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Struggling Over Civil Liberties:  
The Troubled Foundations of the West

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Abstract:

Shared fundamental liberties and democratic principles have long provided the core of what observers of international affairs termed the West. While national institutions and policies have at times varied, they rarely challenged the foundations of the transatlantic partnership. With the rise of information technology and the new security environment, however, local variations in fundamental rights have produced significant international implications. Examining recent transatlantic disputes over privacy and free speech, the paper argues that a new set of international issues have emerged dealing with transnational civil liberties. Once core unifying principles of the transatlantic relationship these basic freedoms have transformed into flashpoints for conflict. After identifying this new trend, the paper argues that the nature of these conflicts is framed by the timing of international interdependence relative to the maturity of national regulatory regimes.

All democratic nations struggle to find the appropriate balance between personal freedom and societal order. The extent of government control over individual behavior poses a fundamental challenge in reaching these compromises. When may the state legitimately restrict rights of speech, assembly, privacy, or due process? By continually revisiting these questions, democratic countries on both sides of the Atlantic have developed unique and evolving answers. While acknowledging the general principles that underpin such rights, the scope and implementation of such protections vary considerably. Distinct national civil liberties regimes emerged out of the on-going domestic state-building and state-adaptation processes.

Long viewed as a core domestic policy concern, civil liberties have recently taken on a critical international dimension. With the diffusion of advanced communications systems, continued international market integration, and rise of transnational criminality and terrorism, individuals increasingly find themselves subject simultaneously to multiple civil liberties regimes. Internet postings, for example, viewed by German citizens residing in Germany that are housed on a server in the United States quickly raise questions concerning traditional notions of sovereignty based on territorial jurisdictional. Similarly, cooperative police efforts within Europe such as the European Arrest Warrant or the growing transatlantic partnership between the FBI and Europol obscure the distinction between domestic and international security. As the balance between individual rights and government control begins to involve multiple governments, *transnational civil liberties* issues arise. Distinct from traditional human rights concerns, where nations agree to abide domestically to basic standards concerning human dignity, transnational civil liberties involve

overlapping jurisdictions and conflicting interpretations of how these basic principles should be carried out; the international and national blur.

Transnational civil liberties have important implications for individual freedom and government control. National civil liberties' norms affect fundamental personal behavior – protest, intimacy, and trust. Subjecting individuals to multiple civil liberties regimes, including those to which they had no part in constructing, destabilizes core norms required for democratic legitimacy. Acts such as extreme rendition, where governments cooperate to skirt national due process rights in order to conduct suspected terrorist interrogations, threaten to foster distrust in the body politic. At the same time, states come into direct conflict with one another over basic institutional powers. As foreign governments and firms encroach on national civil liberties, domestic governments enforce their national rules; regulatory frictions inevitably result.

Over the last decade, the transatlantic partnership has been plagued by a host of transnational civil liberties conflicts. Ranging from free speech to privacy, the U.S. and Europe have engaged in tough international negotiations over how such issues should be managed. Despite considerable negotiations and jockeying back and forth, few global solutions have been found (Bessette and Haufler 2001; Drezner 2004). These disputes signal a troubling unease in the core norms that underpin the relationship. In contrast to scholars writing in the aftermath of the Cold War that stressed the fundamental normative consensus between Europe and the U.S. (Fukuyama 1992; Huntington 1998), these transnational civil liberties issues demonstrate a growing heterogeneity of values in the international block labeled the “West”. As this consensus fractures, transnational civil liberties become a potential wedge issue that other nations can employ to further destabilize the transatlantic

alliance. Countries including China and Saudi Arabia have already leveraged disagreement in the “West” to justify their own harsh policies concerning civil liberties.

This essay identifies this new area of important international conflict and cooperation: transnational civil liberties. It first examines the factors that elevate civil liberties to the international level. This section is followed by several cases of transatlantic conflict involving privacy and free speech. The third section introduces the concept of *regime maturity* to help researchers of international interdependence think about the drivers of these conflicts. The paper ends by calling for future work to consider the timing of international integration relative to the maturity of domestic regulatory regimes.

