

The Polysemy of Privacy: Comparative Constitutional Law and the Problem of Culturally-Contingent Meaning

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Sometimes we use the same word to indicate different things. For example, in standard American English, the word *play* can carry several meanings, including a noun (a theatrical production or a single round in a sporting event) or a verb (a diverting activity, often associated with children). Even though spelled and pronounced identically, the word simply means different things in different contexts. *Ball* is another example of a polysemous word; it can refer to a round, spherical object, a formal dance, or, more generically, a good time (i.e., “we had a ball last night”).

Like “play” and “ball” the concept of “privacy” can be used to refer to multiple legal concepts. Privacy can refer to an autonomy interest; that is to say, the right to do or refrain from doing something. In the United States, the right to terminate a pregnancy is an aspect of a constitutional “right of privacy” that relates mainly to autonomy interests.² But this is hardly the only way one might conceptualize the concept of privacy. Indeed, it arguably is a rather odd construction of the word, given that “privacy” in non-legal contexts usually denotes seclusion or non-disclosure, rather than more generalized autonomy interests.

Indeed, privacy logically can and does refer to an interest in not disclosing personal information; the historical roots of the right of privacy in the United States relate to this aspect of the concept. Warren and Brandeis, in their iconic law review article in the *Harvard Law Review*,³ argued that the common law of torts should protect an interest in non-disclosure of certain true, but embarrassing, personal information.⁴ Unlike the law of defamation, which provides an economic recovery for the dissemination of damaging *but false* information, Warren and Brandeis argued that the law of tort also should provide a recovery for the dissemination of true information that was harmful to personal or business interests, in the absence of some public interest supporting disclosure of the information. The argument

¹ John S. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law. This is a revised (and abridged) version of a longer paper that I presented at the First Amendment Discussion Group meeting at the University of Luxembourg School of Law, in Luxembourg City, Luxembourg, in May 2009.

² See *Roe v. Wade*, 410 U.S. 113 (1973); see also *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁴ *Id.* at 205-14.

proved persuasive and most states recognized a right to recover damages associated with the public disclosure of private facts.

These examples, privacy as autonomy and privacy as non-disclosure, also highlight an important distinction in the use of the concept in both the U.S. and in Europe: whether legitimate privacy interests primarily implicate protection of “privacy” (however defined) against the government, against other private citizens, or against *both* the government and other citizens. In other words, is privacy something we demand from the government? Or something we demand from each other and private corporations? To be clear, a fully theorized understanding of “privacy” should encompass protection against both the government and private interests that unduly seek to compromise a reasonable interest in either autonomy or non-disclosure. Yet, I think that a tendency exists in the contemporary United States to think about privacy primarily as running against the government, rather than against other citizens and private corporations.

Although the proposition is contestable, I want to suggest that in the contemporary United States, most citizens understand privacy interests to implicate autonomy rights against the government; by way of contrast, privacy law does relatively little to protect citizens against each other, or against corporations that seek to collect and sell personal information that arguably fits within the scope of the Warren and Brandeis concerns. By way of contrast, my sense is that in the contemporary European Union, privacy concerns are as much about securing personal information from other private interests, including both other citizens and corporations, as much, if not more, than about autonomy claims against the government.

In their seminal 1890 law review article, Samuel D. Warren and Louis D. Brandeis argued that the law of tort should provide some measure of protection against the public disclosure of private facts.⁵ They argued that “the right to be let alone@ should enjoy formal legal protection and suggested that “[o]f the desirability-indeed the necessity-of some such protection, there can, it is believed, be no doubt.”⁶ After surveying the law of property and copyright, Warren & Brandeis argue that a reasonable extension of existing law could create a zone of protection against the disclosure of private facts.⁷ In the end, “[t]hese considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or the arts, so far as it consists of preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone.”⁸ Thus, recognizing a right against the publication of private facts without permission provides legal protection akin to “the right not to be assaulted or beaten,

⁵ Warren & Brandeis, *supra* note 3.

