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DEFINING PRIVATE LIFE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY REFERRING TO REASONABLE EXPECTATIONS

H. TOMÁS GÓMEZ-AROSTEGUI*

INTRODUCTION

A Norwegian County has ruled that smoking in the workplace is a basic human right, rejecting a ban introduced in one town on municipal employees

Since January 1, municipal employees in Levanger in central Norway had been banned from smoking during work hours, both on or off town property and even when they were on breaks, business trips abroad or travelling in their own cars on business.

Three members of Levanger's city council appealed the municipal by-law and regional officials found that the by-law violated citizens' right to a *private life*, as defined by the European Convention on Human Rights

* B.A. 1993, J.D. 1997, University of Southern California; LL.M. 2004, University of Oslo, Norwegian Research Center for Computers and Law. E-mail: tgomezarostegui@yahoo.com. The author thanks Lee Bygrave and Rex Glensy for their suggestions and Anne Gunn Bekken, departmental librarian at the University of Oslo, for help in obtaining sources. © 2005 H. Tomás Gómez-Arostegui.

The ruling came as the Scandinavian country prepares to impose a total ban on smoking in public places, including bars, restaurants and discos, on June 1[, 2004].¹

This news story highlights a problem that has plagued the institutions of the European Convention on Human Rights² since its effective date in 1953: What subject matter should fall within the meaning of “private life” under Article 8 of the Convention so as to be protected from unjustified governmental interference? The European Court and (previously) Commission³ of Human Rights have failed, by some commentators’ accounts, to provide sufficient guidance on the subject. To some, the “Commission’s practice concerning the meaning of private life has been distinguished neither by its clarity nor its discipline,”⁴ others have called Article 8 “elusive,”⁵ and another has observed that “some decision as to interpretation or an agreed definition, however general, is essential to clarify the existing confusion in the case-law.”⁶ Remarks such as these have arisen in part because the Convention institutions have largely taken a piecemeal approach to defining private life, rather than providing a general or exhaustive definition.

Nevertheless, one can glean from the case law of the European Court of Human Rights that the Court has been trying in the last several years to provide more guidance and perhaps even construct a general (albeit non-exhaustive) approach to conceptualizing private life. Specifically, the Court has on several occasions used a “reasonable expectation of privacy” test as a guide for judging when private life applies. This article explores this recent trend and highlights some of the hurdles the Court will have to overcome if it chooses to commit to

1. *Smoking a Basic Human Right*, PAKISTANI DAILY TIMES, Apr. 19, 2004, http://www.dailytimes.com.pk/default.asp?page=story_19-4-2004_pg6_18 (emphasis added).

2. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, C.E.T.S. 5 [hereinafter Convention]. The Convention currently has 45 member States and is administered by the Council of Europe through various institutions in Strasbourg, France. See COUNCIL OF EUROPE, THE COUNCIL OF EUROPE AND THE PROTECTION OF HUMAN RIGHTS *passim* (2004), at http://www.coe.int/T/E/Human_rights/prothr_eng.pdf (last visited Apr. 11, 2005).

3. The Commission was abolished as a separate institution in November 1998. Protocol No. 11 to the Convention, May 11, 1994, pmbl., C.E.T.S. 155 (effective Nov. 1, 1998).

4. DAVID J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 305 (1995).

5. LUKE CLEMENTS ET AL., EUROPEAN HUMAN RIGHTS: TAKING A CASE UNDER THE CONVENTION 176 (2d ed. 1999).

6. Louise Doswald-Beck, *The Meaning of the “Right to Respect for Private Life” Under the European Convention on Human Rights*, 4 HUM. RTS. L.J. 283, 309 (1983); accord Michael Ford, *Article 8 and the Right to Privacy at the Workplace*, in HUMAN RIGHTS AT WORK 25, 27 (Keith D. Ewing ed., 2000).

reasonable expectations as the future measure of private life. Among other things, I discuss the proper analytical framework for the test and some lessons learned in the United States (and elsewhere) from its use of a similar approach. Ultimately, I propose a working thesis under which the reasonableness of an expectation depends on an empirical analysis of member-State practices.

This article proceeds in several parts. Part I introduces Article 8 of the Convention and summarizes some of the matters already known to implicate private life. The reader will learn that the Convention tribunals have through their case-by-case approach recognized two general categories of private life. The first category includes information and matters that should be kept secret or free from publicity, which I call the *privacy* component, and the second includes matters that relate to the development and fulfillment of a person's personality or autonomy, which I refer to as the *personal choice* component. Part II then discusses the emergence in 1997 of a "reasonable expectation of privacy" test in some of the Court's opinions as a guide for determining whether the *privacy* component of private life applies. Four cases are discussed and critiqued, closing with the Court's most recent pronouncement on the matter in *von Hannover v. Germany*.⁷ I conclude in the first part of my thesis that, despite some signs of trepidation in these cases, the Court appears eager to explore reasonable expectations as the possible benchmark in future cases.

Part III then proposes that if the "reasonable expectation of privacy" test is to be the foundation for future analyses of private life, the test should be expanded to include *personal choice* claims and, more importantly, be based on objective and empirical indicia. The Court could analyze all private-life cases with some species of the following principle: A public authority may not without proper justification interfere with or fail to respect matters in which a person has a reasonable expectation of privacy or personal choice. But this statement is simply a shorthand for my second thesis. Before the Court may hold that an expectation is reasonable, the Court must find, at a minimum, an emerging consensus among the member States of the Convention (as determined by legal and societal norms) that recognizes the *prima facie* right of privacy or personal choice invoked by the applicant. Boiled down to its essential characteristics, private life means what a majority of the member States say it means.

7. 40 Eur. H.R. Rep. 1 (2005).

I. INTRODUCTION TO ARTICLE 8 AND PRIVATE LIFE

Article 8 states in its entirety:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁸

In the first two parts of this introduction to Article 8 and private life, I will describe how the Court determines if a State has violated Article 8 and summarize some of the interpretative methods the Court utilizes. After painting this backdrop, I then discuss how the Convention tribunals have defined private life before the appearance of the reasonable-expectations test in the case law. An understanding of these subjects will help shed light on how the test should operate in the future, and I will refer to them often during the course of this article.

A. *The Court's Approach to Finding an Article 8 Violation*

The Court employs a three-step analysis to determine whether a member State has violated Article 8.⁹ First the Court decides whether Article 8 applies by analyzing whether the case involves private life, family life, home, or correspondence. The bulk of my article relates to this step (and therefore more won't be said about it here). If an application involves any one of the triggering rights, the Court then decides in the second step whether a public authority has (1) interfered with that right or (2) failed to take steps to protect that right. The first class of cases invokes the negative obligation of Article 8—i.e., governments must ordinarily refrain from interfering with a person's rights—whereas the second class invokes a positive obligation, i.e., governments must sometimes take positive steps to “respect” or pro-

8. Convention, *supra* note 2, art. 8.

9. For a description of the Court's procedural requirements for bringing a claim under the Convention, see Kevin Boyle, *Council of Europe, OSCE, and European Union, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 143, 143-70 (Hurst Hannum ed., 4th ed. 2004).

tect a person's rights under Article 8 (such as from interference by private actors).¹⁰

In the third step, the Court asks whether the State's acts or omissions in a particular case are justified. The route taken here depends on the nature of the alleged transgression. In negative-obligation cases, the Court applies Article 8(2) and analyzes whether the State's actions (1) complied with its own laws, (2) pursued one or more of the exhaustive, legitimate aims listed in paragraph 2, and (3) can be regarded as necessary in a democratic society to accomplish the aim(s) pursued. In positive-obligation cases, the analysis differs slightly because Article 8(2) by its own terms is inapposite. The Court therefore employs a balancing test that uses the aims in Article 8(2) as a *non-exhaustive* guide and measures "the competing interests of the individual [against the interests] of the community as a whole."¹¹ Otherwise, the examination here resembles the analysis performed in negative-obligation cases.

Lastly, in measuring the purported justifications in all cases, "the State enjoys a certain margin of appreciation [or discretion] in determining the steps to be taken to ensure compliance with the Convention."¹² Because of "their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the . . . 'necessity' of a 'restriction' or 'penalty.'"¹³ The discretion given to national authorities varies according to the circumstances, however. For example, when a consensus exists on an issue among the laws of the Convention States, then "the margin of appreciation will be narrow and deviation from it will be difficult to justify."¹⁴ The opposite holds true, however, if on that issue "customs, policies and practices vary considerably between contracting states."¹⁵ In addition to the existence of a consensus, the Court will consider other factors such as whether the case involves intimate matters, positive obligations, urgent measures, or national security.¹⁶ In a sense, the margin of appre-

10. See Convention, *supra* note 2, art. 8(1); *Marekx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) ¶ 31 (1979).

11. *Powell v. United Kingdom*, 172 Eur. Ct. H.R. (ser. A) ¶ 41 (1990); see also *Hatton v. United Kingdom*, 2003-VIII Eur. Ct. H.R. 189, ¶ 98.

12. *Powell*, 172 Eur. Ct. H.R. (ser. A) ¶ 41.

13. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶¶ 48-49 (1976).

14. *URSULA KILKELLY, THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE* 7 (2001).

15. *Id.* at 8.

16. See, e.g., *YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* 82-86 (2002); IAIN CAMERON, *AN INTRODUCTION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 96-97 (4th

ciation resembles an appellate standard of review that varies in severity according to the circumstances.

B. *The Court's Methods of Interpretation*

Also important to an understanding of this article are some of the interpretative methods the Court employs to inject meaning into words and phrases of the Convention. The most prominent of these principles may be grouped as follows: textual interpretation in light of object and purpose, dynamic interpretation, and autonomous interpretation. The Court draws the first principle from the Vienna Convention on the Law of Treaties, which states that words and phrases must be interpreted according to their ordinary meaning and in light of the object and purpose of the treaty they are found in.¹⁷ The principal object and purpose of the Convention are to “maintain and promote the ideals and values of a democratic society,”¹⁸ and the emphasis placed on these aims “has led the Court, on many occasions, to adopt a fairly progressive or activist approach.”¹⁹

For related reasons, the Court also interprets the Convention dynamically, i.e., as a living instrument in which the meaning of terms may change over time depending on societal views.²⁰ As was recently stated: “This evolutive approach towards interpretation of the Convention implies that the Commission and the Court take into account contemporary realities and attitudes, not the situation prevailing at the time of the drafting of the Convention in 1949-1950.”²¹ Judge Loucaides has noted that application of this canon also “promises that new rights derived from the notion of ‘private life’ will continually be recognized whenever required by the conditions of social life.”²²

ed. 2002); HOWARD C. YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE passim* (1996).

17. May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340 [hereinafter Vienna Convention]; see also *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) ¶ 29 (1975).

18. *Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser. A) ¶ 119 (1991); see also CLARE OVEY & ROBIN C.A. WHITE, *JACOBS & WHITE: EUROPEAN CONVENTION ON HUMAN RIGHTS* 34-35 (3d ed. 2002).

19. PIETER VAN DIJK & GODEFRIDUS J.H. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 73-74 (3d ed. 1998).

20. See HARRIS ET AL., *supra* note 4, at 7.

21. VAN DIJK & VAN HOOFF, *supra* note 19, at 77-78; see also ANDREW DRZEMCZEWSKI, COUNCIL OF EUROPE, *THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE, HOME AND CORRESPONDENCE* 17 (1984).

22. LOUKIS G. LOUCAIDES, *Personality and Privacy Under the European Convention on Human Rights*, in *ESSAYS ON THE DEVELOPING LAW OF HUMAN RIGHTS* 83, 86 (1995).

Lastly, some concepts and “terms used in [the Convention] are considered to have a special, autonomous meaning, which is independent from, and does not necessarily correspond to, the meaning which identical or similar terms may have in the domestic law of the Contracting States.”²³ This primarily means that the Court can choose to ignore the respondent State’s interpretation or classification of a particular term.²⁴ Less clear, however, is whether, *and to what extent*, this canon should limit the Court from relying on the positions of other contracting States to reach an “autonomous” interpretation. Some scholars argue that the Court should not rely on domestic practices.²⁵ But others have noted (correctly in my view) that “a totally autonomous interpretation could be seen as illegitimate”²⁶ and that “it is difficult to see how an autonomous meaning can be arrived at . . . except by reference to national systems of classification.”²⁷ This point of contention exemplifies the tug of war between the desire to maintain independent, European-level control and the desire to remain rooted in the “common heritage” of the member States.²⁸ My proposal in Part III attempts to create the proper balance.

23. VAN DIJK & VAN HOOF, *supra* note 19, at 77.

24. For example, in *Engel v. Netherlands*, 22 Eur. Ct. H.R. (ser. A) (1976), the Court had to decide whether a governmental proceeding against the applicant fell within the meaning of “criminal charge” under Article 6 so as to entitle the applicant to certain protections under the Convention. Dutch law had classified the proceeding as “disciplinary,” and not “criminal,” but the Court held that the Dutch classification was not dispositive. *Id.* ¶¶ 79-85; see also OVEY & WHITE, *supra* note 18, at 31-32, 140-43.

25. Yutaka Arai-Takahashi has neatly summarized this argument:

An irony of the comparative method is . . . that reliance on national practice among the majority of Member States might jeopardise the endeavour of the Strasbourg organs to keep the Convention’s standards both autonomous and high [I]t is paradoxical for the supervisory bodies, which are responsible for reviewing the laws of the Contracting States, to depend on national legislation Such an approach might sacrifice the quality of the Convention standard at the expense of, and in search of, a “uniform” European approach.

ARAI-TAKAHASHI, *supra* note 16, at 195-96; see also George Letsas, *The Truth in Autonomous Concepts: How to Interpret the ECHR*, 15 EUR. J. INT’L L. 279, 297-305 (2004) (arguing that a consensus-based approach that refers to domestic practices is inferior to interpretation by reference to “moral truth”).

26. François Ost, *The Original Canons of Interpretation of the European Court of Human Rights*, in THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS 283, 305 (Christine Chodkiewicz trans., Mireille Delmas-Marty ed., 1992).

27. JOHN G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 71-72 (1993).

28. Ost, *supra* note 26, at 305-09; see also Mireille Delmas-Marty, A “Reasoned” Conception of the Reason of State, in THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS, *supra* note 26, 281, 281-82.

C. *The Meaning of Private Life*

Having covered the procedural aspects of the Convention jurisprudence, I now turn briefly to some of its substantive rulings. The objective here is not to chronicle all the cases that have refined and expanded the meaning of private life over time; scholars have covered that topic thoroughly elsewhere.²⁹ Rather, my goal is merely to give the reader some indication of the sorts of subject matters the Convention tribunals have held implicate private life, particularly prior to the appearance of the “reasonable expectation of privacy” test in some of the Court’s opinions. A review of the case law and academic literature illustrates that the Court has recognized two main categories of protection within private life: matters and information that should be kept secret or free from publicity—labeled here as the *privacy* component; and matters that involve a person’s personality or autonomy—labeled here as the *personal choice* component.³⁰

It appears the Convention institutions have always understood private life to include a *privacy* component. That is to say, as a general principle, Strasbourg has recognized that the right to respect for private life means at a minimum the right to “live, as far as one wishes, protected from publicity.”³¹ Hyman Gross has in a different context characterized this form of informational privacy as “concern[ing] about what of us can become known, and to whom.”³² Many of these sorts of cases have been easy for the Court and Commission to decide, typically because the government acknowledged or did not contest the private nature of the matter involved. Regrettably, however, the Convention institutions have not yet provided sufficient and (more importantly) consistent direction for deciding the tough cases, thereby leaving what qualifies as “private” to be determined case by case.³³ In that fashion, the Court and Commission have found,

29. *E.g.*, HARRIS ET AL., *supra* note 4, at 305-12; KILKELLY, *supra* note 14, at 34-48; LOUCAIDES, *supra* note 22, at 85-100; JOHN G. MERRILLS & ARTHUR H. ROBERTSON, HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 138-44 (4th ed. 2001); VAN DIJK & VAN HOOFF, *supra* note 19, at 491-503.

