson v. Suitsers*, 499 F.3d 1228 (10th Cir. (2007)). (broadcasting of scenes in videotape handed to police officer with confidentiality agreement and given to the press by officer in violation of that agreement are newsworthy since they are relevant to the prosecution of plaintiff's husband for rape as well as for other sexual assault charges involving multiple victims. The media defendants did not know that the agreement existed. The plaintiff was not identified by name and the excerpted portion of the videotape was limited to a few movements of the alleged attacker's naked body without disclosing the sexual acts in great detail: only plaintiff's feet and calves were clearly visible and they bore no identifying characteristics.)

329. *New York Times Co.*, 376 U.S. 254

330. Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1216 (2005).

331. JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* (2001) (presenting a number of instances of violation of private information by private actors exemplifying the reluctance and the delay with which the state reacts to these violations); *see also*

Court struck down a Vermont law that barred pharmacies from disclosing information to “data miners.”<sup>332</sup> The creation, assemblage, and communication of information are seen to be in the core of the First Amendment. It is part of an expressive activity which should be protected to the detriment of the eventual rights of the concerned persons.<sup>333</sup> According to this conception, the protective regulation of the state would be a limitation of freedom of expression, which cannot be justified.

### *B. The attempts for an equilibrium: “newsworthiness”*

It would seem that the tension between the two rights in conflict lead judges to elaborate the concept “legitimate public interest” (*intérêt public légitime* - “Newsworthiness”) in their efforts to reach an equilibrium between the need to protect these conflicting values. Although the interpretation of “newsworthiness” by United States courts is broad, French courts interpret it narrowly. This is because the United States courts associate the concept of newsworthiness to a descriptive sense. This means that everything already exists in the public sphere, which allows the press discretion on what should be in the public sphere. French courts have a normative understanding of the notion, which leads them to mostly protect privacy.

#### 1. A normative or descriptive notion?

Courts conclude that a revelation is newsworthy once they have balanced all the competing interests, the public interest and the individual interest in privacy. It is a legal “standard” whose role is “to confront [...] the legal technique to the social interests, interpreted by the judge.”<sup>334</sup> The French courts’ legal reasoning is conditioned by an ex understanding in favor of privacy, whereas in the United States the in-

---

Ioanna Tourkochoriti, *The Transatlantic Flow of Data and the National Security Exception in the European Data Privacy Regulation: In Search for Legal Protection against Surveillance*, 36 U. PA. J. INT’L L. 459 (2014); Paul M. Schwartz, *The EU-US Privacy Collision: A Turn to Institutions and Procedures*, 126 HARV. L. REV. 1966, 1978-79 (2013) (discussing the U.S. approach that is largely unregulated, giving companies freedom to “try new kinds of data processing”); Paul M. Schwartz & Daniel J. Solove, *Reconciling Personal Information in the United States and European Union*, 102 CAL. L. REV. 877, 880 (2014).

332. *Sorrel v. IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011).

333. Volokh, *supra* note 120; Michael Froomkin, *The Death of Privacy?* 52 STAN. L. REV. 1461 (2000).

334. Stéphane Rials, *Les Standards, Notions Critiques du Droit*, in CHAÏM PERELMAN & RAYMOND VANDER ELST, *LES NOTIONS A CONTENU VARIABLE* 39, 42 (Bruxelles, E. Bruylant, 1984).

verse attitude is dominant. Freedom of expression and the legitimate public interest condition the construction of the premises of the legal reasoning. The torts protecting privacy are exceptions to freedom of expression. A violation is found almost automatically by French jurisdictions, whereas in the United States, the plaintiff must prove that the publication is not newsworthy.<sup>335</sup> This is justified in reference to the chilling effect that it could have upon the press by requiring proof of newsworthiness.<sup>336</sup>

According to the formulation of "newsworthiness" by the *Restatement (Second) of Torts*:

In determining of what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line must be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.<sup>337</sup>

This empirical approach of the criterion in relation to the mores of the community leads to an annihilation of the protection of privacy. The concept of "mores" contains some elements of normativity. In the various stages concerning the *ought* and the *is*, the mores would be the lowest level of the *ought*, the one that interacts dialectically most closely with the *is*. Giving the advantage to this descriptive definition means narrowing the normative conception of the notion, as the more privacy is violated, the less it will be protected by the courts. The public conceptions of privacy, the notion of decency concerning what is private and what is public, are formed by what has already been published. Under the descriptive definition, judges will refuse liability for those who publish facts which under a normative conception should be protected as private, but whose revelation has become a trivial fact, an everyday reality.<sup>338</sup> The question basically concerns who will decide newsworthiness, the judges or the press. French law gives the advantage to the judges, as agents of the state, whereas United States law privileges press discretion, as an agent of civil society.

---

335. *Diaz v. Oakland Tribune, Inc.*, 139 Cal. App. 3d 118, 126 (1983).

336. *Id.* at 130.

337. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

338. Linda N. Woito and Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185 (1979); David A. Anderson, *The Failure of American IV* 139, 150 (B. Markesinis ed., 1999).

If a legitimate public interest is understood descriptively, this means that there is public interest in a publication only by the fact that this publication took place. A normative conception implies a judgment on the quality of the publication if it is a valuable contribution to public debate.<sup>339</sup> The term “legitimate” refers to a latent value judgment. The normative conception aims to designate a category of discourse that is interesting due to its usefulness for self-government. The descriptive sense, empirically verifiable of the adjective “public,” aims to describe what is already known to the public.<sup>340</sup> Reference to the normative conception of public interest implying an evaluation can lead to limitations of speech, unless one concedes that any subject can be related to self-government. The descriptive conception –founded on an empirical notion of the public as every expression stimulus offered to a sum of persons– might be criticized as likely to have either too wide or too narrow a scope. However, it focuses on the social preconditions concerning the specification of maintaining the quality of discourse as “public.”

The acceptance of the one or the other definition has implications concerning the final conception from a sociological point of view of the distinction between the public and the private sphere, and the role of the judges to define what information should be known. Accepting the descriptive notion means an absolute privilege for the press annihilating all legal remedies for the protection of privacy. If what is worthy of being public is defined in reference to what is already revealed, no legal action makes sense for compensating the violation of another value like privacy, which would be worthy of protection. This implies that the press will arbitrate what should be submitted to the scope of the notion. The courts will be forced to consider that everything that the press prints, is by the fact of having been printed, a question of public interest.<sup>341</sup> The Supreme Court’s fear of self-censorship and the “chilling effect” of limitations to freedom of expression, can lead to a descriptive acceptance of the notion.<sup>342</sup> The interest of the editor to attract readers would be imperative proof of public interest, since proving that an article published and largely distributed was not interesting to the public is

339. Author, *The Right to Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722 (1963) [hereinafter *The Right to Privacy*].

340. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 669 (1990).

341. Harry Kalven, *The Reasonable Man and the First Amendment: Hill, Butts and Walker*, 1967 SUP. CT. REV. 267, 284 (1967) (Criticism addressed to the notion concerning the Supreme Court cases *Time, Inc. v. Hill*, 385 U.S. 374, 412 (1967) and *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967) decided with, *Associated Press v. Walker*, 389 U.S. 28 (1968)).

342. *Id.* at 303.

impossible.<sup>343</sup> A normative understanding of the notion means that the Courts are obliged to determine and balance the social interests, which would justify newsworthiness.<sup>344</sup> In this case, it is the judges and not the press that decide what should be in the public sphere, by employing a multilevel reasoning of principle and consequences on the admissibility of a publication.

The standard of newsworthiness as a defense for privacy torts developed in two ways: it is defined (1) in relation to the quality of the person concerned by the publication as a private or a public figure and (2) in relation to the quality of the subject. The press has the privilege of a "fair comment"<sup>345</sup> concerning "public figures," and for news or questions of public interest. The first category includes commentary on individuals like public figures, candidates for public office, those who appeal to the trust of the public in the professional or financial sphere, and personalities aspiring to public recognition in the domain of the arts, sciences, and sports. The second category concerns persons who have participated, voluntarily or not, to a newsworthy event, e.g., victims or suspects of crimes and accidents. Participation in a newsworthy event is a criterion independent of the person concerned, based on an intersubjective judgment.

The Supreme Court defined "public figure"<sup>346</sup> as including every person who invites attention and critique, holding public office or being a candidate therefore, due to her role of "special prominence in the affairs of society," or due to her having "imposed herself in the avant-garde of specific controversies to influence the resolution of issues involved."<sup>347</sup> The quality of "public figure" is defined in reference to context and apart from special cases; "an individual should not be considered a public personality for all aspects of her life."<sup>348</sup> The rationale for refusing damages to public figures is that they submitted to public con-

---

343. *Id.* at 284.

344. *Id.*

345. RESTATEMENT (FIRST) OF TORTS § 867 cmt. c (AM. LAW INST. 1939).

346. *Gertz*, 418 U.S. at 345 (concerning defamation, where the court defined a different criterion concerning the intentional element for awarding damages in relation to the quality of the persons at stake, that is, "public figures" and non-public figures.).

347. *Id.* ("For the most part, those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.").

348. *Id.* at 324 (on the role of context for the determination of the quality of the "public figure," the Court examined the question in *Time Inc. v. Firestone*, 424 U.S. 448 (1976), stressing the criterion of public or general interest of the publication.).

sideration, and have attracted critique and public commentary.<sup>349</sup> The second concerns persons involuntarily placed under the public eye, having participated in an event, which itself presents a public interest, e.g., the victims or authors of a crime, accident etc. For the Supreme Court, “it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.”<sup>350</sup> Studying the case of involuntary public figures is important as they have not on their own chosen to give up their privacy. Rather, it is circumstances that are outside of their control that make them newsworthy. The question thus becomes, how far should legitimate public interest go concerning these persons? This kind of plaintiff has the same treatment like public personalities, as worthy of legitimate public interest for a temporal period long after their behavior or misfortune placed them under the public’s attention.<sup>351</sup> “As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private.”<sup>352</sup>

In the United States, the continuously increasing scope of the privilege of newsworthiness seems to have annihilated the tort.<sup>353</sup> This is explained by the difficulty of defining the “news” and the fear of press self-censorship contrary to the First Amendment. The Supreme Court in *Cox Broadcasting v. Cohn*, ruled that “newsworthiness” has constitutional value without formulating general principles for the resolution of the conflict between the right to privacy and the public interest in the information.<sup>354</sup> The criterion of the reference to the sensibility of the “reasonable man” is not accepted by the Supreme Court of the United States as sufficient.<sup>355</sup> A category of discourse which is shocking for a member of the community, can be important and is thus protected under the First Amendment. The Court thinks that “offense” is a concept which can only be appreciated in the context of the political and social discourse and only subjectively. In other words, it would not allow a jury to hold a journal responsible on the basis of the opinions and the

349. § 867 cmt. c.

350. *Gertz*, 418 U.S. at 345.

351. § 867 cmt. c.

