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SOME QUERIES ABOUT PRIVACY AND CONSTITUTIONAL RIGHTS

*Michael Grossberg**

DESPITE BIRTH AND residence in Tory-created English Canada, David Flaherty has become a latter-day Paul Revere. A self-described privacy advocate and leader of the data protection movement, Flaherty has traveled throughout Western Europe and North America championing informational self-determination as a necessary protection for human dignity and liberty in advanced industrial societies. From forum to forum, he warns of an Orwellian future of uncontrolled surveillance societies unless we protect informational privacy.

One hundred years after Warren and Brandeis, Flaherty insists that we rephrase the debate over informational privacy by using constitutional protections to leap over the mazes created by state, provincial, and federal laws in the United States and Canada. Constitutionally sanctioned informational self-determination would be, he argues, the ultimate guarantor of privacy rights—the trump to stop the growth of surveillance societies.¹

Flaherty's argument is cogent and compelling. And there is no doubt that informational privacy problems abound.² There are basic reasons for securing protection against public and private data collectors and excessive concentrations of power in state and commercial bureaucracies. We all feel a visceral revulsion against intrusive monitoring of our lives. As a historian, I want to use my comment to place his warning and his remedy in the context of the debate over privacy that has raged since the late nineteenth century. My intent is to probe some of the implications of Fla-

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1. See Flaherty, *On the Utility of Constitutional Rights to Privacy and Data Protection*, 41 CASE W. RES. L. REV. 831 (1991).

2. Those interested in pursuing Flaherty's ideas should read D. FLAHERTY, *PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES* (1989).

herty's plea for action by raising three related concerns about turning to constitutional self-determination to protect informational privacy.

First, as in all privacy debates, persistent definitional problems persist. Flaherty notes that privacy is an amorphous concept and suggests that informational privacy is even more so because it is at the margins of privacy jurisprudence.³ He addresses the issue principally by restating Alan Westin's general definition of informational privacy as an individual's right to control data disclosure.⁴ Yet to carry out the Paul Revere analogy, when Revere yelled "The British are coming," the colonists knew what he meant and grabbed their muskets; but when Flaherty tells us "Big Brother is Coming," neither the enemy nor the required action is clear. He defines informational privacy primarily through Canadian case law examples involving search and seizure, blood tests, and electronic surveillance. However, as a call to arms, we need a proscriptive vision—a sense of the "ought" not just the "is." Specifically, the meaning of informational self-determination or the German "private personality" concept must be made clear. Reading Flaherty's essay, one wonders whether informational privacy is an end or a means to an end, and just what a constitutional informational privacy right might protect.⁵

More detailed explanations are necessary for two reasons. First, while almost everyone favors privacy in the abstract, conflict always arises over the particulars. Like obscenity, most people agree there is a line beyond which conduct is unacceptable: but where is it? Who is to draw the line? How will it be drawn? Specificity is particularly important in understanding whether informational privacy is something that we have and must protect or is something to be gained.

Second, it is impossible to escape these definitional issues because they have pervaded debates over privacy and information

3. See Flaherty, *supra* note 1, at 832-33.

4. See A. WESTIN, *PRIVACY AND FREEDOM* 7 (1967) (defining privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others").

5. Even before the Warren and Brandeis article, Sir James Fitzjames Stephen recognized these definitional problems by stating: "to define the province of privacy distinctly is impossible." J.F. STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 160 (1873). This is because individuals cannot escape the biases of their own times to achieve a precise and abstract analysis. See Gerety, *Redefining Privacy*, 12 *HARV. C.R.-C.L. L. REV.* 233, 238 (1977); see also D. LINOWS, *PRIVACY IN AMERICA, IS YOUR PRIVATE LIFE IN THE PUBLIC EYE?* (1989).

since the nineteenth century.⁶ Privacy is in many ways a matter of shared expectations and sensibilities; thus, controversy over its meaning has always been linked to clashing normative concerns about the flow of information and the social occasion, purpose, timing, and status of those gathering and using information. In 1890, concern about informational privacy focused primarily on the telegraph or census and mail (for example, the legitimacy of census questions about religion or marital status) or individual complaints about press publicity.⁷ Like others at the time, Warren and Brandeis depicted the problem as single, isolated acts of disclosure of private facts.⁸ Since the 1960s, the debate has shifted dramatically to questions involving the long-term accumulation and disclosure of vast amounts of intimate facts. Embedded in these shifts are contested senses of "the self" that privacy ought to protect.⁹ As commentators struggle to categorize the growing number of privacy claims, they have spawned a host of classifications such as aesthetic and strategic privacy, procedural and substantive privacy, or territorial, informational, and decisional privacy.¹⁰ As Mary Dunlap has argued, "in the seemingly inevitable fusion of the actual or descriptive personal with the normative personal, the right to privacy before a given court and in a given political era expands and contracts in significant part according to the subjective perspectives of judges on human nature."¹¹ We need Flaherty to give us a clearer sense of what informational self-determination means today to understand how it might structure the legal future.

