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The Right Not To Be Forgotten

By Dr Neville Buch, MPHA (Qld)

It is very difficult to contenance the *l'esprit de l'époque*, the polite habit of quietly distaining against what one would have once considered a very worthy practice; in this particular case, our work as social historians. There are several reasons offered for why the art and science of history, more broadly conceived than memory or ancestry, is generally shun as conversation or reading. A formative reason is the 'End of History' thesis, a situation where history is oddly defined as a political battle with one's foe.¹ If the foe is defeat, history is said to no longer exist. However, that does not go to the mood out there in ordinary life among what is known as the educated public. It has come as a great surprise to me that due to fears about threats to privacy, there is a misconstrued argument on autonomy, a desire to take ordinary persons' personal footprints out of the public space. It is, in fact, a number of different legal arguments, described in various places as the 'right to be forgotten' and the 'revisability principle'.²

Admittedly, it is not so straightforward, and much that is argued is legitimate concerns about the threats to privacy from the social media world and about ownership and access of personal records. Nevertheless, the argument expressed by Andrew Tuff's "The Revisability Principles" (*Hastings Law Journal*, Volume 66, Issue 4, 2015. pp 1113-1160) conflates a reasonable idea of revisability with the harder 'right to be forgotten'; even though Tuff says he puts revisability principle over the right to be forgotten.³ In this short article I show that the argument leads to the same ill-considered and impossible legal 'right', if we are to retain

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the art and science of history, and explain it as a problem of an Orwellian pathway to erase social history if it ever captured popular sentiment.

What is slippery in the American legal arguments is that we have two concepts placed together in a long tradition without understanding precise definition and meaning. It is a sophistry that conflates the ideas. Tuff defines the first idea as:

Revisability is the capacity of an individual to change her beliefs and self-conception on the basis of her best understanding of what they should be without regard to beliefs she once held, in the distant past.⁴

The second idea Tuff admits is fuzzy, but describes it as, "...requiring that facts once exposed to public view be allowed to disappear."⁵ Tuff gets around the slippiness of the idea by identifying 'The Right to Be Forgotten' as the concept of privacy, "necessarily involves things that individuals reasonably expect to keep from public view, and a right to be forgotten."⁶ There is an entwined history here which combined the historiographical view of the United States as the end of history, defined as the end of European despotism and cultural corruption, and the view of American society as the morally redeemed society.⁷ The historiography is built in a religious conservative ethos, one where oddly the espousers contradict their own authoritative sources. The idea spins on an argument that a redeemed sinner cannot have former sins held against them. The record is erased by God. There is no history to be accounted. These were popular claims within the American revivalist tradition of the nineteenth and twentieth century, however, there is an obvious error that scholars –

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biblical, theologians, modern secular historians – keep pointing out over and over again, and is continually ignored in the populist market.⁸ It is cheap salvation, the cheap and unreliable product of revivalist evangelists, businessmen who have no qualms selling to poor believers. The less poor believers of what is framed as ‘Judeo-Christian values’, and many themselves do not buy the cheap product. Those who have the money for the education understand that redemption in the Puritan and Calvinist grounding of the American nationalist mythology is not any right to be forgotten. Public accountability and history is strongly retained in the scholarly traditions, but not as its revivalist forms.

Tuff states that he is placing “the revisability principle at its rightful place at the very center of the American debate over the right to be forgotten.”⁹ If that was the case, there would be no historiographical problem. Tuff’s stronger argument is that the past decisions recorded prevents or diminishes an individual’s capacity to form and pursue new plans. This might be a valid argument if, as the term ‘revisability principle’ suggests, that there is a right to amend dated documents with new documents, thereby demonstrating that a person is dynamic, and is able to change their mind from one fix point of time to another. In these cases, the record is not erased. It is edited. However, Tuff does not address revisability in this manner, but keeps slipping back to the right to be forgotten. He stated:

Depending on one’s intuitions, the notion that individuals should in general be free from accountability for many of their past decisions may strike some as morally repugnant rather than morally worthwhile. As a threshold matter, any argument in favor of the revisability principle must explain that allowing some things to never be discovered, or to quickly be forgotten, leads to morally valuable outcomes. The task is

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not to establish that revisability is always desirable, because it is not, but rather to establish that in some circumstances it could be important enough to be worth preserving. Perhaps the most important value revisability serves is that it allows individuals to retain the capacity to control, to some significant degree, their own destinies by fashioning a conception of themselves through successive deliberate choices that they make.¹⁰

