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Legislating Privacy: Technology, Social Values and Public Policy

Priscilla M. Regan

Chapel Hill: The University of North Carolina Press, 1995, 310 pp.

Reviewed by Colin W. Ground†

For years, the Clinton administration has been trying to pass legislation to force computer manufacturers to install a “clipper chip” in every computer sold in the United States. The idea is to allow government agencies (particularly the FBI) unlimited access to decode any information that has been encrypted (converted into code) on a computer or on the network to which the computer is connected. The government maintains that this device is necessary for national security and safety reasons. Chief among the reasons stated is the need to thwart the threats of terrorism, organized crime, and the drug trade. Privacy rights advocates, Internet user groups, and media organizations have vehemently opposed the legislation. This battle is typical of the many privacy wars waged in the United States. The battle lines are usually drawn between an individual’s right to privacy and the national interest in unrestricted access to information.

Priscilla Regan moves away from this focus, suggesting it is too simplistic. As she argues in *Legislating Privacy*,¹ privacy is not just an individual value, it should also be a societal value. Once privacy is viewed this way, legislation with implications for privacy will be examined in relation to its effect on society, not just on individuals who may have something to hide. A renewed focus on the importance of privacy to society will not only provide ammunition with which to fight government actions that jeopardize privacy rights, but will also make it easier to pass legislation protecting privacy.

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¹P. M. Regan, *Legislating Privacy: Technology, Social Values and Public Policy* (Chapel Hill: The University of North Carolina Press, 1995).

The right to the protection of privacy is recognized in the Constitution of the United States. In *Warden v. Hayden*,² the United States Supreme Court recognized the protection of privacy as the principal objective of the Fourth Amendment. For a country that has lived through Watergate and McCarthyism, it is no wonder that privacy interests are given such prominence. What the book illustrates, however, is that despite its position of supremacy in law, it is still difficult to sell the nation's lawmakers on the protection of privacy. Again, this is mainly because the principal focus of the debate is centered around individual, rather than societal, values. As Regan notes, there are a number of reasons why individual privacy is a weak policy goal: "it emphasizes the negative value of privacy; it establishes a conflict between the individual and society; and it fails to take into account the importance of large social and economic organizations."³

In order to successfully pass legislation limiting access to personal information and, hence, in favour of individual rights, Regan points out that representatives supporting the measures have had to rely on personal stories or outside incidents to emphasize the need for such legislation. She notes:

[T]he 1974 Privacy Act was in part a response to the misuses of government information that was revealed during the Watergate scandal; the 1978 Right to Financial Privacy Act was a response to the Supreme Court's 1976 ruling in the *United States v. Miller* that bank records were the property of the banks and that individuals have no property interest in those records; the current attempt to strengthen the 1970 Fair Credit Reporting Act can be attributed to the *Business Week* report that one of its reporters easily gained access to the credit history of the vice president; and the adoption of the 1988 Video Privacy Protection Act followed a Washington, D.C., paper's publication of a list of the videotapes rented by Robert Bork, then a nominee for the Supreme Court.⁴

² *Warden v. Hayden*, 387 U.S. 294 (1967).

³ *Supra* note 1 at 215.

⁴ *Ibid.* at 199.

On a more tragic scale, she further states that the *Driver's Privacy Protection Act* was only passed after "a California actress, Rebecca Shaeffer, was stalked and murdered by a man who obtained her home address from the [Department of Motor Vehicles]." ⁵

The book is advertised as the first in-depth political science analysis of privacy-protection politics in the United States. It certainly provides a detailed discussion of the issue, albeit limited to a singularly American perspective. What it illustrates, in addition to the battle between individual rights and the need for information, is the quagmire of politics. The most common theme running through all the chapters, despite their different focuses, is the vast number of bureaucratic impediments to getting a proposed piece of legislation signed into law. This seems to be especially pronounced in the case of privacy measures.

To help illustrate the effect different legislation and different technologies have on privacy, Regan has divided the book into three main parts: information privacy (credit reports, unlisted phone numbers, medical information); communication privacy (wiretapping, e-mail, caller ID); and psychological privacy (polygraphs, integrity, and honesty tests). The virtually exhaustive analysis cleverly exposes the way in which information, which many would have previously considered confidential, is widely available to the highest bidder and the government. For instance, direct marketing firms are constantly buying lists that show purchase histories, association memberships, even credit ratings, all in an effort to bombard you with personally targeted advertising campaigns. Regan seems to be suggesting that once the general public realizes what their "private" information is being used for, they will understand the need to emphasize the public good of protecting privacy. Currently, on the direct marketing front, there is a constitutional battle raging between the marketers' claim of the First Amendment protection of free commercial speech and the privacy advocates' search for protection under the Fourth Amendment. So far, the collective claim of the direct marketers is winning.

The structure of the book eventually pulls the reader gently over to Regan's position on the issue of privacy as a societal value. By the

⁵ *Supra* note 4 at 102.

end, her persuasive style will have most readers agreeing that now, amid the growing integration of all forms of technology into our daily lives, is the time to recognize that privacy should be a collective value and that privacy values and social concerns are not antithetical. She recommends this not as a protection against the threats posed by technology, but because it appears to be the only way to make privacy interests equitable in society. "Privacy is rapidly becoming a *collective value* in that technology and market forces are making it hard for any one person to have privacy without all persons having a similar minimum level of privacy."⁶

In all, for anyone interested in the effects of technology on basic rights, or the history of privacy legislation, this book is a must read.

⁶*Supra* note 4 at 213.