#### *The Rise of Transnational Civil Liberties Disputes:*

The development of national civil liberties regimes has been an on going, at times extremely difficult, process. At their core, these regimes strike a balance between individual freedom and government control. The fundamental issue in question concerns the ability of the government to interfere in the personal lives of its citizens or said differently an individual’s freedom from government control – the right to assemble, to free speech, to privacy.

While all Western democracies recognize these rights, none grant them absolute priority over all other societal concerns. And this balancing of government and individual interests varies cross-nationally. Neo-nazi propaganda is illegal in France and Germany while not in the United States; the right to bodily privacy is heavily contested in the United States but not in Sweden. These differences are a natural evolution of the national state-building process as societies faced unique historical challenges endowed with a specific set of political institutions. Civil law versus common law traditions alone place a completely

different set of actors in charge of developing and enacting national civil liberties protections (Kagan 2001). It is therefore not surprising that countries have distinct defaults in terms of the proper balance between government control and individual liberty (Whitman 2000; Krotoszynski 2004).

These differences long remained odd quirks internationally that were featured most prominently as cultural notes in foreign language texts or in travel guides. Civil liberties issues within the Western democracies were national debates. Three changes in the international system, however, have wrested civil liberties concerns from the parochial and elevated them onto the international stage. First, information technology has radically altered one's ability to communicate and share ideas globally. The Internet has recast the individual as a publishing house with international reach and extremely low overhead. New forms of information detailing intimate personal behavior ranging from retina scans to webclick streams are being produced and sent across borders. Information technology, then, has altered the types and sources of information available to individuals, businesses, and governments. Control over these information flows becomes a central policy debate as governments attempt to regulate content and maintain domestic order (Zysman and Newman 2006). National decisions in these areas now, however, have international effects as regulations in one country spillover into other markets (Economist 2001; Diebert 2002).

Second, market integration has increased demands on government to share information across borders. The removal of internal customs borders within much of Europe to encourage labor mobility, for example, requires intense cooperation among public administrations to maintain security and control immigration. Similarly, the international integration of financial services markets spurred new transgovernmental cooperation to oversee international financial market coordination and fight new forms of criminality

(Raustiala 2002). These cooperative efforts, however, challenge nationally diverse civil liberties regimes as domestic immigration and surveillance policies breakout of the confines of national jurisdictions (Hoey 1998).

Third, and finally, the rise of transnational terrorism and criminality have collapsed the distinction between domestic and international security concerns. As governments attempt to respond to global terrorist networks, they have increasingly made demands on foreign governments that challenge civil liberties in those foreign jurisdictions. At times, national security forces have directly conducted operations in foreign soil. The intense debate over extreme rendition, whereby the US CIA transferred terrorist suspects to foreign soil to conduct interrogations, demonstrates the extreme case. As domestic and international security merge, tensions often escalate, owing to varying national traditions concerning surveillance, due process, and free speech.<sup>1</sup>

Information technology, market integration, and the new security environment, have produced a new set of transnational civil liberties issues in the international system. In more traditional human rights areas, governments attempt to promote core natural rights in other nations despite the fact that their own citizens are rarely directly affected by such policies. Transnational civil liberties, by contrast, emerge when citizens become subject to multiple civil liberties regimes simultaneously. In these cases intense politics is likely as very sensitive national compromises are reopened at the international level and must be negotiated by multiple governments and multiple civil societies.

The following section examines two cases – data privacy and free speech – in more detail in order to flesh out this new impetus for cooperation and conflict in the international arena.

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<sup>1</sup> US-European cooperative efforts and the tensions that they have produced are reviewed in (Archick 2006).

### *Data Privacy:*

In the late 1960s, governments started exploring how to use computer technology to increase bureaucratic efficiency, reduce fraud, and improve services. Across the advanced industrial economies proposals emerged to link previously disparate databases ranging from child welfare roles to police records. These proposals quickly met with significant opposition from politicians and social activists who feared that computer enabled tracking would undermine fundamental civil liberties. Such concerns were stoked by a series of executive agency scandals including Watergate in the U.S. and the SAFARI affair in France, which underscored how personal information could be exploited by governments to dangerously expand their power and silence opposition (Flaherty 1989; Bennett 1992).

