Moral and Legal Foundations of Privacy

February 7, 2023

Recap of Last Week

- Six philosophical articles that attempt to define "privacy"

1. Wasserstrom
   - Introduction to concepts of privacy and how society can affect the definition of privacy
   - "Perspective of counterculture"
2. Thomson – the "reductionist view" of privacy
3. Rachels – privacy is a condition of our relationships
4. Reiman – privacy is a condition of personhood
5. Parent – the "informational view" of privacy
6. Inness – privacy requires "intimacy"

II. The Emergence of a Legal Right to Privacy

Warren/Brandeis: The Right to Privacy

A Legal Definition of Privacy:
The "Right To Be Let Alone"

Warren/Brandeis – The Right to Privacy

- Traces how the law has gone from remedy only for physical interference with life and property, and has broadened to now (in 1890):
  - the right to life includes to enjoy life;
  - "the right to be let alone,"
  - right to liberty, and
  - property included tangible and intangible.
- They say the time has come for the next step: a defined and protected "right to be let alone."

Warren/Brandeis – The Right to Privacy

- Why? "The press is overstepping in every direction the obvious bounds of propriety and of decency."
- Yet, the intensity and complexity of life requires that solitude and privacy have become more essential for retreat.
- Gossip belittles and perverts.

Warren/Brandeis – The Right to Privacy

- Goal of the article:
  - First, does existing law afford a principle which can properly be invoke to protect the privacy of the individual; and
  - Second, if it does, what is the nature and extent of such protection?
- Then-current slander/defamation law was not enough. It requires injury to reputation. Thus, material damage rather than "spiritual" damage.

Warren/Brandeis – The Right to Privacy

- No current law for injury of feelings other than to alter damages for some other harm. It does not stand alone.
- Common law secures the right to what extent a person's thoughts, sentiments and emotions shall be communicated. Even if expressed, one can generally limit the publicity of them (think IP: patent, copyright).
- One only loses that right when the information is published publicly.

Warren/Brandeis – The Right to Privacy

- The right to prevent publication of manuscripts or works of art differs from copyright or other traditional property.
- The value is in "the peace of mind or the relief afforded by the ability to prevent any publication of it at all."
- The content or uniqueness of the information does not matter, and the prohibition is not just limited to copying, but also to summarizing, conveying, etc.

Warren/Brandeis – The Right to Privacy

- Thus, the protection of thoughts, etc., is the more general "right of the individual to be left alone."
- It is like other exclusionary rights – the right not to be assaulted or beaten, not to be imprisoned, maliciously prosecuted, or defamed, as each of these are rights possessed by the person that the law protects.

Warren/Brandeis – The Right to Privacy

- This right "to be let alone" would protect against the press or new technological advances.
- It is not limited to things reduced to writing – it protects the thought, emotion, or feeling.
- Nor does the amount of effort required to create the thought matter; it is impracticable.

Warren/Brandeis – The Right to Privacy

- The authors go through a number of examples, but in each there was an actual contract that was breached in some way.
- The authors argue that the premise in those decisions – of implying a trust – is a declaration that public morality requires such action.
- The authors believe that the courts can hardly stop there (at contract actions).

Warren/Brandeis – The Right to Privacy

- Press and modern devices allow for perpetration of similar wrongs without any participation by the injured party (unlike a contract), and thus the protection must have a broader basis.
- For example, taking a picture surreptitiously should not be allowed simply because the target did not know.

Warren/Brandeis – The Right to Privacy

What about limitations on the right to privacy?

- The authors identify 6 limits:

1. The right to privacy does not prohibit any publication of matter which is of public or general interest.
   - Are you a public person or not?
   - Matters include private life, habits, acts, and relations of an individual and have no relation to his public office or capacity.
   - Though there are some things that could be private regardless.

Warren/Brandeis – The Right to Privacy

2. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.

Warren/Brandeis – The Right to Privacy

3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.
   - This is because the injury resulting from such oral communications is so small that, in the interest of free speech, should not be actionable.

4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent.

Warren/Brandeis – The Right to Privacy

5. The truth of the matter published does not afford a defense.
   - This is because redress would not be sought for injury to the reputation of the person. Slander and libel can address that situation. The right to privacy "implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all."

6. The absence of "malice" by the publisher does not afford a defense. Same logic.

Warren/Brandeis – The Right to Privacy

- What about remedies for a violation?

1. An action of tort for damages in all cases.
   - "Compensation for injury to feelings."
   - Is that too speculative? How do you calculate it?

2. Injunctions, "in perhaps a very limited class of cases."
   - But wouldn't this be better since the harm is effectively irreparable – you can't un-ring the bell.

