Protecting Personal Information

The Right to Privacy Reconsidered

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Personal Information and Privacy

The traffic in data is at the heart of our digital world. The recent Facebook controversies are merely one instance of the extent to which personal information has become the lifeblood of modern technology. It is self-evident that our 'privacy' is threatened by the relentless advances in a host of intrusive activities that includes surveillance, genetics, biometrics, GPS, and anti-terrorist measures. The torrent of private information online as a consequence of the intensification of blogs, social networking sites, Twitter, and other devices of the information age continues unabated. And the appetite for gossip and 24-hour rolling news generates ever-greater sensationalism and 'fake news'.

The Internet spawns risks that were inconceivable even 20 years ago. The methods by which data are collected, stored, exchanged and used have been transformed, and consequently so has the nature of the threats to 'privacy'. At the same time, traditional cultural activities such as photojournalism and the preservation of our collective memory are threatened by a notion of privacy that is both distorted and excessively expanded.

The quotation marks around 'privacy' are intentional. We hope to establish that the use of this popular term, though entirely appropriate as a general description of the interest that warrants protection, is irrevocably nebulous, and fails to provide – for legal purposes – an adequately precise definition of the concern that cries out for effective protection.[1]

In the ensuing chapters we attempt to show why the law ought to eschew the many conceptual and doctrinal ambiguities of 'privacy', by recognising that it is the protection of personal information which is at the core of our disquiet about the increasing frailty of this essential value. The law must therefore concentrate its efforts on the protection of personal information, which we define to include

[1] For previous attempts to demonstrate this failure, see R Wacks, *Personal Information: Privacy and the Law* (Oxford: Clarendon Press, 1989 and 1993); R Wacks, 'The Poverty of "Privacy"' (1980) 96 *Law Quarterly Review* 73; R Wacks, 'Privacy Reconceived: Protecting Personal Information in a Digital World' in Eli Lederman and Ron Shapira (eds), *Law, Information and Information Technology* (The Hague: Kluwer Law International, Law and Electronic Commerce series, 2001) 75–97; R Wacks, 'What has Data Protection to do with Privacy?' (2000) 6 *Privacy Law and Policy Reporter* 143, R Wacks, 'Privacy in Cyberspace: Personal Information, Free Speech, and the Internet' in Peter Birks (ed), *Privacy and Loyalty* (Oxford: Clarendon Press, 1997) 93–112; R Wacks, *Privacy and Media Freedom* (Oxford: Oxford University Press, 2013); R Wacks, *Law, Morality, and the Private Domain* (Hong Kong: Hong Kong University Press, 2000), Part Two.

those facts, communications or opinions which relate to an individual and which it would be reasonable to expect him or her to regard as intimate or sensitive and therefore to want to withhold, or at least to restrict their collection, use, or publication. 'Facts' are, of course, not restricted to textual data, but embrace a wide range of data that can be extracted from numerous sources including images and DNA, as well as from technologies that make available other genetic and biometric data from fingerprints, face and iris recognition, and the ever-increasing types of information about us that technology is able to reveal, use, and misuse by analysing (or purporting to analyse) our behaviour in both its exterior appearance and internal origins.

It is the control of personal information that is central to any workable legal conception of the right to privacy.

Attempts to devise neutral and instrumental definitions of privacy overlook the fundamental concerns that lie at the heart of any meaningful concept of privacy. So, for example, to argue that it is a 'myth' that privacy only matters in relation to critically sensitive, important information and not for trivial, mundane or 'unimportant' information or 'low value' correspondence[2] is to drain privacy of its significance and deny its claim to legal protection as a right beyond that provided by data protection legislation (which regards personal information as any information about an individual).

It may be objected that perfect clarity is never attainable, or that the interpretive skills of judges obviate the need for impeccable precision. But, as we hope to demonstrate, the imprecision that attends the law's treatment of 'privacy' not only generates misunderstanding and ambiguity, but contributes to the adulteration of this fundamental right. Like software coding, difficulties arise when the same variable is assigned different values; the software will not work. Similarly, the law – and, in particular, the recognition and enforcement of a legal right – is undermined by vague or unduly capacious language.

This is the unfortunate fate of the legal concept of 'privacy', which has developed into an umbrella word whose sprawling scope weakens its protection. To inflate rights is often to devalue them. Privacy has grown into a meta-concept that extends beyond its legal formulation. For instance, the title of Article 8 of the European Convention on Human Rights (ECHR) reads 'Right to respect for private and family life' while Article 7 of the Charter of Fundamental Rights of the European Union (hereafter EU Charter) is similarly entitled 'Respect for private and family life'. Yet, curiously, the EU Directive 95/46 (Protection of Personal Data) Article 1 declares:

> In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their *right to privacy* with respect to the processing of personal data (emphasis added).

[2] Paul Bernal, *The Internet, Warts and All: Free Speech, Privacy and Truth* (Cambridge Intellectual Property and Information Law) (Kindle Location 5782) (Cambridge: Cambridge University Press, 2018, Kindle Edition).

In other words, the Directive [now superseded by the General Data Protection Regulation (GDPR)] seeks to protect a right (the right to privacy) that is absent from the EU Charter of Fundamental Rights!

Article 8 of the ECHR reads:

> Right to respect for private and family life
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The notion of 'private and family life' is excessively wide. What could reasonably lie outside it? My 'private life' is, in effect, my existence, my being.[3] This provision is as ambiguous and indeterminate as the 'right to be let alone' that Warren and Brandeis invoked to describe the right to privacy in their celebrated essay,[4] which, as discussed below, is the principal source of the confusion and incoherence.

