Privacy and Information Security Law

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CLASS 2

Information Privacy Law Introduction pt. 2; Perspectives on Privacy
A. Information Privacy, Technology, and the Law

• Information privacy concerns the collection, use, and disclosure of personal information.
Why Study Information Privacy Law?

- Paramount significance for freedom, democracy, and security
- Issue of growing public concern
- New laws and legal developments
- Engaging and fascinating topic (claims the authors)

B. Information Privacy Law: Origins and Types

Common Law Development

- 1890 Publication of Warren and Brandeis's law review article “The Right to Privacy”
- Late 19th century developments lead to a great need for privacy
Warren and Brandeis Article

• Right to enjoy life → Right to be let alone

• “Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”

Warren and Brandeis Article

• “Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.”

Warren and Brandeis Article

• Why not only slander and libel?
  – Damage to reputation requirement

• “[O]ur law recognizes no principle upon which compensation can be granted for mere injury to the feelings.”
Warren and Brandeis Article

• Why not only copyright law?
• “The statutory right is of no value, unless there is a publication; the common-law right is lost as soon as there is a publication.” (J. 17)

Warren and Brandeis Article

• General right of the individual to be let alone
• “[T]he existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds.”

Warren and Brandeis Article

• “If the invasion of privacy constitutes a legal injuria, the elements for demanding redress exist, since already the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation. The right of one who has remained a private individual, to prevent his public portraiture, presents the simplest case for such extension”
Warren and Brandeis Article

• 1. The right to privacy does not prohibit any publication of matter which is of public or general interest.
• When does the public have legitimate concern?

Warren and Brandeis Article

• “[T]he matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity.”

Warren and Brandeis Article

• 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.
• What kind of disclosures qualify?
Warren and Brandeis Article

- 3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.

- 4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent.
  - Once the information is disclosed by or with the authorization of the person…

- 5. The truth of the matter published does not afford a [defense].
  - Not an injury to the individual’s character, but rather injury to the individual’s right to privacy
Warren and Brandeis Article

- 6. The absence of “malice” in the publisher does not afford a [defense].

Warren and Brandeis Article

- Remedies
  - Tort
  - Injunction
- Possibility of criminal law sanctions?

Results of the Article?

- Courts and legislatures created privacy torts
Prosser Article

• Four distinct types of invasion of privacy
  1. Intrusion upon seclusion
  2. Public disclosure of private facts
  3. False light
  4. Appropriation

Prosser Article

• “Taking them in order — intrusion, disclosure, false light, and appropriation — the first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other three do not. The fourth involves a use for the defendant’s advantage, which is not true of the rest.”

Lake v. Wal-Mart Stores, Inc.

• Issue
  – Does MN have a tort action for invasion of privacy?

• Case history
  – D.C. – no tort
  – Court of Appeals – no tort
  – Supreme Court – yes for seclusion, appropriation, and publication of private facts; no for false light publicity
Lake v. Wal-Mart Stores, Inc.

• Background
  – Naked photo of persons was not printed by Walmart
  – Wal-Mart employee circulated the photo in the community
  – Lake and Weber sue Wal-Mart

Lake v. Wal-Mart Stores, Inc.

• “Today, the vast majority of jurisdictions now recognize some form of the right to privacy. Only Minnesota, North Dakota, and Wyoming have not yet recognized any of the four privacy torts. … we reject the proposition that only the legislature may establish new causes of action. The right to privacy is inherent in the English protections of individual property and contract rights and the ‘right to be let alone’ is recognized as part of the common law across this country. Thus, it is within the province of the judiciary to establish privacy torts in this jurisdiction.”

Lake v. Wal-Mart Stores, Inc.

• “Today we join the majority of jurisdictions and recognize the tort of invasion of privacy. The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close…”
Privacy Protection in Tort Law

2) Intrusion upon Seclusion.
3) False Light.
4) Appropriation.

Public Disclosure of Private Facts

• “This tort creates a cause of action for one who publicly discloses a private matter that is ‘highly offensive to a reasonable person’ and ‘is not of legitimate concern to the public.’”
• Restatement (Second) of Torts §652D (1977).