Spears – The Case That Started It All: Roberson v. Rochester Folding Box Co.

One Court Rejects the "Right to Be Let Alone" as Natural Law

Roberson v. Rochester Folding Box Co.

- Defendant Franklin Mills Co. made 25 thousand lithographic prints of a woman without her consent and used it in advertising.
- Plaintiff (the woman) was ridiculed by acquaintances and others.
- She alleged damages of $15,000 from stress, etc.
- She also sought an injunction against further use.

Roberson v. Rochester Folding Box Co.

Roberson v. Rochester Folding Box Co.

- Plaintiff did not allege libel/slander; the likeness of her in the advertisement was actually very good.
- The lower court found that while there was no precedent, there is a valid cause of action for invasion of the "right to privacy."
- Appellate court calls it the "right to be let alone."
- The court is concerned about opening a Pandora's Box.

Roberson v. Rochester Folding Box Co.

- The Court decides it needs to consider the cases cited in the Brandeis/Warren article to understand whether they truly embodied what Brandeis/Warren argue, or are just property cases and not part of a right to privacy.
- Finds that many of the cases were based on a breach of contract, trust or violation of property right, and NOT based on the feelings of the individual involved.

Roberson v. Rochester Folding Box Co.

- *Dockrell v. Dougall* (1898): True but unauthorized statement by a doctor about a product used in advertising.
  - The Court said this was not actionable unless there was injury to reputation or property.
- *Chapman v. Telegraph Co.*: The law does not provide redress for injury to feelings due to mere negligence.

Roberson v. Rochester Folding Box Co.

- *Corliss v. E.W. Walker*: Court stated that "a private individual has the right to be protected from the publication of his portrait in any way," but found Mr. Corliss to be a public figure.
- *Roberson* Court takes issue with the *Corliss* decision: "The line between public and private characters cannot possibly be drawn."

Roberson v. Rochester Folding Box Co.

- As a result, the Court felt that absent legislation, there was no basis for the Court to determine or enforce a right to privacy.
- *Atkinson v. Dougherty*: use of the likeness of a deceased person; family sued to enjoin. The Court found for the defendant, stating that while what was done was repugnant "The law does not remedy all evils."

Roberson v. Rochester Folding Box Co.

- Not surprisingly, the Court finds no cause of action.
- BUT refers to Penal Code section 242, relating to "malicious publication by picture, effigy, or sign, which exposes a person to contempt, ridicule or obloquy, is a libel, and it would constitute such at common law."
- So, doesn't the Plaintiff have a case?
  - The Court allowed the Plaintiff to amend.
- The Court also noted that the legislature could act and change the law

Roberson v. Rochester Folding Box Co.

- The NY State Legislature subsequently amended the law following public uproar about the decision.
- Section 50 prohibits the use of a living person's "name, portrait or picture" for commercial purposes without the person's consent.

Kent: Pavesich, Property and Privacy

(Pavesich v. New England Life Insurance Co.)

A Different Court Affirms the Right to Privacy as a Natural Right

Pavesich v. New England Life Insurance Co.

- Rebuttal to the *Roberson* case.
  - Atlanta Journal-Constitution published likeness of Plaintiff as part of an advertisement run by the insurance company. He was portrayed in a positive manner.
  - He never had a policy or made statements attributed to him.
  - Lower court sustained dismissal for lack of claim.
  - Georgia Supreme Court reversed.


THE CONSTITUTION: ATLANTA, GA., SUNDAY, NOVEMBER 15, 1903

DO IT NOW.
THE MAN WHO DID.

DO IT WHILE YOU CAN.
THE MAN WHO DIDN'T.

THESE TWO PICTURES TELL THEIR OWN STORY.

"In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and today my family is protected and I am drawing an annual dividend on my paid-up policies."

"When I had health, vigor and strength I felt the time would never come when I would need insurance. But I see my mistake. If I could recall my life I would buy one of the New England Mutual's 18-Pay Annual Dividend Policies."

THOMAS B. LUMPKIN, General Agent,
1008-1009-1010 EMPIRE BUILDING.

Pavesich v. New England Life Insurance Co.

- The absence for a long period of time of a precedent for an asserted right is not conclusive evidence that the right does not exist.
- Where the case is new in principle the courts cannot give a remedy, but, where the case is new only in instance, it is the duty of the courts to give relief by the application of recognized principles.

Pavesich v. New England Life Insurance Co.

- A right of privacy is derived from "natural law."
  - Goes to Roman times. See page 4 of the case.
- The right of privacy is embraced within the absolute rights of "personal security" and "personal liberty."
  - Explained on page 5 of the case.

