

Moral and Legal Foundations of Privacy

January 31, 2023



Privacy: What Is It?



“Perhaps the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is.”

- Judith Jarvis Thomson, The Right to Privacy

Privacy: What Is It?



- We must distinguish between two interrelated concepts:
 - The concept of privacy – “what is privacy?”
 - The right of privacy – “what does the law protect/prohibit?”
- “The law does not determine what privacy is, but only what situations of privacy will be afforded legal protection.” - Hyman Gross

I. Philosophical Perspectives on Privacy





Wasserstrom – Privacy: Some Arguments and Assumptions

What Is Privacy, and What Control Does One Have over It?

Wasserstrom – Privacy: Some Arguments and Assumptions



Discusses what privacy is by four scenarios:

1. You are sitting in a chair resting with ideas, emotions, and sensations running through your mind.
2. You are in a closed telephone booth talking to a travel agent (or at home having dinner with your spouse).
3. You are in your bedroom with your spouse.
4. You are considering hiring a research assistant, and you can get a printout with age, marital status, arrest record, grades, income, and what they have done.

Wasserstrom – Privacy: Some Arguments and Assumptions



- Scenario #1 – Your thoughts: This involves facts that only you can know unless you take the step of telling someone or providing access to your body (mind reading, etc.).
- Scenario #2 – Phone Booth / Dinner: Less in your control than thoughts, as the agent/wife can pass on what you said.
- Scenario #3 – With Spouse in Bed: Similar to the phone booth or dinner, except that you have a reasonable expectation that the information will not be passed on.

Wasserstrom – Privacy: Some Arguments and Assumptions



- Why are “thoughts” so innately private?
 - They are intimate and unfiltered – often uncontrollable.
 - We would not want to be accountable for our thoughts.
 - Our thoughts and feelings are what make us a person and part of being a person is having control over our internal and unique feelings and thoughts.
- Helps explain 5th Amendment (right against self-incrimination): you cannot be required to disclose your thoughts.
 - But the government can take a blood sample, because it’s not the same as a thought you possess.

Wasserstrom – Privacy: Some Arguments and Assumptions



- California Department Store Example: Police were drilling holes in the bathroom ceiling to enable watching to catch illegal activity.
- Found to be illegal (unlawful search and seizure, which we will learn in the 4th Amendment portion of class)
 - Wasserstrom asserts that it was also partially because of the violation of privacy of all the persons observed, not just those arrested.

Wasserstrom – Privacy: Some Arguments and Assumptions



- More than thoughts are private: “doing something in private” and “doing a private kind of thing”.
- Telling people different things in private (or not telling them) is how we gauge many relationships.
- “Private kinds of things” are done only when we reasonably believe we are in private.
- Even if you know you are going to be observed, there is an effect – you may act differently as a result.

Wasserstrom – Privacy: Some Arguments and Assumptions



- The “Data Bank” example:
 - All the information about you is somehow extractable.
 - Article is from 1978 but sounds like Wasserstrom could see the future; that’s where we are now.
- You could make some qualitative analysis about who I am.
- You can also roughly figure out where I was and what I was doing.
- Concerns are raised about accuracy, amount, aggregation.

Wasserstrom – Privacy: Some Arguments and Assumptions



- What are the consequences on attitudes toward privacy in society?
 - What we think is private will change if we’re used to giving up such information and having it mined.
 - May alter the ways we consider relationships with one another.
 - Both of these are arguably happening now, especially for persons that may have a lower expectation of privacy. Expectations of privacy have changed.
 - Downloads, Terms of Use, Privacy Policies, Tweets.

Wasserstrom – Privacy: Some Arguments and Assumptions



- Is there another approach that will tie these issues together? Wasserstrom says yes.
- Calls is the “perspective of counterculture.”
 - We act as different people in public and private (the “Real Person” argument).
 - PoC confronts the thought that there are facts we keep private because they would be embarrassing or shame-worthy.
 - If these thoughts were known, and it turned out we all had them, they would cease to be bad.

Wasserstrom – Privacy: Some Arguments and Assumptions



- He says the same goes for acts: We are conditioned by culture to think that sex must be private.
- But would it be just as enjoyable in public if the culture were different?
 - Does a good dinner taste better at home or in a restaurant?

