CONTOURS OF RIGHT TO PRIVACY

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Privacy and its protection can easily seen as a way of drawing the line, at how far society can intrude into a person's affairs. It primarily concerns non-interference with the individual. It therefore relates to and overlaps with the concept of liberty. It is a sweeping concept, encompassing freedom of thought, control over one's body, solitude in one's home, control over information about oneself, freedom from surveillance, protection of one's reputation, and protection from searches and interrogations. There is no core meaning of what privacy is about. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right.[1] Currently there is no consensus in the legal and philosophical literature on a definition of privacy.[2] For some privacy is a psychological state, or a condition of being from others, or a form of control we have over ourselves, a power, or a claim to non-interference and so on. Writers on the subject also do not agree, "Whether privacy is one concept or many? Whether privacy has independent existence or has parasitic or derivative existence?[3] The confusion over the nature of the interest, which the right to privacy is designed to protect, was likened to a "haystack in a hurricane."[4] The Justice Report pointed out the difficulty of finding a precise or logical formula, which could either circumscribe the meaning of the word 'privacy' or define it exhaustively.[5]

If privacy is defined as a psychological state, it becomes impossible to describe a person who has had his privacy temporarily invaded without his knowledge, since his psychological state is not affected at all by the loss of privacy. One of the reasons for the law to protect privacy in certain situations is to protect us as individuals from suffering mental distress.

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1 James Michael, Privacy and Human Rights 1 (UNESCO 1994); see also, *GOBIND v. STATE OF M.P.* (1975) 2 SCC 148, para-23.

2 Richard B. Parker, "A Definition Of Privacy" (1974) 27 Rutegrs Law Review 275

3 Charles Fried, "Privacy", 77 Yale Law Journal (1968) 477

4 Bigg. C.J. in Ettore v. Philco Broadcasting Co., 229F. 2D 481(3d.Cr.1956) quoted in Edward Bloustein, Privacy as an Aspect of Human dignity: An Answer to Dean Prosser. 39 N.Y.U.L.REV.962, 1003(1964)

5 Daniel J. Solove, "Conceptualizing Privacy", Vol. 90, Cal. L. Rev. 1088.

But privacy should not be defined as, for example freedom from various sorts of mental distress, or as the experience of being apart from others. Such definitions of privacy will be unable to cover those situations where we lose or gain privacy with no corresponding change in our mental state.[6] The traditional method of conceptualizing privacy, which has been adopted by the many scholars, is understood as an attempt to articulate what separates privacy from others things, what makes it unique and what identifies it in its various manifestations, to locate the essence of privacy the core common denominator that makes things private.

An attempt, to find out if there is any core meaning of the word, privacy, and if so, whether that may be the basis of its definition comprehending all its ramifications, is not only desirable but also necessary. Prof. Solove has in a recent article made an attempt to conceptualize privacy.[7] He has discussed the pioneering contributions of the American scholars to the concept of privacy under six headings as discussed below:

1. The Right To Be Let Alone

Warren and Brandeis defined privacy as the "right to be let alone" a phrase adopted from Judge Thomos Cooley's famous treatise on Torts, in 1880.[8] This is the conception, which is used by lawyers and judges rather frequently when discussing privacy. The right to be let alone views privacy as a type of immunity or seclusion. The formulation of privacy as the right to be let alone merely describes an attribute of privacy. Being let alone does not inform us about the matters in which we should be let alone. Warren and Brandeis did speak of inviolate personality, which could be viewed, as describing the content of private sphere. But this is vague. And moreover theirs was an attempt to develop a right to privacy in common law and not an attempt to comprehend the concept of privacy.[9] According to Edward Shils, "Privacy is a zero relationship between two groups or between a group and a person."[10] This zero relationship is also is an aspect of the let alone conception. It is a zero-relationship in the sense that it is constituted by the absence of interaction, or communication or perception within the context in which such interaction or communication or perception is practicable.

