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ASPEN CASEBOOK SERIES

# INFORMATION PRIVACY LAW

Fourth Edition

**Daniel J. Solove**

John Marshall Harlan Research Professor of Law  
George Washington University Law School

**Paul M. Schwartz**

Faculty Director, Berkeley Center for Law & Technology  
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U.C. Berkeley Law School



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### 3. CRITICS OF PRIVACY

RICHARD A. POSNER, *THE RIGHT OF PRIVACY*

12 Ga. L. Rev. 393 (1978)

People invariably possess information, including facts about themselves and contents of communications, that they will incur costs to conceal. Sometimes such information is of value to others: that is, others will incur costs to discover it. Thus we have two economic goods, "privacy" and "prying."

[M]uch of the casual prying (a term used here without any pejorative connotation) into the private lives of friends and colleagues that is so common a feature of social life is also motivated, to a greater extent than we may realize, by rational considerations of self-interest. Prying enables one to form a more accurate picture of a friend or colleague, and the knowledge gained is useful in one's social or professional dealings with him. For example, in choosing a friend one legitimately wants to know whether he will be discreet or indiscreet, selfish or generous, and these qualities are not always apparent on initial acquaintance. Even a pure altruist needs to know the (approximate) wealth of any prospective beneficiary of his altruism in order to be able to gauge the value of a transfer to him.

The other side of the coin is that social, like business, dealings present opportunities for exploitation through misrepresentation. Psychologists and sociologists have pointed out that even in every day life people try to manipulate by misrepresentation other people's opinion of them. As one psychologist has written, the "wish for privacy expresses a desire . . . to control others' perceptions and beliefs vis-à-vis the self-concealing person." Even the strongest defenders of privacy describe the individual's right to privacy as the right to "control the flow of information about him." A seldom remarked corollary to a right to misrepresent one's character is that others have a legitimate interest in unmasking the deception.

Yet some of the demand for private information about other people is not self-protection in the foregoing sense but seems mysteriously disinterested — for example, that of the readers of newspaper gossip columns, whose "idle curiosity" Warren and Brandeis deplored, groundlessly in my opinion. Gossip columns recount the personal lives of wealthy and successful people whose tastes and habits offer models — that is, yield information — to the ordinary person in making consumption, career, and other decisions. . . . Gossip columns open people's eyes to opportunities and dangers; they are genuinely informational. . . .

Warren and Brandeis attributed the rise of curiosity about people's lives to the excesses of the press. The economist does not believe, however, that supply creates demand. A more persuasive explanation for the rise of the gossip column is the secular increase in personal incomes. There is apparently very little privacy in poor societies, where, consequently, people can easily observe at first hand the intimate lives of others. Personal surveillance is costlier in wealthier societies both because people live in conditions that give them greater privacy from such observation and because the value (and hence opportunity cost) of time is greater—too great to make a generous allotment of time to watching neighbors

worthwhile. People in wealthier societies sought an alternative method of informing themselves about how others live and the press provided it. A legitimate and important function of the press is to provide specialization in prying in societies where the costs of obtaining information have become too great for the Nosey Parker. . . .

Transaction-cost considerations may also militate against the assignment of a property right to the possessor of a secret. . . . Consider, for example, . . . whether the law should allow a magazine to sell its subscriber list to another magazine without obtaining the subscribers' consent. . . . [T]he costs of obtaining subscriber approval would be high relative to the value of the list. If, therefore, we believe that these lists are generally worth more to the purchasers than being shielded from possible unwanted solicitations is worth to the subscribers, we should assign the property right to the magazine; and the law does this. . . .

Much of the demand for privacy . . . concerns discreditable information, often information concerning past or present criminal activity or moral conduct at variance with a person's professed moral standards. And often the motive for concealment is, as suggested earlier, to mislead those with whom he transacts. Other private information that people wish to conceal, while not strictly discreditable, would if revealed correct misapprehensions that the individual is trying to exploit, as when a worker conceals a serious health problem from his employer or a prospective husband conceals his sterility from his fiancée. It is not clear why society should assign the property right in such information to the individual to whom it pertains; and the common law, as we shall see, generally does not. . . .