30. The Convention institutions do not in their opinions expressly separate their analyses into these two categories.

31. *X v. Iceland*, App. No. 6825/74, 5 Eur. Comm’n H.R. Dec. & Rep. 86, 87 (1976) (Commission Decision).

32. Hyman Gross, *Privacy and Autonomy*, in NOMOS XIII: PRIVACY 169, 172 (J. Roland Pennock & John W. Chapman eds., 1971).

33. This is not a problem unique to Convention case law. Courts and commentators have struggled for years to define the contours of privacy, with some endeavoring to draw bright-line rules and others mere guidelines. For an excellent and current summary of several scholarly conceptions of privacy, see Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L.

by way of example, that the following matters implicate the *privacy* aspect of Article 8: a person's (1) HIV status; (2) medical records; (3) childhood behavioral history; and (4) original gender identification in transsexual cases.³⁴

Most of the activity in the case law has related to the personality or autonomy component of private life. The Commission first moved in that direction in *X v. Iceland*,³⁵ in which the applicant challenged a regulation prohibiting him from keeping a dog in his home. In rejecting the challenge, the Commission stated:

[T]he right to respect for private life does not end [at the right to privacy, i.e., the right to live, as far as one wishes, protected from publicity]. It comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfillment of one's own personality.³⁶

As a result of that statement, and the many decisions that have relied on it since, scholars have accepted that the concept of personality has become an additional point of analysis of private life.³⁷ More recently, the Court has elaborated that "the notion of personal autonomy [also] is an important principle underlying the interpretation of [Article 8's] guarantees."³⁸ Once again, however, the Court has not defined personality or autonomy (or outlined their boundaries) and has instead ruled on the matter in a piecemeal fashion. Among others, the Court and Commission have found the following matters to involve what I label henceforth as the *personal choice*³⁹ component of private

REV. 1087, 1099-1124 (2002). See also Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 424-56 (1980).

34. See respectively *Z v. Finland*, 1997-I Eur. Ct. H.R. 323; *Martin v. United Kingdom*, App. No. 27533/95, 21 Eur. H.R. Rep. CD112 (1996) (Commission Decision); *Gaskin v. United Kingdom*, 160 Eur. Ct. H.R. (ser. A) (1989); *B v. France*, 232-C Eur. Ct. H.R. (ser. A) (1992).

35. App. No. 6825/74, 5 Eur. Comm'n H.R. Dec. & Rep. 86 (1976) (Commission Decision).

36. *Id.* at 87. The Commission ultimately found Article 8 inapplicable because the case did not involve a human relationship. *Id.* I question whether the outcome of the applicability analysis would have remained the same, however, had the Commission applied the test proposed in Part III of this article and framed the issue as whether (without reference to any purported justifications offered by the government for the restriction) the majority of member States would expect that the decision to keep a dog as a house pet is a matter of personal choice.

37. LOUCAIDES, *supra* note 22, at 99, 106-07.

38. *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155, ¶ 61. But see David Feldman, *The Developing Scope of Article 8 of the European Convention on Human Rights*, 1997 EUR. HUM. RTS. L. REV. 265, 273 (1997) ("[T]he idea of private life must not stretch to the point at which it subsumes other autonomy-related rights and loses its rationale.").

39. I will through the remainder of this article use the label *personal choice*, instead of

life: a person's (1) surname; (2) sexual lifestyle; (3) clothing; (4) medical treatment; (5) sexual integrity; and (6) physical integrity.⁴⁰

* * *

In spite of the case-by-case approaches noted above, or perhaps because of them, some opinions from the Strasbourg Court have recently moved toward a better framework for deciding the *privacy* cases, namely by gauging the applicant's reasonable expectations. I review that trend in the next section.

II. THE APPEARANCE OF REASONABLE EXPECTATIONS AS A GUIDE FOR DEFINING THE *PRIVACY* COMPONENT OF PRIVATE LIFE

The "reasonable expectation of privacy" test has appeared as a guide for assessing the *privacy* component of private life in five reported judgments of the Court, starting in 1997 and continuing through 2004. I discuss four of those judgments here. As will be seen in the sections that follow, the test features prominently in the first and fourth cases, with some members of the Court even writing separately in the most recent case to advocate its adoption on a grander scale, but appears more as background noise in the others, perhaps due to unease or unfamiliarity in its use. (This latter fact does not surprise me given the test's relative infancy at the Court.) Although the test has not yet appeared in a case as the sole basis to judge private life, it can be said that the Court nevertheless appears eager to explore reasonable expectations as the possible benchmark in future cases.⁴¹

"personality" or "autonomy," as the Court has, because *personal choice* conveys these ideas in a way more comprehensible to lay people. Further, the proposal offered in Part III would be awkward with the "personality" label. You could try asking someone if they have an "expectation of personality" in something, but I frankly doubt they would have any idea what you were talking about. Although "autonomy" is less awkward than "personality," an "expectation of personal choice" still makes better sense.

40. See respectively *Burghartz v. Switzerland*, 280-B Eur. Ct. H.R. (ser. A) (1994); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981); *McFeeley v. United Kingdom*, App. No. 8317/78, 20 Eur. Comm'n H.R. Dec. & Rep. 44 (1980) (Commission Decision); *Herczegfalvy v. Austria*, 244 Eur. Ct. H.R. (ser. A) (1992); *X & Y v. Netherlands*, 91 Eur. Ct. H.R. (ser. A) (1985); *Costello-Roberts v. United Kingdom*, 247-C Eur. Ct. H.R. (ser. A) (1993).

41. I should note here for those who are unfamiliar with the Court's practices that the Court does not strictly follow the doctrine of *stare decisis*. *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) ¶ 35 (1990). Therefore, the fact the Court has used the reasonable-expectations test to help resolve some cases does not compel it to use the test in others. Nevertheless, the Court often follows its own precedents because such a course is "in the interests of legal certainty and the orderly development of the Convention case-law." *Id.*

After first describing the origins of the reasonable-expectations test outside Strasbourg, I discuss in chronological order the four Convention judgments pertinent here. Along the way, I flag various issues the Court will have to clarify should it choose in the future to employ reasonable expectations as the sole basis for judging private life.

A. Origins of the “Reasonable Expectation of Privacy” Test

The “reasonable expectation of privacy” test (or at least some species of it) almost certainly originated as a doctrine in the U.S. Supreme Court’s 1967 decision *Katz v. United States*.⁴² There, the Supreme Court had to decide what circumstances would trigger an individual’s constitutional right to be free from unreasonable government searches and seizures. Not unlike Article 8, the Fourth Amendment to the U.S. Constitution states that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”⁴³ “Central to an understanding of the Fourth Amendment . . . is a perception of what police activities, under what circumstances and infringing upon what areas and interests, constitute either a search or a seizure within the meaning of [the] Amendment.”⁴⁴ In *Katz*, the Supreme Court departed from earlier case law that had focused on the involvement of one or more of the items listed in the Amendment (houses, papers, etc.) as demonstrating its applicability⁴⁵ and instead held that a person seeking to invoke the Amendment must show an actual and reasonable⁴⁶ expectation of privacy in the place or object at issue.⁴⁷ In cases in which the Amendment applies, U.S. courts then ask, much as is done under Article 8(2) of the Convention, whether the government’s search or seizure was unreasonable under the circumstances.

The *Katz* decision has influenced courts outside the United States and areas outside criminal law. For example, Canada has adopted the

42. 389 U.S. 347 (1967); see also *People v. Morgan*, 16 Cal. Rptr. 838, 840 (Cal. Ct. App. 1961) (possibly stating an earlier claim).

43. U.S. CONST. AMEND. IV.

44. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.1, at 422 (4th ed. 2004).

45. See *id.* § 2.1(a), at 431 (describing earlier case law).

46. Over the years the Supreme Court has used the terms “justifiable” and “legitimate” interchangeably with “reasonable.” *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

47. *Katz*, 389 U.S. at 361 (Harlan, J., concurring); see also *Kyllo v. United States*, 533 U.S. 27, 31-41 (2001). For example, merely showing that the government seized papers from a house would no longer suffice to trigger the Fourth Amendment. Instead, the defendant would have to demonstrate she had an actual and reasonable expectation of privacy in those papers.

Katz reasonable-expectations approach as the means by which to analyze its Fourth Amendment analogue, Section 8 of the Canadian Charter of Rights and Freedoms;⁴⁸ the Constitutional Court of South Africa has used the test to interpret the right to privacy contained in Section 14 of its Constitution;⁴⁹ a court in Australia has used reasonable expectations to analyze the legality of drug testing of police officers;⁵⁰ and Israeli legislation has used the test to evaluate the secret monitoring of conversations.⁵¹ Back in the United States, the U.S. Supreme Court has extended the doctrine to searches of employees for work-related purposes, among other places,⁵² and several jurisdictions have used reasonable expectations as an element of the tort of intrusion of privacy or seclusion.⁵³ Similarly, the test has appeared in the British

48. *Hunter v. Southman Inc.*, [1984] 2 S.C.R. 145, 158-60; see also *R. v. Edwards*, [1996] 1 S.C.R. 128, 139-41; Kate Murray, *The "Reasonable Expectation of Privacy Test" and the Scope of Protection Against Unreasonable Search and Seizure Under Section 8 of the Charter of Rights and Freedoms*, 18 OTTAWA L. REV. 25 (1986). Canadian legislation also incorporated a similar test as early as 1974. See *Protection of Privacy Act, 1974*, c. 50, §§ 2, 4 (Can.) (defining "private communication" to mean any oral communication or telecommunication "made under circumstances in which it is reasonable for the originator thereof to expect that it will not be intercepted").

49. *Bernstein v. Bester*, 1996 (4) BCLR 449 (CC); see also *Investigating Directorate: Serious Economic Offences v. Hyundai Motor Distribs. (Pty) Ltd.*, 2000 (10) BCLR 1079 (CC); SOUTH AFRICA LAW REFORM COMM'N, *PRIVACY AND DATA PROTECTION* §§ 3.2.20, 3.3.8, 3.3.14 (2003), at <http://wwwserver.law.wits.ac.za/salc/issue/ip24-03.pdf> (last visited Apr. 11, 2005). For a criticism of the expectations approach in South African jurisprudence, see Iain Currie, *Some Implications of a Dignity-Based Conception of Privacy*, Sept. 9-10, 2004, at <http://wwwserver.law.wits.ac.za/workshop/workshop04/papers2004/currie.pdf>.

50. *Anderson v. Sullivan*, (1997) 78 F.C.R. 380, 398. The State of Victoria also passed legislation incorporating a similar test in 1969. See *Listening Devices Act, 1969*, Act No. 7804/1969, § 3 (Vic.) (defining "private conversation" to include any "conversation carried on in such circumstances as may reasonably indicate that the parties to such conversation desire it to be confined to such parties but does not include a conversation made in any circumstances in which the parties to the conversation ought reasonably to expect that the conversation may be overheard"), *repealed and superseded by Surveillance Devices Act, 1999*, Act No. 21/1999, § 3(1) (Vic.) (retaining a similar definition).

51. See Emanuel Gross, *The Struggle of a Democracy Against Terrorism—Protection of Human Rights: The Right to Privacy Versus the National Interest—the Proper Balance*, 37 CORNELL INT'L L.J. 27, 60 (2004) ("[T]he [Secret Monitoring] law provides a substantive, objective test: when a person's subjective expectation of privacy (disclosed by his conduct) is reasonable, i.e., is legitimate in the eyes of the public, his conversations must be monitored in accordance with rules applicable to monitoring in the private domain.") (citing *Secret Monitoring Law, 5739-1979*, S.H. 938, 118, § 8 (Isr.) (defining "public domain" as "a place where a reasonable person could have expected that his conversations would be monitored without his consent"))).

52. See *O'Connor v. Ortega*, 480 U.S. 709, 714-19 (1987) and the cases cited therein.

53. E.g., *Hoskins v. Howard*, 971 P.2d 1135, 1141 (Idaho 1998); *Pontbriand v. Sundlun*, 699 A.2d 856, 864-65 (R.I. 1997); *Hill v. National Collegiate Athletic Ass'n*, 865 P.2d 633, 654-55 (Cal. 1994); *Cox v. Hatch*, 761 P.2d 556, 564 (Utah 1988); *M & R Inv. Co. v. Mandarino*, 748 P.2d 488, 493 (Nev. 1987); *Vernars v. Young*, 539 F.2d 966, 969 (3d Cir. 1976); *Pearson v. Dodd*, 410 F.2d 701, 704 (D.C. Cir. 1969); see also CAL. CIV. CODE § 1708.8 (West 1998).

Isles and New Zealand as a possible means for judging the laws of confidence and privacy, although the test's lineage in those instances cannot always be traced to *Katz*.⁵⁴ There is therefore an abundance of international case law and scholarship on these subjects, and I have found much of that information to be valuable here (both from a comparative and exemplary perspective).⁵⁵ I would hope the European Court of Human Rights would also consult these resources, with whatever circumspection it deems necessary, should it choose to develop reasonable expectations as the yardstick for all future cases.

B. Halford v. United Kingdom

The phrase “reasonable expectation of privacy” first appeared in a Convention judgment in 1997, in the case of *Halford v. United Kingdom*.⁵⁶ The applicant, Alison Halford, had worked in 1983 as an Assistant Chief Constable with the Merseyside police and was at the time the highest-ranking female police officer in the United Kingdom. Over the following seven years, Halford applied several times, unsuccessfully, for a promotion to the rank of Deputy Chief Constable. Believing the denials were based on a discriminatory motive, she brought a claim against the Chief Constable for gender discrimination. More important for our purposes, Halford also alleged that members of her department had intercepted calls made from “her office telephones . . .

54. *E.g.*, IRELAND LAW REFORM COMM'N, REPORT ON PRIVACY: SURVEILLANCE AND INTERCEPTION OF COMMUNICATIONS *passim* (1998), available at http://www.lawreform.ie/publications/data/Irc99/Irc_99.html (last visited Apr. 11, 2005); REPORT OF THE COMMITTEE ON PRIVACY AND RELATED MATTERS, Cm. 1102, at 49, ¶ 12.17 (1990); *A v. B Plc*, [2002] 2 All E.R. 545, 553-54, ¶¶ 11(ix)-(x) (Eng. C.A. 2002). The New Zealand Court of Appeal recently recognized a new privacy tort—public disclosure of private facts—in which a required element is the “existence of facts in respect of which there is a reasonable expectation of privacy.” *Hosking & Hosking v. Runtig*, [2005] 1 N.Z.L.R. 1, ¶¶ 117, 249-50 (C.A. 2004). Furthermore, in his discourse on privacy law in common-law jurisdictions, Raymond Wacks has similarly proposed that courts and legislatures should define “personal information,” a concept he believes is the crux of privacy, by referring “both to the *quality* of the information and to the *reasonable expectations of the individual concerning its use*.” RAYMOND WACKS, PERSONAL INFORMATION: PRIVACY AND THE LAW 24 (1989); see also *id.* at 26, 266-67, 279-80.

55. These various adaptations of the reasonable-expectations test do not always in their final forms resemble one another (or necessarily the original approach of *Katz*). Courts outside the Fourth Amendment context have often molded the test as required by the circumstances. My thesis in Part III also departs from *Katz* and its Fourth Amendment progeny in several important respects.

