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# JOURNAL OF MEDIA LAW & ETHICS

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**JOURNAL OF MEDIA LAW & ETHICS**

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Volume 6, Number 1/2

Summer/Fall 2017

Articles

4 PATRICK C. FILE

A History of Practical Obscurity: Clarifying and Contemplating the Twentieth Century Roots of a Digital Age Concept of Privacy

22 HOLLY KATHLEEN HALL

Arkansas v. Bates: Reconsidering the Limits of a Reasonable Expectation of Privacy

39 KENNETH WARD & AIMEE EDMONDSON

The Espionage Conviction of Kansas City Editor Jacob Frohwerk: "A Clear and Present Danger" to the United States

57 LETSHWITI B. TUTWANE

Navigating Legal Obligations and Culture: Satire and Freedom of Expression in Botswana

# **A HISTORY OF PRACTICAL OBSCURITY: CLARIFYING AND CONTEMPLATING THE TWENTIETH CENTURY ROOTS OF A DIGITAL AGE CONCEPT OF PRIVACY**

PATRICK C. FILE \*

*Practical obscurity—the idea that a privacy interest exists in information that is not secret but is nonetheless difficult to obtain—animates an active discussion about data privacy, including the much-debated “right to be forgotten.” But where does practical obscurity really come from? Scholars often point to United States Department of Justice v. Reporters Committee for Freedom of the Press, a landmark 1989 U.S. Supreme Court ruling that sought to balance personal privacy and public records, as the concept’s birthplace, but we know that the Court almost never creates legal concepts out of the blue. Rather, the Court’s opinions give form and force to existing ideas by incorporating them into their reasoning.*

*This article provides a history of practical obscurity as a concept of privacy in law and society, drawing on the decisions, motions and briefs that preceded the Reporters Committee ruling as well as discourse on information privacy that provided the social background for the case. It shows how the Reporters Committee ruling gave a name to concerns about a “surveillance society” that emerged and evolved between the 1960s and 1980s. It argues that although the ruling might be seen as an ironic departure from the concept’s roots and a problematic justification to obscure truthful information already in the public sphere, the concept may still be useful as a means to think beyond a simplistic public/private binary as we consider the legal and ethical responsibilities of various institutions that gather, share, and publish personal information.*

**Keywords:** privacy, practical obscurity, public records, right to be forgotten

## **I. Introduction**

The legal concept of practical obscurity is at the core of today’s debates surrounding digital data privacy, but we know surprisingly little about its roots in legal thinking. Scholars who have studied the concept most closely have defined “obscurity” for privacy purposes as “the idea that information is safe—at least to some degree—when

it is hard to obtain or understand.”<sup>1</sup> Practical obscurity was introduced to most of the legal world in 1989, in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, a decision in which the U.S. Supreme Court declared that a personal privacy interest existed when public information (in this case an individual’s criminal history record or “rap sheet”) was difficult to obtain.<sup>2</sup> Today, the concept underlies initiatives aimed at data privacy protection and similar policy making in the European Union and around the world.<sup>3</sup> It animated the EU Court of Justice’s 2014 ruling in the Google Spain “right to be forgotten” case.<sup>4</sup> In the United States, government agencies use the concept to justify denying records requests when personally identifiable information is at issue, and legislators employ it in contemplating whether a version of the “right to be forgotten” might be made a part of American law.<sup>5</sup> Scholars and commentators use it as a framework for thinking about privacy in a variety of contexts, both online and off.<sup>6</sup>

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<sup>1</sup> Woodrow Hartzog & Evan Selinger, *Obscurity: A Better Way to Think About Your Data Than “Privacy,”* THE ATLANTIC, Jan. 17, 2013, <http://www.theatlantic.com/technology/archive/2013/01/obscurity-a-better-way-to-think-about-your-data-than-privacy/267283/>. See also Woodrow Hartzog & Evan Selinger, *Surveillance as Loss of Obscurity*, 72 WASH. & LEE L. REV. 1343, 1358 (2015); Evan Selinger & Woodrow Hartzog, *Obscurity and Privacy*, in ROUTLEDGE COMPANION TO THE PHILOSOPHY OF TECHNOLOGY (Joseph Pitt & Ashley Shew eds., 2014). Hartzog and Frederic Stutzman have drawn a distinction between obscurity and its “older sibling,” practical obscurity, which they say, “typically focuses on off-line impediments to data retrieval.” Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CAL. L. REV. 1, 21 (2013). This distinction is conceptually important, especially as fewer off-line impediments exist, but this article draws together the blood relatives obscurity and practical obscurity under the same analytical umbrella.

<sup>2</sup>U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989). Scholars generally refer to the “birth” of practical obscurity as having occurred in the *Reporters Committee* case. Jane Kirtley, “*Misguided in Principle and Unworkable in Practice*”: *It is Time to Discard the Reporters Committee Doctrine of Practical Obscurity (And its Evil Twin, The Right to Be Forgotten)*, 20 COMM. L. & POL’Y 91, 93 (2015); see also Hartzog & Selinger, *Surveillance as Loss of Obscurity*, *supra* note 82, at 1356 (referring to *Reporters Committee* as “the canonical starting point for explicit debate about ‘practical obscurity’ in the American judicial system”).

<sup>3</sup>Kyu Ho Youm & Ahran Park, *The ‘Right to Be Forgotten’ in European Union Law: Data Protection Balanced With Free Speech?* 93 JOURNALISM & MASS COMM. Q. (ISSUE 2) 273, 276-278 (June 2016).

<sup>4</sup>*Google Spain SL v. Agencia Española de Protección de Datos [AEPD]*, Case C-131/12, Court of Justice of the European Union (Grand Chamber) (May 13, 2014), available at [http://curia.europa.eu/juris/document/document\\_print.jsf?doclang=EN&docid=152065](http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=152065). See Youm & Park, *supra* note 3, at 282-283.

<sup>5</sup> Jane Kirtley, *supra* note 2, at 109-111 (discussing the Minnesota Supreme Court’s declining to allow remote access to digitized court records); *id.* at 106-107 (discussing California’s “online erasure” law for minors, CAL. BUS. & PROF. CODE § 22581); *id.* at 112-113 (discussing U.S. Court of Appeals for the D.C. Circuit ruling rejecting a FOIA request for law enforcement use of location tracking data in *American Civil Liberties Union v. Department of Justice*, 730 F.3d 927 (D.C. Cir. 2014)). See also Jack Greiner, *Is New York Poised to Adopt a Right to be Forgotten?* CINCINNATI.COM (March 30, 2017), <http://www.cincinnati.com/story/money/2017/03/30/new-york-poised-adopt-right-forgotten/99821344/> (discussing AB A5323, 202d Leg. (N.Y. 2017)).

<sup>6</sup>Hartzog & Selinger, *Obscurity: A Better Way to Think About Your Data Than “Privacy,”* *supra* note 82; Daxton Stewart & Kristie Bunton, *Practical Transparency: How Journalists Should Approach Digital Shaming and the “Streisand Effect,”* 5 J. MEDIA L. & ETHICS 4 (2016); Margot Kaminski, *Enough With the “Sunbathing Teenager” Gambit: Drone Privacy is About Much More than Protecting Girls in Bikinis*, SLATE (May 17, 2016), [http://www.slate.com/articles/technology/future\\_tense/2016/05/drone\\_privacy\\_is\\_about\\_much\\_more\\_than\\_sunbathing\\_teenage\\_daughters.html](http://www.slate.com/articles/technology/future_tense/2016/05/drone_privacy_is_about_much_more_than_sunbathing_teenage_daughters.html) (“The sunbather narrative . . . doesn’t address facial recognition

This article analyzes the history of the concept of practical obscurity in American privacy law prior to the U.S. Supreme Court's ruling in the *Reporters Committee* case. Employing a conceptual framework of "law-in-history" as a socially contingent process of mediation among conflicting ideas,<sup>7</sup> the study draws together briefs and lower court decisions in the *Reporters Committee* case, the sources and authorities on which those documents rely, and legal commentary and discussion about information privacy in the decades preceding the decision. The study traces the development of practical obscurity in order to explain how it was formulated in legal consciousness before being embraced by the United States' highest court.<sup>8</sup> The study aims to provide needed historical context for a controversial ruling and legal concept that heavily influence current discussions of privacy in policy, doctrine, and daily life.

The article argues that the concept of privacy underlying practical obscurity was well into its maturity by the Supreme Court's *Reporters Committee* ruling in 1989, having developed between the 1960s and 1980s out of social concerns and policy responses related to the use of computers—primarily but not exclusively by the government—to gather and store information about citizens. This history can help us better understand the function that practical obscurity serves at the intersection of two core values in democratic society: the right to privacy and the right to know. Moreover, the story this article tells highlights an interesting irony in the *Reporters Committee* case: that the Department of Justice prevailed partly by asserting a rationale for withholding public records that was originally based in public distrust of the government's collection of personal information. This irony helps explain how practical obscurity may be a useful concept for considering information privacy beyond a simplistic public/private binary even if it does not provide a satisfactory justification for the *Reporters Committee* ruling or for legal regimes that would obscure or render "forgotten" true information already in the public sphere.

Section II of the article explains the Court's reasoning in *Reporters Committee* that rested on (and coined) the legal concept of practical obscurity, and discusses themes in the scholarship and commentary that have examined the decision and the concept.

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technology. Our inescapable biometric identifiers mean we can lose the practical obscurity in which we usually operate in physical spaces."); Marissa Lang, *Outing is Totally Still a Thing, People*, S.F. CHRON. (June 2, 2016), <http://www.sfchronicle.com/business/article/Outing-is-totally-still-a-thing-people-7960315.php> ("practical obscurity only works [on dating websites] if the service can adequately protect users' information."); George Lynch, *Could a Right to Be Forgotten Online Kill Libraries?*, BLOOMBERG BNA (Oct. 17, 2016), <https://www.bna.com/right-forgotten-online-n57982078697/> (Quoting Law Librarian and Professor Anne Klinefelter, "We're accustomed to the idea that risk of someone finding a needle in a haystack is low. . . . We have relied on practical obscurity to protect privacy.").

<sup>7</sup> Robert Gordon, *Critical Legal Histories*, 36 STANFORD L. REV. 57, 57, 116 (1984); Robert Gordon, *Introduction: J. Willard Hurst and The Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9, 9-14 (1975).

<sup>8</sup> Legal consciousness has become a key concept for explaining how dominant legal ideologies are formulated and ingrained, challenged and changed, in both formal and informal arenas of law in society. Some of the most successful studies of legal consciousness, according to Susan S. Silbey, have been focused on institutional practices, where "cultural meaning, social inequality, and legal consciousness are forged." Susan S. Silbey, *After Legal Consciousness*, 1 ANN. REV. OF L. & SOC. SCI. 323, 360 (2005). See also Susanna Blumenthal, *Of Mandarins, Legal Consciousness, and the Cultural Turn in US Legal History: Robert W. Gordon. 1984. Critical Legal Histories. Stanford Law Review 36:57-125*, 37 LAW & SOC. INQUIRY 167 (2012).

Sections III and IV uncover and analyze the roots of practical obscurity in social and legal consciousness prior to and during the litigation of the *Reporters Committee* case. Section V is a brief discussion, offering some conclusions on how the history discussed herein can help us better understand how practical obscurity is discussed and debated today.

## II. *Reporters Committee* and Practical Obscurity as a Privacy Concept

In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, the U.S. Supreme Court ruled that the disclosure of an individual's digital criminal history record—a “rap sheet”—constituted an “unwarranted invasion of privacy” under Exemption 7(C) of the Freedom of Information Act (FOIA).<sup>9</sup> In reaching that conclusion, the Court argued that although the information in the rap sheet was public and available at its original sources—the records of local police stations and courthouses—the fact that it was not otherwise easily obtained all at once or in one place created a unique expectation of privacy, which it called “practical obscurity,” that could justify the government’s withholding it.<sup>10</sup> The Court took that phrase from, and attributed it to, the Justice Department, which had used the phrase in a reply brief submitted after the Court had agreed to hear the case.<sup>11</sup>

The *Reporters Committee* case arose out of CBS News reporter Robert Schackne’s investigation into connections between Pennsylvania Congressman Daniel Flood and Medico Industries, a company that the Pennsylvania Crime Commission had designated as a “legitimate business dominated by organized crime figures.”<sup>12</sup> Schackne had filed a FOIA request for the rap sheets for the four Medico brothers. The FBI initially denied all of the requests, but eventually released the documents for three of the brothers after they died. The agency continued to refuse to release the record for Charles Medico, arguing that Exemption 7(C) applied because the rap sheet qualified as “records or information compiled for law enforcement purposes” the release of which “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”<sup>13</sup>

Schackne sued to obtain the rap sheet with the support of the Reporters Committee for Freedom of the Press, a legal advocacy group. The U.S. District Court for the District of Columbia ruled in favor of the Justice Department, but the D.C. Circuit

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<sup>9</sup>*Reporters Committee*, 489 U.S. 749. See 5 U.S.C. § 552 (b)(7)(C) (2017) (“This section does not apply to matters that are . . . records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.”).

<sup>10</sup>*Reporters Committee*, 489 U.S. at 762, 780.

<sup>11</sup>*Id.* Justice Stevens placed quotation marks around the phrase and attributed it to the government, but he did not provide a citation for it. “Practical obscurity” appears only once in the briefs below: Reply Brief for the Petitioners, *Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (No. 87-1379), 1988 U.S. S. Ct. Briefs LEXIS 1519, at \*4-5 (“Respondents attempt to truncate the balancing process by narrowly defining the range of ‘privacy’ interests to be considered and by invoking a virtual *per se* rule that one has no ‘legitimate’ interest in the practical obscurity of widely scattered and frequently unindexed ‘public records.’”). See *infra* discussion at notes 150-158.

<sup>12</sup>*Reporters Committee*, 489 U.S. at 757.

<sup>13</sup> 5 U.S.C. § 552 (b)(7)(C).

U.S. Court of Appeals remanded, finding that the privacy interest asserted by the government in otherwise public information was tangential.<sup>14</sup>

The U.S. Supreme Court reversed the D.C. Circuit in a unanimous decision. The majority opinion by Justice John Paul Stevens maintained that there is a fundamental difference between the “scattered . . . bits of information” that a rap sheet contained, which might be difficult to obtain by themselves and could be forgotten over time, and the rap sheet, which contained all of those bits of information memorialized in one document.<sup>15</sup> An understanding of privacy as an “individual’s control of information concerning his or her person”<sup>16</sup> led Stevens and the majority to the conclusion that the compilation “alters the privacy interest implicated by disclosure of that information.”<sup>17</sup> In other words, information that was considered public at its source could become private when gathered together in a single record, and therefore the release of that record would constitute an unwarranted invasion of personal privacy.

Justice Blackmun wrote a concurring opinion, joined by Justice Brennan, which said that the majority’s declaration that rap sheets were categorically exempt from FOIA was “not basically sound.”<sup>18</sup> While he agreed that “even a more flexible balancing approach” would result in a reversal of the lower court, he could envision circumstances where rap sheet information should be public, “such as in a situation where a rap-sheet discloses a congressional candidate’s conviction of tax fraud five years before.” Surely, Blackmun argued, the hypothetical candidate “relinquished any interest in preventing the dissemination of this information when he chose to run for Congress.”<sup>19</sup>

Scholars have discussed and debated the significance of the Court’s ruling and the legal status of practical obscurity ever since the *Reporters Committee* ruling.<sup>20</sup> Some research has focused on the ruling’s implications for personal privacy concerns as courthouses across the country adopt online records databases<sup>21</sup> or as law enforcement agencies increasingly use digital surveillance tools.<sup>22</sup> Whether practical obscurity is

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<sup>14</sup>*Reporters Comm. for Freedom of the Press v. Dept. of Justice*, 816 F.2d 730 (D.C. Cir. 1987), *rev’d*, 489 U.S. 749 (1989).

<sup>15</sup>*Reporters Committee*, 489 U.S. at 764.

<sup>16</sup>*Id.* at 763.

<sup>17</sup>*Id.* at 764. The court also ruled that the request could be rejected because it did not serve the “central purpose” of the Freedom of Information Act, which was to shed light on government, not private citizens. *See, e.g.*, Martin E. Halstuk & Charles N. Davis, *The Public Interest be Damned: Lower Court Treatment of the Reporters Committee “Central Purpose” Reformulation*, 54 ADMIN L. REV. 983 (2002). In 1996, Congress clarified that the public has a right to records “for any public or private purpose.” Electronic Freedom of Information Act, Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048 (1996).

<sup>18</sup>*Reporters Committee*, 489 U.S. at 781 (Blackmun, J., concurring.).

<sup>19</sup>*Id.*

<sup>20</sup> A LexisNexis search for articles citing the *Reporters Committee* case and using the term “practical obscurity” returned over 100 results as of June 2017.

<sup>21</sup>*See, e.g.*, Peter Winn, *Symposium: Technology, Values, and the Justice System: Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307 (2004); Amanda Conley et al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 MD. L. REV. 772 (2012); D. R. Jones, *Protecting the Treasure: An Assessment of State Court Rules and Policies for Access to Online Civil Court Records*, 61 DRAKE L. REV. 375 (2013).

<sup>22</sup>*See, e.g.*, Ismail Cen Kuru, *Recent Development: Your Hard Drive is Almost Full: How Much Data Can the Fourth Amendment Hold*, 2016 U. ILL. J.L. TECH. & POL’Y 89 (2016).

declining—or should decline—has also been the subject of robust debate. The steady development of sophisticated digital tools to gather, track, and analyze information has led scholars and commentators to continually announce the “death” of obscurity-based privacy, accompanied by suggestions about whether we should “get over it.”<sup>23</sup>

Some legal scholars have argued that, insofar as the concept can be used to justify the nondisclosure or removal of truthful information from the public sphere, it undermines the First Amendment-protected right of access to information and the democratic values of transparency and accountability.<sup>24</sup> Jane Kirtley, for example, argues that, in spite of the court’s own assertion that its use of the concept was a narrow and limited means of balancing Exemption 7(C)’s privacy interests with the public interest in access to a particular law enforcement record, subsequent use of the concept in public records cases show how *Reporters Committee* “dealt a devastating blow to the public’s right to gain access to government records compiled in digital databases.”<sup>25</sup> Meanwhile, other scholars have embraced the concept to recast or reconsider the place of privacy in people’s relationships with the broad range of institutions that gather and publish personal information. For example, Daxton Stewart and Kristie Bunton propose that news media considering whether to publish or amplify embarrassing or damaging information about an individual should employ an ethical concept called “practical transparency”—a means to balance absolute transparency with total privacy amid the fraught “naming, blaming, and shaming culture of the Internet.”<sup>26</sup> Still other scholars have used practical obscurity to inform a broad vision of common-sense data privacy protections in a world increasingly lived online. Woodrow Hartzog and Frederic Stutzman have argued that a more fulsome conceptualization of obscurity can add needed nuance to the law’s consideration of people’s relationships with the institutions that collect information about them—providing a “continuum” of privacy rather than a binary of fully public versus completely secret.<sup>27</sup> Neil Richards and Hartzog have argued that thinking about informational relationships in terms of obscurity can help correct a failure in social and legal discourse to frame privacy in optimistic rather than pessimistic terms, considering the attributes of trust and loyalty rather than focusing on negative considerations about how to secure information from scary or creepy collection or disclosure practices.<sup>28</sup>

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<sup>23</sup> Nicholas John & Benjamin Peters, *Why Privacy Keeps Dying: The Trouble with Talk About the End of Privacy*, 20 INFO., COMM. & SOC. 284, 285 (2016). See, e.g., Rob Carrigan, *On the Web, ‘Practical Obscurity’ has Practically Departed*, INT. J. OF NEWSPAPER TECH. (Jan. 2003), [http://www.newsandtecharchives.com/issues/2003/01-03/nt/01-03\\_carrigan.htm](http://www.newsandtecharchives.com/issues/2003/01-03/nt/01-03_carrigan.htm); Ira Bloom, *Freedom of Information Laws in the Digital Age: The Death Knell of Informational Privacy*, 12 RICH. J.L. & TECH. 9 (2006); but see, e.g., Bruce Boyden, *Regulating at the End of Privacy*, 2013 U. CHI. LEGAL F. 173 (2013) (arguing “the state of alarm over current privacy developments is . . . at best an ambiguous signal.”).

<sup>24</sup> See Jane Kirtley, “*Misguided in Principle and Unworkable in Practice*”: *It is Time to Discard the Reporters Committee Doctrine of Practical Obscurity (And its Evil Twin, The Right to Be Forgotten)*, 20 COMM. L. & POL’Y 91 (2015); Robert G. Larson, *Forgetting the First Amendment: How Obscurity-Based Privacy and a Right to be Forgotten are Incompatible with Free Speech*, 18 COMM. L. & POL’Y 91 (2013).

<sup>25</sup> Kirtley, *supra* note 105, at 92. See also Halstuk & Davis, *supra* note 98.

<sup>26</sup> Stewart & Bunton, *supra* note 87, at 4.

<sup>27</sup> Hartzog & Stutzman, *supra* note 82, at 4.

<sup>28</sup> Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431 (2016).

Surprisingly, the raft of scholarship that has critiqued or elaborated on the concept of practical obscurity has not closely examined its provenance or pedigree pre-*Reporters Committee*. Amid a meaningful moment for personal privacy, the public sphere, and democratic ideals, we should have a clearer understanding of practical obscurity's roots in social and legal consciousness.

### III. Practical Obscurity as a Social Concept

The Justice Department reply brief that introduced the concept of practical obscurity to the U.S. Supreme Court in *Reporters Committee* linked a specific social concern that arose in the 1960s to a more general turn of phrase that had been in use for much longer. The term "practical obscurity" can be found in print going back at least to the mid-1800s, where it was usually used to describe a relative lack of fame or notoriety, a use which is still common today.<sup>29</sup> For example, a news report on the 1892 presidential race noted that Democrats believed candidate David Hill, a senator from New York, had reached the limits of his campaign, "and the qualities of his senatorial term will probably sink him into practical obscurity."<sup>30</sup> In 1918, the *New York Tribune* sports page noted the increasing popularity of the sport of wrestling among soldiers, as compared to baseball and boxing: "already it has crowded from practical obscurity to a place of the greatest prominence."<sup>31</sup> Practical obscurity was also used to describe a state of being difficult to ascertain or understand. For example, a 1911 report on the annual proceedings of the British Sociological Society described a lecturer's discussion of the "theoretical value and practical obscurity" of the concept of race.<sup>32</sup> A 1923 translation of the works of Hippocrates noted that the ancient physician's "account of wrist dislocation ... combines theoretic clearness with even greater practical obscurity."<sup>33</sup>

Although practical obscurity may not have been commonly used 100 years ago to describe a specific interest in keeping personal information unknown and out of the

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<sup>29</sup> The databases searched for the exact term "practical obscurity" included: the 19th Century Masterfile database of US and British periodicals 1106-1930; EbscoHost's MASTERfile Premier database of general publications going back to 1975; Gale's Nineteenth Century U.S. Newspapers database; the Google Books collection; the HathiTrust Digital Library; the LexisNexis Academic collection of newspapers going back to 1950; the Library of Congress's Chronicling America collection of newspapers 1836-1922; the Making of America databases of primary sources covering the mid-nineteenth century from Cornell and the University of Michigan; and ProQuest's American Periodicals database covering 1740-1940. The searches returned approximately 900 results, although there is likely some overlap among them. Because I am concerned with the concept "practical obscurity" as it is used in the context of privacy law, it is beyond the scope of this article to construct a comprehensive etymology of the term.

As to its use today see, e.g., Tess Halpern, *My Generation may be 'Feeling the Bern', but I'm Still with Clinton*, MASS. DAILY COLLEGIAN (Feb. 10, 2016), <http://dailycollegian.com/2016/02/10/my-generation-may-be-feeling-the-bern-but-im-still-with-clinton/> ("Bernie Sanders has risen from practical obscurity to beating Hillary Clinton in the New Hampshire primary"); Sameer Kotian, *Androids in Apple Land*, TECHSHOUT.COM (May 10, 2017), <http://www.techshout.com/features/2017/10/androids-apple-land/> ("In 2007, 5 months after Apple launched the iPhone, Android made the move from practical obscurity to national recognition.").

<sup>30</sup> *Cleveland is the Man: Hill, the Petty Politician, Unable to Deceive the Democratic Party*, SEATTLE POST-INTELLIGENCER, April 7, 1892, at 1, <http://chroniclingamerica.loc.gov/lccn/sn83045604/1892-04-07/ed-1/seq-1/>.

<sup>31</sup> W.J. Macbeth, *In All Fairness*, N.Y. TRIBUNE, Apr. 29, 1918, at 13, <http://chroniclingamerica.loc.gov/lccn/sn83030214/1918-04-29/ed-1/seq-13/>.

<sup>32</sup> THE SOCIOLOGICAL REVIEW 179 (vol. 4, 1911).

<sup>33</sup> HIPPOCRATES, HIPPOCRATES 413 (W. H. S. Jones, trans., Harvard Univ. Press, vol. 3, 1923).

public eye, that kind of control was a growing concern among everyday Americans at that time. Historians have explained that as people of all classes and backgrounds became more geographically and socially mobile near the turn of the twentieth century, they became as concerned with what strangers knew about them as they were with what family, friends, and acquaintances knew.<sup>34</sup>As the country grew more urbanized, stratified, commercialized, and inundated with mass media, law surrounding “personal image”—libel, privacy, and publicity—developed and flourished.<sup>35</sup>Litigants increasingly asserted what Samuel Warren and Louis Brandeis called “the right to be let alone” in their famous 1890 law review article.<sup>36</sup>

The notion that individuals should be able to shield truthful but embarrassing or shameful personal information from public view, or maintain the right to obscurity after fleeting fame, arose in landmark lawsuits against media organizations in the middle of the twentieth century.<sup>37</sup> In 1931, for example, a California appellate court ruled that a rehabilitated former prostitute, acquitted of murder 16 years previously, could pursue a privacy lawsuit against a film director who used her story for a movie. The court acknowledged that the woman’s trial was part of the public record and therefore fair game for the film, but ruled that the director’s use of the woman’s real name violated the state constitution’s protection for “pursuing and obtaining . . . happiness.”<sup>38</sup> “Where a person has by [her] own efforts rehabilitated [her]self, we, as right-thinking members of society, should permit [her] to continue in the path of rectitude rather than throw [her] back into a life of shame or crime,” the court said.<sup>39</sup>A more famous and influential suit involved William James Sidis, a former child prodigy who sued the *New Yorker* magazine in 1938. Sidis sued the magazine for invasion of privacy after it published a “Where are They Now?” feature recounting his youthful fame and precociousness and later slide into destitute, eccentric anonymity.<sup>40</sup>In 1940, a panel of the Second Circuit U.S. Court of Appeals ruled that, although sympathetic to Sidis’s desire to hide his personal life from the public eye, his privacy interest was outweighed by the newsworthiness of his story—the public interest in the fate of a once-promising child prodigy. “Regrettably or not, the misfortunes and frailties of neighbors and ‘public figures’ are subjects of considerable interest and discussion of the rest of the population,”

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<sup>34</sup>See LAWRENCE FRIEDMAN, *GUARDING LIFE’S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY* (2007);SAMANTHA BARBAS, *LAWS OF IMAGE: PRIVACY AND PUBLICITY IN AMERICA* (2015).

<sup>35</sup>BARBAS, *supra* note 34, at 1.

<sup>36</sup> Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

<sup>37</sup>See BARBAS, *supra* note 115, at 115-128. According to Barbas, although “the modern bureaucratic state” was being “built on a mountain of personal data” at midcentury, the news and entertainment media were the central focus of privacy concerns—and the target of most lawsuits for invasion of privacy. *Id.* at 115-116.

<sup>38</sup>*Melvin v. Reid*, 297 P. 91, 93 (Cal. Ct. App. 1931)(citing CAL. CONST., art. I, § 1).

<sup>39</sup>*Id.*; See Stephen Bates, *The Prostitute, The Prodigy, and the Private Past*, 17 COMM. L.&POL’Y175, 208-09 (2012). Bates argues that the *Melvin* ruling and its rationale for privacy protection were likely undercut by *Cox Broadcasting Corp. v. Cohn*, a 1975 Supreme Court ruling that “once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.” 420 U.S. 469, 496 (1975). *Cf.* Florida Star v. B.J.F., 491 U.S. 524, 539 (1989) (imposition of civil damages for publishing a government news release disclosing a rape victim’s name “would surely violate the First Amendment”); *Smith v. Daily Mail Publ’g Co.*, 433 U.S. 97, 102 (1979) (“state action to punish the publication of truthful information seldom can satisfy constitutional standards.”).

<sup>40</sup>*Sidis v. F-R Publ’g Corp.*, 113 F.2d 806 (2d Cir. 1940). See Bates, *supra* note 120; BARBAS, *supra* note 115, at 129-151.

the ruling said. “And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.”<sup>41</sup>

By the 1960s, much of the modern doctrine of personal privacy had been established,<sup>42</sup> just as new concerns about computerized record keeping began to take hold.<sup>43</sup> While earlier privacy problems focused on the types of personal information that might be published by the media, the new worries arose over information that might be collected. Historians have linked the rise of large-scale record keeping by institutions like banks, insurance companies, and the government to the two key policy principles which would eventually come into direct tension in the *Reporters Committee* case: the right to privacy and the right to know.<sup>44</sup>

Fears about data collection and a loss of control over personal information led many Americans to believe they were living in a new “surveillance society” in the 1960s.<sup>45</sup> Exposés in popular magazines like *Life* and *Look* documented the extent to which computerized dossiers were kept on Americans’ employment and finances,<sup>46</sup> and encouraged readers to consider whether such record keeping “will kill . . . your freedom.”<sup>47</sup> A 1971 public opinion poll found that 58 percent of respondents nationwide believed that computerized data banks could be used to “keep people under surveillance.”<sup>48</sup> Proposals to create a centralized federal data center were repeatedly killed after public outcry in 1965, 1967, and 1970.<sup>49</sup>

In 1973, the U.S. Department of Health, Education, and Welfare’s report on “Records, Computers, and the Rights of Citizens” used stark terms to frame public concerns and the need for action, highlighting the ubiquity and efficiency of electronic record keeping alongside citizens’ sense of loss of control over the use or dissemination of records and information. “It is no wonder that people have come to distrust computer-based record-keeping operations,” the report stated, but “under current law, a person’s privacy is poorly protected against arbitrary or abusive record-keeping practices.”<sup>50</sup> Indeed, an otherwise placid and celebratory convention marking the 200th anniversary of the Continental Congress involving governors of the original 13 states in the summer of 1974 turned turbulent when a resolution on the right to privacy was raised—“a virtual

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<sup>41</sup>*Sidis*, 113 F.2d at 809.

<sup>42</sup>See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST.1977), tracing the origins of the right to privacy and organizing them into the four classic torts: intrusion, disclosure of private facts, false light, and appropriation. See also *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (stating that a right to privacy exists in the “penumbras” of other rights guaranteed in the Bill of Rights).

<sup>43</sup> Sarah Igo, *The Beginnings of the End of Privacy*, 17 THE HEDGEHOG REV. (no. 1), [www.iasc-culture.org/THR/THR\\_article\\_2015\\_Spring\\_Igo.php](http://www.iasc-culture.org/THR/THR_article_2015_Spring_Igo.php).

<sup>44</sup>*Id.*; See also DEBORAH NELSON, *PURSUING PRIVACY IN COLD WAR AMERICA* (2002); HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* (2010).

<sup>45</sup>Igo, *supra* note 124.

<sup>46</sup>Robert Wallace, *What Happened to Our Privacy?* *LIFE*, Apr. 10, 1964, at 10.

<sup>47</sup> Jack Star, *The Computer Data Bank: Will It Kill Your Freedom?* *LOOK*, June 25, 1968, at 27.

<sup>48</sup>Igo, *supra* note 124 (citing A NATIONAL SURVEY OF THE PUBLIC’S ATTITUDES TOWARD COMPUTERS (1971)).

<sup>49</sup>NISSENBAUM, *supra* note 125, at 39. See also Igo, *supra* note 124.

<sup>50</sup>U.S. DEPT. OF HEALTH, EDUC., & WELFARE, *RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS* (1973), <https://epic.org/privacy/hew1973report/>.

recreation of the debates 200 years ago,” as one magazine described it.<sup>51</sup> The governors could not agree over the breadth of authority the government should have to gather and keep records on individual citizens. State legislatures responded to the growing public concerns on the matter,<sup>52</sup> as did Congress. Perhaps the biggest landmark, passed amid the fallout of the Watergate scandal, was the federal Privacy Act of 1974, which placed key limits on when data could be gathered in secret and shared without authorization, and allowed individuals to know about, view, and correct personal information in government files.<sup>53</sup>

Concerns about privacy evolved as computers became increasingly prevalent in the 1970s and 1980s—from large government and corporate mainframes to small household desktops. The specific concerns that would reach the U.S. Supreme Court in the *Reporters Committee* case arose as journalists worried that the “legislative passions” for privacy that arose in the wake of Watergate could be “used as an excuse to strengthen the opportunities for secrecy in the government,” undermining transparency laws.<sup>54</sup> These concerns heightened as the Federal Bureau of Investigation sought to expand and strengthen its network of criminal history files in the early 1980s.<sup>55</sup>

But so also came new worries about the compilation, use, and security of health and financial records in the private sector,<sup>56</sup> and even the growing capacity for corporate surveillance.<sup>57</sup> A 1984 survey found that Americans were optimistic about the role of computers in what was frequently called the “information age,” but they were also worried about the threat to privacy—and subsequently liberty writ large—that might accompany a more automated, computerized future.<sup>58</sup> On the eve of the *Reporters Committee* ruling, commentators worried that “anybody with a personal computer and access to public documents can set up his own miniature private-investigating agency,” collecting and selling “specialized electronic lists of police reports, arrest records, citations for motor vehicle violations and other potentially damaging information.”<sup>59</sup> In language that would not sound out of place today, a 1987 report from *Time* magazine observed:

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<sup>51</sup> Al Robins, *Computers and the Bill of Rights*, THE NATION, Sept. 28, 1974, at 260.

<sup>52</sup> See Lohn Lautsch, *Digest and Analysis of State Legislation Relating to Computer Technology*, 20 JURIMETRICS J. 201, 210 (1980) (“Sixteen states have statutes basically designed to regulate the collection and use of information in computerized information processing systems. The genesis of these enactments seems to have been the 1973 Report of the Secretary’s Advisory Committee on Automated Personal Data Systems, Department of Health, Education, and Welfare, entitled *Records, Computers, and the Rights of Citizens*.”).

<sup>53</sup> 5 U.S.C. § 552(a) (2017).

<sup>54</sup> William Hornby, *Secrecy, Privacy, and Publicity*, 13 COLUM. JOURNALISM REV. (No. 6) at 10 (April 1975). The U.S. Department of Health, Education, and Welfare’s 1973 report addressed this tension directly, arguing that the Freedom of Information Act’s privacy protections should be bolstered. See U.S. DEPT. OF HEALTH, EDUC., & WELFARE, *supra* note 131.

<sup>55</sup> David Burnham, *How Long Should the Arm of the Law Be?* N.Y. TIMES MAG., Dec. 12, 1982, at 120.

<sup>56</sup> Randy Young, *Your Health, Their Business*, N.Y. MAG., Oct. 27, 1980, at 39; Jake Kirchner, *Financial Privacy Act Seen Major Victory for Carter*, COMPUTERWORLD, Oct. 30, 1978, at 5.

<sup>57</sup> John Markoff, *Ma Bell and Privacy*, INFOWORLD, Apr. 5, 1982, at 19.

<sup>58</sup> Jake Kirchner, *Friend and Foe*, INFOWORLD, Jan. 16, 1984, at 100.

<sup>59</sup> Philip Elmer-DeWitt, Scott Brown, & Barbara Dolan, *An Electronic Assault on Privacy? Computer Blacklists Have Become a New Growth Industry*, TIME, May 19, 1986, at 104.

It is hard to live in modern society without leaving a long, broad electronic trail. Computers record where you reside and work, how much money you make, the names of your children, your medical and psychiatric history, your creditworthiness and indebtedness, your arrest record, the number of bathrooms in your home, the phone numbers you dial and even the time you last used a street-corner bank machine. What privacy rights apply to this vast dossier of data? When can it be searched, shared or published? And if the information it contains is outdated, injurious or just plain false, what redress does an individual have? Not much, it turns out.<sup>60</sup>

Growing concerns about privacy rights vis-à-vis government recordkeeping ran parallel to a push for more transparency among powerful American institutions. According to historical scholarship, the “right to know”—as a functional concept in law and society—is a more recent development than the right to privacy and a less clearly understood one.<sup>61</sup> Historian Michael Schudson has argued that practices and values reflecting the “virtue . . . of openness” in American culture and politics have developed since the 1950s, serving a variety of modern interests, from consumer empowerment to environmental protection.<sup>62</sup>

The most prominent legal embodiment of the right to know is the federal Freedom of Information Act,<sup>63</sup> a 1966 law that required transparency among the federal government’s executive agencies. Schudson connects that policy outcome to a battle between Congress and the executive branch, rather than to a social problem like public distrust of government.<sup>64</sup> Efforts to open government bureaucracy to public scrutiny came from members of Congress who were frustrated by difficulties in monitoring executive agencies’ activities in the 1950s.<sup>65</sup> News organizations and press associations promoted the efforts to the public, arguing that greater transparency and accountability served core democratic values.<sup>66</sup> While the right to know about government activities was billed as an individual right,<sup>67</sup> the news media were its most obvious and immediate beneficiaries.

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<sup>60</sup> Philip Elmer-DeWitt, *Don’t Tread on My Data: Protecting Individual Privacy in the Information Age*, TIME, July, 6, 1987, at 84.

<sup>61</sup>MICHAEL SCHUDSON, THE RISE OF THE RIGHT TO KNOW POLITICS AND THE CULTURE OF TRANSPARENCY, 1945–1975, 5, 16 (2015).

<sup>62</sup>*Id.* at 15 and *passim*.

<sup>63</sup> 5 U.S.C. § 552 (2017). In 1974, FOIA was amended in a variety of ways, including the “unwarranted invasion of personal privacy” section of Exemption 7(C) at issue in the *Reporters Committee* case. See SCHUDSON, *supra* note 142, at 60-61. See also *Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, at 756 (describing Congress’s process in amending Exemption 7(C)).

<sup>64</sup>SCHUDSON, *supra* note 142, at 57.

<sup>65</sup>*Id.* at 39-41. Although the battle lines would eventually be drawn around executive agency transparency more generally, they began over an inability to account for agencies’ effectiveness in rooting out Communist sympathizers. The “father of the Freedom of Information Act” was Democratic Congressman John Moss of California. See *id.* at 29.

<sup>66</sup>*Id.* at 56.

<sup>67</sup>*Id.* at 54. Sen. Thomas Hennings (D-Mo.), who sponsored the bill that would become the Freedom of Information Act, claimed that the framers believed in “a right in the people to know what their Government was doing.” Schudson calls this “good rhetoric, poor history.”

Thus, the social seeds of the legal concept of practical obscurity were sown in rising concerns about the loss of privacy—in both large and small ways—that could accompany computerized recordkeeping in the public and private sectors. Americans appreciated the ways in which computers made life easier, but they worried about losing control over the vast amounts of personal information—be it benign, sensitive, or embarrassing—that they shared in everyday transactions. Meanwhile, a conflict between concerns about government information collection and concurrent calls for openness and freedom of information increasingly seemed inevitable.

#### IV. Practical Obscurity as a Legal Concept

Prior to the 1989 *Reporters Committee* case, the term “practical obscurity” was not in use in privacy law.<sup>68</sup> But the U.S. Supreme Court did not invent the concept out of thin air. In arguing that the Court should recognize a privacy right in records that were public but otherwise difficult to locate and compile—a principle lawyers for the Department of Justice first called “practical obscurity” in a September 1988 reply brief in the case<sup>69</sup>—they drew on legal thinking that reflected the public’s concerns about technology and the surveillance society.

In his majority opinion in *Reporters Committee*, Justice Stevens uses the term “practical obscurity” twice. In the first instance, he attributes it to the government, but provides no citation: “Exemption 7(C) requires us to balance the privacy interest in maintaining, as the Government puts it, the ‘practical obscurity’ of the rap sheets against the public interest in their release.”<sup>70</sup> The second instance is at the beginning of the last paragraph of the opinion, and drives home the crucial role the term played in the Court’s decision that the records at issue should be considered private:

The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high. When the subject of such a rap sheet is a private citizen and when the information is in the Government’s control as a compilation, rather than as a record of ‘what the Government is up to,’ the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir.<sup>71</sup>

Stevens (or one of his clerks) would have read the term in the only place the government used it: in the Sept. 2, 1988, reply brief.<sup>72</sup> But the idea that the compilation of “otherwise hard-to-obtain information” into a single record “alters the privacy interest

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<sup>68</sup> A search of the legal research databases HeinOnline and LexisNexis turned up several articles and two cases that used the phrase before the *Reporters Committee* case, all using the term to denote lack of notoriety or complexity rather than a conception of privacy. *E.g.*, *Season good v. Ware*, 104 Ala. 212 (1894) (“If he was entitled to a credit on the claims of his wife, the amount thereof was suffered to remain in practical obscurity.”); *State v. Kruger*, 7 Id. 178 (1900) (“The desire to shed more light upon that which is already sufficiently luminous inevitably results in practical obscurity.”).

<sup>69</sup> Reply Brief for the Petitioners, *Reporters Committee*, 489 U.S. 749 (No. 87-1379), 1988 U.S. S. Ct. Briefs LEXIS 1519, at \*5 (“Respondents attempt to truncate the balancing process by narrowly defining the range of ‘privacy’ interests to be considered and by invoking a virtual *per se* rule that one has no ‘legitimate’ interest in the practical obscurity of widely scattered and frequently unindexed ‘public records.’”).

<sup>70</sup> *Reporters Committee*, 489 U.S. at 762.

<sup>71</sup> *Id.* at 780.

<sup>72</sup> Reply Brief for the Petitioners, *supra* note 69, at \*5.

implicated by disclosure of that information,”<sup>73</sup> thus rendering its release an “unwarranted invasion of personal privacy”<sup>74</sup> had always been at the core of the Justice Department’s case.

Although the term practical obscurity was coined in the Department of Justice’s reply brief, the concept is discussed in greater depth earlier: in its Feb. 16, 1988, petition for *writ of certiorari* and its June 17 brief following the Court’s granting *cert.*<sup>75</sup> The government argues that the D.C. Circuit’s analysis below is simplistic, and “wholly ignores the practical differences between information contained in dispersed, obscure local records and information contained in a centralized national data bank and accessible by individual names.”<sup>76</sup> In the June 17 brief, the government argues “from the point of view of the individual who is the subject of a rap sheet—the individual whose ‘privacy’ [Exemption 7(C)] protects—the practical difference between public access to dispersed raw data and public access to the FBI’s centralized files is enormous.”<sup>77</sup>

The government’s argument also draws on what the petition calls “widespread concern that privacy is, as a practical matter, threatened by the availability of compiled information in large, centralized government data banks.”<sup>78</sup> The petition and brief cite law and analysis at the center of the previously discussed social concerns about a surveillance society, including a 1980 American Bar Association report that attributed legislative developments in privacy to the influential 1973 U.S. Department of Health, Education, and Welfare report on computer databases and privacy.<sup>79</sup> “Numerous governmental entities have recognized the need to protect the subjects of such information against inappropriate disclosure,” the petition argues.<sup>80</sup> Moreover, the government argues that the lower court’s ruling that Exemption 7(C) did not apply to Medico’s rap sheet cuts against Congress’s intent in adding that exemption to the Freedom of Information Act in 1974, the same year the Privacy Act was adopted. “The subject of an individual’s ‘privacy’ interest in the obscurity of records had been the focus of substantial attention in the early 1970s by law enforcement officials, the courts, and congressional committees,” the brief states; the D.C. Circuit’s “restrictive view of the term ‘privacy’” it argues, “ignores the breadth and complexity of that concept as it has been understood by Congress, the courts, and legal commentators.”<sup>81</sup>

Respondents, the Reporters Committee for Freedom of the Press, naturally disagreed with the government’s characterization of the personal privacy interest in information that was, at its original source, public. “Whatever concerns government data banks may raise as a general matter, the existence of such data banks cannot and does not transform the fundamentally public information at issue here . . . into private

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<sup>73</sup> *Reporters Committee*, 489 U.S. at 764.

<sup>74</sup> See 5 U.S.C. § 552 (b)(7)(C) (2017).

<sup>75</sup> Petition for a Writ of Certiorari, *Reporters Committee*, 489 U.S. 749 (No. 87-1379), 1988 U.S. S. Ct. Briefs LEXIS 1522; Brief for the Petitioners, *Reporters Committee*, 489 U.S. 749 (No. 87-1379), 1988 U.S. S. Ct. Briefs LEXIS 1525. Although the term “practical obscurity” is used only once in the record, the term “obscurity” is used more often. For example, in the petition and brief cited here, obscurity is used five times.

<sup>76</sup> Petition for Writ of Certiorari, *supra* note 156, at \*22.

<sup>77</sup> Brief for the Petitioners, *supra* note 156, at \*35.

<sup>78</sup> Petition for Writ of Certiorari, *supra* note 156, at \*29.

<sup>79</sup> *Id.* (citing Lautsch, *supra* note 133, at 210-211; R. Smith, COMPILATION OF STATE & FEDERAL PRIVACY LAWS (1984-1985 ed.)).

<sup>80</sup> *Id.*

<sup>81</sup> Brief for the Petitioners, *supra* note 75, at \*32-33.

information,” its brief in opposition said.<sup>82</sup> “A public fact such as a conviction is not transformed into a private fact when it is included in a government data bank.”<sup>83</sup>

In oral argument in the case on Dec. 7, 1988, the Justices grappled with where they might draw a line regarding the privacy interest in an FBI rap sheet.<sup>84</sup> Assistant to the Solicitor General Roy Englert, arguing for the Department of Justice, tried to help the justices draw that line using the concept of practical obscurity. “If there was a publicized murder conviction yesterday, there would be very little privacy interest[] . . . in that compared to an obscure arrest that was never prosecuted for disorderly conduct 30 or 40 or 50 years ago,” Englert argued.<sup>85</sup> He also highlighted differences in the way an FBI rap sheet was indexed—by name—from typical local criminal records: “there is a much greater privacy interest in information that can be retrieved by name than in the kind of obscure information that is available on police blotters.”<sup>86</sup>

Justice Scalia expressed some skepticism of Englert’s position. As to whether an individual had a “reasonable expectation of privacy” in an FBI rap sheet, Scalia queried:

[H]is reasonable expectation is that no one would find the criminal conviction that is spread on the public record in wherever it is spread? It’s so hard to get there from that language. . . . It may be a reasonable expectation, but you would describe that as an expectation of *privacy*? That a public record won’t be discovered?<sup>87</sup>

Englert responded that he believed that Scalia’s framing of the government’s position is what Congress intended.

Other Justices challenged Reporters Committee attorney Kevin Baine to respond to the government’s interpretation of Exemption 7(C). For example, Justice O’Connor asked Baine to consider the differences between “unadjudicated arrests or indictments[,] and convictions,” and said that publicizing arrests—without convictions—could “put people in a very false light.”<sup>88</sup> She noted that the language of Exemption 7(C) was “rather general,” and that “conceivably some antiquated arrest records might well be an unwarranted invasion [of privacy].”<sup>89</sup>

The Justices’ acceptance of the concept of practical obscurity as a rationale for withholding a rap sheet under Exemption 7(C) was central to its decision reversing the D.C. Circuit Court of Appeals, which had not been persuaded by the government’s

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<sup>82</sup> Respondents’ Brief in Opposition, *Reporters Committee*, 489 U.S. 749(No. 87-1379), 1988 U.S. S. Ct. Briefs LEXIS 1521, at \*20.

<sup>83</sup>*Id.*

<sup>84</sup>See Oral Argument Transcript, *Reporters Committee*, 489 U.S. 749(No. 87-1379), 1988 U.S. Trans. LEXIS 118. Audio recording available at <https://www.oyez.org/cases/1988/87-1379>. See also U.S. DEPT. OF JUSTICE, *FOIA Update: Supreme Court Hears Reporters Committee*, 9 FOIA UPDATE NO. 4, (Jan. 1, 1989), <https://www.justice.gov/oip/blog/foia-update-supreme-court-hears-reporters-committee>.

<sup>85</sup> Oral Argument Transcript, *supra* note 165, at \*11.

<sup>86</sup>*Id.* at \*15.

<sup>87</sup>*Id.* at \*22(emphasis added). The transcript does not indicate which Justice is questioning attorneys, but the audio recording sometimes makes it possible for the listener to determine who is speaking.

<sup>88</sup>*Id.* at \*27.

<sup>89</sup>*Id.* at \*28.

reasoning. In two decisions—first ruling in favor of the Reporters Committee on its appeal of the district court’s summary judgment ruling, and then denying the Department of Justice’s petition for rehearing, the appeals court argued that an obscurity-based privacy interest did not fit within the language of Exemption 7(C). Judge Laurence Silberman wrote for the majority in both opinions. He stated that the court declined to accept the government’s reasoning that “putting the public record information in different form, somehow changes the nature of the information sought,”<sup>90</sup> and that Charles Medico’s “concern in maintaining difficulty of access to his public records” did not “equate[] to a ‘privacy’ interest within the meaning of the statute.”<sup>91</sup> He added,

We all cherish the notion that our past mistakes will be forgotten, and most of us—particularly lawyers and judges—share a distaste for the widespread publication of such information as arrest records that will surely harm some innocent targets. But we cannot find in the FOIA or its legislative history any support for the government’s expansive interpretation of privacy.<sup>92</sup>

Circuit Judge Ken Starr’s shift from concurring in the first opinion to dissenting in the second is the most important aspect of the case at the appellate level—both in terms of the trend toward judicial acceptance of the concept of practical obscurity as well as its apparent influence on the Supreme Court’s reasoning. Starr’s concurrence does not touch on practical obscurity. He agreed with his colleague’s reasoning in remanding the case back to the district court, but disagreed with the public interest balancing test it applies.<sup>93</sup> In his dissent, however, Starr embraced the privacy interest in practical obscurity. Starr argued, “computerized data banks of the sort involved here present issues considerably more difficult than, and certainly very different from, a case involving the source records themselves.”<sup>94</sup> In language that echoed concerns about a surveillance society,<sup>95</sup> Starr listed examples of the “many federal agencies [that] collect items of information on individuals that are ostensibly matters of public record,” and warned:

Under the majority’s approach, in the absence of state confidentiality laws, there would appear to be a virtual *per se* rule requiring all such information to be released. The federal government is thereby transformed in one fell swoop into *the* clearinghouse for highly personal information, releasing records on any person, to any requester, for any purpose.<sup>96</sup>

Justice Stevens’s majority opinion in *Reporters Committee* quotes Starr at length in support of the proposition that the D.C. Circuit’s decision was wrong and gave short

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<sup>90</sup>Reporters Comm. for Freedom of the Press v. U.S. Dept. of Justice, 831 F.2d 1124, 1987 LEXIS 18279, at \*9 (D.C. Cir. 1987).

<sup>91</sup>Reporters Comm. for Freedom of the Press v. U.S. Dept. of Justice, 816 F.2d 730, 739 (D.C. Cir. 1987).

<sup>92</sup>*Id.*

<sup>93</sup>*Id.* at 743 (Starr, J., concurring).

<sup>94</sup>*Reporters Committee*, 831 F.2d 1124, 1987 LEXIS 18279 at \*15 (Starr, J., dissenting).

<sup>95</sup> See discussion accompanying *supra* notes 124-134.

<sup>96</sup>*Reporters Committee*, 831 F.2d 1124, 1987 LEXIS 18279 at \*22 (Starr, J., dissenting) (emphasis in original).

shrift to the established idea that a privacy interest exists in the practical obscurity of the information contained in Medico's rap sheet.<sup>97</sup>

Stevens's opinion also cites Supreme Court precedent which he argued shows that the Court has acknowledged similar obscurity-based privacy interests in previous public records cases. In the 1977 case *Whalen v. Roe*, the Court ruled that the state of New York did not violate individuals' privacy in maintaining a state database of prescription information for controlled substances, holding that the state had taken adequate steps to protect patient privacy.<sup>98</sup> "We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files," the Court noted.<sup>99</sup> A year earlier, in *Department of the Air Force v. Rose*, the Court ruled that disclosure of Air Force Academy disciplinary records could not be withheld under a Freedom of Information Act exemption protecting "internal personnel rules."<sup>100</sup> The Court noted that because personally identifying information was redacted, the record subjects' privacy interests were sufficiently protected.<sup>101</sup> However, the Court acknowledged the potential for revealing embarrassing incidents previously obscured or long forgotten. "The risk to the privacy interests of a former cadet. . . cannot be rejected as trivial," the Court said, acknowledging that "no one can guarantee that all those who are 'in the know' will hold their tongues, particularly years later when time may have eroded the fabric of cadet loyalty."<sup>102</sup>

Although not technically precedential on the specific issue under consideration in *Reporters Committee*, *Whalen* and *Rose* lend argumentative authority to Stevens's assertion that the Court had previously taken account of a privacy interest in otherwise public records. But by adding this to an acknowledgment of the social concerns that accompanied the rise of government computer data banks since the 1960s, Judge Starr's apparently persuasive argument that lawmakers have been—and must be—responsive to those concerns, and the fact that Justice Blackmun's concurrence takes issue only with the majority's "bright line" approach to the question,<sup>103</sup> the Court forged a unanimous recognition of a new concept of privacy: practical obscurity.

## V. Discussion and Conclusion

The legal concept of practical obscurity emerged from a privacy interest asserted against the government and other powerful institutions, only to be used by the government to win a lawsuit filed by a group claiming to represent the public's interest in government transparency. The government's successful reliance on practical obscurity as a justification for withholding otherwise public records is ironic, considering that the concept arose amid paranoia about the government's collection and cataloging of vast

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<sup>97</sup>*Reporters Committee*, 489 U.S. at 760-761.

<sup>98</sup>*Whalen v. Roe*, 429 U.S. 589 (1977).

<sup>99</sup>*Whalen*, 429 U.S. at 605. Quoted in *Reporters Committee*, 489 U.S. at 770.

<sup>100</sup> 5 U.S.C. § 552 (b)(2) (2017) exempts information "related solely to the internal personnel rules and practices of an agency."

<sup>101</sup>*Dept. of the Air Force v. Rose*, 425 U.S. 352, 381 (1976). The case dealt with FOIA Exemption 6, 5 U.S.C. § 552 (b)(6), which deals with personal privacy implications not related to law enforcement records.