Nor does Article 8 protect 'privacy' *stricto sensu*. Indeed, if it protects 'privacy' at all, it protects the right to '*respect*' for privacy. Disconcertingly, the European Court of Human Rights has construed it to include 'physical and psychological integrity',[5] protection of one's environment,[6] identity,[7] and personal autonomy.[8] The reach of the notion of 'private life' contained in Article 8, thus extends well beyond the putative protection of privacy, let alone personal information.

The situation is no better in the United States, which evinces the same 'Baron Münchhausen bootstrapping' state of affairs.[9] While there are statutes that proclaim 'privacy' in their title, such as the Privacy Act of 1974,[10] the term does not appear in the United States Constitution. The foundation for a good deal of privacy protection is the Fourth Amendment which safeguards 'The right of the

[3] Notwithstanding this expansive and nebulous phrase, the European Court of Human Rights has sporadically ruled against an applicant: in *Botta v Italy* Application 21439/93, (1998) 26 EHRR 241, the Court rejected a claim that the failure to provide disabled persons with adequate physical access to a beach violated Article 8.

[4] Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193, 196.

[5] *YF v Turkey* Application 24209/94, (2004) 39 EHRR 34, [33]; *Pretty v United Kingdom* Application No 2346/02, (2002) 35 EHRR 1 61].

[6] *Hatton v United Kingdom* Application No 36022/97, (2003) 37 EHRR 28, [119], including the right to sleep.

[7] *Pretty v United Kingdom* Application No 2346/02, (2002) 35 EHRR 1, [61].

[8] *Goodwin v United Kingdom* Application No 28957/95, (2002) 35 EHRR 523, [90].

[9] Actually, the fictional character created in 1785 by German writer Rudolf Erich Raspe lifted himself by pulling his pigtail and not his bootstraps. Nevertheless he has become the symbol of one who attempts an impossible self-executing task.

[10] Privacy Act of 1974 (5 USCA 552a).

people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures'.[11]

It is worth mentioning that the German Constitutional Court has 'discovered' a new basic right in the German Basic Law; citizens have a 'fundamental right to the confidentiality and the integrity of information technology systems'.[12]

Furthermore, the situation has been rendered even more vexing by the advent of data protection law and regulation which, as will become evident in the next chapter, is increasingly regarded as synonymous with privacy.

In this book, we offer an alternative analysis. We seek to demonstrate what privacy is *not*; to illustrate that many of the purported instances of privacy-related conditions or claims should be excluded from any practical legal conception of the right. By eliminating these mistaken applications of privacy to the specific conduct or activities described, what remains ought to provide a more accurate concept of privacy and, we trust, a more effective means by which to protect this fundamental right.[13]

While technology is re-shaping traditional legal concepts, an often neglected factor is the impact of the social networking platforms on both the creation of a new right and the meaning of a traditional right. The networking ability of individuals is available to anyone who can operate a smartphone. User-generated content and social networking sites enhance the capacity to engineer social, political, and legal change. The fate of 'privacy' protection is no less susceptible to these developments. For example, we contend that 'photo/socio-journalism', also known as 'street-photography' (documenting slices of life by candid pictures), does not

[11] Other Amendments have also been deployed by the Supreme Court in its quest to protect 'privacy', including the First, Ninth, and Fourteenth Amendments. The 1993 Russian constitution does not include a specific section on the right of privacy, but merely mentions the word 'тайну' in Articles 23 and 29. But 'тайну' can be translated in various ways, with different nuances ranging from 'privacy' to 'secret'. Neither the Italian, nor the French or German constitutions contain a word that easily fits within the vague 'privacy' definition – and the same can be said for many other countries. This is chiefly because 'privacy' is an English word and national legal systems are expressed in their national languages that can contain similar – or perhaps the same – ideas but formalised in a different way, with different words. The Constitution of South Africa includes, in Section 14, the protection of the right to privacy. The shortcomings of both its phraseology and judicial interpretation are briefly canvassed in Chapter 8 of this volume.

[12] Federal Constitutional Court judgment of 27 February 2008: 1 BvR 370/07, 1 BvR 595/07, BVerfGE 120, 274. According to the Federal Constitutional Court, the general right to privacy ('informational self-determination') arising from Article 2(1) in conjunction with Article 1(1) of the Basic Law also includes a fundamental right to ensure the confidentiality and integrity of information technology systems.

[13] See, for an example of a similar approach, the dictum of Supreme Court Justice Potter Stewart: 'I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand … and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.' *Jacobellis v Ohio*, 378 US 184 (1964); https://supreme.justia.com/cases/federal/us/378/184/. At a more abstract level, 'privacy' is similar to the Kantian noumenon, a 'legal idea in itself' therefore not directly knowable except in its phenomenical perception as constructed by the chaotic turbulence of the interaction among media, politics and social behaviour made possible by the (now) ubiquitous use of the Internet.

infringe 'privacy': see Chapter six. Nor is 'privacy' necessarily violated when a court, following exacting legal procedures, permits the law enforcement authority to eavesdrop upon the suspect's communications.

We do not therefore offer a taxonomy of the different meanings assigned to 'privacy'. This subject has, of course, provided a fertile field of research for philosophers, social scientists, and lawyers. And we resist the temptation to examine or question the immense literature that continues to emerge at a fairly alarming rate. Our purpose is different. We refrain from taking issue with the countless scholars that have contributed to this seemingly interminable debate. Instead we want to improve the legal protection of the information we most value and cherish. By safeguarding sensitive or intimate information, we defend a fundamental right that vouchsafes our individual freedom and personal identity.

