PRIVACY: THE TRANS-ATLANTIC DIVIDE

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There is a yawning divide between the U.S. and Europe regarding privacy issues, especially relating to data protection issues, and that divide seems to be growing rather than shrinking. Even before the European Union's adoption of the General Data Protection Regulation (GDPR),[1] many European countries had moved aggressively to regulate data and protect privacy, many through data protection commissions.[2]

While the U.S. has lagged behind Europe on privacy, it has not been completely insensitive to that issue. However, rather than focusing on creating data privacy protections, the U.S. has focused primarily on creating constitutional protections for privacy. Some of those constitutional protections are explicit (as set forth, for example, in the Bill of Rights),[3] while others have

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[1] Parliament and Council Regulation 2016/679 of April 27, 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1, http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf [https://perma.cc/2T5L-KHEN] (last visited Aug. 12, 2020).

[2] *See* Damon Greer, *Privacy in the Post-Modern Era – An Unrealized Ideal*, 12 SEDONA CONF. J. 189, 190 (2011).

[3] U.S. CONST. amends. I-X.

been "implied" by constitutional decision.[4] In addition, the U.S. has provided privacy rights through tort law.[5] While the U.S. provides some administrative protections for privacy, those protections pale in comparison to those provided by the European Union and many European countries.

This article attempts to do several things. First, it discusses the history and evolution of the constitutional and tort concepts of privacy in the United States, and provides some insight into the basis and scope of those rights. Second, it analyzes U.S. administrative protection for privacy rights, as well as the potential impact of the GDPR on privacy rights in the United States.

I. PRIVACY PROTECTIONS IN THE BILL OF RIGHTS

The founding generation did not focus on the right of privacy, *per se*, but it was concerned about protecting privacy in specific contexts. But demands for protections came about in a round-about way. When the U.S. Constitution was written, the Framers decided not to include a bill of rights, believing that it was unnecessary, given that they had created a federal government of limited and enumerated powers, and they also believed that an explicit statement of rights might unnecessarily suggest that only the listed rights should be protected.[6] The Framer's decision to omit a Bill of Rights was met with vociferous objections from those who believed that a Bill of Rights was needed to avoid tyranny,[7] and it rapidly became clear that the Constitution might not be ratified absent inclusion of a bill of rights.[8] In an effort to salvage the constitutional process, it was ultimately agreed that the Constitution would be adopted "as is" (in other words, without a bill of rights), but that the first Congress would be charged with

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[4] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

[5] *See* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

[6] *See* Wallace v. Jaffree, 472 U.S. 78, 92 (1985) (White, J., dissenting).

[7] *See* McDonald v. City of Chicago, 561 U.S. 742, 768-69 (2010).

[8] *Id.*

creating and adopting a list of rights.[9] The result was the Bill of Rights entered the Constitution as the first ten amendments.[10]

Those who demanded a Bill of Rights did not ask for a specific provision guaranteeing privacy rights to the citizenry. After all, the Bill of Rights was created more than a century before Samuel Warren and Louis D. Brandeis would write their seminal article on the right of privacy. The Bill of Rights did contain a number of provisions that focus on privacy in specific contexts. For example, the Bill of Rights contains the Fourth Amendment which protects the people from "unreasonable searches and seizures" of their persons, places, houses and effects, and provides that warrants shall not issue except when certain conditions are satisfied.[11] The drive for Fourth Amendment protections arose from outrage over abuses that had occurred during the colonial period.[12] For example, "British colonial [officials] had used [W]rits of [A]ssistance that [required] them to do no more than specify the object of a search [in order to] obtain a warrant [that allowed] them to search any place where the [alleged contraband] might be found."[13] The resulting search had no limit as to place or duration.[14] "Colonial officials had also used 'general warrants' that required them only to specify an offense, and then left it to the discretion of [those] officials to decide which persons should be arrested and which places should be searched."[15] General warrants essentially allowed British officials to thoroughly search the colonists' homes and persons. The Fourth Amendment cabined

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[9] *Id.*

[10] U.S. CONST. amends. I-X.

[11] U.S. CONST. amend. IV.

[12] *See* Boyd v. United States, 116 U.S. 616, 625 (1886). The debate and the anger in the American colonies about the arbitrary use of these writs of assistance by the English "was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country," and "were fresh in the memories of those who achieved our independence and established our form of government." *Id*. *See also* United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990) ("[T]he driving force behind the adoption of the [Fourth] Amendment . . . was widespread hostility among the former Colonists to the issuance of writs of assistance . . . [T]he purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government . . .").

[13] *See* Russell L. Weaver, *The Fourth Amendment, Privacy and Advancing Technology*, 80 MISS. L.J. 1131, 1131 (2011).

[14] *Id.* at 1132.

[15] *Id.*

the scope of governmental authority by prohibiting the government from conducting "unreasonable searches and seizures," and by requiring probable cause (as well as oath or affirmation and particularity) as a precondition for the issuance of a warrant.[16]

The Bill of Rights also contained other provisions which touched upon privacy interests. For example, the Third Amendment to the U.S. Constitution prohibited the quartering of soldiers "in any house" in time of peace without the consent of the owner.[17] This Amendment was privacy-like because it prohibited the government from forcing citizens to house soldiers in their homes.

And, of course, the Ninth Amendment to the U.S. Constitution makes clear that the enumeration in the Constitution, of certain rights, shall not be construed as denying or disparaging the existence of other rights.[18] Thus, while not explicitly creating a right of privacy, the Ninth Amendment suggests that such a right could be found to exist.