352. RESTATEMENT (SECOND) OF TORTS § 652B-F (AM. LAW INST., 1977).

353. Harry Kalven, *Privacy in Tort Law – Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROBS. 326 (1966); See *Fla. Star v. B.F.J.*, 491 U.S. 524, 551 (1989). (Judge White, dissent, “I doubt if there are private facts that people can assume will not be published).

354. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

355. *Id.* at 496.



tastes of a jury or on the basis of their disapproval of a specific expression.

The debate on the weight that should be afforded to the right of the public to know and the right to inform the press against the protection of privacy is open. For Diane L. Zimmerman, the interest of knowing elements on the private lives of the other members of society and of evaluating their way of life is a phenomenon which has universal dimensions; from an anthropological and sociological point of view it concerns the need to learn the life attitudes of others in view of changing or strengthening the values of the community.<sup>356</sup> Zimmerman considers "gossip" as a necessary part of everyone's life contributing directly to promote the "market-place of ideas" consecrated by the First Amendment, so that every attempt to limit this discussion will be strictly appreciated. The shift from the life in small communities, where everything was discussed and evaluated, to the anonymous life of the urban centers, led to the press's assumption of this traditional function. The tort for the publication of private facts, established a norm of behavior, which substantially deviates from ordinary practices. Even if a moral consensus on the need to protect privacy can be established, this does not mean that this moral right should be legally forced. For a variety of reasons, i.e., discussion and gossip are largely practiced, the positive law should only accept the current practices as the internal limit of tolerable behavior.<sup>357</sup> Even if the publication of private facts can lead to the distortion of the public image of a person, this is not a sufficient justification for a limitation of freedom of expression. Consequently, the conception of privacy articulates itself in many spheres, depending on various social relations. For Tom Gerety even, if gossip inside a circle of persons can be tolerated as inevitable, i.e., relativizing our control over information which concerns us and diminishing our privacy, this does not necessarily mean that we lose all protection of our privacy; we retain control over the later use of this information.<sup>358</sup> If we accept an articulation of privacy in concentric spheres depending on time and space, we can equally consider that the individual should retain the right to control which sphere of persons will have access to what kind of information. The un-

---

356. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Torts*, 68 CORNELL L. REV., 291, 291-367, 334 (1983).

357. *Id. contra* Thomas Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 328 (1979), Edward Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41 (1974), Melville B. Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

358. Tom Gerety, *Redefining Privacy*, 12 HARV. L. REV. 233, 284 (1977).

controllable dimensions of the publication by the press of an event which concerns us, can substantially threaten this control and our mental health.<sup>359</sup> Applying this reasoning to the case of the right to be forgotten means that it is crucial for a person's mental health to have facts concerning her that were made public in the past be forgotten.

Others, inspired by the libertarian approach of freedom of expression, criticized the standard of "newsworthiness" as implying dangers for a vigorous press. According to this point of view, holding the press responsible for any factually embarrassing report but having informational content would be directly contrary to the Constitution<sup>360</sup> Therefore, there cannot be remuneration except in extreme cases where no other plausible justification of the publication can be found. The Supreme Court of the United States, as sufficient justification to hold the directors of the publication accountable, does not accept the criteria of referencing the sensibility of the "reasonable man."<sup>361</sup> A category of discourse, which is shocking for a member of the community, can, however, be important and is thus protected under the First Amendment of the Federal Constitution. The Court thinks that "offense" is a concept which can only be appreciated in the context of the political and social discourse and only subjectively. In other words, it would allow a jury to hold a journal responsible on the basis of the opinions and the tastes of a jury or on the basis of their disapproval of a specific expression.

In the United States, the discretionary power of the editor is protected under the First Amendment of the Federal Constitution.<sup>362</sup> This is why courts focus on motivation. Justice Harlan provides such justification concerning defamation in *Curtis Publishing Co. v. Butts*.<sup>363</sup> For Harlan, the evaluation of the motivation serves the goal to resolve the antithesis between the interests of the community in the free circulation of information, and those of the individuals to seek remuneration for the harm by a false, defamatory publication since it is an ideologically neutral limitation.<sup>364</sup> This opinion was criticized as focusing on the internal

359. Gerety, *supra* note 22, at 284.

360. Marc Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 823 (1964).

361. *Cox Broadcasting Corp v. Cohn*, 420 U.S. 469, 496 (1975).

362. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) ("Newsworthiness . . . is evaluated with a high degree of deference to editorial judgment"); *Sussman v. ABC*, 186 F.3d 1200, 1202 (9th Cir. 1999); *Anderson v. Suitsers*, 499 F.3d 1228, 1239 (10th Cir. 2007).

363. *Curtis*, 388 U.S. at 130-62 decided with *Associated Press v. Walker* (cases concerning defamation of "public figures," which are close to the cases of protection of privacy concerning the protected interest because public figures are submitted by definition to the notion of "newsworthiness.")

364. *Curtis*, 388 U.S. at 154 (" . . . Impositions based on misconduct can be neutral with re-

motivation of the director of the publication and not on the social utility of the publication, creating an equilibrium in which the interest of the public to obtain some information of value, can be endangered by a requirement of a conduct element which has no relation to the specific case, and which could prevent the press to express itself.<sup>365</sup>

A normative conception underlies the French courts' interpretation of the standard, in the context of its interventionist role in the marketplace of opinions. The judges, representatives of the state, impose on the press, an actor of civil society, their normative conception of newsworthiness. As soon as the revealed facts are considered a private violation of privacy is held to exist automatically. As elaborated earlier,<sup>366</sup> the protection of the right to privacy is detached from the traditional conditions of *mens rea*, proof of fault and harm. Further revelation of private facts is liable, whichever might be the temporal distance between the two publications and whichever might be the notoriety of the person. French law protects the right to be forgotten. A court found liability for the publication of private facts for a person – who had in the past been the involuntary protagonist of a highly publicized event— eight years after the event.<sup>367</sup> Publication of her photographs showing her in a public place, during the exercise of her profession, destined to confirm the information provided without her consent violates also her right to her image.<sup>368</sup>

## 2. Cases of application of the notion

The cases applying the normative notion indicate the differences in the French and American understandings of voluntary and involuntary newsworthy persons. U.S. courts are reluctant to recognize damages to public figures for publication of facts that would be considered “private” in France. This question emerged in reference to cases of “outing,” the involuntary revelation of sexual preferences of public figures, among others. Cases also emerged concerning involuntary public figures' participation in newsworthy events, such as in pending trials, e.g., those accused of having committed crimes and victims of sexual ag-

---

spect to content of speech involved, free historical taint, and adjusted to strike a fair balance between these interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood.”)

365. Franklin, *supra* note 360, at 826.

366. *Id.*

367. CA Paris, 1ère, R. . . c. Soc. Cogedipresse. [Source available in hardcopy at Bibliothèque Cujàs, Paris, France]

368. *Id.*

gressions.

i. Public Figures

The conception of the First Amendment as a tool serving to protect against excessive government intervention upon civil society and the fear against the dangers of regulating speech, is the justification for the *New York Times* liability standard of “actual malice or reckless disregard” for publications concerning public figures.<sup>369</sup> The United States Supreme Court defined “public figures” and “public officials” in the context of defamation in order to delimit when the *New York Times* liability standard should be applied. Nuances concerning the definition of these two categories of persons have a special weight for the definition of the right of the public to know in opposition to “private” persons.

*Gertz v. Robert Welch, Inc.*<sup>370</sup> extends the *New York Times* standard of “reckless disregard” from public officials to public figures. It defines “public figures” as the persons who, due to their notoriety, achievements, or the rigor of their success, seek the attention of the public. These persons obtained this status voluntarily, by assuming roles of special prominence in society.<sup>371</sup> The different liability standard is justified given the opportunities the person has to respond to the defamatory falsehood thereby minimizing the adverse impact on her reputation. Individuals who run for public office must accept the risk of public control, as society is interested in everything that can be related to the relevance of the candidate like dishonesty or improper motivation, even if these elements also concern the private character of the person. The media of communication can act according to the assumption that public personalities and public officials have voluntarily exposed themselves to increased risk of defamatory falsehood. States must retain substantial latitude in their efforts to enforce legal remedies for defamatory falsehood, which can damage the reputation of a private individual, provided that they do not impose liability without fault. The case poses general rules on the quality of the plaintiff as a public figure or not, due to distrust expressed towards the judges and juries of each specific case in

---

369. Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 905-35 (1983-1984).

370. *Gertz v. Welch*, 418 U.S. 323 (1974) (Petitioner was presented as the architect of a “frame-up” part of a nationwide conspiracy to discredit local law enforcement agencies and create a national police force capable of supporting a Communist dictatorship.)

371. *Id.* at 345 (“Some of them occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment”).

view of judging the questions which should be submitted to a "legitimate public interest."<sup>372</sup> It seems motivated by a concern to maintain state neutrality as allowing ad hoc judgments to determine if a subject has a legitimate public interest, even if this leads to incertitude inhibiting speech.

*Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*<sup>373</sup> distinguish the standard of responsibility for "public officials" and "public figures." The similarities and differences between defamation torts concerning public officials and those concerning public figures lead to the application of the standard of "highly unreasonable conduct," constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers," so that a public figure can recover compensatory damages for a defamatory falsehood.<sup>374</sup> The Court stresses the conduct element to "resolve the antithesis between civil libel actions and the freedom of speech and press" since "impositions based on misconduct can be neutral with respect to the content of the speech involved, free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood."<sup>375</sup>

According to Justice Warren's concurrent opinion, the distinction between public officials and public figures under the liability standard for a false and defamatory publication is not justified. The standard proposed by the court is uncertain, and could not guide a jury nor guarantee the protection of discourse and free debate, both fundamental to American society and guaranteed by the First Amendment. Warren thinks that the distinction between "public figures" and "public officials" and the adoption of different standards of proof for every category has no legal or logical basis, neither can it be drawn from the politics of the First Amendment. He puts forward a series of sociological arguments, including the fusion of the private and public sectors particularly after the Depression, the World War II, the international tensions, the national and international markets and the increase in technology and science, which have required national and international solutions.

---

372. *Id.* at 351.

373. *Curtis*, 388 U.S. at 147-48.

374. *Id.* at 155.

375. *Id.* at 153; Harry Kalven, *supra* note 337 at 298-300. (Justice Harlan's opinion was criticized for its premises as well as the liability standard it posed. This commentator doubts whether there is a difference between the criterion of "reckless disregard" in *New York Times* and the one of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" in *Butts* and *Walker*).

