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## Understanding Privacy (Chapter One)

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# Understanding Privacy

DANIEL J. SOLOVE



# *Understanding Privacy*

DANIEL J. SOLOVE

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To my grandfather, Curtis



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## *Preface*

For over a decade, the topic of privacy has had a hold on me. I was attracted to privacy issues because of their immense complexity, philosophical richness, and contemporary relevance. When I first began exploring privacy issues, I sought to reach a definitive conclusion about what “privacy” is, but after delving into the question, I was humbled by it. I could not reach a satisfactory answer. This struggle ultimately made me recognize that privacy is a plurality of different things and that the quest for a singular essence of privacy leads to a dead end. There is no overarching conception of privacy—it must be mapped like terrain, by painstakingly studying the landscape. In my initial years of studying privacy, I was not yet ready to do the mapping. The only way to do so would be to become fully immersed in the issues.

Over the years, my understanding of privacy grew, and I now believe that I am ready to set forth my theory of privacy. Although I feel that my theory is mature enough to take form in this book, it is but a snapshot of one point in an ongoing evolutionary process. Theories are not lifeless pristine abstractions but organic and dynamic beings. They are meant to live, breathe, and grow. Throughout their lifetimes, they will, it is hoped, be tested, doubted, criticized, amended, supported, and reinterpreted. Theories, in short, are not meant to be the final word, but a new chapter in an ongoing conversation.

This book is the product of many years of conversations. Countless people have helped me shape my ideas, and this book would not have been possible without them. A project such as this—one that attempts to make sense of the sprawling and complex concept of privacy—cannot be created by one individual alone. Many people helped by providing insightful comments on the manuscript or portions thereof. Deserving special mention is Michael Sullivan, who has been a great friend and teacher. His comments on this book have truly been indispensable. Many others contributed greatly to all or part of this project: Michelle Adams, Anita Allen, Francesca Bignami, Julie Cohen, Deven Desai, Howard Erichson, Jim Freeman, Robert Gellman, Timothy Glynn, Rachel Godsil, Stan Karas, Orin Kerr, Raymond Ku, Erik Lillquist, Chip Lupu, Jon Michaels, Larry Mitchell, Marc Poirier, Robert Post, Neil Richards, Michael Risinger, Peter Sand, Heidi Schooner, Paul Schwartz, Richard St. John, Lior Strahilevitz, Charles Sullivan, Peter Swire, Robert Tsai, Robert Tuttle, Sarah Waldeck, Richard Weisberg, and James Whitman. I would also like to thank my research assistants, Jessica Kahn, Romana Kaleem, Poornima Ravishankar, Erica Ruddy, Sheerin Shahinpoor, John Spaccarotella, and Tiffany Stedman, for their excellent work. Matthew Braun deftly assisted me in the library, quickly tracking down any books and articles I needed. Additionally, I benefited from helpful comments on parts of this book at workshops at Washington University Law School, the International Association of Privacy Professionals, and the American Philosophical Association Pacific Division Annual Meeting. And lastly, Dean Fred Lawrence of the George Washington University Law School graciously provided me with all the resources I asked for.

Portions of this book were adapted from the following articles: “Conceptualizing Privacy,” 90 *California Law Review* 1087 (2002); “The Virtues of Knowing Less: Justifying Privacy Protections against Disclosure,” 53 *Duke Law Journal* 967 (2003); and “A Taxonomy of Privacy,” 154 *University of Pennsylvania Law Review* 477 (2006). In some cases, I have used only selected passages from the articles; in many cases, the text and argument of the articles have been significantly reworked.

## *Understanding Privacy*



# ~ 1

## *Privacy: A Concept in Disarray*

Privacy. U.S. Supreme Court Justice Louis Brandeis pronounced it “the most comprehensive of rights and the right most valued by civilized men.”<sup>1</sup> Commentators have declared it “essential to democratic government,” critical to “our ability to create and maintain different sorts of social relationships with different people,” necessary for “permitting and protecting an autonomous life,” and important for “emotional and psychological tranquility.”<sup>2</sup> It has been hailed as “an integral part of our humanity,” the “heart of our liberty,” and “the beginning of all freedom.”<sup>3</sup>

