

Criminal Law Principles in California:

BALANCING A “RIGHT TO BE FORGOTTEN” WITH A RIGHT TO REMEMBER

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In the early 1970s, both the California Supreme Court and Germany’s Federal Constitutional Court faced the same legal question. Marvin Briscoe had hijacked a truck in 1956 and sued *Reader’s Digest* for publishing an account of the event a decade later.¹ An unnamed petitioner likewise had participated in a terrorist act that killed several people and sued to enjoin a German television station from identifying him in a documentary about the event, scheduled to air around the time of his prison release.² Both the magazine and station asserted a right to disclose the truthful information, but both courts ruled against them, concluding disclosure could impede the offender’s rehabilitation and reintegration into society.

Both California and Europe recently have developed new rules about how to balance the public’s right to truthful information with an

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¹ *Briscoe v. Reader’s Digest Association, Inc.*, 4 Cal.3d 529 (1971).

² *Lebach* case, 35 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 202 (1973).

individual's right to suppress embarrassing information about his past. Notwithstanding the prior convergence, the new frameworks are very different, and illuminate the competing philosophical priorities of American and European law. These competing priorities are worth studying, as both the United States and Europe are seeking to apply their model throughout a global internet lacking physical borders,³ and the post-Brexit United Kingdom has the opportunity to consider both the American and Continental models on free speech, privacy, criminal justice, and many other issues as it charts its own legal course in the coming years.

California's policy follows the common law tradition limiting minors' rights to "secure them from hurting themselves by their own improvident acts."⁴ Family Code section 6710 shields minors from the consequences of their "improvidence" and "indiscretions" by permitting them to disaffirm their contracts,⁵ and California's new "Eraser Law," developed legislatively, adapts this principle for the Internet Age by letting minors delete content they regretted having posted on the internet.⁶

Europe's "right to be forgotten" is narrower in one respect but broader in others. Whereas California's law allows the poster unilaterally to remove content, Europe's law, developed judicially by the Court of Justice for the European Union (CJEU), requires someone seeking to remove embarrassing data to show they were "inadequate, irrelevant or excessive in relation to the purposes of the processing, that they are not kept up to date, or that they are kept for longer than is necessary," and the final decision lies with a court.⁷ But Europe's right has a broader reach. California's law

³ Leslie E. Minora, *U.S. Courts Should Not Let Europe's "Right to be Forgotten" Force the World to Forget*, 80 TEMP. L. REV. 609, 616, 619 (2017).

⁴ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *464–65, quoted in *J.D.B. v. North Carolina*, 564 U.S. 261, 273 (2011).

⁵ CAL. FAM. CODE, § 6710; *Burnand v. Irigoyen*, 30 Cal.2d 861, 866 (1947); *Pearson v. Superior Court*, 202 Cal. App. 4th 1333, 1339 (2012).

⁶ CAL. BUS. & PROF. CODE, § 22581, subd. (a). The law took effect in 2015.

⁷ Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317 (*Google Spain*). Mario Costeja Gonzalez brought suit upon discovering that internet searches of his name disclosed 1998 newspaper articles describing an auction of his property due to unpaid debts. The EUCJ held Gonzalez' fundamental right "to be 'forgotten' after a certain time" would override both the search engine's "economic interest" in presenting and "the interest of the general public in having access to that information." *Id.*

allows individuals to delete only their own posted content, and not any re-posting of that same content by anyone else. By contrast, the European right permits far more: deletion of (1) one’s own content; (2) another party’s re-posting; and (3) anyone else’s comment or description *about* the original subject (e.g., news reports).⁸ And most obviously, the California law reaches only minors. The CJEU imposed no such limit, implicitly concluding that the indiscretion of youth should not be wasted on the young.

Whereas Germany’s 1973 decision has shaped European law,⁹ the California Supreme Court disapproved its *Briscoe* decision in 2004.¹⁰ The Court naturally cited intervening United States Supreme Court decisions analyzing the First Amendment. But other developments in California criminal law presaged this divergence. In a case arising out of Los Angeles Superior Court, the U.S. Supreme Court in *Farett v. California* (1975)¹¹ recognized a constitutional right to represent oneself in court, a right not protected by European Union law. The Court would later indicate how the self-representation issue pits the individual’s right to be “master of one’s fate” against the possibility of personal embarrassment, and Part I of this article shows how this contrast reflects the respective priorities of Americans and Europeans on privacy law.

Europe’s “right to be forgotten” derives from the French principle letting a convict, after completing his sentence, suppress disclosure of his crime and incarceration,¹² so differences in American and European criminal law naturally offer insight into the disparate conceptions of the law’s reach. Part II of this article recalls California’s 1977 shift from rehabilitation-based indeterminate sentencing to retribution-based determinate sentencing, and its effect on the right of former criminals to hide information about their past. Part III describes a 1982 voter initiative that revised California law to offer juries more information about defendants’ criminal records for the purpose of evaluating their credibility. Part IV

⁸ Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 68 (2012).

⁹ See, e.g., James Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 YALE L.J. 1151, 1195 (2004) (*Two Western Cultures*); JAMES WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 92, 142 (2003) (*HARSH JUSTICE*).

¹⁰ *Gates v. Discovery Commc’ns, Inc.*, 34 Cal.4th 679 (2004).

¹¹ 422 U.S. 806.

¹² Rosen, *supra* note 8.

shows how the First Amendment provides Americans with far greater speech protections than European law, which restricts speech more to accommodate other values.¹³ Part V offers a theory on why the two legal systems have developed such different legal priorities, and Part VI concludes by summarizing the competing principles.

I. PRIVACY

Continental Europe's inquisitorial system of criminal procedure empowers the state to protect the interests of its people, whereas the adversarial system governing Anglo-American criminal procedure generally trusts citizens to define and defend their own interests.¹⁴ The CJEU judges' empowering courts to determine when to delete internet content, and Californians' empowering users themselves to do so, reflects this general contrast. Along these lines, Continental Europe does not recognize the common law right to self-representation.¹⁵ But *Faretta* recognized a constitutional guarantee flowing from English common law that American criminal defendants may trust themselves to decide on their representation; the state may not impose "an organ of the state" on an unwilling defendant, even if it would probably benefit him.¹⁶ The attorney must be the "assistant" of the defendant, not the "master."¹⁷ The dissenting opinion, however, lamented that the Court had created a constitutional right "to make a fool of himself."¹⁸

The self-representation right thus procedurally resembles the right to be forgotten. Self-representation occurs in Europe (though many countries confine it to less serious cases), but a court must assent to the arrangement,

¹³ FLOYD ABRAMS, *THE SOUL OF THE FIRST AMENDMENT* (2017).

¹⁴ Matthew T. King, *Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Systems*, 12 INT'L LEGAL PRINCIPLES 185, 191, 194, 201 (2001–2002).

¹⁵ Nina H. B. Jorgensen, *The Right of the Accused to Self-Representation Before International Criminal Tribunals*, 98 AM. J. OF INT'L L. 711, 714–17 (2004), citing, e.g., 23 CODE DE PROCEDURE PENALE [C. PR. PEN.] (Partie Legislative) Arts. 274, 317 [France]; 22 STRAFPROZEBORDNUNG [StPO] §§ 140, 240 [Germany].

¹⁶ *Faretta v. California*, 422 U.S. 806, 820 (1975). "Personal liberties are not rooted in the law of averages." *Id.* at 834.

¹⁷ *Id.* at 820.

¹⁸ *Id.* at 852 (Blackmun, J., dissenting).

whereas the Sixth Amendment permits a defendant to invoke the right unilaterally.¹⁹ As this article will show, it is not the only context where Europe seeks to protect individual welfare and America seeks to respect individual autonomy.

A subsequent exchange on the subject between Justice Stephen Breyer, the justice who has most consistently favored incorporating European norms into American constitutional analysis, and Justice Antonin Scalia, the justice who most forcefully advocated for exclusive reliance on American sources, illuminated the values underlying the self-representation debate.²⁰ Justice Breyer’s majority opinion opposed self-representation for a defendant whose questionable mental competence suggested “the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling.”²¹ The state thus needed to protect the defendant from his own improvidence. But Justice Scalia defined dignity as the opportunity for self-determination, not a shield against humiliation.

[T]he loss of “dignity” the [self-representation] right is designed to prevent is *not* the defendant’s making a fool of himself by presenting an amateurish or even incoherent defense. Rather, the dignity at issue is the supreme human dignity of being master of one’s fate rather than a ward of the State — the dignity of individual choice.²²

The competition between these values extends well beyond the courtroom. Like Justice Breyer and unlike Justice Scalia, Europeans endorse the value of state intervention to protect individual welfare. When asked which was more important: “for the state to play an active role in society so as to guarantee that nobody is in need” or “for everyone to be free to pursue their life’s goals without interference from the state,” almost two-thirds of the French and German respondents (and more than two-thirds of the Spanish), but barely one-third of Americans, favored state

¹⁹ Jorgensen, *supra* note 15 at 714–15.

²⁰ *The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. OF CON. L. 519 (2005).

²¹ *Indiana v. Edwards*, 554 U.S. 164, 176 (2008).

²² *Id.* at 186–87 (Scalia, J., dissenting) (boldface added).

intervention over self-determination.²³ Whether the state should actively protect people from harmful outcomes (including humiliation), or respect their self-determination, even when improvidently exercised, is a foundational question that has divided European and American conceptions of “privacy” for well over a century.

Europe and the United States have long maintained different privacy priorities. Professor James Whitman, who has written extensively on the differences between the Continental European and American legal traditions,²⁴ has observed how Europeans have always valued personal dignity and honor, and their public image, so their law seeks to protect individuals from humiliation.²⁵ Americans, by contrast, seek to protect “the realm of private sovereignty.”²⁶ This derives from the individual’s right to exclude the government from one’s home, but extends to other forms of personal sovereignty.²⁷ California’s constitutional norms, developed during the Gold Rush, especially valued individualism and unrestrained speech.²⁸

Professor Whitman cited the aristocratic culture of eighteenth-century France and Germany as the root of European privacy preferences.²⁹ High-status individuals enjoyed an enforceable right to prevent the loss of honor (“public face”) arising from insult or the disclosure of embarrassing information.³⁰ A seminal example involved *The Three Musketeers* author Alexander Dumas père, who posed for relatively salacious photographs with a girlfriend half his age.³¹ Dumas admitted he had sold the rights to the

²³ Pew Research Center, *The American–Western European Values Gap* 7 (2011–12) <http://www.pewglobal.org/2011/11/17/the-american-western-european-values-gap>.

²⁴ See *Two Western Cultures of Privacy*, *supra* note 24; James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 *YALE L.J.* 1279 (2000) (*Enforcing Civility and Respect*); HARSH JUSTICE, *supra* note 9. In many ways, the United Kingdom’s common law tradition accords with the American tradition more than the European one. Unless otherwise indicated, this article will use “European” to refer to the Continental tradition.

²⁵ *Two Western Cultures*, *supra* note 9, at 1164.

²⁶ *Id.* at 1162.

²⁷ *Id.*

²⁸ *Gerawan Farming, Inc. v. Lyons*, 24 Cal.4th 468, 495 (2000).

²⁹ *Two Western Cultures*, *supra* note 9, at 1165.

³⁰ *Id.* at 1162, 1168.

³¹ *Id.* at 1175.

photographer, who registered the copyright.³² To protect Dumas’ honor, however, a court created a new privacy right to compel suppression of the photos.³³ Although Dumas “had forgotten to take care of his dignity,” the court protected it for him, by ordering the photographer to return to Dumas the rights to the photographs.³⁴

American privacy law derives from a different foundation. The seminal decision was *Boyd v. United States* (1886),³⁵ which protected the home, the locus of privacy, from state intrusion.³⁶ *Boyd* relied on the English case of *Entick v. Carrington* (1765),³⁷ and described the Founding Fathers as considering *Entick* the “true and ultimate expression of constitutional law.”³⁸ *Entick* celebrated the “sacred and incommunicable right” to property: “The great end for which men entered into society was to secure their property.”³⁹ This societal purpose would compel a different outcome for *Dumas*. The property right lay with *the photographer*, whose contract would be deemed inviolable under American constitutional law.⁴⁰ Even today, California’s Eraser Law denies the right to remove a post if the minor received compensation or other consideration for it.⁴¹

The California Supreme Court’s decision in *Shulman v. Group W Productions, Inc.* (1998)⁴² reflected this “American” understanding of privacy. A news crew filmed the emergency rescue of automobile accident victims.⁴³ A victim who was disoriented after the accident later objected to broadcasting the rescue.⁴⁴ Asserting her interest in “public face,” valued by Europeans as the right “to have people see you the way you want to

³² *Id.* at 1175–76.

³³ *Id.* at 1176.

³⁴ *Id.* Dumas would not be the last person to pose for risqué photographs and then regret it. See Rosen, *supra* note 8.

³⁵ 116 U.S. 616.

³⁶ *Two Western Cultures*, *supra* note 9, at 1210.

³⁷ 95 Eng. Rep. 807 (K.B. 1765). The *Boyd* Court cited the longer version presented in 19 Howell’s State Trials 1029.

³⁸ *Boyd*, 116 U.S. at 626.

³⁹ *Boyd* at 327, citing *Entick*, 19 How. St. Tr. at 1066, emphasis added.

⁴⁰ See, e.g., *Fletcher v. Peck*, 10 U.S. 87, 138, [6 Cranch] (1810).

⁴¹ CAL. BUS. & PROF. CODE, §22581, subd. (b)(5).

⁴² 18 Cal.4th 200.

⁴³ *Id.* at 210–12.