I. The Genesis

Hailed as 'the outstanding example of the influence of legal periodicals upon American law'[14] the famous article of 1890 gave birth to the legal recognition of privacy in the United States. Written by Samuel D Warren and Louis D Brandeis, their commentary was published in the influential *Harvard Law Review*.[15] The two lawyers, Warren, a Boston attorney and socialite, and Brandeis, who would be appointed to the Supreme Court in 1916, incensed by the original paparazzi and so-called 'yellow journalism', wrote what is often characterised as the most influential law review article ever published.[16]

Their essay denounced the press for their impudence, and contended that their conduct constituted an invasion of their privacy the right to which, they claimed, was inherent in the common law. Drawing upon decisions of the English courts relating to, in particular, breach of confidence, property, copyright, and defamation, they maintained that these cases were merely instances and applications of a general right to privacy, of the 'right to be let alone.' The common law, they asserted, although under different forms, protected an individual whose privacy

[14] WL Prosser, 'Privacy' (1960) 48 *California Law Review* 383.

[15] SD Warren and LD Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193; See, too, WF Pratt, 'The Warren and Brandeis Argument for a Right to Privacy' (1975) *Public Law* 161; H Kalven, 'Privacy in Tort Law: Were Warren and Brandeis Wrong?' (1966) 31 *Law & Contemporary Problems* 326; DL Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort' (1983) 68 *Cornell Law Review* 297. This section draws on parts of Chapter 3 of R Wacks, *Privacy and Media Freedom* (Oxford: Oxford University Press, 2013).

[16] The essay 'enjoys the unique distinction of having theoretically outlined a new field of jurisprudence': D Larremore, 'The Law of Privacy' (1912) 12 *Columbia Law Review* 693. It is usually claimed that the catalyst for their annoyance was that the press had spied on Warren's daughter's wedding. But this is improbable since, in 1890, she was six years old! The more likely source of their anger was a series of articles in a Boston high-society gossip magazine, describing Warren's stylish dinner parties.

was invaded by snooping. In so doing the law recognised the significance of the spiritual and intellectual needs of man. They declared:

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasion upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.[17]

The common law, they reasoned, has developed from the protection of the physical person and corporeal property to the protection of the individual's '[t]houghts, emotions and sensations'.[18] But as a result of threats to privacy from recent inventions and business methods and from the press, the common law needed to go further. An individual's right to determine the extent to which his thoughts, emotions, and sensations were communicated to others was already legally protected but only in respect of authors of literary and artistic compositions and letters, who could forbid their unauthorised publication. And though English cases recognising this right were based on protection of property, in reality they were an acknowledgement of privacy, of 'inviolate personality.'[19]

It did not take long before their thesis was tested in court. The plaintiff complained that her image had been used without her consent to advertise the defendant's merchandise. She was portrayed on bags of flour with the dire pun, 'Flour of the family.' A majority of the New York Court of Appeals rejected the Warren and Brandeis opinion, ruling that the privacy argument had 'not as yet an abiding place in our jurisprudence, and … cannot now be incorporated without doing violence to settled principles of law'.[20] The minority, however, was persuaded; Gray J declaring that the plaintiff had a right to be protected against the use of her image for the defendant's commercial advantage: 'Any other principle of decision … is as repugnant to equity as it is shocking to reason.'[21]

The decision was not popular[22] and led to the enactment by the State of New York of a statute rendering unlawful the unauthorised use of an individual's name or image for advertising or trade purposes.[23] A mere three years later in a case involving similar facts, the Supreme Court of Georgia approved of the judgment of Gray J.[24] The Warren and Brandeis argument, 15 years after its publication,

[17] Warren and Brandeis, n 15 above, 196.
[18] ibid, 195.
[19] ibid, 205.
[20] *Roberson v Rochester Folding Box Co* 171 NY 538, 64 NE 442 (1902) 447.
[21] ibid, 450.
[22] A criticism of the judgment by the *New York Times* seems to have been the cause of one of the majority judges taking the unusual step of defending the decision: O'Brien, 'The Right of Privacy' (1902) 2 *Columbia Law Review* 437.
[23] NY Sess Laws (1903) ch 132, paras 1–2, subsequently amended in 1921, NY Civil Rights Law, paras 50–51.
[24] *Pavesich v New England Life Ins Co*, 50 SE 68, 68 (Ga 1905).

had prevailed. Following that historic decision, most American States have incorporated the 'right to privacy' into their law.

Over the years the American common law continued to expand its protection of privacy. In 1960, Dean Prosser, a leading tort expert, expounded the view that the law now recognised not one tort, 'but a complex of four different interests … tied together by the common name, but otherwise [with] nothing in common.'[25] He outlined their nature as follows:

1. Intrusion upon the plaintiff's seclusion or solitude or into his private affairs.

The wrongful act consists in the intentional interference with the plaintiff's solitude or seclusion. It includes the physical intrusion into the plaintiff's premises, and eavesdropping (including electronic and photographic surveillance, 'bugging' and telephone-tapping). Three requirements must be satisfied:[26] (a) there must be actual prying (disturbing noises or bad manners will not suffice); (b) the intrusion must offend a reasonable man; and (c) it must be an intrusion into something private.

2. Public disclosure of embarrassing private facts about the plaintiff.

Three elements of the tort are indicated by Prosser: (a) there must be publicity (to disclose the facts to a small group of people would not suffice); (b) the facts disclosed must be private facts (publicity given to matters of public record is not tortious); and (c) the facts disclosed must be offensive to a reasonable man of ordinary sensibilities.