II. OTHER CONSTITUTIONAL IMPLICATIONS

The other major constitutional source of privacy rights has come by way of constitutional implication. In particular, the U.S. Supreme Court explicitly constitutionalized the right to privacy with its 1965 decision in *Griswold v. Connecticut*.[19] Although privacy concepts had been rippling through the Court's decisions for some time,[20] the Court had not formally declared the existence of a right of privacy. Those prior decisions included *Pierce v. Society of Sisters*,[21] which held that parents can choose to educate their children in private schools, *Meyer v. State of Nebraska*,[22] which recognized a constitutional right to study German in private schools, and *NAACP v. Alabama*,[23] which the Court later

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[16] U.S. CONST. amend. IV.

[17] U.S. CONST. amend. III.

[18] U.S. CONST. amend. IX.

[19] 381 U.S. 479 (1965).

[20] *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[21] 268 U.S. 510 (1925).

[22] 262 U.S. 390 (1923).

[23] 357 U.S. 449, 462 (1958).

characterized as involving the "freedom to associate and privacy in one's associations."[24]

Griswold went beyond these earlier precedents by explicitly recognizing a right of privacy.[25] In other words, it found "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[26] The case involved several Connecticut laws that prohibited the use of contraceptive devices, and also prohibited anyone from assisting, abetting or counseling anyone else regarding the use of such devices.[27] The medical director of the Planned Parenthood League of Connecticut had been prosecuted and convicted of giving information, instruction, and medical advice on the use of birth control to married persons, in violation of the Connecticut statutes.[28] The Court overturned the convictions, finding a constitutional right to use contraceptives because they were within the zone of privacy provided for in the Fifth and Fourteenth amendments.[29] The Court viewed the case as involving governmental intrusion in the martial bedroom: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[30]

Griswold found this right of privacy in the "penumbras" of privacy which it found in various provisions of the Bill of Rights, including the First Amendment (which protects, among other things, freedom of speech and assembly),[31] the Third Amendment (which prohibits the quartering of troops in people's homes),[32] the Fourth Amendment (prohibiting unreasonable searches and seizures),[33] the Fifth Amendment (providing that individuals shall not be deprive of life, liberty or property without due process of

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[24] *Id*.
[25] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
[26] *Id*. at 485.
[27] *Id*. at 480.
[28] *Id*.
[29] *Id*. at 482-86.
[30] *Id*.
[31] *Id*. at 482-84.
[32] *Id*. at 484.
[33] *Id*. at 484-85.

law),[34] and the Ninth Amendment (providing that the enumeration of certain rights shall not be construed as suggesting that other rights do not exist) to the U.S. Constitution.[35] The Court used these penumbras to conclude that the Constitution ensures a general right of privacy.[36]

It is not clear that *Griswold's* logic holds together. Unquestionably, it might be offensive for governmental officials to intrude into the marital bedroom. And one can easily argue that a married couple should be free to choose whether to have children, and therefore whether to use contraceptives to prevent childbirth. But whether the penumbras of the First Amendment create a general right of privacy is more debatable. Consider the arguments of one commentator:

> Justice Douglas's argument seems to go something like this: since the Constitution, in various "specifics" of the Bill of Rights and in their penumbra, protects rights which partake of privacy, it protects other aspects of privacy as well, indeed it recognizes a general, complete right of privacy. And since the right emanates from specific fundamental rights, it too is "fundamental," its infringement is suspect and calls for strict scrutiny, and it can be justified only by a high level of public good.
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> A logician, I suppose, might have trouble with that argument. A legal draftsman, indeed, might suggest the opposite: when the Constitution sought to protect private rights it specified them; that it explicitly protects some elements of privacy, but not others, suggests that it did not mean to protect those not mentioned.[37]

Nevertheless, over time, Justice Douglas' articulation of a right of privacy has won the day and the constitutional concept of privacy has become well-recognized.[38]

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[34] *Id.*

[35] *Id.* at 484.

[36] *Id.* at 485-86.

[37] Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1421-1422 (1974).

[38] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

Griswold was followed by a series of decisions extending the right of privacy to other contexts. For example, in *Eisenstdt v. Baird*,[39] the Court struck down a law restricting the availability of contraceptives to unmarried persons. In *Roe v. Wade*,[40] the Court reiterated its position regarding the existence of a right of privacy:

> The Constitution does not explicitly mention any right of privacy. . . . [T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," . . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, . . . procreation; contraception, . . . family relationships, . . . and child rearing and education.[41]

The *Roe* Court then concluded that the right of privacy includes protection of a woman's right to choose to have an abortion:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed

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[39] 405 U.S. 438, 454-55 (1972).

[40] 410 U.S. 113 (1973).

[41] *Id.* at 152-53.

> motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.[42]

The Court went on to hold that "the right of personal privacy includes the abortion decision,"[43] and to establish an elaborate trimester system regulating a woman's right to have an abortion.[44]

III. THE TORT OF PRIVACY

In the 1890s, Samuel Warren and Louis D. Brandeis published their landmark article *The Right to Privacy*.[45] In that article, they forcefully argued for the need to protect the right of "privacy" which they described as "the right to be let alone" and as one of the rights most valued by civilized men.[46] Brandeis carried his privacy crusade into the twentieth century when he argued for extending the right to privacy to protections against police surveillance. In *Olmstead v. United States*,[47] Brandeis expressed concern that advances in technology could one day threaten personal privacy.[48] He believed that someday government might be able, "without removing papers from secret drawers," to "reproduce them in court," and "expose to a jury the most intimate occurrences of the home."[49] Brandeis urged the Court to create an "indefeasible right of personal security, personal liberty and private property."[50]

Professor William Prosser picked up the gauntlet thrown down by Warren and Brandeis in his article, *Privacy*.[51] In that article, he sought to clarify and define the tort of privacy.[52] He did so by dividing it into four separate and distinct categories,

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[42] *Id.* at 153.