We think it wrong (and inefficient) that the law should permit a seller in hawking his wares to make false or incomplete representations as to their quality. But people "sell" themselves as well as their goods. They profess high standards of behavior in order to induce others to engage in social or business dealings with them from which they derive an advantage but at the same time they conceal some of the facts that these acquaintances would find useful in forming an accurate picture of their character. There are practical reasons for not imposing a general legal duty of full and frank disclosure of one's material. . . .

. . . [E]veryone should be allowed to protect himself from disadvantageous transactions by ferreting out concealed facts about individuals which are material to the representations (implicit or explicit) that those individuals make concerning their moral qualities.

It is no answer that such individuals have "the right to be let alone." Very few people want to be let alone. They want to manipulate the world around them by selective disclosure of facts about themselves. Why should others be asked to take their self-serving claims at face value and be prevented from obtaining the information necessary to verify or disprove these claims?

#### NOTES & QUESTIONS

1. *Posner's Conception of Privacy.* What is Posner's definition of privacy? How does Posner determine the value of privacy (i.e., how it should be weighed relative to other interests and values)? In what circumstances is Posner likely to defend a privacy claim?

**2. Irrational Judgments.** One economic argument for privacy is that sometimes people form irrational judgments based upon learning certain information about others. For example, an employer may not hire certain people based on their political views or associations, sexual orientation, mental illness, and prior criminal convictions — even though these facts may have no relevance to a potential employee's abilities to do the job. These judgments decrease efficiency. In *The Economics of Justice*, Posner offers a response:

This objection overlooks the opportunity costs of shunning people for stupid reasons, or, stated otherwise, the gains from dealing with someone whom others shun irrationally. If ex-convicts are good workers but most employers do not know this, employers who do know will be able to hire them at a below-average wage because of their depressed job opportunities and will thereby obtain a competitive advantage over the bigots. In a diverse, decentralized, and competitive society, irrational shunning will be weeded out over time. . . .<sup>74</sup>

Will the market be able to eradicate irrational judgments?

**3. The Dangers of the "Masquerade Ball."** Consider Dennis Bailey:

. . . [I]t is interesting to consider the ways in which the world has become like a giant masquerade ball. Far removed from the tight knit social fabric of the village of the past, we've lost the ability to recognize the people we pass on the street. People might as well be wearing masks because we are likely to know very little about them. In other words, these strangers are anonymous to us, anonymous in the sense that not only their names, but their entire identities, are unknown to us — the intimate details of who they are, where they have come from, and how they have lived their lives. . . .

[A]nonymity has become one of the central vulnerabilities of an open society. Freedom may have allowed [9/11 terrorists] al-Mihdhar and al-Hamzi to rent an apartment, use a cell phone, meet with terrorists overseas, and take flying lessons in preparation for 9/11, but anonymity kept hidden the manner in which these individual actions fit together into a larger mosaic of death.<sup>75</sup>

Are we living in a "masquerade ball"? Businesses and the government have unprecedented new technologies to engage in surveillance and gather information. Should the law facilitate or restrict anonymity?

Also consider Steven Nock:

Any method of social control depends, immediately, on information about individuals. . . . There can be no social control without such information. . . .

Modern Americans enjoy vastly more privacy than did their forebears because ever and ever larger numbers of strangers in our lives are legitimately denied access to our personal affairs. . . . Privacy, however, makes it difficult to form reliable opinions of one another. Legitimately shielded from other's

<sup>74</sup> Richard A. Posner, *The Economics of Justice* (1981). Posner further develops his theories about privacy in Richard A. Posner, *Overcoming Law* 531-51 (1995). Posner first set out his views on privacy in Richard A. Posner, *An Economic Theory of Privacy*, Regulations (May/June 1978).

<sup>75</sup> Dennis Bailey, *The Open Society Paradox* 26-27 (2004).

regular scrutiny, we are thereby more immune to the routine monitoring that once formed the basis of our individual reputations.<sup>76</sup>

Does too much privacy erode trust and lessen social control in detrimental ways?