<sup>102</sup>*Id.* (internal quotation marks omitted).

<sup>103</sup>*Reporters Committee*, 489 U.S. at 780 (Blackmun, J., concurring).

amounts of personal information, and crystallized while public and private sector institutions gathered and indexed even more information using computer databases.

The irony highlights the tension between the interests of personal privacy and the public's right to know that begat the *Reporters Committee* case and continues to complicate this realm of law today. Practical obscurity is a concept the court used to justify why some otherwise public information might be rendered private when compiled in a different format. Advocates for government transparency and accountability—including Robert Schackne and the Reporters Committee for Freedom of the Press—compellingly argued that such a rendering was nonsensical and even dangerous as a matter of open records law. But the Supreme Court unanimously disagreed, accepting practical obscurity as a framework on which to strike a balance—as it often does—between two important and competing interests. Thus, the case's outcome helps demonstrate the value of legal history as a means to seek a better understanding of the roots of legal concepts. This article shows how social concerns merged with legal consciousness both inside and outside of traditional legal arenas to produce a concept that was used to mediate between conflicting values of privacy and transparency.

In the early-to-mid-twentieth century, people became concerned about their ability to control whether they could live outside of the public eye, particularly when they had achieved some fame or infamy, willingly or not. In the 1960s, 70s, and 80s, concerns about a loss of control of the information that individuals shared with powerful public and private institutions prompted a need to think about how citizen consumers could trust that their expectations about the use or publication of that information would be honored. Privacy law developed in the early twentieth century as a means to answer the pressing question of when collecting or publishing truthful information about a person, acts that are otherwise highly protected in a society that values freedom of expression, should nevertheless be considered harmful and legally actionable. The history recounted here shows that practical obscurity emerged through an extension of that problem—a means to address the potential harm that can arise from the collection or publication of information that is truthful but not widely known, due to its being difficult to obtain or having faded from most people's memories. The continuing relevance of practical obscurity as a concept of privacy is a consequence of technology enabling the sharing, monetizing, and publishing of ever more information that may or may not be any of the public's business.

There is strong evidence supporting the argument that the *Reporters Committee* decision and the concept of practical obscurity have provided a legal justification to limit government transparency where an individual's right to privacy might be implicated, as they have been stretched beyond the narrow context of the law enforcement privacy exemption to the federal Freedom of Information Act.<sup>104</sup> There is also a strong argument that practical obscurity's so-called "evil twin," the "right to be forgotten"—a concept used

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<sup>104</sup>Kirtley, *supra* note 86 (citing, e.g., *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004) (finding that Exemption 7(C) applies to the privacy interest of family members of a deceased relative); *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999) (ruling that California could deny access to some public records requesters, but not others, without violating the First or Fourteenth Amendments). Indeed, Justice Blackmun expressed concerns about the implications of the majority's categorical rule. See *Reporters Committee*, 489 U.S. at 780-781 (Blackmun, J., concurring). Perhaps a ruling limited to Charles Medico's rap sheet alone—rather than to rap sheets generally—would have limited the reach of practical obscurity into other legal realms.

to justify the compelled removal of truthful but irrelevant or outdated information about a person—is inimical to free speech values like the “marketplace of ideas” and the “checking value.”<sup>105</sup> On the other hand, practical obscurity has been used as a logical means to support the straightforward argument that an individual’s privacy interest may not altogether cease to exist the instant information is collected by or shared with a third party, and that in fact, the privacy interest might increase as time passes.<sup>106</sup>

Given that the roots of practical obscurity rest in social concerns about surveillance and its limitations on liberty, the history here seems to support an argument that the concept’s strength and applicability should be measured against the risk it poses to the public’s right to know. Critics of the *Reporters Committee* ruling have argued that practical obscurity has proven too blunt a legal instrument, sacrificing too much public information in exchange for a broad conceptualization of individual privacy concerns.<sup>107</sup> Meanwhile, compelling scholarship that has considered the applicability of practical obscurity as a legal standard for Internet users as part of a privacy continuum<sup>108</sup> or as an ethical standard for considering whether to publicize embarrassing information about an individual<sup>109</sup> embraces a nuanced approach to thinking about privacy that reflects the roots of practical obscurity in legal consciousness. This suggests that the use of the concept to shield an entire category of government records, for example, threatens to weaken government transparency too much,<sup>110</sup> just as a sweeping right to demand the removal of any truthful personal information a person considers outdated or irrelevant is likely to infringe too far on others’ ability to speak freely and truthfully.

Ultimately, the more nuanced view of privacy promoted by current thinking about practical obscurity may be more in keeping with the roots of the concept examined here, showing the *Reporters Committee* decision to be a deviation from the historical norm and leading to an overall clarifying of the blurry space between what is public and what is private in democratic societies that value both privacy and transparency. While the concept of practical obscurity may have significantly curtailed the Freedom of Information Act and contributed to a more limited view of its underlying principles, it has also given credence to less binary thinking about privacy as both a legal and ethical concept. The history of the concept shows that advocates for obscurity as a place on the continuum between total secrecy and total publicity, commentators worried about the death of privacy, and critics of the *Reporters Committee* ruling can all be right at the same time: as the conception of privacy evolves in social and legal consciousness, the relationship between technology and privacy and its implications for public access to truthful information should be carefully considered. In other words, it is possible for practical obscurity to be the basis for a bad ruling for government transparency but also a good starting point for thinking about the complex power relationships between individuals and information gatherers and publishers.

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<sup>105</sup>Kirtley, *supra* note 86; Larson, *supra* note 24, at 119-120.

<sup>106</sup> See discussion of the work of Hartzog et al., at *supra* notes 108-109.

<sup>107</sup> See Kirtley, *supra* note 86; Larson, *supra* note 24.

<sup>108</sup> See Hartzog & Stutzman, *supra* note 82.

<sup>109</sup> See Stewart & Bunton, *supra* note 87.

<sup>110</sup> *Reporters Committee*, 489 U.S. at 781 (Blackmun, J., concurring).

# ARKANSAS V. BATES: RECONSIDERING THE LIMITS OF A REASONABLE EXPECTATION OF PRIVACY

HOLLY KATHLEEN HALL \*

*Smart devices, including those utilizing speech recognition, that are “always-on” are increasingly found in households around the world. They are operated to make household tasks easier, but they also pose unique Fourth Amendment questions. Arkansas v. Bates presented distinct legal challenges when police in the case sought the murder suspect’s home Amazon Echo data, which streams to the cloud, where the data is stored. Amazon fought release of the information. While the defendant ultimately agreed to turn over the data housed on his Echo device, this case highlights the need to re-think privacy standards, the Third Party Doctrine, and the conflict between the government/law enforcement and home devices categorized as “the Internet of Things.”*

**Keywords:** Internet of Things, third party doctrine, Fourth Amendment, privacy

## I. Introduction

Technology that incorporates speech recognition, “the ability to speak naturally and contextually with a computer system in order to execute commands or dictate language,” allows consumers to interact with a range of devices starting with a command such as “Hey, Siri.”<sup>1</sup>The new devices incorporating this technology that are always-on or potentially always listening have both benefits and drawbacks. The fact that the control can be performed without hands can assist those with disabilities, can make services more efficient through voice dictation, and can make everyday tasks more expedient. The data that is collected by those operating these services is used to help improve the services over time.

Concurrently, these same useful features also generate privacy concerns. Consumers are increasingly bringing into their homes devices such as Smart TVs, Fitbits and the Amazon Echo.<sup>2</sup>Known as “the Internet of Things” (IoT), a term first used by Kevin Ashton of the Massachusetts Institute of Technology, these items are “embedded

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<sup>1</sup> Stacey Gray, *Always On: Privacy Implications of Microphone-Enabled Devices*, FUTURE OF PRIVACY FORUM at 4 (April 2016), [https://fpf.org/wp-content/uploads/2016/04/FPF\\_Always\\_On\\_WP.pdf](https://fpf.org/wp-content/uploads/2016/04/FPF_Always_On_WP.pdf).

<sup>2</sup>Ted Karczewski, *Open House: Intel and Amazon Bring Smart Tiny Home with Alexa to CES*, AMAZON DEVELOPER (Jan. 4, 2017), <https://developer.amazon.com/blogs/post/1035ac5c-063a-4339-a495-ecbd1b07847f/open-house-intel-and-amazon-bring-smart-tiny-home-with-alexa-to-ces> (last visited Oct. 3, 2017).

with technologies such as microchips, sensors, and actuators that often use Internet Protocol and share data with other machines or software over communications networks.”<sup>3</sup>There are predicted to be over five billion of these devices by 2020.<sup>4</sup>The risks of using these devices include identity theft, cybersecurity attacks, and unauthorized use of data.

State and federal privacy laws are deficient in addressing these new technological issues, including a recent case dealing with an Amazon Echo device in Arkansas. In December 2016, police issued a warrant seeking records for an Echo device belonging to a murder suspect.

This paper will examine the privacy issues surrounding this case and IoT devices in general and will argue that a new framework for a reasonable expectation of privacy is needed in light of recent developments in technology. The Third Party Doctrine is a Fourth Amendment rule that sanctions law enforcement collection of information if someone discloses that information to a third party, thereby waiving their Fourth Amendment rights in the information.<sup>5</sup>This doctrine no longer serves its purpose in the current structure, and this is an area of privacy law in dire need of modifications.

## II. The Internet of Things

In 2015, the Federal Trade Commission (FTC) issued a report on the IoT, defining it as:

the ability of everyday objects to connect to the Internet and to send and receive data. It includes, for example, Internet-connected cameras that allow you to post pictures online with a single click; home automation systems that turn on your front porch light when you leave work; and bracelets that share with your friends how far you have biked or run during the day.<sup>6</sup>

To the FTC, IoT can include anything from “Radio Frequency Identification (‘RFID’) tags that businesses place on products in stores to monitor inventory; sensor networks to monitor electricity use in hotels; and Internet-connected jet engines and drills on oil rigs.”<sup>7</sup> Hexoskin is a type of clothing that can monitor breathing and heart rates as well as track sleeping patterns of the wearer.<sup>8</sup>OnFarm offers live monitoring of crops.<sup>9</sup>Consumers can buy pocket breathalyzers and fitness trackers. However, few users may realize the data from such devices can be disclosed to others. For example, the

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<sup>3</sup> Katherine Britton, *Handling Privacy and Security in the Internet of Things*, 19 J. INTERNET L. no. 2, 2016, at 3.

<sup>4</sup>*Id.*

<sup>5</sup> Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009).

<sup>6</sup> Fed. Trade Comm’n, *Internet of Things: Privacy and Security in a Connected World*, at 7 (Jan. 2015), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf>.

<sup>7</sup>*Id.* at 21.

<sup>8</sup> Marie-Helen Maras, *Internet of Things: Security and Privacy Implications*, 5 INT’L DATA PRIVACY L. 99, 99 (2015).

<sup>9</sup>*Id.* at 100.

breathalyzer information could be used against them in court and the fitness tracker data could be used to determine disabilities.<sup>10</sup>Fitbit, for example, has sold data to employers.<sup>11</sup>

While many of the devices are sold with a privacy policy, most users don't consider the policies carefully.<sup>12</sup> Of note is Samsung's Smart TV policy noting, "Please be aware that if your spoken words include personal or other sensitive information, that information will be among the data captured and transmitted to a third party through your use of Voice Recognition."<sup>13</sup>After the policy received some notoriety in the media, Samsung apologized and tried to reassure customers they were not monitoring everyday conversations in the home. Shortly thereafter, WikiLeaks revealed what appeared to be a surreptitious spying operation on behalf of the British and United States governments using the Samsung Smart TVs.<sup>14</sup>(The authenticity of the WikiLeaks documents could not be confirmed.)

Nevertheless, up to this point, consumers have tended to exchange convenience for their privacy rights. They allow the companies who make IoT devices to gather all kinds of information which can be used to either improve the device itself, sell the users' data to another party or to generate targeted advertisements for products and services.<sup>15</sup>The devices have also proven to be targets of hackers.<sup>16</sup>

The FTC created the Office of Technology Research and Investigation in 2015 due to some of these concerns. However, the focus of this office appears to be more on research and less on offering regulatory solutions.<sup>17</sup>

Amazon's Echo device is one that has evolved over the last few years. In 2014, the Echo had 14 "skills" or functions.<sup>18</sup>Now, it has over 10,000.<sup>19</sup> Those improvements were made by analyzing the data on the words its users said to Alexa, Echo's personal assistant. Alexa answers the user's questions in full sentences. The Echo is an always-on, always-listening, Internet-connected device that is triggered by saying "Amazon," "Echo" or another "wake word" option.<sup>20</sup> Echo sends your question to the cloud and Amazon's servers determine how to respond. Users can check traffic, weather, set alarms, home thermostats, lights, and ask Alexa to answer their questions.<sup>21</sup>

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<sup>10</sup> Melissa W. Bailey, *Seduction by Technology: Why Consumers Opt Out of Privacy by Buying Into the Internet of Things*, 94 Tex. L. Rev. 1023, 1024 (2016).

<sup>11</sup>*Id.* at 1025.

<sup>12</sup> Brian Heater, *Can Your Smart Home Be Used Against You in Court?* TECHCRUNCH, at ¶ 13 (March 12, 2017), <https://techcrunch.com/2017/03/12/alexa-privacy/>.

<sup>13</sup>*Id.* at ¶15.

<sup>14</sup>*Id.*

<sup>15</sup> Bailey, *supra* note 10, at 1025.

<sup>16</sup>*Id.*

<sup>17</sup>Bailey, *supra* note 10, at 1026.

<sup>18</sup> Amelia Tait, *Amazon Echo: How 2016 Tech is Bringing Us Closer to 1984*, NEW STATESMAN, at ¶ 3 (Sept. 14, 2016), <http://www.newstatesman.com/science-tech/privacy/2016/09/amazon-echo-how-2016-tech-bringing-us-closer-1984>.

<sup>19</sup> Taylor Martin, *35 Most Useful Alexa Skills*, CNET, at ¶ 2 (April 24, 2017), <https://www.cnet.com/how-to/amazon-echo-most-useful-alexa-skills/>.

<sup>20</sup> Rick Billies, *Amazon Alexa Explained*, Senior Tech Tips, at ¶ 7 (April 11, 2016), <http://seniortechtips.com/amazon-alexa-explained/>.

<sup>21</sup>*Id.*

There are options for muting the speaker. When muted, the light ring on the device turns red and no spoken words will be streamed to the cloud. The light turns blue when the Echo is listening to a command, though nothing is recorded before the wake word is uttered.<sup>22</sup>Users also have the ability to delete all the data that has been sent to the cloud via an app.<sup>23</sup>

Despite the privacy options provided by the manufacturer, concerns remain. Germany's data protection commissioner advised great care specifically for the Google Home and Amazon Echo devices due to the lack of clarity regarding how information is collected, stored, and used.<sup>24</sup>

An investigation by *The Guardian* newspaper in London concluded Amazon's Echo likely breaches the Children's Online Privacy Protection Act (COPPA), which regulates the collection and use of personal information from anyone under the age of 13 in the United States.<sup>25</sup> COPPA's definition of personal information includes recordings of a child's voice without the consent of their parents. The consent needs to be in the form of a signed letter, video chat, or phone call. *The Guardian* asserts none of those approved consent methods are used. This is one of many privacy concerns regarding IoT devices.

Under consideration in this paper are the boundaries of the Fourth Amendment search and seizure function for law enforcement regarding cloud data originating from an IoT device. Using cloud storage allows for improvements in speech recognition, letting the device adapt to the user's speech pattern. However, this also has implications on law enforcement access, future use and retention.<sup>26</sup>This was at issue in the recent case of *State of Arkansas v. James A. Bates*.

### III. Arkansas v. Bates

On November 21, 2015, James A. Bates hosted three men – Victor Collins, Owen McDonald and Sean Henry – at his Bentonville, Ark., home to watch football. Henry left late in the evening. The remaining men spent time in the hot tub, drinking. McDonald was reportedly back at his home by 12:30 a.m. Later the morning of the 22<sup>nd</sup>, after Bates called 911, police and medics found Collins dead in the hot tub and noted the rim of the hot tub and concrete patio appeared to have been recently sprayed with water. Collins had a black eye. Bates had bruises and scratches on his shoulder, back and stomach.<sup>27</sup>Collins's cause of death was determined to be primarily strangulation with drowning as a secondary cause. Bates is charged with first-degree murder and is also

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<sup>22</sup>Tait, *supra* note 18.

<sup>23</sup>*Id.*

<sup>24</sup> Oliver Voß, *Google's New System Raises Fresh Privacy Concerns*, EURACTIV (Sam Morgan, trans., May 25, 2016), <http://www.euractiv.com/section/digital/news/googles-new-system-raises-fresh-privacy-concerns/>.

<sup>25</sup> Mark Harris, *Virtual Assistants Such as Amazon's Echo Break US Child Privacy Law, Experts Say*, THE GUARDIAN (May 26, 2016), <https://www.theguardian.com/technology/2016/may/26/amazon-echo-virtual-assistant-child-privacy-law>.

<sup>26</sup> Gray, *supra* note 1, at 8.

<sup>27</sup> Bates Aff., at 1-2, 5 (Feb. 22, 2016), <http://www.documentcloud.org/documents/3473738-Arkansas-vs-James-Andrew-Bates-Affidavit-for.html>; Tracy Neal, *Amazon Objects to Turning Over Device Data in Bentonville Murder Case*, ARKANSAS DEMOCRAT-GAZETTE (Feb. 22, 2017), <http://www.arkansasonline.com/news/2017/feb/22/amazon-objects-to-turning-over-items-in/?f=news-arkansas-nwa>.

accused of tampering with evidence by “using a garden hose to wash away blood from his hot tub and patio area.”<sup>28</sup>Bates has pleaded not guilty.<sup>29</sup>

During a search of Bates’s residence on December 3, the Bentonville Police seized an Echo device located in the kitchen. On December 4, the police emailed a preservation request to Amazon for all the records associated with the Echo and served a search warrant on Amazon. On January 29, 2016, the police obtained an extension of the warrant. Both the original warrant and the extension noted that law enforcement should search for and seize “audio recordings, transcribed records, or other text records related to communications and transactions” between the Echo device and Amazon’s servers during the 48-hour period of November 21 through 22, 2015, in addition to subscriber and account information to see if the device might hold any clues about the murder in the form of audio recordings, transcribed words, text or other data.<sup>30</sup>Amazon partially complied in February by producing subscriber information and the purchase history of Mr. Bates. It did not provide recordings or transcripts.

On June 28, 2016, the police obtained a search warrant for data on the Echo device, Mr. Bates’s Huawei Nexus cell phone and Mr. Collins’s LG cell phone. The police were able to “extract the data” from the Echo device and the LG phone, but not the Nexus cell phone “due to the device being encrypted at the chipset level.”<sup>31</sup>(This cell phone data was desired by the prosecution in case Mr. Bates had installed the Alexa app on the phone. In that instance, any recordings or transcripts could be accessed from the cell phone. The Echo device itself does not store any audio data, but a recording and transcript would be accessible through the app on the cell phone or Amazon’s servers).

In its response to the warrant, Amazon argued recorded audio should have First Amendment protection and asked the warrant be thrown out, noting, “[A]t the heart of that First Amendment protection is the right to browse and purchase expressive materials anonymously, without fear of government discovery,”<sup>32</sup>and citing *McIntyre v. Ohio Elections Comm’n* and *Lamont v. Postmaster Gen.*<sup>33</sup>

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<sup>28</sup>Neal, *supra* note 27, at ¶ 3; Bates, Criminal Information, at 2 (March 30, 2016), [https://caseinfo.aoc.arkansas.gov/cconnect/PROD/public/ck\\_public\\_qry\\_doct.cp\\_dktrpt\\_frames?backto=P&case\\_id=04CR-16-370&begin\\_date=&end\\_date=](https://caseinfo.aoc.arkansas.gov/cconnect/PROD/public/ck_public_qry_doct.cp_dktrpt_frames?backto=P&case_id=04CR-16-370&begin_date=&end_date=) (follow “CRIMINAL INFO SHEET”); Bates Aff. Feb. 22, 2016, *supra* note 27, at 2-3, 7.

<sup>29</sup> Bates Arraignment, at 1(April 5, 2016), <http://www.documentcloud.org/documents/3473742-Arkansas-vs-James-Andrew-Bates-Arraignment.html>.

<sup>30</sup> Memorandum of Law in Support of Amazon’s Motion to Quash Search Warrant at 6, *Arkansas v. James A. Bates*, No. CR-2016-370-2(Feb. 17, 2017) [hereinafter *Amazon Memorandum*], <https://news.vice.com/wp-content/uploads/2017/02/Azn-Brief-in-Support.pdf>.

<sup>31</sup>*Id.* at 7.

<sup>32</sup>*Id.* at 10.

<sup>33</sup> In *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 334 (1995), “After petitioner’s decedent distributed leaflets purporting to express the views of ‘CONCERNED PARENTS AND TAX PAYERS’ opposing a proposed school tax levy, she was fined by respondent for violating § 3599.09(A) of the Ohio Code, which prohibits the distribution of campaign literature that does not contain the name and address of the person or campaign official issuing the literature. The Court of Common Pleas reversed, but the Ohio Court of Appeals reinstated the fine. In affirming, the State Supreme Court held that the burdens § 3599.09(A) imposed on voters’ First Amendment rights were ‘reasonable’ and ‘nondiscriminatory’ and therefore valid. Declaring that § 3599.09(A) is intended to identify persons who distribute campaign materials containing fraud, libel, or false advertising and to provide voters with a mechanism for evaluating such materials, the court distinguished *Talley v. California*... in which this Court invalidated an ordinance

In addition to recordings of user requests for information, Amazon asserted Alexa's *responses* are also protected by the First Amendment. Citing *Zhang v. Baidu.com Inc.*,<sup>34</sup> it argued that courts have recognized that "the First Amendment protects as speech the results produced by an Internet search engine."<sup>35</sup>

Finally, Amazon argued there is a heightened standard the state must meet in this case. It must show a compelling need for the requested information and that there is a sufficient nexus between the information sought and the underlying inquiry of the investigation.<sup>36</sup> The reason given for this heightened standard is that "government requests for expressive information chill the exercise of First Amendment rights."<sup>37</sup>

Amazon filed a motion to quash the search warrant on February 17, 2017. Mr. Bates obtained a new lead attorney in early March, Kathleen Zellner (of Netflix's "Making a Murderer" fame), who proclaimed her client's innocence and filed a motion saying her client would voluntarily hand over the Echo recordings. Amazon provided them on March 7.<sup>38</sup> Thus, the court would not get the opportunity to rule on the issues presented in Amazon's motion, and the question remains: while police in past cases have often seized computers, phones and other electrical devices in the course of an investigation, is there a difference in the reasonable expectation of privacy with these home devices that are always on, always listening, transmitting personal data from home to the cloud?

#### **IV. Existing Legal Frameworks**

Harvard law professors Samuel Warren and Louis Brandeis proposed the concept of a legal right to privacy in the United States in 1890 in the pages of the *Harvard Law Review*.<sup>39</sup> The argument centered on privacy as a personal right, to protect someone's dignity. Warren and Brandeis were both concerned with media being used as a tool to make aspects of private life public.<sup>40</sup> While they could not have predicted the kinds of advances in technology allowing information to flow so effortlessly to servers and "the

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prohibiting all anonymous leafletting. Held: Section 3599.09(A)'s prohibition of the distribution of anonymous campaign literature abridges the freedom of speech in violation of the First Amendment."

<sup>34</sup>*Zhang v. Baidu.Com Inc.*, 10 F.Supp.3d 433, 434-35 (S.D.N.Y. 2014) ("In this suit, a group of New York residents who advocate for increased democracy in China sue one of China's largest companies, Baidu, Inc. (incorrectly named in the Complaint as 'Baidu.com Inc.'). Plaintiffs contend that Baidu, which operates an Internet search engine akin to Google, unlawfully blocks from its search results here in the United States articles and other information concerning 'the Democracy movement in China' and related topics. . . . The case raises the question of whether the First Amendment protects as speech the results produced by an Internet search engine. The Court concludes that, at least in the circumstances presented here, it does.")

<sup>35</sup>*Zhang*, 10 F.Supp.3d at 435.

<sup>36</sup> *Amazon Memorandum*, *supra* note 30, at 12.

<sup>37</sup>*Id.* at 14.

<sup>38</sup>Elliott C. McLaughlin, *Suspect OKs Amazon to Hand Over Echo Recordings in Murder Case*, CNN, <http://www.cnn.com/2017/03/07/tech/amazon-echo-alexa-bentonville-arkansas-murder-case/> (last updated Apr. 26, 2017, 2:52 PM).

<sup>39</sup> Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>40</sup> Harry Kalven Jr., *Privacy in Tort Law – Were Warren and Brandeis Wrong?* 31 L. & CONTEMP. PROBS. 326, 331 (1966).

cloud,” they anticipated the dangers of this, as yet unspoken, right – not explicitly mentioned in the United States Constitution – being trodden upon.

One of the first cases that helped establish a right to privacy in the United States was *Roberson v. Rochester Folding Box Co.*<sup>41</sup> in 1902. Miss Roberson was stunned to wake up one morning and find a drawing of her face adorning posters placed all over her town advertising Franklin Mills flour. Humiliated, she sued for invasion of privacy but lost as there was no such cause of action at the time. Her case, however, led to the establishment of the United States’ first state privacy statute in 1903 in New York.

Tort scholar William Prosser codified privacy law into four areas: appropriation, intrusion, false light and private facts.<sup>42</sup> Appropriation occurs when someone uses another person’s name or likeness without their consent for commercial gain.<sup>43</sup> False light privacy is akin to defamation and includes false information or information that creates a false impression being published without someone’s consent, the information is highly offensive to a reasonable person and the claim contains an actual malice element similar to some defamation claims: the person publishing the information must do so with a reckless disregard for the truth or know the information is false.<sup>44</sup> Intrusion concerns “[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, . . . if the intrusion would be highly offensive to a reasonable person.”<sup>45</sup> The private facts area affects “[o]ne who gives publicity to a matter concerning the private life of another, . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”<sup>46</sup>

Privacy law evolved and grew in the United States in a fragmented manner, creating a patchwork of sector-specific legislation and efforts to guard certain categories of information.<sup>47</sup> Professor Daniel Solove summarizes the state of privacy law in the United States:

Privacy, however, is a concept in disarray. Nobody can articulate what it means. Currently, privacy is a sweeping concept, encompassing (among other things) freedom of thought, control over one’s body, solitude in one’s home, control over personal information, freedom from surveillance, protection of one’s reputation, and protection from searches and interrogations.<sup>48</sup>

The *Privacy Act of 1974* was created with the intent to safeguard personal data, allow federal agencies to collect only what is necessary, and allow citizens the right to see and modify incorrect data about themselves.<sup>49</sup> In addition to this act, a number of industry and sector-specific laws were passed to protect certain kinds of information

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<sup>41</sup>*Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).

<sup>42</sup>William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

<sup>43</sup>*Id.*

<sup>44</sup>Restatement (Second) of Torts § 652 E (1977).

<sup>45</sup>Restatement (Second) of Torts § 652 B (1977).

<sup>46</sup>Restatement (Second) of Torts § 652 D (1977).

<sup>47</sup> Carter Manny, *Recent Controversy Surrounding the EU-US Safe Harbor Data Protection Regime*, 47 BUS. L. REV. 33, 34 (2014).

<sup>48</sup>DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 1 (2008).

<sup>49</sup>Privacy Act of 1974, 5 U.S.C. § 552(a).

including the *Family Educational Rights and Privacy Act (FERPA)*,<sup>50</sup> protecting student academic records and allowing parental access; the *Privacy Protection Act of 1980*,<sup>51</sup> protecting journalists from searches by government officials without a subpoena; the *Electronic Communications Privacy Act (ECPA)*,<sup>52</sup> expanding wiretapping and electronic eavesdropping laws; the *Driver's Privacy Protection Act*,<sup>53</sup> protecting the privacy of personal information assembled by State Department of Motor Vehicles; the *Health Insurance Portability and Accountability Act (HIPAA)*,<sup>54</sup> containing a privacy provision to protect against disclosure of sensitive medical information; the *Gramm-Leach-Bliley Act*,<sup>55</sup> containing a provision for financial institutions to have a policy in place protecting consumers' information from foreseeable threats in security and data integrity; and *COPPA*,<sup>56</sup> mentioned earlier.

There are also laws that are antithetical to privacy. After the terrorist attacks on September 11, 2001, the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, more colloquially known as the "U.S. Patriot Act," was passed and intended to make it easier for federal agents to recognize and probe potential terror threats.<sup>57</sup> The Patriot Act has been heavily criticized for allowing too much government surveillance into the private lives of citizens.<sup>58</sup> All of these fragmented laws are augmented by sporadic state-specific privacy laws, creating a random collection of regulations.

Regarding data privacy protection, four models have been established: (1) comprehensive laws such as the *Privacy Protection Act of 1974*; (2) sectoral laws such as FERPA; (3) industry self-regulation, allowing organizations to establish their own policies; and (4) reliance on privacy-enhancing technologies such as encryption.<sup>59</sup> Privacy regulations in the United States are often developed in a reactionary fashion, after a problem surfaces.<sup>60</sup>

Privacy is also often viewed as a commodity and conflicts arise over who "owns" the data.<sup>61</sup> (This is in contrast to a European Union approach where the tendency is to

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<sup>50</sup>Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g).

<sup>51</sup>Privacy Protection Act of 1980, 42 U.S.C. § 2000.

<sup>52</sup>Electronic Communications Privacy Act, 18 U.S.C. § 2510-22.

<sup>53</sup>Driver's Privacy Protection Act, 18 U.S.C. § 2721.

<sup>54</sup>The Health Insurance Portability and Accountability Act of 1996 (HIPAA) P.L. No. 104-191, 110 Stat. 1938 (1996).

<sup>55</sup>Gramm-Leach-Bliley (Financial Services Modernization) Act of 1999, Pub. L. 106-102, 113 Stat. 1338 (1999).

<sup>56</sup>Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§6501–6505.

<sup>57</sup>Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56.

<sup>58</sup>See Nathan C. Henderson, *The Patriot Act's Impact on the Government's Ability to Conduct Electronic Surveillance of Ongoing Domestic Communications*, 51 DUKE L. J. 179, 200 (2002).

<sup>59</sup>William J. Long & Marc Pang Quek, *Personal Data Privacy Protection in an Age of Globalization*, 9J. EUR. PUB. POL'Y 325, 330 (2002).

<sup>60</sup>See Dulcinea Grantham, *How Does the EU Data Privacy Directive Safe Harbor Affect US Privacy Practices*, 5(3) J. OF INTERNET L. 18, 18 (2001). Grantham notes Europe "has taken a very activist role in the regulation of privacy online." Privacy is a fundamental human right and "as a result of this approach, Europe legislates to ensure the protection of privacy rights."

<sup>61</sup>Steven J. Kobrin, *Safe Harbours Are Hard to Find: The Trans-Atlantic Data Privacy Dispute, Territorial Jurisdiction and Global Governance*, 30 REV. INT'L STUD. 111, 116 (2004). Kobrin explains "The American emphasis on the market is evident even in the context of regulation.

view privacy as more of a fundamental human right.)<sup>62</sup>For example, in March 2017, the United States Senate voted to overturn rules passed in 2016 by the Federal Communications Commission (FCC) that required Internet providers to obtain users' permission before sharing and selling information such as the websites users visit.<sup>63</sup>

## V. Changing Standards of Privacy

Questions surrounding legal rights in electronic communications began to be addressed by the Supreme Court in the *Olmstead* case.<sup>64</sup> Mr. Olmstead was suspected of violating the National Prohibition Act. The F.B.I. garnered evidence against him by wiretapping (without judicial approval) phones near his home and in the basement of his building for several months. The Court held neither Mr. Olmstead's Fourth nor Fifth Amendment rights were violated and that mere wiretapping does not constitute a search and seizure under the Fourth Amendment. Instead, the Fourth Amendment refers to an actual physical examination of papers, effects or a home – not conversations.<sup>65</sup>

In 1967, *Katz* reversed *Olmstead*.<sup>66</sup>Mr. Katz was suspected of transmitting gambling information via interstate phone calls in violation of 18 U.S.C. §1084.F.B.I. agents placed a recording device on a phone booth Mr. Katz used and evidence gathered from those calls was used at trial. The Supreme Court held the eavesdropping violated Mr. Katz's privacy under the Fourth Amendment; that the Fourth Amendment extends not just to tangible items as *Olmstead* asserted, but to the recording of oral statements; and that a warrant should have been authorized in advance.<sup>67</sup> The concept of the Fourth Amendment protection of "people, not places"<sup>68</sup> has implications on searches for evidence on IoT devices. Professor Steven C. Bennett noted in a work regarding right to be forgotten legislation, "[g]iven the breadth of developments in technology and usage of the Internet, and given the increasing globalization of Internet-based commerce, changes in substantive standards for privacy appear almost inevitable."<sup>69</sup>

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Senator Hollings cast the need for The Online Privacy Act (S.2201) in terms of strong pre-emption [to give business the certainty it needs in the face of conflicting state standards], promoting consumer confidence and bolstering online commerce, and preventing consumer fears from stifling the Internet as a consumer medium. In contrast, the European approach to privacy puts the burden of protection on society rather than the individual. Privacy is considered to be a fundamental or natural right which is inalienable, and comprehensive systems of social or communitarian protection take the form of explicit statutes accompanied by regulatory agencies to oversee enforcement. It is the protection of the rights of citizens or 'data subjects' rather than consumers or users that is of concern."

<sup>62</sup> Bob Sullivan, *'La Difference' Is Stark in EU, U.S. Privacy Laws*, NBC News (Oct. 19, 2006), [http://www.nbcnews.com/id/15221111/ns/technology\\_and\\_science-privacy\\_lost/t/la-difference-stark-eu-us-privacy-laws/#.WNGbiRIrJmA](http://www.nbcnews.com/id/15221111/ns/technology_and_science-privacy_lost/t/la-difference-stark-eu-us-privacy-laws/#.WNGbiRIrJmA).

<sup>63</sup> Jacob Kastrenakes, *US Senate Votes to Let Internet Providers Share Your Web Browsing History Without Permission*, THE VERGE (March 23, 2017), <http://www.theverge.com/2017/3/23/15026666/senate-broadband-privacy-rules-congressional-review-act-fcc-vote>.

<sup>64</sup> *Olmstead v. United States*, 277 U.S. 438 (1928).

<sup>65</sup> *Id.* at 466.

<sup>66</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>67</sup> *Id.* at 347.

<sup>68</sup> *Id.* at 351.

<sup>69</sup> Steven C. Bennett, *The "Right to be Forgotten": Reconciling EU and US Perspectives*, 30 BERKELEY J. INT'L L. 161 (2012).

Apple CEO Tim Cook is known for his pro-privacy stance saying, “Privacy is a fundamental human right. . . . If those of us in positions of responsibility fail to do everything in our power to protect the right of privacy, we risk something far more valuable than money, we risk our way of life.”<sup>70</sup>Cook’s views garnered international headlines in February 2016 when he refused an F.B.I. request to unlock the iPhone of San Bernardino shooter Syed Rizwan Farook.<sup>71</sup> Privacy and security are issues that have caught the attention of FTC and FCC. In May 2016, both sent letters of inquiry to several mobile device manufacturers including Apple, Inc., Google, Inc., and LG Electronics USA, Inc., about policies regarding security and vulnerability issues of their devices.<sup>72</sup>

IoT specifically generates several privacy risks because of the data that is transferred and stored. According to the FTC, fewer than 10,000 households with IoT devices can produce 150 million discrete data points a day which breaks down to roughly one data point every six seconds per household.<sup>73</sup>

Solove submitted that all of the data gathered from an individual, while seemingly harmless or perhaps not as harmful when collected in isolation, could become a challenging privacy issue when it is aggregated. Imagine data from financial, educational, medical and other records about one person that could be combined and analyzed by third parties, from marketers to employers to the government.<sup>74</sup>What if this information is gathered by IoT devices and aggregated, then shared with third parties who make decisions based on that data – everything from whether or not to offer someone a job, health insurance, or a home loan? This kind of consumer information is being “scraped, sorted and warehoused” with few formal regulations.<sup>75</sup> And the borders among security, privacy and the law are unclear.<sup>76</sup>

Some technology companies are taking it upon themselves to protect consumers. Microsoft, for example, is implementing enhanced encryption mechanisms. And some companies are purposefully not retaining the encryption keys to unlock the data in case they are asked to do so via a court order.<sup>77</sup>

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<sup>70</sup>*Examining the EU Safe Harbor Decision and Impacts for Transatlantic Data Flows: Hearing Before the Subcomms. on Commerce, Manufacturing, and Trade & Communications and Technology H. Comm. on Energy & Commerce*, 114th Cong. 18 (2015) (statement of Marc Rotenberg, President, EPIC, Adjunct Professor, Georgetown Law)(quoting Tim Cook), <https://epic.org/privacy/intl/schrems/EPIC-EU-SH-Testimony-HCEC-11-3-final.pdf>.

<sup>71</sup> Dave Lee, *Apple Boss Tim Cook Hits Back at F.B.I. Investigation*, BBC NEWS(Feb. 25, 2016), <http://www.bbc.com/news/technology-35656553>.

<sup>72</sup> Federal Trade Commission, *FTC To Study Mobile Device Industry’s Security Update Practices*, FED. TRADE COMMISSION (May 9, 2016), <https://www.ftc.gov/news-events/press-releases/2016/05/ftc-study-mobile-device-industrys-security-update-practices>.

<sup>73</sup> Alexander H. Tran, *The Internet of Things and Potential Remedies in Privacy Tort Law*, 50 COLUM. J.L. & SOC. PROBS. 263, 268 (2017).

<sup>74</sup> Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1185 (2002).

<sup>75</sup> Britton, *supra* note 3, at 5.

<sup>76</sup>MuzamilRiffat, *Contextualizing the Blurring Boundaries of Information Security, Privacy, and Legal Aspects*, 15 INFO. SYS. SEC. ASS’N J., no. 2, 2017, at 24.

<sup>77</sup>*Id.*

Amazon's own policy states: "We release account and other personal information when we believe release is appropriate to comply with the law."<sup>78</sup> So, why did it take such a pro-privacy stance in the *Bates* case? Some concluded Amazon believed the warrant was overbroad.<sup>79</sup> The existing regulations such as the ECPA<sup>80</sup> are not clear regarding IoT devices such as Amazon's Echo.

In 2014, data from a Fitbit was used as evidence in a personal injury lawsuit.<sup>81</sup> In the *Bates* case, law enforcement officials not only went after the data from Amazon's Echo device, they also warrantlessly obtained data from his smart water meter. This data revealed he used 140 gallons of water between 1 a.m. to 3 a.m. the night of the alleged murder, which they surmise was used to wash off bloodstains. Bates claims the clock on the meter was incorrect and that the water was primarily used to fill the hot tub.<sup>82</sup> Did the act of obtaining this data without a warrant violate Mr. Bates's Fourth Amendment rights?

## VI. A New "Reasonable Expectation of Privacy"

The Fourth Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>83</sup>

If conduct is in public, out in the open, it is not protected by the Fourth Amendment; there is no "reasonable expectation of privacy," and law enforcement can have access to anything in public. Entering a home triggers the Fourth Amendment protections. This inside/outside distinction works well until the Internet is brought into the equation.<sup>84</sup> The inside/outside distinction breaks down as data is transferred to servers and the cloud. This also affects the wording of the warrants themselves. A search warrant should specifically describe the physical space to be searched.<sup>85</sup> These limits become more difficult to define when the data a law enforcement official may be seeking is not physically located in the home.

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<sup>78</sup> *Amazon Privacy Notice*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=468496> (last visited Oct. 4, 2017).

<sup>79</sup> Jay Stanley, *The Privacy Threat from Always-On Microphones Like the Amazon Echo*, ACLU (Jan. 13, 2017), <https://www.aclu.org/blog/free-future/privacy-threat-always-microphones-amazon-echo>.

<sup>80</sup> "The Electronic Communications Privacy Act and the Stored Wire Electronic Communications Act are commonly referred together as the Electronic Communications Privacy Act (ECPA) of 1986. The ECPA updated the Federal Wiretap Act of 1968, which addressed interception of conversations using 'hard' telephone lines, but did not apply to interception of computer and other digital and electronic communications." 18 U.S.C. § 2510-22; *supra* note 52.

<sup>81</sup> Parmy Olson, *Fitbit Data Now Being Used in the Courtroom*, FORBES (Nov. 16, 2014), <https://www.forbes.com/sites/parmyolson/2014/11/16/fitbit-data-court-room-personal-injury-claim/>.

<sup>82</sup> Stanley, *supra* note 79.

<sup>83</sup> U.S. CONST. amend. IV.

<sup>84</sup> Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005 (2010).

<sup>85</sup> *Id.* at 1014.

The Third Party Doctrine is also implicated in this situation. A strict reading of the Third Party Doctrine would be interpreted: “The Fourth Amendment would not guarantee the privacy of any personal data held by any private company. This would include virtually all records of electronic communications, web browsing activity, and cloud data, to name just a few examples.”<sup>86</sup> This interpretation led to the adoption of some third-party protecting legislation such as the ECPA.<sup>87</sup> But the ECPA, adopted over 30 years ago, is ill-suited to the technology challenges associated with the cloud and should be updated to protect consumer privacy in IoT devices.

Professor Orin Kerr argues that the Third Party Doctrine can hold up under new technological devices such as IoT and that, without the ability to get information and data from third parties, law enforcement would have a monumentally difficult task in obtaining search warrants in criminal investigations. In other words, “the effect would be a Catch-22: The police would need probable cause to observe evidence of the crime, but they would need to observe evidence of the crime first to get probable cause.”<sup>88</sup>

However, another concern that goes against the current Third Party Doctrine is the possible distrust and chilling effect among consumers, companies and the government due to information-sharing practices. One need only look at the Edward Snowden revelations, including the ability of the National Security Agency (NSA) to collect large amounts of information from Internet companies like Facebook, Microsoft and Yahoo, to see the potential dangers of seemingly private information ending up in the hands of the government.<sup>89</sup>

The Fourth Amendment also guarantees the right of security in individuals’ “effects.” “Effects” typically include personal property. Is IoT data included in “effects”? The *Riley v. California* case could provide some guidance.<sup>90</sup> *Riley* was a criminal case in which a smartphone of a suspect was found on his person at the time of his arrest, containing incriminating evidence. The issue before the court was whether the data from the phone was admissible. The Supreme Court, in a unanimous decision, held the data could not be used without a search warrant, as it was in “the cloud” and not on the person. Therefore, the data from the phone that resided on the cloud was included within the scope of “effects” as defined by the Fourth Amendment. Under that line of reasoning, data from an Amazon Echo device would also be included within the scope of “effects” definition of the Fourth Amendment.

The privacy questions in the *Bates* case also bear some similarity to *Kyllo v. United States*.<sup>91</sup> In *Kyllo*, a thermal-imaging device was used to scan a home from the outside to determine if heat patterns were consistent with high-intensity lamps typically

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<sup>86</sup>Michael W. Price, *Rethinking Privacy: Fourth Amendment “Papers” and the Third-Party Doctrine*, 8 J. NAT’L L. & POL’Y 247, 265 (2016).

<sup>87</sup>*Id.*

<sup>88</sup> Kerr, *supra* note 84, at 575.

<sup>89</sup>Sophie Stalla-Bourdillon, ‘Safe Harbour’ Court Ruling Could Prevent US Firms from Reaching European Users, THE CONVERSATION (April 20, 2015), <https://theconversation.com/safe-harbour-court-ruling-could-prevent-us-firms-from-reaching-european-users-39649>; Shane Darcy, *Battling for the Rights to Privacy and Data Protection in the Irish Courts*, 31 UTRECHT J. INT’L & EUR. L., no. 80, 2015, at 131.

<sup>90</sup>*Riley v. California*, 134 S.Ct. 2473 (2014).

<sup>91</sup>*Kyllo v. United States*, 533 U.S. 27 (2001).

used to grow marijuana. The issue: did the use of such a device without a warrant comprise an unconstitutional search in violation of the Fourth Amendment? A split Supreme Court answered yes, the surveillance was a search and the information should be protected as it came from within the house.<sup>92</sup> Extending that line of reasoning to the *Bates* case, the wake words and other communication comes from within the home and should similarly be protected.

The Supreme Court has held that a person has a reasonable expectation of privacy in property located inside a person's home.<sup>93</sup> While courts have found a reasonable expectation of privacy regarding computers under the control of a person in a home, they are less likely to find that expectation when files or documents are made more "available." For example, a defendant did not have a legitimate expectation of privacy in the contents of a shared drive of his laptop while it was connected to a network.<sup>94</sup>

In Apple's fight with the F.B.I. over the encrypted iPhones of the San Bernardino shooting suspects, the F.B.I. argued an old law known as the All Writs Act (AWA)<sup>95</sup> gave it the legal authority to circumvent the passcode of the iPhones to execute a search warrant. The power of the AWA allows a federal court to issue a writ that would be needed to help another order that has already been issued and can extend to parties who could be in a position to prevent implementation of an order or the administration of justice. Courts must first determine if any other law applies. If it does, the AWA will not be used. Courts regularly employ the AWA to compel third parties to help the government in criminal cases.

In terms of using the AWA to compel third parties to provide assistance or comply with a warrant, the 1977 case *United States v. New York Telephone Co.*<sup>96</sup> is often cited as the leading authority. The Supreme Court held that a district court was correct in issuing an order requiring a telephone company to give assistance to the F.B.I. in installing a pen register ("A device that decodes or records electronic impulses, allowing outgoing numbers from a telephone to be identified")<sup>97</sup> to record phone numbers dialed on two phone lines. The F.B.I. was attempting to gather evidence about an illegal gambling enterprise. The court found the phone company's assistance was necessary and it was not "so far removed" from the original investigation.<sup>98</sup>

In the Apple case, the U.S. District Court for the Eastern District of New York questioned the applicability of the *New York Telephone Co.* case and the AWA. Judge James Orenstein reasoned the AWA did not authorize the relief the F.B.I. was seeking because Congress had contemplated legislation that would have mandated governmental access to encrypted devices but did not adopt that legislation. Therefore, to grant the F.B.I. request would be tantamount to legislating from the bench and infringe on

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<sup>92</sup>*Id.* at 35.

<sup>93</sup>See *Payton v. New York*, 445 U.S. 573, 589-90 (1980).

<sup>94</sup>*United States v. King*, 509 F.3d 1338, 1341-42 (11th Cir. 2007).

<sup>95</sup>28 U.S.C. §1651(a) "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

<sup>96</sup> *United States v. N.Y. Tel. Co.*, 434 U.S. 159 (1977).

<sup>97</sup>*Pen Register*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Pen+Register> (last visited Oct 4, 2017).

<sup>98</sup>*N.Y. Tel. Co.*, 434 U.S. at 174.

separation of powers.<sup>99</sup> The judge also ruled Apple was too far removed from the original investigation and that the government failed to show Apple's help in unlocking the iPhone was a necessity.<sup>100</sup> This decision "stripped the government of an investigative tool upon which it had routinely relied since as early as 2008."<sup>101</sup>

As attorney and professor Alan Rozenshtein describes this new age, ushered in by the Apple v. F.B.I. fight; it "previews the likely new normal: a contentious relationship between the companies that manage our digital bodies and the government that protects our physical ones. Surveillance intermediaries like Apple . . . have the incentives and means to meaningfully constrain government surveillance."<sup>102</sup>

When it comes to sharing information over a computer with third parties, the Office of Legal Education for United States Attorneys offers this guidance, which hinges on who possesses the data:

Individuals who retain a reasonable expectation of privacy in stored electronic information under their control may lose Fourth Amendment protections when they relinquish that control to third parties. For example, an individual may offer a container of electronic information to a third party by bringing a malfunctioning computer to a repair shop or by shipping a floppy diskette in the mail to a friend. Alternatively, a user may transmit information to third parties electronically, such as by sending data across the Internet, or a user may leave information on a shared computer network. When law enforcement agents learn of information possessed by third parties that may provide evidence of a crime, they may wish to inspect it. Whether the Fourth Amendment requires them to obtain a warrant before examining the information depends in part upon whether the third-party possession has eliminated the individual's reasonable expectation of privacy.<sup>103</sup>

So, what is the reasonable expectation of privacy in IoT devices? While the Fourth Amendment protects the inviolability of the home, it may not apply to IoT information: information shared with third parties.<sup>104</sup> Without new regulations to meet the privacy challenges brought by the age of IoT, we could be faced with "a state of pervasive 24/7

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<sup>99</sup> John L. Potapchuk, *A Second Bite at the Apple: Federal Courts' Authority to Compel Technical Assistance to Government Agents in Accessing Encrypted Smartphone Data Under the All Writs Act*, 57 B.C. L. REV. 1403, 1432 (2016).

<sup>100</sup>*Id.* at 1434.

<sup>101</sup>*Id.* at 1403.

<sup>102</sup> Alan Z. Rozenshtein, *Surveillance Intermediaries*, 70 STAN. L. REV. (forthcoming 2018).

<sup>103</sup>H. MARSHALL JARRETT, ET AL., *SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS*, (Off. of Legal Educ. For U.S. Att'ys, 2009), [https://law.ku.edu/sites/law.ku.edu/files/docs/media\\_law/Searching\\_Seizing\\_Computers\\_and\\_Obtaining\\_Electronic\\_Evidence\\_in\\_Criminal\\_Investigations.pdf](https://law.ku.edu/sites/law.ku.edu/files/docs/media_law/Searching_Seizing_Computers_and_Obtaining_Electronic_Evidence_in_Criminal_Investigations.pdf).

<sup>104</sup>*See* Smith v. Maryland, 442 U.S. 735 (1979) (holding there was no legitimate expectation of privacy in information voluntarily turned over to a third party); United States v. Miller, 425 U.S. 435, 443 (1976) ("The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.").

surveillance—a state in which people know that the government may be watching or tracking them at any time.”<sup>105</sup>

A device like the Amazon Echo is essentially a microphone transmitting data to third parties, “so reasonable privacy doesn’t exist. Under the Fourth Amendment, if you have installed a device that’s listening and is transmitting to a third party, then you’ve waived your privacy rights under the Electronic Communications Privacy Act,” said Joel Reidenberg, director of the Center on Law and Information Policy at Fordham Law School in New York City.<sup>106</sup> Privacy attorney Ted Claypoole observed,

There will come a time . . . where . . . it would be unreasonable to expect privacy when we know that our [devices] were all taking information about us and sending it . . . to a third party where it could be subpoenaed by police. When this happens, our current privacy protection regime falls apart, because it is based on the court’s ability to identify a reasonable expectation of privacy. So we will either have **no** legally protectable privacy at all anywhere, or the U.S. Supreme Court will need to acknowledge an entirely new, and probably more objective standard to protect privacy under the U.S. Constitution.<sup>107</sup>

In 2012, the Supreme Court of the United States presaged a potential reevaluation of digital privacy.<sup>108</sup> Justice Sonia Sotomayor’s concurring opinion in *United States v. Jones*, a case dealing with a warrantless tracking device placed on a vehicle, focused on the practicality of the Third Party Doctrine in today’s technology-rich society:

It may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. . . . This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. . . . I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a

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<sup>105</sup> Jamie Lee Williams, *Privacy in the Age of the Internet of Things*, 41HUM. RTS., No. 4, 14, at 22 (2016).

<sup>106</sup> Elizabeth Weise, *Hey, Siri and Alexa: Let’s Talk Privacy Practices*, USA TODAY (March 2, 2016), <http://www.usatoday.com/story/tech/news/2016/03/02/voice-privacy-computers-listening-rsa-echo-siri-hey-google-cortana/81134864/>.

<sup>107</sup> Tom Popomaronis, *Your Honor, I’d Like to Call My Next Witness—Amazon Echo*, INC., at ¶ 4 (Jan. 4, 2017), <http://www.inc.com/tom-popomaronis/your-honor-id-like-to-call-my-next-witness-amazon-echo.html>.

<sup>108</sup> See *United States v. Jones*, 132 S.Ct. 945 (2012).

limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.<sup>109</sup>

While no other member of the Court signed on to her concurrence, when the Framers of the Bill of Rights wrote of “persons, houses, papers, and effects,”<sup>110</sup> they did not envision the cloud and IoT devices. Although Justice Samuel Alito wrote in the same case that “new technology may provide increased convenience or security at the expense of privacy” and that the public may not welcome the loss of privacy, he suspects they will find it to be “inevitable.”<sup>111</sup> This is a disturbing response that diminishes the importance of privacy rights, that assumes the public will casually accept surveillance, and that fails to recognize the increasing unease Americans feel about the privacy, or lack thereof, of their information. A recent Pew Research Center Survey of Americans’ attitudes about privacy demonstrate mounting anxiety about the use and misuse of their personal data, with the majority of respondents arguing for a limit on the amount of time organizations retain data about the user’s activities and communications, and for additional restrictions on government surveillance programs.<sup>112</sup>

## VII. Conclusion

Is IoT just a fad? Perhaps. But, it is currently one of such importance that Congress has set up an entire committee to study the issues involved.<sup>113</sup> While the scope of stakeholders and concerns implicated is vast, the focus here is on law enforcement and the ability to obtain information from an IoT device. The data from devices such as Amazon’s Echo, pacemakers, Fitbits and other devices are increasingly being turned over to authorities to be used in legal proceedings.<sup>114</sup> While all of the data collected from these devices can be a boon to law enforcement, does the public realize when they bring a device such as an Echo into their home they are forgoing their privacy, that they are essentially under constant surveillance? Most likely, they do not.<sup>115</sup>

The Fourth Amendment fails to protect privacy when it comes to IoT devices. A new framework for a reasonable expectation of privacy is needed in light of these developments in technology. As Justice Sotomayor noted in her concurrence in *Jones*, the Third Party Doctrine no longer functions properly in this current structure. This is an

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<sup>109</sup> *Id.* at 957 (Sotomayor, J., concurring).

<sup>110</sup> U.S. CONST. amend. IV.

<sup>111</sup> *Jones*, 132 S.Ct. at 962 (Alito, J., concurring).

<sup>112</sup> Mary Madden & Lee Rainie, *Americans’ Attitudes About Privacy, Security and Surveillance*, PEW RESEARCH CENTER (May 20, 2015), <http://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/>.

<sup>113</sup> See David Kravets, *Internet of Things: There’s Now a US Congressional Committee for That*, ARS TECHNICA (Jan. 13, 2015), <http://arstechnica.com/tech-policy/2015/01/internet-of-things-theres-now-a-us-congressional-committee-for-that/>.