[43] *Id.* at 154.

[44] *Id.* at 160-66.

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

[46] *Id.* at 193.

[47] 277 U.S. 438 (1928).

[48] *Id.* at 474 (Brandeis, J., dissenting).

[49] *Id.*

[50] *Id.* at 474-75.

[51] *See* Prosser, *supra* note 5 at 383.

[52] *Id.* at 389.

involving situations in which: (1) defendant publicly portrays plaintiff in a false light; (2) defendant intrudes on plaintiff 's seclusion; (3) defendant publicly discloses private embarrassing facts about the plaintiff; and (4) defendant appropriates plaintiff 's name, image, or likeness for defendant's benefit.[53]

The Prosser privacy categories are now well-established. However, these rights are frequently limited when they come into tension with free speech interests. U.S. free speech decisions are generally more protective of free speech then European decisions.[54] In addition, the U.S. is much less inclined than Europe to balance free speech against other rights, and the right to free speech usually prevails over many other rights.[55] Thus, the U.S. Supreme Court has given the right to free speech preference over the right to recover for intentional infliction of mental and emotional distress,[56] as well as over most defamation claims.[57] The Court has also refused to lightly balance away First Amendment rights against other competing rights.[58] Indeed, in a number of cases, the U.S. Supreme Court has indicated that it will not apply a "'simple balancing test' that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test."[59] The Court has rejected the idea of such a balancing test as "startling and dangerous," noting that "without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First

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[53] *Id.*

[54] *See, e.g.*, United States v. Alvarez, 567 U.S. 709 (2012); Brown v. Entertainment Merchants Ass'n, 564 U.S. 786 (2011); Snyder v. Phelps, 562 U.S. 443 (2011); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

[55] *See, e.g.*, *Snyder*, 562 U.S. at 460 (right to free speech prevails over right to recover for intentional infliction of mental and emotional distress); *Falwell*, 485 U.S. at 50 (right to free speech prevails over right to recover for intentional infliction of mental and emotional distress); New York Times Co. v. Sullivan, 376 U.S. 254, 254, 279-280 (1964) (right to free speech requires heightened burden of proof standards in a defamation case brought by a public official).

[56] *See, e.g.*, *Snyder*, 562 U.S. at 460; *Falwell*, 485 U.S. at 50.

[57] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. at 254, 279-280.

[58] *See Brown*, 564 U.S. at 792.

[59] *See id.*; *see also* United States v. Stevens, 559 U.S. 460, 471 (2010).

Amendment, 'that the benefits of its restrictions on the Government outweigh the costs.'"[60] As a result, the Court struck down a federal law making it a crime for an individual to falsely claim that he or she has won the congressional medal of honor,[61] a law prohibiting so-called crush videos,[62] and a state law prohibiting the sale of violent videos to minors.[63] Likewise, a prohibition against Holocaust denial would likely be struck down as a viewpoint-based restriction on speech.

When U.S. courts have been confronted by conflicts between the interest in freedom of expression, and the interest in privacy, the Court has generally cut the balance between those interests in favor of free expression. However, in a few instances, privacy interests have prevailed.

False Light Privacy Claims

Although there has been a dearth of U.S. Supreme Court cases on the false light prong of privacy, the one major decision cut decisively in favor of free expression. That decision, *Time, Inc. v. Hill*,[64] arose when Life Magazine published an article entitled "True Crimes Inspire Tense Play" with the subtitle, "The ordeal of a family trapped by convicts gives Broadway a new Thriller, 'The Desperate Hours.'"[65] The article was based on a play that purportedly depicted the ordeal of a family that was held hostage by escaped convicts, and who emerged as heroes for the way they handled a brutal and violent ordeal.[66] The difficulty was that the play misrepresented what had happened: the convicts had treated the family courteously rather than violently.[67]

Thus, plaintiffs were portrayed in a false (although not necessarily defamatory) light.[68] The family sued under a New York ordinance that made it actionable for a "person, firm or corporation that uses for advertising purposes, or for the purposes

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[60] *Brown*, 564 U.S. at 792.
[61] *See Alvarez*, 567 U.S. at 722-24.
[62] *See Stevens*, 559 U.S. at 482.
[63] *See Brown*, 564 U.S. at 792.
[64] 385 U.S. 374 (1967).
[65] *Id*. at 377.
[66] *Id*. at 377-78.
[67] *Id*. at 378.
[68] *Id*. at 378-79.

of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."[69] Although Time, Inc. sought to invoke a First Amendment defense by claiming that the article involved a matter of public interest, the trial court imposed a $50,000 damage award in favor of the plaintiffs, as well as $25,000 in punitive damages.[70]

In overturning the damage award, the U.S. Supreme Court held that, in order to recover, plaintiffs must show that defendant acted with "actual malice."[71] In other words, plaintiffs were required to prove that defendant knew that its statement was false, or that it acted in reckless disregard for truth or falsity.[72] In analyzing the evidence, although Time, Inc. might have been negligent, the Court concluded that Time's report did not involve actual malice.[73]

Intrusion on Plaintiff's Seclusion

The typical intrusion upon seclusion case involves a media report that accurately discloses personal, embarrassing, or intimate details about an individual. In such cases, as discussed more fully below, a privacy claim might prevail over a free speech defense.

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[69] The statute is currently codified at N.Y. Civ. Rights Law §§ 50-51 (McKinney 2019).

[70] Time, Inc. v. Hill, 385 U.S. 374, 378-79 (1967).

[71] *Id.* at 387, 391.

[72] *Id.* at 387.

