

TEACHING AN OLD GOVERNMENT NEW TRICKS: THE USE OF SOCIAL MEDIA IN THE AUGUST 2011 U.K. RIOTS AND THE NEED TO DO MORE TO PROTECT THE FREEDOM OF EXPRESSION

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After four days of riots tore through the United Kingdom in August 2011, Prime Minister David Cameron temporarily considered banning people from social media networks if the individuals were suspected of using the platforms to organize riots and incite violence.¹ Although the government ultimately did not pursue this ban, the government jumped to this panicked conclusion on the mistaken assumption that social media outlets played a larger role in organizing the riots² than was actually the case.³ In response to the riots, the government took enforcement action quickly, which resulted in several arrests and the conviction of two young men, who each received prison sentences of four years for attempting to organize two riots using Facebook.⁴

Regulation of social media in the United Kingdom is a legal no-man's land, and Prime Minister Cameron's consideration of such a ban brings to light legal issues that demand attention and resolution.⁵ Although riotous acts and public unrest are not novel issues in the United Kingdom,⁶ the 2011 riots are unique because of social media's alleged role in the riots' organization, and planning riots via modern

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1. Josh Halliday & Juliette Garside, *Rioting Leads to Cameron Call for Social Media Clampdown*, GUARDIAN (Aug. 11, 2011, 3:04 PM), <http://www.guardian.co.uk/uk/2011/aug/11/cameron-call-social-media-clampdown>.

2. This was largely due to the government finding evidence of riot-related Facebook events. See Owen Bowcott et al., *Facebook Riot Calls Earn Men Four-Year Jail Terms amid Sentencing Outcry*, GUARDIAN (Aug. 16, 2011, 6:02 PM), <http://www.guardian.co.uk/uk/2011/aug/16/facebook-riot-calls-men-jailed>.

3. See *U.K. Opts Not to Block Social Media During Riots*, CBC NEWS (Aug. 25, 2011, 3:06 PM), <http://www.cbc.ca/news/world/story/2011/08/25/uk-riots-social-media.html> (noting that the two riots that had been called for on Facebook had never happened).

4. *Id.*

5. See Halliday & Garside, *supra* note 1.

6. *Riots in England: The Fire This Time*, ECONOMIST, Aug. 13–19, 2011, at 51, 51 (noting that “Britain has a history of contagious rioting” and describing previous riots).

technology is a fairly new issue facing authorities.⁷ Accordingly, growing social media use presents a plethora of legal issues for which there are not yet well-defined answers.⁸

Almost immediately after Cameron proposed a ban on social media, commentators began to speculate as to whether such a social media ban would have survived legal scrutiny.⁹ London's own chief of police indicated that the legitimacy of such a ban would be highly questionable.¹⁰ Other opponents specifically indicated that such a ban would severely limit civil liberties, a fact brought to light by letters from various human rights groups, such as Amnesty International and Liberty, which pointed out that a social media ban would restrict free expression and the right to privacy.¹¹ Both free expression and the right to privacy are protected by the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (the Convention).¹² An obvious way to ensure that the Convention's rights unambiguously extend to social media would be to explicitly amend the text of the Convention to include the new technology, but the burdensome amendment process renders amendment an unviable option.¹³

In 2011, the Committee of Ministers of the Council of Europe¹⁴ took a small step in the right direction by enacting a non-binding recommendation that member states expand the definition of "media" so

7. See Prithih Yelaja, *U.K. Riots Reveal Social Media Double Standard*, CBC NEWS (Aug. 10, 2011, 8:50 PM), <http://www.cbc.ca/news/world/story/2011/08/10/social-media-riots.html> (comparing the U.K. riots to similar situations that occurred in other parts of the world). Other areas of the world such as the Middle East have also dealt with situations similar to the U.K. riots. See generally Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT'L & COMP. L. REV. 145 (2012) (discussing the use of social media in the Arab Spring uprising and its human rights implications).

8. See Halliday & Garside, *supra* note 1 (describing the uncertainty of the legal implications of a social media ban).

9. *U.K. Opts Not to Block Social Media During Riots*, *supra* note 3.

10. *Id.*

11. *Id.*

12. See Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8–10, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

13. See generally COMM. OF EXPERTS ON A SIMPLIFIED PROCEDURE FOR AMENDMENT OF CERTAIN PROVISIONS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (DH-PS), STEERING COMM. FOR HUMAN RIGHTS (CDDH), 1ST MEETING REPORT (Oct. 6–8, 2010), available at http://www.coe.int/t/dghl/standardsetting/cddh/DH_PS/3rd_en.pdf [hereinafter DH-PS] (describing an effort to make the procedure for amending the Convention less complicated and less burdensome).

14. For more background on the Committee of Ministers of the Council of Europe, see *About the Committee of Ministers*, COUNCIL EUR., http://www.coe.int/t/cm/aboutcm_en.asp (last visited Sept. 22, 2013).

that its definition is interpreted broadly to keep up with rapidly emerging technologies.¹⁵ Although these proposals by the Council of Europe are a good step in the right direction, this Note proposes that the United Kingdom (and perhaps other member states of the Council of Europe) must take additional actions to domestically implement this recommendation and plan for future legislation, such as developing and implementing educational programs and increasing coordination between different sections of government.¹⁶ The United Kingdom and other member states must address the new and unique legal issues that social media is creating to ensure that the Convention remains a living document whose interpretation evolves with changing circumstances, a characteristic the member states have intended the Convention to possess since its creation.¹⁷

Part I of this Note will describe the 2011 U.K. riots, social media's purported role, and the government's brief consideration of a ban on social media. Part II will explain the history of the Convention and the standards that a party must meet to successfully allege and prove a violation of the Convention in the European Court of Human Rights ("the Court"). Part III will examine the Court's case law to explain how the Court has interpreted the freedom of expression and the right to privacy. Part IV proceeds from the premise that the complainant has exhausted her "domestic remedies" and finds herself before the Court,¹⁸ and will then analyze whether the contemplated domestic U.K. legislation to shut down social media would have violated the Convention. Additionally, Part IV suggests that the U.K. Department for Culture, Media and Sport and the Equality and Human Rights Commission coordinate to propose specific solutions, such as educational programs, to the legal issues that the advent of social media has created.

15. *Recommendation CM/Rec(2011)7 of the Committee of Ministers to Member States on a New Notion of Media*, COUNCIL EUR. (Sept. 21, 2011), <https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec%282011%297&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383> [hereinafter *Recommendation CM/Rec(2011)7*].

16. See *About Us*, EQUALITY & HUM. RTS. COMM'N, <http://www.equalityhumanrights.com/about-us/> (last visited Sept. 22, 2013).

17. EUR. COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS 3 (2012), available at http://www.echr.coe.int/documents/50questions_eng.pdf.

18. Attempting to redress a claim in the complainant's domestic legal system is a precondition for filing a complaint with the European Court of Human Rights (the Court). *Id.* at 7.

I. BACKGROUND OF THE 2011 U.K. RIOTS, SOCIAL MEDIA, THE U.K. GOVERNMENTS'S RUSHED RESPONSE, AND THE PERTINENT DEPARTMENTS OF THE U.K. DOMESTIC GOVERNMENT

A. *General Background of the August 2011 U.K. Riots*

The background of the 2011 U.K. riots provides a frame of reference for Prime Minister Cameron's overreaction in immediately proposing a ban on social media.¹⁹ These riots started after the police shot and killed a twenty-nine-year-old man, Mark Duggan, on August 4, 2011.²⁰ The facts surrounding Duggan's death were unclear, and the police initially indicated that Duggan took the first shot at the police; however, the police had misled journalists as to this fact, and Duggan had not shot first.²¹ Initially, there was no plan for large-scale rioting—the riots started with a peaceful demonstration that was going to be a silent protest.²² The circumstances quickly changed, however, after the police refused to respond to the protestors' requests for information regarding Duggan's death.²³ The public found out about these police misstatements, which infuriated young U.K. citizens.²⁴ Many members of the demonstration began encouraging each other to riot by sending BlackBerry messages to suggest to each other that certain areas “get smashed up” and that the rioters claim “free stuff.”²⁵

These efforts quickly erupted into rioting, which lasted for only four nights, yet during this brief time the U.K. government arrested more than three thousand people.²⁶ The damage caused by the riots included extensive property damage, numerous cars being lit on fire, and looting.²⁷ The last recorded riot attempt occurred on August 10, 2011,

19. See Halliday & Garside, *supra* note 1.

20. Paul Lewis, *Tottenham Riots: A Peaceful Protest, Then Suddenly All Hell Broke Loose*, GUARDIAN (Aug. 7, 2011, 3:52 PM), <http://www.guardian.co.uk/uk/2011/aug/07/tottenham-riots-peaceful-protest>.

21. 'Media Misled on Mark Duggan Death', PRESSTV (Aug. 13, 2011, 9:39 AM), <http://www.presstv.ir/detail/193718.html>.

22. Sandra Lavelle et al., *Doubts Emerge Over Duggan Shooting as London Burns*, GUARDIAN (Aug. 7, 2011), <http://www.guardian.co.uk/uk/2011/aug/07/police-attack-london-burns>.

23. *Id.*

24. *Id.*

25. Josh Halliday, *London Riots: How BlackBerry Messenger Played a Key Role*, GUARDIAN (Aug. 8, 2011, 7:24 AM), <http://www.guardian.co.uk/media/2011/aug/08/london-riots-facebook-twitter-blackberry>.

26. Paul Lewis, *Understanding the England Riots from the Perspective of Those Responsible*, GUARDIAN (Oct. 10, 2011, 8:47 AM), <http://www.guardian.co.uk/uk/2011/oct/10/learning-england-riots-perspective-responsible>.

