Defining privacy: the merit of conceptual disarray

Tom Jagtenberg

The bad behaviour of banks, Facebook, and other organisations that use our personal data has made privacy a major contemporary issue in western societies. One suspects that it is actually data theft rather than privacy that is the 'hot button' issue, but nonetheless privacy has emerged as a concept of interest - particularly for those affected by data theft and identity fraud, those interested in social issues and social theory, and anyone interested in privacy as part of their being.

Privacy, I argue in this essay, is a complex and under researched issue. Arguably, in a secular society and secular age, privacy is of fundamental importance. In various ways we all seek it, and find breaches of it abhorrent. Privacy is highly valued in societies that value individual effort and creativity. Privacy is sought in order to reflect and create. In all societies personal space and privacy are issues for social planners. North American legal precedents have hailed privacy as 'an integral part of our humanity', the 'heart of our liberty', and 'the beginning of all freedom' (Daniel Solove, *Understanding Privacy*, Harvard University Press, 2008, p.1).

Yet there is no simple definition that might satisfy all specialists concerned with privacy issues. Lawyers do not agree, academics do not agree, and most individuals would have difficulty defining the term. That is because privacy issues are both physical and 'virtual' concerns, requiring a broad understanding of the word 'privacy'. Our personal space and its availability to others define some issues, and the various uses of our personal 'data' define others. The one set of issues is intensely physical, and the other largely electronic and 'informational' in origin.

In some ways lack of consensus and diversity of meaning is a good thing. Lawyers, for instance, have to approach privacy issues on a case by case basis with reference to legislation and precedents that concern different types of privacy issues: data theft is covered by different laws than, say, a home invasion, or blackmail, or a person exposing himself.

Some situations are not yet defined in law - and the potential diversity of future issues merits particular attention. For instance, if specialists (and their lawyers) designing robots could both design robots that were life-like and define privacy simply they would, with the consequence that rights to privacy might in the future be conferred on robots. Or in the case of those currently sequencing human DNA, if the meaning of privacy could be sufficiently narrowed, then no privacy issues could be pursued (at the expense of companies like Ancestry.com) because there might be no personal data possible.

If simplistic legislation were to be drafted that narrowed the kinds of issues defined as 'private', governments interested in surveillance, or combatting terrorism, or totalitarian control of populations, would certainly find narrow definitions of privacy very useful. After all, governments have a legitimate interest in collecting as much data as possible about their citizens - it is not so long ago that Australian governments sought to introduce an 'Australia Card', and sought

access to our electronic 'metadata'. Appropriate definitions of privacy, and legislation, remain as defences against unwelcome intrusions of governments into our privacy.

There are, however, other issues that arise in the context of the 'conceptual disarray' that is often claimed about definitions of privacy. I would argue that not only are our legal rights best served by this conceptual confusion, political process, and social and political theory, are also well served if there is no clear consensus about pivotal existential issues such as privacy. The nature of personhood, the legitimate authority of spiritual organisations, the nature of gender, ethnicity, or any other socially constructed set of meanings that are adopted as norms and values to guide behaviours, all contain privacy issues and are deserving of continuing debate in any society.

It is noteworthy that this social and cultural relativism does not entail arguing against the primary importance of scientific facts relating to an objective physical and ecological world. Climate change, for example, is not the same kind of issue as the claim to a right of privacy, or transgender status, or religious status - although all three claims may have scientific correlates. These are very different categories of issue compared to climate change.

I go on to tease out the broader context of conceptual confusion about privacy and explore the reasons for this confusion, or 'disarray'.

Professional disarray

It is in the nature of professions competing over intellectual property to be in disarray. Different professions have different objectives, methodologies and education processes. In the case of privacy there are so many competing jurisdictions with different interests, that it is hardly surprising that there be a range of definitions and discussions concerning privacy. Indeed, it is desirable that lawyers, medical doctors and sociologists might have major differences with bankers and advertisers about the need for privacy in particular circumstances.

In practice, despite the general importance of privacy issues, academically rigorous defining of privacy has, however, been largely left in the hands of lawyers, conceptually challenged social scientists, and occasional philosophers. We might note that journalists, as usual, are the least concerned with philosophical difficulties – privacy is always alarming when breached, and that is enough to create sensation and attention in audiences.

In the minds of many academics privacy is often conflated with 'individualism' – that is, ideas that promote individuality at the expense of being social, or being a member of a community. According to sociologists and cultural theorists (who are particularly prone to make this argument), advertisers, and their capitalist employers, are major culprits in the generation of 'individualism'. Indeed, in all market driven societies the idea of being an individual is psychologically important to advertisers, enabling them to appeal to everyone who wants to be unique and also experience pleasure. Advertisers exploit these basic needs, and perversely make 'individualism' a process of conformity to fashion and induced desire. Privacy in that context is often conflated with commercial interests, or ideologies of individualism.