**4. Information Dissemination and Economic Efficiency.** Does economic theory necessarily lead to the conclusion that more personal information is generally preferable? Consider the following critique of Posner by Edward Bloustein:

We must remember that Posner stated in *Economic Analysis of Law* that economics "cannot prescribe social change"; it can only tell us about the economic costs of managing it one way or another. . . . [Posner's] characterization of the privacy of personal information as a species of commercial fraud . . . [is an] extension[.] of a social value judgment rather than implications or conclusions of economic theory. . . . Our society, in fact, places a very high value on maintaining individual privacy, even to the extent of concealing "discreditable" information. . . .<sup>77</sup>

Also consider Richard Murphy's critique of Posner:

[D]emarcating a relatively large sphere for the private self creates an opportunity for discovery or actualization of a "true" nature, which may have a value beyond the utility of satisfying preferences. . . . As Roger Rosenblatt put it, "Out of our private gropings and self-inspections grow our imaginative values — private language, imagery, memory. In the caves of the mind one bats about to discover a light entirely of one's own which, though it should turn out to be dim, is still worth a life." Unless a person can investigate without risk of reproach what his own preferences are, he will not be able to maximize his own happiness.<sup>78</sup>

When can the circulation of less personal information be more economically efficient than greater information flow?

**5. Why Don't Individuals Protect Their Privacy?** Empirical studies frequently report on growing privacy concerns across the United States. Yet, individuals seem willing to exchange privacy for services or small rewards and generally fail to adopt technologies and techniques that would protect their privacy. If people are willing to sell their privacy for very little in return, isn't this evidence that they do not really value privacy as much as they say they do?

Alessandro Acquisti and Jens Grossklags have pointed to a number of reasons for this divergence between stated privacy preferences and actual behavior:

First, incomplete information affects privacy decision making because of externalities (when third parties share personal information about an individual, they might affect that individual without his being part of the

<sup>76</sup> Steven L. Nock, *The Costs of Privacy: Surveillance and Reputation in America* (1993).

<sup>77</sup> Edward J. Bloustein, *Privacy Is Dear at Any Price: A Response to Professor Posner's Economic Theory*, 12 Ga. L. Rev. 429, 441 (1978). For another critique of Posner's approach, see Kim Lane Scheppelle, *Legal Secrets: Equality and Efficiency in the Common Law* (1988).

<sup>78</sup> Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 Geo. L.J. 2381 (1996).

transaction between those parties), information asymmetries (information relevant to the privacy decision process — for example, how personal information will be used — might be known only to a subset of the parties making decisions), risk (most privacy related payoffs are not deterministic), and uncertainties (payoffs might not only be stochastic, but dependent on unknown random distributions). Benefits and costs associated with privacy intrusions and protection are complex, multifaceted, and context-specific. They are frequently bundled with other products and services (for example, a search engine query can prompt the desired result but can also give observers information about the searcher's interests), and they are often recognized only after privacy violations have taken place. They can be monetary but also immaterial and, thus, difficult to quantify.

Second, even if individuals had access to complete information, they would be unable to process and act optimally on vast amounts of data. Especially in the presence of complex, ramified consequences associated with the protection or release of personal information, our innate bounded rationality limits our ability to acquire, memorize and process all relevant information, and it makes us rely on simplified mental models, approximate strategies, and heuristics. These strategies replace theoretical quantitative approaches with qualitative evaluations and “aspirational” solutions that stop short of perfect (numerical) optimization. Bounded problem solving is usually neither unreasonable nor irrational, and it needs not be inferior to rational utility maximization. However, even marginal deviations by several individuals from their optimal strategies can substantially impact the market outcome.

Third, even if individuals had access to complete information and could successfully calculate optimization strategies for their privacy sensitive decisions, they might still deviate from the rational strategy. A vast body of economic and psychological literature has revealed several forms of systematic psychological deviations from rationality that affect individual decision making. . . . Research in psychology . . . documents how individuals mispredict their own future preferences or draw inaccurate conclusions from past choices. In addition, individuals often suffer from self-control problems — in particular, the tendency to trade off costs and benefits in ways that damage their future utility in favor of immediate gratification. Individuals' behavior can also be guided by social preferences or norms, such as fairness or altruism. Many of these deviations apply naturally to privacy-sensitive scenarios.<sup>79</sup>

