

The Dance of the Seven Veils.

Privacy and its Discourses

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What is Privacy?

- Daniel Solove, *Understanding Privacy*
- ‘A concept in disarray’
- “Any attempt to locate a common denominator for all the manifold things that fall under the rubric of ‘privacy’ faces an onerous choice. A common denominator broad enough to encompass nearly everything involving privacy risks being overinclusive or too vague. A narrower common denominator risks being too restrictive.”
- “Perhaps the quest for a common denominator is a search for the holy grail. What if there is no essence or core dimension of privacy?”

What is Privacy?

- William L. Prosser, “The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff ... ‘to be let alone’.”
- Judith Jarvis Thomson, “Perhaps the most striking thing about the right to privacy is that nobody seems to have any clear idea of what it is.”

What is Privacy?

- Jeff Jarvis, *Public Parts*
- “Do you feel any closer to a definition of privacy? I don’t. I see a confused web of worries, changing norms, varying cultural mores, complicated relationships, conflicting motives, vague feelings of danger with sporadic specific evidence of harm, and unclear laws and regulations made all the more complex by context.”

Yet Isn't It Simple Really?

- OED, “being withdrawn from society or public interest ... avoidance of publicity”
- If we can discuss the *state* of (lack of) privacy independently of our *claims* to it, the *rights* associated with it, our *preferences* about it, our *control* over it, and the *value* of it, could we begin to make more sense?

Example: One Privacy Definition

- “The freedom from unreasonable constraints on the construction of one’s own identity” (Agre & Rotenberg)
- Whole theory about privacy and its value baked into the definition
 - What is reasonable/unreasonable?
 - What about activities that don’t construct an identity?
 - Are there ramifications about the idea that the interference with constructing an identity precedes the construction?
- Why would anyone not want this?

Structure of the Talk

- Privacy as a family of cases
- Sketch of a theory of privacy
- Separating out definition and discourse

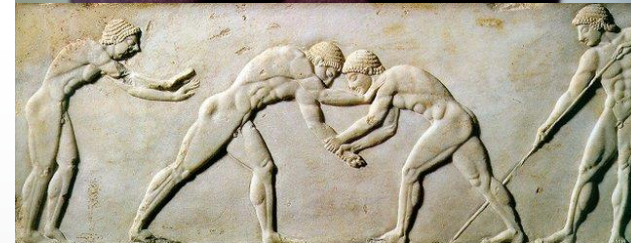
Privacy: A Family Of Cases.

Its Multifarious Nature

- “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. It seems as though everybody is talking about ‘privacy,’ but it is not clear exactly what they are talking about.” (Solove)

Arguments Against Definitions

- “In the continuum between absolutely no access to the self and total access, the important question is ... what degree of access should we recognize as reasonable?” (Solove)
- “While privacy may be a cultural universal necessary for the proper functioning of human beings, its form – the actual rules of association and disengagement – is culturally dependent.” (Moore)
- “Control over who can sense us, is the core of privacy.” (Parker)
 - “We are frequently seen and heard by others without perceiving this as even the slightest invasion of privacy.” (Solove)



Summary of Arguments in *Solove, Understanding Privacy*

- Don't explain different opinions about value
- Don't take into account different meanings
- Don't respect felt experience
- Describe privacy breaches that are not harmful
- Don't recognise individuals' intentions and desires, and who they care about
- Give individuals too much power/control
- Don't give individuals enough power/control
- Don't respect perceptions of what privacy is
- Aren't context-sensitive
- Don't tell us what is reasonable/appropriate
- Don't take account of variance across cultures, explain actual rules of association and disengagement
- Don't take into account what the courts say
- Don't give (practical?) guidance

Some Distinctions Glossed Over

- A matter that concerns only me ~ A matter which is not generally known
- Actual access ~ Potential access
- State ~ Value
- Actual status ~ Aspirations
- Functional role ~ Implementation
- Privacy about which I care ~ Privacy which I am happy to renounce (or don't even notice)
- Individual's interests ~ Society's interests
- Social expectations ~ Courts' rulings and precedents
- Control ~ Concealment
- Secrecy ~ Selective revelation
- Privacy ~ Confidentiality

Outline of a Theory.

