2022

"You Keep Using That Word": Why Privacy Doesn't Mean What Lawyers Think

Joshua A.T. Fairfield

"You Keep Using That Word": Why Privacy Doesn't Mean What Lawyers Think

JOSHUA A.T. FAIRFIELD*

This article explores how the need to define privacy has impeded our ability to protect it in law.

The meaning of "privacy" is notoriously hard to pin down. This article contends that the problem is not with the word "privacy," but with the act of trying to pin it down. The problem lies with the act of definition itself and is particularly acute when the words in question have deep-seated and longstanding common-language meanings, such as liberty, freedom, dignity, and certainly privacy. If one wishes to determine what words like these actually mean to people, definition is the wrong tool to use. The exact wrong way to go about understanding privacy is by supplying one's own definition; that is unscientific.

Since words in a living language mean many things (*e.g.*, what does "cool" mean?), the act of definition reduces the multiple meanings of the defined word to a specified meaning. Each increase in precision comes with a corresponding separation from some set of meanings that would have applied to the living, undefined version of the word. The resulting defined word may be more precise but is often crippled, isolated, and bereft of the connections and connotations that made it part of a rich and living language.

---

* Joshua AT Fairfield, William D Bain Family Professor of Law, Washington and Lee University School of Law. Thanks in particular go to JB Rule for serving as presenter for this article at Privacy Law Scholars 2018. Thank you to Russell Miller, Dan Solove, Chris Jay Hoofnagle, Julie Cohen, Katherine Strandberg, Brett Frischmann, Christian Early, Woody Hartzog, Deirdre Mulligan, Marc Blitz, Gary Marchant, Brad Allenby, Margaret Hu, John Fairfield, Lauren Scholz, Courtney Bowman, and many others for comments and suggestions. Thank you to Nathaniel Reynolds, Christina Hubbard, Jessiah Hulle, and Patrick Twisdale for research support. Thank you to the Frances Lewis Law Center and the European University Institute Fernand Braudel senior research fellowship program for grant support.

Like Procrustes, who strapped his victims to a bed and then either lopped off their feet if they stuck out or stretched the person on a rack if they were too short, lawyers are specifically trained to stretch and cut words. Tools of definition are badly suited to determine what people mean when they say "privacy." For example, the actual meaning of "privacy" might better be explored through the tools of linguistics or cultural anthropology than through the tool of legal definition. This article therefore recommends that lawyers should set aside the flawed tool of definition and pick up the tool of analogy when they ask what words like privacy mean.

This article asks why privacy has been uniquely pressed by concerns about supposed imprecision. For example, we do not stop our search for "security" because of a supposed lack of definition of the word. If privacy must have a definition to be operationalized, it will remain moribund. And if privacy requires narrowing to be operationalized, any operationalization will be conveniently narrow.

"You keep using that word. I do not think it means what you think it means."[1]

DEFINING PRIVACY HAS LONG BEEN a frustrating exercise.[2] This article asserts that the problems with defining privacy lie in the act of definition, and lawyers' relationships to that act, rather than within the concept of privacy itself.[3]

1. Inigo Montoya, *The Princess Bride* (Act III Communications, 1987) at 00h:16m:28s.
2. See Daniel J Solove, "A Brief History of Information Privacy Law" in Christopher Wolf, ed, *Proskauer on Privacy: A Guide to Privacy and Data Security Law in the Information Age* (Practising Law Institute, 2006).
3. The starting point and organizational frame of my argument is the concept, originally ascribed to Ludwig Wittgenstein, that a word's meaning is its use by speakers within the context of a specific task, what he terms a "language-game." See Ludwig Wittgenstein, *Philosophical Investigations*, 3rd ed, translated by GEM Anscombe (Basil Blackwell, 1958) 20 at 43 [Wittgenstein, *Philosophical Investigations*].

A word's meaning is not its definition but its use.[4] The easiest way to see the problem is to imagine you are a scientist and you need to know what a word, "X," means. The wrong way to go about it would be to define it: to write, "'X' equals 'Y,'" and believe that you have discovered something new. The right way to go about it would be to observe, interpret, and analyze how humans use "X" in groups when they are trying to cooperate and communicate with each other. When we ask, therefore, what words mean, we should look to the communities of meaning that use them and see how they use them, not scribe definitions.

Reducing the living word "privacy" to any precise definition,[5] or even to an assortment of definitions arranged in a typology by their resemblances, cannot and should not be expected to capture the meaning of the living word. Trying to define central words using a short set of meanings in language is impossible. In fact, difficulty defining a word indicates that the word is central to the language. The more central the linguistic concept, the more the uses of the word proliferate, and the more difficulty one can confidently expect when attempting to define it.[6]

Definition is quite different from finding meaning in context. If I were to define "privacy," for example, I would be taking what is between quotation marks, suspending its meaning, and overwriting it with the new definition I provide. I might define "privacy" to mean "squirrel." On the other hand, when I ask for some "privacy"—usually as I am dashing from the shower to my room—I am *using* the word just like I am using all the others in the sentence. A mildly humorous anecdote might help with the distinction in an everyday context. In college, I went to the cafeteria with a close friend. When we reached the line, we noticed that the vegetable of the day was some green morass. The kicker was that the sign indicating what the vegetable was read, "Peas"— quotation marks

---

4. See *ibid* at 43 ("For a large class of cases of the employment of the word 'meaning'—though not for all—this word can be explained in this way: the meaning of a word is its use in the language").
5. See Satya Sundar Sethy, "The Untenability of Atomistic Theory of Meaning" (2013) 7 Kritike 138. As Sethy states:

   > [T]he atomistic theory of meaning or "meaning atomism" expresses that a representation either in linguistic or mental system is completely definable by itself. [It claims that the] meaning of a sentence is determined in isolation from other sentences of a language, which implies understanding a proposition does not require any support from other propositions of that language (*ibid* at 138).

6. For example, the English word "run" has over 645 different use cases for verb forms alone. See *e.g.* Simon Winchester, "A Verb for Our Frantic Times," *The New York Times* (2011 May 28), online: <www.nytimes.com/2011/05/29/opinion/29winchester.html>. See also *Oxford English Dictionary*, 3rd ed, (Oxford University Press, forthcoming 2037) sub verbo "run."

emphatically included. My friend said, and *pay attention to the quotes inside the quotes*, "'Peas'? What the hell are 'peas'? I hate this place!"

What my friend meant was that "peas" (as appearing on the sign, with quotes) are not the same as peas. A pea is a known entity, with a range to be sure, but understood by humans. By contrast, a "pea" could be subject to any definition. My friend understood instinctually that "peas" could have been defined to be almost anything. Anything, except, most likely, honest-to-goodness peas.

As we see with "peas," definition is a game in which the participants attempt to strip a living language term of enough of its multiple meanings to permit it to be used in a very specific context, whether that be legal, logical, informatic, or mathematic. The "definition game" differs completely from the many "use games," in which the word is used for its effect on the hearer rather than as defined.

