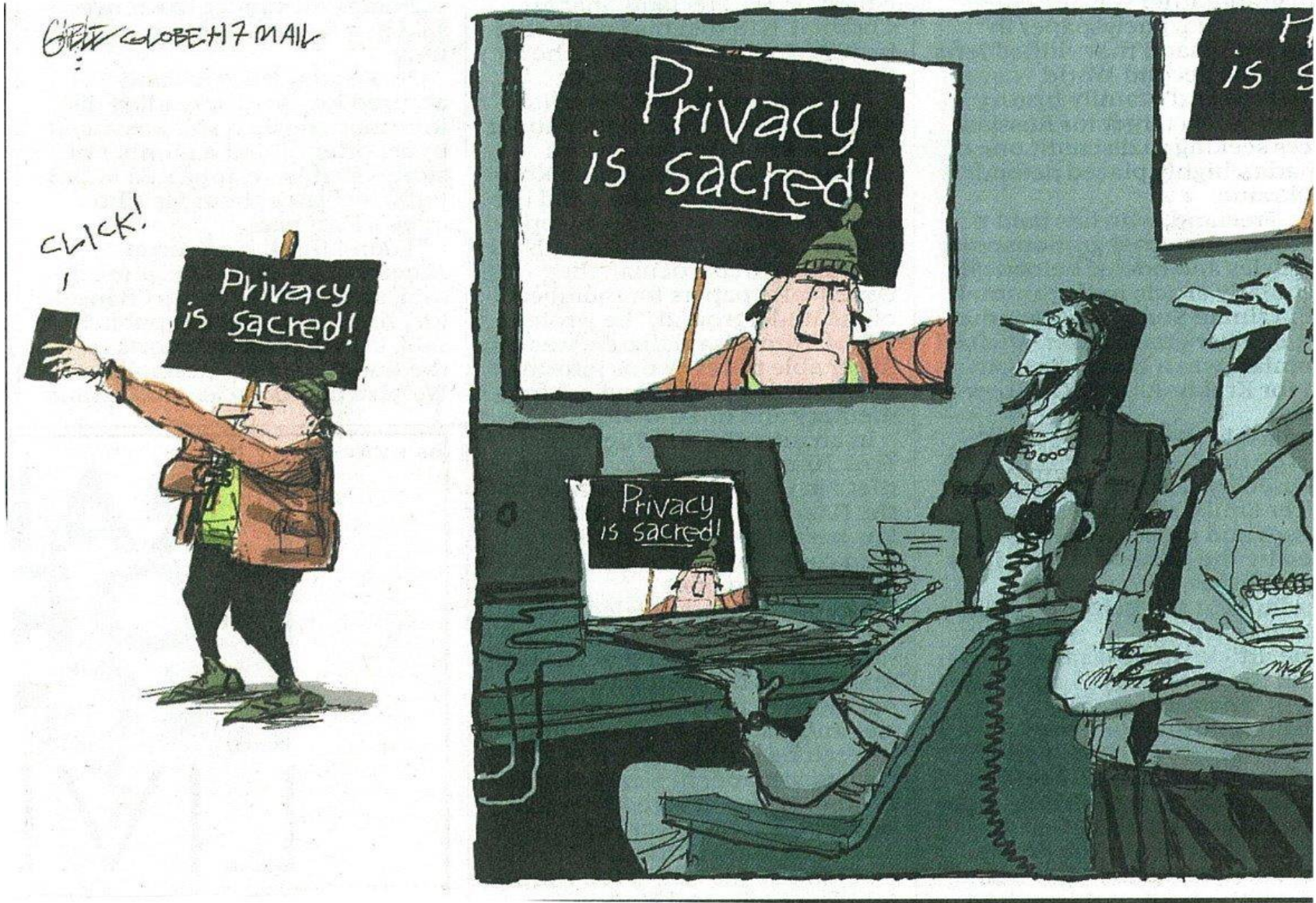


Current privacy dilemmas

University of Ottawa – University
of Haifa Law Course



The objective

Grounding the resolution of conflicting ethical claims to privacy in the applicable legal framework

Main dilemmas - Conflicting ethical claims to privacy

- **In relation to government,**

- I. Accountability: What information should stay private, what information should be disclosed ?
- II. Judicial transparency in the digital age is this what Bentham had in mind?
- III. Safety: does it have to come at the expense of privacy?

- **In relation to individuals and private organizations:**

- I. Transparency Paradox: how do we ensure consent online?
- II. Freedom of expression: where to draw the line with privacy?

Government



I. Accountability...



...or not accountability?

