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Eric Barendt

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Eric Barendt

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Privacy

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Preface to the Second Series

The first series of the International Library of Essays in Law and Legal Theory has established itself as a major research resource with fifty-eight volumes of the most significant theoretical essays in contemporary legal studies. Each volume contains essays of central theoretical importance in its subject area and the series as a whole makes available an extensive range of valuable material of considerable interest to those involved in research, teaching and the study of law.

The rapid growth of theoretically interesting scholarly work in law has created a demand for a second series which includes more recent publications of note and earlier essays to which renewed attention is being given. It also affords the opportunity to extend the areas of law covered in the first series.

The new series follows the successful pattern of reproducing entire essays with the original page numbers as an aid to comprehensive research and accurate referencing. Editors have selected not only the most influential essays but also those which they consider to be of greatest continuing importance. The objective of the second series is to enlarge the scope of the library, include significant recent work and reflect a variety of editorial perspectives.

Each volume is edited by an expert in the specific area who makes the selection on the basis of the quality, influence and significance of the essays, taking care to include essays which are not readily available. Each volume contains a substantial introduction explaining the context and significance of the essays selected.

I am most grateful for the care which volume editors have taken in carrying out the complex task of selecting and presenting essays which meet the exacting criteria set for the series.

TOM CAMPBELL
Series Editor
Centre for Applied Philosophy and Public Ethics
Charles Sturt University

Introduction

Many legal systems protect a right to privacy. The right is also recognized by international legal instruments, notably the International Covenant on Civil and Political Rights (1966) and the European Convention on Human Rights and Fundamental Freedoms (ECHR, 1950). A rich literature in law, philosophy and social science journals explores different aspects of this fundamental right.

Nevertheless, 'privacy' remains an elusive and controversial concept. Some writers have rejected the idea that there is a discrete right to privacy. In their view, it is derivative from well-established rights, such as property rights and personal rights not to be touched or observed without consent, and it would be possible to dispense with it as a distinct right (see Thomson, 1975; Davis, 1959). Other writers do not share this scepticism, but disagree about the value of privacy or, put another way, over the justifications for protecting it by law or under a constitution. These disagreements are mirrored in uncertainty about the scope of the right. Is it broadly synonymous with a 'right to be let alone', or does it really confer only a right to prevent the disclosure of personal information? Does privacy cover a right to take important decisions over intimate personal matters free from regulation?

These questions have been keenly debated in the United States, largely because privacy rights have been asserted there in a wide variety of contexts. Influenced by the famous law review article of Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890), many states developed a privacy tort to provide redress for, among other things, the unreasonable disclosure (by the media) of personal information, intrusion on seclusion, and the appropriation of an individual's name or photograph for commercial purposes. Privacy concerns have also influenced Supreme Court decisions on the scope of the Fourth Amendment to the Constitution, outlawing 'unreasonable searches and seizures' of persons and property. More recently, the Court has formulated a constitutional right of 'decisional privacy', including rights to contraceptive facilities and freedom of choice whether to carry or abort a foetus.

Some critics have doubted whether all these cases instantiate a right to privacy, even if that right is viewed as an underlying moral, rather than a legal, right. They argue, for example, that the 'decisional privacy' cases really rest on a general right to liberty or personal autonomy, rather than a true privacy right (see Gross, 1967; Henkin, 1974). However, other jurists claim that it is possible to detect common factors underlying all these cases. What is involved in each of them, they argue, is the idea that individuals have a right to be free from scrutiny, pressure or control in their conduct of personal areas of life, whether the interference takes the form of surveillance and bugging, media publicity or regulation of sexual matters (Inness, 1992; DeCew, 1997, ch. 3).

As these theoretical issues have been discussed with particular vigour in the United States, most of the essays selected for inclusion in this volume have been taken from American periodicals. But the issues raised by them are also relevant to England and other jurisdictions which have only recently begun to wrestle with the implications of a legal right to privacy. (English law may soon develop such a right, to some extent influenced by the incorporation of

the ECHR into United Kingdom law by the Human Rights Act 1998.) Part I contains four essays which seek to explain why privacy is valuable. Such explanations are necessary, if not sufficient, to substantiate the case for recognition of a legal right to privacy. The first two essays in Part II offer different definitions of the right, while the other three put forward views about its scope and character.

