TOO MUCH INFORMATION: CIVILISATION AND THE PROBLEMS OF PRIVACY[*]

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This evening we remember Michael Whincop. Michael was a brilliant scholar. He won two university medals, one in economics and one in law, from the University of Queensland. Griffith University awarded him his doctorate; and in the 10 short years from when he commenced teaching at Griffith until his untimely death, he rose within the academy to become a full professor. He was a highly regarded deputy to Charles Sampford as the Head of the Law School. He was an engaged and engaging student and teacher of the law. His views were always deeply considered and clearly expressed. He was open to, and respectful of, the views of others. It is an honour to be asked to give this lecture in his memory.

Michael Whincop's work was primarily concerned with the relationship between law and economics with a particular interest in corporate law. Corporate law is not the topic of my address tonight; but the idea of the corporation, as a point of intersection between economics, politics and the law, does provide a useful starting point for my remarks.

Corporations are the principal vehicles of the global economy; they have carried the capitalist economies of the West from one generation to the next over the two and a half centuries since the beginning of the Industrial Revolution. Our corporations are legal fictions; that is to say, they are works of human imagination that exist only in the eye of the law. The existence of a corporation is established by what used to be an entry on a piece of paper kept in a particular registry of the State.

Today, the writing is stored in some electronic form. But the legal fiction of incorporation, given form and economic substance by the power of the State, is one of the principal artefacts of civilisation. By "civilisation", I mean civilisation in its strict sense: living in cities.

While the kind of limited liability corporation with which we are familiar was very much a phenomenon of the Industrial Revolution, the capacity of the human imagination to devise and weave such abstract concepts into the fabric of our lives is as old as writing itself. One would not be at all surprised to be told that somewhere in Iraq cuneiform tablets have been found that confer the authority of the ruler of some ancient city upon a particular group, perhaps the city's college of priests, to enjoy special trading privileges or special tax advantages. And no one would be particularly surprised if tablets recording similar information for similar purposes had been found written in ancient Egyptian hieroglyphs on the site of the ancient capitals of Thebes and Memphis.

On the other hand, a suggestion that such a document had been found in a treasure trove associated with Attila the Hun would be dismissed as a joke. To imagine Attila carrying a bundle of certificates of incorporation in his saddlebags while leading his ferocious hordes across the plains of Europe would stretch credulity too far.

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We would certainly not, however, scoff at a suggestion that legal documents having similar effect have been found at the site of the ancient city of Babylon from the reign of Cyrus the Great after his army of Medes and Persians had taken the city. Such a suggestion would seem perfectly plausible; but that would be because, by his conquest of the city, Cyrus succeeded to its great legacy of human imaginative achievement.

The original urban myth

In Genesis 11, it is written:

> "1. Now the whole earth had one language and one speech.
>
> 2. And it came to pass, as they journeyed from the east, that they found a plain in the land of Shinar, and they dwelt there.
>
> 3. Then they said to one another, 'Come let us make bricks and bake them thoroughly.' They had brick for stone, and they had asphalt for mortar.
>
> 4. And they said, 'Come let us build ourselves a city, and a tower whose top is in the heavens; let us make a name for ourselves, lest we be scattered abroad over the face of the whole earth.'
>
> 5. But the Lord came down to see the city and the tower which the sons of men had built.
> 6. And the Lord said: 'Indeed the people are one and they all have one language, and this is what they begin to do; now nothing that they propose to do will be withheld from them.
>
> 7. Come let us go down and there confuse their language, that they may not understand one another's speech.
>
> 8. So the Lord scattered them abroad from there over the face of all the earth, and they ceased building the city.
>
> 9. Therefore its name is called Babel, because there the Lord confused the language of all the earth; and from there the Lord scattered them abroad over the face of all the earth."

This famous passage in the Old Testament invites a number of comments. First, there is the evident disapproval of cities and city dwellers and of their overweening ambition and pride, amounting to what the Greeks would call "hubris", in the idea of building a city, not just as a place of shelter, but to "make a name" for its citizens.

Next, there is the fact, glossed over by the text, but clear to every person who ever read it, that God's attempt to halt the building of the city in question turned out to be an abject failure. For

Babel was, of course, Babylon, the greatest city in the world known to the author of Genesis, and quite possibly his or her home at the time that the text was being composed in the written form that has come down to us.

Thirdly, there is the tendentious anachronism that the diversity of human languages occurred, by way of a curse, laid on humans for the express purpose of preventing them from building cities. The anachronism is wrong on several counts. Linguistic diversity among humans long preceded the building of cities; and the truth is that human beings overcame, and continue to overcome, differences of language. And they have done so in the cities where they come together.