27. Sarah Bolesworth et al., *Tottenham in Flames as Riot Follows Protest*, GUARDIAN

and the reasons for the end of the riots remain unclear.²⁸ Although the rioters provided a variety of reasons for the end of the riots, including disinterest, a “lack of fresh targets for looting,” and inclement weather, the rioters also named “the fear of a heavy response from law enforcement” as the main reason that they stopped rioting.²⁹ One person who assisted in organizing the first night of rioting described the realization that the police were increasing the size of the groups they were sending to respond to rioters as the reason the rioters decided to stop, particularly since the rioters had already “had our fun.”³⁰ These fears were well-founded—by the end of the second night of the riots, the police force had doubled from three thousand to six thousand officers, and on the fourth night, the police force almost tripled when it sent out sixteen thousand officers.³¹

B. *Social Media and Its Purported Role in the U.K. Riots*

Shortly after the riots broke out, news outlets quickly concluded that rioters had used social media as the primary means to organize the riot logistics.³² Therefore, a brief explanation of social media is necessary to ensure an understanding of the alleged tools behind the U.K. riots. Generally, “social media” involves the use of interconnected Internet sites, where the website’s users can create a profile, provide others with access to one’s profile, and interact with other users who also have profiles.³³ The advent of social media has created a new technological means for people to cooperate in large-scale physical actions that often affect public safety, even when conducted in a non-riotous fashion, such as “flash mobs.”³⁴ Social media is particularly popular among young

(Aug. 6, 2011), <http://www.guardian.co.uk/uk/2011/aug/06/tottenham-riots-protesters-police>.

28. Matthew Taylor et al., *Why the Riots Stopped: Fear, Rain and a Moving Call for Peace*, *GUARDIAN* (Dec. 9, 2011, 9:37 AM), <http://www.guardian.co.uk/uk/2011/dec/09/end-of-riots-reasons-rioters>.

29. *Id.*

30. *Id.*

31. *Id.*

32. *U.K. Opts Not to Block Social Media During Riots*, *supra* note 4 (noting that “[p]olice and politicians claim young criminals used social media to co-ordinate looting sprees”).

33. Brian Kane, *Balancing Anonymity, Popularity, & Micro-Celebrity: The Crossroads of Social Networking & Privacy*, 20 *ALB. L.J. SCI. & TECH.* 327, 332 (2010).

34. See Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31 *PACE L. REV.* 228, 233–34 (2011). The creation of “flash mobs” is a phenomenon characterized by groups of people who quickly descend on a predetermined location and participate in a coordinated act, usually choreographed dancing, and are frequently organized through social media websites such as Facebook or Twitter. See Nathan Rott, *Planning a Flash Mob? Better Keep It Quiet*, *NPR* (Dec. 20, 2010), <http://www.npr.org/2010/12/20/132205587/planning-a-flash-mob-better-keep-it-quiet>.

people; more than eighty percent of Internet users between the ages of eighteen and thirty-four have used Facebook, MySpace, or Twitter, and a similar percentage of people between the ages of eighteen and twenty-nine logs in to a social media site at least one time per week.³⁵ In addition, almost forty percent of Internet users have created a profile on some social network, and people on average create 1.6 profiles and log in three or four times per week.³⁶

The three social media outlets linked to the U.K. riots were Facebook, Twitter, and BlackBerry Messenger (BBM).³⁷ The remainder of this subsection will describe the basic characteristics of each social media outlet, as well as the purported role each platform played in the riots.

Facebook users provide mutual access to their profiles by becoming Facebook friends³⁸ and have the ability to share pictures³⁹ and videos,⁴⁰ as well as create electronic event invitations.⁴¹ News outlets initially concluded that people upset about the killing of Mark Duggan first turned to Facebook, and a commemorative Facebook page had amassed more than 7,500 fans by August 8, 2011, only a few days after Duggan's death.⁴² After the first night of rioting, rioters began using this Facebook page to encourage others to share photos or video footage from the riots to inform others about their reasons for rioting.⁴³ These types of posts became highly damaging to certain Facebook users, such as when U.K. judges later sentenced two young men to four years each in prison for using Facebook to organize riots.⁴⁴ Specifically, both of the sentenced rioters pled "guilty to intentionally encouraging another to assist the commission of an indictable offence under Sections 44 and 46

35. Kane, *supra* note 33, at 329.

36. Daniel B. Garrie et al., *Data Protection: The Challenges Facing Social Networking*, 6 *BYU INT'L L. & MGMT. REV.* 127, 127 (2010).

37. *U.K. Opts Not to Block Social Media During Riots*, *supra* note 4.

38. *Adding Friends & Friend Requests*, FACEBOOK, <http://www.facebook.com/help/friends/requests> (last visited Oct. 4, 2013).

39. *Viewing Photos*, FACEBOOK, <http://www.facebook.com/help/photos> (last visited Oct. 4, 2013).

40. *Uploading & Viewing Videos*, FACEBOOK, <http://www.facebook.com/help/videos> (last visited Oct. 4, 2013).

41. *Creating & Editing Events*, FACEBOOK, <http://www.facebook.com/help/events/create> (last visited Oct. 4, 2013).

42. *See, e.g.*, Halliday, *supra* note 25.

43. *Id.*

44. *See* Bowcott et al., *supra* note 2; 'Facebook Rioters' Lose Appeal Against Prison Sentences, HUFFINGTON POST (Oct. 18, 2011, 1:12 PM), http://www.huffingtonpost.co.uk/2011/10/18/facebook-rioters-lose-app_n_1017120.html.

of the Serious Crime Act 2007.”⁴⁵ One of these convicted young men created a Facebook event entitled “Smash Down;” however, only the police showed up at the event’s indicated location and no rioting resulted from the creation of the event.⁴⁶ The second young man also received a four-year prison sentence for his Facebook page “The Warrington Riots,”⁴⁷ even though no rioting resulted from his page. Other than these initial activities, however, Facebook did not contain any other evidence of incitement to the rioting.⁴⁸

In contrast to the extensive profile capabilities on Facebook’s platform, Twitter users only produce brief message updates known as “tweets,” which are limited to 140 textual characters.⁴⁹ Users can also provide URL links to other media content, such as photo or video to expand their messages.⁵⁰ Twitter became an early scapegoat for the U.K. riots; however, further research has shown that “while politicians, journalists and police were constantly tweeting about the disorder, rioters were not.”⁵¹ Although the police found tweets mentioning rioters’ plans to attend the Hackney Carnival, which authorities cancelled as a result,⁵² the U.K. government did not convict anyone for using Twitter in connection with the riots as of December 2011; rather, interviews with 270 riot participants demonstrated that BBM was their communication method of choice.⁵³ Moreover, authorities have since realized that other members of the public used Twitter for beneficial purposes, such as coordinating post-riot cleanup efforts.⁵⁴

BBM is the most distinguishable of the three social media outlets because it does not involve creating a profile on the Internet; rather, BBM is an instant messaging tool for people who use any BlackBerry

45. Murray Wardrop, *England Riots: Coalition Split as Tories Defend Tough Sentences for Facebook Rioters*, TELEGRAPH (Aug. 17, 2011, 1:05 PM), <http://www.telegraph.co.uk/news/uknews/crime/8706102/England-riots-Coalition-split-as-Tories-defend-tough-sentences-for-Facebook-rioters.html>. For the text of the Serious Crime Act 2007, see Serious Crime Act, 2007, c. 27, §§ 44, 46 (U.K.).

46. Bowcott et al., *supra* note 2.

47. *Id.* This newspaper article also describes dissatisfaction with the length of the sentences; however, the sentencing guidelines of the United Kingdom are outside the scope of this Note.

48. Halliday, *supra* note 25.

49. *About*, TWITTER, <http://twitter.com/about> (last visited Sept. 5, 2013).

50. *Id.*

51. See James Ball & Paul Lewis, *Twitter and the Riots: How the News Spread*, GUARDIAN (Dec. 7, 2011, 11:14 AM), <http://www.guardian.co.uk/uk/2011/dec/07/twitter-riots-how-news-spread>.

52. Halliday, *supra* note 25.

53. See Ball & Lewis, *supra* note 51.

54. See *id.*

device.⁵⁵ Although BBM is similar to other social media outlets in that users can send pictures or videos to each other, BBM users communicate with each other by exchanging identification codes known as “PINs.”⁵⁶ Once BBM users have exchanged PINs, there is no limit to how many messages they can send, and they can send the same message to everyone whose PIN they have received.⁵⁷ In contrast to standard text messaging, there is usually no additional charge for BBM, and communication also takes place in real time.⁵⁸ BlackBerry messages “are private to recipients and encrypted during transmission,”⁵⁹ whereas Twitter users can choose whether their Tweets are visible to the public,⁶⁰ and Facebook users often remain vulnerable to their information being accessible if they do not diligently set the privacy options on their account profiles.⁶¹

The settled consensus with regard to the U.K. riots is that BBM played the largest role in organizing the riots.⁶² As early as August 2011, one news outlet had learned of the content of one BlackBerry message that encouraged “‘everyone from all sides of London’ to vandalise shops on Oxford street.”⁶³ This message instructed those who were going to participate to “SHOOT!” if they saw a “fed,” and also ordered participants to “SALUT!” a “brother.”⁶⁴ Another BlackBerry message “sent shortly before the outbreak of violence” in another town read “Everyone in edmonton enfield wood green everywhere in north link up at enfield town station at 4 o clock sharp!”⁶⁵ One explanation for the widespread use of BBM is that many of the rioters came from low-income areas, and the inexpensive price of a BlackBerry phone, combined with the ability to have a pay-as-you-go plan rather than a monthly contract allowed the rioters to have access to the effective

55. Diane Dannenfeldt, *How BlackBerry Messenger Works*, HOWSTUFFWORKS.COM (Feb. 21, 2008), <http://communication.howstuffworks.com/blackberry-messenger.htm> (providing a detailed description of how BlackBerry Messenger (BBM) works).