A great part of political decisions is no longer taken by the traditional government, but by a whole of councils, committees, commissions, corporations and associations, among which few belong to government. In this context, public personalities play an important role, and citizens have a substantial and legitimate interest in their behavior. It is crucial for the press to engage in an uninhibited debate concerning public officials' acts.<sup>376</sup> Justice Black, a textualist, considers that the Court should abandon even the *New York Times* standard to "adopt [a] rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments."<sup>377</sup>

The standard of reckless disregard or actual malice is applied by courts in privacy cases as a tort cause of action concerning public figures.<sup>378</sup> Few cases have emerged as public figures almost never file lawsuits for unreasonable publicity.<sup>379</sup> Even concerning "limited public figures," for publication of misidentified photos highly offensive to a reasonable person the proof of actual malice is required for recovery.<sup>380</sup> When a publication concerns a private person and a public issue, *Gertz* interpreted by the Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,<sup>381</sup> poses the criterion that the plaintiff must only prove a negligent disregard for truth.

According to Frederick Schauer,<sup>382</sup> the necessity to receive information on candidates for office can be understood by their intended function, i.e., representing the electors in political decision-making about issues concerning their lives. If imperative mandate is impossible, electors need to know the personality of their representatives, to see if they identify with them and trust them to make decisions concerning them.<sup>383</sup> Schauer argues that the problem is transposed to defining which qualities are relevant to a candidate's abilities.<sup>384</sup> As the right to vote derives from the autonomy of every citizen, citizens alone should decide

376. *Curtis*, 388 U.S. at 164.

377. *Id.* at 173.

378. *Buendorf v. Nat'l Pub. Radio, Inc.*, 822 F.Supp. 6 (D.D.C. 1993) (standard of reckless disregard not fulfilled in case of false attribution of homosexuality to individual involved in law enforcement).

379. RESTATEMENT (FIRST) OF TORTS § 652 D.

380. *Lerman v. Flynt Distributing Inc.*, 745 F.2d 123, 130, cert. denied 471 U.S. 1054, (1985) (publication of misidentified nude photos).

381. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

382. Frederick Schauer, *Can Public Figures Have Private Lives?* in 17 THE RIGHT TO PRIVACY 293, 300 (Ellen Frankel Paul et al. eds., 2000).

383. *Id.* at 301.

384. *Id.*

what information is relevant to their voting decisions.<sup>385</sup> Sympathy and trust for someone can be conditioned by one's way of life. According to this conception, human action is unified and homogenous; consequently, the political judgment of a person is connected to her judgment in other areas of life.<sup>386</sup> The decision on the relevance of the criteria to evaluate the candidates for office must be taken by every voter for this is a judgment deriving from individual autonomy:<sup>387</sup> everyone must have the right to determine the criteria upon which they will base their own voting decisions.<sup>388</sup> Thus, the public's right to know is founded directly upon the idea of the social contract. However, for Frederick Schauer, courts should distinguish between political personalities and public personalities, who present a public interest and private individuals, respectively.<sup>389</sup>

The interpretation of the standard of "legitimate public interest" is narrow in France: a relation of strict "relevance" with newsworthiness is required for the publication of private facts.<sup>390</sup> Although some scholars accept an extension of the domain of public life concerning public officials,<sup>391</sup> it is understood narrowly. In French law, the public's right to know concerns only the private facts, which relate to the public function for which they run. Information must be "strictly" related to the public office. French scholarship accepts that, generally, public officials are newsworthy for everything that relates to public office. Public interest in the family life of a public official is justified by the need to affirm compliance with one's ideas: legitimate public interest covers place of birth, religious convictions and family situation.<sup>392</sup> For a politician's family members the criterion of relevance consists in defining a "link" between the behavior of the person concerned and the political function of his or her family.<sup>393</sup> Such a link exists concerning the offenses committed by the family of the personality at stake, just like everything that is thought to provide him or her an advantage or a privilege.<sup>394</sup> In this

---

385. *Id.* at 308.

386. *Id.* at 300.

387. *Id.* at 308-09.

388. *Id.* at 308.

389. Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 934-35 (1983-84).

390. Raymond Lindon, *La presse et la vie privée*, JCP, D., 1965, (1887). [Source available in hardcopy at Bibliothèque Cujàs, Paris, France]

391. *Id.*

392. *Id.* (invoking Raymond the example of Jean Jaurès, questioned by a voter asking him if it was true that as a secular and anticlerical candidate sent his daughters to a religious institution).

393. Cf. Jean-Marie Cotteret, Claude Emeri, *Religion, société, politique, Mélanges en hommage à Jacques Ellul*, 669-686.

394. *Id.* at 343 (Therefore, the publication of the fact that the brother of the president of the

context, a court ordered suppression of some passages from the autobiographical book of a former President of the Central African Republic, which concerned the private and family life of a past president of the French Republic.<sup>395</sup> For the Court, “the will to settle differences must leave out facts and events which concern the privacy of personal and family life of a public official so that it can be exercised within the margins of freedom of the press and information.”<sup>396</sup>

The European Court of Human Rights hesitates to adopt a libertarian conception in favor of freedom of expression, as the case *Plon (société) c. France*,<sup>397</sup> on the ban of a book containing information on President Mitterrand’s health problems, proves.<sup>398</sup> The court considered the ban of Dr. Gubler’s book<sup>399</sup> in which President Mitterrand’s personal doctor detailed how he had falsified reports on the President’s health<sup>400</sup> In conformity with article 10 of the European Convention of Human Rights. The President was suffering from cancer, diagnosed in 1981, some months after his first election to the Presidency of the French Republic.<sup>401</sup> Since the President had promised to publish his health reports every six months, the book refers to the difficulties that the concealment of this illness had caused Dr. Gubler.<sup>402</sup> The book was published at the time of a public debate in France, relative to the right of citizens to be informed about the President’s health.<sup>403</sup> Although Dr. Gubler breached confidentiality established by French law for the medical profession,<sup>404</sup>

---

United States or of the fact that the wife of one of candidates had gone through a treatment for drug addiction would be considered in France as having no link between the behavior of the person concerned).

395. Tribunaux de grande instance [TGI] [ordinary courts of original jurisdiction] Paris, May 14, 1985, *GP*, 2e sem., 608-10 (Fr.). [Source available in hardcopy at Bibliothèque Cujàs, Paris, France]

396. *Id.* at 609. (“As the fact that the person concerned exercises an activity of public man could not authorize or justify some intrusion in what constitutes the ‘private life’ which should be respected as ‘everyone’s right’ (art. 9 of the French civil Code) and as it belongs to the judge to take all appropriate measures to assure the protection of a fundamental prerogative of the personality of the individual, the will to show the accuracy of accusations concerning the political life could not authorize that the intimacy of the adversary be violated.”)

397. *Affaire Éditions Plon v. France*, 2004-IV Eur. Ct. H.R. 31. (2004).

398. *Id.* at 2.

399. *Id.* at 14, 22; CLAUDE GUBLER AND MICHEL GONOD, *LE GRAND SECRET: LE LIVRE INTERDIT* (Paris: Plon, 1996)

400. *Affaire Éditions Plon*, *supra* note 379, at 15.

401. *Id.* at 2.

402. *Id.*

403. *Id.* at 20-21.

404. *Id.* at 12; CODE PÉNAL [C. PÉN.] art. 226-13 (Fr.) (breach of confidentiality is punished with imprisonment and a fine of 15000 Euros.)



his book addressed a topic of vital public interest.<sup>405</sup>

The interim injunction of the urgent-applications judge<sup>406</sup> and the judgment of the Court of Appeals of Paris of March 13<sup>th</sup> prevented the society plaintiff and Dr. Gubler from publishing the book. This Court specified that in the absence of a recourse, the measure would cease to have effect. For the European Court of Human Rights this was a limitation proportioned to the aim of protecting medical secrecy as well as the grief of the relatives of the deceased President. The Court stated that

the distribution so soon after the President's death of a book which depicted him as having consciously lied to the French people about the existence and duration of his illness and [. . .] constituted a prima facie breach of medical confidentiality could only have intensified the grief of the President's heirs following his very recent and painful death. Moreover, the President's death, after a long fight against his illness and barely a few months after he had left office, certainly aroused strong emotions among politicians and the public, so that the damage caused by the book to the deceased's reputation was particularly serious in the circumstances. . . . In view of the date on which the injunction was issued and its temporary nature, the discontinuation of the distribution of the book in question until such time as the relevant courts had ruled whether it was compatible with medical confidentiality and the rights of others, was justified by the legitimate aim or aims pursued.<sup>407</sup>

The court did not take the public interest seriously in the treatment of the President and the falsification of his health report.<sup>408</sup> Instead, it considered that "in the circumstances of the case, the interim injunction by the urgent-applications judge discontinuing the distribution of *Le Grand Secret* may be regarded as having been 'necessary in a democratic society' for the protection of the rights of President Mitterrand and his heirs[.],” legitimizing an obstacle to the democratic debate.<sup>409</sup>

The European court ruling tried to harmonize the privacy rights of the deceased president and his family with the importance of the book for public debate.<sup>410</sup> The Paris Court of First Instance ordered the applicant company to pay damages to François Mitterrand's widow and chil-

---

405. *Affaire Editions Plon*, *supra* note 379, at 20.

406. *Id.* at 4.; Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, January 18, 1996, President (Fr.). [Source available in hardcopy at Bibliothèque Cujàs, Paris, France]

407. *Id.* at 25-26.

408. Pierre Nora, *C'est un secret d'Etat [It's a secret of the State]*, 91 *Le Débat* 49 (1996) (Fr.), available at [http://le-debat.gallimard.fr/numero\\_revue/1996-4-septembre-octobre-1996/](http://le-debat.gallimard.fr/numero_revue/1996-4-septembre-octobre-1996/).

409. *Affaire Editions Plon*, *supra* note 379, at 26.

410. *Id.* at 31.

dren and maintained the ban on the distribution of *Le Grand Secret*.<sup>411</sup> The Paris Court of Appeals upheld the ruling<sup>412</sup> and the *Cour de Cassation* (Supreme Jurisdiction of the Civil jurisdiction) dismissed the appeal affirming these judgments.<sup>413</sup> According to the European Court, these measures providing redress for the damage caused to François Mitterrand and his heirs by Dr Gubler's breach of duty of medical confidentiality, and the liability of the applicant company were compatible with the requirements of Article 10 of the European Convention of Human Rights.<sup>414</sup> The court concluded that, even though the continued ban on the distribution of *Le Grand Secret* was based on relevant and sufficient reasons, the confirmation of the order by the final decision of the *Tribunal de Grande Instance* no longer met a "pressing social need" and was disproportionate to the aims pursued.<sup>415</sup> After all, when the *Tribunal de Grande Instance* of Paris gave judgment, François Mitterrand had been dead for nine and a half months.<sup>416</sup> According to the Court:

as the President's death became more distant in time, this factor became less important. Likewise, the more time that elapsed, the more the public interest in discussion of the history of President Mitterrand's two terms of office prevailed over the requirements of protecting the President's rights with regard to medical confidentiality. This certainly does not mean that the Court considers that the requirements of historical debate may release medical practitioners from the duty of medical confidentiality, which under French law is general and absolute, save in strictly exceptional cases provided for by law.<sup>417</sup>

By the time of the civil court's ruling on the merits not only had some 40,000 copies of the book already been sold, but it had also been disseminated on the Internet and had been the subject of considerable media comment.<sup>418</sup> At that moment, the information contained in the book lost its confidential character.<sup>419</sup> Therefore, the preservation of medical confidentiality could no longer constitute an overriding re-

411. *Id.* at 4; Tribunal de grand instance [TGI] Paris, 1e ch., Oct. 23, 1996, JCP 1997, XXI, 22844, 237, ed. G (Fr.).

412. Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., May 27, 1997, *Editions Plon et autres c/Cts Mitterrand*, D. 1998 Somm. 85-86, note Thierry Massis (Fr.).

413. *Affaire Editions Plon*, *supra* note 54, at 10; Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 14, 1999, *O. Urban et Société des Editions Plon*, Légipresse, No. 169, Mar. 2000, p. 27-28., note E.D. (Fr.).

414. *Affaire Editions Plon*, *supra* note 54, at 27.

415. *Id.*

416. *Id.* at ¶ 53

417. *Id.*

418. *Id.*

419. *Id.*

quirement and by October 23, 1996, when the Paris *tribunal de grande instance* gave judgment, no imperative social need justified maintaining the prohibition to distribute *Le Grand Secret*.<sup>420</sup> If maintaining the book ban was contrary to Article 10 of the ECHR, the compensatory damages accorded to the widow of François Mitterrand and to his children were not: "The measures by which the applicant company incurred civil liability on account of the publication of *Le Grand Secret* and was ordered to pay damages are not as such incompatible with the requirements of Article 10 of the Convention[,]”<sup>421</sup> for they are founded on a pertinent and sufficient justification.<sup>422</sup> This intermediate position attempts to reconcile the necessity to respond to the harm to the relatives of François Mitterrand with the requirements of information.

French case law accepts an extended interpretation of "privacy" and considers that, despite the contribution of private information to public debate, even if falsification by a public official of his health report is at stake, it is not worthy of protection. The law on medical confidentiality protecting human dignity must apply. The Mitterrand case raises the question of whether the book ban aimed at the protection of the dignity of the person concerned or at the dignity of the public office, of the "dignity" of the state<sup>423</sup> In France, the state has a mystical positive authority, contrary to the minimal and instrumental conception dominant in the United States, associated with a requirement of transparency.

With this judgment, the European Court adopted an intermediate point of view reflecting a willingness to "accommodate" the exercise of the two rights: it justified the prohibition of the book by the urgent applications judge, in view of the protection of the mourning of the family of the deceased President, against what *prima facie* constituted a violation of medical confidentiality, but considered that maintaining the prohibition by the judge of the principal case was no longer an appropriate medium to limit public debate, since the passage of time made the public interest in the book more important than the protection of the rights of President Mitterrand in relation to medical confidentiality.<sup>424</sup> The court also referred to a descriptive criterion, that the book was already in the public sphere, that it had been widely disseminated and that it had been the object of media commentary.<sup>425</sup> The compensatory damages to

---

420. *Id.*

421. *Id.* at ¶ 50

422. *Id.*

423. Nora, *supra* note 59, at 49.

424. *Affaire Editions Plon*, *supra* note 379, at 31.

425. *Id.* at 28.

the Mitterrand family were justified, while the ban of the book was not.<sup>426</sup> This means that the duty to abstain from interfering with someone's right generates a positive duty to protect the persons harmed by interference. If a right is less protected in the balance to the advantage of the rights of others, this does not mean any concern, for the protection of the first right vanishes once exchanged against the rights of others. It can remain as a residual source of other duties and obligations, like that of compensation. The balancing latent in the reasoning of the Court consists in attributing an equal weight to freedom of expression and privacy, and in the attempt to find a medium of practical harmonization in the exercise of the two rights.

On the contrary, the United States Supreme Court is predisposed in favor of finding any conceivable justification to refuse media responsibility.<sup>427</sup> The high value attributed to freedom of speech and the precedent of *New York Times v. Sullivan*<sup>428</sup> prevent recovery of compensatory damages to public officials for publication of private facts.<sup>429</sup> The question of relevance of the information concerning public figures is likely to be framed as a content-based distinction, and to be presumed suspicious in relation to the values protected by the First Amendment. This is equivalent to accepting a privilege of the press to define newsworthiness. In France, a publication of pictures or elements which concerned the privacy of the Presidents caused the complete reaction of the country's political and journalistic world, and an interrogation on the role of the media in French society.<sup>430</sup> The publication of photographs of the deceased President, without the consent of the members of his family, entailed liability for punitive damages.<sup>431</sup> In the United States there is a requirement of transparency concerning all the elements, which concern the privacy of political personalities. The various contexts of power will impose various degrees of exposition to the public gaze. Critics of this conception exist in the United States as well. For some, the United

426. *Id.* at 29.

427. Gewirtz, *supra* note # at 140

428. See *New York Times*, 376 U.S. at 254.

429. *Id.* at 279.

430. See e.g. Isabelle Bensaid, *Les atteintes à l'intimité de la vie privée des Hommes Publics par la presse: une étude de cas. La révélation de Mazarine, fille adultérine du Président Mitterrand* (DEA thesis, Paris II ed., 1995). [source available at Bibliothèque Cujàs, Paris, France]

431. Tribunaux de grande instance [TGI] [ordinary courts of original jurisdiction] Paris, 17e, Jan. 13, 1997, *Théron et a. c/Cts Mitterrand, La Semaine Juridique*, JCP 1997, no. 21, 240-244, ed. G. (Fr.), *rev'd*, Cours d'appel [CA] [regional courts of appeal] Paris, 11e, Jul. 2, 1997, D. Jur., 1997, 596-598 (Fr.); *but reaff'd*, Cour de cassation [Cass.] [supreme court for judicial matters] crim., Oct. 20, 1998, D. Jur., 1999, 106-107, note Bernard Beigner (Fr.). [available at Bibliothèque Cujàs, Paris, France]

States presents in this respect a situation of regression; the French civilization, as a post-adolescent civilization, accepts as given that personal relations are essentially private.<sup>432</sup>

According to American theories in favor of freedom of expression, the electors themselves have the right to decide which type of information has a character appropriate to their own voting decisions.<sup>433</sup> The questions of the specific relation of some activity with the specific public post must be decided by each voter herself, since an assertion of relevance presupposes some standard, which itself presupposes a conception of the position in which the characteristic at stake is in causal or indicative relation. The decisions of relevance must immunized from majoritarian control for the practical reason that majorities would have a tendency to limit the voting power of minorities and for the profound reason that the idea of majority rule exists logically and temporally before the taking of majoritarian opinions and should thus be outside of the control of majoritarian modification.<sup>434</sup> If a dimension of democracy is that the people have a non-utilitarian right to decide not only which candidates should be chosen for public functions but, also, on the basis of what criteria this specific decision should be taken, there are important arguments for the limitation of the privacy of the persons at stake. The right to vote, deriving from autonomy, implies that the relation of the content of information required for taking this decision should not be limited. This conception implies that the acting of a person is unified. This idea is expressed in American case-law, to which the publication of any information that would have a potential interest for the capacities of the person at stake should be protected. The American conception is equivalent to accepting a privilege of the press to define what is worthy of legitimate public interest. The question of consequence and of reliability of public personality and their honesty is crucial and worthy of analysis to consider to what extent the modes and choices of life that someone might make could be of interest to the public. However, if responsibility is an important value in a democratic society, it is not a value which should outweigh all others; the protection of privacy is a value that is equally important. Information concerning the privacy of public officials has the potential to distract the attention of the public from their official actions and thus insert obstacles in the public debate.

---

432. Thomas Nagel, *Concealment and Exposure*, 27 PHIL. & PUB. AFF. 1, 2 (1998).

433. Frederick Schauer, *Can Public Figures Have Private Lives?*, in THE RIGHT TO PRIVACY (Ellen Frankel Paul et alii ed. 2000) 293-309.

434. Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 924 (1983-84).

French case law, on the contrary, accepts an extended interpretation of the notion of “privacy” and considers that, whatever might be the contribution of information to the public debate and truth – even if the information proves that a political person has falsified elements concerning his health that he himself had promised to provide to the public –, the expression of the information is not worthy of being protected by the law, as constituting a violation of the medical confidentiality, necessary for the protection of human dignity.<sup>435</sup> Therefore, the circulation of the book *Le Grand Secret* was prohibited and compensatory damages were attributed to the family of President Mitterrand.<sup>436</sup> The case inevitably begs the question of whether the prohibition of the book aimed at protecting the dignity of the person concerned or the dignity of the public function, or the “dignity” of the state, which in France has a mystical positive authority contrary to its minimal and instrumental conception dominant in the United States associated with a requirement of some transparency.

The European Court of Human Rights, which also ruled on the question operating in the European context, adopted an intermediate point of view: it justified the prohibition of the book by the urgent applications judge, in view of the protection of the mourning of the family of the deceased President, against what *prima facie* constituted a violation of medical confidentiality, but considered that maintaining the prohibition by the judge of the principal case was no longer an appropriate medium to limit public debate because the passage of time made more important the public interest in the book than the protection of the rights of President Mitterrand in relation to medical confidentiality.<sup>437</sup> The court also used a descriptive criterion: the fact that the book was already in the public sphere, that it had been widely disseminated and that it had been the object of numerous commentaries in the media.<sup>438</sup> Therefore, for the court, if the compensatory damages to the Mitterrand family were justified, the ban of the book was not.<sup>439</sup>

The European Court adopted an intermediary position in conformity to which rights indicate the way according to which interests generate duties. The duty to abstain from interfering with someone’s right will be accompanied by a positive duty to protect the persons from this interference. The diminution of the protection of a right against the rights of

---

435. *Affaire Editions Plon*, *supra* note 379, at 27.

436. *Id.*

437. *Id.* at 31.

438. *Id.* at 28.

