Privacy: Individual and Group Rights
By: Martha C. Chemas, Esq.
August - November 2013
Revised by the author June 2023

Privacy: Individual and Group Rights

Are privacy rights group rights or individual rights or some combination thereof? In what follows I will broadly survey the philosophical implications of: Supreme Court caselaw in three important privacy cases, the privacy related laws one is expected to master to earn the accreditation "CIPP" and Article 22 of the UN Convention on Persons with Disabilities, in an effort to shed some light on our question.

Introduction

Are privacy rights group rights or individual rights or some combination thereof? In what follows I will broadly survey the philosophical implications of: Supreme Court caselaw in three important privacy cases, the privacy related laws one is expected to master to earn the accreditation "CIPP" and Article 22 of the UN Convention on Persons with Disabilities, in an effort to shed some light on our question.

The now ubiquitous dialogue about privacy could begin with the acknowledgement that instead of a coherent and methodical jurisprudential regime, what currently exists is a patchwork of laws and decisions developed piecemeal, throughout the course of addressing practical concerns. This observation lead me to identify a mostly unaddressed binary in privacy; there is distinction between group rights and individual rights with regard to the existing body of work in this area, and in order to arrive at a more coherent jurisprudence, it may be helpful to compare and contrast how the group based rights and the individual based rights operate to protect privacy.

> *"First, let's review what is denoted by "group rights" and "individual rights."*
>
> - Martha C. Chemas, Esq.

To try and learn more about how we have been conceiving the idea of privacy, from within this lens of the group versus the individual binary, I want to examine three basic areas to see what light they can shed on our method. First, let's review what is denoted by "group rights" and "individual rights."

Group Rights v Individual Rights

Let us refresh our recollection of the defining characteristics of group or individual rights:

Group rights are implicated when the "Individual is part of a group with fixed characteristics not unique to single individuals nor the result of individual achievement.[1] "Individual rights must always be balanced against the requirements of the group.[2]" Group rights related theories are an important component of political philosophy: "Justice requires removing or compensating for undeserved "morally arbitrary" disadvantages, particularly if these are "profound, pervasive and present from birth." "From The Rights of Minority Cultures," paraphrasing Rawls and Dworkin.[3]

Group and individual rights only make sense within this context of a dichotomy. Without group rights individual rights are meaningless and vice versa, and it is the balance of pressure of one against the other that gives the analysis of either coherence. If the rights of the group are defined by that which is immutable, shared by the group and devoid of any characteristic that pertains to merit, then it makes sense to ascribe to individual rights that which is necessarily not shared and wholly pertaining to what makes any individual unique. Any analysis of an individual based right is unquestionably related to the meritorious characteristics of the

---

[1]1 See http://heinonline.org/HOL/LandingPage?handle=hein.journalshurq13&div=26&id=&page= accessed 11.26.13.

[2] See http://www.jstor.org/discover/10.2307/761878uid=3739832&uid=2&uid=4&uid=3739256&sid=21102967850997 accessed 11.26.13.

[3] See http://www.jstor.org/discover/10.2307/191782uid=3739832&uid=2&uid=4&uid=3739256&sid=21102967850997 accessed 11.26.13.

particulars and these particulars can be facts as they relate to the specifics of a matter, or characteristics as they relate to the individual. Choice, then, or lack thereof, has much to do with the analysis of whether a set of particulars can be analyzed through an individual or group lens.

Supreme Court Cases on Privacy

The right to privacy, it has been said, can be found in the penumbra of the First Amendment, as a sort of corollary of the right of association. But there is much more to privacy than just one Amendment.

The three cases I choose to help us further synthesize and contextualize the notion of individual rights versus group rights are Griswold v Connecticut[4], 381 US 479 (1965), Soldal v. Cook County[5], 506 US 56 (1992) and US V Jones[6], 132 S. Ct. 945 (2012). Let's take a look at them from the earliest case, in 1965 and follow through to 2012 to trace the logic of the court over this time frame. Also we will see that the court treats privacy as a procedural as well as substantive right.