The essays in Part III are concerned with the feminist critique of privacy and of the related private–public distinction. As will be explained below, the debate on the scope and character of the right has considerable relevance for the feminist denial of the coherence of the distinction between private and public. Part IV is devoted to essays dealing with the application of privacy rights to the information society and cyberspace. These essays, too, show the relevance of reflection on the values and character of privacy rights to a debate of immense contemporary social importance.

Why Privacy is Valuable

As Glenn Negley points out at the start of his essay (Chapter 1), it is only relatively recently that philosophers have paid attention to the value of privacy. The explanation may be that it has only emerged as a matter for social and individual concern in the last two centuries, through urbanization and the growth of the mass media (see Shils, 1996). Before the end of the eighteenth century a predominantly rural society imposed a relatively uniform social structure in which privacy concerns played little part. But changes in social structure – from a simple homogeneous society to a complex highly organized state – cannot alone *justify* a claim that privacy is a valuable human right. Negley argues that implicit in assertions that individuals need privacy to exercise moral choice is a background claim that individuals *ought* to have privacy for such purposes. The point is that, without according some privacy, it would not make sense to conceive of persons as moral agents. Negley also argues that it makes little sense to ascribe value to privacy for these purposes, unless it is protected by law. This is surely right, but of course it does not follow that privacy should be recognized as a constitutional right, rather than one protected by legislation (see Barendt, 1997).

Nobody now argues that the value of privacy lies exclusively in the (physical or psychological) space it affords for individuals to think for themselves, create works of art and so on. But one common argument for the right is that a state of privacy is necessary for people to develop intimate relationships of love and friendship (see Fried, 1968). James Rachels in Chapter 2 adopts a similar approach, although he broadens it to encompass the formation and development of different types of social and working relationship. Privacy enables us to maintain a wide variety of relationships by sharing information with, and allowing access to, some friends and colleagues, while denying these facilities to others.

While admitting that this approach has appeal, Jeffrey Reiman in Chapter 3 detects important flaws. In the first place, he considers the Rachels–Fried argument for privacy rests on a thin view of 'intimacy'. It is the dimension of caring, rather than the mere sharing of personal information, which gives intimacy to a relationship, although this criticism may miss Rachels's point that privacy does enable individuals to choose the people with whom they might, with caring, develop such a relationship. More convincingly, Reiman argues, privacy is not of value only to those who wish to develop relationships; the right is part of a social ritual which

protects the interest every individual has in developing a sense of her own identity. It is a 'precondition of personhood' (p. 36). The weakness of this argument is that it may be thought to justify broad rights to autonomy or to the free development of personality as much as it underpins the case for privacy; the consequence is that privacy lacks its distinctive value.

In 'The Right of Privacy' (1978), Richard Posner argued that, on an economic analysis, the common law gives privacy too much protection, for in his view there are significant economic benefits to the public disclosure of many private facts which individuals wish to conceal. Privacy rights, for example, encourage deception and may increase transaction costs. The essay by Richard Murphy (Chapter 4) contends that scepticism about privacy on these grounds is overstated. There are clear economic benefits from recognizing privacy rights to information. In the absence of any *legal* redress, some people – notably celebrities – might spend extravagant sums, trying to safeguard their *de facto* privacy against, say, journalists and paparazzi, while after a disclosure of personal information they may incur significant costs in explaining its significance and in taking steps to re-integrate themselves into society. Murphy's second argument concerns the protection of personal information disclosed in voluntary commercial or professional transactions. He suggests that the more efficient *default rule* – that is, the rule which obtains in the absence of agreement between the parties – is one which protects privacy. In other words, supermarkets, banks and credit agencies should respect privacy, unless their customers waive it. Indeed, the protection of privacy may encourage the latter to provide fuller, more accurate information, in the same way that the confidentiality of sources, claimed by journalists, promotes press freedom. It should be noted that Murphy is concerned only with the justification for 'informational privacy', rather than the value of privacy in other contexts.

