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Freedom of Expression Turned on its Head? Academic Social Research and Journalism in the European Union's Privacy Framework

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Abstract

This article argues that mainstream interpreters have been wrong to hold that academic investigations into social (including historical and political) affairs may benefit only from restrictive "research" provisions of the European Privacy Framework, namely Data Protection Directive 95/46/EC and transposing national laws, and not from the far more liberal provisions provided for journalism, literature and art. Academic social investigation is clearly orientated towards the production of books, articles and other publications. It fits entirely within "literary" and possibly even "journalistic" processing. Even if such work also falls within "research" as per the Directive, the exemptions in the instrument cannot sensibly be read as imposing a rigid exclusivity requirement on processing. By imposing severe restraints on "high value" academic speech whilst granting "low-value" "infotainment" a much freer rein, the mainstream interpretation does nothing less than turn the logic of the European Convention on Human Rights (ECHR)'s freedom of expression jurisprudence on its head.

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As Philip Strong noted almost thirty years ago, journalists and academic social researchers are both "professional students of the social world".[1] In pursuing this activity, each group finds it essential to gather and analyze a wide range of information, much of which is personal to identified or identifiable individuals. Despite this shared need, it is generally held that laws protecting such personal data both do, and should, regulate these actors in a radically divergent manner. Whilst the EU Data Protection (DP) Directive 95/46/EC suggests that Member States grant broad derogations from DP laws for journalism, it includes only much narrower provisions to help shield 'research'. Meanwhile, at a regulatory level, in 2003 the European Commission's RESPECT project drew up DP guidance for social researchers which only made use of these narrow 'research' exemptions.[2] Moreover, this peculiarly stringent regime has been rolled out even in jurisdictions such as the UK which have generally been thought to take a rather lax approach to compliance with pan-EU DP requirements.[3] Thus, whilst the UK's Data Protection Act (DPA) 1998 provides journalism with a qualified exclusion from almost all its provisions, only "limited exemptions" are set out for research.[4] Meanwhile, the UK Information Commissioner's Office model registration for British universities under the DPA 1998 suggests that they notify for the purposes of "research" but not for what they term the "journalism and media" purpose which allows for broader derogations from DP norms.[5] Finally, the implementation of such a targeted regime for academic speech has come to constitute a serious problem for social researchers leading amongst other things to restrictions on covert and/or deceptive methodologies, the use of "sensitive" personal data and the non-anonymous reporting of research results.[6]

This article argues that this bifurcated understanding of European DP law's requirements is both legally and normatively wrong. Firstly, the special derogations within the EU Data Protection regime cover not just cover "journalism" but also "literature" and

"art". There is no reason why the work of academics within humanities and social studies should not fit within one or other of these categories. Secondly, whilst the stipulation that to gain such protection the processing must be "only or "solely" for one or other of these purposes is unhelpfully opaque, a purposive reading of this reveals that this should only impose a relatively unproblematic "entirety" as opposed to a strict "exclusivity" requirement as regards the processing in question. Third and most importantly, the alternative and currently mainstream interpretation of the DP framework is radically inconsistent with freedom of expression protections as set out for example in the European Convention on Human Rights (ECHR). Academic and non-academic social investigators are essentially both involved in the common activity of collecting, analyzing and disseminating material for the public's benefit. Moreover, membership of the academic community implies a particular concern for the qualities of "rigour, system, culmination and precision".[7] As a result, *ceteris paribus*, academically validated output may be considered at least, if not more, socially valuable than its non-academic counterpart. However, DP law as traditionally interpreted imposes unique and draconian restraints in the production of just this type of material. It therefore effectively turns freedom of expression protection 'on its head'.

The rest of this article is structured into four sections. Section one outlines the relevant DP provisions and their current application at both the pan-European and UK level. A focus on the UK case is justified on the basis that it is important to examine whether the difficulties with which this article is concerned are even apparent in the 'least likely' jurisdictions, namely, those which have explicitly taken a decision to minimize the effect of European DP norms on their laws.[8] Section two examines the correct construction of these provisions from the perspective of statutory language, legislative intent and relevant case law. Section three moves the discussion into the more detailed discussion of fundamental human rights as set out in the ECHR. Finally, section four offers some brief conclusions.

Section 1: Introduction

The Data Protection Framework in Directive 95/46/EC and the UK's DPA 1998

The European Data Protection Directive 95/46/EC has a "breathtaking" scope.[9] At regards private sector activities, it applies to any "processing" of "personal data" carried out either "wholly or partly by automatic means"[10] or as part of a manual "filing system structured according to specific criteria relating to individuals, so as to permit easy access to the personal data in question".[11] "Personal data" is defined as "any information relating to an identified or identifiable natural person".[12] Thus, it has been held that even innocuous material in the public domain which conveys information about an individual (e.g. the title of an author's book) is "personal".[13] Meanwhile, "processing" encompasses "any operation or set of operations which is performed upon personal data".[14] Generally speaking, all such data processing must comply with both the various rules and principles which the Directive lays down. Those controlling such activities (herein "data controllers") are also subject to regulation by a national data protection authority,[15] as well as to various forms of private legal action.[16] However, these default requirements are qualified by the presence of a number of derogating provisions which are generally purposive specific. One of the most far-reaching concerns processing "solely for journalistic purposes or for the purposes of artistic or literary expression". According to art.9 of the Directive, which is placed in a specific section for "special" categories of processing,[17] Member States are required to provide exemptions from the Directive as regards to such activities if they are "necessary to reconcile the right to privacy with the rules governing freedom of expression."[18] Recital 37 further specifies that:

> [T]he processing of personal data for purposes of journalism of for purposes of literary or artistic expression, in particular in the audiovisual field, should qualify for

> exemption from the requirements of certain provision of this Directive in so far as this is necessary to reconcile the fundamental rights of individuals with freedom of information and notably the right to receive and impart information, as guaranteed in particular in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas Member States should therefore lay down exemptions and derogations necessary for the purpose of balance between fundamental rights as regards general measures on the legitimacy of data processing, measures on the transfer of data to third countries and the power of the supervisory authority; whereas this should not, however, lead Member States to lay down exemptions from the measures to ensure security of processing; whereas at least the supervisory authority responsible for this sector should also be provided with certain ex-port powers, e.g., to publish a regular report or to refer matters to the judicial authorities.

In contrast, the sole specific provisions in favour of 'research' in the body of the Directive provide that Member States may "where there is clearly no risk of breaching the privacy of the data subject, restrict by a legislative measure the rights [of subject access] provided for in art.12 when data are processed solely for the purposes of scientific research or kept in personal form for a period which does not exceed the period necessary for the sole purpose of creating statistics"[19] and that "[f]urther processing of data for historical, statistical or scientific purposes shall not be considered as incompatible [and therefore illegal] provided that member states provide appropriate safeguards".[20] Meanwhile, Recital 34 does state that in areas such as "scientific research" Member States are authorized to derogate from the prohibition of processing sensitive data so long as this is "justified by grounds of important public interest" and that "specific and adequate safeguards so as to protect the fundamental rights and the privacy of individuals" are provided for.[21] Finally in stating that, subject to

appropriate safeguards, the provision of information notification to data subjects for data collected indirectly from a third party might be waived due to being "impossible" or involving "disproportionate effort", art.11(2) does specifically mention that this may arise as regards processing for "statistical purposes" or for that of "historical or scientific research". The overall thrust of the Directive, however, is that "research" processing should be subject to most of default rules and principles for data processing which it sets out.

Notwithstanding the traditional British reputation of laxity as regards compliance with the rigours of European data protection, the provisions of the DPA 1998 mirror that of the Directive 95/46/EC quite closely as regards the basic structural distinction it sets out between the purposes of "journalism, literature and art" and those of "research". Thus, according to s.32 of that Act processing for the "special purposes" of journalism, literature and art is exempted from almost all of the data protection provisions if the following criteria are satisfied:

- The processing is only for one or more of the special purposes.
- It is undertaken with a view to the publication by any person of any journalistic, literary, or artistic material.
- The data controller reasonably beliefs that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and
- The data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes.

