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978-0-521-18765-7 - New Dimensions in Privacy Law: International and Comparative Perspectives

Edited by Andrew T. Kenyon and Megan Richardson

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## 1

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## New dimensions in privacy: Communications technologies, media practices and law

ANDREW T. KENYON AND MEGAN RICHARDSON

While the idea of ‘privacy’ is venerable,<sup>1</sup> modern obsessions with privacy are largely rooted in the twentieth century, particularly the years following the Second World War. The precise reasons may vary and change over time. As any European civilian lawyer will confirm, the European Convention on Human Rights,<sup>2</sup> with its important provision for security of private life alongside its protection of freedom of expression,<sup>3</sup> was a direct response to the many and varied intrusions on personal integrity that occurred during the war years. In Europe it still represents a bulwark against organised authority, and significantly not only one limited to the authority of the state.

An American lawyer would almost certainly refer to the paradigmatic work of Warren and Brandeis,<sup>4</sup> which preceded the twentieth century by only a few years, and its later revision by Prosser.<sup>5</sup> However, such a lawyer might well add that the human rights movement of the 1960s and 1970s really established the modern conception of rights as basic to a democratic polity in the United States – even if it was free speech rather than privacy that emerged as dominant. The rights had to contend for success in America’s so-called ‘marketplace of ideas’,<sup>6</sup> and the competition

<sup>1</sup> Authorities cited for the word ‘Privacy’ in the *Oxford English Dictionary Online* (Oxford: Oxford University Press, 1989–2005) date back to the early seventeenth century and before.

<sup>2</sup> Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 June 1952).

<sup>3</sup> *Ibid.* Article 8 and Article 10 respectively.

<sup>4</sup> Samuel D. Warren and Louis D. Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193. Indeed not only American lawyers commonly cite this – and it is referred to in the OED, above n.1, as authority for ‘privacy’ as ‘The state or condition of being alone, undisturbed, or free from public attention, as a matter of choice or right’.

<sup>5</sup> William L. Prosser, ‘Privacy’ (1960) 48 *California Law Review* 383.

<sup>6</sup> In the words of Holmes J (dissenting) in *Abrams v. United States*, 250 US 616 at 630 (1919) ‘that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out . . . is the theory of our Constitution’.

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was prefigured by the First Amendment's explicit reference to freedom of expression as a basic American value and the interpretation of that constitutional wording by courts, particularly since the 1960s.<sup>7</sup> Here at least there is some basis for difference with the rest of the world.<sup>8</sup>

English lawyers might observe that privacy has been part of the fabric of English law since at least the case of *Entick v. Carrington*,<sup>9</sup> but sometimes find it difficult to explain emerging concerns about privacy except as a European phenomenon swept to England under the impetus of the European Convention. Such an analysis, however, underplays the technological and commercial developments that have led to new pressures for privacy protection. And it arguably neglects ongoing domestic debates about media practices, which are longstanding and have often been linked to the roles of self-regulatory bodies like the Press Complaints Commission.<sup>10</sup> While the European influence is real and of undoubted significance, there is also a certain prosaic utilitarianism to contemporary English legal discussions about privacy, which suggests a distinction from the dignitarian rights-based approaches of continental Europe. If England can be seen as the first home of utilitarianism, it can also be acknowledged that while utilitarians might use the language of rights their ultimate concerns are with social welfare: the 'greatest happiness for the greatest number', as put by Jeremy Bentham and John Stuart Mill.<sup>11</sup>

<sup>7</sup> See, e.g., *New York Times v. Sullivan*, 376 US 254 (1964); *Time Inc. v. Hill*, 385 US 374 (1967); Melville B. Nimmer, 'The Right to Speak From *Times* to *Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy' (1968) 56 *California Law Review* 935.

<sup>8</sup> See, e.g., Frederick Schauer, 'The Exceptional First Amendment' in Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005) p. 29.

<sup>9</sup> *Entick v. Carrington* (1765) 19 St Tr 1029.