439. *Id.* at 29.

others does not mean the vanishing of this right once exchanged against the rights of others, but the right can remain as a residual source of other duties and obligations like the one of compensation. The balancing latent in the reasoning of the Court consists in attributing an equal weight to freedom of expression and privacy and in the attempt to find a medium of practical harmonization in the exercise of the two rights. For the American conception, on the contrary, if the publication of a piece of information which belonged to the public life of a person concerns the public debate, neither the prohibition of the publication, nor another parallel duty of remuneration, can be justified. The Supreme Court of the United States is predisposed to finding any conceivable justification to refuse the responsibility of the media.<sup>440</sup>

## ii. "Outing"

"Outing"<sup>441</sup> is justified in reference to the need to expose the irrationality of policies discriminating on the basis of sexual orientation and the hypocrisy of secretly homosexual public officials, who publicly support these policies.<sup>442</sup> It aims at providing positive examples of homosexuals to the public, in view of normalizing homosexuality, making it something ordinary and dissipating social stereotypes and stigmatization.<sup>443</sup> The practice is justified thus as promoting a "nomic"<sup>444</sup> goal, inscribed in the context of a general political struggle led by homosexual groups aiming at persuading and promoting acceptance of their values and different ways of life, as a historically oppressed and socially marginalized group. Are these justifications sufficiently important to outweigh the absence of consent of the person whose homosexuality is

440. Gewirtz, *supra* note 260, at 140.

441. The term means revealing the secret homosexuality of a public figure and it is commonly practiced by activist homosexuals in the United States. The etymology of the word comes, in English, from the notion of making someone come "out of the closet" by exposing her homosexuality. See Ronald F. Wick, *Out of the Closet and into the Headlines: 'Outing' and the Private Facts Tort*, 80 GEO. L.J. 413, 433 (1991); Raja Halwani, *Outing and Virtue Ethics*, J. APPLIED PHIL. 19, 141-154 (2002); D.J. Mayo, *Privacy and the Ethics of Outing*, J. HOMOSEXUALITY 27, 47-65 (1994); M. Chekola, *Outing, Truth-telling and the Shame of the Closet*, J. HOMOSEXUALITY 27, 67-90 (1994); Jon E. Grant, *Outing and Freedom of the Press: Sexual Orientation's Challenge to the Supreme Court's Categorical Jurisprudence*, 77 CORNELL L. REV. 77 (1991.)

442. John P. Elwood, "Note, *Outing, Privacy, and the First Amendment*", *Privacy, and the First Amendment*, 102 YALE L.J. 102, 747-48 (1992).

443. *Id.* at 747-776 (1992).

444. Robert M. Cover, *The Supreme Court, 1982 Term, Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); See also William N. Eskridge, *Race Sexuality, and Religion, A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411-2474 (1997).

publicly exposed?

Two tort causes of action are available in the United States to obtain recovery: defamation or unreasonable publicity. Defamation as a tort cause of action imposes the proof of the falsity of the information, of intention to harm or negligence, and of harm caused to the reputation of the plaintiff. In addition, according to case law of the Supreme Court, for public figures the plaintiff must prove actual malice, that is, knowledge or reckless disregard of falsehood.<sup>445</sup> The unreasonable publicity tort concerns true revelations and the choice of this legal action implies admission by the plaintiff of the sexual identity attributed to her. For the case of “outing,” even the defamation tort poses problems concerning the standards of defamation fixed by the Supreme Court<sup>446</sup> when a public figure and a public subject is at stake, *New York Times v. Sullivan* and *Gertz* require that the plaintiff prove the assertion and the author’s reckless disregard concerning its truth. When the case concerns a private person and a public question,, *Gertz*, as interpreted by the Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,<sup>447</sup> the plaintiff must only prove a negligent disregard for the truth of the assertion. The Court suggested that the publication is protected only if it concerns the plaintiff as a public figure, as the person who enjoys notoriety is not presumed as a public figure for all aspects of her life.<sup>448</sup> For homosexual activists, the sexual orientation of a public personality is an element inherent in her quality of public figure.

French law protects privacy in similar cases. If a person decides to file a defamation action, the “*exceptio veritatis*,” which leads to exoneration of responsibility if the fact alleged is true, it will not be applied in the case since sexual orientation concerns the privacy of the person. The choice of the regime of the protection of privacy will offer them an automatic protection against any allegation concerning their sexual identity. Although in France the revelations of homosexuality are considered as constituting violations of privacy, it is not always the case in the United States, where the Courts consider the possibility to give priority to the political considerations of homosexuals. For a French court, “the allegation of homosexuality real or supposed, whichever might be the moral coloration attached, constitutes at least a violation to the privacy of a politician, who has the right to recover by application of the Article 9 of the Civil Code, without any proof of the contrary being admitted in

---

445. *New York Times*, 376 U.S. at 277.

446. Grant, *supra* note 441, at 118.

447. *Id.* at 115.

448. *Id.* at 126.



this domain.”<sup>449</sup>

Two cases decided by U.S. courts are interesting for this debate. *Diaz v. Oakland Tribune, Inc.*,<sup>450</sup> before the California Court of Appeals, concerned the revelation by a journal that student body president of a California College had gone through a gender change operation. The Court held that since Diaz had kept her operation secret from her closest friends, this was an invasion of privacy. The Court reminded that the mere fact that a publication contained private information which is particularly offensive is not enough for recovery. On the basis of the prerogative guaranteed by the First Amendment to the media, a publisher can be held liable only if the publication of information is not newsworthy.<sup>451</sup> The court applied a three-step test considering (1) the social value of the published facts, (2) the extent of the intrusion, and (3) whether the person was a voluntary public figure. It held that the publication exceeded the standards of decency of the community and had been done with actual malice to humiliate and outrage Diaz, since even if Diaz was the first student body president, the publication concerned her privacy and had no relation to her abilities for her function, her judgment, or her honesty.<sup>452</sup> The case stirred a lot of criticism stressing on the quality of Diaz as a quasi-public figure<sup>453</sup>: since she was asking for trust as a candidate to be elected for public office, voters should be allowed to decide for themselves what is relevant to her office; no jurisdiction should be allowed to substitute its judgment for one of the electorate.<sup>454</sup>

A year later, the same Court ruled in favor of free speech against the protection of privacy for an involuntary public figure.<sup>455</sup> Oliver Sipple became newsworthy for saving the life of President Ford by preventing an attempt against his life.<sup>456</sup> Sipple was an ancient combatant of the Vietnam War who was active in the gay rights movement in San Francisco since 1970.<sup>457</sup> His family, who lived in Detroit, was not aware of

---

449. Cour d'appel [CA] [regional court of appeal] Paris, 1ère ch., Feb. 20 février, 1986, D. 1986, somm. 446, note R.Lindon et D.Amson. – [source available at Bibliothèque Cujàs, Paris, France]

450. 139 Cal. App. 3d 118 (1983).

451. *Id.* at 12. (“The proof that defendants have published an article containing highly offensive private matters does not itself establish a claim for relief. . . Only when the embarrassing publicity is not newsworthy can plaintiff recover damages, consistent with defendants’ rights of free speech and press.”)

452. *Id.* at 13.

453. Volokh, *supra* note 120, at 1089.

454. *Id.*

455. *Sipple v. Chronicle Pub'g Co.*, 154 Cal. App.3d. 1040 (1984).

456. *Id.* at 1044.

457. Gary Spieler & Oliver Sipple: *It's Time to Recognize His Heroism*, HUFFINGTON POST (last updated May 25, 2011), available at <http://www.huffingtonpost.com/geri-spieler/oliver>

his sexual orientation. Newspaper disclosures of these facts led to his alienation from his family and to psychological and social problems, which led him to commit suicide ten years after saving the President's life.<sup>458</sup> Sipple had filed a lawsuit demanding recovery for disclosure of private facts, stressing that he had kept his homosexuality secret to his parents and that publicity exposed him to scorn, caused him mental anxiety, embarrassment and humiliation.<sup>459</sup> The Court refused to consider him a private character since Sipple's sexual orientation was known largely to the public by his gay rights activism in many cities like New York, Dallas, Houston, Los Angeles and San Francisco.<sup>460</sup> The article merely gave further publicity to a fact already in the public sphere, and which Sipple himself had allowed the public to know.<sup>461</sup> The court held that the publication was newsworthy, referring to "the legitimate political considerations" of homosexuals to combat the stereotypes depicting them as timid, weak and non-heroic.<sup>462</sup> In addition, it was addressing the issue that the President of the United States did not express his gratitude towards the person who saved his life, raising concerns as to whether this was due to his sexual orientation. The case thus concerned the question of capital political importance if the President showed a discriminatory attitude or bias against homosexuality.<sup>463</sup>

This decision was criticized by Ferdinand David Schoeman, who thinks that the distinction between the private and the public is fluid and relative.<sup>464</sup> He proposes a conception of privacy as composed by many levels of reference, concerning various subjects, things, persons, contexts and activities.<sup>465</sup> Even if someone appears in some places as a homosexual activist, this does not mean that the person is deprived of her rights not to reveal her orientation everywhere, or that she should not feel that a violation of her rights has taken place when she is confronted with this revelation in another context.<sup>466</sup> According to this conception of privacy, in relation to various domains of life and various types of intrusions, the participation in a public association, like, for example, an association defined by homosexual orientation, should be considered as

---

sipple-its-time-to\_b\_800901.html.

458. *Sipple*, 154 Cal. App. at 1044.

459. *Id.* at 1049.

460. *Id.* at 1047.

461. *Id.*

462. *Id.* at 1049.

463. *Id.*

464. Ferdinand D. Schoeman, *PRIVACY AND SOCIAL FREEDOM* 142 (Cambridge Univ., 1992).

465. *Id.* at 142-56.

466. *Id.*

worthy of protection.<sup>467</sup>

iii. Newsworthy persons

a. Judicial proceedings, persons accused of committing crimes, victims of sexual aggressions

Another series of “delicate questions” concerning the balancing of the two rights in conflict, the right to freedom of expression and the protection of privacy, concern the publication of elements of identification of the persons involved in judicial proceedings, minor delinquents, and victims of sexual aggressions. Although, in France, a regime of strict protection of the personality rights of newsworthy persons applies, according to the United States Supreme Court, every piece of information resulting from a public file, like, for example, official judiciary files, is considered as being in the public domain, and can thus be reported by the media, provided that it has been lawfully obtained.<sup>468</sup>

The publication of any element of identification of victims of sexual aggressions and minor delinquents is prohibited in France.<sup>469</sup> The same law criminalizes the publication of pictures of suspects and victims of crimes, as well as “the transmission by any medium of the reproduction of the circumstances of a crime or an offence, when this reproduction violates the dignity of the victim.”<sup>470</sup> The law, reflecting a long case law on the same topic maintains the necessity of the consent of the person, for the publication of these elements.<sup>471</sup> Publicizing elements of a sexual assault victim’s identity, images of one accused in a criminal proceeding who has not yet been condemned<sup>472</sup> a minor victim<sup>473</sup> or author of an offense,<sup>474</sup> may incur criminal liability. The consti-

467. *Id.* at 156.

468. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975), *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

469. Loi 2000-516 du 15 juin 2000 renforçant la protection de la présomption d’innocence et les droits des victimes [Law 2000-516 of June 15, 2000 strengthening the protection of the presumption of innocence and victims’ rights], *Journal Officiel de la République Française* [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jun. 16, 2000, 9038. [hereinafter Law 2000-516].

470. *Id.*

471. *Id.*

472. *Id.* at art. 35.3. (“Wearing handcuffs or being in a provisory detention”, the same article criminalizes the realization or publication or commentary of an opinion poll or any other consultation concerning the culpability of a person involved in a criminal proceeding or on the punishment likely to be imposed on her.).

473. *Id.* at art. 39.2.