FRED H. CATE, *PRINCIPLES OF INTERNET PRIVACY*

32 Conn. L. Rev. 877 (2000)

Perhaps the most important consideration when balancing restrictions on information is the historical importance of the free flow of information. The free flow concept is one that is not only enshrined in the First Amendment, but frankly in any form of democratic or market economy. In the United States, we have placed extraordinary importance on the open flow of information. As the Federal Reserve Board noted in its report to Congress on data protection in

<sup>79</sup> Alessandro Acquisti & Jens Grossklags, *Privacy and Rationality in Decision Making*, IEEE, Security and Privacy 24 (2005).

financial institutions, “it is the freedom to speak, supported by the availability of information and the free-flow of data, that is the cornerstone of a democratic society and market economy.”

The significance of open data flows is reflected in the constitutional provisions not only for freedom of expression, but for copyrights — to promote the creation and dissemination of expression, and for a post office — to deliver the mail and the news. Federal regulations demonstrate a sweeping preference for openness, reflected in the Freedom of Information Act, Government in the Sunshine Act, and dozens of other laws applicable to the government. There are even more laws requiring disclosure by private industry, such as the regulatory disclosures required by securities and commodities laws, banking and insurance laws, and many others. This is a very basic tenet of the society in which we live. Laws that restrict that free flow almost always conflict with this basic principle. That does not mean that such laws are never upheld, but merely that they face a considerable constitutional hurdle.

This is done with good reason. Open information flows are not only essential to self-governance; they have also generated significant, practical benefits. The ready availability of personal information helps businesses “deliver the right products and services to the right customers, at the right time, more effectively and at lower cost,” Fred Smith, founder and President of the Competitive Enterprise Institute, has written. Federal Reserve Board Governor Edward Gramlich testified before Congress in July 1999 that “[i]nformation about individuals' needs and preferences is the cornerstone of any system that allocates goods and services within an economy.” The more such information is available, he continued, “the more accurately and efficiently will the economy meet those needs and preferences.”

Federal Reserve Board Chairman Alan Greenspan has been perhaps the most articulate spokesperson for the extraordinary value of accessible personal information. In 1998, he wrote to Congressman Ed Markey (D-Mass.):

A critical component of our ever more finely hewn competitive market system has been the plethora of information on the characteristics of customers both businesses and individuals. Such information has enabled producers and marketers to fine tune production schedules to the ever greater demands of our consuming public for diversity and individuality of products and services. Newly devised derivative products, for example, have enabled financial institutions to unbundle risk in a manner that enables those desirous of taking on that risk (and potential reward) to do so, and those that chose otherwise, to be risk averse. It has enabled financial institutions to offer a wide variety of customized insurance and other products.

Detailed data obtained from consumers as they seek credit or make product choices help engender the whole set of sensitive price signals that are so essential to the functioning of an advanced information based economy such as ours. . . .

In a recent report on public record information, Richard Varn, Chief Information Officer of the State of Iowa, and I examined the critical roles played by public record information in our economy and society. We concluded that such information constitutes part of this nation's “essential infrastructure,” the benefits of which are “so numerous and diverse that they impact virtually every

facet of American life. . . .” The ready availability of public record data “facilitates a vibrant economy, improves efficiency, reduces costs, creates jobs, and provides valuable products and services that people want.”

Perhaps most importantly, widely accessible personal information has helped to create a democratization of opportunity in the United States. Anyone can go almost anywhere, make purchases from vendors they will never see, maintain accounts with banks they will never visit, and obtain credit far from home all because of open information flows. Americans can take advantage of opportunities based on their records, on what they have done rather than who they know, because access to consumer information makes it possible for distant companies and creditors to make rational decisions about doing business with individuals. The open flow of information gives consumers real choice. This is what the open flow of information principle reflects, not just the constitutional importance of information flows, but their significant economic and social benefits as well.

