2012

Facebook Fallicies

Geoffrey C. Hazard Jr.
UC Hastings College of the Law, hazardg@uchastings.edu

Facebook Fallacies

Geoffrey C. Hazard, Jr.*

The papers prepared by the scholars contributing to this symposium are generally sympathetic to the concept that the material on a person's Facebook somehow should be protected against unwanted disclosure on the part of the person whose face has been booked, so to speak. I use the term "Facebook" to refer generically to electronic biographies of one kind or another, not simply Facebook, the copyrighted original.

The papers are also very sober and well-considered. They conclude that under existing law there seems little hope that such protection can be established under constitutional law, whether in the Fourth or Fifth Amendment. Those conclusions seem to be correct.

It is not that some such concept of privacy cannot be envisioned. The contributors in various ways envision that concept. Some such concept could find its way into constitutional law. Indeed, the concept in fact found its way into constitutional law and remained there for a very substantial period.

---

*Professor Hazard served as Director of the American Law Institute, and his casebook, *Law and Ethics of Lawyering* (5th ed. 2010, with Susan P. Koniack, Roger C. Crampton, George M. Cohen, and W. Bradley Wendel), is a mainstay of American legal education. Professor Hazard also produced the ALI/UNIDROIT Principles of Transnational Civil Procedure, which has become a model of civil procedure for international commercial disputes; a treatise; and many articles, particularly on joinder, including class actions, and discovery. He currently serves as the Thomas E. Miller Distinguished Professor of Law at the University of California's Hastings College of the Law, Trustee Professor of Law, Emeritus, at the University of Pennsylvania Law School, and Sterling Professor Emeritus of Law at Yale Law School.

I. *BOYD V. UNITED STATES*, 1886

The original occasion for such an event appears to have been *Boyd v. United States*, 116 U.S. 616 (1886). That case involved a forfeiture prosecution for fraud in the importation of goods in violation of the obligation to pay tariffs. In presenting its case, the Government sought and obtained an order directing defendants, who were partners in the importing business, to produce certain documents involved in the transaction. The Government then offered the documents in evidence, obtained a conviction, and defended the lower-court ruling before the Supreme Court. The Court held that the compelled production was a violation of both the Fourth and Fifth Amendments, saying:

> [A] compulsory production of the private books and papers of the owner of the goods . . . is compelling himself to be a witness against himself . . . ."

116 U.S. at 635.

II. *FISHER V. UNITED STATES*, 1976

The decision in *Boyd*, and subsequent decisions to the same effect, was extensively reviewed by the Supreme Court in *Fisher v. United States*, 425 U.S. 391 (1976). The Court in *Fisher* acknowledged that the *Boyd* rule had still been applied in 1921 in *Gouled v. United States*, 255 U.S. 298 (1921), and indeed as late as 1957, in *Curcio v. United States*, 354 U.S. 118 (1957). But, as the Court noted, tension and contradiction had arisen as early at 1910. In that year, in *Holt v. United States*, 218 U.S. 245 (1910), it was held that no constitutional violation was involved in requiring a criminal defendant to don a garment worn by the perpetrator of the offense being prosecuted. A cascade of cases in the 1960s had refused to find violations of the Fifth Amendment in incriminating acts such as a suspect being compelled to give a blood sample, or being compelled to demonstrate his handwriting.

These changes in doctrine reveal what most candid observers have long observed: That the judicial system in general and the decisions of the Supreme Court in particular, historically do not maintain a strictly straight line in adhering to precedent. The question then arises whether the Supreme Court

might someday and somehow be persuaded that records such as Facebook entries should not be admissible evidence against the person who is their subject.

III. A LAW ENFORCEMENT PERSPECTIVE

It is worth noting that the Supreme Court's decision in *Fisher* was written by Justice White. It is to be remembered that, before going on the bench, Justice White had a high position in the Department of Justice. From the perspective of the Justice Department, there were important categories of cases in which access to "private papers" and the like was of great practical importance. At the time, in the 1960's, these included the investigation and prosecution of offenses such as tax evasion, securities fraud, organized crime control of gambling, and distribution of illegal drugs. These offenses typically involved networks of participants whose members communicated with each other. Having access to these communications, for example by wire-tapping, was essential as a practical matter to successful prosecution.

Justice White in his opinion in *Fisher* did not mention this background, but he surely was mindful of it. We can assume that other members of the Court had a similar understanding.

If we shift focus to the present day, we must become mindful that an additional criminal threat is upon us, that of terrorist activities. I do not wish to exaggerate the threat of terrorism. However, the risks are real and evident in the Twin Towers attack of September 11 and lesser attacks and threats to our home territory, such as the attempted car bombing in Manhattan a couple of years ago. There are also serious events outside our borders, including the attack on the American embassy in Africa and the attacks to which our military and other personnel are exposed in other parts of the world. Moreover, as one of the democracies, we must cooperate with those in Western Europe, Israel, Japan and other similarly inclined regimes to maintain the intelligence networks through which we try to keep these threats under reasonable control.

The terrorist threat unquestionably requires aggressive intelligence gathering directed toward people who are trying to keep their activities secret. We have learned that innocent

people can be made accomplices in financial, political and moral support of enemies of our country.

IV. PRIVACY PROPERLY UNDERSTOOD

The resulting situation is that the investigative bureaus of the government must be allowed to gather information that could lead to bad-actors, as long as the means do not violate constitutional protections. The legal question, then, is how the constitutional protections will be interpreted. A person should not be subject to compulsory interrogation that would lead to self-incriminating answers. That is the protection of the Fifth Amendment. A person should not be subject to search and seizure of things as to which he or she has a "reasonable expectation of privacy," as the phrase goes, except on the basis of a proper search warrant. That is the protection of the Fourth Amendment. The Supreme Court in recent years has stated and signaled that it will interpret these standards with realistic awareness of the problems in detecting and prosecuting not only offenses such as distribution of illegal drugs, but also the new threats from terrorism.

V. ETHICAL IMPLICATIONS

When the problem of a Facebook entry is approached in these terms, it seems clear that the contents of such an entry are not immune from examination and use in evidence by prosecuting authorities. On a somewhat different path of reasoning, it seems clear that they would not be immune from discovery in civil litigation. The law has faced a somewhat similar problem regarding email. Many people have thought that emails should somehow be immune from exposure in discovery in civil cases and exposure in criminal cases. It is now clear that email is subject to exposure. Indeed, a colleague has suggested that the "e" in email stands for "Exhibit."

Lawyers have had a better understanding of the situation. They know that committing a thought to writing makes it difficult and often impossible to later qualify what has been said in writing, let alone contradict it. They know that this difficulty will be confronted even for emails that were written hastily or by someone who did not know what he was talking about. They know that discussion of critically important issues should, if

possible, be conducted orally and only then memorialized in a considered formulation.

Lawyers have learned to conduct their own affairs in this fashion; for example, during internal law firm review of possible mishandling of a client matter. They have sought to educate their clients toward a similar approach in the clients' internal deliberations. The role of inside legal counsel is strategically important in this regard.

Similar awareness should be addressed to Facebook entries. Lawyers should be cautious about what they say of themselves, or let other people say of them. They should counsel clients to be similarly aware. It is not that keeping written forms under control allows for fabricating testimony after the event. That certainly can happen. But awareness of the kind I have suggested recognizes that electronic writing often suffers from the imprecision involved in oral spontaneity, but yields a record having the formality of a written contract or deed. In a world where all evidence is imperfect that is a risk that an ethical lawyer must attend to.