Privacy: Legal Aspects

Serious social and legal concern with privacy is a relatively modern matter, though themes of privacy and its importance form part of all known human civilizations.

1. The Meaning of Privacy

The definition of privacy is a matter of some controversy. Its characterizations move from the all-encompassing ‘right to be left alone,’ covering a general interest in not being interfered with in any way that violates human dignity, advocated by Edward Bloustein (1964), to the more limited interest in control over personal information and accessibility, argued for by Westin Allen (1967) and Parent (1983). Somewhere in the middle we find characterizations of privacy as only those aspects of liberty that relate to intimate and highly personal aspects of one’s life (e.g., Rubenfield 1989), such as those involved in sexual preferences and decisions about whether and when to procreate. The uses of ‘privacy’ in everyday language and in various legal systems are broad enough to cover all of these approaches, so the analysis of ordinary language cannot, by itself, decide the issue. The controversy is found in philosophical analyses of privacy as well as in the contexts of its legal protection. It has led some scholars to argue that the term be abolished in order to promote clarity of thought and analysis (Prosser 1960, Thomson 1975).

Conflating privacy with all claims for noninterference, or with the value of an ‘inviolate personality,’ is indeed much too broad, and threatens the distinctiveness and the practical utility of privacy. All concede that there are ways to violate dignity (e.g., subjecting one to torture) and to interfere with one’s important liberties (e.g., freedom of speech or freedom of religion) without raising concerns of privacy. It is also possible to violate privacy (by watching or by eavesdropping) without limiting the person’s liberty. The need to stress this distinction between privacy and liberty is one of the main reasons for defining privacy in terms of control over information, or, in the somewhat broader analysis suggested by Gavison (1980), of accessibility. According to this approach, the hard core of concerns and interests covered by the label ‘privacy’ is related to the interest of individuals in limiting access to themselves. Privacy can be lost through the invasion of a person’s physical space by either presence, wiretapping, or clandestine super-

vision; the acquisition and dissemination of information about a person; or the ‘lifting’ of a person’s anonymity, which in turn may encourage loss of privacy in either of these other ways. Privacy in this sense is thus distinct from liberty, but it is connected to liberty and to dignity in a variety of ways. These connections to liberty and to ‘inviolate personality,’ to be discussed below, are in part responsible for the importance of privacy as a central value in modern life.

The need to distinguish privacy from a general interest in liberty is challenged by those who identify issues such as abortion, contraception, and choice of sexual expression as matters of privacy. While scholars like Rubenfield (1989) and DeCew (1997) concede that these claims concern liberty, they argue that the special strength of these claims derives from the highly personal and intimate nature of these decisions, and that these features of the decisions are what makes them matters of privacy. This argument, which is supported by our linguistic and moral intuitions, is based on an important ambiguity in the term ‘privacy’ and the related distinction between ‘private’ and ‘public.’ There is a sense in which the ‘private’ is that which is intimate and personal. But ‘private’ is also that which is held, or used, or owned, or financed by individuals (as compared to that which is held, used, or financed by the public or at least by some group). In addition, ‘private’ also means that which one is entitled to keep secret or inaccessible, but also that which the individual is entitled to claim as belonging to her own realm of autonomous decision-making. Abortions and sexual practices are both matters of great intimacy and personal import and matters that most people desire to keep unknown and unpublicized. In addition, the principle of offense suggests that we may prohibit the public performance of activities that are fully legitimate when conducted ‘in private’ (e.g., sexual intercourse).

Against this background, any attempt to provide one definition of privacy and to reject others must be arbitrary to some extent. Those who use the term in descriptive or normative statements should be aware of these ambiguities and clarify the sense(s) in which they use the terms. In the remainder of this essay, only concerns of privacy in terms of accessibility and information will be discussed. Issues of personal autonomy, important as they are, are better discussed under different headings. The importance of stressing the distinctive definition of privacy has grown as modern technology has created a variety of new challenges to privacy. Modes of surveillance, eavesdropping, photographing, and processing of such information, as well as the development of computerized data banks with huge abilities of storage, retrieval, and processing and linking of information, and the growing possibilities of quick dissemination of such information, both verbal and pictorial, have made the threats of loss of privacy more serious and
acute. It is thus important to connect these urgent practical concerns with the reasons for privacy's importance.

