Comparative Perspectives on Privacy in an Internet Era

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Edited by
Russell L. Weaver and Steven I. Friedland

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Series Note

The Global Papers Series involves publications of papers by nationally and internationally prominent legal scholars on a variety of important legal topics, including administrative law, freedom of expression, defamation and criminal law. The books in this series present the work of scholars from different nations who bring diverse perspectives to the issues under discussion.

Russell L. Weaver*
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Introduction

In their landmark 1890 article, *The Right to Privacy*,[1] Samuel Warren and Louis Brandeis sounded the alarm regarding increasing societal encroachments on the right to privacy. Today, with the dawn of the internet era, nineteenth-century technologies and encroachments seem quaint. While the internet has enabled many things, including the ability to communicate more effectively, it has also made it more difficult for individuals to protect their privacy. As Edward Snowden's disclosures revealed, the U.S. National Security Agency (NSA) conducted a massive cybersurveillance that swept up staggering amounts of personal information, including telephone records, emails, text messages, etc. Presumably, other nations are engaged in similar operations. At the same time, businesses mine personal data in order to obtain information regarding their customers' preferences, and more effectively market their products. Moreover, social media companies and internet service providers collect large amounts of information regarding their users' lives.

In 2017, the Privacy Discussion Forum convened at Uppsala University Faculty of Law (Sweden) for the third Privacy Discussion Forum. The event brought together scholars from many different countries to examine privacy issues. Participants were allowed to examine these issues through a variety of lenses, including (but not limited to) Tort, Constitutional Law & Administrative perspectives, as well as from the perspective of media intrusions on individual autonomy, as well as governmental and private uses of information (not only collection issues, but also distribution and use issues). However, a central theme of the discussions was the challenges to privacy created by the internet. The forum produced an interesting array of papers which are published in this book.

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1. 4 Harv. L. Rev. (1890).

Professor Luke Milligan's contribution to the forum is entitled *Freedom from Fear.* In that article, he discusses Warren and Brandeis' article, *The Right to Privacy*.[2] Milligan contends that the Warren and Brandeis view of privacy was multi-dimensional, including both a "breadth" dimension and a "depth" dimension. The "breadth" dimension prohibits government from engaging in physical trespasses, as well as from intruding on individual privacy via other unjustifiable means. The "depth" dimension includes a right to be free of the fear of being subjected to injury. While he notes that the breadth dimension is reflected in the U.S. Supreme Court's interpretation of the Fourth Amendment, as extending to non-physical invasions of privacy, he argues that the depth dimension remains undeveloped. He references the Court's holding in *Clapper v. Amnesty International USA*,[3] where the Court held that "the Fourth Amendment is not violated by mere threats or attempts to conduct unreasonable searches or seizures. Nor is it violated by a vast surveillance scheme which just happens to spare the individual claimant." As a result, the plaintiffs in *Clapper* were unable to establish standing to sue because they could not show that the government was actually surveilling them. In other words, under the Court's current interpretation of the Fourth Amendment, there is no protection against the *fear* of unreasonable searches and seizures. There is only protection against actual searches and seizures.

Viewing the matter from an originalist perspective, Milligan argues that the right to be free from fear was very much on the minds of the founding generation. He notes that the Fourth Amendment guarantees "the people" the right to be "secure" in their persons, houses, papers, and effects, and he argues that there are good historical reasons to define the term "secure" as including the right to be free from fear. In making this argument, he resorts to dictionary definitions and historical materials. After mapping out his arguments, he contends that this broader definition of the Fourth Amendment, as including protection of the right to be free from fear, might offer greater protection against U.S. cybersurveillance operations, and might have altered the result in the *Clapper* case. In other word, the plaintiffs in that case might have been able to establish standing to challenge the NSA's cybersurveillance program.

Professor Jon Mills and J.D. Jill Guidera Brown, in their article, *Privacy in the Culture of Intrusion,* suggests that the legal system has not kept pace with advances in technology. While technological advancements have affected and intruded upon virtually every aspect of our lives, they note that "the legal sys-

2. 4 Harv. L. Rev. (1890).
3. 568 U.S. 398 (2013).

tem has offered an "unpredictable and sometimes inefficient patchwork of privacy protections." Indeed, "since many foundational U.S. privacy laws were enacted, society has moved from desktop computers and clunky data processors to sophisticated Internet-connected microcomputers in nearly everyone's pocket, plus GPS, recreational drones, connected home goods, universal CCTV, Facebook, big data, machine learning, government surveillance, and predictive analytics." As a result, individuals, motivated by diverse emotions such as "curiosity, cruelty, gossip, jealousy, revenge, anger, and fear " have the ability to penetrate deeply into other people's lives. However, not only individuals, but also businesses and the government, have used modern technologies to usher "in a global culture of intrusion that only continues to expand as we depend more on mobile devices, peer-to-peer networks, and the sharing economy for daily tasks. " They conclude that, while "the Internet has a history of rugged individualism that preserved free speech at all costs," that individualism must now be tempered against the "varied privacy and security interests," and they argue that this "is best done by considering the multitude of cultural and individual triggers that compel us to act in our digital lives."

Professor Mark D. Cole, and PhD candidate Teresa Quintel, LL.M., submitted a paper entitled *"Is There Anybody Out There?" Retention of Communications Data: An Analysis of the Status Quo in Light of the Jurisprudence of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR)*. In their paper, they argue that citizens are subjected to manifold forms of surveillance of their communications. This routine of—often covert measures by national intelligence services, but frequently also by obligation on private parties to retain data of their customers—regular collection and processing of communications data has an impact on the fundamental rights of individuals. Consequently, in a number of cases, European courts have concluded that various surveillance and collection techniques involve unjustified intrusions on privacy or a violation of data protection laws. In their paper, Professor Cole and Ms. Quintel analyze decisions of the CJEU and ECtHR, including the CJEU's very recent *Tele2/Watson* as well as *Digital Rights Ireland* case, and ECtHR's judgments in the *Zakharov/Russia* and *Szabó & Vissy/Hungary* cases. The article suggests that the two courts are elegantly working with each other in an effort to protect the privacy rights of European citizens.