Cities have always been a magnet for people of different languages and cultures, either because they were places where opportunities for trade and commerce, industry, employment and education were concentrated; or more simply, because, like my wife, people have always just wanted to go to Paris. The cross-cultural diversity, the cosmopolitanism that we find in our cities is not humanity's curse; rather, it is the social interaction, experimentation and innovation that can only occur in cities that has made human beings the most successful species of social animal on the planet. It is the melting pot of city life that, over time, eradicates tribalism and racism.

The Persians, still a semi-nomadic people when they became the great conquering power in the Middle East in the 6th century BC, disapproved of cities, or at least of those cities that were not dominated by elites drawn from the landed aristocracy. Cyrus the Great was especially disapproving of the "agora", the public space at the centre of Greek cities where people gathered to engage in commerce and politics. Cyrus saw the agora as a physical encouragement to the telling of lies. The Persians disapproved mightily of lies. Cyrus' disapproval of the Greeks, and of what the Greeks got up to in their agora, was reciprocated by Greek city dwellers: Herodotus, the father of history, originally a citizen of the great Ionian city of Halicarnassus and later a resident of Athens, made a point of ridiculing the Persians as people of limited imagination who taught their children nothing but to ride, to shoot with the bow and to tell the truth – accomplishments which he, as a city dweller – and a Greek – regarded as of little account.

The attitude of the Persians towards cities, like the attitude of other nomadic or semi-nomadic peoples, was perfectly understandable. Cities were where the enemy lived. Cities were where the most powerful oppressors of the nomadic or semi-nomadic peoples were to be found. In cities people organised to impose taxes and tolls on the farmers and pastoralists who dwelt around, or had occasion to pass nearby, to recruit their young men into their armies (not always voluntarily) and to lure their young women away from the wholesome austerity and simplicity (not to say the backbreaking drudgery, squalor and subservience) of nomadic life under a cruel or covetous patriarch.

Abhorrence of cities, and the luxury and vice which they were thought to breed, was not confined to ancient times. Thomas Jefferson, himself a member of Virginia's landed gentry, envisioned the United State of America as a nation of solid, independent, self-reliant farmers. He wrote[1]:

[1] Jefferson, *The Writings of Thomas Jefferson* (1894) at 480.

> "I think our governments will remain virtuous for many centuries; as long as they are chiefly agricultural … When they get piled upon one another in large cities, as in Europe, they will become corrupt as in Europe."

It was inevitable that Jefferson, with his belief in the depravity of city life (a depravity to which he devoted himself enthusiastically while resident in Paris as the ambassador of the American colonies), would clash with Alexander Hamilton. Hamilton was, notwithstanding the fact he spent his early years living on tiny islands in the West Indies, the quintessential New Yorker; his vision of the United States was of a mighty trading and commercial power whose cities would dwarf those of the Old World. In the long run, Hamilton had the better of this clash of ideas because the power of the city was irresistible.

Cities developed as centres of production, trade and commerce and as strongholds for the aggregation and exercise of military power over the populations within their spheres of influence. And they continued to develop and thrive notwithstanding the problems that accompanied their rise, the foremost of these problems being the growth of the potentially oppressive institutions of priest and king. Such institutions could as easily become engines of oppression as they could be useful instruments for organising, conserving and deploying agricultural surplus to the benefit of the whole community: it all depended on how the community came to organise itself. And it is at this point that we may note the most remarkable thing about the famous passage from Genesis with which we began.
In Genesis, it is not a priest or a king or a patriarch who makes the decision "to build a city … [to] make a name"; it is the citizenry. If the original source of the myth recorded in Genesis was, as seems likely, a member or a protégé of a nomadic or semi-nomadic patriarchy, we should not be at all surprised that he or she was disposed to attribute such an obviously impious and bad decision to the whole of the people of the city. There can be no doubting that the blame for this wicked and foolish decision lay with all the people of the city: none were exempt from the curse that God laid on them. Our historical sources give no reason at all to think that the ordinary people of Babylon ever had any say in its affairs; but that makes it all the more fascinating to find the author of Genesis *imagining* a city controlled by all the people. And so, we find in Genesis our oldest literary reference, albeit that it is disapproving, tendentious and ahistorical, to democracy.