Definitional uncertainties about informational self-determina-

6. For historical overviews, see D. SEIPP, *THE RIGHT TO PRIVACY IN AMERICAN HISTORY*, 1-27 (1978) (discussing privacy in the early nineteenth century), and Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1894 (1981) (examining the extent to which American courts and legislatures recognized privacy as an independent interest in the 1800s).

7. See D. SEIPP, *supra* note 6, at 30-54 (discussing measures taken to insure the confidentiality of telegraphic messages and the opposition to the addition of questions to the census).

8. See Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

9. For a compelling analysis of these issues, see Post, *The Social Foundation of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 958 (1989).

10. See Artz, *Privacy Law in Massachusetts: Territorial, Informational and Decisional Rights*, 70 MASS. L. REV. 173, 176-99 (1985).

11. Dunlap, *Where the Person Ends, Does the Government Begin? An Explanation of Present Controversies Concerning "The Right to Privacy"* 12 LINCOLN L. REV. 47, 49 (1981).

tion are amplified by a second major issue: Flaherty's tendency to universalize informational privacy. That is, Flaherty treats it as a transcendent reality and diminishes the temporal, cultural, and class differences in its meaning. This tendency is evident in his language. He talks of surveillance societies,¹² correct constitutional decisions,¹³ more advanced privacy protection,¹⁴ and hostility to privacy interests.¹⁵ None of these phrases are expressly defined, but as always with a modernization vocabulary they assume universal meanings. Yet treating privacy as a uniform human value rather than a culture-bound and time-bound concept generalizes both threat and response. It discounts how the boundaries of informational privacy have changed over time and down-plays the specific contests that produced those changes. Sociologist James Rule reminds us that the "tendency to treat privacy as if it were a coherent 'thing' with the same significance in one setting as in another has often blurred important distinctions."¹⁶ In this way, universalizing informational privacy avoids debate on its central, yet contested, issues as well as the need to explain what is at stake.'

The role class has played in conflicts over informational privacy is illustrative. A universal constitutional right to privacy self-determination assumes equal protection for all, as in the German law that seemingly gives every individual control over personal data.¹⁷ The past should make us wonder if such a goal can ever be achieved. Equal privacy rights not only challenge the age-old quest for information about the dependent to protect taxpayers' pockets and about the deviant to enforce community standards, these rights also defy the persistent class biases of privacy law itself. The Warren and Brandeis article is said to have originated in Warren's patrician concerns about the press invading his privacy.¹⁸ Flaherty acknowledges that "[e]ven privacy protectors

12. See Flaherty, *supra* note 1, at 835-37.

13. See *id.* at 840.

14. See *id.* at 854.

15. See *id.* at 835-36.

16. J. RULE, THE POLITICS OF PRIVACY, PLANNING FOR PERSONAL DATA SYSTEMS AS POWERFUL TECHNOLOGIES 21 (1980). For a compelling argument about the time-bound nature of words, see D. RODGERS, CANTESTER TRUTHS, KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE (1987).

17. See D. FLAHERTY, *supra* note 2, at 86-90 (discussing the German Constitutional Court's interpretation of the West German Constitution as creating a general right of privacy).

18. For a full discussion of the class origins of the essay, see Barron, *Warren and*

sometimes forget that all individuals, including such marginals as prisoners, are entitled to advance privacy claims."¹⁹ I am not so sanguine that the issue is "forgetting" rather than differential treatment. In the inevitable balancing tests judges will use to weigh constitutional claims, I wonder how the informational rights of the lower classes will fare.