Additionally, the ICO is prohibited from engaging in most forms of regulatory enforcement in relation to such processing. Specifically, no enforcement action at all may take place in relation to special purposes material which is being processed with a view to the publication

of as yet unpublished material. In relation to material which falls outside this, enforcement action may only take place after the data controller has had an opportunity to appeal this finding of fact and the Court has granted leave and is satisfied that "the Commissioner has reason to suspect a contravention of the data protection principles which is of substantial public importance" (DPA s.46). [22] Finally, so long as the material in question has not yet been published,[23] the data controller also benefits from a duty on the Courts to stay legal proceedings which may otherwise be brought against it under the Act.[24] In contrast to these liberal provisions, the Act provides for far narrower special derogations for "research" including "statistical or historical" purposes.[25] Section 32 of the Act provides for exemptions from the requirement for compatible processing under principle two, for time-limited data storage under principle five and from the right of subject access under principle six.[26] Meanwhile, para.9 the Data Protection (Processing Of Sensitive Personal Data) Order 2000 legitimizes the processing in research of "sensitive" personal data.[27] Use of any of these provisions depends on adherence to certain fairly onerous special safeguards which in all cases include that of non-particularity and non-malfeasance. Non-particularly requires that data are "not processed to support measures or decisions with respect to particular individuals"[28] whilst non-malfeasance ensures that no "substantial damage or substantial distress is, or is likely to be, caused to any data subject".[29] In addition, the exemption from subject access requires that "the results of the research or any resulting statistics are not made available in a form which identifies data subjects or any of them" [30] whilst the legitimization for using sensitive data depends on the processing in question being "in the substantial public interest".[31] Importantly, there is no exemption at all from the first DP principle's requirement to provide information notification to data subjects[32] (and to process data relating to them "fairly and lawfully") or from the ban on the export of the data outside the European Economic Area (EEA) absent "adequate protection".[33]

Mainstream application and answered questions

The mainstream interpreters of both the DPA 1998 and the Directive have held that investigations which takes place within an academic context must comply with the restrictive "research" provisions of these instruments as opposed to the more liberal ones for "journalism, literature and art". Thus, in 2003 the European Commission's RESPECT project drew up DP guidelines for socio-economic researchers which only made reference to the former provisions.[34] Similarly, in the UK, the ICOs model registration template[35] for Universities includes processing for "research" but not journalism, literature and art which it terms "journalism and media".[36] A cognate understanding is also apparent in the official Data Protection Code of Practice for the Higher Education,[37] the registration returns of the vast majority of UK universities[38] and the analysis of a number of authoritative interpreters of the 1998 Statute including Carey[39] and Jay.[40]

The development of this peculiar system of regulation begs the question as to whether academic social research actually should be regulated differently from other non-academic social investigations. This issue will be considered in the next section from the perspective of legislative history, ordinary statutory construction and judicial consideration of European DP law. Following on from this, section three will provide a detailed exploration of the issue from the perspective of fundamental human rights as instantiated in the European Convention on Human Rights (ECHR).

Section 2: Statutory construction of "special purposes"

Statutory construction of journalism, literature and art

Whether social researchers can benefit from the special freedom of expression protections within European DP primarily turns on the meaning to be ascribed to the purposes of journalism, "literary" expression and "artistic" expression. None of these terms are defined on the face of Directive 95/46/EC or that of the DPA 1998 which gives effect to it in the UK. It is therefore necessary to analyze this issue from the perspective of ordinary statutory meaning, legislative history and judicial case law.

Turning to the ordinary meaning of these terms, the first thing to note is that all three terms are at least potentially severable and must therefore be considered in turn. "Journalism" is defined in the Oxford English Dictionary (OED) as "[t]he occupation or profession of a journalist; journalistic writing; the public journals collectively; the keeping of a journal; the practice of journalizing." Meanwhile, "journalist" is defined as "one who earns his living by editing or writing for a public journal or journals; one who journalizes or keeps a journal". Despite the reference to "occupation" and "profession", DPA s. 32 and by implication art.9 of the Directive stress that these purposes can be claimed not just by professional journalists but rather by "any person"[41] who is engaged in journalistic purposes. This suggests that the phrase should at least cover any processing aimed at producing a "public journal" which is further detailed in the OED as "[a] daily newspaper or other publication; hence, by extension, any periodical publication containing news or dealing with matters of current interest in any particular sphere". Meanwhile, "literature" is defined as *inter alia* "[l]iterary work or production; the activity of a man of letters; the realm of letters", "literary productions as a whole; the body of writings produced in a particular country or period, or in the world in general". Now also in a more restricted sense, applied to writing which has a claim to consideration on the ground of beauty of form or emotional effect" and "[t]he body of books and writings that treat a particular subject". Some of these definitions seem to encompass at the least all intelligible writing, a definition which is also reflected in

s.3(1) of the UK's Copyright, Design and Patents Act 1988 which defines a "literary work" as "any work, other than a dramatic or musical work, which is written, spoken or sung". Others suggest the need for a certain positive quality, a stipulation which is reflected in the "literary" merits public good defence within s.4 of the UK's Obscene Publications Act 1959. Finally, "artistic" is defined *inter alia* as "[o]f or relating to art or a work of art", "[o]f or relating to visual arts such as painting, design, and sculpture, as distinguished from literature music, etc." and "[d]isplaying the characteristics of art; having aesthetic or creative merit". Again these definitions variously cover anything visual or limit this according to some positive quality.

Whilst each of these terms are clearly "extremely broad",[42] their ordinary meaning clearly leaves a number of aspects ambiguous. Given this, it is appropriate to have regard to relevant legislative history. When the draft Directive was first published by the European Commission, the original protection accorded to the "special purposes" was very narrow covering only the activities of the "press and audiovisual media".[43] This clause encountered criticism from both Member States[44] and others[45] and in the revised draft of the Directive the provision was rephrased so as to cover processing "solely for journalistic purposes by the press, the audio-visual media and journalists".[46] The article also acquired the title "Processing of Personal Data and Freedom of Expression" and the accompanying explanatory memorandum stressed that the term "journalists" was "intended to include photojournalists and writers such as biographers".[47] This revision failed to satisfied the concerns expressed and in October 1993 the Belgium Presidency suggested adding to the clause the purposes of "creation artistique ou littéraire" whilst also deleting reference to the classes of person who might engage in such activities. This was intended to "mieux préciser les limites des finalités des traitment relatifs à l"exercise de la liberté d"expression pour lesquels des derogations sont nécessaires".[48] Some seven delegations expressed certain reservations about this expansion

of the scope of protection with Spain in particular being keen for the Member States to clarify that "databases could not be regarded as artistic creation".[49] The Italian and Spanish delegations particularly feared that an extension could "give rise to abuse".[50] In the event this scope was not further amended in the final Directive. A statement was, however, added in the formal Council minutes noting that "[t]he Council and the Commission consider that....[a]rtistic and literary expression is a form of expression, freedom of which is guaranteed by article 10 of the European Convention on Human Rights".[51] During the parliamentary debate on the transposition of the Directive within the UK, most of the debate on freedom of expression focused on the traditional media. Nevertheless, in response to questioning about the scope of the "special purposes" protection, the Minister Jeff Hoon stated "[w]e are dealing with the right of a journalist, artist or writer to write and publish freely".[52] The Government also stressed the importance of the protection for "historical programmes dealing with analysis of the past. It is not the intention of the Government in implementing the directive that the making of these programmes should be inhibited or prevented by individuals attempting to use its provisions to re-write history or prevent the responsible discussion of historical subjects".[53]

Turning finally to specific case law, the meanings of "literary" and "artistic" expression have not (to the best of the author's knowledge) received judicial consideration within a DP context. In contrast, the scope of "journalistic purposes" has been analyzed by a number of European courts including the European Court of Justice (ECJ). In *Tietosuojavaltuutettu v. Markkinapőrssi*,[54] the ECJ developed a broad, purposive understanding of this phrase holding that could encompass any activity that has as its object is "the disclosure to the public of information, opinions or ideas".[55]

Statutory construction of "research"

Turning briefly to the cognate construction of "research within the DP scheme, this term is also left undefined within both Directive 95/46/EC and the DPA 1998. Section 33(1) of the DPA does state that it includes "statistical or historical purposes". Meanwhile, the Directive itself introduces a number of important complexities. Firstly, it always qualifies any reference to research with either the words "scientific",[56] "historical"[57] or "historical or scientific".[58] Secondly, it sometimes simply refers to "historical, scientific or statistical purposes"[59] without any use of the word research. Thirdly, although perhaps not entirely consistent on this point, it seems to treat these three purposes as severable and distinct. Turning to a consideration of the ordinary meaning of these terms, the OED defines "research" as *inter alia* (1) a "[s]ystematic investigation or inquiry aimed at contributing to knowledge of a theory, topic, etc., by careful consideration, observation, or study of a subject" and (2) "[i]nvestigation undertaken in order to obtain material for a book, article, thesis etc.; an instance of this". Meanwhile, "science" refers *inter alia* to (1) "[a] particular branch of knowledge or study; a recognized department of learning", (2) anything "contradistinguished from art" and (3) "[i]n a more restricted sense: A branch of study which is concerned either with a connected body of demonstrated truths or with observed facts systematically classified and more or less colligated by being brought under general laws, and which includes trustworthy methods for the discovery of new truth within its own domain".