Privacy, however, is a concept in disarray. Nobody can articulate what it means. Currently, privacy is a sweeping concept, encompassing (among other things) freedom of thought, control over one’s body, solitude in one’s home, control over personal information, freedom from surveillance, protection of one’s reputation, and protection from searches and interrogations. Philosophers, legal theorists, and jurists have frequently lamented the great difficulty in reaching a satisfying conception of privacy.<sup>4</sup> Legal scholar Arthur Miller has declared that privacy is “difficult to define because it is exasperatingly vague and evanescent.”<sup>5</sup> “On closer examination,” author Jonathan Franzen observes, “privacy proves to be the Cheshire cat of values: not much substance, but a very winning smile.”<sup>6</sup> According to philosopher Julie Inness, the legal and philosophical discourse of privacy is in a state of

“chaos.”<sup>7</sup> Professor Hyman Gross asserts that “the concept of privacy is infected with pernicious ambiguities.”<sup>8</sup> Political scientist Colin Bennett declares that “[a]ttempts to define the concept of ‘privacy’ have generally not met with any success.”<sup>9</sup> According to legal theorist Robert Post, “Privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all.”<sup>10</sup>

Widespread discontent over conceptualizing privacy persists even though privacy is an essential issue for freedom and democracy. To begin to solve some of the problems of privacy, we must develop an approach to conceptualizing privacy to guide policymaking and legal interpretation. Although a large body of law pertains to privacy, it thus far has suffered numerous failures and difficulties in resolving privacy problems. Judges, politicians, businesspeople, government officials, and scholars have often failed to adequately conceptualize the problems that privacy law is asked to redress. Privacy problems are often not well articulated, and as a result, we frequently lack a compelling account of what is at stake when privacy is threatened and what precisely the law must do to solve these problems. The difficulty in articulating what privacy is and why it is important has often made privacy law ineffective and blind to the larger purposes it must serve. Thus the need to conceptualize privacy is significant, but the discourse about conceptualizing privacy remains deeply dissatisfying.

In this book, I aim to bring clarity to privacy’s current conceptual muddle. I develop a new understanding of privacy that strives to account for privacy’s breadth and complexities without dissipating into vagueness. I endeavor to set forth a theory of privacy that will guide our understanding of privacy issues and the crafting of effective laws and policies to address them.

## Privacy: An Issue of Global Concern

Privacy is an issue of profound importance around the world. In nearly every nation, numerous statutes, constitutional rights, and judicial decisions seek to protect privacy. In the constitutional law of countries around the globe, privacy is enshrined as a fundamental right. Although the U.S. Constitution does not explicitly mention the word “privacy,” it safeguards the sanctity of the home and the confidentiality

of communications from government intrusion. The Supreme Court has concluded that the Fourth Amendment protects against government searches whenever a person has a “reasonable expectation of privacy.”<sup>11</sup> Additionally, the Supreme Court has held that the Constitution preserves a “zone of privacy” encompassing decisions people make about their sexual conduct, birth control, and health, as well as protects their personal information against unwarranted disclosures by the government.<sup>12</sup> Many states explicitly protect privacy in their constitutions.<sup>13</sup>

Beyond the United States, the vast majority of nations protect privacy in their constitutions. For example, Brazil proclaims that “the privacy, private life, honor and image of people are inviolable”; South Africa declares that “[e]veryone has the right to privacy”; and South Korea announces that “the privacy of no citizen shall be infringed.”<sup>14</sup> When privacy is not directly mentioned in constitutions, the courts of many countries have recognized implicit constitutional rights to privacy, such as Canada, France, Germany, Japan, and India.<sup>15</sup>

In addition, thousands of laws protect privacy around the world. Multinational privacy guidelines, directives, and frameworks have influenced the passage of privacy laws in a vast number of nations. In 1980, the Organization for Economic Cooperation and Development (OECD) issued its Privacy Guidelines.<sup>16</sup> In 1995, the European Union’s Directive on Data Protection specified fundamental principles for privacy protection in Europe.<sup>17</sup> The Asia-Pacific Economic Cooperation (APEC), with over twenty member nations, set forth a Privacy Framework in 2004.<sup>18</sup> Numerous countries have enacted extensive privacy protections, such as Canada’s Personal Information Protection and Electronic Documents Act of 2000, Japan’s Personal Information Protection Law of 2003, Australia’s Privacy Act of 1988, and Argentina’s Law for the Protection of Personal Data of 2000, to name just a few. In the United States, hundreds of laws at state and federal levels protect privacy. Courts in most states recognize four torts to remedy privacy wrongs.<sup>19</sup> Since 1970, the U.S. Congress has passed several dozen statutes to protect the privacy of government records, student records, financial information, electronic communications, video rental data, and drivers’ records, among other things.<sup>20</sup>

Furthermore, privacy is recognized as a fundamental human right. According to the United Nations Universal Declaration of Human Rights of 1948, “No one shall be subjected to arbitrary interference

with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation.”<sup>21</sup> The European Convention of Human Rights of 1950 provides that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”<sup>22</sup> Thus there appears to be worldwide consensus about the importance of privacy and the need for its protection.