Defining Privacy



- We can reconcile these distinctions by a correct understanding of privacy
- A basic common denominator underlying different facets or sub-concepts
- We can focus a definition and defend it against promiscuous criticism by stripping away different discourses
 - Only part of what we say about privacy is relevant to its definition

A Sketch of Privacy

- To do with the boundaries of the self and group
- Comes into play when we entertain first person possessive adjectives
 - My/our
 - That's my/our business
 - My information, my body, my personal space, our property, my image, my family, my thoughts, our intimate secret, my friends, my history, my income, our ambitions, my shame, our meeting, my bodily functions, the skeleton in my closet

Caveat

- This is **NOT** possession as defined by property law
- It's the use of adjectives to mark out territory



Family Resemblance

- Each new urge to mark out territory linguistically will produce an extension to the private sphere
 - A new (facet of the) concept of privacy
 - Includes corresponding transgression
- Required by new practices, technologies, powers, norms, freedoms
 - And opportunities (e.g. differential privacy)
- Likely to evolve in discourse about a perceived problem
 - But needn't
 - Problems will vary across cultures, classes, generations, genders
 - But can be applied universally

Example: Surveillance

- MY behaviour as the subject of attention
- Actual surveillance
- Potential surveillance
- Recorded surveillance

Example: Digital Data Processing

- Data being processed
 - Processing of MY data
 - Processing of MY data automatically
 - Processing of MY data in relation to ME (search, RTBF)
- Sir David Omand: “This involves computers searching through a mass of material, of course, and that might include your and my emails and data on our web traffic, but it is only the legally requested material that ever gets seen by a human being. These computers are not conscious beings: they will only select that which they are lawfully programmed to select.”

Privacy Is ...

- A state of: a boundary of the self or group suggested by first person possessive adjective use
 - Boundary is not being crossed, or transgressed
 - The interior is not being interfered with, or the subject of outside attention
- Relative to others, relative to specific concept(s) of privacy

Definition Does Not Tell Us

- Whether/when privacy is
 - Appropriate, valuable, desired, desirable, legal, enforceable, functional, anti-social, vital for democracy, essential for psychological well-being, good, bad or indifferent
- And quite right too!

Privacy Discourses.

Level 1: Concept

- What concepts of privacy (breaches) govern the relevant space?
 - Different types of breach
- How do we adapt to new practices/technologies?
- Plug your own idea in here
 - A state
 - Value-free



Level 2: Actuality

- Is there a breach of privacy?
 - A matter of fact & measurement
- It does NOT mean
 - Have my rights been breached?
 - Has the law been broken?
 - Has harm been incurred?
 - Have I noticed anything untoward?
 - Has anything happened that I care about?



Level 3: Phenomenology

- What does the breach/non-breach feel like?



- Shame, outrage, creepiness, pride
- Do I even notice?
- Little work at this level
 - Facebook
 - Harzog



Level 4: Preferences

- What do I want?
 - When do I want visibility to my network?
 - When do I want to be concealed?
- What do others want of me?
- What exposure to others do I want?
- Control, consent, privacy markets
- Altman
 - Adjusting/negotiating boundaries
- Acquisti
 - Privacy paradox

Level 5: Norms



“Any of these guys look like the Peeping Tom?”

<https://wordspictureshumor.wordpress.com/2013/03/06/blind-humor/>

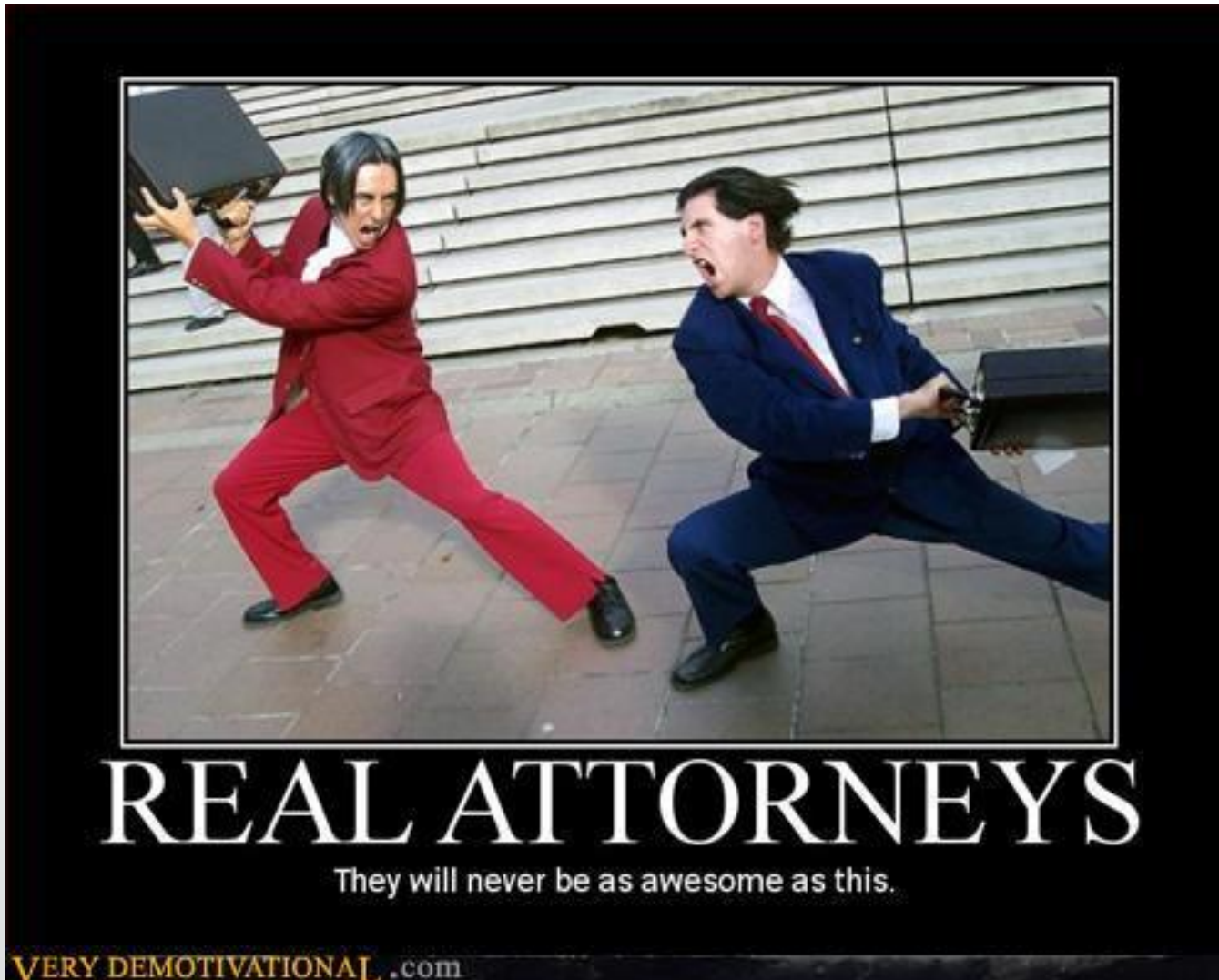
- Regularities, conventions, expectations, ethical codes
- Variations across culture, classes
- Reasonable expectations
- How do norms carry over to new situations?
- Relation to other norms
- Nissenbaum, contextual integrity