6 Richard B. Parker, "A Definition Of Privacy" (1974) 27 Rutegrs Law Review, PP 278-279

7 Daniel J. Solove, "Conceptualizing Privacy", Vol. 90, Cal. L. Rev. 1088.

8 THOMAS M. COOLEY, LAW OF TORTS (2nd ed. 1888)

9 Warren & Brandeis, "The Right To Privacy," 4 Harvard Law Rev 193 (1890), The writers emphasized by citing various cases that the common law indeed provided for the protection of 'right to privacy' by adapting the law of trust, property, confidence, copyright etc.

10 Edward shills, "Privacy-Its Constitution and Vicissitudes", 31 Law and Contemporary Problems, 281 (1966) at 289.

Understanding privacy as being 'let alone' fails to provide much guidance about how privacy should be valued vis-à-vis other interests, such as free speech, effective law enforcement and other important values. A simple right to be let alone will make most interpersonal contacts an invasion of privacy. It highlights only the negative aspect of the privacy. But the concept of privacy has a positive side also reflecting each individual's psychological need and practical need, not only to withhold but also to share certain aspects of him with others with a reasonable expectation that confidentiality will be preserved.[11] Thus the concept of privacy comprises also to a certain .degree, the right to establish and develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's personality.[12] The exercise of these rights needs the active intervention of the state, to balance it with the public interest and that cannot be possible if the individual is let alone. This right to be let alone is rather a broad and vague conception of privacy.[13]

2. Limited Access to the Self

This conception recognizes the individual's desire for concealment and for being apart from others. In this way, it is closely related to the 'right to be let alone' conception, and is perhaps a more sophisticated formulation of that right. It is the right to decide how much knowledge of a person's personal thought and feeling, private doings and affairs the public at large shall have.[14] According to Ernest Van Den Haag, "privacy is the exclusive access of a person (or other legal entity) to a realm of his own. The right to privacy entitles one to exclude others from (a) watching, (b) utilizing, (c) invading his private realm."[15]

In one perspective' limited access to the self' may be the choice of the individual to have control over who will have access to him. In another perspective, it is understood by some to be an existential condition of limited access to individual's life experiences and engagements.[16] According to O' Brien, privacy is not control of access to oneself, because not all privacy is

11 Brij Pal Singh, "Right to Privacy and its Development in India,"Vol.6 NO.1 M.D.U.L.J.171

12 *X v. Iceland*, 5 ECHR, 86-87(1976)

13 See, ANITAALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 7(1988)

14 E.L. Godkin, "The Rights of the Citizen IV- To His Own Reputation", SCRIBNER'S MAGAZINE July-Dee, 1890, quoted in Daniel J. Solove, "Conceptualizing Privacy", Vol. 90, Cal. L. Rev. at 1103

15 Ernest Van Den Haag, On Privacy, in NOMOS XIII: PRIVACY 149, 149(J. Ronlad Pennock & J.W. Chapman eds., 1971), Quoted in Daniel J. Solove, "Conceptualizing Privacy", Vol. 90, Cal. L. Rev. at 103.

16 DAVID M. O'BREIN, PRIVACY, LAW, AND PUBLIC POLICY (1979) 16.

chosen. Some privacy is accidental, compulsory, or even involuntary.[17] But this would mean that a person stranded on the desert or island has complete privacy. This is better described as a state of isolation. Privacy involves one's relationship to society. In a world without others, claiming that one has privacy does not make much sense. According to sociologist Barrington Moore, the need for privacy is a socially created need. Without society there would be no need for privacy.[18] Defining privacy as an existential condition will eliminate all expectation for privacy in the new technological age, as it is violated very frequently. Without a normative component such a concept will legitimize the invasions at present and impede the formulation of legal solutions.

Without a notion of what matters are private, limited-access conception do not tell us the substantive matters for which access would implicate privacy. Certainly not all access to the self infringes upon privacy - only access to specific dimension of the self or to particular matters and information. Thus the formulation too suffers from being too broad and vague. To clarify this vagueness, legal theorist Ruth Gavison, explains what constitutes limited access, which consists of three independent and irreducible elements: secrecy, anonymity and solitude.[19] But this is a very narrow conception of privacy. Excluded from this definition are invasions in to one's private life by harassment and nuisance and the government's involvement in decisions regarding one's body, health, sexual conduct, and family life.