Aspects of the legislative history of the Directive provide a further elucidation of the context in which these provisions should be interpreted. Firstly, it apparent that the overwhelming focus of the discussion between Member States concerned the implications of the Directive for medical and, most especially, epidemiological research. The *traveaux preparatories* includes no fewer than five official Member State papers exclusively dedicated to a discussion of the difficulties apparent in this area.[60] Secondly, the record also

demonstrates an awareness of the problems confronting statistical projects especially as carried out by Government.[61] Responding to both concerns, between 1993 and 1994 the appropriateness of an over-arching clause protecting the "[p]rocessing of personal data for scientific and statistical purposes" was extensively discussed.[62] Ultimately this was abandoned in favour of the current piecemeal approach. Thirdly, however, the in any case limited discussion of other aspects of this issue almost exclusively concentrated on providing a framework for retaining material originally collected for another purpose and then securing a form of safeguarded access for this for historical or related social research. In other words, there is almost no discussion here of whether, and if so how, the DP framework might be applied to the use and dissemination of personal data within such projects themselves.[63] Turning more specifically to the enactment of the DPA 1998, only a short exchange on this aspect took place in the Commons Committee considering the Act between two backbench MPs and the Minister George Howarth. This debate vividly revealed the lack of a tight grasp of the relevant provisions in this area. In sum, John Greenway (MP for Rydale) put down a probing amendment suggesting that there it might be advisable to require that a researcher's *bona fides* be approved by the data protection authority prior to making use of the special research provisions in the Act. In turn, purporting to address the "genuine needs of researchers", Ian Taylor (MP for Esher and Walton) noted the slippery nature of the definitions in the absence of such an accreditation regime:

> Some things masquerade as history but are in fact investigative journalism, and would have been better tackled in our earlier discussion about clause 31. We must distinguish between genuine researchers and those who merely claim to be researchers. I know all the best investigative journalists on the so-called quality newspapers call themselves researchers. I doubt whether they would qualify for grants under the research councils for which I was responsible in the olden days.[64]

In contrast, rejecting such a suggestion the Minister simply dodged the definitional conundrum:

> As it stands, clause 32 [now section 33] is suitably flexible. The benefits it offers are available subject to a straightforward test – that the processing is being carried out for research purposes. It is best keep the test simple. It does not matter who is doing the processing.[65]

Finally, to the best of the author's knowledge, the meaning of these terms within a DP context has not been usefully discussed by either the ECJ or any other European court.

Application to academic social research

Having outlined the statutory meaning of the core terms within the DP framework it is necessary to consider their specific application within an academic context. The essence of academic investigation (or "research") into social (including political and historical) affairs is to enhance general understanding of this sphere of life through the "discovery, exchange, interpretation and presentation of information"[66] to the public at large. Thus, the American Historical Association stresses that scholarship "depends on the open dissemination of historical knowledge via many different channels of communication... The free exchange of information about the past is dear to historians".[67] Meanwhile the UK's Political Studies Association states more prosaically that its "[m]embers have a general duty to promote the growth and spreading of knowledge of the highest academic standards".[68] Finally, the UK's Social Research Association states that "[s]ocial researchers should use the possibilities open to them to extend the scope of social enquiry and communicate the findings, for the benefit of the widest possible community".[69] This building up of such common knowledge and

understanding appears to be a central part of activities aimed at "the disclosure to the public of information, opinion or ideas" which the ECJ ruled in *Tietosuojavaltuutettu v. Markkinapőrssi* should be protected as "journalistic" under the Directive and its implementing legislation. Indeed, a number of academic researchers, especially in the humanities, stress their affinity and overlap with journalists traditionally conceived. For example, the esteemed historian Professor Brian Harrison has stated that:

> in my view there is no distinction in principle between the journalist and the historian: the historians simply have more time for research and reflection, though some journalists (the late Hugo Young, for example) somehow do a better job on historical topics than do some historians.[70]

Moreover, even before the scope of the "special purposes" was explicitly expanded, the European Commission had by emphasizing that the term was intended to include "writers such as biographers"[71] described in pinpoint detail a quintessential output of many contemporary historians. In any case, even if the output of academic social investigators fall outside the "journalistic", their books, articles and other written (or spoken) contributions must almost invariably fall within that of "literary expression." Nor do such outputs constitute the type of "abuse" feared by Spain and Italy during the drafting of the Directive. Instead, as the Council Minutes from 1995 made clear and the next section will further explore, they are a key part of the expression "freedom of which is guaranteed by article 10 of the European Convention on Human Rights".[72]

It is more difficult to determine if academic social investigation would generally fall within definition of "research" set out in the DP framework. The Directive's use of this term in an overarching context is generally confined to that which is "scientific". Meanwhile, wider references which also encompass "history" are usually concerned only with the further

processing of data originally collected for a different purpose and not with processing for the purposes of writing (scholarly or otherwise) which was referenced in the "special purposes" above. "Scientific" would tend to suggest an activity whose essence is generalizability (i.e. the creation of "general rules"). If so then history,[73] political studies and other scholarly endeavours which are legitimately concerned with disseminating public knowledge about the particular (including identifiable individuals) would seem to fall outside this.[74] On the other hand, the distinction between the "particular" and the "generalizable" are by no means clear cut[75] and, in any case, the Directive is not fully consistent in this regard.[76] Moreover, the use of the term "research" in the UK's transposition of the Directive is even more opaque.[77] Ultimately, it is probably best to acknowledge that academic social investigation will often come within the "research" definitions in DP law and that there is therefore a significant degree of overlap between this and the "special purposes" definitions. In fact, given that one definition of research is an "investigation undertaken in order to obtain material for a book, article, thesis etc." it seems that even conventional journalists and other non-academic authors might also often be processing for a "research" purpose.

A need for exclusivity?

The likelihood that the definitions of "research" and the "special purposes" within the DP framework are not dichotomous raises new difficulties. For processing to benefit from the "special" provisions art.9 of the Directive imposes the cognate requirement of "solely" for journalistic purposes or for the purposes of literary or artistic expression. Section 32 of the DPA 1998 imposes the cognate requirement of "only". Meanwhile, art.13(2) of the Directive provides an exemption from subject access which is available only in relation to processing "solely for the purposes of scientific research". Similarly, the exemptions from principles

two (compatibility), five (time-limitedness) and seven (subject access) under s.33 of the DPA 1998 require that any eligible processing be "only for research purposes".

Interpreting these requirements strictly would impose an "exclusivity" condition on the use of any of these provisions. This would mean that academic scholarship, even if did satisfy one or more of the "special purposes" definitions, could not benefit from the relevant protections since at one and the same time it would also constitute a "research" activity. Nor is this a problem which only confronts academics. Even journalists may often be processing for more than one data protection purpose. Thus, the UK's Information Commissioner's Office has advised that, at least as regards freelancers, journalists should be registered under the DPA 1998 not only for the purposes of "journalism and media" but also for that "trading and sharing in personal information".[78] A final irony of adopting such a restrictive interpretation is that it would mean that academic work which constituted both a "research" and "special purpose" activity would also fail to benefit from most of the special "research" provisions in the DP scheme since these also impose a "only"/"solely" requirement for their use. Therefore, and counter intuitively, they would treated even less favourably that ordinary "research" activity.

