DATA PRIVACY AND DIGNITARY PRIVACY: 

*GOOGLE SPAIN*, THE RIGHT TO BE FORGOTTEN, AND THE CONSTRUCTION OF THE PUBLIC SPHERE

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ABSTRACT

The 2014 decision of the European Court of Justice in *Google Spain* controversially held that the fair information practices set forth in European Union (EU) Directive 95/46/EC (Directive) require that Google remove from search results links to websites that contain true information. Google Spain held that the Directive gives persons a “right to be forgotten.” At stake in Google Spain are values that involve both privacy and freedom of expression. Google Spain badly analyzes both.

With regard to the latter, Google Spain fails to recognize that the circulation of texts of common interest among strangers makes possible the emergence of a “public” capable of forming the “public opinion” that is essential for democratic self-governance. As the rise of American newspapers in the nineteenth and twentieth centuries demonstrates, the press underwrites the public sphere by creating a structure of communication both responsive to public curiosity and independent of the content of any particular news story. Google, even though it is not itself an author, sustains the contemporary virtual public sphere by creating an analogous structure of communication.

With regard to privacy values, EU law, like the laws of many nations, recognizes two distinct forms of privacy. The first is data privacy, which is protected by the fair information practices contained

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in the Directive. These practices regulate the processing of personal information to ensure (among other things) that such information is used only for the specified purposes for which it has been legally gathered. Data privacy operates according to an instrumental logic, and it seeks to endow persons with “control” over their personal data. Data subjects need not demonstrate harm in order to establish violations of data privacy.

The second form of privacy recognized by EU law is dignitary privacy. Article 7 of the Charter of Fundamental Rights of the European Union protects the dignity of persons by regulating inappropriate communications that threaten to degrade, humiliate, or mortify them. Dignitary privacy follows a normative logic designed to prevent harm to personality caused by the violation of civility rules. There are the same privacy values as those safeguarded by the American tort of public disclosure of private facts. Throughout the world, courts protect dignitary privacy by balancing the harm that a communication may cause to personality against legitimate public interests in the communication.

The instrumental logic of data privacy is inapplicable to public discourse, which is why the Directive contains derogations for journalistic activities. The communicative action characteristic of the public sphere is made up of intersubjective dialogue, which is antithetical both to the instrumental rationality of data privacy and to its aspiration to ensure individual control of personal information. Because the Google search engine underwrites the public sphere in which public discourse takes place, Google Spain should not have applied fair information practices to Google searches. But the Google Spain opinion also invokes Article 7, and in the end the decision creates doctrinal rules that are roughly approximate to those used to protect dignitary privacy. The Google Spain opinion is thus deeply confused about the kind of privacy it wishes to protect. It is impossible to ascertain whether the decision seeks to protect data privacy or dignitary privacy.

Google Spain is ultimately pushed in the direction of dignitary privacy because data privacy is incompatible with public discourse, whereas dignitary privacy may be reconciled with the requirements of public discourse. Insofar as freedom of expression is valued because it fosters democratic self-government, public discourse cannot serve as an effective instrument of self-determination without a modicum of civility. Yet the Google Spain decision recognizes dignitary privacy only in a rudimentary and unsatisfactory way. If it had more clearly focused on the requirements of dignitary privacy, Google Spain would not so sharply have distinguished Google links from the underlying
websites to which they refer. Google Spain would not have blithely outsourced the enforcement of the right to be forgotten to a private corporation like Google.