56. *Id.*

57. James Ball & Symeon Brown, *Why BlackBerry Messenger Was Rioters’ Communication Method of Choice*, GUARDIAN (Dec. 7, 2011, 10:00 AM), <http://www.guardian.co.uk/uk/2011/dec/07/bbm-rioters-communication-method-choice>.

58. Halliday, *supra* note 25.

59. Ball & Brown, *supra* note 57.

60. *About Public and Protected Tweets*, TWITTER, <http://support.twitter.com/articles/14016> (last visited Sept. 6, 2013).

61. See Ball & Brown, *supra* note 57.

62. See, e.g., Halliday, *supra* note 25.

63. *Id.*

64. *Id.*

65. *Id.*

BBM communication system.⁶⁶ One person familiar with the communication habits of British teenagers described the popularity of the BlackBerry in the United Kingdom as being “the cheapest way to communicate. It’s the best social networking phone out there.”⁶⁷ Notably, statistics show that as of August 2011, thirty-seven percent of British teens owned a BlackBerry.⁶⁸

C. *The U.K. Government’s Consideration of a Ban on Social Media and Theresa May’s Meeting with Social Media Executives*

After the riots, Prime Minister Cameron told parliament “that Facebook, Twitter and Research in Motion (Rim), the maker of BlackBerry devices, should take more responsibility for content posted on their networks, warning the government would look to ban people from major social networks if they were suspected of inciting violence online.”⁶⁹ To evaluate the option of partially shutting down social media during times of violence and unrest, U.K. Home Secretary Theresa May met with leaders from BlackBerry, Twitter, and Facebook to discuss the role of social media in enabling criminal activity.⁷⁰ The meeting was scheduled to last for one hour, with attendees including social media executives, police officers, and ministers.⁷¹

As the meeting approached, however, the plan for the discussion shifted from the government’s ability to restrict access to social networks to how the social media companies could take action to maintain public order.⁷² During the meeting, Twitter’s CEO pointed out that social media websites have the ability to play extremely positive roles during events such as riots and noted that “the ‘hope’ is the

66. Ball & Brown, *supra* note 57.

67. *Id.*

68. Halliday, *supra* note 25.

69. Halliday & Garside, *supra* note 1. Twitter has since decided to ban specific content in efforts to comply with specific countries’ domestic laws. Hayley Tsukayama, *Twitter’s Country-Specific Censorship Tool Prompts User Protest*, WASH. POST (Jan. 27, 2012), http://www.washingtonpost.com/business/technology/twitters-country-specific-censorship-tool-prompts-user-protest/2012/01/27/gIQALWoMVQ_story.html; *Tweets Still Must Flow*, TWITTER BLOG (Jan. 27, 2012, 2:20 PM), <http://blog.twitter.com/2012/01/tweets-still-must-flow.html>. This policy, however, is not currently relevant for the United Kingdom because Twitter does not mention the United Kingdom as a country where it might invoke this policy.

70. Emma Barnett, *David Cameron ‘Will Never Shut Down Facebook’*, TELEGRAPH (Oct. 15, 2011, 7:15 AM), <http://www.telegraph.co.uk/technology/facebook/8828093/David-Cameron-will-never-shut-down-Facebook.html>.

71. Josh Halliday, *Facebook and Twitter to Oppose Calls for Social Media Blocks During Riots*, GUARDIAN (Aug. 24, 2011, 8:06 AM), <http://www.guardian.co.uk/media/2011/aug/24/uk-riots-facebook-twitter-blackberry>.

72. *Id.*

majority of tweets around a hot topic such as the riots[] will be geared at trying to help matters, rather than incite more violence.”⁷³ Reports after the meeting indicated that the government and law enforcement asked the social media executives about how to best observe their websites, with representatives from both the U.K. government and Facebook noting that the meeting was productive.⁷⁴ In the end, the U.K. government decided not to pursue measures to shut down social media and focused instead on collaborating with social media companies to determine the best ways to protect U.K. citizens and social media users.⁷⁵

D. Relevant U.K. Government Departments

Given that commentators mentioned that banning social media could implicate civil rights, a brief description of the pertinent departments of the U.K. domestic government is helpful in taking stock of the issues implicated by the August 2011 riots.⁷⁶ The Equality and Human Rights Commission defines its purpose as “promot[ing] and monitor[ing] human rights,” concentrating its efforts on the following nine areas: “age, disability, gender, race, religion and belief, pregnancy and maternity, marriage and civil partnership, sexual orientation[,] and gender reassignment.”⁷⁷ The Equality and Human Rights Commission’s list is controlled by statute, and at the time of this writing, does not include technology or social media as one of the categories of human rights for which it is responsible.⁷⁸ The U.K. Department for Culture, Media and Sport, however, has recently embarked on an examination of the legal landscape of communications in the United Kingdom.⁷⁹

73. Emma Barnett, *Twitter Chief: We Will Protect Our Users from Government*, TELEGRAPH (Oct. 18, 2011, 10:23 AM), <http://www.telegraph.co.uk/technology/twitter/8833526/Twitter-chief-We-will-protect-our-users-from-Government.html>.

74. Mark Milian, *UK Not Pursuing Limits on Social Media*, CNN (Aug. 26, 2011, 6:00 PM), http://articles.cnn.com/2011-08-26/tech/tech_social-media_uk-social-media_1_social-media-twitter-facebook-spokeswoman.

75. *Id.*

76. Civil rights activists were particularly concerned about potential threats to free expression and communication, as well as privacy issues. See *U.K. Opts Not to Block Social Media During Riots*, *supra* note 3.

77. *About Us*, *supra* note 16.

78. See *id.*

79. See *Making It Easier for the Communications and Telecoms Industries to Grow, While Protecting the Interests of Private Citizens*, DEP’T FOR CULTURE MEDIA & SPORT, U.K. GOV’T (July 30, 2013), <https://www.gov.uk/government/policies/making-it-easier-for-the-communications-and-telecoms-industries-to-grow-while-protecting-the-interests-of-citizens>

II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Although the U.K. government ultimately decided not to pursue a ban on social media,⁸⁰ the 2011 riots and their aftermath have drawn increasing attention to the novel legal issues raised by the advent of new technologies such as social media.⁸¹ If the United Kingdom had decided to ban social media, the legality of that act would have been questionable.⁸² It is likely that the ban would have resulted in a complainant pursuing a domestic claim,⁸³ as well as later challenging the ban in the European Court of Human Rights (the Court) as a violation of Article 10 of the Convention, which guarantees a right to the freedom of expression.⁸⁴

The Court is an organ of the Council of Europe, a multilateral organization whose goal is to advocate “freedom of expression and of the media, freedom of assembly, equality, and the protection of minorities”⁸⁵ The Court is the judicial mechanism for ensuring that states do not domestically restrict their citizens’ human rights under the Convention.⁸⁶ This Convention serves as “the key instrument for [the] protection and promotion of human rights” for citizens of the United Kingdom.⁸⁷ Therefore, a brief history of the Convention and its mechanics is helpful.

[hereinafter *Making It Easier*].

80. Milian, *supra* note 74.

81. Even before the 2011 U.K. riots, governments were addressing content posted on the Internet, such as Italy’s 2009 Alfano Decree. *See generally* Janelle L. Cornwall, *It Was the First Strike of Bloggers Ever: An Examination of Article 10 of the European Convention on Human Rights as Italian Bloggers Take a Stand Against the Alfano Decree*, 25 EMORY INT’L L. REV. 499 (2011) (providing an analysis of Article 10 of the European Convention on Human Rights (the Convention) applied to an Italian law that aimed to regulate the content of online blogs by providing a right of reply for people who disagreed with content that had been published on a blog about them).

82. *U.K. Opts Not to Block Social Media During Riots*, *supra* note 3.

83. *See* EUR. COURT OF HUMAN RIGHTS, *supra* note 17, at 7.

84. ECHR, *supra* note 12, art. 10.

85. *What We Do*, COUNCIL EUR., <http://www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en> (last visited Sept. 8, 2013). For a comprehensive overview of the Council of Europe, see THE COUNCIL OF EUROPE: AN OVERVIEW, *available at* http://www.coe.int/AboutCoe/media/interface/publications/tour_horizon_en.pdf (last visited Sept. 8, 2013).

86. *See How We Work*, COUNCIL EUR., <http://www.coe.int/aboutCoe/index.asp?page=CommentTravaillonsNous&l=en> (last visited Sept. 8, 2013).

87. Rory O’Connell & Tom Obokata, *The United Kingdom: Developing a Human Rights Culture*, in 60 YEARS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS IN EUROPE 27, 33 (Vinodh Jaichand & Markku Suksi eds., 2009).

A. *Background of the Convention and the Committee of Ministers*

The Convention is a multilateral agreement that was signed in Rome on November 4, 1950, and took effect a few years later on September 3, 1953.⁸⁸ Each of the forty-seven member states from the Council of Europe has signed the Convention.⁸⁹ The Convention solidified certain rights protected in the Universal Declaration of Human Rights and created the Court to safeguard the rights of these states' citizens.⁹⁰ The United Kingdom implemented the Convention domestically through the Human Rights Act of 1998.⁹¹ As a result, citizens of the United Kingdom may bring a claim of a violation of the Convention in the U.K. judicial system.⁹² The Convention parties originally intended for the Convention to be a "living instrument" and for its meaning to evolve according to new interpretations that the Court gives to it.⁹³ Nevertheless, amending the Convention is very burdensome,⁹⁴ and likely requires approval of a new official protocol for each amendment.⁹⁵

A protocol is a proposed change to the Convention, and for a protocol to take effect, all member states must ratify it.⁹⁶ The Council of Europe created a Committee of Experts on Simplified Procedure for Amendment to discuss certain provisions of the Convention, which has met four times to work toward a more manageable amendment process.⁹⁷ The articles of the Convention previously up for amendment,

88. EUR. COURT OF HUMAN RIGHTS, *supra* note 17, at 3.

89. *See How We Work*, *supra* note 86.