<sup>114</sup> Rob Lever, *Secrets from Smart Devices Find Path to US Legal System*, PHYS ORG (March 19, 2017), <https://phys.org/news/2017-03-secrets-smart-devices-path-legal.html> (“An Ohio man claimed he was forced into a hasty window escape when his house caught fire last year. His pacemaker data obtained by police showed otherwise, and he was charged with arson and insurance fraud. In Pennsylvania, authorities dismissed rape charges after data from a woman’s Fitbit contradicted her version of her whereabouts during the 2015 alleged assault.”).

<sup>115</sup> Gerald Sauer, *A Murder Case Tests Alexa’s Devotion to Your Privacy*, WIRED, at ¶ 19 (Feb. 28, 2017), <https://www.wired.com/2017/02/murder-case-tests-alexa-devotion-privacy/> (“Millions of people are putting digital assistants in their lives with no clue about the potential havoc this Trojan horse could bring.”).

area that is ripe for transformation. In addition, more companies like Amazon need to endeavor to advance consumer privacy rights, which are gradually being leveled by an overbroad Third Party Doctrine.

There are many factors working against such a change. The prevailing political attitude towards privacy as a commodity in the United States means as long as consumer data is viewed as something simply of monetary value, many companies such as Verizon, Comcast and AT&T will buy, sell and collect the data rather than lobby for stronger privacy regulations.<sup>116</sup> The fragmented state of current privacy laws also does not bode well for a strong, unified approach to new privacy regulations.

Globally, the United States may also be forced to deal more strictly with these issues as Privacy Shield and other data sharing agreements essentially compel companies to treat privacy as more of a fundamental human right. Domestically, the Supreme Court, having just welcomed a new justice, may have opportunities to address Fourth Amendment and Third Party Doctrine issues. Will they follow Justice Sotomayor's much hailed concurrence?<sup>117</sup> Until the Court addresses those kinds of cases, uncertainty reins. So, when you bring an Echo into your home, beware: its reverberations can potentially be heard well beyond the walls of your domicile.

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<sup>116</sup> Cecilia Kang, *Congress Moves to Strike Internet Privacy Rules from Obama Era*, N.Y. TIMES (March 23, 2017), [https://www.nytimes.com/2017/03/23/technology/congress-moves-to-strike-internet-privacy-rules-from-obama-era.html?\\_r=0](https://www.nytimes.com/2017/03/23/technology/congress-moves-to-strike-internet-privacy-rules-from-obama-era.html?_r=0).

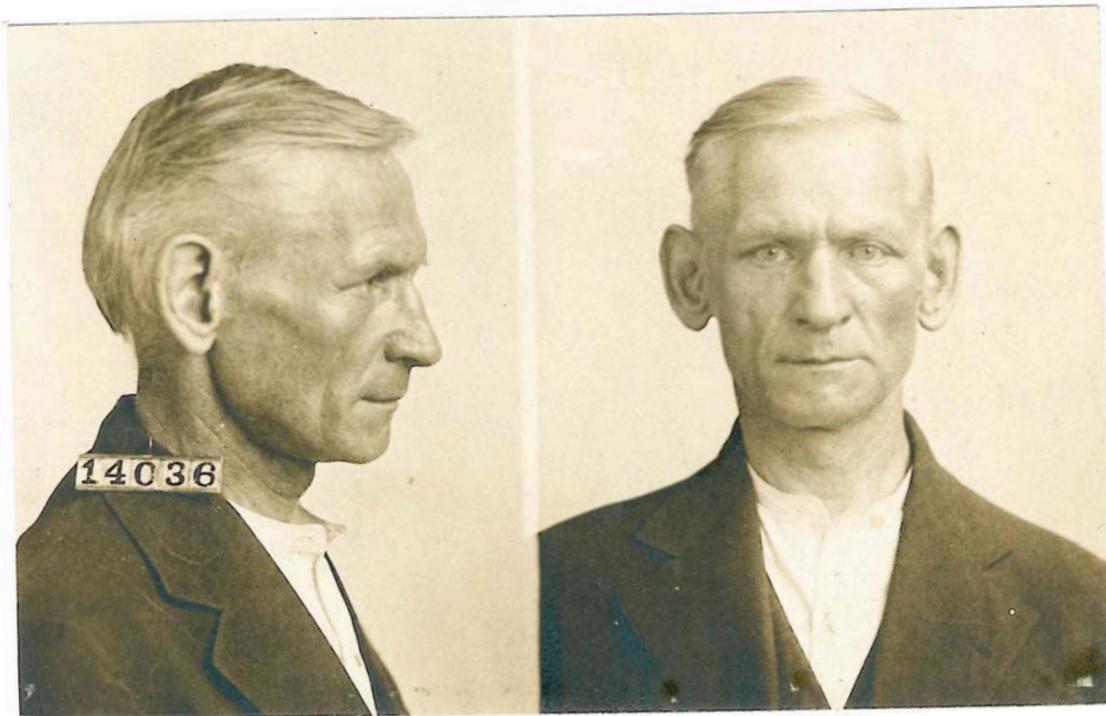
<sup>117</sup> National Security Law Brief, *The Third Party Records Doctrine in the Digital Age*, AM. UNIV. WASH. COLLEGE OF LAW (Jan. 6, 2016), <http://nationalsecuritylawbrief.com/the-third-party-records-doctrine-in-the-digital-age/>; Lynn Oberlander, *Can Justice Sotomayor Stop the N.S.A.?* NEW YORKER, at ¶ 6 (June 7, 2013), <https://www.newyorker.com/news/daily-comment/can-justice-sotomayor-stop-the-n-s-a> (“Sotomayor has joined a growing number of jurists who argue that the law may not have kept up with the huge increase in available information.”).

**THE ESPIONAGE CONVICTION OF KANSAS CITY  
EDITOR JACOB FROHWERK:  
“A CLEAR AND PRESENT DANGER” TO THE UNITED  
STATES**

KENNETH WARD\* AND AIMEE EDMONDSON\*\*

*In 1918, German-language newspaper editor Jacob Frohwerk was convicted under the Espionage Act for editorials critical of World War I. He appealed to the Supreme Court, where his case was considered alongside landmark First Amendment cases like Schenck, Debs and Abrams. Frohwerk was sentenced to ten years in Leavenworth for his editorials in the Missouri Staats-Zeitung. Despite the impact of the case, Frohwerk has been overlooked by legal scholars and journalism historians. This historical analysis utilizes archival documents, newspaper articles, and court and prison records, providing the first thorough consideration of Frohwerk’s career, trial, and lasting impact.*

**Keywords:** Espionage Act, incitement, Frohwerk, German-language newspapers, wartime dissent



**Figure 1.** Jacob Frohwerk's mugshot from his prison records.<sup>1</sup>

## I. Introduction

Jacob Frohwerk did not have to go far to get to the U.S. Penitentiary in Leavenworth, Kansas, on May 31, 1919. He had been to the town of Leavenworth countless times before, traveling the thirty miles from his home in Kansas City to speak to Germans there as editor of the *Kansas Staats-Zeitung* and *Missouri Staats-Zeitung* and a leader of the Kansas branch of the German-American Alliance. He had visited the city of seventeen thousand residents, with its substantial German American population, frequently over the past five years, since the start of World War I, to preach neutrality to a receptive population. This time, however, there would be no reception of friends and allies waiting for him. Once ushered inside the penitentiary, Frohwerk made his way through the gauntlet awaiting all new prisoners. He checked in the few possessions he had brought along: his watch, chain, and charm, a pair of cufflinks and collar buttons, a collar and tie, his glasses, and \$5.49.<sup>2</sup> A brief physical examination turned up nothing out of the ordinary. Frohwerk stood five feet, eight-and-one-half inches tall, weighed 132 pounds, smoked but did not drink, and reported having broken four ribs on his right side earlier in life.<sup>3</sup> This was not the last physical examination he would receive from doctors during his time at Leavenworth, as he would return to the prison hospital only four days later to spend a week undergoing treatment for neurasthenia, or nervosa, likely a response to the shock of his imprisonment.<sup>4</sup> On this day, however, Frohwerk would be taken to his prison cell, B-175, the place he would call home as he served out a ten-year prison sentence for violating the Espionage Act of 1917 for anti-war editorials he published in his newspaper.<sup>5</sup>

Frohwerk's U.S. Supreme Court case was momentous in solidifying federal law in locating the boundary between protected and unprotected speech in the context of national security during World War I. It often appears in the legal historical literature on the First Amendment in the same paragraphs as the famous cases of Charles Schenck, Eugene Debs, and Jacob Abrams, all of whom were convicted under the Espionage Act of 1917 for their anti-war rhetoric.<sup>6</sup> The high court upheld all four cases in 1919. *Schenck* was the first, followed by Debs and Frohwerk on the same day, with Justice Oliver Wendell Holmes writing all three opinions. Abrams was decided later that year. While *Schenck*, *Debs*, and *Abrams* have been widely researched by legal and journalism scholars, *Frohwerk* has received scant attention, likely because the newspapers he edited, the *Kansas Staats-Zeitung* and the *Missouri Staats-Zeitung*, were published primarily in German and because information on Frohwerk the man has been difficult to collect.<sup>7</sup> As Lucas Powe Jr. wrote in *The First Estate and the Constitution: Freedom of*

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<sup>1</sup> Photo of Jacob Frohwerk, prisoner record of Jacob Frohwerk, National Archives at Kansas City.

<sup>2</sup> Intake form, prisoner #14036, Frohwerk (May 31, 1919)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>3</sup> Physician's Examination of Prisoners, prisoner #14036, Jacob Frohwerk(May 28, 1919 [date incorrect])(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>4</sup> Hospital record, prisoner #14036, Jacob Frohwerk (June 3, 1919)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>5</sup>*Id.*; The Espionage Act of 1917, ch. 30, title I, §3, 40 Stat. 219(current version at 18 U.S.C. §2388 (2017)).

<sup>6</sup>*Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616, 630 (1919).

<sup>7</sup> The *Kansas Staats-Zeitung* was later published as the *Neue Kansas Staats-Zeitung*. Both uses in this study refer to the same newspaper.

*the Press in America*, Frohwerk's case was sandwiched between *Schenck* and Debs, "involving a German-language newspaper in Missouri and a defendant so obscure that even his position with the newspaper is unknown."<sup>8</sup> Indeed, Frohwerk and his case have been relegated to a footnote in virtually all of the legal historical literature on the evolution of the modern interpretation of the First Amendment.

The following research seeks not only to make Frohwerk's position with the *Missouri Staats-Zeitung* known, but to properly frame Frohwerk and his case within the context of journalism history and media law as has not been done before. It does so by drawing on a wealth of primary and secondary documents that detail Frohwerk's activities in German American and newspaper circles in the state of Kansas and Kansas City. Using archival and vital records, newspaper articles, and court documents, this research follows his arrival in the United States from his native Germany and establishes him in Kansas City, where he helped found the *Kansas Staats-Zeitung* and came to lead such organizations as the Kansas chapter of the German-American Alliance. Later, it contextualizes his situation in the larger field of German-language newspapers in the United States before analyzing the editorials for which he was convicted under the Espionage Act of 1917. It also seeks to better understand what Frohwerk said in the twelve anti-war editorials that so raised the ire of the U.S. government. It concludes by highlighting his experience at the U.S. Penitentiary in Leavenworth using prison records and newspaper articles in which he describes his time there, briefly reviewing what is known about his life following his release. It also explains some lasting ramifications of his case, perhaps a cautionary tale about the restrictions of government speech during wartime, as well as treatment of immigrants, noting that even the federal prosecutor on the Frohwerk case later called it an unjustified conviction.

While information is sparse on the man and his work, this is not completely uncharted territory. Some scholars have taken steps to explore Frohwerk in the context of his Supreme Court case. Thomas Healy, for example, provides the most substantial consideration in the literature available of Frohwerk as an editor, noting the Department of Justice was investigating Frohwerk and Carl Gleeser, publisher the *Missouri Staats-Zeitung*, months before charges were brought against the two.<sup>9</sup> The focus of Healy's book is Justice Oliver Wendell Holmes Jr. and his consideration of several First Amendment cases heard during his tenure on the Supreme Court, and it does much to situate the case legally. But it stops well short of a comprehensive review of Frohwerk the man, his career or the particulars of his case.<sup>10</sup> Thus, while First Amendment scholars recognize the gravity of *Frohwerk* and have taken steps to understand it in the context of the Espionage Act, a detailed investigation of Frohwerk, the editor and his writings, trial, and post-conviction life, remains to be completed.

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<sup>8</sup>LUCAS A. POWE JR., *THE FIRST ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 70 (1991).

<sup>9</sup>THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* 84-85 (2013).

<sup>10</sup> Another study, completed in 2016, provides detailed analysis of the content of the *Missouri Staats-Zeitung* in 1917. See Christopher Hirsch, *Fighter for Personal Freedom and Advocate of Germanness: Carl Gleeser and Jacob Frohwerk's Missouri Staats-Zeitung during the First World War* (unpublished manuscript)(on file with the authors). Hirsch translated the German text into English as part of his analysis.

## II. German Leader of the West

Jacob Frohwerk was born around 1865 in Germany and immigrated to the United States in 1882.<sup>11</sup> He moved to Kansas within three years of arriving in the United States and was living in Kansas City no later than 1885, when he married Henrietta W. Frohwerk on October 8.<sup>12</sup> Henrietta, whose family name was Frohwerk even before her marriage to Jacob, had immigrated to the United States in 1869 with her parents, Gottfried and Wilhelmina.<sup>13</sup> Jacob became a naturalized U.S. citizen October 3, 1888, at age 24, and he and Henrietta had a daughter, Clara, soon thereafter.<sup>14</sup> Frohwerk left few clues as to his activities during his first decade in the United States, and it is unclear what jobs he held through the early 1890s. By the 1895 census, however, he was involved in newspapering, and in that year he identified himself as a reporter to the census recorder.<sup>15</sup> His newspaper was the *Kansas Staats-Zeitung*, a German-language weekly published in Kansas City, Kansas. The inaugural issue of the *Staats-Zeitung* appeared November 15, 1894, under Frohwerk's editorship. He was fluent in English as well as German, and some of his editorials in German-language newspapers were published in English, and thus likely to reach a wider audience.

While undoubtedly busy running his newspaper, Frohwerk was active in a number of cultural and political organizations by the mid-1890s, particularly groups promoting German culture. Months before launching his newspaper, he attended the state conference of the Kansas German-American League in Salina, Kansas, about 175 miles west of Kansas City. There, he lobbied the assembly to support two resolutions, one opposing women's suffrage, the other preventing the organization from endorsing the entire Democratic state ticket. Both resolutions were adopted.<sup>16</sup> The latter of the two reflects Frohwerk's support of the Republican Party during the decade, which is reflected in regional newspaper coverage of Republican Party activities. Articles identify him as a prominent member of the local party, list him as an election judge in a Republican

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<sup>11</sup>U.S. BUREAU OF THE CENSUS, *Population Schedule, Kansas City*, 1920 U.S. CENSUS, WYANDOTTE COUNTY, KANSAS, 22A, line 30 (1920) (digital image available on Ancestry.com). The passenger list for the S.S. Circassia indicates Frohwerk likely arrived in New York City on October 25 having traveled to the United States by way of Scotland. His occupation is listed in the passenger list as "clerk." Passenger list, S.S. Circassia, arrival October 25, 1882 (digital image available on Ancestry.com).

<sup>12</sup>*Population Schedule, Kansas City*, 1895 KANSAS CENSUS, WYANDOTTE COUNTY, family number 594, line 7 (1895) (digital image available on Ancestry.com); Jackson County, Missouri Marriage Certificate no. 5P-403, Frohwerk-Frohwerk (1885) (digital image available on Ancestry.com). Frohwerk lived in Illinois for an unknown period of time between his arrival in the United States and his appearance in Kansas City.

<sup>13</sup>U.S. BUREAU OF THE CENSUS, *Population Schedule, Kansas City*, 1910 U.S. CENSUS, WYANDOTTE COUNTY, KANSAS, 8B, lines 85-88 (1910) (digital image available on Ancestry.com); *Mrs. Wilhelmina Frohwerk*, KANSAS CITY GAZETTE GLOBE, Apr. 10, 1916.

<sup>14</sup> Missouri, Western District Naturalization Index, Jacob Frohwerk (Oct. 3, 1888) (digital image available on Ancestry.com); *Population Schedule, Kansas City*, 1895 KANSAS CENSUS, WYANDOTTE COUNTY, family number 594, line 9 (1895) (digital image available on Ancestry.com).

<sup>15</sup>1895 KANSAS CENSUS, WYANDOTTE COUNTY, *supra* note 14, family number 594, line 7.

<sup>16</sup>*The German League*, SALINA DAILY REPUBLICAN-JOURNAL, Sept. 5, 1894.

primary, and receiving a payment of \$150 from the Republican state central committee of Kansas.<sup>17</sup>

His loyalty to the Republican Party diminished late in the decade and vanished altogether by 1902. In August 1899, the *Ottawa Daily Republican* reprinted an editorial from the *Staats-Zeitung*, “the local German paper and a normal republican organ,” that accused the Wyandotte County Republican leadership of bossism and urged readers to vote corrupt politicians out.<sup>18</sup> The next year, in the midst of the 1900 presidential contest between William McKinley and William Jennings Bryan, Frohwerk formally shifted alliances. “We are to decide in the present campaign between English or American predominance in our country,” he said in an editorial reprinted in the *Daily Republican*, “between an Ameriban [sic] or an English financial system, between our traditional forms of republican institution and the new fangled notions of foreign conquest, between a large and expensive standing army which is a standing threat to the liberties of the people, and a government of peaceful development established and intended by the fathers of our country.”<sup>19</sup> It is tempting to read this shift as a consequence of involvement in the partisan press, which intensified during the McKinley/Bryan contests in some communities west of the Mississippi.<sup>20</sup> In this case, however, Frohwerk’s words seem genuine. Seventeen years later, Frohwerk would use similar rhetoric to oppose U.S. involvement in World War I, but with much greater consequences.

While his political inclinations changed, the extent of his community involvement did not. Frohwerk remained active in German cultural organizations throughout the 1890s and into the 1910s, eventually stepping into a leadership role in the Kansas German-American Alliance. So substantial were his efforts on behalf of German Americans that some reportedly referred to him as “our leader of the West” and “Carl Schurz the Second” after the Union Army General, German-language newspaperman, and emblem of German-Americanism.<sup>21</sup> At the same time, he participated in community groups such as the Inter-State Commercial Association, which sought to promote trade in Kansas City and encourage low freight rates.<sup>22</sup> He even found time to captain a baseball team comprised of local reporters.<sup>23</sup>

At some point, Frohwerk crossed paths with Carl Henry Gleeser, another German- American living in Kansas City, who would play a key role in the government’s case against Frohwerk. They may have become acquainted through the German culture organizations in which Frohwerk was so active. Gleeser served from 1909 through 1912 as secretary of the local Turner society, a social club for German Americans.<sup>24</sup> Just as likely, they found each other through mutual activity in local German-language newspapering. After emigrating from Germany to the United States in 1872, Gleeser

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<sup>17</sup>*The Opening Gun*, KANSAS CITY GAZETTE, Sept. 29, 1894; *Call ofr [sic] Republican County Primary Election*, KANSAS CITY GAZETTE, Feb. 28, 1895; *Statement of Expense*, LEAVENWORTH WEEKLY TIMES, Dec. 3, 1896.

<sup>18</sup>*What the Germans All Over the State Say*, OTTAWA DAILY REPUBLICAN, Aug. 28, 1899.

<sup>19</sup>*Germans for Bryan*, OTTAWA DAILY REPUBLICAN, July 25, 1900.

<sup>20</sup>Ken Ward, Section and Silver: Editorial Representations of Political Regionalism and Bimetallism in the Cripple Creek Mining District Press, 1896–1904, (2014)(unpublished master’s thesis, Wichita State University)(on file with author).

<sup>21</sup>*Jacob Frohwerk Makes Plea for Fair Neutrality*, LEAVENWORTH TIMES, June 29, 1915.

<sup>22</sup>*Inter-State Commercial Association*, KANSAS CITY GAZETTE, Sept. 6, 1902.

<sup>23</sup>*Victory for the Newspapers*, KANSAS CITY GAZETTE, Apr. 29, 1899.

<sup>24</sup>THE AMERICAN LABOR WHO’S WHO 86 (Solon de Leon, ed., 1925).

worked his way across the country, eventually making his way to California.<sup>25</sup> There he worked on both the *San Francisco Living Issues*, which he edited in 1894 and 1895, and the *San Jose New Charter*, which he edited in 1896.<sup>26</sup> His stays at both publications were brief, and by 1899 he was living in Kansas City.<sup>27</sup> Census records for 1900 indicate only that Gleeser was working as a typesetter in 1900,<sup>28</sup> but city directories connect him directly to the *Missouri Staats-Zeitung* as a printer from 1901 through 1907 under publisher Fred Gehring.<sup>29</sup> From 1904 through 1907, Gehring published both the *Missouri Staats-Zeitung* and the *Kansas Staats-Zeitung*, suggesting Frohwerk handled only the editing and not the publishing of the paper during those years. Gleeser took over publication and editorship of the *MissouriStaats-Zeitung* in 1908 and, beginning in 1910, also published the *Kansas Staats-Zeitung* (sometimes listed as the *Neue Kansas Staats-Zeitung*), a paper that in 1914 was referred to by the reporter of another newspaper as “the most influential German paper in the state.”<sup>30</sup> Frohwerk’s directory entries list him at times as editor, assistant editor, or even solicitor for the two papers, suggesting Gleeser was ultimately in control of both. Thus, the 1910s brought the two men into common enterprise, providing news to German Americans both east and west of the Missouri River in their native language.



**Figure 2.** A photograph of Jacob Frohwerk appearing in a 1913 news article.<sup>31</sup>

<sup>25</sup>U.S. BUREAU OF THE CENSUS, *Population Schedule, Llano Colony, Police Jury Ward 1*, 1930 U.S. CENSUS, VERNON PARISH, LOUISIANA, 16A, line 22 (1930)(digital image available at Ancestry.com).

<sup>26</sup>THE AMERICAN LABOR WHO’S WHO, *supra* note 24, at 86.

<sup>27</sup>*German Day at Chelsea*, KANSAS CITY GAZETTE, Oct. 9, 1899.

<sup>28</sup>U.S. BUREAU OF THE CENSUS, *Population Schedule, Kansas City, Enumeration District 101*, 1910 U.S. CENSUS, JACKSON COUNTY, MISSOURI1A, line 31 (1910)(digital image available at Ancestry.com).

<sup>29</sup>*See, e.g.*, HOYE’S CITY DIRECTORY OF KANSAS CITY, MO. 399, 412 (Hoye Directory Company, 1901).

<sup>30</sup>THE AMERICAN LABOR WHO’S WHO, *supra* note 24, at 86; 1910 KANSAS CITY DIRECTORY 604 (Gate City Directory Co., 1910); *Picnic Was a Big Success*, GREAT BEND TRIBUNE, July 27, 1914.

<sup>31</sup> Photo of Jacob Frohwerk, LEAVENWORTH WEEKLY TIMES, Nov. 20, 1913.

Frohwerk's editorial flair caused a stir on multiple occasions, typically in connection to two causes against which he regularly wrote: corruption and temperance. As already discussed, Frohwerk took the perceived bossism of the Republican party to task, criticizing political patronage and a ring of "a half dozen schemers" who were controlling local Republican politics.<sup>32</sup> More than a decade later, in 1914, he wrote an editorial drawing on a similar theme, accusing the assistant chief of police in Kansas City of appointing city employees who did not have required credentials and receiving money from a saloon in exchange for allowing drunk patrons to find their way home without police interference.<sup>33</sup> In that case, his writings earned him a visit from a police officer who was sent to escort him to the assistant chief of police's office to discuss the matter. Frohwerk declined to cooperate and, with no warrant or other legal means of compelling Frohwerk to oblige, the officer left him alone and the matter was dropped.<sup>34</sup>

This was one of several times Frohwerk made news for his editorials and lobbying efforts against alcohol prohibition, which was in effect in Kansas from 1881 until 1937. At times, he focused on the crime and corruption brought about by driving alcohol underground, actively taking part in attempts to close illegal booze "joints."<sup>35</sup> At other times, he aimed directly at legalization. In 1895, for example, he circulated around the Statehouse in Topeka a petition signed by 3,500 prohibition opponents.<sup>36</sup> Later, Frohwerk would lead a group supporting an independent liberal ticket of anti-prohibition candidates, proclaiming the group was "simply sick and tired of prohibition."<sup>37</sup> The move extended his efforts within the German-American Alliance of Kansas, which elected him president in 1913 and which stood vigorously against prohibition in Kansas.<sup>38</sup> Frohwerk, thus, was far from a fringe editor largely hidden from public view. Instead, he was an active member of the Kansas City community and German-American networks throughout Kansas, advocating multiple causes as a central leader. He did not rely solely on his newspaper for voice but was reported on regularly in other newspapers both in Kansas City and to the west.

Frohwerk's opposition to temperance aligned with the tenor of the German-language press as a whole.<sup>39</sup> After a slow start in the United States, the number of German-language newspapers grew significantly in the second half of the nineteenth century, from forty in 1840 to 613 in 1900.<sup>40</sup> The circulation of those newspapers in 1900 is estimated at around 800,000, with German-language newspapers representing about 80 percent of all foreign-language news in the United States.<sup>41</sup> Much of the content in German-language newspapers in the years leading up to World War I mirrored that in the mainstream American press, with reports on local, state, and national news, notes on

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<sup>32</sup>*Terse Tales of the Town*, KANSAS CITY GAZETTE, May 28, 1897; *What the Germans All Over the State Say*, OTTAWA DAILY REPUBLIC, Aug. 28, 1899.

<sup>33</sup>*A Cop After Frohwerk*, KANSAS CITY GAZETTE GLOBE, July 13, 1914. A state prohibition of alcohol was in effect from 1881 until 1937.

<sup>34</sup>*Frohwerk Didn't Go*, KANSAS CITY GAZETTE GLOBE, July 14, 1914.

<sup>35</sup>*A Misconception*, KANSAS CITY KANSAS GLOBE, July 23, 1906.

<sup>36</sup>*Jacob Frohwerk's Mission*, KANSAS CITY GAZETTE, Jan. 23, 1895.

<sup>37</sup>*Have Liberals Organized Here?*, FORT SCOTT TRIBUNE, Mar. 28, 1914.

<sup>38</sup>*Two Local Men Are Honored at G.A.R. Meeting*, LEAVENWORTH TIMES, Sept. 7, 1913.

<sup>39</sup>CARL WITTKE, *THE GERMAN-LANGUAGE PRESS IN AMERICA* 217 (University of Kentucky Press, 1957).

<sup>40</sup>*Id.* at 76, 208.

<sup>41</sup>*Id.* at 209, 201.

local meetings, events, and lectures, sports coverage, and literature. Yet they differed in important ways. Obviously, they were printed in German, although some, such as Frohwerk's, included English-language content, perhaps to reach a wider audience. They also generally leaned in the same direction on key issues. As Wittke notes, German-language editors and publishers "expressed strong views on [against] woman's suffrage, prohibition, and 'personal liberty,' and argued for the preservation of the German language, German social and cultural life, and the German press."<sup>42</sup> Those editors and publishers, who required a strong cultural base to maintain demand for German-language news, were frequently key members of German organizations. Thus, Frohwerk can be seen as prototypical of the German-language editor of the day.

He operated in a state with a history of German-language newspapers stretching back to its territorial days. The first German-language newspaper in the state, the *Kansas Zeitung*, appeared in 1857.<sup>43</sup> More quickly followed, and though many such newspapers folded after short lives, others were founded to take their places. Eight German-language newspapers circulated in the state in the 1860s, twenty were founded in the 1870s and fifty more in the 1880s and 1890s.<sup>44</sup> The earliest of these operated from areas of high concentrations of German immigrants such as Leavenworth, but they soon fanned out into the developing agricultural areas to the west. A major function of such papers was boosterism, and rural German-language newspapers attempted to draw German Americans to fledgling communities.<sup>45</sup> In time, Kansas German-language newspapers came in content to resemble their counterparts to the east, providing an outlet through which German Americans could connect culturally. They also grew strong in the pre-war years. One publisher managed to organize a chain of German-language weeklies anchored by the *Wichita Herald* with five newspapers in Kansas, four in Oklahoma, and one in Missouri.<sup>46</sup> Far from operating in a vacuum, Frohwerk's newspapers were in the years before World War I but two within a vigorous German-language press in the region.

### III. Conflicting Allegiances?

As did German Americans throughout the United States, Frohwerk and others in Kansas faced increasing anti-German sentiment beginning in 1914 and continuing through the end of World War I. In the early years of the war, before the involvement of U.S. troops, many German-language newspapers and editors, including Frohwerk, rallied behind Germany.<sup>47</sup> Soon after hostilities broke out, he wrote a letter on behalf of the Kansas German-American Alliance to the editor of the *Topeka Daily Capital* that positioned Germany as a victim forced to fight a defensive war. "Germany's cause in this war is more than justified, much as one may deplore war," he wrote. "It is battling today for its very existence."<sup>48</sup> It was a theme he would return to repeatedly in opposition to American involvement in the war.

Yet Frohwerk's statements in the press were far from his only efforts. The start of the war coincided with a marked increase in his activities with the Kansas German-

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<sup>42</sup>*Id.* at 217.

<sup>43</sup> Eleanor L. Turk, *The German Newspapers of Kansas*, 6 KANSAS HISTORY 51 (1983).

<sup>44</sup>*Id.*

<sup>45</sup>*Id.* at 55.

<sup>46</sup>*Id.* at 63.

<sup>47</sup>WITTKE, *supra* note 39, at 238.

<sup>48</sup>*Defends German Emperor*, TOPEKA DAILY CAPITAL, Aug. 24, 1914.

American Alliance, in which he organized new chapters throughout the state and gave numerous speeches against American involvement in the war, Britain, and, later, President Wilson. In October 1914 he delivered an hour-long speech in German to a Leavenworth crowd in which he framed the war as one launched by Britain to preserve its commercial interests against Germany.<sup>49</sup> He went from there directly to Wichita, where he gave a speech in favor of an anti-prohibition candidate for governor, and then to an afternoon German Day event in Reno County, all three events taking place in a single day.<sup>50</sup> January 1915 found him justifying the German cause in the war in Lawrence, where the local newspaper quoted him pleading for the United States to press for an end to the conflict: “The outcome of this war is impossible to see,’ said Mr. Frohwerk, ‘but at any rate we can use our influence to stop the war as soon as possible and stop the slaughter of the very best men of the countries of Europe. We can be with them in heart and help in that way with all our might.’”<sup>51</sup>

As the war dragged on and Americans turned their attention to the presidential election of 1916, Frohwerk’s speeches focused sharply on President Wilson. A January 1916 speech was particularly pointed, attacking the president for claiming neutrality while American money and munitions bolstered the Allied cause.<sup>52</sup> Frohwerk’s election-year speeches took him as far west as Galatia, 260 miles west of Kansas City, and included harsh rhetoric against Wilson.<sup>53</sup> Yet his 1916 speeches also illustrated his fierce commitment to the United States and his elevation of the concerns of his new home over those of Germany. While this sentiment appears in speeches throughout the year, nowhere is it clearer than in his German Day address in Leavenworth. Speaking in both English and German, he began by illustrating the role of German Americans in the development of the United States before moving to the core of the speech, “that the Germans were loyal Americans, that they owed their first allegiance to America above any other country, and that they should be Americans first last and all the time, which they were.”<sup>54</sup> Newspaper coverage of the event stated the audience was moved deeply by the speech, particularly when speaking in German about charges of disloyalty against German Americans.

To Frohwerk’s chagrin, Wilson won reelection, and five months later U.S. soldiers were ordered to Europe. For most German-language newspapers, this meant an abrupt shift in editorial direction. While they had been ardently against Wilson and involvement in the war, the entry of the United States into the conflict forced a quick about-face; as Wittke notes, the papers “had to perform remarkable feats of mental gymnastics as they shifted editorial policy from pro-Germanism to professions of loyalty to the United States. One position after another was abandoned, and before the end of the summer of 1917, the German-language press, with the exception of a few socialist and labor papers, had completed the process of adjustment.”<sup>55</sup> Such was the case of the *St. Louis Westliche Post*, on the eastern border of Missouri, which shifted overnight from a firm pro-German position to unhindered support of the U.S. war effort.<sup>56</sup> Yet not all German-language newspapers, even excepting socialist and labor papers, changed course. At the *Missouri*

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<sup>49</sup> *Teutons Observe German Day with Subdued Spirits*, LEAVENWORTH TIMES, Oct. 22, 1914.

<sup>50</sup> “Billard for Governor” Club Is Getting Busy, WICHITA BEACON, Oct. 22, 1914.

<sup>51</sup> *Turners Celebrate 49th Anniversary*, LAWRENCE DAILY JOURNAL-WORLD, Jan. 29, 1915.

<sup>52</sup> *Jacob Frohwerk Flays Wilson’s Foreign Policy*, LEAVENWORTH TIMES, Jan. 11, 1916.

<sup>53</sup> *Noted Speaker Coming*, GREAT BEND TRIBUNE, Aug. 22, 1916.

<sup>54</sup> *German Day Is Celebrated in a Happy Manner*, LEAVENWORTH TIMES, Oct. 31, 1916.

<sup>55</sup> WITTKÉ, *supra* note 39, at 262.

*Staats-Zeitung*, Frohwerk and Gleeser stayed the course throughout 1917, finding themselves in increasingly choppy waters before eventually finding themselves sunk.

Most controversial was a series of editorials written by Frohwerk and published in the *Missouri Staats-Zeitung* by Gleeser between June 22 and December 14, 1917, that assailed U.S. involvement in the war on multiple points. Some of the ideas espoused therein were topics Frohwerk had drawn upon in previous *Staats-Zeitung* editorials and his speeches. He argued Germany was fighting a defensive war, Britain's commerce was the war's root cause, and the United States was involved chiefly to protect its financial connections with Britain. The instatement of the draft, however, gave Frohwerk new editorial ammunition, and he used it repeatedly. In an August 10 editorial responding to draft riots in Oklahoma, he chided but empathized with the rioters:

Here he is, called upon to leave his wife and children or his aged parents, or to give up the boy upon which he expected to bestow the fruits of his life work and lean upon in the days to come.

Here he is, with the look of anguish and of pleading for help and relief in the eyes of his wife, staring him in the face day after day. She is sorrowing and pleading for her husband, the father of her children or their son. The courts are perhaps far away and if not, he has not the means to ask protection from them. Is not this enough to drive any man to distraction?

And he perhaps further contemplates, that his country is really not in danger, and that he or his boy are to be sent into a foreign land to fight in a cause of which neither he nor any one else knows anything of. And perhaps the suspicion works itself into a conviction, that it is but a war to protect some rich men's money.<sup>57</sup>

By November, Frohwerk was attracting ire from other newspapers. After protesting a police order forbidding the German-American Alliance to hold a meeting in Kansas City, Frohwerk was condemned by the *Fort Scott Tribune*, which labeled him plainly as an enemy: "There are a lot of disloyal people in this state and in every state—a lot of men and women of influence whose sympathies are with Germany and against the United States. . . . It will result in the downfall of the United States if these people are licensed to live and do business unrestrained in the United States." The final sentence of the article was as prophetic as it was threatening. "The last one of them, in this tremendous crisis," it stated, "should be locked up and made to keep his mouth shut or should be shot."<sup>58</sup>

Two months later, on January 26, 1918, Frohwerk and Gleeser were arrested and charged with violation of the Espionage Act of 1917, purportedly at the request of other German Americans.<sup>59</sup> Thirteen charges were leveled against them, all in connection with editorials published in the *Missouri Staats-Zeitung* from June through December 1917, for "wilfully causing and attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States."<sup>60</sup>

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<sup>57</sup> Editorial, MISSOURI STAATS-ZEITUNG, Aug. 10, 1917.

<sup>58</sup> *Treason in Kansas*, FORT SCOTT TRIBUNE, Nov. 9, 1917.

<sup>59</sup> *German Born Readers Cause Editors' Arrest*, WICHITA BEACON, Jan. 28, 1918.

<sup>60</sup> Bill of Indictment at 3, *United States v. Gleeser* (April 23, 1918). Filed in the District Court of the United States for the Western Division of the Western District of Missouri.

Frohwerk and Gleeser were not the only ones snared by the new law. German immigrants to the United States and others had become vocal in their aversion to fighting their homelands. Many saw World War I as a conflict started by the wealthy that would have to be won on the backs of the penniless foot soldier. Among native-born Americans, hysteria and paranoia pervaded as Congress approved the Espionage Act of 1917. The law criminalized speaking or writing with the intent to hinder the United States war efforts, making it illegal to cause or try to cause insubordination or disloyalty in the military or obstruct recruiting. It was also illegal to mail any material that violated the act. Those convicted faced up to a \$10,000 fine and twenty years in jail. Roughly two thousand people were tried under these laws, resulting in the conviction of about nine hundred people, most of whom were aliens, radicals, or publishers of foreign-language magazines and newspapers, among the most noted being socialists and German immigrants. As previously mentioned, among the most famous cases arising from the acts are *Schenck v. United States* and *Debs v. United States*, incitement cases where the court unanimously agreed in 1919 that seditious utterances were not protected speech.<sup>61</sup> *Abrams v. United States*, decided later that fall, is widely noted because of Holmes's famous dissent.<sup>62</sup>

These cases marked the court's most active struggle to date to find the line between unpopular speech and genuine threats to national security. The question in *Schenck*: was the country's ability to raise a fighting force for World War I threatened by war protestors' expression? Socialist Charles T. Schenck sent leaflets to men of draft age, encouraging draftees to "assert their rights" by refusing to serve. Justice Holmes first articulated his famous clear-and-present-danger test in *Schenck*, writing that expression is not protected when words "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."<sup>63</sup> So, if the speech is evil, Congress could stop it. The Supreme Court upheld Schenck's conviction on March 3, 1919, agreeing unanimously that the possibility draftees would refuse induction amounted to a clear and present danger to the country. Most famously, Holmes wrote: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic..."<sup>64</sup> Eugene V. Debs's case, decided with Frohwerk's case a week later, was also part of this line of incitement cases where government critics and anti-war protesters were targeted. Debs, the Socialist Party leader and perennial presidential candidate, was convicted under the Espionage Act for an anti-war speech in Canton, Ohio, where he said "men were fit for something better than slavery and cannon fodder."<sup>65</sup> Debs, a major public figure who received more than one million votes (or 6 percent) in the presidential election of 1912 while sitting in jail, was found guilty of attempting to incite insubordination in the armed forces, as well as obstructing military recruitment and encouraging support of the enemy.<sup>66</sup> On each of three counts, he was sentenced to ten

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<sup>61</sup>*Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

<sup>62</sup>*Abrams v. United States*, 250 U.S. 616, 630 (1919); see also RICHARD POLENBERG, *FIGHTING FAITHS, THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH* (1987).

<sup>63</sup>*Schenck*, 249 U.S. at 52. This replaced the vague "bad tendency test," which the U.S. Supreme Court had said in 1907 permitted free speech restrictions by the government if it is believed that the expression has a sole tendency to incite illegal activity, such as resisting the draft.

<sup>64</sup>*Id.*

<sup>65</sup>*Debs*, 249 U.S. 211.

<sup>66</sup> For further discussion on this case and its context, see MARGARET A. BLANCHARD, *REVOLUTIONARY SPARKS, FREEDOM OF EXPRESSION IN MODERN AMERICA* (1992).

years in prison.<sup>67</sup> Yet again, government officials had succeeded in legally silencing disfavored speech, in this case, the anti-war socialists' leading spokesman.<sup>68</sup> The court ruled on Frohwerk's case the same day.

#### **IV. Frohwerk: 'Cease firing.'**<sup>69</sup>

From July 6 to December 7, 1917, the *Missouri Staats-Zeitung* published a series of twelve articles written by Frohwerk and denouncing the United States involvement in World War I. So what exactly did he say—and how did he say it? In his first editorial, “Come Let U.S. Reason Together,” published July 6, 1917, Frohwerk argued that the United States must cease “the sending of American boys to the blood-soaked trenches of France,” calling America's involvement in the war “a monumental and inexcusable mistake.”<sup>70</sup> The editorial ran in English and German on the front page of the *Missouri Staats-Zeitung*. “These are strong words, we admit, but we would not be true to our allegiance and our love to this country, if we did not utter these words of warning to the American people,” the editorial continued. Frohwerk reminded readers that he was born in Germany and knew of its “unconquerable spirit and undiminished strength.” But he assured readers that Americans were his neighbors and friends, so he felt a moral obligation to speak. “Not to utter it would be treason to this—now our country.” In a July 20, 1917, editorial, Frohwerk argued for neutrality and isolationism on the part of the United States. He also worried about “the rivers of human blood” the war would cause.<sup>71</sup> The following week, a *Missouri Staats-Zeitung* editorial lamented: “We have gone to war to cover up this awful blunder of our administration and to protect the loans of Wall Street to the Allies with the blood of our American boys and the sacrifices and sufferings of the American people.”<sup>72</sup> As noted above, the newspaper argued in an August 10 editorial that the American conscription law, the draft, was a violation of the Constitution. But he argued that draft riots in Oklahoma and elsewhere “were deplorable,” that all resistance to the draft should be carried out by legal means. “In the draft law, as well as in all others, if we feel aggrieved, we have the courts to which we may go for protection. Should these fail us, we have then the right to petition Congress to repeal the law and should we again fail here, then we can ourselves right the wrong at the next election.”<sup>73</sup> Frohwerk continued to complain that the poor man is being sent to protect “some rich men's money,” arguing that the United States is in no danger of invasion.<sup>74</sup> He also exhibited significant anti-British sentiment, arguing that American boys were dying to help secure England's world domination. He listed the names of two of the first American men of German descent to be killed in the war. “God knows the *StaatsZeitung* has done everything within its power to spare these two mothers their terrible bereavement.”<sup>75</sup>

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<sup>67</sup> While serving his prison term, Debs received more than 900,000 votes in the presidential election of 1920.

<sup>68</sup> For detail on the trial and the man, see Nick Salvatore's biography, *EUGENE V. DEBS: CITIZEN AND SOCIALIST* (2007).

<sup>69</sup> Editorial, *MISSOURI STAATS-ZEITUNG*, Aug. 10, 1917.

<sup>70</sup> *Come Let U.S. Reason Together*, *MISSOURI STAATS-ZEITUNG*, July 6, 1917.

<sup>71</sup> Editorial, *MISSOURI STAATS-ZEITUNG*, July 20, 1917.

<sup>72</sup> *Lansing on War Issues*, *MISSOURI STAATS-ZEITUNG*, Aug. 3, 1917.

<sup>73</sup> Editorial, *MISSOURI STAATS-ZEITUNG*, Aug. 10, 1917.

<sup>74</sup> *Id.*

<sup>75</sup> Editorial, *MISSOURI STAATS-ZEITUNG*, Sept. 21, 1917.

The editorials that got the attention of the Department of Justice were indeed printed in English, but Frohwerk's editorial efforts were not limited to the English-language sections of the newspaper. He also published "Kriegsnachrichten," which means "war news" in German, and during the period under study, this section covered two German-language columns on average, starting on the first page with a jump inside. Hirsch's translation of "Kriegsnachrichten" uncovered several recurring themes, including the impact of German submarines, the success of the Central Powers on the Eastern Front and calls for peace. Much of the coverage of the Western Front was framed in terms of the failures of the Allies.<sup>76</sup> Under the 1917 Trading with the Enemy Act, all newspapers printing in a foreign language had to furnish postmaster general with English translations of anything published about the war.<sup>77</sup> It remains unknown, however, whether Frohwerk provided the English translation to the postmaster general.

The newspaper was small, with a circulation of just a few thousand, and one of its subscribers was indeed the Department of Justice.<sup>78</sup> The government was keeping an eye on German newspapers for evidence of espionage. The draft went into effect in the summer and fall of 1917 and the first casualties were coming back from Europe. Government officials visited the newspaper office to interview Frohwerk and the newspaper's owner and publisher, Gleeser. They did not take Frohwerk's editorial stance lightly, seeking to muzzle him and his newspaper with a very effective legal weapon. He and Gleeser were indicted for violation of the Espionage Act on April 23, 1918, in U.S. District Court in Kansas City. The act called for fines and imprisonment of anyone who "shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies." It also outlawed the causing or attempt to cause insubordination or disloyalty during wartime. In response to the charges, Frohwerk and his attorney argued that nothing he published in the *Staats-Zeitung* was false, that the Espionage Act was unconstitutional, and that he had a First Amendment right to editorialize against the war.<sup>79</sup> His motion to dismiss, however, was unsuccessful, and the next day the trial court empanelled and swore in a jury of twelve men. The sequestered jury was to be given quarters and meals for the duration of the trial. Frohwerk, for his part, fought hard to stop—or at least slow down—the process. His motion to quash the panel of jurors was overruled. He also argued that he did not have time to gather witnesses to appear on his behalf. He refused to enter a plea, so the court ordered that a not guilty plea be entered for each of the thirteen counts of the indictment. Frohwerk then sought a continuance, seeking more time to prepare for the inevitable trial. The court rejected this and ordered the jury to appear the next morning, July 26, 1918.

Gleeser's case had been adjudicated even more quickly. Government attorneys said Gleeser and Frohwerk had engaged in conspiracy to obstruct military recruitment. Identified by the court as the owner, proprietor, editor, printer and distributor of the paper, Gleeser had agreed to testify against Frohwerk in exchange for a lesser sentence. By the time Frohwerk's case made it to trial, Gleeser was already sitting in prison at Leavenworth, Kansas. He had pleaded guilty and testified against his former employee, receiving a sentence of five years in prison.<sup>80</sup>

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<sup>76</sup> Hirsch, *supra* note 10.

<sup>77</sup> 12 U.S.C. §§ 95a-95b (1917).

<sup>78</sup> HEALY, *supra* note 9, at 84.

<sup>79</sup> Demurrer to Indictment, *United States v. U.S. Frohwerk*, 249 U.S. 204 (1919).

<sup>80</sup> HEALY, *supra* note 9, at 85.

Meanwhile, far from patiently awaiting trial, Frohwerk was taking steps to improve his image with the public. Immediately following their arrest, Gleaser had already proclaimed that the *Missouri Staats-Zeitung* would shift editorially and begin supporting Wilson, but Frohwerk went further.<sup>81</sup> In March, he appeared on his own accord before a hearing of a U.S. Senate subcommittee investigating the actions of the National German-American Alliance. In the hearing, Frohwerk clarified the actions of the Kansas branch of the organization as in no way beholden to the German government. “We feel ourselves true, loyal American citizens who believe in the Constitution of the United States and who hold it more sacred than probably any other writing of man except the Bible,” he told the subcommittee.<sup>82</sup> The following month, Frohwerk threw himself into the Liberty Bond sales efforts in Kansas City, captaining a team of ten others and claiming he would be more effective in soliciting purchases from German Americans than English-speakers.<sup>83</sup> Ultimately, however, his efforts earned him little but notoriety in the press. In some cases, in fact, he was a liability to allies. A letter to the editor of the *Fort Scott Daily Tribune-Monitor* used Frohwerk’s support of a local politician to discredit that man, writing the *Staats-Zeitung* “kept on praising Little (the politician) and his votes until the paper was suppressed and the publisher jailed. Even a dog is known by the company he keeps.”<sup>84</sup>

It is also possible that Frohwerk’s attorney, a socialist named Joseph D. Shewalter, may not have done his client any favors, that his briefs read more like socialist manifestos than coherent legal arguments.<sup>85</sup> During his trial, which lasted three and a half days, Frohwerk’s attorney made the case that the government was out to get him from the start, and that officials in the court system had already decided he was guilty. When Frohwerk filed his motion to dismiss, for example, the judge should have taken time to consider all of the legal points in his attorney’s motion. But within five minutes of Frohwerk’s oral argument for dismissal, the court produced and read a written opinion that clearly had been prepared in advance. As such, Frohwerk argued that he was deprived of his constitutional right to be heard in court. He complained to the court that the judge’s opinion denying his motion was at least twenty-five pages long, and this proved that the judge did not listen to Frohwerk’s argument before ruling against him after a five-minute recess.<sup>86</sup>

After only three minutes of deliberation, the jury returned a verdict of guilty on all counts, and the following day the court sentenced him to ten years in prison, along with a \$500 fine plus court costs.<sup>87</sup> Out on a \$7,500 bond, Frohwerk appealed to the U.S. Supreme Court, arguing that his First Amendment rights had been violated and that he had uttered no false statements nor did he have any criminal intent. He also urged the high court to overturn the guilty verdict because of multiple errors made at the trial level.

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<sup>81</sup>*German Born Readers Cause Editors’ Arrest*, WICHITA BEACON, Jan. 28, 1918.

<sup>82</sup>*Hearing on S. 3529 Before the S. Comm. on the Judiciary*, 65th Cong. 199 (1918). Page 636 indicates the subcommittee was not aware of the charges against Frohwerk until after hearing his testimony.

<sup>83</sup>*Changes His Tune*, CHANUTE DAILY TRIBUNE, Apr. 24, 1918; *Jacob Frohwerk Paroled*, TOPEKA DAILY CAPITAL, Jan. 8, 1920.

<sup>84</sup> Letter to the editor, FORT SCOTT DAILY TRIBUNE-MONITOR, July 19, 1918.

<sup>85</sup>HEALY, *supra* note 9, at 92.

<sup>86</sup> Transcript of Record, *Frohwerk*, 249 U.S. 204 (1918).

<sup>87</sup>*Frohwerk Guilty*, LEAVENWORTH WEEKLY TIMES, July 4, 1918.

He pointed out that he had no time to secure witnesses and prepare for trial. He also argued that the sentence was “excessive and cruel.”<sup>88</sup>

The U.S. Supreme Court heard Frohwerk’s arguments January 27, 1919, and released its decision March 10. It upheld the verdict in a unanimous opinion authored by Justice Holmes, reasserting its conclusion in *Schenck* that the Constitution does not “give immunity for every possible use of language.”<sup>89</sup> Holmes acknowledged that unlike Schenck, who mailed anti-conscription letters to draftees, Frohwerk had not made “any special effort to reach men who were subject to the draft.”<sup>90</sup> But Holmes wrote that Congress had the power to punish anyone writing and publishing content that urged the obstruction of the draft. The court agreed that Frohwerk engaged in conspiracy with his editor and publisher Gleeser to obstruct recruitment, noting that would be “criminal even if no means were agreed upon specifically by which to accomplish the intent.”<sup>91</sup>

The pivotal point in which the court began to change its thinking about freedom of expression within the context of incitement revealed itself in Justice Holmes’s remarkable dissent in *Abrams v. United States*, decided in November of the same year. This discussion of incitement as a violation of the First Amendment marked the beginning of modern debate on the meaning of free speech.<sup>92</sup> In this case, Jacob Abrams and three other young Jewish-Russian immigrants were convicted of attempting to interfere with the war against Germany after they dropped leaflets written in English and Yiddish from a Lower East Side factory window urging New York City workers to strike in protest of the war that was being carried out by an unjust government.<sup>93</sup> Justice Louis D. Brandeis joined Justice Holmes’s dissent, agreeing that the four were essentially convicted for their socialist and anarchist views—and their criticism of the government. Holmes wrote: “I wholly disagree with the argument . . . that the First Amendment left the common law as to seditious libel in force.”<sup>94</sup> In *Abrams*, Holmes famously referenced the marketplace of ideas philosophy, implying the principle, but never actually using the term. He wrote of the importance of “a free trade in ideas” and “that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>95</sup>

Despite the Supreme Court decision against him, Frohwerk held out hope his sentence might yet be overturned. One month after the decision in his own case, in April, he requested a rehearing but was denied a week later.<sup>96</sup> Two weeks later he received notice from the district court’s office he was to report to the Federal Penitentiary at Leavenworth to begin his ten-year sentence within thirty days.<sup>97</sup> Still he held out for a reprieve. “While there is life,” he told a reporter, “there is hope.”<sup>98</sup> There was reason to remain positive. Gleeser, who had pleaded guilty and began serving his sentence on April

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<sup>88</sup> Appeal and Petition for Writ of Error, Transcript of Record, *Frohwerk*, 249 U.S. 204 (1918).

<sup>89</sup> *Schenck*, 249 U.S. at 206.

<sup>90</sup> *Id.* at 208.

<sup>91</sup> *Id.* at 209.

<sup>92</sup> BLANCHARD, *supra* note 66, at 83.

<sup>93</sup> For a more thorough study of the case, see POLENBERG, *supra* note 62.

<sup>94</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919).

<sup>95</sup> *Id.* Much has been written about Holmes’s change of heart, tracing his evolution to a summer of written correspondence with Judge Learned Hand, as well as several prominent libertarians and legal scholars. See, e.g., POLENBERG, *supra* note 62, at 218-28.

<sup>96</sup> *Frohwerk Wants a Rehearing*, COFFEYVILLE DAILY JOURNAL, Apr. 8, 1919; *No Rehearing for Frohwerk*, CHANUTE DAILY TRIBUNE, Apr. 14, 1919.

<sup>97</sup> *The Frohwerk Mandate*, GREAT BEND TRIBUNE, May 1, 1919.

<sup>98</sup> *Frohwerk Plans for Prison*, KANSAS CITY KANSAN, May 6, 1919.

30, 1918, received notice on May 8, 1919, that his sentence had been commuted to one year and one day.<sup>99</sup> He was released immediately.<sup>100</sup> Meanwhile, Frohwerk's attorney was working to secure a sentence reduction in Washington.<sup>101</sup> Yet as the days crept closer to his deadline, Frohwerk received no such letter. He did manage to arrange one extra day of freedom, allowing him to visit the grave of his only daughter, who had died in 1917, on Decoration Day.<sup>102</sup> But on May 31, he reported to Leavenworth, proceeded through prisoner intake, and began serving his sentence.

Frohwerk's prison records suggest that while his stay began poorly, he was as active and productive a prisoner as he could possibly have been. He was admitted to the prison hospital June 3, just three days after arriving, for neurasthenia, and released one week later.<sup>103</sup> The next day he reported to his job assignment in the prison's printing office, where he worked almost every day but Sundays and holidays for the duration of his imprisonment.<sup>104</sup> There, he edited the prison newspaper, the *New Era*, and encouraged others to write for the newspaper, raising it, in the eyes of his colleagues, to "a higher literary standard than that appearing in any other prison organ in the land."<sup>105</sup> In his downtime, Frohwerk kept steady correspondence with a number of family members and friends, including his wife, Henrietta, to whom he wrote every few days.<sup>106</sup> He also received a steady stream of cigars, which arrived at a rate of about fifty a month, and periodic packages of fruit and candy.<sup>107</sup>

By far the most valuable delivery he received during his stay, however, was the letter from Woodrow Wilson commuting his sentence to one year and one day, the same reprieve granted to Gleeser. It was signed by Wilson only nineteen days after Frohwerk arrived at Leavenworth, and it shortened the editor's sentence by nine years. It also adjusted the date he would be eligible for parole; whereas earlier he would not have become eligible until September 29, 1922, he was now eligible September 29, 1919.<sup>108</sup> The parole board approved his release January 6, 1920.<sup>109</sup> Four days later, on January

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<sup>99</sup> Letter from Department of Justice to Warden of U.S. Penitentiary at Leavenworth (May 8, 1919)(on file in prisoner record of Carl Gleeser, National Archives at Kansas City).

