

RETHINKING THE INTERNET'S PRIVACY DILEMMA: A MODEST CALL FOR INFORMED, NIMBLE SOLUTIONS

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Thank you to Albany Law for inviting me out here. I have really appreciated your hospitality in welcoming me here. This is my first trip to Albany. I did grow up on the East Coast, but I've been in the West for quite a while now.

Before I start, I have to give a standard disclaimer since I work for the A.G.'s office: any thoughts shared here are my own and should not be imputed in any way to the Office of Attorney General or Attorney General of Idaho Lawrence Wasden.

Professor Hutter's introduction actually reminded me of a story because, as I told you, I started out on the East Coast and went west. I went the University of Idaho and at the very first Christmas break I came home and I'm coming down the escalator in the airport and my mother is waiting at the bottom and she has her arms wide open and she goes, "Brian, how was Iowa?" And so one of the little running jokes in Idaho is that we should just put on the license plates: "Idaho: We're not Iowa."

We've heard a lot about privacy and the threat that we have to privacy, and I will tell you that as a relatively new parent the real threat to privacy is low-tech. There is no greater threat to privacy than a two year old in your house when you're trying to take a shower.

In honor of Albany's distinction as the oldest independent law school in America, I thought it would be appropriate to start out with the archaic. I'll probably butcher this Latin, just work with me. Who knows what the following Latin phrase means? "*Omnis est rex in domo sua.*" Go ahead, yeah.

[AUDIENCE MEMBER: Everyone's a king in their own house.]

That's right. Everyone is a king in his own castle, which is Sir Edward Coke way back, way, way back in a case called the *Semayne's Case*. If you really want to think about privacy, that really is the genesis of privacy. Because prior to that time Kings

or Emperors or whatever just came in and did whatever they wanted and left and you were just like, "Hey, that's my house, man," and he's like, "So what? I'm the King." It's relevant for a couple of reasons including that it establishes the fact that as people, as a basic human concept, we're entitled to some sort of safe haven. I don't want to call it a home base but, something to that effect.

It also, as soon as he said it, creates a question. How do we define the limits of that safe haven? Luckily it got much clearer because Brandeis came along. And anybody know what Brandeis said about privacy? It's a very short phrase. Brandeis summed up privacy as the right to be let alone. So now that's clear, right? No, we're still spinning in the same circle.

Privacy at this point has gotten this clear. The Third Circuit has likened privacy to a haystack in a hurricane. Then-Justice Rehnquist in *Paul v. Davis* noted that privacy defies categorical description. So welcome to the backdrop. And it doesn't get any better when we start thinking about the Internet. As you think about all of these meanings of privacy that we've been given, that really don't define anything, what's that mean to us? Well, the good news is job security, because there's plenty to fight about there. But it also displays a fundamental difficulty in the law trying to address what I would posture are subjective matters.

Think about it in these terms: if you have grandparents, your grandparents' definition of privacy is probably different than your parents' definition of privacy, which is different than your definition of privacy. And I would hazard a guess that probably generationally within this room we all have different ideas of what our privacy boundaries are. The Internet has certainly introduced a phenomenon that I would call over-sharing. I'm sure you can all think of examples of that. One of the things to keep in mind is, I would assume, many of you are either entering the job search or on the cusp of the job search. Do you think your Facebook profiles are fair game? How many folks have a Facebook or MySpace page? Most of you. Do you understand what the privacy settings are on it? Like how to screen out who can see what on your Facebook? If you've gone onto Facebook it's a series of drop down menus and as you navigate each of the menus there's nothing on the side telling you if you hit this one that says friends, then only friends can see and not friends of friends for example.

And so you don't fully understand as you go through the drop

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downs what those privacy settings are. As you're going through that, it becomes confusing and most people don't fully understand who can see what, when, and where, or why. Which makes it a problem because then you're going out for a job search and the next thing you know, your would-be employer is passing around a photo of you with a beer bong in a toga, which has actually happened believe it or not. And thank God for me, I graduated before the Facebook phenomenon came out. So we'll just sum that up with checkered past.

