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THE TWO WESTERN CULTURES OF PRIVACY: DIGNITY VERSUS LIBERTY

*1153 I. A Transatlantic Clash

In every corner of the Western world, writers proclaim "privacy" as a supremely important human good, as a value somehow at the core of what makes life worth living. Without our privacy, we lose "our very integrity as persons," Charles Fried declared over thirty-five years ago.[1] Many others have since agreed that privacy is somehow fundamental to our "personhood."[2] It is a commonplace, moreover, that our privacy is peculiarly menaced by the evolution of modern society, with its burgeoning technologies of surveillance and inquiry. Commentators paint this menace in very dark colors: Invasions of our privacy are said to portend a society of "horror,"[3] to "injure [us] in [our] very humanity,"[4] or even to threaten "totalitarianism,"[5] and the establishment of law protecting privacy is accordingly declared to be a matter of fundamental rights.[6] It is the rare privacy advocate who resists citing Orwell when describing these dangers.

At the same time, honest advocates of privacy protections are forced to admit that the concept of privacy is embarrassingly difficult to define.[7] "[N]obody," writes Judith Jarvis Thomson dryly, "seems to have any very clear idea what [it] is."[8] Not every author is as skeptical as Thomson, but many of them feel obliged to concede that privacy, fundamentally important though it may be, is an unusually slippery concept. In particular, the sense of what must be kept "private," of what must be hidden before the eyes of others, seems to differ strangely from society to society. This is a point that is frequently made by citing the literature of ethnography, which tells us that there are some societies in which people cheerfully defecate in full view of others, and at least a few in which the same is true of having ***1154** sex.[9] But the same point can be made by citing a large historical literature, which shows how remarkably ideas of privacy have shifted and mutated over time.[10] Anyone who wants a vivid example can visit the ruins of Ephesus, where the modern tourist can set himself down on one of numerous ancient toilet seats in a public hall where well-to-do Ephesians gathered to commune, two thousand years ago, as they collectively emptied their bowels.[11]

If privacy is a universal human need that gives rise to a fundamental human right, why does it take such disconcertingly diverse forms? This is a hard problem for privacy advocates who want to talk about the values of "personhood," harder than they typically acknowledge. It is a hard problem because of the way they usually try to make their case: Overwhelmingly, privacy advocates rely on what moral philosophers call "intuitionist" arguments.[12] In their crude form, these sorts of arguments suppose that human beings have a direct, intuitive grasp of right and wrong--an intuitive grasp that can guide us in our ordinary ethical decisionmaking. Privacy advocates evidently suppose the same thing. Thus, the typical privacy article

rests its case precisely on an appeal to its reader's intuitions and anxieties about the evils of privacy violations. Imagine invasions of your privacy, the argument runs. Do they not seem like violations of your very personhood? Since violations of privacy seem intuitively horrible to everybody, the argument continues, safeguarding privacy must be a legal imperative, just as safeguarding property or contract is a legal imperative. Indeed, privacy matters so much to us that laws protecting it must be a basic element of human rights.

This kind of argument can certainly make a powerful impression on first reading, since it is true that we can all imagine some violation of our privacy that seems very horrible. This is especially so when the writings in question are composed by scholars with a real literary gift, like Fried. ***1155** Nevertheless, no matter how anxiety-inducing it may be to read these authors, their arguments only carry real weight if it is true that the intuitions they evoke are shared by all human beings. Yet all the evidence seems to suggest that human intuitions and anxieties about privacy differ. We do not need to refer to the practices of exotic ancient or modern cultures to demonstrate as much: It is true even as between the familiar societies of the modern West. In fact, we are in the midst of significant privacy conflicts between the United States and the countries of Western Europe--conflicts that reflect unmistakable differences in sensibilities about what ought to be kept "private."

To the Europeans, indeed, it often seems obvious that Americans do not understand the imperative demands of privacy at all. The Monica Lewinsky investigation, in particular, with its numerous and lewd disclosures, led many Europeans to that conclusion.[13] But the Lewinsky business is not the only example: There are plenty of other aspects of American life that seem to Europeans to prove the same thing. Let me offer a variety of examples from France and Germany, two countries that have been my focus in recent research, and that are my focus in this Article as well.[14] Some of the things that bother French and German observers involve what Americans will think of as trivialities of everyday behavior. For example, visitors from both countries are taken aback by the ill-bred way in which Americans talk about themselves. As a French article warns visitors to the United States, America is a place where strangers suddenly share information with you about their "private activities" in a way that is "difficult to imagine" for northern Europeans or Asians.[15] Americans have a particularly embarrassing habit, continental Europeans believe, of talking about salaries. It is "normal in America," an Internet site informs German tourists, for your host at dinner to ask "not just how much you earn, but even what your net worth is"[16]--topics ordinarily quite off-limits under the rules of European ***1156** etiquette.[17] Talking about salaries is not quite like defecating in public, but it can seem very off-putting to many Europeans nevertheless.

But it is not just a matter of the boorish American lack of privacy etiquette. It is also a matter of American law. Continental law is avidly protective of many kinds of "privacy" in many realms of life, whether the issue is consumer data,[18] credit reporting,[19] workplace privacy,[20] discovery in civil litigation,[21] the dissemination of nude images on the Internet,[22] or shielding criminal offenders from public exposure.[23] To people accustomed to the continental way of doing things, American law seems to tolerate relentless and brutal violations of privacy in all these areas of law. I have seen Europeans grow visibly angry, for example, when they learn about routine American practices like credit reporting. How, they ask, can merchants be permitted access to the entire credit history of customers who have never defaulted on their debts? Is it not obvious that this is a violation of privacy and personhood, which must be prohibited by law?

These are clashes in attitude that go well beyond the occasional social misunderstanding. In fact, they have provoked some tense and costly transatlantic legal and trade battles over the last decade and a half. Thus, the European Union and the United States slid into a major trade conflict over the protection of consumer data in the 1990s, only problematically resolved by a 2000 "safe harbor" agreement.[24] Europeans still constantly complain that Americans do not accept the importance of protecting consumer privacy.[25] Those tensions have only grown in the aftermath of September 11.[26] Something similar has happened with regard to discovery in civil ***1157** procedure: American law allows parties to rummage around in each other's records in a way that seems obnoxious and manifestly unacceptable to Europeans. The result, in recent decades, has been a seething little war over discovery.[27] The circulation of the nude photos of celebrities on the Internet has produced another such conflict, with Europeans acting alone to penalize Internet service providers.[28]

For sensitive Europeans, indeed, a tour through American law may be an experience something like a visit to the latrines of Ephesus. Correspondingly, it has become common for Europeans to maintain that they respect a "fundamental right to privacy" that is either weak or wholly absent in the "cultural context" of the United States.[29] Here, Europeans point with pride

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to Article 8 of the European Convention on Human Rights, which protects "the right to respect for private and family life,"[30] and to the European Union's new Charter of Fundamental Rights, which demonstratively features articles on both "Respect for Private and Family Life" and "Protection of Personal Data."[31] By the standards of those great documents, American privacy law seems, from the European point of view, simply to have "failed."[32]

But it is not just that Europeans resent and distrust the American approach to privacy: The reverse is also true. Anyone who has lived in the United States knows that Americans can be just as obsessively attached to their "privacy" as Europeans, sometimes defending it by resort to firearms. ***1158** As for American law, it too is obsessed with privacy. Indeed, some of the most violently controversial American social issues are conceived of as privacy matters. This has been true of abortion for thirty years.[33] With the Supreme Court's decision in Lawrence v. Texas, it is now true of homosexuality as well.[34] It is simply false to say that privacy doesn't matter to Americans.

