Singapore Journal of Legal Studies
[2021] 6–18

# A COMMON LAW OF PRIVACY?

MEGAN **RICHARDSON***

As comparative lawyer Otto Kahn-Freund observed in the mid-1970s, there is a "far reaching free trade in legal ideas. Far reaching, not all embracing". We see this manifested in the law of privacy, whether understood in the traditional sense of freedom from intrusion into private life or some more extended sense of, for instance, control over personal information or physical or sensory integrity stretching beyond the enjoyment of an intimate interior private life. On the one hand, there is a great deal of cross-fertilisation across jurisdictions as elements of the law of one are copied in others, allowing certain broad groupings to evolve. On the other hand, there are still many differences between and within these groupings which may be partly due to the different legal contexts of the laws, but are also partly due to factors having to do with different social-cultural histories and norms, as well as different political environments within which laws are developed, interpreted, and enforced. These tensions have ongoing implications for the protection of privacy in the digital century. Yet there are hopeful signs of the possibility of convergence around legal standards of privacy protection in the future, as in the present and past—for all the legal, social-cultural and political differences that remain and for all the new challenges to privacy that we can expect to see.

## I. INTRODUCTION

Do we, can we, have a common law of privacy? This might seem desirable in the digital century when the role of law in sustaining privacy seems increasingly under challenge in the face of technologies, practices and social norms pushing in the other direction. Even if we move beyond the traditional idea of privacy as freedom from intrusion into an intimate private life (the ability to set, maintain, and adjust boundaries which some argue is still the core meaning of privacy),[1] and opt for some looser meaning of privacy, *eg,* framed in terms of informational self-determination,[2] or the ability to maintain a sense of bodily, mental or spatial integrity free from observation and control by external forces,[3] or some pluralistic conception

* With thanks to David Tan and participants in the Asian Privacy Scholars Network Conference, 2019. This article is an updated version of my keynote address delivered at the conference. Thanks also to Robin Gardner.

1 See Ruth Gavison, "Privacy and the Limits of Law" (1980) 89:3 Yale LJ 421; Lisa Austin, "Privacy and the Question of Technology" (2003) 22 L & Phil 119; Kirsty Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012) 75 Mod L Rev 806.

2 See Alan F Westin, *Privacy and Freedom* (New York: Atheneum, 1967).

3 See David Lyon, *The Culture of Surveillance: Watching as a Way of Life* (Cambridge UK: Polity Press, 2018); Benjamin J Goold, "Surveillance and the Political Value of Privacy" (2009) 1:4 Amsterdam LF 3.

of 'privacy' accommodating multiple meanings,[4] there are still real questions as to the sustainability of these ideas of privacy all essentially concerned with our ability to maintain individual or group identity. It is like German sociologist Georg Simmel said in the beginning of the last century[5]—we are in danger of being swallowed up by the forces of modern industrial society. And law seems to offer only disparate and fragile support for the individual or group versus society, with little evidence of an integrated common approach developing across jurisdictions and working in concert for the protection of privacy now and in the future.

Certainly, for quite some time we seem to have been living in a world of legal disunity, rather ironically following the assertion of the right to privacy as a universal human right in the post-war *Universal Declaration of Human Rights* and *International Covenant on Civil and Political Rights*.[6] And at the moment there seems to be little by way of consensus on how privacy should be treated and protected as a matter of law—including the very language of a 'right' to privacy (still a matter of some debate in Australia, for instance, despite our participation in the *UDHR*).[7] Despite all the factors that historically might suggest a common goal, for instance membership of the United Nations ("UN"), or participation in a British Empire centred on networks of trade in ideas as well as people, capital and goods,[8] there has been remarkable little coordination on the legal protection of privacy within and outside these loose jurisdictional groupings.

What then of the future? As former Australian judge Michael Kirby said, "Look ahead. Imagine the way in which, in the future, the lives of human beings will be altered as the global network of interconnected users of information technology becomes bigger and even more powerful", suggesting there is a need for 'common principles'.[9] Of course, we are already going further in some respects when we consider the movement towards common data protection standards—a quite remarkable feat.[10] But what about other legislation geared to privacy? What about the common law as formulated by judges? What about other legal policies and legal statements that have so much to say about the prospects of privacy in human lives? Here, to coin the words of comparatist Otto Kahn-Freund in the mid-1970s, there is a "far reaching free trade in legal ideas",[11] when it comes to the protection of privacy.

---

4 See Daniel Solove, *Understanding Privacy* (Cambridge, Mass: Harvard University Press, 2008); Bert-Jaap Koops *et al*, "A Typology of Privacy" (2017) 38:2 U Pa J Intl L 483.

5 Georg Simmel, "The Metropolis and Mental Life", in Donald N Levine, ed, *On Individuality and Social Forms*, (Chicago, Illinois: University of Chicago Press, 1971) at 324.

6 *Universal Declaration of Human Rights*, 10 December 1948, art 12 [*UDHR*]; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 17 [*ICCPR*].