Several decades ago Berkeley law professor Jacobus tenBroek wrote about a persistent dual system of family law that stretched back to the Elizabethan poor laws.²⁰ It promoted liberalist policies for the middle and upper classes and repressive ones for the lower classes.²¹ Privacy is now part of that dual system, as is evident in judicial rulings on the fourth amendment as a privacy protector. In *Wyman v. James*,²² the Supreme Court upheld New York welfare department regulations requiring Aid to Families with Dependant Children claimants to consent to home visits in order to maintain benefit eligibility. The Justices reasoned that even if the visits could be characterized as "searches," the consent of a recipient to be visited was a fair trade-off for the aid sought from the state.²³ In a contrasting use of the constitutional protection against search and seizure, the Court sustained entrepreneurial protests against warrantless Occupational Safety and Health Administration searches.²⁴

Such differing uses of the amendment illustrate how class has been used to distinguish privacy rights. Welfare recipients cannot avoid disclosing intimate information, no matter what havoc it

Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890); *Demystifying a Landmark Citation*, 13 SUFFOLK U.L. REV. 875 (1979).

19. D. Flaherty, *On the Utility of Constitutional Rights to Privacy and Data Protection* 43 (Nov. 16, 1990) (unpublished version of paper delivered at the *Case Western Reserve Law Review* Symposium: "The Right to Privacy One Hundred Years Later") (although Professor Flaherty has deleted this language from his published paper, the issues it raises continue to merit consideration).

20. See Handler, *Editor's Introduction to J. TENBROEK, FAMILY LAW AND THE POOR XV* (J. Handler ed. 1964) ("The dual system took hold at the point when the public took responsibility for the relief of the poor; its guiding principle has always been the protection of the public purse. The result has been to create, in tenBroek's terms, a wall of separation between the poor and the rest of society with regard to family law.").

21. *Id.*

22. 400 U.S. 309 (1971).

23. *Id.* at 309-10.

24. *Marshall v. Bartow's, Inc.*, 429 U.S. 1347 (1977); see also Dunlap, *supra* note 11, at 57-63. Dunlap argues that the Supreme Court in *Wyman* and *Marshall* assumes "material privacy can be earned, and that the 'undeserving poor,' . . . simply have failed to earn the degree of privacy that is afforded to business persons by law." *Id.* at 57.

wreaks on their lives. Equally important is the popular support for such disclosures as protection against welfare fraud. The limits imposed on the informational privacy of the economically poor are echoed in privacy decisions such as those upholding Hyde Amendment²⁵ denials of publicly funded abortions to indigent women.²⁶ Similar balances occur in statutory privacy. For example, the Massachusetts Fair Information Practices Act²⁷ was intended to give the poor and powerless access to needed government services,²⁸ yet other legislation gave welfare bureaucrats the authority to order banks and employers to release information about wages and deposits by applicants and recipients or spouses owing support.²⁹ The bureaucratic ability to police the lives of the dependent has been greatly increased by computer matching, which allows agencies to share data.³⁰ Statutes and decisions like these may well render privacy meaningless for most economically poor people. As a Springfield, Massachusetts, woman struggling to keep her benefits recently told political scientist Austin Sarat, "I don't like coming here [to legal services] no more than I like going there [to the welfare office]. No fun sitting, waiting, *and telling things to another stranger*, but I'm at my end."³¹

Privacy rights have never been uniformly granted but have varied according to age, sex, race, marital status, political beliefs, religious practices, and residence. It is unclear how a universal constitutional right to informational self-determination can overcome this long tradition of differential treatment or if heterogeneity should be addressed through uniform or distinctive privacy protections. Moreover, it is unclear what trade-offs Flaherty would make to protect the integrity of a general constitutional right when he admits in a footnote that as a privacy advocate he fears resting abortion rights on privacy because they may be too much for privacy to bear.³² As Catherine MacKinnon argues, "if inequality is socially pervasive and enforced, equality will require in-

25. Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976).

26. See *Harris v. McRae*, 448 U.S. 297, *reh'g denied*, 448 U.S. 917 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

27. MASS. GEN. L. ch. 66A, §§ 1-3 (1988).

28. See Artz, *supra* note 10, at 183.

29. See *id.* at 192 (discussing MASS. GEN. L. ch. 117, § 17 (1971), ch. 118, § 3A (1982)).

30. See *id.* at 192 (discussing welfare and financial information sharing).

31. Sarat, ". . . *The Law is All Over*": *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUM. 343, 360 (1990) (emphasis added).