The word "privacy," in the definitional game, takes on different features and attributes than it takes on when used. When "What is 'privacy?'" is asked around a conference table, it is a fundamentally different language game from "Give me some privacy!" yelled from behind the door of a bathroom. In the first, "privacy" is data to be operated upon. The conference participants seek to modify, clarify, stretch, or shrink its meaning, and to define it. The bathroom occupant does not treat privacy as their object of definition but as a demand: Shut the damn door.

Asking what "privacy" means after it has gone through the process of legal definition is like asking how a cow is doing after it has been through the process of butchering. The output of the process may be useful (*e.g.*, as food), but it is also a fragmented, rendered down, bloody mess, which in no way reflects the prior integrated whole. From the cow's perspective, the process has not gone well at all. In the same way, a word ceases to be a part of living language once it is tumbled, sliced, and vacuum-packed in a game of legal definitionalism and becomes part of the abstracted terminology of law. It is perhaps fit for some constrained purpose but is of limited use outside of that context.

I conclude that the failure to define privacy is caused by a failure to understand the linguistic act of definition, not by a failure to understand privacy. In the same vein, the failure of attempts to produce a legal definition of privacy does not mean that "privacy" is somehow uniquely vague or undefinable. Quite the opposite: The multiple and shifting meanings of the word come from the fact that it is important and central in our language. We would suffer similar definition problems if we were to subject words like dignity, freedom, justice, and other centrally located linguistic concepts to the same process. This insight should help with the definitional discrimination suffered by privacy, where

lawyers seem more eager to point out difficulties in defining "privacy" than they do other important and central words.

I. THE PROBLEM OF PRIVACY DEFINITION

This article is primarily concerned with the disconnect between the aspiration to define privacy and each attempt's poor results. This Part frames the problem by quoting leading voices in privacy theory. The literature assumes that there is some special difficulty in defining or capturing the essence of privacy.

A. THE PRIVACY LITERATURE

Privacy scholars often attempt to prune the meaning of privacy down to an essentialist definition or, at best, to build its overlapping and often contradictory applications into a typology of related uses.[7] "Privacy is a concept in disarray," begins Daniel Solove's *A Taxonomy of Privacy*.[8] Solove captures the problem of defining privacy to capture its essential meaning (*i.e.*, what he accurately terms the "traditional method"):

> Under the traditional method, conceptions of privacy are evaluated by determining their accuracy in capturing what privacy is and by their coherence—whether they are logical and consistent. Theorists often examine whether a conception of privacy includes the things we view as private and excludes the things we do not….This is certainly not the only way to evaluate conceptions of privacy, but it is the way most often used by theorists….[T]he problem emerges from the fact that theorists are attempting to conceptualize privacy with the traditional method. They are seeking to isolate its core characteristics. Privacy, however, does not lend itself very well to this form of conceptualization.[9]

Indeed, privacy scholars have long claimed that the field is an unmanageable mess because of a lack of definitions. Alan F. Westin writes, "Few values so fundamental to society as privacy have been left so undefined in social theory or have been the subject of such vague and confused writing by social scientists."[10] Julie E. Cohen notes, "Efforts to define privacy as an individual right cognizable within the parameters of liberal rights theories have been dogged by

---

7. See *e.g.* Daniel J Solove, *Understanding Privacy* (Harvard University Press, 2008) [Solove, *Understanding Privacy*].
8. (2006) 154 U Pa L Rev 477 at 477 [Solove, "Taxonomy of Privacy"]. For a comprehensive list of the many written deaths that privacy has died at the hands of scholars, see Solove, *Understanding Privacy*, *supra* note 7 at 1-8.
9. Solove, *Understanding Privacy*, *supra* note 7 at 14.
10. *Privacy and Freedom* (Association of the Bar of the City of New York, 1967) at 7.

incompleteness."[11] Privacy is supposedly "vague and evanescent"[12] and suffering from "an embarrassment of meanings."[13] Raymond Wacks asserts that the concept of privacy is "too great and too awkward" to be practically useful.[14] He believes that concepts that are too nebulous cannot be confined to a workable definition. For him, privacy is similar to a concept like liberty. He rejects the notion that these loosely defined concepts serve a purpose in the legal field beyond general abstraction. As such, they have no place being used to describe a legal cause of action.[15] In a similar vein, Ronald J. Krotoszynski, Jr., remarks that "[d]ifficulties arise because privacy cannot be defined with precision.…[N]o single theory of privacy can capture all the nuances of the concept."[16]

David Alan Sklansky asserts that even in practice the meaning of privacy has "unraveled" and points to the myriad exceptions to the warrant and probable cause requirements that undermine and confuse the "reasonable expectations of privacy"[17] so boldly asserted and defined in *Katz v. United States.*[18] According to Diane L. Zimmerman, privacy advocates are being pulled by incompatible forces and "it is probably time to admit defeat, give up the efforts at resuscitation, and lay the noble experiment in the instant creation of common law [privacy] to a well-deserved rest."[19]

Some authors simply intimate that the difficulty of defining privacy reveals something negative about the concept of privacy itself: that it is overly vague[20] or particularly contested.[21] Oliver Diggelmann and Maria Nicole Cleis assert

---

11. *Configuring the Networked Self* (Yale University Press, 2012) at 18.
12. Arthur R Miller, *The Assault on Privacy: Computers, Data Banks, and Dossiers* (University of Michigan Press, 1971) at 25.
13. See Kim Lane Scheppele, *Legal Secrets* (University of Chicago Press, 1988) at 184-85.
14. See Raymond Wacks, *Law, Morality, and the Private Domain* (Hong Kong University Press, 2000) at 222.
15. *Ibid*.
16. "Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law" (1990) 1990 Duke LJ 1398 at 1401-1402.
17. "Too Much Information: How Not to Think about Privacy and the Fourth Amendment" (2014) 102 Cal L Rev 1069 at 1071.
18. 389 US 347 at 361-62 (US SC 1967), Harlan J, concurring.
19. "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort" (1983) 68 Cornell L Rev 291 at 365.
20. See *e.g.* Judith Wagner DeCew, "Privacy and Its Importance with Advancing Technology" (2016) 42 Ohio NUL Rev 471 at 485.
21. See William L Pardee, "The Massachusetts Right of Privacy Statute: Decoy or Ugly Duckling" (1975) 9 Suffolk UL Rev 1248 at 1249 ("[N]o definition of privacy has been generally accepted").

that "[a] generally recognised 'definition' of privacy does not exist."[22] Anita Allen writes, "[N]o definition of 'privacy' is universally accepted."[23] Jon L. Mills states that "[t]here is no broadly accepted definition of privacy."[24] Dorothee Heisenberg writes that "a comprehensive definition of privacy does not exist among the legal profession."[25]

This anxiety about definitions has built to the point of tempting scholars towards reductionism. The idea is that, if privacy is hard to define, maybe it is made up of other, simpler concepts. Perhaps, the idea goes, the right to privacy is a compound, a derivative of other rights and goods,[26] or a less precise way of approaching more specific values such as the freedoms of speech, association, and religion.[27] But those values are no simpler, and their definitions in turn wrap back around to privacy.[28] Just because a word can be described in terms of other words does not mean that the first word is derivative and the latter foundational.[29] Words describe each other, like M.C. Escher's famous lithograph, *Drawing Hands*.[30]