In response, alliances formed to promote legislation that created regulations concerning the collection, processing, and exchange of personal information. These rules, called data privacy laws, first appeared in Sweden in 1973 and the United States in 1974; France, Germany, and Luxemburg quickly followed in the second half of the 1970s. While these laws all rest on the same fundamental principles, which have been labeled the Fair Information Practice Principles (FIPP; see table 1 for a review of the principles), they differ considerably in their scope and enforcement. The United States (and later countries ranging from Canada to Japan) adopted limited legislation, which focused primarily on the public sector and a few critical industries such as credit reporting. These limited systems had weak oversight mechanisms, relying primarily on self-policing of administrative agencies and the private sector. In much of Europe, by contrast, comprehensive privacy regimes were created that covered the public and the private sectors. They were monitored and enforced by independent regulatory agencies with considerable delegated authority. These agencies enjoy

a considerable amount of autonomy from elected officials, appointed for extended periods of time with dedicated resources and housed separately from any other ministry. Many had the power to sanction non-compliance and were required to give annual reports to the legislatures on privacy protection by both government agencies and the private sector (Newman 2005).

**Table 1: The Fair Information Practice Principles**

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<i>Collection limitation:</i> <b>personal information collection should be limited and lawful</b>
<i>Purpose:</i> <b>the purpose of data collection should be disclosed and data should not be used for other purposes without consent</b>
<i>Openness:</i> <b>individuals should be informed about privacy policies</b>
<i>Accuracy:</i> <b>data should be accurate, complete, and current</b>
<i>Participation:</i> <b>individuals may request information about data held by organizations and challenge incorrect data</b>
<i>Security:</i> <b>stored data must be secure from theft or corruption</b>
<i>Accountability:</i> <b>organization must be held accountable to measures that implement the above principles</b>

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While there had been some early international discussion concerning privacy regimes in the 1970s, these debates produced little policy convergence. An international team of experts met to consider data privacy policy in the 1970s under the auspices of the Organization for Economic Cooperation and Development (OECD) and codified the FIPP principles internationally in the OECD *Guidelines on the protection of privacy and transborder flows of personal data* (OECD 1980). The OECD guidelines, however, were non-binding and did not address issues of scope or enforcement. Additionally, the FIPP provide only broad principles that in legislative implementation can have extremely significant implications for levels of privacy protection. Consider, for example, the

difference between consent requirements that allow an organization to collect information about an individual as long as they do not object to the collection of that information versus a requirement that an organization must obtain positive consent from an individual before collecting personal information (opt-out vs. opt-in). Both satisfy the FIPP principle of purpose but have very different effects on the balance of power between governments and individuals in a privacy regime.<sup>2</sup> The real world difference between regulations in the US and Europe have set the two regions on distinct economic trajectories for their respective information economies.<sup>3</sup>

As market integration progressed in Europe during the late 1980s, data privacy authorities lobbied and pushed for European-wide rules to harmonize regulations. In 1995, the European Union adopted a directive concerned with data privacy.<sup>4</sup> The privacy directive required all member states to adopt comprehensive privacy legislation enforced by an independent regulatory agency.

Acknowledging that information technology had transformed data processing into a global phenomenon, the directive included an extraterritorial provision. This provision banned the transfer of personal information from European organizations to organizations in countries that did not have “adequate” privacy protection standards. And the Europeans did not consider the limited system in countries including United States and Japan to meet the adequacy standard.

As the directive came into force in 1998, its provisions quickly butted up against the commercialization of the Internet and the new security environment. While the differences

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<sup>2</sup> Research has found that individuals are twice as likely to be included in a database under opt-out as opposed to opt-in. See (Washington Post 2006).

<sup>3</sup> See (Dash 2005).