474. *Id.* at art. 39.

tutionality of these laws is not contested and the French Constitutional Council has not given its opinion.<sup>475</sup>

French law foresees criminal sanctions for publicizing elements of a minor delinquent's identity and the proceedings in the media.<sup>476</sup> As an exception to the general rule of criminal trial transparency,<sup>477</sup> trials against minors may not be made public.<sup>478</sup> The law extends liability to the author of the report, the editor, and in the absence of these, the printer, and distributor of the printed publication.<sup>479</sup>

Article 39 of the law of July 29, 1881 (modified), prohibits the press's publication of elements concerning judicial proceedings in cases of divorce, affiliation, marriage annulment, abortion, and in cases of defamation—when the proof of truth concerns facts on a conviction which has been proscribed, given amnesty, or erased due to rehabilitation or revision.<sup>480</sup> The principle of publicity applies again as soon as the decision is announced. Reminding criminal convictions, disciplinary or professional sanctions, and forfeiture of rights in cases where amnesty has been given are also prohibited.<sup>481</sup>

According to United States Supreme Court case law, the press's publication of a minor sexual assault victim's identity, or a delinquent minor's identity, is constitutional. The Supreme Court of the United States held in a number of cases that state laws prohibiting this type of publication run afoul of the First Amendment.<sup>482</sup> In *Cox Broadcasting Corp. v. Cohn*,<sup>483</sup> the court held that a Georgia law prohibiting the publication of the name or identity of a victim of sexual aggression was unconstitutional. This is a narrow ruling applicable only to the case at stake. The protection of her privacy did not outweigh the press's free-

475. *Id.*

476. Ordonnance 45-174 du 2 février 1945 relative à l'enfance délinquante [Ordonnance 45-174 of February 2, 1945 on juvenile delinquency], Nov. 26, 2015, Article 14 (Fr.). Thus, a case like *Hubbard v. Journal Publ. Co.*, 69 N.M. 473, 368 P.2d. 147 (1962) (denying liability to the publication identifying plaintiff minor as a victim of sexual aggression by her brother, also a minor sentenced by juvenile court to serve 60 days in juvenile detention home, would be impossible in France.)

477. CODE PÉNAL [C. PÉN.] art. 306 (Fr.)

478. *Id.*

479. Ordonnance 45-174 du 2 février 1945 relative à l'enfance délinquante [Ordonnance 45-174 of February 2, 1945 on juvenile delinquency], Nov. 26, 2015, Art. 14-1 (Fr.).

480. Law 2000-516, *supra* note 457.

481. Loi 81-736 du 4 août 1981 portant amnistie [Law 81-736 of August 4, 1981 amnesty bearing], Aug. 8, 2011, Article 25.

482. See generally *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); *Florida Star v. B.F.J.*, 491 U.S. 524 (1989); *Globe Newspaper v. Superior Court*, 457 U.S. 596, 607-08 (1982); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 108-09 (1979).

483. *Cox*, 420 U.S. at 495-96.

dom of expression, as the information was obtained from a public record.<sup>484</sup> The journalist had obtained the name by examining the indictments available for his inspection in the courtroom and had broadcasted them in a news report concerning the court proceedings.<sup>485</sup> For the Court, “[t]he interests of privacy fade when the information involved already appears on public record, especially when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press.”<sup>486</sup>

The court stresses the legitimate interest of the public in a newsworthy criminal event and the legal process resulting from its occurrence. It refers to the responsibility of the press to report the operations of government, associated with the Madisonian concept of self-government and public benefit, which results from having information on the actions of government *lato sensu*. In a system of government founded upon control of public officials—judges included—by the citizens, information existing in public records is necessary to those who are concerned with government operations. Publications concerning legal proceedings guarantee equity in the process and in the control of administering justice.<sup>487</sup> The Court uses two criteria: a formal criterion, the public record, together with a substantive criterion, by which the information existing in public records is intrinsically associated with the government’s operations. The French law mentioned above prohibits the publication of the same information despite its existence in public records.

In *The Florida Star v. B.J.F.*<sup>488</sup>, a case also concerning the publication of the victim of a sexual aggression’s identity, the Court referred again to the formal criterion, holding that freedom of the press should outweigh the victim’s interest in privacy, since the information published was true and had been lawfully obtained. This was also a narrow ruling. The journalist had obtained the name of the victim from a police

---

484. *Id.* at 496-97.

485. *Id.*

486. *Id.* at 493-95.

487. *See id.* (“By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. . . . We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the press to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public.”)

488. *The Fla. Star*, 491 U.S. at 524.

report, which was in the pressroom of the Florida Police Department.<sup>489</sup> Florida had enacted a law, similar in many respects to the one valid in France, making it unlawful to publish the name of a sexual offense victim.<sup>490</sup> The Court recognized that the law served significant interests like the protection of privacy and physical security of victims facing potential retaliation, and the aim to encourage the reporting of these crimes without fear of exposure. However, the imposition of liability went against the First Amendment since the information was already in the public sphere, in a report available to everyone in the Police Department's pressroom.<sup>491</sup> When the government itself provides this information to the media, less drastic means exist to guard against the dissemination of private facts than punishing truthful information.<sup>492</sup> This is certainly a "Delphic" judgment: it reasonably begs the question: What would be the best medium to protect the victim of sexual aggressions from the wrongful use of the information concerning them other than the establishment of a judiciary precedent which holds liable all use of this kind of information? The Court also repeats a position—that liability of the editors for the publication of a piece of accurate information would lead the press to "timidity and self-censorship."<sup>493</sup>

A second problem with Florida's law was that it established a wide scope of the negligence *per se* standard applied under the civil cause of action.<sup>494</sup> The French law banning the publication of elements of identi-

489. *Id.* at 535-36.

490. Florida Stat. § 794.03 (1987) provides in its entirety: "Unlawful to publish or broadcast information identifying sexual offense victim.—No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor of the second degree, punishable as provided in § 775.083, or § 775.084."

491. *The Fla. Star*, 491 U.S. at 524.

492. *Id.* at 539. ("Once the government has placed such information in the public domain, "reliance must rest upon the judgment of those who decide what to publish or broadcast", *Cox Broadcasting v. Cohn*, 420 U.S. at 496, and hopes for restitution must rest upon the willingness of the government to compensate victims for their loss of privacy and to protect them from the other consequences of its mishandling of the information which these victims provided in confidence.)

493. *Id.* at 535.

494. *Id.* at 540 (In other words, on the basis of the negligence *per se* standard, the publication *per se* was enough to hold the editors liable, without taking into consideration other factors as for example if the identity of the victim was already known in the community, if the victim had voluntarily attracted public attention on the aggression or if the identity of the victim had otherwise become a subject of public interest, for example because questions have arisen regarding whether the victim fabricated an assault by a particular person. This requirement of the law was not in conformity to the common-law tort of invasion of privacy which requires case-by case findings that the disclosure of a fact about a person's private life was one that a reasonable person would find highly offensive).

fiction of the victims of sexual aggressions is enunciated in such a way that the editor is directly held liable for the publication.<sup>495</sup> Next, for the Court, the "instrument of mass communication," which was required by the law for liability, is uncertain. It does not apply to the individual who disseminates the elements of a victim's identity, although "the communication of such information to persons who live near, or work with, the victim may have consequences as devastating as the exposure of her name to large numbers of strangers."<sup>496</sup> It concludes that when a state takes the extraordinary measure to punish the publication of true information, in the name of privacy, it must prove this interest by applying the prohibition "evenhandedly, to the small time disseminator as well as the media giant."<sup>497</sup> The Court played a balancing act: the need to protect the rape victim against any revelation of her identity, and the concern of any limitation to freedom of expression.<sup>498</sup> The immediate result of the decision was the reversal of judgment in favor of a rape victim who was even more terrorized by her aggressor when the newspaper published her name. The case was criticized as annihilating the privacy tort.<sup>499</sup> State courts had refused earlier liability for publicizing names of minor victims of sexual aggressions, holding that the interests in privacy fade when the information involved already appears on the public record.<sup>500</sup>

---

495. Ordinance 45-174 of February 2, 1945, Art. 14 (Fr.)

496. *The Fla. Star*, 491 U.S. at 541.

497. *Id.* ("Where important First Amendment interests are at stake, the mass scope of disclosure is not an acceptable surrogate for injury". The selective prohibition of mass media publications is not enough to satisfy the objective of protecting of victim; attentive and inclusive precautions against all possible forms of dissemination should be posed instead. "The statute's facial underinclusiveness . . . raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which appellee invokes in support of affirmance"); *Id.* at 540.; *see also id.* at 542. (the concurring opinion of justice Scalia, J.: "This law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself. Such a prohibition does not protect an interest 'of the highest order'". This argument was considered as annihilating the action foreseen by the common law of the states for the publication of private facts and which finds application equally in the wide diffusion of the public and not only to a small group of persons); Volokh, *supra* note 120 at 1049.

498. *The Fla. Star*, 491 U.S. at 530.

499. Van Wei Loreley, *Private Facts Tort: The End is Here*, 52 OHIO ST. L.J. 299 (1991). James R. Beattie Jr., *Privacy in the First Amendment: Private Facts and the Zone of Deliberation*, 44 VAND. L. REV. 899 (1991). Marta Goldman Stanton, *Florida Star v. B.J.F.: The Wrongful Obliteration of the Tort of Invasion of Privacy through the Publication of Private Facts*, 18 HASTINGS CONST. L.Q. 391 (1991). Jacqueline R. Rolfs, *The Florida Star v. B.J.F.: The Beginning of the End for the Tort of Public Disclosure*, 1990 WIS. L. REV. 1107 (1990). Editors *An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases*, 124 U. PA. L. REV. 1385 (1976). Deborah W. Denno, *Perspectives on Disclosing Rape Victim's Names*, 61 FORDHAM L. REV. 1113 (1993).

500. *Poteet v. Roswell Daily Record, Inc.*, 92 N.M. 170 (1978) (discussing a publication con-

The minority Justice White, Chief Justice Rehnquist and Justice O'Connor stressed that the strict control of the Court in this case, for criminalizing the publication of true information concerning privacy, leads to negating any protection to privacy whatsoever.<sup>501</sup> The justices considered the decision an impasse<sup>502</sup>: even when the victims' names are published by mistake, the standards of decency existing in a community should prevent additional publication. The majority argument that the standard of responsibility imposed by Florida law is strict, as it can lead "automatically" to liability, is not pertinent. The Florida legislature, reflecting popular sentiment on this question, determined that the revelation of the fact that a person went through a sexual aggression is something that reasonable persons found offensive. The factual questions invoked by the Court, for example if the identity of the victim was already known, are to be appreciated *ad hoc*. For these justices, the legislator limited the scope of the ban of the publication to instruments of mass communication, considering that large-scale dissemination is likely to cause more harm to the victims of sexual aggression than small-scale.