A more productive approach has been to point out that the conflict over privacy meanings leads to productive conversations *because of* the lack of a universally accepted meaning of privacy. Deirdre Mulligan and others assert that privacy is an essentially contested concept—that is, privacy is a word that exists to be productively fought over.[31] This is based on the work of philosopher W.B. Gallie, who notes that sometimes there seems to be broad agreement on the importance of a concept but profound disagreement on the best way to describe

---

22. "How the Right to Privacy Became a Human Right" (2014) 14 Hum Rts L Rev 441 at 442.
23. Anita L Allen & Erin Mack, "How Privacy Got Its Gender" (1990) 10 N Ill UL Rev 441 at 443, n 11, quoting Anita L Allen, *Uneasy Access: Privacy For Women In A Free Society* (Rowman & Littlefield, 1988) at 11.
24. "Privacy and Press Instrusions: New Media, Old Law" in Dieter Dörr & Russell Weaver, eds, *The Right to Privacy in the Light of Media Convergence: Perspectives from Three Continents* (De Gruyter Inc, 2012) 88 at 108.
25. See *Negotiating Privacy: The European Union, the United States, and Personal Data Protection* (Lynne Rienner, 2005) at 16.
26. See H McCloskey, "Privacy and the Right to Privacy" (1980) 55 Philosophy 17 at 37.
27. See Harry Kalven Jr, "Privacy in Tort Law — Were Warren and Brandeis Wrong?" (1966) 31 Law & Contemp Probs 326-27.
28. See Solove, *Understanding Privacy*, *supra* note 7 at 38.
29. *Ibid.*
30. (1948).
31. See *e.g.* Deirdre K Mulligan et al, "Privacy Is an Essentially Contested Concept: A Multi-Dimensional Analytic for Mapping Privacy" (2016) 374 Philosophical Transactions of the Royal Society A at 1-3.

or operationalize it.[32] Mulligan et al.'s formulation is powerful and strongest when general: There is no single core essence of privacy but instead multiple productive conflicts.[33] We should stop attacking privacy for lacking a core concept and get back to productive scuffling.

This would be such a good result that I encourage the reader, if I am not convincing, to at least adopt Mulligan's view. In the end, however, the idea of essentially contested concepts does not do nearly enough work. Gallie believed, and Mulligan appears needlessly to concede, that only some special concepts are essentially contested.[34] But the overarching problem is not that privacy is linguistically or conceptually special. The problem is that it is neither. Gallie's critique extends only to the meaning of words like "art."[35] But the meanings of most central words, like "liberty," "security," "democracy," "is," "love," and so on, are contested, because the meanings of words are constantly being renegotiated through new uses. The idea that "privacy" is somehow less clear than "liberty," based on a characteristic (negotiated meaning) that "privacy" shares with all living language, is how we got here in the first place. Singling "privacy" out as one of a rarefied set of "essentially contested" terms will just make the problem worse in the end by cementing privacy's status as some sort of linguistic problem child that we really cannot do anything about.

Taking the emphasis off of privacy definitions or essences can provide a new start to privacy, one where communities are given practical tools to defend what they view to be their privacy interests, however defined. Privacy by design, for example, succeeds best where it gives communities effective default protections. (Dumping the responsibility for privacy protection on individuals has a long and storied history of not working.)[36] Shifting the pragmatic focus away from privacy essentialism refocuses theory on *doing* something about privacy demands, rather than evaluating whether the demand is legitimate because it meets some commonly accepted definition. Thus, while Woodrow Hartzog begins by noting

32. *Ibid* at 3.
33. *Ibid* at 4 ("Recognizing privacy's essential contestedness is key to securing its generativity for generations to come.…By recognizing privacy as essentially contested, we acknowledge that rival uses are 'not only logically possible', and 'humanly' probable, but also of 'permanent potential critical value'").
34. *Ibid* at 5 (referencing Gallie's "seven criteria for essentially contested concepts" as the only basis for why privacy is an essentially contested concept).
35. *Ibid*.
36. See Woodrow Hartzog, *Privacy's Blueprint: The Battle to Control the Design of New Technologies* (Harvard University Press, 2018) (developing a balanced theory between the need for design principles that secure privacy, and the difficulties in aligning those incentives with manufacturers who often profit from leaky privacy designs).

"[p]rivacy is an amorphous and elusive concept, which is surprising given its central role in the law and our daily lives," he rapidly moves to adopting Neil Richards's conception that it is *action or inaction* in response to privacy demands that matters.[37] Hartzog pragmatically concludes, "My point is that it's important to focus on the specific concepts, problems, and rules of privacy rather than dwelling on a broad notion of it. Privacy should be valued for its utility."[38] If the search for the essence of privacy re-enters the design conversation, the soup is spoiled. Designers can claim that they protect privacy by protecting only a specific, undeclared definition of privacy and holding all other uses of the term to be illegitimate.

B. LUDWIG WITTGENSTEIN AND THE PHILOSOPHY OF LANGUAGE

> I can characterize my standpoint no better than by saying that it is the antithetical standpoint to the one occupied by Socrates in the Platonic dialogues. For if I were asked what "knowledge" is, I would enumerate instances of knowledge and add the words "and similar things." There is no shared constituent to be discovered in them since none exists.[39]

Law, as a speaking profession, ought to consider what the philosophy of language has to say about the meaning of words. Ludwig Wittgenstein, an Austrian-British philosopher, authored two seminal works during the early part of the twentieth century that have laid the foundations for two entirely separate realms of thought.

Wittgenstein's first book, *Tractatus Logico-Philosophicus* ("*Tractatus*"), formed the foundation for logical and later legal positivism through a "picture theory" of language in which words have meaning based on their connection to something in the real world.[40] Wittgenstein's later work, *Philosophical Investigations*, develops a different view of language in which words have meaning only within certain "language games" that give meaning based on a specific community, context, and task.[41]

The following Part, below, will first examine how Wittgenstein's early work, the *Tractatus*, gave rise to logical positivism and explore its relationship

37. See *ibid* at 10, citing Neil M Richards, "Four Privacy Myths" in Austin Sarat, ed, *A World Without Privacy: What Law Can and Should Do?* (Cambridge University Press, 2015) 33.
38. *Supra* note 36 at 11.
39. Ludwig Wittgenstein in his "Dictation to Schlick." See Hanoch Ben-Yami, "Vagueness and Family Resemblance" in Hans-Johann Glock & John Hyman, eds, *A Companion to Wittgenstein* (John Wiley & Sons, 2017) 407 at 408 (quotation marks around "knowledge" added for effect).
40. Translated by CK Ogden (Project Gutenberg, 2010) at 25-30 [Wittgenstein, *Tractatus*].
41. See Wittgenstein, *Philosophical Investigations*, *supra* note 3 at 20.

to legal positivism. Part I(B)(3), below, will then describe how his later work on philosophy of language upended logical and legal positivism. Tracing the early work of Ludwig Wittgenstein can help make sense of the lawyer's tendency to think that law is whatever the lawgiver puts between the quotation marks. Examination of Wittgenstein's later work shows that law and natural language do not work like that at all.

