Workshop on
Privacy and the Criminal Law

Leuven, Belgium, 14-15 May 2004

Organised by the Centre for Legal Philosophy and Legal Theory (Faculty of Law) at the Catholic University of Leuven (KuLeuven)
In Collaboration with the Department of Philosophy at the University of Stirling
and with the Centre for Metajuridica at the Free University of Brussels (VUB)

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Privacy and the Criminal Law

I. Concept of the workshop

1. Ever since the birth of modern political thought the idea of privacy has been considered an essential part of what we traditionally call the liberal state, a state governed by democratic procedures and the rule of law. However, in our contemporary democratic societies, seriously conflicting trends have emerged in the state’s treatment and protection of privacy.

On the one hand, due to scientific and technological progress, as well as to recent fears of global terrorism, privacy appears to be one of the most vulnerable goods in our contemporary societies. Liberal states are under ever greater pressure to protect their citizens against what are perceived as high social risks, by modes of behavioural control that frequently interfere seriously with people’s private lives. In the light of these developments, for some, the space of privacy becomes frighteningly small, and the very idea of privacy, with its associated values, seems to be under threat.

On the other hand, the recent explosion of international human rights instruments, and their implications for domestic legal orders, seem to mark a heyday of privacy. In western democracies efforts have been made to assure citizens that privacy is one of the most important concerns of their political community. They are given the comfortable feeling of being protected by a bulwark of legal tools that empower them to exercise their right to privacy and to defend it against their government or against fellow citizens.

2. This strange mixture of threats to and support for privacy should provoke reflection about its scope and justification, especially in the realm of the criminal law. We need to clarify the concept of privacy as a political value, and its implications; we need to ask how far the state’s use of its legal powers through criminal legislation, through the criminal process and through the practice of punishment itself, can be consistent with the idea of privacy. Faced by powerful states whose criminal legislation can invade our private lives, which mobilise increasingly extensive and technologically sophisticated investigatory powers, whose penal apparatus is powerful and at least potentially intrusive, citizens need more than the availability of even a whole armoury of human rights tools. A public debate is needed to articulate and strengthen the values that underpin the idea of privacy, if we are to resist its erosion in the criminal law.

3. The Leuven Centre for Legal Philosophy and Legal Theory, in collaboration with the Department of Philosophy at the University of Stirling, the Centre for Metajuridica and the Department of Criminology at the Free University of Brussels (VUB), aims to contribute to that debate by organising an interdisciplinary workshop that will bring together human rights experts, criminal lawyers and philosophers, to reflect on privacy and its underlying values, and on their (degree of) compatibility with the use of state power in the criminal law.

The workshop will take place at the KuLeuven (Belgium) and will be oriented around three sets of issues, concerning substance, process and sanctions.

1. Privacy and the Substantive Criminal Law

What difference should a concern for privacy make to the content of the substantive criminal law? Two kinds of issue arise here –
• Should invasions of privacy ever be criminalised: are there, or should there be, crimes whose criminal wrongfulness consists in part in the way in which they invade a victim’s privacy?
• What constraints does the demand that the law respect citizens’ privacy place on its content? Can we identify realms of ‘private’ conduct that should not be the criminal law’s concern? The second of these issues has of course been much discussed, but we think that new light can be thrown on it against the background of the growing number of public regulations that seem to interfere with people’s private lives and by thinking more carefully about the very idea of privacy as a political value.

2. Privacy and the Criminal Process
What constraints should a concern for privacy place on the criminal process of investigating and prosecuting crime?
• Which kinds of investigative technique constitute invasions or violations of privacy? How far can such invasions or violations be justified as being necessary for the protection of citizens from crime?
• Does a respect for privacy set constraints on the content and procedures of criminal trials, for instance by precluding certain evidence, or certain kinds of questioning of defendants, victims and other witnesses – kinds of questioning that might otherwise be appropriate (for example in the light of the defendant’s right to a fair trial)? Although the main focus here will be on the criminal process itself, it will also be useful to look at other kinds of crime prevention measure – for instance, the use of CCTV in public places – that raise worries about privacy.

3. Privacy and Criminal Punishment
Should criminal punishment respect the privacy of those who are punished? If so, what does this require or preclude?
• Do certain penal aims themselves threaten to intrude improperly on what should be private – for instance the aim of reforming offenders or of bringing them to repent?
• Are there modes of punishment that are objectionable because they constitute invasions of the offender’s privacy?
It will also be useful in this context to look at some species of ‘restorative justice’, since one worry about some kinds of ‘restorative’ process is precisely that they do not respect the privacy of those who are required or expected to take part in them.

II. Organisation

The workshop will be open to invited experts in the U.K. and on the European continent. It will have three sessions, one on each of the sets of issues identified above. For each session there will be a keynote paper, circulated to all participants in advance, and two responses or commentaries. An open discussion will follow brief presentations of the papers.
III. PROGRAMME

Friday 14 May

1300 - 1330: Welcome and opening of the workshop: René Foqué (Leuven)

Session I  Privacy and the Substantive Criminal Law
Key-note paper: David Archard (Lancaster)

1330 Opening of the seminar by the chairman: René Foqué (Leuven)
1330 First commentary on the keynote paper: Sandra Marshall (Stirling)
1350 Second commentary on the keynote paper: Mireille Hildebrandt
(Rotterdam/Brussels)
1410 Reply of the key-note speaker: David Archard
1430 Open discussion

1530 Coffee

Session II  Privacy and the Criminal Process
Key-note paper: Paul De Hert (Leiden/Brussels), Serge Gutwirth (Brussels/Rotterdam)

1600 Opening of the seminar by the chairman: Geert Vervaeye (Leuven)
1600 First commentary on the keynote paper: Victor Tadros (Edinburgh)
1620 Second commentary on the keynote paper: Frank Verbruggen (Leuven)
1640 Reply of the key-note speakers: Paul De Hert, Serge Gutwirth
1700 Open discussion
1800 End of first day

1930 Dinner
Saturday 15 May

Session III  Privacy and Criminal Punishment
Key-note paper: Barbara Hudson (Central Lancashire)

0930 Opening of the seminar by the chairman: Sonja Snacken (Brussels)
0930 First commentary on the keynote paper: Erik Claes (Leuven)
0950 Second commentary on the keynote paper: Lucia Zedner (Oxford)
1010 Reply of the key-note speaker: Barbara Hudson

1030 Coffee

1100 Discussion

1200 Conclusion: Marc Groenhuijsen (Tilburg), Antony Duff (Stirling)

1245 Reception and Lunch