2. The Importance of Privacy

While most individuals seek privacy, at least some of the time and for some purposes, it is not clear whether this wish for privacy should always be protected or granted. Some scholars point out that privacy, at least in the sense of keeping personal information unknown, is simply the scoundrel's best friend (notably, Posner 1978). While these scholars may concede the coherence of the concept of privacy, they argue that privacy is in fact undesirable, encouraging tendencies to individualism and downplaying the importance of community and accountability. Some feminist writers argue that treating privacy as an ideal is just a way to perpetuate the exclusion of women from public life, and to facilitate their continued exploitation and vulnerability within the realm of the private (notably MacKinnon 1989 but see also Gavison 1993).

Proponents of privacy (see, e.g., Bloustein 1964, Westin 1967, Gavison 1980, Fried 1968, Benn 1971) do not argue that all wishes to limit access to information about one or of one’s realm should be respected. They may well concede that total privacy is both impossible and highly undesired and undesirable. They do insist, however, that interests in privacy are important, and that privacy is related, and contributes, to other important values such as freedom, autonomy, and intimacy. These values are an integral part of our ideals of personhood and society, and our normative landscape will be impoverished if we do not recognize both the uniqueness and the importance of privacy claims.

It is easier to see the many ways privacy functions in our lives if we try to imagine a world in which we have lost all the privacy we enjoy at present. Imagine the loss in terms of intimacy, friendship, trust, and love that we would have suffered if we could not choose in whom to confide, and with whom to share personal information about ourselves. Or if we had known that whatever we said to any individual would immediately be broadcast on the Internet. Imagine the loss in learning and acquisition of skills we would have suffered if all our drafts and early attempts at mastering a skill had been made public, open to the judgment and ridicule of all. Imagine the loss in terms of self-respect and autonomy that would ensue from a life in which we would not have the benefit of experimenting and trying things alone, or in a protected and supportive environment, which could teach us and give us the courage to face audiences less supportive. Imagine democracy without a secret ballot and the freedom to develop ideas and associations without constant police surveillance, or rehabilitation without the ability to start afresh. It is no accident that people have sought privacy from the inception of human society, and that extensive loss of privacy (of the kind that is suffered in total institutions like prisons or mental hospitals) is regarded by many as degrading and humiliating.

Even if this argument is conceded, and people accept that some claims to privacy should be morally protected, this does not say that claims to privacy or limitation of accessibility are absolute. Like all other claims, they must be balanced against other important interests and rights. The importance of privacy means only that we should be aware that the costs we pay in terms of privacy are important, and that we should try, as far as possible, to decrease them. While total loss of privacy is dangerous and bad, some claims of privacy are merely self-serving and instrumental. Naturally, a candidate for a job does not want her prospective employer to know her weaknesses. A con-man does not want his victims to know of his past record. In all these cases we may well prefer the interest in knowledge and thus refuse to defend the claim of secrecy or privacy. As a matter of fact, in many situations of conflict, privacy gives way to other claims. Some scholars, have concluded from this fact that it is therefore misleading to talk about a 'right to privacy' in morality or in law (Prosser 1960, Thomson 1975, Davis 1959). They argue that privacy claims can never trump other claims on their own. The cases in which we feel that claims of privacy have the upper hand are ones in which there is another interest involved, such as the interest in reputation, or in physical seclusion, or in property. It is the presence of these other interests, they argue, not the claim of privacy, that explains (and justifies) the fact that we find the privacy argument persuasive.