Beyond this outer layer of consensus, however, lurks an underworld of confusion. What exactly is privacy? Why is it worth protecting? How valuable is it? Legal protections of privacy depend upon a conception of privacy that informs what matters are protected and the nature and scope of the particular protections employed, but this underlying conception of privacy is often poorly theorized and rarely examined.

### Technology and the Rising Concern over Privacy

Since antiquity, people in nearly all societies have debated issues of privacy, ranging from gossip to eavesdropping to surveillance. The development of new technologies kept concern about privacy smoldering for centuries, but the profound proliferation of new information technologies during the twentieth century—especially the rise of the computer—made privacy erupt into a frontline issue around the world. Starting in the 1960s, the topic of privacy received steadily increasing attention.<sup>23</sup> The discourse has ranged from popular writers to journalists to experts in law, philosophy, psychology, sociology, literature, economics, and countless other fields. In 1964, journalist Vance Packard declared in his best-selling book *The Naked Society* that privacy was rapidly “evaporating.”<sup>24</sup> That same year, in another best seller, *The Privacy Invaders*, author Myron Brenton declared that “we stand on the threshold of what might be called the Age of the Goldfish Bowl.” He asked, “A couple of generations hence, will some automated society look upon privacy with the same air of amused nostalgia we now reserve for, say, elaborate eighteenth-century drawing room manners?”<sup>25</sup> In his 1967 book *Privacy and Freedom*, Professor Alan Westin noted “a deep concern over the preservation of privacy under the new pressures from surveillance technology.”<sup>26</sup> Psychologist Bruno Bettelheim observed in 1968, “Everywhere one turns these days it seems that the right to privacy is constantly under assault.”<sup>27</sup>



Today, the concern remains largely the same. Philosopher Thomas Nagel notes that there has been “a disastrous erosion of the precious but fragile conventions of personal privacy in the United States over the past ten or twenty years.”<sup>28</sup> Countless commentators have declared that privacy is “under siege” and “attack”; that it is in “peril,” “distress,” or “danger”; that it is “eroding,” “evaporating,” “dying,” “shrinking,” “slipping away,” “diminishing,” or “vanishing”; and that it is “lost” or “dead.”<sup>29</sup> Legions of books and articles have warned of the “destruction,” “death,” or “end” of privacy.<sup>30</sup> As Professor Deborah Nelson has put it, “Privacy, it seems, is not simply dead. It is dying over and over again.”<sup>31</sup>

But not everyone is concerned. Some argue that despite what people say, their actions demonstrate that they really do not want privacy at all. Jonathan Franzen notes, “The panic about privacy has all the finger-pointing and paranoia of a good old American scare, but it’s missing one vital ingredient: a genuinely alarmed public. Americans care about privacy mainly in the abstract.”<sup>32</sup> Although polls indicate that people care deeply about privacy, people routinely give out their personal information and willingly reveal intimate details about their lives on the Internet. Law professor Eric Goldman points out that people’s “stated privacy concerns diverge from what [they] do.”<sup>33</sup> Canadian scholar Calvin Gotlieb declares that “most people, when other interests are at stake, do not care enough about privacy to value it.”<sup>34</sup>

Others contend that privacy can be socially detrimental. According to law professor Richard Epstein, privacy is “a plea for the right to misrepresent one’s self to the rest of the world.”<sup>35</sup> Judge Richard Posner views privacy as giving individuals “power to conceal information about themselves that others might use to [the individuals’] disadvantage.”<sup>36</sup> Legal scholar Fred Cate declares that privacy is “an antisocial construct . . . [that] conflicts with other important values within the society, such as society’s interest in facilitating free expression, preventing and punishing crime, protecting private property, and conducting government operations efficiently.”<sup>37</sup>

Thus privacy is a fundamental right, essential for freedom, democracy, psychological well-being, individuality, and creativity. It is proclaimed inviolable but decried as detrimental, antisocial, and even pathological. Some claim that privacy is nearing extinction; others argue that the threat to privacy is illusory.<sup>38</sup> It seems as though everybody is talking about “privacy,” but it is not clear exactly what they are talking about.