<sup>4</sup> See *The Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data*. Council of the European Union and the Parliament 95/46/EC, 1995 O.J. (L 281) 31.

between data privacy regulations had been primarily the concern of comparative public policy experts through much of the 1980s, the commercialization of the Internet in the mid-1990s quickly elevated its significance. As companies ranging from AOL to Yahoo expanded international operations and customers interacted virtually with firms residing across the map, European regulators became increasingly concerned with the possibility of regulatory arbitrage. That is to say, companies would relocate in jurisdictions with weaker privacy regulations undermining European rules. Europe, then, began to employ the extraterritorial clause to pressure other countries to adjust. U.S. firms, however, saw information as a critical resource in the new information economy and were not willing to give up an important growth opportunity. The tug of war that ensued marked the first major trade conflict of the information age with both sides threatening to ignite a costly trade war.<sup>5</sup> Only after several years of intense negotiations, the two sides agreed to a delicate compromise known as the Safe Harbor agreement. Under the Safe Harbor agreement, individual U.S. firms that want to exchange information between the U.S. and Europe pledge to uphold European privacy rules and accept regulatory enforcement of those rules by either the Federal Trade Commission or a national European Privacy Agency (Long and Quek 2002; Farrell 2003). While the Safe Harbor agreement attempted to assuage transatlantic privacy concerns, there is still considerable uncertainty with a range of sectors including financial services and telecommunications excluded from the agreement (Heisenberg 2005).

Privacy disputes have continued, albeit at lower level, as two blocks have emerged. Some thirty countries ranging from Australia to Argentina have adjusted their domestic rules to conform to the European privacy regime with its more expansive view of protection (Newman 2005). The US, by contrast, has split with its traditional ideological partner and

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<sup>5</sup> See (de Jonquie'res 1998).

finds itself in a club of mostly newly democratizing Asian partners including South Korea and Thailand, where limited privacy regimes have been adopted. The US and Europe have forged rival camps in the international privacy debate, shattering any previous normative consensus that might have previously existed.

The terrorist attacks in the United States in 2001 spawned a second round of transatlantic privacy disputes concerned with the transnational exchange of personal information to the U.S. government. Here the United States made a series of demands on the Europeans that challenged European privacy norms. One concerned the transfer of airline passenger records to the U.S. Customs authority. The U.S. government asked that all foreign air carriers transfer passenger name records (PNR) to the Customs Bureau before departure for the U.S. These records contained detailed personal information including payment records, meal choices that may denote religious affiliation, and passed flight details. This demand directly challenged European privacy laws because Europe does not consider U.S. public sector privacy laws to be adequate owing to the absence of an independent regulatory agency empowered to monitor and enforce U.S. privacy rules.<sup>6</sup> Additionally, the transfer of personal information without passenger notification or consent violated European rules (Article 29 Data Protection Working Party 2002). This led to a second major transatlantic dispute, with the U.S. threatening to fine European air carriers thousands of dollars for each flight that arrived in the U.S. without transferring records.

At the same time, the U.S. required that European countries must include biometric data such as digital fingerprints in their national passports in order to avoid the reinstatement of visa requirements for travel to the U.S. Europe has successfully delayed the implementation of the passport requirements, but policy experts seem to agree that the

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<sup>6</sup> See (EU Observer 2003).

arrival of the biometric passports is a question of when not if. This has stirred up an additional transatlantic privacy debate, further promoting European anxiety that U.S. security concerns are undermining their civil liberties.<sup>7</sup>

The regulation of the use and exchange of personal information is no longer purely a national debate. As information crosses borders and distinct privacy regimes intersect, frictions arise. Privacy regulations that developed independently in the two regions for over thirty years produced unique interest groups ranging from data privacy authorities to information intensive industries. Given the relative regime maturity, these interest groups have clear preferences to defend their regime against extraterritorial demands. The three examples highlight how this interaction has spawned significant conflicts within the “West” over the appropriate level of privacy in society. And in turn, cast doubt on the fundamental ties that underpin the transatlantic partnership.