Wasserstrom – Privacy: Some Arguments and Assumptions



- What would be gained or lost from such a change in the culture?
 - Would intimacy either as friendships or relationships be weakened or less likely since they are based in part on sharing intimate things?
 - Would day to day relationships get vastly more complicated if we had such openness with everyone about everything?

Thomson – The Right to Privacy

The Reductionist View of Privacy



Thomson – The Right to Privacy



- Like Wasserstrom, Thomson uses several examples to discuss the bounds of privacy:
 1. Husband and wife having a fight heard from the street and windows are open.
 2. Husband and wife having a quiet fight and someone uses an amplifier to hear.
 3. Same as #1 but hard of hearing person walks by and turns up his hearing aid to listen.
 4. Two people talking in the park, man creeps around the bushes to hear.

Thomson – The Right to Privacy



- Another example: A man has a pornographic picture that he keeps in his wall safe.
- Owning a picture – does it include the “negative” right to prevent others from seeing it? Or that it shall not be looked at?
- Sometimes you have a right that can be waived – you accidentally leave out the picture.
- To what extent does the man have to protect the picture? Encase his house in platinum?

Thomson – The Right to Privacy



- Why this discussion? If we have such rights over property, we therefore must have such rights over ourselves.
- Those rights are relative based on circumstances. Examples on pp. 303-304.
- Thus, much like the picture and property, privacy is a “cluster of rights,” and in fact overlaps with it and the “rights over the person.”

Thomson – The Right to Privacy



- No right that a fact shall not be known; rather, that certain steps shall not be taken, and certain uses shall not be made of such facts.
- Using an x-ray to see someone is improper steps to gain information.
- The information must be personal.
- Posits that you may not have a violation of privacy without some other violation:
 - Compare sending a letter with torture.

Thomson – The Right to Privacy



- If you gain information with the caveat that you are not to spread it, and you do, that is a violation of privacy (if it was personal information), because you also have a violation of confidentiality.
- I publicize that you have a pornographic picture in your safe at home: may be a violation of privacy IF you also see a violation of the right to be free of distress.
 - BUT, Thomson says this is trumped by the right of free press.
- Thus, right to privacy is derivative – it always is associated with another right (pages 312-314).

Rachels – Why Privacy Is Important



A Response to Thomson: Privacy as a
Condition of Relationships

Rachels – Why Privacy Is Important



- Response to Thomson’s “cluster of rights.”
- Starts with a basic definition of privacy as “a characterization of the special interest we have in being able to be free from certain kinds of intrusions.”

Rachels – Why Privacy Is Important



- Different interests:
 - Competitive interests: Bobby Fisher’s chess analysis
 - Embarrassment: “End of the Road” story (spying)
 - Medical Records
 - Credit Applications
- But, these do not help with a complete understanding of privacy.
 - They are unique.
 - Are often objectionable on other non-privacy grounds.

Rachels – Why Privacy Is Important



- We need to understand the “something important” about privacy that makes something “someone’s business” or “none of your business.”
- Takes issue with the “Real Person” argument (Wasserstrom), i.e. that beneath the different ways a person interacts with different people is a real person.

Rachels – Why Privacy Is Important



- Rather, he posits that we simply have different understandings of different situations; none of them is necessarily “dishonest” or not real (but they can be, of course).
- These can change from person to person, and from society to society.
- Group therapy – you cease to think of each of other as strangers, but rather as fellow members of the group.
- Things that impede on the ability to have the relationships we want in the way we want is often considered objectionable, and why we value privacy.

Rachels – Why Privacy Is Important



- Example: Close friends joined by a casual acquaintance necessarily changes the dynamic.
 - What if the close friends were never alone? They would either need to share confidences in violation of how they want to be around the casual acquaintance, or not share close information, meaning that they could no longer be close friends.
- Thus, if we cannot control who has access to us, we cannot control our relationships, impeding privacy.

Rachels – Why Privacy Is Important



- What about facts that are “simply nobody else’s business?”
 - Depends on the relationship – a doctor gets different access than an employer.
 - Such relationships are generally voluntary.
- However, once entered, we cannot expect the same degree of privacy as before.
 - “How much money is in your bank account” is not private to your banker, creditor, or spouse. But as to others, it may well be.