<sup>100</sup> Individual Daily Labor Record, Prisoner #12644, Carl Gleeser (n.d.)(on file in prisoner record of Carl Gleeser, National Archives at Kansas City).

<sup>101</sup> Telegram, Franz Lindquist to Jacob Frohwerk (May 31, 1919)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>102</sup> *Frohwerk Comes to Prison Alone*, LEAVENWORTH TIMES, June 1, 1919.

<sup>103</sup> Hospital record, prisoner #14036, Jacob Frohwerk (June 3, 1919)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>104</sup> Individual Daily Labor Record, prisoner #14036, Jacob Frohwerk (n.d.)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>105</sup> *Frohwerk Has Been Released from Prison*, LEAVENWORTH TIMES, Jan. 11, 1920.

<sup>106</sup> Correspondence log, prisoner #14036, Jacob Frohwerk (n.d.)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>107</sup> Record of Articles Received by Prisoners, prisoner #14036, Jacob Frohwerk (n.d.)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>108</sup> Untitled record, prisoner #14036, Jacob Frohwerk (n.d.)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City); Letter from the Office of Record Clerk (n.d.)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>109</sup> Letter from Charles Glasson to A. Anderson (January 6, 1920)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

10, Frohwerk walked out of Leavenworth after serving thirty-two weeks of a ten-year sentence.<sup>110</sup>

By all surviving accounts, Frohwerk closely followed prison rules and was a leader to other prisoners. In a letter written to him from the warden at Leavenworth after his release, the warden praised his conduct while imprisoned, writing, “If every prisoner would live up to the rules and regulations pertaining to the governing of this prison and would be as loyal to the officials connected therewith as you was [sic], this would be a model institution in every way.”<sup>111</sup> He told the press as much, declaring Frohwerk a model prisoner straight out.<sup>112</sup> No stronger an endorsement could have been written, however, than that printed in the *New Era*, the prison newspaper, and reprinted by the *Leavenworth Times* following Frohwerk’s release:

Frohwerk meant something to this place, and to us who are in it. He meant sincerity, for one thing; and that is the finest thing in journalism. He took the editorship of this paper because he thought he could do something toward the enlightening and enlivening of the prisoner’s day. He sought to bring out a paper which would be of real interest to the inmates, which would express freely and flatter none. And he succeeded. . . .

Goodbye, Frohwerk! May you always retain that which is of far greater work than prosperity or tinselled [sic] fame; your fine idealism, your genial sense of comradeship and your sterling humanity.<sup>113</sup>

First Amendment scholars have long criticized the World War I-era incitement cases, but it is notable that even the government attorney, Alfred Bettman, who prevailed in *Frohwerk*, knew an injustice had been perpetrated. In private correspondence he wrote that Frohwerk’s editorials advocated change in existing government policy “as distinguished from advocacy of obstruction of existing policy, and seemed to me therefore to fall within the protection of the constitutional guarantee of free speech and press.”<sup>114</sup> The attorney said Frohwerk was “one of the clearest examples of the political prisoner.”<sup>115</sup>

## V. Conclusion

In the days leading to his release, Frohwerk told reporters that he would go home to Kansas City and likely return to journalism once freed, but he said he did not know for

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<sup>110</sup> After learning of his parole, Frohwerk had initially expected to be released January 9, but a paperwork delay kept him in prison until January 10. Telegram from Jacob Frohwerk to Henrietta Frohwerk (January 7, 1920) (on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City); Telegram from Jacob Frohwerk to Henrietta Frohwerk (January 9, 1920) (on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>111</sup> Letter from warden to Jacob Frohwerk (January 19, 1920) (on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>112</sup> *Jacob Frohwerk Gets Parole at Federal Prison*, LEAVENWORTH TIMES, Jan. 8, 1920.

<sup>113</sup> *Frohwerk Has Been Released from Prison*, LEAVENWORTH TIMES, Jan. 11, 1920.

<sup>114</sup> As quoted in David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 UNIVERSITY OF CHICAGO LAW REVIEW 1205, 1296 (1983). Alfred Bettman was in charge of the federal government’s prosecutions under the Espionage Act. He made this shocking revelation in private correspondence with noted First Amendment scholar and Harvard Law School professor Zechariah Chafee Jr. That correspondence is included in Chafee’s papers housed at Harvard.

<sup>115</sup> *Id.*

which newspaper.<sup>116</sup> While he largely falls from the record after January 1920, news accounts and archival records show he did indeed return to newspapering. Frohwerk returned to the U.S. Penitentiary at Leavenworth in September to give a tour of the prison to a group of socialites from Kansas City, and news coverage of the visit states he was “again in newspaper work in Kansas City,” perhaps for a German-language newspaper.<sup>117</sup> Similarly, city directories and census records extend his press involvement for decades after his release. He identified himself as an editor in both the 1930 and 1940 U.S. Censuses, still in Kansas City and still living in the same home.<sup>118</sup> Additional information about Frohwerk’s employment comes from city directory listings. In 1924 he is listed as an advertising agent with the *Kansas City Press* and in 1925 as a journalist with the same newspaper.<sup>119</sup> From the late 1920s into the early 1930s, he published the *Kansas City News*, a weekly newspaper, in which his editorials “always took a determined stand.”<sup>120</sup> He died at age 84 on November 19, 1949, at his home in Kansas City, almost thirty years after his release from prison.<sup>121</sup>

One wonders, in light of his significance to the German-American community, the gravity of his editorials, and the impact of his Supreme Court case, why Jacob Frohwerk has been overlooked by history. Perhaps the notoriety of Eugene Debs, a candidate for president who was sitting in jail when he received one million votes as the Socialist Party candidate, overshadowed the Kansas City editor of German-language newspapers who tirelessly advocated for the interests of German Americans in his region. As such, this paper might challenge our academic tendency to write about history as a parade of Great Moments or Great Men, thus helping us to further recognize that in addition to the famous Debs, newspaper editors faced the wrath of the U.S. government and withstood the almost routine trampling of their First Amendment rights during this era. This research, then, offers further context, expanding the analysis of such incitement cases within the context of journalism history, illustrating how they affected everyday people and especially journalists. Schenck was an activist, as was Abrams. Debs was a politician. Frohwerk represents that area of history of interest to media scholars, the editor of a local newspaper in America’s heartland, and thus adds another layer of complexity and nuance relating to the history these early incitement cases.

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<sup>116</sup>*Frohwerk Order of Release Will Arrive Tomorrow*, LEAVENWORTH POST, Jan. 8, 1920.

<sup>117</sup>*Frohwerk Shows His Former Home*, LEAVENWORTH POST, Sept. 16, 1920.

<sup>118</sup>U.S. BUREAU OF THE CENSUS, *Population Schedule, Kansas City*, 1930 U.S. CENSUS, WYANDOTTE COUNTY, KANSAS, 15A, house 243, line 19 (1930)(digital image available at Ancestry.com); U.S. BUREAU OF THE CENSUS, *Population Schedule, Kansas City*, 1940 U.S. CENSUS, WYANDOTTE COUNTY, KANSAS, 5A, house 111, line 21 (1940)(digital image available at Ancestry.com).

<sup>119</sup>CLASSIFIED BUYER’S GUIDE OF THE CITY OF KANSAS CITY, KANS. & CATALOG SECTION, 1924, 474 (Gate City Directory Co., 1924); POLK’S KANSAS CITY KANSAS DIRECTORY, 1925, 345 (Gate City Directory Co., 1925); POLK’S KANSAS CITY (WYANDOTTE COUNTY, KANSAS) CITY DIRECTORY, 1938, 160(R. L. Polk & Co., 1938).

<sup>120</sup>*Jacob Frohwerk*, KANSAS CITY STAR, Nov. 20, 1949.

<sup>121</sup>*Id.*

# NAVIGATING LEGAL OBLIGATIONS AND CULTURE: SATIRE AND FREEDOM OF EXPRESSION IN BOTSWANA

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*Botswana is a country well respected for its historic adherence to the rule of law in a continent mostly known for dictators and the rule of man. However, this country retains some of the most anachronistic pieces of legislation. Some of these are constantly called into question when constitutional rights are alleged to be breached. Customary law is also in operation, and the society still maintains a large share of its traditions, some of which are increasingly rejected by the courts. These cultural values often clash with the laws of Botswana, which are influenced by a host of international and regional treaties and decisions of foreign courts that have shaped the local jurisprudence. A photoshopped picture of an almost naked President Khama caused a seismic uproar in the country when it was published online.<sup>1</sup> This article locates it within the milieu of Botswana's Constitution and the Penal Code and argues that in light of freedom of speech guarantees in the Constitution of Botswana, the picture flouted no law, however distasteful and impudent it may have been. The courts would reject arguments based on culture.*

**Key Words:** Khama, Botswana, photoshopped, culture, freedom of expression

## I. Introduction

Satire, which manifests itself in different forms, is now a growing fascination among some people in Botswana. While cartoons making fun of politicians are common in mainstream newspapers such as *Mmegi*, *Botswana Gazette* and *Botswana Guardian*, the burlesque type, delineating sexuality or sexual organs, are unheard of. It is reasonable to assume that with close proximity to South Africa, the country is getting this influence from across the border. This is made much easier by the internet, especially Facebook. Although fixed line mobile internet subscription was estimated at 8.5% as of 2014, many people are able to access the internet through their work desktops but a great majority do so through their mobile phones.<sup>2</sup> With a population of just 2 million people, Botswana has one of the world's highest mobile phone penetration rates,

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<sup>1</sup>The picture was first posted on facebook.com/bwlaugh which is no longer in existence. It was subsequently shared widely by some Facebook users.

<sup>2</sup>AMGOO Marketing Team, *Mobile Phone Industry in Africa: Botswana Leading the Digital Pack*, AMGOO (Dec. 11, 2014), <http://www.amgoo.com/blog/mobile-industry-in-africa-botswana-leading-the-digital-pack>.

with most people typically having at least two sim cards for two different networks in one phone, or two mobile phones for two out of the three mobile phone operators. In 2014, international phone manufacturer AMGOO recorded Botswana's mobile phone penetration at 159%.<sup>3</sup>

The main form of satire in Botswana is cartoons, which can be found in most print newspapers and in the online versions of some. These are mostly caricatures of politicians, from the President to Members of Parliament to Councillors from across the political divide. In South Africa, in addition to cartoons, which are also very common there, caricatures have taken the form of paintings, and both cartoons and paintings have often exhibited nudity. They have been very controversial in recent years because they have featured the South African president Jacob Zuma. These have divided opinion as many see them in poor taste and disrespectful.



One of the Zuma paintings done by artist Ayanda Mabulu, who is pictured here (right).<sup>4</sup>

Recently, Botswana experienced a similar incident around September 2016. Kealeboga Chinganda, a young man of 36 from the tourism village of Maun in the North West District posted a photoshopped picture of President Ian Khama on a website ([www.bwlaughs.com](http://www.bwlaughs.com))<sup>5</sup> and it was redistributed on Facebook.<sup>6</sup>

This engendered a fierce debate and many people expressed shock and disbelief. As in the Zuma case, many argued that it was sheer impudence that crossed the boundaries of freedom of expression and was against Setswana culture,<sup>7</sup> an affront on the norms and traditions of the people of Botswana. These people tend to be conservative and venerate the elderly and those holding positions of power in Botswana. However, others, especially journalists and some lawyers, argued that it was permissible and within the limits of free expression.

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<sup>3</sup>*Id.*

<sup>4</sup>*SA: Women Protest over Painted President Zuma Penis*, IMIRASIRE (Jan. 11, 2015 11:35), <http://eng.imirasire.com/news/all-around/out-of-rwanda/article/sa-women-protest-over-painted>.

<sup>5</sup>This link is no longer available.

<sup>6</sup>Link no longer available.

<sup>7</sup>The culture of the people of Botswana.

Most lawyers who debated the issue on Facebook<sup>8</sup> were of the view that, culturally, the photoshopped picture of the president was an insult to him and unacceptable. However, they pointed out that there would be many hurdles to be overcome if criminal prosecution was to ensure. In their view, there is no criminality in morality; there is no standard for morality to determine criminality or otherwise. They pointed to a clash between culture and the modern law.<sup>9</sup>

This article discusses this incident looking at the interface between law, culture,<sup>10</sup> and freedom of expression. It attempts to address the concerns raised by the public: whether this was morally wrong and whether it was legally permissible. Above all, the article investigates what should happen should there be a clash between cultural norms and the laws of Botswana.

The article argues that extensive litigation in Botswana's courts of law has settled the law and that constitutional arguments will and should win. The Constitution is the supreme law of Botswana and, unlike in Britain where Parliament is supreme, the courts in Botswana have the final say on the law. Arguments predicated on culture cannot triumph over the Constitution.

To address these issues of culture and law satisfactorily, I take a two-pronged approach. Discussed first is the place of culture (values, norms, beliefs, and morality) in the lives of Botswana<sup>11</sup> and the laws of Botswana. Secondly, I discuss the law with regard to freedom of expression. Finally, I consider the crux of the matter: the position of the law regarding these conflicting rights and which one has precedence. This will allow us to establish the illegality or otherwise of this much-talked-about Khama picture.

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<sup>8</sup>BusangManewe, FACEBOOK (Sept. 14, 2016), <https://www.facebook.com/busang.manewe/posts/10210481937834819> (attorney in private practice's wall post). In support of him were attorneys Tshiamo Rantao, Tebogo Sebegu and Joao Carlos Salbany.

<sup>9</sup>*Id.*

<sup>10</sup>In the context of this paper, culture refers to custom or tradition: the group pattern of habitual activity, beliefs, norms and values that are transmitted from generation to generation.

<sup>11</sup>The people of Botswana are called Batswana, as opposed to Botswanans or Botswanese.



The controversial photoshopped picture supposedly of H.E. President Dr. Ian Khama, with Parliament in the background.

## II. Tswana Traditions and Customary Law

Before independence in 1966, Botswana mainly relied on various tribal chiefs (*dikgosi*) and their juniors known as headmen (*dikgosana*) for leadership. Even the British, who colonised Botswana in 1885 used a system of Indirect Rule to govern the Protectorate. It was these tribal leaders who ruled the people in their villages on behalf of the Monarch. As custodians of Setswana culture, the chiefs entrenched a respect for cultural values, principal among them obeisance for people in key positions such as cabinet ministers, church ministers, Members of Parliament and Councillors. This resulted in veneration of elders, commonly referred to *asbagolo* (plural) and *mogolo* (singular).

In recognition of this, the independence Constitution of the Republic recognized tribal customs as central to the lives of Batswana. A pluralistic legal system was established, with four primary sources of law: the Constitution, statute law, customary law and common law (based on Roman-Dutch law), with significant influences from English law.

Customary law has thus been recognized as a repository of culture. It is administered by the Customary Courts spread across the country, in every major village and even in towns. It is contained in the Customary Law Act (of 1996), while the original Act was enacted in 1961 by a Proclamation (prior to independence in 1966). Each tribe has its own customary law which is normally administered with regard to fellow

“tribesmen” in civil proceedings. This customary law is knitted with the tribesmen’s culture and identity.<sup>12</sup> This includes the tribal morals, which are important to this paper. As the majority of people in Botswana are Tswana speaking (79%), they share similar traditional values.

The chiefs and headmen administer the customary law. However, in anticipation of difficulties that may arise, Section 10 of the Customary Law Act provides that if the system of customary law cannot be established with certainty, the Customary Court is required to apply principles of justice, equity and good conscience. However, since tribal chiefs and headmen—who by and large do not have the legal, let alone basic, education to deal with technical matters—administer this law, they can hardly apply these principles. As a result, most of these courts deliver incompetent judgements, especially at the lower levels. With the customary law unwritten and passed on only by word of mouth, there are often contradictions as to what is the true position of the laws of the various tribes. This makes it difficult to adjudicate cases at times and to determine the correct position.<sup>13</sup>

Customary law is so important that the Constitution makes certain exceptions based on it. This is with regard to discrimination based on matters of personal law such as divorce, burial, adoption, devolution of property on death, or membership of community or tribe of customary law.<sup>14</sup>

There have been many cases brought to Botswana’s higher courts, by both private parties and the State, where customary law was at issue. It is important to state a few of these briefly and we will return to them later to see how the law was interpreted by the courts. In the case *Legwaila v. The State*,<sup>15</sup> the Attorney-General prosecuted an opposition lawyer at the Magistrates Court for allegedly using abusive words considered to be in bad taste and culturally unacceptable: *dithala* (testicles) and *nnywana* (vagina) and *dinnywana* (vaginas). The matter was brought in appeal at the High Court. The appeal is the case that is the interest of this paper as it set important judicial precedent. At the height of internecine strife in the then main opposition Botswana National Front (BNF), Legwaila, a member of the party, had addressed a public rally and quoted those words as used by one of the factions.

In bringing the case to Court, the Attorney-General had argued that he was protecting public morals. He wanted to avoid a situation whereby the people of Botswana could become “ill-mannered, depraved and uncivilized.”<sup>16</sup> The court disagreed with him and ruled in favour of the accused.

In another case, a civil matter, another Motswana<sup>17</sup> lawyer, Mrs. Unity Dow, married to an American citizen with whom she had three children, brought a case<sup>18</sup> against the Attorney-General for discriminating against her based on her gender. The said law, the Citizenship Act of 1984, denied her children Botswana citizenship just because their father was a foreigner. At issue was Botswana’s patrilineal culture because

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<sup>12</sup>Tabeth Masengu, *Customary Law Inheritance: Lessons Learnt from Ramantele v. Mmusi and Others* (Oxford Human Rights Hub, Working Paper No. 6, 2015).

<sup>13</sup>*Mmusi and Others v. Ramantele and Another* 2012 2 BLR 590 HC (Botswana).

<sup>14</sup>BOTSWANA CONST. § 15 (4) (c, d).

<sup>15</sup>*Legwaila v. The State* 1990 BLR 260 HC (Botswana).

<sup>16</sup>*Id.* at 270.

<sup>17</sup>Motswana means Botswana national.

<sup>18</sup>*Dow v. Attorney-General* 1991 BLR 233 HC (Botswana).

a Motswana man in a similar situation would have automatically passed the citizenship to his children, even if his wife were a foreigner. The Attorney General took the matter on appeal to Botswana's highest court, the Court of Appeal, and argued that this was Botswana culture that must be tolerated and must not be deemed unconstitutional, however discriminatory. The court disagreed with him.

In yet another case which proves the clash between culture and modern law, *Mmusi and Others v Ramantele and Another*,<sup>19</sup> four sisters from the Bangwaketse tribe in the village of Kanye came before the High Court challenging their customary law (again based on patrilineal dominance) which entitled a last born male child to inherit intestate family property. The four sisters had built their widowed mother a three-bedroom house on the family homestead. Their only brother (Banki) did not contribute anything toward the development of the property. Their father had a relationship with another woman before they were born which produced a son. Upon their mother's death, their late half brother's son emerged and claimed the property on the basis that his uncle (the late Banki) had bequeathed the plot to his father (who had also died). The premise of the bequest, he argued, was that as the last-born son, Banki, had the right to inherit the property according to culture. The matter was also taken on appeal to the Court of Appeal. Once more, the cultural argument was defeated, and the women were granted intestate inheritance.

### III. Freedom of Expression and the Law

Having discussed customary law, we now turn to the law regarding freedom of expression in Botswana, which also entails freedom of the press. Chapter 2 of the Constitution of Botswana is the Bill of Rights (Sections 3-18). Section 3 (b) of the Constitution guarantees "freedom of conscience, of expression and of assembly and association" and (3a) guarantees amongst others "the protection of the law."

There are more detailed and specific sections dealing with freedom of expression and freedom of conscience. **Section 11 states that:**

- (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.<sup>20</sup>

Section 12 (1) dealing with freedom of expression states:

Except with his or her consent, no person shall be hindered in the enjoyment of his or her freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the

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<sup>19</sup>*Mmusi*, 2012 2 BLR 590 HC.

<sup>20</sup>BOTSWANA CONST. § 11.

public generally or to any person or class of persons) and freedom from interference with his or her correspondence.<sup>21</sup>

Just like with customary law, the country's higher courts have been called upon to interpret these laws. It is Section 12 (1) that gains particular attention because there have been many cases related to it involving the media. In *Media Publishing v. Attorney-General*,<sup>22</sup> the *Botswana Guardian* approached the High Court after the government withdrew advertising from the paper and its sister publication *Midweek Sun* after they wrote stories critical of the then-President Festus Mogae and the then-Vice President Seretse Khama Ian Khama (currently the President of Botswana).

His Lordship Mr. Justice Isaac Lesetedi interpreted this provision widely such that it subsumes press freedom. Subsequent cases have been argued against this precedent. The learned<sup>23</sup> judge ruled that it was unconstitutional for the government to withdraw advertising on the basis that it was upset by negative publicity. "Indeed because of the important role that it plays in a democratic society, freedom of expression is jealously guarded by courts of law,"<sup>24</sup> even if unpalatable material is published by the media, the court ruled. The judge further ruled that those who hold power, although protected by the law and having recourse to such laws as those of defamation and privacy, must be tolerant of more scrutiny about their responsibilities to the public. The judge, however, made it clear that, ordinarily, the government has a right to choose where to advertise.

#### **IV. Resolving the Conflict**

In the past, customary law and other rights provided in the Constitution have clashed, and the courts have always ruled in favour of these other rights. In the *Legwaila* matter, the High Court made very important pronouncements. Ruling in favour of the defendant, Justice Gyeke-Dako rejected arguments based on culture and Tswana morals:

I deem it unsafe to go along with the learned counsel for the State-Respondent's contention that "the mischief which the amendment made to the section seeks to cure is to remedy the situation whereby the people of Botswana become ill-mannered, depraved and uncivilized" and to achieve this purport, mere use of the word "*nnywana*" in a public space or gathering becomes an offence under the section.<sup>25</sup>

The judge reasoned that the words might be offensive but not abusive or insulting. There might also be "many manifestations of behaviour which will cause resentment or protest without being insulting or abusive,"<sup>26</sup> His Lordship ruled.

In the *Dow* case,<sup>27</sup> the trial judge Justice Horwitz similarly rejected the argument that culture must trump human rights. At the Court of Appeal, the matter of culture and

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<sup>21</sup>BOTSWANA CONST. § 12 (1).

<sup>22</sup> *Media Publishing (Pty) Ltd v. Attorney-General and Another* 2001 (2) BLR 485 HC (Botswana) [hereinafter *Media Publishing*].

<sup>23</sup>The word "learned" is a standard courtesy used to address either a judge or attorney in the Botswana Courts of Law.

<sup>24</sup>*Id.* at 495.

<sup>25</sup>*Legwaila*, 1990 BLR 260 HC at 170.

<sup>26</sup>*Id.*

customs received considerable attention. The court noted that the parliament of Botswana was the only entity vested with the responsibility to make laws for order, peace, and good governance.

The Court of Appeal majority<sup>28</sup> agreed with him and ruled that the Constitution was above culture. The court thus granted Dow's children Botswana citizenship and struck down the discriminatory provisions of the Citizenship Act of 1984, being Sections 4 and 5. Specifically addressing itself to the customs and traditions of Botswana, the Court of Appeal President Justice Amissah pronounced that:

Custom and tradition have never been static. Even then, they have always yielded to express legislation. Custom and tradition must a *fortiori*, and from what I have already said about the pre-eminence of the Constitution, yield to the Constitution of Botswana. A constitutional guarantee cannot be overridden by custom. Of course, the custom will as far as possible be read to conform with the Constitution. But where this is impossible, it is custom not the Constitution which must go.<sup>29</sup>

The Court of Appeal also made another important pronouncement. It stated that Section 3 is not just a mere preamble because if it is violated, one has recourse to the High Court for redress as per Section 18 of the same Constitution. The court therefore treated Section 3 as substantive and "the key or umbrella provision in chapter 2 under which all rights and freedoms protected under the chapter must be subsumed."<sup>30</sup> Provisions in chapter 2 therefore have to be read in conjunction with Section 3.

The argument in this case, marshalled by the Attorney-General of the Republic of Botswana, was that the law must tolerate discrimination against a woman based on her gender because it served to reflect and preserve Botswana's patrilineal tradition. It might be discriminatory, but it was made in good faith to reflect societal interest, the Attorney-General argued.

In *Mmusi v. Ramantele*,<sup>31</sup> Justice Key Dingake once more underlined that cultural arguments have no basis in law, especially when they clash with fundamental rights enshrined in the Constitution. "The justices of this court view the Constitution as the mirror reflecting the national soul. The justice of this court have shunned the apologetic value-oriented model that derives its substance from the moral choices of the majority or the public mood/opinion."<sup>32</sup>

Once more, the Attorney-General of the Republic of Botswana had sought reliance on Tswana traditions (and customary law) to preserve a practice in which females were denied inheritance in an estate. The court rejected the government claim that Botswana was "a culturally inclined nation."<sup>33</sup> Another important point made by the

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<sup>27</sup> *Dow*, 1991 BLR 233 HC.

<sup>28</sup> In agreement: Amissah A.N.E. (Judge President), Aguda JA and Bizoz JA, Justices; Schreiner and Puckrin dissenting.

<sup>29</sup> Attorney-General v. Dow 1992 BLR 119 CA at 137 (Botswana) [hereinafter *Dow appeal*].

<sup>30</sup> *Id.* at 133.

<sup>31</sup> *Mmusi and Others v. Ramantele and Another* 2012 2 BLR 590 (Botswana) [hereinafter *Mmusi*].

<sup>32</sup> *Id.* at 64.

<sup>33</sup> *Id.*

judge was that the court would prefer an interpretation that gives effect to the values of the Constitution as opposed to one which does not.

The Court of Appeal judgment on this matter<sup>34</sup> upheld the decision of the High Court that the Constitution must trump culture. However, it made a very careful consideration regarding Tswana culture in repudiation of some aspects of the judgment on points of law beyond the scope of this paper. The court first acknowledged the importance of the culture and morals of the people of Botswana. Judge President Justice Ian Kirby said due regard must be had to the moral choices of the majority because this legitimates all laws and this was a cornerstone of democracy and the rule of law. He also emphasized that the majority could not be ignored because the majority elects Parliament. Further, he stressed that the Constitution was “a creature of the people.”<sup>35</sup>

In criticizing the court *a quo*, the Judge President opined, “No apology need to be offered for respecting the moral choices of the majority, as reflected in the laws passed by parliament and in the Constitution itself.”<sup>36</sup> He said prevailing public opinion as reflected in legislation, international treaties, the report of public commissions and contemporary practice was a relevant factor in the determination of constitutionality of a law or practice but “it is not a decisive one.”<sup>37</sup>

However, like the court *a quo*, he concluded that the courts have “a sacred duty to test any law passed by parliament against the imperatives of the Constitution and to strike down any law including customary law that does not pass constitutional muster. That will always be so.”<sup>38</sup>

Delivering the leading judgment on the same matter, Appeal Justice Isaac Lesetedi was more damning on customary law:

It is axiomatic to state that customary law is not static. It develops and modernizes with the times, harsh and inhuman aspects of customs being discarded as time goes on. . . .*For after all, what is customary law but a set of rules developed by society to address issues which protect the country’s social fabric and cohesion.*<sup>39</sup>

From these cases, it is clear that the law in Botswana places a premium on human rights as per the Constitution and will not entertain arguments based merely on traditions, morals or customary law. The High Court and the Court of Appeal have borrowed from international law and decisions of other courts in the African jurisdiction to arrive at these decisions. It is on this basis that it is very unlikely that a court faced with the Khama photo will rule in his favour.

This is why the state had difficulty charging the alleged offender. The prosecutor did not know what law to use. At first, some lawyers felt that he could be charged under Section 91 of the Penal Code that deals with insults to Botswana. However, he was in the

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<sup>34</sup>Ramantele v. Mmusi and Others CACGB-B104-12, unreported 3 Sep. 2013 [2013, Court of Appeal of Botswana].

<sup>35</sup>*Id.* at 11.

<sup>36</sup>*Id.* at 12.

<sup>37</sup>*Id.* at 15.

<sup>38</sup>*Id.* at 12.

<sup>39</sup>*Id.* at 48 (emphasis added).

end charged under Section 90 and 93 of the Penal Code, which deal with unacceptable (abusive, obscene or insulting) language and public gatherings respectively. We shall return to these later.

It is important to also underscore the importance of case law from other jurisdictions, especially the United States, the UK and European Courts, Canada, South Africa, and many other countries in Sub-Saharan Africa and India, as persuasive authority in these types of cases. I will elaborate on these shortly, and this is important to note because some lawyers<sup>40</sup> tried to argue that decisions from foreign jurisdictions are not Botswana law. That kind of argument is unsustainable.

When examined against international law, which Botswana has committed itself to, the country has a lot of work to do to repeal some of its old laws, some of which are based on tradition but most of which are contained in the Penal Code and are a bequest from the colonial days. These and some culturally based laws will not stand the muster of Constitutional scrutiny. The cases above show that, and already laws of such ilk, like the one granting marital power to males in marriage, have been repealed.

Professor Fombad, a leading scholar on Botswana's constitutional and media law observes that, like a lot of African countries, Botswana is faced with the mammoth challenge to modernize its laws to reflect not only socio-economic and political realities of today but also the "realities of the emerging digital and globalized world of today."<sup>41</sup> In addition, more importantly as Fombad points out, with the third wave of democratization that swept through Africa in the 1990s, which resulted in the collapse of one-party states and liberalization of the press, it can no longer be business as usual on the legal front. An "acute human rights consciousness which African governments can no longer ignore," was planted.<sup>42</sup> This photo must be debated within this context.

There are international and regional legal treaties that have had an impact on the law in Botswana generally and on the issue of freedom of expression and press freedom as a human right. At the international level, there is the United Nations Human Declaration on Human Rights (1948) and the International Covenant on Civil and Political Rights [ICCPR] (1966). At the continental level, there is the African Charter on Human and People's Rights [ACHPR] (1981), which was reinforced in 2002 by the African Union's Commission on Human and People's Rights through the "Declaration of Principles on Freedom of Expression," famously known as the Banjul Declaration or the African Charter on Broadcasting. At the sub-regional level, through the Southern African Development Community (SADC), member states signed the SADC Protocol on Culture, Information and Sport (2009), which like the Banjul Declaration bound members to promote, establish and grow independent media and the free flow of information. The Windhoek Declaration of 1991, signed under the auspices of UNESCO also speaks to the same aspirations, with governments pledging to promote and support an independent and pluralistic media.

Botswana ratified the ACHPR and the ICCPR in 1986 and 2001 respectively. However, even if Botswana had not ratified these regional instruments and they were

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<sup>40</sup> Kgosietsile Ngakaagae, remarks made in apodcast debate regarding the Khama photo, GABZ FM (15 Sept. 2016), [http://www.gabzfm.com/podcasts?title=khama+photo&field\\_type\\_of\\_podcast\\_value=All](http://www.gabzfm.com/podcasts?title=khama+photo&field_type_of_podcast_value=All).

<sup>41</sup>CHARLES M. FOMBAD, MEDIA LAW IN BOTSWANA(2011).

<sup>42</sup>*Id.* at 26.

thus not domesticated,<sup>43</sup> they can still be brought to bear on the law in Botswana in a number of ways. Some of the ways include aiding in statutory interpretation, adoption into the Common law of Botswana, consideration by administrative bodies in exercising their discretion or through the activities of human rights institutions such as NGOs. In the *Mmusi* case, Justice Dingake ruled that Botswana was bound by the ACHPR and the ICCPR not to discriminate based on culture.

In the *Dow* appeal case,<sup>44</sup> the Court of Appeal of the Republic of Botswana declared that a signed instrument, even if not ratified or domesticated, could still be used as an aid to statutory interpretation. Appeal Judge President Austin Amissah concurred with the High Court on the same matter that Botswana's signing of a Convention on the Organisation of African Unity (OAU) bound the Court to adopt a broader construction of a provision in the Constitution of Botswana such that the language adopted would not do violence to that provision but was consistent and harmonious with the Convention. In the landmark judgment, the Court rejected a narrower construction that would have reinforced discrimination based on sex. The judge also underlined that Botswana, "as a member of the community of civilized states," had to abide by certain standards and that "it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations."<sup>45</sup> Amissah, J.P., additionally recognised the importance not just of Botswana's proud heritage as a democracy but also the courts' reliance on progressive thought in developing constitutional interpretation to further democratic ideals:

At this juncture I wish to take judicial notice of that which is known the world over that Botswana is one of the few countries in Africa where liberal democracy has taken root. It seems clear to me that all the three arms of the government – the Legislative, the Executive and the Judiciary – must strive to make it remain so except to any extent as may be prohibited by the Constitution in clear terms. It seems clear to me that in so striving we cannot afford to be immuned [sic] from the progressive movements going on around us in other liberal and not so liberal democracies such movements manifesting themselves in international agreements, treaties, resolutions, protocols and other similar understandings as well as in the respectable and respected voices of our other learned brethren in the performance of their adjudicatory roles in other jurisdictions. Mr. Browde S.C. counsel for the respondent referred us to the words of Earl Warren, Chief Justice of the United States, when he said in *Trop v. Dulles*, 356 U.S. 86 (1958) at p. 103 that: "The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit government powers in our nation."<sup>46</sup>

Apart from the above *ratio* of the learned judge president, Section 24 (1) of Botswana's Interpretation Act also allows the courts to refer to a relevant international treaty, agreement, or convention as aid to interpretation when the domestic legislation in

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<sup>43</sup>As a dualist state, Botswana requires international treaties to be domesticated by statute before they can take effect.

<sup>44</sup>*Dow Appeal*, 1992 BLR 119 CA.

<sup>45</sup>*Id.*

<sup>46</sup>*Id.* at 168.

question is obscure. As a corollary, Botswana's High Court and the Court of Appeal have done so on numerous occasions.

The instruments can have domestic legal force as core international human rights law. They codify well-established principles of customary international law. Alternatively, some of the principles they espouse are so widely accepted and adopted as such that they have crystallised into customary international law, Fombad argues.<sup>47</sup>

Even in the absence of incorporation into domestic law, if the principles of the instrument have progressively become customary international law, these principles are not only considered by the courts but also by administrative bodies in exercising discretionary powers.

Local NGOs, civil society organisations, and pressure groups can also further international human rights instruments, especially those that are not ratified or domesticated. Through lobbying and other methods, these organisations can encourage ratification and domestication of these instruments. They can approach the courts or join relevant parties in court action as friends of court (*amici curiae*). In an unprecedented case in mid-2014, the media advocacy group, The Media Institute of Southern Africa (MISA), successfully applied to the High Court to be admitted *amicus curiae* in proceedings by a local paper, the *Sunday Standard*, to challenge a statute deemed to be limiting press freedom and thus unconstitutional.<sup>48</sup>

When seized with a matter such as the photo in question, the court will not be persuaded by a simple claim that culture is threatened or it is not cultural practice. The case law that we have examined above no doubt confirms the claims made by Fombad.

## V. The Position of the Law on the Photoshopped Khama Picture

In the case of the Khama photo, a claim has been made that Section 91 of the Penal Code has been violated. Section 91 of the Penal Code concerns "Insults relating to Botswana." It provides that:

Any person who does any act or utters any words or publishes any writing with intent to insult or to bring into contempt or ridicule (a) The Arms or Ensigns Armorial of Botswana (b) The National Flag of Botswana (c) The Standard of the President of Botswana (d) The National Anthem of Botswana, is guilty of an offence and liable to a fine not exceeding P500.

Appearing on a radio call-in program, private attorney Kgosietsile Ngakaagae argued that the Khama photo was unlawful as it was "wrong not only morally but even legally."<sup>49</sup> He accepted it was satire but submitted, in accordance with Justice Rehnquist in *Hustler Magazine v. Falwell*,<sup>50</sup> that by nature satire entails the visitation of contempt, ridicule and humiliation on its subject. However, unlike the learned judge (Justice Rehnquist), he submitted that this was in violation of Section 91 of the Penal Code of Botswana, which in his view very expressly prohibits language of contempt and

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<sup>47</sup>FOMBAD, *supra* note 41.

<sup>48</sup>MISA Successfully Cited as a Friend of Court in Kgosi Docket Case, BOTSWANA GAZETTE (10 July 2014), <http://www.thegazette.news/?p=8345>.

<sup>49</sup>Ngakaagae, *supra* note 40.

<sup>50</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) [hereinafter *Hustler*].

ridicule. He argued that *Hustler Magazine v. Falwell* has no application in Botswana as, unlike the First Amendment in the United States, Section 12 (2) of the Constitution of Botswana places a limitation on free speech. His argument recognised that the piece was satire but that the limitations introduced by Section 12 (2) of the Constitution were applicable in this case, due to section 91 of the Penal Code. In attempt to expand the argument, reliance was sought to be made on the basis of an *expression unius alterius* claim, he submitted that satire has no constitutional protection because the Constitution does not mention it at all. "It is not constitutionally recognized as satire," he said.<sup>51</sup>

He suggested in consequence that Section 91 of the Penal Code would not be impinged constitutionally as Section 12(2) protects it with an exception as shall be shown below. He conceded that satire was almost universally recognized as having some free speech value, "but must be contextualized in a legal and cultural environment."<sup>52</sup> He further argued that "If it infringes public morality like in this case, it would lose protection of the law." He contended that the Constitution recognizes public morality, which he defined as a publicly accepted standard of behaviour in a social context, recognizing societal values. In Setswana society *go rogamogologa go letlelelwe* ("insulting an elder is not acceptable"), he argued.

There are two critical errors in the above rationalisation. First, Section 91 of the Penal Code has no application respecting a satire of the person of the President. The Section quite clearly and expressly applies to flags, emblems and insignia as well as the national Anthem, all non-living representations used for identification of the Office of the President and the Nation. The application of the principle of statutory interpretation that criminal offences must be construed in accordance with their given wording necessarily excludes a satirical picture of the person of the President as constituting an offence under Section 91. It would be fallacious to argue otherwise. In consequence, therefore, and in absence of a legislative inroad to Section 12 of the Constitution *vis-a-vis* section 91 of the Penal Code, the argument must fail.

Secondly, the claim that satire is not recognized in the category of free speech in the Botswana Constitution is invalid. In the *Dow* appeal case,<sup>53</sup> the Court of Appeal dealt with this matter at length and ruled that sections of the Constitution must not be read independent of each other. Further, the court ruled that mere omission of a right does not exclude it from protection because the framers of the Constitution could not envisage every eventuality. The court also ruled that the Constitution must be interpreted widely. The court concluded that Section 3 provides that everybody (barring any applicable constitutional limitations) is entitled to "protection of the law" and that the courts "should construe limitations to fundamental rights and freedoms strictly."<sup>54</sup>

The court gave the omission of the word "discrimination" from the U.S. Constitution as an example and used that to read "discrimination based on sex" into the Botswana Constitution and to strike off the discriminatory provision of the Citizenship Act of 1984:

The United States Constitution makes no specific reference to discrimination as such. Yet several statutes have been held to be in

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<sup>51</sup>Ngakaagae, *supra* note 40.

<sup>52</sup>*Id.*

<sup>53</sup>*Dow Appeal*, 1992 BLR 119 CA.

<sup>54</sup>*Id.* at 134.

contravention of the Constitution on the ground of discrimination. These cases have been decided based on the 14<sup>th</sup> Amendment of the Constitution.<sup>55</sup>

On the other hand, another attorney, Motswagole, who represented the artist at the centre of the Khama photocontroversy, argued that it was not problematic and within the realm of free speech.<sup>56</sup> He contended that nobody was the custodian of public morals: “Nobody is the *custos morum*.”<sup>57</sup> He argued that a three-part test would need to be passed to limit free speech. He postulated that there would be need to proof that the limitation of free speech is “reasonably justifiable in a democratic society.”<sup>58</sup> In the face of a case based on Section 91 of the Penal Code, the court will have to make an interpretation of this statute. In doing so, the Court is going to juxtapose the limitation clause of the Constitution with the statute that creates the offence complained of.

These two opposing views behoove us to resolve this tension. Let us start with Section 12 (2) of the Constitution which places limitations on free speech. It states:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

- a) That is reasonably required in the interest of defence, public safety, public order, public morality or public health or
- b) That is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interest of persons receiving instruction therein, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless, broadcasting or television or
- c) That imposes restrictions upon public officers, employees of local government bodies, or teachers and except so far as that provision, or as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

The phrase “nothing contained in or done under the authority of any law” will face serious scrutiny. The court first has to examine whether what purports to be a law as envisaged under the limitation clause is indeed a law. Secondly, the court has to establish whether that law is accessible as in the European case of *Sunday Times v. The United Kingdom*.<sup>59</sup> Adopting this jurisprudence in *Chavunduka and Another v. Minister of Home Affairs and Another*,<sup>60</sup> the Supreme Court of Zimbabwe, interpreting Section 50

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<sup>55</sup>*Id.*

<sup>56</sup>KaboMotswagole, remarks made during a podcast debate regarding the Khama photo, GABZ FM (15 Sept. 2016), podcast available [http://www.gabzfm.com/podcasts?title=khama+photo&field\\_type\\_of\\_podcast\\_value=All](http://www.gabzfm.com/podcasts?title=khama+photo&field_type_of_podcast_value=All).

<sup>57</sup>*Id.*

<sup>58</sup>*Id.* This is in reference to Section 12 (2) (c) of the Constitution of Botswana.

<sup>59</sup> *Sunday Times v. The United Kingdom*, 2 Eur. H.R. Rep. 245(1979).

<sup>60</sup>*Chavunduka and Another v. Minister of Home Affairs and Another* (2000) 4 LRC 561 (Zimbabwe).

(2) of their Constitution, which is worded very much like the Botswana one, pronounced that:

A norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>61</sup>

Many scholars have expressed vagueness about many of Botswana’s laws that limit freedom of expression, especially those in the Penal Code.<sup>62</sup> Many of these laws are “couched in vague, elastic and absolute terms”<sup>63</sup> and susceptible to abuse. In that sense, these laws fail to meet the test of what a law is.

Fombad has written specifically about Section 91 and highlighted its nebulous nature and the difficulty that it creates for compliance.<sup>64</sup> “Because of the lack of a precise definition for the word ‘insult’ it would be difficult to determine the existence of an intention to insult. The obscurity of this offence may therefore cause uncertainty which is not healthy for freedom of expression,”<sup>65</sup> he argued. There is nowhere in the said provision where the term “insult” is defined, thus creating a wide scope for all manner of interpretations. Such laws as the Penal Code do not set out clearly what is proscribed and will thus not pass the Constitutional test.<sup>66</sup>

The Supreme Court in *Chavunduka* ruled that a legal rule, properly worded, must give the citizen a fair amount of guidance. It must be formulated with sufficient precision to enable compliance. A law must leave enough room for legal debate and discussion and give a court of law a basis to define its limit. This is especially crucial if the sanctions to be meted out are of a criminal nature. Otherwise the citizen will be denied due process, the court ruled.<sup>67</sup> It would thus be easy for a defence lawyer to convince the court that this provision has a chilling effect; it instills fear as people will avoid expressing themselves, thinking that they might be breaking the law. Given the manner in which Section 91 is worded, it is not accessible either.

The phrase “the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society” will also be placed under bright torch light. The three-part test, which Motswagole alluded to, is indeed a correct interpretation of the law and will apply as it did in *Chavunduka* and the Canadian case *R. v. Zundel*.<sup>68</sup>

The first question that a court faced with this picture has to ask is whether the legislative objective that the limitation was designed to promote is sufficiently important to warrant overriding a fundamental right. A case should be made for a superior,

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<sup>61</sup>*Id.* at 561.

<sup>62</sup>Bugalo Maripe, *Freezing the Press: Freedom of Expression and Statutory Limitations in Botswana*, 3 AFR. HUM. RTS. L. J. 52 (2003). TACHILISA BALULE & BUGALO MARIPE, A QUICK GUIDE TO LAWS AND PRACTICES THAT INHIBIT FREEDOM OF EXPRESSION IN BOTSWANA (2000).

<sup>63</sup>Maripe, *supra* note 62, at 55.

<sup>64</sup>FOMBAD, *supra* note 41.

<sup>65</sup>Maripe, *supra* note 49, at 64.

<sup>66</sup>*Id.*

<sup>67</sup>*Chavunduka*, 4 LRC 561.

<sup>68</sup> *R. v. Zundel*, 2 S.C.R. 731, 10 C.R.R. (2nd) 193, 206(1992) (Can.).

overriding public interest free speech in terms of the right-creating provision of Section 12. It is acknowledged that while criminal laws may remain unused in the statute books, they remain in full effect and may be invoked should the facts suit the offence.<sup>69</sup> However when facing a Constitutional challenge as to the validity of the law, its usage or lack thereof has a bearing. Since there has never been any prosecution under this antiquated law, which dates back to 1964, it will be very difficult for a State Attorney to convince a judge that the legislation is, in the event of a conflict with the rights creating provisions of Section 12, of sufficient import not to be struck down in its entirety. Botswana cannot claim that it has any international obligation to limit human rights. The opposite is true. As one scholar has argued, “Botswana’s human rights jurisprudence has fallen in step with international trends.”<sup>70</sup>

Raising cultural arguments with regard to the photoshopped picture cannot trump a constitutional protection provided by Section 12 of the Constitution. Customary law repugnant to the written law, justice and humanity cannot be accorded protection. Botswana’s regional and international obligations such as the International Covenant on Civil and Political Rights and the African Charter on Human and People’s Rights are highly persuasive to the Courts as illustrated above in the *Dow*<sup>71</sup> appeal case.

Secondly, the court must enquire as to whether the measures designed to meet the legislative objective are rationally connected to it rather than being arbitrary, unfair, or based on irrational considerations. The mischief to be cured by the law must not be remote and conjectural. In other words, a clear nexus must be made between the mischief and the measures taken. Since its first enactment in 1964, this law has never been applied, clearly indicating that it is not needed. It belongs to another era. Like most laws in the Penal Code, it is a remnant of the colonial period (1885-1964). Laws like these were enacted by the Monarch in Britain to prevent the subjugated colonial subjects from rebelling against the authority of the Monarch. While such provisions remain in force, if in conflict with current progressive and enlightened interpretations to freedom of speech, they fail to meet constitutional muster.

The wording and the meaning of words is very crucial. For instance, the popular cry associated with the picture that “*go rogamogologa se Setswana*” (“insulting an elder is contrary to Setswana culture”) will not be persuasive in a court of law. In the *Legwaila*<sup>72</sup> matter the learned judge of the High Court of Botswana Gyeke-Dako J opined that some words when used in public may be offensive but not necessarily insulting or abusive. There might also be “many manifestations of behaviour which will cause resentment or protest without being insulting or abusive,” His Lordship ruled.<sup>73</sup> The present case presents a very similar scenario.

A court has to decide if there was no other way (less arbitrary and less unfair) of dealing with this issue rather than the serious measure of interfering with freedom of expression. Since Botswana prides itself as an epitome of democracy, the fact that a lot of model democracies such as the USA, the United Kingdom, France, the Netherlands, Canada and Australia have abolished insult laws weakens the case for the State.

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<sup>69</sup>Reference By The Attorney-General In Re: Dynamic Services (Pty) Ltd And The Attorney-General And Another 1996 BLR 49 (Botswana).

<sup>70</sup>Maripe, *supra* note 49, at 62.

<sup>71</sup>*Dow appeal*, 1992 BLR 119 CA.

<sup>72</sup>*Legwaila*, 1990 BLR 260 HC.

<sup>73</sup>*Id.* at 170.

Lastly, the law is that the means used must not be more than what is necessary to achieve the objective set by the constitution. Under Section 12, the objective is free speech. Any restrictions on the guaranteed constitutional right must be narrowly construed against the objective of the right-creating provisions. The court will interpret narrowly any restriction on any fundamental right. This is an established legal position in Botswana.<sup>74</sup> A limitation on freedom of expression would thus be examined against this precedent. The term “standard of the president” is vague and lends itself to many interpretations. It is more far-reaching than the injury anticipated. It does not make clear what aspect of the President’s person or life is out of bounds. A matter like this is better left to the civil courts. The consolation might be that the fine to be paid is not much (about \$50), but any criminal conviction is a serious blot on a citizen’s profile.

In the U.S. *Hustler* case,<sup>75</sup> which is very similar to the Khama photo scenario as it involved a satirical article describing a well-known pastor having sex with his mother, the Supreme Court by a unanimous decision ruled that offensive speech is still valuable and afforded constitutional protection. First, the court accepted that the so-called ad parody was “doubtless gross and repugnant in the eyes of most.”<sup>76</sup> However, just like with the *Legwaila* case, the court went on to reject arguments based on societal morals and public anger. “The fact that society may find speech offensive is not sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”<sup>77</sup>

As a general legal principle, courts are hesitant to intervene and limit constitutional rights, especially where values like freedom of speech are concerned. That is especially the case when public figures such as politicians are involved, because it is believed that in a democracy vigorous debate must be encouraged. If courts are called upon to interpret legislation that limits press freedom or freedom of expression they are even more circumspect and in the first instance will consider if there is nothing that they can do not to limit the freedom. “Before we put a person beyond the pale of the Constitution, before we deny a person the protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection.”<sup>78</sup>

Even if the speech concerned was motivated by hatred or ill-will and such intention is proved, constitutional protection would be extended, the court ruled in the *Hustler* case. In this particular case, which was unprecedented, the court departed from the general principle of refusing to give protection where intent to inflict emotional distress was sufficiently outrageous and was clearly intended to be so. The court pronounced that while other areas of tort (delict) law may protect subjects of offensive speech, in the case of public figures and public debate, actual malice must be shown.

The court ruled that, were it to hold otherwise, there would be floodgates of cartoonists and satirists being sued and paying damages without any proof that their

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<sup>74</sup> *Clover Petrus v The State* 1984 BLR 14 (Botswana).

<sup>75</sup> *Hustler*, 485 U.S. 46.

<sup>76</sup> *Id.* at 49.

<sup>77</sup> *Id.* at 55-56.

<sup>78</sup> *Zundel*, *supra* note 68.

work falsely defamed their subjects. The court acknowledged that cartoonists are often “not reasoned or even-handed but slashing and one-sided.”<sup>79</sup> Moreover, it also acknowledged that political cartoons are often based on the exploitation of unfortunate physical traits or embarrassing events. However, it noted that from the time of George Washington (1789-1797) to the present, cartoons have not only played a prominent role in public and political discourse but have also enriched it. It is also significant to note that the court refused to apply a standard to a cartoon/satire in order to determine liability and damages. The question of taste was a subjective one and words like “outrageous” were not deemed persuasive to grant damages.

We now move to deal with the charges that were ultimately brought against Chimganda. These were based on the Penal Code, Sections 93 and 90. These sections provide *inter alia* that:

93. Abusive, obscene or insulting language re President and others;

- (1) Any person who in a public place or at a public gathering uses abusive, obscene or insulting language in relation to the President, any other member of the National Assembly or any public officer is guilty of an offence and liable to a fine not exceeding P400.
- (2) In this section, "public gathering" has the same meaning as in section 90.

And section 90 (2) provides:

- (3) In this section, "public gathering" means any meeting, gathering or concourse, whether in a public place or otherwise, which the public or any section of the public or more than 15 persons are permitted to attend or do attend, whether on payment or otherwise, and includes a procession to or from a public place.

It is clear from the above sections that a photoshopped photo published on the internet does not fall into the intention of the offence, which clearly is aimed at verbal expression. This is buttressed by the provision that such expression must take place in the presence of more than fifteen persons “permitted to attend.”

There is no denying that under the current legislative provision in Botswana there is no penal provision to curtail the freedom of expression in the manner done by Kealeboga Chimganda. The use of inapplicable penal provisions, quite from the argument that they would fail constitutional muster, is a violation against freedom of expression.

New information indicates that following his arrest and detention two days after the publication of the photoshopped image of the President, Kealeboga Chimganda was secretly tried. He was denied access to his attorney and made a confession before a Magistrate in Maun. This was done surreptitiously, sources say.<sup>80</sup>

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<sup>79</sup>*Hustler*, 485 U.S. at 54.

<sup>80</sup>Author’s email conversation with an attorney in private practice, November 12, 2016.

He was flown to Gaborone in the custody of the members the Directorate of Intelligence and Security Service and continued to be detained without access to his lawyer. Two days later, still on remand in custody, he appeared once again before a Magistrate (once again in Maun) and pleaded guilty to an offence under Section 93 of the Penal Code as read with Section 90 subsection 2. He was fined the maximum penalty of P400.<sup>81</sup>

## VI. Conclusion

The argument that the Khama photograph offends against Tswana culture is indeed very popular as many members of the public (including lawyers) said on Facebook and on phone calls to *Gabz FM*. *Setswana* culture would not accommodate intemperate language, especially when used against an elder. Again, in terms of *Setswana* culture, using words which are regarded to be in bad taste, especially in public, is not acceptable and those listening would be offended. However, as has been shown through various cases cited, the courts in Botswana do not esteem culture over the Constitution. Parliament alone makes laws, but the Constitution is supreme over all the laws in the land. Moreover, the courts have powers to quash any laws that undermine the Constitution.

Apart from the Constitution, many international treaties signed or ratified by Botswana have placed her in a position where she has a serious international obligation which she must discharge. Prosecution under Section 91 of the Penal Code will not be enough to break into the protection to free speech given by Section 12 (1) of the Constitution of Botswana.

As some lawyers have argued, there are many hurdles to cross before successfully litigating under the current laws of Botswana. The overarching question is whether limiting the fundamental right of freedom of expression is reasonably justifiable in a democratic society. The three-part test has to be satisfied. The first question that the court has to ask is whether the legislative objective that the limitation was designed to promote is sufficiently important to warrant overriding a fundamental right. Secondly, the court must enquire as to whether the measures designed to meet the legislative objective are rationally connected to it rather than being arbitrary, unfair, or based on irrational considerations. The mischief to be cured by the law must not be remote and conjectural. Thirdly, the means used to address the offence must not be more than what is necessary to achieve the objective set by the Constitution. Under Section 12, the objective is free speech. Any restrictions on the guaranteed constitutional right must be narrowly construed against the objective of the right-creating provisions. As it stands, any prosecutor will not meet the three-part test. Limitation of Chinganda's right to freedom of speech is not justifiable in Botswana's democratic set up.