#### *Free Speech:*

Although free speech has long been considered a quintessential component of modern democracy, its application has developed in several very distinct incarnations across the “West”. As is the case with all civil liberties, the right to express one’s self is balanced against other societal interests; speech is evaluated against harm that it might pose to the community. And countries, especially in the post-war period, have reached distinct compromises concerning this balance.

Speech regimes differ on two critical components. First, speech regimes vary on the set of speech that might be considered harmful. When can the state intervene to regulate speech in order to protect others? The most controversial issues have to do with either sex

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<sup>7</sup> See (McCue 2005).

or politics. Some countries have an extremely strict interpretation of obscenity; others place additional scrutiny on hate speech; and still others place restrictions on political speech. The norms that govern dangerous speech are deeply tied to national historical experiences and produce speech regimes that vary considerably (McGuire 1999).

The second major component of these regimes concerns the norms that states use to manage harmful speech. Some systems rely on the belief that speech should be regulated by “a free market of ideas”. Competition between different viewpoints will contain harmful speech as opponents of such speech undermine its credibility and legitimacy. Harmful content will eventually disappear under this pressure. The primary responsibility of the government is to guarantee access so diverse participants can contribute to the market. Aside from instances where speech may result in physical violence or extreme harm to minors, the state avoids *ex ante* restrictions on speech (Sunstein 1995).

Other systems, by contrast, follow a norm of militant democracy. This norm accepts the fact that democratic nations may at times use anti-democratic means to defend the democracy. Speech that undermines the fundamental principles of democracy may face *ex ante* regulation; these speech acts may be prohibited (Loewenstein 1937; Capoccia 2001). The two norms of militant democracy and the free market of ideas present ideal-typical regulatory positions. In reality, many nations have developed systems that emphasize different principles in different areas of the law. But the two serve as an important benchmark.

Given these benchmarks, it is quickly apparent that the U.S. and European nations have developed very different speech regimes in the second half of the 20<sup>th</sup> century. The U.S. has avoided restricting political speech, promoting the free market approach. The famous *Skokie* decision exemplifies the importance of the norm in U.S. law. In 1977 a

group of American neo-nazi's organized a march in the predominately Jewish neighborhood of Skokie Illinois, which was populated by a large number of holocaust survivors. The community passed an ordinance that prohibited hate group demonstrations, arguing that it would cause considerable psychic harm to the holocaust survivors. The neo-nazi's filed a counter suit to permit the march. The Supreme Court ruled that the community could not ban the protest because despite its offensive nature it did not raise the specter of significant physical harm (Sandel 1996). In Europe, by contrast, many countries developed norms of militant democracy in response to the experience of the interwar period and European fascism. As a result, governments in Europe have limited political marches, restricted the publication and distribution of propaganda, and even banned parties. Promoting the *Auschwitzlüge*, the claim that Auschwitz and the Holocaust never happened, for example, is criminalized in Germany and Austria (Stein 1986). The contrast between the *Auschwitzlüge* and the Skokie decision offers a stark comparison between the two regimes.

While these differences have received considerable attention from scholars of comparative constitutional law, they have only recently sparked serious interest among observers of international affairs. A series of transnational free speech conflicts have underscored a growing uncertainty in the transatlantic consensus on free speech. The first arose in the context of the information technology revolution as digital networks brought various free speech regimes into contact with one another. The ultimate example of which involved the prosecution by French authorities of Yahoo!. In 2000, A French anti-racism organization took Yahoo! to court in France for making Nazi paraphernalia available on its website. Yahoo! countered that the material was available on the US website and not the French version of the service. The company argued that it could not be held responsible for or prevent French citizens from visiting the US site. The French court found Yahoo! guilty

of violating French hate speech law and demanded that the company create filters to prevent French citizens from accessing the site. The ruling was backed by a fine of 100,000 French Francs (over \$13,000 at the time) per day.<sup>8</sup> Yahoo! removed the material, not wanting to damage its reputation, but also began a series of appeals in the US citing US free speech protections. The first court to hear the case in the US ruled for Yahoo on free speech grounds, only later to be overruled by a higher court on jurisdictional issues.<sup>9</sup> The question, however, of how to resolve such disputes generally is far from over.