In fact, let us make no mistake about it: When it comes to privacy, there are plenty of European practices that seem intuitively objectionable to Americans. Some of these have to do with seemingly minor aspects of the anthropology of everyday life, most especially involving nudity. If the Europeans are puzzled by the ill-bred way in which Americans casually talk about themselves, Americans are puzzled by the ill-bred way in which Europeans casually take off their clothes. Phenomena like public nudity in the parks of German cities are particularly baffling to Americans, but so are phenomena like the presence of female attendants in men's washrooms. It is genital nudity that Americans find most bizarre: One's genitalia are "privates" in the full sense of the word in America, and one does not ordinarily expose them in public, and certainly not before the opposite sex. Even breasts are supposed to be kept covered in the United States--as the occasional female European tourist has discovered, when arrested (or even jailed!) for sunbathing topless on an American beach. ("Those Americans are Out of their Minds!" howls a headline from a Swiss tabloid reporting one such incident from Florida.)[35] Even American advertising, which doesn't stop at much, doesn't show bare breasts.

Public nudity may seem little more than a curiosity (though we shall see that it raises revealing problems in the European law of privacy). But here again, it is not just a matter of norms of everyday behavior; it is a matter of law. There are numerous aspects of European law that can seem not only ridiculous, but somewhat shocking to Americans. For example, continental governments assert the authority to decide what names parents will be permitted to give their children--a practice affirmed by the European Court of Human Rights as recently as 1996.[36] This is an application of state power that Americans will view with complete astonishment, as a manifest violation of proper norms of the protection of privacy and personhood. How can the state tell you what you are allowed to call your baby? Nor does it end there: In Germany, everybody must be formally registered with the police at all times.[37] In both Germany and ***1159** France, inspectors have the power to arrive at your door to investigate whether you have an unlicensed television.[38] Evidence that Americans would regard as illegally seized is routinely considered in continental adjudication.[39] In France and Germany, according to a recent study, telephones are tapped at ten to thirty times the rate they are tapped in the United States--and in the Netherlands and Italy, at 130 to 150 times the rate.[40] All of this will make many an American snigger at the claim that Europeans have a superior grasp of privacy. What kind of "privacy" is there, Americans will ask, in countries where people prance around naked out of doors while allowing the state to keep tabs on their whereabouts, convict them on the basis of unfair police investigations, peer into their living rooms, tap their phones, and even dictate what names they can give to their babies?

Evidently, Americans and continental Europeans perceive privacy differently. Privacy advocates sometimes try to downplay these differences. The felt need for privacy, they insist, is in fact universal, and the only real difference is that American protections are the product of piecemeal legislation, less systematically developed than European protections as yet, but nevertheless evolving in a European direction.[41] There is certainly some truth in this: There are indeed important resemblances between the systems on either side of the Atlantic. Any proper account of comparative privacy law will have to explain many similarities as well as many differences.

Nevertheless, when all is said and done, it is impossible to ignore the fact that Americans and Europeans are, as the Americans would put it, ***1160** coming from different places. At least as far as the law goes, we do not seem to possess general "human" intuitions about the "horror" of privacy violations. We possess something more complicated than that: We possess American intuitions--or, as the case may be, Dutch, Italian, French, or German intuitions. We must make some effort

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to explain this fact before we start proclaiming universal norms of privacy protection. In particular, we will not do justice to our transatlantic conflicts if we begin by declaring that American privacy law has "failed" while European privacy law has "succeeded." That is hogwash. What we must acknowledge, instead, is that there are, on the two sides of the Atlantic, two different cultures of privacy, which are home to different intuitive sensibilities, and which have produced two significantly different laws of privacy.

II. Dignity Versus Liberty

So why do these sensibilities differ? Why is it that French people won't talk about their salaries, but will take off their bikini tops? Why is it that Americans comply with court discovery orders that open essentially all of their documents for inspection, but refuse to carry identity cards? Why is it that Europeans tolerate state meddling in their choice of baby names? Why is it that Americans submit to extensive credit reporting without rebelling?

These are not questions we can answer by assuming that all human beings share the same raw intuitions about privacy. We do not have the same intuitions, as anybody who has lived in more than one country ought to know. What we typically have is something else: We have intuitions that are shaped by the prevailing legal and social values of the societies in which we live. In particular, we have, if I may use a clumsy phrase, juridified intuitions--intuitions that reflect our knowledge of, and commitment to, the basic legal values of our culture.

Indeed, to get a handle on our transatlantic privacy conflicts, we must begin by recognizing that continental European and American sensibilities about privacy grow out of much larger and much older differences over basic legal values, rooted in much larger and much older differences in social and political traditions. The fundamental contrast, in my view, is not difficult to identify. In one form or another, it is a contrast that has been noticed by observers of the transatlantic scene for a century.[42] It is the ***1161** contrast between two conceptions of privacy most recently distinguished by Robert Post: between privacy as an aspect of dignity and privacy as an aspect of liberty.[43]

Continental privacy protections are, at their core, a form of protection of a right to respect and personal dignity. The core continental privacy rights are rights to one's image, name, and reputation,[44] and what Germans call the right to informational self-determination--the right to control the sorts of information disclosed about oneself.[45] These are closely linked forms of the same basic right: They are all rights to control your public image--rights to guarantee that people see you the way you want to be seen. They are, as it were, rights to be shielded against unwanted public exposure--to be spared embarrassment or humiliation. The prime enemy of our privacy, according to this continental conception, is the media, which always threatens to broadcast unsavory information about us in ways that endanger our public dignity. But of course, this concern does not end with media exposure. Any other agent that gathers and disseminates information can also pose such dangers. In its focus on shielding us from public indignity, the continental conception is typical of the continental legal world much more broadly: On the Continent, the protection of personal dignity has been a consuming concern for many generations.

By contrast, America, in this as in so many things, is much more oriented toward values of liberty, and especially liberty against the state. At its conceptual core, the American right to privacy still takes much the form that it took in the eighteenth century: It is the right to freedom from intrusions by the state, especially in one's own home.[46] The prime danger, ***1162** from the American point of view, is that "the sanctity of [our] home [s]," in the words of a leading nineteenth-century Supreme Court opinion on privacy, will be breached by government actors.[47] American anxieties thus focus comparatively little on the media. Instead, they tend to be anxieties about maintaining a kind of private sovereignty within our own walls.