32. Flaherty, *supra* note 1, at 839 n.37.

tervention, not abdication, to be meaningful. But the right to privacy is not thought to require social change. It is not even thought to require any social preconditions, other than nonintervention by the public."³³ By presenting informational self-determination in universal terms, Flaherty challenges us to question whether we believe in privacy in civil libertarian terms: that everyone shares an interest in freedom from unjust, intimidating surveillance and that an attack on the privacy rights of the dependent and deviant poses a threat to us all.³⁴

A final issue in comprehending the utility of a constitutional protection for informational self-determination comes with Flaherty's presentation of the sources of surveillance societies. The primary cause appears to be technology, but Flaherty does not fully discuss his causal argument.³⁵ However, causal sources provide important mediums for evaluating Flaherty's conception of the threat to privacy and his proposed solution. In that regard, two sources suggested, but not fully explained in the essay, are worth noting briefly.

First, the debate over informational privacy since Warren and Brandeis's era can be read as a series of escalating struggles over information itself. Part of the threat Flaherty warns us about derives directly from the incessant demand for information that has dominated organizational life in the United States and other Western European nations since the nineteenth century.³⁶ The growing thirst for data at the time that Warren and Brandeis wrote became evident in census changes: one schedule with four questions in 1790, 233 schedules and a total of 13,161 questions in 1890.³⁷ For those imbued with the new empirical mentality, to count was to understand.³⁸ Consequently, rising demands for in-

33. C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 191 (1989).

34. In this vein, Flaherty's argument for constitutionally sanctioned informational privacy raises the thorny issue of rights as tactical weapons. Though he does not address it, a lively debate is underway on the faith in rights that lies at the heart of his argument. *See, e.g.,* Minnow, *Interpreting Rights: An Essay for Robert Cover*, 96 *YALE L.J.* 1860 (1987) (posing an interpretive view of rights); Tushnet, *An Essay on Rights*, 62 *TEX. L. REV.* 1363 (1984) (surveying and critiquing rights as debated by American legal scholars).

35. *See generally* D. FLAHERTY, *supra* note 2 (individuals in Western societies are subject to surveillance through the use of data bases).

36. *See id.* at 1 (Western industrial countries are already information societies and are becoming surveillance societies).

37. C. WRIGHT, *THE HISTORY AND GROWTH OF THE UNITED STATES CENSUS* (1900). *See generally* M. ANDERSON, *THE AMERICAN CENSUS, A SOCIAL HISTORY* (1988) (describing the evolution of the United States Census and its relation to history).

38. *See* P. COHEN, *A CALCULATING PEOPLE, THE SPREAD OF NUMERACY IN EARLY*

formation were not only products of new technologies but more importantly were signs of a persistent organizational ethos that created what Arthur Miller has called "data addicts."³⁹ Public and private organizations began gathering information in response to their need for specialized data to monitor welfare cheats, credit risks, felons on probation, and parents owing child support. According to the 1977 United States Privacy Protection Study Commission, "The real danger is the gradual erosion of individual liberties through the automation, integration, and interconnection of many small, separate record-keeping systems, each of which alone may seem innocuous, even benevolent, and wholly justifiable."⁴⁰ Thus, a constitutional challenge to data collection would strike at the heart of modern organizational society.

Flaherty raises a second causal issue by using comparative analysis. His transnational comparison inevitably provokes questions about the cultural determinants of informational privacy in an effort to understand to what extent it is culture-bound.⁴¹ Canada and the United States are useful examples. Flaherty stresses the similarities between the two by presenting parallel versions of the same story.⁴² However, an extensive body of comparative analysis stresses the fundamental cultural differences between the United States and Canada. It emphasizes clashing values about the state, individualism, the virtues of adversarial solutions, and the proper balance between individual and social needs.⁴³ These are evident in contrasting national slogans: "Life, Liberty, and the Pursuit of Happiness" versus "Peace, Order, and Good Government."⁴⁴ The differences have implications for informational pri-

AMERICA (1982) (discussing the causes that gave rise to the increases in popularity of numbers and statistics in the 1800s).

39. A. MILLER, *THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS* 250 (1971).

40. PRIVACY PROTECTION STUDY COMM'N, *THE PRIVACY ACT OF 1974: AN ASSESSMENT* app. 4, at 108 (1977).

41. For a telling James Thurber comparative privacy anecdote about clashing French and American notions of state information powers, see H. SPIRO, *PRIVACY IN COMPARATIVE PERSPECTIVE* 121 (1971).