<sup>10</sup> See, e.g., United Kingdom, Home Office, *Report of the Committee on Privacy and Related Matters*, Cm 1102 (London: HMSO, 1990) (commonly known as the '*Calcutt Report*'); Raphael Cohen-Almagor, *Speech, Media and Ethics: The Limits of Free Expression* (Basingstoke, UK: Palgrave, 2001) chap. 7 'The Work of the Press Councils . . .' and particularly pp. 124–32 for a review of the UK history, preceding and following the *Calcutt Report*, and the influence of concerns about press intrusion in UK debates; David Sherborne and Sapna Jethani, 'The Privacy Codes' in Michael Tugendhat and Iain Christie (eds.), *The Law of Privacy and the Media* (Oxford: Oxford University Press, 2002) chap. 13 and *First Cumulative Updating Supplement* (2004); and Russell L. Weaver, Andrew T. Kenyon, David F. Partlett and Clive P. Walker, *The Right to Speak III: Defamation, Reputation and Free Speech* (Durham, NC: Carolina Academic Press, 2006) pp. 124–7 and p. 273 for details about the pattern of complaints to the Press Complaints Commission in recent years.

<sup>11</sup> Although Mill at least attempted to acknowledge rights as entailing 'vastly more important, and therefore more absolute and imperative' social utilities: 'Utilitarianism' in John Stuart

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Those in former English colonies such as Australia and New Zealand seem more conflicted in attitudes to privacy. Our debates about privacy and free speech appear as pale companions to English battles between celebrities seeking to control personal revelations (with one eye to preserving a marketable reputation) and the media whose business includes celebrity revelation.<sup>12</sup> There may be less concern than in our European counterparts with founding rights on notions of personal integrity; although we may readily say that privacy is about dignity as much as utility, there is a sense that we do not hold to this when it comes to providing special legal support.<sup>13</sup> And although we may reference freedom of speech we are more cynical than American lawyers about claims as to its fundamental political importance in the development of an autonomous subject. Concerns about public security offer another reason to limit privacy, as do the market imperatives of commerce: in Australia the force of arguments from security or markets may be even stronger than arguments from free speech. But here Australia does not stand apart from much of the world, except perhaps in the degree of emphasis. There are other countries too, for instance in Asia, where in a conflict with commerce or security privacy may not count for much. In any event, recent international trends appear to be going against privacy in relation to issues of safety: until recently it might have been said in many western societies that protection of public security could rarely justify severe encroachments on privacy – notwithstanding concerns about uses of data surveillance

Mill, *Utilitarianism, On Liberty and Essay on Bentham*, ed. and intro. Mary Warnock (London: Collins, 1962) p. 321. This position can be critiqued as incoherent, but it does provide a pragmatic mechanism for accommodating the language of rights within what is still an essentially utilitarian framework. See further Megan Richardson, 'Whither Breach of Confidence: A Right of Privacy for Australia?' (2002) 26 *Melbourne University Law Review* 381 at 391–3 especially.

<sup>12</sup> Perhaps it is the UK that is unusual. In 2005, *The Economist* reported that 'Britons buy almost half as many celebrity magazines as Americans do, despite having a population that is only one-fifth the size' and '[n]ew figures from the Audit Bureau of Circulation show that the ten best-selling celebrity publications and ten most popular tabloids have a combined circulation of 23m': 'Making and Marketing Celebrities: The Fame Machine' (2005) 376 (8442) *The Economist* 49 (3 September).

<sup>13</sup> This is particularly clear in the minimal implementation given in Australia to the data protection standards required under the European Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data, 1995, *OJ*, L 281, 23 November 1995 (which requires countries outside the EU to provide adequate protection to personal information in order for data to move freely to them from EU states): see Privacy Act 1988 (Cth) (especially 2000 amendments).

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technologies<sup>14</sup> – but this position faces multiple challenges from current political and public perceptions.