Rachels – Why Privacy Is Important



- Takes issue with Thomson's attempt to say privacy is a "cluster" of rights that intersects with the right over the person, and the cluster of rights over property.
- Rachels says that, for example, the right not to have various parts of your body looked at is not analogous to property rights, and such subject to societal norms. A question of degree, and therefore different from property.

Rachels – Why Privacy Is Important



- Rachels also rebuts the "very personal gossip" argument – Thomson argued that if the information was obtained without violating your rights and disclosed without violating a confidence, there is no violation of a right to privacy in disclosing it.

Rachels – Why Privacy Is Important



- Rachels thinks his understanding of privacy means there may be a violation in such a case:
 - What if you were overheard telling a friend the intimate information, and that other person discloses it?
 - There was not also a right over property or the person, but it would still be a violation of the right to privacy because of our right to control who has access to us.
 - Privacy is a protection here because it has a “different point” than the other rights.

Three Viewpoints So Far...



- Wasserstrom: Privacy hides who we are as “real people”
- Thomson: Privacy is derivative of your pre-existing “Cluster of Rights”
- Rachels: Privacy is a condition of relationships



Reiman – Privacy, Intimacy, and Personhood

A Response to Thomson and Rachels:
Privacy as a Condition of Personhood

Reiman – Privacy, Intimacy, and Personhood



- A follow-on to Thomson and Rachels.
 - Also disagrees with Thomson, but thinks Rachels does so for the wrong reason.
- Says Thomson's premise that privacy is a derivative right is a non sequitur.
 - Assuming that privacy rights overlap with property and personal rights does not prove that privacy is derivative from these rights.
 - In fact, this assumption is consistent with the opposite conclusion: that all property and personal rights are derivative from a privacy right.

Reiman – Privacy, Intimacy, and Personhood



- Even if you agreed with Thomson's hypothesis, it does not follow that you do not need to or want to find out what is common to the cluster of rights in the right to privacy.
- Finding out what is common may help resolve difficult moral conflicts.
- Reiman says there is something unique, and promises a conclusion. But first, he rebuts Rachels.

Reiman – Privacy, Intimacy, and Personhood



- According to Reiman, Rachels is wrong in his analysis starting with his basic definition of privacy as “a characterization of the special interest we have in being able to be free from certain kinds of intrusions.”
- Reiman says this definition is circular: saying privacy is the right to be free from certain intrusions is no more than saying that “rights to privacy protect our special interest in privacy.”

Reiman – Privacy, Intimacy, and Personhood



- Reiman also takes issue with Rachels' conclusion that privacy, and thus our selection of what and whom to share certain things, allows us to create and maintain our relationships with other people.
- This has a logical end: if you give full access of everything to everybody, you can't have any friendships because there is no special sharing with anyone not shared with everyone.
 - Is there any truth to this logic in the current digital age?
- Reiman finds this problematic; the value of intimacy then lies not in what you have, but what others do not have.

Reiman – Privacy, Intimacy, and Personhood



- Rachels also misses the context of the sharing, which to Reiman is more important than the content shared.
- You share information with a psychoanalyst that you wouldn't share with a friend, but that does not make the analyst relationship more intimate.
- If you share the information with a friend, it means something more because of the "context of caring." You care about each other.
- Rachels also makes the right to privacy derivative like Thomson, but derivative from social relationships.

Reiman – Privacy, Intimacy, and Personhood



- Reiman thinks Benn comes closer to the right answer: privacy is the principle of respect for persons as choosers of what and to whom they share.
- But Benn is too broad. It would give us a right not to have people glance at us walking down the street or stare us in the face if we didn't "choose" for them to do so.

Reiman – Privacy, Intimacy, and Personhood



- So what is the fundamental interest?
 - "Privacy is a social ritual by means of which an individual's moral title to his existence is conferred."
- Privacy is what defines us as persons:
 - "Privacy is necessary to the creation of *selves* out of human beings, since a self is at least in part a human being who regards his existence—his thoughts, his body, his actions—as his *own*."

Reiman – Privacy, Intimacy, and Personhood



- “The right to privacy, then, protects the individual’s interest in becoming, being, and remaining a person. It is thus a right which all human individuals possess.”