56. 1997-III Eur. Ct. H.R. 1004. Four years before *Halford*, the government of Ireland used a “reasonable expectation of privacy” test as an argument for why private life did not apply, but the Commission declared the application inadmissible on exhaustion grounds and therefore did not reach the issue. *E.N. v. Ireland*, App. No. 18670/91, ¶ 2 (1993) (Commission Decision), <http://www.echr.coe.int/Eng/Judgments.htm> (last visited Apr. 11, 2005).

for the purposes of obtaining information to use against her in the discrimination proceedings.”⁵⁷ After exhausting her domestic remedies, she complained in Strasbourg that the interceptions implicated her private life and correspondence in violation of Article 8. The Government countered, however, that the telephone calls “fell outside the protection of Article 8 because she could have had *no reasonable expectation of privacy* in relation to them.”⁵⁸

The Court began its analysis by citing precedent which holds that telephone calls made from business premises are covered under both private life and correspondence.⁵⁹ Though the Court could have stopped there, it then employed as an alternative basis the Government’s proposed “reasonable expectation of privacy” test and again found that both private life and correspondence applied:

There is no evidence of any warning having been given to Ms Halford, as a user of the internal telecommunications system operated at the Merseyside police headquarters, that calls made on that system would be liable to interception. She would, the Court considers, *have had a reasonable expectation of privacy for such calls*, which expectation was moreover reinforced by a number of factors. As Assistant Chief Constable she had sole use of her office where there were two telephones, one of which was specifically designated for her private use. Furthermore, she had been given the assurance, in response to a memorandum, that she could use her office telephones for the purposes of her sex-discrimination case⁶⁰

Finding no proper justification for the interference, the Court concluded that the Government had violated Article 8.

The judgment is remarkable, of course, for its first use of the “reasonable expectation of privacy” test.⁶¹ But it also highlights two issues that I will discuss further along in this article and that the Court

57. *Halford*, 1997-III Eur. Ct. H.R. ¶ 17.

58. *Id.* ¶ 43 (emphasis added and citation omitted). In its brief to the Court, the Government did not cite any authorities to support its use of the reasonable-expectations test. See Memorial of the Government, *Halford v. United Kingdom*, Jan. 2, 1997, at 32, ¶ 2.7. It is therefore not possible to determine whether the Government derived the test from *Katz* or elsewhere.

59. *Halford*, 1997-III Eur. Ct. H.R. ¶ 44. Notably, most of the cases cited by the Court do not bother to analyze *why* telephone calls generally fall under *both* private life and correspondence. See, e.g., *Huvig v. France*, 176-B Eur. Ct. H.R. (ser. A) ¶ 25 (1990); *Malone v. United Kingdom*, 82 Eur. Ct. H.R. (ser. A) ¶ 64 (1984); *Klass v. Germany*, 28 Eur. Ct. H.R. (ser. A) ¶ 41 (1978).

60. *Halford*, 1997-III Eur. Ct. H.R. ¶ 45 (emphasis added).

61. Its influence in the United Kingdom was almost immediate. Soon after the decision, the U.K. Press Complaints Commission (PCC) amended its Code of Practice to state “private places” include either “public or private property where there is a reasonable expectation of privacy.” PRESS COMPL. COMM’N CODE OF PRACTICE § 3 (as amended Jan. 1998), <http://www.pcc.org.uk/cop/cop.asp>. The PCC’s implementation of the test is narrower than *Halford*’s test, however, because the PCC focuses solely on *places*.

will have to address should it decide to employ reasonable expectations as its benchmark for future cases (regardless of whether the Court adopts my proposed formulation of the test). The first issue is whether a person's actual or subjective expectations of privacy are relevant, or perhaps even required (as is usual in the United States), in determining whether an expectation of privacy is reasonable. The Court's reference to the assurances given to Halford, and the lack of warnings as well, suggests it found her subjective expectations at least somewhat relevant. Unfortunately, the Court said nothing further on the matter, thereby inviting the question of whether the outcome would have differed had Halford's employer posted signs stating it would monitor and record all telephone calls.⁶² This is an important point I will return to in Part III.D *infra*, where I argue that actual expectations should not be required for private life to apply.

The second issue the case raises is whether the Court should use the reasonable-expectations test to judge the applicability of private life alone or whether the Court should also use the test to judge the other rights contained in Article 8, namely family life, home, and correspondence? In *Halford* the Court seemed to sweep the applicability of both private life and correspondence under the rubric of reasonable expectations (similar to the approach in *Katz*). This suggests the Court may have intended the reasonable-expectations test to guide the analysis of both elements—a not entirely unreasonable proposition given that both elements arguably fall within the private sphere. On the other hand, the amalgamation may have been inadvertent. In any event, in Part III.E *infra*, I explain why I believe the Court should limit the reasonable-expectations test to private life.

C. P.G. & J.H. v. United Kingdom

Four years after *Halford*, the Court again mentioned the reasonable-expectations test, this time in *P.G. & J.H. v. United Kingdom*,⁶³ a case concerning, among other things, whether the police may covertly record a conversation between a police officer and a suspect at a police station to obtain an audio sample of the suspect's voice. The case began when the police learned that several persons (including one of the applicants) were planning to rob a cash-collection van. In an effort to thwart the robbery and identify all the conspirators, the police

62. See John D.R. Craig & Hazel D. Oliver, *The Right to Privacy in the Public Workplace: Should the Private Sector be Concerned?*, 27 *INDUS. L.J.* 49, 55-56 (1998).

63. 2001-IX Eur. Ct. H.R. 546.

installed a covert listening device in an apartment and recorded several conversations. Later, the police requested voice exemplars from the applicants to compare to the voices on the tapes, but the applicants refused. To obtain the samples, the police then secretly recorded the applicants at a police station during a charging procedure.⁶⁴

Upon reaching the European Court of Human Rights, the applicants argued that the Government had infringed their private lives because they did not know or have reason to suspect that the police at the station had recorded their conversations.⁶⁵ The Government countered that private life did not apply because the recordings were made to obtain voice samples (not substantive information) and because the “aural quality of the applicants’ voices was . . . a public, external feature.”⁶⁶ The Court rejected the Government’s view. After summarizing some of the matters it has protected under private life in the past, the Court stated:

There are a number of elements relevant to a consideration of whether a person’s private life is concerned by measures effected outside a person’s home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, *a person’s reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor.* [For example,] [a] person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character.⁶⁷

But the Court then seemed to stress that the important issue in the case was whether and how the applicants’ information was *processed*:

Private-life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain The Court has referred in this context to the Council of Europe’s Convention . . . for the protection of individuals with regard to automatic processing of personal data . . . whose purpose is “to secure in the territory of each Party for every individual . . . respect for his . . . right to privacy, *with regard to automatic processing of personal data relating*

64. *Id.* ¶¶ 8-9, 12-16.

65. The applicants also complained about the legality of the bug at the apartment and the use of telephone metering, but the Government did not contest the applicability of private life in those matters.

66. *P.G. & J.H.*, 2001-IX Eur. Ct. H.R. ¶ 54.

67. *Id.* ¶ 57 (emphasis added). The Court’s reference in this paragraph to an applicant’s “knowing” or “intentional” involvement in certain activities, suggests, as in *Halford*, that the Court might consider an applicant’s actual expectations of privacy a relevant or perhaps even a required component of the reasonable-expectations test. Again, I believe this is the wrong approach. See *infra* Part III.D.

to him”, such data being defined as “any information relating to an identified or identifiable individual.”⁶⁸

With these latter principles in mind, the Court stated that the voice samples fell within private life: “Though it is true that when being charged the applicants answered formal questions in a place where police officers were listening to them, the recording and analysis of their voices on this occasion must still be regarded as concerning the processing of personal data about the applicants.”⁶⁹

It is a little unclear from the Court’s opinion whether it intended the presence of personal data processing alone to be the dispositive issue in all cases or simply another factor to consider in addition to or as part of an analysis of an applicant’s reasonable expectations of privacy. It would seem to me that some species of the latter reading is the correct one as otherwise the Court’s discussion of reasonable expectations becomes superfluous. That then invites the follow-up question, however, of how reasonable expectations and processing relate to each other as criteria. Are they independent or is one subsumed within the other? As I see it, how information is processed and by whom should simply be a factor to consider, among others, in determining whether an expectation was reasonable. This follows because I cannot imagine a situation where the Court would hold that the *privacy* component of private life applies—despite the case involving matters in which an applicant could have no reasonable expectation of privacy—solely because information was processed. Data processing alone should not be the dispositive test.

It is thus unfortunate the Court did not frame its conclusion within the rubric of reasonable expectations. Perhaps the Court felt uncomfortable stating, given the public nature of people’s voices and where the samples were taken, that the applicants had reasonable expectations of privacy. Yet the Court could have stated as much had it recognized that expectations of privacy can be *partial*.⁷⁰ The applicants in *P.G. & J.H.* could have reasonably expected to retain at least some degree of privacy in their voices, perhaps expecting that at most only the people who were present (and whom the applicants were aware of) might contemporaneously hear and recognize them. They would not,

68. *P.G. & J.H.*, 2001-IX Eur. Ct. H.R. ¶ 57 (emphasis added and citations omitted); see also Lee A. Bygrave, *Data Protection Pursuant to the Right to Privacy in Human Rights Treaties*, 6 INT’L J.L. & INFO. TECH. 247 (1998) (discussing the extent to which Article 8 embraces the principles and guarantees found in data protection laws).

69. *P.G. & J.H.*, 2001-IX Eur. Ct. H.R. ¶ 59.

70. This is an important point I will return to in Part III.B *infra*.

however, have foreseen the sort of electronic recording and analysis (i.e., data processing) that occurred.⁷¹ As I believe this is the proper way to conceptualize this scenario, my proposal in Part III accommodates and encourages the partial-expectations approach, namely through the proper construction of an applicant's claim.⁷²

D. Peck v. United Kingdom

The Court next mentioned the "reasonable expectation of privacy" test in *Peck v. United Kingdom*.⁷³ There, a city's public-surveillance system contemporaneously observed and recorded the applicant on a public road attempting suicide with a knife. On account of the surveillance, police were able to respond to the scene, stop the applicant, and give him medical assistance. The city issued a press release soon after the incident touting that its surveillance system had helped prevent a potentially dangerous situation; the release included two still video images of the applicant holding the knife. The images later made their way into local newspapers and ultimately appeared, along with some of the surveillance footage, on a BBC television show called *Crime Beat*, where friends and family of the applicant recognized him.⁷⁴ When the case reached the European Court of Human Rights, the principal issue was whether private life applied. The Government argued it did not because the "[d]isclosure of those actions simply distributed a public event to a wider public and could not change the public quality of the applicant's original conduct and render it more private."⁷⁵ The applicant countered that the relevant footage related to an attempted suicide and he was unaware he was being filmed. Importantly, the applicant did not complain about the surveillance per se (as it had helped save his life); rather, "he took issue with

71. Incidentally, the U.S. Supreme Court reached the opposite conclusion on similar facts in its Fourth Amendment case *United States v. Dionisio*, 410 U.S. 1 (1973). There, the Supreme Court held that "[n]o person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world." *Id.* at 14. For other examples of the Supreme Court's rejection of partial expectations of privacy in the Fourth Amendment context, see *infra* note 111.

72. For the sake of completeness, I should also briefly mention the Court's subsequent judgment in *Perry v. United Kingdom*, 2003-IX Eur. Ct. H.R. 141, which resembled *P.G. & J.H.* in facts and outcome with the exception that it involved the covert videotaping of a suspect at a police station. Because the reasoning in *Perry* differs little from *P.G. & J.H.*, particularly in how it deals with reasonable expectations, I do not discuss *Perry* here. For a summary of the case, see Andy Roberts, *Covert Video Identification: European Convention on Human Rights, Article 8*, 67 J. CRIM. L. 480 (2003).

73. 2003-I Eur. Ct. H.R. 123.

74. *Id.* ¶¶ 10-21.

75. *Id.* ¶ 53.

the disclosure by the [city] of the CCTV material which resulted in the relevant publications and broadcasts.”⁷⁶

The Court began its analysis by quoting verbatim from the passage in *P.G. & J.H.* that discusses the “reasonable expectation of privacy” test.⁷⁷ But the Court then discussed other factors that are important in determining whether “public” activities become private for purposes of Article 8 that, like *P.G. & J.H.*, principally rely on whether and how personal data was processed.⁷⁸ Performing the necessary review, the Court found that private life applied because “the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation . . . and to a degree surpassing that which the applicant could possibly have foreseen when he walked in [the city on the date in question].”⁷⁹ Again, what is remarkable about this case is that despite the apparent allegiance to data processing as the proper framework for analysis, the actual analysis of the Court seems more akin to one involving degrees of reasonable expectations of privacy.⁸⁰ The applicant could reasonably expect that his activities would be private to a certain extent (visible, perhaps, only to people who happened to pass by). He would not expect or foresee, however, the sort of use and disclosure that occurred.⁸¹ So although the applicant cannot claim an absolute expectation of privacy, he can claim a partial one.⁸²

E. von Hannover v. Germany

The Court’s most recent and arguably significant judgment in this area is *von Hannover v. Germany*,⁸³ a case involving the often-

76. *Id.* ¶ 54.

77. *Id.* ¶ 58.

78. *Id.* ¶¶ 59-61.

79. *Id.* ¶ 62.

80. For a similar reading of the case, see Gavin Phillipson, *Transforming Breach of Confidence? Towards a Common Law Right of Privacy Under the Human Rights Act*, 66 MOD. L. REV. 726, 738-39 (2003).

81. *Cf.* Andrew von Hirsch, *The Ethics of Public Television Surveillance*, in ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION 59, 61-65 (Andrew von Hirsch et al. eds., 2000) (discussing how the public perceives public video surveillance).

82. Two months after *Peck* the Court issued an admissibility decision in another case in which video surveillance of allegedly public areas also occurred. The applicant and government in the case based their arguments in large part on reasonable expectations of privacy, but the Court declared the Article 8 claim admissible without assessing the case in detail. *Martin v. United Kingdom*, App. No. 63608/00, 37 Eur. H.R. Rep. CD91, CD102-03 (2003) (Admissibility Decision). The case subsequently settled before the merits could be heard, and the Court struck the case from its docket.

83. 40 Eur. H.R. Rep. 1 (2005).

occurring conflict between Princess Caroline von Hannover of Monaco and the paparazzi. Apart from discussing reasonable expectations, the judgment is notable for how it explains the relationship between the right to respect for private life and the right to freedom of expression in Article 10.⁸⁴ In *von Hannover*, Princess Caroline tried to enjoin a series of German tabloid publications that contained, among other things, photos of her and her then boyfriend at a restaurant; her canoeing, horseback riding, shopping, and playing tennis; and her at the Monte Carlo Beach Club tripping over an obstacle. After she attained mixed results in lower German courts, the German Federal Constitutional Court denied most of her complaint on the ground that she was a figure *par excellence* (or public figure for all purposes). That meant that under German law she was, when outside her home, fair game for photographers unless she had retired to a *secluded place*, out of the public eye, where it was objectively clear to everyone that she wanted to be alone and where, confident of being alone, she behaved differently than she would in public.⁸⁵

Princess Caroline complained to the European Court of Human Rights alleging that the German court decisions failed to respect her private and family life. The Court began, as it often does, by analyzing whether Article 8 applied at all. It noted among other things that Article 8 comprises to a certain extent a person's personal identity (including name and picture), psychological and physical integrity, and interaction with others.⁸⁶ But the Court also stated that it had in the past acknowledged the relevance of expectations of privacy:

[I]n certain circumstances, a person has a 'legitimate expectation' of protection and respect for his or her private life. Accordingly, [the Court] has held in a case concerning the interception of telephone calls on busi-

84. Article 10(1) provides in part: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." Convention, *supra* note 2, art. 10(1).