⁶ *Id.* at 196.

⁷ *Id.* at 197-203.

⁸ *Id.* at 205.

the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed.”⁹

From a European perspective, of course, the notion that disclosure of private facts without permission might give rise to liability should not be particularly revolutionary. The protection of personal honor and dignity, as an incident of aristocratic privilege, later democratized so that, in theory, all persons are potentially people deserving of honor and respect, is a baseline principle of the civil law of Germany and France (and has been for a very long time).¹⁰ As Professor James Q. Whitman puts the matter, in Europe, legal systems tended to level everyone up, whereas in the United States, we have “leveled down.”¹¹ Moreover, “[t]o say that America has absolutely no law of civility is to say too much. But to say that in general America has no law of civility - especially as compared with a country like Germany - is to make the right generalization.”¹² In contrasting U.S. and German law on the protection of honor with respect to personal insult, Whitman observes that “[t]his is a body of law that shows, in many of its doctrines, a numbness to free-speech concerns that will startle any American.”¹³

In thinking about the protection of privacy in transatlantic terms, I think a key distinction that must be addressed is the utter absence of mandatory civility norms in the United States. Under the Free Speech Clause of the First Amendment, one is free in the United States to engaged in targeted insult, with the aim of “assassinating” the character of a public official or public figure, with complete legal impunity.¹⁴ Whether one attempts to fix liability on a theory of defamation, intentional infliction of emotional distress, or even privacy, in the United States the claim will fall to concerns about ensuring the public debate about public officials, public figures, and matters of public concern is “uninhibited, robust, and wide-open.”¹⁵

These fundamental differences in the conceptualization of a shared legal construct, “privacy,” a construct that enjoys constitutional protection both under the U.S. Constitution

⁹ *Id.*

¹⁰ See James Q. Whitman, *Enforcing Civility and Respect: Three Cultures*, 109 YALE L.J. 1279 (2000) (discussing the protection of personal honor in the civil law of France and Germany, and contrasting this protection with the approach in the United States).

¹¹ See *id.* at 1285, 1319-20, 1344, 1358-59, 1387.

¹² *Id.* at 1384.

¹³ *Id.* at 1312.

¹⁴ See *Hustler Magazine v. Falwell*, 485 U.S. 46, 52-55 (1988).

¹⁵ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

(by virtue of the Due Process Clauses) and also in Western Europe (by virtue of both domestic constitutions and the European Convention on Fundamental Rights) suggest an important problem for comparative constitutional law: even when the problems inherent in working with translated materials do not exist (and European Court of Human Rights decisions are readily available in English, directly from the Council of Europe), problems of legal culture still remain. In other words, when Europeans and U.S. lawyers, judges, or legal academics talk about “privacy” the words might be the same, but the shorthand of “privacy” represents radically different baseline assumptions about the underlying legal, social, and moral concerns. Indeed, it is quite easy to imagine a U.S. and German judge talking about privacy amiably, but both taking away very different understandings of what has been said; they might very easily talk *past* each other rather than truly *with* each other.

In raising the problem of polysemy, I do not mean to suggest that it cannot be met and overcome; rather, I mean only to posit that comparative constitutional law involves difficulties that go well beyond the surface of language: they involve deeper issues that relate to a proper understanding of not only legal culture, but of a polity=s culture more generally. In fact, the risk of falling victim to the perils of polysemy seem to me greater *in the absence* of a linguistic difference; when one works with materials in translation, a legal scholar has an awareness she must be on guard against over reading or under reading a text. When language is familiar, however, the subconscious mind races ahead and fills in meaning, reflexively, without so much as skipping a beat.¹⁶

When engaged in a comparative public law project, one must stay carefully attuned to the possibility (probability?) that familiar words and concepts do not bear the same meaning abroad as they do at home. It seems, perhaps, a self-evident proposition, but it is a cautionary note far easier to state in the abstract than to apply in practice.

¹⁶ See Stanley Fish, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).