Such is the contrast that lies at the base of our divergent sensibilities about what counts as a "privacy" violation. On the one hand, we have an Old World in which it seems fundamentally important not to lose public face; on the other, a New World in which it seems fundamentally important to preserve the home as a citadel of individual sovereignty. What Europeans miss in Americans is a sense of the demands of public face; indeed, Europeans have been denouncing American law on that ground since at least 1903.[48] When Americans seem to continental Europeans to violate norms of privacy, it is because they seem to display an embarrassing lack of concern for public dignity--whether the issue is the public indignity inflicted upon Monica

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Lewinsky by the media, or the self-inflicted indignity of an American who boasts about his salary. Conversely, when continental Europeans seem to Americans to violate norms of privacy, it is because they seem to show a supine lack of resistance to invasions of the realm of private sovereignty whose main citadel is the home--whether the issue is wiretapping or baby names. The question of public nudity presents the contrast in piquant form. To the continental way of seeing things, what matters is the right to control your public image--and that right may include the right to present yourself proudly nude, if you so choose. To the American mind, by contrast, what matters is sovereignty within one's own home; and people who have shucked the protection of clothing are like people who have shucked the protection of the walls of their homes, only more so. They are people who have surrendered any "reasonable expectation of privacy."[49]

Now, let me emphasize that this contrast is not absolute. These are complex societies, which are home to a variety of sensibilities, concerns, traditions, and mutual influences. There are certainly some Americans who find the European idea of dignity appealing. This is notably true of Justice Kennedy, whose opinion for the Court in Lawrence v. Texas expresses admiration for European approaches, and who tries energetically to found his opinion on ideals of both liberty and dignity.[50] For that matter, there are no doubt Europeans who find the characteristic American approach appealing. Moreover, it is certainly the case that both forms of the protection of privacy are in force to some extent on both sides of the ***1163** Atlantic: There are some protections against the media and the like in the United States, and there are certainly some American tort cases protecting people's public image.[51] As for Europe: There are certainly some quite far-reaching protections against the state there, and there is certainly law protecting people within the bounds of the home.[52]

So it would be wrong to say that there is some absolute difference between American and continental European law. But the issue is not whether there is an absolute difference. Comparative law is the study of relative differences. Indeed, it is the great methodological advantage of comparative law that it can explore relative differences. No absolute generalization about any legal system is ever true. It would be false, for example, to say that American law is hostile to the social welfare state: It is easy to think of exceptions to that generalization. But what is true is that American law is more hostile to the social welfare state than continental law--and that is a statement that is not only true, but highly important to understanding the world in which we live.

In comparative privacy law, too, it is the relative differences that matter. Americans and Europeans certainly do sometimes arrive at the same conclusions. Nevertheless, they have different starting points and different ultimate understandings of what counts as a just society. If I may use a cosmological metaphor: American privacy law is a body caught in the gravitational orbit of liberty values, while European law is caught in the orbit of dignity. There are certainly times when the two bodies of law approach each other more or less nearly. Yet they are consistently pulled in different directions, and the consequence is that these two legal orders really do meaningfully differ: Continental Europeans are consistently more drawn to problems touching on public dignity, while Americans are consistently more drawn to problems touching on the depredations of the state. Indeed, as our many transatlantic conflicts suggest, the distances between us can often stretch into the unbridgeable.

It should be obvious enough that this is not a contrast that we can understand by reflecting on the supposed universal intuitive imperatives of "personhood," or of "the integrity of the person." One's sense of personhood can be grounded just as much in an attachment to liberty as in an attachment to dignity. Maybe Europeans feel that their personhood is confirmed by the fact that their bosses are obliged to respect their privacy in the workplace, or by the fact that they can freely strip and sun themselves in central Berlin. That does not prevent Americans from feeling that their personhood is confirmed when they sit at home, a shotgun across their knees, determined to resist taxation.

***1164** No, the issue is not that one side of the Atlantic has discovered true "personhood," while the other lags behind. Something else is going on. The only way to think straight about these differences is to reflect on the core social values of dignity or liberty. The comparative law of privacy is not about the intuitive preconditions of personhood, but about contrasting political and social ideals. In the United States those political and social ideals revolve, as they have for generations, primarily around our suspicions of the police and other officials, while on the Continent they revolve unmistakably around one's position in society, one's "dignity" and "honor."

Such is the contrast this Article explores. Its focus is primarily on the Continent, whose world is too little known among

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Americans, with only an abbreviated sketch of American law. But I hope that even a sketch of American law will stand out in much bolder and more revealing relief when placed against the continental background.

III. The European Tradition of Dignity: Leveling Up

The political and social values of "dignity" and "honor" are indeed what is at stake in the continental concept of privacy, in ways that we can only understand if we dig deeply into continental traditions. That is what I propose to do in the next few Parts of this Article, focusing, as I have done in a series of related publications, on Germany and France, the two dominant legal traditions of the Continent. Here I must begin by summarizing work I have published on a variety of aspects of European "dignity."

Where do the peculiar continental anxieties about "privacy" come from? To understand the continental law of privacy, we must start by recognizing how deeply "dignity" and "honor" matter in continental law more broadly. Privacy is not the only area in which continental law aims to protect people from shame and humiliation, from loss of public dignity. The law of privacy, in these continental countries, is only one member of a much wider class of legal protections for interpersonal respect. The importance of the value of respect in continental law is most familiar to Americans from one body of law in particular: the continental law of hate speech, which protects minorities against disrespectful epithets. But the continental attachment to norms of respect goes well beyond hate speech. Minorities are not the only ones protected against disrespectful epithets on the Continent. Everybody is protected against disrespect, through the continental law of "insult," a very old body of law that protects the individual right to "personal honor."[53] Nor does it end there. Continental ***1165** law protects the right of workers to respectful treatment by their bosses and coworkers, through what is called the law of "mobbing" or "moral harassment." This is law that protects employees against being addressed disrespectfully, shunned, or even assigned humiliating tasks like xeroxing.[54] Continental law also protects the right of women to respectful treatment through its version of the law of sexual harassment. It even tries to protect the right of prison inmates to respectful treatment, as I have noted in a recent book, to a degree almost unimaginable for Americans.[55]

Why does continental law work so hard to guarantee norms of "respect," "dignity," and "personal honor" in so many walks of life? This is a question to which I believe we must give a different answer from the one Europeans themselves commonly give. Europeans generally give a dramatic explanation for why dignity figures so prominently in their law: They assert that contemporary continental dignity is the product of a reaction against fascism, and especially against Nazism.[56] Having experienced the horrific indignities of the 1930s and 1940s, continental societies, Europeans say, have mended their ways. Europe has dignity today because Europe was traumatized seventy years ago. This is an answer that is often embraced by Americans, too-- most notably Robert Kagan, in his recent bestseller Of Paradise and Power.[57]