This collection encompasses three overlapping areas of analysis: issues about privacy protection under the general law, legislative measures affecting privacy that are aimed at data protection within digital communications networks, and the influences of transnational agreements and other pressures toward harmonised standards. The issues of general law can be related to transforming communications technologies and media practices. The issues of legislative measures, at least those aimed at data protection within digital communications networks, are connected with the transactions of individuals, as citizens and consumers, with state and commercial actors. And the pressures for harmonisation of laws are related in part to the changing authorities of nation states and the emergence of new legal organisations and communities of influence, particularly linked with international trade and the internet.<sup>15</sup> The various authors in this book explore these issues, offering insights that have general as well as comparative interest.

That freedom of speech and privacy are not always in conflict is the message of Eric Barendt in chapter 2. Barendt reviews and revises the ‘standard theme’ that privacy and speech conflict such that one must prevail over the other; and observes that speech includes private as well as public expression. Thus where the protection of private speech is in issue, the dilemma faced in legal cases, sometimes explicit but more often implicit, is not so much privacy *versus* free speech as which *kind* of speech should be privileged. The analysis suggests that the values associated with privacy and expression may not be as distinct as commonly supposed. On the one hand, privacy is not just the right ‘to be let alone’ – the classic Warren and Brandeis view<sup>16</sup> – but includes private interchanges and shared experiences within non-public communities. On the other hand, expression is not simply about what goes on in public arenas; freedom of expression includes choices as to mode, timing, location, audience – whether public or private – and even the choice not to speak at all if expression is understood as a freedom connected to liberty and autonomy. These points about privacy’s social dimensions are picked up in the third chapter by our American contributor, Brian Murchison, who argues that selective

<sup>14</sup> See, e.g., Cees J. Hamelink, *The Ethics of Cyberspace* (London, Sage, 2000).

<sup>15</sup> See, e.g., John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge; Cambridge University Press, 2000); Kathy Bowrey, *Law and Internet Cultures* (Cambridge: Cambridge University Press, 2005).

<sup>16</sup> Warren and Brandeis, ‘The Right to Privacy’, above n. 4 at 205.

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sharing of private personal matters is a means to forge close relationships based on trust, drawing in particular on the work of Richard Rorty – and his use of Sigmund Freud, Ralph Waldo Emerson, John Dewey and others<sup>17</sup> – and on the work of Charles Taylor.<sup>18</sup> The chapter suggests the importance of maintaining that freedom should not be underestimated in a society that places high value on free speech, and examines a number of recent cases in which American courts seem sympathetic to such ideas, notwithstanding the breadth taken by the courts in construing a ‘matter of legitimate public concern’.<sup>19</sup> While Murchison’s focus is largely on media publicity, envisaging the self as a ‘web of relations’<sup>20</sup> has implications for later chapters including those focused on digital communications, data protection and Digital Rights Management (DRM) systems. In addition, non-US readers may be struck by the presence of the jury as an element in analysing US privacy protection under its general law. This jury role is necessary given US federal and state constitutional provisions,<sup>21</sup> but is surely a notable difference which should influence how evaluations of privacy protection seek to draw comparatively on US experiences.<sup>22</sup>

Clearly, ‘public’ as well as ‘private’ may have many meanings. Public expression does not necessarily entail instantaneous communication to the entire world any more than private expression necessarily entails an audience of only one. In the past what was called ‘public expression’ was typically directed to a particular audience (albeit bigger or different from the audience that the privacy subject would have chosen) and publication was often of a rather transitory nature, at least in terms of the audience’s practical ability to access the material. In such cases, privacy interests may not have seemed all that much imperilled if unwanted publication occurred without the possibility of legal recourse. But the concern is greater for networked publications, crossing physical national boundaries

<sup>17</sup> See, e.g., Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989); Richard Rorty, *Philosophy and Social Hope* (London: Penguin, 1999).

<sup>18</sup> Charles Taylor, *The Ethics of Authenticity* (Cambridge, Mass.: Harvard University Press, 1992).