⁴⁴ *Id.* at 212.

be seen,”⁴⁵ she noted, “I certainly did not look my best, and I don’t feel it’s for the public to see.”⁴⁶ The Court rejected this “European” interest, finding that the newsworthiness of the event, which highlighted the challenges facing emergency workers, justified publication despite the woman’s embarrassment.⁴⁷

But the Supreme Court vindicated her “American” interest in “resistance to invasions of the realm of private sovereignty.”⁴⁸ Endorsing the view that “[h]e who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant,”⁴⁹ the Court held there was a triable issue of fact as to whether the journalist improperly intruded into the victim’s “zone of privacy” by riding along in the rescue helicopter, and/or placing a microphone on the rescuer’s person, amplifying and recording what she said and heard.⁵⁰

The *Shulman* court concluded that information’s newsworthiness could justify *publication* despite the subject’s embarrassment, but the story’s value did not abrogate limitations on its *gathering*. “Intrusion into a private place, conversation or source of information” cannot be justified by the intruder’s goal to “get good material for a news story.”⁵¹ The U.S. Court of Appeals, Ninth Circuit had similarly distinguished between publication and gathering in forbidding investigative journalists from using hidden cameras and tape recorders in the Los Angeles home of their target. “The First Amendment is not a license to trespass, to steal, or to *intrude* by electronic means *into the precincts of another’s home or office*.”⁵²

Shulman reflected an “American” preference for process over outcome in distinguishing between one “who [voluntarily] imparts private information” (and has no right to suppress) and “unauthorized interception” and “secret monitoring” (which might justify suppression).⁵³ It reflected

⁴⁵ *Two Western Cultures*, *supra* note 9, at 1161.

⁴⁶ *Shulman*, 18 Cal.4th at 212.

⁴⁷ *Id.* at 228–30.

⁴⁸ *Two Western Cultures*, *supra* note 9, at 1162.

⁴⁹ *Shulman* at 231, quoting Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 973–74 (1964) (n. omitted).

⁵⁰ *Shulman*, at 233.

⁵¹ *Id.* at 242.

⁵² *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (emphasis added).

⁵³ *Shulman* at 234–35.

the constitutional principle that “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”⁵⁴

American law thus protects the individual from external intrusion but not personal indiscretion. The law does not prevent the revelation of salacious photographs where they are voluntarily (if improvidently) *offered*, but there is a right to suppress if they are involuntarily *taken* from the subject by hidden camera.

This First Amendment principle accords with criminal procedure principles. Americans enjoy not only an exceptional protection from governmental searches compared to Europeans⁵⁵ but also an exceptional right to exclude unlawfully taken evidence from trial.⁵⁶ But American law is actually more permissive of evidence obtained through trickery,⁵⁷ where confessions may be attributed to personal improvidence rather than governmental intrusion.⁵⁸

The Anglo-American cases of *Boyd* and *Entick* likewise recognized “consent” as one of the two exceptions to the general rule protecting private property from intrusion. “No man can set his foot upon my ground *without my licence*.”⁵⁹ French law, more paternalistically, constrained the right to consent. A court could find one of the century’s most celebrated novelists had simply “forgotten” to protect his dignity, and vitiate the consent he had freely given.

Europe has long implemented the goal of protecting individuals from improvidence, whether their own or of relatives who could impair the

⁵⁴ *Katz v. United States*, 389 U.S. 347, 351 (1967).

⁵⁵ *See, e.g., Two Western Cultures, supra* note 9, at 1159 (France and Germany tap citizens’ phones 10 to 30 times as often, and Italy and the Netherlands 130 to 150 times as often, as the United States).

⁵⁶ *See Roper v. Simmons*, 543 U.S. 551, 624–25 (2005) (Scalia, J., dissenting).

⁵⁷ Christopher Slogobin, *An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation*, 22 MICH. J. INT’L L. 423, 441, 443–44, 446 (2001).

⁵⁸ *See also Colorado v. Connelly*, 479 U.S. 157 (1986) (confession prompted by defendant’s psychosis rather than governmental coercion was constitutionally voluntary).

⁵⁹ *Entick*, 19 How. St. Tr. 1029, 1066, *quoted in Boyd*, 116 U.S. 616, 627 (emphasis added). (The American court changed the spelling to “license.”)

family's standing. Unlike America, which has followed the English rule allowing a testator to distribute his wealth as he chose, permitting the complete disinheritance of any (or all) of his children, France, Germany, and other civil law nations, more concerned with equality (and fraternity), have restricted testamentary autonomy for the sake of a relatively equal division among heirs.⁶⁰ For Anglo-Americans, the priority is letting individuals control their fate; Europe subordinates self-determination to protecting individuals (and their heirs) from improvidence.

An even more interesting European restriction on autonomy for the sake of saving offspring from parental improvidence is the practice of restricting parents' choice of a baby's name.⁶¹ Germany, for example, maintains a list from which parents must choose their child's name.⁶² The infringement on self-determination is unfathomable to Americans, but "Europeans say that the state simply must intervene to protect children against the stupidities of their parents."⁶³ But a government that takes the stupidity of adults as its premise will also deny them the authority to make other decisions, or have access to disputed information.

A second ground for limiting the right to property or liberty was criminal misconduct; *Boyd* observed these rights could be "forfeited by his conviction of some public offense."⁶⁴ This accorded with waiver by consent, because crime was considered a voluntary act, chosen by a morally responsible agent,⁶⁵ so punishment was the "agent's own act."⁶⁶ The state designed punishment to induce rational, self-interested actors to follow the law and

⁶⁰ JENS BECKERT, *INHERITED WEALTH*, 35–37, 62, 69–70 (English ed. 2008); Barbara Willenbacher, *Individualism and Traditionalism in Inheritance Law in Germany, France, England and the United States*, 28 J. OF FAM. HIST. 208, 210 (2003). For the French, the objection to testamentary freedom lay in "the sacred principles of natural equality" (BECKERT, at 30, quoting Mirabeau, 2 April 1791); for the Germans, it was the objection to an individualism that denigrated family obligations.

⁶¹ *Two Western Cultures*, *supra* note 9, at 1216.

⁶² *Id.* Although Monty Python's "Ministry of Silly Walks," was entirely fictional, there really is a registry of "Silly Names."

⁶³ *Two Western Cultures*, *supra* note 9, at 1217.

⁶⁴ *Boyd*, 116 U.S. 616, 630.

⁶⁵ MARTIN J. WIENER, *RECONSTRUCTING THE CRIMINAL: CULTURE, LAW AND POLICY IN ENGLAND, 1830–1914* 11 (1990).

⁶⁶ Markus Dirk Dibber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 L. & HIST. REV. 113, 118, (1998) quoting J.D. Mabbott, *Freewill*

avoid crime.⁶⁷ The contemporary Supreme Court, with Justice Scalia leading the way, has continued to champion the view that punishment shapes criminals’ decision-making, so they choose their punishment.⁶⁸

Nineteenth-century Europe viewed criminals more sympathetically, as the state prerogative to outlaw nonharmful conduct led to the imprisonment of dissidents, duelists and debtors, people who were not “really criminals.”⁶⁹ Criminal convictions thus did not stigmatize the individual as much as in America.⁷⁰ European privacy law protected high-status individuals from embarrassment, with less regard for whether the status was deserved or not. “[P]rying and insults . . . violate the law when they tend to destroy, through public revelation . . . honor justly or *unjustly acquired*.”⁷¹

Both Europe and America thus tended to protect from external derogation that which gave individuals status within their social community. In Europe, this was honor and reputation, usually inherited from one’s ancestors. In America, it was property, often earned personally.

America authorized individuals to waive these rights, through consent, or forfeit them, through criminal misconduct. To use Justice Scalia’s later phrase, the American was the “master of one’s fate,”⁷² who could alienate his rights, however inadvisably. Europe did more to protect individuals from the consequences of their improvidence (especially where it would harm the entire family).

For much of the nineteenth century, the “classical school” of criminology relied on the Enlightenment premise of human rationality. But America and Europe would discard the classical model and embrace the principles of “scientific” criminology, which shaped criminal law from the

and Punishment, in CONTEMPORARY BRITISH PHILOSOPHY: PERSONAL STATEMENTS 303 (Richard I. Aaron and Hywel David Lewis eds. 1956).

⁶⁷ DANIEL J. CURRANT & CLAIRE M. RENZETTI, THEORIES OF CRIME 11 (2001).

⁶⁸ *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring): “[T]he criminal will never get more punishment than he bargained for when he did the crime”; see also *Blakely v. Washington*, 542 U.S. 296, 309 (2004). As with his position on self-representation, Scalia in *Apprendi* and *Blakely* prioritized individual choice in determining one’s future (sentence) over the state’s providing a more benign one.

⁶⁹ HARSH JUSTICE, *supra* note 9, at 108, 120, 178.

⁷⁰ *Id.* at 178–79, 196–97.

⁷¹ *Two Western Cultures*, *supra* note 9, at 1179, quoting EMILE BEAUSSIRE, LES PRINCIPES DU DROIT (1888) (emphasis added).

⁷² *Indiana v. Edwards*, 554 U.S. 164, 186–87 (2008) (Scalia, J., dissenting).

late nineteenth century until the last quarter of the twentieth century.⁷³ In allowing Americans to alienate (often improvidently) their right to counsel in *Faretta*, just as they could more freely alienate their dignity through improvident photographs or alienate their property through improvident bequests, the 1975 decision provided an inflection point, from which the two continents would diverge.

California would soon provide other inflection points for this divergence.

II. PUNISHMENT

The Enlightenment philosophy of Kant and Hegel, deriving from the premise of human rationality, posited that all citizens could combine to devise, follow, and enforce laws as members of an equal community.⁷⁴ Retributive punishment was therefore the legitimate consequence of freely chosen behavior.⁷⁵ The classical school considered the primary preventive function of punishment to be general deterrence,⁷⁶ as “[t]he guiding vision of . . . criminal justice was that of the responsible individual,” who could be influenced by adequate punishment to avoid wrongdoing (and deserve it if he did not).⁷⁷

Owing as much to Darwin as the Enlightenment,⁷⁸ the “scientific school” of criminology displaced this model,⁷⁹ positing: “The new view

⁷³ Mitchell Keiter, *How Evolving Social Values Have Shaped (and Reshaped) California Criminal Law*, 4 CAL. LEGAL HIST. 393, 397–400 (2009); Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 1020 (2016).

⁷⁴ Dibber, *supra* note 66, at 117–18.

⁷⁵ *Id.* at 118.

⁷⁶ General deterrence works by informing the general public of the consequences for an offense; specific deterrence works on the individual, tailored to his circumstances. The rehabilitation model essentially encompasses specific deterrence.

⁷⁷ Wiener, *supra* note 65, at 11.

⁷⁸ “Humans were beginning to appear to scientists merely as one type of creature, with no special links to divinity . . . [as well as] creatures whose conduct was influenced, if not determined, by biological and cultural antecedents rather than self-determining beings who were free to do what they wanted.” CURRANT & RENZETTI, *supra* note at 15, quoting G.B. VOLD & T.J. BERNARD, *THEORETICAL CRIMINOLOGY* 36 (3d ed. 1986).

⁷⁹ Keiter, *supra* note 73, at 398.

of crime and criminals is, that what a man does is a result of his heredity and his environment”⁸⁰ Lacking the classical school’s confidence in individuals’ rational agency, the criminologists of the scientific school de-emphasized deterrence; punishment’s goal was not so much to deter the wicked as to heal the weak.⁸¹ This “diminished estimate” of individuals’ agency invited the state “to assume even greater powers in ‘correcting’ problems now deemed beyond the individual’s power to alter.”⁸² If people could not govern themselves, the state would do it for them.

Criminologists spoke of crime in medical terms; it was no more or less than a treatable disease.⁸³ As the 1931 report of the National Commission on Law Observance and Enforcement (Wickersham Commission) declared, “Physicians, upon discovering disease, cannot name the day upon which the patient will be healed. No more can judges intelligently set the day of release from prison at the time of trial.”⁸⁴ As the criminal law moved away from treating criminals as responsible individuals, sentencing became less retributive and more rehabilitative, determining criminal punishment not so much according to the criminal *offense* than the criminal *offender*.⁸⁵ Retribution was no longer the primary objective of the criminal law, and many found it an improper consideration altogether.⁸⁶ California and other jurisdictions adopted indeterminate sentencing, whereby sentence length was decided not by judges upon conviction but “correctional” officers during the rehabilitative process.⁸⁷

⁸⁰ ERNEST BRYANT HOAG & EDWARD HUNTINGTON WILLIAMS, *CRIME, ABNORMAL MINDS AND THE LAW* xxi (1923).

⁸¹ Keiter, *supra* note 73, at 399.

⁸² Wiener, *supra* note 65, at 338; Mimi Aizenstadt & Brian E. Burtch, *Medicalization and Regulation of Alcohol and Alcoholism: The Professions and Disciplinary Measures*, 13 INT’L J.L. & PSYCHIATRY 127, 135 (1990).

⁸³ Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. & CRIMINOLOGY 883, 893 n.62 (1990).

⁸⁴ *Id.*, quoting the 1931 Wickersham Commission.

⁸⁵ *People v. Love*, 53 Cal.2d 843, 856 n.3 (1960).

⁸⁶ *Id.*

⁸⁷ Rehabilitative-based, indeterminate sentencing was not necessarily more favorable to defendants than retributive punishment; for example, retribution could never justify a sentence of life imprisonment (one year to life) for the offense of indecent exposure, as occurred under California’s indeterminate sentencing model. But in the context of murder, rehabilitation would offer a chance at release, which retribution would not.