## The Concept of Privacy

Privacy violations involve a variety of types of harmful or problematic activities. Consider the following examples of activities typically referred to as privacy violations:

- A newspaper reports the name of a rape victim.<sup>39</sup>
- Reporters deceitfully gain entry to a person's home and secretly photograph and record him.<sup>40</sup>
- New X-ray devices can see through people's clothing, amounting to what some call a "virtual strip-search."<sup>41</sup>
- The government uses a thermal sensor device to detect heat patterns in a person's home.<sup>42</sup>
- A company markets a list of five million elderly incontinent women.<sup>43</sup>
- Despite promising not to sell its members' personal information to others, a company does so anyway.<sup>44</sup>

Although these violations are clearly not the same, courts and policy-makers frequently have a singular view of privacy in mind when they assess whether an activity violates privacy. As a result, they either conflate distinct privacy problems despite significant differences or fail to recognize a problem entirely. In short, privacy problems are frequently misconstrued or inconsistently recognized in the law.

Merely being more contextual about privacy, however, will not be sufficient to develop a fruitful understanding of privacy. In author Jorge Luis Borges's illuminating parable "Everything and Nothing," a gifted playwright creates breathtaking works of literature, populated with an unforgettable legion of characters, one after the other imbued with a unique, unforgettable personality. Despite his spectacular feats of imagination, the playwright lives a life of despair. He can dream up a multitude of characters—become them, think like them, understand the depths of their souls—yet he himself has no core, no way to understand himself, no way to define who he is. His gift of assuming so many different personalities has left him with no identity of his own. At the end of the parable, before he dies, the playwright communicates his despair to God:

“I who have been so many men in vain want to be one and myself.” The voice of the Lord answered from a whirlwind: “Neither am I anyone; I have dreamt the world as you dreamt your work, my Shakespeare, and among the forms in my dream are you, who like myself are many and no one.”<sup>45</sup>

Privacy seems to encompass everything, and therefore it appears to be nothing in itself. One commentator observed:

It is apparent that the word “privacy” has proven to be a powerful rhetorical battle cry in a plethora of unrelated contexts. . . . Like the emotive word “freedom,” “privacy” means so many different things to so many different people that it has lost any precise legal connotation that it might once have had.<sup>46</sup>

Legal scholar Lillian BeVier writes, “Privacy is a chameleon-like word, used denotatively to designate a wide range of wildly disparate interests—from confidentiality of personal information to reproductive autonomy—and connotatively to generate goodwill on behalf of whatever interest is being asserted in its name.”<sup>47</sup> Other commentators have lamented that privacy is “protean” and suffers from “an embarrassment of meanings.”<sup>48</sup> “Perhaps the most striking thing about the right to privacy,” philosopher Judith Jarvis Thomson has observed, “is that nobody seems to have any clear idea what it is.”<sup>49</sup>

Often, privacy problems are merely stated in knee-jerk form: “That violates my privacy!” When we contemplate an invasion of privacy—such as having our personal information gathered by companies in databases—we instinctively recoil. Many discussions of privacy appeal to people’s fears and anxieties. Commentators, however, often fail to translate those instincts into a reasoned, well-articulated account of why privacy problems are harmful. When people claim that privacy should be protected, it is unclear precisely what they mean. This lack of clarity creates difficulty when making policy or resolving a case because lawmakers and judges cannot easily articulate the privacy harm. The interests on the other side—free speech, efficient consumer transactions, and security—are often much more readily articulated. Courts and policymakers frequently struggle in recognizing privacy interests, and when this occurs, cases are dismissed or laws are not passed. The

result is that privacy is not balanced against countervailing interests. For example, in England, discontent over defining privacy led the Younger Committee on Privacy to recommend in 1972 against recognizing a right to privacy, as was proposed in legislation at the time. The major difficulty in enacting a statutory protection of privacy, the committee's report declared, is the "lack of any clear and generally agreed definition of what privacy itself is." Courts would struggle in dealing with "so ill-defined and unstable a concept."<sup>50</sup> As a result, the legislation failed to pass.

Despite the wide-ranging body of law that addresses privacy issues today, commentators often lament the law's inability to adequately protect privacy.<sup>51</sup> Moreover, abstract incantations of "privacy" are not nuanced enough to capture the problems involved. In the United States, for example, the *9/11 Commission Report* recommended that as government agencies engage in greater information sharing with each other and with businesses, they should "safeguard the privacy of individuals about whom information is shared."<sup>52</sup> But what does safeguarding "privacy" mean? Without an understanding of what the privacy problems are, privacy cannot be addressed in a meaningful way.