A review of the intent behind the inclusion of these restrictions, however, indicates that they had a much more limited purpose than enforcing a stipulation of "exclusivity". In sum, the overwhelming concern was to ensure that data controllers engaged in either "research" or in the "special purposes" would not be able to rely on the insulating provisions in relation to processing actually being undertaken for a separate purpose.[79] Thus, in a 2001 case which pitting data protection against free speech on the internet, Sweden's Supreme Court of Justice issued the following ruling on the interpretation of the art.9 of the Directive:

> The restriction to "exclusively" journalistic purposes is intended primarily to clarify that personal data used by the media and journalists other than for editorial purposes falls outside the exemption. For example, mass media's treatment of personal data for billing, or direct mail survey or reader profiles fall outside the exemption.[80]

Meanwhile, the Oxford English Dictionary defines "solely" not just as "only" or "exclusively" but also as "entirely". Given this, it is appropriate to interpret these various references as imposing only a limited "entirely" requirement. This interpretation is consistent with an open acknowledgment of the fact that data processing purposes can, and often do, overlap. Thus, in relation to the insulating "research" and "special purposes" provisions of both the Directive and DPA 1998, such an interpretation would require an analysis of whether, notwithstanding any overlap present, all the processing under consideration still fell within the relevant protected purpose. To take the freelancer considered above, it may be that in providing his work to a specific third party for payment he would be "trading and sharing in personal information". Nevertheless, so long as this trading/sharing was done with a view to the publication of literary, journalistic or artistic material, the entirety of the processing would still be for the special purposes and the relevant exemptions would therefore not be lost.[81] The research/special purposes interface is similarly structured. Therefore, academic investigators processing in order to publish literary, journalistic or artistic material should be able to benefit from both the "special purpose" provisions and the provisions on "research". Some forms of commercial work may, depending on its particular aims and analysis, also benefit from the data protection "research" provisions. However, in so far as the knowledge generated from such activities would be intended only for the eyes and benefit of a particular firm, the "special purposes" protections could not be claimed.[82] The Venn diagram in Figure 1 below sets on in diagrammatic form the understanding of purpose specification under the data protection framework which has been forwarded here.

Fig. 1: Overlapping not dichotomous: Purpose specification under data protection

Whilst not included in the figure above due to restrictions on space, other recognized DP purposes such as "information and data bank administration" also clearly overlap with both "research" and "journalism, literature and art".[83]

Section Three: Academic social research, freedom of expression and the European Convention on Human Rights (ECHR)

As the discussion in section two demonstrated, it can be argued on the simple grounds of statutory interpretation that mainstream commentators have been wrong to hold that academic social investigations cannot benefit from the protections for "special purpose" processing set out both in the Directive and in UK law but may only benefit from the far more limited "research" provisions. This analysis, however, fails to fully identify the central and deep damage which this current interpretation of the DP framework inflicts on the free flow of information and ideas. This final section, therefore, aims to remedy this defect by explicating the contradictions between the mainstream DP perspective and the right to freedom of expression as set out in the ECHR and interpreted by the European Court of Human Rights.[84] This analysis not only increases the moral significance of this argument but for a number of inter-related reasons further bolsters the legal argument. Firstly, a key

purpose of the "special purpose" regime itself was to reconcile data protection with the right to public freedom of expression instantiated in the ECHR. Secondly, all EU member states have ratified the ECHR and, under art.59(2) of the Lisbon Treaty, the EU itself is shortly due to do so. Thirdly, in the UK context, the Human Rights Act 1998 requires that all legislation, including the DPA 1998, must be interpreted "as far as possible" in conformity with the Convention.

Scope and nature of ECHR protection

Article 10 (1) of the ECHR provides that everyone has the right to "receive and impart information and ideas without interference by public authority and regardless of authorities". Article 10 (2), however, qualifies this broad liberty by authorising limitations which are "in the interests" of *inter alia* "protection of the reputation or rights of others" and "preventing the disclosure of information received in confidence". Any such limitations, however, must be "necessary in a democratic society". Additionally, according to art.14, limits on the enjoyment of any ECHR right which apply in a discriminatory fashion are generally banned.

Given the broad wording of art.10(1), the information gathering, analysis and dissemination activities which constitute academic social investigation clearly fall within its scope. It is therefore important to consider whether the "research" provisions of the DP framework are permissible substantive limitations as provided for in art.10(2). This will be considered immediately below. Additionally, the less favourable treatment which the mainstream DP position mandates as regards academic vis-à-vis non-academic expression raises pressing issues of equality and fairness which are at least tangentially related to a potential art.14 violation. This issue will be considered at the end of this section.

The ECHR and substantive limitations on freedom of expression

Over the past thirty years, the European Court of Human Rights has built up "an established body of jurisprudence" on the meaning of freedom of expression as set out in the Convention. It is true that this has been criticised for being "notably under theorized"[85] and, given that "almost all free expression jurisprudence is, today, media jurisprudence",[86] narrow in its specific focus. Despite this, one unifying tenet has been that limitations which may genuinely be held "necessary in a democratic society" will vary greatly depending on the type of expression at issue. Moreover, the notion of a democratic society has been interpreted in a substantive liberal fashion so as to encompass both participative procedural processes and values such as "pluralism, tolerance and broadmindedness".[87] At the top of this hierarchy of expression is what has been termed "political speech"[88] but might more accurately be defined that which is correctly considered as particularly valuable to the public of a democratic society as just defined. This encompasses expression linked to "debate on matters of public interest",[89] which is "part of an open discussion on matters of public concern"[90] or which concerns the imparting of "information and ideas of public interest".[91] The Court has consistently held that, as regards such "high value" expression, there is "little scope under art.10(2) for restrictions" on such expressive activities.[92] Thus, in *The Sunday Times v. United Kingdom*, the Court upheld the right to publish information relating to the deleterious effects of the drug thalidomide against the claim that it could prejudice ongoing legal proceedings and, therefore, should constitute a contempt of court.[93] In *Thorgeirson v. Iceland*, the Court held that the publication of an article detailing allegations of police brutality within the Reykjavik police force could not be prohibited as defamatory even if the accuracy of these allegations could not be verified.[94] Finally, in *Jersild v. Denmark*, the Court held that, given the importance of free public discussion, a broadcaster could not be

criminally prohibited from disseminating the content of interviews with persons making extreme racist statements even if the resulting content "did not explicitly recall the immorality, dangers and unlawfulness of the promotion of racial hatred and the ideas of superiority of one race".[95] By contrast other types of expression, even if communicated to the public, may benefit from a much lesser degree of art.10 protection. One clear example of such "low value" speech are the "infortainment" stories about celebrities' intimate affairs which often appear in the popular, and perhaps also increasingly the "quality", press. Thus, in the controversial case of *Von Hanover v. Germany*, the Court refused to grant protection to the publication of photos and commentary of Princess Caroline or Monaco which had been published in a German newspaper. This was because, in its opinion, "the sole purpose [of publication] was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life".[96] Therefore, and critically, such publication could not "be deemed to contribute to any debate of general interest to society".[97]

There are cogent reasons for believing that academic social investigation can, and generally will, fall into the category of expression defined under the ECHR as serving a "high" public interest. As the professional association statements quoted above have already indicated, academics have the task not of feeding idle curiosity but rather of ensuring "the methodological discovery and the teaching of truths about serious and important things".[98] The internal ethic of academics encourages an output marked by "concern for rigour, system, culmination and precision",[99] a reflexive and non-partisan stance and a "regulative ideal of truth-telling".[100] Moreover, at least as regards social investigation, academic output will often speak powerfully and directly to debates on vital matters of public interest. Thus, as regards historical writings, Palmowki and Readman argue that "[f]rom scholarly debates about collaboration in Vichy France in the 1970s and the *Historikerstreit* in the 1980s, to Polish discussions about Jebwabne, the findings of contemporary historians have had huge

social and political significance."[101] Overall, these authors find that such work performs helps "speak truth to power".[102] Meanwhile, Robert Dingwall finds social science investigations often play a vital role in ensuring the "mutual accountability of citizens" to each other.[103] Finally, we should also not underestimate the broader role of such academic work in sustaining an "empirical conception of knowledge that disrupts traditional verities and that continues to create the modern self, modern society, and modern politics".[104]

Nevertheless, in clear opposition to the ECtHR's admonishment that there can be "little scope under art.10 (2) for restriction"[105] on such expression, the labyrinthine "research" provisions of the DP framework do subject academic work to very severe limitations.[106] Particularly problematic are the provisions requiring that the data subject be notified of processing[107] and given a right to object,[108] the ban on the transfer of personal data outside the European Economic Area (EEA) absent "adequate protection"[109] and restrictive conditions which apply when dealing with "sensitive" personal data.[110] Thus, the data subject notification requirements in the DPA 1998 have led Rosemary Jay, the former Head of Legal at the UK's Data Protection Registrar, to argue that covert and/or deceptive research is now "almost certainly" illegal.[111] These methodologies have been vital in building up an understanding a variety of critical social phenomena including racial and ethnic discrimination,[112] police malpractice,[113] and the activities of far-right political groupings.[114] Moreover, as Canadian scholar Kevin Haggerty notes:

