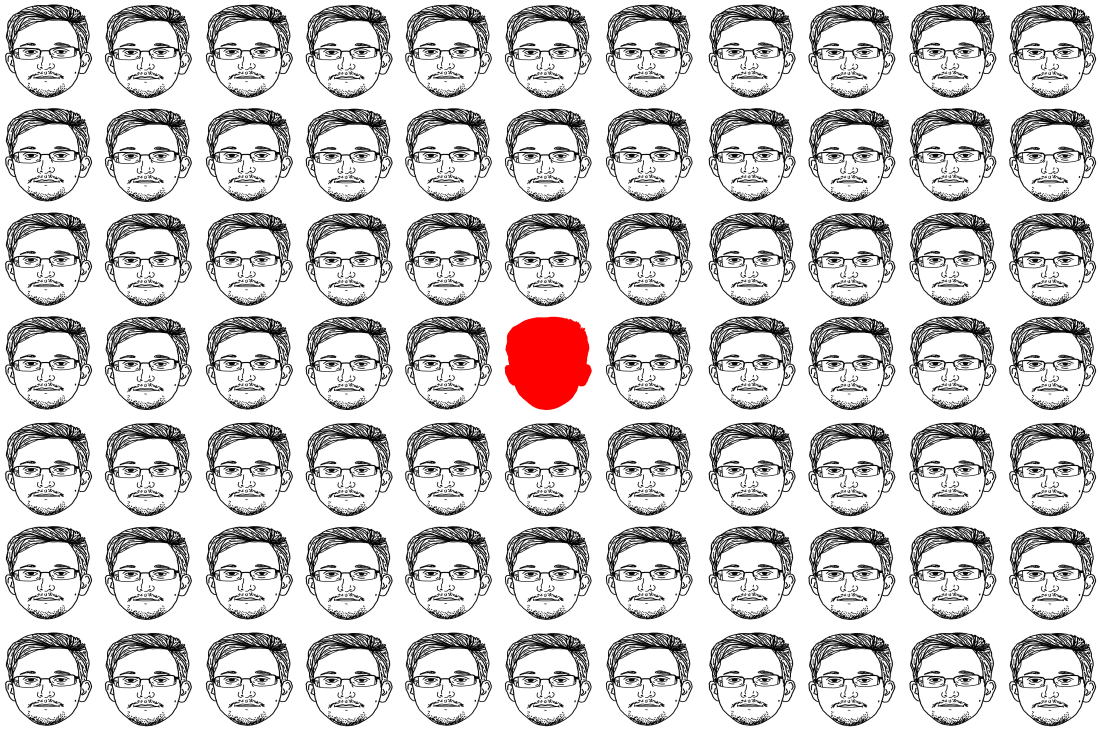
Transatlantic Clashes on Privacy in a Digitalized World

Information Society Project @ Yale
Fall 2016
Informal Reading Group



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Details :

Time : Every monday at 6.pm except october 24 and november 14
Location : The conference Room @ 40 Ashmun Street (4th floor).
Reading group leader : Jean-Philippe Foegle
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Reading materials : Journal articles

Description :

In recent years, the development of the internet and the public disclosure of mass surveillance programs by Edward Snowden have led to clashes between EU and US cultures of privacy. These clashes have harshly revealed differences of opinion between the EU and the US on the very nature of privacy, and on how to reconcile privacy claims and freedom of expression and opinion in both sides of the atlantic. Finally, this led the CJEU to overturn the EU-US "Safe Harbor" agreement that used to be the main legal basis for transborder flows of personal data between the EU and the US. The court also harshly condemed the very principle of mass surveillance. Theses developments in privacy leaves us with a disordely situation, where it's becoming increasingly difficult for both courts and legislatures to find their way through the maze, but where it remains nonetheless "business as usual" given the huge economic interest at stake in maintaining transatlantic personal data flows.

In 6 weekly meetings (2 hours each), this informal reading group will examine key issues in privacy clashes between the EU and the US. Attendees will read cutting edge papers on the issues of the

differences between both the U.S and Europe views on privacy, and discuss these. The reading group will provide participants with a good overview of EU-US privacy controversies, and will give them the opportunity of thinking about how to reconcile EU and US approaches to privacy and data protection in a digitalized world.

October 10 : Data protection in US law and EU Law: basics and history

Synopsis :

In a 2004 article published in Yale Law Journal, Yale professor James Whitman saw the European conception of privacy as tied to the concept of "dignity", in contrast with the U.S conception which appears as tied to the concept of "liberty". Nuancing this argument, Pr. Whitman showed that the US and European legal cultures of privacy have simultaneously followed different paths, and interacted together. This leads to be very cautious about the idea that there would be, because of the history, irreconcilable differences between the US and Europe in respect of the right to privacy.

How have US and EU cultures of privacy developed over times ? What are the noticeable differences between the two conceptions in a digitalized world ? How have they interacted, and how recent controversies have helped shaping a partially mutual understanding of privacy on both sides of the atlantic ?

Readings :

- Whitman, J. Q. (2004). The two western cultures of privacy: Dignity versus liberty. *Yale Law Journal*, 1151-1221.
- Post, R. C. (2000). Three concepts of privacy. *Geo. LJ*, *89*, 2087.