3. Publicity which places the plaintiff in a false light in the public eye.

According to Prosser,[27] this tort normally arises in circumstances in which some opinion or utterance (such as spurious books or views) is publicly attributed to the plaintiff, or where his picture is used to illustrate a book or article with which he has no reasonable connection. The overlap with the tort of defamation is at once apparent and, though the false light 'need not necessarily be a defamatory one',[28] it is submitted that an action for defamation will invariably lie in such cases. The publicity must be 'highly offensive to a reasonable person'.[29]

4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Under the common law tort, the advantage derived by the defendant need not be a financial one;[30] it has, for instance, been held to arise where the plaintiff was

[25] WP Keeton, DB Dobbs, RE Keeton and DG Owen (eds), *Prosser & Keeton on, the Law of Torts*, 5th edn (St Paul MN, West Publishing Co, 1984) 855.
[26] *Prosser & Keeton*, n 25 above, 856–67; *Restatement*, para 652 D.
[27] *Prosser & Keeton*, n 25 above, 863–64; *Restatement*, para 652 E.
[28] ibid.
[29] *Restatement*, para 652E, comment b.
[30] *Prosser & Keeton*, n 25 above, 853; *Restatement*, para 652C, comment b.

wrongly named as father in a birth certificate. The statutory tort (which exists in several States) normally requires the unauthorised use of the plaintiff's identity for commercial (usually advertising) purposes; the New York statute,[31] upon which most of the current legislation is modelled, confines itself to advertising or 'purposes of trade'.[32] The recognition of this tort establishes what has been called a 'right of publicity'[33] under which an individual is able to decide how he wishes to exploit his name or image commercially. It is difficult to see how the protection of this essentially proprietary interest is connected with the protection of even a general 'right to privacy'.[34] It is only the torts of 'intrusion' and 'public disclosure' that 'require the invasion of something secret, secluded or private pertaining to the plaintiff'.[35] It might therefore be argued that the torts of 'appropriation' and 'false light' are not properly conceived of as aspects of 'privacy'.[36]

Some view this fourfold segregation as misconceived because it undermines the Warren and Brandeis axiom of 'inviolate personality' and neglects its moral basis as an aspect of human dignity.[37] The classification has nevertheless assumed a prominent place in American tort law, although, as anticipated by the jurist Harry Kalven, it has to a large extent ossified the conception into four types:

> [G]iven the legal mind's weakness for neat labels and categories and given the deserved Prosser prestige, it is a safe prediction that the fourfold view will come to dominate whatever thinking is done about the right of privacy in the future.[38]

The vicissitudes of these four torts have been charted in a gargantuan welter of academic and popular literature.[39] Almost every advanced legal system has, to a greater or lesser extent, sought to recognise various aspects of privacy, not always with clarity or consistency.[40]

[31] New York Civil Rights Law 1921, Titles 50–51.

[32] This has been widely defined; see eg, *Spahn v Julian Messner, Inc* 23 App Div 2d 216; 260 NYS 2d 451 (1964).

[33] MB Nimmer, 'The Right of Publicity' (1954) 19 *Law and Contemporary Problems* 203; Kalven, n 15 above, 331.

[34] See RC Post, 'Rereading Warren and Brandeis: Privacy, Property, and Appropriation' (1991) 41 *Case Western Reserve Law Review* 647.

[35] *Prosser & Keeton*, n 25 above, 814.

[36] 'Its splendid pedigree notwithstanding, false light has proved in practice to illuminate nothing. From the viewpoint of coherent first amendment theory, it has served to deepen the darkness', DL Zimmerman, 'False Light Invasion of Privacy: The Light that Failed' (1989) 64 *New York University Law Review* 364, 453.

[37] EJ Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *New York University Law Review* 962.

[38] H Kalven, 'Privacy in Tort Law: Were Warren and Brandeis Wrong?' (1966) 31 *Law & Contemporary Problems* 326, 332.

[39] Several of the most significant – and influential – articles may be found in R Wacks (ed), *Privacy.* Vol I: *The Concept of Privacy*; Vol II: *Privacy and the Law*, The International Library of Essays in Law and Legal Theory (London/Dartmouth/New York: New York University Press, 1993).

[40] They include Austria, Canada, China, Taiwan, Denmark, Estonia, France, Germany, Holland, Hungary, Ireland, India, Italy, Lithuania, New Zealand, Norway, the Philippines, Russia, South Africa, South Korea, Spain, Thailand, and the majority of Latin American countries.

II. Defining 'Privacy'

A satisfactory definition of privacy continues to elude commentators. Alan Westin famously treats privacy as a claim: the 'claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others'.[41] But this miscarries as a definition since it includes the use or disclosure of *any* information about an individual. Moreover, an association of privacy with what might be called naked or general control means that we lose privacy when we are prevented from exercising control, even if, for some reason, we are unable to disclose personal information. Similarly, when we voluntarily disclose personal information, do we really lose our privacy? We are exercising rather than relinquishing control.

In short, this sense of naked control fails adequately to describe privacy; for while we may have control over whether to disclose information, it may, of course, be acquired by other means. If, however, control is meant in a stronger sense (namely that to disclose information, even voluntarily, constitutes a loss of control because we have lost the means to restrain the broadcasting of the information by others), it describes the potential for, rather than the actual, loss of privacy.

In other words, treating privacy as broad-spectrum control (or autonomy), assumes that it concerns our freedom to choose privacy. But, as pointed out, we may choose to abandon our privacy; in such a case a control-based definition relates to the question of the nature of our choices rather than the manner in they are exercised.