The government of Botswana only has one option: repeal laws inconsistent with the Constitution and maintain its position as a leading democracy that respects the rule of law. In that way, Parliament can pride itself as discharging the Constitutional imperative of making laws consonant with order, peace, and good governance.

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<sup>81</sup>*Id.*

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# **A HISTORY OF PRACTICAL OBSCURITY: CLARIFYING AND CONTEMPLATING THE TWENTIETH CENTURY ROOTS OF A DIGITAL AGE CONCEPT OF PRIVACY**

PATRICK C. FILE \*

*Practical obscurity—the idea that a privacy interest exists in information that is not secret but is nonetheless difficult to obtain—animates an active discussion about data privacy, including the much-debated “right to be forgotten.” But where does practical obscurity really come from? Scholars often point to United States Department of Justice v. Reporters Committee for Freedom of the Press, a landmark 1989 U.S. Supreme Court ruling that sought to balance personal privacy and public records, as the concept’s birthplace, but we know that the Court almost never creates legal concepts out of the blue. Rather, the Court’s opinions give form and force to existing ideas by incorporating them into their reasoning.*

*This article provides a history of practical obscurity as a concept of privacy in law and society, drawing on the decisions, motions and briefs that preceded the Reporters Committee ruling as well as discourse on information privacy that provided the social background for the case. It shows how the Reporters Committee ruling gave a name to concerns about a “surveillance society” that emerged and evolved between the 1960s and 1980s. It argues that although the ruling might be seen as an ironic departure from the concept’s roots and a problematic justification to obscure truthful information already in the public sphere, the concept may still be useful as a means to think beyond a simplistic public/private binary as we consider the legal and ethical responsibilities of various institutions that gather, share, and publish personal information.*

**Keywords:** privacy, practical obscurity, public records, right to be forgotten

## **I. Introduction**

The legal concept of practical obscurity is at the core of today’s debates surrounding digital data privacy, but we know surprisingly little about its roots in legal thinking. Scholars who have studied the concept most closely have defined “obscurity” for privacy purposes as “the idea that information is safe—at least to some degree—when

it is hard to obtain or understand.”<sup>82</sup> Practical obscurity was introduced to most of the legal world in 1989, in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, a decision in which the U.S. Supreme Court declared that a personal privacy interest existed when public information (in this case an individual’s criminal history record or “rap sheet”) was difficult to obtain.<sup>83</sup> Today, the concept underlies initiatives aimed at data privacy protection and similar policy making in the European Union and around the world.<sup>84</sup> It animated the EU Court of Justice’s 2014 ruling in the Google Spain “right to be forgotten” case.<sup>85</sup> In the United States, government agencies use the concept to justify denying records requests when personally identifiable information is at issue, and legislators employ it in contemplating whether a version of the “right to be forgotten” might be made a part of American law.<sup>86</sup> Scholars and commentators use it as a framework for thinking about privacy in a variety of contexts, both online and off.<sup>87</sup>

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<sup>82</sup> Woodrow Hartzog & Evan Selinger, *Obscurity: A Better Way to Think About Your Data Than “Privacy,”* THE ATLANTIC, Jan. 17, 2013, <http://www.theatlantic.com/technology/archive/2013/01/obscurity-a-better-way-to-think-about-your-data-than-privacy/267283/>. See also Woodrow Hartzog & Evan Selinger, *Surveillance as Loss of Obscurity*, 72 WASH. & LEE L. REV. 1343, 1358 (2015); Evan Selinger & Woodrow Hartzog, *Obscurity and Privacy*, in ROUTLEDGE COMPANION TO THE PHILOSOPHY OF TECHNOLOGY (Joseph Pitt & Ashley Shew eds., 2014). Hartzog and Frederic Stutzman have drawn a distinction between obscurity and its “older sibling,” practical obscurity, which they say, “typically focuses on off-line impediments to data retrieval.” Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CAL. L. REV. 1, 21 (2013). This distinction is conceptually important, especially as fewer off-line impediments exist, but this article draws together the blood relatives obscurity and practical obscurity under the same analytical umbrella.

<sup>83</sup>U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989). Scholars generally refer to the “birth” of practical obscurity as having occurred in the *Reporters Committee* case. Jane Kirtley, “*Misguided in Principle and Unworkable in Practice*”: *It is Time to Discard the Reporters Committee Doctrine of Practical Obscurity (And its Evil Twin, The Right to Be Forgotten)*, 20 COMM. L. & POL’Y 91, 93 (2015); see also Hartzog & Selinger, *Surveillance as Loss of Obscurity*, *supra* note 82, at 1356 (referring to *Reporters Committee* as “the canonical starting point for explicit debate about ‘practical obscurity’ in the American judicial system”).

<sup>84</sup>Kyu Ho Youm & Ahran Park, *The ‘Right to Be Forgotten’ in European Union Law: Data Protection Balanced With Free Speech?* 93 JOURNALISM & MASS COMM. Q. (ISSUE 2) 273, 276-278 (June 2016).

<sup>85</sup>*Google Spain SL v. Agencia Española de Protección de Datos [AEPD]*, Case C-131/12, Court of Justice of the European Union (Grand Chamber) (May 13, 2014), available at [http://curia.europa.eu/juris/document/document\\_print.jsf?doclang=EN&docid=152065](http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=152065). See Youm & Park, *supra* note 3, at 282-283.

<sup>86</sup> Jane Kirtley, *supra* note 2, at 109-111 (discussing the Minnesota Supreme Court’s declining to allow remote access to digitized court records); *id.* at 106-107 (discussing California’s “online erasure” law for minors, CAL. BUS. & PROF. CODE § 22581); *id.* at 112-113 (discussing U.S. Court of Appeals for the D.C. Circuit ruling rejecting a FOIA request for law enforcement use of location tracking data in *American Civil Liberties Union v. Department of Justice*, 730 F.3d 927 (D.C. Cir. 2014)). See also Jack Greiner, *Is New York Poised to Adopt a Right to be Forgotten?* CINCINNATI.COM (March 30, 2017), <http://www.cincinnati.com/story/money/2017/03/30/new-york-poised-adopt-right-forgotten/99821344/> (discussing AB A5323, 202d Leg. (N.Y. 2017)).

<sup>87</sup>Hartzog & Selinger, *Obscurity: A Better Way to Think About Your Data Than “Privacy,”* *supra* note 82; Daxton Stewart & Kristie Bunton, *Practical Transparency: How Journalists Should Approach Digital Shaming and the “Streisand Effect,”* 5 J. MEDIA L. & ETHICS 4 (2016); Margot Kaminski, *Enough With the “Sunbathing Teenager” Gambit: Drone Privacy is About Much More than Protecting Girls in Bikinis*, SLATE (May 17, 2016), [http://www.slate.com/articles/technology/future\\_tense/2016/05/drone\\_privacy\\_is\\_about\\_much\\_more\\_than\\_sunbathing\\_teenage\\_daughters.html](http://www.slate.com/articles/technology/future_tense/2016/05/drone_privacy_is_about_much_more_than_sunbathing_teenage_daughters.html) (“The sunbather narrative . . . doesn’t address facial recognition

This article analyzes the history of the concept of practical obscurity in American privacy law prior to the U.S. Supreme Court's ruling in the *Reporters Committee* case. Employing a conceptual framework of "law-in-history" as a socially contingent process of mediation among conflicting ideas,<sup>88</sup> the study draws together briefs and lower court decisions in the *Reporters Committee* case, the sources and authorities on which those documents rely, and legal commentary and discussion about information privacy in the decades preceding the decision. The study traces the development of practical obscurity in order to explain how it was formulated in legal consciousness before being embraced by the United States' highest court.<sup>89</sup> The study aims to provide needed historical context for a controversial ruling and legal concept that heavily influence current discussions of privacy in policy, doctrine, and daily life.

The article argues that the concept of privacy underlying practical obscurity was well into its maturity by the Supreme Court's *Reporters Committee* ruling in 1989, having developed between the 1960s and 1980s out of social concerns and policy responses related to the use of computers—primarily but not exclusively by the government—to gather and store information about citizens. This history can help us better understand the function that practical obscurity serves at the intersection of two core values in democratic society: the right to privacy and the right to know. Moreover, the story this article tells highlights an interesting irony in the *Reporters Committee* case: that the Department of Justice prevailed partly by asserting a rationale for withholding public records that was originally based in public distrust of the government's collection of personal information. This irony helps explain how practical obscurity may be a useful concept for considering information privacy beyond a simplistic public/private binary even if it does not provide a satisfactory justification for the *Reporters Committee* ruling or for legal regimes that would obscure or render "forgotten" true information already in the public sphere.

Section II of the article explains the Court's reasoning in *Reporters Committee* that rested on (and coined) the legal concept of practical obscurity, and discusses themes in the scholarship and commentary that have examined the decision and the concept.

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technology. Our inescapable biometric identifiers mean we can lose the practical obscurity in which we usually operate in physical spaces."); Marissa Lang, *Outing is Totally Still a Thing, People*, S.F. CHRON. (June 2, 2016), <http://www.sfchronicle.com/business/article/Outing-is-totally-still-a-thing-people-7960315.php> ("practical obscurity only works [on dating websites] if the service can adequately protect users' information."); George Lynch, *Could a Right to Be Forgotten Online Kill Libraries?*, BLOOMBERG BNA (Oct. 17, 2016), <https://www.bna.com/right-forgotten-online-n57982078697/> (Quoting Law Librarian and Professor Anne Klinefelter, "We're accustomed to the idea that risk of someone finding a needle in a haystack is low. . . . We have relied on practical obscurity to protect privacy.").

<sup>88</sup> Robert Gordon, *Critical Legal Histories*, 36 STANFORD L. REV. 57, 57, 116 (1984); Robert Gordon, *Introduction: J. Willard Hurst and The Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9, 9-14 (1975).

<sup>89</sup> Legal consciousness has become a key concept for explaining how dominant legal ideologies are formulated and ingrained, challenged and changed, in both formal and informal arenas of law in society. Some of the most successful studies of legal consciousness, according to Susan S. Silbey, have been focused on institutional practices, where "cultural meaning, social inequality, and legal consciousness are forged." Susan S. Silbey, *After Legal Consciousness*, 1 ANN. REV. OF L. & SOC. SCI. 323, 360 (2005). See also Susanna Blumenthal, *Of Mandarins, Legal Consciousness, and the Cultural Turn in US Legal History: Robert W. Gordon. 1984. Critical Legal Histories. Stanford Law Review 36:57-125*, 37 LAW & SOC. INQUIRY 167 (2012).

Sections III and IV uncover and analyze the roots of practical obscurity in social and legal consciousness prior to and during the litigation of the *Reporters Committee* case. Section V is a brief discussion, offering some conclusions on how the history discussed herein can help us better understand how practical obscurity is discussed and debated today.

## II. *Reporters Committee* and Practical Obscurity as a Privacy Concept

In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, the U.S. Supreme Court ruled that the disclosure of an individual's digital criminal history record—a “rap sheet”—constituted an “unwarranted invasion of privacy” under Exemption 7(C) of the Freedom of Information Act (FOIA).<sup>90</sup> In reaching that conclusion, the Court argued that although the information in the rap sheet was public and available at its original sources—the records of local police stations and courthouses—the fact that it was not otherwise easily obtained all at once or in one place created a unique expectation of privacy, which it called “practical obscurity,” that could justify the government’s withholding it.<sup>91</sup> The Court took that phrase from, and attributed it to, the Justice Department, which had used the phrase in a reply brief submitted after the Court had agreed to hear the case.<sup>92</sup>

The *Reporters Committee* case arose out of CBS News reporter Robert Schackne’s investigation into connections between Pennsylvania Congressman Daniel Flood and Medico Industries, a company that the Pennsylvania Crime Commission had designated as a “legitimate business dominated by organized crime figures.”<sup>93</sup> Schackne had filed a FOIA request for the rap sheets for the four Medico brothers. The FBI initially denied all of the requests, but eventually released the documents for three of the brothers after they died. The agency continued to refuse to release the record for Charles Medico, arguing that Exemption 7(C) applied because the rap sheet qualified as “records or information compiled for law enforcement purposes” the release of which “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”<sup>94</sup>

Schackne sued to obtain the rap sheet with the support of the Reporters Committee for Freedom of the Press, a legal advocacy group. The U.S. District Court for the District of Columbia ruled in favor of the Justice Department, but the D.C. Circuit

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<sup>90</sup>*Reporters Committee*, 489 U.S. 749. See 5 U.S.C. § 552 (b)(7)(C) (2017) (“This section does not apply to matters that are . . . records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.”).

<sup>91</sup>*Reporters Committee*, 489 U.S. at 762, 780.

<sup>92</sup>*Id.* Justice Stevens placed quotation marks around the phrase and attributed it to the government, but he did not provide a citation for it. “Practical obscurity” appears only once in the briefs below: Reply Brief for the Petitioners, *Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (No. 87-1379), 1988 U.S. S. Ct. Briefs LEXIS 1519, at \*4-5 (“Respondents attempt to truncate the balancing process by narrowly defining the range of ‘privacy’ interests to be considered and by invoking a virtual *per se* rule that one has no ‘legitimate’ interest in the practical obscurity of widely scattered and frequently unindexed ‘public records.’”). See *infra* discussion at notes 150-158.

<sup>93</sup>*Reporters Committee*, 489 U.S. at 757.

<sup>94</sup> 5 U.S.C. § 552 (b)(7)(C).

U.S. Court of Appeals remanded, finding that the privacy interest asserted by the government in otherwise public information was tangential.<sup>95</sup>

The U.S. Supreme Court reversed the D.C. Circuit in a unanimous decision. The majority opinion by Justice John Paul Stevens maintained that there is a fundamental difference between the “scattered . . . bits of information” that a rap sheet contained, which might be difficult to obtain by themselves and could be forgotten over time, and the rap sheet, which contained all of those bits of information memorialized in one document.<sup>96</sup> An understanding of privacy as an “individual’s control of information concerning his or her person”<sup>97</sup> led Stevens and the majority to the conclusion that the compilation “alters the privacy interest implicated by disclosure of that information.”<sup>98</sup> In other words, information that was considered public at its source could become private when gathered together in a single record, and therefore the release of that record would constitute an unwarranted invasion of personal privacy.

Justice Blackmun wrote a concurring opinion, joined by Justice Brennan, which said that the majority’s declaration that rap sheets were categorically exempt from FOIA was “not basically sound.”<sup>99</sup> While he agreed that “even a more flexible balancing approach” would result in a reversal of the lower court, he could envision circumstances where rap sheet information should be public, “such as in a situation where a rap-sheet discloses a congressional candidate’s conviction of tax fraud five years before.” Surely, Blackmun argued, the hypothetical candidate “relinquished any interest in preventing the dissemination of this information when he chose to run for Congress.”<sup>100</sup>

Scholars have discussed and debated the significance of the Court’s ruling and the legal status of practical obscurity ever since the *Reporters Committee* ruling.<sup>101</sup> Some research has focused on the ruling’s implications for personal privacy concerns as courthouses across the country adopt online records databases<sup>102</sup> or as law enforcement agencies increasingly use digital surveillance tools.<sup>103</sup> Whether practical obscurity is

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<sup>95</sup>*Reporters Comm. for Freedom of the Press v. Dept. of Justice*, 816 F.2d 730 (D.C. Cir. 1987), *rev’d*, 489 U.S. 749 (1989).

<sup>96</sup>*Reporters Committee*, 489 U.S. at 764.

<sup>97</sup>*Id.* at 763.

<sup>98</sup>*Id.* at 764. The court also ruled that the request could be rejected because it did not serve the “central purpose” of the Freedom of Information Act, which was to shed light on government, not private citizens. *See, e.g.*, Martin E. Halstuk & Charles N. Davis, *The Public Interest be Damned: Lower Court Treatment of the Reporters Committee “Central Purpose” Reformulation*, 54 ADMIN L. REV. 983 (2002). In 1996, Congress clarified that the public has a right to records “for any public or private purpose.” Electronic Freedom of Information Act, Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048 (1996).

<sup>99</sup>*Reporters Committee*, 489 U.S. at 781 (Blackmun, J., concurring.).

<sup>100</sup>*Id.*

<sup>101</sup> A LexisNexis search for articles citing the *Reporters Committee* case and using the term “practical obscurity” returned over 100 results as of June 2017.

<sup>102</sup>*See, e.g.*, Peter Winn, *Symposium: Technology, Values, and the Justice System: Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307 (2004); Amanda Conley et al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 MD. L. REV. 772 (2012); D. R. Jones, *Protecting the Treasure: An Assessment of State Court Rules and Policies for Access to Online Civil Court Records*, 61 DRAKE L. REV. 375 (2013).

<sup>103</sup>*See, e.g.*, Ismail Cen Kuru, *Recent Development: Your Hard Drive is Almost Full: How Much Data Can the Fourth Amendment Hold*, 2016 U. ILL. J.L. TECH. & POL’Y 89 (2016).

declining—or should decline—has also been the subject of robust debate. The steady development of sophisticated digital tools to gather, track, and analyze information has led scholars and commentators to continually announce the “death” of obscurity-based privacy, accompanied by suggestions about whether we should “get over it.”<sup>104</sup>

Some legal scholars have argued that, insofar as the concept can be used to justify the nondisclosure or removal of truthful information from the public sphere, it undermines the First Amendment-protected right of access to information and the democratic values of transparency and accountability.<sup>105</sup> Jane Kirtley, for example, argues that, in spite of the court’s own assertion that its use of the concept was a narrow and limited means of balancing Exemption 7(C)’s privacy interests with the public interest in access to a particular law enforcement record, subsequent use of the concept in public records cases show how *Reporters Committee* “dealt a devastating blow to the public’s right to gain access to government records compiled in digital databases.”<sup>106</sup> Meanwhile, other scholars have embraced the concept to recast or reconsider the place of privacy in people’s relationships with the broad range of institutions that gather and publish personal information. For example, Daxton Stewart and Kristie Bunton propose that news media considering whether to publish or amplify embarrassing or damaging information about an individual should employ an ethical concept called “practical transparency”—a means to balance absolute transparency with total privacy amid the fraught “naming, blaming, and shaming culture of the Internet.”<sup>107</sup> Still other scholars have used practical obscurity to inform a broad vision of common-sense data privacy protections in a world increasingly lived online. Woodrow Hartzog and Frederic Stutzman have argued that a more fulsome conceptualization of obscurity can add needed nuance to the law’s consideration of people’s relationships with the institutions that collect information about them—providing a “continuum” of privacy rather than a binary of fully public versus completely secret.<sup>108</sup> Neil Richards and Hartzog have argued that thinking about informational relationships in terms of obscurity can help correct a failure in social and legal discourse to frame privacy in optimistic rather than pessimistic terms, considering the attributes of trust and loyalty rather than focusing on negative considerations about how to secure information from scary or creepy collection or disclosure practices.<sup>109</sup>

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<sup>104</sup> Nicholas John & Benjamin Peters, *Why Privacy Keeps Dying: The Trouble with Talk About the End of Privacy*, 20 INFO., COMM. & SOC. 284, 285 (2016). See, e.g., Rob Carrigan, *On the Web, ‘Practical Obscurity’ has Practically Departed*, INT. J. OF NEWSPAPER TECH. (Jan. 2003), [http://www.newsandtecharchives.com/issues/2003/01-03/nt/01-03\\_carrigan.htm](http://www.newsandtecharchives.com/issues/2003/01-03/nt/01-03_carrigan.htm); Ira Bloom, *Freedom of Information Laws in the Digital Age: The Death Knell of Informational Privacy*, 12 RICH. J.L. & TECH. 9 (2006); but see, e.g., Bruce Boyden, *Regulating at the End of Privacy*, 2013 U. CHI. LEGAL F. 173 (2013) (arguing “the state of alarm over current privacy developments is . . . at best an ambiguous signal.”).

<sup>105</sup> See Jane Kirtley, “*Misguided in Principle and Unworkable in Practice*”: *It is Time to Discard the Reporters Committee Doctrine of Practical Obscurity (And its Evil Twin, The Right to Be Forgotten)*, 20 COMM. L. & POL’Y 91 (2015); Robert G. Larson, *Forgetting the First Amendment: How Obscurity-Based Privacy and a Right to be Forgotten are Incompatible with Free Speech*, 18 COMM. L. & POL’Y 91 (2013).

<sup>106</sup> Kirtley, *supra* note 105, at 92. See also Halstuk & Davis, *supra* note 98.

<sup>107</sup> Stewart & Bunton, *supra* note 87, at 4.

<sup>108</sup> Hartzog & Stutzman, *supra* note 82, at 4.

<sup>109</sup> Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431 (2016).

Surprisingly, the raft of scholarship that has critiqued or elaborated on the concept of practical obscurity has not closely examined its provenance or pedigree pre-*Reporters Committee*. Amid a meaningful moment for personal privacy, the public sphere, and democratic ideals, we should have a clearer understanding of practical obscurity's roots in social and legal consciousness.

### III. Practical Obscurity as a Social Concept

The Justice Department reply brief that introduced the concept of practical obscurity to the U.S. Supreme Court in *Reporters Committee* linked a specific social concern that arose in the 1960s to a more general turn of phrase that had been in use for much longer. The term "practical obscurity" can be found in print going back at least to the mid-1800s, where it was usually used to describe a relative lack of fame or notoriety, a use which is still common today.<sup>110</sup> For example, a news report on the 1892 presidential race noted that Democrats believed candidate David Hill, a senator from New York, had reached the limits of his campaign, "and the qualities of his senatorial term will probably sink him into practical obscurity."<sup>111</sup> In 1918, the *New York Tribune* sports page noted the increasing popularity of the sport of wrestling among soldiers, as compared to baseball and boxing: "already it has crowded from practical obscurity to a place of the greatest prominence."<sup>112</sup> Practical obscurity was also used to describe a state of being difficult to ascertain or understand. For example, a 1911 report on the annual proceedings of the British Sociological Society described a lecturer's discussion of the "theoretical value and practical obscurity" of the concept of race.<sup>113</sup> A 1923 translation of the works of Hippocrates noted that the ancient physician's "account of wrist dislocation ... combines theoretic clearness with even greater practical obscurity."<sup>114</sup>

Although practical obscurity may not have been commonly used 100 years ago to describe a specific interest in keeping personal information unknown and out of the

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<sup>110</sup> The databases searched for the exact term "practical obscurity" included: the 19th Century Masterfile database of US and British periodicals 1106-1930; EbscoHost's MASTERfile Premier database of general publications going back to 1975; Gale's Nineteenth Century U.S. Newspapers database; the Google Books collection; the HathiTrust Digital Library; the LexisNexis Academic collection of newspapers going back to 1950; the Library of Congress's Chronicling America collection of newspapers 1836-1922; the Making of America databases of primary sources covering the mid-nineteenth century from Cornell and the University of Michigan; and ProQuest's American Periodicals database covering 1740-1940. The searches returned approximately 900 results, although there is likely some overlap among them. Because I am concerned with the concept "practical obscurity" as it is used in the context of privacy law, it is beyond the scope of this article to construct a comprehensive etymology of the term.

As to its use today see, e.g., Tess Halpern, *My Generation may be 'Feeling the Bern', but I'm Still with Clinton*, MASS. DAILY COLLEGIAN (Feb. 10, 2016), <http://dailycollegian.com/2016/02/10/my-generation-may-be-feeling-the-bern-but-im-still-with-clinton/> ("Bernie Sanders has risen from practical obscurity to beating Hillary Clinton in the New Hampshire primary"); Sameer Kotian, *Androids in Apple Land*, TECHSHOUT.COM (May 10, 2017), <http://www.techshout.com/features/2017/10/androids-apple-land/> ("In 2007, 5 months after Apple launched the iPhone, Android made the move from practical obscurity to national recognition.").

<sup>111</sup> *Cleveland is the Man: Hill, the Petty Politician, Unable to Deceive the Democratic Party*, SEATTLE POST-INTELLIGENCER, April 7, 1892, at 1, <http://chroniclingamerica.loc.gov/lccn/sn83045604/1892-04-07/ed-1/seq-1/>.

<sup>112</sup> W.J. Macbeth, *In All Fairness*, N.Y. TRIBUNE, Apr. 29, 1918, at 13, <http://chroniclingamerica.loc.gov/lccn/sn83030214/1918-04-29/ed-1/seq-13/>.

<sup>113</sup> THE SOCIOLOGICAL REVIEW 179 (vol. 4, 1911).

<sup>114</sup> HIPPOCRATES, HIPPOCRATES 413 (W. H. S. Jones, trans., Harvard Univ. Press, vol. 3, 1923).

public eye, that kind of control was a growing concern among everyday Americans at that time. Historians have explained that as people of all classes and backgrounds became more geographically and socially mobile near the turn of the twentieth century, they became as concerned with what strangers knew about them as they were with what family, friends, and acquaintances knew.<sup>115</sup>As the country grew more urbanized, stratified, commercialized, and inundated with mass media, law surrounding “personal image”—libel, privacy, and publicity—developed and flourished.<sup>116</sup>Litigants increasingly asserted what Samuel Warren and Louis Brandeis called “the right to be let alone” in their famous 1890 law review article.<sup>117</sup>

The notion that individuals should be able to shield truthful but embarrassing or shameful personal information from public view, or maintain the right to obscurity after fleeting fame, arose in landmark lawsuits against media organizations in the middle of the twentieth century.<sup>118</sup> In 1931, for example, a California appellate court ruled that a rehabilitated former prostitute, acquitted of murder 16 years previously, could pursue a privacy lawsuit against a film director who used her story for a movie. The court acknowledged that the woman’s trial was part of the public record and therefore fair game for the film, but ruled that the director’s use of the woman’s real name violated the state constitution’s protection for “pursuing and obtaining . . . happiness.”<sup>119</sup> “Where a person has by [her] own efforts rehabilitated [her]self, we, as right-thinking members of society, should permit [her] to continue in the path of rectitude rather than throw [her] back into a life of shame or crime,” the court said.<sup>120</sup>A more famous and influential suit involved William James Sidis, a former child prodigy who sued the *New Yorker* magazine in 1938. Sidis sued the magazine for invasion of privacy after it published a “Where are They Now?” feature recounting his youthful fame and precociousness and later slide into destitute, eccentric anonymity.<sup>121</sup>In 1940, a panel of the Second Circuit U.S. Court of Appeals ruled that, although sympathetic to Sidis’s desire to hide his personal life from the public eye, his privacy interest was outweighed by the newsworthiness of his story—the public interest in the fate of a once-promising child prodigy. “Regrettably or not, the misfortunes and frailties of neighbors and ‘public figures’ are subjects of considerable interest and discussion of the rest of the population,”

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<sup>115</sup>See LAWRENCE FRIEDMAN, *GUARDING LIFE’S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY* (2007);SAMANTHA BARBAS, *LAWS OF IMAGE: PRIVACY AND PUBLICITY IN AMERICA* (2015).

<sup>116</sup>BARBAS, *supra* note 34, at 1.

<sup>117</sup>Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

<sup>118</sup>See BARBAS, *supra* note 115, at 115-128. According to Barbas, although “the modern bureaucratic state” was being “built on a mountain of personal data” at midcentury, the news and entertainment media were the central focus of privacy concerns—and the target of most lawsuits for invasion of privacy. *Id.* at 115-116.

<sup>119</sup>*Melvin v. Reid*, 297 P. 91, 93 (Cal. Ct. App. 1931)(citing CAL. CONST., art. I, § 1).

<sup>120</sup>*Id.*; See Stephen Bates, *The Prostitute, The Prodigy, and the Private Past*, 17 COMM. L.&POL’Y175, 208-09 (2012). Bates argues that the *Melvin* ruling and its rationale for privacy protection were likely undercut by *Cox Broadcasting Corp. v. Cohn*, a 1975 Supreme Court ruling that “once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.” 420 U.S. 469, 496 (1975). *Cf.* *Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989) (imposition of civil damages for publishing a government news release disclosing a rape victim’s name “would surely violate the First Amendment”); *Smith v. Daily Mail Publ’g Co.*, 433 U.S. 97, 102 (1979) (“state action to punish the publication of truthful information seldom can satisfy constitutional standards.”).

<sup>121</sup>*Sidis v. F-R Publ’g Corp.*, 113 F.2d 806 (2d Cir. 1940). See Bates, *supra* note 120; BARBAS, *supra* note 115, at 129-151.

the ruling said. “And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.”<sup>122</sup>

By the 1960s, much of the modern doctrine of personal privacy had been established,<sup>123</sup> just as new concerns about computerized record keeping began to take hold.<sup>124</sup> While earlier privacy problems focused on the types of personal information that might be published by the media, the new worries arose over information that might be collected. Historians have linked the rise of large-scale record keeping by institutions like banks, insurance companies, and the government to the two key policy principles which would eventually come into direct tension in the *Reporters Committee* case: the right to privacy and the right to know.<sup>125</sup>

Fears about data collection and a loss of control over personal information led many Americans to believe they were living in a new “surveillance society” in the 1960s.<sup>126</sup> Exposés in popular magazines like *Life* and *Look* documented the extent to which computerized dossiers were kept on Americans’ employment and finances,<sup>127</sup> and encouraged readers to consider whether such record keeping “will kill . . . your freedom.”<sup>128</sup> A 1971 public opinion poll found that 58 percent of respondents nationwide believed that computerized data banks could be used to “keep people under surveillance.”<sup>129</sup> Proposals to create a centralized federal data center were repeatedly killed after public outcry in 1965, 1967, and 1970.<sup>130</sup>

In 1973, the U.S. Department of Health, Education, and Welfare’s report on “Records, Computers, and the Rights of Citizens” used stark terms to frame public concerns and the need for action, highlighting the ubiquity and efficiency of electronic record keeping alongside citizens’ sense of loss of control over the use or dissemination of records and information. “It is no wonder that people have come to distrust computer-based record-keeping operations,” the report stated, but “under current law, a person’s privacy is poorly protected against arbitrary or abusive record-keeping practices.”<sup>131</sup> Indeed, an otherwise placid and celebratory convention marking the 200th anniversary of the Continental Congress involving governors of the original 13 states in the summer of 1974 turned turbulent when a resolution on the right to privacy was raised—“a virtual

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<sup>122</sup> *Sidis*, 113 F.2d at 809.

<sup>123</sup> See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST.1977), tracing the origins of the right to privacy and organizing them into the four classic torts: intrusion, disclosure of private facts, false light, and appropriation. See also *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (stating that a right to privacy exists in the “penumbras” of other rights guaranteed in the Bill of Rights).

<sup>124</sup> Sarah Igo, *The Beginnings of the End of Privacy*, 17 THE HEDGEHOG REV. (no. 1), [www.iasc-culture.org/THR/THR\\_article\\_2015\\_Spring\\_Igo.php](http://www.iasc-culture.org/THR/THR_article_2015_Spring_Igo.php).

<sup>125</sup> *Id.*; See also DEBORAH NELSON, *PURSUING PRIVACY IN COLD WAR AMERICA* (2002); HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* (2010).

<sup>126</sup> Igo, *supra* note 124.

<sup>127</sup> Robert Wallace, *What Happened to Our Privacy?* *LIFE*, Apr. 10, 1964, at 10.

<sup>128</sup> Jack Star, *The Computer Data Bank: Will It Kill Your Freedom?* *LOOK*, June 25, 1968, at 27.

<sup>129</sup> Igo, *supra* note 124 (citing A NATIONAL SURVEY OF THE PUBLIC’S ATTITUDES TOWARD COMPUTERS (1971)).

<sup>130</sup> NISSENBAUM, *supra* note 125, at 39. See also Igo, *supra* note 124.

<sup>131</sup> U.S. DEPT. OF HEALTH, EDUC., & WELFARE, *RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS* (1973), <https://epic.org/privacy/hew1973report/>.

recreation of the debates 200 years ago,” as one magazine described it.<sup>132</sup> The governors could not agree over the breadth of authority the government should have to gather and keep records on individual citizens. State legislatures responded to the growing public concerns on the matter,<sup>133</sup> as did Congress. Perhaps the biggest landmark, passed amid the fallout of the Watergate scandal, was the federal Privacy Act of 1974, which placed key limits on when data could be gathered in secret and shared without authorization, and allowed individuals to know about, view, and correct personal information in government files.<sup>134</sup>

Concerns about privacy evolved as computers became increasingly prevalent in the 1970s and 1980s—from large government and corporate mainframes to small household desktops. The specific concerns that would reach the U.S. Supreme Court in the *Reporters Committee* case arose as journalists worried that the “legislative passions” for privacy that arose in the wake of Watergate could be “used as an excuse to strengthen the opportunities for secrecy in the government,” undermining transparency laws.<sup>135</sup> These concerns heightened as the Federal Bureau of Investigation sought to expand and strengthen its network of criminal history files in the early 1980s.<sup>136</sup>

But so also came new worries about the compilation, use, and security of health and financial records in the private sector,<sup>137</sup> and even the growing capacity for corporate surveillance.<sup>138</sup> A 1984 survey found that Americans were optimistic about the role of computers in what was frequently called the “information age,” but they were also worried about the threat to privacy—and subsequently liberty writ large—that might accompany a more automated, computerized future.<sup>139</sup> On the eve of the *Reporters Committee* ruling, commentators worried that “anybody with a personal computer and access to public documents can set up his own miniature private-investigating agency,” collecting and selling “specialized electronic lists of police reports, arrest records, citations for motor vehicle violations and other potentially damaging information.”<sup>140</sup> In language that would not sound out of place today, a 1987 report from *Time* magazine observed:

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<sup>132</sup> Al Robins, *Computers and the Bill of Rights*, THE NATION, Sept. 28, 1974, at 260.

<sup>133</sup> See Lohn Lautsch, *Digest and Analysis of State Legislation Relating to Computer Technology*, 20 JURIMETRICS J. 201, 210 (1980) (“Sixteen states have statutes basically designed to regulate the collection and use of information in computerized information processing systems. The genesis of these enactments seems to have been the 1973 Report of the Secretary’s Advisory Committee on Automated Personal Data Systems, Department of Health, Education, and Welfare, entitled *Records, Computers, and the Rights of Citizens.*”).

<sup>134</sup> 5 U.S.C. § 552(a) (2017).

<sup>135</sup> William Hornby, *Secrecy, Privacy, and Publicity*, 13 COLUM. JOURNALISM REV. (No. 6) at 10 (April 1975). The U.S. Department of Health, Education, and Welfare’s 1973 report addressed this tension directly, arguing that the Freedom of Information Act’s privacy protections should be bolstered. See U.S. DEPT. OF HEALTH, EDUC., & WELFARE, *supra* note 131.

<sup>136</sup> David Burnham, *How Long Should the Arm of the Law Be?* N.Y. TIMES MAG., Dec. 12, 1982, at 120.

<sup>137</sup> Randy Young, *Your Health, Their Business*, N.Y. MAG., Oct. 27, 1980, at 39; Jake Kirchner, *Financial Privacy Act Seen Major Victory for Carter*, COMPUTERWORLD, Oct. 30, 1978, at 5.

<sup>138</sup> John Markoff, *Ma Bell and Privacy*, INFOWORLD, Apr. 5, 1982, at 19.

<sup>139</sup> Jake Kirchner, *Friend and Foe*, INFOWORLD, Jan. 16, 1984, at 100.

<sup>140</sup> Philip Elmer-DeWitt, Scott Brown, & Barbara Dolan, *An Electronic Assault on Privacy? Computer Blacklists Have Become a New Growth Industry*, TIME, May 19, 1986, at 104.

It is hard to live in modern society without leaving a long, broad electronic trail. Computers record where you reside and work, how much money you make, the names of your children, your medical and psychiatric history, your creditworthiness and indebtedness, your arrest record, the number of bathrooms in your home, the phone numbers you dial and even the time you last used a street-corner bank machine. What privacy rights apply to this vast dossier of data? When can it be searched, shared or published? And if the information it contains is outdated, injurious or just plain false, what redress does an individual have? Not much, it turns out.<sup>141</sup>

Growing concerns about privacy rights vis-à-vis government recordkeeping ran parallel to a push for more transparency among powerful American institutions. According to historical scholarship, the “right to know”—as a functional concept in law and society—is a more recent development than the right to privacy and a less clearly understood one.<sup>142</sup> Historian Michael Schudson has argued that practices and values reflecting the “virtue . . . of openness” in American culture and politics have developed since the 1950s, serving a variety of modern interests, from consumer empowerment to environmental protection.<sup>143</sup>

The most prominent legal embodiment of the right to know is the federal Freedom of Information Act,<sup>144</sup> a 1966 law that required transparency among the federal government’s executive agencies. Schudson connects that policy outcome to a battle between Congress and the executive branch, rather than to a social problem like public distrust of government.<sup>145</sup> Efforts to open government bureaucracy to public scrutiny came from members of Congress who were frustrated by difficulties in monitoring executive agencies’ activities in the 1950s.<sup>146</sup> News organizations and press associations promoted the efforts to the public, arguing that greater transparency and accountability served core democratic values.<sup>147</sup> While the right to know about government activities was billed as an individual right,<sup>148</sup> the news media were its most obvious and immediate beneficiaries.

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<sup>141</sup> Philip Elmer-DeWitt, *Don’t Tread on My Data: Protecting Individual Privacy in the Information Age*, TIME, July, 6, 1987, at 84.

<sup>142</sup>MICHAEL SCHUDSON, THE RISE OF THE RIGHT TO KNOW POLITICS AND THE CULTURE OF TRANSPARENCY, 1945–1975, 5, 16 (2015).

<sup>143</sup>*Id.* at 15 and *passim*.

<sup>144</sup> 5 U.S.C. § 552 (2017). In 1974, FOIA was amended in a variety of ways, including the “unwarranted invasion of personal privacy” section of Exemption 7(C) at issue in the *Reporters Committee* case. See SCHUDSON, *supra* note 142, at 60-61. See also *Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, at 756 (describing Congress’s process in amending Exemption 7(C)).

<sup>145</sup>SCHUDSON, *supra* note 142, at 57.

<sup>146</sup>*Id.* at 39-41. Although the battle lines would eventually be drawn around executive agency transparency more generally, they began over an inability to account for agencies’ effectiveness in rooting out Communist sympathizers. The “father of the Freedom of Information Act” was Democratic Congressman John Moss of California. See *id.* at 29.

<sup>147</sup>*Id.* at 56.

<sup>148</sup>*Id.* at 54. Sen. Thomas Hennings (D-Mo.), who sponsored the bill that would become the Freedom of Information Act, claimed that the framers believed in “a right in the people to know what their Government was doing.” Schudson calls this “good rhetoric, poor history.”

Thus, the social seeds of the legal concept of practical obscurity were sown in rising concerns about the loss of privacy—in both large and small ways—that could accompany computerized recordkeeping in the public and private sectors. Americans appreciated the ways in which computers made life easier, but they worried about losing control over the vast amounts of personal information—be it benign, sensitive, or embarrassing—that they shared in everyday transactions. Meanwhile, a conflict between concerns about government information collection and concurrent calls for openness and freedom of information increasingly seemed inevitable.

#### IV. Practical Obscurity as a Legal Concept

Prior to the 1989 *Reporters Committee* case, the term “practical obscurity” was not in use in privacy law.<sup>149</sup> But the U.S. Supreme Court did not invent the concept out of thin air. In arguing that the Court should recognize a privacy right in records that were public but otherwise difficult to locate and compile—a principle lawyers for the Department of Justice first called “practical obscurity” in a September 1988 reply brief in the case<sup>150</sup>—they drew on legal thinking that reflected the public’s concerns about technology and the surveillance society.

In his majority opinion in *Reporters Committee*, Justice Stevens uses the term “practical obscurity” twice. In the first instance, he attributes it to the government, but provides no citation: “Exemption 7(C) requires us to balance the privacy interest in maintaining, as the Government puts it, the ‘practical obscurity’ of the rap sheets against the public interest in their release.”<sup>151</sup> The second instance is at the beginning of the last paragraph of the opinion, and drives home the crucial role the term played in the Court’s decision that the records at issue should be considered private:

The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high. When the subject of such a rap sheet is a private citizen and when the information is in the Government’s control as a compilation, rather than as a record of ‘what the Government is up to,’ the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir.<sup>152</sup>

Stevens (or one of his clerks) would have read the term in the only place the government used it: in the Sept. 2, 1988, reply brief.<sup>153</sup> But the idea that the compilation of “otherwise hard-to-obtain information” into a single record “alters the privacy interest

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<sup>149</sup> A search of the legal research databases HeinOnline and LexisNexis turned up several articles and two cases that used the phrase before the *Reporters Committee* case, all using the term to denote lack of notoriety or complexity rather than a conception of privacy. *E.g.*, *Season good v. Ware*, 104 Ala. 212 (1894) (“If he was entitled to a credit on the claims of his wife, the amount thereof was suffered to remain in practical obscurity.”); *State v. Kruger*, 7 Id. 178 (1900) (“The desire to shed more light upon that which is already sufficiently luminous inevitably results in practical obscurity.”).

<sup>150</sup> Reply Brief for the Petitioners, *Reporters Committee*, 489 U.S. 749 (No. 87-1379), 1988 U.S. S. Ct. Briefs LEXIS 1519, at \*5 (“Respondents attempt to truncate the balancing process by narrowly defining the range of ‘privacy’ interests to be considered and by invoking a virtual *per se* rule that one has no ‘legitimate’ interest in the practical obscurity of widely scattered and frequently unindexed ‘public records.’”).

<sup>151</sup> *Reporters Committee*, 489 U.S. at 762.

<sup>152</sup> *Id.* at 780.

<sup>153</sup> Reply Brief for the Petitioners, *supra* note 69, at \*5.

implicated by disclosure of that information,”<sup>154</sup> thus rendering its release an “unwarranted invasion of personal privacy”<sup>155</sup> had always been at the core of the Justice Department’s case.

Although the term practical obscurity was coined in the Department of Justice’s reply brief, the concept is discussed in greater depth earlier: in its Feb. 16, 1988, petition for *writ of certiorari* and its June 17 brief following the Court’s granting *cert.*<sup>156</sup> The government argues that the D.C. Circuit’s analysis below is simplistic, and “wholly ignores the practical differences between information contained in dispersed, obscure local records and information contained in a centralized national data bank and accessible by individual names.”<sup>157</sup> In the June 17 brief, the government argues “from the point of view of the individual who is the subject of a rap sheet—the individual whose ‘privacy’ [Exemption 7(C)] protects—the practical difference between public access to dispersed raw data and public access to the FBI’s centralized files is enormous.”<sup>158</sup>

The government’s argument also draws on what the petition calls “widespread concern that privacy is, as a practical matter, threatened by the availability of compiled information in large, centralized government data banks.”<sup>159</sup> The petition and brief cite law and analysis at the center of the previously discussed social concerns about a surveillance society, including a 1980 American Bar Association report that attributed legislative developments in privacy to the influential 1973 U.S. Department of Health, Education, and Welfare report on computer databases and privacy.<sup>160</sup> “Numerous governmental entities have recognized the need to protect the subjects of such information against inappropriate disclosure,” the petition argues.<sup>161</sup> Moreover, the government argues that the lower court’s ruling that Exemption 7(C) did not apply to Medico’s rap sheet cuts against Congress’s intent in adding that exemption to the Freedom of Information Act in 1974, the same year the Privacy Act was adopted. “The subject of an individual’s ‘privacy’ interest in the obscurity of records had been the focus of substantial attention in the early 1970s by law enforcement officials, the courts, and congressional committees,” the brief states; the D.C. Circuit’s “restrictive view of the term ‘privacy’” it argues, “ignores the breadth and complexity of that concept as it has been understood by Congress, the courts, and legal commentators.”<sup>162</sup>

Respondents, the Reporters Committee for Freedom of the Press, naturally disagreed with the government’s characterization of the personal privacy interest in information that was, at its original source, public. “Whatever concerns government data banks may raise as a general matter, the existence of such data banks cannot and does not transform the fundamentally public information at issue here . . . into private

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<sup>154</sup> *Reporters Committee*, 489 U.S. at 764.

<sup>155</sup> See 5 U.S.C. § 552 (b)(7)(C) (2017).

<sup>156</sup> Petition for a Writ of Certiorari, *Reporters Committee*, 489 U.S. 749 (No. 87-1379), 1988 U.S. S. Ct. Briefs LEXIS 1522; Brief for the Petitioners, *Reporters Committee*, 489 U.S. 749 (No. 87-1379), 1988 U.S. S. Ct. Briefs LEXIS 1525. Although the term “practical obscurity” is used only once in the record, the term “obscurity” is used more often. For example, in the petition and brief cited here, obscurity is used five times.

<sup>157</sup> Petition for Writ of Certiorari, *supra* note 156, at \*22.

<sup>158</sup> Brief for the Petitioners, *supra* note 156, at \*35.

<sup>159</sup> Petition for Writ of Certiorari, *supra* note 156, at \*29.

<sup>160</sup> *Id.* (citing Lautsch, *supra* note 133, at 210-211; R. Smith, COMPILATION OF STATE & FEDERAL PRIVACY LAWS (1984-1985 ed.)).

<sup>161</sup> *Id.*

<sup>162</sup> Brief for the Petitioners, *supra* note 75, at \*32-33.

information,” its brief in opposition said.<sup>163</sup> “A public fact such as a conviction is not transformed into a private fact when it is included in a government data bank.”<sup>164</sup>

In oral argument in the case on Dec. 7, 1988, the Justices grappled with where they might draw a line regarding the privacy interest in an FBI rap sheet.<sup>165</sup> Assistant to the Solicitor General Roy Englert, arguing for the Department of Justice, tried to help the justices draw that line using the concept of practical obscurity. “If there was a publicized murder conviction yesterday, there would be very little privacy interest[] . . . in that compared to an obscure arrest that was never prosecuted for disorderly conduct 30 or 40 or 50 years ago,” Englert argued.<sup>166</sup> He also highlighted differences in the way an FBI rap sheet was indexed—by name—from typical local criminal records: “there is a much greater privacy interest in information that can be retrieved by name than in the kind of obscure information that is available on police blotters.”<sup>167</sup>

Justice Scalia expressed some skepticism of Englert’s position. As to whether an individual had a “reasonable expectation of privacy” in an FBI rap sheet, Scalia queried:

[H]is reasonable expectation is that no one would find the criminal conviction that is spread on the public record in wherever it is spread? It’s so hard to get there from that language. . . . It may be a reasonable expectation, but you would describe that as an expectation of *privacy*? That a public record won’t be discovered?<sup>168</sup>

Englert responded that he believed that Scalia’s framing of the government’s position is what Congress intended.

Other Justices challenged Reporters Committee attorney Kevin Baine to respond to the government’s interpretation of Exemption 7(C). For example, Justice O’Connor asked Baine to consider the differences between “unadjudicated arrests or indictments[,] and convictions,” and said that publicizing arrests—without convictions—could “put people in a very false light.”<sup>169</sup> She noted that the language of Exemption 7(C) was “rather general,” and that “conceivably some antiquated arrest records might well be an unwarranted invasion [of privacy].”<sup>170</sup>

The Justices’ acceptance of the concept of practical obscurity as a rationale for withholding a rap sheet under Exemption 7(C) was central to its decision reversing the D.C. Circuit Court of Appeals, which had not been persuaded by the government’s

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<sup>163</sup> Respondents’ Brief in Opposition, *Reporters Committee*, 489 U.S. 749 (No. 87-1379), 1988 U.S. S. Ct. Briefs LEXIS 1521, at \*20.

<sup>164</sup> *Id.*

<sup>165</sup> See Oral Argument Transcript, *Reporters Committee*, 489 U.S. 749 (No. 87-1379), 1988 U.S. Trans. LEXIS 118. Audio recording available at <https://www.oyez.org/cases/1988/87-1379>. See also U.S. DEPT. OF JUSTICE, *FOIA Update: Supreme Court Hears Reporters Committee*, 9 FOIA UPDATE NO. 4, (Jan. 1, 1989), <https://www.justice.gov/oip/blog/foia-update-supreme-court-hears-reporters-committee>.

<sup>166</sup> Oral Argument Transcript, *supra* note 165, at \*11.

<sup>167</sup> *Id.* at \*15.

<sup>168</sup> *Id.* at \*22 (emphasis added). The transcript does not indicate which Justice is questioning attorneys, but the audio recording sometimes makes it possible for the listener to determine who is speaking.

<sup>169</sup> *Id.* at \*27.

<sup>170</sup> *Id.* at \*28.

reasoning. In two decisions—first ruling in favor of the Reporters Committee on its appeal of the district court’s summary judgment ruling, and then denying the Department of Justice’s petition for rehearing, the appeals court argued that an obscurity-based privacy interest did not fit within the language of Exemption 7(C). Judge Laurence Silberman wrote for the majority in both opinions. He stated that the court declined to accept the government’s reasoning that “putting the public record information in different form, somehow changes the nature of the information sought,”<sup>171</sup> and that Charles Medico’s “concern in maintaining difficulty of access to his public records” did not “equate[] to a ‘privacy’ interest within the meaning of the statute.”<sup>172</sup> He added,

We all cherish the notion that our past mistakes will be forgotten, and most of us—particularly lawyers and judges—share a distaste for the widespread publication of such information as arrest records that will surely harm some innocent targets. But we cannot find in the FOIA or its legislative history any support for the government’s expansive interpretation of privacy.<sup>173</sup>

Circuit Judge Ken Starr’s shift from concurring in the first opinion to dissenting in the second is the most important aspect of the case at the appellate level—both in terms of the trend toward judicial acceptance of the concept of practical obscurity as well as its apparent influence on the Supreme Court’s reasoning. Starr’s concurrence does not touch on practical obscurity. He agreed with his colleague’s reasoning in remanding the case back to the district court, but disagreed with the public interest balancing test it applies.<sup>174</sup> In his dissent, however, Starr embraced the privacy interest in practical obscurity. Starr argued, “computerized data banks of the sort involved here present issues considerably more difficult than, and certainly very different from, a case involving the source records themselves.”<sup>175</sup> In language that echoed concerns about a surveillance society,<sup>176</sup> Starr listed examples of the “many federal agencies [that] collect items of information on individuals that are ostensibly matters of public record,” and warned:

Under the majority’s approach, in the absence of state confidentiality laws, there would appear to be a virtual *per se* rule requiring all such information to be released. The federal government is thereby transformed in one fell swoop into *the* clearinghouse for highly personal information, releasing records on any person, to any requester, for any purpose.<sup>177</sup>

Justice Stevens’s majority opinion in *Reporters Committee* quotes Starr at length in support of the proposition that the D.C. Circuit’s decision was wrong and gave short

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<sup>171</sup>Reporters Comm. for Freedom of the Press v. U.S. Dept. of Justice, 831 F.2d 1124, 1987 LEXIS 18279, at \*9 (D.C. Cir. 1987).

<sup>172</sup>Reporters Comm. for Freedom of the Press v. U.S. Dept. of Justice, 816 F.2d 730, 739 (D.C. Cir. 1987).

<sup>173</sup>*Id.*

<sup>174</sup>*Id.* at 743 (Starr, J., concurring).

<sup>175</sup>*Reporters Committee*, 831 F.2d 1124, 1987 LEXIS 18279 at \*15 (Starr, J., dissenting).

<sup>176</sup> See discussion accompanying *supra* notes 124-134.

<sup>177</sup>*Reporters Committee*, 831 F.2d 1124, 1987 LEXIS 18279 at \*22 (Starr, J., dissenting) (emphasis in original).

shrift to the established idea that a privacy interest exists in the practical obscurity of the information contained in Medico's rap sheet.<sup>178</sup>

Stevens's opinion also cites Supreme Court precedent which he argued shows that the Court has acknowledged similar obscurity-based privacy interests in previous public records cases. In the 1977 case *Whalen v. Roe*, the Court ruled that the state of New York did not violate individuals' privacy in maintaining a state database of prescription information for controlled substances, holding that the state had taken adequate steps to protect patient privacy.<sup>179</sup> "We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files," the Court noted.<sup>180</sup> A year earlier, in *Department of the Air Force v. Rose*, the Court ruled that disclosure of Air Force Academy disciplinary records could not be withheld under a Freedom of Information Act exemption protecting "internal personnel rules."<sup>181</sup> The Court noted that because personally identifying information was redacted, the record subjects' privacy interests were sufficiently protected.<sup>182</sup> However, the Court acknowledged the potential for revealing embarrassing incidents previously obscured or long forgotten. "The risk to the privacy interests of a former cadet. . . cannot be rejected as trivial," the Court said, acknowledging that "no one can guarantee that all those who are 'in the know' will hold their tongues, particularly years later when time may have eroded the fabric of cadet loyalty."<sup>183</sup>

Although not technically precedential on the specific issue under consideration in *Reporters Committee*, *Whalen* and *Rose* lend argumentative authority to Stevens's assertion that the Court had previously taken account of a privacy interest in otherwise public records. But by adding this to an acknowledgment of the social concerns that accompanied the rise of government computer data banks since the 1960s, Judge Starr's apparently persuasive argument that lawmakers have been—and must be—responsive to those concerns, and the fact that Justice Blackmun's concurrence takes issue only with the majority's "bright line" approach to the question,<sup>184</sup> the Court forged a unanimous recognition of a new concept of privacy: practical obscurity.

## V. Discussion and Conclusion

The legal concept of practical obscurity emerged from a privacy interest asserted against the government and other powerful institutions, only to be used by the government to win a lawsuit filed by a group claiming to represent the public's interest in government transparency. The government's successful reliance on practical obscurity as a justification for withholding otherwise public records is ironic, considering that the concept arose amid paranoia about the government's collection and cataloging of vast

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<sup>178</sup>*Reporters Committee*, 489 U.S. at 760-761.

<sup>179</sup>*Whalen v. Roe*, 429 U.S. 589 (1977).

<sup>180</sup>*Whalen*, 429 U.S. at 605. Quoted in *Reporters Committee*, 489 U.S. at 770.

<sup>181</sup> 5 U.S.C. § 552 (b)(2) (2017) exempts information "related solely to the internal personnel rules and practices of an agency."

<sup>182</sup>*Dept. of the Air Force v. Rose*, 425 U.S. 352, 381 (1976). The case dealt with FOIA Exemption 6, 5 U.S.C. § 552 (b)(6), which deals with personal privacy implications not related to law enforcement records.

<sup>183</sup>*Id.* (internal quotation marks omitted).

<sup>184</sup>*Reporters Committee*, 489 U.S. at 780 (Blackmun, J., concurring).

amounts of personal information, and crystallized while public and private sector institutions gathered and indexed even more information using computer databases.