90. EUR. COURT OF HUMAN RIGHTS, *supra* note 17, at 3.

91. JoAnne Sweeny, *The United Kingdom's Human Rights Act: Using Its Past to Predict Its Future*, 12 LOY. J. PUB. INT. L. 39, 40 (2010); *see also* Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT'L L.J. 329 (2002) (presenting a comprehensive overview of the Human Rights Act).

92. Cara Hirsch, *Policing Undercover Agents in the United Kingdom: Whether the Regulation of Investigatory Powers Act Complies with Regional Human Rights Obligations*, 25 FORDHAM INT'L L.J. 1282, 1312–13 (2002).

93. EUR. COURT OF HUMAN RIGHTS, *supra* note 17, at 3.

94. *See* DH-PS, *supra* note 13, at 3–5 (describing an effort to make the procedure for amending the Convention less complicated and less burdensome); FLORENCE BENOÎT-ROHMER & HEINRICH KLEBES, COUNCIL OF EUROPE LAW: TOWARDS A PAN-EUROPEAN LEGAL AREA 107 (2005) (noting that recommendations "can be modified more rapidly" than Conventions).

95. *See Explanatory Report: Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, COUNCIL EUR., <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm> [hereinafter *Explanatory Report: Protocol No. 14*] (last visited Sept. 8, 2013) (describing Protocol 14 and the amendments it made to the Convention).

96. Jennifer W. Reiss, *Protocol No. 14 ECHR and Russian Non-Ratification: The Current State of Affairs*, 22 HARV. HUM. RTS. J. 293, 293–94 (2009).

97. *Committee of Experts on a Simplified Procedure for Amendment of Certain Provisions*

however, have not included any of the Convention's substantive rights.⁹⁸ Although the Committee met in May 2012, the draft of their final report does not indicate any plans to simplify the process for amending Article 10,⁹⁹ and there is no indication of when the Committee's next meeting will take place.¹⁰⁰

In addition, the Committee of Ministers, "the Council's decision-making body [that] is made up of the ministers of foreign affairs of each member state . . . decides Council of Europe policy"¹⁰¹ and ensures that the member states are granting the rights guaranteed by the Convention.¹⁰² Under Article 15(b) of the Statute of the Council of Europe, the Committee of Ministers may promulgate recommendations that suggest steps the Committee believes will assist in ensuring the Convention's rights, and the Committee has the discretion to request that domestic governments keep the Committee apprised of their progress.¹⁰³ Such recommendations "reflect a measure of agreement between all the member governments on the issue they target."¹⁰⁴ However, a weakness of these recommendations is that they "are not binding on member States."¹⁰⁵ The Committee of Ministers issued a recommendation on September 21, 2011, which astutely encourages member states to "adopt a new, broad notion of media" that should include social networks.¹⁰⁶

B. *Alleging a Violation of the European Convention on Human Rights*

A dissatisfied citizen of a member state must follow a specific process to attempt to obtain redress for an alleged wrong under the

of the European Convention of Human Rights (DH-PS), COUNCIL EUR., http://www.coe.int/t/dghl/standardsetting/cddh/DHPS_en.asp (last visited Jan. 7, 2012) (listing the Committee's meetings).

98. DH-PS, *supra* note 13, at 13–31 (providing Appendix III, which lists the Articles of the Convention whose amendment procedure the Committee considered, and which excludes the articles that provide substantive rights).

99. See COMM. OF EXPERTS ON A SIMPLIFIED PROCEDURE FOR AMENDMENT OF CERTAIN PROVISIONS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (DH-PS), STEERING COMM. FOR HUMAN RIGHTS (CDDH), DRAFT CDDH FINAL REPORT (May 14–16, 2012), *available at* http://www.coe.int/t/dghl/standardsetting/cddh/DH_PS/4th_Add_en.pdf.

100. *Committee of Experts on a Simplified Procedure for Amendment of Certain Provisions of the European Convention of Human Rights (DH-PS)*, *supra* note 97.

101. *How We Work*, *supra* note 86.

102. *About the Committee of Ministers*, *supra* note 14.

103. Statute of the Council of Europe art.15, May 5, 1949, 87 U.N.T.S. 103, 110.

104. BENOÎT-ROHMER & KLEBES, *supra* note 94, at 107.

105. *About the Committee of Ministers*, *supra* note 14.

106. *Recommendation CM/Rec(2011)7*, *supra* note 15.

Convention.¹⁰⁷ First, an individual must initially try to rectify the claim in her own domestic legal system until “domestic remedies have been exhausted.”¹⁰⁸ If a claimant satisfies this procedural hurdle in attempting to remedy her claim domestically and the claim remains unredressed, then the individual has six months from the last judicial decision to apply to the Court.¹⁰⁹ If the Court determines that the application does not meet its eligibility requirements, the complainant has reached the end of the road because she cannot appeal a dismissal decision.¹¹⁰ If the Court’s Committee decides that the claim is admissible, however, the Court would then examine the complaint on the merits to determine whether a violation of a particular Convention article had occurred.¹¹¹ In making a specific determination regarding a ban of social media, the Court would have to interpret Article 10 of the Convention in light of the development of the Internet and social media.¹¹² If the Court rules in favor of the person alleging an infringement of her rights, the Committee of Ministers has the responsibility of ensuring that the respective domestic government complies with the Court’s decision and does not engage in comparable violations in the future.¹¹³

III. ARTICLE 10 AND THE EUROPEAN COURT OF HUMAN RIGHTS APPROACH: CASE LAW AND THE IMPORTANCE OF PROPORTIONALITY

Section one of Article 10 of the Convention guarantees the freedom of expression, whereas section two provides specific instances of when the government may lawfully restrict the freedom of expression and specifically contains enumerated exceptions relating to public order and safety.¹¹⁴ The Court’s Article 10 analysis consists of three steps and ultimately depends on whether a government’s domestic restriction of

107. See EUR. COURT OF HUMAN RIGHTS, *supra* note 17, at 7 (describing “conditions of admissibility”).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* (noting that the Court will only examine the merits of a claim if the application was admissible).

112. MONICA MACOVEI, FREEDOM OF EXPRESSION: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 5–6 (2d ed. 2004) (noting that the Convention is “a living instrument which must be interpreted in the light of the present day conditions”).

113. *A Unique and Effective Mechanism*, COUNCIL EUR., http://www.coe.int/t/dghl/monitoring/execution/Presentation/About_en.asp (last visited Oct. 6, 2013).

114. ECHR, *supra* note 12, art. 10.

the freedom of expression was a proportional response to the threat the initial expression created.¹¹⁵ Although the text of the Convention uses broad language to guarantee the freedom of expression, the Convention does not specifically provide for the freedom to use social media.¹¹⁶

A. *Framework for Article 10 Analysis*

The proposed ban on social media in the United Kingdom implicates alleged violations of Article 10 of the Convention, which provides for the freedom of expression.¹¹⁷ The text of Article 10 is as follows:

(1) 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹¹⁸

Scholars agree that the Convention's grant of "freedom of expression and information is not absolute" and that a state may validly restrict the freedom of expression in the situations listed in the second paragraph of Article 10.¹¹⁹ To determine whether a restriction violates Article 10, the Court evaluates "the type of expression," "the means by which the expression is disseminated," and the expression's intended "audience" to determine whether the government may permissibly restrict the expression.¹²⁰ The freedom of expression applies even to information that is unpleasant or provocative because a democratic society depends

115. JAMES X. DEMPSEY ET AL., REGARDLESS OF FRONTIERS – PROTECTING THE HUMAN RIGHT TO FREEDOM OF EXPRESSION ON THE GLOBAL INTERNET, *available at* <http://gilc.org/speech/report> (last visited Sept. 8, 2013).

116. *See id.*; ECHR, *supra* note 12, art. 10.

117. ECHR, *supra* note 12, art. 10.

118. *Id.*

119. *See, e.g.*, DIRECTORATE GEN. OF HUMAN RIGHTS, COUNCIL EUR., FREEDOM OF EXPRESSION IN EUROPE: CASE LAW CONCERNING ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 8 (2002).

120. MACOVEI, *supra* note 112, at 7.

on the acceptance of a diversity of opinions.¹²¹

The Court's analysis in a freedom of expression case proceeds in three steps: first, the member state must have a law prohibiting certain behavior; second, the state must try to further one of the objectives from the second paragraph of Article 10 of the Convention; and third, the restriction must be "necessary in a democratic society."¹²² The Court has interpreted the first element of an Article 10 analysis, that the behavior be "prescribed by law,"¹²³ to mean that the state must have initially created valid legislation restricting the freedom of expression.¹²⁴ The Court has further indicated that the domestic legislation must both provide notice to the citizen and be written specifically enough that the individual has the opportunity to change her behavior to conform to the law in order to satisfy this first requirement.¹²⁵

Regarding the second and third steps, the Court advocates a limited interpretation of the exceptions provided in the second paragraph of Article 10 and requires that the state have an excellent reason for restricting the freedom of expression.¹²⁶ Freedom of expression cases generally turn on the necessity of the state's restriction, and thus the Court bases its "necessary in a democratic society" determination on "whether the limitations imposed are proportionate to the harm that is alleged to have occurred."¹²⁷ In other words, the Court tries to assess the reasonableness of the state's behavior, which depends on the facts of each individual situation.¹²⁸ To make this proportionality determination, the Court compares a state's end to the means used and analyzes whether there is a "pressing social need" for suspending the human right of expression, as well as sometimes applying strict scrutiny.¹²⁹ The Court will look for some degree of necessity when a

121. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 23 (1976); DEMPSEY ET AL., *supra* note 115.