Another approach is to describe the characteristics of privacy itself. But this is always contentious. One perspective is that privacy consists of 'limited accessibility': a cluster of three related but independent components: *secrecy* – information known about an individual; *anonymity* – attention paid to an individual; and *solitude* – physical access to an individual.[42] It claims that we lose our privacy when others obtain information about us, or pay attention or gain access, to us. This analysis is said to possess four advantages. First, it is neutral, providing an objective identification of a loss of privacy. Secondly, it exhibits the coherence of privacy as a value. Thirdly, by identifying the invasions warranting legal protection, it demonstrates the utility of the concept in legal contexts. Finally, it includes 'typical' violations of privacy and eliminates those issues which, as argued above, although often regarded as privacy questions, are best viewed as moral or legal issues in their own right (noise, odours, prohibition of abortion, contraception, homosexuality, and so on).

However, even this perceptive analysis is problematic. In its pursuit of a neutral definition of privacy, it rejects definitions that are based on the attributes of the information involved, as presented in these pages; namely that the core of the

[41] Alan F Westin, *Privacy and Freedom* (New York: Atheneum, 1967) 7.
[42] Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89 *Yale Law Journal* 412.

concept and the right to privacy is the use or misuse of information that is 'private' in the sense of being intimate or related to the individual's identity. If a loss of privacy occurs whenever *any* information about us becomes known (the secrecy component), the notion is significantly attenuated. It is a contortion to describe *every* instance of the unsolicited use of information as a loss of privacy. Some limiting or controlling factor is required. The most acceptable factor is arguably that the information be 'personal'. To maintain that whenever we are the subject of attention or when access to us is obtained we necessarily lose privacy is to strip our anxiety about our privacy of an important part of its significance. Being the subject of attention or being subjected to uninvited intrusions upon your solitude are offensive in their own right, but our concern about privacy in these situations is strongest when we are conducting activities which we would typically regard as private.

A further difficulty is that disputes about the meaning of privacy are advanced from essentially dissimilar premises. For example, when privacy is described as a 'right', issue is not really joined with those who regard it as a 'condition'. The former is generally a normative statement about the need for privacy (however defined), while the latter is merely a descriptive statement about 'privacy'. Furthermore, assertions about the attraction of privacy tend to confuse its instrumental and inherent value: privacy is considered by some as an end in itself, while others perceive it as a means by which to safeguard other social ends such as creativity, love, or emotional release.

Yet another contention is that by defending the values underlying privacy (property rights, human dignity, protection against discrimination or against the infliction of emotional distress, and so on), we might obviate the need to debate the legal protection of privacy. This reductionist position seriously weakens the conceptual distinctiveness of privacy.

III. Privacy and Personal Information

The alternative proposed here is, without adulterating the importance of privacy as a fundamental right, to identify the specific problems that generate our apprehensions. While the original archetypal complaints concerned what the American law calls 'public disclosure of private facts' and 'intrusion upon an individual's seclusion, solitude or private affairs',[43] contemporary anxieties naturally relate to the collection and misuse of computerised personal data and metadata, and other issues associated with our digital society. They share the need to limit the degree to which private facts about us are published, intruded upon, or generally misused.

[43] See section II above.

The approach advanced in these pages gives rise to two basic questions. First, what is 'personal' and, secondly, under what conditions is a subject to be regarded as 'personal'? Is a matter 'personal' by virtue merely of the assertion that it is so, or are there matters that are inherently personal? To declare that our political views are personal is contingent upon certain norms which forbid or restrict queries into, or unapproved accounts of, such opinions. It may, however, suffice to invoke the norm that entitles us to keep our views to ourselves. These norms are obviously culture-relative as well as mutable. There is unquestionably less reticence in most modern communities with regard to several aspects of private life than characterised societies of even 50 years ago. The age of social media has dramatically transformed attitudes towards revealing the most intimate facts.

Any definition of 'personal information' must include both the nature of the information and the wish to control it. The notion of 'personal information' is therefore both descriptive and normative. Personal information includes those facts, communications, or opinions which relate to us and which it is reasonable to expect we would consider intimate or sensitive, and therefore want to withhold, or at least to control access to them or their collection, use, or circulation.

'Facts', as mentioned, are not, of course, confined to textual data, but encompass a wide range of information, including those extracted from images, DNA, and other genetic and biometric data such as fingerprints, face and iris recognition, and the constantly growing categories of information about us that technology is able to reveal and exploit.

IV. A Constitutional Right

For some time these four torts endured as the primary means by which the American law protected privacy in different forms. They were also, more or less, the boundaries of the constitutional protection of privacy. The main concern of Warren and Brandeis was, of course, what we would now call media intrusion. In 1928 Justice Brandeis (as he had then become) dissented forcefully in the case of *Olmstead v United States*.[44] He declared that the Constitution conferred 'as against the Government, the right to be let alone,' adding, '[t]o protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.'[45] That view was adopted by the Supreme Court in *Katz v United States*.[46] Since then privacy as the right to be let alone has been invoked by the Court in this context.

[44] *Olmstead v United States* 277 US 438 (1928).
[45] ibid, 473.
[46] *Katz v United States* 398 US 347 (1967).