October 17 : Mass surveillance and Transbord Flows of Data Post Schrems

In its Schrems ruling, the ECJ has sharply condemned the US mass surveillance system. After recalling that the Safe Harbour lays down that "national security, public interest, or law enforcement requirements" have primacy over the safe harbour principles, the Court stated that the decision did not contain any finding regarding the existence of rules adopted by the United States intended to limit any interference. Thus, it implicitely stated that derogations and limitations in relation to the protection of personal data in the U.S does not apply only in so far as is strictly necessary Interestingly enough, the ECJ has also seemed to require the US to implement a "EU-style" data protection authority, by stating that the Federal Trade Commission disputes relating to the legality of interference with fundamental rights that results from measures originating from the State. This raises a lot of question in light of the new "Privacy Shield".

What does the decision says about the supposed "European model" of data protection and how does it differ from the U.S ? Were the findings of the court about the U.S surveillance system really accurate in the light of the new "Freedom Act" ? What does the "Privacy Shield" changes in terms of privacy protection, and is it actually compliant with the S*chrems* ruling ? More broadly, how should corporations review their strategies on data management and transborder flows of data ?

Readings

- Padova, Y. (2016). The Safe Harbour is Invalid : What tools remain for international transfers and what comes next ? . International Data Privacy Law, ipw009.

- Tzanou, M. (2016) The Commission's draft EU-US Privacy Shield adequacy decision: A Shield for Transatlantic Privacy or Nothing New under the Sun?, EU Law analysis
- Bender, D. (2016). Having mishandled Safe Harbor, will the CJEU do better with Privacy Shield ? A U.S perspective? *International Data Privacy Law*, ipw005.

October 31 and November 7 : The right to be forgotten before and after the EC « Google Spain » ruling

Guest speaker (By skype) on November 7 : Frank Pasquale (to be confirmed)

Synopsis:

In Europe, Article 12 of the Directive 95/46/EC provided legal basis for "right to erasure" claims, and the draft European Data Protection Regulation published in 2012 and adopted in 2016 now explicitely provides EU citizens with a "right to be forgotten". In the US, the "right to be forgotten" has long been recognized in the context of criminal law, but it has been outlined that the further recognition of the right would contravene the right to freedom of speech and potentially violate the Constitution. In the context of transatlantic data flows, the controversial "Google Spain" ruling has demonstrated that regulatory differences between the EU and US still remained on that issue, and this shaped discussions and negotiations on trans-Atlantic data privacy regulations.

What are the main differences in the scope and nature of the right to be forgotten in both sides of the atlantic ? Has the ECJ found an accurate balance between the different fundamental rights at stake in the right to be forgotten ? How has it affected the right to inform ? How will the new EC directive shape further discussions on that issue ? How should the law of reputation be reformed to help resolving clashes ?

Readings :

➢ On **October 31** : Roots of the rights, the ECJ Jugment and differences in EU and US conceptions

- Mantelero, A. (2013). The EU Proposal for a General Data Protection Regulation and the roots of the 'right to be forgotten'. *Computer Law & Security Review*, *29*(3), 229-235
- Rosen, J. (2012). The right to be forgotten. *Stanford law review online*, *64*, 88.
- Frantziou, E. (2014). Further Developments in the Right to be Forgotten: The European Court of Justice's Judgment in Case C-131/12, Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos. *Human Rights Law Review*, ngu033.

➢ On **November 7** : Reputation, Free Speech and the Right to be Forgotten

- Pasquale F.(2016). Reforming the Law of Reputation (2015). 47 Loyola University Chicago Law Journal 515, U of Maryland Legal Studies Research Paper No. 2016-03.
- Werro, F. (2009). The right to inform v. the right to be forgotten: A transatlantic clash. *The Right to be Forgotten: A Transatlantic Clash (May 8, 2009). LIABILITY IN THE THIRD MILLENNIUM, Aurelia Colombi Ciacchi, Christine Godt, Peter Rott, Leslie Jane Smith, eds., Baden-Baden, FRG*.

November 21 and 28 : Looking back and forward : is there a way of reconciling EU and US approaches to privacy and data protection ?

Synopsis :

Based on previous discussions and further readings, this two-week's session will lead to an open discussion on how to reconcile EU and US approaches to privacy and restore trust in transborder flows of data.

How the extraterritorial scope of EU data protection law is likely to evolve in the light of the enactment of article 3 in the new European Data Protection Regulation ? How should the territorial scope of EU law be defined to help resolving transatlantic controversies ? How could international law (OECD, Human Rights Law) help building a common understanding of privacy ?

Readings :

For **november 21** : Necessary steps to be taken by both the EU and US

- Svantesson, D. J. B. (2015). Extraterritoriality and targeting in EU data privacy law: the weak spot undermining the regulation. *International Data Privacy Law*, ipv024.
- Bignami, F. and Resta, G. (2015). Transatlantic Privacy Regulation: Conflict and Cooperation,. Law and Contemporary Problems, Vol. 78, Fall 2015; GWU Law School Public Law Research Paper No. 2015-52; GWU Legal Studies Research Paper No. 2015-52.

For **november 28** : How could international law help building a common understanding ?

- Deeks, Ashley (2014). An International Legal Framework for Surveillance. Virginia Journal of International Law, Vol. 55, Issue 2, 2015; Virginia Public Law and Legal Theory Research Paper Series 2014-53.
- Marcinkowski, B. M. (2013). Privacy Paradox (es): In Search of a Transatlantic Data Protection Standard. *Ohio St. LJ*, *74*, 1167.