The emphasis on rehabilitation generated a right to be forgotten. In the very year of the Wickersham Commission's Report, the California Court of Appeal decided *Melvin v. Reid*.⁸⁸ Gabrielle Darley Melvin had been a prostitute and was tried and acquitted for murder. In 1919, after her acquittal, as the California Court of Appeal explained, she "became entirely rehabilitated" and commenced living an "exemplary, virtuous, honorable and righteous life."⁸⁹ The defendants produced a film in 1925, *The Red Kimono*, which chronicled the true story of her "past life" with its "unsavory incidents."⁹⁰ The film led her new friends to scorn and abandon her, exposed her to ridicule, and caused her mental and physical suffering. The defendants denied that her allegations stated a cause of action.⁹¹

The Court of Appeal acknowledged that the defendants could describe her life story, as the trial was a matter of public record.⁹² But the court found actionable the film's use of her real name.⁹³ The court recognized that neither the common law nor any California statute barred such use. Like the French court in *Dumas*, the California Court of Appeal discerned a new right, rooted in the opening of the California Constitution, which guaranteed every individual "the right to pursue and obtain happiness."⁹⁴ Because Mrs. Melvin had "rehabilitated herself and taken her place as a respected and honored member of society" she was entitled not to have "her reputation and social standing destroyed by the publication."⁹⁵ The decision was aspirational, resting on how people (including the media) *ought to* behave, as it chastised the producers for their "unnecessary and indelicate" use of her maiden name, which reflected a "willful and wanton disregard of that charity which should actuate us in our social intercourse."⁹⁶

⁸⁸ 112 Cal. App. 285 (1931).

⁸⁹ *Id.* at 286.

⁹⁰ *Id.* at 287.

⁹¹ *Id.* By demurring, the defense conceded that Melvin's account was true for the purpose of litigation, though the historical record offers room for doubt.

⁹² *Id.* at 290.

⁹³ *Id.* at 291–92.

⁹⁴ *Id.* at 291, citing CAL. CONST. art. I, § 1.

⁹⁵ *Id.* at 292.

⁹⁶ *Id.* at 291. The Delaware Supreme Court would express its doubt that speech could be restricted whenever it was "indelicate," as "the standard of good taste" was "too elusive to serve as a workable rule of law." *Barbieri v. News-Journal Co.*, 189 A.2d 773, 776 (Del. 1963).

But the primary basis for the result was the prevailing philosophy of criminal law, which the court extended to society as a whole:

One of the major objectives of society as it is now constituted, and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal. Under these theories of sociology, it is our object to lift up and sustain the unfortunate rather than tear him down.⁹⁷

As a federal court would later recall, *Melvin v. Reid* created “an entire branch of the tort law of privacy.”⁹⁸

The California Supreme Court relied on *Melvin*’s reasoning forty years later when *Reader’s Digest* published an article describing how Marvin Briscoe had hijacked a truck in 1956.⁹⁹ The article described several hijacking incidents and the trucking industry’s response.¹⁰⁰ It recalled that Briscoe “fought a gun battle” with police but did not mention when it occurred.¹⁰¹ Following Mrs. Melvin’s lead, Briscoe conceded that the magazine could describe the event but challenged its use of his name, contending it likewise caused friends and family to scorn and abandon him, and exposed him to humiliation and ridicule.¹⁰²

The California Supreme Court’s analysis vindicated the European privacy interest in saving “face” and preventing humiliation. “Loss of control over which ‘face’ one puts on may result in literal loss of self-identity [citations] and is humiliating beneath the gaze of those whose curiosity treats a human being as an object.”¹⁰³

The Supreme Court offered a three-factor balancing test, and found that Briscoe, like Melvin, had stated a cause of action.¹⁰⁴ The court resolved the first factor, the social value of the published facts, by finding that a reasonable jury could find minimal social value in publishing Briscoe’s

⁹⁷ *Id.* at 292.

⁹⁸ *Doe v. Chicago*, 360 F.3d 667, 672 (7th Cir. 2004).

⁹⁹ *Briscoe v. Reader’s Digest Ass’n, Inc.*, 4 Cal.3d 529, 532 (1971).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 532–33.

¹⁰² *Id.* at 533.

¹⁰³ *Id.* at 534.

¹⁰⁴ *Id.* at 544.

name.¹⁰⁵ Second, “the depth of the article’s intrusion into ostensibly private affairs” supported suppression because most people would find “revealing’s one criminal past” highly offensive to most Americans.¹⁰⁶ And third, the plaintiff in no way voluntarily consented to the publicity: “His every effort was to forget and have others forget that he had once hijacked a truck.”¹⁰⁷

The opinion lacked a dissent, which could have challenged some of these assumptions. Defining the public criminal act as a “private affair” based on the perpetrator’s *desire to keep it private* would permit any misdeed to qualify as private and justify suppression. And unless criminals had a reasonable expectation of privacy in a public, violent act, its voluntary commission could be seen as “knowingly expos[ing it] to the public,” rendering it fair game for public description. Perhaps the most disturbing part (of either the findings or the test itself) was that speech could be actionable so long as a reasonable trier of fact could find it lacked “social value.” Such value may well lie in the eye of the beholder; few writings, whether articles or complete books, attract the interest of a popular majority. Many of history’s most significant works would never have enriched public discussion if the political majority had been able to suppress them for lacking adequate “social value.” As a contemporary commentary observed, the social value test improperly grants the judiciary “a censorship role, deciding what the public should read, see or hear.”¹⁰⁸ Although other states declined to adopt the social value test,¹⁰⁹ contemporary Europe remains more willing to vest courts with authority over what the public should read, see, or hear.¹¹⁰

The Supreme Court, like the Court of Appeal in *Melvin*, ultimately grounded its conclusion in penal policy:

One of the premises of the rehabilitative process is that the rehabilitated offender can rejoin that great bulk of the community from

¹⁰⁵ *Id.* at 541–42.

¹⁰⁶ *Id.* at 542.

¹⁰⁷ *Id.*

¹⁰⁸ Don R. Pember & Dwight L. Teeter, Jr., *Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L. REV. 57, 81 (1974).

¹⁰⁹ *Id.* at 78, 81.

¹¹⁰ See Part IV.

which he has been ostracized for his anti-social acts. In return for becoming a “new man,” he is allowed to melt into the shadows of obscurity.¹¹¹

The court expressly referenced indeterminate sentencing:

The purpose of the indeterminate sentencing law in California . . . is “to put before the prisoner great incentive to well-doing [citations].” The indeterminate sentence law in theory “affords a person convicted of crime the opportunity to minimize the term of imprisonment by rehabilitating himself in such manner that he may again become a useful member of society.” [Citation.]¹¹²

Within a decade, the Supreme Court would declare that the “most important” basis for its *Briscoe* decision was the state’s “compelling interest in the rehabilitative process,” as media disclosure of criminals’ identity counteracted that process.¹¹³ This basis appeared so central to the decision that the New Jersey Supreme Court construed the California Supreme Court as limiting *Briscoe*’s publication bar to “cases involving the identity of rehabilitated convicts.”¹¹⁴

Germany’s Constitutional Court addressed a comparable issue.¹¹⁵ The anonymous petitioner had participated in a terrorist act that killed several soldiers. After serving two-thirds of his six-year sentence, he was set to be released. A television station planned a documentary play about the incident, which planned to use the petitioner’s name and likeness. The Constitutional Court granted an injunction because the publication could violate his right to personality.

Germany’s constitution recognized a greater right to suppress information than its American counterpart. “Everyone has the right in principle to determine himself alone whether and to what extent others may represent in public an account of his life or of certain incidents thereof.” The German constitution protected both the press’ right to speak and the subject’s right

¹¹¹ *Briscoe*, 4 Cal.3d. at 539.

¹¹² *Id.* at 539 n.12.

¹¹³ *Forsher v. Bugliosi*, 26 Cal.3d 792, 810 (1980).

¹¹⁴ *Romaine v. Kallinger*, 537 A.2d 284, 295 (N.J. 1988).

¹¹⁵ *Lebach* case, 35 BVerfGE 202. The article quotes from the translated version provided by F H Lawson & B S Markesinis at <https://germanlawarchive.iuscomp.org/?p=62>.

to suppress unwanted descriptions, and neither could claim precedence as being more fundamental. Resolving the conflict required case-by-case judicial balancing, which denied the press any general guidance.

The court acknowledged (as *Briscoe* seemingly had not), that the petitioner's voluntary criminal act had generated the public interest.¹¹⁶ Disclosure could thus serve as an additional form of punishment (or deterrent). But the court also followed the principle that the "decisive point of reference" was "the interest in reintegrating the criminal into society"; the interest was not just the individual's but that "of the community to restore his social position." Once the event was no longer "current," a television station "undoubtedly" could not disclose the information "if it endangers the social rehabilitation of the culprit." Just as statutes of limitations could restrict *prosecuting* criminal acts, so too could one restrict *speaking* about them. This contrasted with a California appellate decision denying that the "mere passage of time" could bar publication of events involving a person formerly in the public eye.¹¹⁷

Despite the similarities between *Briscoe* and *Lebach*, American and European penal policy diverged in the 1970s in a way that would also shape the disclosure issue. The United States generally and California specifically abandoned the formerly ascendant imperative of rehabilitation. The United States Supreme Court justified punishment for the sake of retribution.

[P]unishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else . . . [S]ome crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.¹¹⁸

In 1977, California replaced its indeterminate sentencing law with one imposing determinate sentences, graded in accordance with the objective severity of the offense, not the offender's subjective progress during rehabilitation. Its preamble announced, "The Legislature finds and declares that

¹¹⁶ The "public interest in information [was] caused by himself by his own deed."

¹¹⁷ *Werner v. Times-Mirror Co.*, 193 Cal. App. 2d 111, 118 (1961).

¹¹⁸ *Gregg v. Georgia*, 428 U.S. 153, 184 n.30 (1976).

the purpose of imprisonment is punishment.”¹¹⁹ And in 1978, California voters answered the California Supreme Court’s 1972 decision abolishing capital punishment¹²⁰ with an initiative reinstating it,¹²¹ notwithstanding the penalty’s permanently foreclosing the possibility of rehabilitation.¹²²

But Europe retained the rehabilitation imperative, keeping the “scientific” understanding of criminals as “sick” rather than sinful.¹²³ Germany’s peculiar postwar status generated a special motivation to emphasize rehabilitation and reintegration.¹²⁴

Unlike Americans (or Britons), Germans “feel a burning need to deny that there is such a thing as *immutable* evil, *unforgivable* evil, in order to reconcile themselves to what their culture and people — indeed their *families*, and their parents and grandparents — have done.”¹²⁵ In fact, much of the support for Germany’s abolishing capital punishment in 1949 derived from the motivation to save Nazi war criminals from execution.¹²⁶

Germany also was the European pioneer in abolishing the sentence of life imprisonment without possibility of parole, which it did judicially in 1977; Italy followed in 1987 and France in 1994.¹²⁷ As Germany’s Constitutional Court later explained, “[a]n offender had to be given the chance, after atoning for his crime, to re-enter society,”¹²⁸ even where the crime was sending fifty people to the gas chambers:

¹¹⁹ CAL. STATS 1976, ch. 1139 § 273. The law has since been amended to revise the purpose as “public safety,” prescribing prison terms “that are proportionate to the seriousness of the offense.” CAL. PEN. CODE, § 1170, subd. (a)(1).

¹²⁰ *People v. Anderson*, 6 Cal.3d 428 (1972).

¹²¹ CAL. PEN. CODE, §§ 190 et seq.

¹²² Over the next four decades, many California criminal law doctrines would shift to place more emphasis on “the maintenance of personal security and social order” and less on “an accurate discrimination as to the moral qualities of individual conduct.” Keiter, *supra* note 73, at 395, 441, citing *People v. Blake*, 65 Cal. 275, 277 (1884).

¹²³ Kleinfeld, *supra* note 73, at 981.

¹²⁴ *Id.* at 1035.

¹²⁵ *Id.*

¹²⁶ *Id.* at 988.

¹²⁷ *Id.* at 955.

¹²⁸ *Life Imprisonment case (lebenslange Freiheitsstrafe)* 45 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 187 (1977), quoted in *Case of Vinter and Others v. United Kingdom*, Eur. Ct. H.R. 66069/09 28 (2013).

[The] judicial balancing of these [sentencing] factors *should not place too heavy an emphasis on the gravity of the crime* as opposed to the personality, state of mind, and age of the person. In that case, any subsequent review of the petitioner's request for release would be required to weigh more heavily than before the petitioner's personality, age and prison record. This was because the negative effects of sentence became stronger and stronger after an unusually long period of imprisonment.¹²⁹

Lebach's reintegration goal of restoring wrongdoers to their former position limits not only the state in *imprisoning* such offenders but private citizens in *speaking* about their past misconduct, as former collaborators with the Vichy regime or Nazis may seek defamation relief for reference to their wartime activities.¹³⁰

The California Supreme Court would reject this notion that, eventually, time heals all wounds:

Insofar as the “just desserts” theory holds that certain murderers do not deserve a fate better than that inflicted on their victims, the passage of time and alteration of circumstances have no bearing on this retributive imperative. [Citation.] For these reasons, Nazi war criminals and church bombers motivated by racial hatred have been prosecuted for murders committed decades earlier.¹³¹

The contrasting premises expressed in these two quotations help explain why the “right to be forgotten” had gained less traction in the United States.