The Definition and Scope of Privacy

Many lawyers and philosophers have tried to define 'privacy'. They feel that, without a definition, the law would be intolerably uncertain. Proposals to introduce a legal privacy right in England have indeed been opposed because of the difficulties in arriving at a sufficiently precise definition (Younger, 1972; Calcutt, 1990). Richard Parker's essay (Chapter 5) addresses the problem. After setting out the criteria for an acceptable definition, he maintains that 'privacy is control over who can sense us' (p. 88). He advocates this formulation in preference to definitions in terms of control over any information about oneself or of control over personal information. In his view such definitions may, depending on the context, be either too broad or too narrow. In contrast, W.A. Parent in Chapter 6 urges that privacy is the condition of not having undocumented personal knowledge about oneself possessed by others. He rejects 'control' definitions as confusing privacy and liberty.

Neither definition seems entirely satisfying. On that of Parker, a newspaper would not necessarily violate privacy when it reveals intimate details of somebody's sexual affairs, but it would infringe the right if one of its journalists were to read the contents of an appointments diary, no matter how formal and innocent its contents. Parent's personal information definition suggests that many rulings on the privacy tort, as well as the Supreme Court decisions on 'decisional privacy', are misconceived; moreover, it may run counter to our intuitive feeling that privacy is at stake in many situations apart from those which his narrow formula would

cover. Perhaps it is a mistake to require a tight definition. Many legal concepts – for example, 'possession', 'reputation' and 'freedom of speech' – can be satisfactorily applied in practice, although they lack single precise definitions.

Robert Post's essay (Chapter 7) raises different issues. He explores the character of the privacy right advocated by Warren and Brandeis in 'The Right to Privacy', and of the appropriation tort, one of the four types of privacy violation identified by William Prosser in his article 'Privacy' (1960). Post argues that the privacy right advocated by Warren and Brandeis is a personal (or, one might say, human) right dependent on a normative view of privacy – that is, that the right stems from obligations of respect owed to individuals as members of a community. Conversely, the celebrities' right of publicity, developed in the United States in the last forty years, is really a property right, rooted in concepts of 'personality' as a marketable asset. It is now unclear whether the appropriation tort protects a true privacy or a property right, an ambiguity which itself reveals uncertainties in the American approach to the character of the underlying concept of personality.

Chapters 8 and 9 are concerned with the scope of privacy in the information age. In the former, Jeffrey Reiman discusses the implications of observation systems which monitor the journeys of car drivers. In his view, such systems, especially when used in conjunction with computerized data bases, pose serious threats to privacy. They enable others to acquire information about us at their discretion. Our loss is not simply that our conduct may be inhibited – we may be frightened that we will be observed driving with a particular companion or to a particular place – but that we are no longer free to drive '*without leaving a record*' (p. 170, his emphasis). On the basis of his argument for the value of privacy as a social ritual by which each person is treated as the author of her own identity (see Chapter 3), Reiman also concludes that highway monitoring systems insult individuals by treating their travel as data for observation. Most disturbingly, exposure to constant visibility might deny us the opportunity for growth and the capacity to participate effectively in democratic politics.

Helen Nissenbaum (Chapter 9) contends that for the most part privacy theories have unduly concentrated on justifications for the protection of *private* or *intimate* information and conduct against publicity, observation and regulation. On those theories there is, however, no right to privacy against surveillance of conduct *in public*; it is not thought that we have a 'reasonable expectation' of privacy when we are in public. Nissenbaum challenges this distinction. She argues for the importance of contextual integrity in determining whether a privacy right has been violated. The crucial question is whether information has been requested, obtained, used or exchanged in a way which is appropriate to the context. For example, our doctor does not violate privacy if she asks questions about our sexual health – an intimate matter – or files our answer, but a credit card agency arguably infringes privacy if it lists on computer a record of our transactions and then sells this information to retailers and service suppliers. One argument against recognition of a right to privacy in public is that we freely consent to observation or publication when we appear in public or disclose information to the person with whom we are dealing. Nissenbaum replies that, in fact, our consent is much more limited; we do not consent to the sale or exchange of information by, say, credit agencies or supermarkets to which we give information only for a limited purpose. This is an important point. If valid, it would weaken the position of the media when they argue that information already published somewhere is then automatically in the 'public domain' and can no longer be regarded as covered by a privacy right.