Whose intuition could possibly want to make this principle general? If we forget or are ignorant, then we are likely in be in a pattern of exploitation unawares. Our intuition of current exploitation is only known from what was recorded and retained, albeit in different historical context. Tuff's references to autonomy and 'control' – where Tuff believes revisability is desirable – is not an argument about ownership or access, it is the right to remove and erase documents on the basis of privacy, and ultimately to remove oneself out of history. Tuff's very weak premise is that "things never to be discovered, or to quickly be forgotten, leads to a variety of morally valuable outcomes", and it works its way to the conclusion that, "that individuals should in general be free from accountability for many of their past decisions."¹¹

In such cases, it is not the ill-repute that could be revealed in private information of deceased persons that should be of any concern. The counter-argument is as follows. In both life and death, the person with integrity stands with open testimony, and letting judgement fall as it may. In all probability it will fall both ways as some will agree, and some oppose, and other may suspend judgement. It is the autonomy in the future, not mine as a living person. I do not get to write my own history ultimately, but my testimony is something I should expect to

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be retained along with everyone else's, so that it may be informative for the future. Concerns about privacy are a distraction to what is being orchestrated. The fear needed for every person is that we are forgotten too soon.

Without accumulated private information surviving, the exploitive pattern of current governments and other power-brokers is covered up. If we have no evidence from the past, there is less motivation to demand accountability in the present. There is a good argument for confidentiality in a person's lifetime (their existence), but it is not that a person has a right to erase their own statements and actions in death. Tuff makes no reference to death and the existential limits to personhood. The consequence is clear. If the right to be forgotten or a revisability principle absolutely rooted in autonomy is invoked then there is no accountability in historical judgement, any such judgement possible where it is hoped that evidence does still exist.

Tuff's idea of personal autonomy is insufficient. The abuse of private information provided to public or corporate institutions for confidential records can only occur in the ethos of secrecy, and it is a selective secrecy of a few. Confidentiality infers the power, whether power well used or abused. It is open government and open investigation of the actions of everyone in the public space that disabuse the abuse. Tuff is less than concerned because of "...the fact that for much of human history much of what individuals do and have done has remained unknown or gone unrecorded."¹² Such a view underrates the knowledge production of history. Furthermore, what happened to individual human beings, as a matter of their own past record, is important because it is consequential in what happens to individual human

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beings in the present; this is what we call 'social history'. The present is informed by the past for everybody, not just a few.

There may be a question as to whether the push for eliminating private information, which has become part of the confidential public domain, whether in government or corporate hands, can actually generate a popular movement. Nevertheless, it is not hard to see that an American-based legal rights movement, based on Tut's sophistry and an obsession about privacy which is a mark of our own historical era, could be a pathway to the elimination of social history. Is this already the mood out there in ordinary life? There are legitimate concerns about continuous surveillance, well popularised in the culture from dystopian warnings of Orwell's novel, *Nineteen Eighty-Four*. The problem is that the popular conversation tends to evolve only around cameras and screens that monitor every possible place and reveal what the 'Ministry of Information' wants to be revealed. What is forgotten, in the dystopian warning, are the huge incinerators at the Ministry where documents are destroyed after they are put down memory holes. The phrase 'memory hole' of Orwell is interesting and, according to Wikipedia, it is "any mechanism for the alteration or disappearance of inconvenient or embarrassing documents, photographs, transcripts, or other records, such as from a website or other archive, particularly as part of an attempt to give the impression that something never happened."¹³

The archives have served social historians very well, but informally there are many stories of the pressure to rationalise and limit the collections, and there can be good reasons, sometimes, in such arguments. The point is that there is very little pressure on governments and corporations to ensure the security of private information in the public domain to be

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retained for the socially-significant information it contains for the future. Equally, there is a general misconception in our society of assuming memory for history, a misconception that our profession has helped to continue with favourable-but- less-than-thought-out arguments for memorialists; and not historians who wish to both document and to hear the voices of past that do not want to be forgotten.

ENDNOTES

¹ Most recently, Peter Onuf described this phenomenon of the absence of history in a culture through the 'End of History' thesis, not merely as the debate around Francis Fukuyama's work in the 1990s, but as a historiographical pattern in American national mythology. Peter Onuf. *The United States. The land that chose to be without history. Histories of Nations: How their Identities were Forged.* Edited by Peter Furtado, Thames & Hudson, 2017. pp. 174-182.