> The requirement to be "up front" about the focus of your research can simply preclude valuable forms of critical inquiry. Researchers, for example, who wanted to accompany and interview police officers at work in order to learn about police racism (or corruption, sexism, excessive use of force, etc.) would likely see their research grind to a halt at the first sign of a consent form informing officers of the research

> topic. The same is true for a host of other critical scholarship that might seek to investigate high-profile, contentious issues involving powerful people or agencies.[115]

A number of research organizations have gone further citing DP as a reason for requiring extremely lengthy and off-putting informed consent procedures.[116] Meanwhile, at least one leading British university has held that if the research in question is "controversial in any way" then data subjects might even need to be given a right to object to the processing of innocuous information already in the public domain.[117] Finally, either as a result of principle eight's export ban or the DP framework as a whole, it has been held that research must not be reported in a personally identifiable form.[118] This would be incompatible with the analysis and reporting of contemporary historical events which often must involve the identification of the various participants.[119]

Standards of equity and limitations on freedom of expression:

Even if the DP "research" provisions were a potentially justifiable restriction on academic social investigation, adherents of the mainstream interpretation of the DP framework must additionally demonstrate that it does not impose a discriminatory burden on academic vis-à-vis non-academic expression contrary to the standards of art.14 of the ECHR. According to the European Court of Human Rights, so long as the activity in question falls within the scope of a Convention right, this article affords "protection against different treatment, without an objective and reasonable justification, of persons in similar situations".[120] As argued in section two above, both academic and non-academic social investigators (the latter often known in general discourse as "journalists") are engaged in essentially the "same enterprise"[121] of collecting, analysing and disseminating information to the public. It is therefore necessary to consider whether there are any "objective and

reasonable" justifications for the much less favourable treatment which mainstream interpretations of DP would impose on academics. This raises the difficult and thorny issue of defining the distinction between the academic and non-academic. Two potential distinguishing criteria – the institutional and the substantive – suggest themselves. Institutionally, academic work is generally (thought not exclusively) connected to universities, whilst non-academic work usually takes place outside these settings. Substantively, academic standards mandate a particular "concern for rigour, system, culmination and precision"[122] as well as a high "regulative ideal of truth-telling".[123] Production of work in adherence to these standards is a process which often takes months or years as opposed to days or weeks.

Despite these distinctions being potentially possible, neither seem to provide the appropriate justification for the differential treatment under consideration. Singling out the investigative work of all individuals who are members of a particular type of civil society institution for less favourable treatment constitutes precisely the type of invidious class-based legislation which art.14 of the Convention protects against. The situation is even more perverse given not just because the treatment in question burdens knowledge production (and dissemination) but that it targets those who are the institutional custodians of "the pursuit, acquisition, assessment, and transmission of knowledge".[124] This point segues into consideration of the appropriateness of utilising an explicitly substantive definition of academic versus non-academic activity in this context. It is true that, unlike most academic work, a sub-set of non-academic writing (news journalism) is orientated to the publication of extremely time-critical material. Thus, the ECtHR has argued that news is "a perishable commodity and to delay its publication even for a short period might well deprive it of all its value and interest".[125] Even if such publication is in the public interest, the sheer speed with which these tasks may be carried out may present particular problems for compliance with

some elements of the general DP scheme such as the accuracy principle.[126] In principle, therefore, it might be justifiable to provide a targeted liberal exemption from these DP norms for precisely this type of activity.[127] However, the special purposes regime was clearly also designed to protect against provisions in the DP framework which can have just a pernicious effect on long-term publishing projects. One obvious example is the complete ban, absence explicit consent, of publishing certain "sensitive" personal data which would either "support measures or decisions with respect to any particular data subject" or would cause, or be likely to cause, "substantial damage or substantial distress".[128] The factor of time-perishability, therefore, provides no "objective and reasonable" justification for differential treatment here. In any case, non-academic, as well as academic, writers often engage in long-term projects and it is fully accepted that, either due to being instances of "journalism" or "literature", they may benefit from the special purposes regime. A possible justification for the distinction must therefore be approached anew. The traditional attributes of academic scholarship, including rigour, system, culmination, reflexivity and non-partisan truth-telling, are clearly far from irrelevant in assessing the justifiability under the ECHR of law which specifically cover such expression. To the contrary, adherence to these virtues provides a near blueprint for ensuring that the output will focus on matters of genuine public importance as opposed to pure public amusement. In conformity to the ECHR speech hierarchy, this distinction could therefore provide a justification for imposing on such studies fewer legal restrictions than on types of inquiries which were not so carefully honed. In stark contrast, however, according to its mainstream interpreters the European DP framework does the precise opposite. Academic output is designated "research" and thereby subjected to strict and potentially debilitating restrictions. Meanwhile, even non-academic outputs which provide only low-value titillation benefit can benefit from the liberal "special purposes" regime established under the Directive and in UK law. In sum, therefore, as traditionally interpreted, the current regime does

nothing less than turns on its head the protection of freedom of expression as developed under the ECHR. This would appear to raise a legitimate art.14 point in addition at issue under art.10 itself. In any case, it certain demonstrates the degree of divergence between binding ECHR requirements and the current mainstream interpretation of DP requirements across Europe. These issues must be addressed in the review of the DP framework now underway.[129]

Section 4: Conclusion

This article has argued that mainstream interpreters of the DP framework have been profoundly mistaken in claiming that academic social (including historical and political) investigations must adhere to the restrictive "research" provisions of the pan-EU Directive 95/46/EC and cognate national laws as opposed to the considerably more liberal regime which applies for the "special purposes". Drawing on statutory language, legislative intent and relevant case law, such a claim can be rejected on the grounds of proper statutory construction of these laws. Firstly, the "special purposes" regime was deliberately expanded beyond its initial focus on the "press and audiovisual media" in order to ensure that the publishing by any person of journalistic, literary and artistic material was also not unduly inhibited. Academic social investigation is clearly orientated toward the production such of books, articles and other literary products for the public. In fact, secondly, given the focus in the legislative debate on medical and statistical research as well as the general reference in the Directive to "scientific research" was opposed to "research" *simpliciter* it actually less clear that such social investigations fit within the definition of "research" as set out within the DP context. In any case, thirdly, the general need in order to benefit from an exemption for processing to be "solely" or "only" for the relevant purpose should be read as imposing only

an “entirety” requirement (namely that all the processing can be conceptualized as falling within the particular exempted purpose) as opposed to a chimerical requirement for “exclusivity” (that all of the processing fall outside any other recognized processing purpose). Even more fundamentally, this mainstream interpretation seriously conflicts with the logic of freedom of expression as developed under the ECHR. Academic social investigation not only falls within the broad scope of art.10 but, due to its general concern to systematically contribute to improving societal knowledge about serious and important things, is part of that category of “high-value” expression which the European Court of Human Rights has ruled must generally not be subject to legal restriction. In contrast, the “research” provisions of the European DP scheme subject such expression to a thicket of onerous regulations which can include a need to notify data subjects of processing (and given them a right to object), a ban on publishing certain forms of “sensitive” personal data and a ban on exporting personal data outside the EEA absent “adequate protection”. As problematically, the mainstream understanding of DP as a whole entails such restrictions being imposed in these cases whilst granting to low-value “infotainment” expression which appears in the Press or on the internet the much broader “special purposes” exemptions. This effectively turns to logic of freedom of expression under the ECHR on its head. In explicitly targeting “academic” speech for uniquely draconian treatment it raises pressing issues not only under art.10 but also under art.14 which protects against arbitrary discrimination.

The issues presented in this article have broader implications for the future of laws regulating privacy and information flows. Firstly, it demonstrates the need to rethink a largely unreflective but widespread societal assumption that academic investigation should legitimately be subject to more restrictions than cognate forms of expressive activity. This is an issue which confronts regulatory systems which exist even in the absence of comprehensive data protection legislation including Institutional Review Boards and the

Common Rule in the United States and ethical review committees and research governance in an ever wider range of countries.[130] Second, for those countries which adhere to the Data Protection Directive 95/46/EC or cognate laws, the implications are even broader. The sheer labyrinthine complexity of these laws indicates that their overall nature needs to be seriously reviewed so as to provide a manageable and better targeted framework for the protection of personal information. Even the UK's former Information Commissioner Richard Thomas had labelled the Directive as "no longer fit for purpose" and "bureaucratic".[131] As the EU begins the process of negotiating a revised DP framework, it is to be hoped that these concerns will be begin to be seriously addressed.