The scientific school's paternalistic premise, that individuals are not (or are barely) capable of rational self-determination, benefits convicts seeking parole, or people seeking to suppress disclosure of past misconduct. But it

¹²⁹ *War Criminal case*, 72 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 105 (1986) (emphasis added), *quoted in Vinter* at 28. This echoed the *Lebach* reasoning that, as time passes, the “right ‘to be left alone’ gains increasing importance in principle and limits the desire of the mass media and the wish of the public to make the individual sphere of his life the object of discussion.”

¹³⁰ *Enforcing Civility and Respect*, *supra* note 24, at 1356–57. The policy gives ironic resonance to the iconic line of the British comedy *Fawlty Towers*, where hotel staff hosting German guests were advised emphatically: “Don't mention the war!”

¹³¹ *People v. Ochoa*, 26 Cal.4th 398, 463 (2001). As a chambers attorney, the author drafted this opinion for the California Supreme Court.

also has consequences for an individual’s right to receive information and be trusted to use it properly.

III. JURY TRIAL

The United States differs from the European Union in guaranteeing a criminal defendant’s right to trial by jury.¹³² American law trusts the public rather than a state professional to determine both the defendant’s guilt and the maximum possible sentence.¹³³ California courts had long debated just how much to trust jurors with information needed to adjudicate guilt, and then voters themselves expressed their position through a 1982 initiative.

The common law historically deemed felons incompetent to testify at all; testifying was thus one of those rights that could be forfeited through criminal misconduct.¹³⁴ The law evolved to permit their testimony but allow impeachment with their past crimes.¹³⁵ Attorneys may thus present *witnesses’* convictions to challenge their *credibility*, though prosecutors ordinarily may not present *defendants’* convictions to prove their *guilt*.¹³⁶ Nevertheless, convictions offered for impeachment could have that effect.¹³⁷

This creates a legal quandary: informing the jury of a defendant’s past crimes could lead it to improperly find him guilty of the current offense, but denying the jury that information might grant his testimony a “false aura of veracity.”¹³⁸ Whether to let the public learn of a neighbor’s past misconduct presents a similar dilemma.

¹³² Like self-representation, jury trial exists (in modified form) on the Continent but is not a guaranteed right. *The jury is out*, THE ECONOMIST (Feb. 12, 2009), <http://www.economist.com/node/13109647>.

¹³³ *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

¹³⁴ *See Boyd v. United States*, 116 U.S. 616, 630 (1886).

¹³⁵ *People v. Castro*, 38 Cal.3d 301, 325–26 (Bird, C.J., dissenting).

¹³⁶ *But see* CAL. EVID. CODE § 1108 (permitting evidence of past sex offenses to establish guilt); CAL. EVID. CODE § 1109 (permitting evidence of past domestic violence to establish guilt).

¹³⁷ “[P]rior convictions, while relevant to a witness’s honesty or veracity . . . at the same time may be unduly prejudicial.” *Schullman v. State Bar*, 10 Cal.3d 526, 540 (1973).

¹³⁸ *People v. Beagle*, 6 Cal.3d 441, 453 (1972).

In the 1970s, the California Supreme Court tightened the admissibility of prior convictions for impeachment purposes.¹³⁹ The trend reached its peak (or nadir) in 1975, when the court reversed the murder conviction of Frank Antick in part because the trial court had allowed the jury to learn of Antick's 1955 and 1957 forgery convictions. Consistent with the principles of rehabilitation expressed in *Briscoe* and the *Lebach* case, the court emphasized the convictions' "remoteness" in compelling their suppression: "A conviction which the defendant suffered many years before, '[e]ven one involving fraud or stealing,' is at best very weak evidence that he is perjuring himself at trial."¹⁴⁰

Voters responded by amending the California Constitution to provide, in pertinent part: "Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding."¹⁴¹ Though the Supreme Court trimmed the absolute reach of this provision, it nevertheless altered the court's analysis from the preceding decade, and authorized greater impeachment through past convictions than had existed in the 1970s.¹⁴² The voters insisted they be trusted to use and not misuse this information.¹⁴³

The value of information about an individual's past justifies reference to that past in judicial proceedings (at least for impeachment purposes), as well as the state's maintaining databases of those committing child abuse¹⁴⁴ or sexual offenses.¹⁴⁵ But it is not just the government that can benefit from widely available information about personal histories; the entire public craves such information to exercise the right to "informed living," defined

¹³⁹ *People v. Castro*, 38 Cal.3d at 307–08 (see cases collected therein).

¹⁴⁰ *People v. Antick*, 15 Cal.3d 79, 98, quoting *People v. Beagle*, 6 Cal.3d 441, 453.

¹⁴¹ CAL. CONST., art. I, § 28, subd. (f).

¹⁴² *Castro*, 38 Cal.3d at 306–12.

¹⁴³ In the 1990s, the California Legislature authorized prosecutors to introduce evidence of past sex crimes (Evidence Code section 1108) or domestic violence (Evidence Code section 1109) to show defendants' substantive guilt. This followed Congress' comparable decision to permit such use of past sexual assaults (Federal Rule of Evidence 413) or child molestation (Federal Rule of Evidence section 414).

¹⁴⁴ CAL. PEN. CODE, §§ 11164, et seq.; see *Los Angeles v. Humphries*, 562 U.S. 29, 31 (2011).

¹⁴⁵ CAL. PEN. CODE, § 290.

as people’s “right to exercise an informed choice about those with whom they live and associate.”¹⁴⁶ The countless online searches conducted every day regarding prospective employees or romantic partners confirm the popularity of this right.

But underlying both *Briscoe* and *Lebach* was the premise that imposing consequences on violent criminals was exclusively a state prerogative; private persons could not later choose to exclude them from their intimate circles. Imprisonment was the prescribed consequence, after which, according to the German court, the decisive point of reference was the community’s interest in restoring the criminal to his former position, even though such restoration required keeping his friends and neighbors ignorant about his past conduct.¹⁴⁷ The *Briscoe* court likewise concluded a convicted criminal was entitled upon release from prison to wear a figurative “mask” to hide from friends and family his violent past,¹⁴⁸ even though that could create a “false aura” of peacefulness.¹⁴⁹ These pre-*Faretta* decisions assumed people would make the “wrong” decision (unduly stigmatizing offenders), so the state would prevent them from doing so by denying them the information, and the opportunity to choose for themselves.

Decisions like *Melvin*, *Briscoe*, and *Lebach* denied that ordinary citizens can be trusted with such information; *Melvin* was “paternalistic in doubting the ability of people to give proper rather than excessive weight to a person’s criminal history.”¹⁵⁰ The resiliency of many people in surmounting embarrassing disclosures casts doubt upon *Melvin*’s conclusion that the public gives so much weight to such information that disclosure will invariably “throw [the subject] back into a life of shame or crime.”¹⁵¹ One well-known example of an embarrassing disclosure occurred in the 1980s, when *Penthouse* magazine published naked photographs taken years earlier

¹⁴⁶ Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, in Need of a Rule*, 64 MD. L. REV. 755, 807 (2005).

¹⁴⁷ *Lebach* case, 35 BVerfGE 202.

¹⁴⁸ *Briscoe*, 4 Cal.3d 529, 539.

¹⁴⁹ *People v. Beagle*, 6 Cal.3d 441, 453 (1972). The *Lebach* case expressly permitted disclosure if it was for the purpose of eliciting sympathy rather than creating a “negative slant.”

¹⁵⁰ *Willan v. Columbia County*, 280 F.3d 1160, 1162 (7th Cir. 2002) (emphasis added).

¹⁵¹ *Melvin*, 112 Cal. App. 285, 292.

of the reigning Miss America, Vanessa Williams. But Williams was a talented singer and actress, and despite the humiliation, went on to a very successful career. Americans are more forgiving than the *Melvin* court assumed, though more for indecencies like naked photographs than for grave crimes like mass murder.

Although *Briscoe* denied that disclosure of past crimes offered any “social value,”¹⁵² nothing better establishes its value than the post-appeal life of Gabrielle Darley Melvin. The Court of Appeal characterized her rehabilitation in glowing terms because it was evaluating the defense’s demurrer, and thus needed to presume the truth of her complaint.¹⁵³ But despite her alleging that she “became entirely rehabilitated” after her acquittal and “at all times lived an exemplary, virtuous, honorable, and righteous life,”¹⁵⁴ the truth was more complicated. She returned to prostitution, primarily in a management capacity.¹⁵⁵ Her 1915 victim (whom she admitted shooting) would be joined by others; a total of six men in her life (plus one of her female employees) ultimately were either shot, poisoned, or died under mysterious circumstances.¹⁵⁶ One or more of these individuals might have benefited from greater access to information about her past.

America places more trust than Europe in ordinary citizens to determine guilt in criminal proceedings, recognizing a fundamental right to trial by jury. This participation, essential to democratic self-government, presumes jurors can be trusted to use and not misuse information. The United States also facilitates democratic self-government by trusting its citizens to

¹⁵² *Briscoe*, 4 Cal.3d 529, 541–42.

¹⁵³ *Melvin*, 112 Cal. App. 285, 292; see *Doe v. Chicago*, 360 F.3d 667, 672.

¹⁵⁴ *Melvin*, at 286.

¹⁵⁵ Leo W. Banks, *A Madam, A Murder, A Mystery*, PHOENIX NEW TIMES, Aug. 12, 1999, <http://www.phoenixnewtimes.com/news/a-madam-a-murder-a-mystery-6420333> (Banks).

¹⁵⁶ *Id.* Even her trial defense relied on the absence of truthful information about her past; she claimed to have been orphaned by the San Francisco earthquake of 1906, though she actually had been born in France and emigrated as a teenager. She portrayed the abuse imposed on her by the victim (her pimp/fiancé) so graphically that the foreman explained after the jury’s *eight-minute* deliberation: “She righted a wrong that had been done her.”

use and not misuse speech to determine policy through public debate and elections. Access to information is a precondition for such debate.

IV. FREE SPEECH

The California Supreme Court disapproved the 1971 *Briscoe* decision in 2004.¹⁵⁷ Not surprisingly, the court cited not the intervening developments regarding penal philosophy or witness impeachment but United States Supreme Court precedents addressing the reach of the First Amendment. These more recent cases protecting disclosure of assertedly private information show how the United States values and protects free speech more than does Europe.

The first of the intervening cases may have been the most wrenching factually; a television news broadcast disclosed the name of a 17-year-old who had been murdered in the course of a rape.¹⁵⁸ The Supreme Court’s decision rested on the American concept of privacy described by Professor Whitman, and applied by the California Supreme Court in *Shulman*.¹⁵⁹ Publication infringed the European privacy imperative, as it was “embarrassing or otherwise hurtful” to the father.¹⁶⁰ But there was no “physical or other tangible intrusion into a private area,” as the information was gathered lawfully from public judicial records.¹⁶¹ Ultimately, the court justified publication on the public interest in information about the administration of a government “in which *the citizenry is the final judge* of the proper conduct of public business.”¹⁶²

¹⁵⁷ *Gates v. Discovery Communications, Inc.*, 34 Cal.4th 679 (2004).

¹⁵⁸ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471–74 (1975). In earlier proceedings, the Georgia Supreme Court had cited *Briscoe* in concluding the First Amendment did not necessarily trump the father’s privacy interest. *Cox Broad. Corp. v. Cohn*, 200 S.E.2d 127, 133–34 (Ga. 1973).

¹⁵⁹ *Two Western Cultures*, *supra* note 9, at 1162, 1165; *Shulman v. Group W Prods., Inc.*, 18 Cal.4th 200 (1998).

¹⁶⁰ *Cox*, 420 U.S. at 489.

¹⁶¹ *Id.* at 489, 491.

¹⁶² *Id.* at 495 (emphasis added). In a later case, the Court likewise protected a newspaper’s disclosing the name of a (surviving) rape victim even where it gathered the information, not from public judicial records, but a police report, which inadvertently included the victim’s name. But the Court again emphasized that the newspaper committed no misconduct in the process of gathering the information. *The Florida Star v. B.J.F.*, 491 U.S. 524, 536, 538 (1989).

Easier cases concerned disclosure of the names of alleged perpetrators.¹⁶³ In urging the court to reject a right to publish, the petitioners asserted the rehabilitation interest that the California Supreme Court had found compelling in *Melvin and Briscoe*. “It is asserted that confidentiality will further his rehabilitation because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense.”¹⁶⁴ But the rehabilitation imperative was already receding by 1979, and the court refused to justify suppression for that purpose.¹⁶⁵

The Supreme Court made no mention of the California electorate’s voting to reinstate capital punishment, or to authorize impeachment through prior convictions.¹⁶⁶ But the initiative process indirectly explains why the First Amendment protects speech more fully than its European counterpart(s): No European nation offers ordinary voters the same direct opportunity to influence law and policy. Europeans have less opportunity than Americans generally (and Californians specifically) to reshape law through the initiative process. Even beyond that context, Americans exercise more influence on policy. Americans directly vote for their senators and representatives, so these officials owe their position, and their loyalty, to these voters. By contrast, many European parliaments follow a proportional system, where party leaders assign legislators a place on the party list, and the number of votes received by the party nationwide determines how many candidates on that list take office. Under this kind of system, legislators ultimately owe their position to party leaders rather than voters, minimizing their responsiveness to constituent preferences.¹⁶⁷

The criminal punishments described in Part II reflect the relative influence of American voters and the political insignificance of their European counterparts. Just as the California Supreme Court’s 1972 decision banning capital punishment¹⁶⁸ produced a popular initiative reinstating

¹⁶³ *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979); *Oklahoma Publ’g Co. v. Oklahoma County Dist. Court*, 480 U.S. 308 (1977).

¹⁶⁴ *Daily Mail*, 443 U.S. at 104.