The majority opinion does not seem to take seriously any consideration of proportion of the audience that has access to some information. Even if some elements of a person's identification are on a public record, this does not mean necessarily that the information should be further disseminated. Even if a piece of information was *lawfully* obtained, this does not mean at the same time that it was *properly* obtained. A distinction between empirical revelation and normative revelation seems necessary. The protection from psychological trauma often endured by sexual assault victims is an interest, which should outweigh the right to information. The notion of privacy is a relative notion, concerning various persons and different contexts of communication. It should be understood as composed by different spheres, which might overlap. Even if the State's interests in maintaining public records are important, the protection of the victim's psychological well-being is a significant interest, which justifies limiting public dissemination. The arguments drawn from the reference to the notion of democracy and the control of the proper functioning of the judiciary do not seem pertinent

---

cerning minor victim of sexual assault protected by constitutional privilege of the press).

501. *The Fla. Star*, 491 U.S. at 550-51. ("If the First Amendment prohibits wholly private persons (such as B.J.F.) from recovering for the publication of the fact that she was raped, I doubt that there remain any 'private facts' which persons may assume will not be published in the newspapers or broadcast on television")

502. *Id.* at 553. ("Today we hit the bottom of the slippery slope").



in this case. The elements of identification of the victims of sexual aggressions do not add any value to publication. Their publication only multiplies trauma. French law does not allow for a similar exception to the prohibition depending on whether the information was lawfully obtained by the press.

In *Globe Newspaper v. Superior Court*, the Supreme Court held that the interest in protecting minor victims of sexual aggression from further trauma and embarrassment does not justify a mandatory closure rule in trial, but only a requirement on a case-by-case basis upon the trial court to determine whether the State's legitimate concern for the minor victim's well-being necessitates closure.<sup>503</sup> A Massachusetts law foreseeing a general closure of the proceedings from the public<sup>504</sup> violates the First Amendment and the necessity to assure an informed "discussion of governmental affairs."<sup>505</sup> Denial of the rights of access in order to inhibit the disclosure of sensitive information must be necessitated by a compelling government interest and must be narrowly tailored to serve that interest.<sup>506</sup> Safeguarding the physical and psychological well-being of a minor is a compelling interest, but it does not justify a mandatory closure rule.<sup>507</sup>

Although the Court attributes some weight to the protection of minor victims of sexual aggressions from trauma or embarrassment, it attributes even less weight to the rehabilitation of minor delinquents.<sup>508</sup> The Court gave two decisions concerning publications of elements of identification of minor delinquents. In *Oklahoma Publishing Co. v. District Court*, it held that a state court injunction prohibiting the publica-

---

503. *Globe Newspaper*, *supra* note 479, at 607-08.

504. MASS. GEN. LAWS ANN., ch. 278 §16A, provides in pertinent part: "At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case."

505. *Globe Newspaper*, *supra* note 479, at 604-05.

506. *Id.* at 596.

507. *Id.* at 609 (For the Court the Commonwealth of Massachusetts did not offer any empirical support for the claim that the rule of automatic closure will lead to an increase in the number of minor sex victims coming forward and cooperating with state authorities); *Id.* at 617 (This argument is criticized by the dissenting opinion of justice Burger and Rehnquist, who think that only by allowing state experimentation may such empirical evidence be produced) *Id.* at 610 (The Court also concludes that the Commonwealth's assertion that the law might reduce underreporting of sexual offenses fails "as a matter of logic and common sense"); *Id.* at 618 (This argument has also criticized by the two dissenting justices who note that the law aimed at preventing a voyeuristic audience which would create a devastating experience for a minor victim. For the judges the closure determination should not be left to the idiosyncrasies of individual judges subject to the pressures available to the media)

508. *Id.* at 608-09.

tion of the name and the picture of a minor who was being tried before a juvenile court was contrary to the First and Fourth Amendments, since the elements of identification of the minor had been taken during the instruction of the young delinquent, when the members of the press were present, without any objection on behalf of the judge, the prosecutor or his defense counsel.<sup>509</sup> The name and the picture of the young delinquent had been published in a report concerning judiciary proceedings against the crime.<sup>510</sup>

In *Smith v. Daily Mail Publishing Co.*,<sup>511</sup> the Court once again used a formal criterion to consider as contrary to the First and Fourteenth Amendments of the Federal Constitution, the criminalization by a West Virginia Statute of the publication of the name of a minor delinquent accused of murder<sup>512</sup> when the information was “lawfully” obtained by the press. The Court held that, regardless of whether the law operated as a prior restraint or as a penal sanction, only an imperative interest can justify criminal sanctions on a newspaper for the truthful publication of an alleged juvenile delinquent’s name that was lawfully obtained.<sup>513</sup> The State’s asserted interests in protecting the anonymity of juvenile offenders to further their rehabilitation—since publication may encourage antisocial conduct and may cause the juvenile to lose further employment or suffer other consequences—were not sufficient enough to justify the application of criminal sanctions.<sup>514</sup> The law did not satisfy constitutional requirements as it had a very narrow scope; it applied only to “newspapers” and not to other forms of publication, such as electronic media.<sup>515</sup> Even assuming it served a State interest of the highest order, it did not accomplish its stated purpose. For the Court, “there is no evidence to demonstrate that the imposition of criminal [penalties] is necessary to protect the confidentiality of juvenile proceedings.”<sup>516</sup> Juvenile proceedings may be open to the media and the information collected

509. *Okla. Publ’g Co. v. District Court*, 430 U.S. 308, 310-11 (1977).

510. *Id.* at 311.

511. *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 108-09 (1979).

512. W. Va. CODE § 49-7-3 (1976)(The challenged West Virginia statute provided: “[Nor] shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court. . . .”); W. VA. CODE § 49-7-20. (1976) (“A person who violates . . . a provision of this chapter for which punishment has not been specifically provided, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than one hundred dollars, or confined in jail not less than five days nor more than six months, or both such fine and imprisonment.”)

513. *Smith*, 443 U.S. at 102.

514. *Id.* at 104.

515. *Id.* at 104-5.

516. *Id.* at 105.

from them considered "lawfully obtained." By contrast in France, there is a general prohibition against public access to juvenile proceedings and to the publication of any information concerning them.<sup>517</sup> In the state of California, publication of the names of minor delinquents accused of crimes is not protected since the media "has a statutory right to attend the hearing and a constitutional right to say what transpires."<sup>518</sup>

Beyond the technical difficulties posed by the laws under judicial scrutiny, the Court's judgment of principle concerning the negation of criminal sanctions for the publication of identification elements of a minor delinquent justified as not constituting a "compelling interest," which alone could justify a limitation of freedom of expression under the First Amendment allows for critique. It tends to ignore the emotional vulnerability of minor delinquents. Even if the press is free to describe the details of a minor's offense and to publicize the evolution of the proceedings,<sup>519</sup> the public release of the minor's identity does not seem to serve any additional purpose. Our conscience and conception of the self is formed by how others behave toward us and the expectations that they impose upon us<sup>520</sup> The stigmatization of a minor delinquent by the publication of her identity makes her social reintegration almost impossible. French legislation banning the publication of the names of delinquent minors under all circumstances is more effective. The relevant

---

517. *Id.* at 106 (Rehnquist, J., concurring).

518. *KGTV Channel 10 v. Superior Court*, 26 Cal. App. 4th 1673, 1675 (1994) [Thus minute order issued by trial court prohibiting the media from disclosing the minor's name or publishing her likeness in connection with reports of the hearing constitutes prior restraint violating U.S. Constitution 1<sup>st</sup> and 14<sup>th</sup> Amendments. Although by 1960 proceedings were private in all 1 cases in California under section B 676, subd. (a), added by Stats. 1961, ch. 1616, B 2. Of the Welfare and Institutions Code, in 1980 the Legislature altered its approach in recognition of the fact that juvenile participation in serious and violent crime was on the rise. The 1980 Amendment retains the same provisions for closed hearings in most cases but requires public admission to hearings where the petition alleges murder and other serious offenses. The courts have given a broad reading to the public's right to attend the hearings]; *Cheyenne K. v. Superior Court*, 208 Cal. App. 3d 331, 337 (1989) [the court determined a minor charged with murder had no right to exclude the public from a competency proceeding]; *Tribune Newspapers West, Inc. v. Superior Court*, 172 Cal. App. 3d 443, 447-448 (1985) [the court held the statute provided a right of public access in section 707 hearings to determine fitness to be tried as a juvenile]; *San Bernardino City. Dep't of Pub. Soc. Serv. v. Superior Court*, 232 Cal. App. 3d 188 (1991) [held that the court has discretion under section 346 to admit the media to juvenile dependency proceedings. Discretion was abused where the court permitted the press to attend the hearings but conditioned attendance upon compliance with unconstitutional restrictions prohibiting publication of the names, characters, cartoons or photographs of the minors, and limiting the media's right to investigate and interview witnesses.].

519. *Id.*

520. Hegel famously describes in HIS PHENOMENOLOGY OF SPIRIT how our consciousness of ourselves is formed in the dialectic with the consciousness of others, PHENOMENOLOGY OF SPIRIT, Engl. transl. by A.V. Miller (1977) 111sq.

clauses do not distinguish between various means of mass communication covering "dissemination in any way it takes place."<sup>521</sup>

Unlike France, the publication of pictures of persons arrested by police wearing handcuffs is protected in the U.S., and innocent bystanders at a police raid erroneously implicated are not entitled to relief.<sup>522</sup> Courts impose the actual malice standard for matters of public concern; mere negligence is not enough.<sup>523</sup> False accusation of murder in the media is protected in Florida, a state which does not recognize false light privacy as a tort cause of action.<sup>524</sup> However, the revelation of a person's true identity, which had been concealed by the federal witness protection program, is not protected as it is not newsworthy.<sup>525</sup>

#### b. Persons involved in newsworthy events

Should erroneous statements about a matter of public interest, like the opening of a new play linked to a real incident, be protected speech? *Time Inc. v. Hill*<sup>526</sup> concerned the publication of *Life* magazine on a theatrical play based upon a novel describing the real experience of sequestration of a family in their house by fugitive prisoners, with photographs of their real house. The event received publicity, but in the meantime, the family had relocated to avoid further public exposure.<sup>527</sup> The family sued for compensatory damages on the basis of the Articles 50-51 of the New York Civil Rights law,<sup>528</sup> alleging that the article intentionally gave the false impression that the play faithfully described their experience and presented them as victims of verbal and physical insults by the fugitive prisoners. The Supreme Court applied the standard of fault established in *New York Times Co. v. Sullivan*, considering that as the article was newsworthy, only the proof that it had been published with actual

521. Law 2000-516 of June 15<sup>th</sup> 2000 Strengthening the protection of the presumption of innocence and the rights of the victims, art. 92 adding article 35.5 to the law of July 29<sup>th</sup> 1881.

522. *Williams*, 472 S.W.2d 1 (Mo. Ct. App. 1971) (Newscast showing person arrested my mistake is newsworthy and thus protected).

