



1-1-2012

Defining Privacy

Daniel W. Hardwick

Follow this and additional works at: <http://scholarship.law.nd.edu/ndjlepp>

Recommended Citation

Daniel W. Hardwick, *Defining Privacy*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 673 (2000).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol14/iss2/1>

This Introduction is brought to you for free and open access by the Notre Dame Journal of Law, Ethics & Public Policy at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of Law, Ethics & Public Policy by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

FOREWORD

DEFINING PRIVACY

DANIEL W. HARDWICK*

Imagine what life must have been like during the Civil War. Without telephones, answering machines, caller-I.D., televisions, radios or telecommunications. Without ATMs, wire-transfers, computers or e-mails. These items change the way we live, communicate and think about the world. Alongside the impact technology has had on our lives, technology has changed the way individuals view themselves and their community. Being alone meant no communication in 1870. In the year 2000, Internet advertisers can record wherever one surfs on the Internet and create “cookies” on a person’s hard drive. The police can wire-tap phones with permission from judges. A telephone user can tell who is calling him and screen his calls. Sitting alone in a house is no longer a completely private activity. While technology may have made life simpler, it has brought the notion of privacy to the forefront of public debate.

In this modern context, it is increasingly hard to define “privacy.” “Privacy” in the contemporary context does not solely deal with an individual’s relationship with the government, like ancient philosophers viewed it; but rather, “privacy” in contemporary terms encompasses an individual’s relationship with the government *and* civil society, i.e. his fellow citizens (whether friends, enemies or neither). Therefore, protecting privacy may mean more than developing new laws, it may entail developing new ways people think and deal with others.

Another explanation for why privacy is hard to define is that, perhaps, “privacy” does not truly exist, and therefore, any attempt to define it never satisfies what either the government, the individual or the “public” is willing to live with. Ancient philosophers may have supported this claim. In Greek philosophy, the polis, or city-state, existed for the public good and any

* B.A., 1997, Michigan State University (James Madison College); J.D., 2000, University of Notre Dame Law School.

attempt to hide information from the authority would be a public wrong. Plato explains in the *Republic*:

[I]t's appropriate for the rulers, if for anyone at all, to lie for the benefit of the city in cases involving enemies or citizens, while all the rest must not put their hands to anything of the sort. We'll say that for a private man to lie to such rulers is a fault the same as, and even greater than, for a sick man or a man in training not to tell the truth about the affections of his body to the doctor or the trainer, or for a man not to say to the pilot the things that are concerning the ship and the sailors, or lying about how he himself or his fellow sailors are faring.¹

If ancient Greek democracies are thought of as the foundation of western civilization and modern-day democratic governments, perhaps there is no proper function or place for advocating privacy. Perhaps individuals should be bound to disclose their private affairs for the good of the government. The goal of *e pluribus unum* (out of many, one) may be to have us give up our rights to privacy for the sake of the greater whole.

Whatever the federal constitution or the United States Supreme Court may or may not say about privacy, nobody can quite put her finger on what exactly privacy means. Although it might be impossible to determine what exactly it is, we do know that privacy is a modern day phenomena. The notion of a right "to be let alone" was first advanced by Thomas Cooley in his *Treatise on Torts* in 1880.² In their famous article, *The Right to Privacy*,³ Samuel Warren & Louis Brandeis began the public discussion of a separate and distinct right of privacy. The article "reviewed a number of older cases in which relief had been afforded on the basis of defamation, or breach of confidence on an implied contract, in the publication of letters, portraits and the like."⁴ The United States Supreme Court first discussed the importance of protecting privacy in 1891, in *Union Pacific Railroad v. Botsford*.⁵

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all

1. PLATO, *THE REPUBLIC OF PLATO* 67 (Allan Bloom ed., 1968).

2. THOMAS COOLEY, *LAW OF TORTS* (2d ed. 1888).

3. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

4. JOHN W. WADE ET AL., *PROSSER, WADE & SCHWARTZ'S TORTS — CASES AND MATERIALS* 947 (1994).

5. 141 U.S. 240 (1891).

restraint or interference by others, unless by clear and unquestionable authority of law.⁶

The Supreme Court first promulgated a constitutional "right to privacy" in the 1965 holding of *Griswold v. Connecticut*.⁷ Although the right to privacy is not specifically found in the United States Constitution, the Court created it based on the "penumbras"⁸ of various amendments.