A closer analysis of cases of conflict, in both morality and law, does not support this generalization. Norms defending the rights of prominent gay people not to be 'outed,' and laws prohibiting the publication of rape victims' names, are two examples in which claims of privacy are seen as morally justifying, on their own, the limitation of the freedom of others to disseminate information. Moreover, even if it is the case that in many situations privacy claims win only when they are reinforced by other interests, this does not mean that the costs in terms of privacy are not important. It may mean only that claims of privacy, on their own, cannot defeat some conflicting claims. It is misleading to conclude that the costs in terms of privacy are nonexistent.

3. Legal Protection of Privacy and its Limits

Part of the debate around the concept of privacy and the justification for granting a right to privacy was triggered by claims for legal protection against various sorts of losses of privacy. One of the consequences of the conceptual ambiguity mentioned above is that the
extension of the term ‘privacy’ may be different in different legal systems. Thus, the initial decisions concerning the use of contraceptives and abortion in the US were made in terms of privacy (Grisworld 1965 and Roe 1973). While the US Supreme Court has moved to discuss abortion as an issue of liberty rather than one of privacy (Planned Parenthood 1992), there are still scholars seeking to justify dealing with issues, such as the liberty to behave in certain intimate matters, in terms of privacy (Rubenfeld 1989, DeCew 1997, Allen 1988). Other scholars see these decisions as based on conceptual and normative confusion between issues of liberty and issues of privacy (Gross 1971, Henkin 1974, Gavison 1980).

Legal systems vary a great deal in their positive protection of privacy. Most Western countries now try to regulate computerized data banks in some ways. The legal frameworks seek to make sure that data is accurate, that individuals know what information about them is held in such data banks, and that acquisition and dissemination of information are controlled. The first two issues, while of extreme practical importance, are not—strictly speaking—privacy concerns. My privacy is not enhanced by the fact that I know what information about me is available to others. In fact, such knowledge may threaten my sense of privacy, because it may reveal to me that I am in fact more exposed than I had thought. Most legal systems include in their protection of property rights the liberty and the power to exclude others from entrance. Most legal systems now contain regulation of practices such as wiretapping and electronic eavesdropping. While the details of legal regulation differ, all systems seek to reduce abuses resulting from the existence of extensive data banks. The law has been slow to respond to the implication of technological innovations in the realm of dissemination of information. Cable TV and satellite technologies, as well as the Internet, create fascinating and difficult problems for imposing legal liability for the dissemination of information, including privacy-violating publications.

Legal systems differ also in the extent to which they are willing to grant legal protection to individuals’ concerns that true information about them not be published against their will. In the European continent, legal systems protect this interest through a ‘right to personality.’ England still has no recognition of a general right to privacy, and no legal liability for such publication, while in the US a right to privacy is recognized, but it usually gives way to the paramount interest in free speech. Finally, the question of the extent to which public figures are entitled to the protection of their privacy remains controversial, with different answers given by different legal systems and cultures. The US seems to take the lead in denying its public figures their right to privacy, and in a willingness not to stop short of explicit and detailed public discussion of their most intimate affairs. However, this area of privacy claims illustrates that, very frequently, social realities are not dictated only by the law. The actual privacy enjoyed by public figures in Western countries depends on cultural and journalistic norms much more than on the legal arrangements existing in them.

Violations of privacy, especially in the field of dissemination and publication of personal information, also illustrate the limits of law in effective protection of values. Once the information is published, or the embarrassing picture aired, there is nothing that can delete it from memory or consciousness. Money awards cannot undo the harm, and the publicity of the trial just adds to the magnitude of the original injury. We encounter here a paradox of law in some areas: Laws may, to some extent, serve as the basis of injunctions, or they may deter people from violations. If they fail in doing that, they are unlikely to be invoked to impose subsequent liability.