523. *Pfannenstiel v. Osborne Publ'g Co.*, 939 F.Supp. 1497, 1497, 1502. (D. Kan. 1996) (Similarly a private individual whose photograph was mistakenly published in a newspaper as that of a convicted mentally ill murderer cannot recover for false-light invasion of privacy, unless a reckless or intentional act is proven rather than mere negligence); *Colbert v. World Pub. Co.*, 747 P.2d 286, 290. (Okla. 1987).

524. *Anderson v. Gannett Co., Inc.*, 994 So. 2d 1048, 1050. (Fla. 2008).

525. *Capra v. Thoroughbred Racing Ass'n of North America, Inc.*, 787 F.2d 463, (9th Cir. 1986).

526. *Hill*, 385 U.S. at 400.

527. *Time Inc.*, 385 U.S. at 376-80.

528. *Id.* at 378. (Which opened a legal action to every person whose name or picture would be used by another without her consent for an aim of commerce or publicity.)

malice – knowledge of its falsity or reckless disregard as to its true or false character – could justify liability.<sup>529</sup> The guarantees of the First Amendment for freedom of expression and the press, applied for the discussion on the official behavior of commissioner Sullivan in *New York Times* must also “embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period [ . . . ] ‘The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press].’<sup>530</sup>

The Court stressed that false assertions on a question of public interest are inevitable; if they are due to simple negligence, they must be protected because “freedom of expression must have the ‘breathing space’ it ‘need[s] to survive.’”<sup>531</sup> Imposing to the press the challenging task of verifying the minute details of facts with the name, the picture or the portrait of a person, may impair the important service of providing free press in a free society aimed to maintain the American political system. The imposition of a negligence standard “would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.”<sup>532</sup> Only deliberate falsehood does not enjoy immunity, since it is not part of an essential expression of ideas. For the Court, the fact that books, newspapers or magazines are sold for profit is not enough to exclude them from the constitutional protection of free expression.<sup>533</sup>

For some, the application of the *New York Times* standard is understandable; defamation and false light are similar, as it is difficult to distinguish between what would be a private fact and what not.<sup>534</sup> For others, if the falsely reported facts concern the privacy of a person, publication should be considered illicit.<sup>535</sup> Even if false light is conceptually similar to defamation, the interests underlying the protection of privacy should be more important in relation to the freedom of expression since the revelation of private, embarrassing facts can cause significant harm.

Courts also struggle with protection of rights of victims’ of newsworthy events such as accidents.<sup>536</sup> For U.S. courts, the rescue and med-

529. *New York Times Co.*, 376 U.S. at 283.

530. *Time, Inc.*, 385 U.S. at 388 (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)).

531. *Time, Inc.*, 385 U.S. at 389.

532. *Id.*

533. *New York Times Co.*, 376 U.S. at 266.

534. Woito and McNulty, *supra* note 4, at 215.

535. Nimmer, *supra* note 357, at 963.

536. *Id.* at 962.

ical treatment of accident victims is a legitimate concern to the public, but the presence of journalists, in vehicles that transfer victims, who record discussions with nurses intrudes upon the victims' right to medical privacy.<sup>537</sup> The French *Cour de Cassation* held that publicizing the picture of a decedent, murdered during a terrorist attack in Corsica, a few seconds after the event was illicit. It also considered that this judgment concerning the publication did not pose any problems in relation to Article 10 of the European Convention on Human Rights.<sup>538</sup> Commentators approved of the result considering that the publication aimed to "stimulate the emotion of the public in order to generate profits," "flatter perverse impulses," and "odiously satisfy some readers to begin with the authors of the crime."<sup>539</sup> Identification of victims in a "particularly ridiculizing situation"<sup>540</sup> constitutes a violation of human dignity. Photos of terrorist attack victims not focusing on a person were held not to be violating human dignity by the *Cour de Cassation*.<sup>541</sup> The "functional complementarity" between the photos and the newsworthy event justified a judgment in favor of freedom of expression.

The reference to philosophical notions of dignity for example, the introduction in a legal norm of a philosophical notion (open to various interpretations) to justify the legal quality of the publication against the right to information, raises concerns. The publication of photographs of victims of terrorist attacks is not a violation of human dignity but a representation of the brutality of reality. If reality is brutal, prohibiting the photos which show it and hiding the importance of the assassination of a person vested with a public function, indicative of an embarrassing social situation, of a problematic social reality is a greater violation of dignity. Information on terrorist attacks is worthy of public interest, as it points to the social discontent which causes terrorism and illustrates the violence that may be triggered by such discontent. Giving publicity to a brutal event serves to denounce the absence of respect for dignity, thus strengthening the need to protect it. It is the assassination, which violates human dignity negating the quality of person of the victim. Publi-

537. *Shulman v. Group W Productions Inc*, 955 P.2d 469 (Cal. 1998).

538. Cass. 1ère civ., Dec. 20, 2000, *Sté Cogédipresse et a. c/Mme Marchand, Vve Erignac et a.* (Fr.)

539. Jean-Pierre Gidel, "Retour sur l'image du préfet assassiné: dignité de la personne humaine et liberté de l'information d'actualité", [Return to the Image of the Murdered Prefect: Human dignity and liberty in the digital age], *D.* 2001, chron., 872-877, 876. (Fr.). Cass. 1ère civ., Dec. 20, 2000, JCP G 2001, 10488, 547-550, note Contra Jacques Ravanans (Fr.)

540. Jean-Pierre Gridel, *Note to Cass.* 1ère Ch. Civ., Feb. 20, 2001, *D.* 1199.

541. Cass. 1ère civ. Feb. 20, 2001, *Sté Hachette Filipacchi associés c/Mme Bruno, épouse Beauvisage*, Bull. civ. I, n° 341. (Fr.) (concerning terrorist attacks in the central subway stop of Saint-Michel of the commuting rail between Paris and its suburbs -RER.)

cations of pictures serve to make public opinion sensitive to newsworthy acts and their social contexts, providing them with information necessary to form their opinions, and thus allowing them to be in a position to judge reality. Any attempt to impose regulations concerning the taking of the picture, the time, the place or the manner is equivalent to limiting the ability of the photographers to communicate their messages to others.<sup>542</sup> The distinction between what is sensational and what is a legitimate assembly of information is elusive.

To conclude, trust towards collective power in France legitimizes intervention to assure that everyone respects human dignity. In the United States, the reference to human dignity remains associated with a conception of negative liberty which prevents limitations to the negative aspect of freedom of expression, even in cases where the privacy of vulnerable individuals is concerned, such as minors accused of committing crimes or victims of sexual aggressions. In France, judges see themselves as legitimized to accept limitations of freedom of expression in order to protect competing rights, whereas in the United States, judges are less willing to accept the same limitations. Freedom of the press as a mechanism of control for the exercise of state power is overvalued in the United States, to the detriment of the protection of "personality rights." The extended interpretation of "privacy" in French law, on the other hand, although protective of vulnerability, leads at the same time to depriving the public debate from information crucial to a well-informed electorate, as the *Plon* case proves. The dangers of erring on both sides are equally worthy of consideration.

## II. CONCLUSION

There is a close association between the ideals of democracy and the search for "truth" in politics.<sup>543</sup> The fundamental rights of the liberal society and the democratic liberties depend on the development and the protection of methods for discovering and transmitting truth, a fact which implies that the public debate must incarnate an approximate form of an idealized market of ideas.<sup>544</sup> If democracy is evaluated in relation to liberty, truth is evaluated in relation to liberty. The falsification or the suppression of information is an important limitation of liberty in itself and prevents its exercise in many domains. Even if total truth can never be achieved in epistemology, it is possible to go beyond the con-

---

542. Samuel D. Warren & Louis D. Brandeis, Note, *Privacy, Photography and the Press*, 111 HARV. L. REV. 1086, 1102 (1990).

543. Bernard Williams, TRUTH AND TRUTHFULNESS 206 (2002).

544. *Id.* at 219.

ception that epistemology is anterior to ethics; if the two are mutually nourished, none among them can pretend to be a priority. The question to ask is: what is the appropriate and necessary truth concerning which activities are pertinent for democracy? The understanding of the idea of legitimacy and of participation implies some tolerance of discourse offensive at first sight, just like the circumstances of its publication. Another characteristic of democracy is distributive justice, or the fact that all goods are well distributed in society. The formation of opinions – concerning what is good in morality and political action – presupposes at times the possession of information on the plans of life and the personal goals of other persons. The interest of the citizens to form voting decisions and to participate in political activity in general. Can it legitimize the disrespect of liberty in the privacy of the personalities charged with a public function in the name of transparency for public life? Does a public official have a right concerning the kind of information for which there would be a legitimate interest of the electorate?

The concept of “right” is thought to protect a fundamental human interest. According to a deontological reasoning, the persons are worthy of respect only because they are human beings, and their rights must pass the generalization test.<sup>545</sup> Violating the privacy of a person, in view of a goal of information, is equivalent to violating her liberty to define, by herself, her right to dispose of some quantity of information, which concerns her and thus means negating the dignity of this person. The generalization test is put aside for this specific case by the reasoning according to which receiving information for some of the most important life decisions, like the ones to define oneself politically by the choice of one’s representatives would justify this exception in the respect due to everyone without distinction.

Freedom of the press is overvalued in the United States, to the detriment of personality rights. Human dignity, beyond its specific contextual conception, has a history in the course of philosophy, which implies the necessary respect due to each person as a person. Although some protection for freedom of expression is justified in the political sphere, publicizing the identities of minor delinquents and victims of sexual aggression does not appear to be justified, due to the vulnerability of the persons in question.

Similarly, the recent debate that has erupted on the right to be forgotten in Internet searches can help protect mental stability and emotional well-being of persons implied in events past and forgotten. E.U.

---

545. See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS*, 402-403 (Engl. transl. by James W. Ellington (1993)).



law has, in the past, contributed to leveling up the protection for U.S. consumers as well through the Safe Harbor Agreement concerning the processing of data of European citizens by U.S. companies.<sup>546</sup> This agreement was recently invalidated by the Court of Justice of the European Union<sup>547</sup> Nevertheless, the US and the EU have negotiated a new privacy shield<sup>548</sup> Through the right to be forgotten, the E.U. might actually help level up the privacy protection in new areas as well. The Kantian principle, treating human beings as ends and never only as means, should be the guiding principle in all cases analyzing what types of information should be made available to the public.

---

546. For a presentation of the Safe Harbor agreement See Ioanna Tourkochoriti, *The Transatlantic Flow of Data and the National Security Exception in the European Data Privacy Regulation: In Search for Legal Protection against Surveillance*, 36 U. PA. J. INT'L L. 459 (2014).

547. See Case C-362/14, Maximilian Schrems v Data Protection Commissioner, available at: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d55acab2713cb546c99948f684f5c20efc.e34KaxiLc3eQc40LaxqMbN4Pa3eRe0?text=&docid=172254&pageIndex=0&dolang=EN&mode=req&dir=&occ=first&part=1&cid=162794>.

548. See <https://www.commerce.gov/page/eu-us-privacy-shield>.