The need for personal privacy is rather more fundamental than the directing of consumer preferences by advertisers. Privacy corresponds with the natural awareness that there is an inner 'space' that is utterly and completely 'mine'. This is borne out in practice because socialisation processes are usually predicated on an individual becoming able to act 'independently' and 'responsibly', knowing that 'I' am not 'you' or any other entity. The awareness of privacy as a state of being not only corresponds with that ability but is a precondition for being able to act as an 'adult'. This awareness precedes all socialisation into particular professions, and precedes different professional interests in privacy issues - so it is interesting that privacy is nonetheless a neglected issue across disciplines and occupations.

One might go so far as to claim that privacy has spiritual significance. In western societies the privacy of the religious confessional still resists the law; in Protestant theology the relationship between an individual and God is essentially private; for Catholics any priest is able to be involved in an individual's relationship with God, so privacy is a somewhat moot point. Of course, in any theology it is possible to 'withdraw' from a relationship with God – but it may not be possible for God to withdraw from any relationship with human beings. Whether any kind of relationship with God might be considered 'private' is, however, another moot point.

By contrast, in secular society, privacy might be considered a consolation for the loss of god - or at least what remains in an individual's relationship with the cosmos once God, or gods, are removed. In all cases, the search for privacy in a secular world is still centred on finding a space that is uniquely and utterly 'mine'. In all cases (secular or non-secular), when our privacy is breached - by physical violence, noise pollution, data theft, or by some other means – our quality of life is diminished, and we may even seek redress.

So, in various ways privacy is difficult to define - in practice, or in theory. It has proven difficult to reconcile the idea of something highly personal with the apparently competing demands of community and society. Even *Oxford Dictionary* definitions ('being withdrawn from society', or 'avoidance of publicity') fail to capture any sense that privacy might be somehow 'integral to our humanity', not to mention rights we might have to 'our' personal data.

If we start from Warren and Brandeis' benchmark discussion in their 1890 essay 'The Right to Privacy' (*Harvard Law Review* 193), in which these two judges define privacy as 'the right to be left alone', it is clear that such a 'right' to privacy will always be a challenge to the idea that an individual ought to participate in society, sharing norms and values and acting towards the common good. Being 'an individual' still challenges those on the left who advocate or seek centralised structures of power and decision-making. As I go on to discuss, this demonization of individualism has always been an ideological ploy to both destabilise capitalism and advance the interests of those advocating communalism, socialism and communism. Such machinations are both confused and confusing – privacy is an issue that exposes much about the dialectic between the individual and society, and demonstrates what it is about being an individual that is important to individuals – without necessarily losing touch with community or society.

All professions (or any regularised occupations) assume some equivalent definition to those offered by the Oxford Dictionary – that privacy is somehow a 'withdrawal' from society. Insofar

that privacy is more fundamental in the lived experiences of individuals - at least, privacy being a 'separation' rather than 'withdrawal' (with all the negative connotations that 'withdrawal' might have) – privacy will remain undervalued, and probably under-appreciated.

Most basically, every human experience is individual and unique – even though these experiences are at the same time socially mediated, socially contexted, and in some way socially constructed. Sex, love and death, for example, are individually experienced, but are utterly dependent upon society for their basic possibility and meaning. It might even seem that privacy ought to be a basic human right - arguably, the innermost essence of being human is private and therefore worthy of protection in law. These are all very hard ideas for those who believe in human rights to be starting points for all valid social theory, or for those who see the destruction of capitalism as the greatest good. In this essay I hope to further ventilate these ideas, in the interest of critical theory and 'common sense'.

Conceptual disarray

Privacy, says legal academic Daniel Solove, is 'a concept in disarray'. In his 2008 multi disciplinary review *Understanding Privacy* (Harvard University Press) he finds the concept is either defined too narrowly or too broadly, and symptomatically lawyers, judges and academics from many different disciplines have failed to capture the concept theoretically, or practically. In Solove's book this disarray is reflected in a multitude of different legal angles. He also suggests that the word *privacy* is actually 'an umbrella term' with a family of meanings depending on particular contexts. He provides the conceptual remedy of 'a taxonomy' – that I go on to discuss. I find 'disarray' fortunate for different reasons – as discussed above, disarray may actually work in the best interests of protecting privacy. More generally, the ability of conceptual indeterminacy to work in the best interests of some social processes, and indeed some human rights, is a proposition that warrants closer scrutiny, but notionally no 'freedom', or right, 'wants' to be too closely defined. Furthermore, intellectual progress depends upon being able to break away from orthodoxy; our rights in law need to be defended on a case by case basis; absolute certainty is not available in empirically based science, or any other empirically based discipline.