In Griswold v Connecticut[7], the appellants, an executive director of Planned Parenthood in Connecticut, and its Medical Director, a licensed physician and professor at Yale, were arrested, convicted and fined pursuant to §§ 53-32 and 54-196 of the General Statutes of Connecticut (1958 rev.), for being accessories in the prevention of human conception. The appellants had prescribed contraceptives to their patients. The Appellate Division, and the Supreme Court of Errors confirmed the conviction. The Supreme Court begins its analysis by noting that it believes the appellants "have standing to raise the constitutional rights of the married people with whom they had a professional relationship" and goes on to say: "The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them." The majority finds that the fact pattern "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees," reasoning that the Due Process Clause of the Fourteenth Amendment, along with the First Amendment, the Third, Fourth and Fifth Amendment all operate to protect privacy, and as such, a law forbidding the use, rather than regulating the manufacture or sale of contraceptives is overbroad.

---

[4] *Griswold v Connecticut, 381 US 479 (1965)*.

[5] *Soldal v. Cook County, 506 US 56 (1992)*.

[6] *US V Jones, 132 S. Ct. 945 (2012)*.

[7] *Griswold v Connecticut, 381 US 479 (1965)*.

In Soldal v. Cook County[8], Soldal, the tenant of a trailer home in Cook County Illinois, brings a 42 U. S. C. § 1983[9] action alleging a violation of his rights under the Fourth and Fourteenth Amendment, after the employees of his landlord, without an eviction order, evicted Soldal from his trailer park by wrenching the sewer and water connections off the side of his trailer home. They also disconnected the phone, tore off the trailer's canopy and skirting, and hooked the entire home to a tractor. Cook County Sheriff's Department were present, to make sure Soldal did not offer resistance. The Supreme Court reversed[10] the District Court and Seventh Circuit Court holding[11] that removal of the Soldals' trailer did not constitute a seizure for purposes of the Fourth Amendment or a deprivation of due process for purposes of the Fourteenth, noting that the Fourth Amendment is implicated in civil contexts as well as in criminal contexts and that reasonableness is still the ultimate standard under the Fourth Amendment.

In US v Jones[12], the defendant, a suspected cocaine dealer, sought exclusion of all evidence obtained via a GPS tracking device that was placed on his vehicle without his consent. The United States Court of Appeals overturned[13] the lower court's conviction, on the grounds that the tracking device was a search that violated the defendant's expectation of privacy. Certiorari was granted in June of 2011[14], after which the Supreme Court held that installing a GPS tracking device on the defendant's vehicle and using the device to monitor the vehicle's movements constituted a search under the Fourth Amendment[15]. The matter was remanded to the DC court, where the District Court judge allowed the use of cell phone location data pursuant to the Stored Communications Act[16]. After a mistrial Jones eventually accepted a plea.

The remand is particularly interesting for our purposes because the data admitted via the Stored Communications Act had the net effect of supplying substantially similar, if not the same, data about Jones that the GPS device did, via the defendant's custom of carrying his cell phone, rather than via his habit of riding in his car.

---

[8] *Soldal v. Cook County, 506 US 56 (1992)*.

[9] See http://www.law.cornell.edu/uscode/text/42/1983 accessed 11.26.13.

[10] *Soldal v. Cook County, 506 US 56 (1992)*.

[11] *Soldal v Cook County, 942 F.2d 1073 (1991)*

[12] *US v Jones, 132 S. Ct. 945 (2012)*.

[13] *US v Maynard, 615 F.3d 544 (D.C. Cir. 2010)*.

[14] *US v Jones, 131 S. Ct. 3064 (2011)*.

[15] *US v. Jones, 132 S. Ct. 945 (2012)*.

[16] See https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cr0386-658 accessed 11.26.13.