1. EARLY WITTGENSTEIN: THE *TRACTATUS LOGICO-PHILOSOPHICUS* AND LOGICAL POSITIVISM

How do words acquire meaning? We give them meaning, to be sure, but do we do so by associating words with things we see around us—does the word "cup" gain meaning from an object that we point to, as a kind of definition?—or from how we use them? The big split in the early twentieth century between philosophy, science, and law revolved around this simple problem.

Ludwig Wittgenstein first tried to solve the problem of language's relationship to reality by subjecting language to intense—indeed, mathematical—precision. The result was the only book published during his life, the 1922 *Tractatus*.[42] The *Tractatus* proposed what Wittgenstein and others called the "picture theory" of language.[43] It proposed that the purpose of language was to communicate a statement about reality as a picture, to make assertions about states of affairs, or to make verifiable statements about how the world is.[44]

---

42. See Alan Janik & Stephen Toulmin, *Wittgenstein's Vienna* (Simon & Schuster, 1973) at 23.
43. See GEM Anscombe, *An Introduction to Wittgenstein's Tractatus*, 2nd ed (Harper & Row, 1959) at 25 ("[I]t is sufficiently well known that the *Tractatus* contains a 'picture theory' of language").
44. See Wittgenstein, *Tractatus*, *supra* note 40 at 25-30 (analyzing and discussing how logical "pictures" of the world represent a "state of affairs" that must then be compared with reality to discover whether the picture is true or false). See also David G Stern, *The Cambridge Companion to Wittgenstein*, ed by Hans Sluga (Cambridge University Press, 1996). Stern observes:

> It is not difficult to understand why so many readers have been both baffled and fascinated by the *Tractatus*.…Following in Frege's and Russell's footsteps, Wittgenstein argued that every meaningful sentence must have a precise logical structure which, however, is generally hidden beneath the clothing of the grammatical appearance of the sentence and requires, therefore, an extensive logical analysis to be made evident. Such an analysis, Wittgenstein was convinced, would establish that every meaningful sentence is either a truth-functional composite of other simpler sentences or an atomic sentence consisting of a concatenation of simple names. He argued furthermore that every atomic sentence is a logical picture of a possible state of affairs which must have exactly the same formal structure as the atomic sentence that depicts it. Wittgenstein employed this "picture theory of meaning"—as it is usually called—to derive conclusions about the world from his observations about the structure of the atomic sentences.

A word, per the *Tractatus*, stood for the thing to which it referred—a theory of language sometimes called "ostensive."[45] An ostensive theory of language holds that the meaning of the word is the object or phenomenon to which it points.[46] A word's referent could therefore serve as a kind of definition: "Cup" means a physical and verifiable object, the particular cup from which one drinks, that gives the word meaning.[47] The sentence, "the cup is on the table," would have verifiable meaning by looking at the cup, the table, and their relative positions to each other. According to the *Tractatus*, the purpose of language was to make verifiable statements about specific states of affairs and gather them together to form facts about the world: The cup is on the table, and the coffee is in the cup. Those statements could then be tested for truth.[48]

The "picture theory" of language can be observed both by a lawyer defining words in a contract and by a parent teaching words to a child from a storybook. The game is one of this (symbol) means that (pointing). The parent holds up a picture of a cow and encourages the child to say "cow," thus enforcing the bond between the picture and the word. In the legal world, the picture theory is seen most commonly in the definitions section of a contract or statute. We see the pernicious use of picture theory regarding privacy when companies and lawmakers continuously define a "privacy policy" as a "data protection policy" regarding the "collection, use, storage and destruction of the data, as well as any specific rights the data subjects may have."[49] In other words, companies and lawmakers define a user's "privacy" as the means through which data is collected.

> He postulated, in particular, that the world must itself have a definite logical structure, even though we may not be able to determine it completely. He also held that the world consists primarily of facts, corresponding to the true atomic sentences, rather than of things, and that those facts, in turn, are concatenations of simple objects, corresponding to the simple names of which the atomic sentences are composed (*ibid* at 9-10).

45. In his later work *Philosophical Investigations*, Wittgenstein defines the "ostensive theory of language" in the following way:

> An important part of the training will consist in the teacher's pointing to the objects, directing the child's attention to them, and at the same time uttering a word; for instance, the word "slab" as he points to that shape.…This ostensive teaching of words can be said to establish an association between the word and the thing (*supra* note 3 at 4).

46. See *ibid* at 4 ("An important part of the training will consist in the teacher's pointing to the objects, directing the child's attention to them, and at the same time uttering a word; for instance, the word "slab" as he points to that shape.…This ostensive teaching of words can be said to establish an association between the word and the thing").
47. See Wittgenstein, *Tractatus*, *supra* note 40 at 28.
48. *Ibid* at 51.
49. See "The New Terminology of Privacy," Opinion, *The New York Times* (10 April 2019), online: <www.nytimes.com/interactive/2019/04/10/opinion/internet-privacy-terms.html>.

Wittgenstein's Tractarian treatment of language appeared to bind a precisely defined language to trustworthy, verifiable systems: logic, mathematics, and empirically observable facts.[50] This appealed to a growing movement of scientists who believed scientists should take only two types of facts seriously: empirical observations and mathematical tautologies—lab experiments and statements like two plus two equals four, for example.[51] These, they believed, could be verified, or meaningfully tested for truth.[52]

The *Tractatus* suggested that a sufficiently formal language could make verifiable statements about states of affairs, such that a verifiably accurate representation of an existing state of affairs could be termed true and a statement that did not accurately represent existing states of affairs could be deemed false. Scientists of the day viewed Wittgenstein's picture theory of language as providing key links between language and logic, logic and observed reality,[53] and—through the work of Gottlob Frege, Bertrand Russell, and Giuseppe Peano—logic and mathematics.[54] Thus language, logic, mathematics, and science were believed to form a closed, complete, and consistent system. (Law very much wanted to join

---

50. Bertrand Russell, "Foreword" in Wittgenstein, *Tractatus*, *supra* note 40, 1. Russell states:

> Mr. Wittgenstein is concerned with the conditions for a logically perfect language....The essential business of language is to assert or deny facts. Given the syntax of a language, the meaning of a sentence is determinate as soon as the meaning of the meaning of the component words is known....The first requisite of an ideal language would be that there should be one name for every simple, and never the same name for two different simples (*ibid* at 8).

51. See Verein Ernst Mach, *Wissenschaftliche Weltauffassung Der Wiener Kreis* (Artur Wolf Verlag, Wien, 1929) at 307 [Verein Ernst Mach in Wein]. See also Otto Neurath, "Wissenschaftliche Weltauffassung: Der Wiener Kreis" in Marie Neurath & Robert S Cohen, eds, *Empiricism and Sociology* (D Reidel, 1973). Neurath states:

> We have characterised the scientific world-conception essentially by two features. First it is empiricist and positivist: there is knowledge only from experience, which rests on what is immediately given. This sets the limits for the content of legitimate science. Second, the scientific world-conception is marked by application of a certain method, namely logical analysis. The aim of scientific effort is to reach the goal, unified science, by applying logical analysis to the empirical material (*ibid* at 307).