It remains an issue whether the supposed 'disarray' surrounding conceptions of privacy is more than 'uncertainty'. In deference to the many academics supporting that claim, we might assume that 'disarray' is indeed the case, and that 'disarray' is particularly uncertain.

However, 'disarray' across disciplines might still appear surprising because privacy is so central to our identity and self-understanding in contemporary western life. Even if we allow that non-western cultures place a different value and emphasis on individual privacy, being an individual human being raises privacy issues in any culture. At the very least, privacy has been of central concern to all western projects of modernity: human rights and the basics of life all involve privacy issues. Work and leisure; family life and house design; sex, love and death - all take meaning in some context of privacy. Even homelessness and poverty have privacy as a central concern. An 'information age' continues to raise privacy issues. So why is the concept in such disarray? Surely there must be some theoretical consensus at some level of analysis?

Well, not really - except at the very broad level of allowing that human beings are 'individuals' in society having expectations of some level of personal safety guaranteed by those in power, and that these individuals will often claim rights, or at least expect laws that protect their person. Of course there are dominant views in different disciplines about the meaning and basis of human rights and even about the undesirability of violence and other breaches of privacy, such as information theft, but search as one may, 'privacy' appears to fall between the cracks that define disciplinary difference and professional practice.

There are some obvious reasons why lawyers might not be able to agree about privacy – the law is, after all, always playing catch-up with technological innovation and cultural change. We pay lawyers to interpret laws and don't really expect them to define the meaning of things. In modern times that is the job of other specialists - including journalists, creative artists, social scientists, priests and philosophers. Or so one might say, except that privacy appears to remain something of a taboo subject.

I can speak most confidently about the mindset of modern sociologists (and related academics), but I should emphasise that I do not want privacy to become too well defined. In that respect I thoroughly agree with Daniel Solove: privacy is too important and too complex to be able to be simply defined. We might be grateful that privacy has avoided the logic chopping arguments of contemporary sociologists and cultural theorists.

As a remedy Solove provides a 'taxonomy' of the various kinds of issues and harms that should concern lawyers; I want to make further cautionary remarks about the nature of being human - cautionary remarks that I hope will appeal to sociologists and cultural theorists.

What would sociologists know?

Sociologists have, since the late sixties, increasingly distanced themselves from the individuality of being human. Apart from the discipline being constitutionally about social phenomena, the slow reculturation of the discipline as a 'broad left' project has de-emphasised scrutiny of what one might call phenomenological interests in what individuals experience at the deepest, or most basic levels. The gaining of human rights, and indeed the emancipation of the human subject from the 'dead hand' of history – that is, from preconceptions about class, gender, race and ethnicity - have required certain kinds of discourses emphasising collective interests and not individual experience of the kind that might reveal privacy as a basic human need. There are, of course many exceptions to this rule; a number of writers and researchers have written about the experiencing subject (for example, some of the work of Anthony Giddens), but the general development of the discipline (including the hiring and firing of sociologists) has been that of a broad left culture in the context of neighbouring specialisms and disciplines – pre-eminently history and political science, social psychology and psychology and political economy and economics, and in recent times 'informatics'. In that constellation of academic and professional activity, privacy tends to have been either ignored or defined in specialist contexts that do not gain wide audiences.

For instance, the *public/private* dichotomy is a favourite trope in recent sociology and cultural theory that casts very limited light on the nature of privacy. There is nothing social that escapes this dichotomy – the social 'dimensions' of class, gender, race and ethnicity, for example, have public and private aspects. We are all constrained by the 'public' processes of law, policing, media reporting and popular opinion that regulate such social processes, but we also have personal views and behaviours that may differ from public consensuses or dogmas. But the meaning of 'private' in this context is very broad, having necessarily to span a vast array of conceptual situations. Yet despite this apparent concern with the processes of being an individual, the individual 'right' to 'privacy' has been at best a theoretical side show for sociologists. Mostly, sociologists have avoided the issue completely because it does not sit easily with the 'emancipatory' projects that have historically defined the discourses of class, gender and race and ethnicity. The individual issue of privacy has, in practice, been assumed to be more germane to other specialisms and disciplines, such as social psychology, psychology and the law and therefore has been excluded from the loftier concerns of sociology.