## A New Theory of Privacy

There is a great need to understand privacy in a clear and comprehensive manner. In this book, I set forth a new theory of privacy. I begin in Chapter 2 by critiquing the existing attempts to conceptualize privacy by a wide array of jurists, legal scholars, philosophers, psychologists, and sociologists. In examining these theories of privacy, I survey the criticisms of various scholars regarding each other's conceptions of privacy and suggest a number of my own criticisms. Almost all the criticisms boil down to claims that the theories are too narrow, too broad, or too vague. More generally, many existing theories of privacy view it as a unitary concept with a uniform value that is unvarying across different situations. I contend that with a few exceptions, traditional accounts of privacy seek to conceptualize it in terms of necessary and sufficient conditions. In other words, most theorists attempt to define privacy by isolating a common denominator in all instances of privacy. I argue that the attempt to locate the "essential" or "core" characteristics of privacy has led to failure.

In Chapter 3, I develop an alternative approach to conceptualizing privacy. There are four dimensions to my approach: (1) method, (2) generality, (3) variability, and (4) focus. Regarding method, I suggest abandoning the traditional way of conceptualizing privacy and instead understanding it with Ludwig Wittgenstein's notion of "family resemblances." Wittgenstein suggests that certain concepts might not have a single common characteristic; rather, they draw from a common pool of similar elements.<sup>53</sup> Privacy, therefore, consists of many different yet related things.

In terms of generality, I argue that privacy should be conceptualized from the bottom up rather than the top down, from particular contexts rather than in the abstract. All conceptions must exist at some level of generality, however, so my theory generalizes beyond the myriad of specific contexts.

Regarding variability, a workable theory of privacy should account for the differing attitudes toward privacy across many cultures. It should recognize that notions about what information or matters are private have evolved throughout history. A theory of privacy, however, should avoid being too variable and contingent, or else it will not have lasting or widespread usefulness.

Finally, an approach to conceptualizing privacy must have a focus. It needs to unravel the complexities of privacy in a consistent manner; otherwise it merely picks at privacy from many angles, becoming a diffuse and discordant mess. Following philosopher John Dewey's view that philosophical inquiry should begin as a response to dealing with life's problems and difficulties, I argue that the focal point should be on privacy *problems*.<sup>54</sup> When we protect privacy, we protect against disruptions to certain activities. A privacy invasion interferes with the integrity of certain activities and even destroys or inhibits some activities. Instead of attempting to locate the common denominator of these activities, we should conceptualize privacy by focusing on the specific types of disruption.

Therefore, my approach to conceptualizing privacy understands it pluralistically rather than as having a unitary common denominator. In focusing on privacy problems, my approach seeks to be contextual without being overly tied to specific contexts, flexible enough to accommodate changing attitudes toward privacy, yet firm enough to remain stable and useful.

In Chapter 4, I contend that the value of privacy must be determined on the basis of its importance to society, not in terms of individual rights. Moreover, privacy does not have a universal value that is the same across all contexts. The value of privacy in a particular context depends upon the social importance of the activities that it facilitates.

In Chapter 5, having laid out the general groundwork for what needs to be done to develop a theory of privacy, I propose a taxonomy of privacy—a framework for understanding privacy in a pluralistic and contextual manner. The taxonomy is grounded in the different kinds of activities that impinge upon privacy. I endeavor to shift the focus away from the vague term “privacy” and toward the specific activities that pose privacy problems. Additionally, the taxonomy is an attempt to identify and understand the different kinds of socially recognized privacy violations, one that I hope will enable courts and policymakers to better balance privacy against countervailing interests. Ultimately, the purpose of this taxonomy is to aid the development of the body of law that addresses privacy.

The taxonomy consists of four principal groups of activities: (1) information collection, (2) information processing, (3) information dissemination, and (4) invasion. Each group encompasses a variety of activities that can create privacy problems. The taxonomy is as follows:

1. Information collection
  - Surveillance
  - Interrogation
2. Information processing
  - Aggregation
  - Identification
  - Insecurity
  - Secondary use
  - Exclusion
3. Information dissemination
  - Breach of confidentiality
  - Disclosure
  - Exposure
  - Increased accessibility
  - Blackmail

- Appropriation
- Distortion
- 4. Invasion
  - Intrusion
  - Decisional interference

In the chapter, I explain in depth each of these types of problems and why they can be problematic.

In Chapter 6, I conclude by explaining the benefits of understanding privacy with the taxonomic framework I have developed. It is my hope that the theory of privacy set forth in this book will clear the fog of confusion that often envelops the concept of privacy. A lucid, comprehensive, and concrete understanding of privacy will aid the creation of law and policy to address privacy issues. Far too often, the effective resolution of privacy issues gets lost in navigating the conceptual labyrinth of privacy. This book endeavors to guide us in understanding this bewildering terrain.

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