¹⁶⁵ *Id.* at 104–05.

¹⁶⁶ The case predated the impeachment initiative by three years.

¹⁶⁷ Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 474–75 (2006).

¹⁶⁸ *People v. Anderson*, 6 Cal.3d 628 (1972).

it,¹⁶⁹ the indication from several United States Supreme Court justices that they might also abolish the punishment¹⁷⁰ produced a nationwide reaction. Support for the death penalty rose substantially, state legislatures (and electorates) reformed their punishment statutes to pass the Supreme Court’s standards, more juries imposed it, and elected officials pledged to implement it.¹⁷¹ The same popular reaction occurred most recently in Nebraska; the Legislature voted in 2015 to abolish the death penalty and voters the next year reinstated it by initiative, by more than a three-to-two ratio.¹⁷² By contrast, although at least 85 percent of Europeans in every surveyed nation (France, Germany, Italy, Spain, and the United Kingdom) favor the option of a life-without-parole sentence for an especially egregious offender like Osama bin Laden, the European Court of Human Rights’ 2013 *Vinter* decision¹⁷³ banning that sentence has not faced any democratic counter-proposal.¹⁷⁴

The free exchange of information promotes the efficient operation of a government where “the citizenry is the final judge.”¹⁷⁵ As the U.S. Supreme Court explained in *New York Times v. Sullivan*, the First Amendment

¹⁶⁹ CAL. PEN. CODE, § 190 et seq.

¹⁷⁰ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁷¹ See, e.g., Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1 (2007); *Legislative Response to Furman v. Georgia — Ohio Restores the Death Penalty*, 8 AKRON L. REV. 149 (1974).

¹⁷² Kim Bellware, *Nebraska Voters Restore the Death Penalty*, HUFFINGTON POST, Nov. 9, 2016, https://www.huffingtonpost.com/entry/nebraska-death-penalty_us_58226bfee4b0e80b02cdb66e.

¹⁷³ *Case of Vinter and Others v. United Kingdom*, Eur. Ct. H.R. 66069/09 (2013). The European Court backtracked somewhat in 2017, finding the United Kingdom’s whole life punishment protocols complied with *Vinter*, even though the U.K. did not amend those provisions after that case. *Case of Hutchinson v. United Kingdom*, Eur. Ct. H.R. 57592/08 (2017).

¹⁷⁴ Ipsos MORI, *Death Penalty–International Poll*. <https://www.ipsos.com/ipsos-mori/en-uk/death-penalty-international-poll>. Individual European nations had banned the death penalty despite public support, sometimes encompassing more than two-thirds of the population. ANDREW HAMMEL, *ENDING THE DEATH PENALTY: THE EUROPEAN EXPERIENCE IN GLOBAL PERSPECTIVE* 82–85, 108–12, 140–43 (2010); RITA J. SIMON AND DAGNY A. BLASKOVICH, *A COMPARATIVE ANALYSIS OF CAPITAL PUNISHMENT: STATUTES, POLICIES, FREQUENCIES AND PUBLIC ATTITUDES THE WORLD OVER* 35–36 (2002).

¹⁷⁵ *Cox*, 420 U.S. at 495.

was designed “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”¹⁷⁶ Speech on political issues is more than self-expression; it is the essence of self-government.¹⁷⁷ Such unfettered interchange is less important (and therefore may not warrant impingement on other interests) where party elites make all the important decisions behind closed doors with only minimal public involvement.

The *Melvin* decision illustrates how suppressing information about individuals can frustrate public debate and the consequent “bringing about of political and social changes desired by the people.” The producer of *The Red Kimono* was Dorothy Davenport Reid, the widow of actor Wallace Reid, who had died from an accidental drug overdose. Rather than squander her inheritance on luxuries, she responded to his death by producing “social conscience” films. Her first, appearing soon after her husband’s death, concerned narcotics addiction.¹⁷⁸

The *Red Kimono* was a proto-feminist production, created by an all-female team. Adapted from the short story of journalist Adela Rogers St. Johns by Dorothy Arzner, a lesbian who became a pioneer of women’s filmmaking, the film highlighted the social ills created by human trafficking. It portrayed Darley Melvin as more victim than villain, who ultimately redeemed herself rather than let the male protagonist save her. The film ended with her character’s pleading to the audience to give fallen characters a second chance in life — the very principle that *Melvin v. Reid* purported to establish.

Whatever the film’s artistic merit, it expressed a social commentary worthy of protection, which drew additional resonance from the film’s grounding in reality. The 1998 *Shulman* decision would recognize that “truthful detail” is “not only relevant, but essential to the narrative,”¹⁷⁹ and contemporary California might well have found that Darley Melvin’s challenge violated the state’s anti-SLAPP (Strategic Lawsuit Against Public

¹⁷⁶ *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964), quoting *Roth v. United States*, 354 U.S. 476, 484 (1957).

¹⁷⁷ *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

¹⁷⁸ *OF HUMAN WRECKAGE* (1923).

¹⁷⁹ *Shulman v. Group W Prods., Inc.*, 18 Cal.4th 200, 230 (1998).

Participation) law.¹⁸⁰ Far from unnecessarily holding Darley Melvin up to scorn for no other reason than the pursuit of private profit, as the Court of Appeal characterized it,¹⁸¹ the film actually worked to protect women from sexual exploitation, and scorned the culture that victimized so many of them. But the Depression-era suit bankrupted Davenport Reid and forced her to sell her mansion. The outcome likely chilled similar socio-political commentary.

Recognizing that speech’s value often lies in the eye of the beholder, the United States Supreme Court has more recently rejected the “social value” test, favored by *Briscoe*, which weighs the benefits of speech with its costs:

The First Amendment itself reflects a judgment by the American people that the benefits of [protecting speech] outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.¹⁸²

But Continental law expressly authorizes courts to balance the value of free speech against other interests.¹⁸³ The Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms Article 10 (the European equivalent of the First Amendment) expressly recognizes individual “freedom of expression” but permits its restriction as necessary to protect “the reputation or rights of others,” as well as other competing priorities. Across the board, expression in Europe may be suppressed for a “pressing need” so long as the interference with expression is not “disproportionate to the legitimate aim pursued.”¹⁸⁴

Protecting honor is one such legitimate aim.¹⁸⁵ The “right to be forgotten’s” anti-embarrassment function manifests in German law criminally proscribing rude exchanges, which may include calling another

¹⁸⁰ CAL. CODE CIV. PROC., § 425.16.

¹⁸¹ *Melvin v. Reid*, 112 Cal. App. 285, 291–92.

¹⁸² *United States v. Stevens*, 559 U.S. 460, 470 (2010).

¹⁸³ *Enforcing Civility and Respect*, *supra* note 24, at 1381. The *Florida Star* court offered the possibility that “a state interest of the highest order” might justify suppression, but, due to the statute’s underinclusiveness, denied that even the physical safety of rape victims (who might be subject to retaliation) would qualify. *Florida Star*, 491 U.S. at 537–40.

¹⁸⁴ Council of Europe Publishing, *Human Rights Files*, No. 18, 9 (March 2007), [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18\(2007\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18(2007).pdf).

¹⁸⁵ *Enforcing Civility and Respect*, *supra* note 24, at 1381.

person a “jerk,” giving “the finger,” or failing to address the person with the proper honorific.¹⁸⁶ Although American law may suppress speech to prevent a legitimate threat of violence, it will not “provide a balm for wounded feelings”: “There is still, *in this country at least*, such a thing as liberty to express an unflattering opinion of another, however wounding it may be to the other’s feelings”¹⁸⁷ American law has essentially reified the maxim, “Sticks and stones may break my bones, but names will never harm me.”

Just as Europe limits speech to protect the status of individuals, it also limits speech to protect the reputations of groups.¹⁸⁸ The European Commission against Racism and Intolerance “strongly recommend[ed]” that the United Kingdom create an office for regulating the press and hearing complaints against “prejudicial reporting concerning their community.”¹⁸⁹ The report opposed media “stress” on the “Muslim background of perpetrators of terrorist acts” as harming a “vulnerable group[,]” and urged journalists to downplay or reject that background in favor of alternative explanations for terrorist acts, like mental illness.¹⁹⁰ Europe thus restricts speech that the First Amendment protects.¹⁹¹ The government in America may suppress a speaker who both intends and is likely to produce imminent unlawful action,¹⁹² but not speech seeking to make fun of immigrants, a ground that the European Court of Human Rights (ECHR) has found will justify criminal conviction.¹⁹³

Far from assuring an *unfettered* interchange of ideas to enable desired changes, Europe restricts “political advertising” to level the “playing field of debate” between viewpoints, even where such advertising does

¹⁸⁶ *Id.* at 1282–83, 1296–97, 1299.

¹⁸⁷ *Id.* at 1378, quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 59 (5th ed. 1984).

¹⁸⁸ Abrams, *supra* note 13, at 41–42.

¹⁸⁹ European Commission against Racism and Intolerance, *Report on the United Kingdom* 22 (fifth monitoring cycle, 2016), https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/United_Kingdom/GBR-CbC-V-2016-038-ENG.pdf.

¹⁹⁰ *Id.*

¹⁹¹ Abrams, *supra* note 13, at 46.

¹⁹² *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

¹⁹³ Abrams, *supra* note 13, at 42; *see Case of Vinter and Others v. United Kingdom*, Eur. Ct. H.R. 66069/09 (2013). *Case of Feret v. Belgium*, Eur. Ct. H.R. 15615/07 (2009).

not concern specific candidates.¹⁹⁴ Noting that most European nations ban paid political advertising, the ECHR upheld a British ban against a challenge from an organization seeking better treatment for animals.¹⁹⁵ More recently, France prevented the airing of an advertisement conveying the humanity of children with Down Syndrome, as it might “disturb the conscience” of women who had aborted such children.¹⁹⁶

But America values the interchange of ideas so much that it protects speech that is disturbing, offensive, or even hurtful, so long as it concerns a matter of public import.¹⁹⁷ This import creates a public benefit to the exchange, which outweighs the hurtful effect on the subject.

But whereas America trusts private individuals to create an environment benefiting the public as a whole (e.g., through unfettered debate enriching democratic self-government), Europe looks to government to protect individuals (e.g., through suppressing speech causing the individual discomfort).¹⁹⁸ European balancing to preserve individual reputations has suppressed from public view many reports about events that could have fostered debate on public policy issues. These included reports about how:

- (1) a. Great Britain allowed entry to a Latvian despite his two prior convictions for raping women at knifepoint; b. he then abducted, sexually assaulted and fatally stabbed a 17-year-old girl; c. three years later, her traumatized younger sister committed suicide;
- (2) a Kosovo-born immigrant struggled against deportation;
- (3) people under 30 suffer from strokes;
- (4) a computer hacker shut down America’s largest port to avenge an insult;
- (5) a solicitor breached insider trading laws;

¹⁹⁴ *Case of Animal Defenders International v. United Kingdom*, Eur. Ct. H.R. 48876/08 (2013), at 7, quoting *On the Application of Animal Defenders Int’l v. Secretary of State for Culture, Media and Sport* [2008] UKHL 15.

¹⁹⁵ *Animal Defenders International*, Eur. Ct. H.R. 48876/08 at 21–22.

¹⁹⁶ *France’s War on Anti-Abortion Speech: The government bans an ad showing happy children with Down Syndrome*, WALL ST. J., Nov. 30, 2016, <https://www.wsj.com/articles/frances-war-on-anti-abortion-speech-1480552815?mg=prod/accounts-wsj>. Other European nations have aired the advertisement, and the ECHR has not yet ruled on it.

¹⁹⁷ *Snyder v. Phelps*, 562 U.S. 443, 454, 459 (2011).

¹⁹⁸ King, *supra* note 14, at 190–191.

- (6) a woman used Rohypnol to drug (and then rob) wealthy men;
- (7) an Austrian family court denied a British woman even partial custody of her twins despite social workers' concerns about her estranged husband's violent and unpredictable behavior;
- (8) a lawyer who had requested to work for her law firm part-time won a claim for unfair dismissal;
- (9) closed circuit television filmed a police officer assaulting a man;
- (10) three men who refused a police demand to stop were transporting explosives in their car, and more were found in their homes;
- (11) a pensioner's corpse lay undiscovered for nearly six months.¹⁹⁹

All of these articles could foster a meaningful interchange of ideas leading to desirable political and social changes. Most obviously, (1) could foster debate about (a) immigration policy (as could (2)); (b) public safety; and (c) teenage suicide and the indirect crime on victims' families. Articles (3) through (6) could alert the public about certain dangers and enable self-protection against these diverse harms. Articles (7) and (8) could prompt debate on public issues like domestic violence, divorce and child custody, and balancing parenthood and employment. Articles (9) and (10) could foster debate about police, including their willful misconduct and the dangers produced by fleeing motorists. And (11) could lead to greater protection of the elderly and encourage the public to articulate concerns or suspicions (of all kinds) rather than suppress them as probably meaningless.

The disparate scope of Europe's right to be forgotten is not *sui generis* but part of the broader paternalism underlying European law. Part I described how America trusts its people to defend themselves in court and defend their dignity outside it, whereas Europe more aggressively protects individuals from their own improvidence. Part II showed how the U.S. has moved away from a rehabilitative penology, which spares individuals from the full consequences of their improvident criminal conduct, and toward a retributive model of justice. Part III showed how American law trusts jurors with information about defendants' pasts, unlike Europe, which does

¹⁹⁹ Rhiannon Williams, *Telegraph stories affected by EU "right to be forgotten,"* THE TELEGRAPH, Sep. 3, 2015, <http://www.telegraph.co.uk/technology/google/11036257/Telegraph-stories-affected-by-EU-right-to-be-forgotten.html>.

not generally empanel juries at all. And Part IV reviewed how the United States protects a far greater range of speech to foster civic self-government, whereas Europe suppresses more speech to shield individuals from offense and discomfort. Accordingly, whereas California offers minors the opportunity to remove unwanted content from the internet, Europe offers this protection to adults as well.

