The Future of Privacy Law Scholarship: Some Brief Reflections

*Lee A Bygrave**

When Samuel Warren and Louis Brandeis penned their famous article ‘The Right to Privacy’ near the end of the 19th century, published scholarship on the matters taken up in the article was sparse. Even thirty years ago, when I first delved into law on privacy and data protection, the amount of academic literature on such law, though considerable, was fairly easy to track down and digest. Back then most scholarship dealing specifically with privacy issues was of a philosophical, sociological or psychological nature and it tended to discuss – in various permutations – the meaning and value of privacy. Today, however, the situation is markedly different. While a great deal of the latter type of scholarship is still undertaken, it has been joined and partly outstripped by a massive wave of academic endeavour focused on the legal dimensions of privacy and data protection. Moreover, just as legal practitioners no longer treat privacy and data protection law as a ‘poor cousin’ of law on intellectual property rights, so too is research on the former area of law no longer a quaint niche activity on the outer margins of legal science. The establishment of specialist journals like this one testifies to the enhanced status of such research.

A disinterested observer might wryly note that there is an apparent paradox to this development: as the basic societal bedrock supporting privacy radically erodes, scholarship on its legal protection flourishes. And while this scholarship harbours the occasional funeral speech for privacy law, the bulk of contributors appear to have their shirt-sleeves rolled up, ready for many years of future research in the field. Yet, the paradox (if any) lies more in the stark contrast between *de facto* privacy erosion and the increasingly elaborate legal structures aimed ostensibly at preventing that erosion. It is these structures’ growth and ever greater complexity that largely explains the flourishing of legal scholarship.

The scale and speed of recent developments in privacy and data protection law is breath taking, particularly in a global perspective. We now have well over 100 countries with relatively comprehensive laws on protection of personal data, and the rate of this growth has been almost exponential. In many of these jurisdictions, the legislative regimes in point are a tangled mix of omnibus and sectoral codes, often of different generations and with inconsistent terminological apparatuses. Ongoing reform processes add to the complexity – as those trying to make sense of current EU legisla-

* Lee Bygrave, Professor and Director, Norwegian Research Center for Computers and Law, Department of Private Law, University of Oslo. For correspondence: <lee.bygrave@jus.uio.no>.

tive developments in the field are acutely aware. Yet another complicating factor is the increasing amount of case law. Fifteen years ago, I wrote an article asking ‘where have all the judges gone?’ in the development of data protection law; today, however, the question is much less pertinent, at least if we look to the burgeoning jurisprudence from Strasbourg and Luxembourg – a jurisprudence that increasingly ties the hands of other law makers. Thus, there is no shortage of developments in this legal field to parse and analyse. And as this special issue showcases, there is no shortage of bright young minds to bring fresh insights to such endeavour.

Expanding regulatory complexity not only creates ever greater difficulties for individual scholars to keep the entire field of privacy and data protection law ‘under surveillance’, it also pressures them to specialise. While specialisation has clear benefits, it also has disadvantages. My chief worry for the future of privacy law scholarship is that it will fracture into silos of discourse that rarely speak with, let alone acknowledge, each other. The notoriously US-centric focus of much privacy law scholarship in North America is a case in point, although recent years have seen systematic attempts being made by both US and European scholars to build Transatlantic bridges. As we are inevitably pressured to burrow down into our respective areas of specialisation in the years ahead, it will be extremely important to keep our eyes on the ‘big picture(s)’ and stay alert to possible synergies between the various discourses.

Finally, even if privacy as we currently know it risks extinction, the questions of how power is constituted, spread and exercised – questions around which the law and politics of privacy and data protection essentially revolve – will always remain and require addressing. Indeed, these are questions that ought continuously to structure privacy law scholarship, at least if it is to maintain broader societal relevance. A risk with much of the legal dogmatic scholarship in the field is that it loses sight of the societal power constellations inhering in the ‘black letter’ norms, or it makes untested assumptions about the norms’ efficacy, ignoring other power constellations that might well frustrate the norms’ formal objectives. We have a considerable amount of ad hoc evidence of a large gap existing in this field between ‘law in the books’ and ‘law in practice’. But greater effort is needed to monitor the way(s) in which the laws are actually understood, applied and respected by those who are subject to their requirements. Without such effort the ability to ensure that the laws are more than window dressing is fundamentally hamstrung.