85. *von Hannover*, 40 Eur. H.R. Rep. ¶ 25. This test represents the Constitutional Court's attempt to reconcile the rights to personality and freedom of expression found in Germany's Basic Law. The court first determines the role or function of the applicant in society—i.e., whether he or she is a public figure. Second, if the applicant is a public figure for all purposes, the court then focuses on the place or location where the claimant was photographed or observed. The European Court of Human Rights has labeled the first part of the German test the "functional" aspect and the second part the "spatial" aspect. *Id.* ¶ 54. For an analysis of the German court decisions, see Thomas Lundmark & Richard Chlup, *Princess Caroline in Bismarck's Shadow: Photographs of Public Figures in German Law*, JURIST LEGAL INTELLIGENCE, Feb. 15, 2001, at <http://jurist.law.pitt.edu/world/gercor2.htm>.

86. *von Hannover*, 40 Eur. H.R. Rep. ¶ 50.

ness premises that the applicant ‘would have had a *reasonable expectation of privacy* for such calls.’ [*Halford v. United Kingdom*].⁸⁷

The Court then concluded, albeit with no explanation whatsoever, that “[i]n the present case there is no doubt that the publication by various German magazines of photos of the applicant in her daily life . . . falls within the scope of her private life”⁸⁸ and that “she should, in the circumstances of the case, have had a ‘legitimate expectation’ of protection of her private life.”⁸⁹ Notably, the Court did not apply the data-processing test discussed in *P.G. & J.H. and Peck*. The significance of the Court’s omission remains to be seen, but one could argue that the omission strengthens the view that reasonable expectations could soon become the determinative test and that data processing is but a factor to consider within the scope of that test.⁹⁰

The Court next discussed whether the press’s right to freedom of expression under Article 10 justified the Government’s failure to provide Princess Caroline with a means in domestic law to stop the publications. In this respect, the Court held that the “decisive factor in bal-

87. *Id.* ¶ 51 (emphases added).

88. *Id.* ¶ 53.

89. *Id.* ¶ 78; see also *id.* ¶ 69. The judgment has been criticized for its lack of reasoning on this point. See Michael A. Sanderson, *Is von Hannover v. Germany a Step Backward for the Substantive Analysis of Speech and Privacy Interests*, 2004 EUR. HUM. RTS. L. REV. 631, 638, 640-43 (2004); Comment, *Media Law: Publication by the Media of Photographs of the Applicant*, 2004 EUR. HUM. RTS. L. REV. 593, 595 (2004). In light of its finding on private life, the Court did not decide whether family life applied. *von Hannover*, 40 Eur. H.R. Rep. ¶ 81.

90. Although not mentioned in *von Hannover*, the Court probably consulted the decision of the House of Lords in *Campbell v. MGN Ltd.*, [2004] 2 All E.R. 995 (U.K.H.L. 2004), which was factually similar and involved Articles 8 and 10 of the Convention as incorporated into domestic U.K. law by the Human Rights Act of 1998. There, supermodel Naomi Campbell sued *The Mirror* for publishing stories (with photographs) about her addiction to drugs. The House of Lords had to decide whether the case involved a private matter and, if so, how to balance that interest against the right of freedom of the press. By a decision of 3 to 2, the Lordships found for Campbell, although they could not seem to agree on which test to use to determine whether private life applied. Baroness Hale and Lord Nicholls stated that the touchstone of private life is whether the person in question has a reasonable expectation of privacy. *Id.* at 1031-33, ¶¶ 134-37 (Hale, L.J.); *id.* at 1004, ¶ 21 (Nicholls, L.J., dissenting). On the other hand, Lord Hope advocated two separate tests for determining when private life applies: (1) when a person has a reasonable expectation of privacy in the matter involved, the matter is “obviously private”; and (2) when the first test fails, a matter nevertheless is private if its disclosure or observation would highly offend a reasonable person of ordinary sensibilities. *Id.* at 1019-21, ¶¶ 92-99 (Hope, L.J.). Lord Carswell, in turn, said only that the information was obviously private, and he therefore did not consider the “offensiveness” test, *id.* at 1040, ¶ 166 (Carswell, L.J.), and Lord Hoffman resolved the issue in a manner similar to Lord Carswell, *id.* at 1011, 1015, ¶¶ 53-54, 75 (Hoffman, L.J., dissenting). Notably, a more recent Court of Appeal decision has since adopted the reasonable-expectations test. *X v. Y.*, [2004] E.W.C.A. Civ. 662, ¶¶ 55, 67 (Eng. C.A. 2004). See also *R. v. Chief Constable*, [2004] 4 All E.R. 193, 216, ¶ 71 (U.K.H.L. 2004) (Hale, L.J., dissenting).

ancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest.”⁹¹ Carrying out its review, the Court found that the photos at issue failed to contribute to such a debate but instead served solely to satisfy the “curiosity of a particular readership regarding [Princess Caroline’s] private life.”⁹² The Court therefore interpreted the right to freedom of expression narrowly so that in effect it ceded to the right to respect for private life.⁹³ As a result, the Court held that Germany had violated Article 8.

More was said about the reasonable-expectations test in the concurring opinion of Judge Barreto. He agreed (for the most part) with the outcome of the case but disagreed with the Court’s use of a separate “debate of general interest” test to account for Article 10. Instead, Judge Barreto endorsed the view that the Court should use the reasonable-expectations test more broadly so as to render a separate “debate of general interest” test unnecessary: “[W]henever a public figure has a ‘legitimate expectation’ of being safe from the media his or her right to private life prevails over the right to freedom of expression or the right to be informed.”⁹⁴ In his view, the reasonable-expectations test already incorporates the public interest component of Article 10 because it inherently “acknowledge[s] that, in view of their fame, a public figure’s life outside their home, and particularly in public places, is inevitably subject to certain constraints. Fame and public interest inevitably give rise to a difference in treatment of the private life of an ordinary person and that of a public figure.”⁹⁵ Using that precept, Judge Barreto then parted ways with the majority with regard to the reasonableness of certain expectations of privacy. He doubted, for example, that Princess Caroline could “entertain a reasonable expectation of not being exposed to public view or to the media”⁹⁶ at the beach club or while shopping.⁹⁷

91. *von Hannover*, 40 Eur. H.R. Rep. ¶ 76; *see also id.* ¶ 63.

92. *Id.* ¶ 65.

93. *Id.* ¶¶ 64-68, 76-77.

94. *Id.* ¶ O-12 (Barreto, J., concurring). Judge Barreto’s statement of the test implicitly recognizes partial expectations of privacy in how it highlights the expectation vis-à-vis the media.

95. *Id.*; accord *Hosking & Hosking v. Runtig*, [2005] 1 N.Z.L.R. 1, ¶ 120 (C.A. 2004) (“Viewed objectively, as it must be, the reasonable expectations of privacy of [those in public life] will necessarily be lower since it is inevitable the media will subject celebrity figures . . . to closer scrutiny and because the public has a natural curiosity and interest not only in the personal lives and activities of the celebrity but also in their families.”).

96. *von Hannover*, 40 Eur. H.R. Rep. ¶ O-12 (Barreto, J., concurring).

97. Judge Zupančič also filed a concurring opinion in which he endorses the reasonable-expectations test. *Id.* ¶¶ O-II1 to O-II7 (Zupančič, J., concurring). It is unclear from his

The *von Hannover* judgment and its concurrences highlight two important issues. First, at least some judges disagree on the proper reach of the reasonable-expectations test. The majority seemed content to use the test to decide solely whether private life applied and to use another test (the contributes to a “debate of general interest” test) to account for Article 10. Judge Barreto (and perhaps Judge Zupančič), on the other hand, sought to blend the two analyses into one test by in effect incorporating the public interest justification of Article 10 into the reasonable-expectations test of Article 8. I believe the majority approach of keeping the tests separate is the better one. Under the Barreto approach, it will be difficult to ascertain whether a claim has failed because the matter does not relate to private life or because a more compelling public-interest need overrode a private-life interest. The Court should keep the applicability analysis of private life separate from the justification analysis normally carried out under Article 8(2).⁹⁸ Beyond that, I would add only that Judge Barreto’s approach also fails to consider that rights other than private life (such as home and correspondence) can trigger Article 8 and that some separate test to account for Article 10 will remain necessary in those other contexts.⁹⁹

The second issue *von Hannover* underscores is that the determination of reasonableness (especially when based on notions of common sense) will likely lead to “differences of opinion”¹⁰⁰ among judges. Thus, if reasonable expectations is going to be the benchmark for future cases, and the Court hopes to maintain consistency and credibility in its decisions, the Court will have to develop a more structured and objective framework by which to proceed. In the next part of this arti-

opinion, however, whether he proposes that the Court should (1) merely make the test the “determinative” method by which to judge private life or (2) use the test to judge private life *and* the public interest component of Article 10 (as Judge Barreto suggested). For a commentator adopting the latter reading of Judge Zupančič’s opinion, see Paul Reid, “*Regulating Online Data Privacy*,” 1 SCRIPT-ED 533, 536 (2004), at <http://www.law.ed.ac.uk/ahrb/script-ed/issue3/privacy.asp> (last visited Apr. 11, 2005).

98. *Accord* *Campbell v. MGN Ltd.*, [2004] 2 All E.R. 995, 1004, ¶¶ 21-22 (U.K.H.L. 2004) (Nicholls, L.J., dissenting) (“[I]n deciding what was the ambit of an individual’s ‘private life’ in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality.”). For related reasons, under my proposal, when searching national legal instruments for a recognized expectation of privacy (see *infra* Part III.C), the Court should ignore those provisions of a member State’s laws that incorporate a free speech or similar Article-10-type defense that might eliminate an otherwise-recognized expectation.

99. Unless, of course, Judge Barreto believes that the Court should use reasonable expectations to judge all the rights under Article 8. See discussion *supra* Part II.B and *infra* Part III.E.

100. *von Hannover*, 40 Eur. H.R. Rep. ¶ O-12 (Barreto, J., concurring).

cle, I suggest a possible framework that addresses these issues and the many others flagged previously.

III. DEVELOPING REASONABLE EXPECTATIONS AS THE RULE FOR DETERMINING WHETHER PRIVATE LIFE APPLIES

The preceding sections have demonstrated that whereas the Convention tribunals initially defined private life in a piecemeal fashion and without reference to any general framework, some opinions of the Court have now floated a trial balloon based on a person's reasonable expectations of privacy. Unfortunately, the test is underdeveloped. Having been around for only seven years, it is in its relative infancy at the Court. Making matters worse, during that time the test has been mentioned in only a handful of cases, much less been actively utilized. This has led the Court to leave many questions unanswered or answered inadequately. Among them are: (1) whether the reasonable-expectations test should also apply to *personal choice* claims; (2) how to frame an applicant's claim of privacy or personal choice; (3) how to assess the reasonableness of a purported expectation; (4) whether actual expectations are relevant; (5) whether the reasonable-expectations test should also assess the applicability of the other rights in Article 8; and (6) whether the reasonable-expectations test should incorporate the public interest justification of Article 10. The remainder of this article addresses the first five of these six issues.¹⁰¹

A. *Personal Choice Claims*

The Court has yet to apply or even mention the reasonable-expectations test in a case involving a pure *personal choice* claim. Does this indicate the Court would refuse to extend the test to those sorts of cases? Doubtful. If anything, the Court appears to have hinted it might soon head in the *personal choice* direction. In *von Hannover*, the Court described the reasonable-expectations test as involving a "legitimate expectation" of protection and respect for . . . *private life*¹⁰²—not simply as an expectation of *privacy*, as it had in previous cases. Insofar as the distinction was intentional, it suggests the Court has left open the possibility of extending the test to all private-life claims. One might also go so far as to argue that the *von Hannover* case itself had a *personal choice* component: the publica-

101. I already have offered my thoughts on the sixth issue in my discussion of *von Hannover*.

102. *von Hannover*, 40 Eur. H.R. Rep. ¶ 51 (emphasis added).

tion of the photographs encroached on Princess Caroline's ability to develop personal relationships of her own choosing without outside interference.¹⁰³ In any event, it may only be a matter of time before the Court makes this extension more transparent.

For the sake of completeness and consistency it would appear the Court should, apart from refining the analytical framework of the reasonable-expectations test, apply a similar test to *personal choice* cases. I have therefore, in the sections that follow, tried to construct a reasonable-expectations test that includes the necessary refinement in both categories of private life. Consider the following proposed statement as the standard to govern future cases in which the applicability of private life is in question:

A public authority may not, without proper justification, interfere with or fail to respect matters in which a person has a reasonable expectation of privacy or personal choice. Before the Court may hold that an expectation is reasonable, however, it must find, at a minimum, a simple majority (i.e. emerging consensus) among the member States, as determined by legal and societal norms, that recognizes the right of privacy or personal choice invoked by the applicant.

B. Framing the Applicant's Claim

Given the underdevelopment of the reasonable-expectations test in the Court's jurisprudence, it is not surprising that the Court has said little on how to frame an application that attempts to satisfy the expectations standard. Nevertheless, the key to framing the expectation is simple. The Court and the Parties must include as many salient facts as possible, rather than presenting the issue in a more abstract way.¹⁰⁴ Too few facts may lead the Court to recognize an expectation as reasonable that it should not have or reject an expectation that it should have found reasonable. Improper construction of the issues also may prevent the Court from looking to legal and societal norms that recognize partial expectations of privacy.¹⁰⁵ Particular attention should

103. See *infra* note 114.

104. Daniel Solove appears to advocate a similar pragmatic approach to conceptualizing privacy in his proposal on the subject. See Solove, *supra* note 33, at 1128 ("A pragmatic approach to the task of conceptualizing privacy should not . . . begin by seeking to illuminate an abstract conception of privacy, but should focus instead on understanding privacy in specific contextual situations."); see also *id.* at 1130.

105. Cf. Colin Warbrick, "Federal" Aspects of the European Convention on Human

therefore be paid to: (1) the type, nature, and frequency of the intrusion; (2) the location of the intrusion; (3) the identity of the intruder; (4) any exposure attendant to the intrusion; and (5) whether the case allegedly involves a privacy or personal-choice expectation.

The importance and consequences of factual specificity are best demonstrated by example. Take, for instance, the common situation (at least in the United States) in which a regulation states that when a person brings a lawsuit, the court will assign the case to a particular judge, and the litigant must present all arguments to that judge only, barring some showing of bias or impropriety. Now suppose the litigant challenges this law on the ground he believes the decision of whom to speak to is a decision that ordinarily would be of personal choice, and that therefore the government, by not permitting him to present his case to another judge, has interfered with his Article 8 right.¹⁰⁶ It seems like an absurd case. But if the Court frames the expectation without sufficient facts, e.g., by posing it simply as whether it would be reasonable to state that it is ordinarily a matter of personal choice to decide whom to speak to and whom not to, then the Court would undoubtedly have to find the expectation to be reasonable (as I assume that legal and societal norms would overwhelmingly point in this direction). But as more facts are added, e.g., whether it would be reasonable for a person to expect that he had the personal choice of deciding which judge to present his arguments to, it becomes less likely the Court would adjudge the expectation to be reasonable. Of course, it should be repeated that the analysis I speak of here relates solely to the applicability of Article 8; the Court can still dismiss an absurd application on the basis of a government's justification under Article 8(2) (or the positive-obligations balancing test).