Since the prosecution of Yahoo!, a number of other countries – most notably China – have used the French precedent to demand the filtering of political speech. The major web companies have complied with many of these demands, producing a Congressional review of such activities. The US government has condemned these activities leaving US industry in a difficult double bind.<sup>10</sup> Unfortunately for industry, national governments have as of yet not been able to construct any significant international regime for content regulation. And the US and Europe have failed to find common ground on the issue (Drezner 2004).

Society on both sides of the Atlantic have grown-up in given free speech environment. As such, firms and citizens have come to expect certain behavior from individuals and companies. Free speech norms have matured over the course of many years, building constituencies that promote and defend the respective interpretations. The rapid internationalization of interdependence has forced these regimes to face off.

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<sup>8</sup> For a summary of the Yahoo! case see (Greenberg 2003).

<sup>9</sup> Yahoo! appealed the decision in a Northern California district court. The district court found that free speech protection contained in the First Amendment shielded Yahoo!. But the 9<sup>th</sup> Circuit court reversed the district court decision, affirming the jurisdiction of the French court. See 169 F. Supp. 2d 1181 (N.D. Cal., 2001) and 379 F. 3d 1120 (9<sup>th</sup> Cir. 2004). More generally on the question of sovereignty in digital marketplaces see (Kobrin 2001; Mody 2001).

<sup>10</sup> See (Pan 2006).

*Why can't we all just get along?*

Information technology, market integration, and new security concerns have created transnational civil liberties issues. The distinction between international and domestic politics has collapsed as citizens increasingly find themselves simultaneously subject to the jurisdiction of multiple governments. Owing to considerable national variation in such regimes, this interaction has the potential to spark considerable tension. These conflicts, in turn, undermine the ideological consensus that many scholars had identified as critical to the cohesion of the “West”.

But increased interdependence alone does not explain why conflict has emerged. Why is Europe pressing the world to adopt its privacy rules against the wishes of the United States? Why are French courts setting a precedent for U.S. companies active in China?

Two critical factors play a role in explaining the heightened conflict in transatlantic civil liberties disputes. Internally, Europe and the US have developed distinct civil liberties regimes and externally the international balance of power has elevated Europe’s position vis-à-vis the United States. While the U.S. and Europe have confronted civil liberties concerns since the rise of the modern nation-state, the last sixty years has seen a radical expansion of civil liberties and in turn the differentiation of civil liberties regimes (Epp 1998). The fascist experience, mid-century student movements, the integration of home and justice affairs at the supranational level have shaped European debates. Post-war anti-communism, the Watergate affair, and the terrorist attacks of 2001 have marked developments in the U.S. In contrast to the immediate post-World War II reconstruction effort, where U.S. norms tended to dominate formal institution-building efforts, Europe now has a robust set of norms that diverge from its Atlantic partner. In areas as diverse as privacy, free speech, bodily privacy, and police powers, European governments and constitutional courts have

fully articulated national positions. Europe is then now in a position to project these norms internationally. At the same time, domestic constituents in both regions including social activists and industry internalize their civil liberties policies and often come to defend them against international pressure. Police associations, the Press, and information industries have a stake in their domestic civil liberties regimes. The constellation of these interests domestically significantly shapes international outcomes. In short, the fact that domestic regimes matured prior to international interdependence increases the potential for conflict.

Externally, the balance of power in the international system has shifted. With the demise of the Soviet Union and the institutionalization of the European Union, “Europe” enjoys a new found voice in the international arena. A long way from the economic chaos of the immediate post-war reconstruction, Europe has successfully integrated its internal market, established a single independent currency, and now negotiates collectively in many international settings (Jupille 1999; Meunier 2005). Economic integration has been matched by supranational institution-building, whereby regulatory structures have been constructed to implement and enforce European rules. As a result, Europe has the market power to back-up many of its positions and the institutional capacity to use that market power (Kupchan 2002).

