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**Legal Regimes for Protecting Internet Privacy**

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This paper principally concerns protection of personal data, information that is either identified to a private individual or identifiable to a particular individual. The United States has long lacked an effective regime for protecting the privacy of individuals. From a public international law perspective, the EU Directive mandating data privacy (Directive 94/46 of 1995)<sup>[1][1]</sup> will almost certainly become the *ius gentium* for Data Privacy.<sup>[2][2]</sup> This is because twenty-five countries are now member states of the European Union itself, and legislation similar to the EU data-privacy law has rapidly spread to the notional British Commonwealth. As explored below, on this issue the U.S. remains at heart still out of sync. The EU's threat to interdict data transmission to the U.S., unless the U.S. enacted minimal U.S. guarantees of privacy for personal data, finally struck Washington as real. The resultant Safe Harbor agreement achieved in the year 1999 guarantees in theory at least some degree of data privacy, but as explored below the U.S. regime essentially leaves the personal information of its hapless citizenry vulnerable to business self-regulation, making U.S. law inadequate to protect the privacy interest from business intrusions.

Recently the Internet, with its wide gathering and dissemination of personal and impersonal information, has exacerbated the privacy-invasion problem. The fear is properly against two goliaths' invasions of personal privacy: the monolithic U.S. Government and U.S. Business with its presumption that the "owner" of personal data is not the human data subject but Business itself. The EU and Canada and other members of the Commonwealth have not embraced the Americans' concept of *propertization* of personal data. Why the American psyche sits passively allowing business usurpation of privacy rights is unclear, but the problem is likely mass ignorance of the extent of business intrusion mixed with inertia and, in the case of the well-informed, hopelessness about changing the existing system. Parenthetically, this problem is reminiscent of the current U.S. problem with insurance companies' invasions to the point of dictating the rules, of the doctor-patient relationship.

The focus of concern in the United States has been the constitutional freedom from unreasonable *governmental* intrusion. The 1776 Declaration of Independence proclaims Americans' hoped-for freedoms of life, liberty, and the pursuit of happiness, *happiness*" for many Americans being synonymous with *property*, just as in Thomas Jefferson's time. The American focus on constitutional freedoms from governmental intrusions is appropriate, even laudable, but dangerously incomplete in modern times. In 1776 there were unpopulated territories to which to retreat, places where a person could begin a new life with a new identity. Today, computerized tracking follows a fleeing citizen anywhere. Every arrest is recorded,

and available through the Internet, making the sacrosanct presumption of innocence a sham in U.S. society, particularly as acquittals and settlements rarely come onto Google to be discovered in conjunction with the arrest. And today, private **business'** data-mining of private individuals' identity factors, and free-wheeling selling of personal data, have come to represent at least as great a threat to personal liberty and privacy as governmental surveillance.

Congress passed a so-called Patriot Act too soon, without proper reflection, after the terrorist threat of 11 September 2001, legislation so rapidly and comprehensively written and enacted as fairly to be characterized as knee-jerk legislation. The very name given the Patriot Act is frightening: *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act* (PATRIOT Act).<sup>[3][3]</sup> Ditto the Orwellian "Department of Homeland Security." The Patriot Act and subsequent public sentiment that called into question as "unpatriotic" any voice not wholeheartedly in support of such legislation heightened the post-World War II threat of governmental usurpation of the traditional liberties embraced by Americans.

Aside from the EU-U.S. Safe Harbor agreement, for the most part U.S. law leaves it to the law of torts, woefully inadequate to the task, to protect the personal privacy of an individual. So-called dignity or defamation torts include slander and libel, and public disclosure of private facts. The United States Supreme Court as told us in *New York Times v. Sullivan*<sup>[4][4]</sup> that an injured victim who is a "public figure" can sue in slander or libel only if the defamatory material is not true. This is a shameful decision, leaving a public figure no semblance of privacy. And in the U.S. the public-disclosure-of-private-facts tort has few teeth. The failure of tort law to meet today's concerns leaves a lacuna for true but (what should be) private information constituting and supporting the dignity interest of an individual. The fundamental principle the U.S. should adopt is that even if there must be "propertization" of data, it is the individual himself or herself who owns that property.

### **U.S. Privacy Protections Against the Government:**

The author has gathered pertinent statutes up to the year 2002 in a previous publication,<sup>[5][5]</sup> but will list and briefly discuss them here. First, the Privacy Act of 1972 was enacted during the Watergate era as a response to Nixonian abuses and as the first omnibus legislation intended to protect against the government's intrusions into personal privacy. It does nothing to stop private entities' gathering and disseminating what should be private, personal information.

The **First Amendment** to the Constitution is interpreted to go too far when it has allowed corporations to claim a right to freedom of speech that includes the right to "own" the private information of other, private citizens. Indeed, some courts have refused to recognize such a First Amendment right in business.

**An example of piecemeal, and incomplete, legislation in the U.S. is the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa et seq., which is not what its name would imply, but is merely Congress's response (knee-jerk?) to the case of *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).<sup>[6]</sup> Its limited aim is to prohibit a kind of governmental prior restraint, that is, to prevent**

**police from demanding that journalists turn over their work products and documentation before publication to the public. According to the Electronic Privacy Information Center, "While law enforcement would like to obtain this type of information from a journalist, the PPA protects the journalist's freedom to publish such information under the First Amendment without government intrusion."**<sup>[7]</sup>

### **History of the Act**

The PPA was the Congressional response. That case arose when police conducted a warranted search of the Stanford Daily's newsroom seeking photos of a demonstration at which officers were injured. Staff of the Daily had attended and photographed the violent demonstration and ran a story with photographs. In response to the publication, the police went to the Daily looking for unpublished photographs which investigators could then use to identify and prosecute violent demonstrators. The search turned up no new photographs of the event other than those already published.

In England, there is surprising passivity to the recent ubiquitous placement of CCTV cameras: at train stations, airports, banks, public gathering places. Perhaps the public tolerates this governmental scrutiny because of the long-existing terrorist activities of the Irish Republican Army, perhaps because of the long memory of the invasion of bombs and alien forces during the *Blitzkrieg* times of World War II. Compared to England, the U.S. is not scrutinized by CCTV cameras. But little is known to the average American about overhead surveillance by CIA and other government-maintained satellites. *Quaere*: Are they really necessary to maintain world peace? Would their presence survive a legal test under the Doctrine of Proportionality?<sup>[8]</sup>