The irony highlights the tension between the interests of personal privacy and the public's right to know that begat the *Reporters Committee* case and continues to complicate this realm of law today. Practical obscurity is a concept the court used to justify why some otherwise public information might be rendered private when compiled in a different format. Advocates for government transparency and accountability—including Robert Schackne and the Reporters Committee for Freedom of the Press—compellingly argued that such a rendering was nonsensical and even dangerous as a matter of open records law. But the Supreme Court unanimously disagreed, accepting practical obscurity as a framework on which to strike a balance—as it often does—between two important and competing interests. Thus, the case's outcome helps demonstrate the value of legal history as a means to seek a better understanding of the roots of legal concepts. This article shows how social concerns merged with legal consciousness both inside and outside of traditional legal arenas to produce a concept that was used to mediate between conflicting values of privacy and transparency.

In the early-to-mid-twentieth century, people became concerned about their ability to control whether they could live outside of the public eye, particularly when they had achieved some fame or infamy, willingly or not. In the 1960s, 70s, and 80s, concerns about a loss of control of the information that individuals shared with powerful public and private institutions prompted a need to think about how citizen consumers could trust that their expectations about the use or publication of that information would be honored. Privacy law developed in the early twentieth century as a means to answer the pressing question of when collecting or publishing truthful information about a person, acts that are otherwise highly protected in a society that values freedom of expression, should nevertheless be considered harmful and legally actionable. The history recounted here shows that practical obscurity emerged through an extension of that problem—a means to address the potential harm that can arise from the collection or publication of information that is truthful but not widely known, due to its being difficult to obtain or having faded from most people's memories. The continuing relevance of practical obscurity as a concept of privacy is a consequence of technology enabling the sharing, monetizing, and publishing of ever more information that may or may not be any of the public's business.

There is strong evidence supporting the argument that the *Reporters Committee* decision and the concept of practical obscurity have provided a legal justification to limit government transparency where an individual's right to privacy might be implicated, as they have been stretched beyond the narrow context of the law enforcement privacy exemption to the federal Freedom of Information Act.<sup>185</sup> There is also a strong argument that practical obscurity's so-called "evil twin," the "right to be forgotten"—a concept used

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<sup>185</sup>Kirtley, *supra* note 86 (citing, e.g., *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004) (finding that Exemption 7(C) applies to the privacy interest of family members of a deceased relative); *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999) (ruling that California could deny access to some public records requesters, but not others, without violating the First or Fourteenth Amendments). Indeed, Justice Blackmun expressed concerns about the implications of the majority's categorical rule. See *Reporters Committee*, 489 U.S. at 780-781 (Blackmun, J., concurring). Perhaps a ruling limited to Charles Medico's rap sheet alone—rather than to rap sheets generally—would have limited the reach of practical obscurity into other legal realms.

to justify the compelled removal of truthful but irrelevant or outdated information about a person—is inimical to free speech values like the “marketplace of ideas” and the “checking value.”<sup>186</sup> On the other hand, practical obscurity has been used as a logical means to support the straightforward argument that an individual’s privacy interest may not altogether cease to exist the instant information is collected by or shared with a third party, and that in fact, the privacy interest might increase as time passes.<sup>187</sup>

Given that the roots of practical obscurity rest in social concerns about surveillance and its limitations on liberty, the history here seems to support an argument that the concept’s strength and applicability should be measured against the risk it poses to the public’s right to know. Critics of the *Reporters Committee* ruling have argued that practical obscurity has proven too blunt a legal instrument, sacrificing too much public information in exchange for a broad conceptualization of individual privacy concerns.<sup>188</sup> Meanwhile, compelling scholarship that has considered the applicability of practical obscurity as a legal standard for Internet users as part of a privacy continuum<sup>189</sup> or as an ethical standard for considering whether to publicize embarrassing information about an individual<sup>190</sup> embraces a nuanced approach to thinking about privacy that reflects the roots of practical obscurity in legal consciousness. This suggests that the use of the concept to shield an entire category of government records, for example, threatens to weaken government transparency too much,<sup>191</sup> just as a sweeping right to demand the removal of any truthful personal information a person considers outdated or irrelevant is likely to infringe too far on others’ ability to speak freely and truthfully.

Ultimately, the more nuanced view of privacy promoted by current thinking about practical obscurity may be more in keeping with the roots of the concept examined here, showing the *Reporters Committee* decision to be a deviation from the historical norm and leading to an overall clarifying of the blurry space between what is public and what is private in democratic societies that value both privacy and transparency. While the concept of practical obscurity may have significantly curtailed the Freedom of Information Act and contributed to a more limited view of its underlying principles, it has also given credence to less binary thinking about privacy as both a legal and ethical concept. The history of the concept shows that advocates for obscurity as a place on the continuum between total secrecy and total publicity, commentators worried about the death of privacy, and critics of the *Reporters Committee* ruling can all be right at the same time: as the conception of privacy evolves in social and legal consciousness, the relationship between technology and privacy and its implications for public access to truthful information should be carefully considered. In other words, it is possible for practical obscurity to be the basis for a bad ruling for government transparency but also a good starting point for thinking about the complex power relationships between individuals and information gatherers and publishers.

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<sup>186</sup>Kirtley, *supra* note 86; Larson, *supra* note 24, at 119-120.

<sup>187</sup> See discussion of the work of Hartzog et al., at *supra* notes 108-109.

<sup>188</sup> See Kirtley, *supra* note 86; Larson, *supra* note 24.

<sup>189</sup> See Hartzog & Stutzman, *supra* note 82.

<sup>190</sup> See Stewart & Bunton, *supra* note 87.

<sup>191</sup> *Reporters Committee*, 489 U.S. at 781 (Blackmun, J., concurring).

# ARKANSAS V. BATES: RECONSIDERING THE LIMITS OF A REASONABLE EXPECTATION OF PRIVACY

HOLLY KATHLEEN HALL \*

*Smart devices, including those utilizing speech recognition, that are “always-on” are increasingly found in households around the world. They are operated to make household tasks easier, but they also pose unique Fourth Amendment questions. Arkansas v. Bates presented distinct legal challenges when police in the case sought the murder suspect’s home Amazon Echo data, which streams to the cloud, where the data is stored. Amazon fought release of the information. While the defendant ultimately agreed to turn over the data housed on his Echo device, this case highlights the need to re-think privacy standards, the Third Party Doctrine, and the conflict between the government/law enforcement and home devices categorized as “the Internet of Things.”*

**Keywords:** Internet of Things, third party doctrine, Fourth Amendment, privacy

## I. Introduction

Technology that incorporates speech recognition, “the ability to speak naturally and contextually with a computer system in order to execute commands or dictate language,” allows consumers to interact with a range of devices starting with a command such as “Hey, Siri.”<sup>1</sup>The new devices incorporating this technology that are always-on or potentially always listening have both benefits and drawbacks. The fact that the control can be performed without hands can assist those with disabilities, can make services more efficient through voice dictation, and can make everyday tasks more expedient. The data that is collected by those operating these services is used to help improve the services over time.

Concurrently, these same useful features also generate privacy concerns. Consumers are increasingly bringing into their homes devices such as Smart TVs, Fitbits and the Amazon Echo.<sup>2</sup>Known as “the Internet of Things” (IoT), a term first used by Kevin Ashton of the Massachusetts Institute of Technology, these items are “embedded

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<sup>1</sup> Stacey Gray, *Always On: Privacy Implications of Microphone-Enabled Devices*, FUTURE OF PRIVACY FORUM at 4 (April 2016), [https://fpf.org/wp-content/uploads/2016/04/FPF\\_Always\\_On\\_WP.pdf](https://fpf.org/wp-content/uploads/2016/04/FPF_Always_On_WP.pdf).

<sup>2</sup>Ted Karczewski, *Open House: Intel and Amazon Bring Smart Tiny Home with Alexa to CES*, AMAZON DEVELOPER (Jan. 4, 2017), <https://developer.amazon.com/blogs/post/1035ac5c-063a-4339-a495-ecbd1b07847f/open-house-intel-and-amazon-bring-smart-tiny-home-with-alexa-to-ces> (last visited Oct. 3, 2017).

with technologies such as microchips, sensors, and actuators that often use Internet Protocol and share data with other machines or software over communications networks.”<sup>3</sup>There are predicted to be over five billion of these devices by 2020.<sup>4</sup>The risks of using these devices include identity theft, cybersecurity attacks, and unauthorized use of data.

State and federal privacy laws are deficient in addressing these new technological issues, including a recent case dealing with an Amazon Echo device in Arkansas. In December 2016, police issued a warrant seeking records for an Echo device belonging to a murder suspect.

This paper will examine the privacy issues surrounding this case and IoT devices in general and will argue that a new framework for a reasonable expectation of privacy is needed in light of recent developments in technology. The Third Party Doctrine is a Fourth Amendment rule that sanctions law enforcement collection of information if someone discloses that information to a third party, thereby waiving their Fourth Amendment rights in the information.<sup>5</sup>This doctrine no longer serves its purpose in the current structure, and this is an area of privacy law in dire need of modifications.

## II. The Internet of Things

In 2015, the Federal Trade Commission (FTC) issued a report on the IoT, defining it as:

the ability of everyday objects to connect to the Internet and to send and receive data. It includes, for example, Internet-connected cameras that allow you to post pictures online with a single click; home automation systems that turn on your front porch light when you leave work; and bracelets that share with your friends how far you have biked or run during the day.<sup>6</sup>

To the FTC, IoT can include anything from “Radio Frequency Identification (‘RFID’) tags that businesses place on products in stores to monitor inventory; sensor networks to monitor electricity use in hotels; and Internet-connected jet engines and drills on oil rigs.”<sup>7</sup> Hexoskin is a type of clothing that can monitor breathing and heart rates as well as track sleeping patterns of the wearer.<sup>8</sup>OnFarm offers live monitoring of crops.<sup>9</sup>Consumers can buy pocket breathalyzers and fitness trackers. However, few users may realize the data from such devices can be disclosed to others. For example, the

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<sup>3</sup> Katherine Britton, *Handling Privacy and Security in the Internet of Things*, 19 J. INTERNET L. no. 2, 2016, at 3.

<sup>4</sup>*Id.*

<sup>5</sup> Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009).

<sup>6</sup> Fed. Trade Comm’n, *Internet of Things: Privacy and Security in a Connected World*, at 7 (Jan. 2015), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf>.

<sup>7</sup>*Id.* at 21.

<sup>8</sup> Marie-Helen Maras, *Internet of Things: Security and Privacy Implications*, 5 INT’L DATA PRIVACY L. 99, 99 (2015).

<sup>9</sup>*Id.* at 100.

breathalyzer information could be used against them in court and the fitness tracker data could be used to determine disabilities.<sup>10</sup>Fitbit, for example, has sold data to employers.<sup>11</sup>

While many of the devices are sold with a privacy policy, most users don't consider the policies carefully.<sup>12</sup> Of note is Samsung's Smart TV policy noting, "Please be aware that if your spoken words include personal or other sensitive information, that information will be among the data captured and transmitted to a third party through your use of Voice Recognition."<sup>13</sup>After the policy received some notoriety in the media, Samsung apologized and tried to reassure customers they were not monitoring everyday conversations in the home. Shortly thereafter, WikiLeaks revealed what appeared to be a surreptitious spying operation on behalf of the British and United States governments using the Samsung Smart TVs.<sup>14</sup>(The authenticity of the WikiLeaks documents could not be confirmed.)

Nevertheless, up to this point, consumers have tended to exchange convenience for their privacy rights. They allow the companies who make IoT devices to gather all kinds of information which can be used to either improve the device itself, sell the users' data to another party or to generate targeted advertisements for products and services.<sup>15</sup>The devices have also proven to be targets of hackers.<sup>16</sup>

The FTC created the Office of Technology Research and Investigation in 2015 due to some of these concerns. However, the focus of this office appears to be more on research and less on offering regulatory solutions.<sup>17</sup>

Amazon's Echo device is one that has evolved over the last few years. In 2014, the Echo had 14 "skills" or functions.<sup>18</sup>Now, it has over 10,000.<sup>19</sup> Those improvements were made by analyzing the data on the words its users said to Alexa, Echo's personal assistant. Alexa answers the user's questions in full sentences. The Echo is an always-on, always-listening, Internet-connected device that is triggered by saying "Amazon," "Echo" or another "wake word" option.<sup>20</sup> Echo sends your question to the cloud and Amazon's servers determine how to respond. Users can check traffic, weather, set alarms, home thermostats, lights, and ask Alexa to answer their questions.<sup>21</sup>

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<sup>10</sup> Melissa W. Bailey, *Seduction by Technology: Why Consumers Opt Out of Privacy by Buying Into the Internet of Things*, 94 Tex. L. Rev. 1023, 1024 (2016).

<sup>11</sup>*Id.* at 1025.

<sup>12</sup> Brian Heater, *Can Your Smart Home Be Used Against You in Court?* TECHCRUNCH, at ¶ 13 (March 12, 2017), <https://techcrunch.com/2017/03/12/alexa-privacy/>.

<sup>13</sup>*Id.* at ¶15.

<sup>14</sup>*Id.*

<sup>15</sup> Bailey, *supra* note 10, at 1025.

<sup>16</sup>*Id.*

<sup>17</sup>Bailey, *supra* note 10, at 1026.

<sup>18</sup> Amelia Tait, *Amazon Echo: How 2016 Tech is Bringing Us Closer to 1984*, NEW STATESMAN, at ¶ 3 (Sept. 14, 2016), <http://www.newstatesman.com/science-tech/privacy/2016/09/amazon-echo-how-2016-tech-bringing-us-closer-1984>.

<sup>19</sup> Taylor Martin, *35 Most Useful Alexa Skills*, CNET, at ¶ 2 (April 24, 2017), <https://www.cnet.com/how-to/amazon-echo-most-useful-alexa-skills/>.

<sup>20</sup> Rick Billies, *Amazon Alexa Explained*, Senior Tech Tips, at ¶ 7 (April 11, 2016), <http://seniortechtips.com/amazon-alexa-explained/>.

<sup>21</sup>*Id.*

There are options for muting the speaker. When muted, the light ring on the device turns red and no spoken words will be streamed to the cloud. The light turns blue when the Echo is listening to a command, though nothing is recorded before the wake word is uttered.<sup>22</sup>Users also have the ability to delete all the data that has been sent to the cloud via an app.<sup>23</sup>

Despite the privacy options provided by the manufacturer, concerns remain. Germany's data protection commissioner advised great care specifically for the Google Home and Amazon Echo devices due to the lack of clarity regarding how information is collected, stored, and used.<sup>24</sup>

An investigation by *The Guardian* newspaper in London concluded Amazon's Echo likely breaches the Children's Online Privacy Protection Act (COPPA), which regulates the collection and use of personal information from anyone under the age of 13 in the United States.<sup>25</sup> COPPA's definition of personal information includes recordings of a child's voice without the consent of their parents. The consent needs to be in the form of a signed letter, video chat, or phone call. *The Guardian* asserts none of those approved consent methods are used. This is one of many privacy concerns regarding IoT devices.

Under consideration in this paper are the boundaries of the Fourth Amendment search and seizure function for law enforcement regarding cloud data originating from an IoT device. Using cloud storage allows for improvements in speech recognition, letting the device adapt to the user's speech pattern. However, this also has implications on law enforcement access, future use and retention.<sup>26</sup>This was at issue in the recent case of *State of Arkansas v. James A. Bates*.

### III. Arkansas v. Bates

On November 21, 2015, James A. Bates hosted three men – Victor Collins, Owen McDonald and Sean Henry – at his Bentonville, Ark., home to watch football. Henry left late in the evening. The remaining men spent time in the hot tub, drinking. McDonald was reportedly back at his home by 12:30 a.m. Later the morning of the 22<sup>nd</sup>, after Bates called 911, police and medics found Collins dead in the hot tub and noted the rim of the hot tub and concrete patio appeared to have been recently sprayed with water. Collins had a black eye. Bates had bruises and scratches on his shoulder, back and stomach.<sup>27</sup>Collins's cause of death was determined to be primarily strangulation with drowning as a secondary cause. Bates is charged with first-degree murder and is also

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<sup>22</sup>Tait, *supra* note 18.

<sup>23</sup>*Id.*

<sup>24</sup> Oliver Voß, *Google's New System Raises Fresh Privacy Concerns*, EURACTIV (Sam Morgan, trans., May 25, 2016), <http://www.euractiv.com/section/digital/news/googles-new-system-raises-fresh-privacy-concerns/>.

<sup>25</sup> Mark Harris, *Virtual Assistants Such as Amazon's Echo Break US Child Privacy Law, Experts Say*, THE GUARDIAN (May 26, 2016), <https://www.theguardian.com/technology/2016/may/26/amazon-echo-virtual-assistant-child-privacy-law>.

<sup>26</sup> Gray, *supra* note 1, at 8.

<sup>27</sup> Bates Aff., at 1-2, 5 (Feb. 22, 2016), <http://www.documentcloud.org/documents/3473738-Arkansas-vs-James-Andrew-Bates-Affidavit-for.html>; Tracy Neal, *Amazon Objects to Turning Over Device Data in Bentonville Murder Case*, ARKANSAS DEMOCRAT-GAZETTE (Feb. 22, 2017), <http://www.arkansasonline.com/news/2017/feb/22/amazon-objects-to-turning-over-items-in/?f=news-arkansas-nwa>.

accused of tampering with evidence by “using a garden hose to wash away blood from his hot tub and patio area.”<sup>28</sup>Bates has pleaded not guilty.<sup>29</sup>

During a search of Bates’s residence on December 3, the Bentonville Police seized an Echo device located in the kitchen. On December 4, the police emailed a preservation request to Amazon for all the records associated with the Echo and served a search warrant on Amazon. On January 29, 2016, the police obtained an extension of the warrant. Both the original warrant and the extension noted that law enforcement should search for and seize “audio recordings, transcribed records, or other text records related to communications and transactions” between the Echo device and Amazon’s servers during the 48-hour period of November 21 through 22, 2015, in addition to subscriber and account information to see if the device might hold any clues about the murder in the form of audio recordings, transcribed words, text or other data.<sup>30</sup>Amazon partially complied in February by producing subscriber information and the purchase history of Mr. Bates. It did not provide recordings or transcripts.

On June 28, 2016, the police obtained a search warrant for data on the Echo device, Mr. Bates’s Huawei Nexus cell phone and Mr. Collins’s LG cell phone. The police were able to “extract the data” from the Echo device and the LG phone, but not the Nexus cell phone “due to the device being encrypted at the chipset level.”<sup>31</sup>(This cell phone data was desired by the prosecution in case Mr. Bates had installed the Alexa app on the phone. In that instance, any recordings or transcripts could be accessed from the cell phone. The Echo device itself does not store any audio data, but a recording and transcript would be accessible through the app on the cell phone or Amazon’s servers).

In its response to the warrant, Amazon argued recorded audio should have First Amendment protection and asked the warrant be thrown out, noting, “[A]t the heart of that First Amendment protection is the right to browse and purchase expressive materials anonymously, without fear of government discovery,”<sup>32</sup>and citing *McIntyre v. Ohio Elections Comm’n* and *Lamont v. Postmaster Gen.*<sup>33</sup>

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<sup>28</sup>Neal, *supra* note 27, at ¶ 3; Bates, Criminal Information, at 2 (March 30, 2016), [https://caseinfo.aoc.arkansas.gov/cconnect/PROD/public/ck\\_public\\_qry\\_doct.cp\\_dktrpt\\_frames?backto=P&case\\_id=04CR-16-370&begin\\_date=&end\\_date=](https://caseinfo.aoc.arkansas.gov/cconnect/PROD/public/ck_public_qry_doct.cp_dktrpt_frames?backto=P&case_id=04CR-16-370&begin_date=&end_date=) (follow “CRIMINAL INFO SHEET”); Bates Aff. Feb. 22, 2016, *supra* note 27, at 2-3, 7.

<sup>29</sup> Bates Arraignment, at 1(April 5, 2016), <http://www.documentcloud.org/documents/3473742-Arkansas-vs-James-Andrew-Bates-Arraignment.html>.

<sup>30</sup> Memorandum of Law in Support of Amazon’s Motion to Quash Search Warrant at 6, *Arkansas v. James A. Bates*, No. CR-2016-370-2(Feb. 17, 2017) [hereinafter *Amazon Memorandum*], <https://news.vice.com/wp-content/uploads/2017/02/Azn-Brief-in-Support.pdf>.

<sup>31</sup>*Id.* at 7.

<sup>32</sup>*Id.* at 10.

<sup>33</sup> In *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 334 (1995), “After petitioner’s decedent distributed leaflets purporting to express the views of ‘CONCERNED PARENTS AND TAX PAYERS’ opposing a proposed school tax levy, she was fined by respondent for violating § 3599.09(A) of the Ohio Code, which prohibits the distribution of campaign literature that does not contain the name and address of the person or campaign official issuing the literature. The Court of Common Pleas reversed, but the Ohio Court of Appeals reinstated the fine. In affirming, the State Supreme Court held that the burdens § 3599.09(A) imposed on voters’ First Amendment rights were ‘reasonable’ and ‘nondiscriminatory’ and therefore valid. Declaring that § 3599.09(A) is intended to identify persons who distribute campaign materials containing fraud, libel, or false advertising and to provide voters with a mechanism for evaluating such materials, the court distinguished *Talley v. California*... in which this Court invalidated an ordinance

In addition to recordings of user requests for information, Amazon asserted Alexa's *responses* are also protected by the First Amendment. Citing *Zhang v. Baidu.com Inc.*,<sup>34</sup> it argued that courts have recognized that "the First Amendment protects as speech the results produced by an Internet search engine."<sup>35</sup>

Finally, Amazon argued there is a heightened standard the state must meet in this case. It must show a compelling need for the requested information and that there is a sufficient nexus between the information sought and the underlying inquiry of the investigation.<sup>36</sup> The reason given for this heightened standard is that "government requests for expressive information chill the exercise of First Amendment rights."<sup>37</sup>

Amazon filed a motion to quash the search warrant on February 17, 2017. Mr. Bates obtained a new lead attorney in early March, Kathleen Zellner (of Netflix's "Making a Murderer" fame), who proclaimed her client's innocence and filed a motion saying her client would voluntarily hand over the Echo recordings. Amazon provided them on March 7.<sup>38</sup> Thus, the court would not get the opportunity to rule on the issues presented in Amazon's motion, and the question remains: while police in past cases have often seized computers, phones and other electrical devices in the course of an investigation, is there a difference in the reasonable expectation of privacy with these home devices that are always on, always listening, transmitting personal data from home to the cloud?

#### IV. Existing Legal Frameworks

Harvard law professors Samuel Warren and Louis Brandeis proposed the concept of a legal right to privacy in the United States in 1890 in the pages of the *Harvard Law Review*.<sup>39</sup> The argument centered on privacy as a personal right, to protect someone's dignity. Warren and Brandeis were both concerned with media being used as a tool to make aspects of private life public.<sup>40</sup> While they could not have predicted the kinds of advances in technology allowing information to flow so effortlessly to servers and "the

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prohibiting all anonymous leafletting. Held: Section 3599.09(A)'s prohibition of the distribution of anonymous campaign literature abridges the freedom of speech in violation of the First Amendment."

<sup>34</sup>*Zhang v. Baidu.Com Inc.*, 10 F.Supp.3d 433, 434-35 (S.D.N.Y. 2014) ("In this suit, a group of New York residents who advocate for increased democracy in China sue one of China's largest companies, Baidu, Inc. (incorrectly named in the Complaint as 'Baidu.com Inc.'). Plaintiffs contend that Baidu, which operates an Internet search engine akin to Google, unlawfully blocks from its search results here in the United States articles and other information concerning 'the Democracy movement in China' and related topics. . . . The case raises the question of whether the First Amendment protects as speech the results produced by an Internet search engine. The Court concludes that, at least in the circumstances presented here, it does.")

<sup>35</sup>*Zhang*, 10 F.Supp.3d at 435.

<sup>36</sup> *Amazon Memorandum*, *supra* note 30, at 12.

<sup>37</sup>*Id.* at 14.

<sup>38</sup>Elliott C. McLaughlin, *Suspect OKs Amazon to Hand Over Echo Recordings in Murder Case*, CNN, <http://www.cnn.com/2017/03/07/tech/amazon-echo-alexa-bentonville-arkansas-murder-case/> (last updated Apr. 26, 2017, 2:52 PM).

<sup>39</sup> Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>40</sup> Harry Kalven Jr., *Privacy in Tort Law – Were Warren and Brandeis Wrong?* 31 L. & CONTEMP. PROBS. 326, 331 (1966).

cloud,” they anticipated the dangers of this, as yet unspoken, right – not explicitly mentioned in the United States Constitution – being trodden upon.

One of the first cases that helped establish a right to privacy in the United States was *Roberson v. Rochester Folding Box Co.*<sup>41</sup> in 1902. Miss Roberson was stunned to wake up one morning and find a drawing of her face adorning posters placed all over her town advertising Franklin Mills flour. Humiliated, she sued for invasion of privacy but lost as there was no such cause of action at the time. Her case, however, led to the establishment of the United States’ first state privacy statute in 1903 in New York.

Tort scholar William Prosser codified privacy law into four areas: appropriation, intrusion, false light and private facts.<sup>42</sup> Appropriation occurs when someone uses another person’s name or likeness without their consent for commercial gain.<sup>43</sup> False light privacy is akin to defamation and includes false information or information that creates a false impression being published without someone’s consent, the information is highly offensive to a reasonable person and the claim contains an actual malice element similar to some defamation claims: the person publishing the information must do so with a reckless disregard for the truth or know the information is false.<sup>44</sup> Intrusion concerns “[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, . . . if the intrusion would be highly offensive to a reasonable person.”<sup>45</sup> The private facts area affects “[o]ne who gives publicity to a matter concerning the private life of another, . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”<sup>46</sup>

Privacy law evolved and grew in the United States in a fragmented manner, creating a patchwork of sector-specific legislation and efforts to guard certain categories of information.<sup>47</sup> Professor Daniel Solove summarizes the state of privacy law in the United States:

Privacy, however, is a concept in disarray. Nobody can articulate what it means. Currently, privacy is a sweeping concept, encompassing (among other things) freedom of thought, control over one’s body, solitude in one’s home, control over personal information, freedom from surveillance, protection of one’s reputation, and protection from searches and interrogations.<sup>48</sup>

The *Privacy Act of 1974* was created with the intent to safeguard personal data, allow federal agencies to collect only what is necessary, and allow citizens the right to see and modify incorrect data about themselves.<sup>49</sup> In addition to this act, a number of industry and sector-specific laws were passed to protect certain kinds of information

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<sup>41</sup>*Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).

<sup>42</sup>William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

<sup>43</sup>*Id.*

<sup>44</sup>Restatement (Second) of Torts § 652 E (1977).

<sup>45</sup>Restatement (Second) of Torts § 652 B (1977).

<sup>46</sup>Restatement (Second) of Torts § 652 D (1977).

<sup>47</sup> Carter Manny, *Recent Controversy Surrounding the EU-US Safe Harbor Data Protection Regime*, 47 BUS. L. REV. 33, 34 (2014).

<sup>48</sup>DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 1 (2008).

<sup>49</sup>Privacy Act of 1974, 5 U.S.C. § 552(a).

including the *Family Educational Rights and Privacy Act (FERPA)*,<sup>50</sup> protecting student academic records and allowing parental access; the *Privacy Protection Act of 1980*,<sup>51</sup> protecting journalists from searches by government officials without a subpoena; the *Electronic Communications Privacy Act (ECPA)*,<sup>52</sup> expanding wiretapping and electronic eavesdropping laws; the *Driver's Privacy Protection Act*,<sup>53</sup> protecting the privacy of personal information assembled by State Department of Motor Vehicles; the *Health Insurance Portability and Accountability Act (HIPAA)*,<sup>54</sup> containing a privacy provision to protect against disclosure of sensitive medical information; the *Gramm-Leach-Bliley Act*,<sup>55</sup> containing a provision for financial institutions to have a policy in place protecting consumers' information from foreseeable threats in security and data integrity; and *COPPA*,<sup>56</sup> mentioned earlier.

There are also laws that are antithetical to privacy. After the terrorist attacks on September 11, 2001, the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, more colloquially known as the "U.S. Patriot Act," was passed and intended to make it easier for federal agents to recognize and probe potential terror threats.<sup>57</sup> The Patriot Act has been heavily criticized for allowing too much government surveillance into the private lives of citizens.<sup>58</sup> All of these fragmented laws are augmented by sporadic state-specific privacy laws, creating a random collection of regulations.

Regarding data privacy protection, four models have been established: (1) comprehensive laws such as the *Privacy Protection Act of 1974*; (2) sectoral laws such as FERPA; (3) industry self-regulation, allowing organizations to establish their own policies; and (4) reliance on privacy-enhancing technologies such as encryption.<sup>59</sup> Privacy regulations in the United States are often developed in a reactionary fashion, after a problem surfaces.<sup>60</sup>

Privacy is also often viewed as a commodity and conflicts arise over who "owns" the data.<sup>61</sup> (This is in contrast to a European Union approach where the tendency is to

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<sup>50</sup>Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g).

<sup>51</sup>Privacy Protection Act of 1980, 42 U.S.C. § 2000.

<sup>52</sup>Electronic Communications Privacy Act, 18 U.S.C. § 2510-22.

<sup>53</sup>Driver's Privacy Protection Act, 18 U.S.C. § 2721.

<sup>54</sup>The Health Insurance Portability and Accountability Act of 1996 (HIPAA) P.L. No. 104-191, 110 Stat. 1938 (1996).

<sup>55</sup>Gramm-Leach-Bliley (Financial Services Modernization) Act of 1999, Pub. L. 106-102, 113 Stat. 1338 (1999).

<sup>56</sup>Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§6501–6505.

<sup>57</sup>Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56.

<sup>58</sup>See Nathan C. Henderson, *The Patriot Act's Impact on the Government's Ability to Conduct Electronic Surveillance of Ongoing Domestic Communications*, 51 DUKE L. J. 179, 200 (2002).

<sup>59</sup>William J. Long & Marc Pang Quek, *Personal Data Privacy Protection in an Age of Globalization*, 9J. EUR. PUB. POL'Y 325, 330 (2002).

<sup>60</sup>See Dulcinea Grantham, *How Does the EU Data Privacy Directive Safe Harbor Affect US Privacy Practices*, 5(3) J. OF INTERNET L. 18, 18 (2001). Grantham notes Europe "has taken a very activist role in the regulation of privacy online." Privacy is a fundamental human right and "as a result of this approach, Europe legislates to ensure the protection of privacy rights."

<sup>61</sup>Steven J. Kobrin, *Safe Harbours Are Hard to Find: The Trans-Atlantic Data Privacy Dispute, Territorial Jurisdiction and Global Governance*, 30 REV. INT'L STUD. 111, 116 (2004). Kobrin explains "The American emphasis on the market is evident even in the context of regulation.

view privacy as more of a fundamental human right.)<sup>62</sup>For example, in March 2017, the United States Senate voted to overturn rules passed in 2016 by the Federal Communications Commission (FCC) that required Internet providers to obtain users' permission before sharing and selling information such as the websites users visit.<sup>63</sup>

## V. Changing Standards of Privacy

Questions surrounding legal rights in electronic communications began to be addressed by the Supreme Court in the *Olmstead* case.<sup>64</sup> Mr. Olmstead was suspected of violating the National Prohibition Act. The F.B.I. garnered evidence against him by wiretapping (without judicial approval) phones near his home and in the basement of his building for several months. The Court held neither Mr. Olmstead's Fourth nor Fifth Amendment rights were violated and that mere wiretapping does not constitute a search and seizure under the Fourth Amendment. Instead, the Fourth Amendment refers to an actual physical examination of papers, effects or a home – not conversations.<sup>65</sup>

In 1967, *Katz* reversed *Olmstead*.<sup>66</sup>Mr. Katz was suspected of transmitting gambling information via interstate phone calls in violation of 18 U.S.C. §1084.F.B.I. agents placed a recording device on a phone booth Mr. Katz used and evidence gathered from those calls was used at trial. The Supreme Court held the eavesdropping violated Mr. Katz's privacy under the Fourth Amendment; that the Fourth Amendment extends not just to tangible items as *Olmstead* asserted, but to the recording of oral statements; and that a warrant should have been authorized in advance.<sup>67</sup> The concept of the Fourth Amendment protection of "people, not places"<sup>68</sup> has implications on searches for evidence on IoT devices. Professor Steven C. Bennett noted in a work regarding right to be forgotten legislation, "[g]iven the breadth of developments in technology and usage of the Internet, and given the increasing globalization of Internet-based commerce, changes in substantive standards for privacy appear almost inevitable."<sup>69</sup>

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Senator Hollings cast the need for The Online Privacy Act (S.2201) in terms of strong pre-emption [to give business the certainty it needs in the face of conflicting state standards], promoting consumer confidence and bolstering online commerce, and preventing consumer fears from stifling the Internet as a consumer medium. In contrast, the European approach to privacy puts the burden of protection on society rather than the individual. Privacy is considered to be a fundamental or natural right which is inalienable, and comprehensive systems of social or communitarian protection take the form of explicit statutes accompanied by regulatory agencies to oversee enforcement. It is the protection of the rights of citizens or 'data subjects' rather than consumers or users that is of concern."

<sup>62</sup> Bob Sullivan, *'La Difference' Is Stark in EU, U.S. Privacy Laws*, NBC News (Oct. 19, 2006), [http://www.nbcnews.com/id/15221111/ns/technology\\_and\\_science-privacy\\_lost/t/la-difference-stark-eu-us-privacy-laws/#.WNGbiRIrJmA](http://www.nbcnews.com/id/15221111/ns/technology_and_science-privacy_lost/t/la-difference-stark-eu-us-privacy-laws/#.WNGbiRIrJmA).

<sup>63</sup> Jacob Kastrenakes, *US Senate Votes to Let Internet Providers Share Your Web Browsing History Without Permission*, THE VERGE (March 23, 2017), <http://www.theverge.com/2017/3/23/15026666/senate-broadband-privacy-rules-congressional-review-act-fcc-vote>.

<sup>64</sup> *Olmstead v. United States*, 277 U.S. 438 (1928).

<sup>65</sup> *Id.* at 466.

<sup>66</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>67</sup> *Id.* at 347.

<sup>68</sup> *Id.* at 351.

<sup>69</sup> Steven C. Bennett, *The "Right to be Forgotten": Reconciling EU and US Perspectives*, 30 BERKELEY J. INT'L L. 161 (2012).

Apple CEO Tim Cook is known for his pro-privacy stance saying, “Privacy is a fundamental human right. . . . If those of us in positions of responsibility fail to do everything in our power to protect the right of privacy, we risk something far more valuable than money, we risk our way of life.”<sup>70</sup>Cook’s views garnered international headlines in February 2016 when he refused an F.B.I. request to unlock the iPhone of San Bernardino shooter Syed Rizwan Farook.<sup>71</sup> Privacy and security are issues that have caught the attention of FTC and FCC. In May 2016, both sent letters of inquiry to several mobile device manufacturers including Apple, Inc., Google, Inc., and LG Electronics USA, Inc., about policies regarding security and vulnerability issues of their devices.<sup>72</sup>

IoT specifically generates several privacy risks because of the data that is transferred and stored. According to the FTC, fewer than 10,000 households with IoT devices can produce 150 million discrete data points a day which breaks down to roughly one data point every six seconds per household.<sup>73</sup>

Solove submitted that all of the data gathered from an individual, while seemingly harmless or perhaps not as harmful when collected in isolation, could become a challenging privacy issue when it is aggregated. Imagine data from financial, educational, medical and other records about one person that could be combined and analyzed by third parties, from marketers to employers to the government.<sup>74</sup>What if this information is gathered by IoT devices and aggregated, then shared with third parties who make decisions based on that data – everything from whether or not to offer someone a job, health insurance, or a home loan? This kind of consumer information is being “scraped, sorted and warehoused” with few formal regulations.<sup>75</sup> And the borders among security, privacy and the law are unclear.<sup>76</sup>

Some technology companies are taking it upon themselves to protect consumers. Microsoft, for example, is implementing enhanced encryption mechanisms. And some companies are purposefully not retaining the encryption keys to unlock the data in case they are asked to do so via a court order.<sup>77</sup>

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<sup>70</sup>*Examining the EU Safe Harbor Decision and Impacts for Transatlantic Data Flows: Hearing Before the Subcomms. on Commerce, Manufacturing, and Trade & Communications and Technology H. Comm. on Energy & Commerce*, 114th Cong. 18 (2015) (statement of Marc Rotenberg, President, EPIC, Adjunct Professor, Georgetown Law)(quoting Tim Cook), <https://epic.org/privacy/intl/schrems/EPIC-EU-SH-Testimony-HCEC-11-3-final.pdf>.

<sup>71</sup> Dave Lee, *Apple Boss Tim Cook Hits Back at F.B.I. Investigation*, BBC NEWS(Feb. 25, 2016), <http://www.bbc.com/news/technology-35656553>.

<sup>72</sup> Federal Trade Commission, *FTC To Study Mobile Device Industry’s Security Update Practices*, FED. TRADE COMMISSION (May 9, 2016), <https://www.ftc.gov/news-events/press-releases/2016/05/ftc-study-mobile-device-industrys-security-update-practices>.

<sup>73</sup> Alexander H. Tran, *The Internet of Things and Potential Remedies in Privacy Tort Law*, 50 COLUM. J.L. & SOC. PROBS. 263, 268 (2017).

<sup>74</sup> Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1185 (2002).

<sup>75</sup> Britton, *supra* note 3, at 5.

<sup>76</sup>MuzamilRiffat, *Contextualizing the Blurring Boundaries of Information Security, Privacy, and Legal Aspects*, 15 INFO. SYS. SEC. ASS’N J., no. 2, 2017, at 24.

<sup>77</sup>*Id.*

Amazon's own policy states: "We release account and other personal information when we believe release is appropriate to comply with the law."<sup>78</sup> So, why did it take such a pro-privacy stance in the *Bates* case? Some concluded Amazon believed the warrant was overbroad.<sup>79</sup> The existing regulations such as the ECPA<sup>80</sup> are not clear regarding IoT devices such as Amazon's Echo.

In 2014, data from a Fitbit was used as evidence in a personal injury lawsuit.<sup>81</sup> In the *Bates* case, law enforcement officials not only went after the data from Amazon's Echo device, they also warrantlessly obtained data from his smart water meter. This data revealed he used 140 gallons of water between 1 a.m. to 3 a.m. the night of the alleged murder, which they surmise was used to wash off bloodstains. Bates claims the clock on the meter was incorrect and that the water was primarily used to fill the hot tub.<sup>82</sup> Did the act of obtaining this data without a warrant violate Mr. Bates's Fourth Amendment rights?

## VI. A New "Reasonable Expectation of Privacy"

The Fourth Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>83</sup>

If conduct is in public, out in the open, it is not protected by the Fourth Amendment; there is no "reasonable expectation of privacy," and law enforcement can have access to anything in public. Entering a home triggers the Fourth Amendment protections. This inside/outside distinction works well until the Internet is brought into the equation.<sup>84</sup> The inside/outside distinction breaks down as data is transferred to servers and the cloud. This also affects the wording of the warrants themselves. A search warrant should specifically describe the physical space to be searched.<sup>85</sup> These limits become more difficult to define when the data a law enforcement official may be seeking is not physically located in the home.

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<sup>78</sup> *Amazon Privacy Notice*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=468496> (last visited Oct. 4, 2017).

<sup>79</sup> Jay Stanley, *The Privacy Threat from Always-On Microphones Like the Amazon Echo*, ACLU (Jan 13, 2017), <https://www.aclu.org/blog/free-future/privacy-threat-always-microphones-amazon-echo>.

<sup>80</sup> "The Electronic Communications Privacy Act and the Stored Wire Electronic Communications Act are commonly referred together as the Electronic Communications Privacy Act (ECPA) of 1986. The ECPA updated the Federal Wiretap Act of 1968, which addressed interception of conversations using 'hard' telephone lines, but did not apply to interception of computer and other digital and electronic communications." 18 U.S.C. § 2510-22; *supra* note 52.

<sup>81</sup> Parmy Olson, *Fitbit Data Now Being Used in the Courtroom*, FORBES (Nov. 16, 2014), <https://www.forbes.com/sites/parmyolson/2014/11/16/fitbit-data-court-room-personal-injury-claim/>.

<sup>82</sup> Stanley, *supra* note 79.

<sup>83</sup> U.S. CONST. amend. IV.

<sup>84</sup> Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005 (2010).

<sup>85</sup> *Id.* at 1014.

The Third Party Doctrine is also implicated in this situation. A strict reading of the Third Party Doctrine would be interpreted: “The Fourth Amendment would not guarantee the privacy of any personal data held by any private company. This would include virtually all records of electronic communications, web browsing activity, and cloud data, to name just a few examples.”<sup>86</sup> This interpretation led to the adoption of some third-party protecting legislation such as the ECPA.<sup>87</sup> But the ECPA, adopted over 30 years ago, is ill-suited to the technology challenges associated with the cloud and should be updated to protect consumer privacy in IoT devices.

Professor Orin Kerr argues that the Third Party Doctrine can hold up under new technological devices such as IoT and that, without the ability to get information and data from third parties, law enforcement would have a monumentally difficult task in obtaining search warrants in criminal investigations. In other words, “the effect would be a Catch-22: The police would need probable cause to observe evidence of the crime, but they would need to observe evidence of the crime first to get probable cause.”<sup>88</sup>

However, another concern that goes against the current Third Party Doctrine is the possible distrust and chilling effect among consumers, companies and the government due to information-sharing practices. One need only look at the Edward Snowden revelations, including the ability of the National Security Agency (NSA) to collect large amounts of information from Internet companies like Facebook, Microsoft and Yahoo, to see the potential dangers of seemingly private information ending up in the hands of the government.<sup>89</sup>

The Fourth Amendment also guarantees the right of security in individuals’ “effects.” “Effects” typically include personal property. Is IoT data included in “effects”? The *Riley v. California* case could provide some guidance.<sup>90</sup> *Riley* was a criminal case in which a smartphone of a suspect was found on his person at the time of his arrest, containing incriminating evidence. The issue before the court was whether the data from the phone was admissible. The Supreme Court, in a unanimous decision, held the data could not be used without a search warrant, as it was in “the cloud” and not on the person. Therefore, the data from the phone that resided on the cloud was included within the scope of “effects” as defined by the Fourth Amendment. Under that line of reasoning, data from an Amazon Echo device would also be included within the scope of “effects” definition of the Fourth Amendment.

The privacy questions in the *Bates* case also bear some similarity to *Kyllo v. United States*.<sup>91</sup> In *Kyllo*, a thermal-imaging device was used to scan a home from the outside to determine if heat patterns were consistent with high-intensity lamps typically

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<sup>86</sup>Michael W. Price, *Rethinking Privacy: Fourth Amendment “Papers” and the Third-Party Doctrine*, 8 J. NAT’L L. & POL’Y 247, 265 (2016).

<sup>87</sup>*Id.*

<sup>88</sup> Kerr, *supra* note 84, at 575.

<sup>89</sup>Sophie Stalla-Bourdillon, ‘Safe Harbour’ Court Ruling Could Prevent US Firms from Reaching European Users, THE CONVERSATION (April 20, 2015), <https://theconversation.com/safe-harbour-court-ruling-could-prevent-us-firms-from-reaching-european-users-39649>; Shane Darcy, *Battling for the Rights to Privacy and Data Protection in the Irish Courts*, 31 UTRECHT J. INT’L & EUR. L., no. 80, 2015, at 131.

<sup>90</sup>*Riley v. California*, 134 S.Ct. 2473 (2014).

<sup>91</sup>*Kyllo v. United States*, 533 U.S. 27 (2001).

used to grow marijuana. The issue: did the use of such a device without a warrant comprise an unconstitutional search in violation of the Fourth Amendment? A split Supreme Court answered yes, the surveillance was a search and the information should be protected as it came from within the house.<sup>92</sup> Extending that line of reasoning to the *Bates* case, the wake words and other communication comes from within the home and should similarly be protected.

The Supreme Court has held that a person has a reasonable expectation of privacy in property located inside a person's home.<sup>93</sup> While courts have found a reasonable expectation of privacy regarding computers under the control of a person in a home, they are less likely to find that expectation when files or documents are made more "available." For example, a defendant did not have a legitimate expectation of privacy in the contents of a shared drive of his laptop while it was connected to a network.<sup>94</sup>

In Apple's fight with the F.B.I. over the encrypted iPhones of the San Bernardino shooting suspects, the F.B.I. argued an old law known as the All Writs Act (AWA)<sup>95</sup> gave it the legal authority to circumvent the passcode of the iPhones to execute a search warrant. The power of the AWA allows a federal court to issue a writ that would be needed to help another order that has already been issued and can extend to parties who could be in a position to prevent implementation of an order or the administration of justice. Courts must first determine if any other law applies. If it does, the AWA will not be used. Courts regularly employ the AWA to compel third parties to help the government in criminal cases.

In terms of using the AWA to compel third parties to provide assistance or comply with a warrant, the 1977 case *United States v. New York Telephone Co.*<sup>96</sup> is often cited as the leading authority. The Supreme Court held that a district court was correct in issuing an order requiring a telephone company to give assistance to the F.B.I. in installing a pen register ("A device that decodes or records electronic impulses, allowing outgoing numbers from a telephone to be identified")<sup>97</sup> to record phone numbers dialed on two phone lines. The F.B.I. was attempting to gather evidence about an illegal gambling enterprise. The court found the phone company's assistance was necessary and it was not "so far removed" from the original investigation.<sup>98</sup>

In the Apple case, the U.S. District Court for the Eastern District of New York questioned the applicability of the *New York Telephone Co.* case and the AWA. Judge James Orenstein reasoned the AWA did not authorize the relief the F.B.I. was seeking because Congress had contemplated legislation that would have mandated governmental access to encrypted devices but did not adopt that legislation. Therefore, to grant the F.B.I. request would be tantamount to legislating from the bench and infringe on

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<sup>92</sup>*Id.* at 35.

<sup>93</sup>See *Payton v. New York*, 445 U.S. 573, 589-90 (1980).

<sup>94</sup>*United States v. King*, 509 F.3d 1338, 1341-42 (11th Cir. 2007).

<sup>95</sup>28 U.S.C. §1651(a) "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

<sup>96</sup> *United States v. N.Y. Tel. Co.*, 434 U.S. 159 (1977).

<sup>97</sup>*Pen Register*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Pen+Register> (last visited Oct 4, 2017).

<sup>98</sup>*N.Y. Tel. Co.*, 434 U.S. at 174.

separation of powers.<sup>99</sup> The judge also ruled Apple was too far removed from the original investigation and that the government failed to show Apple's help in unlocking the iPhone was a necessity.<sup>100</sup> This decision "stripped the government of an investigative tool upon which it had routinely relied since as early as 2008."<sup>101</sup>

As attorney and professor Alan Rozenshtein describes this new age, ushered in by the Apple v. F.B.I. fight; it "previews the likely new normal: a contentious relationship between the companies that manage our digital bodies and the government that protects our physical ones. Surveillance intermediaries like Apple . . . have the incentives and means to meaningfully constrain government surveillance."<sup>102</sup>

When it comes to sharing information over a computer with third parties, the Office of Legal Education for United States Attorneys offers this guidance, which hinges on who possesses the data:

Individuals who retain a reasonable expectation of privacy in stored electronic information under their control may lose Fourth Amendment protections when they relinquish that control to third parties. For example, an individual may offer a container of electronic information to a third party by bringing a malfunctioning computer to a repair shop or by shipping a floppy diskette in the mail to a friend. Alternatively, a user may transmit information to third parties electronically, such as by sending data across the Internet, or a user may leave information on a shared computer network. When law enforcement agents learn of information possessed by third parties that may provide evidence of a crime, they may wish to inspect it. Whether the Fourth Amendment requires them to obtain a warrant before examining the information depends in part upon whether the third-party possession has eliminated the individual's reasonable expectation of privacy.<sup>103</sup>

So, what is the reasonable expectation of privacy in IoT devices? While the Fourth Amendment protects the inviolability of the home, it may not apply to IoT information: information shared with third parties.<sup>104</sup> Without new regulations to meet the privacy challenges brought by the age of IoT, we could be faced with "a state of pervasive 24/7

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<sup>99</sup> John L. Potapchuk, *A Second Bite at the Apple: Federal Courts' Authority to Compel Technical Assistance to Government Agents in Accessing Encrypted Smartphone Data Under the All Writs Act*, 57 B.C. L. REV. 1403, 1432 (2016).

<sup>100</sup>*Id.* at 1434.

<sup>101</sup>*Id.* at 1403.

<sup>102</sup> Alan Z. Rozenshtein, *Surveillance Intermediaries*, 70 STAN. L. REV. (forthcoming 2018).

<sup>103</sup>H. MARSHALL JARRETT, ET AL., *SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS*, (Off. of Legal Educ. For U.S. Att'ys, 2009), [https://law.ku.edu/sites/law.ku.edu/files/docs/media\\_law/Searching\\_Seizing\\_Computers\\_and\\_Obtaining\\_Electronic\\_Evidence\\_in\\_Criminal\\_Investigations.pdf](https://law.ku.edu/sites/law.ku.edu/files/docs/media_law/Searching_Seizing_Computers_and_Obtaining_Electronic_Evidence_in_Criminal_Investigations.pdf).

<sup>104</sup>*See* Smith v. Maryland, 442 U.S. 735 (1979) (holding there was no legitimate expectation of privacy in information voluntarily turned over to a third party); United States v. Miller, 425 U.S. 435, 443 (1976) ("The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.").

surveillance—a state in which people know that the government may be watching or tracking them at any time.”<sup>105</sup>

A device like the Amazon Echo is essentially a microphone transmitting data to third parties, “so reasonable privacy doesn’t exist. Under the Fourth Amendment, if you have installed a device that’s listening and is transmitting to a third party, then you’ve waived your privacy rights under the Electronic Communications Privacy Act,” said Joel Reidenberg, director of the Center on Law and Information Policy at Fordham Law School in New York City.<sup>106</sup> Privacy attorney Ted Claypoole observed,

There will come a time . . . where . . . it would be unreasonable to expect privacy when we know that our [devices] were all taking information about us and sending it . . . to a third party where it could be subpoenaed by police. When this happens, our current privacy protection regime falls apart, because it is based on the court’s ability to identify a reasonable expectation of privacy. So we will either have **no** legally protectable privacy at all anywhere, or the U.S. Supreme Court will need to acknowledge an entirely new, and probably more objective standard to protect privacy under the U.S. Constitution.<sup>107</sup>

In 2012, the Supreme Court of the United States presaged a potential reevaluation of digital privacy.<sup>108</sup> Justice Sonia Sotomayor’s concurring opinion in *United States v. Jones*, a case dealing with a warrantless tracking device placed on a vehicle, focused on the practicality of the Third Party Doctrine in today’s technology-rich society:

It may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. . . . This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. . . . I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a

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<sup>105</sup> Jamie Lee Williams, *Privacy in the Age of the Internet of Things*, 41HUM. RTS., No. 4, 14, at 22 (2016).

<sup>106</sup> Elizabeth Weise, *Hey, Siri and Alexa: Let’s Talk Privacy Practices*, USA TODAY (March 2, 2016), <http://www.usatoday.com/story/tech/news/2016/03/02/voice-privacy-computers-listening-rsa-echo-siri-hey-google-cortana/81134864/>.

<sup>107</sup> Tom Popomaronis, *Your Honor, I’d Like to Call My Next Witness—Amazon Echo*, INC., at ¶ 4 (Jan. 4, 2017), <http://www.inc.com/tom-popomaronis/your-honor-id-like-to-call-my-next-witness-amazon-echo.html>.

<sup>108</sup> See *United States v. Jones*, 132 S.Ct. 945 (2012).

limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.<sup>109</sup>

While no other member of the Court signed on to her concurrence, when the Framers of the Bill of Rights wrote of “persons, houses, papers, and effects,”<sup>110</sup> they did not envision the cloud and IoT devices. Although Justice Samuel Alito wrote in the same case that “new technology may provide increased convenience or security at the expense of privacy” and that the public may not welcome the loss of privacy, he suspects they will find it to be “inevitable.”<sup>111</sup> This is a disturbing response that diminishes the importance of privacy rights, that assumes the public will casually accept surveillance, and that fails to recognize the increasing unease Americans feel about the privacy, or lack thereof, of their information. A recent Pew Research Center Survey of Americans’ attitudes about privacy demonstrate mounting anxiety about the use and misuse of their personal data, with the majority of respondents arguing for a limit on the amount of time organizations retain data about the user’s activities and communications, and for additional restrictions on government surveillance programs.<sup>112</sup>

## VII. Conclusion

Is IoT just a fad? Perhaps. But, it is currently one of such importance that Congress has set up an entire committee to study the issues involved.<sup>113</sup> While the scope of stakeholders and concerns implicated is vast, the focus here is on law enforcement and the ability to obtain information from an IoT device. The data from devices such as Amazon’s Echo, pacemakers, Fitbits and other devices are increasingly being turned over to authorities to be used in legal proceedings.<sup>114</sup> While all of the data collected from these devices can be a boon to law enforcement, does the public realize when they bring a device such as an Echo into their home they are forgoing their privacy, that they are essentially under constant surveillance? Most likely, they do not.<sup>115</sup>

The Fourth Amendment fails to protect privacy when it comes to IoT devices. A new framework for a reasonable expectation of privacy is needed in light of these developments in technology. As Justice Sotomayor noted in her concurrence in *Jones*, the Third Party Doctrine no longer functions properly in this current structure. This is an

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<sup>109</sup> *Id.* at 957 (Sotomayor, J., concurring).

<sup>110</sup> U.S. CONST. amend. IV.

<sup>111</sup> *Jones*, 132 S.Ct. at 962 (Alito, J., concurring).

<sup>112</sup> Mary Madden & Lee Rainie, *Americans’ Attitudes About Privacy, Security and Surveillance*, PEW RESEARCH CENTER (May 20, 2015), <http://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/>.

<sup>113</sup> See David Kravets, *Internet of Things: There’s Now a US Congressional Committee for That*, ARS TECHNICA (Jan. 13, 2015), <http://arstechnica.com/tech-policy/2015/01/internet-of-things-theres-now-a-us-congressional-committee-for-that/>.

<sup>114</sup> Rob Lever, *Secrets from Smart Devices Find Path to US Legal System*, PHYS ORG (March 19, 2017), <https://phys.org/news/2017-03-secrets-smart-devices-path-legal.html> (“An Ohio man claimed he was forced into a hasty window escape when his house caught fire last year. His pacemaker data obtained by police showed otherwise, and he was charged with arson and insurance fraud. In Pennsylvania, authorities dismissed rape charges after data from a woman’s Fitbit contradicted her version of her whereabouts during the 2015 alleged assault.”).