It is nonetheless surprising, perhaps, that a concept so central to the whole project of modernity be in such 'conceptual disarray'. Yet it is true: lawyers and academics (including sociologists) don't seem to be able to find the essence of the matter. But that is a jolly good thing, as I hope to show - for reasons other than those canvassed widely in the literature. Basically, if it were possible to define the term once and for all, or at least persuasively, our privacy would be seriously compromised by lawyers, commercial interests, criminals, technocrats, and any person seeking to benefit from the control afforded by a clear understanding of the essence of our being. For instance, as mentioned earlier, we might in the future have to allow robots the right to privacy because they have become sentient. Most lawyers would relish the task of forging a new legal frontier. Even today, if information experts could work out a way of surreptitiously making us complicit with advertisers, information technologists such as Facebook and Apple, bankers, and any perveyor of a commodity, they would- as confirmed time and again by the varying degrees of success of such projects.

Solove's solution is 'pragmatic' as he defines the term, invoking Wittgenstein, Dewey and other theorists who are able to not define anything too concretely. Privacy, in this view, is such a broad concept that it is most appropriate to think of it as an 'umbrella' concept – following Wittgenstein, the word takes meaning as 'a family' of resemblances. This means that all words become meaningful in particular contexts of use, with the consequence that 'privacy' (like any word) can have no single meaning. This is particularly obvious in the case of such a big and general word. Solove's 'mapping' of usages leads him to a 'taxonomy' of usages organised as four categories of harms and situations in which privacy may be breached: *information collection*, *information processing*, *information dissemination* and *invasion*. This taxonomy is particularly oriented towards lawyers; the kind of understanding he seeks to generate is one that will aid the crafting of laws and policies that address all different types of privacy issues (cf. 2008, p. 2).

I think there are deeper reasons why privacy is a neglected topic. There is still a widespread reluctance to provide 'too much information' about many of the physical phenomena we might deem as private. Hygiene, sexual practices, nudity, and extreme violence, for example, are subjects typically avoided in most processes of communication; the phenomena are often subject to censorship in the media, and they are forbidden topics in 'polite' society. All religious society is particularly prurient about such topics. Not only are these phenomena generally 'private', as opposed 'public', they are still, I would argue *taboos*, or as close to being taboo that is possible in media dominated societies that promote 'spectacle' as relatively 'normal'. This might well explain why there remains a general reluctance on the part of academics to discuss the details of privacy matters that are so indelicately physical. Medical practitioners, and some artists and practitioners of 'cultural studies' aside, it is not considered normal to have a keen interest in all of the phenomena sequestered away as 'private'. That is, there is more to the matter than conceptual disarray in disciplines fettered by divisions of academic labour, and professions in disarray because of their different interests.

Privacy in Australian law

In Australia there are many laws that bear on our privacy; for instance, laws that defend our personal safety and security, and laws that defend our reputation. However, it was only in 1988 that privacy was named in the title of a legal act: the Privacy Act 1988. In 2008 the Australian Law Reform Commission conducted a review of Australian privacy law – its recommendations include what is now known as the Australian Privacy Principles. This advice was taken up and implemented by The Australian government via the Privacy Amendment (Enhancing Privacy Protection) Bill 2012. These principles relate to anonymity and pseudo-anonymity, direct marketing and the use of personal information – such as its management, collection, security, use of, access to and disclosure of personal information (for more detail see Wikipedia, 'Privacy', 2018).

There are other laws that provide privacy protection in Australia, such as the Telecommunications Act, 1997, Spam Act 2006, and the Do Not Call Register 2009; there are also various State laws that apply to surveillance, health care data, and other personal information. However, as everyone with a personal computer or smart phone will realise, laws that might apply to electronic data are far distant from the front line of electronic device usage. Legislation that is powerful enough to protect us against the exploitation of new technology by providers and data harvesters will always lag behind innovation. Government enquiries are always playing catch-up with companies like Facebook, Google, or Apple.

It is worth noting that even the more stringent legislation about privacy that has been recently enacted in the European Union does not sufficiently challenge the basic modus operandi of advertising companies like Facebook. These new laws (the General Data Protection Regulation) have been described as so complicated that no one understands them: 'the new regulation is intentionally ambiguous representing a series of compromises. It promises to ease restrictions on data flows while allowing citizens to control their personal data, and to spur European growth while protecting the right to privacy. It skirts over possible differences between current and future technologies by using broad principles' (Alison Cool, 'Europe's

data protection law is a big mess', *New York Times International Edition*, May 17, 2018, p. 13). She refers to the variety of different historical experiences of European countries about data collection as a cause of the problem: 'Germans recalling the Nazi's deadly efficient use of information are suspicious of government or corporate data collection of personal data; people in Nordic countries, on the other hand, link the collection and organization of data to the functions of strong welfare systems.' In short, the new law is 'a mess'.