And indeed, it is hard to resist a story with so much natural drama. But I have tried to demonstrate that the real story is different, and much more complicated. The European culture of dignity is not well-understood as any kind of simple reaction against fascism; even the place of fascism in the making of European dignity is more ambiguous than one might suppose. In fact, the history of the continental law of dignity begins long before the postwar period. It begins in the eighteenth, and even the seventeenth, centuries. The continental societies that we see today are the descendants of the sharply hierarchical societies that existed two or two-and-a-half centuries ago--of the aristocratic and monarchical societies of which the France of Louis XIV was the model. In point of fact, continental law has enforced norms of respect and dignity for a very long time. In earlier centuries, though, only persons of high social status could expect their right to respect to be protected in court. Indeed, well into the twentieth century, only high-status persons could expect to be treated respectfully in the daily life of Germany or France, and only high-status persons could expect their "personal honor" to be protected in continental courts. Members of the ***1166** lower orders--the vast majority of the population--certainly had no meaningful right to respect. Quite the contrary.[58]

What we see in continental law today is the result of a centuries-long, slow-maturing revolt against that style of status privilege. Over time, it has come to seem unacceptable that only certain persons should enjoy legal protections for their "dignity." Indeed, the rise of norms of respect for everybody--even minorities, even prison inmates--represents a great social

transformation on the Continent. Everybody is now supposed to be treated in ways that only highly placed and wealthy people were treated a couple of centuries ago. Germany and France have been the theater of a leveling up, of an extension of historically high-status norms throughout the population. As the French sociologist Philippe d'Iribarne has elegantly put it, the promise of modern continental society is the promise that, where there were once masters and slaves, now "you shall all be masters!"[59]

The uncomfortable paradox, as I have tried to show, is that much of this leveling up took place during the fascist period, for fascist politics involved precisely the promise that all members of the nation-state would be equal in "honor"--that all racial Germans, for example, would be "masters."[60] For that very reason, some of the fundamental institutions of the continental law of dignity experienced significant development under the star of fascism. In fact, the fascist period, seen in proper sociological perspective, was one stage in a continuous history of the extension of honor throughout all echelons of continental society.

This long-term secular leveling-up tendency has shaped continental law in a very fundamental way.[61] Contemporary continental hate speech protections, for example, can be traced back to dueling law: In the nineteenth century, continental courts protected the right to respect only of the dueling classes. Today they protect everybody's right to respect; indeed, the rules of dueling have had a striking influence in the Continent, sometimes being imported bodily into the law. Contemporary protections for prison inmates have a very similar history: In the eighteenth century, continental law maintained sharp distinctions between high- and low-status punishments. If executed, high-status offenders were beheaded, while low- ***1167** status offenders were hanged; if spared, high-status offenders were housed in comfortable apartments, while low-status offenders were subjected to degrading penal slavery. In the two centuries since the French Revolution, the old high-status forms of punishment have gradually been generalized to all: All inmates are now treated according to a regime of imprisonment that was once reserved to figures like Voltaire.[62]

Such has been the history of the continental law of respect. It is a history, as I have tried to show, that has always been closely linked with the history of continental etiquette, which also began as a set of rules for courtiers, only to be generalized to the entire population. Indeed, the rules of etiquette, like the rules of dueling, have sometimes exercised a direct influence on the making of the European law of respect, which is often concerned with matters like the legal right to be addressed as "vous" or "Sie."[63]

This world of continental respect is also the world of continental privacy. When continental lawyers speak of "privacy" as a set of rights over the control of one's image, name, and reputation, and over the public disclosure of information about oneself, they are speaking to these selfsame continental sensibilities. To be sure, they are talking about privacy in a way that many Americans also talk about it. The idea that privacy is really about the control of one's public image has long appealed to the most philosophically sophisticated American commentators, from Alan Westin,[64] to Charles Fried,[65] to Jeffrey Rosen,[66] to Thomas Nagel.[67] In its most compelling form, the claim has come from Robert Post: For Post, privacy law protects norms of dignity that are "civility rules," just like the norms of etiquette; and without the protection of such norms, he argues, no society can maintain any form of community.[68] Moreover, similar ideas can already be found in the most famous of American articles, Samuel Warren and Louis Brandeis's 1890 The Right to Privacy.[69] All of these American writers have viewed the danger in the violation of our "privacy" as the danger that we will lose the capacity to control what Erving Goffman famously called our "presentation of self"--our image before the eyes of ***1168** others in society.[70] All of them have thought of our right to privacy, perhaps a shade paradoxically, as our right to a public image of our own making, as the right to control our public face. Indeed, it is precisely for that reason that they have insisted on the connection between privacy and personhood.

So the prevailing continental conception is also the one that most thoughtful American commentators on privacy and "personhood" have found the wisest and most sophisticated. But if this conception has triumphed in continental law, it is not because European lawyers possess any unique measure of wisdom or sophistication. Nor is it because they alone recognize the norms that are necessary for the maintenance of community. Human communities can be founded on the widest variety of norms. As for law: It is not about the worldly realization of wisdom or sophistication as such. Law is about what works, what seems appealing and appropriate in a given society, and the conception of privacy as control of one's "image" has succeeded because it fits into continental social traditions, and into a quotidian continental culture of respect. Continental privacy is

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"continental" in much the way that continental hate speech law is "continental," and in much the way that continental prison law is "continental." For that matter, it is "continental" in much the way that continental etiquette is "continental"--for, pace Professor Post, the norms of "civility," far from being universal, vary dramatically from community to community.

Indeed, etiquette makes, as so often, a striking example of the social roots of European dignitary law. It is not an accident that both etiquette and privacy law show the same anxious preoccupation with "public image." Thus, it is common for continental etiquette guides to open with a section called "how we present ourselves before the world";[71] or "the politesse of appearances";[72] or more broadly a section on how to maintain the correct external look and manners.[73] Rules about how to dress and how to wear makeup are part of continental etiquette just as are rules about how to comport oneself on the street, at the table, or in the workplace.[74] Continental etiquette is indeed overwhelmingly about "the presentation of self in everyday life," just like continental privacy law. In fact, continental authors sometimes consciously present etiquette and privacy law as related subjects: For example, you can buy a book for German journalists, ***1169** published by the leading German newspaper, called Kleiner Knigge des Presserechts--a little etiquette book of press law--which treats all of the standard questions of privacy as questions of good manners.[75]

But it is not just that the conception of privacy as control over one's image fits into the traditions of continental etiquette. It fits into the continental traditions of dignity, respect, and personal honor more broadly.[76] As we shall see shortly, continental privacy law, like most continental law of respect, developed largely from the law of insult. It even has connections with dueling. It has a Nazi history. Most generally, it fits within the tradition of status revolution that has shaped so much of continental law--the revolution of leveling up. Indeed, as I want to insist in this Article, continental privacy protections offer perhaps the paradigmatic example of high-status norms that have been generalized to the wider population. For as we can all instantly recognize, the conception of privacy as control over one's public image is a conception originally and primarily concerned with the doings of very high-status persons.