[73] *Id.* at 393-94. The court stated:

> The jury might reasonably conclude from this evidence—particularly that the New York Times article was in the story file, that the copy editor deleted 'somewhat fictionalized' after the research assistant questioned its accuracy, and that Prideaux admitted that he knew the play was 'between a little bit and moderately fictionalized'—that Life knew the falsity of, or was reckless of the truth in, stating in the article that 'the story reenacted' the Hill family's experience. On the other hand, the jury might reasonably predicate a finding of innocent or only negligent misstatement on the testimony that a statement was made to Prideaux by the free-lance photographer that linked the play to an incident in Philadelphia, that the author Hayes cooperated in arranging for the availability of the former Hill home, and that Prideaux thought beyond doubt that the 'heart and soul' of the play was the Hill incident.

Id.

Some of the cases have involved slightly different facts. For example, in *Cox Broadcasting Corp. v. Cohn*,[74] the father of a deceased rape victim sued based on a state law that prohibited publication of a rape victim's name during the trial of the alleged rapist.[75] The girl's father, who claimed that the publication invaded his privacy, was granted summary judgment.[76] The U.S. Supreme Court reversed, treating the claim as involving an intrusion into plaintiff's right to seclusion.[77] Defendants claimed that they had a constitutional right to publish truthful information,[78] however damaging it may be to reputation or individual sensibilities,[79] but the Court decided the case on the more narrow ground that the victim's identity had been obtained legally from a public record (the indictment),[80] and thus, "the interests in privacy fade when the information involved already appears on the public record."[81]

Likewise, *Landmark Communications, Inc. v. Virginia*[82] involved a newspaper report concerning a confidential judicial disciplinary proceeding. On appeal, the Supreme Court was faced with the question of "whether the First Amendment permits the criminal punishment of . . . the news media[] for divulging or

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[74] 420 U.S. 469 (1975).

[75] *Id.* at 471-74. *See* GA. CODE ANN. § 16-6-23 (2001), *held unconstitutional by* Dye v. Wallace, 553 S.E.2d 561, 561 (Ga. 2001). The statute stated:

> It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity or any female who may have been raped or upon whom an assault with intent to commit rape may have been made. . . . Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor.

Id.

[76] *Cox Broadcasting*, 420 U.S. at 474.

[77] *Id.* at 489. "[P]laintiff claims the right to be free from unwanted publicity about his private affairs, which, although wholly true, would be offensive to a person of ordinary sensibilities." *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 472-73, 491.

[81] *Id.* at 494-95.

[82] 435 U.S. 829 (1978).

publishing truthful information regarding confidential proceedings" of a judicial disciplinary hearing.[83] Finding that the information was truthful and lawfully obtained, the Court sided with the newspaper and held that the First Amendment does not permit the criminal punishment of third persons such as the news media for divulging or publishing truthful information regarding confidential proceedings of a state judicial review commission.[84]

For similar and other reasons, the First Amendment prevailed over privacy concerns in *Smith v. Daily Mail Publishing Co.*,[85] a case that concerned a newspaper's publication of a legally obtained child murderer's name. Although the Court refused to establish an absolute privilege for the disclosure of truthful private information, it held that liability for publishing accurate information on an issue of "public significance" could not be established absent "a state interest of the highest order."[86]

In one of the most famous intrusion upon seclusion cases, *Snyder v. Phelps*,[87] the First Amendment again prevailed over a privacy claim. *Snyder* involved members of the Westboro Baptist Church who believed that God hates and punishes the United States for its tolerance of homosexuality, particularly in its military.[88] The group publicized its views by picketing at military funerals, having protested at some 600 funerals over a twenty-year period.[89] After Marine Lance Corporal Matthew Snyder was killed in Iraq in the line of duty, six Westboro parishioners decided to protest his funeral on public land near the Maryland State House, the U.S. Naval Academy, and the funeral.[90] They carried signs with messages such as, "God Hates the USA/Thank God for 9/11," "America is Doomed," "Thank God for Dead Soldiers," "God Hates Fags," and "God Hates You."[91]

The Westboro picketers displayed their signs prior to the funeral, and they also sang hymns and recited Bible verses, but

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[83] *Id*. at 837.
[84] *Id*. at 838.
[85] 443 U.S. 97 (1979).
[86] *Id.* at 103.
[87] 562 U.S. 443, 459-60 (2011).
[88] *Id*. at 454.
[89] *Id*. at 448.
[90] *Id*.
[91] *Id*.

they did not enter church property or the cemetery.[92] Snyder's father did not see the signs, but rather only their tops, even though the funeral procession passed within 200 feet of the picket site.[93] However, Snyder's father did see the signs later on the evening news broadcast.[94] Also, while doing an Internet search, he came across a Web posting (the "epic") that was posted after the funeral and contained religiously oriented denunciations of the Snyders interspersed with Bible quotations.[95]

Snyder sued the founder of the Westboro Baptist Church, Fred Phelps, Phelps's daughters, and the Westboro Baptist Church.[96] The trial court awarded summary judgment for Westboro on Snyder's defamation and publicity claims, but the remaining claims went to trial where Snyder testified that he was "unable to separate the thought of his dead son from his thoughts of Westboro's picketing, and that he often became tearful, angry, and physically ill when he thought about it."[97]

Expert witnesses testified that Snyder suffered "emotional anguish" and "severe depression" which exacerbated his pre-existing health conditions.[98] Snyder prevailed in the trial court on the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, and obtained judgments against Westboro liable for $2.9 million in compensatory damages and $8 million in punitive damages (remitted to $2.1 million).[99] The U.S. Supreme Court reversed, reasoning that defendant's speech occurred in a public place and related to a matter of public concern.[100] The Court also refused to allow recovery for the intrusion tort based on plaintiff's claim that defendants had invaded Snyder's privacy during a time of bereavement, when they posted the "epic" on the Westboro website.[101] Given Snyder's