Factual specificity and careful construction of the issues also are particularly important in *privacy* cases because sometimes, as I have adverted to earlier, reasonable expectations can be partial. "There are degrees and nuances to societal recognition of our expectations of privacy,"¹⁰⁷ and the rule should not be that for an expectation of privacy to be reasonable that expectation must be of absolute privacy. The

Rights, 10 MICH. J. INT'L L. 698, 716-17 (1989) (noting in a different context that the "Court can protect the national interest of a State not only by a narrow interpretation of the rights but also by its characterization of the individual's application").

106. An applicant might also attempt to raise an Article 10 claim.

107. *Sanders v. ABC, Inc.*, 978 P.2d 67, 72 (Cal. 1999); accord Elizabeth Paton-Simpson, *Private Circles and Public Squares: Invasion of Privacy by the Publication of "Private Facts"*, 61 MOD. L. REV. 318, 321-26 (1998); Ernest van den Haag, *On Privacy*, in NOMOS XIII: PRIVACY, *supra* note 32, at 149, 157-58.

California Supreme Court demonstrated this point in its decision *Shulman v. Group W Productions, Inc.*,¹⁰⁸ a case involving the tort of intrusion of privacy (which requires as an essential element that the plaintiff have a reasonable expectation of privacy). There, the plaintiffs were injured when their car overturned in an accident. A medical rescue helicopter crew arrived at the scene accompanied by a television cameraman. Unbeknown to the victims, the cameraman had fitted the rescue nurse with a small microphone that enabled him to record the victims' conversations with the nurse. The cameraman's video footage then later appeared, without the plaintiffs' permission, on a documentary television show called *On Scene: Emergency Response* (not unlike in the *Peck* case). The plaintiffs sued for intrusion of privacy, among other claims.¹⁰⁹

In finding that the plaintiffs could have had a reasonable expectation of privacy in their conversations with the rescue personnel, the Court held that "mass media videotaping [and surreptitious recording] may constitute an intrusion even when the events and communications recorded were visible and audible to some limited set of observers at the time they occurred."¹¹⁰ The California Supreme Court later explained its holding as follows:

[We have never] stated that an expectation of privacy, in order to be reasonable for purposes of the intrusion tort, must be of *absolute* or *complete* privacy. . . .

. . . [A] person may reasonably expect privacy against the electronic recording of a communication, even though he or she had no reasonable expectation as to confidentiality of the communication's contents. . . . "While one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction has been recognized between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device. . . . [S]uch secret monitoring denies the speaker an important aspect of privacy of communication—the right to control the nature and extent of the firsthand dissemination of his statements."¹¹¹

108. 955 P.2d 469 (Cal. 1998).

109. *Id.* at 474-77.

110. *Sanders*, 978 P.2d at 72 (summarizing its holding in *Shulman*).

111. *Id.* at 71-72 (quoting *Shulman*, 955 P.2d at 492, and discussing several cases from other U.S. jurisdictions that have taken a similar approach). California's partial-expectations approach is not accepted in all of the United States, however. See, e.g., *Med. Lab. Mgmt. Consultants v. ABC, Inc.*, 306 F.3d 806, 815-16 (9th Cir. 2002); RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977). Moreover, the U.S. Supreme Court has essentially rejected the approach in the Fourth Amendment context. See, e.g., *Florida v. Riley*, 488 U.S. 445, 449-52 (1989); *California v. Greenwood*, 486 U.S. 35, 39-43 (1988); *California v. Ciraolo*, 476 U.S.

Thought of another way, this principle means that a court should focus not solely on the nature of the information *per se* but on how that information was subsequently used or disclosed.¹¹²

As I have recounted elsewhere, the European Court of Human Rights has already implicitly accepted a partial-expectations approach, particularly in the cases in which the Court focused on facts relating to how and by whom information was processed.¹¹³ The Court should continue to ensure that it collects sufficient facts and properly frames the applicants' expectations in future cases to allow it to recognize partial expectations of privacy. (Whether and how those expectations should be judged reasonable is a subject I address in the next section.)

A final word should also be said about the consequences of correctly framing the expectation as involving either the *privacy* or *personal choice* component of private life. Both the parties and the Court should be careful in this regard, as placing an issue in a particular category may affect the outcome of a case.¹¹⁴ Take, for example, some of the cases relating to transsexuality. Many of the applicants' complaints concern public records (e.g., driver's licenses) that contain their old gender status and that disclose to others during ordinary use that the person who appears before them as a male must have at one time been a female (or vice versa). These sorts of cases should be presented as *privacy* expectations. But if the case has less to do with the secrecy of the gender change and more to do with a person's status as a transsexual *per se*, it should instead be presented and addressed as a *personal choice* expectation; otherwise, the claim will fail.¹¹⁵

207, 213-15 (1986); Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1086, 1133-38 (2002) ("The Court's current conception of privacy is as a form of total secrecy.").

112. Cf. WACKS, *supra* note 54, at 24 (urging courts and legislatures to define "personal information" by referring "both to the quality of the information and to the reasonable expectations of the individual concerning its use") (other emphases omitted).

113. See *supra* Parts II.C–D.

114. There may of course be cases in which one could frame an expectation under both categories. For example, most claims relating to informational privacy can also be framed as personal-choice expectations. Cf. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967) (describing "informational privacy" as empowering "the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others"). And in some cases the publication of private information may "constrain[] a person's choices as to his or her private behaviour, interfering in a major way with his or her autonomy." David Feldman, *Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty*, in 47(2) *CURRENT LEGAL PROBLEMS* 41, 57 (M.D.A. Freeman & R. Halson eds., 1994). Furthermore, I should add that the consequences of framing the expectation in one category over the other will be less pronounced when searching for legal norms than when searching for societal norms.

115. Similar distinctions may be drawn in cases involving homosexuality, as was demonstrated in *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988), where criminal laws restricted

C. The Reasonableness of the Expectation

The more difficult question is how to take the expectation as framed by the parties and the Court and then decide whether that expectation is reasonable. I expect this area to cause the Court the most trouble. In my view, the expectation should be judged against what a free and democratic society is prepared to recognize as reasonable.¹¹⁶ But this statement is simply a shorthand. Determining what expectations a free and democratic society is prepared to recognize as reasonable depends on which countries to include in the definition of a free and democratic society, the threshold for when an expectation becomes reasonable, and the evidence the Court can consider to meet that threshold. I discuss each of these topics in the sections that follow and conclude that before the Court may hold that an expectation is reasonable, the Court must find, at a minimum, a simple majority (i.e., emerging consensus) among the member States, as determined by legal and societal norms, that recognizes the right of privacy or personal choice invoked by the applicant. Searching for a trend among State practices should be familiar to the Court given its use of a similar exercise in the margin-of-appreciation context.¹¹⁷

the behavior of an openly gay applicant.

[T]he interference with privacy involved [there] could not consist of activities of the state in disclosing to public view facts which the applicants wished to keep secret. Rather, the Court [held] that respect for private life includes respect for the applicant's sexual life by which, of course, the Court must mean a sexual life of the applicant's own choosing. Thus, 'private' must be read to refer not to questions of disclosure or nondisclosure but the right to choose certain intimate aspects of one's life, free of government regulation.

MARK W. JANIS ET AL., *EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS* 278 (2d ed. 2000).

116. Cf. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (stating that in determining whether a person has a reasonable expectation of privacy for purposes of a search or seizure conducted by law enforcement authorities, the court must inquire whether the individual's expectation of privacy is "one that society is prepared to recognize as 'reasonable'").

117. See *supra* Part I.A. The Court also has on occasion endorsed a comparative method to interpret terms in the Convention. See, e.g., *Engel v. Netherlands*, 22 Eur. Ct. H.R. (ser. A) ¶ 82 (1976); *Ezeh & Connors v. United Kingdom*, 39 Eur. H.R. Rep. 1, ¶ 82 (2004). Judge Matscher offered his own explanation of this approach in *König v. Germany*, 27 Eur. Ct. H.R. (ser. A) (1978). There, he stated:

[O]ne must look for the "common denominator" behind the provisions in question, since it is legitimate to suppose—in the absence of any legal definition in the Convention itself—that such is the meaning which the Contracting States wished these provisions to have. This "common denominator" can be found through a comparative analysis of the domestic law of the Contracting States.

Id. ¶ A (Matscher, J.) (but not defining what amounts to a common denominator). The Court also recently referred to the practices of member States when it struck a provision of the Convention that expressly permits the death penalty. See Convention, *supra* note 2, art. 2(1). In *Öcalan v. Turkey*, 37 Eur. H.R. Rep. 10 (2003), the Court held (over a dissent) that it could

1. *The Countries to Consult*

The first issue the Court must consider is which countries to include in the definition of a “free and democratic society.” In other words, which countries should the Court consult in its search for an emerging consensus? Foremost, it would seem the Court should include all the member States of the Convention. As contracting parties and the nations who will be bound by any interpretations of the Convention, the member States should certainly have a say in what the Convention means. Moreover, by virtue of their membership in the Convention and the Council of Europe, each of the member States also accepts, at least in theory, “the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.”¹¹⁸ We should therefore presume that each of these countries has the proper quality to take their place among free and democratic societies.

There are, of course, free and democratic societies other than those of the Council of Europe, and the question thus arises whether the Court should include an analysis of those other countries as well. Nothing in the Convention jurisprudence suggests this would be inappropriate. To the contrary, “some [Court] interpretations of Convention guarantees [already] refer to the law and practice of States which . . . [are] not Parties to the European Convention on Human Rights.”¹¹⁹ Consistent with this practice, the Court could in certain circumstances consult the views of non-member countries—with two important limitations. First, the Court should only consult countries that share with Europe “a common heritage of political traditions, ide-

read the permission out of the Convention because 43 of the 44 contracting States had abolished (and the 44th State had suspended) the death penalty for crimes committed during peace time. The Court ruled as it did despite the fact the member States had opted to use the protocol system to amend Article 2(1)—namely Protocol Nos. 6 and 13, which call for abolition of the death penalty under peace and war time, respectively—and that not all contracting States had ratified these protocols. *Id.* ¶¶ 189-98. The case is currently being reheard by a Grand Chamber of the Court. See Pending Cases Before a Grand Chamber, <http://www.echr.coe.int/BilingualDocuments/PendCase.htm> (last visited Apr. 11, 2005).

By way of comparison, the U.S. Supreme Court has used a similar consensus-based approach to interpret the Eighth Amendment to the U.S. Constitution. That Amendment, when read in conjunction with the Fourteenth Amendment, provides that neither the federal government nor the governments of the states may inflict “cruel and unusual punishments.” U.S. CONST. AMEND. VIII. In interpreting this phrase, the Supreme Court asks whether there exists a “national consensus” against the practice at issue. *Atkins v. Virginia*, 536 U.S. 304, 314, 316-17 (2002).

118. Statute of the Council of Europe, May 5, 1949, art. 3, 87 U.N.T.S. 103, C.E.T.S. 1.

119. Kersten Rogge, *Fact-Finding, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 677, 682 (R. St. J. Macdonald et al. eds., 1993).

als, freedom and the rule of law.”¹²⁰ I have in mind countries such as Australia, Canada, New Zealand, and the United States, but there are others as well.¹²¹ Second, because of the risk of selective piling-on of views from non-member States to influence a case, the Court should consult non-member countries only when truly *necessary* (i.e., when the practices of the contracting States are teetering on a balance of opposing views) and, in such a case, be as *complete and inclusive as possible* in selecting and including those non-member countries.

2. *The Evidence to Consider*

Having decided which countries to consult, the next logical issue is *how* to consult them. In searching for a sufficient consensus, it would seem the Court should determine the position of each State individually, insofar as possible, and then compare the positions of the States to one another. This appears more principled than a gestalt-like approach. In performing this task, the Court should consider two principal factors:¹²²

1. *Legal instruments*, including national constitutions, legislation, regulations, and case law;¹²³ regional and international treaties to which the State is a signatory; the case law of the Convention tribunals; and the case law of the European Court of Justice, insofar as applicable to the State in question; and
2. *Societal norms and customs*,¹²⁴ as demonstrated by public opinion surveys,¹²⁵ social science, legal-enforcement histories, and pending legal reforms.¹²⁶

120. Convention, *supra* note 2, pmbl.

121. Determining which non-member countries to include is beyond the scope of this article. One commentator has offered selection criteria in the context of which countries the United States should look to in its use of comparative analysis. Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. (forthcoming May 2005); see also ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 147-48 (1993) (listing some of the hallmarks of a democratic society).

122. Cf. Laurence R. Helfer, *Consensus, Coherence and The European Convention on Human Rights*, 26 CORNELL INT'L L.J. 133, 139 (1993) (observing the importance of similar factors in the margin-of-appreciation context) [hereinafter *Consensus, Coherence and the ECHR*]; Laurence R. Helfer, *Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention on Human Rights*, 65 N.Y.U. L. REV. 1044, 1056-57 (1990) (same).

123. Daniel Solove provides a good example of how this part of the investigation might come out (under U.S. law) in a case where a doctor wrongly discloses medical information about a patient. See Solove, *supra* note 111, at 1155-56.

124. For an instructive proposal on how courts should obtain information from the social

This sort of comparative, empirical approach (often absent in the cases)¹²⁷ is necessary given that there must be “some methodology or evidence upon which the [Court] can base the stated perception of the common will. The evolving standards in the Convention should be informed by empirical evidence [rather than] simply be plucked from the sky by the judge.”¹²⁸

In some cases, a conflict may exist *within* a State between legal instruments and societal norms, thereby making it difficult for the Court to determine the true position of a member State. Whether to favor the legal instrument over the societal norm should depend on the nature and source of the law. A legal instrument may *prima facie* (1)

sciences and evaluate that information to interpret laws, see John Monahan & Laurens Walker, *Judicial Use of Social Science Research*, 15 *LAW & HUM. BEHAV.* 571, 573-76, 582-83 (1991); John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 *U. PA. L. REV.* 477, 495-516 (1986).

125. Cf. Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”* 42 *DUKE L.J.* 727, 759-74 (1993) (surveying 217 individuals to gauge the intrusiveness of police-investigative techniques); Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 *MISS. L.J.* 213, 271-85 (2002) (surveying 190 individuals to determine the intrusiveness of closed circuit television surveillance).

126. The U.S. Supreme Court has considered similar factors in assessing whether a national consensus exists in Eighth Amendment cases. See *supra* note 117. The Supreme Court favors objective indicia and therefore first looks to (1) the legislative enactments of the 50 states, the District of Columbia, and the federal government (as those enactments are interpreted by their respective judiciaries); and (2) the practices of prosecutors and sentencing juries within those jurisdictions. *Stanford v. Kentucky*, 492 U.S. 361, 370-77 (1989); *Thompson v. Oklahoma*, 487 U.S. 815, 821-22 (1988). The Supreme Court also has on occasion considered other criteria such as public opinion polls; the views of interest groups; the legislation and case law of other countries; and the instruments of international organizations. *E.g.*, *Roper v. Simmons*, 125 S. Ct. 1183, 1194-1200 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Penry v. Lynaugh*, 492 U.S. 302, 334-35 (1989); *Stanford*, 492 U.S. at 389-90 (Brennan, J., dissenting); *Thompson*, 487 U.S. at 830-31 (Stevens, J., plurality opinion).

127. Rudolf Bernhardt, *The Convention and Domestic Law*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS*, *supra* note 119, at 25, 35 (“A comparative approach seems to be an absolute necessity in order to find common European principles in the legal orders of these States. [¶] Under these circumstances, it may be astonishing that extensive comparative law analyses cannot be found in the judgments of the Court or the reports of the Commission.”).

128. Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 *HUM. RTS. L.J.* 57, 73-74 (1990); accord *ARAI-TAKAHASHI*, *supra* note 16, at 197 (“Vague references to ‘emerging national standards’, which are not empirically verifiable, would undermine [the Strasbourg organs’] credibility and sow the seed of suspicion that they are engaged in an unfounded judicial activism.”). The U.S. Supreme Court has raised similar concerns in its Eighth Amendment jurisprudence. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (“Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.”).

approve of an expectation by guaranteeing that a person such as the applicant has a right of privacy or personal choice in the matter at issue, or (2) reject an expectation by stating or reflecting that the matter is not one in which the applicant can have such an expectation. (Of course, given the factual specificity required to frame expectations, it becomes possible that no law will speak directly on the issue either way.) Under the first circumstance, it would seem the law should effectively render the expectation reasonable as a matter of law within that State, regardless of other public or societal evidence to the contrary. The public is entitled to rely on laws that benefit them until those laws are changed. Moreover, to hold otherwise would appear inconsistent with Article 53 of the Convention.¹²⁹ I would argue, however, that the second scenario creates at most a presumption that the expectation is unreasonable in that State, subject to rebuttal by contrary societal norms evidence. This follows because often within the national system of a country it takes a long time (sometimes ridiculously long) for a State's legislation to reflect public, societal consensus, and often the under protection of privacy in legislation results not from the will of the people but from special interest groups that have greater power to influence the legislature.¹³⁰

I recognize that the comparative task described here will be difficult and time consuming. Indeed, commentators have lamented in the margin-of-appreciation context that the Court lacks the resources to undertake these types of wide-ranging investigations on its own.¹³¹ Fortunately, it is doubtful these sorts of investigations will have to occur in every case. Many applications will invoke expectations already recognized by the Court as involving private life or expectations that are obviously reasonable. Moreover, the Court will often be able to dispose of a case on an alternative ground, such as by finding that another right under Article 8 applies or by assuming *arguendo* that private life applies and then ruling that the State's actions are nevertheless justified. But in cases in which the existence or extent of a consensus on private life or personal choice will be hotly contested, and the issue cannot be avoided, the Court should seek assistance by making greater use of its rules permitting member-State interven-

129. Convention, *supra* note 2, art. 53 ("Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.").

130. Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843, 859-60 (2002).

131. See Mahoney, *supra* note 128, at 76; HARRIS ET AL., *supra* note 4, at 11, 294.

tion,¹³² party-requested *amici curiae*,¹³³ Court-appointed experts,¹³⁴ and legal aid for applicants.¹³⁵ It also bears stressing that much of the work to be undertaken here should not markedly increase the Court's workload beyond what already is often required (although not always performed) when determining the margin of appreciation to afford a State. Though not serving the same purposes, the Court can use the results of the consensus investigation for defining private life as part of its governmental-justification inquiry, and vice versa.¹³⁶

3. *The Proper Threshold*

Defining the threshold for a sufficient common ground is a more difficult issue. After all, it is inevitable that in many cases the evidence will demonstrate diversity among the practices of member States. Should the Court require a true consensus—i.e., all States must agree that an expectation is reasonable—before the Court can conclude that private life applies? Or is only an emerging consensus (i.e., simple majority) required? For that matter, is only a handful of States enough?¹³⁷ The Court already has encountered this problem with the margin-of-appreciation doctrine, and the cases and scholarship on this related subject are instructive. Those sources demonstrate that although the Court has not adopted a precise arithmetical thresh-

132. Convention, *supra* note 2, art. 36; EUR. CT. H.R. RULE 44.

133. EUR. CT. H.R. RULE 44.

134. EUR. CT. H.R. RULE A1.

135. EUR. CT. H.R. RULE 91. For a criticism of the Court's current legal-aid practices, see Andrew S. Butler, *Legal Aid Before Human Rights Treaty Monitoring Bodies*, 49 INT'L & COMP. L.Q. 360 (2000).

136. It remains important to keep in mind that the goals and therefore consequences of the consensus inquiries differ in each context. With respect to the margin of appreciation, a consensus or lack thereof is just one of many non-dispositive factors the Court will consider as part of its analysis of how much discretion to give the government. See *supra* Part I.A. On the other hand, the purpose of the consensus investigation under the reasonable-expectations test (at least as proposed here) is to determine the existence of a *prima facie* right and the outcome is dispositive.

137. I recognize that the term "consensus" is ambiguous which is why I have attempted to clarify the term in the present context. For conflicting definitions of the term, see BLACK'S LAW DICTIONARY 323-24 (8th ed. 2004) ("A general agreement; collective opinion," but then referring the reader to the entry for "general consent" which states: "[a]doption without objection, regardless of whether every voter affirmatively approves."); THE COMPACT OXFORD ENGLISH DICTIONARY 318 (2d ed. 1991) ("2. a. Agreement in opinion; the collective unanimous opinion of a number of persons."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 482 (1986) ("2 a : general agreement : UNANIMITY, ACCORD . . . b : collective opinion : the judgment arrived at by most of those concerned."); HENRY W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 91 (1927) ("[C]onsensus means unanimity, or unanimous body, of opinion or testimony.").

old,¹³⁸ the Convention tribunals have, beginning with the judgment in *Tyrer v. United Kingdom*, appeared to embrace a “great majority” standard¹³⁹ (and on occasion a simple majority standard)¹⁴⁰ as the basis for finding a sufficient common ground among the States to decrease the level of appreciation.¹⁴¹ This is not surprising, given that it would seem incongruous to hold that the shared position of only a handful of States is sufficient to suggest that another State’s deviation is unreasonable. But should a similar super-majority threshold be adopted in the reasonable-expectations context? In the next several paragraphs, I canvass the arguments for and against the various possible thresholds and conclude that on balance a simple-majority standard is the most workable and compatible with the Convention.

In the context of reasonable expectations, it can first be said that there should be at least an emerging consensus (i.e., simple majority) among the pertinent States before the Court may recognize an expectation as reasonable. As Laurence Helfer has stated in another context:

While it is impossible to specify for every situation a precise formula for the number of states that must have [taken a certain position], at a minimum, at least half of the Contracting States should have adopted some form of the rights-enhancing measure in question. This majority rule serves as a minimum baseline against which the tribunals can judge the emergence of genuinely regional norms.¹⁴²

138. HARRIS ET AL., *supra* note 4, at 295-96; *see also* Ost, *supra* note 26, at 305 (“When the Court cites the situation in the ‘majority’ of the Member States, it is difficult to decide whether the Court is referring to the statistical majority or an ideal majority of those States with a high level of protection of individual rights.”).

139. *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) ¶ 38 (1978); *see also* L. & V. v. Austria, 2003-I Eur. Ct. H.R. 29, ¶¶ 47, 50; *Sutherland v. United Kingdom*, App. No. 25186/94, ¶ 59 (1997) (Commission Report), <http://www.echr.coe.int/Eng/Judgments.htm> (last visited Apr. 11, 2005); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) ¶ 46 (1988); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) ¶ 60 (1981); *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) ¶ 41 (1979); *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶ 57 (1976). Given the paucity of explanation that often surrounds the Court’s assessments of consensus, it is impossible to discern whether the term “great majority” should be read to mean a three-fifths, two-thirds, or three-fourths majority (or none of the above). I believe, however, that it is safe to assume it must mean more than a simple majority but less than unanimity.

140. *Albert & Le Compte v. Belgium*, 58 Eur. Ct. H.R. (ser. A) ¶ 22 (1983); *see also* *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) § 5.6.3 (1990) (Martens, J., dissenting) (criticizing the Court’s use of the “great majority” standard in the margin-of-appreciation context).

141. I offer no opinion here as to which threshold (if any) is correct in the margin-of-appreciation context.

142. Helfer, *Consensus, Coherence and the ECHR*, *supra* note 122, at 159 (discussing the Court’s consensus methodology in the margin-of-appreciation context). Incidentally, Helfer states “at least half,” but he also refers to this as a “majority rule.” Therefore, he probably

I am inclined to agree. There appears to be no justification for permitting a minority of States to change the status quo—even in the noble case where the minority’s legal and societal norms recognize the expectation invoked by an applicant. Indeed, the few scholars who have endorsed the use of minority rules have done so only with respect to procedural or preliminary matters.¹⁴³ Anything less than a simple majority on substantive issues would be undemocratic, and I imagine the member States would not tolerate it.¹⁴⁴

I also see no reason for requiring the threshold to be at the other end of the spectrum, i.e., to require unanimity among the member States. Such a rule would give each member State too much power to influence the decisions of the Court; the position of a single State could scuttle an applicant’s private-life claim. Unanimity also would be unworkable because there will *always* be a State that has rejected the applicant’s purported expectation. Perhaps most obvious here is the respondent State. Applicants file claims in the European Court of Human Rights because the respondent State has already rejected those claims in national proceedings. This is a strong (although not always conclusive) indication that the respondent State can be counted among those that would refuse to recognize the applicant’s expectation of privacy or personal choice.¹⁴⁵ Moreover, even when this sort of inherent rejection is not present, there is still—given the number of States involved (today 45, soon to be 46) and the diverse cultures of those States—bound to be at least one opponent to an expectation. Perhaps most importantly, requiring a true consensus would also contravene the object and purpose of the Convention. The Court is obligated to *promote* and not just maintain human rights.¹⁴⁶ Requiring unanimity of opinion would make achieving this goal impossible.

Valid arguments exist for requiring unanimity in other contexts, but even the strongest of those arguments is not persuasive here. Scholars often acknowledge that in international affairs States should

meant to say half plus one.

143. *E.g.*, Adrian Vermeule, *Submajority Rules: Forcing Accountability Upon Majorities*, 13 J. POLIT. PHIL. 74, 74 n.3 (2005).

144. *Cf.* HENRY B. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY 187 (1960) (“What is the alternative to the majority principle, to trusting the majority of the representatives and using our influence upon them? The simple alternative, for some kind of minority rule, is not usually put forward today plainly and unashamedly.”); *id.* at 179; HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES (1625), *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW NO. 3, bk. II, 167, 249 (Francis W. Kelsey trans., James B. Scott, ed., 1925) (“[I]t is manifestly unfair that the majority should be ruled by the minority.”).

145. I say strong, but not conclusive, because the respondent State’s legal norms may be out of step with its societal norms.

146. Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) ¶ 119 (1991).

not be bound by any decision of a collective group unless that decision was unanimous. Proponents of this position argue that “the nature of the international community, resting as it does upon the independence or sovereignty of its component parts, makes acceptance of any other rule impossible.”¹⁴⁷ This principle is embodied in the protocol system of the Convention on Human Rights by virtue of customary international law.¹⁴⁸ Contracting States must ratify any amendment or protocol in order to be bound by it.¹⁴⁹ By analogy, one could argue that insofar as the Court is amending the term “private life” to recognize a new expectation of privacy or personal choice, the Court must do so in a manner no less stringent than that required to add a protocol. To permit otherwise would violate the sovereignty and independence of each of the member States.

Although facially appealing, the contracting States have effectively waived this argument by agreeing to be bound by the decisions of the Court.¹⁵⁰ As Cromwell Riches prophetically explained in 1940:

Sovereign states may unite in the establishment of permanent international organs possessing authority to regulate matters of common concern and they may consent, either expressly or tacitly, to accept as binding decisions reached in these organs by some form of majority vote, without in any sense compromising their own independence or sovereignty.¹⁵¹

The Court has always ruled on its decisions internally by majority rule, and this is a practice the member States are aware of and expect.¹⁵² If the contracting States have agreed that a simple majority of the judges can decide what private life means by whatever manner

147. CROMWELL A. RICHES, MAJORITY RULE IN INTERNATIONAL ORGANIZATION 8 (1940) (citing various sources).

148. Cf. Vienna Convention, *supra* note 17, art. 40(4) (“The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement.”).

149. E.g., Protocol No. 14 to the Convention, May 13, 2004, art. 19, C.E.T.S. 194; Protocol No. 13 to the Convention, May 3, 2002, art. 7(2), C.E.T.S. 187.

150. See Convention, *supra* note 2, art. 46.

151. RICHES, *supra* note 147, at 291; see also OVEY & WHITE, *supra* note 18, at 34-35 (“[A]ny general presumption that treaty obligations should be interpreted restrictively since they derogate from sovereignty of States is not applicable to the Convention.”); Rudolf Bernhardt, *Commentary: The European System*, 2 CONN. J. INT’L L. 299, 300 (1987) (“For a considerable time, European states felt that state sovereignty and . . . supra-national supervision were incompatible These feelings have, to a large extent, now disappeared, resulting in the acceptance of the European system.”); Reed H. Bement, *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, 24 U. PITT. L. REV. 563, 585 (1963) (“The . . . members have willingly guaranteed a number of individual rights and freedoms and, more importantly, have granted to a multinational body the power to investigate and to supervise the extent to which this responsibility is being met.”).

152. See EUR. CT. H.R. RULES 23, 88.

they see fit—sometimes by means of their own subjective views—there should be no reason to require something more (especially not a rule of unanimity) from an objective and empirical approach.

Given that neither minority nor unanimity rules are suitable, we are left with deciding whether to favor a super-majority standard over a simple majority. Several justifications are often advanced for choosing super-majority rules.¹⁵³ Chief among them is that the standard better protects minority factions from what has been called the “tyranny of the majority.”¹⁵⁴ Majority factions may regularly suppress the views and positions of the minority¹⁵⁵ and may even, because of their position, make structural or institutional changes to help keep themselves in power.¹⁵⁶ A super-majority rule helps prevent abuses by weighing the votes of those in the minority more heavily than those in the majority. For example, if the threshold required to change the status quo is a three-fifths majority, then the majority must muster 1.5 “yes” votes for every single “no” vote just to break even.¹⁵⁷ Scholars rarely question the ability of super-majority rules to better protect minority interests from abuses, and I won’t do so here.¹⁵⁸ Rather, I doubt whether, in our context, countries in the minority position need protection.

At the outset, we can dismiss one of the principal reasons for protecting minority factions—to prevent the majority from making structural changes to help keep itself in power. Given the nature of what the Court is judging here, the existence of a prima facie right to pri-

153. These justifications are most often made in the contexts of elections and legislative and constitutional decision-making—not judicial decision-making. Nevertheless, given the nature of my proposal in Part III, those justifications cannot simply be dismissed out of hand.

154. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 330, 332-34 (Henry Reeve trans., 1898) (1835); JOHN STUART MILL, *ON LIBERTY* (1859), reprinted in 43 *GREAT BOOKS OF THE WESTERN WORLD* 267, 269 (Robert M. Hutchins ed., 1952).

155. LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 3, 102-03, 116-17 (1994); Tony Honoré, *The Human Community and The Principle of Majority Rule*, 8 *SYD. L. REV.* 599, 600, 610 (1979); Note, *Supermajority Voting Requirements: Possible Constitutional Objections*, 55 *IOWA L. REV.* 674, 676 (1970) [hereinafter *Supermajority*]; JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787* 76-77 (1966) (1840).

156. See John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 *TEX. L. REV.* 703, 786-87 (2002); Benjamin Lieber & Patrick Brown, *On Supermajorities and the Constitution*, 83 *GEO. L.J.* 2347, 2356 (1995); *Supermajority*, *supra* note 155, at 677.