52. See Verein Ernst Mach in Wein, *supra* note 51 at 307.
53. *See* Janik & Toulmin, *supra* note 42 at 212-14 (discussing how the Vienna Circle used Wittgenstein's *Tractatus* as an epistemological starting point for their positivism, which was later built on by Russell and other contemporaries).
54. See Verein Ernst Mach in Wein, *supra* note 51 at 303:

> Von wissenschafts und philosophiegeschichtlichen Linien waren es besonders die folgenden, die sich hier vereinigten; sie seien gekennzeichnet durch diejenigen ihrer Vertreter, deren Werke hier hauptsächlich gelesen und erörtert wurden.…Logistik und ihre Anwendung auf die Wirklichkeit: Leibniz, Peano, Frege, Schröder, Russell, Whitehead, Wittgenstein…[und] Axiomatik: Pasch, Peano, Vailati, Pieri, Hilbert.

this club, as we will see.) They developed into a system first called verificationism (because all scientific truths were to be either verified or discarded) and then logical positivism. If the logical positivists were correct, formal logic would order the search for scientific truth and precisely defined language could tie logic to empirical observations of facts.

Similar yet distinct, legal positivism developed around the same time and bore a striking resemblance to logical positivism. Logical and legal positivism share the key goal of trying to create closed systems made up of phrases with defined meanings connected by logical operators ("and, but, equals, not"). In these systems, the meaning of any legal proposition could be determined with certainty, and statements had the power to change the world with performative meanings.[55]

H.L.A. Hart developed and popularized legal positivism with a collection of statements that came to typify the subject:

> (1) the contention that laws are commands of human beings…;
>
> (2) the contention that there is no necessary connection between law and morals or law as it is and ought to be…;
>
> (3) the contention that the analysis (or the study of the meaning) of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of laws [and other endeavors of legal history or sociology]…;
>
> (4) the contention that a legal system is a "closed logical system" in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards…; and
>
> (5) the contention that moral judgments cannot be established or defended, as statements of facts can, by rational argument, evidence, or proof.[56]

Hart's similarities to logical positivism are best seen in the third and fourth principles, which state the primary contention of logical positivism: Tightly defined and closed logical systems yield truth about the world. Indeed, the fourth statement is merely a transposition of the core logical positivist program into the field of law.[57]

Hart's ideas were developed out of the strong influence of both J.L. Austin and Wittgenstein.[58] Hart looked to the power of words in shaping the legal

---

55. See David Sugarman & HLA Hart, "Hart Interviewed: HLA Hart in Conversation with David Sugarman" (2005) 32 JL & Soc'y 267 at 273-75.
56. See "Positivism and the Separation of Law and Morals" (1958) 71 Harv L Rev 593 at 601-02, n 25.
57. See *ibid* at 608-10, 602, n 25.
58. See Sugarman & Hart, *supra* note 55.

relationships between people and objects.[59] When I say, "I hereby give you my gold pen," I am not merely describing my action but am actually making it true with my words.[60] When a judge sentences someone to fifteen years in prison, they create the prison sentence with their words. Their sentence (spoken words) creates the sentence (prison time). The problem comes when the use of a term (for example, the demand, "give me some privacy") does not operate in a closed, symbolic realm.

The intellectual inheritance of legal positivism lies at the roots of lawyers' difficulties with terms like "privacy." There are two levels. First, lawyers tend to define terms out of professional training and reflex. Give a lawyer the task of writing an article or judicial opinion on privacy, and they will first seek or craft a definition. Ask a lawyer what a term means, and they will look to the definitions section. Second, lawyers look to caselaw for their definitions because the words of courts make the law. In a legal sense—but only in a legal sense—the privacy right is exactly and only what a court says it is. Thus, if a lawyer is asked what the nature of privacy *is*, they are likely to instead ask to what extent a privacy interest is cognizable at law and to look at caselaw to see if some set of cases includes the factual scenario of their present case. That legal definition is comprised of fragments of court or statutory language that, in circular fashion, shape the privacy interest because of the extent to which the court did or did not include elements in the definition. For both reasons, our guild may be the wrong one to develop meanings of privacy. We do not ask people who make privacy claims what their use and context are; we look up the words of courts and adopt them as definitions. Worse, if lawyers mistake compliance with legal words for substantive privacy protections, privacy laws become useless. The risk is that privacy laws generate compliance, not privacy. As Ari Ezra Waldman puts it, "[P]rivacy law is experiencing a process of *legal endogeneity*: mere symbols of compliance are standing in for real privacy protections."[61] Compliance with privacy law does not mean that citizens have privacy. The practical consequences of this mistake are immense. Most companies comply with privacy law. Citizens do not have privacy.

Lawyers are never more legal positivists than when they look to a definition of a word to trump its meaning in living language. The question, we tell ourselves, with a curious, almost-imperceptible professional pride, is not what the word

59. *Ibid*.
60. *Ibid*.
61. "Privacy Law's False Promise" (2020) 97 Wash UL Rev 773 at 776 [emphasis in original].

should mean but rather what it has been defined to mean or, more precisely, what a court would say that it means.

This article encourages us to understand the meaning of words as they are used, not merely by contract drafters, lawyers, or judges, but also by the people who make claims to privacy. When we accept too lightly the language game of assigning radical and even opposite meanings to important words like privacy, we lose even the pretense of uncovering useful meaning.

2. MAPPING PRIVACY MEANINGS

The Tractarian and legal positivist position—that words are whatever they are defined to be—can be directly tied to some of our problems with obtaining practical privacy. If the logical-legal positivist view—that law is what is defined by the lawgiver—holds, then we can take words like "privacy" and define them in direct opposition to how the word is actually used by humans.

To take arguably the most important example, when we seek "privacy" on Facebook, we begin a legal journey that ends with our having no privacy at all. Indeed, our clicking to find out what words mean has made things worse. We are exposed to definitions of privacy that are the opposite of our expectations, and the effect of such exposure is a shift in our legal rights. Now that we know, we are bound. If a user clicks on "Privacy" on the Facebook homepage, they will not land in a linked context of privacy and the powers to enforce it. Instead, the user lands on a page titled "Data Policy." That page devotes itself almost entirely to establishing the legality of Facebook's collection and use of user data and is impossible to read. In an op-ed for *The New York Times*'s Privacy Project, Kevin Litman-Navarro, a data journalist, created a visual representation of the readability of various websites' privacy policies.[62] Facebook's policy takes about eighteen minutes to read, which is slightly above average, and has a Lexile score of slightly over 1300, which is the Lexile score required to be successful in college.[63] For comparison, this is higher than the Lexile score for *A Brief History of Time*.[64]

If a user then further selects to "learn more about how privacy works on Facebook," they land on a page devoted to controlling which friends see which posts. The page is dedicated to helping users understand how their posts, photos, and information can be controlled within the Facebook universe.

---

62. See "We Read 150 Privacy Policies. They were an Incomprehensible Disaster," *The New York Times* (12 June 2019), online: <www.nytimes.com/interactive/2019/06/12/opinion/facebook-google-privacy-policies.html>.
63. *Ibid*.
64. *Ibid*; Stephen Hawking, *A Brief History of Time* (Bantam Books, 1988).

