SOCIAL COSTS OF INCOHERENT PRIVACY POLICIES

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OVERVIEW

• Range of conceptions of the nature of a person’s privacy interests in personal data
• Strengths and weaknesses of EU Directive on Personal Data Protection
• Strengths and weaknesses of U.S. privacy policies
• Social costs of incoherent policies
• Some thoughts about possible paths to greater coherence
CONCEPTS OF PRIVACY

• Fundamental human right
• Right of individuals as vs. governmental intrusions
• Context-dependent
• Zero privacy (get over it)
• Property-based concepts of privacy
• Modified trade secrecy approach
HUMAN RIGHT

• EU Personal Data Protection Directive endorses
• Dignity, autonomy, self-determination interests protected
• Gives rights to individual as vs. government and vs. private sector
• Comprehensive regulatory regime to control collection & processing of personal data
• Perhaps attributable in part to experience of extreme misuses of personal data during Nazi era
EU DATA PRIVACY REGIME

• Not entitled to collect personal data except in limited circumstances (e.g., necessity)
• Not entitled to process or reuse data except for limited purpose for which collected
• Subject has right of access to data collected, right to challenge misuse of data
• Firms must designate data controller
• Government agency to oversee
BENEFITS OF EU APPROACH

• Comprehensive and defined objective = coherence
• Firms on notice of what must do
• Technology developers have some guidance as to system design
• Public is reassured about respect for privacy & hence more willing to disclose because misuse will be punished (fines, damages, bad publicity)
CRITICISM OF EU PRIVACY

• Too paternalistic
• Overbroad (e.g., taking laptops to EU)
• Impedes many socially beneficial uses
• Creates unnecessary transactions costs (e.g., getting new permissions)
• Mainframe-centric in increasingly distributed computing environments
• Fundamental right in my address & phone?
PRIVACY RIGHT VS. GOV’T

• 4th A protects vs. “unreasonable” gov’t searches & seizures (especially if trespass involved)

• 1st A protects vs. laws forbidding anonymous publications (McIntyre v. Ohio) or forced disclosure of data with chilling effect on freedom of association (NAACP v. Alabama)

• Roe v. Wade: gov’t can’t interfere with doctor/patient communications re abortion; right of privacy found in “penumbra” of U.S. Constitution (widely criticized)
PERSONAL DATA & GOV’T

• 4th A & federal wiretap laws require warrant before government has right to tap telephone conversations of US nationals (but not pen register/trap & trace)

• Privacy Act of 1974 limits public agency disclosures of personal data in government databases, & requires gov’t agents to obtain a subpoena to gather information from third parties
CONTEXT-DEPENDENT

• Typical US pattern: documented abuses lead to adoption of new law
• Fair Credit Reporting Act: imposes responsibilities on credit report agencies to protect confidential personal data & ensure information is up-to-date & accurate
• “Bork” law: Video Privacy Protection Act
• Other specialized laws protect telephone/cable subscriber information, financial privacy, children online, health data
ZERO PRIVACY

- Doesn’t information want to be free?
- Aren’t free flows of information a good thing?
- Collection and reuses of personal data promote commerce (direct marketing, better service to customers); firms have 1\textsuperscript{st} A right to use
- Most people don’t care about data privacy (or are willing to give it up for a small token)
- Trust industry “self-regulation” through privacy policies, codes of conduct, &/or P3P (NO LAW)
PRIVACY AS PROPERTY?

• Compilers of personal data now regard this data as *their* property, have incentives to over-collect because they can internalize the benefits & externalize social costs; lack of transparency

• Granting property rights to individuals could force firms to internalize social costs by paying $ for it

• If this data is so valuable, why shouldn’t individuals be entitled to benefit from this value?

• Let the market set prices/terms that accommodate variations in personal preferences on privacy
WHY BE WARY OF PROPERTY AS A SOLUTION?

• Anathema to civil liberties perspective
• Normatively unappealing
• Property rights regimes are far from costless
  – significant transactions costs (rise of infomediaries?)
  – market infrastructure must be constructed
• Most property rights are transferrable, but only inalienability rules will protect privacy
• Mismatch with purpose of other IP rights (incenting investment to create more information)
U.S. PRIVACY POLICY

• Presently a mixture of all of the above
  – Sometimes human rights
  – Sometimes right vs. government
  – Sometimes context-dependent
  – Sometimes zero
  – Sometimes self-regulatory
  – Sometimes property-like

• Result: incoherence
SOCIAL COSTS

• Little or no guidance to firms or technology developers (except in specified contexts)
• No coherence from one law to next
• Firms continue to have considerable financial interests in collecting and processing data, want systems that ignore privacy interests
• Privacy as a social value is eroding, approaching the zero privacy state McNealy says to get over
• Yet do we want to live in a society with 0 privacy?
TRADE SECRET ANALOGY

• Individuals have an interest in restricting access to & use of non-public data about themselves akin to interests of TS developers
  – Want control over reuses beyond authorized purposes
  – Want protection vs. breaches of contract, confidence
  – Want protection vs. use of improper means to obtain non-public data
  – Want others to maintain secrecy through security
• Sets minimum standards of commercial morality
• Common law norms can evolve over time
IMPLIED LICENSE TERMS

• When data is disclosed or acquired for a legitimate purpose, right to use is limited to that purpose; need permission to use for different purpose
• No right to disclose to others w/o permission
• No automatic right to transfer your interest
• Even if transfer OK, transferee bound to same terms
• Other reasonable expectations of parties will be enforced (e.g., use of appropriate security)
• Ability to terminate rights if misappropriate
CONCLUSION

• Overwhelming majority of Americans believe that privacy of personal data should be respected, worry about lack of privacy in online environment

• Comprehensive legal framework to protect privacy has benefits, including guidance to technologists about system design; modified trade secret approach may be better than EU-style law

• As citizens & technologists, you bear some responsibility for whether privacy will be respected or not, so what are you going to do?