In the earliest case[17] we see the court reasoning that privacy is protected at various places by the Bill of Rights as well as via the Due Process Clause of the Fourteenth Amendment. Generally speaking the operation of these rights is via a theory of individual rights as well as group rights. The right of free expression guaranteed by the First Amendment has both procedural and substantive components, but either is related to the particulars, rather than the immutable characteristics of the individual, as it is the latter part of the First Amendment that addresses a group right, via the Establishment Clause. The Third Amendment in its prohibition against the quartering of soldiers "in any house" may be best understood as a privacy right rooted in group rights, as surely the individual who might object to such a thing would have had little choice in determining whether it is peacetime or wartime. The Fourth Amendment, as viewed by the Griswold Court, is also a procedural right and clearly pertains to the rights of the individual. The Fifth Amendment right against self-incrimination implicates both group and individual rights; the Majority in Griswold states that it: “create(s) a zone of privacy which government may not force him to surrender to his detriment.”

As we follow through to Soldal[18], the focus of the inquiry is on the Fourth and Fourteenth Amendment, as this is a case that turns on the notion of state action with regard to an individual’s private property. Thus procedural and substantive rights are implicated, the Third and Fifth Amendments are not mentioned, as they do not have applicability with regard to the particular fact pattern. The rights here are exclusively individual based rights, the immutable characteristics of the appellant do not enter the court’s reasoning.

The Jones[19] court also focuses on individual based rights, as the fact pattern also gives rise to an inquiry about whether a particular individual’s expectation of privacy was implicated.

CIPP Rules

Bearing in mind the decisions we just addressed, let’s now turn our attention to rulemaking within the sphere of privacy. To begin this research, I Googled: “Privacy accreditation legal” without quotes and was rewarded with results, the more interesting of which were those for the CIPP certification. CIPP is an abbreviation for “Certified Information Privacy Professional,” it is a professional certification that, according to its website: “demonstrates a strong foundation in U.S. privacy laws and regulations and understanding of the legal requirements for the responsible transfer of sensitive personal data to/from the United States, the European Union

---

[17] *Griswold v Connecticut, 381 US 479 (1965)*.

[18] *Soldal v. Cook County, 506 US 56 (1992)*.

[19] *US V Jones, 132 S. Ct. 945 (2012)*.

and other jurisdiction." One does not have to be an attorney to be a CIPP. To master the subject matter tested on the CIPP exam one must demonstrate knowledge of:

• The U.S. legal system: definitions, sources of law and sectoral model for privacy enforcement

• U.S. federal laws for protection of personal data: FCRA and FACTA, HIPAA, GLBA, COPPA and DPPA

• U.S. federal regulation of marketing practices: TSR, DNC, CAN-SPAM, TCPA and JFPA

• U.S. state data breach notification and select state laws

• Regulation of privacy in the U.S. workplace: FCRA, EPP, ADA and ECPA plus best practices for privacy and background screening, employee testing, workplace monitoring, employee investigation and termination of employment"[20]

These are fairly broad domains within American law, and in order to keep this to approximately two- thousand words I can really only address some broad strokes, but if this gets the rest of us thinking about the bigger issues in privacy, that may help as we, collectively, as legal professionals, think about how to address some of the logistical hurdles of our time, with respect to the technology attorneys use to communicate all the time, and how this may or may not have an impact on the institution of attorney-client privilege.

Okay, the first one says:

"The U.S. legal system: definitions, sources of law and sectoral model for privacy enforcement"

Let us then acknowledge that any principles we derive from this thought experiment will be distinctively American in flavor, and, as we are increasingly dealing with a global approach to law, this is of particular significance because in the highest ranks of the cyberdefense arena, what is sought is an international framework by which to approach cybersecurity. Also let me assert that cybersecurity and privacy are two concepts that are intertwined; one cannot be considered without considering the other and to the extent that I am going to opine on this, it should be acknowledged early on that my training and context are American.

The second thing we get from looking at this list is that regulations that address this issue exist in the federal domain, thus there may be significant issues in the area of preemption to come.

Third, state breach notification laws exist. Fourth: Marketing and the workplace have received extra and special attention from legislators.

(For The Record: The word "privacy" does not appear in the index of my copy of the Uniform Commercial Code.)

---

[20] From https://www.privacyassociation.org/certification/cipp_certification_programs accessed 11.26.13.

