Free Speech and the Social Construction of Privacy

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According to the conventional wisdom, privacy rights and the rights to freedom of speech and press are frequently and necessarily in conflict with each other. Privacy, it is said, and has been said since Brandeis, is the right to be let alone.[1] Freedom of speech and press, however—it is said, and has been said since Holmes—is the right to say and print what one pleases, especially about the wielders of public power.[2] Because what people and the press might wish to say about others can and often does conflict with those others' desire not to have things said about them, the conflict between the right to privacy and the rights to freedom of speech and press is both patent and deeply intractable.[3]

But perhaps the conventional wisdom is wrong. Perhaps the right to privacy is more socially contingent, more socially constructed, and more culturally relative than other rights, or has a degree of social contingency and cultural relativity that other rights do not possess. If this is the case, then the social construction of the right to privacy may be based on a wide array of contingent culturally salient understandings. In the United States at least, the First Amendment and freedom of speech rank quite high in the pantheon of these culturally salient understandings, and as a result we in the United States may, because of a dominant First Amendment ideology, define the area of appropriate personal space more narrowly than it may be defined elsewhere. If

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this is so—and thus far I have only asserted it and not argued for it—then the right to privacy, especially in the United States, may be better understood as being driven by the First Amendment more than being constrained by it. As a legal matter this may make no difference, because the doctrinal consequences are virtually identical. But once we get beyond the narrow domain of legal doctrine, an appreciation of the way in which our very understanding of the idea of privacy is shaped by a free speech ideology will help us to understand the idea of privacy at a deeper level.

Just Enough Law

It may be useful to start with a quick overview of the formal law. Brandeis and Warren's original conception of privacy arose in the context of what has come to be known as misappropriation, the dimension of privacy focusing on the unauthorized use of one's name or likeness for commercial purposes.[4] If BMW were to run an advertisement promoting the fact that, "When Michael Johnson is not running the 400 meters, he's driving his BMW," and if BMW were to run this advertisement without the permission of Michael Johnson, Johnson would have a privacy claim for appropriation against BMW, and the claim would be just as strong even if Michael Johnson in fact *does* drive a BMW. At the heart of the misappropriation claim is the understanding that one's name and likeness have a commercial value, and that taking something of commercial value to Michael Johnson without paying him or obtaining his permission is akin to theft.[5]

Allowing Michael Johnson to recover under these circumstances might strike some as a restriction of freedom of speech. After all, it restricts BMW's to *say* or to *print* something, and indeed it restricts BMW's right to say or print something that happens to be true. Nevertheless, the obvious commercial value of a celebrity's name and likeness has successfully blunted most free

speech claims against the misappropriation tort, and has done so even when the free speech claimant is the media. In *Zacchini v. Scripps-Howard Broadcasting Co.* (433 U.S. 562, 1977), a news program had broadcast the entirety of Mr. Zacchini's performance in which he was shot out of a cannon, the law of gravity (considerably less socially constructed than the law of torts) ensuring that the performance was brief and thus easily broadcast in an uncut version. Zacchini claimed misappropriation of something of commercial value, and the media defendant, not surprisingly, claimed a First Amendment right to broadcast what it perceived to be a newsworthy event. In rejecting the First Amendment argument, the Supreme Court relied heavily on the commercial dimension of the plaintiff's claim, holding (perhaps presciently, in light of contemporary issues regarding Napster and others who seek to couch their commercial appropriation of intellectual property in First Amendment terms) that the First Amendment was no defense to a plain misappropriation of Mr. Zacchini's livelihood.[6]

More commonly, invasion of privacy claims are not based on the idea of misappropriation of a name or likeness of commercial value, but rather on another of the Prosser categories now entrenched in the *Restatement of Torts* (American Law Institute, 1967). Here the tort is based on, to use Dean Prosser's language, "the public disclosure of embarrassing private facts about the plaintiff." In these cases, the invasion of privacy comes about not because of the theft of something of commercial value, but because of what can be thought of as the theft of the plaintiff's right to control the facts about her own life. If the intimate details of my life are disclosed without my consent, so the argument goes, then even the truth of that disclosure cannot undercut the fact that something that is essentially *mine* to control has been taken from me.