We make our cities, and our cities make us

As cities grew, their inhabitants were forced to address problems that arose from city living. There were problems of defence against marauders, who were themselves, in turn, forced by the scale of the defence measures available to a prosperous city to organise ever more powerful war-bands until they were the mighty armies of Cyrus and Attila and Genghis Khan. The populace of each city was also required to address more mundane, but no less vital, problems of feeding and entertaining the civic population, organising the operation of the city's industries and ensuring that their operation did not degrade civic life, keeping the records that ensured the continuity of those industries and of city life itself, building dams for water supply and irrigation and devising means to dispose of civic waste, as well as organising the movement of people and goods, both within the city and to and from other cities.

Cities solved these problems; and in solving them made us more distinctly what we have become as social animals. While we were making our cities, they were making us by suggesting to the human imagination possibilities as to how we might live more happily with each other, as to how we might think of ourselves, and even as to how we might speak.

The very word "autonomy", which expresses what is now a bedrock value of Western individualism, was first used by the ancient Greeks to describe self-governing towns or cities, that is, those communities which were strong enough to maintain their independence from external powers. Their autonomy was their capacity for "autonomia", "self-lawmaking", that is, for maintaining the ability to live according to their own laws, against external powers who sought to impose alien rule upon them. Autonomy was originally a characteristic of a successful city. It seems that the word autonomy was first used to describe the notion of personal self-determination as an attribute of an individual human being when the great Athenian dramatist Sophocles used it in relation to his heroine Antigone in the tragedy of that name[2].

Because cities have been the focal nodes of human economic life, the intensive and extensive human associations so generated made politics both possible and necessary, politics being derived from "polis" the Greek word for city. Beginning with the Greeks, our understanding of freedom under law has been drawn from the experience of city life. After Aristotle, a whole new field of study opened up as we humans strove to understand how a polis, ie a city, might best be governed. This was "politics", the field of study which sought to address the pathologies of human association within the polis.

For Aristotle, freedom under law was famously the attribute of the citizen of a city who had a say in its governance; indeed, a man (and I am afraid that, for Aristotle, it always was a man) was only fully human when he exercised his right to have a say in the discharge of the burdens and responsibilities involved in governing one's own city. For the Greeks, and for ever after, one spoke of democracy only in the context of city life. For the Greeks, the agora was the physical centre of city life; and the forum played the same role in the life of the Roman republic.

Obviously, as oligarchies like Sparta showed, cities are possible without democracy; but democracy is not possible without cities. Democracy, like writing, is an artefact of city life. And in those cities where democracy flourished, it, in turn, came to be a powerful driver of economic development and prosperity. When ancient Greek city-states began to found colonies in other parts of the Mediterranean, their citizens, acting collectively, took the opportunity to plan the sites of their new cities so as to improve the communal lives of the citizenry.

In the Greek settlements in Southern Italy and Sicily of the eighth and seventh centuries BC, we find archaeological evidence of the ubiquity of the "agora", the place of assembly where public issues were debated and decisions made, and where justice was done as a public act of the community. We also find evidence of nearby spaces for public exercise and the holding of athletic games for the participation and entertainment of the citizens[3]. And unlike the failed

[2] Lane Fox, *The Classical World* (2005) at 7.
[3] Lane Fox, *The Classical World* (2005) at 34.

aristocratic settlements by the English in North America, none of these early Greek colonisations is known to have failed because of the incompetence of its founders[4].

In the famous Greek settlement at Sybaris in Southern Italy, which was founded in about 720 BC, and from which we derive the word "Sybarite", the chamber pot and the Turkish bath were invented. No doubt, as a result, Sybaris and the Sybarites were a lot healthier, and better smelling, than, for example, the French aristocrats of the 17th century, who notoriously used any corner of the galleries of the beautiful palace at Versailles as a place to relieve themselves. And among the Sybarites, town planning regulation began with banning the ownership of roosters within the city limits because the crowing disturbed the sleep of the citizens[5].

Our cities have accommodated the extensive and intensive social interactions that have produced hospitals for the sick, schools for children, literature and drama, architecture and art. Cities provide both the opportunity for leisure, and the prosperity to enjoy that leisure to the fullest. Cities are *the* great human success story.

But ...

All human success comes at a price; and often we are unaware of the price we pay. Our cities have generated serious problems which we have always struggled to address satisfactorily. Most obviously, just as our cities made possible improvements in the quality of life for the majority of people, so they have also, especially (though not exclusively) since the Industrial Revolution, become hosts to grave physical threats to our health and to the health of the environment, and even to the long-term survival of our species on the planet.