Pavesich v. New England Life Insurance Co.

- Response to *Roberson*: Says that the cases that the *Roberson* court focused on were not the right sources. Others show a right to privacy.
- Liberty of speech and of the press, when exercised within the bounds of the constitutional guaranties, are limitations upon the exercise of the right of privacy.

Pavesich v. New England Life Insurance Co.

- The publication of one's picture, without his consent, for commercial purpose, is in no sense an exercise of the liberty of speech or of the press, within the meaning of those terms as used in the Constitution.

Prosser – Privacy

How Do We Define a Legal Violation of a Right to Privacy?

Prosser – Privacy

- The article Attempts to synthesize the various privacy decisions.
- It finds "four distinct kinds of invasion of four different interests of the plaintiff which are tied together by a common name, but otherwise have almost nothing in common…." Page 107.
- Basically a rebuttal of the Brandeis/Warren article's amorphous definition of privacy.

Prosser – Privacy

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.

2. Public disclosure of embarrassing private facts about the plaintiff.

3. Publicity which places the plaintiff in a false light in the public eye.

4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Prosser – Privacy

- Intrusion:
  - Includes both physical and other types of intrusion (eavesdropping, etc.).
  - BUT the intrusion must be something which would be offensive or objectionable to a reasonable man.
  - "It is clear also that the thing into which there is prying or intrusion must be, and be entitled to be, private." Page 108.

Prosser – Privacy

- Public Disclosure of Private Facts:
  - First, the disclosure of the private facts must be a public disclosure, and not a private one.
  - Second, the facts disclosed to the public must be private facts, and not public ones.
    - Being seen in public is not private (but adding commentary can be a separate violation).
    - What about the lapse of time? The *Melvin* case (ex-prostitute who turned good, later movie about her previous life).
    - Maybe there are limits?

Prosser – Privacy

- Public Disclosure of Private Facts (cont'd):
  - Third, the matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities.
    - *Sidis* case regarding child prodigy (newspaper follow-up, led to the bookkeeper's early death).
  - Prosser suggests a "mores" test given the differing results in *Melvin* and *Sidis*.
- Claims that this is different from intrusion, because reputation is the interest.

Prosser – Privacy

- False Light in the Public Eye
  - Need not be defamatory.
  - But must be objectionable to the ordinary reasonable man.
  - Prosser again suggests "mores."
  - The interest is also reputation, but differs from public disclosure because one deals with truth and the other falsity.
  - Concerns regarding whether this overwhelms defamation.

Prosser – Privacy

- Appropriation
  - One makes use of another's name to pirate the other's identity for some advantage of his own
    - Impersonation to obtain credit or secret information
    - Posing as the plaintiff's wife, or providing a father for a child on a birth certificate.
    - Etc.
- Must be use that shows that the name is in fact the plaintiff.
- The interest protected is a "proprietary" one.

Prosser – Privacy

- The right to privacy is personal, not assignable, and generally does not survive death.
- Showing of special damages not required, but can increase damages if shown, or if punitive damages can be established.
- Public persons (defined page 119). Need "some logical connection between the plaintiff and the matter of public interest." p. 120.

Student Presentation

Gaurav Narwani: The Future of Privacy in the Digital Age with the Rise of AI and IoT

Bloustein – Privacy as an Aspect of Human Dignity

A Response to Prosser:
The Human Dignity Thesis

Bloustein – Privacy as an Aspect of Human Dignity

- Feels that the varying cases on privacy have confused the underlying understanding which can cause issues for future cases.
- Takes issue with Prosser. In essence, Bloustein feels that we need to look at more than the remedy or particular interest affected.
- Feels that this moves us back to a tie to previously existing causes of action – like Thomson (cluster of rights).

Bloustein – Privacy as an Aspect of Human Dignity

- Says that Prosser steps away from Warren/Brandeis, who saw privacy as something larger, for which there is sometimes a cause of action.
- He says, however, that Warren/Brandeis never really defined it. pp. 161-162.
- Bloustein says “inviolate personality” encompasses the individual’s independence, dignity, and integrity.

Bloustein – Privacy as an Aspect of Human Dignity

- Intrusion – he says Prosser "neglects the real nature of the complaint; namely that the intrusion is demeaning to individuality, is an affront to personal dignity.
  - Says intrusion is "wrongful because [it is] demeaning of individuality, and [is] such whether or not [it] causes emotional trauma." (which differs from Prosser). p. 165.
  - For example, the 4th Amendment requires no such trauma.
  - "Liberty of the person" underlies all intrusions.