When the accurate disclosure of facts about individuals does not have as obvious a commercial dimension, the seeming tensions with free speech principles have become more apparent. As a result, the authoritative embodiment of this dimension of the

tort of invasion of privacy has been subject to qualifications of both "reasonableness" and "newsworthiness." The consequence of this has been to remove from the ambit of the tort those unwanted disclosures that could subsequently be determined to have been newsworthy, as with, to take two prominent examples, the disclosure of the subsequent life history of someone who had previously been a child prodigy but had for 20 years lived in obscurity (*Sidis v. F-R Publishing Corp.*, 113 F.2d Cir.06 [2d Cir.], *cert. denied*, 31 U.S. 711, 1940), and the disclosure of the homosexuality of the former marine who thwarted Sara Jane Moore's attempt to assassinate President Gerald Ford (*Sipple v. Chronicle Publishing Co.*, 154 Cal. App. 3d 1040, 201 Cal. Rptr. 1065, 1984).

The newsworthiness standard is intriguingly broader than even the parallel defamation test. If a person claims to have been libeled by the press, her burden of proof is largely determined by whether she is a public figure or a public official, in which case she must prove something close to intentional falsity with convincing clarity (*New York Times v. Sullivan*, 376 U.S. 254, 1964). If she is a private individual, however, she need only prove negligent behavior by the press, and need prove it only by the lower standard of preponderance of the evidence (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 1974). Yet if the claim is one of invasion of privacy for the unwanted disclosure of embarrassing private facts, the plaintiff's claim is barred by the newsworthiness principle regardless of whether she is a public figure or a private individual. Not only is former President Bill Clinton barred by the newsworthiness principle from legally objecting to the publication of the facts that he cheats on his wife and cheats at golf, but so too, as in Oliver Sipple's child prodigy case, are the claims barred if an otherwise obscure individual becomes involved in an event of newsworthy interest.

The greater protection of the press against privacy claimants than against defamation claimants likely reflects the fact that the privacy plaintiff is essentially objecting to the publication of accurate information, and is in addition claiming no appropriation of

anything of commercial value. When so described, the free speech implications of the issue become more apparent, and indeed the few Supreme Court cases dealing with privacy claims—usually (except for *Zacchini*) cases in which a victim of a crime seeks to keep his or her name and other facts out of press descriptions of subsequent proceedings against the perpetrator—have progressively narrowed the scope of the privacy rights while they have progressively insisted on the press's First Amendment rights to publish accurate information of public interest, regardless of the consequences to the individuals unwillingly brought into public view.[7]

The Journalistic Construction of Privacy

Although it is easy these days to focus on the electronic and cyberspace dimensions of our changing informational lives, it is worthwhile recalling that Justice William Brennan was making his point about all of us being public persons not in the context of changing information technology, but instead in the context of changes in our conception of public physical space, and changes in the actual practices of journalism.[8] If, so he supposed, the media was becoming more aggressive in what it reported and what it did not, legal rules aside, then this social fact was relevant in determining the extent to which so-called private individuals should be able to bring lawsuits based on what was said about them when they were involved in public events.

It is a mistake to think that all or even much of this is attributable to law. Just as vast differences between American and Australian media law over-predict differences between American and Australian media,[9] so too is it a mistake to attribute too much of journalistic behavior to legal incentives.[10] Although I will return to the law in the following section, here I am concerned instead with the legally unmediated effect of press practices in general. Consider, for example, the widespread historical practice by

American political journalists of not publishing information about the sexual and alcohol-related behavior of public officials and public figures. Even though the publication of such information was plainly legally protected, and even though many voters would have used such information in making their voting and other decisions, the rules of the game kept such matters from public view. Starting with Senator Gary Hart in 1988, and probably not finishing with President Clinton, the rules have changed, and public officials no longer have the expectation of privacy with respect to sex-related or alcohol-related behavior that they enjoyed before the late 1980s. Unlike President John F. Kennedy, President George W. Bush will in 2003 have no expectations of privacy, reasonable or otherwise, with respect to sexual behavior with a woman not his wife, regardless of where that behavior occurred.