The concentration of human populations in cities that created the possibility of democratic politics – amplified the power of some people, through gaining control of the power of the State, to impose their will upon others and so to restrict their liberty, and even to persecute them, in some cases on an industrial scale.

The institutional response of the post-Enlightenment West to the potential for abuse of political power was to separate the powers of government to ensure that those who enforced the laws were not the same people who made them, lest those who enforce the laws give way to the temptation to shift the burden of compliance with those laws onto others. But these are not the problems I want to speak about today. I want to say some things about the problems of privacy.

The problems of privacy

The problems of privacy are problems of civilisation.

As Gleeson CJ said in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[6]: "Part of the price we pay for living in an organised society is that we are exposed to observation in a variety of ways by other people." Living under the scrutiny of our fellow citizens is no picnic. The stresses of human interaction intensified by the exigencies of city life are apt to affect

[4] Lane Fox, *The Classical World* (2005) at 35.
[5] Lane Fox, *The Classical World* (2005) at 36.
[6] (2001) 208 CLR 199 at 226 [41].

individuals adversely in many ways. Living together in cities means that we see rather a lot of each other; often more than we would like, and indeed more than may be objectively good for us as individuals.

In 2000, the American legal scholar Jeffrey Rosen, in his book, *The Unwanted Gaze*[7], wrote:

> "[W]e are beginning to learn how much may be lost in a culture of transparency: the capacity for creativity and eccentricity, for the development of self and soul, for understanding, friendship and even love. There are dangers to pathological lying, but there are also dangers to pathological truth-telling. Privacy is a form of opacity, and opacity has its values. We need more shades and more blinds and more virtual curtains. Someday, perhaps, we will look back with nostalgia on a society that still believed opacity was possible and was shocked to discover what happens when it is not."

Earlier, and more famously, Sigmund Freud wrote in his book *Civilisation and its Discontents* of the anxieties and neuroses generated by civilised living. The social disciplines necessary to the highly associated life lived in a city, whether self-imposed or externally enforced, serve to suppress and frustrate the gratification of our ordinary selfish human instincts, and so create internal conflicts which exacerbate, and are themselves exacerbated by, the social conflicts that are multiplied by city life. And these stresses are further aggravated by the, often well-meaning, suggestions of others as to how we might best live our lives. Not infrequently, those suggestions harden into orders, enforced by the power of the State.

In the small cities of Socrates' time, everyone knew everyone else and everyone else's business. It just seemed to be natural that no one claimed a right to privacy or even a right to one's own opinion. It is noteworthy that Socrates did not seek to defend himself against the charge of despising the gods by asserting his right as an individual to his own opinion on the subject of the gods. Such an assertion would have made no sense to him, much less to the citizens who sat in judgment of him. They all regarded themselves as creatures of their city and their city's laws. They were entirely dependent socially and psychologically, upon the communal life of their city. Plato suggests that, after sentence was passed upon Socrates, he refused to escape into exile because, as a child of his city's laws, he could not imagine the possibility of life outside them.

Significantly, the political philosophy that Plato developed in reaction to what he despised as mob rule by the kind of totalitarian democracy that crushed Socrates did not include any notion of individual rights and freedom of conscience. His philosophy was one of totalitarian aristocracy, of rule by grim guardians who would decide what is best for the rest of us, and in whose republic there was no place for poets.

Two and a half millennia after Socrates chose to take the hemlock, we would not now be so blithe to follow him to a like fate in pious deference to the judgment of anxious busy-body neighbours about whether or not we are offending their gods. Our notion of a free society encompasses more than freedom from the demands of a foreign tax-collector; we are deeply conscious of the need for space for ourselves as individuals, for some distance from each other.

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[7] Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (2000) at 223-224.

These ideas have been long aborning. Thoughtful people, troubled by the tragedies such as that of Socrates, began to claim recognition for the individual, rather than the community, as the basic moral unit. The Stoic school of philosophy was the first response to this growing concern about the proper relationship between what is public and what is private. This concern found expression in the works of some of the early Christian writers; but after Constantine took the Church into alliance with the State, the zeitgeist would not be captured by the notion of the individual conscience as the fundamental moral unit until the Protestant Reformation allowed each person to read the Word of God in the Bible for herself or himself.