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[1] P. M. Strong, "The Rivals: An Essay on the Sociological Trades," in R. Dingwell and P. Lewis (eds), *The Sociology of the Professions: Lawyers, Doctors and Others* (London: Macmillan, 1982), p.59.

[2] K. Rosier and I. Vereecken, "Data Protection Aspects within the Framework of Socio-Economic Research," Institute for Employment Studies, Report 415 (June 2004).

[3] *Out-Law.com*, "Europe Claims UK Botched One Third of Data Protection Directive", September 17, 2007.

[4] R. Jay, *Data Protection Law and Practice* (London: Sweet and Maxwell, 2007), p.337.

[5] Information Commissioner's Office, "N887 – University", available through: https://www.ico.gov.uk/onlinenotification/.

[6] See Author (2011a) and Author (2011b).

[7] R. Dingwall, "Confronting the Anti-Democrats: The Unethical Nature of Ethical Regulation in Social Science," (2006) 1 *Medical Sociology Online* 51, 54.

[8] European Digital Rights, "UK Law Fails to Properly Implement the EU Data Protection Directive", *EDRI-gram*, October 10, 2007, available at http://www.edri.org/edrigram/number5.19/uk-data-protection.

[9] D. Bainbridge, *EU Data Protection Directive* (London: Butterworths, 1996).

[10] Data Protection Directive 95/46/EC, art.3(1). In other words any such activity carried out on computer or other digital device falls within the scope of this Directive.

[11] Data Protection Directive 95/46/EC, Recital 15.

[12] Data Protection Directive 95/46/EC, art.2(a).

[13] During the drafting of the Directive, the UK Minister of State for Home Affairs Angela Rumbold MP confirmed that this definition applied even to authors and titles of books as compiled by the book industry. See *Bookseller*, "Amendments Likely on Data Protection", July 05, 1991. The applicability of the Directive to public domain data was confirmed by the European Court of Justice (ECJ) in *Tietosuojavaltuutettu v. Markkinapőrssi* [2010] All E.R. (EC) 213.

[14] Data Protection Directive 95/46/EC, art.2(b).

[15] Data Protection Directive 95/46/EC, art.28.

[16] Data Protection Directive 95/46/EC, arts 22-23.

[17] Data Protection Directive 95/46/EC, s.III.

[18] Data Protection Directive 95/46/EC, art.9.

[19] Data Protection Directive 95/46/EC, art.13(2). Article 32(3) of the Directive provides that, subject to suitable safeguards and a transitional measure only, processing already under way for the sole purpose of historical research need not be brought into conformity with the principles in relating to data quality in art.6, the criteria for making data processing legitimate in article 7 and the restrictions on processing sensitive data in art.8.

[20] Data Protection Directive 95/46/EC, art.6(1)(b). According to recital 29 such safeguards "must in particular rule out the use of the data in support of measures or decisions regarding any particular individual". Article 6(1)(e) further provides that in relation to personal further processed and "stored for longer periods for historical, statistical or scientific use", Member States should also lay down "appropriate safeguards".

[21] Such derogations for reasons of important or "substantial public interest" are generally allowed for under art.8(4) of the Directive.

[22] In slight contrast, post-publication it is possible for a data subject to obtain compensation for violation of the requirements of the DPA in relation to processing only for the special purposes which cause distress alone (thus waiving the need to show damage which applies in other cases) (DPA s.13). In addition, individuals seeking judicial remedy in relation to data processing for the special purposes may apply to the Information Commissioner for assistance in relation to these proceedings; the Commissioner may provide such assistance so long as they are satisfied that "the case involves a matter of substantial public importance" (DPA s.53).

[23] Officially these provisions expire twenty-four hours post-publication. See DPA s.32(4)(b).

[24] Again, action taken against processing for the purposes of direct marketing (DPA s.11) is excluded.

[25] DPA s.33(1).

[26] In addition, as a transitional measure, processing for the purposes of historical research which was already under way at the time the Act came into effect in March 2000 is indefinitely exempt from the first five data protection principles (though not from some of the associated rules) so long as any processing is in conformity with the non-particularly and non-malfesance conditions and, as regards automated data, is not "by reference to the data subject" (DPA Sch.9, pt.IV, para.17(c)). This provision may provide some protection for keepers of historical archives. However, especially given the breadth of the definition of processing in the Act, its restriction to processing which was already under way prior to 2000 makes it largely irrelevant for academic projects which will necessarily involve some new processing.

[27] As set out in DPA s.2, such data is defined broadly and categorically with the scheme. It includes any data consisting of information as to a data subject's racial or ethnic origins, religious (or similar) beliefs, trade union membership, physical or mental health and condition, commission or alleged commission or an offence and criminal proceedings.

[28] DPA s.33(5). In the Data Protection (Processing Of Sensitive Personal Data) Order 2000 this is stated as a requirement not to support "measures or decisions with respect to any particular data subject" (para.9(c)).

[29] DPA s.33(1)(b). The Data Protection (Processing Of Sensitive Personal Data) Order 2000 states this slightly more broadly such that causing such damage or distress must be avoided not just in relation to a data subject but also in relation to "any other person" (para.9(d)).

[30] DPA s.33(4)(b).

[31] Data Protection (Processing Of Sensitive Personal Data) Order 2000, para.9(a).

[32] DPA Sch.1, pt.II; Data Protection Directive 95/46/EC, arts 10-11.

[33] DPA Sch.1, para.8; Data Protection Directive 95/46/EC, art.25.

[34] K. Rosier and I. Vereecken, "Data Protection Aspects within the Framework of Socio-Economic Research", Institute for Employment Studies, Report 415 (June 2004). The European Commission later drew up similar, and more formal, guidelines which structure is "ethical" review of research proposals under the European Framework 7 funding stream. See C. Gans-Combe, "Data Protection and Privacy Ethical Guidelines", European Commission, available at: http://cordis.europa.eu/fp7/ethics_en.html (under "Privacy").

[35] Registration with the ICO for any non-exempt purpose (which includes both "research" and "journalism, literature and art") is a legal responsibility under DPA s.17. Under s.21, failure to so register is a criminal offence.

[36] Information Commissioner's Office, "N887 – University". In fact, out of the 158 model notifications on the ICO site, the only one which does make full use of the "journalism and media" purpose is that set out for

registration as a journalist. See Information Commissioner's Office, "N900 – Journalist", available through: https://www.ico.gov.uk/onlinenotification/.

[37] A. Charlesworth, "Code of Practice for the Further and Higher Education Sectors on the Data Protection Act 1998", *JISC Legal* (2008), available at http://www.jisclegal.ac.uk/Portals/12/Documents/PDFs/DPACodeofpractice.pdf.

[38] See data protection register (Information Commissioner's Office, "Data Protection Public Register", available at: http://www.ico.gov.uk/ESDWebPages/search.asp).

[39] P. Carey, *Data Protection: A Practical Guide to UK and EU Law*, 3rd edn (Oxford: Oxford University Press, 2009), p.173.

[40] R. Jay, *Data Protection Law and Practice* (London: Sweet and Maxwell, 2007), p.537. See more specifically R. Jay, "The Impact of the Data Protection Act 1998 on Socio-Legal Research", paper presented at the Socio-Legal Studies Association Conference 2004, University of Westminster, London.

[41] DPA s.31(1)(a).

[42] R. Jay, *Data Protection Law and Practice* (London: Sweet and Maxwell, 2007), p.518.

[43] European Commission, "Proposal for a Council Directive Concerning the Protection of Individuals in Relation to the Processing of Personal Data COM (90) 314 Final", SYN 287, *OJ C* 277, November 5, 1990.

[44] See Council Document 7767/91 (31 July 1991).

[45] See European Parliament, *Proposal for a Council Directive Concernign the Protection of Indivdiausl in Relation to the Processing of Personal Data - Approved with the Following Amendments, No.C* 94 (1992).

[46] European Commission, *Amended Proposal for a Council Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data*, COM (92) 422 (1992).

[47] European Commission, *Explanatory Memorandum: Amended Proposal for a Council Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data* (1992), p.19.

[48] Council Document 7693/93 (October 7, 1993) (no English version available).