At the same time, the position of the U.S. is being challenged. While still the most powerful country in the international system, it has been weakened both economically and strategically. On the economic front, the rapidly expanding debt and reliance on foreign economic capital to service that debt constrains U.S. independence. On the security front, transnational terrorism has confounded U.S. military strategy and alliance requirements. Both changes – economic and security – attenuate the transatlantic partnership, as the U.S.

looks to Asian financing for the domestic debt and central Asian bases for forward deployment.

Because of these change, conflict over basic norms has increased. Europe has the coercive authority and institutions to assert it-self and the US has lost its ability to dictate the evolution of liberal norms in the international system. Transnational civil liberties disputes, then, result from the simultaneous articulation of distinct domestic trajectories and the shift in the international balance of power.

Future research should explore the relationship between *domestic regime maturity* and international interdependence. The cases of privacy and free speech, which had mature domestic regimes, could be contrasted with a case such as Internet domain names (Mueller 2002). At the moment of growing international interdependence, the US domestic domain name regime had already experienced several rounds of development while the European regime was still in its infancy. A regime maturity perspective would predict that in such a case, domestic interest groups in Europe would be less vocal in opposing the externalization of the US regime. Regime maturity becomes then an additional tool in identifying the “national interest”. In general, international relations scholarship could benefit from more fully integrating concepts of timing and sequencing into its theoretical discussion (Büthe 2002).

It is worth mentioning a few final policy implications. Despite the divergence of domestic preferences and the shift in relative power, the transatlantic partners should reevaluate the significance of reaching international agreement on transnational civil liberties for the future of international cooperation and conflict more generally. Basic notions of democracy and trust are destabilized as citizens find themselves bound by rules developed in foreign jurisdictions. And as the transatlantic norm consensus fractures, other countries have

taken advantage of these new tensions. The Chinese defense of its regulation of Internet speech citing French actions or Middle Eastern governments call for religious tolerance relying in part on early US statements demonstrate the all too real implications of the West's failure to reach an international regime on content regulation. Similarly, the lack of a robust privacy regime in the US has increased concerns among European civil society over future international security cooperation with the US and in turn threatened to undermine anti-terrorism efforts (Archick 2006).

Policy-makers must realize that seemingly isolated incidents (the dispute over airline passenger data or Yahoo! content regulation) are actually part of a new set of international issue: transnational civil liberties. A failure to address these issues could undermine the post-Cold War ideological consensus and drive a powerful wedge between the transatlantic partners. It is therefore necessary to reassess "hybrid" agreements where the US and Europe have agreed to disagree on such fundamental concerns. A failure to do so could very well undermine the basic trust required to lead the world in the 21<sup>st</sup> century.

