The Deepening EU Blindness on Privacy: A Pointed Response to Professor Martin Scheinin

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Professor Martin Scheinin's response, 'Towards evidence-based discussion on surveillance: A Rejoinder to Richard A. Epstein', reveals the enormous gulf between us on the place of privacy in any overall social scheme. The differences relate to two points. The first is the importance of the ability to collect data and the second is to the interpretation of the key provisions of the Charter of Fundamental Rights of the European Union. I regard his impassioned response on both points as utterly unconvincing, even perverse. Let me take these up in order.

Scheinin excoriates me for not understanding that the ISIS attack in France was best attributable to the breakdown in cooperation between the French and Belgian police, repeated I might add, by the subsequent ISIS attacks in Brussels that killed over 30 people, maimed many more, and resulted in a massive disruption of business and social life in Belgium and beyond. I have no reason to quarrel with his assessment that the police fell down in these cases. Indeed, I would call attention to 'this crazy Belgian law' that prohibited police raids on private homes before 5 am, passed in 1969 out of respect, of course, for the privacy of the individuals whose dwelling houses were invaded.[1] The law allows for an exception in cases of 'flagrant crimes or fire,' which could not apply since Salah Abdeslam, the police target, was not engaged in any crime at the moment. The key point here is that it is only an exaggerated sense of the right to privacy that imposes the restrictions found in the Belgian law. The correct response is that so long as there is probable cause that a criminal may be lodged in the building, the raid should be conducted in a fashion that is calculated to secure his capture, not facilitate his mid-night escape.

The tragedy here is that this foolish law is inspired by the same exaggerated sense of privacy that Professor Scheinin defends in his response. No one should be

[1] B. Schatz, 'This Crazy Belgian Law Allowed One of the Paris Terrorists to Escape', <www.motherjones.com/politics/2015/12/belgium-law-paris-terrorist-escape>, visited 22 June 2016.

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foolish enough to claim that more effective electronic surveillance will stop all terrorist plots, or that it should be used in lieu of all other police techniques. Clearly the sensible approach seeks to organise budgets and priorities so that expenditures are equated at the margin, such that the last euro spent on electronic surveillance has the same anticipated benefit as euros spent on other programs. Practically, this is hard to do, but the notion that the glittering generalities of the European Charter on Fundamental Rights help resolve any of the concrete choices is, to my mind, fatuous. It takes a hard-headed view of management and administration to make the right form of trade-offs. So long as the outsized reverence for privacy rights remains at the top of the agenda, Europe will recoil from one disaster after another. What is needed is a full-court press, not some uncritical homily to the importance of family and personal rights.

Professor Scheinin, to his credit, thinks that 'an evidence-based' approach to security measures is appropriate in order to set the correct balance. But at no point in his response does he make even the first step towards that assessment. Instead, he insists that the key component of this inquiry is that the security measures in question be 'proportionate' to the harms inflicted on the privacy interest. At this point, his entire analysis turns on the overheated claim that there is an 'actual harm' to individual people that comes from the mere access that government has to information, as opposed to some evidence that the information has been misused after it is collected. To Scheinin, this claim remains powerful even if *no* abuses occur.

I think that this claim of 'actual harm' is wholly bogus whether raised in the EU or the US. To give one test of it, ask what would happen if Max Schrems, and millions of others, sought monetary damages for the alleged harms that they had received from the government's storage of this information, wholly without its use. The correct measure of damage is zero, as there is nothing whatsoever, apart from their abstract outrage at the system, that counts as an actual harm. In making this contention, I am not relying on any artificial truncation of the definition of 'actual harm' that limits it to physical injury, or even cases of mental distress suffered in consequence of some possible physical harm or public ridicule or release of confidential information. It is clearly necessary to include the loss of associational benefits that arise from the release of confidential information that causes others to shun or avoid a person about whom they have wrongfully acquired information.

There is, however, an enormous gulf between those situations and the asserted harm that everyone suffers from the mere knowledge of the collection of information whose use in no way whatsoever alters patterns of social behavior. Indeed, the only real actual harm that comes from the Scheinin proposal is the palpable sense of fear that every person in Europe suffers from the ever-present risk of terrorist attacks that their governments are unable to contain.

Scheinin's position gets no better when he tries to link it to provisions of the European Union Charter of Fundamental Rights,[2] which I regard as an ill-considered, banal, and amateurish effort to make sure that all people in a world of scarcity can enjoy all good things at the same time. In dealing with the Charter, Scheinin starts with Article 7, which provides: 'Respect for private and family life: Everyone has the right to respect for his or her private and family life, home and communications.' This article is then backed by Article 8: 1, which states, 'Everyone has the right to the protection of personal data concerning him or her.'

In his view,[3] the correct reading of these provisions is captured in paragraph 94 of the *Schrems* opinion:

> In particular, legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter …

I regard this passage as pure palaver. As an internal matter, any reference to 'the essence' of anything is a mystical and grandiose appeal that carries with it two unacceptable tangible consequences. The first of these is that it hypes the right in question, making it more difficult to discuss the potential justifications, including national security, that have to be part of any comprehensive analysis. Every legal system has to develop some set of 'police power' justifications that pertain, at the very least, to the health and safety of the population, and which in the American formulation at least covers both 'morals and the general welfare.' But of these issues, the Charter does not say a single word, at least when privacy is at stake.

The second major defect of paragraph 94 is that it slights other key provisions of the European Charter, which in its first three articles announces its support for 'human dignity,' the right to life, and 'the physical and mental integrity' of the person. The Charter also imposes (but only in the passive voice) the requirement that human dignity 'be respected and protected,' which is decidedly not the case for the innocent persons whose lives were taken or wrecked by the terrorist attacks. Scheinin chides me for saying that 'an invasion of privacy is small potatoes in comparison with the loss of life and limb.' But no truer words have ever been spoken, especially concerning the privacy interest pumped up on steroids by the European Court of Justice's decision.

There is absolutely nothing whatsoever in the bland declarations of the Charter that drove the outcome in *Schrems*. All the relevant considerations were

[2] Available at <www.europarl.europa.eu/charter/pdf/text_en.pdf>, visited 22 June 2016.

[3] *See* M. Scheinin, 'The Essence of Privacy, and Varying Degrees of Intrusion', *Verfassungsblog*, 7 October 2015 <verfassungsblog.de/the-essence-of-privacy-and-varying-degrees-of-intrusion-2/>, visited 22 June 2016.

non-textual, and these depended on the warped set of understandings that infected every syllable of the European Court of Justice's collective handiwork. Sadly, we can expect many more terrible tragedies in Europe so long as the *Schrems* decision stands, and it will continue to stand so long as serious academics, like Professor Scheinin, offer misguided and indignant rationalisations of an indefensible judicial decision that gives inordinate clout to an exaggerated and misconceived notion of individual privacy.

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