The most momentous – and contentious – development came in 1965 with the Supreme Court's decision in *Griswold v Connecticut.*[47] It declared unconstitutional a Connecticut statute prohibiting the use of contraceptives because it violated the right of marital privacy, a right 'older than the Bill of Rights'.[48]

Although the word 'privacy' appears nowhere in the Constitution, in a succession of cases the Supreme Court has – via the Bill of Rights (particularly the First, Third, Fourth, Fifth, and Ninth Amendments to the Constitution therein) recognised, amongst other privacy rights, that of associational privacy',[49] 'political privacy',[50] and 'privacy of counsel'.[51] It has also set the limits of protection against eavesdropping and unlawful searches.[52]

By far the most divisive 'privacy' decision that the Court has decided is the case of *Roe v Wade* in 1973.[53] It held by a majority, that the abortion law of Texas was unconstitutional as a violation of the right to privacy. Under that law abortion was criminalised, except when performed to save the pregnant woman's life. The Court held that States may prohibit abortion to protect the life of the foetus only in the third trimester. The judgment, which has been described as 'undoubtedly the best-known case the United States Supreme Court has ever decided',[54] is simultaneously embraced by feminists and deplored by many Christians. It is the slender thread by which the right of American women to a lawful abortion hangs. There appears to be no middle ground. Ronald Dworkin, describes the vehemence of the dispute:

> The war between anti-abortion groups and their opponents is America's new version of the terrible seventeenth-century European civil wars of religion. Opposing armies march down streets or pack themselves into protests at abortion clinics, courthouses, and the White House, screaming at and spitting on and loathing one another. Abortion is tearing America apart.[55]

No less intense a tempest was created by *Bowers v Hardwick* in 1986 in which a bare majority held that the privacy protections of the due process clause did not extend to homosexual acts between consenting adults in private: 'No connection between family, marriage, or procreation on the one hand and homosexual conduct on the other has been demonstrated.'[56] This decision was explicitly overruled in *Lawrence v Texas* in which, by six to three, the Supreme Court decided

[47] *Griswold v Connecticut* 381 US 479 (1965).
[48] ibid 486.
[49] *National Association for the Advancement of Colored People v Alabama* 357 US 449 (1958).
[50] *Sweezy v New Hampshire* 364 US 234 (1957).
[51] *Massiah v United States* 377 US 201 (1964).
[52] *Olmstead v United States* 277 US 438 (1928); *Goldman v United States* 316 US 129 (1942).
[53] *Roe v Wade* 410 US 113 (1973). See too *Planned Parenthood v Casey* 505 US 833 (1992).
[54] Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (London: Harper Collins, 1993) 4.
[55] ibid, 103.
[56] *Bowers v Hardwick* 478 US 186 (1986) 284.

that it had construed the liberty interest too narrowly. The majority held that substantive due process under the Fourteenth Amendment entailed the freedom to engage in intimate consensual sexual conduct.[57] Its effect is to nullify all legislation throughout the United States that purports to criminalise sodomy between contenting same-sex adults in private.

The American experience is instructive. Other common law jurisdictions continue to wrestle with the stubborn difficulties of definition, scope, and the balancing of privacy with other competing rights, particularly freedom of expression. In general, the approach of the common law is largely interest-based, while the continental tradition of civil law jurisdictions tends to be rights-based. In other words, while the English law, for example, adopts a pragmatic case-by-case approach to the protection of privacy, French law conceives privacy as a fundamental human right. This difference has nonetheless been tempered by the impact of the European Convention on Human Rights and other declarations and Directives emanating from Brussels.

V. A Way Forward

If imprecision has impeded the effective legal recognition of 'privacy', how should we proceed? The recognition of a legal right to privacy (notwithstanding the confusion the concept engenders) has a 'collateral' benefit: it assists in bringing closer together the divergent approaches of the common and civil law systems. In respect of the former, the words of Lord Hoffmann still resonate:[58]

> There seems to me a great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself. The English common law is familiar with the notion of underlying values – principles only in the broadest sense – which direct its development. A famous example is … freedom of speech [as an] … underlying value … But no one has suggested that freedom of speech is in itself a legal principle which is capable of sufficient definition to enable one to deduce specific rules to be applied in concrete cases. That is not the way the common law works.[59]

[57] *Lawrence v Texas* 539 US 558 (2003).

[58] *Wainwright v Home Office* [2003] UKHL 53, [31] per Lord Hoffmann.

[59] '*Au contraire*', would be Warren and Brandeis' response. Their case for the legal recognition of the right of privacy was the precise opposite. They reasoned that the common law had developed from the protection of the physical person and corporeal property to include the protection of the individual's '[t]houghts, emotions and sensations': SD Warren and LD Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193, 195. An individual's right to determine the extent to which these were communicated to others was already legally protected, but only in respect of authors of literary and artistic compositions and letters who could forbid their unauthorized publication. And though English cases recognizing this right were based on protection of property, in reality they were an acknowledgement of privacy, of 'inviolate personality' (ibid, 205).

From a civil law perspective, however, the acknowledgement of the existence of a 'new' right can occur only by way of a complex and delicate exercise in legal interpretation. While this is, of course, possible, and has to some extent been achieved by the English courts in their interpretation of the Human Rights Act 1998, a clearly drafted statute is manifestly preferable.[60] A draft bill is proposed in the Appendix.

It is, of course, impossible to avoid using 'privacy' to describe the right that warrants legal protection. Indeed, it makes perfect sense to speak of 'privacy' as shorthand for the individual and social interest[61] that we champion. But, in pursuit of effective safeguards, the vagueness that besets the term is best eschewed. Our uneasiness is founded not simply on semantics, but also on the unrestrained application of 'privacy' to a diverse collection of subjects from abortion, contraception and sexual preference to noise and pornography. The quest is not for conceptual purity, but legal certainty.