Indeed, critics have always insisted that a notion of privacy as a right to control one's "image" is a notion primarily of interest to people of very high status--to personages like the Warrens of Boston, or for that matter like Princess Caroline of Monaco, whose affairs still provide constant grist for the continental privacy mill. The conception of privacy as control of one's image rests, at base, on the idea that one ought to be able to keep one's name and picture out of the newspapers. This is obviously a conception that matters primarily to members of "society" as the term is used in the phrase "society pages."

And that is just what we see in continental privacy law: a high-status conception of privacy, a "society" conception of privacy. In fact, it is almost comical to read off the names in the captions of the leading postwar continental cases. Open a book on comparative privacy law, and here are the names you will see: Princess Soraya of Iran,[77] Princess Caroline of Monaco,[78] Prince Ernst August of Hanover.[79] There is a remarkable disproportion of royalty in continental privacy thinking. Down to this day, in fact, German texts list royalty first among the classes of "public figures" ***1170** who require special treatment in the law of privacy,[80] while French texts, the product of a deeper democratic tradition, only list royalty second, after politicians.[81] "Members of the aristocracy"[82] too are presented as classes that had to be specially treated. These are textbooks written in worlds that remain very different from ours. Even the nonroyals and nonaristocrats involved in the leading European privacy cases are often very prominent persons indeed: Hjalmar Schacht, former Nazi finance minister,[83] Robert Barcia, longtime eminence grise of the French Trotskyite party.[84] Indeed, an American cynic who wants to mock the vaunted continental commitment to privacy will point gleefully at these names. At core, the American will sneer, the continental protection for privacy grants everyone alike the right to be safe from paparazzi. Does this really have anything to do with the values of a true democracy? At best, continental privacy law is not a form of protection for universal human "personhood," but a means of regulating the relations between celebrities and the rest of us.

Nevertheless, as I want to insist, to take that mocking attitude would be to underestimate the moral claims of European leveling up, as it expresses itself in privacy law. There is more to the law than its practical impact. The law also aims to express social values--the continental law of privacy as much as or more than any other body of law. What the continental law of privacy expresses is the fundamental social importance of a commitment to extend royal treatment to everyone. Indeed, we cannot understand our transatlantic conflicts if we do not recognize the authentically wide social application of "society" privacy in continental law. Over the past several generations, the basic commitment to control of one's public

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image has been extended well beyond its origins in the problems of the Princess Carolines of the world, in ways that do indeed affect the lives of ordinary people. This is most especially true of the areas where the conflicts between continental and American norms are most heated--areas like consumer data, credit reporting, public nudity, and the dignity of criminal offenders. These are all realms of life in which continental law has forcefully extended privacy protections to noncelebrities and nonroyals. Control of one's ***1171** "image," in the continental mind, now includes more than everybody's right to keep one's names out of the newspapers. It also includes everybody's right to control the use of one's consumer data and the like, everybody's right to privacy in the workplace, everybody's right (if one should need it) to respectful imprisonment, and more. Continental privacy law is, as it were, "society" privacy for everybody.

One recent German popular guide to the law proudly puts it in this way, in language that deserves to be underlined. Privacy rights, the book explains, are part of a larger law of the "defense of personal honor," and nowadays it's not just the "royal houses" whose image is threatened; "everybody is in danger."[85] Silly enough--but also truly appealing in its way. Of course it matters to insist that everybody counts the same way royalty does, from racial minorities and prison inmates on up through the ranks of society.

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The protection of consumer data reflects in many ways the same clash of attitudes. Europeans have aggressively condemned traffic in consumer data: It is, European lawyers believe, a serious potential violation of the privacy rights of the consumer if marketers can purchase data about his or her preferences, and regulation is thus imperative. The resulting protections are embodied in the European Commission's forceful Privacy Directive of 1995,[184] under which Europeans claim the authority, as the Wall Street Journal puts it, to play "Privacy Cop to the World."[185] Americans have of course been much slower and more hesitant to regulate, with the resulting battles that I have already described.[186] And indeed, the continental attitude is not easy for Americans to understand. After all, there is a benefit in the traffic in consumer data. If marketers can learn more easily what my preferences are, they can provide me more easily with the goods and services I seek. To put it in the language of American law and economics, trafficking in consumer data lowers search costs: It makes it easier for buyers and sellers to find each other, creating sales that would otherwise not have been made, and thereby enhances the efficiency of the market.[187]

Not all Americans would approve of the theories of law and economics, of course. Nevertheless, on some level, the relaxed attitude of law-and- ***1193** economics scholars toward the market is clearly widely shared among American policymakers. This does not mean that Americans do not experience some anxiety about the traffic in their "private" information. But it does mean that American law has been far less categorical in its condemnations than European law. Whereas European law allows the collection of consumer data only for limited purposes and limited times, upon explicit consent of the affected person, and under government supervision,[188] Americans are much more willing to tolerate industry self-regulation.[189] Most of all, when they do propose regulation, they tend, in a characteristically American way, to favor "market-based solutions to personal data protection," as Pamela Samuelson writes, "over the strict comprehensive regulatory regime adopted . . . in Europe."[190]

Indeed. Europeans have a harder time seeing the benefits of free-market solutions. As another leading scholar puts it, Europeans "trust government more than the private sector with personal information."[191] Why is this? It is not hard to understand if we keep in mind the continental traditions I have described. Privacy is an aspect of personal dignity within the continental tradition, and personal dignity is never satisfactorily safeguarded by market mechanisms. Ever since the case of Dumas père, continental law has resisted the notion that one can definitively alienate one's "dignity."[192] Dignity, to this way of thinking, simply must be treated differently from property. As one French scholar insists, contrasting the American attitude with the French, one can freely dispose of one's liberty, but one can never be permitted to freely dispose of one's dignity.[193] If one accepts that premise, one should accept the proposition that any consumer's consent to the sale of his or her data should have only limited effect at best. After all, "the importance of one's image," as a recent French article puts it, is greater than ever "in the information society."[194]

Here again, consumers need more than cheap goods and services, just as they need more than easy credit. They need dignity. If your consumer profile is floating around somewhere in cyberspace, you are not in control ***1194** of your image. A just

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world, from this point of view, is a world in which everybody's respectability is carefully protected.[195] This sort of thinking has far less resonance in America than it does in Germany and France. We will never quite share the intuitions that fuel the continental conviction that trading in consumer data must be prevented, or at least sharply limited by law.