122. DEMPSEY ET AL., *supra* note 115.

123. *Id.*

124. See Onder Bakircioglu, *Freedom of Expression and Hate Speech*, 16 TULSA J. COMP. & INT'L L. 1, 36-37 (2008).

125. *Id.* (describing and quoting *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 31 (1979)).

126. Bakircioglu, *supra* note 124, at 36.

127. Paul L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 U.S.F. L. REV. 1, 47-48 (2005) (describing what the Court has found to violate Article 10 in a variety of cases).

128. See *id.* at 46.

129. Margit Cohn, *Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom*, 58 AM. J. COMP. L. 583, 612-13 (2010).

country has impaired the freedom of expression because “[b]anning information or the expression of opinion should be seen as exceptional.”¹³⁰

Even if the Court finds a violation of a Convention right, the Court affords the European legal system a “margin of appreciation,” which allows discretion “for countries to differ in what is acceptable under the terms of the Convention based on cultural differences.”¹³¹ As a result, the Court can arrive at different conclusions about whether a state’s behavior infringes a human right based on the customs, practices, and laws of the individual state where the violation allegedly occurred.¹³² This “margin of appreciation” doctrine is particularly relevant for the purposes of the United Kingdom’s proposed social media ban because the doctrine is applied “primarily in connection with Articles 8 through 11” since they pertain to “civil liberties rather than more basic human rights.”¹³³

In addition, the advent of the Internet has created a host of new issues for the Court’s analysis. For example, the application of the Article 10 analysis varies depending on the type of expression; therefore, whether a restriction is permissible will vary by the tools used to create the expression.¹³⁴ One argument concerning expression on the Internet is that there is less of a justification for restricting expression online because Internet users are highly “dispersed in [different] location[s] and may even be dispersed over time.”¹³⁵ Nevertheless, “the Internet lends itself particularly to the possibly unrestrained exercise of freedom of expression,” which at the same time makes it “more difficult to impose restrictions [on online expression, even] when these are necessary.”¹³⁶

B. *The Court’s Exception for Expression that Incites Violence*

The U.K. government’s rash conclusion that rioters used social media as an outlet for encouraging violence merits a brief explanation of the Court’s approach to incitement of violence as it relates to the guarantee

130. THOMAS HAMMARBERG, HUMAN RIGHTS IN EUROPE: NO GROUNDS FOR COMPLACENCY 293 (2011).

131. McKaskle, *supra* note 127, at 49.

132. *Id.*

133. *Id.* at 50.

134. DEMPSEY ET AL., *supra* note 115 (noting that “[t]he Court has made it clear that the free expression principles of Article 10 apply differently to different media”).

135. *Id.*

136. MICHEL VERPEAUX, FREEDOM OF EXPRESSION IN CONSTITUTIONAL AND INTERNATIONAL CASE LAW 171 (2010).

of the freedom of expression.¹³⁷ The Court has indicated that “Article 10 does not protect remarks that encourage violence”¹³⁸ and as such has interpreted incitement as expression that either explicitly encourages violence or has the ability to solidify biases that could result in violence.¹³⁹ Although creating biases qualifies as incitement, standing up for a group that has been marginalized in such a way does not permit incitement to violence.¹⁴⁰ Moreover, if the Court determines that certain communications did incite violence, or had the potential to incite violence, the state’s domestic government receives broader latitude to restrict the freedom of expression without violating Article 10.¹⁴¹ In other words, when the domestic system is dealing with “incitement to violence[,] national authorities enjoy a greater margin of appreciation in assessing the need for interference” because the Court has not tolerated incitement as a valid freedom under the Convention.¹⁴² When determining to what extent certain behavior has incited violence, the role of context remains disputed.¹⁴³

C. *The Interplay Between Article 10 and Article 8, Which Guarantees a Right to Privacy*

The U.K. government’s desire to access people’s social network data and shut down social media after the 2011 U.K. riots¹⁴⁴ also implicates the right to privacy, which is guaranteed by Article 8 of the Convention.¹⁴⁵ The right to privacy is a complementary consideration to the freedom of expression, and the Court balances the freedom of expression against the right to privacy.¹⁴⁶ It is difficult, if not impossible, to predict which right the Court will find takes precedence

137. Bolesworth et al., *supra* note 27 (describing the violence during the 2011 U.K. riots).

138. VERPEAUX, *supra* note 136, at 127.

139. Jean-François Flauss, *The European Court of Human Rights and the Freedom of Expression*, 84 IND. L.J. 809, 840–41 (2009).

140. *Id.* at 840.

141. *Id.* at 841.

142. DIRECTORATE GEN. OF HUMAN RIGHTS, *supra* note 119, at 25.

143. Flauss, *supra* note 139, at 841 (describing the various opinions of judges regarding the role context should play in the incitement determination).

144. Vikram Dodd et al., *M15 Joins Social Messaging Trawl for Riot Organisers*, GUARDIAN (Aug. 15, 2011, 3:12 PM), <http://www.guardian.co.uk/uk/2011/aug/15/mi5-social-messaging-riot-organisers-police>; Vikram Dodd, *Police Accessed BlackBerry Messages to Thwart Planned Riots*, GUARDIAN (Aug. 16, 2011, 9:14 AM), <http://www.theguardian.com/uk/2011/aug/16/police-accessed-blackberry-messages-thwart-riots>.

145. ECHR, *supra* note 12, art. 8 (“Everyone has the right to respect for his private and family life, his home and his correspondence.”).

146. Eric Barendt, *Freedom of Expression in the United Kingdom Under the Human Rights Act 1998*, 84 IND. L.J. 851, 865–66 (2009).

because “the facts of the case” provide the most important consideration.¹⁴⁷ The Court must “attach proper weight to the important rights both articles are designed to protect.”¹⁴⁸ The balancing of these two freedoms could be pertinent to limits on social media as it relates to the 2011 U.K. riots, particularly with regard to BBM, because those users were sending their messages over the private, encrypted BBM network, and the government wanted to receive access to the content of these messages.¹⁴⁹

D. Discussion of the Court's Case Law

Although the Court has never directly considered how social media relates to the Convention's guarantee of the freedom of expression,¹⁵⁰ its existing Article 10 case law illustrates how the Court has previously applied the Article 10 framework and shows how the Court would likely view a social media ban.¹⁵¹ For example, the Court found that protecting public morals by banning a book directed at young children that discussed sex did not violate Article 10 of the Convention.¹⁵² Even though other countries had published the book, the Court's “margin of appreciation” doctrine allowed the state to ban the book, as the state was furthering an enumerated interest outlined in the second paragraph of Article 10.¹⁵³ Another example involved a situation where a man was convicted domestically “on the charge of incitement to commit an offence” for distributing pamphlets criticizing the Turkish government's

147. *Id.* at 866.

148. Basil Markesinis et al., *Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)*, 52 AM. J. COMP. L. 133, 152 (2004).

149. Dodd et al., *supra* note 144, at 2.

150. This is based on the author's research into cases of the European Court of Human Rights. See *Search Portal HUDOC*, EUR. COURT HUM. RTS., <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited Sept. 12, 2013) (performing a search for “social media” only yields two results, neither of which consider social media as a central issue of the case).

151. See, e.g., *Times Newspapers Ltd. (Nos. 1 and 2) v. United Kingdom*, App. Nos. 3002/03 & 23676/03 at 14 (Eur. Ct. H.R. Mar. 10, 2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91706>; *K.U. v. Finland*, App. No. 2872/02 at 13–14, (Eur. Ct. H.R. Dec. 2, 2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89964>; *Incal v. Turkey*, 1998-IV Eur. Ct. H.R. 1547, 1562–84; *Castells v. Spain*, 236 Eur. Ct. H.R. (ser. A) at 17–26 (1992); *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 27–45 (1979); *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 18–31 (1976).

152. *Handyside*, 24 Eur. Ct. H.R. (ser. A) at 31.

153. See SUE FARRAN, *THE UK BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY* 255–60 (1996) (describing the *Handyside* case and the “margin of appreciation”).

approach toward the Kurds because his conduct was deemed likely to incite the Kurds.¹⁵⁴ There, the Court struck down the domestic conviction as a violation of Article 10 and held that the conviction was not “necessary in a democratic society” because the defendant was not the cause of terrorism occurring in Turkey, and the pamphlets did not encourage violence.¹⁵⁵ Finally, the Court has found a violation of Article 10 for restricting defendants’ speech when defendants criticized the state government, clearly indicating that criticism of one’s government is a right protected by the freedom of expression.¹⁵⁶

Although the Court has not considered a case specifically about expression via social media,¹⁵⁷ the Court has previously dealt with the Internet. For example, the Court refused to find a violation of Article 10 when it upheld the “Internet publication rule,” which permits a new cause of action “each time material is downloaded from the Internet” because the rule’s purpose was to protect people’s rights, which the Court considered “a legitimate aim.”¹⁵⁸ In contrast, however, the Court has also held that the United Kingdom could not monitor a person’s electronic communications without that person’s consent because such observation amounted to an interference with a citizen’s privacy rights under Article 8 of the Convention, particularly because at the time “there was no domestic law regulating [electronic] monitoring.”¹⁵⁹ Therefore, in the event that the Court reviews a freedom of expression case about social media, a complainant would follow the aforementioned procedures for bringing her claim, and the Court would conduct the foregoing analysis to which it has previously adhered in Article 10 cases.¹⁶⁰

154. MACOVEI, *supra* note 112, at 44–45 (describing the case of *Incal v. Turkey*); *Incal*, 1998-IV Eur. Ct. H.R. at 1566.

