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An Institutional Emphasis

LANCE LIEBMAN*

Professor Schwartz is an important scholar of the interface between the difficult moral concept of privacy and the new information technologies. Someday a book will tell the story of modern history through the lens of privacy: village lives well known to neighbors; the claims of the national state (taxes, military service); the social welfare state; and the possibilities and dangers of modern biology. As Paul Schwartz has written, DNA and other tools can tell us a great deal about ourselves and can improve our lives; they can also tell employers, drug companies, prospective in-laws, and the police things we prefer they not know.

Today's privacy questions will seem like nursery school in a few years. My students divide fifty-fifty when asked if they would prefer free local telephone service if each outgoing call were preceded by a fifteen-second commercial, tailored to their calling patterns (you call for pizza, I for sushi). The British publisher of Harry Potter books charges two pounds for a plain-cover copy, which permits an adult to read the book on the London underground without embarrassment. Living Americans can establish descent from Thomas Jefferson. Amazon can use and sell my book-buying tastes. The plastic membership card I use to enter the Museum of Modern Art allows the museum to keep track of my visits.

Contemporary thinking about law is well suited for analysis of these issues as they arise. Who should have the "right" to the information? Should we bar sale? What is the appropriate remedy for violation? With information located in cyberspace, what terrestrial jurisdiction's law should control? The Schwartz emphasis is on republican values: how do we, collectively, want to live our lives? It is on the importance of market-guiding structures: what is meaningful consent? what should be the default rule? And it is on the chicken-and-egg direction of influence as norms are formed. Especially with rapidly changing technology, we and our friends are likely to think that what occurs is normal. How can organized society make itself think about whether evolving expectations create the best pos-

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sible world? Asking these questions, Professor Schwartz chooses several lenses through which to observe incompletenesses and simplifications in standard rhetoric. Yes, there are arguments for decentralization, for markets, for industry self-regulation, and for contract. But yes also, there is need for collective public action and seemingly—horrors—even for government.

Professor Schwartz suggests that we change fundamentally the way we think about privacy before we act either through markets or through government. We now assume that every individual has a right to control her information and to choose, as an independent actor, whether and how much information to give and to what extent it can be shared by the donee. Professor Schwartz slowly unravels the threads that form the basis for this view and offers in its place a model based on fact instead of illusion. Our idealistic assumption, he argues, ignores the facts that people are unaware of their rights, that the consent process lacks transparency, and that the self-regulated are unaccountable. He urges us to stop thinking of privacy as a right of control and instead to view it as an essential value. That, he hopes, will lead us toward appropriate new law. This is more than a distinction between viewing the glass as half-empty and seeing it as half-full. Rather, it is a new metric for evaluating schemes that regulate privacy. Cautiously, knowing we are entering the legal version of a demilitarized zone, he demonstrates how a realistic view of the current situation and a new set of goals can lead to effective government regulation.

Now that I am a professional law-improver, my contribution to this discussion is to urge attention to the institutions now struggling to adapt existing public rules (laws) to the opportunities and dangers newly presented by technology.

In the United States, one might think that instant globalized information would give us a period of national law-making. On the contrary, this has been a quarter-century of state constitutional sovereignty. It has also been a period of divided government in Washington. The two perhaps-related circumstances have not made it easy for the national government to lead. Yet can we imagine that fifty states and one district will separately make competent law for electronic commerce and the Internet?

The American Law Institute (ALI) and its long-term partner the National Conference of Commissioners on Uniform State Laws (NCCUSL), justly proud of their accomplishments with the Uniform Commercial Code (UCC) over six decades, have attempted to be useful. Meanwhile, after ten years of work in an effort to adapt the UCC's principles for the sale of goods to the new good labeled software, NCCUSL was satisfied that a draft of adequate quality had been achieved but the ALI was unconvinced. Therefore, the two organizations agreed to disagree and to separate this effort from the UCC. Originally designed to be Article 2B of the UCC, the completed work is now the Uniform Computer Information

Transactions Act (UCITA), recommended by NCCUSL to state legislatures.¹

Traditionally, the primary task of the ALI has been creation of restatements. Restatements offer general principles describing and explicating state judge-made law. Like a code in a civil law jurisdiction, a restatement guides actors through the maze of the common law. If litigation occurs, it guides litigants and judges. Suggestions have been made that it is now time for a restatement of the law of privacy. While affected by a variety of relevant statutes, the field remains substantially judge-made. While federalized in important ways, it remains substantially a matter of state law. This may well be the time when the ALI's patient, even exhaustive procedures should be focused on a field essentially created by a law review article now almost 120 years old.²