As these examples suggest, continental privacy is not just for Princess Caroline, Princess Soraya, or Prince Ernst August. It is for the ordinary person as well, in his or her guise as consumer. It is also for the ordinary person in his or her guise as worker. Continental law has made considerable efforts to guarantee the privacy of workers in the workplace, at least within the limits of the possible.[196] Worker e-mails, for example, are vigorously protected in a way that is not the case in America.[197] There are protections for workers' other private documents, guarantees against video surveillance, and rights to use telephones for personal calls--all in the name of maintaining a certain "personal sphere."[198] It goes well beyond e-mails and the like, too, to cover a wide range of issues touching questions of workplace dignity. One striking French decision, for example, found it a violation of dignity rights when an employer in a retail store required that employees show a receipt for merchandise that they wished to take home. Treating workers with that sort of suspiciousness was regarded by the court as a violation of their expectation to be treated as honorable persons.[199]

The contrast with American approaches to the workplace is telling. American privacy protections, at their metaphoric core, are the sorts of protections afforded by the walls of one's home. They have been extended beyond the literal home, of course, since the eighteenth century. Nevertheless, it remains the case that American protections become progressively weaker the further the affected person is from home. This is particularly true when courts apply the "reasonable expectation of privacy" test developed in the Fourth Amendment context.[200] The primary locus of one's "reasonable expectation of privacy" is of course in the home, and persons outside the home have correspondingly few privacy protections. ***1195** This applies to workers as well, whose expectation of privacy in the workplace, according to the American cases, is sometimes close to nil.[201]

The same contrast holds in one of the most striking aspects of the comparative law of privacy: the treatment of criminal offenders, including accused persons and prison inmates. Continental privacy protections extend to these classes of persons as well. Continental privacy law has been strongly concerned with the privacy rights of persons caught up in the toils of the justice system. In Germany, modern personality protection grows preeminently out of a 1976 case involving a homosexual prison inmate convicted of an act of terrorism.[202] In that case, Lebach, the German Constitutional Court found that it would be a violation of the inmate's personality rights to broadcast a made-for-television movie about him. Lebach has been regarded since as the font of late-twentieth-century personality doctrine. French law too has made strong efforts to guarantee the privacy of accused persons as a fundamental aspect of the presumption of innocence,[203] and more broadly of the "honorability" of the accused.[204] In line with this, both Germany and France make considerable efforts to guarantee that prison inmates will enjoy protections for their privacy, in ways that are unimaginable for Americans.[205] All persons haled into the criminal justice system enjoy, at least in principle, protections that are not available to their American counterparts.

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VIII. Warren and Brandeis Revisited

Indeed, continental ideas of privacy are just not much at home in American legal culture. To be sure, there is certainly American law on the books that sounds something like what we find on the books of Germany or France. American law has its famous four forms of the privacy tort, as analyzed by William Prosser in 1960: intrusion upon seclusion,[243] appropriation of the name or likeness of another,[244] public disclosure of private facts "not of legitimate concern to the public,"[245] and disclosure of private facts in such a way as to portray victims in a "false light."[246] There is considerable legislation too, like the Video Privacy Protection Act of 1987,[247] passed in reaction to journalistic investigations of Robert Bork, and various other acts and bills, both state and federal. American legislatures do pass privacy protection statutes of various kinds[248]--especially, as Jeffrey ***1203** Rosen has observed, in the wake of "heartstring-tugging" scandals.[249] While many of these statutes treat the government as the principal threat to privacy, not all of them do. Though less than a third of the states have general laws on the protection of privacy, there certainly are state protections.[250] There are even state constitutional protections for privacy.[251] There are decisions giving protection to one's image--notably cases involving the nude or sexually charged images of young

women who did not intentionally pose in a provocative way,[252] or who are the victims of sexual assaults,[253] or who otherwise seem to be living "a life of rectitude."[254] There are cases involving nongovernmental invasions of the "privacy of [the] home,"[255] and especially of the privacy of the bedroom:[256] Where the walls of the home are breached Americans can be sensitive. There is a lot of American scholarship that vigorously defends the European point of view.[257] And of course, there is the famous article of Warren and Brandeis.

Nevertheless, as our many and heated conflicts with Europe suggest, the American attitude remains different. It is not true that American law is absolutely different from European law. No generalization about any legal system is ever absolutely correct: Law is always something of a jumble, and there are always exceptions to any general description. The differences that we can see are always comparative differences, not absolute ones. Nevertheless, the American climate of values remains basically inhospitable to the European way of looking at things. We do find patches of more or less continental law in America, just as patches of snow sometimes survive in a hollow on an early spring day. But over time, most efforts to make American law look more continental tend to melt away.

***1204** This is indeed how we should understand the fate of "that most influential law review article of all,"[258] Warren and Brandeis's The Right to Privacy.[259] Warren and Brandeis undertook the seminal, and still most cited, effort to introduce a continental-style right of privacy into American law. In theory, their right is still part of the law almost everywhere in America. Nevertheless, it is generally conceded that, after a century of legal history, it amounts to little in American practice today.[260] The story of the relative failure of Warren and Brandeis is precisely a study in how poorly continental ideas do in the American climate.

In fact, it is best to think of the Warren and Brandeis tort not as a great American innovation, but as an unsuccessful continental transplant. For, though commentators have failed to recognize it, what the two authors set out to do was precisely to introduce the continental protection of privacy into America. It is hardly news that Warren and Brandeis worked in a world of Boston respectability closely akin to the high society of late-nineteenth-century Europe. Warren was a Boston Brahmin, a child of one of the socially dominant families of the city. Brandeis was the son of Bohemian-Jewish immigrants who had fled to America after 1848.[261] Their article was written in a fit of outrage over newspaper reports of a party given by the Warrens,[262] and its main target was the gossip pages of the "yellow press," which Warren and Brandeis were convinced represented a new phenomenon.[263] Like a number of authors of the period,[264] they were upset ***1205** by these press intrusions. "The press," the coauthors complained, "is overstepping in every direction the obvious bounds of propriety and of decency. . . . To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle."[265] The only answer to the challenge, they argued, was to insist on a "right to privacy." This would protect individuals not only against the press, but also against intrusive photographers and the like. Nor would the new right be confined to high-status people like the Warrens:

> The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever [] their position or station, from having matters which they may properly prefer to keep private, made public against their will.[266]

All of this was obviously much in the continental style, up to and including its desire to level up, to guarantee the right of all citizens "whatsoever" to be safe from "undesirable and undesired publicity." The high-status tenor of the Warren and Brandeis article is indeed something any reader can see immediately, and critics of Warren and Brandeis have said so.[267] But if we look closely at the article we can see something else: We can see that Warren and Brandeis took continental law as their starting point.

