

Legislating Privacy

By Priscilla Regan,

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Book review by Robert Orr

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In Legislating Privacy, Priscilla Regan sets out to do two things: 1) explain the process of congressional formation and adoption of privacy policy, specifically in the context where privacy is perceived to be threatened by new technologies; and 2) “explain why the accepted understanding of the value of privacy did not elicit more support for stronger regulation to protect privacy.” In her study, she looks at three modern technologies that have threatened, or are perceived to threaten, privacy; namely, computerized databases (information privacy), wiretapping (communication privacy), and polygraph testing (psychological privacy). These technologies, and their corresponding domains of privacy, have in one form or another dominated late 20th-century American federal privacy legislation. Regan also wisely uses these technologies as concrete illuminating cases throughout her book.

After an introduction, Regan tackles the legal and philosophical development of the right to privacy. She then reviews the historical importance of privacy in American society. In her next three chapters, Regan reviews the areas of information privacy, communication privacy, and psychological privacy, and uses the policy process as a framework for comparison. She then examines the legislative process in detail, and concludes that it is largely the same in each area: a privacy problem is perceived and introduced to legislators, the (generally business) interests that would be affected by the privacy legislation lobby lawmakers and the legislation is watered down, small devoted groups continue to pressure lawmakers to address the issue, and finally weakened legislation is passed. In her final chapter, Regan addresses the idea that privacy should be considered a social good and not simple an individual liberty. I will revisit this idea below.

Regan early on notes that privacy is a difficult term to define. However, she sidesteps the issue by defining it as “the right control information about and access to oneself.” She also draws the distinction of privacy as a civil liberty (a freedom from something, usually intrusion into one’s life, a negative liberty) vs. being a civil right (a freedom to do something, such as vote, a positive liberty). Privacy has historically

also been framed as an individual liberty, as opposed to a public good. This last distinction Regan takes issue with.

Regan makes the case that privacy ought not be viewed simply as a good in and of itself. Privacy, she says, is fundamentally necessary for a democratic and just society. In order to participate fully in society, one must have trust in one's neighbors, community, nation, and government. That trust is established in part through privacy. Privacy allows a citizen to think and worship, for example, as he or she pleases without fear of repercussion from society at large. Once that individual space is established, a citizen can establish trusting and engaged relationships with the community and society at large. In this sense, then, Regan says that privacy not only serves the individual, but makes it possible for a vibrant democracy to be possible, and as such, we ought to view privacy as a public value.

Furthermore, when privacy is framed as an individual right, the resulting discussions are flawed and usually lead to poor policy. Regan says this is because, in this light, 1) privacy can be viewed as a negative value that allows misfits to get away with acts society disapproves of ("Those who aren't doing anything wrong have nothing to fear."); 2) it is perceived to be in conflict with values that serve society as a whole (such as governmental efficiency or crime fighting); and 3) privacy as an individual right fails to acknowledge the complexities of social organization. On the other hand, privacy as a social good is based on three factors. Privacy has common value: all individuals value some degree of privacy and have some common perceptions about what privacy is. Privacy also has public value, value not just to individuals but also to the democratic system as a whole. Finally, privacy has collective value: it would be difficult to raise the minimum level of privacy for one person without raising it for all people. Regan also argues that our flawed conception of privacy has been at the root of the flawed policy that the Congress has created in the past. For these three reasons, she argues that our conception of privacy ought to evolve to that of a social value, and that we would reap better policy as a result.

Legislating Privacy is at times marked by dense prose and very academic language, and can be difficult reading. However, Regan succeeds at her two stated goals of explaining the process of congressional formation and adoption of privacy policy and explaining why our conventional understanding of the value of privacy has not elicited stronger support for regulation to protect privacy. It is an interesting book overall, and makes an engaging and strong case for viewing privacy as a larger social good.