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The New American Privacy

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THE NEW AMERICAN PRIVACY

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The European Union sparked an intercontinental furor last year with proposed legislation[1] to supersede the 1995 Data Protection Directive (DPD).[2] The EU Parliament approved the legislation in a 49-3 committee vote in October. The text, which is not yet published in its current draft at the time of this writing,[3] may yet be amended before being accepted by the union's 28 member states. The legislation is billed as a money saver because it would harmonize EU member states' data protection laws, which have diverged under the DPD umbrella. The business community is not convinced, fearful that costly new demands will strain balance sheets and depress innovation.

But that's not the half of it; unlike the DPD, the regulation would reach businesses that serve Europeans but are based abroad, including transnational purveyors of information, such as giants Google and Facebook, and of online news, such as Washington-based National Public Radio.

At the heart of the controversy lies the "right to be forgotten," a.k.a. *le droit à l'oubli*, a feature of the EU proposal that would let people revoke consent for the use of their personally identifying information (PII) and even demand its erasure—perhaps even when the PII is posted upstream or possessed downstream by a

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1 Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf.

2 Directive 95/46/EC of the European Parliament and the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1995:281:0031:0050:EN:PDF.

3 For a good hint, see European Parliament Approves Compromise Text on Regulation, Hunton & Williams Privacy & Info. Security L. Blog, Oct. 21, 2013, http://www.huntonprivacyblog.com/2013/10/articles/european-parliament-approves-compromise-text-on-regulation/.

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third party. Google could be compelled to block search results, or Facebook to erase a group photo despite the poster's objection.

European officials have promised a regulatory exemption for news outlets. But the scope of any such exemption is to be negotiated and anyway would move free expression into the regulatory prerogative. The powerful right of human dignity in European human rights law already has precipitated the criminalization of republication of a dated crime story, for example, where the subject's rehabilitative interest is said to outweigh the freedom of expression. That this balance runs contrary to the free speech imperative in U.S. constitutional law, namely the general rule against criminal penalty for the publication of truthful information lawfully obtained, ruffles the feathers of American free speech advocates.

The divide is familiar, of a kind with the tension that generated the U.S. SPEECH Act of 2010 that precludes the enforcement of foreign libel judgments incompatible with the First Amendment. The U.S. ethic derives from American libertarianism and suspicion of government, while the European approach is thought consistent with social-democratic norms and an affection for measured market regulation. Marked by the Atlantic Ocean, a divergence in Western thought erupted over the primacy of personal privacy in the wired world.

Or so goes the conventional wisdom. But in a recent article in the *Georgetown Journal of International Law*,[4] I argue that a simple dichotomy ignores a nuanced reality in thinking about free expression and privacy in the United States; and that the American position in fact might not differ so dramatically from Europe's. In the waning light of the civil rights-era reformation of American constitutional law, the U.S. free speech imperative is tarnishing. In its notoriously gradual but unrelenting pace, the law of the United States is embracing a new American privacy.

The law in the United States is famously fond of free expression. Civil rights-era constructions of the American First Amendment transformed and expanded the role of free speech in tort and criminal defense. The defamation doctrine of *New York Times v. Sullivan*[5] has dashed the prospects of many a plaintiff, and the rule against prior restraint has grown through its corollary disfavor for restrictions on the republication of lawfully obtained, truthful information—the latter in a series of cases that we can shorthand-cite to *Smith v. Daily Mail*.[6]

But both *Sullivan* and *Daily Mail* rules are showing their age. *Sullivan*'s obsession with proof of falsity is not readily broadened to other torts, such as invasion of privacy and interference, wherein truth may be the very thing that causes injury. Moreover, Sullivan's hard constitutional lines have drawn criticism for unintended consequences, such as media refusal to meet plaintiffs halfway in case of shoddy journalism. Citing such concerns, other common law countries have rejected *Sullivan*, an impetus in part for the aforementioned SPEECH Act.

Smith is facing its trials too. Media took a hit when they pressed their position in the Tenth Circuit to protect a right to republish the identity of Kobe Bryant's sexual-assault accuser, whose identity was published first in error by the court clerk. The Colorado Supreme Court narrowed a prior restraint order upon changed facts. But the court's initial inclination to unring the bell, never fully disavowed, suggests that personal privacy might one day put on enough constitutional weight to take down free speech.

Meanwhile the free expression interest is fighting for its life with personal privacy in areas of the law in which the First Amendment never during the civil rights era managed to insinuate itself fully. For example, privacy has gained ground in freedom of information law—consider the recent reemergence of the issue of public access to gun registries—where statutory balancing tests have long born a remarkable resemblance to the European approach to balancing human rights. And recent decades' development of court record access policies have given new credence and legal significance to personal privacy in practical obscurity, undermining electronic-era access norms such as medium neutrality, and even the civil rights-born norm that a record requester's motive is immaterial.

Academics are writing furiously on privacy. Influential thinkers such as Daniel Solove and Helen Nissenbaum are trying to tame American privacy law into a rational framework that can bear arms against

4 *The New American Privacy*, 44:2 Geo. J. Int'l L. 365 (2013), *available at* http://ssrn.com/abstract=2266528.

5 376 U.S. 254 (1964).

6 443 U.S. 97 (1979).

competing rights. Solove looked at privacy injuries and worked backward to define actionable wrongs. Nissenbaum posited "contextual integrity," a model in which changes in the context surrounding information may trigger enforceable changes in the subject's expectations. Both theories mean to challenge the media complaint that Americans want to have their cake and eat it too—that is, to enjoy personal privacy or public exposure alternatively, as it suits them—with models that rationally accommodate such variability.

This kind of thinking keeps free speech absolutists up at night. But the tarnishing rules of civil rights-era free speech law, emerging protections for privacy in free expression contexts, and evolving scholarly proposals all add up to a reflection of American privacy norms that do not comport with the conventional wisdom; and that in fact reflect a European balancing approach far better than American free speech libertarianism. Despite vociferous U.S. objections to the EU legislation, law in the United States is coalescing around a new American privacy. ⚖

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2013-2014 TIPS Meeting Dates

TIPS Fall Meeting
October 8-13, 2013
Minneapolis Marriott Hotel
Minneapolis, MN

TIPS Spring Meeting
May 14-18, 2014
Boca Raton Resort & Club
Boca Raton, FL

ABA Midyear Meeting
February 5-11, 2014
Swissotel
Chicago, IL

ABA Annual Meeting
August 7-12, 2014
Sheraton Hotel
Boston, MA

2014-2015 TIPS Meeting Dates

TIPS Fall Meeting
October 15-19, 2014
The Meritage Resort & Spa
Napa, CA

TIPS Spring Meeting
April 29-May 3, 2015
The Ritz-Carlton
Philadelphia, PA

ABA Midyear Meeting
February 4-10, 2015
Hilton of the Americas
Houston, TX

ABA Annual Meeting
July 30-August 3, 2015
Hyatt Regency
Chicago, IL

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