Intrusion upon Seclusion

• “This tort provides a remedy when one intrudes ‘upon the solitude or seclusion of another or his private affairs or concerns’ if the intrusion is ‘highly offensive to a reasonable person.’”
• Restatement (Second) of Torts §652B (1977).
False Light

• “This tort creates a cause of action when one publicly discloses a matter that places a person ‘in a false light’ that is ‘highly offensive to a reasonable person.’”
• Restatement (Second) of Torts §652E (1977).

Appropriation

• “Under this tort, a plaintiff has a remedy against one ‘who appropriates to his own use or benefit the name or likeness’ of the plaintiff.”
• Restatement (Second) of Torts §652C (1977).

Additional Privacy Related Torts

• Breach of Confidentiality
• Defamation
• Infliction of Emotional Distress
Privacy Protection in Evidence Law

- "[C]ertain communications are privileged, and hence cannot be inquired into during a legal proceeding."

Privacy Protection in Contract Law

- Breach of implied contracts
- Implicit duties based torts
- Privacy policy violations

Perspectives on Privacy
A. The Philosophical Discourse About Privacy

The Concept

- “In order to determine what the law should protect, we cannot merely look to what the law does protect.”

Public and Private Spheres

- “[T]he public sphere is the realm of life experienced in the open, in the community, and in the world of politics. The private sphere is the realm of life where one retreats to isolation or to one’s family. At its core is the world of the home.”
B. The Definition and the Value of Privacy

Privacy and Freedom

“Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”

Four States of Privacy

- Solitude
- Small Unit
- Anonymity
- Reserve
Functions of Privacy

- Personal Autonomy
- Emotional Release
- Self-Evaluation
- Limited and Protected Communication

Control Over Information

- "Privacy is not simply an absence of information about what is in the minds of others; rather it is the control we have over information about ourselves."

Examined Lives

- "The point is not that people will not learn under conditions of no-privacy, but that they will learn differently, and that the experience of being watched will constrain, ex ante, the acceptable spectrum of belief and behavior. Pervasive monitoring of every first move or false start will, at the margin, incline choices toward the bland and the mainstream. The result will be a subtle yet fundamental shift in the content of our character, a blunting and blurring of rough edges and sharp lines. … The condition of no-privacy threatens not only to chill the expression of eccentric individuality, but also, gradually, to dampen the force of our aspirations to it. …"
Privacy Conceptualized

1) the right to be let alone
2) limited access to the self
3) secrecy
4) control over personal information
5) personhood
6) intimacy

Revised Taxonomy

• Information Collection
• Information Processing
• Dissemination of Information
• Invasion into Private Affairs

Information Collection

• Surveillance is the watching, listening to, or recording of an individual’s activities.
• Interrogation consists of various forms of questioning or probing for information.
Information Processing

- **Aggregation** involves the combination of various pieces of data about a person.
- **Identification** is linking information to particular individuals.
- **Insecurity** involves carelessness in protecting stored information from being leaked or improperly accessed.
- **Secondary use** is the use of information collected for one purpose for a different purpose without a person's consent.
- **Exclusion** concerns the failure to allow people to know about the data that others have about them and participate in its handling and use.

Dissemination of Information

- **Breach of confidentiality** is breaking the promise to keep a person's information confidential.
- **Disclosure** involves the revelation of truthful information about a person which impacts the way others judge that person's character.
- **Exposure** involves revealing another's nudity, grief, or bodily functions.
- **Increased accessibility** is amplifying the accessibility of information.
- **Blackmail** is the threat to disclose personal information.
- ** Appropriation** involves the use of another's identity to serve the aims and interests of another.
- **Distortion** consists of the dissemination of false or misleading information about individuals.

Invasion into Private Affairs

- **Intrusion** concerns invasive acts that disturb one's tranquility or solitude.
- **Decisional interference** involves the government's incursion into people's decisions regarding their private affairs.
Self-Development

• Privacy is essential for self-development (according to a number of theorists)

C. Critics of Privacy

• “Very few people want to be let alone. They want to manipulate the world around them by selective disclosure of facts about themselves. Why should others be asked to take their self-serving claims at face value and be prevented from obtaining the information necessary to verify or disprove these claims?”
Program Completed

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