
REVIEW

Evolution of Privacy Policies

*Colin J. Bennett and Charles D. Raab, **The Governance of Privacy: Policy Instruments in Global Perspective**, Ashgate Publishing Limited, Aldershot England, 2003*

Review by Solveig Singleton

In *The Governance of Privacy*, political science professors Bennett and Raab offer a survey of privacy policies in the industrialized world to explore the intersection between globalisation and privacy policy. Their ultimate concern is to explore whether privacy protection has seen a 'race to the bottom' or a 'race to the top,' or 'something less uni-directional and complex'. (Even without having read beyond the introduction, astute readers should feel confident in predicting that the author's answer will fall in the last-named category.) The book offers a valuable resource in exploring how different privacy policies have evolved since the 1970s. Although helpful in confining the work to one volume, some of the authors' assumptions about privacy and its recent legal incarnation, data protection, sadly limit their insights into the more persistent puzzles of privacy and globalisation. Asking somewhat deeper questions might have yielded some more interesting answers of greater durability.

A Panorama of Privacy in the Late Twentieth Century

In essence, the first two-thirds of the book offer an outline of privacy protection goals and institutions as seen by the larger community of privacy advocates, supplemented with other sections offering the authors' own perspective. For example, early on they set out four key assumptions of the privacy-conscious elite. First, privacy is an individual right linked to liberal democracies; second, privacy is being eroded; third, the source of the erosion is structural (that is, a set of impersonal and remote forces outside the control of individuals); and fourth, privacy-invading entities are subject to control by nation-states. In addition, they describe in greater detail the theory that privacy is linked to trust in institutions and, in particular, to the growth of electronic commerce. The authors then offer their own take: privacy is a social value; privacy related risks stem from many sources; and privacy problems may no longer be controlled and defined within state borders. The concluding chapters offer more comparative analysis and evaluation.

The authors' summary of the logic of the privacy elite is a good one. The central part of the book offers an excellent summary of the history of data protection institutions in Europe and of self-regulatory instruments, but the authors

fail throughout to offer a more than cursory glimpse at the views of critics of data protection, and leave out some important strands of criticism altogether. For example, Jacob Palme in Sweden and Eugene Volokh¹ in the US, among others (including myself) have pointed out the tension between privacy regulation of the private sector and another liberal democratic value, the free flow of information — the right of human beings to talk about each other, to learn and communicate their knowledge of other people. Additionally, there are substantial data suggesting that the economic cost of data protection to consumers may be extreme. These omissions of the ‘minority view’ mean that while the book may be ‘global’ in its scope in one sense, it is far from complete. And while the authors seem to strive on the one hand to provide an objective critique of the privacy paradigm, they sometimes seem to slip into the role of advocates.

Privacy as a Social Value

If the omission of a longer account of views of critics were essential to save space, one would hope that it would be because the authors felt a burning need to convey other insights of importance. One candidate is the thesis that privacy is a social value, but their arguments for this position are not sufficiently concrete to be really strong. There are many types of privacy; while a journalist’s loss of the privilege of confidentiality respecting his sources will have broader social effects on free speech, it is hard to see how a consumer who elects to qualify for a discount on groceries by letting the store track his purchases is doing much of broader social consequence.

If one thinks of privacy as having absolute value in and of itself, the mere fact that information about a consumer is accumulating in a database somewhere is troubling. But that is rather a simplistic position to take: human beings often need to know about the behaviour of others in order to make better decisions. The insistence that privacy is an absolute value seems more designed to insulate extremely restrictive privacy regulations from criticism than to serve any real human need. The authors seem to share this view, but present no argument for it: they vaguely note anthropological studies stressing the importance of some kind of undefined privacy to human well-being, but authors on the other side could equally well cite anthropological studies stressing the importance of information exchanges about other people (even gossip) to human beings.

Their discussion of privacy protection as broad social policy also stumbles inadvertently into the surreal. One thesis is that a lack of privacy can lead to social inequities; certainly this would come as no surprise to the average dictator (indeed, it seems to be the whole point of being a dictator). The authors then propose a more systematic study of who is and who is not actually being protected by data protection, criticizing it for being too categorical and institutional. By

¹ Eugene Volokh (2000), ‘Freedom of Speech, Information Privacy, and the Troubling Implications of a Right to Stop People From Speaking About You’, *Stanford Law Review* 52:1049.

contrast with marketing, which is increasingly targeted with ‘fine-grained precision’, they say they ‘know of no equivalent impetus on the part of regulatory agencies to know systematically more about those whose privacy they are protecting’ (p. 38). Did they write this sentence, seeming to support yet more compilation of data, all in the name of privacy, with a straight face?