Level 6: Law

- What does the law protect?
- Interpretations
- Jurisdiction
- Privacy law
 - Tort, contract, property
 - Rights
- Solove

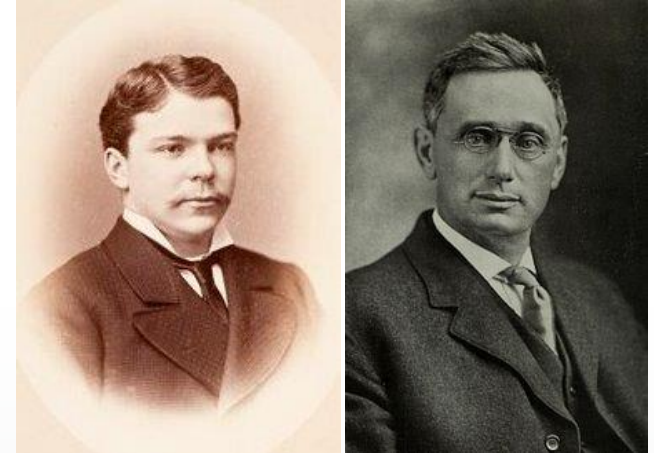


Too Much Law?



The Right to be Let Alone

- Warren & Brandeis, ‘The Right to Privacy’ (1890)
- “The conception of privacy as the right to be let alone ... fails to provide much guidance about what privacy entails” (Solove)
- “It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual” (W&B)



Level 7: Politics & Morality



- What is right/wrong?
 - Value
 - Consequentialist/deontological
- (Nature of) privacy rights
- Political effects
 - Democracy (Westin)
 - Security (Etzioni)
 - Autonomy of the citizen (Rössler)
 - Asymmetrical information flow & power
 - Trust & confidentiality

These Levels Interact

- Privacy breach feels bad because norms are broken
- My preferences may be unreasonable
- Privacy law seeks to outlaw or deter harms
- I want to share information because SNSs make it feel good
- Data sharing habits are incompatible with democracy
- US law supports individual preferences
- EU law realises norms and political outcomes
- Consent implements control in a legal framework
- Markets (e.g. PDSs) implement control in a legal-economic framework

... But Remain Distinct

- If my preferences are unreasonable, that does not mean they are cannot be my preferences
- If EU law supports social norms, that does not mean that norms are the law, or that we can determine the norms by looking at the law
- If a market allows control within an economic framework, that does not mean that whatever I achieve is my preference
- If privacy law legitimises a set of practices, that does not mean that those practices do not breach privacy

Conclusions?

Conclusions

- When we feel we have to use ‘my’ or ‘our’ to describe an area, that indicates a facet of privacy is in play
 - Even if it is not always relevant or interesting
 - A state defined independent of value
- Privacy discourse is on several separate levels
 - Conceptual, empirical, psychological, sociological, legal, moral, political
 - We often confuse these
 - In particular, we pack too much into our definitions
- Privacy is not a legal concept
 - It is regulated, to an extent, by law
- Privacy concept is not in disarray
 - Our discourse may be

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