3. Secrecy

One of the most common understandings of privacy is that it constitutes the secrecy of certain matters. According to Judge Richard Posner: "the word privacy seems to embrace at least two distinct interests. One is the interest in being left alone. The other privacy interest, 'concealment of information', (which) is invaded whenever private information is obtained against the wishes of the person to whom the information pertains.[20] Thus privacy is violated by the public disclosure of previously concealed information. The latter, privacy interest, "concealment of information", involves secrecy. Concealment of information enables to manipulate the world around them by selective disclosure of facts about themselves.[21]

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17 Id. at 15

18 BARRINGTON MOORE, JR. PRIVACY: STUDIES IN SOCIAL AND CULTURAL HISTORY 72(1984» Quoted in Daniel J. Solove, "Conceptualizing Privacy", Vol. 90, Cal. L. Rev. at 1104

19 Ruth Gavison, Privacy and the Limits of Law, 89 YALE. L. J. 421,443.

20 RICHARD A.POSNER, THE ECONOMICS OF JUSTICE 272-73 (1981).

21 Id. at 234

The privacy -as - secrecy conception can be understood as a subset of limited access to the self. Secrecy of personal information is a way to limit access to the self. This conception is narrower than limited access conceptions as secrecy involves only one aspect of access to the self- the concealment of personal facts.[22] In a variety of legal contexts the view of privacy as secrecy often leads to the conclusion that once a fact is divulged in public, no matter how limited or narrow the disclosure, it can no longer remain private. Privacy is thus viewed as coextensive with the total secrecy of information.[23] Thus matters which are no longer secret or no longer private. For example in *California* v. *Greenwood*[24] the court held there is no reasonable expectation of privacy in garbage because it is knowingly exposed to the public. The case of *McNamara* v. *Freedom Newspapers Inc*[25] is a good example of absurd result that would follow if privacy were treated as complete secrecy. In this case a newspaper published a photo of a high school soccer player's genitalia that he inadvertently exposed while running on the soccer field. The student sued under the tort of 'public disclosure of private facts'.[26] The court held that the student's case should be dismissed because, "the picture accurately depicted a public event….at the time the photograph was taken the student was voluntarily participating in a spectator sport at a public place.[27] Although not explicitly stated, the court appeared to be conceptualizing privacy as a form of secrecy, which is violated by the disclosure of concealed facts. This is a very narrow conception of privacy.

Legal theorist Edward Bloustein has criticized the theory of privacy as secrecy as failing to recognize group privacy.[28] By equating privacy with secrecy we fail to recognize that individuals want to keep things private from some people but not others. According to Kenneth Karst, "Meaningful discussions of privacy, requires the recognition that ordinarily we deal not with an interest in total non disclosure but with an interest in selective disclosure.[29]

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22 Daniel J. Solove, "Conceptualizing Privacy", Vol. 90, Cal. L. Rev., at 1106.

23 Id. at 1007

24 486 U.S. 35 (1988)

25 802 S.W.2d 901 (Tex. Ct. App. 1991)

26 This branch of Tort is discussed in Chapter 3 of this dissertation.

27 802 S.W.2d 901 (Tex. Ct. App. 1991) at 904-905.

28 See EDWARD J. BLOUSTEIN, INDIVIDUAL AND GROUP PRIVACY 123-86 (1978), See e.g. Arnold Simmel, "Privacy Is Not an Isolated Freedom", in NOMOS XIII at 71, 81. Simmel observed: we become what we are not only by establishing boundaries around ourselves but also by a periodic opening of these boundaries to nourishment, to learning and to intimacy. But the opening of a boundary of the self may require a boundary farther out, a boundary around the group to which we are opening ourselves.