<sup>19</sup> See *Restatement (Second) of Torts* (St Paul, Minn.: American Law Institute, 1977) s. 625D.

<sup>20</sup> Rorty, *Philosophy and Social Hope*, above n. 17 at 53.

<sup>21</sup> The US federal Constitution’s Seventh Amendment provides for a right to jury trial for all claims above \$20; most state Constitutions provide similar rights. See *Colgrove v. Battin*, 413 US 149 (1973).

<sup>22</sup> The presence of juries in both defamation and privacy litigation in the US is a contrast to the situation in, e.g., England where the jury role extends only to defamation; see, e.g., Andrew T. Kenyon, *Defamation: Comparative Law and Practice* (London: UCL Press, 2006).

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and generally being stored and accessible in various forms over long periods. Potential risks raised by the internet, and various attempts to address them at the European level, are canvassed in chapter 4 by Yves Poullet and Marc Dinant. In a close analysis of the network's open character as well as its opaque qualities – such as, the lack of transparency to users that can exist with targeted advertising, differential pricing, limited access to particular sites, and search engines – they seek to clarify and resolve debates about the internet's implications for privacy. Investigating legislative and market-based approaches that may be suitable for the situation where information flows and surveillance are facilitated *together*, they would go further than current provisions in framing a charter of privacy principles aimed at increasing the control which data subjects can exercise over their own circumstances. As Terry Flew notes, the network poses 'a paradoxical scenario' in that consumers are seen as gaining 'voice' in the market, but only through 'willingly divulg[ing] information about their preferences as consumers.'<sup>23</sup> There is another aspect to this chapter – it shows how privacy standards within national jurisdictions may be strongly affected by regional standards, in this case within the EU. Similarly, regional privacy issues are canvassed in chapter 5 for the Asia-Pacific region. Graham Greenleaf examines the APEC Privacy Framework<sup>24</sup> – the most significant recent transnational instrument on privacy – within the context of existing European and US approaches to privacy protection. Usefully reviewing the history of the Framework's development, he sets out how its privacy principles adopt a low standard of protection, whether in comparison to existing international instruments or regional national laws, and raises serious issues for the implementation of the Framework. Like Poullet and Dinant's proposals, the analysis is tempered by realism about the constraints legislators feel when privacy intersects with other interests, especially in relation to commerce, public security and, in some ways at least, freedom of speech.

Interests in intellectual property provide another source of potential constraint, which is the focus of chapter 6 by David Lindsay and Sam Ricketson. They outline the matters at stake in the conjunction of DRM systems and privacy – an issue that can be expected to pose significant future policy questions. Superficially, of course, privacy and intellectual property have a great deal in common. Both almost invariably concern information. Both involve preserving a degree of individual control and

<sup>23</sup> Terry Flew, *New Media: An Introduction* (2nd edn, South Melbourne: Oxford University Press, 2005).

<sup>24</sup> Asia-Pacific Economic Cooperation, *APEC Privacy Framework*, November 2004; available from <http://www.apec.org/>.

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ability to exclude in the face of a public desire for access. Both may be explained and justified in utilitarian as well as dignitarian policy terms. And, as the authors suggest, these policy terms reflect different understandings of the relation between law and the market. Lindsay and Ricketson outline ways in which both economic analysis and consideration of non-market-based values will be important in framing regulatory approaches to DRM systems – with a keen understanding of the possibilities for those approaches to draw on technology as well as on law.