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92 *Id*. at 448-49.
93 *Id*. at 449.
94 *Id*.
95 *Id*. at 449 n.1.
96 *Id*. at 449-50.
97 *Id*. at 450.
98 *Id*.
99 *Id*.
100 *Id*. at 458-59.
101 *Id*. at 459-60.

counsel's failure to mention the "epic" in the certiorari petition, the Court declined "to consider the 'epic.'"[102]

There are contexts in which the intrusion on seclusion claim will prevail over a free speech claim. For example, suppose that a reporter wants to publish a scoop about a famous personality. In order to gather exclusive information, unknown to other journalists, the journalist breaks into and searches a famous person's home. In that situation, one can assume that the journalist can be criminally prosecuted for trespass, as well as for theft if he removes items from the house. In addition, the homeowner could presumably sue the journalist for trespass and conversion, and perhaps for restitution if any benefit or gains obtained by publication of the story, and arguably an intrusion on seclusion claim would prevail.

In one such case, Hulk Hogan sued Gawker, an American Blog site focusing on celebrities and the media, relating to Gawker's publication of intimate sex tapes of Hogan.[103] In that case, billionaire Paul Thiel allegedly funded the litigation[104] to the tune of $10 million, purportedly because Gawker had outed him and several of his friends as gay.[105] The suit resulted in a $140 million judgment for invasion of privacy, and ultimately to a $31 million settlement.[106] The case led to a sale of Gawker and ultimately to its demise.[107]

In addition, courts will sometimes impose restrictions on outrageous behavior. In *Galella v. Onassis*,[108] former First Lady Jacqueline Onassis sued a freelance "paparazzi" photographer

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[102] *Id*. at 449 n.1.

[103] *See* Callum Borchers, *Peter Thiel is Totally Not Sorry, People*, WASHINGTON POST (Jan. 13, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/13/peter-thiel-is-totally-not-sorry-people/ [https://perma.cc/5779-BTNR].

[104] *See* Katie Rogers & John Herrman, *Thiel-Gawker Battle Raises Some Concerns About Press Freedom*, NEW YORK TIMES (May 27, 2016), https://www.nytimes.com/2016/05/27/business/media/thiel-gawker-fight-raises-concerns-about-press-freedom.html [https://perma.cc/E9JY-MYMX].

[105] *See* Barry Meier, *Revenge and the Future of Media Finances*, NEW YORK TIMES, (May 26, 2016), https://www.nytimes.com/2016/05/27/business/revenge-and-the-future-of-media-finances.html [https://perma.cc/L6B5-P7A7].

[106] *See* Sydney Ember, *Gawker and Hulk Hogan Reach $31 Million Settlement*, NEW YORK TIMES (Nov. 2, 2016), https://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html [https://perma.cc/77J2-NYFN].

[107] *See* Borchers, *supra* note 104.

[108] 353 F. Supp. 196 (S.D.N.Y. 1972).

(Galella) for, *inter alia*, invasion of privacy. In an effort to produce interesting pictures of Mrs. Onassis and her children, Galella engaged in conduct that was "frightening" ("lunging," "rushing out," "bumping," "scuffling," "blocking"),[109] "[o]ffensive mouthings" ("grunts," "yells," and "strange sounds"),[110] "[b]ogus events" (hiring a costumed Santa to try to force himself close to defendant),[111] "[s]elf-aggrandizement" (conniving to have himself photographed with Mrs. Onassis and claiming an intimate knowledge of her every move),[112] seeking a payoff in exchange for suppressing his story, and "[i]ncessant surveillance" (the threat to follow her hour after hour wherever she goes),[113] including "[s]ecret [a]gent" tactics (e.g., hiding behind restaurant coat racks, sneaking into beauty parlors, donning "disguises," hiding in theater boxes, intruding into school buildings, bribing doormen, and romancing maids).[114]

The district court flatly rejected the "proposition that the First Amendment gives the press wide liberty to engage in any sort of conduct, no matter how offensive, in gathering news,"[115] and it also rejected the idea that the First Amendment gives a newsman the unbridled license to commit torts.[116] Moreover, the court concluded that it was entitled to balance the interest in speech against the intrusion on Onassis' life.[117] In *Galella*, even

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[109] *Id.* at 216.

[110] *Id.* at 217.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at 220.

[116] *Id.* at 221-22.

[117] *Id.* at 225. The district court noted the conflict between the individual's interest in privacy and the public interest in being informed on newsworthy matters and provided that a balancing test would be appropriate in this context, stating:

> The balancing test is responsive both to the protection of the individual's right to privacy and to the purposes of the First Amendment. Clearly, the First Amendment protects freedom of expression with respect to public affairs—matters relevant to the self-government of the nation. It extends to "all issues about which information is needed or appropriate to enable members of the society to cope with the exigencies of their period." Doubtless, Mrs. Onassis is a public figure, whose life has included events of great public concern. But it cannot be said that information about her comings and goings, her tastes in ballet, the food that she eats, and other minutiae which are the sole product of Galella's

after applying the balancing test, the court was unwilling to prohibit Galella from taking pictures of Onassis or her children.[118] However, the Court held that "the First Amendment does not license Galella to trespass inside private buildings, such as the children's schools, lobbies of friends' apartment buildings and restaurants."[119] Moreover, the court held that there is no "general constitutional right to assault, harass, or unceasingly shadow or distress" Onassis when she is in public.[120] The court concluded that Galella had committed assault, battery, harassment, invasion of privacy, tortious infliction of emotional distress, and violation of Onassis' civil rights, and could be subjected to a damage award.[121]

Right to Publicity

The right of publicity protects an individual's economic interest in the use of his name, image, and talent; an interest that is of special concern to athletes, entertainers, and performers. However, protection of name, image, and likeness also imposes restrictions on news gathering and thus implicates First Amendment interests. In a number of cases, privacy interests have prevailed over free speech interests.