Articles in this symposium discuss privacy in such diverse areas as cyberspace, the hospital bed, the marital bed, the courtroom, in bankruptcy cases and in business. In his article, *Consumer Privacy in Electronic Commerce: As the Millenium Approaches, Minnesota Attacks, Regulators Refrain, and Congress Compromises*, Professor Mark Budnitz is concerned about consumer privacy in electronic commerce, a new concern for privacy advocates, yet one that threatens the core of an individual's privacy. Professor Budnitz examines a Minnesota lawsuit alleging that a bank violated that state's Consumer Fraud Act by selling customer information to a third party marketer. He analyzes current legislation concerning the protection of consumer privacy and suggests the need for additional legislation. Professor Budnitz suggests how to improve our laws in the immediate future in order to provide privacy protection in electronic commerce.

Professor Oscar Gandy, in *Exploring Identify and Identification in Cyberspace*, challenges business practices regarding identification of consumers in Cyberspace. He points out that the use of profiles not only threatens privacy, but inherently includes discrimination based on subjective categories. Professor Gandy argues for a standard, general policy of handling the collection

6. *Id.* at 251.

7. 381 U.S. 479 (1965).

8. *Id.* at 484:

[T]he Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of Peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of Privacy which government may not force him to surrender to his detriment. The Ninth Amendment provided "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

of information in order to protect social groups and individuals from discrimination.

The right to privacy in an individual's personal decision is the subject of *Justifying Assisted Suicide: Comments on the Ongoing Debate*, by Professor Melvin Urofsky. The author asks whether the right to privacy extends to one's decision to commit suicide — with or without the help of physicians and directly or indirectly through the denial of machines or intravenous feeding systems. His analysis questions whether the government has a right to influence an individual's autonomous decision to affect his own life.

Professor Gerard Bradley examines what effects Vermont's "civil union" law will have on the institution of marriage in *Same-Sex Marriage: Our Final Answer?* Professor Bradley looks at how the once inconceivable notion of same-sex marriage is becoming a reality. He questions whether proper dileberation has been made on the effects Vermont's new law will have on the institution of marriage. He argues that same-sex marriages cannot be equated with traditional marriages because they lack many fundamental attributes that define traditional marriages.

Same-sex marriages are supported by Professor Mark Strasser in his article, *Sex, Law and the Sacred Precincts of the Marital Bedroom: On State & Federal Right to Privacy Jurisprudence*. Professor Strasser criticizes the Supreme Court for not extending the right to privacy to protect same-sex marriages. He argues that since current federal right to privacy jurisprudence has the family at its core, it should protect the rights of individuals to have their already-existing families legally recognized. Professor Strasser alternatively argues that if same-sex marriages are not protected, currently protected rights may not be protected for much longer.

In her article, *Sex and Lies: Rules of Ethics, Rules of Evidence, and Our Conflicted Views on the Significance of Honesty*, Professor Diane Mazur looks at the significance of honesty in American culture with a look at the Clinton Impeachment. Professor Mazur questions whether required disclosures of private actions are justified and the role honesty plays in protecting an individual from unwanted intrusion.

The protection of "informational privacy," is analyzed in *Privacy in the Federal Bankruptcy Courts*, by Mary Jo Obee and William C. Plouffe, Jr. The authors explore how the increasing amount of record keeping in society as a whole has led to a dilemma for bankruptcy courts. While creditors and attorneys want, and feel justified in requesting, all available information pertaining to debtors, they want limited information released about them.

Obee and Plouffe argue that the creditors and attorneys are getting the debtors' information and that the amount of information released exceeds and is inconsistent with the amount available in other contexts.

Medical information privacy is analyzed in Professor James Hodge's article, *National Health Information and the New Federalism*. Professor Hodge offers an in-depth analysis of legislation aimed at protecting patient privacy. He points out that the regulation of health information by administrative regulations or national legislation raises federalism issues. While nationalization of privacy rights may be the most efficient way to protect privacy, the rights of state and local governments to create their own laws must be respected. Professor Hodge analyzes the argument over the best way to protect to insure medical information privacy.

Finally, in their article, *Right to be Let Alone?—Has the Adoption of Article I, Section 23 in the Florida Constitution, Which Explicitly Provides for a State Right to Privacy, Resulted in Greater Privacy Protection for Florida Citizens*, Hon. Major B. Harding, along with Mark Criser and Michael Ufferman, question whether Florida's Constitutional Amendment granting Floridians an explicit right to privacy actually protects the right to privacy more than other Americans living in states without explicit constitutional protection. Also, the authors provide an analysis of how the courts have interpreted Florida's right to privacy. They conclude that an explicit right to privacy in the Florida Constitution has given Floridians more privacy protection than other Americans.

How should privacy be defined? Should it be about the right to think, feel and act as one wishes? Should it include the right to be left alone? Or should it be a hybrid of both individual choice and public restraint from the personal lives of individuals? The articles in this symposium seek to answer these questions in a variety of contexts. Each author seeks to enlighten the reader of the conflicts privacy faces in their area of expertise. In doing so, this symposium provides a general sketch of privacy and the law.