[49] Council Document 7500/94 (June 9, 1994) (noting reservations on this point of Germany, Spain, France, Greece, Italy, Portugal and to a certain extent Luxembourg).

[50] Council Document 9957/94 (October 18, 1994).

[51] Council Document 12148/94 (ANNEX), December 16, 1994 (Statements for the minutes).

[52] *Hansard*, HC Standing Committee D Vol.III, Data Protection Bill, col.55 (May 12, 1998).

[53] *Hansard*, HL Vol.585, col.443 (February 2, 1998).

[54] *Tietosuojavaltuutettu v. Markkinapőrssi* [2010] All E.R. (EC) 213. The case concerned whether the systematic publishing via a Short Messaging Service (SMS) of tax information on some 1.2 million persons should be considered journalistic in nature.

[55] At. 61. A similarly broad perspective was adopted by the Swedish Supreme Court of Justice in the case of *Ramsbo* (B 293-00) (June 12, 2001).

[56] As in recital 34 concerning sensitive personal data and art.13(2) concerning derogations from subject access.

[57] Mentioned only in art.32(3) which provides a derogation in relation to historical research processing already under way before the Directive came into force. This was specifically added as a result of the Netherlands request for "an exception for historical archives compiled before entry into force of the Directive". See Council Document 6648/94 (May 1, 1994).

[58] As in relation to "disproportionate effort" and "impossibility" in art.11(2).

[59] As in relation to further processing and incompatibility in recital 29.

[60] These are Council documents: 6454/93 (May14, 1993) (Danish Presidency), 574061 (December 6, 1993) (UK), 4859/94 (February 15,1994) (Spain), 2463/94 (SAN) (Netherlands), 9415/94 (September 21, 1994) (UK).

[61] Thus, on the European Advisory Committee on Statistical Information in the Economic and Social Spheres (CEIES) submitted official evidence during the legislative proceedings on the various issues involved. See Council Document 571956 (October 6, 1993).

[62] As originally proposed by Denmark (see Council Document 8217/93 (ANNEX) (July 28, 1993)), this new art.9(a) would in principle have been almost as far reaching as the protection for the Press under art.9. However, its use would have been subject in all cases to "prior notification to the supervisory authority" who in order to obtain "adequate guaranties" would be able to "lay down detailed provisions for the processing in question". In practice, therefore, a far stricter form of regulation than that regarding the Press was always intended. This stringency undermined the case for such a dedicated comprehensive special regime.

[63] The only tangential mention of such work occurs in a paper submitted by Denmark outlining general concerns with the Directive as regards research which was submitted very late in the proceedings. This document (10934/94 (November 14, 1994)) does state: "Denmark has stressed strongly during the negotiations that the present wording [as regards the purposes of research and statistics] is too restrictive. Basic research today is to a large extent based on the establishing and running of registers (databases), especially within medical research, and the directive as proposed may hinder important sociological, historical and medical research as well as statistical work".

[64] What Mr Taylor most especially does not seem to have appreciated here was either that history was also specifically discussed in relation to what became s.32 or that this section actually established a far more advantageous legal position that the research provisions which became s.33.

[65] *Hansard*, HC Standing Committee D Vol.III, Data Protection Bill, col.230 (May 21, 1998).

[66] American Historical Association, "Statement on Standards of Professional Conduct" (February 2011).

[67] American Historical Association, "Statement on Standards of Professional Conduct" (February 2011).

[68] Political Studies Association, "Guidelines for Good Professional Conduct" (1994).

[69] Social Research Association, "Ethical Guideline" (December 2003).

[70] Brian Harrison, "Evidence Submitted to the Review of The "30-Year Rule"" (2008) (on file with author).

[71] European Commission, *Explanatory Memorandum: Amended Proposal for a Council Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data* (1992), p.19.

[72] Council Document 12148/94 (ANNEX) (December 16, 1994) (Statements for the minutes).

[73] It has been held that historical scholarship will usually fall outside a similar regulation within the United States Code of Federal Regulations (*Common Rule for the Protection of Human Subjects*, 45 C.F.R. pt.45 (2009)) which specifically define research as "systematic investigation...designed to develop or contribute to generalizable knowledge" (s. 46.102).

[74] This would tend to suggest that references in recital 34 of the Directive to the acceptability of a lifting of the ban on the processing of sensitive personal data as regards "scientific research" and also to a limitation on subject access under art.13(3) would not be applicable to such activities. Given that the "special purpose" purpose provisions in art.9 are in any case much more liberal, this would not be a problem for academic scholarship so long as this does indeed fall within this latter article. Nevertheless, this issue may be a live one for certain types of "research" (e.g. certain types of market research) which might fail both the "special purposes" and the "scientific" tests.

[75] In fact, even pure historical projects will often have a "generalizing" dimension. See P. Burke, *History and Social Theory* (Cambridge: Polity, 2005).

[76] Arguably, in other language versions of the Directive, the cognate of "scientific" is not so tightly drawn as that in English. Thus, in German the term "wissenschaftliche" is used which, as the Oxford German Dictionary notes, can depending on its context refer both to "scholarly" and "scientific" pursuits. Nevertheless, as an examination of the various official Council documents makes clear, the context during the negotiations of the relevant articles was on the properly "scientific" as opposed to simply "scholarly".

[77] In the Government consultation paper on what became the DPA, the Home Office made a careful distinction between the implementation of those parts of the Directive which concerned "scientific", "historical" and "statistical" research respectively. See Home Office, *Consultation Paper on the EC Data Protection Directive (95/46/EC)* (1996). In some contrast, its only reference to "research" in the White Paper was in relation to the

exemption from subject access and referenced the issue back to the previous *Data Protection Act* 1984 (Home Office, *Data Protection the Government's Proposals*, Cm.3725 (1997), p.9). Drawing on the analysis of the UK's Lindop Committee on Data Protection, the Data Protection Act 1984's understanding of "research" was most probably broader than the "scientific research" referenced in the Directive. See Home Office, *Report of the Committee on Data Protection*, Cm.7341 (1978), pp.233-244. It should be stressed that under the Data Protection Act 1984 there was no specific protection at all for freedom of expression *per se* (journalistic, academic or otherwise).

[78] The Commissioner did not however suggest that such individuals would thereby lose the protection of s.32 of the DPA. See M. Holderness, "Data Protection Required", *Freelance: Newsletter of the London Freelance Branch, NUJ* (September 2008).

[79] The primacy of this concern is particularly reflected in a changed wording of the "special purposes" within the various drafts of what became the Data Protection Directive. This shifted from a protection in the first draft (art.19, COM (90) 314) for the "press" and "audiovisual media" (which could theoretically be stretched to cover, for example, employee or direct marketing processing) to one which explicitly restricted this for "only journalistic purposes" (art.9, COM (92) 422). The final version of the Directive both expanded these purposes to include "literature" and "art" and removed the restriction on their use only be particular entities such as the Press.

[80] Case PUL-B 293-00 *Ramsbo v. Public Prosectuor in Stockholm* (June 12, 2001) at [13] (own translation), available in Swedish at: http://www.bankrattsforeningen.org.se/hddomslut.html.

[81] If, on the hand, he was feeding information in to a secret database to be used on a non-public basis for making hiring decisions then such processing will clearly not be for the "special purposes" and the exemption will be lost. For one high-profile example of enforcement action under the DPA taken against such a secret database see R. Evans and P. Chamberlain, ""Do Not Touch" - the Covert Database That Kept Union Activists out of Work", in *Guardian*, March 06, 2009.

[82] Market researchers have argued that they should be able to benefit from the "research" protections under data protection law but have made no cognate claim in relation to the "special purposes". See Market Research Society, "The Data Protection Act 1998 and Market Research: Guidance for MRS Members" (September 2003).

[83] In fact it seems highly probable that many journalists and researchers will be processing for the purposes of "information and databank administration". Under the old Data Protection Act 1984 (which contained no "special purposes" provision) numerous mainstream newspapers registered all their news activity under the "information and databank administration" purpose. Given that this remains a legitimate purpose under the DPA1998 it is unclear how such processing can have ceased to be encompassed within it simply due to the inclusion another overlapping purpose of "journalism, literature and art".

[84] Although the article pays due regard to the jurisprudence of the ECtHR, the focus will be on exploring the broad philosophy of the Convention's protections. This reflects both the fact that not all the case law specifically relates the points at issue and that a conscious desire to avoid an "unthinking legalism" in relation to these matters. See H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford: Oxford University Press, 2006), p.81.