One of the more famous decisions was rendered in *Zacchini v. Scripps-Howard Broadcasting Co.*,[122] involving a television station which broadcast Zacchini's "human cannonball" performance which propelled Zacchini some 200 feet. Zacchini performed his act at a fairgrounds surrounded by grand stands which made it difficult to see the performance from outside.[123] A reporter, who Zacchini had asked not to film his performance, filmed the entire act and broadcast it on the evening news.[124] Zacchini sued, claiming that he was "engaged in the entertainment business,"

> three years of pursuit, bear significantly upon public questions or otherwise "enable the members of society to cope with the exigencies of their period." It merely satisfies curiosity.

Id. at 226 (internal citation omitted).

[118] *Id.* at 241.

[119] *Id.* at 222.

[120] *Id.* at 223.

[121] *Id.* at 226-33.

[122] 433 U.S. 562 (1977).

[123] *Id.* at 563.

[124] *Id.*

that the act had been "invented by his father" and "performed only by his family for the last fifty years," and that defendant "showed and commercialized the act without his consent," thereby unlawfully appropriating "plaintiff's professional property."[125] The Court noted that the right of publicity accounted for two significant societal concerns: the right of an entertainer to trade upon his or her talents to make a living and society's interest in the facilitation of creative energy.[126] Although recognizing that news gathering is an important media function, the Court held that plaintiff was entitled to damages. Otherwise, defendant's broadcast might rob his performance of all economic value.[127] Moreover, Zacchini did not seek to prevent defendant from airing the performance. He simply sought compensation.[128]

Most publicity cases involve claims that defendant stole plaintiff's name or likeness, often for defendant's business purposes. For example, in *Davis v. Electronic Arts, Inc.*,[129] former professional football players sued the maker of the *Madden NFL* video game which included avatars that game users could direct. The designers were trying to simulate a real NFL football game by depicting current players for all 32 NFL teams, along with accurate player names, team logos, colors and uniforms.[130] The game maker paid millions of dollars in licensing fees to the players association in order to obtain the rights.[131]

However, the game also included "historic teams" with the names and likenesses of actual players on those teams, and the game maker made no payments for those rights.[132] Some of the "historic" players sued.[133] Although defendant admitted that plaintiff's likenesses were included in its games, it asserted a "transformative use" defense which shields a work from liability when it "adds significant creative elements so as to be

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[125] *Id.* at 564.
[126] *Id.* at 573.
[127] *Id.* at 575-76.
[128] *Id.* at 573.
[129] 775 F.3d 1172 (9th Cir. 2015).
[130] *Id.* at 1175.
[131] *Id.*
[132] *Id.*
[133] *Id.* at 1176.

transformed into something more than a mere celebrity likeness or imitation."[134]

The Court rejected this defense, noting that the game replicated "players' physical characteristics and allowed users to manipulate them in the performance of the same activity for which they are known in real life—playing football for an NFL team," and therefore the Court did not regard the background and graphics added by the game makers as "transformative."[135] The court rejected the idea that defendant's use of plaintiffs' likenesses was incidental.[136]

In *Onassis v. Christian Dior–New York, Inc.*,[137] Christian Dior ran a series of ads featuring the "Diors" (a female and two males), who were portrayed as chic, sophisticated, elite, unconventional, quirky, audacious, elegant, and unorthodox.[138] One of the advertisements depicted a wedding attended by their ostensible intimates—Gene Shalit, the T.V. personality, model Shari Belafonte, actress Ruth Gordon, and a woman (Barbara Reynolds) who looked like Jacqueline Onassis. [139] The copy for the advertisement read: "The wedding of the Diors was everything a wedding should be: no tears, no rice, no in-laws, no smarmy toasts, for once no Mendelssohn. Just a legendary private affair."[140]

Of course, what was "legendary" was the presence of this eclectic group, the most legendary of which was Mrs. Onassis, obviously delighted to be in attendance at this "event." [141] Defendants knew that Mrs. Onassis never have allowed her name or face to be used in commercials, and only rarely allowed it to be used in connection with civic, art, and educational projects. [142] So, defendants sought out Ms. Reynolds who, with appropriate

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134 *Id.* at 1177.

135 *Id.* at 1178.

136 *Id.* at 1180. For a case applying these rules to video games using the images of college athletes, *see* O'Bannon v. National Collegiate Athletic Association, 802 F.3d 1049 (9th Cir. 2015).

137 472 N.Y.S.2d 254, 257 (Sup. Ct. 1984), *aff'd*, 488 N.Y.S.2d 943 (App. Div. 1985).

138 *Id.* at 257.