To invoke 'privacy' as if it were a talisman endowed with magical power is an imperfect, and potentially negative, manner by which to deliver legal certainty. '[T]he cardinal principle', declares HLA Hart, '[is] that legal words can only be elucidated by considering the conditions under which statements in which they have their characteristic use are true.'[62] In other words, it is mistaken to believe that, from a legal standpoint, the idea of 'privacy' or 'private life' can be usefully applied without a careful enquiry into the specific conduct or interests lying beneath claims for its protection.

There have, of course, been many such attempts, and the literature is awash with sociological, philosophical, legal and other explorations of the matter. The argument presented here does not seek to address, let alone disparage or repudiate, these scholarly endeavours, but it considers that, by generally adopting a broad conception of 'privacy' they tend to discount the critical question of the control over personal information that lies at the heart of our anxieties. By perceiving the

[60] An interpretive approach is central to Ronald Dworkin's theory of law. See, especially, *Taking Rights Seriously* (London: Duckworth, 1978) and in *A Matter of Principle* (Cambridge MA: Harvard University Press, 1985), *Law's Empire* (Cambridge MA: Harvard University Press, 1986), and *Justice in Robes* (Cambridge MA/London: Harvard University Press, 2006). For an outline of Dworkin's theory see Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory*, 5th edn (Oxford: Oxford University Press, 2017) Chapter 5.

[61] Charles Raab, 'Privacy, Social Values and the Public Interest' in A Busch and J Hofmann (eds), *Politik und die Regulierung von Information* (*Politische Vierteljahresschrift*, Sonderheft 46, Baden-Baden: Nomos verlagsgesellschaft, 2012) 129–51: Kirsty Hughes, 'A Behavioural Understanding of Privacy and its Implications for Privacy Law' (2012) 75 *Modern Law Review* 806.

[62] See HLA Hart, 'Definition and Theory in Jurisprudence' (1954) 70 *Law Quarterly Review* 37 in HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), Essay 1, p 47. This 'makes it vital to attend to Bentham's warning that we should not … abstract words like "right" … from the sentences in which alone their full function can be seen, and then demand of them so abstracted their genus and differentia' (ibid, 31). See too R Birmingham, 'Hart's Definition and Theory in Jurisprudence Again' (1984) 16 *Connecticut Law Review* 774 for an illuminating account of Frege's analysis, which includes his view that law is plausibly a scientific discourse and that sentences, not words, are the unit of meaning.

subject in this manner, the core of the value is diminished or lost altogether. Except as an abstract description of its underlying meaning or social, political, or philosophical significance, until an actual legal right is recognised, the term 'privacy' (though colloquially unavoidable) should be avoided as a cause of action. This, we believe, is the soundest foundation upon which to base effective *legal* protection of this fundamental right and restrict the notion to matters that relate to 'privacy' properly so called.

While it is heartening that the jurisprudence has affirmed the existence of an independent right, its conceptual foundation is far from clear. The notion of 'private life' is unfortunately as nebulous as Warren and Brandeis' vague 'right to be let alone'.[63] And the European Court of Human Rights appears to be satisfied that it should be so. Thus, to take only one instance, it held that Article 8 protects the right to sleep.[64] Should this, undeniably vital, interest be regarded as a human right? As argued above, the very concept of 'private life' invites obscurity and abstraction. This is plain from an early decision of the Court, that declared:

> [T]he right to respect for private life does not end [at the right to privacy, ie, the right to live, as far as one wishes, protected from publicity]. It comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality.[65]

Is this not an unmistakeable endorsement of the vast reach of Article 8? 'We cannot', it has been justly remarked, 'inflate the concept of human rights so much that it covers the whole realm of justice. Human rights would lose their distinctive moral force.'[66] This is not to deny the significance of individual rights or even their formulation in broad terms, which facilitates their recognition by the law; however, as one American commentator has stated, 'a natural "right" to privacy is simply inconceivable as a legal right – sanctioned perhaps by society but clearly not enforceable by government … Privacy itself is beyond the scope of law.'[67]

[63] See R Wacks, 'The Poverty of "Privacy"' (1980) 96 *Law Quarterly Review* 73. See too H Kalven, 'Privacy in Tort Law: Were Warren and Brandeis Wrong?' (1966) 31 *Law & Contemporary Problems* 326.

[64] See, for example, the decision in *Hatton v United Kingdom* Application 36022/97, (2002) 34 EHRR 37, which accepted the proposition that sleep disturbance, distress, and illness caused by night flights at Heathrow airport could constitute a violation of the claimants' right to private life under Article 8 of the ECHR.

[65] *X v Iceland* Application 6825/74, (1976) 5 DR 86, 87.

[66] G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007) 25. It is part of our argument that the unremitting exercise of human rights inflation has devalued the currency. As James Griffin puts it, '[t]he term "human right" is nearly criterionless. There are unusually few criteria for determining when the term is used correctly and when incorrectly – not just among politicians, but among philosophers, political theorists, and jurisprudents as well. The language of human rights has, in this way, become debased.' J Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008) 14–15.

[67] RF Hixson, *Privacy in a Public Society: Human Rights in Conflict* (New York/Oxford: Oxford University Press, 1987) 98.

The effect of decisions such as this is to extricate 'privacy' from its habitat as a legal concept, and implant it into a moral or ethical realm thereby weakening its claims as a legal right. When the law comes to recognise such a right, we are forced back to square one since the moral right will stand in need of legal definition and application.

VI. Personal Information

Nothing in our approach contradicts the need to evaluate the context in which personal information arises. When considering whether the information in question satisfies the threshold requirement of 'personal', the facts that are the subject of the individual's complaint will naturally need to be examined 'in the round'. Publicly accessible data (telephone numbers, addresses, number plates, and so on) cannot be regarded as data whose disclosure or circulation it is reasonable to seek to control or restrict. But when these data are rendered sensitive by their linkage to other data, a justifiable complaint may be said to arise.