Are these various pieces of legislation concerned with addressing the rights of the group or that of the individual? The federal laws operate to protect both. For example HIPAA, in protecting the privacy of minors aged 12-18 protects the child as an individual, with her own specific data, but it also is protecting her because she is a minor, which is an immutable characteristic not marked by choice. This argument may be carried to the other pieces of legislation, in some instances, as well.

Article 22 of the UN Convention on Persons with Disabilities

Finally, and briefly, let's take a look toward the international sphere. Finding the Convention on Persons with Disabilities[21] we see a group rights related approach to the protection of privacy:

Article 22 - Respect for Privacy

1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.

2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.[22]

This legislation, taken at its plain meaning exists to further a group right related set of concerns.

Questions Raised

Are privacy related rights group rights or are they individual based rights? How does a theory of either operate to protect privacy?

---

[21] Accessed via: http://www.un.org/disabilities/convention/conventionfull.shtml on 11.26.13.

[22] See fn 21.

Conclusions

As we have seen from our broad strokes survey, privacy is a right rooted in both group rights and in individual rights related theories. Existing caselaw has examined the right in light of the multifaceted protection offered to it by the US Constitution's Bill of Rights as well as the Fourteenth Amendment, and both from the context of privacy being a procedural as well as a substantive right. Existing legislation approaches the right via group or individual rights related language or both. Thus, the deprivation of privacy is the deprivation of a substantive and procedural right of an individual, as well as of a group.

2023 Considerations

In June 2023, the United States Supreme Court upheld, in *Health and Hospital Corporation v. Talevski, 599 US _ (2023)*[23], a private right of action pursuant to 42 U. S. C. § 1983[24] because it "unambiguously confer[s] individual federal rights enforceable under §1983" where the party sought relief under a federal statute. Although *Talevski* was not about privacy *per se*, the court found "Section 1983 has, since the 1870s, provided an express cause of action to any person deprived (by someone acting under color of state law) of "any rights . . . secured by the Constitution and laws."[25] This holding could potentially be cited in support of a cause of action for privacy related transgressions, for example, pursuant to legislation as diverse as HIPAA (Health Insurance Portability and Accountability Act of 1996) or The Right to Financial Privacy Act of 1978[26] or similar legislation in many other areas, so long as the right guaranteed is part of a federal statute, and sufficient criteria for "acting under color of state law" subject the action, the activity and actor(s) is alleged. Litigating and defending such an action could potentially further elucidate the Supreme Court's, current, more strict interpretation of the right to privacy, as recently articulated in Dobbs v. Jackson Women's Health Organization, 597 US ___(2022)[27].

---

[23] *Health and Hospital Corporation v. Talevski, 599 US _ (2023)*; please see: https://www.oyez.org/cases/2022/21-806, accessed on 06.25.2023.

[24] 42 U. S. C. § 1983; please see: https://www.law.cornell.edu/uscode/text/42/1983, accessed 06.25.2023.

[25] *Health and Hospital Corporation v. Talevski, 599 US _ (2023)*.

[26] The Right to Financial Privacy Act, 12 U.S.C. §§ 3401-342; please see: https://epic.org/the-right-to-financial-privacy-act/ accessed 06.25.2023.

[27] *Dobbs v. Jackson Women's Health Organization, 597 US ___ (2022)*, decided June 24th, 2022.

Finally, the possible legal implications and eventualities contemplated by the logic of the preceding paragraph continue to encompass nuanced issues of preemption and federalism[28], where no SCOTUS caselaw yet may be precisely on point.

[28] To illustrate, please see: *Pryor v Reno, 171 F.3d 1281 (1999)*, with thanks for context to: Friedman, Leon (2000) "Supreme Court Federalism Decisions," Touro Law Review: Vol. 16: No. 2, Article 6. Available at: https://digitalcommons.tourolaw.edu/lawreview/vol16/iss2/6; https://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1962&context=lawreview accessed 06.25.23.

Recommended Citation:

Chemas, Martha C. (2013, 2023) “Privacy: Individual and Group Rights," Available at: https://www.marthachemas.net/publications-presentations