29 Kenneth L. Karst, "The Files": Legal Controls Over the Accuracy and Accessibility of Stored Personal Data, 31 LAW & CONTEMPORARY PROBLEMS, 342, 344 (1966)

Privacy involves more than avoiding disclosure; it also involves the individual's ability to ensure that personal information is used for the purposes he desires. According to philosopher Judith Waner Decew, secrecy is certainly not coextensive with privacy; secret information is often not private, for example, secret military plans and private matters are not always secret, for example, one's debts.[30] Privacy is not that one's private affairs are kept out of others sight or knowledge. Rather one's private affairs are matters that it would be inappropriate for others to try to find out, much less report on, without one's consent.[31] Secrecy as the common denominator of privacy makes the conception of privacy too narrow.

4. Control over personal information

The 'control over information' can be viewed as a subset of the limited access conception. According to Westin, "privacy is the claim of individuals, groups, or institutions to determine for themselves when, how and to what extent information about them is communicated to others. Viewed in terms of social participation privacy is the voluntary and temporary withdrawal of a person form the general society through physical or psychological means, either in a state of solitude or small group intimacy or when larger groups in a condition of anonymity or reserve."[32]

The theory's focus on information, however, makes it too narrow a conception, for it excludes those aspects of privacy that are not informational, such as the right to make certain fundamental decisions about one's body, reproduction, or rearing of one's children. Additionally, the theory is too vague because proponents of the theory often fail to define the types of information over which individuals should have control. Ferdinand Schoeman, observes: "one difficulty with regarding privacy as a claim or entitlement to determine what information about oneself is to be available to others is that is begs the question about the moral status of privacy. It presumes privacy is something to be protected at the discretion of the individual to whom the information relates."[33] Privacy however is not simply a matter of individual prerogative; it is also an issue of what society deems appropriate to protect.[34] There is no explanation of the

30 JUDITH WAGNER DECEW. IN PURSUIT 0 F PRIACY: LAW, ETHICS, AND THE RISE OF TECHONOLOGY 48 (1997)
31 Stanley I. Benn, Privacy, Freedom and Respect for Person, in NOMOS XIII, 2
32 ALAN F. WESTIN, PRIVACY AND FREEDOM (1967) at 7
33 FERDINAND SCHOEMAN, Privacy: Philosophical Dimensions of the Literature, in PHILOSOPHICAL DIMENSIONS OF PRIVACY at 3.
34 Daniel J. Solove, "Conceptualising Privacy", Vol. 90, Cal. L. Rev., at 1111

meaning of what information is personal. Charles Freid says, "Intimate information are personal."[35] This leaves out financial, educational and information about one's assets. And more over there are so many information about an individual, which are not considered private.

Further defining privacy as control over information also brings in another problem of, what is control? Most of the time personal information is often formed in relationships with others, with all parties to that relationship having some claim to that information. The best example is an autobiography where the individual writing it will be divulging information of relationships with many others, which may violate their privacy. This shared nature of information also makes the control over personal information concept of privacy vague and inadequate.

Mere loss of information will not involve loss of privacy. An actress, posing nude to a photograph does not lose her privacy, though loses information about her body. But a similar photograph taken later surreptitiously will violate her privacy. Here the information about her body is already public but the context differs and makes the latter actionable. Many privacy interests involve an individual's "freedom to engage in private activities" rather than the disclosure or nondisclosure of information. Conceptualizing privacy as control over personal information can be too vague, too broad, or too narrow. Not every loss or gain of control over information about us is a loss or gain of privacy. In some contexts there seems to be losses or gains of privacy, which are only marginally related to information about us. One example is the loss of privacy involved in being forced to bear an unwanted child; another example is the loss of privacy when someone sits next to us in deserted public place.[36] Moreover all information about a person is not so private to result in violation of privacy. Say for example the knowledge of name or the person is a vegetarian or other information that are very obvious to the naked eye could not result in privacy violation. There is no necessary connection between a loss of control over private information and a loss of privacy. If we tell someone that we are homosexual, we lose control over private information but we do not necessarily lose privacy.