7 See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 (HCA) at para 34 (*per* Gleeson CJ); *Smethurst v Commissioner of Police* (2020) 94 ALJR 502 (HCA) at para 24 (*per* Kiefel CJ, Bell and Keane JJ) [*Smerthurst*].

8 See Gary Magee & Andrew Thompson, *Empire and Globalisation: Networks of People, Goods and Capital in the British World, c.1850-1914* (New York: Cambridge University Press).

9 Michael Kirby, "Privacy in Cyberspace" (1998) 21:2 UNSWLJ 323 at 324.

10 See Simon Chesterman, "After Privacy: The Rise of Facebook, the Fall of WikiLeaks, and Singapore's *Personal Data Protection Act 2012*" (2012) Sing JLS 391; Graham Greenleaf, *Asian Data Privacy Laws: Trade and Human Rights Perspectives* (New York: Oxford University Press, 2014); Graham Greenleaf, "Global Data Privacy Laws 2019: 132 National Laws and Many Bills" (2019) 157 Privacy Laws & Bus Intl R 14.

11 O Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37:1 Mod L Rev 1 at 10.

Yet the differences continue, so the trade in legal ideas is "[f]ar reaching, not all embracing". Indeed, in the area of privacy law, being an area like family law and succession that is "closest to people's lives" (in Kahn-Freund's words), the pressures for disunity come from multiple sides. Some may be put down to different legal contexts (for instance, particular constitutional arrangements that impede or facilitate protection of privacy). And there may also be very different social-cultural histories and norms, forming "environmental obstacles" to closer harmonisation, as well as political features which Kahn-Freund suggests may be important impediments to harmonisation.[12]

So, can we expect more or less harmonisation? While greater and more uniform protection of privacy may seem desirable in the digital century, there is of course one apparent barrier to real change in this direction coming from the side of law itself—what Oona Hathaway refers to as the "path dependence" of the common law,[13] which can be taken as a proposition not just about the common law of so-called common law jurisdictions but about any system of law that respects the rule of law, valuing the benefits of continuity and consistency with history.[14] In other words, "the weight of the historical heritage", as Simmel puts it,[15] is a feature not just of modern life but also of the law of many modern jurisdictions. As someone who has looked closely at the history of privacy law, I accept that a great deal of the law's development is about maintaining continuity and resisting more than minimal change. I say that myself.[16] But I want to point out that despite the pressures for continuing disunity in the history of privacy law, there have also been some important disruptive moments of coming together which have set off a different course. In short, the history of privacy law is not just a history of incremental progression along different paths. The paths may often divide but they may also merge together from time to time setting the scene for some (somewhat) more common approaches.

In the space I have left, I offer five moments of disruption, changing the course of history across the common law world (in particular), and producing albeit within a limited compass some common new or renewed privacy traditions.[17] I finish with some speculations about what we might hope to see in the digital century—suggesting that a common law of privacy can accommodate variations in the treatment of privacy in different parts of the world, reflecting different legal frameworks and social-cultural norms,[18] as well as political realities, while holding on to the idea that if the 'right' to privacy is to mean anything in our present and future world, it is that

---

12 *Ibid* at 10.

13 Oona A Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2001) 86:2 Iowa L Rev 601.

14 See Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43:1 Ga L Rev 1; Philippe Nonet and Philip Selznick, *Law & Society in Transition: Toward Responsive Law* (New Brunswick, NJ: Transaction Publishers, 2009) at ch 3.

15 Simmel, *supra* note 5.

16 See, Megan Richardson, "Responsive Law Reform: A Case Study in Privacy and the Media" (2013) 15:1 Eur JL Reform 20; Megan Richardson, *The Right to Privacy: Origins and Influence of a Nineteenth-Century Idea* (Cambridge UK: Cambridge University Press, 2017).

17 *Cf* generally on the invention of tradition, Eric Hobsbawm & Terence Ranger, eds, *The Invention of Tradition* (New York: Cambridge University Press, 2012).

18 *Cf* James Q Whitman, "The Two Western Cultures of Privacy: Dignity versus Liberty" (2004) 113:6 Yale LJ 1151 (pointing to significant cultural and legal variations even as between the US and Europe).

people should be able to enjoy some baseline protection of the right to privacy that we can help to actuate, shape and enforce for ourselves regardless of our location.

## II. *Entick v Carrington*: Discovering Privacy as a Tool of Political Freedom

This early English case of John Entick,[19] radical journalist and friend of John Wilkes (that "attractive symbol" for the Society of the Supporters of the Bill of Rights),[20] has been described as "a defining moment in the political struggles of the 1760s because it helped clarify the role of public dissent in British politics".[21] Entick's public dissent voiced in *The Monitor* concerned the government's prospective move away from its traditional liberal approach to governance of (now much larger) British Empire in the wake of the Seven Years' War with Imperial France and Spain. The government's response was harsh. Nathan Halifax and his men, emissaries of the Earl of Halifax, entered and searched Entick's home, stayed there for four hours, broke into his cupboards, and read and removed large quantities of his papers looking for evidence which could be used to mount a prosecution for sedition. After Entick was released with no charges laid, he brought a claim for trespass. And the claim succeeded before Lord Camden. Coming still in the eighteenth century, the idea of privacy as a value of specific interest to the law was still embryonic in this case. William Blackstone, writing his *Commentaries* in the 1860s, rather emphasised the inviolability of property as an ancient English right.[22] But Lord Camden held that the trespass was an intrusion on private property, and that rifling through Entick's drawers and removing his private papers, among a man's "dearest possessions", disturbed the "secret nature of those goods" and was an "aggravation of the trespass".[23] Michael Tugendhat suggests this was the closest thing we had to a privacy argument when lawyers and judges were not yet talking about it in specific legal terms.[24]

