A History of Privacy Law up to 2006 from the Perspective of an Non-Specialist; or, the Modern Age’s Biggest Essentially Contested Concept and Why It’s More Than Just Secrets

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What is privacy?

- Popular answer: secrecy paradigm.
Tort law

- Damnum absque injuria (loss without injury).
Cases

• Secrecy paradigm failures:
  – Smith v. Maryland. (1979)

• Some `good’ law cases:
Cases

• If it’s public, it’s public.
  – Dow Chemical Co. v. United States. (1986)
  – Walls v. City of Petersburg. (1990)
  – Patrick Buono in 2014.
Cases

• But sometimes when it’s public, it’s not.
  – Daily Times Democrat v. Graham. (1964)
  – Katz v. United States. (1967) [overturned *Olmstead v. United States* (1928)]
  – Nader v. General Motors Corp. (1970)

• And the home is pretty much always sacred.
  – Hamberger v. Eastman. (1964)
Figure 2. The Wi-Fi camera and an example positioning. The plan was redrawn from a subject’s original.
Figure 5. Subjects’ graphical depiction of how experience of surveillance changed over 0–6 months. Higher = worse, lower = better (* = interrupted at six months).
The secrecy paradigm is not sufficient!
The Right to Privacy (1890)

- *The Right to Privacy* (1890) by Warren and Brandeis.
  - **Conclusion**: Privacy is the right to be “left alone”.
The first privacy tort

Franklin Mills Flour

The Constitution, Atlanta, Ga., Sunday, November 15, 1903

DO IT NOW.
THE MAN WHO DID.

DO IT WHILE YOU CAN.
THE MAN WHO DIDN'T.

THESE TWO PICTURES TELL THEIR OWN STORY.

“In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and today my family is protected and I am drawing an annual dividend on my paid-up policies.”

THOMAS B. LUMPKIN, General Agent,
1008-1009-1010 Empire Building.

“When I had health, vigor and strength, I felt the time would never come when I would need insurance. But I see my mistake. If I could recall my life I would buy one of the New England Mutual’s 18-Pay Annual Dividend Policies.”
More privacy torts

• *Privacy (1960)* by William Prosser.
  – Appropriating the plaintiff's identity for the defendant's benefit.
  – Placing the plaintiff in a false light in the public eye.
  – Publicly disclosing private facts about the plaintiff.
  – Unreasonably intruding upon the seclusion or solitude of the plaintiff.
The birth of the digital person

What is privacy?

- The Right to be Left Alone
- Limited Access to the Self
- Secrecy
- Control Over Personal Information
- Personhood
- Intimacy
What is a chair?
The value of privacy
Pragmatic Approach to Privacy

- Privacy is an aspect of social practices.
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What is Privacy?

• Essentially contested concept.