In fact, it is not difficult to retrace the research steps that Warren and Brandeis took. Like the authors of any law review article, they looked for authority for their position. The first and most natural place to look for their right to privacy, the two authors strikingly observed, lay in the protection of "honor" through the law of insult. And in the law of insult, they rightly noted, there were already lively traditions to draw upon in both France and Germany by the end of the nineteenth century. As we have seen,[268] by 1890, when Warren and Brandeis wrote, the right to privacy was a longstanding topic of study and

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discussion within the continental traditions of the law of insult. Indeed, continental discussions were reaching a fever point in the 1880s. Warren and Brandeis were perfectly familiar with this. They cited the French privacy legislation of 1868 at length, and admiringly.[269] They also cited German scholarship on the law of insult--in ***1206** particular Carl Salkowski's standard Institutes and History of Roman Private Law,[270] a very German text, which interpreted ancient Roman law through the lens of German philosophy:

> Iniuria in the narrower sense is every intentional and illegal violation of honour, i.e., the whole personality of another. . . . This may be committed by insulting oral or written words or signs (so-called verbal and symbolic injuries), by deeds (so-called real injuries), by slander, and speeches and acts which cast suspicion upon, or are prejudicial to, the social or pecuniary position of any one, or other acts interfering with the right of personality.[271]

From Salkowski, or from some other German source, Warren and Brandeis borrowed the term "personality," and they characterized their right to privacy, in orthodox German fashion, as one aspect of the protection of "personality" more broadly. Indeed, it is likely that Warren and Brandeis knew more about the continental tradition than they chose to cite. Brandeis, who had been brought up in a Germanophile Louisville household, had been sent to high school in Germany during the 1870s, and he remained a passionate admirer of German culture.[272] It seems wholly improbable that he did not know of the lively German literature on "personality" when he adopted the term for his article. (If he only cited Salkowski it may be because Salkowski's was the only German text that had been translated into English.) Moreover, at least some of the French cases on the right to one's image must have been known to educated Bostonians. The Dumas case in particular had been an international cause célèbre.[273] In any case, French privacy protections had been publicized by E.L. Godkin, an author often identified as an influence on Warren and Brandeis.[274] As Godkin had explained, "In France a man can legally prevent or punish the mere mention of his name in any disagreeable connection, if he be not in political, literary or artistic life"--law that Godkin insightfully credited to a French "sensitiveness to ridicule or insult which has probably never existed in any Anglo-Saxon country."[275]

Nevertheless, though Warren and Brandeis certainly knew the continental traditions, and cited them, they did not claim that it was possible to introduce continental practices directly into American law. They understood the continental tradition too well for that. The continental ***1207** approach, they observed, was not available within the common law tradition--for the simple and insurmountable reason that the law of insult, and the protection of "personal honor," did not exist in America. "[O]ur system, unlike the Roman law, does not afford a remedy . . . for mental suffering which results from . . . contumely and insult [involving] an intentional and unwarranted violation of the 'honor' of another."[276] No matter how vigorous and appealing the ideas of Royer-Collard, Jhering, Gareis, Beaussire, and the rest might be, they could not be fitted into the common law precedents, which simply said nothing about personal honor, or at least nothing useful.

Warren and Brandeis's article thus started from the admission that the United States was doomed to be a nation without continental-style "privacy" protections, at least in their full form. But it continued by insisting that this was no cause for despair: Even in the absence of a law of insult, there were other resources to which one could turn. Indeed, Warren and Brandeis maintained, the protection of "honor" was not as promising a vehicle for the protection of "privacy" as continental writers imagined. The apparent analogy between honor and privacy was merely "superficial." Another road would have to be taken:

> It is not however necessary, in order to sustain the view that the common law recognizes and upholds a principle applicable to cases of invasion of privacy, to invoke the analogy, which is but superficial, to injuries sustained, either by an attack upon reputation or by what the civilians called a violation of honor; for the legal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy, which properly understood afford a remedy for the evils under consideration.[277]

There was no ultimate need for "honor" in order to protect privacy; artists' rights would do. But even here, of course, Warren and Brandeis were pursuing a continental tack, and most particularly a German one. The Germans, as we have seen,[278] had

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created their law of personality by drawing both on the law of insult and on Urheberrecht, on intellectual and artistic property. This is exactly what Warren and Brandeis, like Gareis and Kohler before them, did as well.

The resulting article is, of course, a common law classic, a tour de force effort to capture the drift of a case law system in a state of productive flux. Yet let us note that, even in their account of common law evolution, Warren ***1208** and Brandeis did not sound all that different from their continental, and especially German, predecessors. As we have seen, French and German writers held that privacy had emerged as a limitation on property,[279] and an evolutionary outgrowth of the growing sensitivity to the needs of "personality."[280] Warren and Brandeis echoed these ideas. In a style unmistakably like that of Jhering, they tried to trace the evolving "spirit" of the law. Copyright, rights in "intellectual and artistic property," they observed, had always been understood as a property right.[281] Yet primitive ideas of property were falling by the wayside as the common law evolved. It was a general evolutionary trend of the common law to get beyond the protection of mere material "property rights," offering new protections for the immaterial damage of emotional and moral harms.[282] This was true of privacy as well. Cases that had been interpreted as property cases, as cases in copyright, in fact revealed a growing judicial sense that it was necessary to "protect the privacy of the individual" from invasion--not just from the literal invasion of one's property, but from metaphorical invasions "either by the too enterprising press, the photographer, or the possessor of any other modern device for rewording or reproducing scenes or sounds."[283] At the same time the common law of torts had gradually come to cognize the harm in various forms of mental suffering.[284] These two trends conduced to the same evolutionary end: Common law thinking was giving rise to the new "Warren and Brandeis tort," the tort of invasion of privacy.

All of this made for an inspired contribution to the international literature on the protection of privacy--one that Europeans themselves still cite.[285] But what Warren and Brandeis could not do was bring the European structure of values to the United States. Indeed, it was not just the continental law of insult that Warren and Brandeis were unable to introduce into America. It was much more broadly the constellation of ideas about personal honor that undergirded it.

The history of the cold reception that American law has given Warren and Brandeis has been written many times, and I will not repeat it here. I want only to emphasize that the American resistance to Warren and Brandeis has always been a resistance founded on two values in particular: the value of the free press, and the value of the free market. These are of course the very values that continental advocates of continental-style, honor-oriented privacy rights have long regarded with the greatest suspicion.

***1209** Freedom of expression has been the most deadly enemy of continental-style privacy in America. To cite once again our German scholar of 1959, the conflict has always been one between the values of Jefferson and the values of Goethe.[286] Of all American liberty values, freedom of the press is the most poisonous for continental-style privacy rights. Starting with the famous Sidis case of 1940,[287] American law began, in an American way, to favor the interests of the press at the cost of almost any claim to privacy. Perhaps the most striking examples come from the Supreme Court, with its decisions in Cox Broadcasting Corp. v. Cohn[288] and Florida Star v. B.J.F.[289] These were cases in which the media published the names of rape victims--in the latter case despite the fact that dissemination of the victim's name was a crime under state law. In both cases the Supreme Court found that the First Amendment protected media outlets against suit.[290] Freedom of expression just about always wins in America--both in privacy cases and in cases involving infliction of emotional distress, like Hustler Magazine, Inc. v. Falwell, which denied recovery to preacher Jerry Falwell after Hustler published a particularly gross parody.[291] This is the kind of question on which continental law, with its focus on personal honor, comes out differently.[292]