157. See Thomas A. Frericks, *Super-Majorities and Equal Protection*, 31 *OHIO ST. L.J.* 333, 339 (1970).

158. But see Anthony J. McGann, *The Tyranny of the Supermajority: How Majority Rule Protects Minorities*, 16 *J. THEORETICAL POLIT.* 53 (2004) (arguing that the ability of super-majority rules to protect the minority is illusory and that simple-majority rules better serve the needs of minorities).

vate life, this concern simply does not apply. The second issue, oppression of minority views, also should cause little concern. First, no suppression will occur when the minority comprises countries that recognize the applicant's expectation of privacy or personal choice. In those cases, the Court will have to hold (because of the majority's position) that the applicant's expectation was unreasonable and that private life does not apply. But those sorts of rulings do nothing more than maintain the status quo. Countries in the minority faction will not be required to change their laws to reduce privacy rights; rather, they will remain free to protect those Article 8 rights beyond what the Court has recognized in its Convention case law.¹⁵⁹

But what about countries who are in the minority faction on account of *refusing* to recognize an expectation? In those sorts of cases, the Court will have to expand private life (on account of the majority) to encompass the applicant's expectation and in effect force the member States in the minority to do so as well. Suppression of this type also should not cause concern, however, because it does not rise to the level of oppression that worries commentators in other contexts. Proponents of super-majority rules necessarily assume that the makeup of a majority will persist for some time—e.g., during the two years between federal elections in the United States—and that over time the majority will, *through multiple decisions*, be able to *dominate* a certain minority faction. This sort of abuse is less likely to occur in our context. The countries that makeup the majorities and minorities will shift as the private-life issue differs in each case. Thus, a State that is in the minority faction on issue X may well be in the majority faction on issue Y, and so forth. That having been said, I recognize that a few member States may be much less protective of personal liberties as a general matter, and that they will fall in the minority more often than in the majority. Those States will thus be forced more often than others to expand privacy rights beyond their own national desires. I am hopeful, however, that those countries are so few in number that they would constitute what I call a super minority. That is to say, they will always be on the losing side, always in the minority, regardless of whether the threshold is a simple majority or super majority. Therefore, they should not form the sole reason for choosing a super-majority rule.

Another reason advanced for favoring super-majority rules is to increase the stability of decisions.¹⁶⁰ By virtue of the fact super-

159. See also Convention, *supra* note 2, art. 53.

160. McGinnis & Rappaport, *supra* note 156, at 787; Frericks, *supra* note 157, at 339; see

majority decisions must be made with more than a bare majority, more parties will have agreed to the decision, and therefore the decision will be less likely to be reversed or repealed in the future. I do not question the logic of this reason for choosing super-majority rules.¹⁶¹ Rather, once again, the premise does not apply here. The decisions of the Court will remain stable even if interpretation occurs through the use of a simple-majority rule. In practice, the Court's decisions on private life operate as a one-way ratchet. The Court expands the meaning of private life over time but does not contract it.¹⁶² This ratchet should continue to function under the reasonable-expectations test. Member States that have recognized an expectation of privacy or personal choice are unlikely, after the Court confirms that the expectation is a component of private life, to shift their legal and societal practices to eliminate that expectation in their respective jurisdictions.¹⁶³ Apart from these observations, the object and purpose of the Convention also appear to require the Court to adopt this ratchet as an express policy. The job of the Court is to promote and maintain the ideals and values of a democratic society;¹⁶⁴ nowhere does the Convention say that the Court may reduce them. By logical extension, this principle means that the Court should never eliminate from the meaning of private life an expectation of privacy or personal choice that it has previously recognized.¹⁶⁵

Various policy reasons also militate toward adopting a simple-majority threshold over a super majority. For one, a less rigorous standard makes it easier for the Court to (again) fulfill the object and purpose of the Convention and "further reali[ze]" human rights, as is

also Andrew Caplin & Barry Nalebuff, *On 64%-Majority Rule*, 56 *ECONOMETRICA* 787, 789-90 (1988) (suggesting through economic analysis that super-majority rules lead to more stable decisions than simple-majority rules).

161. Other scholars have, however. *E.g.*, Frericks, *supra* note 157, at 339-40.

162. I am not aware of a single instance since the inception of the Convention in 1953 in which the Court has overruled a prior final judgment to eliminate a *prima facie* privacy right that it had recognized previously.

163. *Cf.* Warbrick, *supra* note 105, at 716 ("[T]he States cannot lightly change their legislation to retreat from a previous judgment of the Court because the new laws would be contrary to the Convention."). The factor most likely to cause a material shift would be the addition of a large number of States to the membership of the Convention.

164. *See supra* Part I.B.

165. Again, I should stress here that I am speaking only of the *applicability* of private life under Article 8. If there is indeed a major shift in consensus among the member States in a way that restricts individual rights (say for example during times of war), the offending State will likely have a valid justification for restricting or infringing the applicant's private life. *See also* Convention, *supra* note 2, art. 15 (permitting States to derogate from certain of their obligations under the Convention in "time of war or other public emergency threatening the life of the nation").

required in the preamble of the Statute of the Council of Europe.¹⁶⁶ The Court should not have to wait for what may amount to decades after a simple majority emerges for a super majority to arrive before it can act. Further, a simple-majority rule ensures each member State's position is weighed the same as the others, regardless of whether they are in the majority or the minority.¹⁶⁷ A super-majority threshold would weigh "reject" votes more heavily than "accept" votes, thereby contravening the spirit of the Convention's own anti-discrimination provisions.¹⁶⁸ Lastly, choosing a simple-majority threshold relieves the Court of having to make the more difficult choice of selecting among the various possible super-majority rules—e.g., three-fifths, two-thirds, three-fourths, or four-fifths. I can discern no principled reason for choosing one of these thresholds over the other,¹⁶⁹ and pru-

166. Statute of the Council of Europe, *supra* note 118, pmbl.

167. See RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 122 (2002) ("[M]ajority rule is also a principle with a strong ethical basis in an egalitarian society. If we are all political equals, then each of our opinions should count equally. Majority rule is thus the political expression of a liberal commitment to treat each individual equitably."). Tony Honoré also has noted:

[I]f . . . members are thought of as equal the simplest method and the one which is least likely to cause dissension is to treat them as equal in relation to the matters to be decided. Hence they should each have an equal voice in the decision. But this means that the view of the majority will prevail, since if the weight to be attached to the opinion of each is the same, the opinion of more than half must have greater weight than the opinion of less than half.

Honoré, *supra* note 155, at 602.

168. See Convention, *supra* note 2, art. 14; Protocol No. 12 to the Convention, Nov. 4, 2000, art. 1, C.E.T.S. 177.

169. By way of comparison, the U.S. Supreme Court has encountered this problem in its death-penalty jurisprudence. There, the Supreme Court has often, in its analysis of legislative enactments, seemed to create an *implicit* threshold that resembles a three-fifths-majority standard. But the tacit 60% rule seems a bit odd and unprincipled in light of the fact the U.S. Constitution explicitly states it can only be amended by a three-fourths (75%) majority. U.S. CONST. AMEND. V. For example, in *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Supreme Court rejected an Eighth Amendment challenge to the execution of the mentally retarded where 17 jurisdictions prohibited this sort of capital punishment, *id.* at 334, thereby creating only a 33% rejection of the practice in the United States. But the Supreme Court then reversed itself and found an Eighth Amendment violation in *Atkins v. Virginia*, 536 U.S. 304 (2002), when it found that in the intervening years 31 jurisdictions had rejected the practice of executing the mentally retarded (for a 60% rejection rate). *Id.* at 314-15. The three-fifths threshold also appeared in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), where the Supreme Court struck down laws permitting the execution of defendants who were 15 years old when they committed their crimes. Thirty-two jurisdictions prohibited the practice, *id.* at 826-29, leading to a 62% rejection rate. Also instructive are the Court's decisions on the practice of executing defendants who were 16 or 17 years old at the time of the offense. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Court found that the practice did not violate the Eighth Amendment where only 29 states and the District of Columbia rejected the practice with respect to 16-year-olds (a 58% rejection rate) and only 27 jurisdictions rejected the practice with respect to 16- and 17-year-olds (a 52% rejection rate). *Id.* at 370-73. (My calculation includes those jurisdictions that rejected the death penalty outright, contrary to the position taken by the majority in *Stanford*.) Yet in *Roper v. Simmons*, 125 S. Ct. 1183 (2005), the

dence thus suggests it is best to avoid the issue altogether by requiring only a simple majority before the Court may find an expectation to be reasonable.

Granted, these are but a handful of issues relating to determining the appropriate threshold. I imagine others exist as well. For example, three issues that immediately come to mind are whether the duration of the emerging consensus should matter,¹⁷⁰ whether the Court should require an absolute majority,¹⁷¹ and whether the populations of the member States should be taken into account.¹⁷² Each of these topics could merit their own treatment, and they are therefore beyond the scope of this article. Suffice it to say, however, that the Court could probably avoid these issues for a substantial length of time given that their resolution would not be required unless the case was exceptionally close and alternative grounds were not otherwise available.

Court reversed course and ruled that capital punishment of minors violated the Eighth Amendment. The change in objective criteria was slight, with 30 states, the District of Columbia, and the federal government rejecting the execution of anyone under 18 years old (a 62% rejection rate). *Id.* at 1190-94. Earlier cases do not always exhibit this 60% threshold, however. *E.g.*, *Spaziano v. Florida*, 468 U.S. 447, 463-64 (1984) (rejecting an Eighth Amendment challenge to Florida's practice of allowing a judge to impose the death penalty in the face of a recommendation of life from the jury, even though 81% of jurisdictions with the death penalty rejected such a practice).

170. *Cf. Atkins*, 536 U.S. at 344 (Scalia, J., dissenting) (arguing in the Eighth Amendment context that the Court should consider the age of the laws which make up a purported national consensus; "[it] is 'myopic to base sweeping constitutional principles upon the narrow experience of [a few] years'" (quoting *Coker v. Georgia*, 433 U.S. 584, 614 (1977) (Burger, J., dissenting))).

171. The absolute-majority issue would arise in cases in which the Court cannot, despite its best efforts, discern a member State's position on a particular expectation. What should be done with States that have in effect abstained? Under an absolute-majority rule, the Court would have to find a simple majority among *all* the member States; i.e., a 23-vote majority is always required. For example, if 30 of the 45 member States have a discernable position but 15 do not, then, of those 30 States, 77% must favor the expectation in order for the Court to recognize it. In cases where the absolute-majority rule does not apply, the Court would only need to find a simple majority among those States that have a discernable position. This issue should not arise often as I am hopeful the Court will be able to discern the position of every member State (often with assistance of the States themselves). Though I leave this subject for another day, an interesting economic analysis of the subject may be found in Keith L. Dougherty & Julian Edward, *Simple v. Absolute Majority Rule*, Jan. 11, 2005, at 2-3, 17-19 (suggesting that simple-majority rules more frequently outperform absolute-majority rules), at http://www.arches.uga.edu/~dougherk/simple_absolute_MSS.pdf.

172. Compare, for example, the voting procedures under the proposed European Union Constitution. See *EU Heads Hail Constitution Deal*, BBC NEWS, June 19, 2004 ("Under the new voting rules, measures must have the backing of at least 15 EU states, representing at least 65% of the total population, in order to pass."), <http://news.bbc.co.uk/1/hi/world-europe/3821305.stm>; Treaty Establishing a Constitution for Europe, Dec. 16, 2004, arts. I-25, I-44, 47 O.J. C-310.

D. The Relevance of the Applicant's Actual Expectations

Earlier in this article I flagged and then tabled the question of whether an applicant's actual or subjective expectations of privacy or personal choice should be at all relevant in analyzing whether private life applies.¹⁷³ The European Court of Human Rights could take one of three approaches to this issue: actual expectations are (1) required, (2) relevant to a certain extent, or (3) irrelevant. The United States has, by way of comparison, taken the first approach (for the most part) and required litigants who seek to invoke their rights under the Fourth Amendment to demonstrate a subjective expectation of privacy (in addition to an objective one).¹⁷⁴ Requiring a subjective expectation is facially appealing as it would appear odd to hold that an applicant had a reasonable expectation of privacy or personal choice in a matter when that person had no *actual* expectation. Yet there are arguments that counsel against such a requirement.

It has been repeatedly recognized, in both scholarship analyzing the *Halford* judgment and the Fourth Amendment, that outside forces can easily manipulate a person's subjective expectations. Take, for example, "[a]n employer who informs employees at the workshop door that they have no right to privacy, and may be watched or listened to at any time"¹⁷⁵ Commentators have argued that:

workplace privacy standards . . . will invariably favour employer interests over individual privacy, and will also become the 'norm' to be expected in workplaces which do not have explicit privacy-related policies.

. . . Ultimately the scope of privacy rights could be reduced to virtually nothing. This is a real danger of approaches which treat expectations of privacy as a purely empirical concept, rather than taking a normative perspective based on the expectations of society as a whole.¹⁷⁶

173. See *supra* Part II.B and note 67.

174. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); see also *infra* note 180.

175. Ford, *supra* note 6, at 31.

176. Hazel Oliver, *Email and Internet Monitoring in the Workplace: Information Privacy and Contracting-Out*, 31 *INDUS. L.J.* 321, 332-33 (2002). This topic has been covered thoroughly elsewhere, to say the least. E.g., Gail Lasprogata et al., *Regulation of Electronic Employee Monitoring: Identifying Fundamental Principles of Employee Privacy through a Comparative Study of Data Privacy Legislation in the European Union, United States and Canada*, 2004 *STAN. TECH. L. REV.* 4, ¶ 65 (2004), at http://str.stanford.edu/STLR/Articles/04_STLR_4/index.htm (last visited Apr. 11, 2005); Patricia Findlay & Alan McKinlay, *Surveillance, Electronic Communications Technologies and Regulation*, 34 *INDUS. REL. J.* 305, 307-08 (2003); Aileen McColgan, *Do Privacy Rights Disappear in the Workplace*, 2003 *EUR. HUM. RTS. L. REV.* 120, 123 (2003); Michael Ford, *Two Conceptions of Worker Privacy*, 31 *INDUS. L.J.* 135, 143-54 (2002); Craig & Oliver, *supra* note 62, at 55-56; Heather L. Hanson,

In the context of the Fourth Amendment, Anthony Amsterdam has similarly argued that “the government could diminish each person’s subjective expectation of privacy merely by announcing half-hourly on television that . . . we [are] all forthwith being placed under comprehensive electronic surveillance.”¹⁷⁷ Of course he exaggerates, but the point remains valid and could also be made with respect to encroachments on actual expectations of personal choice.

It should thus come as no surprise that despite requiring actual expectations in the Fourth Amendment context, the U.S. Supreme Court has on occasion tried to distance itself from the requirement. Ironically, the first person to retreat was the author of the *Katz* opinion that spawned the reasonable-expectations test. Just four years after *Katz*, Justice Harlan stated in a dissenting opinion:

The analysis must, in my view, transcend the search for subjective expectations Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.

Since it is the task of the law to form and protect, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.¹⁷⁸

Later, a majority of the Supreme Court recognized that when an “individual’s subjective expectations had been ‘conditioned’ by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was.”¹⁷⁹ Nevertheless, more recent cases continue to require some form of subjective expectations.¹⁸⁰

The Fourth Amendment in the Workplace: Are We Really Being Reasonable?, 79 VA. L. REV. 243, 250-52 (1993); ARTICLE 29 WORKING PARTY, WORKING DOCUMENT ON THE SURVEILLANCE OF ELECTRONIC COMMUNICATIONS IN THE WORKPLACE, May 29, 2002, at 8-9, http://europa.eu.int/comm/internal_market/privacy/docs/wpdocs/2002/wp55_en.pdf. Similarly, in his study of privacy, Raymond Wacks has stated that “a subjective test would clearly be unacceptable.” WACKS, *supra* note 54, at 26.

177. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974).

178. *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

179. *Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979).