<sup>115</sup> Gerald Sauer, *A Murder Case Tests Alexa’s Devotion to Your Privacy*, WIRED, at ¶ 19 (Feb. 28, 2017), <https://www.wired.com/2017/02/murder-case-tests-alexa-devotion-privacy/> (“Millions of people are putting digital assistants in their lives with no clue about the potential havoc this Trojan horse could bring.”).

area that is ripe for transformation. In addition, more companies like Amazon need to endeavor to advance consumer privacy rights, which are gradually being leveled by an overbroad Third Party Doctrine.

There are many factors working against such a change. The prevailing political attitude towards privacy as a commodity in the United States means as long as consumer data is viewed as something simply of monetary value, many companies such as Verizon, Comcast and AT&T will buy, sell and collect the data rather than lobby for stronger privacy regulations.<sup>116</sup> The fragmented state of current privacy laws also does not bode well for a strong, unified approach to new privacy regulations.

Globally, the United States may also be forced to deal more strictly with these issues as Privacy Shield and other data sharing agreements essentially compel companies to treat privacy as more of a fundamental human right. Domestically, the Supreme Court, having just welcomed a new justice, may have opportunities to address Fourth Amendment and Third Party Doctrine issues. Will they follow Justice Sotomayor's much hailed concurrence?<sup>117</sup> Until the Court addresses those kinds of cases, uncertainty reigns. So, when you bring an Echo into your home, beware: its reverberations can potentially be heard well beyond the walls of your domicile.

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<sup>116</sup> Cecilia Kang, *Congress Moves to Strike Internet Privacy Rules from Obama Era*, N.Y. TIMES (March 23, 2017), [https://www.nytimes.com/2017/03/23/technology/congress-moves-to-strike-internet-privacy-rules-from-obama-era.html?\\_r=0](https://www.nytimes.com/2017/03/23/technology/congress-moves-to-strike-internet-privacy-rules-from-obama-era.html?_r=0).

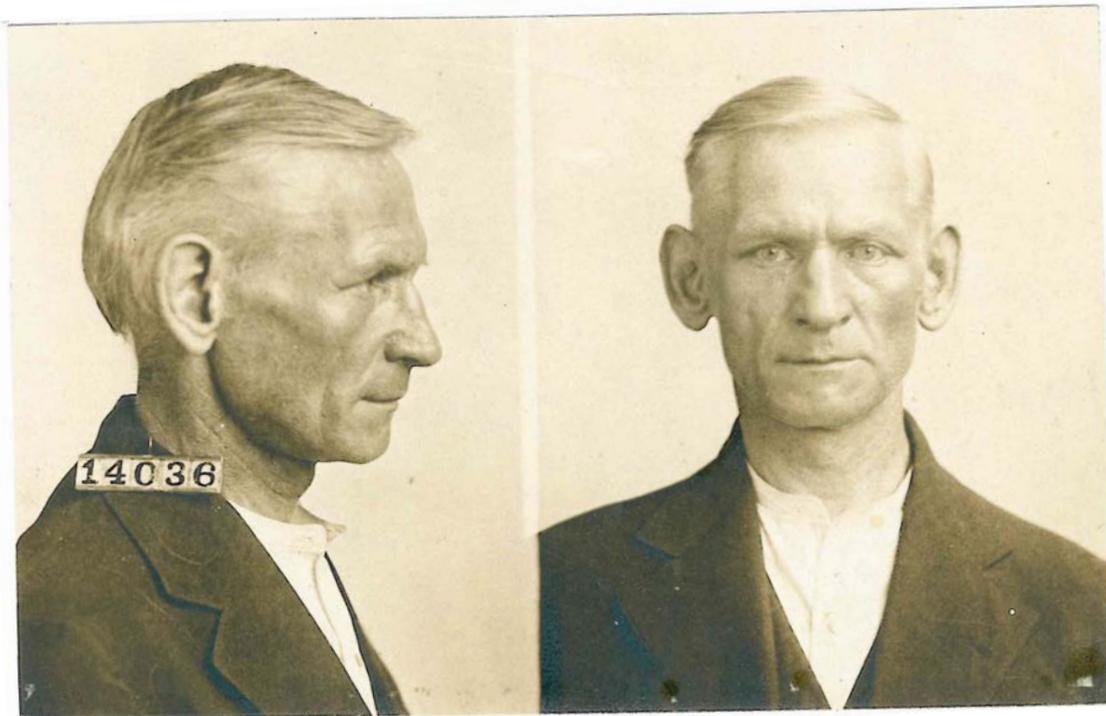
<sup>117</sup> National Security Law Brief, *The Third Party Records Doctrine in the Digital Age*, AM. UNIV. WASH. COLLEGE OF LAW (Jan. 6, 2016), <http://nationalsecuritylawbrief.com/the-third-party-records-doctrine-in-the-digital-age/>; Lynn Oberlander, *Can Justice Sotomayor Stop the N.S.A.?* NEW YORKER, at ¶ 6 (June 7, 2013), <https://www.newyorker.com/news/daily-comment/can-justice-sotomayor-stop-the-n-s-a> (“Sotomayor has joined a growing number of jurists who argue that the law may not have kept up with the huge increase in available information.”).

**THE ESPIONAGE CONVICTION OF KANSAS CITY  
EDITOR JACOB FROHWERK:  
“A CLEAR AND PRESENT DANGER” TO THE UNITED  
STATES**

KENNETH WARD\* AND AIMEE EDMONDSON\*\*

*In 1918, German-language newspaper editor Jacob Frohwerk was convicted under the Espionage Act for editorials critical of World War I. He appealed to the Supreme Court, where his case was considered alongside landmark First Amendment cases like Schenck, Debs and Abrams. Frohwerk was sentenced to ten years in Leavenworth for his editorials in the Missouri Staats-Zeitung. Despite the impact of the case, Frohwerk has been overlooked by legal scholars and journalism historians. This historical analysis utilizes archival documents, newspaper articles, and court and prison records, providing the first thorough consideration of Frohwerk’s career, trial, and lasting impact.*

**Keywords:** Espionage Act, incitement, Frohwerk, German-language newspapers, wartime dissent



**Figure 1.** Jacob Frohwerk's mugshot from his prison records.<sup>1</sup>

## I. Introduction

Jacob Frohwerk did not have to go far to get to the U.S. Penitentiary in Leavenworth, Kansas, on May 31, 1919. He had been to the town of Leavenworth countless times before, traveling the thirty miles from his home in Kansas City to speak to Germans there as editor of the *Kansas Staats-Zeitung* and *Missouri Staats-Zeitung* and a leader of the Kansas branch of the German-American Alliance. He had visited the city of seventeen thousand residents, with its substantial German American population, frequently over the past five years, since the start of World War I, to preach neutrality to a receptive population. This time, however, there would be no reception of friends and allies waiting for him. Once ushered inside the penitentiary, Frohwerk made his way through the gauntlet awaiting all new prisoners. He checked in the few possessions he had brought along: his watch, chain, and charm, a pair of cufflinks and collar buttons, a collar and tie, his glasses, and \$5.49.<sup>2</sup> A brief physical examination turned up nothing out of the ordinary. Frohwerk stood five feet, eight-and-one-half inches tall, weighed 132 pounds, smoked but did not drink, and reported having broken four ribs on his right side earlier in life.<sup>3</sup> This was not the last physical examination he would receive from doctors during his time at Leavenworth, as he would return to the prison hospital only four days later to spend a week undergoing treatment for neurasthenia, or nervosa, likely a response to the shock of his imprisonment.<sup>4</sup> On this day, however, Frohwerk would be taken to his prison cell, B-175, the place he would call home as he served out a ten-year prison sentence for violating the Espionage Act of 1917 for anti-war editorials he published in his newspaper.<sup>5</sup>

Frohwerk's U.S. Supreme Court case was momentous in solidifying federal law in locating the boundary between protected and unprotected speech in the context of national security during World War I. It often appears in the legal historical literature on the First Amendment in the same paragraphs as the famous cases of Charles Schenck, Eugene Debs, and Jacob Abrams, all of whom were convicted under the Espionage Act of 1917 for their anti-war rhetoric.<sup>6</sup> The high court upheld all four cases in 1919. *Schenck* was the first, followed by Debs and Frohwerk on the same day, with Justice Oliver Wendell Holmes writing all three opinions. Abrams was decided later that year. While *Schenck*, *Debs*, and *Abrams* have been widely researched by legal and journalism scholars, *Frohwerk* has received scant attention, likely because the newspapers he edited, the *Kansas Staats-Zeitung* and the *Missouri Staats-Zeitung*, were published primarily in German and because information on Frohwerk the man has been difficult to collect.<sup>7</sup> As Lucas Powe Jr. wrote in *The First Estate and the Constitution: Freedom of*

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<sup>1</sup> Photo of Jacob Frohwerk, prisoner record of Jacob Frohwerk, National Archives at Kansas City.

<sup>2</sup> Intake form, prisoner #14036, Frohwerk (May 31, 1919)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>3</sup> Physician's Examination of Prisoners, prisoner #14036, Jacob Frohwerk(May 28, 1919 [date incorrect])(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>4</sup> Hospital record, prisoner #14036, Jacob Frohwerk (June 3, 1919)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>5</sup>*Id.*; The Espionage Act of 1917, ch. 30, title I, §3, 40 Stat. 219(current version at 18 U.S.C. §2388 (2017)).

<sup>6</sup>*Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616, 630 (1919).

<sup>7</sup> The *Kansas Staats-Zeitung* was later published as the *Neue Kansas Staats-Zeitung*. Both uses in this study refer to the same newspaper.

*the Press in America*, Frohwerk's case was sandwiched between *Schenck* and Debs, "involving a German-language newspaper in Missouri and a defendant so obscure that even his position with the newspaper is unknown."<sup>8</sup> Indeed, Frohwerk and his case have been relegated to a footnote in virtually all of the legal historical literature on the evolution of the modern interpretation of the First Amendment.

The following research seeks not only to make Frohwerk's position with the *Missouri Staats-Zeitung* known, but to properly frame Frohwerk and his case within the context of journalism history and media law as has not been done before. It does so by drawing on a wealth of primary and secondary documents that detail Frohwerk's activities in German American and newspaper circles in the state of Kansas and Kansas City. Using archival and vital records, newspaper articles, and court documents, this research follows his arrival in the United States from his native Germany and establishes him in Kansas City, where he helped found the *Kansas Staats-Zeitung* and came to lead such organizations as the Kansas chapter of the German-American Alliance. Later, it contextualizes his situation in the larger field of German-language newspapers in the United States before analyzing the editorials for which he was convicted under the Espionage Act of 1917. It also seeks to better understand what Frohwerk said in the twelve anti-war editorials that so raised the ire of the U.S. government. It concludes by highlighting his experience at the U.S. Penitentiary in Leavenworth using prison records and newspaper articles in which he describes his time there, briefly reviewing what is known about his life following his release. It also explains some lasting ramifications of his case, perhaps a cautionary tale about the restrictions of government speech during wartime, as well as treatment of immigrants, noting that even the federal prosecutor on the Frohwerk case later called it an unjustified conviction.

While information is sparse on the man and his work, this is not completely uncharted territory. Some scholars have taken steps to explore Frohwerk in the context of his Supreme Court case. Thomas Healy, for example, provides the most substantial consideration in the literature available of Frohwerk as an editor, noting the Department of Justice was investigating Frohwerk and Carl Gleeser, publisher the *Missouri Staats-Zeitung*, months before charges were brought against the two.<sup>9</sup> The focus of Healy's book is Justice Oliver Wendell Holmes Jr. and his consideration of several First Amendment cases heard during his tenure on the Supreme Court, and it does much to situate the case legally. But it stops well short of a comprehensive review of Frohwerk the man, his career or the particulars of his case.<sup>10</sup> Thus, while First Amendment scholars recognize the gravity of *Frohwerk* and have taken steps to understand it in the context of the Espionage Act, a detailed investigation of Frohwerk, the editor and his writings, trial, and post-conviction life, remains to be completed.

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<sup>8</sup>LUCAS A. POWE JR., *THE FIRST ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 70 (1991).

<sup>9</sup>THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* 84-85 (2013).

<sup>10</sup> Another study, completed in 2016, provides detailed analysis of the content of the *Missouri Staats-Zeitung* in 1917. See Christopher Hirsch, *Fighter for Personal Freedom and Advocate of Germanness: Carl Gleeser and Jacob Frohwerk's Missouri Staats-Zeitung during the First World War* (unpublished manuscript)(on file with the authors). Hirsch translated the German text into English as part of his analysis.

## II. German Leader of the West

Jacob Frohwerk was born around 1865 in Germany and immigrated to the United States in 1882.<sup>11</sup> He moved to Kansas within three years of arriving in the United States and was living in Kansas City no later than 1885, when he married Henrietta W. Frohwerk on October 8.<sup>12</sup> Henrietta, whose family name was Frohwerk even before her marriage to Jacob, had immigrated to the United States in 1869 with her parents, Gottfried and Wilhelmina.<sup>13</sup> Jacob became a naturalized U.S. citizen October 3, 1888, at age 24, and he and Henrietta had a daughter, Clara, soon thereafter.<sup>14</sup> Frohwerk left few clues as to his activities during his first decade in the United States, and it is unclear what jobs he held through the early 1890s. By the 1895 census, however, he was involved in newspapering, and in that year he identified himself as a reporter to the census recorder.<sup>15</sup> His newspaper was the *Kansas Staats-Zeitung*, a German-language weekly published in Kansas City, Kansas. The inaugural issue of the *Staats-Zeitung* appeared November 15, 1894, under Frohwerk's editorship. He was fluent in English as well as German, and some of his editorials in German-language newspapers were published in English, and thus likely to reach a wider audience.

While undoubtedly busy running his newspaper, Frohwerk was active in a number of cultural and political organizations by the mid-1890s, particularly groups promoting German culture. Months before launching his newspaper, he attended the state conference of the Kansas German-American League in Salina, Kansas, about 175 miles west of Kansas City. There, he lobbied the assembly to support two resolutions, one opposing women's suffrage, the other preventing the organization from endorsing the entire Democratic state ticket. Both resolutions were adopted.<sup>16</sup> The latter of the two reflects Frohwerk's support of the Republican Party during the decade, which is reflected in regional newspaper coverage of Republican Party activities. Articles identify him as a prominent member of the local party, list him as an election judge in a Republican

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<sup>11</sup>U.S. BUREAU OF THE CENSUS, *Population Schedule, Kansas City*, 1920 U.S. CENSUS, WYANDOTTE COUNTY, KANSAS, 22A, line 30 (1920) (digital image available on Ancestry.com). The passenger list for the S.S. Circassia indicates Frohwerk likely arrived in New York City on October 25 having traveled to the United States by way of Scotland. His occupation is listed in the passenger list as "clerk." Passenger list, S.S. Circassia, arrival October 25, 1882 (digital image available on Ancestry.com).

<sup>12</sup>*Population Schedule, Kansas City*, 1895 KANSAS CENSUS, WYANDOTTE COUNTY, family number 594, line 7 (1895) (digital image available on Ancestry.com); Jackson County, Missouri Marriage Certificate no. 5P-403, Frohwerk-Frohwerk (1885) (digital image available on Ancestry.com). Frohwerk lived in Illinois for an unknown period of time between his arrival in the United States and his appearance in Kansas City.

<sup>13</sup>U.S. BUREAU OF THE CENSUS, *Population Schedule, Kansas City*, 1910 U.S. CENSUS, WYANDOTTE COUNTY, KANSAS, 8B, lines 85-88 (1910) (digital image available on Ancestry.com); *Mrs. Wilhelmina Frohwerk*, KANSAS CITY GAZETTE GLOBE, Apr. 10, 1916.

<sup>14</sup> Missouri, Western District Naturalization Index, Jacob Frohwerk (Oct. 3, 1888) (digital image available on Ancestry.com); *Population Schedule, Kansas City*, 1895 KANSAS CENSUS, WYANDOTTE COUNTY, family number 594, line 9 (1895) (digital image available on Ancestry.com).

<sup>15</sup>1895 KANSAS CENSUS, WYANDOTTE COUNTY, *supra* note 14, family number 594, line 7.

<sup>16</sup>*The German League*, SALINA DAILY REPUBLICAN-JOURNAL, Sept. 5, 1894.

primary, and receiving a payment of \$150 from the Republican state central committee of Kansas.<sup>17</sup>

His loyalty to the Republican Party diminished late in the decade and vanished altogether by 1902. In August 1899, the *Ottawa Daily Republican* reprinted an editorial from the *Staats-Zeitung*, “the local German paper and a normal republican organ,” that accused the Wyandotte County Republican leadership of bossism and urged readers to vote corrupt politicians out.<sup>18</sup> The next year, in the midst of the 1900 presidential contest between William McKinley and William Jennings Bryan, Frohwerk formally shifted alliances. “We are to decide in the present campaign between English or American predominance in our country,” he said in an editorial reprinted in the *Daily Republican*, “between an Ameriban [sic] or an English financial system, between our traditional forms of republican institution and the new fangled notions of foreign conquest, between a large and expensive standing army which is a standing threat to the liberties of the people, and a government of peaceful development established and intended by the fathers of our country.”<sup>19</sup> It is tempting to read this shift as a consequence of involvement in the partisan press, which intensified during the McKinley/Bryan contests in some communities west of the Mississippi.<sup>20</sup> In this case, however, Frohwerk’s words seem genuine. Seventeen years later, Frohwerk would use similar rhetoric to oppose U.S. involvement in World War I, but with much greater consequences.

While his political inclinations changed, the extent of his community involvement did not. Frohwerk remained active in German cultural organizations throughout the 1890s and into the 1910s, eventually stepping into a leadership role in the Kansas German-American Alliance. So substantial were his efforts on behalf of German Americans that some reportedly referred to him as “our leader of the West” and “Carl Schurz the Second” after the Union Army General, German-language newspaperman, and emblem of German-Americanism.<sup>21</sup> At the same time, he participated in community groups such as the Inter-State Commercial Association, which sought to promote trade in Kansas City and encourage low freight rates.<sup>22</sup> He even found time to captain a baseball team comprised of local reporters.<sup>23</sup>

At some point, Frohwerk crossed paths with Carl Henry Gleeser, another German-American living in Kansas City, who would play a key role in the government’s case against Frohwerk. They may have become acquainted through the German culture organizations in which Frohwerk was so active. Gleeser served from 1909 through 1912 as secretary of the local Turner society, a social club for German Americans.<sup>24</sup> Just as likely, they found each other through mutual activity in local German-language newspapering. After emigrating from Germany to the United States in 1872, Gleeser

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<sup>17</sup>*The Opening Gun*, KANSAS CITY GAZETTE, Sept. 29, 1894; *Call ofr [sic] Republican County Primary Election*, KANSAS CITY GAZETTE, Feb. 28, 1895; *Statement of Expense*, LEAVENWORTH WEEKLY TIMES, Dec. 3, 1896.

<sup>18</sup>*What the Germans All Over the State Say*, OTTAWA DAILY REPUBLICAN, Aug. 28, 1899.

<sup>19</sup>*Germans for Bryan*, OTTAWA DAILY REPUBLICAN, July 25, 1900.

<sup>20</sup>Ken Ward, Section and Silver: Editorial Representations of Political Regionalism and Bimetallism in the Cripple Creek Mining District Press, 1896–1904, (2014)(unpublished master’s thesis, Wichita State University)(on file with author).

<sup>21</sup>*Jacob Frohwerk Makes Plea for Fair Neutrality*, LEAVENWORTH TIMES, June 29, 1915.

<sup>22</sup>*Inter-State Commercial Association*, KANSAS CITY GAZETTE, Sept. 6, 1902.

<sup>23</sup>*Victory for the Newspapers*, KANSAS CITY GAZETTE, Apr. 29, 1899.

<sup>24</sup>THE AMERICAN LABOR WHO’S WHO 86 (Solon de Leon, ed., 1925).

worked his way across the country, eventually making his way to California.<sup>25</sup> There he worked on both the *San Francisco Living Issues*, which he edited in 1894 and 1895, and the *San Jose New Charter*, which he edited in 1896.<sup>26</sup> His stays at both publications were brief, and by 1899 he was living in Kansas City.<sup>27</sup> Census records for 1900 indicate only that Gleeser was working as a typesetter in 1900,<sup>28</sup> but city directories connect him directly to the *Missouri Staats-Zeitung* as a printer from 1901 through 1907 under publisher Fred Gehring.<sup>29</sup> From 1904 through 1907, Gehring published both the *Missouri Staats-Zeitung* and the *Kansas Staats-Zeitung*, suggesting Frohwerk handled only the editing and not the publishing of the paper during those years. Gleeser took over publication and editorship of the *MissouriStaats-Zeitung* in 1908 and, beginning in 1910, also published the *Kansas Staats-Zeitung* (sometimes listed as the *Neue Kansas Staats-Zeitung*), a paper that in 1914 was referred to by the reporter of another newspaper as “the most influential German paper in the state.”<sup>30</sup> Frohwerk’s directory entries list him at times as editor, assistant editor, or even solicitor for the two papers, suggesting Gleeser was ultimately in control of both. Thus, the 1910s brought the two men into common enterprise, providing news to German Americans both east and west of the Missouri River in their native language.



**Figure 2.** A photograph of Jacob Frohwerk appearing in a 1913 news article.<sup>31</sup>

<sup>25</sup>U.S. BUREAU OF THE CENSUS, *Population Schedule, Llano Colony, Police Jury Ward 1*, 1930 U.S. CENSUS, VERNON PARISH, LOUISIANA, 16A, line 22 (1930)(digital image available at Ancestry.com).

<sup>26</sup>THE AMERICAN LABOR WHO’S WHO, *supra* note 24, at 86.

<sup>27</sup>*German Day at Chelsea*, KANSAS CITY GAZETTE, Oct. 9, 1899.

<sup>28</sup>U.S. BUREAU OF THE CENSUS, *Population Schedule, Kansas City, Enumeration District 101*, 1910 U.S. CENSUS, JACKSON COUNTY, MISSOURI1A, line 31 (1910)(digital image available at Ancestry.com).

<sup>29</sup>*See, e.g.*, HOYE’S CITY DIRECTORY OF KANSAS CITY, MO. 399, 412 (Hoye Directory Company, 1901).

<sup>30</sup>THE AMERICAN LABOR WHO’S WHO, *supra* note 24, at 86; 1910 KANSAS CITY DIRECTORY 604 (Gate City Directory Co., 1910); *Picnic Was a Big Success*, GREAT BEND TRIBUNE, July 27, 1914.

<sup>31</sup> Photo of Jacob Frohwerk, LEAVENWORTH WEEKLY TIMES, Nov. 20, 1913.

Frohwerk's editorial flair caused a stir on multiple occasions, typically in connection to two causes against which he regularly wrote: corruption and temperance. As already discussed, Frohwerk took the perceived bossism of the Republican party to task, criticizing political patronage and a ring of "a half dozen schemers" who were controlling local Republican politics.<sup>32</sup> More than a decade later, in 1914, he wrote an editorial drawing on a similar theme, accusing the assistant chief of police in Kansas City of appointing city employees who did not have required credentials and receiving money from a saloon in exchange for allowing drunk patrons to find their way home without police interference.<sup>33</sup> In that case, his writings earned him a visit from a police officer who was sent to escort him to the assistant chief of police's office to discuss the matter. Frohwerk declined to cooperate and, with no warrant or other legal means of compelling Frohwerk to oblige, the officer left him alone and the matter was dropped.<sup>34</sup>

This was one of several times Frohwerk made news for his editorials and lobbying efforts against alcohol prohibition, which was in effect in Kansas from 1881 until 1937. At times, he focused on the crime and corruption brought about by driving alcohol underground, actively taking part in attempts to close illegal booze "joints."<sup>35</sup> At other times, he aimed directly at legalization. In 1895, for example, he circulated around the Statehouse in Topeka a petition signed by 3,500 prohibition opponents.<sup>36</sup> Later, Frohwerk would lead a group supporting an independent liberal ticket of anti-prohibition candidates, proclaiming the group was "simply sick and tired of prohibition."<sup>37</sup> The move extended his efforts within the German-American Alliance of Kansas, which elected him president in 1913 and which stood vigorously against prohibition in Kansas.<sup>38</sup> Frohwerk, thus, was far from a fringe editor largely hidden from public view. Instead, he was an active member of the Kansas City community and German-American networks throughout Kansas, advocating multiple causes as a central leader. He did not rely solely on his newspaper for voice but was reported on regularly in other newspapers both in Kansas City and to the west.

Frohwerk's opposition to temperance aligned with the tenor of the German-language press as a whole.<sup>39</sup> After a slow start in the United States, the number of German-language newspapers grew significantly in the second half of the nineteenth century, from forty in 1840 to 613 in 1900.<sup>40</sup> The circulation of those newspapers in 1900 is estimated at around 800,000, with German-language newspapers representing about 80 percent of all foreign-language news in the United States.<sup>41</sup> Much of the content in German-language newspapers in the years leading up to World War I mirrored that in the mainstream American press, with reports on local, state, and national news, notes on

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<sup>32</sup>*Terse Tales of the Town*, KANSAS CITY GAZETTE, May 28, 1897; *What the Germans All Over the State Say*, OTTAWA DAILY REPUBLIC, Aug. 28, 1899.

<sup>33</sup>*A Cop After Frohwerk*, KANSAS CITY GAZETTE GLOBE, July 13, 1914. A state prohibition of alcohol was in effect from 1881 until 1937.

<sup>34</sup>*Frohwerk Didn't Go*, KANSAS CITY GAZETTE GLOBE, July 14, 1914.

<sup>35</sup>*A Misconception*, KANSAS CITY KANSAS GLOBE, July 23, 1906.

<sup>36</sup>*Jacob Frohwerk's Mission*, KANSAS CITY GAZETTE, Jan. 23, 1895.

<sup>37</sup>*Have Liberals Organized Here?*, FORT SCOTT TRIBUNE, Mar. 28, 1914.

<sup>38</sup>*Two Local Men Are Honored at G.A.R. Meeting*, LEAVENWORTH TIMES, Sept. 7, 1913.

<sup>39</sup>CARL WITTKE, *THE GERMAN-LANGUAGE PRESS IN AMERICA* 217 (University of Kentucky Press, 1957).

<sup>40</sup>*Id.* at 76, 208.

<sup>41</sup>*Id.* at 209, 201.

local meetings, events, and lectures, sports coverage, and literature. Yet they differed in important ways. Obviously, they were printed in German, although some, such as Frohwerk's, included English-language content, perhaps to reach a wider audience. They also generally leaned in the same direction on key issues. As Wittke notes, German-language editors and publishers "expressed strong views on [against] woman's suffrage, prohibition, and 'personal liberty,' and argued for the preservation of the German language, German social and cultural life, and the German press."<sup>42</sup> Those editors and publishers, who required a strong cultural base to maintain demand for German-language news, were frequently key members of German organizations. Thus, Frohwerk can be seen as prototypical of the German-language editor of the day.

He operated in a state with a history of German-language newspapers stretching back to its territorial days. The first German-language newspaper in the state, the *Kansas Zeitung*, appeared in 1857.<sup>43</sup> More quickly followed, and though many such newspapers folded after short lives, others were founded to take their places. Eight German-language newspapers circulated in the state in the 1860s, twenty were founded in the 1870s and fifty more in the 1880s and 1890s.<sup>44</sup> The earliest of these operated from areas of high concentrations of German immigrants such as Leavenworth, but they soon fanned out into the developing agricultural areas to the west. A major function of such papers was boosterism, and rural German-language newspapers attempted to draw German Americans to fledgling communities.<sup>45</sup> In time, Kansas German-language newspapers came in content to resemble their counterparts to the east, providing an outlet through which German Americans could connect culturally. They also grew strong in the pre-war years. One publisher managed to organize a chain of German-language weeklies anchored by the *Wichita Herald* with five newspapers in Kansas, four in Oklahoma, and one in Missouri.<sup>46</sup> Far from operating in a vacuum, Frohwerk's newspapers were in the years before World War I but two within a vigorous German-language press in the region.

### III. Conflicting Allegiances?

As did German Americans throughout the United States, Frohwerk and others in Kansas faced increasing anti-German sentiment beginning in 1914 and continuing through the end of World War I. In the early years of the war, before the involvement of U.S. troops, many German-language newspapers and editors, including Frohwerk, rallied behind Germany.<sup>47</sup> Soon after hostilities broke out, he wrote a letter on behalf of the Kansas German-American Alliance to the editor of the *Topeka Daily Capital* that positioned Germany as a victim forced to fight a defensive war. "Germany's cause in this war is more than justified, much as one may deplore war," he wrote. "It is battling today for its very existence."<sup>48</sup> It was a theme he would return to repeatedly in opposition to American involvement in the war.

Yet Frohwerk's statements in the press were far from his only efforts. The start of the war coincided with a marked increase in his activities with the Kansas German-

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<sup>42</sup>*Id.* at 217.

<sup>43</sup> Eleanor L. Turk, *The German Newspapers of Kansas*, 6 KANSAS HISTORY 51 (1983).

<sup>44</sup>*Id.*

<sup>45</sup>*Id.* at 55.

<sup>46</sup>*Id.* at 63.

<sup>47</sup>WITTKE, *supra* note 39, at 238.

<sup>48</sup>*Defends German Emperor*, TOPEKA DAILY CAPITAL, Aug. 24, 1914.

American Alliance, in which he organized new chapters throughout the state and gave numerous speeches against American involvement in the war, Britain, and, later, President Wilson. In October 1914 he delivered an hour-long speech in German to a Leavenworth crowd in which he framed the war as one launched by Britain to preserve its commercial interests against Germany.<sup>49</sup> He went from there directly to Wichita, where he gave a speech in favor of an anti-prohibition candidate for governor, and then to an afternoon German Day event in Reno County, all three events taking place in a single day.<sup>50</sup> January 1915 found him justifying the German cause in the war in Lawrence, where the local newspaper quoted him pleading for the United States to press for an end to the conflict: “The outcome of this war is impossible to see,’ said Mr. Frohwerk, ‘but at any rate we can use our influence to stop the war as soon as possible and stop the slaughter of the very best men of the countries of Europe. We can be with them in heart and help in that way with all our might.’”<sup>51</sup>

As the war dragged on and Americans turned their attention to the presidential election of 1916, Frohwerk’s speeches focused sharply on President Wilson. A January 1916 speech was particularly pointed, attacking the president for claiming neutrality while American money and munitions bolstered the Allied cause.<sup>52</sup> Frohwerk’s election-year speeches took him as far west as Galatia, 260 miles west of Kansas City, and included harsh rhetoric against Wilson.<sup>53</sup> Yet his 1916 speeches also illustrated his fierce commitment to the United States and his elevation of the concerns of his new home over those of Germany. While this sentiment appears in speeches throughout the year, nowhere is it clearer than in his German Day address in Leavenworth. Speaking in both English and German, he began by illustrating the role of German Americans in the development of the United States before moving to the core of the speech, “that the Germans were loyal Americans, that they owed their first allegiance to America above any other country, and that they should be Americans first last and all the time, which they were.”<sup>54</sup> Newspaper coverage of the event stated the audience was moved deeply by the speech, particularly when speaking in German about charges of disloyalty against German Americans.

To Frohwerk’s chagrin, Wilson won reelection, and five months later U.S. soldiers were ordered to Europe. For most German-language newspapers, this meant an abrupt shift in editorial direction. While they had been ardently against Wilson and involvement in the war, the entry of the United States into the conflict forced a quick about-face; as Wittke notes, the papers “had to perform remarkable feats of mental gymnastics as they shifted editorial policy from pro-Germanism to professions of loyalty to the United States. One position after another was abandoned, and before the end of the summer of 1917, the German-language press, with the exception of a few socialist and labor papers, had completed the process of adjustment.”<sup>55</sup> Such was the case of the *St. Louis Westliche Post*, on the eastern border of Missouri, which shifted overnight from a firm pro-German position to unhindered support of the U.S. war effort.<sup>56</sup> Yet not all German-language newspapers, even excepting socialist and labor papers, changed course. At the *Missouri*

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<sup>49</sup> *Teutons Observe German Day with Subdued Spirits*, LEAVENWORTH TIMES, Oct. 22, 1914.

<sup>50</sup> “Billard for Governor” Club Is Getting Busy, WICHITA BEACON, Oct. 22, 1914.

<sup>51</sup> *Turners Celebrate 49th Anniversary*, LAWRENCE DAILY JOURNAL-WORLD, Jan. 29, 1915.

<sup>52</sup> *Jacob Frohwerk Flays Wilson’s Foreign Policy*, LEAVENWORTH TIMES, Jan. 11, 1916.

<sup>53</sup> *Noted Speaker Coming*, GREAT BEND TRIBUNE, Aug. 22, 1916.

<sup>54</sup> *German Day Is Celebrated in a Happy Manner*, LEAVENWORTH TIMES, Oct. 31, 1916.

<sup>55</sup> WITTKÉ, *supra* note 39, at 262.

*Staats-Zeitung*, Frohwerk and Gleeser stayed the course throughout 1917, finding themselves in increasingly choppy waters before eventually finding themselves sunk.

Most controversial was a series of editorials written by Frohwerk and published in the *Missouri Staats-Zeitung* by Gleeser between June 22 and December 14, 1917, that assailed U.S. involvement in the war on multiple points. Some of the ideas espoused therein were topics Frohwerk had drawn upon in previous *Staats-Zeitung* editorials and his speeches. He argued Germany was fighting a defensive war, Britain's commerce was the war's root cause, and the United States was involved chiefly to protect its financial connections with Britain. The instatement of the draft, however, gave Frohwerk new editorial ammunition, and he used it repeatedly. In an August 10 editorial responding to draft riots in Oklahoma, he chided but empathized with the rioters:

Here he is, called upon to leave his wife and children or his aged parents, or to give up the boy upon which he expected to bestow the fruits of his life work and lean upon in the days to come.

Here he is, with the look of anguish and of pleading for help and relief in the eyes of his wife, staring him in the face day after day. She is sorrowing and pleading for her husband, the father of her children or their son. The courts are perhaps far away and if not, he has not the means to ask protection from them. Is not this enough to drive any man to distraction?

And he perhaps further contemplates, that his country is really not in danger, and that he or his boy are to be sent into a foreign land to fight in a cause of which neither he nor any one else knows anything of. And perhaps the suspicion works itself into a conviction, that it is but a war to protect some rich men's money.<sup>57</sup>

By November, Frohwerk was attracting ire from other newspapers. After protesting a police order forbidding the German-American Alliance to hold a meeting in Kansas City, Frohwerk was condemned by the *Fort Scott Tribune*, which labeled him plainly as an enemy: "There are a lot of disloyal people in this state and in every state—a lot of men and women of influence whose sympathies are with Germany and against the United States. . . . It will result in the downfall of the United States if these people are licensed to live and do business unrestrained in the United States." The final sentence of the article was as prophetic as it was threatening. "The last one of them, in this tremendous crisis," it stated, "should be locked up and made to keep his mouth shut or should be shot."<sup>58</sup>

Two months later, on January 26, 1918, Frohwerk and Gleeser were arrested and charged with violation of the Espionage Act of 1917, purportedly at the request of other German Americans.<sup>59</sup> Thirteen charges were leveled against them, all in connection with editorials published in the *Missouri Staats-Zeitung* from June through December 1917, for "wilfully causing and attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States."<sup>60</sup>

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<sup>57</sup> Editorial, MISSOURI STAATS-ZEITUNG, Aug. 10, 1917.

<sup>58</sup> *Treason in Kansas*, FORT SCOTT TRIBUNE, Nov. 9, 1917.

<sup>59</sup> *German Born Readers Cause Editors' Arrest*, WICHITA BEACON, Jan. 28, 1918.

<sup>60</sup> Bill of Indictment at 3, *United States v. Gleeser* (April 23, 1918). Filed in the District Court of the United States for the Western Division of the Western District of Missouri.

Frohwerk and Gleeser were not the only ones snared by the new law. German immigrants to the United States and others had become vocal in their aversion to fighting their homelands. Many saw World War I as a conflict started by the wealthy that would have to be won on the backs of the penniless foot soldier. Among native-born Americans, hysteria and paranoia pervaded as Congress approved the Espionage Act of 1917. The law criminalized speaking or writing with the intent to hinder the United States war efforts, making it illegal to cause or try to cause insubordination or disloyalty in the military or obstruct recruiting. It was also illegal to mail any material that violated the act. Those convicted faced up to a \$10,000 fine and twenty years in jail. Roughly two thousand people were tried under these laws, resulting in the conviction of about nine hundred people, most of whom were aliens, radicals, or publishers of foreign-language magazines and newspapers, among the most noted being socialists and German immigrants. As previously mentioned, among the most famous cases arising from the acts are *Schenck v. United States* and *Debs v. United States*, incitement cases where the court unanimously agreed in 1919 that seditious utterances were not protected speech.<sup>61</sup> *Abrams v. United States*, decided later that fall, is widely noted because of Holmes's famous dissent.<sup>62</sup>

These cases marked the court's most active struggle to date to find the line between unpopular speech and genuine threats to national security. The question in *Schenck*: was the country's ability to raise a fighting force for World War I threatened by war protestors' expression? Socialist Charles T. Schenck sent leaflets to men of draft age, encouraging draftees to "assert their rights" by refusing to serve. Justice Holmes first articulated his famous clear-and-present-danger test in *Schenck*, writing that expression is not protected when words "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."<sup>63</sup> So, if the speech is evil, Congress could stop it. The Supreme Court upheld Schenck's conviction on March 3, 1919, agreeing unanimously that the possibility draftees would refuse induction amounted to a clear and present danger to the country. Most famously, Holmes wrote: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic..."<sup>64</sup> Eugene V. Debs's case, decided with Frohwerk's case a week later, was also part of this line of incitement cases where government critics and anti-war protesters were targeted. Debs, the Socialist Party leader and perennial presidential candidate, was convicted under the Espionage Act for an anti-war speech in Canton, Ohio, where he said "men were fit for something better than slavery and cannon fodder."<sup>65</sup> Debs, a major public figure who received more than one million votes (or 6 percent) in the presidential election of 1912 while sitting in jail, was found guilty of attempting to incite insubordination in the armed forces, as well as obstructing military recruitment and encouraging support of the enemy.<sup>66</sup> On each of three counts, he was sentenced to ten

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<sup>61</sup>*Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

<sup>62</sup>*Abrams v. United States*, 250 U.S. 616, 630 (1919); see also RICHARD POLENBERG, *FIGHTING FAITHS, THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH* (1987).

<sup>63</sup>*Schenck*, 249 U.S. at 52. This replaced the vague "bad tendency test," which the U.S. Supreme Court had said in 1907 permitted free speech restrictions by the government if it is believed that the expression has a sole tendency to incite illegal activity, such as resisting the draft.

<sup>64</sup>*Id.*

<sup>65</sup>*Debs*, 249 U.S. 211.

<sup>66</sup> For further discussion on this case and its context, see MARGARET A. BLANCHARD, *REVOLUTIONARY SPARKS, FREEDOM OF EXPRESSION IN MODERN AMERICA* (1992).

years in prison.<sup>67</sup> Yet again, government officials had succeeded in legally silencing disfavored speech, in this case, the anti-war socialists' leading spokesman.<sup>68</sup> The court ruled on Frohwerk's case the same day.

#### **IV. Frohwerk: 'Cease firing.'**<sup>69</sup>

From July 6 to December 7, 1917, the *Missouri Staats-Zeitung* published a series of twelve articles written by Frohwerk and denouncing the United States involvement in World War I. So what exactly did he say—and how did he say it? In his first editorial, “Come Let U.S. Reason Together,” published July 6, 1917, Frohwerk argued that the United States must cease “the sending of American boys to the blood-soaked trenches of France,” calling America's involvement in the war “a monumental and inexcusable mistake.”<sup>70</sup> The editorial ran in English and German on the front page of the *Missouri Staats-Zeitung*. “These are strong words, we admit, but we would not be true to our allegiance and our love to this country, if we did not utter these words of warning to the American people,” the editorial continued. Frohwerk reminded readers that he was born in Germany and knew of its “unconquerable spirit and undiminished strength.” But he assured readers that Americans were his neighbors and friends, so he felt a moral obligation to speak. “Not to utter it would be treason to this—now our country.” In a July 20, 1917, editorial, Frohwerk argued for neutrality and isolationism on the part of the United States. He also worried about “the rivers of human blood” the war would cause.<sup>71</sup> The following week, a *Missouri Staats-Zeitung* editorial lamented: “We have gone to war to cover up this awful blunder of our administration and to protect the loans of Wall Street to the Allies with the blood of our American boys and the sacrifices and sufferings of the American people.”<sup>72</sup> As noted above, the newspaper argued in an August 10 editorial that the American conscription law, the draft, was a violation of the Constitution. But he argued that draft riots in Oklahoma and elsewhere “were deplorable,” that all resistance to the draft should be carried out by legal means. “In the draft law, as well as in all others, if we feel aggrieved, we have the courts to which we may go for protection. Should these fail us, we have then the right to petition Congress to repeal the law and should we again fail here, then we can ourselves right the wrong at the next election.”<sup>73</sup> Frohwerk continued to complain that the poor man is being sent to protect “some rich men's money,” arguing that the United States is in no danger of invasion.<sup>74</sup> He also exhibited significant anti-British sentiment, arguing that American boys were dying to help secure England's world domination. He listed the names of two of the first American men of German descent to be killed in the war. “God knows the *StaatsZeitung* has done everything within its power to spare these two mothers their terrible bereavement.”<sup>75</sup>

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<sup>67</sup> While serving his prison term, Debs received more than 900,000 votes in the presidential election of 1920.

<sup>68</sup> For detail on the trial and the man, see Nick Salvatore's biography, *EUGENE V. DEBS: CITIZEN AND SOCIALIST* (2007).

<sup>69</sup> Editorial, *MISSOURI STAATS-ZEITUNG*, Aug. 10, 1917.

<sup>70</sup> *Come Let U.S. Reason Together*, *MISSOURI STAATS-ZEITUNG*, July 6, 1917.

<sup>71</sup> Editorial, *MISSOURI STAATS-ZEITUNG*, July 20, 1917.

<sup>72</sup> *Lansing on War Issues*, *MISSOURI STAATS-ZEITUNG*, Aug. 3, 1917.

<sup>73</sup> Editorial, *MISSOURI STAATS-ZEITUNG*, Aug. 10, 1917.

<sup>74</sup> *Id.*

<sup>75</sup> Editorial, *MISSOURI STAATS-ZEITUNG*, Sept. 21, 1917.

The editorials that got the attention of the Department of Justice were indeed printed in English, but Frohwerk's editorial efforts were not limited to the English-language sections of the newspaper. He also published "Kriegsnachrichten," which means "war news" in German, and during the period under study, this section covered two German-language columns on average, starting on the first page with a jump inside. Hirsch's translation of "Kriegsnachrichten" uncovered several recurring themes, including the impact of German submarines, the success of the Central Powers on the Eastern Front and calls for peace. Much of the coverage of the Western Front was framed in terms of the failures of the Allies.<sup>76</sup> Under the 1917 Trading with the Enemy Act, all newspapers printing in a foreign language had to furnish postmaster general with English translations of anything published about the war.<sup>77</sup> It remains unknown, however, whether Frohwerk provided the English translation to the postmaster general.

The newspaper was small, with a circulation of just a few thousand, and one of its subscribers was indeed the Department of Justice.<sup>78</sup> The government was keeping an eye on German newspapers for evidence of espionage. The draft went into effect in the summer and fall of 1917 and the first casualties were coming back from Europe. Government officials visited the newspaper office to interview Frohwerk and the newspaper's owner and publisher, Gleeser. They did not take Frohwerk's editorial stance lightly, seeking to muzzle him and his newspaper with a very effective legal weapon. He and Gleeser were indicted for violation of the Espionage Act on April 23, 1918, in U.S. District Court in Kansas City. The act called for fines and imprisonment of anyone who "shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies." It also outlawed the causing or attempt to cause insubordination or disloyalty during wartime. In response to the charges, Frohwerk and his attorney argued that nothing he published in the *Staats-Zeitung* was false, that the Espionage Act was unconstitutional, and that he had a First Amendment right to editorialize against the war.<sup>79</sup> His motion to dismiss, however, was unsuccessful, and the next day the trial court empanelled and swore in a jury of twelve men. The sequestered jury was to be given quarters and meals for the duration of the trial. Frohwerk, for his part, fought hard to stop—or at least slow down—the process. His motion to quash the panel of jurors was overruled. He also argued that he did not have time to gather witnesses to appear on his behalf. He refused to enter a plea, so the court ordered that a not guilty plea be entered for each of the thirteen counts of the indictment. Frohwerk then sought a continuance, seeking more time to prepare for the inevitable trial. The court rejected this and ordered the jury to appear the next morning, July 26, 1918.

Gleeser's case had been adjudicated even more quickly. Government attorneys said Gleeser and Frohwerk had engaged in conspiracy to obstruct military recruitment. Identified by the court as the owner, proprietor, editor, printer and distributor of the paper, Gleeser had agreed to testify against Frohwerk in exchange for a lesser sentence. By the time Frohwerk's case made it to trial, Gleeser was already sitting in prison at Leavenworth, Kansas. He had pleaded guilty and testified against his former employee, receiving a sentence of five years in prison.<sup>80</sup>

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<sup>76</sup> Hirsch, *supra* note 10.

<sup>77</sup> 12 U.S.C. §§ 95a-95b (1917).

<sup>78</sup> HEALY, *supra* note 9, at 84.

<sup>79</sup> Demurrer to Indictment, *United States v. U.S. Frohwerk*, 249 U.S. 204 (1919).

<sup>80</sup> HEALY, *supra* note 9, at 85.

Meanwhile, far from patiently awaiting trial, Frohwerk was taking steps to improve his image with the public. Immediately following their arrest, Gleaser had already proclaimed that the *Missouri Staats-Zeitung* would shift editorially and begin supporting Wilson, but Frohwerk went further.<sup>81</sup> In March, he appeared on his own accord before a hearing of a U.S. Senate subcommittee investigating the actions of the National German-American Alliance. In the hearing, Frohwerk clarified the actions of the Kansas branch of the organization as in no way beholden to the German government. “We feel ourselves true, loyal American citizens who believe in the Constitution of the United States and who hold it more sacred than probably any other writing of man except the Bible,” he told the subcommittee.<sup>82</sup> The following month, Frohwerk threw himself into the Liberty Bond sales efforts in Kansas City, captaining a team of ten others and claiming he would be more effective in soliciting purchases from German Americans than English-speakers.<sup>83</sup> Ultimately, however, his efforts earned him little but notoriety in the press. In some cases, in fact, he was a liability to allies. A letter to the editor of the *Fort Scott Daily Tribune-Monitor* used Frohwerk’s support of a local politician to discredit that man, writing the *Staats-Zeitung* “kept on praising Little (the politician) and his votes until the paper was suppressed and the publisher jailed. Even a dog is known by the company he keeps.”<sup>84</sup>

It is also possible that Frohwerk’s attorney, a socialist named Joseph D. Shewalter, may not have done his client any favors, that his briefs read more like socialist manifestos than coherent legal arguments.<sup>85</sup> During his trial, which lasted three and a half days, Frohwerk’s attorney made the case that the government was out to get him from the start, and that officials in the court system had already decided he was guilty. When Frohwerk filed his motion to dismiss, for example, the judge should have taken time to consider all of the legal points in his attorney’s motion. But within five minutes of Frohwerk’s oral argument for dismissal, the court produced and read a written opinion that clearly had been prepared in advance. As such, Frohwerk argued that he was deprived of his constitutional right to be heard in court. He complained to the court that the judge’s opinion denying his motion was at least twenty-five pages long, and this proved that the judge did not listen to Frohwerk’s argument before ruling against him after a five-minute recess.<sup>86</sup>

After only three minutes of deliberation, the jury returned a verdict of guilty on all counts, and the following day the court sentenced him to ten years in prison, along with a \$500 fine plus court costs.<sup>87</sup> Out on a \$7,500 bond, Frohwerk appealed to the U.S. Supreme Court, arguing that his First Amendment rights had been violated and that he had uttered no false statements nor did he have any criminal intent. He also urged the high court to overturn the guilty verdict because of multiple errors made at the trial level.

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<sup>81</sup>*German Born Readers Cause Editors’ Arrest*, WICHITA BEACON, Jan. 28, 1918.

<sup>82</sup>*Hearing on S. 3529 Before the S. Comm. on the Judiciary*, 65th Cong. 199 (1918). Page 636 indicates the subcommittee was not aware of the charges against Frohwerk until after hearing his testimony.

<sup>83</sup>*Changes His Tune*, CHANUTE DAILY TRIBUNE, Apr. 24, 1918; *Jacob Frohwerk Paroled*, TOPEKA DAILY CAPITAL, Jan. 8, 1920.

<sup>84</sup> Letter to the editor, FORT SCOTT DAILY TRIBUNE-MONITOR, July 19, 1918.

<sup>85</sup>HEALY, *supra* note 9, at 92.

<sup>86</sup> Transcript of Record, *Frohwerk*, 249 U.S. 204 (1918).

<sup>87</sup>*Frohwerk Guilty*, LEAVENWORTH WEEKLY TIMES, July 4, 1918.

He pointed out that he had no time to secure witnesses and prepare for trial. He also argued that the sentence was “excessive and cruel.”<sup>88</sup>

The U.S. Supreme Court heard Frohwerk’s arguments January 27, 1919, and released its decision March 10. It upheld the verdict in a unanimous opinion authored by Justice Holmes, reasserting its conclusion in *Schenck* that the Constitution does not “give immunity for every possible use of language.”<sup>89</sup> Holmes acknowledged that unlike Schenck, who mailed anti-conscription letters to draftees, Frohwerk had not made “any special effort to reach men who were subject to the draft.”<sup>90</sup> But Holmes wrote that Congress had the power to punish anyone writing and publishing content that urged the obstruction of the draft. The court agreed that Frohwerk engaged in conspiracy with his editor and publisher Gleeser to obstruct recruitment, noting that would be “criminal even if no means were agreed upon specifically by which to accomplish the intent.”<sup>91</sup>

The pivotal point in which the court began to change its thinking about freedom of expression within the context of incitement revealed itself in Justice Holmes’s remarkable dissent in *Abrams v. United States*, decided in November of the same year. This discussion of incitement as a violation of the First Amendment marked the beginning of modern debate on the meaning of free speech.<sup>92</sup> In this case, Jacob Abrams and three other young Jewish-Russian immigrants were convicted of attempting to interfere with the war against Germany after they dropped leaflets written in English and Yiddish from a Lower East Side factory window urging New York City workers to strike in protest of the war that was being carried out by an unjust government.<sup>93</sup> Justice Louis D. Brandeis joined Justice Holmes’s dissent, agreeing that the four were essentially convicted for their socialist and anarchist views—and their criticism of the government. Holmes wrote: “I wholly disagree with the argument . . . that the First Amendment left the common law as to seditious libel in force.”<sup>94</sup> In *Abrams*, Holmes famously referenced the marketplace of ideas philosophy, implying the principle, but never actually using the term. He wrote of the importance of “a free trade in ideas” and “that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>95</sup>

Despite the Supreme Court decision against him, Frohwerk held out hope his sentence might yet be overturned. One month after the decision in his own case, in April, he requested a rehearing but was denied a week later.<sup>96</sup> Two weeks later he received notice from the district court’s office he was to report to the Federal Penitentiary at Leavenworth to begin his ten-year sentence within thirty days.<sup>97</sup> Still he held out for a reprieve. “While there is life,” he told a reporter, “there is hope.”<sup>98</sup> There was reason to remain positive. Gleeser, who had pleaded guilty and began serving his sentence on April

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<sup>88</sup> Appeal and Petition for Writ of Error, Transcript of Record, *Frohwerk*, 249 U.S. 204 (1918).

<sup>89</sup> *Schenck*, 249 U.S. at 206.

<sup>90</sup> *Id.* at 208.

<sup>91</sup> *Id.* at 209.

<sup>92</sup> BLANCHARD, *supra* note 66, at 83.

<sup>93</sup> For a more thorough study of the case, see POLENBERG, *supra* note 62.

<sup>94</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919).

<sup>95</sup> *Id.* Much has been written about Holmes’s change of heart, tracing his evolution to a summer of written correspondence with Judge Learned Hand, as well as several prominent libertarians and legal scholars. See, e.g., POLENBERG, *supra* note 62, at 218-28.

<sup>96</sup> *Frohwerk Wants a Rehearing*, COFFEYVILLE DAILY JOURNAL, Apr. 8, 1919; *No Rehearing for Frohwerk*, CHANUTE DAILY TRIBUNE, Apr. 14, 1919.

<sup>97</sup> *The Frohwerk Mandate*, GREAT BEND TRIBUNE, May 1, 1919.

<sup>98</sup> *Frohwerk Plans for Prison*, KANSAS CITY KANSAN, May 6, 1919.

30, 1918, received notice on May 8, 1919, that his sentence had been commuted to one year and one day.<sup>99</sup> He was released immediately.<sup>100</sup> Meanwhile, Frohwerk's attorney was working to secure a sentence reduction in Washington.<sup>101</sup> Yet as the days crept closer to his deadline, Frohwerk received no such letter. He did manage to arrange one extra day of freedom, allowing him to visit the grave of his only daughter, who had died in 1917, on Decoration Day.<sup>102</sup> But on May 31, he reported to Leavenworth, proceeded through prisoner intake, and began serving his sentence.

Frohwerk's prison records suggest that while his stay began poorly, he was as active and productive a prisoner as he could possibly have been. He was admitted to the prison hospital June 3, just three days after arriving, for neurasthenia, and released one week later.<sup>103</sup> The next day he reported to his job assignment in the prison's printing office, where he worked almost every day but Sundays and holidays for the duration of his imprisonment.<sup>104</sup> There, he edited the prison newspaper, the *New Era*, and encouraged others to write for the newspaper, raising it, in the eyes of his colleagues, to "a higher literary standard than that appearing in any other prison organ in the land."<sup>105</sup> In his downtime, Frohwerk kept steady correspondence with a number of family members and friends, including his wife, Henrietta, to whom he wrote every few days.<sup>106</sup> He also received a steady stream of cigars, which arrived at a rate of about fifty a month, and periodic packages of fruit and candy.<sup>107</sup>

By far the most valuable delivery he received during his stay, however, was the letter from Woodrow Wilson commuting his sentence to one year and one day, the same reprieve granted to Gleeser. It was signed by Wilson only nineteen days after Frohwerk arrived at Leavenworth, and it shortened the editor's sentence by nine years. It also adjusted the date he would be eligible for parole; whereas earlier he would not have become eligible until September 29, 1922, he was now eligible September 29, 1919.<sup>108</sup> The parole board approved his release January 6, 1920.<sup>109</sup> Four days later, on January

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<sup>99</sup> Letter from Department of Justice to Warden of U.S. Penitentiary at Leavenworth (May 8, 1919)(on file in prisoner record of Carl Gleeser, National Archives at Kansas City).