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.*

coiffure and dress, looked remarkably like Mrs. Onassis.[143] The ad ran in several upscale publications (i.e., *Esquire, The New Yorker*), and Dior boasted that the campaign caused sales to go through the roof.[144] Onassis sued Christian Dior, claiming that it had appropriated her right of publicity.[145]

In *Onassis*, the Court held that Christian Dior had appropriated Ms. Onassis' personality in an effort to sell its product by using the look-alike.[146] The Court noted that Dior was attempting to portray its products as "as chic, sophisticated, elite, unconventional, quirky, audacious, elegant, and unorthodox."[147] Knowing that Ms. Onassis would never have consented to appear in such an ad, Dior located Ms. Reynolds through a "Celebrity Look-Alike" agency.[148] Thus, it was no accident that she bore a striking resemblance to Ms. Onassis, and the court concluded that Onassis was entitled to protection against this "rapacious commercial exploitation"[149]:

> We are dealing here with actuality and appearance, where illusion often heightens reality and all is not quite what it seems. Is the illusionist to be free to step aside, having reaped the benefits of his creation, and permitted to disclaim the very impression he sought to create? If we were to permit it, we would be sanctioning an obvious loophole to evade the statute. If a person is unwilling to give his or her endorsement to help sell a product, either at an offered price or at any price, no matter—hire a double and the same effect is achieved.[150]

Of course, the unique aspect of the case was that Onassis sought to enjoin Ms. Reynolds from appearing in the ads using her own face, and the court concluded that she could be enjoined from exhibiting her own face in such a way as to be deceptive or to promote confusion.[151]

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[143] *Id.*
[144] *Id.*
[145] *Id.* at 256.
[146] *Id.* at 263.
[147] *Id.* at 257.
[148] *Id.*
[149] *Id.* at 260.
[150] *Id.* at 261.
[151] *Id.*

Public Disclosure of Private Embarrassing Facts

In the final privacy category, public disclosure of private embarrassing facts, free speech interests often prevail as well. This tort requires proof that (1) defendant published matters regarding plaintiff's private life, (2) the publication would be highly offensive to a reasonable person of ordinary sensibilities, and (3) the matter was not of legitimate public concern.[152] Although the U.S. Supreme Court has mentioned this branch of the privacy tort, it has not ruled on the applicability of that tort, or its relationship to the right to free speech.[153] There have, however, been a number of lower court decisions, and the right to free speech has generally prevailed over the right of privacy.

Illustrative is the holding in *Lowe v. Hearst Communications, Inc.*,[154] in which a newspaper was sued for public disclosure after the publication of several articles about how a woman had bilked several lovers out of tens of thousands of dollars through an Internet ad seeking "erotic and intellectual" relationships with men. [155] After the relationships were consummated, her husband would draft petitions and settlement agreements and present them to her lovers, naming them as potential defendants and threatening them with legal action that would publicly expose the affairs. [156] As many as five men ultimately entered into settlement agreements to avoid litigation, paying $75,000 to $155,000.[157] The court emphasized that "the right to publish information will overcome privacy rights" when the publication involves a matter of "legitimate public concern."[158] Given that the case involved an alleged blackmail scheme, the court found that it involved a matter of "legitimate public concern."[159]

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[152] *See* Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473-74 (Tex.1995); Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 682 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

[153] *See* Paroline v. United States, 572 U.S. 434, 483 (2014) (Sotomayor, J., dissenting); Bartnicki v. Vopper, 532 U.S. 514, 539 (2001) (Breyer, J., concurring).

[154] 414 F. Supp.2d 669 (2006).

[155] *Id.* at 671-72.

[156] *Id.* at 672.

[157] *Id.* at 672.

[158] *Id.* at 673 (internal citation and quotation marks omitted).

[159] *Id.* at 674. The court stated:

Freedom of expression also prevailed in *Gilbert v. Medical Economics, Inc*.[160] In that case, defendant published an article entitled "Who Let This Doctor In The O.R.? The Story Of A Fatal Breakdown In Medical Policing."[161] The article outlined incidents of alleged medical malpractice in which plaintiff's patients (plaintiff was an anesthesiologist) suffered fatal or severely disabling injuries because of plaintiff's acts of alleged malpractice.[162] Plaintiff's insurer settled one malpractice action for $900,000.[163] The article suggested that the incidents occurred because of "a collapse of self-policing by physicians and disciplinary action by hospitals and regulatory agencies."[164]

The article further suggested (1) that there was a causal relationship between plaintiff's personal problems and the acts of alleged malpractice, (2) that plaintiff's lack of capacity to engage responsibly in the practice of medicine was or should have been known to the policing agents of the medical profession, and (3) that more intensive policing of medical personnel is needed.[165] The article identified plaintiff by name and included her photograph.[166] The court rejected a privacy claim on the basis that the item was newsworthy and therefore protected by the First Amendment.[167]

> Without question, the facts depicted in the article are matters of legitimate public concern. The article described an alleged blackmail scheme by lawyers who were willing to bend if not break the law to procure money from Mary's unsuspecting paramours. The public is legitimately interested in and entitled to know that two local lawyers, who hold themselves out as pursuers of justice and skilled and vigorous advocates on behalf of their clients, are using the processes of the law in such a legally and morally questionable manner. The article also presented insights into the operation of the legal system and a debate involving the ethics and legality of the Robertses' scheme.

Id.

160 665 F.2d 305, 310 (10th Cir. 1981).

161 *Id.* at 306.

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.* at 306-07.

166 *Id.* at 307.

167 *Id.* at 308-309. The court stated:

> With respect to the publication of plaintiff's photograph and name, we find that these truthful representations are substantially relevant to a

IV. DATA PRIVACY

Even though the U.S. has developed privacy concepts in many different contexts, including the constitutional context and the tort context, the U.S. has never been as concerned with data protection as Europe has been. For a variety of reasons, including strong lobbying by business interests, there is no U.S. equivalent of the GDPR.