Mike Duffy calls Peruvian daughter story ‘a private matter’



Accountability!

- Mike Duffy trial: 8 allegedly fraudulent trips that cost almost \$38,000



The ethical boundaries of privacy and accountability

1. Necessity: is it relevant for the public to know to hold the President/ Senator accountable in his position as President/Senator?
2. Proportionality: if so, how much information is relevant to ensure accountability?
3. Effectiveness: does the disclosure of the information effectively serve the objective of accountability for the position of President/Senator?
4. Alternatives: were there less intrusive ways to hold the President/Senator accountable?

II. Judicial transparency – Bentham's point

*Keeping the
judge under trial,
while trying*



Bentham did not know about the internet

- **Caselaw.Globe24h.com Removal**

- **The Problem**

- **When someone Googles you they find a legal document with embarrassing and personal information about you in it. This is embarrassing, damaging to your career and creating conflict and headaches in your life.**

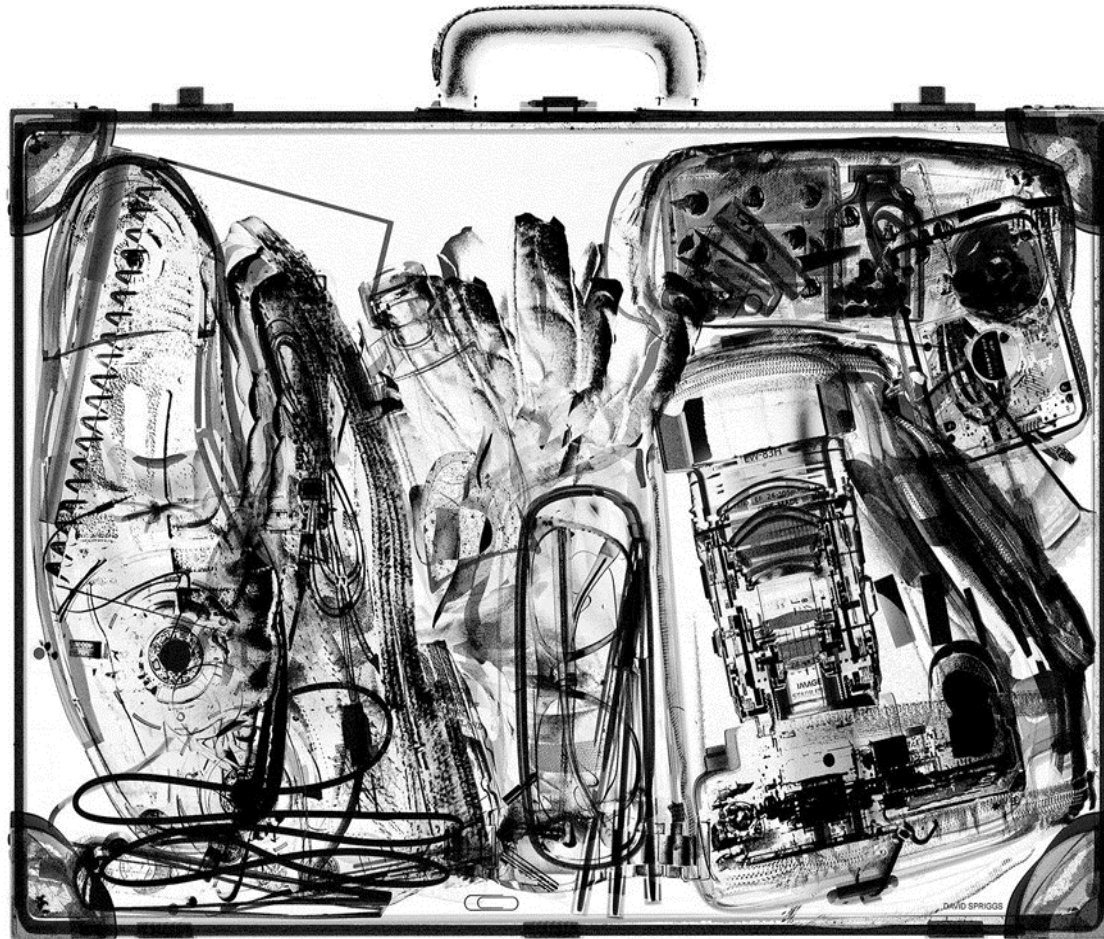
The ethical boundaries of judicial transparency on the internet

- Necessity: what do we need to know about the trial to keep the judge “under trial, while trying”?
- Proportionality: how much personal information do we need to know about the trial to meet that objective?
- Effectiveness: does the information we have serve the purpose of holding the court under trial while trying?
- Alternatives: are there any alternative measures to achieve that objective in a less intrusive manner?