Many of the recent developments in privacy law have concerned not legislation, or not *simply* legislation, but law as developed in cases during the last half decade – particularly in England, New Zealand and the European Court of Human Rights. The final chapters in this book consider the vexed question of how courts should go about protecting privacy when the legislature has not provided clear guidance. The issue is not simply whether a privacy tort or torts would be preferable to reliance on more traditional doctrines – a development suggested, for example, by Sedley LJ in *Douglas v. Hello! Ltd.*<sup>25</sup> As Murchison's analysis shows, privacy torts are common in US courts, but questions still exist as to whether sufficient recognition is given to privacy interests to address contemporary social values. Rather debates about privacy and the general law encompass the question of whether courts in common law jurisdictions go far enough in reflecting privacy values in their legal decisions. The contributions offer some unique insights. In chapter 7, Raymond Wacks contends that generally conservative English courts are not very interested in implementing what they see as European-style privacy norms and, if anything, have used doctrines such as breach of confidence as a panacea for the inadequate protection of privacy. In a somewhat different interpretation, Gavin Phillipson in chapter 8 suggests that English courts have effectively adapted breach of confidence into a de facto privacy tort offering a greater scope for privacy protection than before, but adds that they face difficulties now as the level of privacy protection demanded by the European Court of Human Rights appears to have expanded markedly in recent jurisprudence.<sup>26</sup> Might it almost be getting to the stage that, as lawyer and journalist Joshua Rozenberg has predicted, 'anyone photographed at a public event ha[s] the right to veto an unflattering shot'?<sup>27</sup> In chapter 9 our New Zealand contributor, Sir Kenneth Keith, suggests that, irrespective of whether a tort of privacy is adopted (and New Zealand courts

<sup>25</sup> *Douglas v. Hello! Ltd* [2001] QB 967 at para. 126.

<sup>26</sup> See *Von Hannover v. Germany* (2005) 40 EHRR 1.

<sup>27</sup> Joshua Rozenberg, *Privacy and the Press* (revised edn, Oxford: Oxford University Press, 2005), p. xvi.



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have indeed moved in this direction),<sup>28</sup> courts need to be wary about offering broad support for privacy where the legislature has not elected to do so, especially given this is an area where there has now been considerable legislation. In the concluding chapter, Megan Richardson and Lesley Hitchens take as their starting point the historical role of courts in developing traditional doctrines to serve new situations and circumstances, and examine the treatment of breach of confidence and related doctrines in the nineteenth-century celebrity privacy case of *Prince Albert v. Strange*.<sup>29</sup> The conclusion drawn is that not only are there surprising factual parallels to be drawn between this case and modern celebrity privacy cases but the reasoning in the nineteenth-century judgments shows an awareness that, notwithstanding the potential exchange value associated with a celebrity's image, the choice instead to maintain a degree of privacy can be defended in utilitarian terms as integral to individual flourishing and social development, ideas brought out further in the writings of John Stuart Mill.<sup>30</sup>

The chapters in this book take different approaches to their subjects – for example Murchison analyses recent US cases and substantial literature from outside law to consider possible doctrinal change to US privacy torts; Wacks and Barendt draw on their own developed philosophical positions on privacy and free speech; Richardson and Hitchens' focus is essentially historical; Poulet and Dinant, Greenleaf, and Lindsay and Ricketson pay close attention to the interaction of technology and law; Keith provides a useful judicial perspective; while Phillipson provides a close doctrinal analysis of contemporary English and European legal judgments. Within this variety of interests and of methods, some themes recur across the broad issues of protecting privacy under case law, legislating for data protection in digital networks, and the roles of transnational agreements and influences of pressures for harmonised standards: for example, that private and public are relative concepts; that technology can radically change the landscape on which laws are made; that in this area questions

<sup>28</sup> The history of the tort approach in New Zealand, and its most recent enunciation by the Court of Appeal in *Hosking v. Runting* [2005] 1 NZLR 1, is set out in John Burrows and Ursula Cheer, *Media Law in New Zealand* (5th edn, South Melbourne: Oxford University Press, 2005) pp. 245ff. See also Megan Richardson, 'Privacy and Precedent: The Court of Appeal's Decision in *Hosking v Runting*' (2005) 11 *New Zealand Business Law Quarterly* 82.

<sup>29</sup> *Prince Albert v. Strange* (1849) 2 De G & SM 652; 64 ER 293 and (1849) 1 H & TW 1; 47 ER 1302.