² The literature is not as extensive as one would hope, but it is recognised that the issues and terminology are very unclear and requiring critical attention. To focus on the historiographical problem, in this short piece, I am attending to Andrew Tuff's 2015 'The Revisability Principles' arguments. Much of rest of the literature are too detailed in issues of information policy and legal arguments for the purpose of the article, but I indicate here as the background literature (chronological order):

Prins, Corien, et al. "Digitizing the Citizen and Government." *IGovernment*, Amsterdam University Press, Amsterdam, 2011, pp. 21–46. *JSTOR*, www.jstor.org/stable/j.ctt46mwkw.5.

Prins, Corien, et al. "Recommendations: Working on Igovernment." *IGovernment*, Amsterdam University Press, Amsterdam, 2011, pp. 197–222. *JSTOR*, www.jstor.org/stable/j.ctt46mwkw.13.

Robinson, Neil, et al. "Understanding the Implications for Security, Privacy and Trust." *The Cloud: Understanding the Security, Privacy and Trust Challenges*, RAND Corporation, Santa Monica, CA; Arlington, VA; Pittsburgh, PA, 2011, pp. 23–27. *JSTOR*, www.jstor.org/stable/10.7249/tr933ec.8.

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Meg Leta Ambrose, and Jef Ausloos. "The Right to Be Forgotten Across the Pond." *Journal of Information Policy*, Vol. 3, 2013, pp. 1–23., JSTOR, www.jstor.org/stable/10.5325/jinfopoli.3.2013.0001.

Dmitry Epstein, et al. "It's the Definition, Stupid! Framing of Online Privacy in the Internet Governance Forum Debates." *Journal of Information Policy*, Vol. 4, 2014, pp. 144–172. , JSTOR, www.jstor.org/stable/10.5325/jinfopoli.4.2014.0144.

Holt, Jennifer, and Steven Malčić. "The Privacy Ecosystem: Regulating Digital Identity in the United States and European Union." *Journal of Information Policy*, Vol. 5, 2015, pp. 155–178. , JSTOR, www.jstor.org/stable/10.5325/jinfopoli.5.2015.0155.

Vermeys, Nicolas. "Privacy v. Transparency: How Remote Access to Court Records Forces Us to Re-Examine Our Fundamental Values." *EAccess to Justice*, edited by Karim Benyekhlef et al., University of Ottawa Press, 2016, pp. 123–154. *JSTOR*, www.jstor.org/stable/j.ctt1wn0qx3.9.

Burri, Mira, and Rahel Schär. "The Reform of the EU Data Protection Framework: Outlining Key Changes and Assessing Their Fitness for a Data-Driven Economy." *Journal of Information Policy*, Vol. 6, 2016, pp. 479–511. , JSTOR, www.jstor.org/stable/10.5325/jinfopoli.6.2016.0479.

Case studies with historiographical relevance described can be found in:

Yaco, Sonia. "Balancing Privacy and Access in School Desegregation Collections: A Case Study." *The American Archivist*, Vol. 73, no. 2, 2010, pp. 637–668., JSTOR, www.jstor.org/stable/23290762.

Kansteiner, Wulf. "Transnational Holocaust Memory, Digital Culture and the End of Reception Studies." *The Twentieth Century in European Memory: Transcultural Mediation and Reception*, edited by Tea Sindbæk Andersen and Barbara Törnquist-Plewa, Brill, Leiden; Boston, 2017, pp. 305–344. *JSTOR*, www.jstor.org/stable/10.1163/j.ctt1w8h377.18.

³ Andrew Tuff. "The Revisability Principles." *Hastings Law Journal*, Volume 66, Issue 4, 2015. pp 1113-1160. Available at https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1125&context=hastings_law_journal

⁴ Tuff. pp. 1118-1119.

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⁵ Tuff. p. 1118.

⁶ *Ibid.*

⁷ Peter Onuf's description, see footnote 1.

⁸ The complex history of the American revivalist tradition with its contradictory Protestant theological movements, and its influence in Australia in the late twentieth century, is the subject of my doctorate. Neville Buch. American Influence on Protestantism in Queensland since 1945, Ph.D thesis, Department of History, University of Queensland, August 1994.

⁹ Tuff. p. 1119.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Tuff. p. 1121.

¹³ Wikipedia contributors, "Memory hole," Wikipedia, The Free Encyclopedia, https://en.wikipedia.org/w/index.php?title=Memory_hole&oldid=816775264 (accessed January 16, 2018).