So anyway, it's one of those things where one of the common misperceptions that people have is they say, "Well, that's my Facebook page, that's private and so it should be segregated and essentially off limits." The problem is even though that's your perception, where is your Facebook page? Two words, anybody? Public domain. You know, you go on the Internet, anybody can see it, that sort of thing.

And so I get these questions all the time, people always say, "Hey, should I not have a picture of me with a beer on Facebook?" And I always tell them, "Well, you know" I think we all understand that at this point in time you probably had a beer or two in your life, but if it's your profile photo, maybe that's not the best image that you want to be projecting during the job search. I think that one of the things that is equally applicable on the Internet as it is in real life is common sense. Remember that folks will be able to find your online social network profiles, it's worth having that common sense there to say, "Okay, if this is the first thing they're going to see when they pull it up, maybe it should project a better image." I always joke, the dream picture would be you reading to blind kids or building a house down in New Orleans or something. But it's all within sensibilities.

So what do you think the primary purpose of a social networking site is?

[AUDIENCE MEMBER: Entertainment.]

Entertainment. That's a good answer, anybody else?

[AUDIENCE MEMBER: Meet people.]

Meet people; good, good. No hardcore business guys in here? Economics? I mean the purpose is to make money and so what's the single greatest asset that the social networking site can offer? Go ahead.

[AUDIENCE MEMBER: I guess advertising opportunities for information.]

Information—that's the magic word. Information. The single

greatest asset on a social networking site is the information. And the information, when you start looking at the numbers, is absolutely staggering. Consider, for example, that 85% of Internet users eighteen to thirty-five are members of a social networking site. Consider that of that in the eighteen to twenty-nine range, 85% of those folks check in at least once a week for at least twenty minutes. And then let's just control it for a hundred and forty characters and say that's still a ton of information getting out there every time.

The other interesting thing about social networking sites is there's actually a debate over whether they're appropriately termed social networking sites. Because very little networking actually goes on. Who do you mostly connect with?

[AUDIENCE MEMBER: My friends.]

Your friends, people you already know. Actually, in the literature folks actually argue over whether or not it's appropriately termed a social networking site or if it should just be called a social network. This information has evolved into a science.

Let's talk about it in terms of Facebook and does anybody remember Facebook Beacon? I mean, it popped up and then it was gone almost as fast. Now why did it pop up and disappear so quickly? It was because of the way that it was introduced. What happened was Facebook Beacon comes on and then all of a sudden these stories start coming out; a guy buys his kids a video game for Christmas. On Beacon what happens is when you go to Game Fly and purchase that game while you were logged onto Facebook, it automatically updates your newsfeed to say, "You just bought, World of Warcraft" or whatever. So his kids see that and they're like, "Yeah, we're getting a Wii for Christmas!" And so this guy has a blog post out there that is entitled, "Facebook, you owe me one Christmas present."

There's another one out there that a guy bought his wife a diamond on overstock.com. Now, there are a couple of problems there. I mean obviously you're laughing at the most obvious one. I mean, do you want to go to your wife and say, "Honey, look at this awesome budget diamond I got you." You know there's certain things that you like to just pretend it came from Tiffany's or Harry Winston or wherever. But then the other thing, and this is probably the funnier part, is I always think, "Well, yeah, of course it's for his wife *now*," there's no wiggle room on that.

Do you want to know the thing that brought down Beacon? It's

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a law. A federal law called the Video Privacy Protection Act. Anybody ever hear of that? Anybody know what the genesis of the Video Privacy Protection Act was? Judge Bork, when he went through his confirmation hearings, which he ultimately wound up not getting confirmed, a list of 146 video rentals leaked. And people were all over this thing hoping to find porn and this is going to be awesome, he's going to be out. And unfortunately all it really revealed was the guy had a thing for James Bond, which, I would submit, probably makes you more qualified. But the interesting thing is the ripple effect because now you've got all these congressmen saying, "Hey, wait a minute, could somebody get a hold of my video rental list?"

There's a recent case in the Ninth Circuit if anyone has followed that where Judge Kozinski had a website that was private, but it was hacked into and inappropriate content was found within it. There was a big dispute over how, why, or when it was found and whether it was appropriate. But the offspring of that has been that Kozinski has now come down very hard on searches of hard drives and what not. And there's an opinion out now in which he's written it that purports to make it so that you have to get very specific in what you're searching for on a computer hard drive. And so one of the things when we're looking at how we advance privacy law, perhaps one of our catalysts are embarrassed judges.