Whether NCCUSL, NCCUSL, and ALI (the UCC), or ALI (restatements) are attempting to influence the development of the law, the effort deserves and has received scrutiny and criticism. Thoughtful scholars have raised hard questions about these private law-recommending organizations and processes.³ Certainly there are risks. Nothing guarantees that all appropriate arguments will be heard, much less that these arguments will receive their correct weight. Capture can occur.⁴ NCCUSL's delegates are selected by governors and thus are responsive to political concerns at the state level. NCCUSL's procedures give access to those who choose to participate. Of course moneyed interests will have no difficulty being heard, while important other interests may not achieve an effective voice. For better and worse, ALI members come from the elite levels of the practicing bar, the judiciary, and the professoriate. Lawyers and professors can be too responsive to paying clients. Perhaps equally likely, those with the interest and the resources to invest time in ALI procedures may reflect, in their views and their experiences, a limited portion of the spectrum of important substantive concerns. Small efforts have been made to address

1. Compare this to the 12-year effort to revise Article 2 of the Uniform Commercial Code. The American Law Institute gave final approval to a version of the new Article 2 at its annual meeting in May 1999. In July 1999, the leadership of NCCUSL withdrew that draft from consideration at NCCUSL's annual meeting. Currently, a new drafting committee, jointly appointed by NCCUSL and the ALI, is attempting to produce a version that can achieve approval from both private organizations and (much more importantly) wide uniform enactment among the states.

2. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

3. See, e.g., Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569 (1998); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995); Robert Scott, *The Uniformity Norm in Commercial Law: A Comparative Analysis of Common Law and Code Methodologies*, in *THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW* (Jody S. Kraus & Steven D. Walt eds., 2000) (forthcoming) (manuscript on file with author).

4. I sometimes think that capture should be defined as a substantive result with which one disagrees.

these concerns: funding for participants at NCCUSL meetings and scholarships for ALI members needing help in attending Members Consultative Group meetings. These gestures hardly answer all the concerns.

But what is the alternative? The great plus about both NCCUSL and the ALI is patient consideration of difficult legal questions in a public environment where discourse is about public interest and about professional drafting. Meeting after meeting, draft after draft, preliminary work is exposed to wide attention and criticism. Motions are made to change punctuation. Drafts are improved after careful review by anyone in the world who is concerned. Arguments about substance must be met on the merits.

Compare, as the common law evolves, a decision by an over-worked trial judge who has received two briefs from parties concerned with the result. Can one argue that the statistical chances for good law are weakened by the availability, on the judge's bookshelf or computer, of an ALI restatement that reflects ten years of work by professors, judges, and lawyers? Or compare a state legislature wrestling—in an environment of interest group pressure and with limited resources to hire talented draftspeople—with how to protect privacy in an age of electronic media. Recommended statutory language, if the result of long and open debate, can only help. That is even more true if there is a benefit to state legal uniformity yet no chance that it will be achieved through a federal enactment.

Now turn to the transnational scene. It is obvious that no single geographic jurisdiction can successfully regulate cyberspace. The European Union and the United States are the behemoths, each with the capacity to have an elephant's influence on countries with fewer computers.⁵ But slowly, gradually, even the United States is learning that it cannot remain autarchic. The recent withdrawal of the attempt to control (for law-enforcement purposes) encryption technology may stand as a signal moment. Europe, committed to certain definitions of privacy as to non-genetically altered food, will learn similar lessons.

Meanwhile, various multinational institutions have become engaged in aspects of these questions. It is too soon to know the long-term importance in privacy matters of United Nations Commission of International Trade Law (UNCITRAL), International Institute for the Unification of Private Law (Unidroit), the Hague Convention, the World Trade Organization

5. Professor Schwartz is among a handful of published experts on the details of European/American disputes over privacy protection. See Paul M. Schwartz, *European Data Protection Law and Restrictions on International Data Flows*, 80 IOWA L. REV. 471 (1995); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1607, 1698-1701 (1999). Professor Schwarz has also advised the European Union on both American and European privacy law; this work has led to two co-authored studies. See PAUL M. SCHWARTZ & JOEL R. REIDENBERG, *DATA PRIVACY LAW* (1996 & Supp. 1998); JOEL R. REIDENBERG & PAUL M. SCHWARTZ, *DATA PROTECTION LAW AND ON-LINE SERVICES: REGULATORY RESPONSES* (1998), available in <<http://europa.eu.int/comm/dg15/en/media/dataprot/studies/regul.htm>>.

(WTO), and World Intellectual Property Organization (WIPO). What seems clear is the tremendous risk that incomplete national assumptions will be powerful, that multinational media giants will assert themselves, and that imperfect enforcement schemes will allow loopholes and cheating. The subject of privacy has the potential to be an area in which world government creeps forward. But this can only happen if, among the various law-considering organizations, one or more forums are found that are patient, serious, and therefore credible. It is, after all, a new millennium, and just perhaps the United States, so resistant to risks of compromised sovereignty, will for a change play a positive role.

Imagining institutions, within the United States and multinationally, one must then hope that the individuals who are part of those entities will base their work on the vision of privacy sketched by Paul Schwartz or on another equally serious and realistic.