Public and Private

The drawing of satisfactory boundaries between our private and public lives has been an abiding challenge for Western civilisation. Should the right to practice one's religion by attending services in Church during a pandemic override concerns about adverse effects upon public health? The Supreme Court of the United States in a 5-4 decision with Roberts CJ joining the Court's liberal wing, said: "No"[8]. Or should the State be able to overrule the decision of parents to refuse a blood transfusion necessary to save the life of a sick child where the refusal is based on deeply held religious views? Should our understanding of the proper claims of privacy extend to staying prosecutions of alleged paedophiles, on the basis of evidence gathered by paedophile hunter organisations of the kind that are said to be active in the United Kingdom, with the tacit encouragement of police and prosecuting authorities in covert decoy or sting operations? Are such activities incompatible with the alleged paedophile's right to a private life enshrined in Article 8 of the European Convention on Human Rights[9]?

Our perspectives on these kinds of questions change with the times. The dynamics of the tension between the public and the private in relation to issues of freedom of religious belief and worship, and freedom of association generally and social solidarity and fellowship have been both creative and destructive. The glories of medieval art, architecture and education were created in a milieu in which the energies of Christian religious belief were harnessed by the nascent European states allied to the Church. Thousands upon thousands of people were energised by the belief that they were ensuring the salvation of their own souls bound themselves together by vows of poverty, charity and obedience to become the instrument that recivilised Europe.

On the other hand, the horrors of the religious wars and the Inquisition were driven by the willingness of those good Christians who were clothed in the power of the State to act upon St Augustine's mandate "impelle intrare": make them come in. On this view, if one loves one's fellow, one does not allow him or her to go his or her own way in private error: love requires that the erring soul be brought back, by force if necessary, to the truth as we know it to be. And, unfortunately for large numbers of people in Europe during the Middle Ages, the Dominicans loved them very much.

The problem today

[8] *South Bay United Pentecostal Church v Newsom* (2020) 140 S Ct 1613.
[9] See *Sutherland v HM Advocate* [2020] UKSC 32, 15 July 2020.

The State has long been recognised as the most obvious threat to individual rights, especially the right to be let alone. But our fellow citizens and the fourth estate, jealous of the public's "right to know", are also no little part of the problem of privacy. Whether it is the attention of the State or its agents, or of the media, or simply the scrutiny of our fellow citizens that threatens the quality of our lives as individuals, some legal protection for the private space in our highly associated lives has come to be recognised as essential.

Louis D Brandeis was one of the greatest Justices of the United States Supreme Court. He, together with Samuel Warren, was prompted to write a ground-breaking article, "The Right to Privacy" that was published in the Harvard Law Review in 1890[10]. That article initiated and inspired modern discussion of the problem of privacy in the common law as an aspect of modern civilised living. Brandeis' great insight was that privacy should not be understood as a right based on notions of property, but on the idea "of an inviolate personality", as an aspect of our common human dignity[11].

In the century following publication of "The Right to Privacy", the Courts of the United States developed a cause of action to protect privacy[12] so understood. This development was greatly aided in the United States by "the discovery in *Griswold v Connecticut*[13] of 'the zone of privacy' located in the penumbras of specific guarantees in the Bill of Rights" and "in a number of cases [in which] the prohibition imposed by the Fourth Amendment ... upon unreasonable searches and seizures has been interpreted by reference to a reasonable expectation of privacy"[14].

The problem, as a matter of particular concern to lawyers, did not pass unnoticed in Australia. In 1937, Sir George Rich, speculating on the consequences of the invention of television, said presciently[15]:

> "I venture to think that the advance of that art may force the courts to recognise that protection against the complete exposure of the doings of the individual may be a right indispensable to the enjoyment of life."

Nevertheless, Australia, with its very different constitutional context and stronger tradition of judicial restraint in relation to the making of law, did not follow the lead of the United States. And so, notwithstanding the many and profound changes to the common law in Australia wrought by decisions of our courts in the last two decades of the 20th Century, there is "still no 'right of privacy' properly so called in the Australian common law"[16].

A right to privacy?

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[10] Warren and Brandeis, "The Right to Privacy" (1890) *Harvard Law Review* 193.
[11] Warren and Brandeis, "The Right to Privacy" (1890) *Harvard Law Review* 193 at 205.
[12] *Restatement of the Law Second, Torts*, § 652.
[13] (1965) 381 US 479 at 485.
[14] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 254-255 [122].
[15] *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 505.
[16] Taylor, "Why is there no common law right of privacy?" (2000) 26 *Monash University Law Review* 235 at 236 cited by Callinan J in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 329-330 [336].