But let's look back at Facebook Connect and Facebook Beacon. You start looking at that and what they're doing is they're aggregating data. And this data aggregation is really what poses the biggest risk to us from a privacy perspective. One of the things to keep in mind, like on ChoicePoint, a hundred twenty-eight thousand user's data compromised. Here's the thing with ChoicePoint. They were fined fifteen million dollars. That sounds harsh, doesn't it? Well, the reality is ChoicePoint was fined fifteen million dollars but they had a market cap at that point of 3.1 billion.

So essentially, if I walked up to you and I said, "Look, here's a system. You can make a hundred dollars and if you get caught the fine you have to pay is a nickel." I'd say, "I'm in. Let's do it." Dale, earlier today, made a great point on this when she said you look at the commerce folks. They care about privacy because people can just go and say we're not going to use it anymore. Here's the problem with data aggregators like DoubleClick and ChoicePoint: we get mad and so what? It's not like anybody stops

subscribing to ChoicePoint's information. You know what the ultimate penalty for ChoicePoint was? They wound up getting bought by Reed Elsevier for 4.1 billion dollars. Reed Elsevier, for you guys that don't know, is the parent company of Lexis, which is in and of itself a massive data aggregator. And so when you look at it from the privacy equation, those folks don't really care.

But there's hope. And I think that part of the problem is that we've got this issue with the law. The law just doesn't move the way it should, particularly when you put it against the backdrop of emerging technology. Who knows the four Privacy Torts? Appropriation, intrusion, false light, and publication of embarrassing facts. In a nutshell, those are our four Privacy Torts. They emerged after Prosser read Cooley's restatement, and yadda, yadda, yadda. The problem is they were created in 1960 and nothing has been done since. If anything, they've eroded because you can't win on any of the different things because of it's got to be offensive or highly offensive. Well, that's a moving target. The target has got to be: there's a reasonable portion in there, has it been disclosed?

Part of it is that there's this underlying assumption in some of the Privacy Torts of what I call perfect privacy. And to achieve perfect privacy you have to somehow figure out a way to live in your house with the shades drawn and never exit or interact with anyone. Because the minute you walk out of your house you've now sacrificed a modicum of privacy. One of the interesting things is that when Brandeis wrote his right to be let alone, he was terrified of cameras, Kodak of all cameras, which is also interesting from Dale's perspective. This is funny given our voyeuristic society at this point with cell phone cameras everywhere.

But the tort he left behind is the Tort of Confidentiality. And the Tort of Confidentiality is very simple. Our four Privacy Torts always focus on the information that's disclosed. The Tort of Confidentiality focuses on the relationship between the people sharing the information. And so, for example, in England if you're a lover of mine—it's a weird example—the fact that I'm your lover is protected information so you can't disclose that further. And there have actually been cases where the person who disclosed the tryst was liable to the other person for disclosing it. And that's the Law of Confidentiality.

It takes two elements. Number one, you have to have a duty established. So the duty has to be established. And then number

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two, a breach of that duty. Now, the great thing about that is now all of a sudden you've got a law that has become somewhat agile, because that's what the Internet is. It constantly adapts and changes, the way that Beacon got killed.

Now, look at Facebook Connect. Facebook Connect has 15,000 partners and the way that they've done it is when you go to the partner site they say "Would you like to log in using your Facebook?" And so if you go to TV.com for example, you log in using your Facebook and then it automatically updates what videos you're looking at on TV.com. And people love it, they're like, "Oh, this is so easy," and it's because they don't have to set up a new account, they can use an existing log in, there's all these things. The problem is now they're just dumping more information out there into the stream for data aggregators.

The other, and probably the more radical, solution to privacy would be to assign a dollar value to each piece of information. For example, if you have an entity that wants to sell your name and address, okay, that's a nickel. And it just accumulates and then those companies would then have to pay you for using your information. I don't know that that can work; I think confidentiality may be a way to go because one of the other nice things about confidentiality is that it naturally creates a hierarchy.