The decision in Entick's case paved the way for privacy to come to be seen in terms of resistance to state intrusion, centred mainly but not solely on the home and other private physical places—beginning in the United States ("US"), where the right against unreasonable search and seizure by the state was embodied in the *Bill of Rights*' Fourth Amendment, later characterized as a constitutional right to privacy.[25] There has been a parallel constitutional movement in Canada.[26] India's

---

19 *Entick v Carrington* (1765) 19 How St Tr 1029 (KB) [*Entick*].

20 Linda Colley, *Britons: Forging the Nation 1707–1837* (New Haven: Yale University Press, 2009) at 112.

21 David Stiles, "Arresting John Entick: The *Monitor* Controversy and the Imagined British Conquests of the Spanish Empire" (2014) 53:4 J Brit Stud 934 at 938; Jacob Rowbottom, "The Propaganda Wars and Liberty of the Press" in Adam Tomkins & Paul Scott, eds, *Entick v Carrington: 250 Years of the Rule of Law* (Oxford, UK: Hart Publishing, 2015) at ch 3.

22 Sir William Blackstone, *Commentaries on the Laws* of *England, vol 2* (Oxford, UK: Clarendon Press, 1769).

23 *Entick, supra* note 19 at 1066.

24 Michael Tugendhat, *Liberty Intact: Human Rights in English Law* (Oxford UK: Oxford University Press, 2017) ch 10 at 132, 133, 136.

25 See *Boyd v United States*, 116 US 616 (1886); *Olmstead v United States*, 277 US 438 (1928) (*per* Justice Brandeis' dissent) [*Olmstead*]; *Katz v* United *States* 389 US 347 (1967); *Carpenter v United States*, 585 US (2018).

26 See *R v Fearon* (2014) 3 SCR 621.

*Puttaswamy v Union of India* provides another more recent example of a constitutional right to privacy found in general constitutional terms.[27] Yet the movement towards constitutionalising privacy has not been all-encompassing. In Singapore, a constitutional right to privacy implied in the Constitution has so far been rejected.[28] In New Zealand, privacy has been treated as a matter of private law, not constitutional law, under the *Bill of Rights Act*.[29] And in Australia, where the High Court has found an implied freedom of political communication in the democratic principles of our Constitution, privacy has not so figured (at least to date).[30] Even in the United Kingdom ("UK"), *Entick* is commonly viewed as having more to say about ancient freedoms than a modern constitutional right to privacy.[31] Instead, courts in the UK have looked to European privacy and data protection standards to formulate a constitutional protection of privacy.[32] However, now that it appears that the UK will disentangle itself from the European Union ("EU"), implementing its Brexit decision, we can expect to see this change—with formal ties to be cut to the EU *Charter of Fundamental Rights*,[33] although (for now) they will remain in place for the Council of Europe's *European Convention on Human Rights*.[34] In the wake of this de-Europeanisation, we may yet see a rediscovery of *Entick* as offering a constitutional right to privacy embedded deep in the history of the common law. In other words, what we may see is a renewal of the ancient English liberties that formed the backdrop of this case.

## III. *Prince Albert v Strange*: Fashioning Domestic Privacy

In this case brought by Prince Albert (also representing Queen Victoria) in the Chancery court and widely reported in the Victorian press,[35] the right to privacy was presented as a common right that even public figures devoted to public service should be able to enjoy in the face of attempted incursions by society into the private sphere.[36] As such, the case represented a distinct step beyond the idea of the right

---

27 *Justice KS Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1 [*Puttaswamy* (2017)]; see also *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 and *Justice KS Puttaswamy (Retd) v Union of India* (2019) 1 SCC 1 [*Puttaswamy* (2019)].

28 *Lim Meng Suang v Attorney-General* (2015) 1 SLR 26 (CA).

29 See *Bill of Rights Act 1990* (NZ), 1990/109, and *Hosking v Runting* (2005) 1 NZLR 1 (CA) (*per* Keith J) [*Hosking*].

30 See *Smethurst, supra* note 7.

31 See Sir Brian O'Neill, "Privacy: A Challenge for the Next Century" in Basil Markesinis, ed, *Protecting Privacy* (Oxford, UK: Clarendon Press, 1999) ch 1 at 24; *cf* Tomkins and Scott, *supra* note 21; Tugendhat, *supra* note 24.