Is a right to privacy required in order to address this issue? Data protection legislation would seem to be adequate. This matter is considered in the following chapter; suffice it to say here that data protection regulation applies only to data that is subject to automated processing, or by way of a filing system.

This does not entirely eliminate the influence of individual idiosyncrasy where its effect would be relevant to the circumstances of the case. Nor would an objective test negate the relevance of such elements in deciding whether it is reasonable for an individual to consider information as personal. The British, for example, are notoriously diffident about revealing their salaries. Scandinavians are far less reserved in this respect. Cultural factors unavoidably affect whether it is reasonable to consider information as personal.

No single item of information is – in and of itself – personal. An anonymous medical file, bank statement, or lurid disclosures of a sexual affair are innocuous until linked to an identified individual. Once the identity of the subject of the information is exposed it becomes personal. And once this threshold is crossed what is now personal information is worthy of protection only when it satisfies an objective test. But this does not occur in a conceptual or social vacuum; it must be evaluated by reference to the specific conditions under which disclosure is threatened or, more usually, made.

The promiscuous extension of the notion to 'decisional' matters (abortion, contraception, sexual preference), and its – understandable – conflation with freedom and autonomy, is a conceptual error. Fortunately, there appears to be a growing recognition that these (important) issues concern the exercise of freedom or autonomy, albeit in private. But 'private' or 'personal' in this context describes the fact that such decisions are normatively best left to the individual rather than the state. They are, in other words, private rather than public.

For legal purposes the meaning of 'privacy' corresponds to our intuitive understanding of it as, fundamentally, our interest in protecting personal information. When we lament its erosion, we mourn the loss of control over intimate facts about ourselves.

It will at once be enquired why should different rights of 'privacy' be so characterised? And why can they not co-exist as diverse, but related, dimensions of the same essential conception? The answer, as already mentioned above, is not that we deny the importance of rights or even their expression in wide terms, which promotes their legal recognition. Rather it is based on the conviction that by addressing the problem as the protection of personal information, the persistent problems that are commonly pushed into the straitjacket of 'privacy' might more successfully be resolved.

The concepts of 'privacy' and 'private life' have become too vague and incoherent to achieve the purpose of protecting our personal information.[68] This ambiguity has, as already argued, undermined the importance of this value and frustrated its effective protection. It has grown into as nebulous a notion as 'freedom' (with which it is not infrequently equated) or 'autonomy' (with which it is regularly confused).[69] Furthermore, it endangers the development of a satisfactory theory of privacy. The more voluminous the concept, the less likely is its coherent conceptual expression.

It might be objected that the early, generous 'right to be let alone' essayed by Warren and Brandeis could easily accommodate a wide range of supposed privacy-invading conduct. But it is only by the most convoluted reasoning that the collection, processing, or misuse of personal data (let alone – in this Facebook age – the many forms of online exploitation and abuse), can be adequately encapsulated within even so bountiful a mantra.

The elaborate attempt by Daniel Solove to conceive a 'taxonomy of privacy' is founded on the idea that we abandon the search for a common denominator or essence of privacy. Instead, he proposes that privacy be can usefully conceptualised in terms of Wittgenstein's notion of 'family resemblances': although certain concepts might not share one common characteristic, they might form a 'network of similarities overlapping and criss-crossing.' Solove therefore proposes that instead of seeking an overarching concept of 'privacy', we ought to focus on specific forms of interference or disruption. But, on what basis, then, do certain practices constitute *privacy*-invading conduct if there is no shared concept of 'privacy'? The core idea of 'family resemblance' seems to invite the very elusiveness that Solove is at pains to avoid. His meticulous analysis produces an admirable theory of *infringement* of privacy, rather than of privacy itself, confirming the view

[68] An early expression of these difficulties is F Davis, 'What Do We Mean by "Right to Privacy"?' (1959) 4 *South Dakota Law Review* 1.

[69] For an attempt to derive the right to privacy from the 'moral principle … of respect for individual liberty', see RB Hallborg, 'Principles of Liberty and the Right to Privacy' (1986) 5 *Law and Philosophy* 175.

that the concept is intractably incoherent.[70] Secondly, even among those who deny the parasitical character of 'privacy', there is little agreement concerning its principal defining features.

The following chapters will attempt to expose how 'privacy' has developed into a conceptual incubus in a number of areas. The confusion between privacy and data protection is a conspicuous example of the failure to elucidate the crux of privacy. The European Court of Human Rights increasingly applies the notion of privacy to activities conducted in public spaces. Moreover, the data protection authorities of many jurisdictions frequently conceive data protection as a synonym for the protection of private life, confusing the 'need-to-know' as a legal basis to access personal information, on the one hand, with the right to restrict that access, on the other.

Minorities invoke privacy as a legal basis on which to challenge discrimination. Politicians frequently claim privacy protection to shield their immoral behaviour. High-tech companies deploy privacy as a justification to design services that both make it difficult to co-operate with courts and lawyers and limit tort liability. There is also a growing techno-centric approach to privacy which tends to shift the debate away from the central legal and constitutional questions that are at the heart of its effective recognition and protection.

In what follows we trace these unsettling developments, and seek to reveal the essential nature of privacy and – critically – what the right to privacy is *not*.

[70] See DJ Solove, *Understanding Privacy* (Cambridge MA: Harvard University Press, 2008). But 'context' can be taken too far. See Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford CA: Stanford Law Books, 2009).