For example, when we think about hierarchies, you heard earlier there's a debate about opt in or opt out. Let's talk about opt outs for a second. Anybody familiar with the case of *Boring v. Google*? Okay, *Boring v. Google* is Street View. What happened was the Boring's—true name, you couldn't make this stuff up—had their house taken and put on Google's Street View. Well, they sued under the four Privacy Torts to have it removed. The judge unleashed on them, not only did he deny all four of the Privacy Torts, but then he said that you brought on more publicity by filing the suit and you could have just opted out.

Well, has anybody ever tried to opt out of Google's Street View? It's hard. There's actually a very funny story by Kevin Bankston, he's one of the original founders of the Electronic Freedom Foundation. They snapped a Google shot of him smoking and he wanted to get it removed, so he sent an e-mail to Google saying I'd like to have this removed. And they said under their opt-out procedures you have to submit a sworn affidavit that it's you. You have to submit a copy of your driver's license, when and where the picture that you're saying is, and all this information.

To which he said, "If I'm faced with the choice between having to give Google, who I don't trust with my information to begin with, my driver's license, I'm just going to leave the picture up." Google eventually caved and removed the picture. But it's one of those things where Google is in the information business, they've actually said, "We don't have enough information at this point, we want more." When you go to Google's page what is the thing in the smallest font on the page? The privacy link. So everything else is nice and big and then down there in the smallest font is privacy. So that's the problem with opt outs.

The other thing is that when you look at confidentiality and you establish a hierarchy of duties for like financial institutions for example, that's the highest duty probably. So if they're going to share information, you need to opt in. They need to ask you if you want to share. And it goes on down the list and it becomes easy at that point to kind of sort out opt in and opt out scenarios. At some point, I think there's even a spot where if you're willingly throwing stuff out there like on a social networking site, I'm not sure you have to opt in or out because it's almost like a data dump that everybody is willingly participating in.

So the opt out. It's important as attorneys to recognize these things because when you go to court the other side, if you're advocating for privacy is going to say, "Well, but they could have just opted out." So one of the things that we have a duty as attorneys to do is to figure out if that's a true opt out or if it's elusory. It's the same thing when you look at a privacy policy. One of the interesting things is that the FTC will hammer a company if they violate their privacy policy. So what has that lead to? More vague privacy policies. I actually just blew through Google's privacy policy this morning. One of the great sentences on Google's privacy policy is that Google may allow you to opt in or out of certain information sharing. Awesome. I'm really fired up for that possibility that I might get to opt in or out of it at some point.

I think as we look at it, we have to somehow craft the law that remains as agile and adaptable as the Internet is. If we could somehow revive or resuscitate this tort of confidentiality, that at least gives us something to march forward. As we've pointed out this morning, if we're waiting for Congress or the states to get in there, that's great, we're passing laws for things that happened two years ago and people aren't doing any more. And that's one of the great things is by the time we've got all these data breach

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laws out both ChoicePoint and DoubleClick had been gobbled up.

Just in case you're wondering who's got DoubleClick now, it's Google. And so when you look at that, we need better explanations of what the privacy settings on the websites are. For example, when you're on Facebook, as you click through those drop down menus it should pop out. At this point, the technology's there, just pop out. If you set it to here, this is who will be able to see it; friends, friends of friends, and friends of their friends, and that way we can start to make informed decisions about what we're putting out there.

The other thing I would caution you on is what I would call the phenomenon of over sharing. We don't need to know that you're brushing your teeth before you go to bed. Hopefully, you are and we'll just take that for granted. One of the things that I saw just this week was someone that I knew had posted on her Facebook newsfeed, "I hate my husband's employer." Well, you know her husband is friended and guess who's probably friended with her husband? And so it's one of those things where common sense still works.

One of the ironies of Prosser is that he firmly believed that torts was supposed to be a marriage of common sense and social necessities. And so it's not. It wasn't intended for him to write the Restatement in '72 and say this is it forever. Instead, we should have been revisiting it all along and allowing these things to evolve and adapt and maybe we wouldn't be in this position now where we're kind of running around to some extent like Chicken Little. But I think there's hope. We just have to get creative.

Thank you.