The technological advances that began in the 20th Century have aggravated rather than mitigated the problem of distinguishing between the public and the private aspects of our lives. In earlier and simpler times, people knew that they were crossing the line between the private and the public when they entered the agora or the forum or the town hall, or even when they appeared on television, to engage in debate. The physical fact of the public location of the activity both marked the activity as a matter of public concern. The physical fact of face to face communication also helped to ensure a minimum level of civility. The coming of the digital age has, in large part, erased the gentling effect of the physical prompts to civility. Civility is the indispensable virtue of democracy. It is the virtue that helps us to accept the unsatisfactory possibility that we may not be right about an issue, and that those who think differently may nevertheless be decent and honourable not to be despised.

Online communication, for all its intensity and ubiquity, is an isolated and isolating activity conducted without the ordinary social constraints provided by the presence of another human being and the possibility of provoking an uncivil reaction. The Information Revolution has largely removed these physical markers. Without the guidance of these physical markers, the need to articulate a stable theoretical basis for drawing the boundary has become at once even more imperative and yet more difficult.

The ubiquity of social media has exacerbated the stresses associated with intensive interaction between individuals. An active online presence is likely to mean finding oneself in heated disputes with people we do not know and may well have difficulty identifying. Some keyboard warriors may be malignant; some may be relatively innocent but of questionable mental health. An absence of civility is characteristic of much of this communication. And there is confusion as to whether much of this debate should be regarded as a private or public activity.

In the recent case of *Comcare v Banerji*[17], the High Court was called upon to determine a challenge to the validity of provisions of the *Public Service Act 1999* (Cth) that required employees of the Australian Public Service ("APS") to at all times behave in a way that upholds the apolitical character of the APS. Ms Banerji, an APS employee, used Twitter to broadcast more than 9,000 tweets, many of which were critical of her Department, other employees, government and opposition policies and Members of Parliament. Ms Banerji argued that insofar as the provisions of the *Public Service Act* purported to authorise sanctions against an APS employee for political communications that did not, on their face, disclose her true name, or the fact of her being an APS employee, they were invalid as an unjustified burden on the constitutionally implied freedom of political communication. The Court held that the maintenance of an apolitical public service is a legitimate purpose compatible with the system of responsible government contemplated by s 64 of the *Constitution*[18].

One academic commentator criticised the decision on the basis that it allowed sweeping intrusions into the private lives of public servants[19]. In this regard, it must be remembered that

[17] (2019) 93 ALJR 900; (2019) 372 ALR 42.
[18] (2019) 93 ALJR 900 at 912-913 [31], 927 [111], 941-942 [190].
[19] Kieran Pender, "A Powerful Chill"? *Comcare v Banerji* [2019] HCA 23 and the Political Expression of Public Servants, AUSPUBLAW, (Blog Post, 28 August 2019) <https:\\auspublaw.org/2019/08/a-powerful-chill-comcare-v-Banerji-2019-hca-23>.

the implied freedom could be invoked at all only because Ms Banerji claimed to be contributing to public debate about matters of public interest. It is a contradiction in terms to claim to be speaking in the public square about the public interest while at the same time insisting that one is engaged in a private activity.

Privacy in Australia

In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[20], a majority of the Justices of the High Court expressed themselves to be open to the development of the common law to accept "a principle protecting the interests of the individual in leading, to some reasonable extent, a secluded and private life ... 'free from the prying eyes, ears and publications of others'[21]".

Given the tenor of the reasons of the majority in *Lenah Game Meats,* it would not be surprising were the High Court now to accept a tort of invasion of privacy, along the lines of the US *Restatement*. But such a cause of action would probably be confined to cases of intentional intrusion, physically or otherwise, upon the solitude or seclusion of an individual or his or her private affairs[22]. In the case of the publicising of a matter concerning the private life of an individual, the conduct would be actionable if the matter publicised is of a kind that would be highly offensive to a reasonable person and is not of legitimate concern to the public[23].

Modern experience suggests that, when the public interest in knowing the truth about government and public affairs collides with the protection of an individual's privacy, "privacy almost always loses"[24]. In the Supreme Court of the United States in *Bartnicki v Vopper*[25], Justice John Paul Stevens, delivering the opinion of the Court, observed that "privacy concerns give way when balanced against the interest in publishing matters of public importance".

It is also likely that a new cause of action along the lines adumbrated in the US *Restatement* would not be available to a corporation because the cause of action is concerned to protect human dignity, not the opportunity to exploit information about business.

Salacious celebrities

That leads us to consider for a moment the extent to which the law, in seeking to protect privacy, should be concerned to protect individual property or financial interests associated with privacy or something more basic such as our shared dignity as human beings.

