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Two concepts of privacy

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ABSTRACT

The right of privacy is one of the thorniest legal issues today. Courts, legislators, practitioners and academics have all struggled to provide a compelling, consistent, account of what privacy is, why it matters, when it is violated and what the consequences of such a violation should be. Decisions of Canadian courts show that the way in which privacy is characterized differs depending on whether it is a criminal case, an interpretation of a statute that seeks to regulate the use of personal information, or a case in which a person claims damages for an invasion of privacy. As a result, it is difficult to articulate what a right of privacy means, let alone what 'privacy law' is. I argue that this is because, at base, the cases reflect two competing concepts of privacy – dignitary privacy and resource privacy. Dignitary privacy is based on a belief that privacy is intrinsically valuable, whereas resource privacy is based on a belief that privacy is simply a tool that has instrumental value. Further, I argue that what drives every real-life privacy claim is a concern on the part of an individual to prevent personal information about him/herself from being used to harm him/herself, and that the right of privacy arises when that harm is unjust. I argue that it is harm that lies at the heart of privacy and that, ultimately, the difference between the two concepts of privacy turns on the determination of when a particular harm is justifiable.

I am not unmindful of the need to address the risks to privacy posed by the digital age. The task of adapting laws that were a product of the 1970s to a world of smartphones and social networks is a challenging and profoundly important one.

– Moldaver J., *R. v. Telus*[1]

1. Introduction

When Samuel Warren and Louis Brandeis wrote the 'Right to Privacy'[2] they were concerned about the threat to privacy posed by the invention of the instant camera, yet at that time only a select few people were able to afford these devices and the only entities with the power, the interest and the resources to systematically collect personal information were governments. The potential for invasion of privacy was, by today's standards, minimal. Since 9/11, a huge proportion of the world's population has acquired pocket-sized, portable, tracking and recording devices, while the volume of personal information collected, stored, analyzed and shared by non-

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[1] *R v. Telus*, [2013] 2 S.C.R. 3 at 53.

[2] Samuel Warren and Louis Brandeis, "The Right to Privacy", (1890) 4 Harv. L. R. 193 [Warren and Brandeis, "The Right to Privacy"].

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governmental entities such as Google and Facebook is simply without parallel in human history.[3] The upshot of this is that we are entering, perhaps unintentionally, into an age in which the surveillance of everyone, by everyone, has become easy and in which questions of privacy rights have become paramount.[4] Perhaps more than any other single issue, the way in which judges and lawmakers respond to the privacy challenges brought about by the evolution of technology will determine the values and the type of society in which our children will grow up. Thus, as Justice Moldaver has recognized, the task of updating our privacy laws is truly a profoundly important one. However, in order to do this, there is a need for a common understanding of what privacy is and what it is not, as well as why it matters. Unfortunately, this common understanding does not exist. Judicial and academic statements about privacy are inconsistent. As Daniel Solove puts it '[p]rivacy seems to be about everything, and therefore it appears to be nothing.'[5] According to Justice Binnie, 'privacy is a protean concept'.[6] The risk is that if privacy is everything to everyone then it loses all conceptual force, and privacy law is doomed to be forever weak.

The goal of this article is twofold: first, to expose the inconsistencies in the way in which privacy is dealt within the law in Canada and show that these differences correspond to fundamentally different views of privacy that can be termed 'dignitary privacy' and 'resource privacy'[7]; second, the article attempts to develop an explanation of the right of privacy that offers a common starting point for a cohesive theory of privacy law. Privacy is not actually about 'everything' and while to many the concept may appear to lack coherence, it should not and need not.