In so doing, Facebook has been able to section off privacy into two separate definitional spheres: (1) the collection and use of your data and (2) who sees what you post on Facebook. Within the Facebook universe, the user has whatever control to manage who sees their posts and other information as Facebook allows at the time. The question of what data Facebook itself may collect and exploit remains controlled by the Data Policy: All is allowed.

Facebook's "Privacy" page provides a clear example of the kind of legal framework that has been created by the law's commitment to Tractarian definitionalism. According to legal positivism, the law is what the lawmaker (here, the drafter of the contract) says it is. Under this positivist framework, Facebook, and companies like it, have been able to continually define "privacy" as data collection. The word that, for many people in many contexts, meant the right and ability to exclude others from personal data has now been used as shorthand for how a company may go about extracting, packaging, and monetizing that data. Clicking on "privacy" on Facebook's page maps to a legally enforced system of total privacy loss.

3. LATE WITTGENSTEIN: LANGUAGE GAMES, MEANING IS USE, AND FORMS OF LIFE

Fortunately, we are not stuck with either definitionalism or legal positivism. Neither reflects how natural language, including legal language, actually works. Words do not acquire meaning from having a set definition; they acquire meaning by how humans use them in real tasks and contexts. This problem caused Wittgenstein to invent an entirely different second take on what language is and how it works.[65]

Wittgenstein's later thinking is reflected in a manuscript first published posthumously in 1953, *Philosophical Investigations*.[66] *Philosophical Investigations* reflects a significantly different view of language, and one that has had strong influence on philosophers of language and science and, in particular, social scientists. In the twentieth century, computer science and analytic philosophy followed the traditions of the *Tractatus* while cultural anthropology followed the tradition of *Philosophical Investigations.* Law, as we will see, is caught in between.[67]

65. This effort was well underway when Ludwig Wittgenstein wrote to a confidant in 1932: "In the *Tractatus*, I was unclear about 'logical analysis' and ostensive demonstration. I used to think that there was a direct link between Language and Reality." Janik & Toulmin, *supra* note 42 at 222.
66. *Supra* note 3.
67. See *ibid.* See also Dennis M Patterson, "Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine" (1988) 137 U Pa L Rev 335 at 356-59.

Under the *Philosophical Investigations* approach, the meaning of a word is not derived from some object or even concept to which it "points," but is instead the result of negotiations within a community of meaning.[68] Without some notion of both the task the community seeks to accomplish and the context in which it is operating, such negotiation is like smooth ice: "frictionless."[69] Thus, Wittgenstein demonstrates that the meanings of words are determined by how they are used by a community, in a context, and in relation to a specific task.[70] To clarify (and demonstrate the power of) this new take on language, Wittgenstein both describes and uses the theory in *Philosophical Investigations.* The text introduces and negotiates with the reader a series of neologisms and aphorisms that both constitute and explicate the linguistic approach that Wittgenstein espoused. These terms, including "forms of life," "language-games," "meaning is use," and "family resemblances," are explored in more depth in Part I(B)(3)(i-iii), below.

I. LANGUAGE GAMES ("SPRACHSPIELE")

A "language-game" is a specific activity or context in which a word-system arises.[71] In the classic example, a builder, A, and an assistant, B, must build something. They require a language to describe the elements that they need to discuss: "block," "pillar," "slab," "beam," and so forth.[72] As the project progresses, the builders might develop words for "here" or "there," to indicate where things are to be placed.[73] The words make sense in relation to the activity that A and B share. Of course, the assistant may disagree as to whether something is a "pillar" (vertical orientation) or a "beam" (horizontal orientation), and those differences must be further negotiated. The meanings of words are determined by how A and B use them, not measured by their mental assent to definitions but by whether B hands A what they requested.[74]

We glean two principles from this game. First, language is rooted in activity. Second, the development of language cannot be divorced from its context. Wittgenstein warned against developing language in a logically abstracted space

---

68. See Roshan Ara, "Wittgenstein's Concept of Language Games" (2006) 26 Al-Hikmat 47 at 48-49.
69. See Wittgenstein, *Philosophical Investigations*, *supra* note 3 at 46.
70. See Daniel G Stroup, "Law and Language: Cardozo's Jurisprudence and Wittgenstein's Philosophy" (1984) 18 Val U L Rev 331 at 349-50.
71. Wittgenstein, *Philosophical Investigations*, *supra* note 3 at 11.
72. *Ibid* at 3.
73. *Ibid* at 5.
74. See *e.g. ibid* at 4 ("Don't you understand the call "Slab!" if you act upon it in such-and-such a way?").

free from context, because in such a space—in classic lawyers' style—words can be arbitrarily defined.[75] A context-free environment is, in Wittgenstein's words, "slippery ice."[76] There is no friction, no contours of the terrain to offer natural topological guidance to the semiotic lay of the land.[77]

The lawyer's tool of definition decontextualizes the meaning of the word "privacy." It puts us on Wittgenstein's slippery ice. Decontextualization is dangerous because the word can mean whatever the user wants it to mean. For example, online, privacy policies are really surveillance policies. By contrast, the lawyer's tool of analogy helps to recontextualize use and takes us off the slippery ice and back to the rough ground. Analogy creates a context that prevents us from slipping. Analogy ties the meaning of the word to a rich context in which people are actually using the word rather than merely defining it.

An example of how decontextualization and recontextualization affect meaning may be helpful. Judge Richard Posner is well known for his claim that almost all appeals to privacy are attempts to hide guilty behaviour.[78] Yet this was not Judge Posner's view when he was reminded of specific contexts. For example, Posner wrote in *Haynes v. Alfred A. Knopf, Inc.*:

> Even people who have nothing rationally to be ashamed of can be mortified by the publication of intimate details of their life. Most people in no wise deformed or disfigured would nevertheless be deeply upset if nude photographs of themselves were published in a newspaper or a book. They feel the same way about photographs of their sexual activities, however "normal." [...] Although it is well known that every human being defecates, no adult human being in our society wants a newspaper to show a picture of him defecating. The desire for privacy illustrated by these examples is a mysterious but deep fact about human personality.[79]

This is the power of using context to convey meaning. Judge Posner, on the toilet, understands privacy. Posner, the public intellectual, does not. Without context, Judge Posner slips on ice.

Wittgenstein's builders analogy illustrates the development of the language of privacy. To answer the question of "what privacy means," one needs at a

---

75. See *e.g.* Rick Davis, "Group Morality and Forms of Life: Dewey, Wittgenstein and Inter-Subjectivity" (2012) 4 Eur J Pragmatism & Am Phil 118 at 119 ("Wittgenstein… [holds] that language—its structure and meaning—cannot be understood if divorced from its context").
76. See Wittgenstein, *Philosophical Investigations*, *supra* note 3 at 46.
77. *Ibid*.
78. See David Goldberg, "Dronalism: Journalism, Remotely Piloted Aircraft, Law and Regulation" (2015) 10 FIU L Rev 405 at 428.
79. 8 F.3d 1222 (7th Cir 1993) at para 1229.

minimum some sense of context, task, and community to even begin to think about the word's meaning. And these are not theoretical circumstances describing how a word might be used. A word only draws its meaning from how it is actually used. Context, task, and community do not inform the meaning of the word; they are that which gives the word meaning at all.[80]

In addition, the example of the builders' language highlights some dangers of the traditional approach to privacy scholarship. Academics (myself included) do not often notice that we are ourselves engaged in a language game. For many of these traditional privacy articles, one might say that the context is the academic quest for influence; the task is one of demonstrating the author's command of the literature and their competence (particularly in advancing novel and non-obvious theses); and the linguistic community is legal academic discourse. This obviously produces very different meanings for words than their common meanings, even without any academic attempt at definition. The context, task, and community of academic discourse are not wrong; they just describe a specific language game. A word used in the language game of academic discourse does not—indeed, cannot—mean the same as the same word used in other language games, precisely because the shift in context, task, and community changes the meaning. Or, put more simply, "meaning is use."