Europe ultimately treats its adult citizens as paternalistically as the United States treats minors — if not more so. The United States Supreme Court has observed that minors have “[a] lack of maturity and an underdeveloped sense of responsibility” which “often result in impetuous and ill-considered actions and decisions.”²⁰⁰ Minors’ reduced capacity for *personal* self-government shields them from the consequence of capital punishment.²⁰¹ But it also excludes them from *civic* self-government, as they do not serve on a jury or vote.²⁰² European law extends these consequences to adults, as they are exempt from capital/retributive punishment, and there is no right in Continental Europe to serve on (or be judged by) a jury. Although European adults vote, they have less influence over public policy than the American electorate.²⁰³ In fact, adult criminal defendants in Europe are deemed insufficiently responsible to represent themselves or be punished with life imprisonment without possibility of parole, both of which are available to American minors. Part V will explore the roots of this paternalism.

V. THE ROOTS AND CONSEQUENCES OF EUROPEAN PATERNALISM

When Anthony Faretta asked to represent himself, the court advised him of what he could expect.

You are going to follow the procedure. You are going to have to ask the questions right. If there is an objection to the form of the question and it is properly taken, it is going to be sustained. We are going to treat you like a gentleman. We are going to respect you. We are

²⁰⁰ *Roper v. Simmons*, 543 U.S. 551, 579 (2005), quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993).

²⁰¹ *Roper*, at 578.

²⁰² *Id.* at 569.

²⁰³ See Beale, *supra* note 167, at 474–75; see also Kleinfeld, *supra* note 73, at 989–90.

going to give *you* every chance, but *you* are going to play with the same ground rules that anybody plays. And *you* don't know those ground rules. *You* wouldn't know those ground rules any more than any other lawyer will know those ground rules until he gets out and tries a lot of cases. And *you* haven't done it.²⁰⁴

This admonition would not occur on the European Continent, where criminal defendants have no such right to represent themselves.²⁰⁵

But the universal use of the second-person pronoun “you” also manifests Anglo-American exceptionalism; Continental European nations use two different pronouns for the second person.²⁰⁶ Though it may not cause the competing legal cultures, in which Americans choose to be masters of their fate and Europeans seek protection from their own improvidence, it does much to explain them.

A. IT'S ALL ABOUT YOU

The dual use of the second-person pronoun began in the fourth century, when Latin, which had used *tu* (*T*) exclusively, developed the plural *vos* (*V*) for speech directed toward the emperor.²⁰⁷ It was eventually extended toward other elite figures to reflect asymmetrical power relationships: the nobility used *T* toward commoners and received *V* from them, masters used *T* to servants and received *V*, parents used *T* to their children and received *V*, while social equals used the same pronoun with each other.²⁰⁸ This *T-V* contrast extended to other languages including French (*tu* and *vous*), Italian (*tu* and *voi*, later *Lei*), German (*du* and *ihr*, then *er*, and then

²⁰⁴ *Faretta v. California*, 422 U.S. 806, 808 n.2 (1975) (italics added).

²⁰⁵ Jorgensen, *supra* note 15, at 711, 714–17.

²⁰⁶ According to the World Atlas of Language Structures, the only European nations whose primary language has only one second-person pronoun are England, Ireland, and Albania. WORLD ATLAS OF LANGUAGE STRUCTURES ONLINE, <http://wals.info/feature/45A#2/23.2/148.5>.

²⁰⁷ Roger Brown & Albert Gilman, *The Pronouns of Power and Solidarity*, in *STYLE IN LANGUAGE* (T.A. Sebeok ed. 1960) 252, 254.

²⁰⁸ *Id.* at 255; Catherine A. Maley, *The Evolution of a French Plural of Respect*, 15 *ROMANCE NOTES* 192 (1973); Joseph Williams, “O! When Degree is Shak'd” *Sixteenth-Century Anticipations of Some Modern Attitudes Toward Usage* 69, 90, in *ENGLISH IN ITS SOCIAL CONTEXTS: ESSAYS IN HISTORICAL SOCIOLINGUISTICS* (Machan and Scott eds. 1992).

Sie), Spanish (*tú* and *vos*, later *usted*), Portuguese (*tu* and *vos*, later *você*), Russian (*ty* and *vy*).²⁰⁹

English did not follow this dual usage. Although the Norman Conquest imported the French practice,²¹⁰ England was less rigid about social hierarchy. Medieval and Early Modern English texts show frequent shifts between *T* and *V* usage, often in the same statement, with the pronoun determined more by the *content* of the speech than the *status* of the speaker.²¹¹ The respectful *you* began as the exception in English and became the rule by the sixteenth and seventeenth century,²¹² by which time the use of *thou* to a non-intimate of equal rank was considered rude.²¹³

The permeability of social class fostered this trend: skilled craftsmen became merchants, and successful merchants became gentlemen, often through educational achievement.²¹⁴ Elizabethan England needed a growing bureaucracy to manage the Church and commercial life, so universities recruited intelligent commoners, who, once graduated, became “gentlemen by achievement.” On the other hand, the younger sons of gentlemen, excluded from land ownership through primogeniture, often served as apprentices to artisans. This fluid culture produced numerous interactions where a speaker would not know his listener’s status. The desire to avoid giving offense led to a broader use of *you* with unfamiliar people (regardless of their actual status).²¹⁵

The relative egalitarianism and social mobility shaped political trends; Parliament demanded greater distribution of political authority while

²⁰⁹ Brown & Gilman, *supra* note 207, at 254–55, 257; Maley, *supra* note 208, at 188; Williams, *supra* note 208, at 90.

²¹⁰ KATIE WALES, PERSONAL PRONOUNS IN PRESENT-DAY ENGLISH 74 (1996).

²¹¹ *Id.* at 75; Brown & Gilman, *supra* note 207, at 278. It was more common in English than European languages for a speaker to use *T* to show contempt, even to a social superior. Brown & Gilman, *supra* note 207, at 278; Wales, *supra* note 210, at 75.

²¹² TERRY WALKER, *THOU AND YOU IN EARLY MODERN ENGLISH DIALOGUES* 40 (2007).

²¹³ *Id.*

²¹⁴ Williams, *supra* note 208, at 79.

²¹⁵ WALKER, *supra* note 212, at 43; Williams, *supra* note 208, at 86, 91. The upwardly mobile tended to use *you* with each other, adopting the norms of the upper class to which they aspired. WALKER, at 43; WALES, *supra* note 210, at 76.

royal absolutism held sway in France and Spain.²¹⁶ English immigrants to the New World were even more predisposed to an egalitarian, democratic culture. The immigrant cohort was “middle-class,” insofar as the aristocratic elite declined to immigrate and forfeit the advantages they enjoyed in England; also staying at home were those at the bottom, who lacked the means (or confidence) to make the voyage.²¹⁷

The general availability of land transformed the social environment. Widespread land ownership created a very different socioeconomic structure than existed in Europe. Instead of a small “V” minority owning the land on which a large “T” majority worked, most American colonists owned their own land and were responsible for its development.²¹⁸ Near-universal land ownership produced a much broader governing community than existed in Europe.²¹⁹

It was in America that the institution of trial by jury (of *you*-class peers) permanently expanded protection for truthful speech. Eighteenth-century governments routinely proscribed criticism of government officials, and defendants could not justify their statements by citing truth as a defense. But when John Peter Zenger asserted that his criticisms of New York Governor William Cosby were true and the jury refused to convict, it created *de facto* protection for truthful speech needed for self-government.

By the late nineteenth century, European usage began to distinguish *T* from *V* based more on distance than status.²²⁰ Speakers began using *V* with a stranger and *T* with an intimate, so an employer will now more

²¹⁶ JOHN HARMON MCELROY, *AMERICAN BELIEFS* 180–81 (1999). England’s colonization of the United States developed very differently from France’s colonization of Canada, Portugal’s colonization of Brazil, and the Spanish colonization of Latin America. The U.S. developed a heterogenous population, responsible for its own defense and, increasingly, governance, and reflected less of a binary *T-V* dynamic with the mother country than did the French, Portuguese and Spanish colonies. *Id.* at 32–34.

²¹⁷ JOHN HARMON MCELROY, *FINDING FREEDOM* 44 (1989). New England had an even higher rate of literacy than England, further facilitating self-government. DAVID HACKETT FISHER, *ALBION’S SEED* 130–31 (1989).

²¹⁸ *AMERICAN BELIEFS*, *supra* note 216, at 46.

²¹⁹ Political influence in eighteenth-century America was hardly well-distributed by contemporary American standards, with African Americans and women excluded from the franchise. But it was very well distributed compared to eighteenth-century France, where no one but the king had a meaningful vote.

²²⁰ Brown & Gilman, *supra* note 207, at 258–60.

likely use *V* with an employee, and even high-status brothers will use *T* with each other. The usage reflects an English preference for distance; no other European language has an equivalent word for “privacy,” and the very concept reflects a uniquely Anglo-Saxon value.²²¹

Just as “you” creates equality among individuals, it creates distance.²²² In contrasting what he deemed the “European Dream” with its American counterpart, Jeremy Rifkin characterized Americans as finding freedom in independence, created through self-reliance and autonomy, whereas Europeans find freedom in the embeddedness of many interdependent relationships.²²³ The language corresponds to Professor Whitman’s description of privacy priorities: Americans seek a private sovereignty with which to interact as equals in arm’s-length transactions, whereas Europeans seek empathic treatment (and protection from shame) from the powers that be.²²⁴

Europe’s right to be forgotten and California’s Eraser Law manifest the contrasts between European paternalism and American egalitarianism (the former *T-V* distinction) and between European embeddedness/interdependence and American self-reliance/independence (the contemporary *T-V* distinction). The CJEU (the hyper-elite *V*-class) created the right to suppress truthful information, the judiciary determines when and how the right applies in individual cases, and these elites protect everyone; it is not just minors who are deemed to need state protection. On the other hand, the Eraser Law is the product of a democratic process involving a wider range of decisionmakers, who are trusted to manage both their personal and communal

²²¹ ANNA WIERZBICKA, *CROSS-CULTURAL PRAGMATICS: THE SEMANTICS OF HUMAN INTERACTION* 47 (2003).

²²² *Id.* This linguistic distance pervades everyday life, as English speakers are more reserved physically, and less likely than other Europeans to kiss, hug, or touch in public interactions. Suvilheto et al., *Topography of social touching depends on emotional bond between humans*, 112 *PROCEEDINGS OF NATIONAL ACADEMY OF SCIENCES* 13811, 13814 (2015), <https://pdfs.semanticscholar.org/53e6/1ce334dcf8f9252e2b9a8f7112fd10d19bd2.pdf>.

²²³ Jeremy Rifkin, *The European Dream*, *UTNE READER* (Sept./Oct. 2004), <https://www.utne.com/community/the-european-dream>.

²²⁴ The disparate natures of the American and French Revolutions explain some of the difference. Americans wanted distance (from English authority) and created a limited government model where people could exercise sovereignty in their own private space. The French Revolution, by contrast, opposed exploitation and oppression of the lower class by the upper class. Its political goals involved less the prevention of governmental *intrusion* than *mistreatment* by other private parties.

affairs. The American law furthers self-determination rather than embeddedness, by granting minors a unilateral right to delete information without permission from the governing class. But California allows the user to delete only her own autonomous speech, and not to suppress anyone else's, whereas Europe enforces the subject's right to suppress the speech of others to preserve her face in embedded interdependent relationships.

B. THE CONSTITUTIONAL CONSEQUENCES OF *NOBLESSE OBLIGE*

Pronoun use symbolizes the status of each population. Insofar as there is a trend to reduce social hierarchy and use a single pronoun in Europe, it is toward the universal use of the informal (*T*),²²⁵ a policy Mussolini had tried to impose on Italians.²²⁶ The United States, by contrast, lacking the feudal ethos that shaped European legal and political norms,²²⁷ has universalized the "adult" form. American (and, to a lesser extent, British) norms reflect a very different set of assumptions about the electorate and its capacity for self-government.

Contemporary European norms, developed by *V*-class elites with minimal involvement from the rest of the population, reflect the continuing influence of *noblesse oblige*. These norms purport to benefit the *T*-class, but also privilege the *V*-class and preserve its ultimate authority.

For example, Europe has outlawed permanent punishment, whether capital or "whole life" imprisonment (without possibility of parole) through the authority of judicial elites. The European Court of Human Rights recalled the conclusion of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which deemed it "inhuman to imprison someone for life with no hope of release."²²⁸ Europe likewise insists that rehabilitation form the centerpiece of penology and bars punishment where it serves only retributory purposes.²²⁹

²²⁵ Janet Morford, *Social Indexicality in French Pronominal Address*, 7 J. OF LINGUISTIC ANTHROPOLOGY 3 (1997); Christina Bratt Paulston, *Pronouns of Address in Swedish: Social Class Semantics and a Changing System*, 5 LANGUAGE AND SOC'Y 359 (1976).

²²⁶ *Enforcing Civility and Respect*, *supra* note 24, at 1329 n.152.

²²⁷ *Id.* at 1285, citing LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 4 (1955).

²²⁸ *Case of Vinter and Others v. United Kingdom*, Eur. Ct. H.R. 66069/09 23 (2013).

