



## ***Privacy Notes III***

***June 15, 2012***

The short commentaries in these issues of Dialogue on Diversity's notes on the hot topic of privacy, one of the chief facets of the realm of information technology concerns in this first decade of the twenty first century, are intended to stimulate readers to pursue the subjects that are dealt with here by only the merest, surface-scratching mention. In today's list is the question of an increasing use by law enforcement agencies of a variety of high-tech locating and tracking technologies, sometimes with all the proprieties of warrants, sometimes with efforts to conceal the shakier legal foundations of the practice; the impasse in the U.S. Congress over proposed legislation aimed at enhancing security for sensitive infrastructure – e.g. electrical power grids, the internet itself, and more); the curious role of the social networks in impacting the privacy of persons estranged from their relations, and at once affording the beginnings of reconnection between the departing family member and the remaining kinship circle; and finally a few thoughts on a recent essay, carefully reasoned and shrewdly nuanced, on the interrelated interests of free association and of privacy, and the law and policy questions these pose.

First, however, readers are reminded of the Summit on Health Privacy, just held in Washington (June 6-7), the second annual presentation of top-flight discussants on a bill of essential health care privacy topics. The conference was organized by the remarkable Dr. Rebecca C. Peel (a speaker at Dialogue on Diversity's March conference for Women's History Month), the dynamic head of Patient Privacy Rights, a leading force for privacy in the medical/health care context. Details at [www.healthprivacysummit.org](http://www.healthprivacysummit.org).

### I. LAW ENFORCEMENT TRACKING – HOW CLOSE TO THE CONSTITUTIONAL BORDER?

Social networking sites are all the rage, and governments are hurriedly engaged in re-evaluation of the manner in which data on individual communicating parties may properly be disclosed to classes of other communicators, friends, friends of friends, and a growingly remote penumbra of persons who may relish contemplating the innards of your private affairs. It is like those who are blessed with the latest of smart phones, amazed as they note, with a tap on Maps icon, the travels of a blue dot, seeming to follow inexorably, street by street, corner by corner, their own perambulations. Useful when you are lost to be able to describe to rescuers the intersection you have arrived at, but not particularly comforting when one considers that an unseen intelligence, if only that of a machine, is the wielder of the intelligence — but if only a machine, it is one built by and thus accessible to the feeling, privacy-menacing beings whom one ordinarily may wish to keep at arm's length. The question poses itself: the site or the social network system, may perhaps diffuse much data, and all regardless of what the member has supposed to have been dictated as the terms of control over the information. To rebuild the system or to restrict certain disclosures over its channels is a possibility to be taken under consideration. This is paternalistic, but is arguably to be justified by considerations of the proclivities of a good many users, and of these many of tender years, to loosen the bonds on their own secrets out of an exuberance in the face of the gallery of smiling friends.

This is where the news, appearing in bits and pieces in the papers around the country, comes in, detailing the surveillance practices of police departments in city after city, eagerly tracing the trajectories of the good and the evil. The Supreme Court in a decision in January forbade the long term use of an implanted location device on a suspect's car, and this ruling colors the intimations of illegality that law enforcement is faced with in a gradation of varyingly similar and dissimilar situations. At the same time the selfsame technology has its more benign uses – example: the discovery of the precise location of a person gravely injured in a murder attempt and left in the cellar of a house. Thus: read the details and fashion the remedy with due subtlety and precision. The harms from surveillance are often put down as inconsequential, usually by folks who fancy they have little to hide. But the existence of the channels by which at will operators can call up the data in question implies that the corpus of data is accessible in a pinch to inimical users, both illegal ones and official ones. And in the latter case, if an abusive government comes to have authority, and listeners to one's communications may send their minions around to deliver the proverbial knock on the door at midnight. . . . But it can't, as we always say, happen here.