5. Personhood

The theory of privacy as 'personhood' differs from the theories earlier because it is constructed around a normative end of privacy, namely the protection o the integrity of the

[35] Charles Fried, "Privacy", 77 Yale Law Journal (1968) at 483
[36] G. MISRA, RIGHT TO PRIVACY IN INDIA, (1994), PP 36-37

personality. This theory talks about the reason why privacy is protected. According to Edward Bloustein, "privacy is an interest of the human personality. It protects the inviolate personality, the individual's independence, dignity and integrity."[37]

The right to privacy protects the individual's interest in becoming, being and remaining person. i.e. individuality, dignity and autonomy. In *Planned Parenthood* v. *Casey*[38] the Supreme Court of United States provided its most elaborate explanation of what the privacy protected by the constitutional right to privacy encompasses. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood, were they formed under compulsion of the state. Personhood theories are alleged to be really about liberty and autonomy and not about privacy. But DeCew counters; "there is no need to view privacy as totally exclusive from autonomy and liberty, for conception can overlap."[39]

Gavison criticizes Bloustein's dignity conception because "there are ways to offend dignity and personality that have nothing to do with privacy. Having to beg or sell one's body in order to survive are serious affronts to dignity, but do not appear to involve loss of privacy."[40] Bloustein does not define and analyze privacy itself. Rather his approach consists of a broad characterization of the reason privacy is of value at allnamely that privacy is associated with human freedom and dignity.[41]

By conceiving privacy as essential to individual's identity and his being a person, Rubenfield, feels that it introduces the state's power to determine what is 'essential'. According to him the Personhood theory is this where our identity or self-definition is at stake, there the state may not interfere. His conception of personhood forbids him to sketch any conception of identity

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37 Edward J. Bloustein. Privacy as an Aspect of Human dignity: An Answer to Dean Prosser. 39 N.Y.U.L.REV.962, 1003(1964).

38 505 U.S. 833 (1992)

39 JUDITH WAGNER DECEW. IN PURSUIT 0 F PRIACY: LAW, ETHICS, AND THE RISE OF TECHONOLOGY (1997) at 44

40 Ruth Gavison, Privacy and the Limits of Law, 89 YALE. L. J. at 438

41 Gerald Dworkin, "The Common Law Protection of Privacy", 2 University of Tasmania Law Review, 418,433(1967).

that the law should protect, for to do so would be to seize from individuals their right to define themselves. Thus his conception of privacy collapses into a vague right to be let alone. Dworkin feels that Theories of personhood fail to elucidate what privacy is and the notions of individuality; dignity and autonomy are far too vague as a legal concept and are also too broad.

6. Intimacy

The theory of privacy as intimacy views privacy as consisting of some form of limited access or control, and it locates the value of privacy in the development of personal relationships. Privacy is valuable because, there is a close connection between our ability to control, who has access to us, to information about us and our ability to create and maintain different sorts of intimate relationships with different people. Privacy as intimacy theories is too narrow because they focus too exclusively on interpersonal relationships and the particular feelings engendered by them. Although trust, love, and intimacy are facilitated by privacy, these are not the sole ends of privacy. Information about our finances is private yet not intimate. There are many relationships; sexual, businesses, official etc that are private though not intimate. Intimacy captures the dimension of the private life that consists of close relationships with others; but it does not capture the dimension of private life that is devoted to the self-alone.[42] Privacy as intimacy conceptions is mostly too narrow as they exclude many matters that do not involve loving and caring relationships. Some times they are broad if they do not adequately define the scope of intimacy.

Concluding Remarks

The concept of privacy has, of course, psychological, social, and political dimensions, which reach far beyond its analysis in the legal context. Some of the concepts concentrate on means to achieve privacy; others focus on the ends or goals of privacy. Some others treat it as an existential condition and some other as an expectation of reasonable mind. Given such diversity, for many scholars, lawyers and administrators, protection of privacy appears random, adhoc and unprincipled. They are led to believe that the concept of privacy has no core meaning.[43] The

[42] Daniel J. Solove, "Conceptualising Privacy", Vol. 90, Cal. L. Rev. at 1124
[43] DAVID M. O'BREIN, PRIVACY, LAW, AND PUBLIC POLICY (1979) 16.