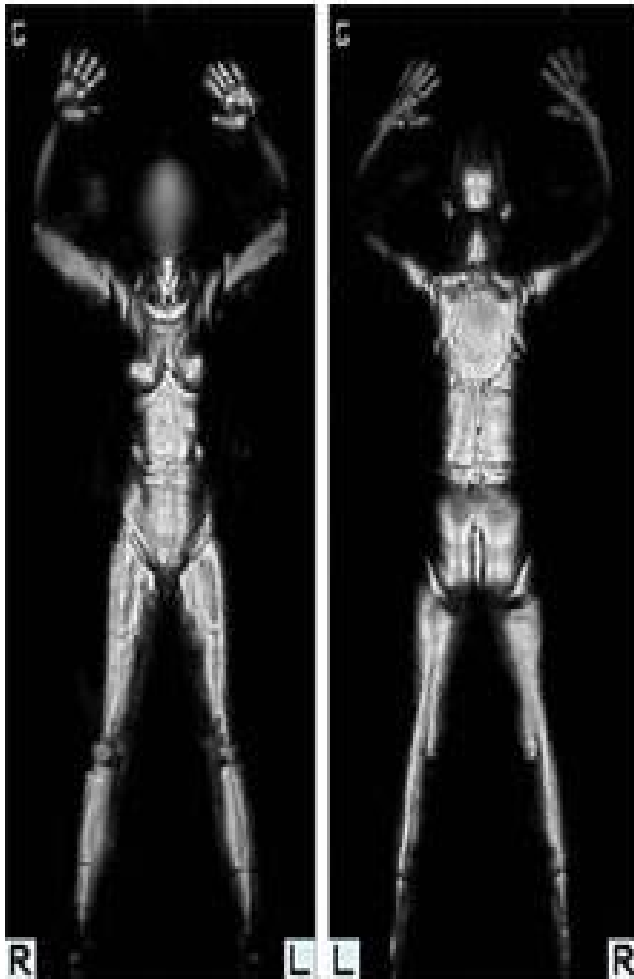
Judicial transparency AND privacy – the case of Eric and Lola



III. Does it have to be safety OR privacy?



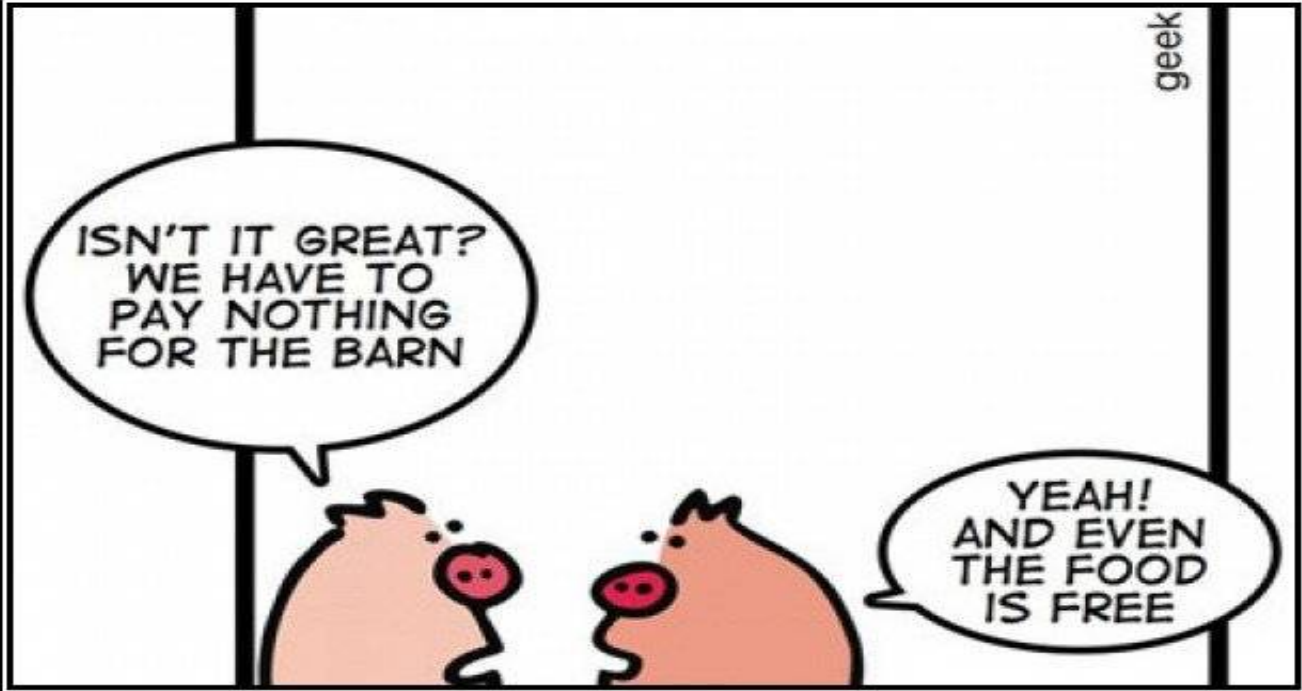
How about safety AND privacy?