32 *R (Application of National Council for Civil Liberties) v Secretary for Home Department* (2019) EWHC 2057.

33 *Charter of Fundamental Rights of the European Union,* 7 December 2000 (part of the constitutional law of the European Union via the Lisbon Treaty, 2007) [*CFR*].

34 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS No 005 [*ECHR*].

35 *Prince Albert v Strange* (1849) 2 De G & Sm 652 (*per* Knight Bruce VC); aff'd 1 H & Tw 1 (*per* Lord Cottenham LC).

36 See Lionel Bently, "*Prince Albert v Strange* (1849)", in Charles Mitchell & Paul Mitchell, eds, *Landmark Cases in Equity* (Oxford, UK: Hart Publishing, 2012) ch 8; Richardson, *The Right to Privacy*, *supra* note 16, ch 2.

to privacy as a political right *vis-à-vis* the state that might be derived from Entick's case. The proceedings were initiated after the royals received notice of a proposed public exhibition of their domestic etchings complete with a descriptive catalogue. At the initial stages of the proceedings, it was not known how the etchings had come into William Strange's hands. However, by the time the case came before Lord Cottenham LC, the possibility that a local printer or his assistant, given the plates to make limited copies for the royals' private use, had taken extra copies sold on to Strange was settled on as the likely cause. And the injunction was granted, the Lord Chancellor observing that where "privacy is the right invaded", postponing the injunction would be like denying the right.[37] Protection was still tied to recognized legal and equitable wrongs, here breach of confidence, the common law property right in unpublished works, with passing off hinted at (part of the argument being that the royals' approval was misrepresented, harming their ability to mount an approved exhibition at some point in the future for a suitable worthy cause). But the case shows the flexibility of these traditional doctrines in protecting privacy.[38] And, far from privacy's concerns being about individuals in isolation, the right that we see at work in this case of the royal couple making etchings of their children, and gifting copies to private friends, conveys a sense of people sharing a private life of intimate association and close community. Breach of confidence has been the major survival of the doctrines refashioned to protect privacy in this case, offering protection of social privacy in varying degrees in jurisdictions including Australia, where cases feature aboriginal secrets, surreptitiously obtained genetic information and sexted intimate disclosures, and Hong Kong and Singapore, where it has been applied in equally diverse situations.[39]

Recently judges in the UK have suggested that a doctrine focused on secrecy may be less suited to the digital age of easy mass-dissemination than the UK's modern misuse of private information tort focused on intrusion.[40] But courts in Australia and Singapore have held that relative secrecy can remain even in the face of internet chatter and dumps of information on WikiLeaks.[41] Thus, they maintain the relevance of a doctrine whose central appeal is to the traditional, yet also modern value of trust. Might something similar be argued for other traditional doctrines? So far these have yielded rather patchy protection of privacy—in the English courts, the property torts are especially treated as offering little against overlooking (for all of *Entick*'s authority),[42] making them the subject of some questioning and differentiation across the

---

37 *Prince Albert v Strange* (1849) 1 H & Tw 1, *supra* note 35 at 26.

38 *Ibid* at 23. For instance, the property right's extension to descriptions in a catalogue (the defendant having conceded the exhibition could not proceed) and breach of confidence's extension to surreptitious and improper obtaining.

39 *Foster v Mountford and Rigby Ltd* (1976) 14 ALR 71 (NTSC); *Franklin v Giddins* (1978) Qd R 72 (QSC); *Wilson v Ferguson* [2015] WASC 15. *Cf* in Hong Kong and Singapore, *Chor Ki Kwong David v Lorea Solabarrieta Cheung* [2013] 5 HKC 525 (CFI Hong Kong); *ANB v ANC* [2015] 5 SLR 522 (CA).

40 See *PJS v News Group Newspapers Ltd* [2016] AC 1081 (UKSC) at paras 25–32 (*per* Lord Mance), 57 and 58 (*per* Lord Neuberger) [*PJS*].

41 *Australian Football League v Age Company Ltd* (2006) 15 VR 419 (VSC) at para 56 (*per* Kellam J); *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 (CA) at paras 39–43 (*per* Tay Yong Kwang JA).

42 See *Fearn v Tate Gallery Board of Trustees* (2020) Ch 621 (CA) (citing nineteenth century UK cases and the Australian case of *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 (HCA) as authority for a narrow approach, and suggesting legislation would be a preferable means of reforming the law in this context).

common law world.[43] But perhaps the assumed British inflexibility will eventually be revisited in a century of endemic looking?