155. MACOVEI, *supra* note 112, at 44–45; *Incal*, 1998-IV Eur. Ct. H.R. at 1563–69.

156. MACOVEI, *supra* note 112, at 45–47 (describing *Castells v. Spain*); *Castells*, 236 Eur. Ct. H.R. (ser. A) at 26.

157. *See supra* note 150.

158. *Times Newspapers Ltd. (Nos. 1 and 2) v. United Kingdom*, App. Nos. 3002/03 & 23676/03 at 1, 14 (Eur. Ct. H.R. Mar. 10, 2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91706>.

159. *Copland v. United Kingdom*, (No. 1), 2007-I Eur. Ct. H.R. 317, 330 (holding that the deputy principal of a college monitoring a student’s telephone, e-mail, and Internet usage without informing her and without a policy authorizing him to do so was a violation of the Convention).

160. *See supra* Part III.A–D.

IV. ANALYSIS OF THE U.K. RIOTS, ARTICLE 10, AND THE COMMITTEE OF
MINISTERS' RECOMMENDATION—THE NEED FOR THE DOMESTIC
GOVERNMENT TO DO MORE

The U.K. riots have an important takeaway: the rushed response of the U.K. government to consider banning social media¹⁶¹ demonstrates a lack of understanding of the intricate differences between various forms of social media, the ways they function, and their potential capacity for wrongdoing.¹⁶² The following analysis examines whether a legislative ban on social media based on the facts of the 2011 U.K. riots would survive scrutiny under the Court's current framework for Article 10 analysis. The analysis concludes that such a ban would fail the proportionality test because there is no effective way to ban access to social media to prevent violence before any such violence has actually occurred.¹⁶³ This Note then proposes that various departments of the U.K. government should work together toward determining how to tailor future legislation that will effectively address the legal issues that have emerged with the advent of social media, such as by conducting educational programs.¹⁶⁴

A. *A Legislative Ban on Social Media Based on the Facts of the August 2011 U.K. Riots Would Not Survive Scrutiny Under Article 10 of the Convention*

Although the U.K. government ultimately decided not to pursue banning social media,¹⁶⁵ the issues raised by the August 2011 riots will likely resurface throughout Europe because of the ever-increasing prevalence of social media.¹⁶⁶ Therefore, it is useful to analyze whether such a legislative prohibition would pass muster under the Convention in the event the United Kingdom (or any other party to the Convention) considers taking similar action to limit or ban social media in the

161. Halliday & Garside, *supra* note 1.

162. In addition to a lack of understanding, there is an argument that the government was considering a ban on social media to bolster the claim the police were dealing with “mindless thugs” while drawing attention away from the underlying racial tension and police behavior that led to the riots. See Peter Jackson, *London Riots: Tensions Behind Unrest Revealed*, BBC NEWS (Aug. 7, 2011, 11:05 AM), <http://www.bbc.co.uk/news/uk-14436529>.

163. McKaskle, *supra* note 127, at 46–47 (discussing the proportionality test).

164. For an extensive discussion of education proposals as they relate to new technology, see generally DIVINA FRAU-MEIGS, *MEDIA MATTERS IN THE CULTURAL CONTRADICTIONS OF THE “INFORMATION SOCIETY” – TOWARDS A HUMAN-RIGHTS-BASED GOVERNANCE* (2011).

165. *U.K. Opts Not to Block Social Media During Riots*, *supra* note 3.

166. See Garrie et al., *supra* note 36, at 127–28 (noting a “recent rise in social networking activity”).

future.¹⁶⁷ Moreover, any legislative ban would have to satisfy the requirements that the Court has established in its Article 10 analysis, namely, that the “restriction on the freedom of expression must (1) be prescribed by law; (2) have as its aim a goal that is legitimate under paragraph 2 of Article 10; and (3) be ‘necessary in a democratic society’ to achieve that goal.”¹⁶⁸

For a legislative ban on social media to prohibit citizens’ behavior by law, the ban would have to include enough detail for U.K. citizens to recognize the types of impermissible behavior.¹⁶⁹ An ambiguous and unqualified restriction on access to social media similar to the one U.K. Prime Minister Cameron proposed in his public remarks¹⁷⁰ would likely not satisfy this specificity threshold. If the U.K. government took unilateral steps to ban certain people from using social media, rather than provide its citizens a chance to alter their behavior before removing access to social media, this conduct would not meet the Court’s requirement that citizens have the opportunity to modify their behavior. Moreover, under the Court’s holding in *Copland v. United Kingdom*, the government may not permissibly access a person’s electronic communications if no law exists to permit the government to do so,¹⁷¹ and the United Kingdom did not have any such domestic law at the time of the 2011 riots.¹⁷² In the future, however, assuming the government could satisfy the first prong of an Article 10 analysis by enacting such laws, the legislation would also have to satisfy one of the legitimate goals from the second paragraph of Article 10.¹⁷³ In a situation

167. Halliday & Garside, *supra* note 1 (noting that any ban that David Cameron proposes to enact would require legislation).

168. DEMPSEY ET AL., *supra* note 115 (discussing the Court’s Article 10 analysis in *Handyside*).

169. Bakircioglu, *supra* note 124, at 37 (quoting *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 31 (1979)).

170. See Halliday & Garside, *supra* note 1.

171. *Copland v. United Kingdom*, (No. 1), 2007-I Eur. Ct. H.R. 317, 322–23, 330 (holding that the government’s interference did not violate Article 8 of the Convention because there was no domestic law regulating monitoring usage of telephone, Internet, and e-mail at the relevant time).

172. Halliday & Garside, *supra* note 1 (noting that a ban would “require legislation” in the future, which indicates that there was no relevant legislation at that time). The analysis in this Note assumes that the United Kingdom does not already have a domestic law that would permit the government to remove access to social media. While the United Kingdom has the Regulation of Investigatory Powers Act (RIPA), which “grants the investigatory bodies extremely broad powers, without the need to obtain judicial warrants,” its conformity with the Convention has been questioned. 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, 82–83 (2004).

173. See ECHR, *supra* note 12, art. 10(2); DEMPSEY ET AL., *supra* note 115.

comparable to the 2011 U.K. riots, it is likely that the government would argue that restricting access to social media would further the valid Article 10 governmental end of preventing public disorder or crime, given the high level of damage that would likely occur during riots.¹⁷⁴ Although the 2011 riots created public unrest,¹⁷⁵ the rioters did not use social media to incite violence.¹⁷⁶ Specifically, the rioters indicated that they used Facebook during the beginning of the August 2011 riots to inform others about why they had rioted,¹⁷⁷ and this is distinguishable from using social media to encourage further rioting or incite violence. Therefore, the eventual conclusion that rioters did not use Facebook and Twitter as the primary communication tools to organize the riots would undercut the government's arguments that the rioters used these social media outlets to incite violence.¹⁷⁸

Although the Court affords the European legal system a "margin of appreciation" for each country's domestic culture, it is unlikely that the Court would allow the "margin of appreciation" doctrine to justify the United Kingdom's rash and reactionary threat to ban social media.¹⁷⁹ Although the Court would be more deferential in its application of the "margin of appreciation" doctrine to a government's decision to restrict expression to prevent violence,¹⁸⁰ the expression at issue in the U.K. riots did not incite violence,¹⁸¹ therefore, the margin of appreciation doctrine would not save the United Kingdom before the Court. In addition, even though rioters used BBM to incite violence, the government would likely be unable to gain access to the content of BBMs because doing so would violate Article 8 of the Convention.¹⁸²

Even if the Court were to find that the United Kingdom suspended the freedom of expression to prevent public disorder, the restriction must also "be necessary in a democratic society," which means proportionate.¹⁸³ The Court's case law about public disorder indicates

174. ECHR, *supra* note 12, art. 10(2).

175. Bolesworth et al., *supra* note 27 (describing the violence and damages resulting from the riots).

176. Halliday, *supra* note 25.

177. *Id.*

178. See Ball & Lewis, *supra* note 51 (noting a lack of convictions for using Twitter during the riots).

179. McKaskle, *supra* note 127, at 49–51.

180. Flauss, *supra* note 139, at 841.

181. Halliday, *supra* note 25.

182. See *infra* note 196.

183. McKaskle, *supra* note 127, at 46–47. For an interesting discussion of proportionality as it relates to cutting off Internet access under European "three strikes" laws for illegal downloading and file-sharing, see generally Andrew T. Hopkins, *The Right to be Online*:

that a social media ban in the case of the riots would not have been a proportionate response.¹⁸⁴ Assuming that the Court finds the government's aim legitimate, it is likely that the Court would reach a similar decision as it did in *Incal v. Turkey* by finding that a ban on social media is disproportionate to the government's aim.¹⁸⁵ In *Incal*, the Court struck down the defendant's conviction under a statute similar to the Serious Crime Act 2007, the U.K. statute under which two young men were sentenced for their Facebook activity related to the riots, because the Court examined the government's behavior under "close scrutiny."¹⁸⁶ Moreover, at their core, the 2011 U.K. riots embodied a criticism of the U.K. government and the police force,¹⁸⁷ and the Court has previously held that citizens have the right to criticize their governments.¹⁸⁸ Although the form of governmental criticism in *Castells v. Spain* was different because the defendant had criticized the government by writing an article¹⁸⁹ and not by rioting, the extent to which the use of social media caused the rioting was small;¹⁹⁰ therefore, banning social media would also be a disproportionate response in violation of the Convention. Moreover, the results of thorough research demonstrate that in reality, Twitter played a large positive role after the riots because people used Twitter to communicate information about clean-up efforts.¹⁹¹ At least seven million Twitter users received information on Twitter advocating for clean-up of the damage caused by the riots.¹⁹² In addition, an increase in the number of police officers also contributed to the end of the riots, which indicates that the government was ultimately able to control the situation through more proportionate means;¹⁹³ therefore, the proposed means of banning

Europe's Recognition of Due Process and Proportionality Requirements in Cases of Individual Internet Connections, 17 COLUM. J. EUR. L. 557 (2011).