majority Report of the Younger Committee[44] also observed, "We have found privacy to be a concept which means widely different things to different people and changes significantly over relatively short periods. In considering how courts could handle so- ill defined and unstable a concept, we conclude that privacy is ill -suited to be a subject of a long process of definition though the building up of a precedents over the years since the judgments of the past would be unreliable guide to any current evaluation of privacy.[45] The lack of a single definition should not imply that the issue lacks importance. As one writer observed, "in one sense, all human rights are aspects of the right to privacy."[46]

The conceptions discussed here are by no means independent of each other. Each conception deals with an important dimension of privacy without anyone being able to satisfactorily explain the concept fully. The conceptual disagreement over the essence of privacy should be taken as underlining the importance of the privacy problems and particularity in various cultural and legal backgrounds. This in a way reinforces the necessity to understand the problem of privacy in particular context and value; not to dismiss it as a vague and evanescent.

Prof. Solove, after reviewing the concept advanced by various writers, adopts the pragmatic approach advocated by Ludwig Wittgenstein's notion of family resemblances. As Wittgenstein suggests certain concepts might not have a single common characteristic rather they draw from a common pool of similar elements[47] Solove identifies his approach as pragmatic as it emphasizes the contextual and dynamic nature of privacy. He does not advocate any approach to build up any overarching concept of privacy.

A pragmatic approach to the task of conceptualizing privacy should not, therefore, begin by seeking to illuminate an abstract conception of privacy, but should focus instead on understanding privacy in specific contextual situations. According to John Dewey, "Knowledge without its context loses much of its meaning and we cannot ignore the contextual situation in

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44 Report of the Committee on Privacy, 1972, Cmnd, 501) in para-665

45 But the minority report in para-6, observes, "As a philosophic concept the limits may be imprecise for the purpose of law, however, privacy is what the law say it is."

46 Volio, Fernando, "Legal personality, privacy and the family" in Henkin (ed), The International Bill of Rights (Columbia University Press 1981)

47 62LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 66-67 (G.E.M.Anscombe trans. 1958) Prof. So love discusses the approach. He turns away from the traditional method of conceptualizing privacy by looking for the core or essence of privacy to a pragmatic approach, which focuses on specific situations. He says that, "we should act as cartographers, mapping out the terrain of privacy by examining specific problematic situations rather than trying to fit each situation into a rigid pre defined category. See Supra note 22, at 1126-1129.

which thinking occurs."[48] Prof. Solove asserts that turning to particular context from the abstract does not mean abandoning a quest to conceptualize privacy. To a contrary, he observes, a legal or policy analysis of a privacy problem without attempting to understand what privacy is represents a failure to define the problem adequately.[49] He advances an approach to understanding privacy rather than a definition or formula for privacy. It is an approach because it does not describe the sum and substance of privacy but provides dimensions of practices. He also feels that an approach to conceptualize privacy should aid in solving problems, assessing costs and benefits, and structuring social relationships.

Privacy is a dimension of certain practices and aspects of life. When we state that we are protecting "privacy" we are claiming to guard against disruptions to certain practices. The aspects of these practices, which are sought to be protected from disruption, are often referred as "private matters". Practices can be disrupted in certain way, such as interference with peace of mind and Tranquility, invasion of solitude, breach of confidentiality, loss of control over facts about oneself, searches of one's person and property, threats to or violations of personal security, destruction of reputation, surveillance, and so on.

Particular types of disruption do not interfere with all privacy practices in the same way. For example, anonymity in authorship is a long-standing practice that has the purpose of, among other things, promoting the unfettered expression of ideas. One form of disruption to this practice is the disclosure of concealed information. In this context, such disclosure involves revealing the identity of the author, and society protects against this disruption because of the importance of the purposes of anonymity. Disclosure also interferes with other practices. The disclosure of a person's criminal past can interfere with that person's ability to reform him and build a new life and stay his employment possibilities. The value of protecting against such disclosure depends in part upon the social importance of rehabilitation. Since the purposes of the practices of anonymity and rehabilitation are different, the value of protecting against disclosures differs in these two contexts. Hence the value of protecting privacy in a particular context should be known to effectively address the problem.