## IV. Samuel Warren and Louis Brandeis in the Harvard Law Review (1890): Identifying the Right to Privacy as Resting on Freedom, Happiness and 'Inviolate Personality'

The underlying philosophy was not new.[44] For instance, John Stuart Mill in England, Ralph Waldo Emerson in America, and Rudolf von Jhering in Germany had been arguing for the value of dignity, liberty and human flourishing in the nineteenth century.[45] But in their formative article on the right to privacy as a right to be "let alone" (like the right not to be assaulted) and in essence a right of an "inviolate personality",[46] Samuel Warren and Louis Brandeis did much to popularize these ideas, identify them specifically with privacy, and link them to a legal argument for refashioning privacy law to better address human needs and capabilities, which is still very influential in privacy circles. While making numerous references to legal authorities in support of their argument that the right to privacy was already embedded in traditional legal doctrines such as breach of confidence and the property right in unpublished works (citing for instance *Prince Albert v Strange*),[47] they also offered a quite modern idea of law in a process of reform,[48] responding to changes in technology, business enterprise and social norms.[49] And while in cosmopolitan fashion they referred to laws of England, Germany and France,[50] their proto-American legal realist article was geared more to formulating a distinctive body of US law capable of responding to the current US technological, business and social environment.

As such, they offered a genuinely new approach of inventing new torts to deal with contemporary problems in modern America. Their main concern was publication of

---

43 See *Gokal Prasad v Radho* (1888) ILR 10 Allahabad 358 (HC India) (customary law protecting privacy of Parda preferred over the British law of nuisance as reflected in cases such as *Tapling v Jones* (1865) 11 HL Cas 290); *Raciti v Hughes* (1995) 7 BPR 14 (NSWC) at 837 (suggesting nuisance might extend to intrusive surveillance); *Sullivan v Boylan* (2013) IEHC 104 (Irish constitutional right to privacy preferred over common law nuisance as allowing a claim for damages between citizens).

44 Samuel D Warren & Louis D Brandeis, "The Right to Privacy" (1890) 4:5 Harv L Rev 193.

45 Ralph Waldo Emerson, "Self-Reliance" in *Essays, First Series* (Boston: James Munroe & Company, 1841); John Stuart Mill, *On Liberty* (London: John W Parker and Son, 1859); Rudolph von Jhering, *The Struggle for Law*, translated by John J Lalor, (Chicago: Callaghan and Company, 1915); and see Richardson, *supra* note 16.

46 Warren & Brandeis, *supra* note 44 at 195, 205.

47 *Prince Albert v Strange*, *supra* note 35.

48 Warren & Brandeis, *supra* note 44 at 193, stating that "[p]olitical, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society".

49 *Ibid* at 195, 196, stating that:

> Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops'… and the question whether our law will recognize and protect the right to privacy… must soon come before our courts…

*Cf* the discussion of law more generally changing in response to changes in technology, markets and social norms, see Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999); Lawrence Lessig, *Code: version 2.0,* 2d ed (New York: Basic Books, 2006), ch 7.

50 A point made by Whitman, *supra* note 18.

private facts by enterprising photographers and pressmen (and women). But they kept open the prospect of an expansionist approach in response to new technologies and business practices. Indeed, some of the first privacy cases and statutes coming quite quickly after their article concerned visual advertising technologies and practices of the 1890s and 1900s, and new media technologies such as radio and film.[51] By 1939, the American Law Institute in its *First Restatement on Torts*, somewhat ambitiously suggested the following reflected a common position in various US states: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other".[52]

In 1960, William Prosser more precisely identified four privacy torts developing in various states of the US in the wake of Warren and Brandeis's article, namely publication of private facts, intrusion on seclusion, false light publicity, and appropriation of name or likeness[53]—a taxonomy adopted also in the American Law Institute's *Second Restatement on Torts* in 1977 (where Prosser served as chief reporter).[54] Not all succeeded. False light has never taken off (although it may make more sense now in a time of deep fakes). Appropriation may be as much about professional and commercial interests as privacy interests, perhaps more.[55] Intrusion is still largely quite narrowly to do with private places. And the publication of private facts tort (the tort that Warren and Brandeis were especially concerned with in writing their article) has been largely decimated by a surgent First Amendment right of free speech as construed expansively by the US Supreme Court in some notable cases from the mid-1960s[56]—reflecting David Anderson's suggestion of a modern American idea of the value of "information and candour",[57] and James Whitman's suggestion of a traditional American idea of the value of privacy as more important against the state and in the home than generally against society.[58] Nevertheless, there are some residual influences of Warren and Brandeis' basic idea of generating new torts to deal with new threats to privacy. Thus, in New Zealand and Canada,[59] and to some extent also the UK with its tort of misuse of private information (despite all the reference to

---

51 For instance, *Roberson v Rochester Folding Box Co*, 171 NY 538 (1902) (although the plaintiff failed before the court in her claim for appropriation of likeness in advertising under New York common law, the position was soon overtaken by legislation in the New York Civil Rights Law); *New York Civil Rights Law 1903*, §§50, 51; *Pavesich v New England Life Insurance Co*, 122 Ga 190 (1905); *Binns v Vitagraph Company of America*, 210 NY 51 (1913); *Melvin v Reid*, 112 Cal App 285 (1931).

52 *Restatement (First) of Torts*, §867 (1939).

53 William Prosser, "Privacy" (1960) 48:3 Calif L Rev 383.

54 *Restatement (Second) of Torts* §§652A-E (1977).

55 See David Tan, *The Commercial Appropriation of Fame: A Cultural Critique of the Right of Publicity and Passing Off* (New York: Cambridge University Press, 2017).