184. See MACOVEI, *supra* note 112, at 44–47 (describing "[f]reedom of expression and prevention of disorder or crime").

185. *Id.* at 44–45; *Incal v. Turkey*, 1998-IV Eur. Ct. H.R. 1547, 1569.

186. *Incal v. Turkey*, 1998-IV Eur. Ct. H.R. at 1567; MACOVEI, *supra* note 112, at 44–45.

187. See, e.g., James Ball & Matthew Taylor, *Theresa May to Review Stop and Search in Wake of Reading the Riots Study*, GUARDIAN (Dec. 14, 2011, 12:33 PM), <http://www.guardian.co.uk/uk/2011/dec/14/theresa-may-stop-search-review> (noting that "anger at the police was a major fuel for the London riots").

188. See MACOVEI, *supra* note 112, at 45–47 (describing *Castells v. Spain*).

189. See MACOVEI, *supra* note 112, at 46; *Castells v. Spain*, 236 Eur. Ct. H.R. (ser. A) at 23 (1992).

190. Ball & Lewis, *supra* note 51.

191. See *id.* (noting that "Twitter was a valuable tool for mobilising support for the post-riot clean-up and for organising specific clean-up activities").

192. *Id.*

193. Taylor et al., *supra* note 28.

certain people from using social media was not proportionate to the end of stopping the riots.

The same reasoning supports a similar conclusion for the government's desire to access the content of BlackBerry messages.¹⁹⁴ Similar to Article 10, Article 8 of the Convention provides exceptions that would allow the government to suspend the right to privacy, such as preventing public disorder.¹⁹⁵ The U.K. government's ability to stop the riots without intercepting BlackBerry messages in August 2011, however, indicates that invading the right to privacy would not be a proportionate response because there were other means available to serve the government's interest in maintaining public order.¹⁹⁶

For any future ban on social media to satisfy the proportionality test, the government would also need to show that social media was the primary cause behind organizing the riots and inciting violence and that the riots were causing a serious threat to public order.¹⁹⁷ In addition, the beneficial uses of social media, such as providing information about safety, would need to be minimal for the government's means (limiting access) to justify its ends (protecting public safety) because beneficial uses would seem to make restricting expression a less proportionate response.¹⁹⁸ Therefore, it is unlikely that the Court would find a legislative ban of social media to be acceptable under Article 10 of the Convention on the facts of the 2011 U.K. riots because the government would not have met the high threshold of defining the offense with specificity,¹⁹⁹ and banning social media would have been a disproportionate response for the small role it played in causing the riots.²⁰⁰ As a result, other parties to the Convention should keep this framework and analysis in mind in the event that they consider restricting access to social media in the future.²⁰¹

194. Dodd et al., *supra* note 144.

195. ECHR, *supra* note 12, art. 8(2) ("There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of . . . public safety . . . [or] for the prevention of disorder or crime.").

196. Taylor et al., *supra* note 28.

197. *Contra* Ball & Lewis, *supra* note 51 (describing the facts of the 2011 U.K. riots and noting that rioters were not the main actors using social media).

198. Cohn, *supra* note 129, at 612–13.

199. Bakircioglu, *supra* note 124, at 37 (quoting *Sunday Times v. United Kingdom*).

200. McKaskle, *supra* note 127, at 46–47.

201. *See supra* Part III.A.

B. *The Difficulty of Amending the Convention and the Need For Domestic Implementation of the Committee of Ministers' Recommendation*

Although the U.K. government decided not to pursue a ban on social media²⁰² and that even if they had, the Court may well have struck it down as a violation of Article 10,²⁰³ the riots and their ensuing focus on legal issues relating to social media cannot be ignored. The most obvious way of ensuring that the freedom of expression under Article 10 keeps pace with the evolution of new forms of media would be to amend the Convention.²⁰⁴ It is very difficult, however, to amend the Convention; although the Council of Europe does not provide an explicit description of the procedure for amending the Convention, the process for amending the Convention is complicated²⁰⁵ and requires unanimous adoption of any proposed change,²⁰⁶ known as a protocol.²⁰⁷ Another shortfall of a protocol is that only the states that ratify a protocol must provide the new rights to their citizens.²⁰⁸ Moreover, the meetings of the Committee of Experts on a simplified procedure for amendment that took place prior to the recommendation did not indicate any intent to focus on Article 10.²⁰⁹ Therefore, it is likely that the Council of Europe has chosen only to address the evolution of new media forms by issuing a recommendation rather than amending the Convention because of the severe obstacles to amendment.²¹⁰ Although the recommendation that was recently promulgated does not specifically mention the 2011 U.K. riots, the Committee of Ministers adopted this recommendation on September 21, 2011, only six weeks after the riots and the attention the riots brought to the role of social media. Thus, the riots may have been a factor in adopting the recommendation.²¹¹

The recommendation set forth by the Council of Europe provides a

202. Milian, *supra* note 74.

203. *See supra* Part IV.A.

204. *See* DH-PS, *supra* note 13, at 2.

205. *See id.* at 4–7 (describing an effort to make the procedure for amending the Convention less complicated and less burdensome); *see also* BENOÎT-ROHMER & KLEBES, *supra* note 94, at 107 (noting that recommendations “can be modified more rapidly” than Conventions).

206. *See* Reiss, *supra* note 96, at 293–94.

207. *See, e.g., Explanatory Report: Protocol No. 14, supra* note 95 (describing Protocol 14 and the amendments it made to the Convention).

208. EUR. COURT OF HUMAN RIGHTS, *supra* note 17, at 3.

209. *See* DH-PS, *supra* note 13 (excluding Article 10 from the list of articles that the Committee has agreed should or should not be subject to amendment by a simplified procedure).

210. *See Recommendation CM/Rec(2011)7, supra* note 15; BENOÎT-ROHMER & KLEBES, *supra* note 94, at 107–08.

211. *See Recommendation CM/Rec(2011)7, supra* note 15.

strong beginning for attempting to understand the legal implications of social media.²¹² In spite of the recommendation's meritorious attributes, however, it has an important shortfall: the Council of Europe acknowledges that its "[r]ecommendations are not binding on member States."²¹³ Therefore, while the recommendation is a commendable starting point, the individual members of the Council of Europe must take steps to implement this recommendation domestically and delve with more detail into the broadly phrased suggestions of the Committee of Ministers, as well as more thoroughly elaborate on differences between social media outlets that the Committee's recommendation did not address.²¹⁴ In so doing, the member states will ensure that any future governmental regulation of social media does not restrict the individual freedom of expression that Article 10 of the Convention guarantees.²¹⁵ Therefore, the member states must take action to implement the recommendation's suggestion that states "adopt a new, broad notion of media" that should expressly include social networks.²¹⁶ This Note only provides specific guidance for how the United Kingdom should incorporate the recommendation domestically, yet other member states may look to these suggestions to the extent that they would be feasible across international borders.

C. *Implementation of the Recommendation in the United Kingdom*

The United Kingdom should implement the Committee of Ministers' recommendation in two ways. First, the United Kingdom should encourage coordination between the Department for Culture, Media and Sport and the Equality and Human Rights Commission²¹⁷ to establish how to legislatively protect expression created by using social media. Second, the government should enact legislation requiring educational programs for the citizens and members of the government of the United Kingdom.²¹⁸

212. *See id.*

213. *See About the Committee of Ministers, supra* note 14.

214. *See Recommendation CM/Rec(2011)7, supra* note 15.

215. *See ECHR, supra* note 12, art. 10.

216. *See Recommendation CM/Rec(2011)7, supra* note 15.

217. *See generally Making It Easier, supra* note 79; *About Us, supra* note 16 (providing information about the organizations).

218. For a comprehensive discussion of educational initiatives, see FRAU-MEIGS, *supra* note 164.

1. Coordination Between the Department for Culture, Media and Sport and the Equality and Human Rights Commission

The United Kingdom's Department for Culture, Media and Sport and the Equality and Human Rights Commission should coordinate and work together to achieve the goal of implementing the Committee of Ministers' recommendation. The protected grounds for which the Equality and Human Rights Commission advocates notably do not include anything about media, and the Commission's website does not indicate that it has considered the issues raised by the 2011 U.K. riots or the relation of social media to human rights.²¹⁹ Meanwhile, the Department for Culture, Media and Sport is in the midst of a "wide-scale review of the regulatory framework supporting the UK [sic] communications sector."²²⁰ Therefore, these two branches of the U.K. government should work together to decide how to most effectively implement the recommendation's suggestion to "adopt a new, broad notion of media," since each department is independently tackling half of the issues.²²¹ These departments can no longer afford to operate in isolation from one another because they must address how to ensure that new forms of media, including social media expression, receive sufficient protection as individual human rights.²²²

Specifically, the Department for Culture, Media and Sport and the Equality and the Human Rights Commission need to carefully examine the myriad differences between various social media outlets. For example, looking only at Facebook and Twitter, the social networks originally blamed in the U.K. riots,²²³ one will find various differences between the two online platforms. It is important to be aware of the unique characteristics of each website in case the United Kingdom does decide to pursue limiting access at some point in the future. More specifically, Facebook users have the ability to create events, as one rioter did,²²⁴ whereas Twitter does not include an event-making

219. See, e.g., *Message from Our Chair, Trevor Philips*, QUALITY & HUM. RTS. COMMISSION, <http://www.equalityhumanrights.com/human-rights/human-rights-celebrations/international-human-rights-day-10-december-2011/message-from-our-chair-trevor-phillips> (last visited Oct. 15, 2013) (mentioning the 2011 U.K. riots without addressing the use of social media and its human rights implications).