²²⁹ *Id.* at 34, 41.

Although presented in terms of solicitude for unfortunates who have suffered conviction for the most aggravated form of murder, repeated surveys have shown that the *T*-class supports permanent punishment far more than the *V*-class.²³⁰ The most obvious explanation is that the *T*-class suffers the most from crime, and thus favors more severe punishment for their own protection.²³¹

But protection from punishment is a double-edged sword. The exercise of Continental mercy traditionally served not so much to relieve the convict as to magnify royal authority through a “pure display of sacral sovereignty and hierarchical order.”²³²

European criminal law likewise aggrandizes *V*-class authority: trial decisions are made by counsel, not the defendant, guilt is determined by a judge, not jury, and the public has little voice in sentencing policy. The scientific school’s conceptualization of citizens as children can justify their exclusion from basic tasks of self-government:

To be “cured” against one’s will and cured of states which we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals. But to be punished, however severely, because we have deserved it, because we “ought to have known better,” is to be treated as a human person made in God’s image.²³³

²³⁰ *Attitudes toward the EU*, Chatham House - Kantar Public Survey (2017), <https://www.chathamhouse.org/publication/future-europe-comparing-public-and-elite-attitudes>; Ipsos MORI, *Death Penalty Drama* (2009), <https://www.ipsos.com/ipsos-mori/en-uk/survey-channel-4-attitudes-towards-death-penalty>.

²³¹ See *Glossip v. Gross*, 135 S.Ct. 2726, 2749 (2015) (Scalia, J., concurring):

[W]e federal judges live in a world apart from the vast majority of Americans. After work, we retire to homes in placid suburbia or to high-rise co-ops with guards at the door. We are not confronted with the threat of violence that is ever present in many Americans’ everyday lives. The suggestion that the incremental deterrent effect of capital punishment does not seem “significant” reflects, it seems to me, a let-them-eat-cake obliviousness to the needs of others. Let the People decide how much incremental deterrence is appropriate.

²³² HARSH JUSTICE, *supra* note 9, at 144, 165.

²³³ C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 228 (1953).

Like parents guiding children, Europe's governing elite denies its general population *responsibility* in both senses of the word. The general population does not face full *accountability* through retributive punishment, but also lacks the *opportunity* to participate meaningfully in policy decisions, which are essentially reserved for the elite. The United States offers a different bargain to its *you*-class. It deems its members capable of *personal* self-government: they can shape their conduct before trial, by choosing the conduct determining their sentence, and during trial, by either representing themselves or determining their defense with counsel. And it deems them capable of *civic* self-government: they can serve on juries and determine sentencing policy. Tocqueville observed how jury service bridges the *T-V* chasm and raises the *T* class to the "*you*" class, which governs itself:

He who punishes the criminal is therefore the real master of society. Now, *the institution of the jury raises the people itself . . . to the bench of judges*. The institution of the jury consequently invests the people . . . with the direction of society.²³⁴

European speech restrictions reflect a comparable exercise of *V*-class authority. German law proscribing insults developed to guarantee deference to high-status individuals, and it still enforces the right to receive the correct pronoun: the high-status (*V*) address of *Sie*.²³⁵ French insult law also developed to protect from criticism the government generally and police specifically.²³⁶ Calling a German officer a "blockhead" or "idiot with a badge" may result in a fine of over one thousand dollars,²³⁷ but in the U.S., "criticism of the police is not a crime" even to the point of profanity.²³⁸ "The freedom of individuals verbally to oppose or challenge police

²³⁴ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 287 (H. Reeve transl., rev. ed. 1900). Although the democratic procedures of self-representation and jury service have distinguished the United States from Europe over time, professionalization of the bar (and bench) has also limited Americans' opportunity for self-government in an absolute if not relative sense. *See, e.g., Faretta v. California*, 422 U.S. 806, 820–32 (1975).

²³⁵ *Enforcing Civility and Respect*, *supra* note 24, at 1297, 1316. German law provides special protections from criticism to groups based on their status, including the judiciary, members of the armed forces, and bank officers. *Id.* at 1311, n.87.

²³⁶ *Id.* at 1350, 1354–55.

²³⁷ As of 2000, the fine was up to 3,000 (pre-Euro) Deutschemarks. *Id.* at 198 n.52.

²³⁸ *Velazquez v. City of Long Beach*, 793 F.3d 1010, 1019–20 (9th Cir. 2015), quoting *Duran v. City of Douglas, Arizona*, 904 F.2d 1372, 1377 (9th Cir. 1990); *see also* Johnson

action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”²³⁹ It is no coincidence that Germany’s group insult law derives from a 1934 prosecution for criticizing the SS and SA, Hitler’s paramilitary organizations.²⁴⁰ Though there may be increasingly few who would benefit from suppressing such information, the text of *Google Spain*, empowering courts to censor information deemed to have been “kept for longer than is necessary,” could be cited by an aging collaborator seeking to have his crimes “forgotten.” The conclusion of Germany’s highest court in the *War Criminal* case, that courts should consider the “personality, state of mind, and age of the person,” and not emphasize too heavily the gravity of the crime²⁴¹ suggests the new right could apply to such cases.

Defamation law substantially restricts speech in Europe, and the *V* class benefits most from these limits. Notwithstanding her humble origins, Gabrielle Darley Melvin’s successful suppression of social criticism resembled that of aristocrats and governmental officials who have used (or threatened) litigation to suppress challenging speech. Most recently, Vladimir Putin’s threat of a libel suit convinced Cambridge University Press (CUP) to drop a book by Karen Dawisha on Putin’s gangster connections.²⁴² The publisher attributed the decision to speech-restrictive British libel law, which forces a speaker to prove a statement’s truth, in contrast to the speech-protective American standard, established in *New York Times v. Sullivan*,²⁴³ which forces the plaintiff to prove the statement’s falsity (as well as malice where the subject is a public figure).²⁴⁴ CUP informed Professor Dawisha that even a successful defense would prove too costly to

v. Bay Area Rapid Transit Dist., 724 F.3d 1159, 1174 (9th Cir. 2013). The author briefed and argued *Velazquez* before the Ninth Circuit.

²³⁹ *City of Houston, Texas v. Hill*, 482 U.S. 451, 462–63 (1987).

²⁴⁰ *Enforcing Civility and Respect*, *supra* note 24, at 1328.

²⁴¹ *War Criminal* case, 72 [BVerfGE] 105 (1986), *quoted in* Case of Vinter and Others v. United Kingdom, Eur. Ct. H.R. 66069/09 28 (2013).

²⁴² Abrams, *supra* note 13, at 51; *A book too far: A controversial book goes unpublished*, THE ECONOMIST, Apr. 3, 2014, <https://www.economist.com/blogs/easternapproaches/2014/04/russia>.

²⁴³ 376 U.S. 254, 269 (1964).

²⁴⁴ *A book too far*.

justify publication.²⁴⁵ She published her book in the United States without legal challenge.²⁴⁶

Defamation can also create criminal liability throughout Europe. Every European Union member (except Cyprus, Estonia, Ireland, Romania, and the United Kingdom) maintains criminal defamation statutes, and 20 of those 23 nations (except Bulgaria, Croatia, and France) authorize imprisonment as a possible penalty.²⁴⁷ Many of those nations, including France and Germany, impose more severe punishment for speech directed at governmental officials,²⁴⁸ unlike American law, which provides greater *protection* to criticism of public officials.²⁴⁹

Other disparities between European and American speech law described in Part IV likewise reflect formal protections for the *T* class (based on paternalistic estimates of their capacity for self-government) which also benefit the *V* class. Censoring the identity of terrorists (or offering alternative explanations for their crimes, whether true or not)²⁵⁰ paternalistically presupposes that the public will not use truthful information to engage in an informed debate about immigration policy but will misuse it to engage in retaliatory violence against innocent immigrants or Muslims.²⁵¹ The ECHR justified restricting speech critical of immigration due to the risk that “less knowledgeable members of the public” might come to distrust

²⁴⁵ *Id.*

²⁴⁶ ABRAMS, *supra* 13, note at 51.

²⁴⁷ Organization for Security and Co-operation in Europe, The Representative on Freedom of the Media Dunja Mijatović, *Defamation and Insult Laws in the OSCE Region: A Comparative Study* (March 2017), <http://www.osce.org/fom/303181?download=true>.

²⁴⁸ The Committee to Protect Journalists, *Balancing Act: Press Freedom at Risk as EU Struggles to Match Action with Values* 16 (2015), https://cpj.org/reports/cpj_eu_special_report_2015.pdf. Wealthy private citizens also benefit disproportionately from restrictive speech laws. See John Kampfner, *The Worrying Rise of the rich man's weapon of justice*, THE INDEPENDENT, Mar. 31, 2011, <http://www.independent.co.uk/voices/commentators/john-kampfner-the-worrying-rise-of-the-rich-mans-weapon-of-justice-2258869.html>.

²⁴⁹ *Gertz v. Welch*, 418 U.S. 323, 342–44 (1974).

²⁵⁰ The relative insignificance of truth in the debate recalls the European goal of protecting “honor justly or unjustly acquired.” *Two Western Cultures*, *supra* note 9, at 1179, quoting EMILE BEAUSSIRE, *LES PRINCIPES DU DROIT* (1888) (emphasis added). Both explain why truth is an inadequate justification for disclosure according to *Google Spain*.

²⁵¹ See *Willan v. Columbia County*, 280 F.3d 1160, 1162 (7th Cir. 2002).

immigrants.²⁵² The censorship promises to protect vulnerable immigrants from violence but also protects governmental elites from critical scrutiny of immigration policy.

The status quo likewise enjoys immunity from challenge due to laws barring advertising on public policy issues. Commercials could present animals in assertedly inhumane conditions but Animal Defenders International could not air comparable commercials calling attention to that issue. Again, a paternalistic assumption about *T*-class rationality justified the ban: the “potential mischief” of political advertising lay in the risk that the public would, in Pavlovian fashion, embrace certain ideas “not because they are shown in public debate to be right but because, by dint of constant repetition, the public has been conditioned to accept them.”²⁵³ Though the United Kingdom justified the law as needed to level the playing field so the wealthy would not dominate public debate, the law effectively eliminates the field of debate altogether — and freezes in place established policies and practices.

That policy contrasts sharply with the American constitutional tradition, which provides more protection to speech about public figures than private, and provides greater protection to speech about public policy than commercial products.²⁵⁴ The U.S. provides a level playing field by granting the citizen-critic the same legal standing to speak as the government official, because “[i]t is as much his duty to criticize as it is the official’s duty to administer.”²⁵⁵ And the Court leveled the playing field not by banning political speech but by protecting it:

It would give public servants *an unjustified preference over the public* they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.²⁵⁶

²⁵² Case of Féret v. Belgium, Application, Eur. Ct. H.R. 15615/07 (2009). The irony of a judicial decision forbidding speech to prevent “mistrust” of immigrants, which itself derives from mistrust of the European public, was apparently lost on the ECHR.

²⁵³ On the Application of Animal Defenders Int’l v. Secretary of State for Culture, Media and Sport [2008] UKHL 15, *quoted in* Case of Animal Defenders International v. United Kingdom, Eur. Ct. H.R. 48876/08 7 (2013).

²⁵⁴ See *Expressions Hair Design v. Schneiderman*, 137 S.Ct. 1144, 1152 (2017) (Breyer, J., concurring.)

²⁵⁵ *New York Times v. Sullivan*, 376 U.S. 254, 282 (1964).

²⁵⁶ *Id.* at 282–83 (emphasis added).

If an American advertiser may treat animals inhumanely, another advertiser may object. Accordingly, where the *Google Spain* decision empowered courts to determine whether posted content is adequate, relevant, or excessive, the First Amendment assigns that determination to the public: “[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented.”²⁵⁷ Rejecting the *noblesse oblige* model, in which the *V* class protects the *T* class, every American equally must decide for himself, “every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.”²⁵⁸

Although the U.S. Supreme Court has never faced the *Google Spain* question of whether the state may censor truthful speech to save the subject from embarrassment, its decision in a case about *false* speech leaves no doubt about how it would rule. Xavier Alvarez falsely claimed to have won the Congressional Medal of Honor, and the government prosecuted him criminally for the lie.²⁵⁹ The Court decided that private shaming, “the dynamics of free speech, of counterspeech, of refutation,” rather than governmental punishment should correct the lie and deter future mendacity.²⁶⁰ A self-governing people could solve the problem without the coercive hand of government: “Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication.”²⁶¹ Far from shielding Alvarez from online ridicule, the Supreme Court celebrated how private citizens had become their own watchmen for truth: “[T]he outrage and contempt expressed for respondent’s lies can serve to reawaken and reinforce the public’s respect for the Medal, its recipients, and its high purpose.”²⁶²

In endorsing private criticism of Alvarez’s reputation but precluding state-imposed punishment, the U.S. Supreme Court squarely rejected the

²⁵⁷ *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

²⁵⁸ *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring opinion). As the government may not separate “true” from “false,” a fortiori, it may not separate “adequate” from “inadequate,” or “relevant” from “irrelevant.”

²⁵⁹ *Id.* at 713.

²⁶⁰ *Id.* at 726–27.

²⁶¹ *Id.* at 729.