56 A key case being *Time, Inc v Hill,* 385 US 374 (1967). See also Andrew Kenyon & Megan Richardson, "Reverberations of Sullivan: Considering Defamation and Privacy Law Reform" in Andrew Kenyon, ed, *Comparative Defamation and Privacy Law* (Cambridge UK: Cambridge University Press, 2017), ch 16.

57 David Anderson, "The Failure of American Privacy Law", in *Protecting Privacy, supra* note 31, ch 6 at 215.

58 Whitman, *supra* note 18.

59 See *Hosking supra* note 29; *C v Holland* (2012) 3 NZLR 672 (HC); *Jones v Tsige* (2012) 108 OR (3d) 241 (ONCA); *Jane Doe 464533 v ND* (2016) 128 OR (3d) 352, rev'd (2017) ONSC 127 (on procedural grounds); *Jane Doe 72511 v Morgan* (2018) 143 OR (3d) 277; *Condon v Canada*, 2018 FC 522 (CA).

the *ECHR*),[60] new torts have developed at the hands of courts—except without the US practice of free speech prevailing in the balance with privacy (a practice already under pressure in the US in some of the most extreme cases of uncontrolled social media sharing).[61]

## V. The *Universal Declaration of Human Rights*, Setting off a Broader Discourse of the Right to Privacy as an International Human Right

Certainly, we have seen much talk about privacy as a human right after the *Universal Declaration of Human Rights*,[62] "by far the most well-known of all international instruments",[63] for all its failure in establishing a universal consensus on the question of protection in subsequent years. How did we get from a right to privacy focused on domestic privacy in *fin de siècle* America at the time of Warren and Brandeis's article to Article 12 of the *UDHR* identifying privacy (along with family, home and correspondence, and reputation and dignity) as a human right appropriate to post-war circumstances of the world? Firstly, there was the powerful rhetorical appeal of the idea of a right to be "let alone", a right of an "inviolate personality".[64] Secondly, there was the prescient suggestion of Justice Brandeis (by then an Associate Justice of the Supreme Court) in *Olmstead* in 1928,[65] that the right could speak to scenarios of "unjustifiable intrusion by the government upon the privacy of the individual", employing technologies of surreptitious surveillance, updating the authority of *Entick*.[66] Thirdly, there was the war-time experience of egregious intrusions into private life—and not just by states, also by other agents of society—meaning that the idea of protection of privacy could be readily accepted by the international community as falling within the new rubric of universal human rights, even without the ancient lineage of other human rights in the *UDHR*. And the influence of the American Law Institute's 1944 "Statement of Essential Human Rights",[67] as including

---

60 See *Campbell v Mirror Group Newspapers* (2004) 2 AC 457 (HL) at paras 14–17 (*per* Lord Nicholls); *McKennitt v Ash* (2008) QB 73 (CA); *Murray v Express Newspapers plc* (2009) Ch 481 (CA); *OBG Ltd v Allan* (2008) 1 AC 1 (HL) at para 255 (*per* Lord Nicholls); *Vidal-Hall v Google Inc* (2016) QB 1003 (CA); *PJS*, *supra* note 40.

61 See *Jackson v Mayweather*, 10 Cal App 5th 1240 (2017); Eriq Gardner, "Judge Upholds Hulk Hogan's $140 Million Trial Victory Against Gawker" *The Hollywood Reporter* (25 May 2016), online: The Hollywood Reporter <https://www.hollywoodreporter.com/thr-esq/judge-upholds-hulk-hogans-140-897301>.

62 *UDHR*, *supra* note 6, art 12 ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.").

63 Rick Lawson, "The Universal Declaration on Human Rights—A Commentary" (1993) 6:1 Leiden J Intl L 164.

64 Warren & Brandeis, *supra* note 44

65 *Olmstead*, *supra* note 25.

66 *Ibid* at 478:

> The makers of our Constitution… conferred, as against the Government, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment…

67 American Law Institute, "The Statement of Essential Human Rights" (1945), online: American Law Institute <https://www.ali.org/news/articles/statement-essential-human-rights/>.

"[f]reedom from unreasonable interference with his person, home, reputation, privacy, activities, and property" has been widely acknowledged.[68] But in fact, the idea of a right to privacy seemed to be little discussed if widely supported at the UN in the lead up to its vote in December 1948, much of the debate coming down to drafting.[69]

The divisions became clearer in later decades as the idea of a right to privacy, broadly construed, became a common way of asserting a right of control over personal information in response to new threats posed by computerised databases and digital surveillance technologies—especially in the US,[70] but increasingly also in other parts of the common law world (finding it a simpler approach than the European language of data protection).[71] When 'privacy' itself became associated with protection of personal information across the board, or resistance to endemic surveillance, it was more liable to come into conflict with other rights, freedoms and interests, for instance, in policing and security. Not every state signed up to the *ICCPR*,[72] placing the right to privacy in convention form in 1966 (Malaysia and Singapore did not, for instance). Some states that were parties also made substantial reservations (for instance, the US reservation for freedom of expression).[73] On the UN side, the Human Rights Committee construed the right to privacy in Article 17 of the *ICCPR* in very broad terms in its General Comment No 16, published in 1988.[74] And there were complaints about state non-compliance with UN standards. Scholars were divided on the value of a right to privacy, and indeed on the value of human rights generally.[75] Nevertheless, as Beate Roessler says, by the end of the century, the right to privacy seemed to occupy "an entirely natural place… within the structure of human rights", its "moral" status a matter of "almost worldwide consensus".[76]