42. See, e.g., Flaherty, *supra* note 1, at 846.

43. See, e.g., S. LIPSET, *CONTINENTAL DIVIDE: THE VALUES AND INSTITUTIONS OF THE UNITED STATES AND CANADA* (1990).

44. See generally M. GOLDBERG & J. MERCER, *THE MYTH OF THE NORTH AMERICAN CITY* 12-31 (1986) (discussing values and attitudes that differentiate Americans from Canadians); S. LIPSET, *supra* note 43 (comparing the values and culture of the United States and Canada). Flaherty's use of comparison raises methodological issues as well, particularly the question of whether similarities or differences are the most analytically useful.

vacy in each nation. One result of these differences is evident in the contrast between the Canadian decision to create a Privacy Commissioner and the American rejection of an administrative solution in favor of allowing individuals to police data-keeping organizations. The American reluctance to create independent agencies versus the Canadian tendency to do so and the tendency of American procedures to preserve a more significant role for judicial review replay earlier differences in approaches to juvenile justice and workers' compensation.⁴⁵

Focusing on comparison thus helps locate a second set of causal issues involved in informational self-determination. It suggests a need to appreciate that the phrase "informational self-determination" may signify very different realities in different nations.⁴⁶ At a time when the reemergence of ethnic rivalries in eastern Europe gives new meaning to the term Balkanization and even Canada seems to be breaking apart, perhaps we should pay more attention to the cultural determinants of informational privacy.

In raising these issues, my intent has been to pose the questions I think are raised by Professor Flaherty's timely call for informational self-determination. Recalling Paul Revere, perhaps the way to achieve the informational self-determination Flaherty seeks is not through procedural reforms or constitutional changes, but to do what Revere did: help launch a revolution. It may be that we need to challenge the collecting of information itself. As Rule and his colleagues declared in 1980: "The alternative to endless erosion of personal privacy through increased surveillance is for organizations to relax the discriminations which they seek to make in their treatment of people."⁴⁷ To do so would entail risks:

For a compelling argument in favor of the importance of analyzing differences, see Sewall, *Marc Bloch and the Logic of Comparative History*, 6 HIST. & THEORY 208 (1967).

45. See, e.g., Hagan & Leon, *Rehabilitation of Law: A Social-Historical Comparison of Probation in Canada and the United States*, 5 CAN. J. SOC. 235, 236 (1980) (exploring the similarities and differences in the juvenile and adult probation movements in the United States and Canada); Leon, *The Development of Canadian Juvenile Justice: A Background for Reform*, 15 OSGOODE HALL L.J. 71, 95-104 (1977) (discussing the history of early twentieth century legislation regarding juvenile law in Canada); Risk, *'This Nuisance of Litigation': The Origins of Workers' Compensation in Ontario*, in 2 ESSAYS IN THE HISTORY OF CANADIAN LAW 418 (D. Flaherty ed. 1983) (discussing the forces behind the development and origin of workers' compensation laws and legislation in Ontario).

46. For a compelling example of such an argument, see Fineman, *Contexts and Comparisons*, 55 U. CHI. L. REV. 1431 (1988) (critically reviewing Professor Glendon's comparison of American and European approaches to abortion).

47. J. RULE, *THE POLITICS OF PRIVACY* 154 (1980). See generally K. GREENAWALT,

risking an economy judged by standards other than efficiency (another crusade led by Brandeis with his repeated calls for economic decentralization); a welfare state in which support is not tied to full disclosure of family life; and a market in which credit is less dependent on to past behavior. It may be that we can achieve the informational self-determination that Flaherty so fervently champions only by reducing our total reliance on personal information.

Through his compelling call for informational self-determination, Flaherty continues to guide the present debate over informational privacy. In the spirit of commemorating the Warren & Brandeis article, I would like to conclude by emphasizing that the debate over privacy of information has raged for a hundred years. In 1890 not only did the privacy article appear in the *Harvard Law Review*, the *New York Sun* also published "The New Inquisition":

I am census inquisitor
I travel about from door to door.
From house to house, from store to store,
With pencil and paper and power galore.
I do as I like and ask what I please.
Down before me you must get on your knees:
So open your books, hand over your keys,
And tell me about your chronic disease.
Are you sure you don't like it? Well, I'm not to blame;
I do as I'm ordered. Wouldn't you do the same?
I'm a creature of law, and work in its name
To further the new statistical game.
I nose from garret to cellar,
With my last improved statistical smeller.
If the housewife objects I loftily tell her,
"I'm a socialistic government feller."⁴⁸

LEGAL PROTECTIONS OF PRIVACY 92 (1975) (evaluating current legal protections of informational privacy in a study prepared for the United States Office of Telecommunications Policy).

48. D. SEIPP, *supra* note 6, at 27.