See also: Confidentiality and Statistical Disclosure Limitation; Information Society; Personal Privacy; Cultural Concerns; Privacy of Individuals in Social Research; Confidentiality; Public Sphere and the Media; Telecommunications and Information Policy

Bibliography


Benn S 1971 Privacy, freedom and respect for persons. Nomos 13: 1

Benn S 1988 The Private and Public in Social Policy. NY

Bloustein E 1964 Privacy as an aspect of human dignity. 39 New York University Law Review 962

Davis F 1959 What do we mean by the right to privacy? South Dakota Law Review. 4


Fried C 1968 Privacy, Yale Law Journal 77: 475


Gavison R 1993 Feminism and the private–public distinction. Stanford Law Review 45: 1

Grisworld vs. Connecticut 1965 381 US 479


MacKinnon C 1989 Towards a Feminist Theory of the State. Cambridge, MA


Pennock R, Chapman J (eds.) 1971 Privacy, Nomos 13

Planned Parenthood vs. Casey 1992 505 US 533

Posner R 1978 The right to privacy. Georgia Law Review. 12: 393


Roe vs. Wade 1973 410 US 113

12069
Privacy: Legal Aspects

12070

Privacy of Individuals in Social Research: Confidentiality

1. Definitions

The word privacy here refers to the state of the individual, including individuals’ right to control information about them at times. Confidentiality refers to the state of information, that is, information in an individual’s record may not be disclosed without the individual’s consent except under certain conditions. Security here refers to the state of physical or electronic records, especially protection against unauthorized access to the record.

2. An Ethical and Legal Context

People may provide information in social surveys, randomized field trials, and in other studies. Their doing so may be voluntary. Or it may be mandatory, that is, required by law.

Generally, the researcher is under an explicit ethical obligation to assure the privacy of the individual, the confidentiality of information generated on the individual, and the security of the record. These obligations may be reflected in professional codes of ethics. The obligations may be verified through government regulations and review processes that foster assurance of privacy, such as Institutional Review Boards in the United States. Or, the obligation may be verified in law. Statutes that govern the activity of census bureau interviewers and statisticians in countries, such as Sweden, the United States, Canada, and elsewhere, are plain on this account and include penalties for failure to meet the obligation.

3. Assessing Privacy in Surveys and Randomized Field Trials

The social scientist’s statutes must be met in a variety of ways at each stage in the process of a study. At the study’s design stage, for instance, one minimizes the information that is asked of a respondent and minimizes the intrusiveness of questions, that is, one restricts questions so as to meet the study’s object. One also minimizes the number of people who are engaged in a study. This is determined partly by technical concerns such as the level of statistical precision or statistical power that is needed.

Under many codes of ethics and certain broad legal regulations, individuals to whom questions are put must be told whether their participation in the research is voluntary. People usually must be told the purpose of the research, and the disposition and functions of the data that they provide. Usually, they are assured that the information they provide will remain confidential, that is, the assurance is that information will be used only for research purposes and that the information they provide will not be disclosed with their identity attached to anyone else.

Under certain circumstances, the information provided by individuals can be assured of confidentiality even in the face of government or private threat. In the United States, for example, researchers who are involved in studies on alcohol and substance abuse, and criminological research can receive a certificate of confidentiality. The rules are such that researchers are prohibited under penalty of law from disclosing identifiable microrecords, and are legally immune from any obligation to provide microrecords to law enforcement agencies.

More generally, statutes that govern statistical agencies in the United States and other countries require that the agencies refrain from disclosing records on individuals to other people, that is, the statutes say that records on identifiable individuals cannot be appropriated legally by anyone else, including the courts, legislatures, and law enforcement agencies.

The researcher is under an ordinary obligation to cooperate with courts and other government agencies in providing information. This obligation becomes problematic if the researcher made promises of confidentiality and then, when confronted with a government demand, discovers that the promise has no legal standing. Keeping track of such episodes and their frequency is important. Shield laws that assure that the social scientist cannot be compelled to disclose information about identifiable individuals who have agreed to participate in the research are then important.

4. Privacy and Researchers’ Use of Statistical Data Bases

Producing high quality data in social research can be costly irrespective of the benefits of the information. To the extent that the same data set can be put to work frequently to benefit the public, the cost/effectiveness ratio decreases.

For instance, good scholars undertook multiple reanalysis of data from the statewide class size randomized trial in Tennessee. These analyses informed...