No doubt it helped that a range of other international and regional human rights standards which states might sign up to included reference to privacy as a human right.[77] References to privacy were also included in standards geared to promoting

---

68 See "Introductory Essay: The Drafting and Significance of the Universal Declaration of Human Rights" in William A Schabas, ed, *The Universal Declaration of Human Rights: The Travaux Préparatoires*, (New York: Cambridge University Press, 2013) lxxv at lxxxviii (noting the influence of the American Law Institute in the drafting); see also Schabas, *ibid* at vol 1, 402 showing draft Article 6 as proposed by Panama, drawing on the American Law Institute's Statement of Essential Human Rights.

69 See Oliver Diggelmann & Maria Nicole Cleis, "How the Right to Privacy Became a Human Right" (2014) 14:3 Hum Rts L Rev 441.

70 See Westin, *supra* note 2 at 7.

71 For 'data protection' as a common term in Europe denoting legal control over personal data, while 'privacy' or 'data privacy' may be used in other parts of the world, see Lee Bygrave, *Data Privacy Law: An International Perspective* (New York: Oxford University Press, 2014) at xxv and generally Greenleaf, *Asian Data Privacy Laws: Trade and Human Rights Perspectives*, *supra* note 10.

72 *ICCPR*, supra note 6.

73 US, S Res, *US Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights*, 102nd Cong (1992) online: < https://web.archive.org/web/19991117202828/http://www1.umn.edu/humanrts/usdocs/civilres.html>.

74 UNHCR, *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32nd Sess (1988).

75 See Marie-Bénédicte Dembour, "What Are Human Rights? Four Schools of Thought" (2010) 32:1 Hum Rts Q 1.

76 Beate Roessler, "Privacy as a Human Right" (2017) 117 Proc Aristot Soc 187 at 187 and 192.

77 See, for instance, *ECHR*, *supra* note 34, art 8; *CFR*, *supra* note 33, arts 7, 8; *ASEAN Human Rights Declaration,* 18 November 2012, art 21.

fair and transparent data markets, an idea that, as Simon Chesterman says, has broad international appeal.[78] To give just one example, the OECD Guidelines Governing the Protection of Privacy and Transborder Data Flows of Personal Data promulgated by an expert group chaired by Michael Kirby in 1980,[79] which formed the baseline standard for data protection (or 'data privacy') laws in many jurisdictions around the world, were based on the dual goal of "reconciling fundamental but competing values such as privacy and the free flow of information".[80] As Michael Kirby puts it, "the OECD Guidelines have proved to be one of the more effective international statements of recent times affording protections for a basic human right, privacy, as that right has come to be understood in the context of contemporary information technology".[81] Indeed, if we look closely at more recent leading data protection/data privacy instruments, such as the *EU General Data Protection Regulation 2016* in Europe and *California Consumer Privacy Act of 2018*, we see the language of human rights in there along with the language of trade.[82] These agreements and standards have helped solidify the idea of the right to privacy as a human right despite the lack of consensus on its value and significance in the digital century.

## VI. *Digital Rights Ireland Limited v Minister for Communications*; *Vidal Hall v Google*, *Inc*; *In re facebook*, *Inc*—Enforcing the Right to Privacy as People's Right

This trio of cases exemplifies in different ways a growing movement towards enforcing the right to privacy as a people's right in the digital century.[83] In the first, *Digital Rights Ireland*, a challenge mounted by an Irish civil society group to the validity of EU Data Retention Directive started in an Irish court, shot to fame in the midst of Edward Snowdon's revelations of mass government surveillance, and ended in victory in the EU Court of Justice with the Directive struck down as invalid for want of proportionality under the terms of the *CFR*, setting the scene for other challenges

---

78 Chesterman, *supra* note 10.

79 OECD, *Guidelines Governing the Protection of Privacy and Transborder Data Flows of Personal Data* (1980).

80 OECD, *Recommendation of the Council Governing the Protection of Privacy and Transborder Data Flows of Personal Data* (1980).

81 Michael Kirby, "The History, Achievement and Future of the 1980 OECD Guidelines on Privacy" (2009/2010) 20:2 JL Infi & Sci 1 .

82 See EC, *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ, L 119/1 at Recital (4) (noting the right to data protection in art 8 of the CFR along with other rights); *California Consumer Privacy Act of 2018*, CA CIV §1798.100 at §1798.175 ("This title is intended to further the constitutional right of privacy and to supplement existing laws relating to consumers' personal information").

