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Privacy

Contributors: Raymond Wacks
Editors: David S. Clark
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The legal concept of *privacy* has expanded significantly since its original formulation in 1890 in the *Harvard Law Review* by Samuel Warren and Louis Brandeis as a right against embarrassing publicity. The rapid advance of information technology, especially the Internet, has generated concern about the protection of personal data, manifested in many jurisdictions by the adoption of data protection legislation. The contemporary conception of privacy thus incorporates not only the right of privacy (as enunciated in, for example, the European Convention on Civil and Political Rights, 1950), but also what may be called informational privacy.

At the heart of any conception of privacy lie several moral, cultural, and economic assumptions that are always contentious. What is private is plainly contingent on social and historical factors, and the construction of privacy norms rests on our political institutions and social environment.

The notion of privacy in its broadest—and least lucid—sense is founded on a conception of the individual and his relationship with society. The idea of private and public spheres of activity assumes a community in which such a classification is possible, though this positive conception of privacy is a modern one; the emergence of the nation-state and theories of sovereignty in the sixteenth and seventeenth centuries produced the idea of a distinctly public realm. The division between a public and private sphere is a central tenet of liberalism, and the extent to which the law might legitimately intrude on the private is a recurring theme, especially in nineteenth-century liberal doctrine.

An acceptable definition of privacy remains elusive. Thus, one particularly ubiquitous and influential view (especially in the legal literature) conceives of privacy as the “claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others” (Westin 1970: 7). Alan Westin's approach, however, has exerted even greater influence in respect of its description of privacy in terms of the extent to which an individual has *control* over information about herself. For control over information to be coextensive with privacy, however, an individual would have to have lost privacy if anyone prevents her from exercising this control, even if she is unable to disclose personal information. Moreover, this is a preemptive, nonneutral view of privacy.

The search for a satisfactory definition of privacy continues. This pursuit, alas, has borne little fruit, largely because the premises on which the proposed definitions are based are materially different. Thus, for example, those who assume privacy to be a right have not really joined issue with those who conceive it to be a condition, state, area of life, and so on. Moreover, arguments as to the desirability of privacy frequently proceed from different standpoints. Some see privacy as an end in itself, while others regard it as instrumental in the securing of other desirable social ends such as creativity, love, or emotional release.

Considerable disagreement exists in respect of the features of privacy, though the analysis by Ruth Gavison captures the central idea of privacy as limited accessibility—a cluster of three related but independent components: (1) secrecy, information known about an individual; (2) anonymity, attention paid to an individual; and (3) solitude, physical access to an individual. A loss of privacy (as distinct from an infringement of a right of privacy) occurs, in this account, where others obtain information about an individual, pay attention to her, or gain access to her. The claimed virtues of this approach are, first, that it is neutral, facilitating an objective identification of a loss of privacy; second, it demonstrates the coherence of privacy as a value; third, it suggests the utility of the concept in legal contexts (because it identifies those occasions calling for legal protection); and fourth, it includes typical invasions of privacy and excludes those issues mentioned above which, though often thought to be privacy questions, are best regarded as moral or legal issues in their own right (noise, odors, prohibition of abortion, contraception, homosexuality, and so on).

While drawing the public-private boundary is logically anterior to any conception of the role of law, the boundary is also constituted by law. This circularity is compounded by the fact that nonlegal regulation of what is apparently private may exercise significant controls over such behavior.

The voluminous literature on the subject has failed to produce a lucid or consistent meaning of a concept that, particularly in the United States, continues to provide a forum for contesting various behavior. This behavior includes the rights of women (especially in respect of abortion), the use of contraceptives, the freedom of homosexuals and lesbians, the right to obscene or pornographic publications, and some of the problems generated by AIDS. An important consequence of this harnessing of

privacy in the pursuit of so many disparate, sometimes competing, political ideals has been substantial analytical confusion.

U.S. common law, following William Prosser, now recognizes four different torts related to privacy: (1) intrusion on the plaintiff's seclusion or solitude or into his private affairs (this includes eavesdropping, including electronic and photographic surveillance, bugging and telephone-tapping); (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity that places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

The constitutional right of privacy, especially in its contest against freedom of expression, has loomed large in the United States. This tension is debated in the context of the purport and scope of the First Amendment's injunction that “Congress shall make no law … abridging the freedom of speech, or of the press.” Balancing these apparently competing rights, especially in cases involving media intrusion, has recently also preoccupied the courts of England, Australia, and New Zealand.

RaymondWacks

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See also

- Abortion
- Civil Liberties
- Constitutional Law, Doctrinal Issues in
- Databases
- Expression, Freedom of
- Health
- Individualism
- Judicial Activism
- Sexual Orientation
- Transparency

Further Readings

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