2. The inconsistent uses of privacy in Canadian law

Compared to the U.S., Canada is a late entrant to the field of privacy law. British Columbia's *Privacy Act*[8] creating a statutory tort for invasion of privacy was introduced in 1968, the *Canadian Charter of Rights and Freedoms*[9] which enshrined privacy in the constitution of Canada became effective in 1982, the federal *Privacy Act*[10] that regulated the ways in which the federal government used personal information was introduced in 1983, the *Personal Information Protection and Electronic Documents Act* ('PIPEDA'),[11] that regulated the ways in which the private sector collected and used information was enacted in 2000, British Columbia enacted its own *Personal Information Protection Act* ('PIPA')[12] in 2003, and in terms of the common law, it was not until 2012 that a tort of invasion of privacy was recognized in Ontario.[13] Thus, three main types of privacy claims (constitutional, regulatory and tort) can be made in Canada today. I will review each of these areas in turn, to show what each suggests about the answer to the fundamental question of "what is privacy and why does it matter"?

2.1. The constitutional cases

Section 8 of the *Charter of Rights and Freedoms* provides that '[e]veryone has the right to be secure against unreasonable search or seizure'.[14] From the outset, this has been recognized as involving a claim of privacy. In the foundational case under this section, *Hunter v Southam*, Dickson J, noted:

> *[t]here is no specificity in the section beyond the bare guarantee of freedom from "unreasonable" search and seizure; nor is there any particular historical, political or philosophic gloss on the meaning of the guarantee.*[15]

In determining the contours of s. 8, Dickson J. drew upon Stewart J.'s interpretation of the Fourth Amendment in *Katz* who had noted that 'the Fourth Amendment protects people, not places'.[16] Dickson J. continued:

> *[t]his limitation on the right guaranteed by s.8, whether it is expressed negatively as freedom from "unreasonable" search or seizure or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement. (emphasis added)*[17]

However, Dickson J. did not offer a great deal of insight into what privacy was or why it mattered, he simply characterized

[3] As Craig Mundie puts it: "it has become virtually impossible [for someone] to know exactly how much of his data is out there or where it is stored". Craig Mundie, "Privacy Pragmatism: Focus on Data Use, Not Data Collection", (2014) Foreign Affairs 93:2 <http://www.foreignaffairs.com/articles/140741/craig-mundie/privacy-pragmatism>.

[4] See e.g. Jason Palmer, "Mobile location data present anonymity risk", March 25, 2013, BBC news, <http://www.bbc.com/news/science-environment-21923360>, showing that based on common patterns of movement 95% of people can be identified by their repeat appearance at 4 location points.

[5] Daniel Solove, "A Taxonomy of Privacy", (2005–2006) 154 U. Pa. L. Rev. 477 at 479.

[6] *R. v. Tessling* [2004] 3 S.C.R. 432 at 25 [*Tessling*].

[7] I borrow the term "resource privacy" from Russell Brown. See, Russell Brown, "Rethinking Privacy: Exclusivity, Private Relation and Tort Law", (2006) 43 Alta. L. Rev. 589. The idea of two competing concepts of privacy has also been explored (albeit in slightly different terms) by James Q. Whitman. See his "The Two Western Cultures of Privacy: Dignity versus Liberty", (2004) 113 Yale L. J. 1151, in which he contrasts the European approach that focuses on upholding dignity with the American approach that is focused more on preventing government intrusions.

[8] *Privacy Act*, R.S.B.C. 1996 c. 373.

[9] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (Charter of Rights and Freedoms).

[10] *Privacy Act*, R.S.C. 1985 c P-21.

[11] *Personal Information Protection and Electronic Documents Act*, SC 2000, c.5 (PIPEDA).

[12] *Personal Information Protection Act*, S.B.C. 2003 c.63 (BC PIPA).

[13] *Jones v. Tsige* [2012] O.N.C.A. 32 [*Jones*].

[14] Charter of Rights and Freedoms, s. 8.

[15] *Hunter v Southam* [1984] 2 S.C.R. 145 at 155 [*Hunter*].

[16] *Katz v. United States* [1967] 389 U.S. 347 at 351.

[17] *Hunter*, *supra* note 15 at 159–160.