This is not the place to discuss whether the change I have just described is for better or for worse.[11] The point is only that we have witnessed a substantial change in what a class might reasonably have expected, and that change is largely a consequence of legally uninfluenced change in journalistic behavior. Nor is there any reason to believe that the phenomenon is restricted to public officials and public figures. Insofar as similar changes in journalistic mores and journalistic practices make it more likely that ordinary people will see their pictures in the newspaper, more likely that ordinary people will be approached by a journalist in the immediate aftermath of a tragic accident, and more likely that ordinary people who are the victims (or perpetrators) of crimes will be described in some detail in the press, then it is more likely that people's understanding of what privacy is will be influenced as well. And this is not just a matter of people becoming psychologically or sociologically inured to things that previously would have appalled them, although this factor is also at work. Rather, journalistic practices, by changing people's empirical expectations of the space that is theirs alone to control, have also changed, in what is ultimately a conceptual and not empirical way, their understanding of just what privacy *is*.[12]

Conclusion

Although technological changes and journalistic practices influence our understanding of what privacy is, my main point in this paper is that law does not just stand by as an innocent observer. Especially in a law-soaked society like that of the United States, our social and cultural practices, our institutions, and our conceptual understanding are highly influenced by the law.[13] Law creates possibilities, conceptual, institutional, and empirical, and extinguishes them. Law can mold and remold our understanding of the world, and in the United States the First Amendment is a large part of the legal environment. In the United States many people understand incitement to racial hatred as a free speech issue and not as a crime, as an issue of communication and not as an issue of equality, largely because of the way in which the First Amendment has shaped our practices of cultural categorization.[14] Similarly, Americans increasingly categorize hostile environment sexual harassment as a free speech issue—although they did not merely a few years ago, largely because of the salience of the First Amendment and its doctrines.[15]

In much the same way, we can see the distinct possibility that the law of privacy informs our conception of what privacy is in ways different from the effect of law in other areas. Our conception of what a horse is remains largely untouched by equine law, and so too with the law pertaining to rivers, food, and chemicals. In all of these cases the law operates on a prelegal world, and although the law may affect that world, it is unlikely to affect our conceptual understanding of what that world is all about. Not so, however, with privacy. Although the concept of privacy does have a moral, social, and philosophical prelegal existence (and in this respect differs from the First Amendment, which does not have a prelegal existence), a great deal of our understanding about the concept of privacy appears influenced by judicial decisions invoking the right to privacy,[16] and by legal categories (including the common law tort of invasion of privacy) that inform our language

and our practices of categorization. The person in the street might think of elephants and rivers without thinking of the law, but that same person is unlikely to think of privacy without thinking of the *right* to privacy and *invasion* of privacy, and the intrusion of these legal terms and legal ideas makes it far less likely that a widespread understanding of the concept of privacy can exist without being created and re-created by the law itself.

If this is so, our conception of privacy is likely to be as influenced by legal change as it is by changes in technology and changes in journalistic practices. As courts and legislatures identify as privacy violations concerns that would not previously have been so categorized, this will likely inform public understanding of the idea of privacy itself. In a world in which the law is especially important and especially salient, those who have the power to make the law—legislatures, judges, administrative agencies, and, occasionally, authoritative commentators on the work of legislatures, judges, and administrative agencies—are likely to be the ones who have a disproportionate power over our conceptual apparatus in those areas in which the concepts have at best a thin prelegal existence.[17] As a largely socially constructed concept, privacy is particularly at the mercy of society's constructors, and in the United States at least, law is one of the most important of our constructors.

The claims of social construction are important, but cannot be pressed too far. That privacy is socially constructed does not mean that it is not subject to normative critique and evaluation, nor does it mean that privacy is immune to legal and political influence. But once we understand that privacy, arguably unlike justice, utility, and other moral primaries, and certainly unlike rabbits, tulips, and other natural kinds, is largely a function of a socially constructed and socially contingent way of organizing the world, we can understand as well that this social construction is as variable as the forces that create it. And since we now live in a world in which changes in law, changes in journalistic practice, and, most of all, changes in technology are accelerating, we con-

sequently live in a world in which the very forces that have constructed the right to privacy are changing as quickly as anything we know. One approach to all this—an unfortunately common one—is to rush to the barricades and guard against intrusions to our privacy. But, as I hope to have shown here, the barricades themselves are made of the same material as the forces that are alleged to threaten them. As a result, there is something strangely circular and strangely anachronistic about contemporary fears regarding our privacy. Those fears may be real, but insofar as those fears are expressed in terms of social understandings that are themselves changing, the fears may turn out to be as short-lived as the technologies that are thought to threaten them. And insofar as those fears presuppose the independence of privacy concerns from free speech concerns, we may come to discover that the role of free speech as American cultural icon, with influential advocates in both the courts and the press, will turn out to limit the still developing conception of privacy in ways that are too rarely recognized.