Parent – Privacy, Morality, and the Law



The Informational View of Privacy

Parent – Privacy, Morality, and the Law



- “Privacy is the condition of not having undocumented personal knowledge about one possessed by others.”
W.A. Parent, *Privacy, Morality, and the Law* (1983).
 - Drinking? Drug Use? Height? Income?
- “Personal Information”: “facts which most persons in a given society choose not to reveal about themselves . . . or facts about which a person is acutely sensitive and which he therefore does not choose to reveal about himself, even though most people don’t care if these same facts are widely known about themselves.”
- Other definitions wrong...pages 271-274

Parent – Privacy, Morality, and the Law



- Is information that fits the definition, but that is obtained legitimately still private?
- Parent’s example: Reading old newspapers, you find Bob’s name in a story about child prodigies who failed to succeed as adults. Bob has become a gambler and alcoholic.
 - Have you invaded Bob’s privacy?
 - What if you then publish that information in a magazine?

Parent – Privacy, Morality, and the Law



- Parent says no: it may harm Bob's reputation, but his privacy – as defined by Parent – is not changed.
 - Does it matter if Bob told you in confidence?
 - Does it matter if Bob's friend told you about Bob?

Parent – Privacy, Morality, and the Law



- His example:
 - A person who voluntarily divulges all sorts of intimate, personal information about himself to a friend.
 - He says that while that person exercises control over the personal information, it has ceased to be private.
 - The other definitions, he argues, do not allow for this situation, as they would argue the information could still be private.

Parent – Privacy, Morality, and the Law



- Why? Because these theories mistake privacy as a part of liberty, which it is not.
- Thus, he argues, laws that prohibit actions (contraception, abortion, or anything else), do not impact privacy in what a person chooses to do, but rather that person's liberty.

Inness – Privacy, Intimacy, and Isolation



The Decisional View of Privacy

Inness – Privacy, Intimacy, and Isolation



- What is the content of privacy? Intimacy of information defines it.
- Three common considerations:
 - Information-based: the ability to regulate information about ourselves, but can lose privacy w/o losing information.
 - Access-based: the ability to regulate access to ourselves, but doesn't mean private information lost.
 - Decision-based: the ability to regulate decisions about our actions, but not all such decisions are privacy-related.

Inness – Privacy, Intimacy, and Isolation



- Why is the informational definition insufficient?
 - Simply being “information” is not a sufficient condition to be within the scope of privacy.
 - The “intimacy” of the information is what matters.
 - Would “secrecy” be a better consideration?
 - Not inherently positive, covers “non-intimate” information.

Inness – Privacy, Intimacy, and Isolation



- “Information Based” problems, cont’d:
 - Do not require information loss to have loss of privacy.
 - Peeping Tom example: you have not lost information, but you have lost your privacy.

Inness – Privacy, Intimacy, and Isolation



- Access-based privacy:
 - “The state of an agent have control over access to herself.”
 - Does this address the problems with “information-based” privacy?
 - Addresses the Peeping Tom problem.
 - Learning “information” can be seen as the result of access.
 - However, not all access impacts privacy;
 - Non-intimate access: glance in public, etc.

Inness – Privacy, Intimacy, and Isolation



- Constitutional issues seem to go further – about our right to decide to take actions, rather than access to information.
- Does this mean “decisional” privacy goes beyond “access” privacy?
- “Liberty of action” is better name than “decisional”?

Inness – Privacy, Intimacy, and Isolation



- Three problems:
 - 1. “Decisional privacy” involves liberties with different features.
 - 2. Does not explain why we confuse them.
 - 3. Undermines “access-based” privacy.
- So how do we reconcile them?
 - Define them both by way of control over intimate decisions.

Inness – Privacy, Intimacy, and Isolation



- Inness' position is that you cannot focus on any one of these because privacy involves all three areas.
- Rather, she asserts that “the common denominator of intimacy” governs.
- Thus “privacy’s content covers intimate information, access, and decisions.”

Inness – Privacy, Intimacy, and Isolation



- Her conclusion:
 - “Privacy can be defined as the state of an agent possessing control over a realm of intimacy, which includes her decisions about intimate informational access, intimate access, and intimate actions.”