It might be thought that after a thousand years of common law, financial and property interests are already sufficiently protected. The question as to the extent to which the law should protect human dignity has arisen in an acute form in cases where celebrities have sought to monetise

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[20] (2001) 208 CLR 199 at 230-231 [53]-[55], 231 [58], 258 [132].
[21] *Restatement of the Law Second, Torts* § 652A, Comment b.
[22] *Restatement of the Law Second, Torts* § 652B.
[23] *Restatement of the Law Second, Torts* § 652C.
[24] Anderson, "The Failure of American Privacy Law", in Markesinis (ed). *Protecting Privacy* (1999) 139 at 140.
[25] (2001) 532 US 514 at 534.

their private lives. Should the law aid individuals to profit from the commercialisation of their intimate moments? I would not presume to offer an answer to this question; but Louis Brandeis seems to have suggested an answer that some might find surprising. In the seminal article on privacy by Brandeis and Warren that I mentioned earlier, the preservation of individual privacy is presented as an aspect of human dignity in relation to which the community as a whole has an interest.

In this regard, Brandeis and Warren wrote, in a passage that I need to cite at some length:

> "Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. *In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence*."[26] (emphasis added)

In this passage, considerations of human dignity underlie Brandeis' view of the need for legal protection for the privacy of the individual. The other side of the coin of concern about our shared human dignity has its practical manifestation in a concern for the moral "health" of the community. Breaches of individual privacy can cause harm not only to the dignity of the individual whose privacy is violated, but they are also apt to diminish the dignity of others as members of a community demoralised by gossip obsessed with other people's moral failings.

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[26] Warren and Brandeis, "The Right to Privacy" (1890) *Harvard Law Review* 193 at 196.

In Brandeis' view, privacy is not merely something which individuals should be able to assert against governments, or as against the media who seek to uncover our private moments whether for public amusement or public disapproval. Respect for privacy may encompass the broader concern that human dignity itself requires the keeping of a respectful distance from each other's private life. On this view, the right to a happy private life for all citizens is not protected by imposing legal limits on the power of the State or the fourth estate to intrude upon the life of the individual; there should also be a brake upon the demoralisation of the community and the degradation of public discourse by the sharing of what belongs to our private lives and our intimate moments.

While some may wish the law did more to rein in the compulsive oversharing of their friends and family on social media, the suggestion in the seminal article on privacy by Brandeis and Warren that the notion of the right to privacy includes an obligation to respect the entitlement of other individuals to freedom *from* the public sharing of information of a private nature seems largely to have escaped critical attention. That is not surprising: its implications are far from straightforward and are not particularly attractive.

If we accept that we all have an interest as a matter of our shared human dignity in ensuring that our private lives should be kept private to ourselves, then is not the celebrity who seeks to commercialise his or her private moments in breach of this mutual expectation? If I take seriously the notion that your private life is none of my business, should the law help you to monetise your attention-seeking affront to our shared dignity, if the only reason you are doing so is to be paid for publishing your intimate moments?

If the logic of this position were to be accepted, then the courts would refuse the protection of the tort of invasion of privacy where it is invoked to vindicate a celebrity's financial interest in being able to turn the intimate moments of his or her life, or family life, into money. Of course, this is not how the law has developed. Since the decision in *Douglas v Hello*[27], English law has allowed celebrities to claim recompense when others interfere with their opportunity to exploit their intimate moments for profit.

It may be objected that my interpretation of what Brandeis had in mind in the passage I have read out is unduly strained. I don't think that it is.

Louis Brandeis was clearly concerned with the debilitating effects of gossip and its tendency to debase the standards necessary to the public life of the nation. And the thinking revealed in the passage I have read from Brandeis' seminal article is of a piece with his general outlook and his personal habits.

Brandeis himself took the idea of privacy, and the demands which it made on the individual, very seriously. He lived his life on the basis that if one was serious about preserving one's privacy, one would have to accept a measure of self-discipline and inconvenience to that end. For him, physical boundaries marked out his private space. He would not allow a telephone to be installed in his own home. Once he was in the sanctum of his own home, even his fellow citizens and friends had to keep their distance. Even outside the sanctity of his own home, Brandeis was not

[27] *Douglas v Hello (No 3)* (2007) 2 WLR 920.

willing to surrender to the social opportunities facilitated by the telephone. He steadfastly refused to use the telephones which were installed in his chambers in the Supreme Court.