220. *Government Commits to Child Protection in Video-on-Demand Services in Light of Ofcom Report*, GOV.UK (June 28, 2012), <http://www.gov.uk/government/news/government-commits-to-child-protection-in-video-on-demand-services-in-light-of-ofcom-report>.

221. *Recommendation CM/Rec(2011)7*, *supra* note 15.

222. *Id.*

223. Ball & Lewis, *supra* note 51.

224. Bowcott et al., *supra* note 2.

capability.²²⁵ Therefore, Facebook may have freedom of expression implications that Twitter will not.²²⁶ Another difference between Facebook and Twitter is that a “tweet” is limited to 140 characters,²²⁷ while the analogous “status update” on Facebook has a limit of 63,206 characters.²²⁸ Therefore, a Facebook user would be able to provide much more detailed information than a Twitter user posting about the same topic, idea, or event. Additionally, Facebook provides users with the option to have their profile show up in public search engine listings,²²⁹ whereas Twitter users’ messages may either be publicly available to any online user or “require manual approval of each and every person who may view that account’s Tweets.”²³⁰ Domestically, the United Kingdom must recognize these and other differences in deciding what measures they would take to ensure that different forms of social networks receive the freedom of expression that Article 10 of the Convention guarantees.

In contrast to Facebook and Twitter, BBM users send messages to each other that are “secure [and] encrypted.”²³¹ Therefore, it seems that any attempt to intercept or shut down BBM would raise serious privacy issues²³² under Article 8 that are not associated with Facebook and Twitter because the latter two social media outlets involve posting

225. *About, supra* note 50 (describing Twitter without including any information about a capability to create events).

226. As previously mentioned, the Human Rights Act of 1998 has domestically incorporated the Convention into domestic U.K. law. See Sweeny, *supra* note 91; Vick, *supra* note 91. Although a more extensive discussion on domestic legislation is outside the scope of this Note, for a summary of U.K. criminal laws restricting the freedom of expression, see generally *Your Rights – Criminal Law Restrictions on Freedom of Expression*, LIBERTY, <http://www.yourrights.org.uk/yourrights/right-of-free-expression/criminal-law-restrictions-on-freedom-of-expression/index.html> (last visited Oct. 15, 2013) (listing various categories of restrictions on the freedom of expression).

227. *About, supra* note 50.

228. Emil Protalinski, *Facebook Increases Status Update Character Limit to 63,206*, ZDNET (Nov. 30, 2011, 5:44 PM), <http://www.zdnet.com/blog/facebook/facebook-increases-status-update-character-limit-to-63206/5754>.

229. *What Is a Public Search Listing?*, FACEBOOK, <http://www.facebook.com/help/?faq=124518907626945> (last visited Oct. 16, 2012).

230. *About Public and Protected Tweets, supra* note 60.

231. Eric Zeman, *RIM: We'd Shut Down BBM Under Government Order*, INFO. WEEK. (Sept. 15, 2011, 2:29 PM), http://www.informationweek.com/news/mobility/smart_phones/231601502.

232. An extensive discussion of the different interpretations of privacy in the United States and the United Kingdom in this context is outside the scope of this Note. For a general discussion of the topic, see Duncan Carling, *Less Privacy Please, We're British: Investigating Crime with DNA in the U.K. and the U.S.*, 31 HASTINGS INT'L & COMP. L. REV. 487, 502–07 (2008) (noting that the British government invades the privacy of its citizens far more severely than the U.S. government does).

information publicly to some extent.²³³ In addition, it would be difficult for the government to obtain access to private and encrypted BlackBerry messages before the messages have caused damage because the public disorder itself would provide evidence of using a communication tool like the BlackBerry for creating public disorder.²³⁴ Therefore, the U.K. government's attempt to access BlackBerry messages to aid in criminal prosecution under the Serious Crime Act (the statute under which the two young men imprisoned for Facebook activity were charged)²³⁵ is distinguishable from infringing on the right to privacy *ex ante* because the government knows by that point that the technology has been used for nefarious purposes.

Therefore, in terms of going forward with the Committee's recommendation, the United Kingdom needs to inform itself of how to tailor any future legislative prohibition on social media because the Court imposes a strict test before it will permit a state to infringe on the freedom of expression.²³⁶ The 2011 U.K. riots have demonstrated that the Department for Culture, Media and Sport and the Equality and the Human Rights Commission can no longer function in isolation from one another because the development of new forms of media are also entitled to a guarantee of freedom of expression under the Convention.²³⁷

2. Social Media Education for Young People and Government Officials

Another way the United Kingdom can take steps to implement the recommendation is to create domestic legislation providing for educational training for different groups about social media.²³⁸ A draft version of the recommendation discussed the role of education regarding social media, but primarily focused on users' awareness of

233. *Compare Information We Receive About You*, FACEBOOK, <http://www.facebook.com/about/privacy/your-info> (last visited Sept. 8, 2013), and *Twitter Privacy Policy*, TWITTER, <https://twitter.com/privacy> (last visited Sept. 8, 2013), with *Privacy Policy*, BLACKBERRY, <http://us.blackberry.com/legal/privacy-policy.html> (last visited Sept. 8, 2013).

234. Dodd et al., *supra* note 144.

235. Wardrop, *supra* note 45.

236. Cohn, *supra* note 129, at 612–13.

237. See *Recommendation CM/Rec(2011)7*, *supra* note 15 (discussing how social media “requires a graduated and differentiated approach”).

238. See *Measures to Protect and Promote Respect for Human Rights with Regard to Social Networking Services*, COMM. OF EXPERTS ON NEW MEDIA (Sept. 15, 2011), http://www.coe.int/t/dghl/standardsetting/media/MC-NM/MC-NM%282011%2915_en%20HR%20and%20social%20networking%20services.asp.

not violating other people's freedom of expression, rather than concentrating on preventing the government from infringing on citizens' freedom of expression.²³⁹ One reason that Facebook and Twitter did not play a predominant role in the escalation of the U.K. riots is that such an electronic footprint inciting violence is easily traceable.²⁴⁰ Therefore, legislation that incorporates education and awareness about social media and its implications for both the government and pre-adolescent students is an effective way of implementing the Committee's recommendation.²⁴¹ Education about responsible social media use will also be helpful for pre-adolescent students because more than eighty percent of Internet users under the age of thirty use some form of social media regularly on a weekly basis.²⁴² Social media is practically of second nature to young people,²⁴³ and they might not realize all of the implications of their actions. Therefore, educating them about the perils of misusing social media could serve as another means of prevention.

Education of the government also needs to be a high priority. The meeting that Home Secretary May held with leaders from the social media companies is an example of the type of discourse that should continue as the United Kingdom tackles the many novel legal issues social media has created. Prior to that meeting, the government considered banning social media; however, public statements issued after the meeting indicated that the parties instead planned to work together.²⁴⁴ This indicates that governmental leaders should use similar meetings as a way to educate themselves and make sure that they understand the complex workings of social media, rather than jumping to alarmist conclusions as David Cameron did after the riots.²⁴⁵

Specifically, the United Kingdom could incorporate the efforts of the European Wergeland Centre, which receives funding from the Norwegian parliament and encourages all members of the Council of

239. *Id.*

240. Ball & Brown, *supra* note 57 (noting teens' awareness that the police would not be able to track BBMs).

241. *See generally* FRAU-MEIGS, *supra* note 164 (discussing ways to incorporate education about new technology).

242. Kane, *supra* note 33, at 329.

243. James Ball, *Two-thirds Support Social Networking Blackout in Future Riots*, GUARDIAN (Nov. 7, 2011), <http://www.guardian.co.uk/media/2011/nov/08/two-thirds-support-social-media-blackout> (noting that people between the ages of eighteen and twenty-four use social media most frequently).

244. Milian, *supra* note 74.

245. *See* Halliday & Garside, *supra* note 1.

Europe to avail themselves of its resources.²⁴⁶ The Centre recognizes that “institutions and laws are not enough by themselves” and aims to connect “policy and practice.”²⁴⁷ Moreover, the Centre has previously worked with member states to aid their respective governments in implementing the Committee of Ministers’ recommendations, and this prior experience would be beneficial here.²⁴⁸

V. CONCLUSION

The riots that took place in the United Kingdom in August of 2011²⁴⁹ placed a new spin on a familiar situation. The use of social media websites and BBM has introduced novel legal issues that the Court has not previously considered.²⁵⁰ The Court’s analysis is heavily dependent on the individual facts of each situation in Article 10 cases.²⁵¹ Therefore, while it is not entirely possible to predict how the Court would rule if the United Kingdom were to ban social media to prevent violence, it is likely that the Court would consider such a ban an infringement on the freedom of expression due to the lack of proportionality in a broad social media ban.²⁵² Fortunately, the Council of Europe acknowledged almost immediately after the riots that it is prudent to recognize that the advent of the Internet, social media, and new technologies is changing how the world defines the freedom of expression.²⁵³ Even so, member states of the Council of Europe must take the next step in domestically implementing the Committee of Ministers’ recommendation since it is not binding.²⁵⁴ If the Court, the United Kingdom, and other member states of the Council of Europe take note and make special allowances for these new issues, they will be at the forefront of international human rights in today’s technological twenty-first century.

246. *The European Wergeland Centre: A Resource Centre to Build Bridges from Policy to Practice*, COUNCIL EUR. COMMITTEE MINISTERS (Feb. 9, 2011), <http://www.theewc.org/uploads/content/EWC%20presentation%20to%20the%20CoE%20Committee%20of%20Ministers.pdf>.

247. *Id.*

248. *Id.*

249. Bolesworth et al., *supra* note 27 (describing the riots).

250. *See supra* note 150.

251. *See Barendt, supra* note 146, at 866.

252. *See McKaskle, supra* note 127, at 46–49.

253. *See Recommendation CM/Rec(2011)7, supra* note 15.

254. *About the Committee of Ministers, supra* note 14.