

Defining Privacy

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Privacy is a difficult notion to define in part because rituals of association and disassociation are cultural and species-relative. For example, opening a door without knocking might be considered a serious privacy violation in one culture and yet permitted in another. Definitions of privacy can be couched in descriptive or normative terms—we can view privacy as a condition or as a moral claim on others to refrain from certain activities. Furthermore, some view privacy as a derivative notion that rests upon more basic rights such as liberty or property.

As highlighted below, there is little agreement on how to define privacy. But like other contested concepts—for example, liberty or justice—this conceptual difficulty does not undermine its importance. If only Plato were correct and we could gaze upon the forms and determine the necessary and sufficient conditions for each of these concepts. But we can't, and neither intuitions nor natural language analysis offer much help. Not doing violence to the language and cohering with our intuitions may be good features of an account of privacy. Nevertheless, these features, individually or jointly, do not suffice to provide adequate grounds for a definition—the language and the intuitions may be hopelessly muddled.

Moreover, as indicated by the analysis of examples offered throughout this article, there are central cases of privacy and peripheral ones. Aristotle discussed this idea of central and peripheral cases in talking about “friendship”: “. . . so they are not able to do justice to all the phenomena of friendship; since one definition will not suit all, they think there are no other friendships; but the others are friendships. . . .”¹ The same may be said of privacy. Some of the core features of the central cases of privacy may not be present in the outlying cases. One of the ways a conception is illuminated is to trace the similarities and differences between these examples.²

Evaluation is a further tool that aids in arriving at a defensible conception of privacy. A perfectly coherent definition of privacy that accords faultlessly with some group's intuitions may be totally useless. In the most general terms, we are asking “what this or that way of classifying privacy is good for.” At the most abstract level the evaluation may be moral—we ask “does this way of carving up the world promote, hinder, or leave unaffected, human well-being or flourishing?” John Finnis echoes this sentiment,

There is a mutual . . . interdependence between the project of describing human affairs by way of theory and the project of evaluating human options with a view . . . to acting

reasonably well. The evaluations are in no way deduced from the descriptions; but one whose knowledge of the facts of the human situation is very limited is unlikely to judge well in discerning the practical implications of the basic values. Equally, the descriptions are not deduced from the evaluations; but without the evaluations one cannot determine what descriptions are really illuminating and significant.³

Perhaps the best that can be done is to offer a coherent conception of privacy that highlights why it is distinct and important. In this article, after a brief survey of various definitions, I will offer and defend a control over access and use account of privacy. My goal is to provide a normative definition of privacy although I will sketch a descriptive account as well. Demonstrating that this conception of privacy is important and valuable has been considered in other works, thus analysis along this dimension will be purposively minimal.⁴

Conceptions of Privacy

Privacy has been defined in many ways over the last few hundred years.⁵ Warren and Brandeis, following Judge Thomas Cooley, called it “the right to be let alone.”⁶ Pound and Freund have defined privacy in terms of an extension personality or personhood.⁷ Legal scholar William Prosser separated privacy cases into four distinct but related torts. “*Intrusion*: Intruding (physically or otherwise) upon the solitude of another in a highly offensive manner. *Private facts*: Publicizing highly offensive private information about someone which is not of legitimate concern to the public. *False light*: Publicizing a highly offensive and false impression of another. *Appropriation*: Using another’s name or likeness for some advantage without the other’s consent.”⁸

Alan Westin and others have described privacy in terms of information control.⁹ Still others have insisted that privacy consists of a form of autonomy over personal matters.¹⁰ William Parent argued that “[p]rivacy is the condition of not having undocumented personal knowledge about one possessed by others,”¹¹ while Julie Inness defined privacy as “the state of possessing control over a realm of intimate decisions, which include decisions about intimate access, intimate information, and intimate actions.”¹²

More recently, Judith Wagner DeCew has proposed that the “realm of the private to be whatever types of information and activities are not, according to a reasonable person in normal circumstances, the legitimate concern of others.”¹³ This brief summary indicates the variety and breadth of the definitions that have been offered.

Normative and Non-Normative Accounts of Privacy

There are two distinctions that have been widely discussed related to defining privacy. The first is the distinction between descriptive and normative conceptions of privacy. A descriptive or non-normative account describes a state or condition

where privacy obtains. An example would be Parent's definition, "[p]rivacy is the *condition* of not having undocumented personal knowledge about one possessed by others."¹⁴ A normative account, on the other hand, makes references to moral obligations or claims. For example, when DeCew talks about what is of "legitimate concern of others," she includes ethical considerations.

One way to clarify this distinction is to think of a case where the term "privacy" is used in a non-normative way such as someone saying, "When I was getting dressed at the doctor's office the other day I had some measure of privacy." Here it seems that the meaning is non-normative—the person is reporting that a condition obtained. Had someone breached this zone the person may have said: "You should not be here, please respect my privacy!" In this latter case, normative aspects are stressed.

Reductionist and Non-Reductionist Accounts of Privacy

Reductionist and non-reductionist accounts of privacy have also been offered. Reductionists, such as Judith Jarvis Thomson, argue that privacy is derived from other rights such as life, liberty, and property rights—there is no overarching concept of privacy but rather several distinct core notions that have been lumped together.¹⁵ Viewing privacy in this fashion might mean jettisoning the idea altogether and focusing on more fundamental concepts. For example, Frederick Davis has argued that, "[i]f truly fundamental interests are accorded the protection they deserve, no need to champion a right to privacy arises. Invasion of privacy is, in reality, a complex of more fundamental wrongs. Similarly, the individual's interest in privacy itself, however real, is derivative and a state better vouchsafed by protecting more immediate rights."¹⁶ Unlike Davis, the non-reductionist views privacy as related to, but distinct from, other rights or moral concepts.

It is my view that the normative and non-normative distinction is important and crucial for conceptual coherence—it is possible and proper to define privacy along normative and descriptive dimensions. Liberty is also defined descriptively and normatively. We may, for example, define liberty without making any essential references to normative claims. Thomas Hobbes defines liberty as "the absence of external impediment."¹⁷ In this example, as with Hobbes's conception of the state of nature, there are no moral "oughts" or "shoulds" present. Alternatively, J. S. Mill defends a normatively loaded account of liberty opening his classic work *On Liberty* with "The subject of this essay is . . . civil, or social liberty: the nature and limits of the power which can be legitimately exercised by society over the individual."¹⁸ Privacy may also be defined descriptively or normatively.

Second, assuming a normative definition, without considering the justification of the rights involved it is unclear if privacy is reducible to other rights or the other way around. This point has been made by Parent and others.¹⁹ Moreover, given the arguments that I offer elsewhere, it is not surprising that there are close