The details of the arguments deployed by Reiman and Nissenbaum vary considerably. The latter, for instance, places emphasis on the link between privacy and the control, or choice, of each individual to determine the context in which information is shared and observation allowed. Reiman is critical of control theories. But their common perspective is more important. They both urge that the scope of privacy needs to be reconsidered in an age when public authorities and private corporations find it increasingly easy through technological developments to observe us, and to acquire (and use) information about us. It is sensible, not paranoid, to reflect on this theme.

The Feminist Critique of Privacy

In the last twenty years there has been a significant attack on the coherence and utility of privacy rights from a feminist perspective. Although the Supreme Court in its landmark ruling in *Roe* v. *Wade* (410 US 113 (1973)) held that a woman's right to an abortion falls within the constitutional right to privacy, feminists have argued that to rely on privacy for the right to an abortion serves women badly (see, in particular, Catharine MacKinnon, 1987; 1989; Ginsberg, 1985). Privacy rights do not address the inequality of women, but rather preserve the existing social and economic circumstances where men exercise power over them. It would have been much better to have relied on rights to equality as a foundation for the abortion decision. More radically, many feminists challenge the public/private distinction which underlies the right to privacy (MacKinnon, 1987; 1989; Olsen, 1983).

In Chapter 10 Ruth Gavison analyses the feminist critique of the public/private distinction and privacy rights. She distinguishes between internal and external challenges to the distinction. The former criticize specific uses of the terms 'public' and 'private' or specific arrangements based on them, while the latter suggest that the distinction is fundamentally incoherent or that it should be abolished as undesirable. Applied to privacy rights, the former type of challenge might be used to expose to criticism particular claims about the scope of the right – that, for instance, it covers sexual behaviour conducted in public. But external challenges – for example, the cry that 'the personal is political' – imply that privacy rights are fundamentally misconceived. Gavison rejects the more extreme claims as counterintuitive and undesirable in their implication; women do have an interest in the values of privacy and intimacy. Feminists, she concludes, should contest invalid arguments which misuse the distinction between public and private (or wrongly ascribe privacy rights), rather than jettison the distinction altogether.

In Chapter 11 Elizabeth Schneider accepts much of the feminist criticism of privacy. The traditional concept enables violence against women to be committed without official intervention. It treats the phenomenon as a 'private' matter. Even the decision in *Griswold* v. *Connecticut* (381 US 479 (1965)), affirming the right of married couples to contraceptive advice and facilities, is problematic insofar as it suggests that the state can never interfere with the conduct of married couples. Schneider argues for a different reading of the right articulated in *Griswold*. It can be understood as linking privacy to personal liberty, with 'affirmative dimensions of autonomy, self-determination, and self-expression' (p. 287). This reconstruction of privacy has the merit of transcending the public/private distinction.

Laura Stein (Chapter 12) also argues that the feminist critique of privacy assumes a traditional definition of the right. Grounding it on personhood would hold more promise for women.

Further, she contends that there are positive rights to privacy, which may require the government to act in its defence. Privacy claims should not, as MacKinnon has urged, be replaced by equality arguments in challenges to legal rules subordinating women. Rather, the two can be used together to challenge sexual harassment and other forms of discrimination.

One drawback of these arguments might be that it becomes difficult to divorce a refashioned 'feminist' vision of privacy from general rights to liberty and personal autonomy. The same is true whenever privacy rights are linked to fundamental values of personhood and the discovery by individuals of their identity (see the discussion of Reiman's essay in Chapter 3). Difficulties of this type have persuaded one author to argue that privacy does not provide the most appropriate basis for justifying a legal right to engage in consensual homosexual acts (Thomas, 1992). Such a right would be more honestly based on a right of homosexuals to use their bodies as they wish. Against that, it can be said that privacy may be the best legal peg on which women (or homosexuals) may hang constitutional equality arguments and challenges to the balance of power between the sexes (or between those of different sexual orientation).