II. "MEANING IS USE"

Language is not built from formal or ostensive definitions.[81] Rather, language is an action, a way of doing, and a "form of life" within and by a linguistic community. As Dan Solove writes:

> Wittgenstein suggests that meaning is not an objectively true link between a word and the things to which it refers. Rather, the meaning of a word comes from the way a word is used in language, not from any inherent connection between the word and what it signifies.[82]

Humans use words to communicate to others (a community) within a context to complete a task. "Working together" is the centre of the language, not any universal alignment between word and meaning. Indeed, when the nature of "working together" changes, the meaning of the words change. Sentences convey

---

80. See Gordon Baker, "Wittgenstein: Concepts or Conceptions?" (2001) 9 Harvard Rev Philosophy 7 at 14.
81. See *e.g.* Deborah Tannen, "Discourse Analysis—What Speakers Do in Conversation" (last visited 10 January 2022), online (blog): *Linguistic Society of America* <www.linguisticsociety.org/resource/discourse-analysis-what-speakers-do-conversation>.
82. See Solove, *Understanding Privacy*, *supra* note 7 at 42.

less information and make less sense the more they fall outside of the context and task that the linguistic community undertakes. Wittgenstein writes, "If a lion could talk, we could not understand him."[83] The idea is that any possible community, context, and task about which the lion wishes to communicate would be derived from a linguistic community to which we are outsiders, in a context foreign to us, and as part of tasks that we do not perform (say, how to coordinate hamstringing and bringing down an antelope). Conversely, primates point, and the words "here" or "there" arise. But what is pointing to a lion, who does not have an index finger?

The example of the builders' language demonstrates this. The words "here" or "there" and "pillar" or "slab" refer to places and orientations that can be determined only by reference to the context and task in which the builders are operating. The words are shaped by the community (the builders) in a context (a building site, building materials, and so on) and with reference to a task (building).[84] Outside of any community, context, and task, the words are meaningless.[85]

"Meaning is use" is the linchpin of this article. It shows why defining words impedes the understanding of their meaning. It invites attention to how humans use language, rather than to how humans construct precise definitions and typologies of privacy. It invites privacy scholars to observe communities, tasks, and contexts, particularly outside of just the legal community. It invites attention to the questions of when, where, why, and to whom humans say "privacy," and correspondingly deemphasizes the question of *what* privacy is. And, most importantly, it helps us recognize new uses of the term even when those uses fall outside of any given, presently recognized, typology of privacy. It lets us access the future of privacy.

III. "FAMILY RESEMBLANCES," DANIEL SOLOVE'S UNDERSTANDING PRIVACY, AND TYPOLOGIES AND TAXONOMIES

I am not the first to suggest using Wittgensteinian tools to study privacy. In his landmark book *Understanding Privacy* and its predecessor articles, "Conceptualizing Privacy" and "A Taxonomy of Privacy," Daniel Solove argues

83. See Wittgenstein, *Philosophical Investigations*, *supra* note 3 at 225.

84. See Dennis M Patterson, "Law's Pragmatism: Law as Practice and Narrative" (1990) 76 Va L Rev 937 at 974 ("[E]ven for Wittgenstein's builders, ostensive definition is not enough for there to be meaning. The meaning of the activity is a function of 'a particular training.' If the training were different, 'the same ostensive teaching of these words would have effected a quite different understanding'").

85. *Ibid*.

against attempts to find one or a few common denominators that comprise the "essence" of privacy.[86] Throughout this scholarship arc, Solove uses Wittgenstein's idea of "family resemblances" to decentralize privacy discussions.[87] To explain the concept, Solove writes:

> Wittgenstein demonstrates a way to conceptualize language apart from the traditional method of conceptualizing. Specifically, he explains that language does not have a single essence but involves a horde of different activities which have "no one thing in common" but "are *related* to one another in many different ways."[88]

Thus, they "draw from a common pool of similar characteristics—'a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail.'"[89]

Solove attempts to avoid definitionalism and embrace the family resemblances theory by primarily looking to case law and legal theory (with some historical and cultural sources that bear on legal conceptions) to develop a typology that links together some of the disparate ways in which lawyers have used the term "privacy." This creates not a singular overarching principle, but rather a constellation of different approaches.[90] To build his typology, Solove consults legal sources—cases, legislative histories, and a few recognizable other legal and cultural traditions—and emerges with what he thinks privacy is across a range of "privacy problems": a coherent, but sometimes loose, set of related difficulties that concern information, the individual, and society.[91]

---

86. See Solove, *Understanding Privacy*, *supra* note 7 at 42 ("[T]he meaning of a word comes from the way a word is used in language, not from an inherent connection between the word and what it signifies"); Daniel J Solove, "Conceptualizing Privacy" (2002) 90 Cal L Rev 1087 at 1097-98 [Solove, "Conceptualizing Privacy"] (describing Wittgenstein's theory of family resemblances and calling for a decentralized look at privacy meanings that incorporate different legal approaches and conceptualizations of privacy); Solove, "A Taxonomy of Privacy," *supra* note 8 at 477 (developing a taxonomy of privacy with buckets of meaning, drawn from privacy problems, legal conceptions, and law-focused historical and cultural sources).
87. See Solove, *Understanding Privacy*, *supra* note 7 at 40.
88. Solove, "Conceptualizing Privacy," *supra* note 86 at 1097 [emphasis in original].
89. See Wittgenstein, *Philosophical Investigations*, *supra* note 3 at 32.
90. See Daniel J Solove, "I've Got Nothing to Hide and Other Misunderstandings of Privacy" (2007) 44 San Diego L Rev 745 at 760 ("The term privacy is best used as a shorthand umbrella term for a related web of things.…Classifying [a problem] as a privacy problem is merely saying that it bears some resemblance to other privacy problems") [Solove, "I've Got Nothing to Hide"].
91. See generally Solove, "Taxonomy of Privacy," *supra* note 8 (explaining how Solove's taxonomy was developed and what it contains).

Solove's typology-based approach, grounded in Wittgenstein's family resemblances theory, is satisfying in that it draws the reader away from essentialist thinking and focuses their attention on the multiple and conflicting contexts in which privacy language is used.[92] The typology-based approach takes the first step in the right direction, but it should not be the last. The family resemblances theory looks at examples of privacy use cases and discerns distinct groupings of privacy "types" that resemble each other like members of a word family.[93] These groupings can then be converted into named buckets, and most later cases can be sorted neatly into those buckets.[94] For example, data leaks can be sorted into the "informational privacy" bucket, and decisions central to private life can be sorted into either the "right to be let alone" or "decisional privacy" buckets. Each bucket shares characteristics with other buckets, though no bucket shares every characteristic with another. It is this approach that this article builds on while it takes on the job of moving beyond Solove's intuitions around family resemblances.