Normally the term private matter is understood in terms of public and private spheres. To understand privacy in terms of public and private sphere, reduces it to a sort of space which

[48] JOHN DEWEY, EXPERIENCE AND NATURE 67 (1929).
[49] Daniel J. Solove, "Conceptualising Privacy", Vol. 90, Cal. L. Rev. at 1128

cannot be violated, whereas privacy is not simply a for of space. An important dimension of privacy is informational control, which does not readily transform into spatial terms. Further such an understanding will have problems for addressing issues of privacy is in cyberspace since it is not a physical space. Hence, we should seek to understand practices rather than classify certain matters as public or private, though such classifications may be easy for general discussion. And also the matters that have been public and private have metamorphosed throughout history due to changing attitudes, institutions, living conditions, and technology. Many changes in family, body and home in every civilization could be taken to establishing the dynamic nature of privacy.[50] A conception of privacy must be responsive to social reality since privacy is an aspect of social practices. Since practices are dynamic, we must understand their historical development. An empirical study of privacy problems will play an important role in conceptualizing privacy. But that is not all.

A mere empirical study of the privacy, without a normative component, can only provide a status report on existing privacy norms rather than guide us towards shaping privacy law and policy in the future. If we focus simply on people's current expectations of privacy, our conception of privacy would continually shrink given the increasing surveillance in the modern world. To determine what law should protect as private depends on a normative analysis, which requires us to examine the value of privacy in particular contexts. As already seen the interest protected, by protecting the same practices against disruptions is different in different contexts. Hence any overarching concept of privacy would not be valuable to understand and balance the privacy problems in particular contexts. Thus it would also be difficult to suggest any effective legal solution. As a dynamic concept, privacy requires, law to adopt multiple conceptions of privacy to tackle the myriad of problems. The United States Supreme Court's decision of 1928 in *Olmstead* v. *United States*[51] epitomizes the need for flexibility in conceptualizing privacy. The court held that the wiretapping of a person's home telephone (done outside a person's house) did not run a foul of the fourth amendment because it did not involve a trespass inside a person's home.[52] Justice Louis Brandeis vigorously dissented, chastising the Court for failing to adapt the Constitution to new problems: "In the application of a constitution, our contemplation cannot be

50 Id. at pp 1132-1143
51 277 U.S. 438 (1928)
52 Ibid. 465

only of what has been, but of what may be."[53] The landscape of privacy is constantly changing; the rapid pace of technological invention shapes it, and therefore, the law must maintain great flexibility in conceptualizing privacy problems.

The western scholars have also subscribed to the view that privacy is very closely knitted with the life-style of the people. People have different life-styles indifferent civilizations. And so long as different civilizations exist on the globe, there cannot be a uniform human behaviour. This is one of the reasons, which defies a universally accepted definition of privacy. There cannot be a common definition of privacy with uncommon human behaviour. Whatever definition one may give to right to privacy, one has to fall back upon the cultural norm of a particular society, to understand the meaning of private matters, which are embarrassing to one. For example kissing in public place or in elevator may not be a matter of shame in one society but it may be treated as shameful act in other society. According to Dr. Misra, cultural relativity does not defy a definition of privacy. There may be a core notion of privacy, universal in its application, with variable contents in variable cultural background. Prof. Tripathi has rightly observed that the quintessence of privacy lies in the idea of "exclusion."[54] It is an essential element of privacy in all its manifestations. The idea of "exclusion," however, is the essence of all types of freedom and liberty and privacy is nothing but an aspect of liberty or autonomy.

53 Ibid. 474

54 Prof.Tripathi made this suggestion in the Symposium on "the Right to Privacy" held on Feb. 17, 1982 in the Campus Law Centre, Faculty of Law, University of Delhi), Quoted in Misra, G. Misra, Right To Privacy In India, (1994), at 44