[85] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford: Oxford University Press, 2006), p.6.

[86] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford: Oxford University Press, 2006), p.2. The doctrine of the "margin of appreciation", which limits the applicability of the Convention in a transnational but not a national context, presents further difficulties (Fenwick and Phillipson, *Media Freedom under the Human Rights Act*, p.549).

[87] *Handyside v. UK* A 24 1 *EHRR* 737 (1977) at [49].

[88] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford: Oxford University Press, 2006), p.50.

[89] *Gerger v. Turkey* (Application No. 249191/94) (unreported) (1999) at [48].

[90] *Janowski v. Poland*, 29 E.H.R.R. 705 (2000) at [31].

[91] *Jersild v. Denmark*, 19 E.H.R.R. 1 (1994) at [31].

[92] *Gerger v. Turkey* (Application No. 249191/94) (unreported) (1999) at [48]. It may be suggested that the Court's jurisprudence actually only recognizes that speech of such nature should only be highly protected if it is carried out by the Press. It is true that some of the Court's judgments have noted the particular function of the Press as a "public watchdog" (*The Observer and Guardian v. United Kingdom*, 14 E.H.R.R. 153 (1991) at [35]). However, this should be read as reflecting the, albeit increasingly less valid, understanding that the Press often is the key purveyor of information of critical public interest. What ultimately matters, however, is the nature of the information. Thus, in *Jersild v. Denmark*, 19 E.H.R.R. 1 (1994) the Court explicitly recognized that the audiovisual media also disseminated such valuable information; it, therefore readily extended its principles of social protection developed initially in a Press context to this situation as well. Similarly, in *Steel and another v. United Kingdom* 41 E.H.R.R. 403 it even granted such protection to a "small and informal campaign group" (London Greenpeace) so long as it was "disseminating information and ideas on matters of general public interest such as health and the environment" (at [89]).

[93] The *Sunday Times v. United Kingdom*, 2 E.H.R.R. 245 (1979).

[94] *Thorgeirson v. Iceland*, 14 E.H.R.R. 843 (1992).

[95] *Jersild v. Denmark*, 19 E.H.R.R. 1 (1994) at [34].

[96] *Von Hanover v. Germany*, [2004] ECHR 294 at [65].

[97] *Von Hanover v. Germany*, [2004] ECHR 294 at [65].

[98] E. Shills, "The Academic Ethic", (1982) 1-2 *Minerva* 105, p.107.

[99] R. Dingwall, "Confronting the Anti-Democrats: The Unethical Nature of Ethical Regulation in Social Science", (2006) 1 *Medical Sociology Online* 51, p. 54.

[100] R. Dingwall, "The Ethical Case Against Ethical Regulation of Humanities and Social Science Research", (2008) 3 *Twenty-First Century Society* 1, p.6.

[101] J. Palmowski and K. S. Readman, "Speaking Truth to Power: Contemporary History in the Twenty-First Century", (2011) 46 *Journal of Contemorary History* 485, p.505.

[102] J. Palmowski and K. S. Readman, "Speaking Truth to Power: Contemporary History in the Twenty-First Century", (2011) 46 *Journal of Contemorary History* 485, p.485.

[103] R. Dingwall, "The Ethical Case Against Ethical Regulation of Humanities and Social Science Research", (2008) 3 *Twenty-First Century Society* 1, p.55.

[104] P. Hamburger, "Getting Permission", (2007) 101 *Northwestern University Law Review* 405, p.483.

[105] *Gerger v. Turkey* (Application No. 249191/94) (unreported) (1999) at [48].

[106] It is clearly outside the scope of this article to provide a comprehensive analysis of the DP "research" provisions as regards social investigation. Interested readers are referred to Author 2011a and Author 2011b. These articles primarily concentrate on UK law. For a factual but largely non-analytic consideration of law across the European Union see K. Rosier and I. Vereecken, "Data Protection Aspects within the Framework of Socio-Economic Research", Institute for Employment Studies, Report 415 (June 2004).

[107] Data Protection Directive 95/46/EC, arts 10-11; DPA Sch.1, pt.II.

[108] Data Protection Directive 95/46/EC, art.14; DPA s.10.

[109] Data Protection Directive 95/46/EC, art.25; DPA Sch.1, pt.I, para.8.

[110] Data Protection Directive 95/46/EC, art.8; Data Protection (Processing of Sensitive Data) Order 2000, para.9.

[111] A. Barlow, "New Ethical Challenges for Socio-Legal Researchers: SlSA One-Day Conference", *Socio-Legal Newsletter*, (2004) no.44.

[112] D. Sapatkin, "Was This Ethical? Scientists Dare to Decieve", *The Philadelphia Inquirer* (May 24, 2010).

[113] S. Holdaway, *Inside the British Police: A Force at Work* (Oxford: Blackwell, 1983).

[114] N. Fielding, "Observational Research on the National Front", in M. Bulmer (eds.), *Social Research Ethics: An Examination of the Merits of Covert Participant Observation* (London: Macmillan, 1982).

[115] K. Haggerty, "Ethics Creep: Governing Social Science Research in the Name of Ethics", (2004) 27 *Qualitative Sociology* 391, p.406.

[116] R. Wiles *et al*., "Informed Consent and the Research Process: Following Ruels or Striking Balances?", (2007) 12 *Sociological Research Online*.

[117] University of Edinburgh, "Guidance: Research and the Data Protection Act" (April 2008). The example given is published details of Olympic medal rankings.

[118] University of Bath, "Guidelines on Academic Research and the Data Protection Act 1998" (October 2008); University of Newcastle, "Data Protection Staff Handbook - Eighth - Transfer of Data" (December 2005).

[119] See section 8.1.3, Socio-Legal Studies Association, "Statement of Principles of Ethical Research Practice" (January 2009).

[120] T*he Observer and Guardian v. United Kingdom*, 14 E.H.R.R. 153 (1991), at [73].

[121] R. Dingwall, "Confronting the Anti-Democrats: The Unethical Nature of Ethical Regulation in Social Science", (2006) 1 *Medical Sociology Online* 51, p.54.

[122] R. Dingwall, "Confronting the Anti-Democrats: The Unethical Nature of Ethical Regulation in Social Science", (2006) 1 *Medical Sociology Online* 51, p.54.

[123] R. Dingwall, "The Ethical Case Against Ethical Regulation of Humanities and Social Science Research", (2008) 3 *Twenty-First Century Society* 1, p.6.

[124] E. Shills, "The Academic Ethic", (1982) 1-2 *Minerva* 105, p.113.

[125] T*he Observer and Guardian v. United Kingdom*, 14 E.H.R.R. 153 (1991), at [60].

[126] Article 6 (e), Data Protection Directive 95/36/EC; DPA, Sch.2, para.7. These potential difficulties were noted by Lord Phillips in *Campbell v. Mirror Group Newspapers* [2004] UKHL 22, at [122].

[127] In some cases the DP framework itself will also provide the opportunity for such a fine-grained approach. Thus, with its emphasis on ensuring that "having regard to the purpose or purposes for which the data were obtained" it is generally only necessary that "reasonable steps" be taken to ensure accuracy, general UK (as opposed to pan-European law) already allows the Courts to take into account the specific nature of news journalism. The possibility for a similarly targeted approach also exists in relation to the interpretation of the UK transposition of art.9 of the Directive, namely DPA s.32. This requires the Courts to consider whether the data controller reasonably believed that "in all the circumstances" compliance with the relevant data protection principle was incompatible with the special purpose in question. It would therefore be open to the court to rule that following elements of the accuracy provisions were incompatible with publication of daily newspaper reportage but that a higher standard of accuracy could legitimately be expected when material (whether academic or non-academic) which had a longer gestation was published.

[128] Data Protection (Processing of Sensitive Personal Data) Order 2000, para.9.

[129] European Commission, "A Comprehensive Approach on Personal Data Protection in the European Union", *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions*, COM (2010) 609 final (November 4, 2010).

[130] For a very interesting and pertinent critique of the *Common Rule* from a First Amendment perspective see P. Hamburger, "The New Censorship: Institutional Review Boards", (2004) 2004 Sup. Ct. Rev. 271.

[131] S. George, "Shock As Information Commissioner Deems Data Protection Laws "Not Fit For Purpose"", *Mondaq Business Briefing*, (August 15, 2008).