Bloustein – Privacy as an Aspect of Human Dignity

- Public Disclosure:
  - Prosser improperly focuses on the particular harm, when the real issue is "that some aspect of their life has been held up to public scrutiny at all," thus making it similar to the intrusion cases, since the publicity is a form of intrusion. Example p. 169.

Bloustein – Privacy as an Aspect of Human Dignity

- Appropriation (page 173)
  - Again, no different than intrusion or public disclosure: not proprietary as suggested by Prosser, but a protection of individual dignity.
  - Same risk of harm from using a name for advertising and disclosing salacious details.
  - Only difference is the manner in which the dignity is harmed.
    - What about where the publication is a boon? Is it still a violation at first, and then consented in the future?

Bloustein – Privacy as an Aspect of Human Dignity

- False Light:
  - Addresses the "embrace" cases ("wrong kind of love" vs "right kind of love" articles). No indignity from mere republication without comment, because they consented by embracing in public.
  - BUT, there was no consent to any further use in connection with a damaging statement – this turns it into a violation of dignity.
  - Thinks Prosser missed it because he focused on the couple's loss of commercial rights, not the harm to their individuality.

Bloustein – Privacy as an Aspect of Human Dignity

- Bloustein says he's right because his theory holds when you get outside of torts, and Prosser's does not.
  - 4th Amendment: is actually a protection of human dignity, and not concerned with prevention of emotional distress.
  - *DeMay* (unauthorized witness to childbirth) and *Silverman* (wiretap) are premised on "an affront to the individual's independence and freedom."
  - Same value in peeping tom statutes.

Bloustein – Privacy as an Aspect of Human Dignity

- Why does this matter?
  - Prosser's approach will have the tendency to deny relief where there has not previously been damage found. Same problem as *Roberson*.
  - Bloustein also changes the way you look at remedies, because it becomes a remedy to individuality, not reputation or some other already-recognized harm.

Palmer – The Three Milestones in the History of Privacy in the United States

Palmer – Three Milestones in Privacy in the US

- The US differs from Europe in its views of privacy rights.
  - In Europe, privacy is an inherent right related to an individual's social personality rights.
  - In the US, the law has developed over time to sweep together various liberties that are not traditionally "privacy" rights.
- "[P]rivacy in the United States is now an umbrella concept under which diffuse personality interests are brought together."
- Palmer does not dwell on defining "privacy" but believes that "privacy cannot be defined coherently to mean so many things."

Palmer – Three Milestones in Privacy in the US

- Palmer posits that we got where we are now based on three milestones in the past 120 years of privacy law creation:
  1. The Warren/Brandeis Article, "The Right to Privacy," in 1890.
  2. The Prosser Article, "Privacy," in 1960.
  3. US Supreme Court interpretation of liberty rights from 1960-present.

Palmer – Three Milestones in Privacy in the US

1. Warren/Brandeis - "The Right to Privacy"
   - Palmer takes a different view of the article and finds three "phases of the personality" that the article sought to protect (not just the "right to be let alone"):
     - Control over the use of one's name, likeness, or photograph.
     - A reserved sphere of personal and family life.
     - Control over one's creations, writings, and thoughts.
   - They also "offered no doctrinal steps, constructed no new [laws] … [f]uture steps are not even discussed. The solutions were simply entrusted to the judges."

Palmer – Three Milestones in Privacy in the US

2. Prosser - "Privacy"
   - To Palmer, Prosser "lifted the confusion" about privacy that previously existed and persuaded the reader that "each tort had distinguishable characteristics, offered different protections, and did not duplicate or conflict with the other three."
   - But Prosser also took "liberties" with the cases he read and "retrofitt[ed] them to his purposes" to make the four categories.
   - Also, while Prosser sought to find order in the chaos of privacy, his four torts have "nothing in common with each other".

Palmer – Three Milestones in Privacy in the US

3. Transformation of Liberty into Privacy
   - Supreme Court started characterizing an "interest in independence in making certain kinds of important decisions" as a privacy right.
     - Included marriage, procreation, raising children, travel, etc.
   - Not just the freedom to be private, but to make personal choices in public.

Palmer – Three Milestones in Privacy in the US

3. Transformation of Liberty into Privacy
   - *Griswold v. Connecticut* – "zones of privacy" not explicitly defined in the US Constitution protect the marital relationship.
   - *Roe v. Wade* – found a right to choose to terminate her pregnancy was part of her right to privacy.
   - *Lawrence v. Texas* – found a freedom to choose a sexual lifestyle.
- As a result, "[m]any personality rights are recognized in the United States as if they were aspects of privacy."