Privacy, the Media and Data Protection

Another area of vigorous contemporary debate is the relationship of privacy to freedom of expression and freedom of information. In the United States the right of individuals not to have their private affairs revealed by newspapers and on the broadcasting media has been substantially weakened by the courts' frequent insistence that it should give way to the freedom of press guaranteed by the First Amendment to the Constitution (see Anderson, 1999). The argument that the introduction of a privacy tort would seriously undermine newspapers' freedom to report matters of public interest has been largely accepted in England; as a result there is still no general common law or statutory right in that country.

Randall Bezanson's essay (Chapter 13) explores these tensions from an historical perspective. Written a century after Warren and Brandeis's pioneering article, it argues that social patterns have changed fundamentally in that period. According to Bezanson, it is no longer possible to support privacy by reference to shared conventions of politeness and deference. The concept should be based on the *individual's* control over information rather than on *social* controls which no longer apply. Secondly, news values have radically altered. There is now no general agreement on the limits of acceptable gossip; in contrast to the publication of defamatory allegations, there are few objective criteria to guide editors in determining whether it is right, or legally safe, to publish 'private' facts.

Much of this seems incontrovertible, but Bezanson's conclusion is more controversial. He would abandon the civil action in tort which provides redress for *publication* infringing privacy, and replace it with an action to restrain breach of confidence, inhibiting disclosure by the confidant (and other possessors of the information). This conclusion must appear surprising to English, and perhaps other, readers; in England the argument has often been that the equitable jurisdiction to restrain a breach of confidence is used, in some contexts, to protect privacy (see Wacks, 1995, pp. 48–80, and Laws J in *Hellewell* v. *Chief Constable of Derbyshire* [1995] 1 WLR 804, 807). More importantly, while Bezanson may have accurately described significant changes in social patterns, it does not necessarily follow that legal rights to privacy against the media should be discarded. If privacy is a fundamental human right, the law should uphold it

despite such changes. Indeed, it is likely that, in the United States, it has been the law itself – in particular the importance attached to the First Amendment freedom of the press – which has weakened the right to privacy and played a major role in changing, or at least legitimating changes in, social attitudes.

The implications of the information society for the scope of privacy were considered in Chapters 8 and 9. The other two essays in Part IV discuss the application of privacy principles in two contexts which have only emerged recently: data protection and cyberspace. The danger to privacy in the modern democratic state, it may be contended, does not primarily arise from the traditional mass media or surveillance by the security services and the police. Rather, the threat comes from private corporations, banks and credit agencies which accumulate and exchange personal data. In this way they acquire information which can be used to the prejudice of the individual data subjects. In his essay, applying privacy to data protection rules, Peter Blume (Chapter 14) makes a number of important points. In the first place, the accumulation and misuse of data may prejudice underprivileged members of society, in contrast, it may be suggested, to media publicity which has much more impact on public figures and celebrities. Second, while one purpose of data protection legislation may be to prevent the misuse of information and hence to limit its disclosure, it also grants data subjects' access to rights to know and, if need be, to correct information held about them. In that way, privacy rights and legislation can be said to promote freedom of information and are not inimical to it. Third, Blume emphasizes that, in Europe, data protection legislation regulates private corporations as well as public authorities, reflecting the point that privacy may be as much threatened by private bodies as it is by the state.

In Chapter 15 Katrin Byford explores privacy in cyberspace. She argues for an understanding of the right which is based on both moral philosophy and cultural studies. The principles of privacy developed in the physical world may need to be adapted to meet the cultural expectations of users of the Internet. At the same time, account should be taken of the ease with which use of the Internet can be monitored and information exploited for marketing and other business purposes. Byford argues that privacy has a social value in the context of cyberspace. Its protection is necessary to ensure a balance of power between individual users and business. Finally, she suggests that legal regulation specifically adapted to cyberspace, rather than voluntary regulation, is necessary to safeguard the right in this context. Perhaps her most important general point is her insistence that users of the Internet should enjoy privacy rights in cyberspace, although the effective application of legal principles may test the ingenuity of lawyers (see also Wacks, 1997).

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