83 See *Digital Rights Ireland v Minister for Communications, Marine and Natural Resources*, C-293/12 (2014) (GC); *Vidal-Hall v Google Inc (Information Comr intervening)* (2014) 1 WLR 4155 (HC) (per Tugendhat J) [*Vidal-Hall* (HC)], aff'd (2016) QB 1003 (CA) [*Vidal-Hall* (CA)] (and note that leave to appeal to the Supreme Court was allowed but the case was settled); *In re Facebook, Inc, Consumer Privacy User Profile Litigation*, 402 F Supp 3d 767 (2019) (ND Cal) [*In re Facebook*].

against state surveillance practices.[84] As Orla Lynskey writing on the European Law Blog noted, the case was "a victory for grassroots civil liberties organisations and citizen movements".[85] The second case, *Vidal-Hall*, brought by journalist Judith Vidal-Hall, and IT security company directors Robert Hann and Marc Bradshaw objecting to Google's bypassing Apple Safari security to collect personal data and target advertising to Apple device users, which was just one of a series of high-profile data hacks, ended up as one of the leading cases considering the legal privacy and data protection controls over "secret and blanket tracking and collation of information" in the UK,[86] Writing in Eurozine in 2015, Vidal-Hall, quoted Tim Berners Lee, inventor of the World Wide Web, saying "we need an 'online Magna Carta' to protect the web" and calling on ordinary people to take control of the web and challenge "those who seek to control [it] for their own purposes", adding, "[i]t is within that context that we decided to pursue the present case".[87] The third case, *In re Facebook*, focused on Facebook's role in fomenting the Cambridge Analytica election-tampering scandal.[88] The Plaintiffs rejected the social network's suggestion that to share private data on a social network is to effectively give up privacy, and the judge agreed that "Facebook's argument could not be more wrong. When you share sensitive information with a limited audience (especially when you've made clear that you intend your audience to be limited), you retain privacy rights and can sue someone for violating them".[89] We can expect to see this reasoning repeated and expanded upon in future privacy class actions interrogating data sharing practices involving social networks, relying on a mix of common law and statutory claims.

These cases, which form part of what Manuel Castells calls "networked social movements",[90] offer a hint at the future. They show how individuals and groups can respond to the challenges of sustaining privacy across digital networks while using these networks to foster and facilitate their privacy advocacy. More than that, they show how change can be produced from within rather than outside the rule of law's "procedural current".[91] As such, they present privacy scholars, lawyers and judges around the world with rich models for like efforts—and indeed they are already

---

84 A key example being *Schrems v Facebook Ireland Limited*, C-498/16 (2018) (GC), initiated by an Austrian law student against the Irish Data Protection Commissioner and Facebook Ireland in the Irish High Court and with Digital Rights Ireland intervening. For the Court of Justice's decision in favour of Schrems, invalidating the EU-US Data Protection Safe Harbor decision from 2000, see *Schrems v Data Protection Commissioner,* C-362/14 (2015) (GC). For the latest Schrems successful challenge to the EU-US Privacy Shield, see *Data Protection Commissioner v Facebook Ireland Limited*, C-311/18 (2019) (GC).

85 Orla Lynskey, "Joined Cases C-293/12 and 594/12 Digital Rights Ireland and Seitlinger and Others: The Good, the Bad and the Ugly" *European Law Blog* (8 April 2014), online: European Law Blog <https://europeanlawblog.eu/2014/04/08/joined-cases-c-29312-and-59412-digital-rights-ireland-and-seitlinger-and-others-the-good-the-bad-and-the-ugly/>.

86 *Vidal-Hall* (CA), *supra* note 83 at para 137 (*per* Lord Dyson MR and Sharp LJ). See also the much larger class action case of *Lloyd v Google llc* (2020) QB 747 (CA), currently under appeal to the UKSC.

87 Judith Vidal-Hall, "Taking on the giant" *Eurozine* (17 April 2015), online: Eurozine <https://www.eurozine.com/taking-on-the-giant/>.

88 *In re Facebook, supra* note 83.

89 *Ibid* at 776 (*per* Vince Chhabria DJ).

90 Manual Castells, *Networks of Outrage and Hope: Social Movements in the Internet Age* (Cambridge, UK: Polity Press, 2012) at x.

91 Waldron, *supra* note 14 at 9.

just some of many examples that can be drawn on in a democratic movement for privacy law reform.[92] Taken together, they serve as yet another sign of the possibility of convergence around legal standards of privacy protection in the future, as in the present and past—for all the legal, social-cultural and political differences that remain and for all the new challenges to privacy that we can expect to see.[93] And the fact that they are being talked about widely suggests that the free trade in ideas will continue, giving us further reason to hope for some base-line protections of the right to privacy in the digital century.

[92] Not just in the Western world: see also *Puttaswamy* (2017) *supra* note 27, launched by a retired Indian judge.

[93] See Yuval Noah Harari, "The World After Coronavirus" *Financial Times* (20 March 2020), online <https://www.ft.com/content/19d90308-6858-11ea-a3c9-1fe6fedcca75>.