Analogizing Privacy?

When an airplane flies over a company plant and takes unauthorized aerial photographs to learn about the plant, under existing precedent, the availability of legal remedies depends on whether the photographer was hired by a private actor or the government. If a competitor hired the photographer, the aerial photography would constitute improper trade secret misappropriation. If, however, the government hired the photographer, the aerial photography would not violate the Fourth Amendment. This illustrates a broader phenomenon in which trade secret law is seen to provide greater protection against surveillance by competitors than the Fourth Amendment does against surveillance by the government. Nonetheless, some courts have analogized between the trade secret and Fourth Amendment contexts. The literature largely supports such analogies when they increase privacy protection—importing trade secret law into Fourth Amendment law, but not when they reduce privacy—importing Fourth Amendment law into trade secret law.

Similarly, whether an employee concerned about privacy from surveillance by an employer has any available legal remedy depends in part on whether the employer is in the private or public sector. The longstanding wisdom is that public sector employees receive stronger workplace privacy protections than similarly situated private sector employees as a result of constitutional protections. Yet, just as courts analogize across the private and public sectors in the trade secret context, both the majority and concurring opinions by the Supreme Court in *City of Ontario v. Quon*, suggest that analogies between the public and private sectors are appropriate in evaluating questions of workplace privacy. Some scholars resist this reduction of public sector workplace privacy rights to that of the level in the private sector on several grounds including the Constitution, the role of the government as an employer and the important role of public employees in American democracy.

In numerous contexts, courts import privacy analogies across the private and public sectors without any meaningful consideration of whether such analogies make sense. The literature largely favors analogies that result in more

privacy, but rejects analogies when their use decreases privacy. By examining workplace privacy and trade secret law, this Article explores the question of whether the law should offer the same privacy protection from private actors as from the government. The fact that the Fourth Amendment only applies to the government is beside the point. Assuming that Fourth Amendment jurisprudence is fixed, privacy from private actors can be set at the same, higher or lower levels as that fixed Fourth Amendment level. The Article examines structural differences between the government and private actors in order to evaluate the appropriateness of analogizing across sectors. The Article argues that before blindly extending privacy analogies, courts and scholars should consider these differences that might caution against equating the two sectors for privacy law purposes including the purpose of the government surveillance, the government's access to technology that is not in general public use, and the government's ability to obtain specific permission such as warrants that would not be available to a private actor.