<sup>30</sup> See, e.g., 'On Liberty', in John Stuart Mill, *Utilitarianism, On Liberty and Essay on Bentham*, above n. 11 at pp. 126–250.



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of law and theory appear to be inextricably linked; and perhaps that the scope for national differences may be reducing. Of course, none of these recurring themes should be thought of as supporting commonplace, if somewhat misleading, arguments about digital communications driving revolutions in social, political and economic practices and sidelining the role of the state.<sup>31</sup> The changes are more nuanced, and the times are less revolutionary, as this volume seeks to suggest in its exploration of new dimensions in privacy law.

In doing so, the book lays a base for future privacy research. No doubt there will be more legislative developments and judicial decisions to be discussed (including an anticipated appeal to the House of Lords in the *Hello!* case). Beyond these, more consideration might be made of media production practices and the role, if any, that privacy law plays within the decisions of journalists, editors and producers and their legal advisers.<sup>32</sup> There might also be more substantial efforts to engage with contemporary issues of production, circulation and consumption of celebrity identity, and the interpenetrations of media and celebrity industries in the production of celebrity content.<sup>33</sup> The contested social roles of popular media content deserve examination. Some contemporary and historical instances suggest mediated ‘gossip’ about formerly private matters has reshaped public spheres in more inclusive forms that suggest notable political potential in such media content.<sup>34</sup> But some such practices are decried as merely being ‘tabloidisation’ – at times inflected by non-explicit judgments of taste or class<sup>35</sup> – and linked to questions about the ethics

<sup>31</sup> See further, e.g., Christopher May, *The Information Society: A Sceptical View* (Cambridge: Polity, 2002).

<sup>32</sup> Existing research into defamation law and the media could provide useful models for such research endeavours; see, e.g., Weaver et al., above n. 10; Chris Dent and Andrew T. Kenyon, ‘Defamation Law’s Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers’ (2004) 9 *Media & Arts Law Review* 89; and Kenyon, *Defamation*, above n. 22, chap. 1 for an overview of other empirical research in the field.

<sup>33</sup> Useful starting points from varied theoretical perspectives could include Graeme Turner, *Understanding Celebrity* (London: Sage, 2004); John B. Thompson, *Political Scandal: Power and Visibility in the Media Age* (Cambridge: Polity Press, 2000); Graeme Turner, Frances Bonner and P. David Marshall, *Fame Games: The Production of Celebrity in Australia* (Melbourne: Cambridge University Press, 2000); Catherine Lumby, *Gotcha: Life in a Tabloid World* (St Leonards, NSW: Allen & Unwin, 1999).

<sup>34</sup> See, e.g., Alan McKee, *The Public Sphere: An Introduction* (Cambridge: Cambridge University Press, 2005) pp. 32–42 and *passim*.

<sup>35</sup> For a review of arguments about tabloidisation, drawing on primarily UK and Australian examples, see Graeme Turner, *Ending the Affair: The Decline of Television Current Affairs in Australia* (Sydney: University of NSW Press, 2005) chap. 3. Some of the material that

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of media practices.<sup>36</sup> However, here we are moving beyond the particular project of this book. It is enough that the collective contributions represent an important transition towards a sophisticated, multidimensional treatment of contemporary privacy issues. More could also be said about each of the chapters, but even a longer introduction could not hope to do justice to their richness and complexities. For a fuller appreciation we commend them to your reading.

Turner uses can be updated by reference to the UK regulator Ofcom's investigation of public service broadcasting; see, e.g., United Kingdom, Ofcom, *Ofcom Review of Public Service Television Broadcasting: Phase 2 – Meeting the Digital Challenge* (London: Ofcom, 2004) and more recent documents in the review available from [www.ofcom.org.uk](http://www.ofcom.org.uk).

<sup>36</sup> See, further, Catherine Lumby and Elspeth Probyn (eds.), *Remote Control: New Media, New Ethics* (Cambridge: Cambridge University Press, 2003).