### II. INFRASTRUCTURE SECURITY – LEGISLATIVE IMPASSE DÉJÀ VU

A cyber-security bill, authored principally by Senator Lieberman, has struck a rocky patch on the road to enactment. The locus of the difficulties appears to rest in the provisions purporting to introduce security measures for safeguarding

the integrity of “infrastructure” installations, among these of electrical power grids, dams, hospital systems, air-traffic control operations, and more. The national security and the military establishments, among other stakeholders, are understood to be champing at the bit for passage of some semblance of a legislative cure for the existing lacunae in the protective shield, and are thus, to say the least, impatient with the partisan set-to that is blocking approval at the Senate level. It is thought that if enactment is much delayed the hurly burly of the political campaign will preclude any real action. And that the prize will thus fall through the country’s outstretched hands. This at a time when the chorus of warning of “cyber” threats is growing in clarity and volume.

### III. INTRA-FAMILY ESTRANGEMENT AND THE SOCIAL NETWORKS

Acute family hostility leading, regrettably, to a long siege of distance and silence between parents and a child and between one child and brothers and sisters – these cases are doubtless not as rare as one might hope – is influenced nowadays, according to an extensive report in the New York Times of June 15, by the existence of the ubiquitous social networks that have sprung up on the internet in recent years. These networks can be both an annoyance and, in turn, a source of potentially salutary communication in the estrangement situations. One seeking to be isolated from the disliked family members or the oppressive household milieu can nevertheless be traced quite efficiently by the remaining kinspersons through a search of the social network pages of the departing member or of numerous in-laws or other acquaintances, who often post news and photos of new grandchildren, new spouses, new places of residence, new occupational attainments, and the like, bringing into renewed focus the person and affairs of the one who has sought solace in isolation. For the abandoned parent or brothers/sisters, on the other hand, these links may be a comforting, if only virtual, source of information on the wandering family members, or, more hopefully, the beginnings of a rapprochement. Is privacy sacrosanct, even when it is the protector of a terminal sullenness?

### IV. LIBERTY OF ASSOCIATION, PRIVACY – RIVALS AND ALLIES: THE EVOLVING LAW

Peter Swire, a professor of law at Ohio State University and a fellow of both the Center for Democracy and Technology and the Center for American Progress in Washington (the latter being the source of several speakers at Dialogue on Diversity symposia, most recently the 2012 Health Care program), has produced a highly detailed and painstakingly elaborated paper on the dual values of privacy and of freely undertaken and amply enjoyed association, as competing, but also reinforcing tendencies in the contemporary technological and legal environment. The paper, written largely from the standpoint of law (as distinct from technology or economics), explores the strands of legal authority in the constitutional jurisprudence of the Supreme Court on the ever evolving right of privacy – which has taken shape at one remove from explicit wording in the constitution, and on the similarly protectable interest (or “right”) of association, which again depends on the (here relatively explicit) first amendment rights of assembly and petition (and for that matter, the freedoms of expression and religion as well). The utility of association is demonstrated very conspicuously in the recent upheavals in the Middle East, in which the popular movements, sometimes almost at the level of street confrontation, have been coordinated through wireless communications capabilities that only a decade ago did not exist. The uses of association go on to commercial and social groupings, and finally to entertainment value: in our less socially turbulent circumstances, persons find pleasure in connecting with more and more persons, rated by proximity of the sentiment as friends, friends of friends, and so on. Again, the values of association are often menaced by the very efficiency in communications: common interests can now be furthered more and more readily by the swift and broadly scaled diffusion of writings and advocacy and by formation of more or less formal societies. The classic case is the attempt of local governments to discover the membership lists of unpopular political and social movements – an attempt that has been restrained by courts as an undue impact on a protectable interest in association. The contrary impulse is the assertion of the rival protectable interest, that of privacy, through any of a variety of possible restrictions on the most generous license for association – as with the social networks proliferating on the internet. The discussion in this brief note only sketches a portion of the framework of the nuanced and carefully reasoned exposition of Prof. Swire. Whether or not one assents in all, or indeed any, particulars of the arguments advanced, the very detail and insistently logical train of the argument compels one to think in terms going much beyond the facile insistence on an unexamined conception of privacy, or, for that matter, on a similarly casual notion of the interest in a liberty of association. The paper, along with others of Prof. Swire on a variety of topics, can be located at the Center for American Progress internet site ([www.americanprogress.org](http://www.americanprogress.org)). It is not light reading, but it will repay the reader’s effort to come to terms with the several values in play, and applicable structure of legal principles, and their interactions.