INFORMATIONAL PRIVACY IN A SURVEILLANCE SOCIETY

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A law school classmate of Justice Louis Brandeis referred to him as a "seer,"[1] a prophet, one who knows all, an opinion echoed by many scholars since his appointment to the Supreme Court. I, too, recently found myself in the company of those marveling at the possibility that Brandeis was, indeed, gifted with some legal clairvoyance, a fact that seems particularly undeniable when reviewing his writings on citizens' rights and privacy. Given the challenges to privacy in America today, it is unquestionable that Brandeis and Warren minimally possessed a degree of wisdom both exceptional and rare when they heralded the foreboding impact technology would have on individual privacy. In what has been touted as the single most influential law review article in history, their 1890 publication warns that inventions and business practices invade the "sacred precincts of private and domestic life, and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closets shall be proclaimed from the house-tops.'"[2]

Brandeis and his law partner appreciated and feared the cost to individual privacy, especially informational privacy, future mechanical inventions were likely to exact. Most certainly, the number and breadth of discoveries that have occurred would have been unfathomable to Brandeis 120 years ago. The truth is that most of us as little as 20 years ago could not have guessed of today's technological advancements. Nevertheless, what Brandeis and Warren saw then proved sufficient to warrant their alarm. Their concern sounded a call for both awareness of what would transpire with regard to privacy infringements and vigilance in the efforts to guard that that was sacrosanct.

The telephone was one of the technological advancements that gave the lawyers pause. In the introduction of Bell's invention, the two recognized a newfound ability to discover and disseminate information. And, accompanying an enhanced ability to gather and share information is the simultaneous threat to the retention of privacy. Consistent with Brandeis and Warren's concerns, individual rights to privacy are arguably more vulnerable today, both to government surveillance and workplace monitoring, because of the application of new technologies. While this revelation would not be lost on Brandeis and Warren, the impact of technology on our informational privacy remains underappreciated by most Americans, not the least of which may be Justice Brandeis's successors on our nation's High Court.

Recent news reports of a rise in lawsuits by employees challenging the surveillance efforts by their respective employers point to growing awareness by individuals. As I reviewed a number of these reports my thoughts hearkened back to Brandeis's 120-year-old forewarning of the negative implications of technology. The relative ease of acquiring the hardware and software necessary to conduct physical and informational surveillance means these capabilities are available to almost everyone.

In the workplace, news articles related complaints of employer monitoring consisting of observations by private investigators, videotaped recordings of employees

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[1] Stephen G. Breyer, *Brandeis: The Legal Seer*, 42 BRANDEIS L.J. 711, 711 (2004).

[2] Louis D. Brandeis and Samuel D. Warren, *The Right to Privacy,* 4 HARVARD LAW REVIEW 193, 194 (1890).

both on and off the job, examinations of employees' emails and text messages, eavesdropping on employees' telephone conversations, and surveillance of employees' personal communications on social networking sites. Employer scrutiny resulted in negligent employment actions ranging from decreases in compensation at one end of the spectrum to terminations at the other extreme. Among a variety of complaints, many of the effected employees raised First Amendment and Fourth Amendment violations claiming infringements of free speech, free association and privacy rights.

These suits may indicate a new diminishing tolerance for what these employees consider infringement of their rights by their employers, but the struggle between the competing interests of workers' privacy rights and employers' risks and responsibilities is not a recent development. For some time the controversy among industry and corporate players and those they employ has been brooding in the shadows of the higher-profile national debate. In the weeks that followed 9/11, the federal government began instituting new policies and practices designed to reduce the risk of harm from terror threats to Americans. Rules and regulations adopted by both the nation's executive and legislative branches incited intense debate among advocates for civil liberties and proponents of national security. In particular, enlarged latitudes in electronic eavesdropping and wiretapping fueled, rather than quieted, the discord. Understandably, continuing increases in federal surveillance efforts have succeeded in doing little to diminish an ever-growing swell in the debate and may be impacting worker intolerance. To say now that the resulting controversies have not waned is a gross understatement.

Within the shadows of the mounting national debate lingered a similar but somewhat lower-profile struggle existing in tandem with the clash between individuals' privacy rights and the security of the nation. Weighing the competing values of employees' privacy and employers' risk concerns is a workplace dilemma that in many respects mirrors the national debate and is garnering more attention. Support for this is found, in part, in the recent increases in court filings by employees who are asserting their privacy interests as superior to their employers' risk management efforts.

In one such suit, Houston's Restaurant employees sought relief from their former employer for wrongful termination.[3] The employees complained the employer improperly monitored comments made by the employees on a private, invitation-required, password-protected chat feature within the social networking site MySpace.[4] Agreeing with the employees, the jury returned a verdict in favor of the plaintiffs finding that the company's managers had violated the Electronic Communications Privacy Act and, further, had acted maliciously.[5] Punitive damages were included in the jury's award.[6]

Another recently filed lawsuit resulted after workers at six Coca-Cola plants in western Washington walked off the job.[7] The Coke employees began a strike

[3] Pietrylo v. Hillstone Restaurant Group, No. 2:06-cv-0554, 2009 WL 3128420, at *1(D.N.J. Sept. 25, 2006).
[4] *Id.*
[5] *Id.* at *1-2.
[6] *Id.* at *3-4.
[7] Washington Teamsters United, *Coke Provokes Strike Over Employee Surveillance, Failure to Bargain*,