The ethical boundaries of safety and privacy

- **Necessity:** is there a demonstrated public safety need for the collection of personal information?
- **Proportionality:** is the State collecting only the personal information it needs to meet the objective of public safety?
- **Effectiveness:** is there evidence that the collection of personal information actually serves or is likely to actually serve the public safety objective pursued?
- **Alternatives:** is there a less privacy intrusive way to achieve the same public safety objective?

Private sector



ISN'T IT GREAT?
WE HAVE TO
PAY NOTHING
FOR THE BARN

YEAH!
AND EVEN
THE FOOD
IS FREE

geek

FACEBOOK AND YOU

If you're not paying for it, you're not the customer. You're the product being sold.

I. Transparency paradox: consent on line

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The test for valid consent

- *...the consent of an individual is only valid if it is reasonable to expect that an individual to whom the organization's activities are directed would understand the nature, purpose and consequences of the collection, use or disclosure of the personal information to which they are consenting....*
 - 6.1 PIPEDA, Canada
- *Informed consent requires the following details :*
- *(1) whether that person is under a legal duty to deliver that information or whether its delivery depends on his volition and consent;*
- *(2) the purpose for which the information is requested;*
- *(3) to whom the information is to be delivered and the purpose of such delivery.*
 - *Privacy Protection Law , Israel @ LAW.gov*

The practical requirements

- Prominent, reader-friendly policies detailing
 - What information is used
 - How
 - Why
- Accessed before collection
- Layered information
 - Explicit notice with hot links to full version
 - Full version with all details
- Contact for privacy official
- Graphics
- Targeted notifications

The freedom to choose paradox

- German parents told to destroy doll that can spy on children



The practical requirements

- Safeguards must meet the level of sensitivity of the information
- Sensitivity of the information is determined in relation to potential harm in case of disclosure
- Vulnerability of the individual is relevant to assessing potential harm,
- Safeguards include
 - Data security
 - Robustness of consent

II. Freedom of expression and privacy

- *Protecting Canadians from Online Crime Act*, S.C. 2014, c. 31



The boundaries around privacy and freedom of expression

- Necessity: is the necessity to restrict freedom of expression greater than the necessity to restrict privacy
 - *Alberta Information and Privacy Commissioner vs United Food Commercial Workers* , (2013) SCC 62: freedom expression is s vital to unions functions that privacy cannot curtail it unduly
- Proportionality: is the restriction to freedom of information proportionate to the privacy interests to protect:
 - *Protecting Canadians from Online Crime Act* limits the prohibition to transmit intimate images to
 - Definition of intimate image
 - Under reasonable expectation of privacy
 - Without consent
 - Unless it serves the public good

The boundaries...

- Effectiveness: is criminalization of transmission of intimate images without consent an effective way to protect against this form of violation of privacy?

“(...) in light of the multiple times the video was viewed by others and, more importantly, the potential for the video still to be in circulation, it is appropriate to regard this as tantamount to multiple assaults on the plaintiff’s dignity.”

- *(...) For the reasons previously mentioned, this case involves much more than an invasion of the right to informational privacy, as I have observed, in many ways, it is analogous to multiple sexual assaults.”*

Jane Doe464533, Superior Court of Ontario(2016) set aside for new trial

The boundaries...

- Alternatives: is there a way to protect freedom and expression and privacy a less restrictive way?
- The *General Data Protection Regulation (GDPR)* – coming into force *May 25 2018*, on the “right to be forgotten” allows the erasure of personal information online but only where
 - It is no longer necessary for the purposes for which it was collected or processed . OR
 - The person has withdrawn consent or objects to the processing OR
 - The information had been unlawfully processed
 - EXCEPT
 - “*for exercising the right of freedom of expression and information.*”

• *Article 17, GDPR*

The ethics of privacy and competing claims in one sentence

- *“it is the greatest happiness of the greatest number that is the measure of right and wrong”*



Your thoughts?

Thank you

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