### NOTES & QUESTIONS

1. **The Pros and Cons of the Free Flow of Information.** In a striking passage, Cate points out that free flows of information create a “democratization of opportunity in the United States.” With this phrase, he reminds us that part of the equality at the basis of American life concerns economic opportunity, and that, in his view, a certain kind of flow of personal information will contribute to this goal. While privacy can be problematic, can open access to information also raise difficulties? How should one establish a baseline for open access or restricted access to personal information?
2. **The Costs of Privacy.** Can you think of some of the other important values with which privacy might conflict and the costs that privacy can impose? What should the baseline be in measuring costs?
3. **The Business of Data Trade.** The trade in personal information is now a valuable part of the U.S. economy. As a single example, Google reached an agreement on April 14, 2007, to purchase DoubleClick, an online advertising company, for \$3.1 billion. The deal was driven by Google’s interest in behavioral advertising, in which companies use digital data collection techniques to track individuals around the Internet and serve them targeted ads. Should consumers be allowed to sign up for a National Do Not Track List?
4. **The Benefits of Information Collection and Use.** Consider Kent Walker:
 

Having some information about yourself out there in the world offers real convenience that goes beyond dollars and cents. Many people benefit from warehousing information — billing and shipping addresses, credit card numbers, individual preferences, and the like — with trustworthy third parties. Such storage of information can dramatically simplify the purchasing experience, ensure that you get a nonsmoking room, or automate the task of ordering a kiddie meal every time your child boards a plane. Likewise, most people prefer to use a credit card rather than a debit card, trading confidentiality of purchases for the convenience of deferred payment. . . .

While there’s often little individual incentive to participate in the aggregation of information about people, a great collective good results from the default participation of most people. The aggregation of information often requires a critical mass to be worth doing, or for the results to be worth using. (A phone book with only one out of ten numbers would hardly be worth using, let alone printing.) . . .

Another example is Caller ID, which pits different privacy claims against one another. Many people like the notion of an electronic peephole, letting them know who’s at the electronic door before they decide whether to pick up the phone. Yet many people block transmission of their own numbers, valuing protection of their privacy. Neither choice is necessarily right, but it’s worth recognizing that the assertion of the privacy claim affects the contending desires of others. The classic Tragedy of the Commons aspects are clear. From my selfish perspective, I want access to information about everyone else — the identity of who’s calling me, their listed phone number, etc. I want to be able to intrude on others without their knowing who I am (which I can accomplish by blocking Caller ID), and don’t want others to be able to intrude on me unbidden (which I can accomplish by unlisting my phone number). The gain in privacy makes it harder to find the people you want to reach, and harder to know who’s calling you.<sup>80</sup>

5. **Privacy as the “Cheshire Cat of Values”?** Many commentators have noted that although people express concern over privacy, their behavior indicates that they do not care very much about privacy. As Jonathan Franzen, the novelist, writes:

The panic about privacy has all the finger-pointing and paranoia of a good old American scare, but it’s missing one vital ingredient: a genuinely alarmed public. Americans care about privacy in the abstract. . . .

On closer examination . . . privacy proves to be the Cheshire cat of values: not much substance, but a very winning smile.

Legally, the concept is a mess. Privacy violation is the emotional core of many crimes, from stalking and rape to Peeping Tommerly and trespass, but no criminal statute forbids it in the abstract. . . .

When Americans do genuinely sacrifice privacy . . . they do so for tangible gains in health or safety or efficiency. Most legalized infringements — HIV notification, airport X-rays, Megan’s Law, Breathalyzer roadblocks, the drug-testing of student athletes, . . . remote monitoring of automobile emissions . . . are essentially public health measures. I resent the security cameras in Washington Square, but I appreciate the ones on a subway platform. The risk that someone is abusing my E-ZPass toll records seems to me comfortably low in comparison with my gain in convenience. Ditto the risk that some gossip rag will make me a victim of the First Amendment; with two hundred and seventy million people in the country, any individual’s chances of being nationally exposed are next to nil.<sup>81</sup>

Do arguments about bounded rationality, as developed in the earlier section, answer Franzen’s concerns?

<sup>80</sup> Kent Walker, *Where Everybody Knows Your Name: A Pragmatic Look at the Costs of Privacy and the Benefits of Information Exchange*, 2000 Stan. Tech. L. Rev. 2, 39, 46, 48 (2000).

<sup>81</sup> Jonathan Franzen, *How to Be Alone: Essays* 42, 45-46 (2003).