Professor Jane Reichel and PhD candidate Joanna Chamberlain in their article, *The Swedish Understanding of Privacy as a Fundamental Right in a Comparative Perspective—Overview and Possibilities*, examine the history and development of the right to privacy in Sweden. In their article, they note that Sweden's foray into privacy protections began with the creation of the right to

personal integrity. However, it was difficult for Sweden to expand the right of personal integrity for a variety of reasons. For one thing, Swedish jurisprudence, including the school of thought referred to as Scandinavian Legal Realism, suggested that nothing could exist outside of the natural context of time and space, and therefore that immaterial things such as rights could not exist. In addition, freedom of speech and of the press were accorded a higher status than the right of personal integrity, as were the principles of openness and transparency, and therefore privacy rights were subordinated. All of this began to change as new technologies began to infringe on the privacy rights of individuals, and Sweden decided to enact its Data Act. Change was also prompted by Sweden's accession to the European Union, and its decision to become a party to the European Convention on Human Rights, as well as because of the European Union's adoption of its Data Protection Directive. Chamberlain and Reichel use these recent changes to discuss developments regarding the right of privacy in Europe and in the United States, and make suggestions regarding how Sweden can learn from U.S. and European efforts, and bring about change either through constitutional amendment or through case law.

Professor András Koltay's article, *Internet Gatekeepers as Editors—The Case of Online Comments*, examines privacy in the context of the internet, and the posting of online comments. He notes the potential tension between Article 10 and Article 8 of the EctHR, which protect freedom of expression and privacy, respectively, in regard to online comments. He then analyzes European Court of Human Rights decisions regarding the liability of internet participants for such comments. He notes the distinction between "moderated" and "unmoderated" comments, and "active" and "passive" control of websites. Ultimately, he suggests the need for greater clarification and elaboration regarding the rules governing internet service providers. He argues that the need for such rules is apparent given that online comments may be directly related to the public interest, but can also involve hate speech, defamatory material, etc.

Senior Lecturer Mariette Jones's article, *Privilege, Power and the Perversion of Privacy Protection*, examines the tension between individual privacy and the societal need for protection against terrorists, as well as the tradeoffs that societies contemplate in order to protect themselves. She notes that privacy protections run the risk of becoming a tool of the powerful, analogous to the (alleged) abuse of pre-reform libel laws. She also notes that the nature of modern life has led to a *de facto* surrender of privacy rights. Indeed, quoting from the famous Warren and Brandeis article, she argues that a "true understanding of life lived fully in a modern state reveals that the average person is almost *never* 'left alone.' While she acknowledges that, when privacy interests are weighed against secu-

rity interests, the balance will usually favor security, she questions whether it can "be proven that giving up more privacy rights would necessarily improve the security situation?" Indeed, even though security agencies routinely claim that they were able to thwart terrorist incidents, it is difficult to know whether their claims are true. Everything is conducted in secret. As a result, it is difficult to know whether further intrusions on privacy interests would "have a positive effect on preventing future atrocities when it seems that many of those that do happen seemingly could have been prevented without much intrusion on privacy. For example, questions are raised about the authorities' failure to take repeated alerts about the Manchester bomber seriously."

Professors Ellen Podgor and Louis Virelli's contribution is entitled *"Accountability in Criminal Discovery*." In their article, they examine recent litigation against the U.S. Department of Justice (DOJ), referred to as the "Blue Book Litigation," which deals with the tension between the DOJ's discovery authority in criminal prosecutions and the public's right to know what its institutions (in that case, DOJ's exercise of its prosecutorial powers) are doing. The Blue Book, which plaintiffs wished to see, contained information and advice for criminal prosecutors regarding the conduct of discovery in criminal cases. DOJ refused to divulge the contents of the Blue Book on the theory that it involved protected work product and was therefore privileged. Professors Podgor and Virelli take issue with the DOJ's position, noting that "secrecy outside the confines of a specific case, and more importantly as to policies regarding such procedures, remains questionable" because it directly contradicts the prosecutorial role of being a "minister of justice" and puts prosecutors in the uncomfortable position of seemingly being engaged in what is effectively a "sporting event." In addition, they argue that the DOJ's secrecy "flies in the face of key administrative law principles of legitimacy: expertise, accountability, and efficiency."

Finally, Professor Russell Weaver's contribution, *Privacy and Free Expression*, examines the tension between the right to free speech and the right to privacy. He notes that, in the U.S., freedom of expression is generally treated as a "preferred right" in the sense that it often prevails over other competing rights. As a result, in competition with the right to be free from defamatory comment, the intentional infliction of mental and emotional distress, or even the right to be free from offensive words, the right to freedom of expression is generally given precedence. The privacy area is a bit unique. While the right to free speech will generally prevail over the right to privacy as well, there are situations when the right to privacy will prevail. Nevertheless, he concludes that there is a significant gulf between the U.S. and Europe with regard to the handling of both free speech and privacy interests. Whereas the U.S. is often very

protective of speech interests, treating freedom of expression as an interest that is entitled to special or preferred protection, European countries are generally more protective of privacy interests. As a result, in many types of privacy cases (e.g., false light privacy and intrusion on seclusion), it can sometimes be difficult for U.S. plaintiffs to prevail against free speech claims. However, in one area, cases involving appropriation of plaintiff's name or likeness for business or commercial purposes, U.S. plaintiffs have been more successful.