That does not mean, of course, that American law never protects the control of one's image. But even where it does, it tends to do it in an American way. This is perhaps clearest in the doctrine of the "right of publicity." The "right of publicity" is a characteristic American doctrinal invention, which we owe to Melville Nimmer's work of the 1950s.[293] In a sense, it is a doctrine of the protection of one's image. Nimmer argued that persons had an ownership right in their image, and that they could sue others who had misappropriated it. But it should be obvious that the notion of one's image as a piece of property, as a commercial commodity, is different in spirit from the continental protection of image. And indeed, while continental lawyers endorse this American innovation, they are ***1210** careful to distinguish it from their own distinctive traditions.[294] (Indeed, Americans themselves are confused by the question of whether the right of publicity really belongs within the realm

of privacy protections or not.)[295] And unsurprisingly, the American doctrine produces different results from continental doctrine. As critics complain, the "right of publicity" has tended to lose all of its moorings in the Warren and Brandeis idea of privacy, becoming essentially a vehicle for protecting the enterprises of celebrities like Bette Midler and Vanna White.[296] Moreover, nothing in the doctrine of the "right of publicity" prevents Americans from alienating the rights in their image, no matter how humiliating their subsequent use may be. If your image is your property, you can sell it. In Europe, by contrast, as we have seen, sales of your nude image remain voidable[297]--a very important doctrine, in particular, for protecting the interests of persons who, in moments of youthful folly, have allowed themselves to be photographed in embarrassing positions.

Finally, an American interest in one's "publicity" is an interest in one's property, not an interest in one's honor. This too sets the American tradition apart from the continental, and it affects the analysis in such famous matters as the "Here's Johnny!" case. In that case, the entertainer Johnny Carson sued a portable toilet maker who had adopted the well-known tagline "Here's Johnny!" for its product. An appellate court held that Carson's publicity rights had been violated. But it was careful to insist that Carson's rights were commercial rights only, not privacy rights against humiliation or embarrassment.[298] Here again, we can see a contrast with continental law, and with German law in particular. Even commercial enterprises can be "insulted" in Germany. German firms have "personality" rights, and they are indeed protected against embarrassing or humiliating uses of their slogans or logos, through what is called the doctrine of Markenverunglimpfung.[299] Some cases litigated under the American "right ***1211** of publicity" may come out the same way that they would in European "right to one's image" cases. But the underlying values are different, and courts feel obliged to say as much.

Indeed, even if some cases come out the same way, many come out differently. And there are many areas of the law, as we have seen, where Americans do not even perceive the sorts of privacy violations that seem to Europeans obviously present. The Europeans are right. At the end of the day, Americans do not really grasp the European idea of the protection of privacy.

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X. Conclusion

I will not try to answer that last question, because the correct concept of personhood is not what is at stake here. What is at stake are two different core sets of values: On the one hand, a European interest in personal dignity, threatened primarily by the mass media; on the other hand, an American interest in liberty, threatened primarily by the government. On both sides of the Atlantic, these values are founded on deeply felt sociopolitical ideals, whose histories reach back to the revolutionary era of the later eighteenth century.

These different core values do not, to say it one last time, completely dictate the shape of the law on either side of the Atlantic. The contrast, like all such contrasts, is relative and not absolute. Moreover, there is no logical inconsistency in pursuing both forms of privacy protection: It is perfectly possible to advocate both privacy against the state and privacy against nonstate information gatherers--to argue that protecting privacy means both safeguarding the presentation of self and inhibiting the investigative and regulatory excesses of the state. Indeed, American advocates of privacy typically do just that, denouncing the threat to "privacy" indiscriminately, as coming both from the state and from the media. There is nothing illogical in this.

Nevertheless, the emphases and sensibilities of the law on either side of the Atlantic remain stubbornly different, whatever careful philosophical logic might allow or dictate. Privacy law is not the product of logic. But neither is it the product of "experience" or of supposed "felt necessities" that are shared in all modern societies.[333] It is the product of local social anxieties and local ideals. In the United States those anxieties and ideals ***1220** focus principally on the police and other officials, and around the ambition "to secure the blessings of liberty," while on the Continent they focus on the ambition to guarantee everyone's position in society, to guarantee everyone's "honor." This was already true in 1791, in the French Revolution of Jérôme Pétion, and it remains true today.

This is not something we will ever understand if we do not get beyond the sort of shallow intuitionism that is the stuff of

most of our privacy literature. Indeed, it is a basic error to try to explain or justify any aspect of the law by appealing to our unmediated intuitions about what seems evil or horrible. That kind of crude intuitionist approach has been rejected by most moral philosophers--most famously by John Rawls, who insisted that good moral reasoning is founded on a "reflective equilibrium" between intuitions and rational moral theory.[334] Crude intuitionism is pretty much dead among moral philosophers, and it ought to be dead in the law too. Indeed, if anything, that sort of intuitionism is less acceptable in the law than it is in other realms of moral reasoning. In liberal Western societies, law is regarded as a weapon of last resort, to be drawn only when authentically fundamental values of society are at stake. This has a consequence that deserves to be stated over and over again: It is in the very nature of being a member of a liberal society that one must live with many things that seem horrible. If the sort of arguments mounted by privacy advocates were valid, many things indeed would be forbidden. Take only the example of adultery. One could easily offer an argument about adultery that took the same form as the arguments commonly offered in our privacy literature: Picture, one might say, your spouse having sex with someone else. Isn't it horrible? Horrible it may be, for most of us. But that does not decide the question of what the law should do about adultery. To decide that question, we must reflect on other, larger values--most particularly, on values of liberty.

The same is true of the law of privacy. We cannot simply start by asking ourselves whether privacy violations are intuitively horrible or nightmarish. The job is harder than that. We have to identify the fundamental values that are at stake in the "privacy" question as it is understood in a given society. The task is not to realize the true universal values of "privacy" in every society. The law puts more limits on us than that: The law will not work as law unless it seems to people to embody the basic commitments of their society. In practice, this means that the real choice, in the Atlantic world at least, is between social traditions strongly oriented toward liberty and social traditions strongly oriented toward dignity. This is a choice that goes well beyond the law of privacy: It is a choice that involves all the areas of law that touch, more or less nearly, on questions of dignity.

***1221** We can respond to this choice by refusing to make it: We can opt for a world in which societies just do things differently. For example, we can declare that American gays can realistically expect only to have their liberty rights protected. The prospects for the kind of dignitary protections embodied in a law of gay marriage, we could say, are remote. After all, protecting people's dignity is quite alien to the American tradition. Or we can do what most moral philosophers want to do: We can reject the notion that different societies should have differing standards. But if we take that tack, we must face the fact that we will not succeed in changing either world unless we embark on a very large-scale revaluation of legal values.

In truth, there is little reason to suppose that Americans will be persuaded to think of their world of values in a European way any time soon; American law simply does not endorse the general norm of personal dignity found in Europe. Nor is there any greater hope that Europeans will embrace the American ideal; the law of Europe does not recognize many of the antistatist concerns that Americans seem to take for granted. Of course we are all free to plead for a different kind of law--in Europe or in the United States. But pleading for privacy as such is not the way to do it. There is no such thing as privacy as such. The battle, if it is to be fought, will have to be fought over more fundamental values than that.

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