Many would object that Brandeis' distinctly illiberal view of the demoralising potential of oversharing of private matters in public life is too extreme. I doubt that any of us takes privacy as seriously as Louis Brandeis evidently did. A rigorous implementation of the notion of freedom *from* information touched on in his seminal article on privacy could lead to limits on freedom of expression that would appear to us to be very right wing indeed. Such limits might be welcome in Plato's *Republic*, but they are quite unacceptable in an open society. While some might welcome relief from the relentless streaming of gossip about other people's private lives, for most of us the prospect of bonfires stoked by copies of "New Idea" – a great leap forward to Fifteenth Century Spain – is simply too alarming to countenance.

Solutions?

In Australia, we don't have the constitutional foundation for "the zone of privacy" approach discovered by the US Supreme Court in *Griswold v Connecticut*. Some say that the US *Constitution* does not, in truth, provide such a foundation either. Be that as it may, drawing the contours of the zone of privacy is an exercise that depends very much on the views of the Judges who on issues of this kind divide in conformity with the views of the political party that appointed them. In Australia, we have neither that blessing nor that curse. Perhaps we need to recognise that relying upon judicial development of the law to solve the problem of privacy has been, at best, a hit and miss affair. The example of Louis Brandeis – one of the very greatest of the judges of the 20th Century – shows that reliance upon judicial reconciliation of the competing values that underlie our appreciation of privacy and the public interest may lead to conclusions that sit awkwardly with the zeitgeist[28].

We can, I think, say with some confidence, that experience also shows that it is not prudent to rely upon the media – whether old or new – to solve the problem of striking the right balance between the claims of the public and the private. It is not unfair, I hope, to observe that much of the current agitation for changes to our laws of defamation in favour of greater freedom of speech, and consequently less protection for the privacy and reputation of individuals, comes from those who own, or have ready access to, the mass media and whose financial interests are advanced by reducing the ability of those they harm to claim meaningful redress.

As Jack Lang famously said: "Always back self-interest. It is the only horse in the race that is always trying." The vested interests of the old media are such that they can always be expected to sacrifice the privacy of citizens, that is to say, all those of us who do not own media outlets, in order to make more sales. The recent litigation involving the journalist Annika Smethurst helps to make this point. The arguments propounded in that case by the media outlets carefully eschewed any attempt to press forward from the decision in *Lenah Game Meats* towards a broader protection of privacy[29].

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[28] Compare *Wainwright v Home Office* (2004) 2 AC 406 at 423 [33]; *Fearn & Ors v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [83]-[84].
[29] *Smethurst v Commissioner of Police* (2020) 376 ALR 575 at 587-588 [46]-[48], 596-597 [86]-[90].

The position taken by the media in *Smethurst* is a reminder, if one were needed, that, when the owners of the media are faced with a choice between the right to know and the right to privacy, they can be expected to favour the right with the dollar signs attached - and that will be so wherever one might think the balance of the public interests lies.

The legitimate self-interest whose energy we need to harness is the interest that all of us have as citizens. It is definitely not the interest of media outlets, such as Fox News, which lies in pandering to the prejudices of its audience and stoking their distrust and disapproval of their fellow citizens.

The new media, in particular online carriers of user-generated content, have the power to collect vast amounts of information about all of us, and to sell that information to their advertisers. It is in the interest of these platforms to exercise that power as free from responsibility for the harm they cause as they can be.

If you are a user of social media platforms, you should be aware that they know a great deal about you, and that they are willing to share what they know about you with their advertisers, and possibly others, in return for money. And I have little doubt that Louis Brandeis would say that you should also know that that is so largely because you have collectively enabled them to act as they do, and that, therefore, it is your responsibility collectively to do something about it.

In the end, there is no comprehensive and stable solution to the legal problems of privacy because there is no bright and eternal line between the private and the public aspects of civilised life. And it is difficult in the extreme to legislate for civility. If we are to do something practical about the debasing of political discourse and the coarsening of public life, it is both necessary and prudent to involve our legislatures, no doubt with the assistance of our law reform agencies and the academic scholarship into which they can tap. It is important to remember that government is not necessarily the enemy, especially in a democracy where we can change our legislature and executive, but not our plutocrats. And we need to engage with each other through them in a spirit of good citizenship, a spirit that is willing to acknowledge that it is not always right[30], and that is not astute to invoke the power of the State to have its way over other citizens because it respects the vital contribution made by them to our shared lives – very much the spirit of Michael Whincop.

Thank you for your attention.

[30] Compare Learned Hand, "The Spirit of Liberty", speech given 21 May 1944, Central Park, New York.