In these circumstances, Solove's taxonomy applies well. Further, it appears that Australian case law and legal precedent are paralleled by American developments, although that is a judgement best left to Australian lawyers. There is, however, at least one major shortcoming in Solove's work. His taxonomy overemphasises privacy as being primarily about 'information' at the expense of more existential issues, specifically the nature of individuality in a social field. That is, Solove's model, like the journalism of contemporary privacy issues, is essentially an information processing model and avoids making claims about the experience of being human, or the nature of being human.

The privacy issues that have become prominent in recent times, like the unauthorised dissemination of personal data by Facebook, and like the 'privacy protections' of bankcards and insurance policies, are all about harms that may arise because of flows of information. They are not necessarily about our need for protection from violence, or protection from noise abuse, or about our basic spiritual condition in a secular age. Even the abuse of children by clergy, for instance, is not publically discussed as a privacy issue, although of course it is. The main issues raised are about abuses of power and trust, and the way lies and deceits have enabled privileged men to avoid punishment. It is assumed that the legal means to pursue such matters is the deepest problem, rather than the assumed right of priests to invade personal privacy in the interests of salvation, or other religious reasons. That assumption deflects concerns about the right of religious institutions and organisations to routinely invade privacy. Naturally enough, the 'rights to privacy' of children, and even consenting adults, is a taboo subject, even today. In a secular society, politicians have a very unhealthy regard for the votes of religious orthodoxy. The negotiation of taboos is a carefully enacted, but insufficiently discussed, part of all professional behaviour.

In conclusion

I want to conclude by making two further qualifications: it is not desirable to define privacy in absolute terms because of the harm it might create; and, taboos have a very positive role to play in 'normal' society.

First, because criminality depends upon privacy, it would be obviously unacceptable if criminals were able to find protection because of a basic right to privacy. It is therefore more sensible that privacy be protected by a patch-work of law and precedent rather than by any charter of human rights.

Further, because taboo subjects have evolved as part of the regulatory systems in all societies, they are certainly not arbitrary in their determination. Nor are they simply repressive, or oppressive, in any 'open society'. They are subjects that do need regular visitation by all professions and academic discourse, and they do need to be named by journalists (not that journalists suffer from over-prurience, generally speaking).

However, privacy is so broad and complex in practice that it needs to remain protected from professionals by conceptual disarray, and by the endless work of lawyers. Taboo subjects should also remain endlessly fascinating.

Tom Jagtenberg
27 October, 2018

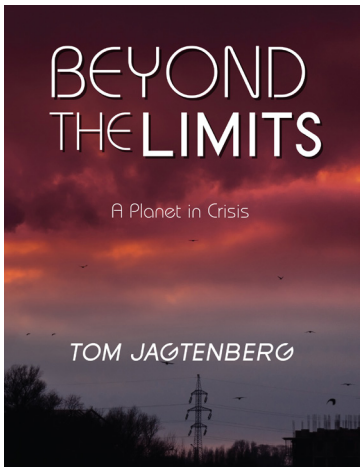
About Tom Jagtenberg

Tom has a longtime interest in the natural world and concern about its decline. His interests, whilst being inter-disciplinary, have always had a focus on nature and the environment.

He worked as a sociologist for thirty years at Wollongong University (where he was a Senior Lecturer) and Southern Cross University (where he was an adjunct research fellow). He is a published author of books and articles about the environment and related cultural fields. Tom has qualifications in science, engineering and sociology – a BE (Chemical and Fuel Engineering, Hons 1, UNSW), an MSc (Liberal Studies in Science, Manchester University) and a PhD (Sociology, University of Wollongong).

Since Tom's student days he has been concerned with the representation of nature in disciplinary fields as diverse as science, sociology, cultural studies and communication studies, natural medicine and political life. He has been a strong critic of the exclusion of non-human interests from academic fields and political parties. As his latest book suggests even Green political parties are limited in the extent to which they can be advocates for other species, their habitats, and even human environments.

Tom retired from academic life to live in Northern New South Wales with his partner. They chose the Northern Rivers region because of its strong ecologically focused community and beautiful environment.



Beyond the Limits

ISBN-13-978-0992560287

Cilento Publishing

No matter how hard politicians try to broker agreements about curbing greenhouse gas emissions there are deeper obstacles that would seem to guarantee Planet Earth's ecological decline.

Beyond the Limits is a hard-hitting and probing analysis of the underlying problems that define the possibilities of any response to the problem of climate change.

All profits from sales will be donated to the buy back charity Bush Heritage Australia