In asking who is being left out of the world of data protection, the authors do ask a tremendously important question. One interesting part of the answer, though, is staring us all in the face: taxpayers and criminals, since the taxation and criminal investigation arms of government cheerfully exempt themselves. Indeed, the more closely one looks at data protection the less real protection it seems to offer to anybody. France, for example, has ‘strong’ data protection, but that does not stop labour inspectors from scrutinizing workers as they leave their offices, looking for laptops or some other indication that the hapless employees are exceeding the bounds of the 35-hour work week at home. Swedish data protection authorities intervened to get an airline to delete from its databanks the identity of passengers who ordered kosher meals. But suppose an anti-Semitic regime actually came to power in Sweden. If it was looking for lists of Jewish citizens for some evil purpose, wouldn’t it just seize the membership lists kept by synagogues or other Jewish organizations (exempt from data protection) on some pretext? Or look for family names at a Jewish cemetery? The most likely result of ‘de-koshering’ the airline’s database seems to be to inconvenience those who order kosher meals.

The idea that tyranny can be contained in a powerful welfare state by a bureaucratic structure such as data protection is extraordinarily naïve; the entire premise of the welfare state is that there ought to be few limits on government intervention in citizens’ daily lives. The authors sometimes teeter on the verge of realizing the extent to which data protection has failed, but are too much members of the privacy elite themselves to step outside of it and answer their own question.

Privacy in the Market

The book’s high level of abstraction continues to handicap its analysis as the authors move into the realm of economics. They deplore market ‘ideologies and technologies of individual choice and tailor-made preferences’ (p. 41). Wreathed in egalitarian language, this signals compassion in academic circles. But what the authors seem to support in fact is top-down policies that make it illegal or technically difficult for people to reveal information — even when they choose to in exchange for a real benefit. Privacy is evidently not just a right, but an *inalienable* right. The first generation of privacy advocates thought that people should be able to choose whether to reveal information about themselves; the next generation is horrified that people in fact so choose, and would like to prevent them from doing so.

The level of intervention that this would entail with technology and with the economy is extraordinary. And it seems entirely unjustified, given that consumers are — even in that last refuge of supposed *laissez faire*, the US — doing nicely

without it, thank you very much, cheerfully piling onto electronic commerce in ever greater numbers (whatever they may say in surveys, a poor guide to preferences).² The authors' note that in the US business lobbyists held back data protection laws, which some readers might take to refer to a deplorable exercise of raw power and unseemly influence. But the business side succeeded in Washington DC because it made strong arguments. No one was able to point to real problems caused by a lack of broad privacy laws; narrower problems like identity theft are being better addressed with sector-specific laws and new enforcement tools; and consumers enjoy many benefits from a default rule that allows businesses to learn more about their preferences. Early security problems with electronic commerce and spam are gradually being straightened out, and consumers do not seem to attach concrete value to privacy much beyond that.

In suggesting that privacy is a 'public good', the authors might argue that this is a market failure. But the fact that consumers do not attach the value to privacy that advocates think they should is *not* evidence of market failure. Indeed, the free flow of information has more of the qualities of a public good than privacy. Everyone would prefer if his own unpaid bills were left off the credit report, but wants to know what the baby-sitter is up to.

Conclusion: Another Stripe on the Paper Tiger

The *Governance of Privacy* offers an excellent summary of worldwide trends in data protection in the late twentieth century. While valuable as a resource, it is weak as a guide to policy going forward. It fails to grapple with the central failings of data protection — a conflict with liberal values such as free flow of information, its economic cost to consumers, and its failure to offer a real check on the power of the welfare state.

Solveig Singleton (solveig.singleton@comcast.net) is a lawyer based in Washington, DC, and the author of many articles on privacy and data protection issues, including 'Privacy and Human Rights: Comparing the US to Europe', in The Future of Financial Privacy (Washington, DC: Competitive Enterprise Institute, 2000) and 'Privacy Versus the First Amendment: A Skeptical Approach', XI Fordham Intellectual Property, Media and Entertainment Law Journal 98 (2000).

² To do them justice, the authors themselves note that 'Although many people say that the lack of privacy is a crucial barrier to participation in cyberspace, there is no clear indication that significant numbers of individuals actually do perform their transactions online as soon as better privacy statements and rules are offered' (p. 77).