Notes

[1]Warren and Brandeis (1890): 195, quoting Thomas Cooley, *A Treatise on the Law of Torts,* 2d ed. (1888): 29.

[2]*Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[3]Especially in the context of this essay, in which I treat public understanding as being as important as formal legal doctrine, the distinctions between freedom of speech, largely the right of individuals and private associations (and increasingly of corporations not themselves in the speech business), and freedom of the press, largely the right of the institutionalized media, are important. Nevertheless, the repetition of "freedoms of speech and press" is infelicitous, and from hereon I will use one or the other to designate both unless the context plainly demands a distinction. For better or for worse, the conflation accurately reflects American First Amendment doctrine, in which the press receives no rights under the Press Clause that all speakers, including the press, get under the Speech Clause. See especially Chief Justice Warren Burger's concurring opinion in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978). See also Lange (1975): 77 ff. and Clark (1991): 921.

[4]See Prosser (1960): 383.

[5]See Felcher and Rubin (1979): 1577.

[6]*A & M Records, Inc. v. Napster, Inc.*, 2000 WL 1182467 (N.D. Cal., August 10, 2000). See also *Universal City Studios, Inc. v. Reimerdes,* 2000 WL 1160678 (S.D.N.Y. August 17, 2000).

[7]See, for example, *Florida Star v. B. J. F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

[8]Although he did not say so, it is not unreasonable to suppose that Justice Brennan was thinking not only of defamation, and not only of privacy, but also of (then) recent changes in First Amendment doctrine marked by cases such as *Cohen v. California,* 403 U.S. 15 (1971). If the "shell" with which one surrounded one's self was becoming more permeable with the possibility of affront, offense, and verbal assault of the kind protected in cases like *Cohen* and pending cases like *Gooding v. Wilson,* 405 U.S. 518 (1972), then it was not unreasonable for someone in Justice Brennan's position to suppose that the increasingly permeable shell provided less of a protection for personal privacy in public space.

[9]Although Australian defamation law, in contrast to the American, has historically been both well used and among the most press restrictive in the English-speaking world, the actual content of the Australian press, in terms of the "wide-open" and "robust" criticism of government and officials (*New York Times Co. v. Sullivan,* 376 U.S. 254 (1964)), is strikingly similar to that of the American press. See generally New South Wales Law Reform Commission (1993).

[10]At least some journalists and editors, for example, claim that their publication decisions are largely uninfluenced by considerations of defamation law. See Anderson (1975): 422; Hollander (1989): 257, 258 n. 3; Smith (1983): 87.

[11]For the record, I believe it more for the better than the conventional wisdom supposes, partly because I think that journalistic covering up of information that some voters would have thought relevant to *their* voting decisions is more for the worse than the conventional wisdom believes. See Schauer (2000a).

[12]There is an interesting issue here, and with other First Amendment-related reporting as well, of journalists' ethical responsibilities when reporting *on* privacy issues. Given that individual privacy and freedom of the press are often thought to be in conflict—see Edelman (1990) and Clark (1991)—much of the reporting on privacy issues will involve, whether explicitly or implicitly, reporting on free press issues as well, issues in which the reporters, the editors, the publishers, and the news-

paper (or magazine, or radio station, or television station, or whatever) have strong views, and are themselves interested parties. If a reporter for the *New York Times* is ordinarily expected to recuse himself or herself when the issue on which she is reporting is one in which she has especially strong moral or political views, and to identify any potential conflict of interest, then what are the implications for this when reporters are reporting on issues centrally about, or touching on, issues of freedom of the press, issues on which reasonable people often disagree, and on which there are often two sides (especially with privacy versus free speech conflicts), but in which journalists are more uniformly on one side than the other?

[13]See, generally, Gordon (1984).

[14]See Schauer (1991).

[15]See Schauer (2000b).

[16]Especially decisions such as *Roe v. Wade,* 410 U.S. 113 (1973), and *Griswold v. Connecticut,* 381 U.S. 479 (1965). See Gerety (1981).

[17]There is also the interesting phenomenon by which influential public understanding of what the law is may diverge from the formal or technical understanding of what the law is. See Ellickson (1991).

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