180. *E.g.*, *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001); *Bond v. United States*, 529 U.S. 334, 338 (2000); *California v. Greenwood*, 486 U.S. 35, 39-40 (1988); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *see also* 1 JOHN W. HALL JR., SEARCH AND SEIZURE § 2.6, at 78 (3d ed. 2000) (“Some recent cases, if taken to their logical conclusions, could ultimately lead to unfortunate and unjustifiable results.”).

So what should be done with private life and Article 8? Given the baggage noted above, the best approach to answering this question might be to ask another, namely whether there exists any true value in making actual expectations relevant. Perhaps the best argument for why subjective expectations are at least somewhat relevant is that persons should not be heard to complain about an invasion of private life if they knowingly and voluntarily release private information¹⁸¹—such as by consenting to the publication of private photographs in a newspaper—or knowingly and voluntarily relinquish a decision of personal choice to another, such as by consenting to any necessary medical treatment by a State hospital. These limitations for recovery make sense, and I won't argue here that the Court should ignore them.

Nevertheless, I am of the view that it makes better sense to analyze those limitations under the doctrine of waiver of Convention rights, rather than the rubric of expectations.¹⁸² The benefits of this approach are threefold. First, there already exists a body of Convention case law that acknowledges and defines the waiver of Convention rights.¹⁸³ Second, the standard required by that case law is exacting as it requires a knowing, voluntary (i.e., without constraint), and unequivocal waiver.¹⁸⁴ And finally, although not entirely clear under the current Court jurisprudence, by analyzing the issue under waiver, it would appear that any onus of proof on the matter would fall to the respondent State and not the applicant.¹⁸⁵ As waiver appears a better method of analysis, the Court should not require any proof of actual expectations of privacy or personal choice to trigger Article 8.

181. See Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968, 982-83 (1968).

182. Ignatius Rautenbach appears to advocate a similar approach when analyzing the right to privacy under the Constitution of the Republic of South Africa. See Ignatius M. Rautenbach, *The Conduct and Interests Protected by the Right to Privacy in Section 14 of the Constitution*, 2001 TYDSKRIF VIR DIE SUID-AFRIKAANSE REG 115, 118 (2001), cited in PRIVACY AND DATA PROTECTION, *supra* note 49, at 48 n.63.

183. *E.g.*, *Philis v. Greece*, App. No. 19773/92, ¶ 48 (1996) (Commission Report), <http://www.echr.coe.int/Eng/Judgments.htm> (last visited Apr. 11, 2005); *Pfeifer v. Austria*, 227 Eur. Ct. H.R. (ser. A) ¶ 37 (1992); *Oberschlick v. Austria*, 204 Eur. Ct. H.R. (ser. A) ¶ 51 (1991); *Colozza v. Italy*, 89 Eur. Ct. H.R. (ser. A) ¶ 28 (1985); *Deweer v. Belgium*, 35 Eur. Ct. H.R. (ser. A) ¶¶ 49-54 (1980); *Neumeister v. Austria*, 17 Eur. Ct. H.R. (ser. A) ¶ 36 (1974); see generally RICHARD CLAYTON ET AL., *THE LAW OF HUMAN RIGHTS* §§ 6.148-154 (2000); MERRILLS, *supra* note 27, at 177-85.

184. See the cases cited in the preceding footnote. See also Gillian S. Morris, *Fundamental Rights: Exclusion by Agreement?*, 30 INDUS. L.J. 49, 53 (2001) (acknowledging that the waiver requirements often pose high hurdles for a government to overcome but then arguing that the Court should impose additional waiver requirements in the employment context).

185. *Cf. Deweer*, 35 Eur. Ct. H.R. (ser. A) ¶ 26 (stating that the State must plead and prove the defense of failure to exhaust remedies).

E. *The Relation to Family Life, Home, and Correspondence*

A final but peripheral issue that requires discussion concerns how the reasonable-expectations test should interact with the other rights recognized in Article 8, *viz.*, family life, home, and correspondence. The issue is an important one because applicants frequently complain of a violation of private life in conjunction with one of these other rights. Often the rights also overlap, such as when the government intercepts a telephone call (correspondence) made from a house (home) that concerns personal information (private life) about the caller. Given that all these concepts conceivably involve the private sphere, should the reasonable-expectations test judge the applicability of private life alone or should it judge the remaining rights as well, as is done in *Katz*?¹⁸⁶

Unfortunately, the Convention case law offers little guidance on how to answer this question. The Convention institutions have not always, when reviewing applications involving more than one Article 8 right, treated those rights separately or explained their relationship to one another.¹⁸⁷ This occurred, for example, in *Halford* where the Court was imprecise in separating and analyzing Article 8 claims based on private life and correspondence. There are numerous other examples of ambiguous rulings.¹⁸⁸ In all fairness, however, the Court

186. Also important is how the reasonable-expectations test should interact with rights recognized or rejected in other articles or protocols of the Convention. The matter is particularly acute with respect to *personal choice* claims as they are more susceptible to broad readings that could overlap with other articles and protocols. See Feldman, *supra* note 38, at 273. John Merrills has noted that, with few exceptions, it

can be said that when the question is whether a particular article is applicable, the presence of another article dealing with the subject is not a conclusive objection. Because the Convention must be read as a whole, the same subject may sometimes fall to be considered under more than one rubric.

MERRILLS, *supra* note 27, at 74; see also *id.* at 74-76 (discussing two recognized exceptions); OVEY & WHITE, *supra* note 18, at 32-34. Unfortunately, this topic merits more attention than can be undertaken here, and I can only therefore refer the reader to some cases where the Court has tried to resolve these sorts of conflicts. See, e.g., Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989); Leander v. Sweden, 116 Eur. Ct. H.R. (ser. A) (1987); Johnston v. Ireland, 112 Eur. Ct. H.R. (ser. A) (1986); Abdulaziz v. United Kingdom, 94 Eur. Ct. H.R. (ser. A) (1985); Rasmussen v. Denmark, 87 Eur. Ct. H.R. (ser. A) (1984).

187. HARRIS ET AL., *supra* note 4, at 303 ("Both the Commission and the Court have avoided laying down general understandings of what each of the items covers and, in some cases, they have utilized the co-terminancy of them to avoid spelling out precisely which is or are implicated when an applicant has invoked more than one of them in his claim that there has been a violation of the Convention.").

188. E.g., Hatton v. United Kingdom, 2003-VIII Eur. Ct. H.R. 189, ¶¶ 96-130 (2003) (mixing analysis of private life and family life); MG v. United Kingdom, 36 Eur. H.R. Rep. 3, ¶¶ 27-28 (2003) (same); Gaskin v. United Kingdom, 160 Eur. Ct. H.R. (ser. A) ¶¶ 34-41 (1989) (same); Klass v. Germany, 28 Eur. Ct. H.R. (ser. A) ¶ 41 (1978) (mixing analysis of private life and correspondence).

has in other cases carefully analyzed the Article 8 rights separately,¹⁸⁹ and one could argue in light of language from *P.G. & J.H.* that the Court believes it should analyze the right to respect to home independently of the reasonable-expectations test.¹⁹⁰ Nevertheless, the Court's practices in this regard should be more transparent.

Interestingly, commentators also seem to disagree whether to treat the rights in Article 8 in isolation or as a unitary whole. On the one hand, there is the view of Louise Doswald-Beck (which undoubtedly is shared by others) that the rights are separate and should be treated as such.¹⁹¹ Van Dijk & van Hoof appear to hold the contrary view, however, in their treatise on the Convention:

Since any further definition [of Article 8] is lacking, the rights laid down in this provision cannot be clearly distinguished from each other. This is true in particular for the right to respect for private life on the one hand, and the other three rights belonging to the private sphere on the other hand. In fact, a clear delimitation is not necessary, since a complaint concerning violation of the private sphere can be based on the provision as a whole.¹⁹²

Ovey & White also appear to believe in a more unitary approach to Article 8:

[T]he fact that the rights in Article 8 are grouped together in the same article strengthens the protection given by that article, since each right is reinforced by its context. Thus, the right to respect for family life, the right to privacy, and the right to respect for the home and correspondence may be read together as guaranteeing collectively more than the sum of their parts. . . . [¶] 193. [T]hese notions should be considered together rather than in isolation.

189. *E.g.*, *Keegan v. Ireland*, 290 Eur. Ct. H.R. (ser. A) ¶¶ 42-45 (1994) (defining family life separately); *Berrehab v. Netherlands*, 138 Eur. Ct. H.R. (ser. A) ¶¶ 20-21 (1988) (same); *Niemietz v. Germany*, 251-B Eur. Ct. H.R. (ser. A) ¶¶ 27-33 (1992) (analyzing private life, home, and correspondence separately).

190. *P.G. & J.H. v. United Kingdom*, 2001-IX Eur. Ct. H.R. 546, ¶ 57 (stating that reasonable expectations of privacy can be a significant factor to consider in cases where a "person's private life is concerned by measures effected *outside* a person's home or private premises.") (emphasis added).

191. Doswald-Beck, *supra* note 6, at 284.

192. VAN DIJK & VAN HOOF, *supra* note 19, at 489.

193. OVEY & WHITE, *supra* note 18, at 217-18 (yet they also later state that "there is no single or embracing concept contained in Article 8"). In his survey of Article 8 claims in national jurisprudence, Nihal Jayawickrama also has noted that "[i]t is not always possible to precisely determine whether an alleged infringement of this right ought to be examined with reference to one's 'privacy' (or private life) on the one hand, or the private sphere (i.e. 'family', 'home' or 'correspondence') on the other." NIHAL JAYAWICKRAMA, *THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW* 602-03 (2002).

Scholars embracing the unitary view would seemingly prefer a single test to judge all the various rights. In our context, that would mean the reasonable-expectations test should apply to all the rights in Article 8.

Of course, none of the above-noted comments was specifically made in answer to the question I posed above, but I believe they, along with the practices of the Court and (previously) Commission, highlight an issue that the Court will have to clearly delineate and explain if it regularly employs the reasonable-expectations test. There are three positions the Court could take:

1. Reasonable-expectations is the conclusive test for the entirety of Article 8 and thus the sole method by which to demonstrate the applicability of Article 8;¹⁹⁴

2. Reasonable-expectations is the conclusive test for the entirety of Article 8, but the involvement of one or more of the other more specific rights (i.e., family life, home, or correspondence) creates a presumption that the applicant's expectation of privacy or personal choice is reasonable, shifting the burden to the Government to prove a consensus or emerging consensus to the contrary;¹⁹⁵ or

3. Each right under Article 8 has its own independent meaning such that, for example, the right to respect to home could apply even though there was no reasonable expectation of privacy in the activity that took place there.

Of the three options, it would seem the Court should discard the first with little discussion. To adopt this approach, one must buy into the idea that all the rights in Article 8 cannot be parsed (as has been argued by some) or one must feel comfortable mixing rights that the contracting States saw fit to list separately. I suppose, given that the

194. Most U.S. jurisdictions have adopted this approach in the Fourth Amendment context. Reasonable-expectations is the determinative test and all the more specific rights in the Fourth Amendment to the U.S. Constitution are not in themselves grounds to invoke the Amendment. *See supra* Part II.A.

195. Other U.S. jurisdictions have adopted an approach similar to this one. Although reasonable-expectations is the determinative test, courts (or at least some of their members) presume a reasonable expectation of privacy in cases where correspondence is involved, *see* *United States v. Young*, 350 F.3d 1302, 1306-07 (11th Cir. 2003), or where the search involves a home's interior that is not within plain view, *see* *Kyllo v. United States*, 533 U.S. 27, 34 (2001); *United States v. Haqq*, 278 F.3d 44, 52-54 (2d Cir. 2002) (Meskill, J., concurring); *United States v. Vega*, 221 F.3d 789, 796 (5th Cir. 2000).

test proposed here could encompass matters normally thought to relate to family life, home, and correspondence, that one could argue that the first option may not do as much harm to the intentions of the contracting States as initially appears. But I am not convinced. The second option is more appealing but it has its own problems. I doubt whether a presumption would work in this context given that it assumes the Court would normally impose the burden of persuasion on the applicant to prove an emerging consensus—a questionable premise in itself.¹⁹⁶ Moreover, the Court would still have to define when the other rights applied, thereby eliminating any judicial economy hoped to be gained by using a single test. That leaves the last option. It emerges as the most straightforward and favorable to applicants as it presents them with four separate ways by which to demonstrate that Article 8 applies. It also appears the most consistent with the goals of the Convention and some of the arguments I have set forth throughout this article. I would therefore prefer this option and hope the Court would as well. In order for it to work, however, the Court will have to make greater strides in consistently separating the Article 8 rights.

IV. CONCLUSION

I have in the preceding pages proposed a framework by which private life can be assessed by asking whether the applicant had a reasonable expectation of privacy or personal choice in the matter involved. More importantly, I have argued that before the Court may hold that an expectation is reasonable, the Court must find, at a minimum, an emerging consensus among the member States (as determined by legal and societal norms) that recognizes the expectation invoked by the applicant. This method is pragmatic, dynamic and arguably more principled than the Court's current approach. Along the way, I have traced the seeds of the reasonable-expectations test in the Court's jurisprudence (and elsewhere) and highlighted some of the

196. Judge Loucaides has argued:

[T]he wording of [former] Article 28 supports the view that no onus of proof is cast exclusively on the applicant in respect of the establishment of the facts. Both parties, the applicant and the respondent State, are on equal footing as regards their duty to help the Commission to establish the facts with the aim of ascertaining the truth in the case before it.

LOUKIS G. LOUCAIDES, *Standards of Proof in Proceedings Under the European Convention on Human Rights*, in *ESSAYS ON THE DEVELOPING LAW OF HUMAN RIGHTS*, *supra* note 22, at 157, 165; *see also* Rogge, *supra* note 119, at 692 (“While at the initial stage of the proceeding the individual applicant has to substantiate his or her complaint . . . , the Convention organs do not in their examination of the merits of the application rely on the concept that the burden of proof is by one or the other party.”).

principal issues the Court will encounter and have to resolve should it choose to use reasonable expectations as its standard. Although the Court will likely encounter some difficulty in administering the reasonable-expectations test at first, I believe the Court can overcome those difficulties in time as it becomes more accustomed to its use.

So, does the work-related smoking ban in Levanger, Norway implicate private life under Article 8? The regional officials in Norway seemed to think so, but they obviously are not the final arbiters of the Convention. I imagine that if the Court ever heard the case that it would be one of the tougher ones to decide. Assuming the Court applied the reasonable-expectations test, it would want to parse the smoking ban into pieces and consider each of its aspects separately—e.g., the applicant's expectations of personal choice in smoking in the office versus smoking while on a break outside the office. I suspect the Court would find the latter expectation to be reasonable without much trouble, but that the former would be hotly contested. In any event, we may soon have some guidance on how the case would come out given that the Court is currently considering a similar issue.¹⁹⁷ It will be interesting to see if the Court attempts to tackle the matter within the rubric of reasonable expectations.

197. *Aparicio Benito v. Spain*, App. No. 36150/03 (2004) (communicating to the respondent State the issue of whether a non-smoking prisoner's private life has been infringed because there are no non-smoking sections in the community areas of the prison), <http://www.echr.coe.int/Eng/Judgments.htm> (French language only) (last visited Apr. 11, 2005). Comparative guidance may also soon come from the United States where litigation is expected from a broader employer-imposed ban on smoking. See *US Staff Lose Jobs Over Smoke Ban*, BBC News, Jan. 27, 2005 (describing an employer policy that bans employees from smoking anywhere and anytime, including in their private lives), <http://news.bbc.co.uk/2/hi/americas/4213441.stm>.