That is not to say that there is a complete lack of interest in data privacy issues. For example, the Federal Trade Commission (FTC) has adopted a "Privacy Rule" which requires companies to provide customers with "a clear and conspicuous notice that accurately reflects your privacy policies and practices to . . . [a] consumer, before you disclose any nonpublic information about the consumer to any nonaffiliated third party, if you make such a disclosure other than as authorized by §§ 248.14 and 248.15."[168] and the FTC has investigated Facebook and Uber following revelations of privacy breaches.[169]

It will be interesting to see how the GDPR affects the U.S. I have heard some European scholars boldly predict that the GDPR will transform the world. Since the EU can impose major financial sanctions for violation of the GDPR, the Directive may essentially force non-European companies to bring their practices into

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> newsworthy topic because they strengthen the impact and credibility of the article. They obviate any impression that the problems raised in the article are remote or hypothetical, thus providing an aura of immediacy and even urgency that might not exist had plaintiff's name and photograph been suppressed. Similarly, we find the publication of plaintiff's psychiatric and marital problems to be substantially relevant to the newsworthy topic. While it is true that these subjects would fall outside the first amendment privilege in the absence of either independent newsworthiness or any substantial nexus with a newsworthy topic, here they are connected to the newsworthy topic by the rational inference that plaintiff's personal problems were the underlying cause of the acts of alleged malpractice.

Id.

[168] 17 C.F.R. § 248.4(a)(1) (2019).

[169] *See* Cecilia Kang, *The Man Deciding Facebook's Fate*, N.Y. TIMES (Mar. 8, 2019), https://www.nytimes.com/2019/03/08/technology/ftc-facebook-joseph-simons.html [https://perma.cc/MFB6-B9TQ]; Hamza Shaban, *Uber is sued over massive data breach after paying hackers to keep quiet*, WASH. POST (Nov. 24, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/11/24/uber-is-sued-over-massive-data-breach-after-paying-hackers-to-keep-quiet/ [https://perma.cc/JDF6-6TW9].

compliance with European data protection standards. And there is some validity to this prediction. Some U.S. companies have chosen to bring their websites into compliance with the GDPR, and visitors to these websites are beginning to see subtle differences in the way that those websites function. When one tries to access Weather.com[170] from Europe, one receives the following message:

About Cookies on This Site

> We use data or cookies on your browser to serve weather features, optimize site functionality, and deliver marketing based on your interests. Click "Agree and proceed" to accept cookies and go directly to the site. If you would like additional information or to customize your cookies click "View cookie settings."[171]

Likewise, the *New York Times* now requires individuals to affirmatively agree to their website policies in order to access their website.[172]

By contrast, some U.S. websites are beginning to differentiate between Europeans and non-Europeans, and refusing access to Europeans. More precisely, those websites do not distinguish between Europeans and non-Europeans, but between those who attempt to access their websites from Europe and those who attempt to access their websites from outside of Europe. Thus, an American who tries to access these websites from Europe will be treated like a European. Conversely, a European who happens to be in the U.S. will be treated like an American.

Illustrative is the retailer L.L.Bean (from which some Europeans like to order clothes and household items) now blocks those who try to access its site from Europe. Likewise, a local Louisville television station now routinely blocks Europeans from accessing its website. Those who attempt to access the website from Europe are given the following message:

451: Unavailable due to legal reasons

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[170] *See* THE WEATHER CHANNEL, https://www.weather.com (last visited Aug. 12, 2020).

[171] *See id.*

[172] *See* N.Y. TIMES, www.nytimes.com (last visited Jan. 22, 2020).

> We recognize you are attempting to access this website from a country belonging to the European Economic Area (EEA) including the EU which enforces the General Data Protection Regulation (GDPR) and therefore access cannot be granted at this time. For any issues, contact digitalteam@wdrb.com or call 502-585-0811.[173]

This type of response is hardly unique. Another Louisville television station routinely blocks individuals who try to access the website from the EU:

> **We're Sorry**
>
> Our website is unavailable in your region.
>
> If you feel you have reached this page in error, please email us.[174]

Other U.S. websites are not completely blocking Europeans, but are restricting European access. For example, while it is possible to access the Louisville Courier-Journal's website from Europe, one cannot get full access to that website.[175] Instead, it is only possible to access the European version of the newspaper.

CONCLUSION

From its founding, there has always been an interest in privacy in the U.S. The Bill of Rights reflects this interest by imposing various restrictions on government, including (among others) prohibiting the government from engaging in unreasonable searches and seizures and from quartering soldiers in citizens' homes. In the 1890s, following the call of Samuel Warren and Louis D. Brandeis for privacy protections, a privacy tort developed in the U.S. with four separate and distinct prongs. That tort was eventually supplemented by development of the constitutional right of privacy which the U.S. Supreme Court derived from the penumbras of the Bill of Rights. This constitutional right gave married (and unmarried) couples the

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[173] *See* WDRD, www.wdrb.com (last visited Jan. 22, 2020).

[174] *See* WLKY LOUISVILLE, www.wlky.com (last visited Jan. 22, 2020).

[175] *See* COURIER JOURNAL, www.courier-journal.com (last visited Jan. 22, 2020).

right to use contraception, and gave women the right to have abortions.

Despite the development of these privacy rights, the U.S. has never developed comprehensive data privacy protections like those that exist in Europe. Indeed, the U.S. has never moved to adopt an equivalent of the GDPR. In addition, in the U.S., there are no equivalents to European data and privacy commissions. However, the FTC has adopted a limited privacy rule.

Of course, there is always the possibility that the GDPR will force change in the U.S. Since the GDPR imposes substantial financial penalties on those who violate its provisions, U.S. companies arguably have powerful financial incentives to bring their actions into compliance with the GDPR. Whether the GDPR will actually have that effect is unclear. Undoubtedly, large multi-national companies who do a lot of business in Europe will ultimately bring their practices into compliance with the GDPR.

However, business decisions about whether to comply are likely to involve a cost-benefit analysis: how much business does a particular company expect from Europe versus how much will it cost to comply with the GDPR? As we have seen, a number of U.S. companies are simply blocking Europeans from accessing their websites, and a number of others are only giving Europeans limited access. It will be interesting to see how the GDPR impacts U.S. practices in the future.