²⁶² *Id.*

Briscoe–Lebach model, in which state-imposed punishment is the exclusive remedy for misconduct, and informal, private sanctions are forbidden. *Alvarez* concluded that truth does not need handcuffs or a badge, but *Google Spain* appeared to endorse the *Lebach* holding that it does. The divergence on this issue reflects the fundamental contrast: the United States tends to trust the (*you*-class) public but not the government, whereas the European Union trusts the (*V*-class) government more than its (*T*-class) people.²⁶³

VI. THE FUTURE OF RETRIBUTIVE SPEECH

The law mostly uses the term “retribution” in the penal context, and it is commonly associated with harsh, mean treatment. But it literally means “pay back,” and it undergirds any culture where one receives treatment according to her conduct rather than birth, race, or any other status-related condition. In the 1970s, both the California Supreme Court and Germany’s Constitutional Court shared a commitment to the rehabilitation imperative, and both ruled against disclosure of past crime to enable the criminal’s restoration to his former standing in the community.²⁶⁴ Since then, the United States (and California) have returned to the retributive model for punishment — and speech.

To pay back for conduct, good or bad, requires knowledge of it. To judge neighbors on the content of their character rather than the color of their skin requires information with which to evaluate that character. The same retribution that supports punishment of wrongdoing supports reward for doing right.

Continental Europe did not join in the return to retributivism, a model of treating others based on conduct rather than status:

Europeans are not yet ready for a world in which *acts* matter so much more than *persons* — for a world in which the consequences that befall you depend so much on *what you do* rather than *who you are*.²⁶⁵

²⁶³ King, *supra* note 14, at 191.

²⁶⁴ *Briscoe*, 4 Cal.3d 529 (1971); *Lebach* case, 35 BVerfGE 202 (1973).

²⁶⁵ Harsh Justice, *supra* note 9, at 94.

Anthony Faretta symbolized the contrary ethos. Though lacking status as a lawyer, the court promised he would be treated with “respect,” “like a gentleman.”²⁶⁶ But he would receive the same treatment as any credentialed attorney; his success would depend on his own conduct.

Conduct-based treatment works to the detriment of those who have committed serious crimes by allowing severe punishment. It likewise permits speech enabling the public to learn of past misconduct. Retributive speech thus lowers wrongdoers in public standing, and those with the highest standing have the most to lose.

But it enables others to rise according to their favorable conduct. Ever since medieval and early-modern English speakers used *T* (thou) or *V* (you) based on the content of the speech (including the speaker’s contempt for the listener) rather than the listener’s status,²⁶⁷ the English-speaking world has tended toward a *relative* meritocracy compared to Continental Europe, where the law protected the status of high-ranking individuals, regardless of the *origins* of such rank.²⁶⁸ Of course, eighteenth-century Anglo-American norms were hardly meritocratic by contemporary standards, but the English at least celebrated the *ideal* of equal justice (however unrealized in practice), as Continental elites did not.²⁶⁹ Judgment based on conduct offered the possibility that English commoners could become “gentlemen by achievement.”²⁷⁰ But this conversely entails that others could become “common by vice.”

²⁶⁶ *Faretta v. California*, 422 U.S. 806, 808 n.2.

²⁶⁷ See WALES, *supra* note 210, at 75; Brown & Gilman, *supra* note 207, at 278.

²⁶⁸ See *Two Western Cultures*, *supra* note 9, at 1179, quoting EMILE BEAUSSIRE, *LES PRINCIPES DU DROIT* (1888) (emphasis added): “[P]rying and insults . . . violate the law when they tend to destroy, through public revelation . . . honor justly or *unjustly acquired*.”

²⁶⁹ Blackstone boasted, “And it is moreover one of the glories of our English law, that the nature, though not always the quantity or degree, of punishment is *ascertained* for every offence; and that is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has before ordained, for every subject alike, without respect of persons.” 4 WILLIAM BLACKSTONE, *COMMENTARIES* *370–71, *quoted in* HARSH JUSTICE, *supra* note 9, at 41–42. The English hanged murderers regardless of their status, whereas Continental aristocrats convicted of murder received what was considered the higher-status punishment of beheading. HARSH JUSTICE, *supra*, at 103, 153–58.

²⁷⁰ Williams, *supra* note 208, at 79.

Americans (and, to a lesser extent, Britons) continue to perceive their conduct plays a greater role in their eventual success than do Europeans, who incline more to the determinism underlying the scientific school of criminology, which the United States abandoned in the 1970s. A 2002 Pew survey asking why some people “don’t succeed in life” found Americans were far less likely than German, Italian, or French respondents to attribute non-success to “society’s failure” rather than their own “individual failures” (with the British in the middle).²⁷¹ Similarly, six times this century Pew has asked whether “[s]uccess in life is pretty much determined by forces outside our control.”²⁷² Not once in the twelve combined times they have been asked has a plurality of Americans (or Britons) agreed with this deterministic premise.²⁷³ Pew has asked the French, Germans, Italians, and Spanish about this premise a combined twenty-one times, and not once has a plurality denied it.

These contrasting perceptions may be self-reinforcing. The belief that misconduct is not really the individual’s fault may lead to a broad “right to be forgotten” that suppresses such information. But the absence of such information may further disconnect reward from desert. A homeowner recruiting candidates for a contracting job may seek to learn about their past conduct, and hire the one with the best record. But if no meaningful information is available (because the “right to be forgotten” censors any negative reports, and everyone enjoys a “false aura” of favorability), the homeowner may rely instead on personal connections for recommendations, which will tend to disadvantage people with minimal connections — thereby further diminishing the import of personal merit.

The very “protection” offered by *Google Spain*, shielding from the public an individual’s past difficulty in paying debts, harms the aspiring *T*-class most of all. European law restricts access to individuals’ credit

²⁷¹ Pew Research Center, *What the World Thinks in 2002: How Global Publics View Their Lives, Their Countries, The World, America*, Question 36 (2002), <http://www.pew-global.org/2002/12/04/what-the-world-thinks-in-2002>.

²⁷² Pew Research Center, *Topline Results, Spring 2014 Survey*, Question 13b, 38, <http://www.pewglobal.org/files/2014/07/2014-07-14-Balance-of-Power-Topline.pdf>.

²⁷³ *Id.* The contrast is a relative one, as usually at least one-third of Americans assert the determinist position, and at least one-third of Europeans assert the non-determinist position.

history far more than American law.²⁷⁴ Credit is thus much less accessible in Europe,²⁷⁵ and it is not the *V*-class who suffer from tight credit.

Supporters of the expansive European right may celebrate that it weakens the historical *T-V* dichotomy: in centuries past only the *V* class could protect itself against unfavorable speech (whether true or not), but the aristocratic privilege now extends to everyone.²⁷⁶ As one commentator celebrates this promise: “whereas there were once masters and slaves, now ‘you shall all be masters.’”²⁷⁷ But universalizing the censoring power minimizes the capacity of speech to alter the status quo, freezing in place the social hierarchy. If one defines a “master” as having the ability to speak truthfully about others without fear of a defamation suit, and a “slave” as lacking that ability, the European trend could be described as rendering everyone (outside the government) a slave. Limits on speech are limits on social change and mobility.

Americans instead idealize the absence of the *T-V*, master–slave dichotomy altogether, aspiring to (if not fully achieving) its negation as described by Abraham Lincoln: “As I would not be a slave, so too I would not be a master. That is my idea of democracy.”²⁷⁸ Though there were slaves (and masters) in nineteenth-century America, the nation is moving closer to the ideal of a participatory democracy in which everyone is a self-governing *you*, able to represent herself in court, serve on a jury, and have a meaningful vote on public policy. This adult *you* status also entails being subject to retributive punishment and speech. This status also trusts members of the public with information, because they will use and not abuse it, and accord past misdeeds proper rather than excessive weight.²⁷⁹ Every American, and not only judges, can be a watchman for truth and decide whether information is relevant or necessary.

²⁷⁴ *Two Western Cultures*, *supra* note 9, at 1190–92.

²⁷⁵ *Id.* at 1192.

²⁷⁶ *Id.* at 1166.

²⁷⁷ *Id.*, quoting PHILIPPE D’IRIBARNE, *VOUS SEREZ TOUS DES MAITRES!: LA GRANDE ILLUSION DES TEMPS MODERNES* (1996).

²⁷⁸ See *Enforcing Civility and Respect*, *supra* note 24, at 1285 (contrasting the European ethos of “*we are all aristocrats now*,” with the American ethos of “*there are no more aristocrats*”).

²⁷⁹ *Willan v. Columbia County*, 280 F.3d 1160, 1162 (7th Cir. 2002).

The debate over the international reach of *Google Spain*, and the competing claims of the First Amendment, will weigh the value of retributive speech, and the outcome of that debate is uncertain. Americans’ commitment to the unfettered exchange of ideas is diminishing with each generation, and more than three times as many “millennials” as senior citizens favor a governmental ban on speech that is offensive to minority groups,²⁸⁰ although American millennials remain more speech-protective than the overall populations of all surveyed European nations except the United Kingdom.²⁸¹ Millennials may be more comfortable with a paternalistic model, as they form the first generation of adults with more members living with parents than a spouse.²⁸²

On the other hand, the United Kingdom’s looming exit from the European Union may provide the United States with an influential ally in the international debate over retributive speech. The United Kingdom has been critical of the “censorship” authorized by *Google Spain*.²⁸³ As a House of Lords report concluded, “We do not believe that individuals should have a right to have links to accurate and lawfully available information about them removed, simply because they do not like what is said.”²⁸⁴ The UK likewise refused a Continental call to create a watchdog organization to censor speech about terrorism.²⁸⁵ Anglophonic Britain likewise shares

²⁸⁰ Pew Research Center, *40% of Millennials OK with limiting speech offensive to minorities*, Nov. 20, 2015, http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/ft_15-11-19_speech.

²⁸¹ *Id.* The surveyed Continental European countries were Germany, Italy, Poland, France and Spain.

²⁸² Pew Research Center, *For First Time in Modern Era, Living With Parents Edges Out Other Living Arrangements for 18- to 34-Year-Olds*, May 24, 2016, <http://www.pewsocialtrends.org/2016/05/24/for-first-time-in-modern-era-living-with-parents-edges-out-other-living-arrangements-for-18-to-34-year-olds>.

²⁸³ THE COMMITTEE TO PROTECT JOURNALISTS, *BALANCING ACT: PRESS FREEDOM AT RISK AS EU STRUGGLES TO MATCH ACTION WITH VALUES* 41 (2015).

²⁸⁴ *Id.*

²⁸⁵ “The Government is committed to a free and open press and does not interfere with what the press does and does not publish, as long as the press abides by the law.” Blake Neff, *UK Urged to Ban Press from Revealing Terrorists Are Muslim*, THE DAILY CALLER, Oct. 5, 2016, <http://dailycaller.com/2016/10/05/uk-urged-to-ban-press-from-revealing-terrorists-are-muslim>.

with the U.S. a commitment to both retributive punishment²⁸⁶ and the self-government procedures of jury service and self-representation.²⁸⁷ In fact, confidence in their capacity for self-government may have motivated many Brexit voters. Among the factors predicting strongly for a Leave vote was agreement with the statements, “I’d rather put trust in ordinary people than the opinions of experts and intellectuals,” and, “I generally trust the judgements of the British people, even for complicated issues.”²⁸⁸

Americans’ similar distrust of legal elites (and trust in themselves) likewise produced a divergence from Europe in criminal justice and speech law in the past four decades. The *you*-class insisted it could be trusted with the responsibility of presenting evidence as a defendant or weighing it as a juror, and would not necessarily defer to the decisions of counsel and judges. Most significantly, a crime wave exposed the apparent ineffectiveness of the rehabilitation model, which experts had promised would contain crime.²⁸⁹ Americans’ greater capacity for shaping policy enabled them to reject the European model whereby governing elites could forgive violent criminals and send them out to live among unknowing (*T*-class) neighbors. This demand for decision-making responsibility soon affected speech; after Vietnam and Watergate, Americans were less inclined to trust the government to control access to information and restrict its flow.

The CJEU in *Google Spain* acted out of a humanitarian impulse in trying to shield from shame an individual who had failed to pay his debts nearly two decades earlier, assuming that people would give not proper but

²⁸⁶ See *R. v. Secretary of State for the Home Department, ex parte Hindley* [2001] 1 AC 410, 416–417, quoted in *Vinter* 14 (¶ 46) finding “no reason in principle, why a crime or crimes, if sufficiently heinous should not be regarded as deserving lifelong incarceration for purposes of pure punishment,” as there are “crimes so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution”

²⁸⁷ Nina H. B. Jorgensen, *supra* note 15, at 714–17.

²⁸⁸ Ipsos MORI Social Research Institute, *Shifting Ground: new political dividing lines?: The interaction between leave/remain and Conservative/Labour voters* (May 2017), <https://www.ipsos.com/sites/default/files/2017-05/shifting-ground-new-political-dividing-lines.pdf>. The confidence in the “British people” may have contrasted with that in the *European* people, or the *British elite*.

²⁸⁹ Kleinfeld, *supra* note 73, at 1021–24, Keiter, *supra* note 73, at 420–21.

excessive weight to this remote information.²⁹⁰ It followed the path trod by the California Court of Appeal nearly a century earlier in *Melvin v. Reid*, which sought to reify the “charity which should actuate us in our social intercourse.”²⁹¹ But that decision may have had the opposite effect, shielding from public review Darley Melvin’s conduct specifically and prostitution’s harmful effects more generally. In rejecting retributive speech, the *Melvin* decision might have exposed individuals to Melvin’s subsequent mistreatment, and denied the broader public a chance to debate an important public policy issue. California has since renounced that outcome,²⁹² and the eventual consequences of *Google Spain* may someday lead the CJEU to do the same.

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²⁹⁰ Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317.

²⁹¹ 112 Cal. App. 285, 291 (1931).

²⁹² *Gates v. Discovery Communications, Inc.*, 34 Cal.4th 679 (2004).