## Bibliography

- Archick, K. (2006). *US-EU Cooperation Against Terrorism*. Washington DC, Congressional Research Service.
- Article 29 Data Protection Working Party (2002). Opinion 6/2002 on transmission of Passenger Manifest Information and other Data from Airlines to the United States. Brussels.
- Bennett, C. (1992). *Regulating privacy: data protection and public policy in Europe and the United States*. Ithaca, Cornell University Press.
- Bessette, R. and V. Haufler (2001). "Against all Odds: Why there is no international information regime." *International Studies Perspectives* 2.
- Büthe, T. (2002). "Taking Temporality Seriously: Modeling History and the Use of Narratives as Evidence." *American Political Science Review* 96(3): 481-493.
- Capocchia, G. (2001). "Defending Democracy: Reactions to Political Extremism in Inter-War Europe." *European Journal of Political Research* 39(4): 431-460.
- Dash, E. (2005). Europe Zips Lips; U.S. Sells ZIPs. *New York Times*: 1.
- de Jonquiè'res, G. (1998). Bid to avert threat of 'cyber trade war'. *Financial Times*: 6.
- Diebert, R. (2002). "The Internet and the Coming Borderless World." *Isuma: Canadian Journal of Policy Research*(Spring): 113-119.
- Drezner, D. (2004). "The Global Governance of the Internet: Bringing the State Back In." *Political Science Quarterly* 119(3): 477-498.
- Economist (2001). Borders in Cyberspace.
- Epp, C. (1998). *The Rights Revolution*. Chicago, University of Chicago Press.
- EU Observer (2003). Decimated Airlines seek solution to passenger data feud.
- Farrell, H. (2003). "Constructing the International Foundations of E-commerce: The EU-US Safe Harbor Arrangement." *International Organization* 2: 277-306.
- Flaherty, D. (1989). *Protecting Privacy in Surveillance Societies*. Chapel Hill, University of North Carolina Press.
- Fukuyama, F. (1992). *The End of History and the Last Man*. New York, Avon Books.
- Greenberg, M. (2003). "A Return to Lilliput: LICRA v. Yahoo! Case and the Regulation of Online Content in the World Market." *Berkeley Technology Law Journal* 1191(Fall): Online.
- Heisenberg, D. (2005). *Negotiating Privacy: The European Union, the United States, and Personal Data Protection*. Boulder, Lynne Rienner.
- Hoey, a. (1998). "Policing the New Europe." *International Review of Law, Computers, and Technology* 12(3): 501-511.
- Huntington, S. (1998). *The Clash of Civilizations and the Remaking of World Order*. New York, Simon and Schuster.
- Jupille, J. (1999). "The European Union and international outcomes." *International Organization* 53(2): 409-21.
- Kagan, R. (2001). *Adversarial legalism: the American way of law*. Cambridge, Harvard University Press.
- Kobrin, S. (2001). "Territoriality and the Governance of Cyberspace." *Journal of International Business Studies* 32(4): 687-704.

- Krotoszynski, R. (2004). "A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value." *Tulane Law Review* 78(5): 1549-1610.
- Kupchan, C. (2002). *The End of the American Era: US Foreign Policy and the Geopolitics of the Twenty-First Century*. New York, Knopf.
- Loewenstein, K. (1937). "Militant Democracy and Fundamental Rights II." *American Political Science Review* 31(4): 638-658.
- Long, J. W. and M. P. Quek (2002). "Personal Data Privacy Protection in and Age of Globalization: the US-EU Safe Harbor Compromise." *Journal of European Public Policy* 9(3): 325-344.
- McCue, A. (2005). EU wants Biometric Passports Delayed. *Cnet*: online.
- McGuire, J. (1999). "When Speech is Heard Around the World: Internet Regulation in the United States and Germany." *New York University Law Review* 74: 750-792.
- Meunier, S. (2005). *Trading Voices: The European Union in International Commercial Negotiations*. Princeton, Princeton University Press.
- Mody, S. (2001). "National Cyberspace Regulation: Unbundling the Concept of Jurisdiction." *Stanford Journal of International Law* 365: 372.
- Mueller, M. (2002). *Ruling the Root*. Cambridge, MIT Press.
- Newman, A. (2005). Creating Privacy: the international politics of personal information. *Political Science*. Berkeley, UC, Berkeley.
- OECD (1980). *Guidelines on the protection of privacy and transborder flows of personal data*. Paris, Organization for Economic Cooperation and Development.
- Pan, P. (2006). US Firms Balance Morality, Commerce. *Washington Post*: A17.
- Raustiala, K. (2002). "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law." *Virginia Journal of International Law* 43.
- Stein, E. (1986). "History against Free Speech: The New German Law Against the 'Auschwitz' and other 'Lies'." *Michigan Law Review* 85(2): 277-324.
- Sunstein, C. (1995). *Democracy and the Problem of Free Speech*. New York, Free Press.
- Washington Post (2006). Default Boxes: F5.
- Whitman, J. (2000). "Enforcing Civility and Respect: Three Societies." *Yale Law Journal* 109: 1279.
- Zysman, J. and A. Newman (2006). *How Revolutionary was the Digital Revolution: National Responses, Market Transitions, and Global Technologies*. Palo Alto, Stanford University Press.