<sup>100</sup> Individual Daily Labor Record, Prisoner #12644, Carl Gleeser (n.d.)(on file in prisoner record of Carl Gleeser, National Archives at Kansas City).

<sup>101</sup> Telegram, Franz Lindquist to Jacob Frohwerk (May 31, 1919)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>102</sup> *Frohwerk Comes to Prison Alone*, LEAVENWORTH TIMES, June 1, 1919.

<sup>103</sup> Hospital record, prisoner #14036, Jacob Frohwerk (June 3, 1919)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>104</sup> Individual Daily Labor Record, prisoner #14036, Jacob Frohwerk (n.d.)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>105</sup> *Frohwerk Has Been Released from Prison*, LEAVENWORTH TIMES, Jan. 11, 1920.

<sup>106</sup> Correspondence log, prisoner #14036, Jacob Frohwerk (n.d.)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>107</sup> Record of Articles Received by Prisoners, prisoner #14036, Jacob Frohwerk (n.d.)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>108</sup> Untitled record, prisoner #14036, Jacob Frohwerk (n.d.)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City); Letter from the Office of Record Clerk (n.d.)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>109</sup> Letter from Charles Glasson to A. Anderson (January 6, 1920)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

10, Frohwerk walked out of Leavenworth after serving thirty-two weeks of a ten-year sentence.<sup>110</sup>

By all surviving accounts, Frohwerk closely followed prison rules and was a leader to other prisoners. In a letter written to him from the warden at Leavenworth after his release, the warden praised his conduct while imprisoned, writing, “If every prisoner would live up to the rules and regulations pertaining to the governing of this prison and would be as loyal to the officials connected therewith as you was [sic], this would be a model institution in every way.”<sup>111</sup> He told the press as much, declaring Frohwerk a model prisoner straight out.<sup>112</sup> No stronger an endorsement could have been written, however, than that printed in the *New Era*, the prison newspaper, and reprinted by the *Leavenworth Times* following Frohwerk’s release:

Frohwerk meant something to this place, and to us who are in it. He meant sincerity, for one thing; and that is the finest thing in journalism. He took the editorship of this paper because he thought he could do something toward the enlightening and enlivening of the prisoner’s day. He sought to bring out a paper which would be of real interest to the inmates, which would express freely and flatter none. And he succeeded. . . .

Goodbye, Frohwerk! May you always retain that which is of far greater work than prosperity or tinselled [sic] fame; your fine idealism, your genial sense of comradeship and your sterling humanity.<sup>113</sup>

First Amendment scholars have long criticized the World War I-era incitement cases, but it is notable that even the government attorney, Alfred Bettman, who prevailed in *Frohwerk*, knew an injustice had been perpetrated. In private correspondence he wrote that Frohwerk’s editorials advocated change in existing government policy “as distinguished from advocacy of obstruction of existing policy, and seemed to me therefore to fall within the protection of the constitutional guarantee of free speech and press.”<sup>114</sup> The attorney said Frohwerk was “one of the clearest examples of the political prisoner.”<sup>115</sup>

## V. Conclusion

In the days leading to his release, Frohwerk told reporters that he would go home to Kansas City and likely return to journalism once freed, but he said he did not know for

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<sup>110</sup> After learning of his parole, Frohwerk had initially expected to be released January 9, but a paperwork delay kept him in prison until January 10. Telegram from Jacob Frohwerk to Henrietta Frohwerk(January 7, 1920)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City); Telegram from Jacob Frohwerk to Henrietta Frohwerk(January 9, 1920)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>111</sup> Letter from warden to Jacob Frohwerk(January 19, 1920)(on file in prisoner record of Jacob Frohwerk, National Archives at Kansas City).

<sup>112</sup> *Jacob Frohwerk Gets Parole at Federal Prison*, LEAVENWORTH TIMES, Jan. 8, 1920.

<sup>113</sup> *Frohwerk Has Been Released from Prison*, LEAVENWORTH TIMES, Jan. 11, 1920.

<sup>114</sup> As quoted in David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 UNIVERSITY OF CHICAGO LAW REVIEW 1205, 1296 (1983). Alfred Bettman was in charge of the federal government’s prosecutions under the Espionage Act. He made this shocking revelation in private correspondence with noted First Amendment scholar and Harvard Law School professor Zechariah Chafee Jr. That correspondence is included in Chafee’s papers housed at Harvard.

<sup>115</sup> *Id.*

which newspaper.<sup>116</sup> While he largely falls from the record after January 1920, news accounts and archival records show he did indeed return to newspapering. Frohwerk returned to the U.S. Penitentiary at Leavenworth in September to give a tour of the prison to a group of socialites from Kansas City, and news coverage of the visit states he was “again in newspaper work in Kansas City,” perhaps for a German-language newspaper.<sup>117</sup> Similarly, city directories and census records extend his press involvement for decades after his release. He identified himself as an editor in both the 1930 and 1940 U.S. Censuses, still in Kansas City and still living in the same home.<sup>118</sup> Additional information about Frohwerk’s employment comes from city directory listings. In 1924 he is listed as an advertising agent with the *Kansas City Press* and in 1925 as a journalist with the same newspaper.<sup>119</sup> From the late 1920s into the early 1930s, he published the *Kansas City News*, a weekly newspaper, in which his editorials “always took a determined stand.”<sup>120</sup> He died at age 84 on November 19, 1949, at his home in Kansas City, almost thirty years after his release from prison.<sup>121</sup>

One wonders, in light of his significance to the German-American community, the gravity of his editorials, and the impact of his Supreme Court case, why Jacob Frohwerk has been overlooked by history. Perhaps the notoriety of Eugene Debs, a candidate for president who was sitting in jail when he received one million votes as the Socialist Party candidate, overshadowed the Kansas City editor of German-language newspapers who tirelessly advocated for the interests of German Americans in his region. As such, this paper might challenge our academic tendency to write about history as a parade of Great Moments or Great Men, thus helping us to further recognize that in addition to the famous Debs, newspaper editors faced the wrath of the U.S. government and withstood the almost routine trampling of their First Amendment rights during this era. This research, then, offers further context, expanding the analysis of such incitement cases within the context of journalism history, illustrating how they affected everyday people and especially journalists. Schenck was an activist, as was Abrams. Debs was a politician. Frohwerk represents that area of history of interest to media scholars, the editor of a local newspaper in America’s heartland, and thus adds another layer of complexity and nuance relating to the history these early incitement cases.

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<sup>116</sup>*Frohwerk Order of Release Will Arrive Tomorrow*, LEAVENWORTH POST, Jan. 8, 1920.

<sup>117</sup>*Frohwerk Shows His Former Home*, LEAVENWORTH POST, Sept. 16, 1920.

<sup>118</sup>U.S. BUREAU OF THE CENSUS, *Population Schedule, Kansas City*, 1930 U.S. CENSUS, WYANDOTTE COUNTY, KANSAS, 15A, house 243, line 19 (1930)(digital image available at Ancestry.com); U.S. BUREAU OF THE CENSUS, *Population Schedule, Kansas City*, 1940 U.S. CENSUS, WYANDOTTE COUNTY, KANSAS, 5A, house 111, line 21 (1940)(digital image available at Ancestry.com).

<sup>119</sup>CLASSIFIED BUYER’S GUIDE OF THE CITY OF KANSAS CITY, KANS. & CATALOG SECTION, 1924, 474 (Gate City Directory Co., 1924); POLK’S KANSAS CITY KANSAS DIRECTORY, 1925, 345 (Gate City Directory Co., 1925); POLK’S KANSAS CITY (WYANDOTTE COUNTY, KANSAS) CITY DIRECTORY, 1938, 160(R. L. Polk & Co., 1938).

<sup>120</sup>*Jacob Frohwerk*, KANSAS CITY STAR, Nov. 20, 1949.

<sup>121</sup>*Id.*



# NAVIGATING LEGAL OBLIGATIONS AND CULTURE: SATIRE AND FREEDOM OF EXPRESSION IN BOTSWANA

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*Botswana is a country well respected for its historic adherence to the rule of law in a continent mostly known for dictators and the rule of man. However, this country retains some of the most anachronistic pieces of legislation. Some of these are constantly called into question when constitutional rights are alleged to be breached. Customary law is also in operation, and the society still maintains a large share of its traditions, some of which are increasingly rejected by the courts. These cultural values often clash with the laws of Botswana, which are influenced by a host of international and regional treaties and decisions of foreign courts that have shaped the local jurisprudence. A photoshopped picture of an almost naked President Khama caused a seismic uproar in the country when it was published online.<sup>778</sup> This article locates it within the milieu of Botswana's Constitution and the Penal Code and argues that in light of freedom of speech guarantees in the Constitution of Botswana, the picture flouted no law, however distasteful and impudent it may have been. The courts would reject arguments based on culture.*

**Key Words:** Khama, Botswana, photoshopped, culture, freedom of expression

## I. Introduction

Satire, which manifests itself in different forms, is now a growing fascination among some people in Botswana. While cartoons making fun of politicians are common in mainstream newspapers such as *Mmegi*, *Botswana Gazette* and *Botswana Guardian*, the burlesque type, delineating sexuality or sexual organs, are unheard of. It is reasonable to assume that with close proximity to South Africa, the country is getting this influence from across the border. This is made much easier by the internet, especially Facebook. Although fixed line mobile internet subscription was estimated at 8.5% as of 2014, many people are able to access the internet through their work desktops but a great majority do so through their mobile phones.<sup>779</sup> With a population of just 2 million people, Botswana has one of the world's highest mobile phone penetration rates, with most people typically having at least two sim cards for two different networks in one phone, or two mobile phones for two out of the three mobile phone operators. In 2014, international phone manufacturer AMGOO recorded Botswana's mobile phone penetration at 159%.<sup>780</sup>

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<sup>778</sup>The picture was first posted on facebook.com/bwlaugh which is no longer in existence. It was subsequently shared widely by some Facebook users.

<sup>779</sup>AMGOO Marketing Team, *Mobile Phone Industry in Africa: Botswana Leading the Digital Pack*, AMGOO (Dec. 11, 2014), <http://www.amgoo.com/blog/mobile-industry-in-africa-botswana-leading-the-digital-pack>.

<sup>780</sup>*Id.*

The main form of satire in Botswana is cartoons, which can be found in most print newspapers and in the online versions of some. These are mostly caricatures of politicians, from the President to Members of Parliament to Councillors from across the political divide. In South Africa, in addition to cartoons, which are also very common there, caricatures have taken the form of paintings, and both cartoons and paintings have often exhibited nudity. They have been very controversial in recent years because they have featured the South African president Jacob Zuma. These have divided opinion as many see them in poor taste and disrespectful.



One of the Zuma paintings done by artist Ayanda Mabulu, who is pictured here (right).<sup>781</sup>

Recently, Botswana experienced a similar incident around September 2016. Kealeboga Chinganda, a young man of 36 from the tourism village of Maun in the North West District posted a photoshopped picture of President Ian Khama on a website ([www.bwlaughs.com](http://www.bwlaughs.com))<sup>782</sup> and it was redistributed on Facebook.<sup>783</sup>

This engendered a fierce debate and many people expressed shock and disbelief. As in the Zuma case, many argued that it was sheer impudence that crossed the boundaries of freedom of expression and was against Setswana culture,<sup>784</sup> an affront on the norms and traditions of the people of Botswana. These people tend to be conservative and venerate the elderly and those holding positions of power in Botswana. However, others, especially journalists and some lawyers, argued that it was permissible and within the limits of free expression.

Most lawyers who debated the issue on Facebook<sup>785</sup> were of the view that, culturally, the photoshopped picture of the president was an insult to him and unacceptable. However, they pointed out that there would be many hurdles to be overcome if criminal prosecution was to ensure. In their view, there is no criminality in morality; there is no standard for morality to

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<sup>781</sup>SA: *Women Protest over Painted President Zuma Penis*, IMIRASIRE (Jan. 11, 2015 11:35), <http://eng.imirasire.com/news/all-around/out-of-rwanda/article/sa-women-protest-over-painted>.

<sup>782</sup>This link is no longer available.

<sup>783</sup>Link no longer available.

<sup>784</sup>The culture of the people of Botswana.

<sup>785</sup>BusangManewe, FACEBOOK (Sept. 14, 2016), <https://www.facebook.com/busang.manewe/posts/10210481937834819> (attorney in private practice's wall post). In support of him were attorneys Tshiamo Rantao, Tebogo Sebegu and Joao Carlos Salbany.

determine criminality or otherwise. They pointed to a clash between culture and the modern law.<sup>786</sup>

This article discusses this incident looking at the interface between law, culture,<sup>787</sup> and freedom of expression. It attempts to address the concerns raised by the public: whether this was morally wrong and whether it was legally permissible. Above all, the article investigates what should happen should there be a clash between cultural norms and the laws of Botswana.

The article argues that extensive litigation in Botswana's courts of law has settled the law and that constitutional arguments will and should win. The Constitution is the supreme law of Botswana and, unlike in Britain where Parliament is supreme, the courts in Botswana have the final say on the law. Arguments predicated on culture cannot triumph over the Constitution.

To address these issues of culture and law satisfactorily, I take a two-pronged approach. Discussed first is the place of culture (values, norms, beliefs, and morality) in the lives of Batswana<sup>788</sup> and the laws of Botswana. Secondly, I discuss the law with regard to freedom of expression. Finally, I consider the crux of the matter: the position of the law regarding these conflicting rights and which one has precedence. This will allow us to establish the illegality or otherwise of this much-talked-about Khama picture.



The controversial photoshopped picture supposedly of H.E. President Dr. Ian Khama, with Parliament in the background.

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<sup>786</sup>*Id.*

<sup>787</sup>In the context of this paper, culture refers to custom or tradition: the group pattern of habitual activity, beliefs, norms and values that are transmitted from generation to generation.

<sup>788</sup>The people of Botswana are called Batswana, as opposed to Botswanans or Botswanese.

## II. Tswana Traditions and Customary Law

Before independence in 1966, Botswana mainly relied on various tribal chiefs (*dikgosi*) and their juniors known as headmen (*dikgosana*) for leadership. Even the British, who colonised Botswana in 1885 used a system of Indirect Rule to govern the Protectorate. It was these tribal leaders who ruled the people in their villages on behalf of the Monarch. As custodians of Setswana culture, the chiefs entrenched a respect for cultural values, principal among them obeisance for people in key positions such as cabinet ministers, church ministers, Members of Parliament and Councillors. This resulted in veneration of elders, commonly referred to as *asbagolo* (plural) and *mogolo* (singular).

In recognition of this, the independence Constitution of the Republic recognized tribal customs as central to the lives of Batswana. A pluralistic legal system was established, with four primary sources of law: the Constitution, statute law, customary law and common law (based on Roman-Dutch law), with significant influences from English law.

Customary law has thus been recognized as a repository of culture. It is administered by the Customary Courts spread across the country, in every major village and even in towns. It is contained in the Customary Law Act (of 1996), while the original Act was enacted in 1961 by a Proclamation (prior to independence in 1966). Each tribe has its own customary law which is normally administered with regard to fellow “tribesmen” in civil proceedings. This customary law is knitted with the tribesmen’s culture and identity.<sup>789</sup> This includes the tribal morals, which are important to this paper. As the majority of people in Botswana are Tswana speaking (79%), they share similar traditional values.

The chiefs and headmen administer the customary law. However, in anticipation of difficulties that may arise, Section 10 of the Customary Law Act provides that if the system of customary law cannot be established with certainty, the Customary Court is required to apply principles of justice, equity and good conscience. However, since tribal chiefs and headmen—who by and large do not have the legal, let alone basic, education to deal with technical matters—administer this law, they can hardly apply these principles. As a result, most of these courts deliver incompetent judgements, especially at the lower levels. With the customary law unwritten and passed on only by word of mouth, there are often contradictions as to what is the true position of the laws of the various tribes. This makes it difficult to adjudicate cases at times and to determine the correct position.<sup>790</sup>

Customary law is so important that the Constitution makes certain exceptions based on it. This is with regard to discrimination based on matters of personal law such as divorce, burial, adoption, devolution of property on death, or membership of community or tribe of customary law.<sup>791</sup>

There have been many cases brought to Botswana’s higher courts, by both private parties and the State, where customary law was at issue. It is important to state a few of these briefly and we will return to them later to see how the law was interpreted by the courts. In the case *Legwaila v. The State*,<sup>792</sup> the Attorney-General prosecuted an opposition lawyer at the Magistrates Court for allegedly using abusive words considered to be in bad taste and culturally

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<sup>789</sup>Tabeth Masengu, *Customary Law Inheritance: Lessons Learnt from Ramantele v. Mmusi and Others* (Oxford Human Rights Hub, Working Paper No. 6, 2015).

<sup>790</sup>Mmusi and Others v. Ramantele and Another 2012 2 BLR 590 HC (Botswana).

<sup>791</sup>BOTSWANA CONST. § 15 (4) (c, d).

<sup>792</sup>Legwaila v. The State 1990 BLR 260 HC (Botswana).

unacceptable: *dithala*(testicles) and *nnywana* (vagina) and *dinnywana* (vaginas). The matter was brought in appeal at the High Court. The appeal is the case that is the interest of this paper as it set important judicial precedent. At the height of internecine strife in the then main opposition Botswana National Front (BNF), Legwaila, a member of the party, had addressed a public rally and quoted those words as used by one of the factions.

In bringing the case to Court, the Attorney-General had argued that he was protecting public morals. He wanted to avoid a situation whereby the people of Botswana could become “ill-mannered, depraved and uncivilized.”<sup>793</sup> The court disagreed with him and ruled in favour of the accused.

In another case, a civil matter, another Motswana<sup>794</sup> lawyer, Mrs. Unity Dow, married to an American citizen with whom she had three children, brought a case<sup>795</sup> against the Attorney-General for discriminating against her based on her gender. The said law, the Citizenship Act of 1984, denied her children Botswana citizenship just because their father was a foreigner. At issue was Botswana’s patrilineal culture because a Motswana man in a similar situation would have automatically passed the citizenship to his children, even if his wife were a foreigner. The Attorney General took the matter on appeal to Botswana’s highest court, the Court of Appeal, and argued that this was Botswana culture that must be tolerated and must not be deemed unconstitutional, however discriminatory. The court disagreed with him.

In yet another case which proves the clash between culture and modern law, *Mmusi and Others v Ramantele and Another*,<sup>796</sup> four sisters from the Bangwaketse tribe in the village of Kanye came before the High Court challenging their customary law (again based on patrilineal dominance) which entitled a last born male child to inherit intestate family property. The four sisters had built their widowed mother a three-bedroom house on the family homestead. Their only brother (Banki) did not contribute anything toward the development of the property. Their father had a relationship with another woman before they were born which produced a son. Upon their mother’s death, their late half brother’s son emerged and claimed the property on the basis that his uncle (the late Banki) had bequeathed the plot to his father (who had also died). The premise of the bequest, he argued, was that as the last-born son, Banki, had the right to inherit the property according to culture. The matter was also taken on appeal to the Court of Appeal. Once more, the cultural argument was defeated, and the women were granted intestate inheritance.

### III. Freedom of Expression and the Law

Having discussed customary law, we now turn to the law regarding freedom of expression in Botswana, which also entails freedom of the press. Chapter 2 of the Constitution of Botswana is the Bill of Rights (Sections 3-18). Section 3 (b) of the Constitution guarantees “freedom of conscience, of expression and of assembly and association” and (3a) guarantees amongst others “the protection of the law.”

There are more detailed and specific sections dealing with freedom of expression and freedom of conscience. **Section 11 states that:**

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<sup>793</sup>*Id.* at 270.

<sup>794</sup>Motswana means Botswana national.

<sup>795</sup>Dow v. Attorney-General 1991 BLR 233 HC (Botswana).

<sup>796</sup>*Mmusi*, 2012 2 BLR 590 HC.

- (2) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.<sup>797</sup>

Section 12 (1) dealing with freedom of expression states:

Except with his or her consent, no person shall be hindered in the enjoyment of his or her freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his or her correspondence.<sup>798</sup>

Just like with customary law, the country's higher courts have been called upon to interpret these laws. It is Section 12 (1) that gains particular attention because there have been many cases related to it involving the media. In *Media Publishing v. Attorney-General*,<sup>799</sup> the *Botswana Guardian* approached the High Court after the government withdrew advertising from the paper and its sister publication *Midweek Sun* after they wrote stories critical of the then-President Festus Mogae and the then-Vice President Seretse Khama Ian Khama (currently the President of Botswana).

His Lordship Mr. Justice Isaac Lesetedi interpreted this provision widely such that it subsumes press freedom. Subsequent cases have been argued against this precedent. The learned<sup>800</sup> judge ruled that it was unconstitutional for the government to withdraw advertising on the basis that it was upset by negative publicity. "Indeed because of the important role that it plays in a democratic society, freedom of expression is jealously guarded by courts of law,"<sup>801</sup> even if unpalatable material is published by the media, the court ruled. The judge further ruled that those who hold power, although protected by the law and having recourse to such laws as those of defamation and privacy, must be tolerant of more scrutiny about their responsibilities to the public. The judge, however, made it clear that, ordinarily, the government has a right to choose where to advertise.

#### IV. Resolving the Conflict

In the past, customary law and other rights provided in the Constitution have clashed, and the courts have always ruled in favour of these other rights. In the *Legwaila* matter, the High Court made very important pronouncements. Ruling in favour of the defendant, Justice Gyeke-Dako rejected arguments based on culture and Tswana morals:

I deem it unsafe to go along with the learned counsel for the State-Respondent's contention that "the mischief which the amendment made to the section seeks to

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<sup>797</sup>BOTSWANA CONST.§ 11.

<sup>798</sup>BOTSWANA CONST. § 12 (1).

<sup>799</sup> *Media Publishing (Pty) Ltd v. Attorney-General and Another* 2001 (2) BLR 485 HC (Botswana) [hereinafter *Media Publishing*].

<sup>800</sup>The word "learned" is a standard courtesy used to address either a judge or attorney in the Botswana Courts of Law.

<sup>801</sup>*Id.* at 495.

cure is to remedy the situation whereby the people of Botswana become ill-mannered, depraved and uncivilized” and to achieve this purport, mere use of the word “*nnywana*” in a public space or gathering becomes an offence under the section.<sup>802</sup>

The judge reasoned that the words might be offensive but not abusive or insulting. There might also be “many manifestations of behaviour which will cause resentment or protest without being insulting or abusive,”<sup>803</sup> His Lordship ruled.

In the *Dow* case,<sup>804</sup> the trial judge Justice Horwitz similarly rejected the argument that culture must trump human rights. At the Court of Appeal, the matter of culture and customs received considerable attention. The court noted that the parliament of Botswana was the only entity vested with the responsibility to make laws for order, peace, and good governance.

The Court of Appeal majority<sup>805</sup> agreed with him and ruled that the Constitution was above culture. The court thus granted Dow’s children Botswana citizenship and struck down the discriminatory provisions of the Citizenship Act of 1984, being Sections 4 and 5. Specifically addressing itself to the customs and traditions of Botswana, the Court of Appeal President Justice Amisshah pronounced that:

Custom and tradition have never been static. Even then, they have always yielded to express legislation. Custom and tradition must *fortiori*, and from what I have already said about the pre-eminence of the Constitution, yield to the Constitution of Botswana. A constitutional guarantee cannot be overridden by custom. Of course, the custom will as far as possible be read to conform with the Constitution. But where this is impossible, it is custom not the Constitution which must go.<sup>806</sup>

The Court of Appeal also made another important pronouncement. It stated that Section 3 is not just a mere preamble because if it is violated, one has recourse to the High Court for redress as per Section 18 of the same Constitution. The court therefore treated Section 3 as substantive and “the key or umbrella provision in chapter 2 under which all rights and freedoms protected under the chapter must be subsumed.”<sup>807</sup> Provisions in chapter 2 therefore have to be read in conjunction with Section 3.

The argument in this case, marshalled by the Attorney-General of the Republic of Botswana, was that the law must tolerate discrimination against a woman based on her gender because it served to reflect and preserve Botswana’s patrilineal tradition. It might be discriminatory, but it was made in good faith to reflect societal interest, the Attorney-General argued.

In *Mmusi v. Ramantele*,<sup>808</sup> Justice Key Dingake once more underlined that cultural arguments have no basis in law, especially when they clash with fundamental rights enshrined

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<sup>802</sup>*Legwaila*, 1990 BLR 260 HC at 170.

<sup>803</sup>*Id.*

<sup>804</sup>*Dow*, 1991 BLR 233 HC.

<sup>805</sup>In agreement: Amisshah A.N.E. (Judge President), Aguda JA and Bizoz JA, Justices; Schreiner and Puckrin dissenting.

<sup>806</sup>Attorney-General v. Dow 1992 BLR 119 CA at 137 (Botswana) [hereinafter *Dow appeal*].

<sup>807</sup>*Id.* at 133.

<sup>808</sup>*Mmusi and Others v. Ramantele and Another* 2012 2 BLR 590 (Botswana) [hereinafter *Mmusi*].

in the Constitution. “The justices of this court view the Constitution as the mirror reflecting the national soul. The justice of this court have shunned the apologetic value-oriented model that derives its substance from the moral choices of the majority or the public mood/opinion.”<sup>809</sup>

Once more, the Attorney-General of the Republic of Botswana had sought reliance on Tswana traditions (and customary law) to preserve a practice in which females were denied inheritance in an estate. The court rejected the government claim that Botswana was “a culturally inclined nation.”<sup>810</sup> Another important point made by the judge was that the court would prefer an interpretation that gives effect to the values of the Constitution as opposed to one which does not.

The Court of Appeal judgment on this matter<sup>811</sup> upheld the decision of the High Court that the Constitution must trump culture. However, it made a very careful consideration regarding Tswana culture in repudiation of some aspects of the judgment on points of law beyond the scope of this paper. The court first acknowledged the importance of the culture and morals of the people of Botswana. Judge President Justice Ian Kirby said due regard must be had to the moral choices of the majority because this legitimates all laws and this was a cornerstone of democracy and the rule of law. He also emphasized that the majority could not be ignored because the majority elects Parliament. Further, he stressed that the Constitution was “a creature of the people.”<sup>812</sup>

In criticizing the court *a quo*, the Judge President opined, “No apology need to be offered for respecting the moral choices of the majority, as reflected in the laws passed by parliament and in the Constitution itself.”<sup>813</sup> He said prevailing public opinion as reflected in legislation, international treaties, the report of public commissions and contemporary practice was a relevant factor in the determination of constitutionality of a law or practice but “it is not a decisive one.”<sup>814</sup>

However, like the court *a quo*, he concluded that the courts have “a sacred duty to test any law passed by parliament against the imperatives of the Constitution and to strike down any law including customary law that does not pass constitutional muster. That will always be so.”<sup>815</sup>

Delivering the leading judgment on the same matter, Appeal Justice Isaac Lesetedi was more damning on customary law:

It is axiomatic to state that customary law is not static. It develops and modernizes with the times, harsh and inhuman aspects of customs being discarded as time goes on. . . .*For after all, what is customary law but a set of rules developed by society to address issues which protect the country’s social fabric and cohesion.*<sup>816</sup>

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<sup>809</sup>*Id.* at 64.

<sup>810</sup>*Id.*

<sup>811</sup>Ramantele v. Mmusi and Others CACGB-B104-12, unreported 3 Sep. 2013 [2013, Court of Appeal of Botswana].

<sup>812</sup>*Id.* at 11.

<sup>813</sup>*Id.* at 12.

<sup>814</sup>*Id.* at 15.

<sup>815</sup>*Id.* at 12.

<sup>816</sup>*Id.* at 48 (emphasis added).

From these cases, it is clear that the law in Botswana places a premium on human rights as per the Constitution and will not entertain arguments based merely on traditions, morals or customary law. The High Court and the Court of Appeal have borrowed from international law and decisions of other courts in the African jurisdiction to arrive at these decisions. It is on this basis that it is very unlikely that a court faced with the Khama photo will rule in his favour.

This is why the state had difficulty charging the alleged offender. The prosecutor did not know what law to use. At first, some lawyers felt that he could be charged under Section 91 of the Penal Code that deals with insults to Botswana. However, he was in the end charged under Section 90 and 93 of the Penal Code, which deal with unacceptable (abusive, obscene or insulting) language and public gatherings respectively. We shall return to these later.

It is important to also underscore the importance of case law from other jurisdictions, especially the United States, the UK and European Courts, Canada, South Africa, and many other countries in Sub-Saharan Africa and India, as persuasive authority in these types of cases. I will elaborate on these shortly, and this is important to note because some lawyers<sup>817</sup> tried to argue that decisions from foreign jurisdictions are not Botswana law. That kind of argument is unsustainable.

When examined against international law, which Botswana has committed itself to, the country has a lot of work to do to repeal some of its old laws, some of which are based on tradition but most of which are contained in the Penal Code and are a bequest from the colonial days. These and some culturally based laws will not stand the muster of Constitutional scrutiny. The cases above show that, and already laws of such ilk, like the one granting marital power to males in marriage, have been repealed.

Professor Fombad, a leading scholar on Botswana's constitutional and media law observes that, like a lot of African countries, Botswana is faced with the mammoth challenge to modernize its laws to reflect not only socio-economic and political realities of today but also the "realities of the emerging digital and globalized world of today."<sup>818</sup> In addition, more importantly as Fombad points out, with the third wave of democratization that swept through Africa in the 1990s, which resulted in the collapse of one-party states and liberalization of the press, it can no longer be business as usual on the legal front. An "acute human rights consciousness which African governments can no longer ignore," was planted.<sup>819</sup> This photo must be debated within this context.

There are international and regional legal treaties that have had an impact on the law in Botswana generally and on the issue of freedom of expression and press freedom as a human right. At the international level, there is the United Nations Human Declaration on Human Rights (1948) and the International Covenant on Civil and Political Rights [ICCPR] (1966). At the continental level, there is the African Charter on Human and People's Rights [ACHPR] (1981), which was reinforced in 2002 by the African Union's Commission on Human and People's Rights through the "Declaration of Principles on Freedom of Expression," famously known as the Banjul Declaration or the African Charter on Broadcasting. At the sub-regional level, through the Southern African Development Community (SADC), member states signed the SADC Protocol on Culture, Information and Sport (2009), which like the Banjul Declaration bound members to promote, establish and grow independent media and the free flow of

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<sup>817</sup> Kgosietsile Ngakaagae, remarks made in apodcast debate regarding the Khama photo, GABZ FM (15 Sept. 2016), [http://www.gabzfm.com/podcasts?title=khama+photo&field\\_type\\_of\\_podcast\\_value=All](http://www.gabzfm.com/podcasts?title=khama+photo&field_type_of_podcast_value=All).

<sup>818</sup>CHARLES M. FOMBAD, MEDIA LAW IN BOTSWANA(2011).

<sup>819</sup>*Id.* at 26.

information. The Windhoek Declaration of 1991, signed under the auspices of UNESCO also speaks to the same aspirations, with governments pledging to promote and support an independent and pluralistic media.

Botswana ratified the ACHPR and the ICCPR in 1986 and 2001 respectively. However, even if Botswana had not ratified these regional instruments and they were thus not domesticated,<sup>820</sup> they can still be brought to bear on the law in Botswana in a number of ways. Some of the ways include aiding in statutory interpretation, adoption into the Common law of Botswana, consideration by administrative bodies in exercising their discretion or through the activities of human rights institutions such as NGOs. In the *Mmusi* case, Justice Dingake ruled that Botswana was bound by the ACHPR and the ICCPR not to discriminate based on culture.

In the *Dow* appeal case,<sup>821</sup> the Court of Appeal of the Republic of Botswana declared that a signed instrument, even if not ratified or domesticated, could still be used as an aid to statutory interpretation. Appeal Judge President Austin Amisshah concurred with the High Court on the same matter that Botswana's signing of a Convention on the Organisation of African Unity (OAU) bound the Court to adopt a broader construction of a provision in the Constitution of Botswana such that the language adopted would not do violence to that provision but was consistent and harmonious with the Convention. In the landmark judgment, the Court rejected a narrower construction that would have reinforced discrimination based on sex. The judge also underlined that Botswana, "as a member of the community of civilized states," had to abide by certain standards and that "it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations."<sup>822</sup> Amisshah, J.P., additionally recognised the importance not just of Botswana's proud heritage as a democracy but also the courts' reliance on progressive thought in developing constitutional interpretation to further democratic ideals:

At this juncture I wish to take judicial notice of that which is known the world over that Botswana is one of the few countries in Africa where liberal democracy has taken root. It seems clear to me that all the three arms of the government – the Legislative, the Executive and the Judiciary – must strive to make it remain so except to any extent as may be prohibited by the Constitution in clear terms. It seems clear to me that in so striving we cannot afford to be immuned [sic] from the progressive movements going on around us in other liberal and not so liberal democracies such movements manifesting themselves in international agreements, treaties, resolutions, protocols and other similar understandings as well as in the respectable and respected voices of our other learned brethren in the performance of their adjudicatory roles in other jurisdictions. Mr. Browde S.C. counsel for the respondent referred us to the words of Earl Warren, Chief Justice of the United States, when he said in *Trop v. Dulles*, 356 U.S. 86 (1958) at p. 103 that: "The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit government powers in our nation."<sup>823</sup>

Apart from the above *ratio* of the learned judge president, Section 24 (1) of Botswana's Interpretation Act also allows the courts to refer to a relevant international treaty, agreement, or

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<sup>820</sup>As a dualist state, Botswana requires international treaties to be domesticated by statute before they can take effect.

<sup>821</sup>*Dow Appeal*, 1992 BLR 119 CA.

<sup>822</sup>*Id.*

<sup>823</sup>*Id.* at 168.

convention as aid to interpretation when the domestic legislation in question is obscure. As a corollary, Botswana's High Court and the Court of Appeal have done so on numerous occasions.

The instruments can have domestic legal force as core international human rights law. They codify well-established principles of customary international law. Alternatively, some of the principles they espouse are so widely accepted and adopted as such that they have crystallised into customary international law, Fombad argues.<sup>824</sup>

Even in the absence of incorporation into domestic law, if the principles of the instrument have progressively become customary international law, these principles are not only considered by the courts but also by administrative bodies in exercising discretionary powers.

Local NGOs, civil society organisations, and pressure groups can also further international human rights instruments, especially those that are not ratified or domesticated. Through lobbying and other methods, these organisations can encourage ratification and domestication of these instruments. They can approach the courts or join relevant parties in court action as friends of court (*amici curiae*). In an unprecedented case in mid-2014, the media advocacy group, The Media Institute of Southern Africa (MISA), successfully applied to the High Court to be admitted *amicus curiae* in proceedings by a local paper, the *Sunday Standard*, to challenge a statute deemed to be limiting press freedom and thus unconstitutional.<sup>825</sup>

When seized with a matter such as the photo in question, the court will not be persuaded by a simple claim that culture is threatened or it is not cultural practice. The case law that we have examined above no doubt confirms the claims made by Fombad.

## V. The Position of the Law on the Photoshopped Khama Picture

In the case of the Khama photo, a claim has been made that Section 91 of the Penal Code has been violated. Section 91 of the Penal Code concerns "Insults relating to Botswana." It provides that:

Any person who does any act or utters any words or publishes any writing with intent to insult or to bring into contempt or ridicule (a) The Arms or Ensigns Armorial of Botswana (b) The National Flag of Botswana (c) The Standard of the President of Botswana (d) The National Anthem of Botswana, is guilty of an offence and liable to a fine not exceeding P500.

Appearing on a radio call-in program, private attorney Kgosietsile Ngakaagae argued that the Khama photo was unlawful as it was "wrong not only morally but even legally."<sup>826</sup> He accepted it was satire but submitted, in accordance with Justice Rehnquist in *Hustler Magazine v. Falwell*,<sup>827</sup> that by nature satire entails the visitation of contempt, ridicule and humiliation on its subject. However, unlike the learned judge (Justice Rehnquist), he submitted that this was in violation of Section 91 of the Penal Code of Botswana, which in his view very expressly prohibits language of contempt and ridicule. He argued that *Hustler Magazine v. Falwell* has no application in Botswana as, unlike the First Amendment in the United States, Section 12 (2) of

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<sup>824</sup>FOMBAD, *supra* note 41.

<sup>825</sup>MISA Successfully Cited as a Friend of Court in Kgosi Docket Case, BOTSWANA GAZETTE (10 July 2014), <http://www.thegazette.news/?p=8345>.

<sup>826</sup>Ngakaagae, *supra* note 40.

<sup>827</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) [hereinafter *Hustler*].

the Constitution of Botswana places a limitation on free speech. His argument recognised that the piece was satire but that the limitations introduced by Section 12 (2) of the Constitution were applicable in this case, due to section 91 of the Penal Code. In attempt to expand the argument, reliance was sought to be made on the basis of an *expression unius alterius* claim, he submitted that satire has no constitutional protection because the Constitution does not mention it at all. “It is not constitutionally recognized as satire,” he said.<sup>828</sup>

He suggested in consequence that Section 91 of the Penal Code would not be impinged constitutionally as Section 12(2) protects it with an exception as shall be shown below. He conceded that satire was almost universally recognized as having some free speech value, “but must be contextualized in a legal and cultural environment.”<sup>829</sup> He further argued that “If it infringes public morality like in this case, it would lose protection of the law.” He contended that the Constitution recognizes public morality, which he defined as a publicly accepted standard of behaviour in a social context, recognizing societal values. In Setswana society *go rogamogologa go letlelelwe* (“insulting an elder is not acceptable”), he argued.

There are two critical errors in the above rationalisation. First, Section 91 of the Penal Code has no application respecting a satire of the person of the President. The Section quite clearly and expressly applies to flags, emblems and insignia as well as the national Anthem, all non-living representations used for identification of the Office of the President and the Nation. The application of the principle of statutory interpretation that criminal offences must be construed in accordance with their given wording necessarily excludes a satirical picture of the person of the President as constituting an offence under Section 91. It would be fallacious to argue otherwise. In consequence, therefore, and in absence of a legislative inroad to Section 12 of the Constitution *vis-a-vis* section 91 of the Penal Code, the argument must fail.

Secondly, the claim that satire is not recognized in the category of free speech in the Botswana Constitution is invalid. In the *Dow* appeal case,<sup>830</sup> the Court of Appeal dealt with this matter at length and ruled that sections of the Constitution must not be read independent of each other. Further, the court ruled that mere omission of a right does not exclude it from protection because the framers of the Constitution could not envisage every eventuality. The court also ruled that the Constitution must be interpreted widely. The court concluded that Section 3 provides that everybody (barring any applicable constitutional limitations) is entitled to “protection of the law” and that the courts “should construe limitations to fundamental rights and freedoms strictly.”<sup>831</sup>

The court gave the omission of the word “discrimination” from the U.S. Constitution as an example and used that to read “discrimination based on sex” into the Botswana Constitution and to strike off the discriminatory provision of the Citizenship Act of 1984:

The United States Constitution makes no specific reference to discrimination as such. Yet several statutes have been held to be in contravention of the Constitution on the ground of discrimination. These cases have been decided based on the 14<sup>th</sup> Amendment of the Constitution.<sup>832</sup>

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<sup>828</sup>Ngakaagae, *supra* note 40.

<sup>829</sup>*Id.*

<sup>830</sup>*Dow Appeal*, 1992 BLR 119 CA.

<sup>831</sup>*Id.* at 134.

<sup>832</sup>*Id.*

On the other hand, another attorney, Motswagole, who represented the artist at the centre of the Khama photocontroversy, argued that it was not problematic and within the realm of free speech.<sup>833</sup> He contended that nobody was the custodian of public morals: “Nobody is the *custos morum*.”<sup>834</sup> He argued that a three-part test would need to be passed to limit free speech. He postulated that there would be need to prove that the limitation of free speech is “reasonably justifiable in a democratic society.”<sup>835</sup> In the face of a case based on Section 91 of the Penal Code, the court will have to make an interpretation of this statute. In doing so, the Court is going to juxtapose the limitation clause of the Constitution with the statute that creates the offence complained of.

These two opposing views behoove us to resolve this tension. Let us start with Section 12 (2) of the Constitution which places limitations on free speech. It states:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

- d) That is reasonably required in the interest of defence, public safety, public order, public morality or public health or
- e) That is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interest of persons receiving instruction therein, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless, broadcasting or television or
- f) That imposes restrictions upon public officers, employees of local government bodies, or teachers and except so far as that provision, or as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

The phrase “nothing contained in or done under the authority of any law” will face serious scrutiny. The court first has to examine whether what purports to be a law as envisaged under the limitation clause is indeed a law. Secondly, the court has to establish whether that law is accessible as in the European case of *Sunday Times v. The United Kingdom*.<sup>836</sup> Adopting this jurisprudence in *Chavunduka and Another v. Minister of Home Affairs and Another*,<sup>837</sup> the Supreme Court of Zimbabwe, interpreting Section 50 (2) of their Constitution, which is worded very much like the Botswana one, pronounced that:

A norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>838</sup>

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<sup>833</sup>KaboMotswagole, remarks made during a podcast debate regarding the Khama photo, GABZ FM (15 Sept. 2016), podcast available [http://www.gabzfm.com/podcasts?title=khama+photo&field\\_type\\_of\\_podcast\\_value=All](http://www.gabzfm.com/podcasts?title=khama+photo&field_type_of_podcast_value=All).

<sup>834</sup>*Id.*

<sup>835</sup>*Id.* This is in reference to Section 12 (2) (c) of the Constitution of Botswana.

<sup>836</sup> *Sunday Times v. The United Kingdom*, 2 Eur. H.R. Rep. 245 (1979).

<sup>837</sup> *Chavunduka and Another v. Minister of Home Affairs and Another* (2000) 4 LRC 561 (Zimbabwe).

<sup>838</sup>*Id.* at 561.

Many scholars have expressed vagueness about many of Botswana's laws that limit freedom of expression, especially those in the Penal Code.<sup>839</sup> Many of these laws are "couched in vague, elastic and absolute terms"<sup>840</sup> and susceptible to abuse. In that sense, these laws fail to meet the test of what a law is.

Fombad has written specifically about Section 91 and highlighted its nebulous nature and the difficulty that it creates for compliance.<sup>841</sup> "Because of the lack of a precise definition for the word 'insult' it would be difficult to determine the existence of an intention to insult. The obscurity of this offence may therefore cause uncertainty which is not healthy for freedom of expression,"<sup>842</sup> he argued. There is nowhere in the said provision where the term "insult" is defined, thus creating a wide scope for all manner of interpretations. Such laws as the Penal Code do not set out clearly what is proscribed and will thus not pass the Constitutional test.<sup>843</sup>

The Supreme Court in *Chavunduka* ruled that a legal rule, properly worded, must give the citizen a fair amount of guidance. It must be formulated with sufficient precision to enable compliance. A law must leave enough room for legal debate and discussion and give a court of law a basis to define its limit. This is especially crucial if the sanctions to be meted out are of a criminal nature. Otherwise the citizen will be denied due process, the court ruled.<sup>844</sup> It would thus be easy for a defence lawyer to convince the court that this provision has a chilling effect; it instills fear as people will avoid expressing themselves, thinking that they might be breaking the law. Given the manner in which Section 91 is worded, it is not accessible either.

The phrase "the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society" will also be placed under bright torch light. The three-part test, which Motswagole alluded to, is indeed a correct interpretation of the law and will apply as it did in *Chavunduka* and the Canadian case *R. v. Zundel*.<sup>845</sup>

The first question that a court faced with this picture has to ask is whether the legislative objective that the limitation was designed to promote is sufficiently important to warrant overriding a fundamental right. A case should be made for a superior, overriding public interest free speech in terms of the right-creating provision of Section 12. It is acknowledged that while criminal laws may remain unused in the statute books, they remain in full effect and may be invoked should the facts suit the offence.<sup>846</sup> However when facing a Constitutional challenge as to the validity of the law, its usage or lack thereof has a bearing. Since there has never been any prosecution under this antiquated law, which dates back to 1964, it will be very difficult for a State Attorney to convince a judge that the legislation is, in the event of a conflict with the rights creating provisions of Section 12, of sufficient import not to be struck down in its entirety. Botswana cannot claim that it has any international obligation to limit human rights. The

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<sup>839</sup>Bugalo Maripe, *Freezing the Press: Freedom of Expression and Statutory Limitations in Botswana*, 3 AFR. HUM. RTS. L. J. 52 (2003). TACHILISA BALULE & BUGALO MARIPE, A QUICK GUIDE TO LAWS AND PRACTICES THAT INHIBIT FREEDOM OF EXPRESSION IN BOTSWANA(2000).

<sup>840</sup>Maripe, *supra* note 62, at 55.

<sup>841</sup>FOMBAD, *supra* note 41.

<sup>842</sup>Maripe, *supra* note 49, at 64.

<sup>843</sup>*Id.*

<sup>844</sup>*Chavunduka*, 4 LRC 561.

<sup>845</sup> *R. v. Zundel*, 2 S.C.R. 731, 10 C.R.R. (2nd) 193, 206(1992) (Can.).

<sup>846</sup>Reference By The Attorney-General In Re: Dynamic Services (Pty) Ltd And The Attorney-General And Another 1996 BLR 49 (Botswana).

opposite is true. As one scholar has argued, “Botswana’s human rights jurisprudence has fallen in step with international trends.”<sup>847</sup>

Raising cultural arguments with regard to the photoshopped picture cannot trump a constitutional protection provided by Section 12 of the Constitution. Customary law repugnant to the written law, justice and humanity cannot be accorded protection. Botswana’s regional and international obligations such as the International Covenant on Civil and Political Rights and the African Charter on Human and People’s Rights are highly persuasive to the Courts as illustrated above in the *Dow*<sup>848</sup> appeal case.

Secondly, the court must enquire as to whether the measures designed to meet the legislative objective are rationally connected to it rather than being arbitrary, unfair, or based on irrational considerations. The mischief to be cured by the law must not be remote and conjectural. In other words, a clear nexus must be made between the mischief and the measures taken. Since its first enactment in 1964, this law has never been applied, clearly indicating that it is not needed. It belongs to another era. Like most laws in the Penal Code, it is a remnant of the colonial period (1885-1964). Laws like these were enacted by the Monarch in Britain to prevent the subjugated colonial subjects from rebelling against the authority of the Monarch. While such provisions remain in force, if in conflict with current progressive and enlightened interpretations to freedom of speech, they fail to meet constitutional muster.

The wording and the meaning of words is very crucial. For instance, the popular cry associated with the picture that “*go rogamogologa se Setswana*” (“insulting an elder is contrary to Setswana culture”) will not be persuasive in a court of law. In the *Legwaila*<sup>849</sup> matter the learned judge of the High Court of Botswana Gyeke-Dako J opined that some words when used in public may be offensive but not necessarily insulting or abusive. There might also be “many manifestations of behaviour which will cause resentment or protest without being insulting or abusive,” His Lordship ruled.<sup>850</sup> The present case presents a very similar scenario.

A court has to decide if there was no other way (less arbitrary and less unfair) of dealing with this issue rather than the serious measure of interfering with freedom of expression. Since Botswana prides itself as an epitome of democracy, the fact that a lot of model democracies such as the USA, the United Kingdom, France, the Netherlands, Canada and Australia have abolished insult laws weakens the case for the State.

Lastly, the law is that the means used must not be more than what is necessary to achieve the objective set by the constitution. Under Section 12, the objective is free speech. Any restrictions on the guaranteed constitutional right must be narrowly construed against the objective of the right-creating provisions. The court will interpret narrowly any restriction on any fundamental right. This is an established legal position in Botswana.<sup>851</sup> A limitation on freedom of expression would thus be examined against this precedent. The term “standard of the president” is vague and lends itself to many interpretations. It is more far-reaching than the injury anticipated. It does not make clear what aspect of the President’s person or life is out of bounds. A matter like this is better left to the civil courts. The consolation might be that the fine to be paid is not much (about \$50), but any criminal conviction is a serious blot on a citizen’s profile.

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<sup>847</sup>Maripe, *supra* note 49, at 62.

<sup>848</sup>*Dow appeal*, 1992 BLR 119 CA.

<sup>849</sup>*Legwaila*, 1990 BLR 260 HC.

<sup>850</sup>*Id.* at 170.

<sup>851</sup> *Clover Petrus v The State* 1984 BLR 14 (Botswana).

In the U.S. *Hustler* case,<sup>852</sup> which is very similar to the Khama photo scenario as it involved a satirical article describing a well-known pastor having sex with his mother, the Supreme Court by a unanimous decision ruled that offensive speech is still valuable and afforded constitutional protection. First, the court accepted that the so-called ad parody was “doubtless gross and repugnant in the eyes of most.”<sup>853</sup> However, just like with the *Legwaila* case, the court went on to reject arguments based on societal morals and public anger. “The fact that society may find speech offensive is not sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”<sup>854</sup>

As a general legal principle, courts are hesitant to intervene and limit constitutional rights, especially where values like freedom of speech are concerned. That is especially the case when public figures such as politicians are involved, because it is believed that in a democracy vigorous debate must be encouraged. If courts are called upon to interpret legislation that limits press freedom or freedom of expression they are even more circumspect and in the first instance will consider if there is nothing that they can do not to limit the freedom. “Before we put a person beyond the pale of the Constitution, before we deny a person the protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection.”<sup>855</sup>

Even if the speech concerned was motivated by hatred or ill-will and such intention is proved, constitutional protection would be extended, the court ruled in the *Hustler* case. In this particular case, which was unprecedented, the court departed from the general principle of refusing to give protection where intent to inflict emotional distress was sufficiently outrageous and was clearly intended to be so. The court pronounced that while other areas of tort (delict) law may protect subjects of offensive speech, in the case of public figures and public debate, actual malice must be shown.

The court ruled that, were it to hold otherwise, there would be floodgates of cartoonists and satirists being sued and paying damages without any proof that their work falsely defamed their subjects. The court acknowledged that cartoonists are often “not reasoned or even-handed but slashing and one-sided.”<sup>856</sup> Moreover, it also acknowledged that political cartoons are often based on the exploitation of unfortunate physical traits or embarrassing events. However, it noted that from the time of George Washington (1789-1797) to the present, cartoons have not only played a prominent role in public and political discourse but have also enriched it. It is also significant to note that the court refused to apply a standard to a cartoon/satire in order to determine liability and damages. The question of taste was a subjective one and words like “outrageous” were not deemed persuasive to grant damages.

We now move to deal with the charges that were ultimately brought against Chimganda. These were based on the Penal Code, Sections 93 and 90. These sections provide *inter alia* that:

93. Abusive, obscene or insulting language re President and others;

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<sup>852</sup>*Hustler*, 485 U.S. 46.

<sup>853</sup> *Id.* at 49.

<sup>854</sup> *Id.* at 55-56.

<sup>855</sup> Zundel, *supra* note 68.

<sup>856</sup> *Hustler*, 485 U.S. at 54.

- (4) Any person who in a public place or at a public gathering uses abusive, obscene or insulting language in relation to the President, any other member of the National Assembly or any public officer is guilty of an offence and liable to a fine not exceeding P400.
- (5) In this section, "public gathering" has the same meaning as in section 90.

And section 90 (2) provides:

- (6) In this section, "public gathering" means any meeting, gathering or concourse, whether in a public place or otherwise, which the public or any section of the public or more than 15 persons are permitted to attend or do attend, whether on payment or otherwise, and includes a procession to or from a public place.

It is clear from the above sections that a photoshopped photo published on the internet does not fall into the intention of the offence, which clearly is aimed at verbal expression. This is buttressed by the provision that such expression must take place in the presence of more than fifteen persons "permitted to attend."

There is no denying that under the current legislative provision in Botswana there is no penal provision to curtail the freedom of expression in the manner done by Kealeboga Chinganda. The use of inapplicable penal provisions, quite from the argument that they would fail constitutional muster, is a violation against freedom of expression.

New information indicates that following his arrest and detention two days after the publication of the photoshopped image of the President, Kealeboga Chinganda was secretly tried. He was denied access to his attorney and made a confession before a Magistrate in Maun. This was done surreptitiously, sources say.<sup>857</sup>

He was flown to Gaborone in the custody of the members the Directorate of Intelligence and Security Service and continued to be detained without access to his lawyer. Two days later, still on remand in custody, he appeared once again before a Magistrate (once again in Maun) and pleaded guilty to an offence under Section 93 of the Penal Code as read with Section 90 subsection 2. He was fined the maximum penalty of P400.<sup>858</sup>

## **VI. Conclusion**

The argument that the Khama photograph offends against Tswana culture is indeed very popular as many members of the public (including lawyers) said on Facebook and on phone calls to *Gabz FM*. *Setswana* culture would not accommodate intemperate language, especially when used against an elder. Again, in terms of *Setswana* culture, using words which are regarded to be in bad taste, especially in public, is not acceptable and those listening would be offended. However, as has been shown through various cases cited, the courts in Botswana do not esteem culture over the Constitution. Parliament alone makes laws, but the Constitution is supreme over all the laws in the land. Moreover, the courts have powers to quash any laws that undermine the Constitution.

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<sup>857</sup>Author's email conversation with an attorney in private practice, November 12, 2016.

<sup>858</sup>*Id.*

Apart from the Constitution, many international treaties signed or ratified by Botswana have placed her in a position where she has a serious international obligation which she must discharge. Prosecution under Section 91 of the Penal Code will not be enough to break into the protection to free speech given by Section 12 (1) of the Constitution of Botswana.

As some lawyers have argued, there are many hurdles to cross before successfully litigating under the current laws of Botswana. The overarching question is whether limiting the fundamental right of freedom of expression is reasonably justifiable in a democratic society. The three-part test has to be satisfied. The first question that the court has to ask is whether the legislative objective that the limitation was designed to promote is sufficiently important to warrant overriding a fundamental right. Secondly, the court must enquire as to whether the measures designed to meet the legislative objective are rationally connected to it rather than being arbitrary, unfair, or based on irrational considerations. The mischief to be cured by the law must not be remote and conjectural. Thirdly, the means used to address the offence must not be more than what is necessary to achieve the objective set by the Constitution. Under Section 12, the objective is free speech. Any restrictions on the guaranteed constitutional right must be narrowly construed against the objective of the right-creating provisions. As it stands, any prosecutor will not meet the three-part test. Limitation of Chinganda's right to freedom of speech is not justifiable in Botswana's democratic set up.

The government of Botswana only has one option: repeal laws inconsistent with the Constitution and maintain its position as a leading democracy that respects the rule of law. In that way, Parliament can pride itself as discharging the Constitutional imperative of making laws consonant with order, peace, and good governance.

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