Although I am inspired by Solove's application of Wittgenstein's family resemblances theory to cut short the useless search for privacy's essential core meaning, I am convinced that typologies are not the answer. Typologies are definitions with extra steps. The meaning of privacy is to be found by looking at uses, not family resemblances. Resemblances are derived from uses; they do not legitimize them. When a word like privacy is uttered, interpreted, and acted upon within some community of meaning, we should not exclude it from the meaning of the word merely because it does not correspond with some previously identified family resemblance. Things may have evolved in a new direction. A new family resemblance may emerge from the use.

This lays bare the points of departure from which this article builds on and goes beyond Solove's analysis. Solove focuses on family resemblances between terms. I focus on the way a term acquires meaning within a context and community by its use. Solove's model is a typology or taxonomy of family resemblances. This

92. See Solove, *Understanding Privacy*, *supra* note 7 at 9-11.

93. See *e.g.* Bert-Jaap Koops et al, "A Typology of Privacy" (2017) 38 U Pa J Intl L 483 at 487 (creating a quintessential and erudite typology, in which the authors construct a set of mutually exclusive conceptual buckets that cover the broad range of privacy claims, based on their reading of some scholars, legal cases, and national constitutions). If the reader cannot succeed in sorting at least some of these into very different buckets, or coming up with other buckets with as much (or more) value, I will eat my hat. Solove, "I've Got Nothing to Hide," *supra* note 90 at 757.

94. See *e.g.* Koops, *supra* note 93; Solove, "I've Got Nothing to Hide," *supra* note 90 at 757 ("I developed a taxonomy of privacy….The taxonomy is my attempt to formulate a model of the problems from studying the welter of laws, cases, issues, and cultural and historical materials").

article views the meaning of privacy as a heat map of overlapping and recursive uses that change meaning as they are used in new contexts. For a practical example of the difference, Solove's approach grew from examining the multiple ways lawyers have talked about privacy in case law, articles, and treatises. Mine suggests examining ordinary language sources.

Solove captures past cases but does not articulate a principle for future ones. To be clear, he posits that new buckets could be formed but does not explain on what basis. This article's approach would count future uses of the word "privacy"—instances in which the word is uttered and interpreted effectively within a community—without pre-checking to see if the use matches some family resemblance. And to that point, the community of meaning Solove examines differs strongly from the one posited here. Solove looks to the legal community to generate buckets. In my view, it has been a mistake for academics to exclude ordinary language communities of meaning, especially when they differ from legal conceptions of privacy. That is where lawyers lose the privacy plot. To determine what privacy is, it is more important to observe the contexts in which the term is invoked than it is to nail down an operational legal definition.

Privacy is not a big umbrella term with subcategories that capture different groupings of cases. Rather, it is a word that acquires new meaning (as all words acquire meaning) as its use in context becomes specific. Abstraction strips away the context that gives words meaning. Abstraction puts us back on Wittgenstein's slippery ice of context-free definition. So, "back to the rough ground!"[95] Privacy demands only acquire discernible meaning when a context, community, and task are there to give the words their shape. Typologies harm meaning, just as definitions do. It is a more gentle pruning of the orchard, and certainly better than definitionalism, but both approaches lop off use cases.

Here, we run again into the old problem of differing language games. The abstract space of a typology is a specific context in which a specific language game is played. Fitting a use into a typology bucket is not the same game as using the word to make a claim or demand. The language game of building a typology is not nearly the same as the game of everyday use of language. The typology game abstracts the context of use meanings in order to put them in an organized constellation or, worse, to compare and contrast them. (I say worse because a focus on contrast causes deemphasis of legitimate but overlapping meanings.) The same Procrustean stretching and hacking goes into fitting use cases into the abstract logical buckets of a typology that went into hacking off the meanings of words. And what if a use of the word "privacy" does not fit into a bucket? Either a

95. See Wittgenstein, *Philosophical Investigations*, *supra* note 3 at 46.

new typology must be written to capture it (and that game never stops) or the new case must be, like Cinderella's sisters trying to fit the glass shoe, bloodily mangled to get it to fit a framework both alien to and abstracted from its use context. Applying a typology approach will exclude future uses of the term privacy just as much as any attempt to fit privacy into a singular, honed definition.

A typology approach seeks to superimpose the image of buckets catching privacy definitions over what should be a heat map of privacy definitions. Privacy use would be best captured by heat maps of meaning that fully appreciate the gray areas of meaning that depend on context and use. Forcing meaning into a bucket harms the natural meaning of the word. The problem of typologies is especially apparent in the way that they harm potential new uses in new contexts. Typology buckets not only capture uses of the word but also suck in new uses. Buckets exert a gravitational pull.

As surveillance technology develops, the word "privacy" will be used in new contexts and new ways. For example, privacy in public is no longer a contradiction in terms: There is something sinister about nationwide vehicle license plate tracking programs or cameras parsing passersby with always-on facial recognition.[96] These public contexts now provoke demands from humans that use the word "privacy." We should develop the tools now—tools like thick qualitative description, structural topic modelling, behavioural economics experiments, or surveys, which each help us capture how humans actually make privacy claims—to help us understand what causes humans to demand privacy in those contexts.

Privacy definitions will not count new intuitions around privacy and settled and broadly accepted definitions will be even more stultified. Established typologies do not capture novel uses by newly formed communities of meaning in new contexts to solve emerging tasks, because we see the new use through the lens of the bucket into which we are already trying to sort it. Of course, clever definitions may help us understand some new contexts as involving existing privacy concerns. A theory of privacy that maps privacy to autonomy in decision making might help us view rising authoritarianism as a threat to privacy, for example. But that would happen under a "meaning is use"-centered interpretive approach as well. Nothing invalidates prior uses in prior contexts; they merely do not determine our approach to uses that do not share core features of a definition of privacy or typology bucket.

Thus, for all the good typologies do in steering the privacy debate away from the search for essence, there is a very real risk that definitional and

96. Joel Reidenberg, "Privacy in Public" (2014) 69 U Miami L Rev 141 at 142-43.

typological approaches alike will discard outlying or overlapping use cases that do not comport with the author's definition or typology. Imagine conducting a scientific survey on how humans use the word "privacy." One participant responds with a use of the term that is not easily captured in existing definitions or typologies (as commonly happens when a novel technological privacy problem is presented—see, *e.g.*, the rise of conversations about privacy in public, driven by the omnipresent surveillance of the internet of things).[97] One might be justified in discarding the use case if one thinks the person using the word is lying. But one is not justified in discarding the use if it is sincerely held but not in accord with a given definition or typology. Discarding good data because it does not fit the hypothesis's framework is as close as science gets to naming a sin.[98]

A closely related problem of typologies is the problem of authority. Who decides what is included in or excluded from a typology? Ryan Calo raises a similar point in discussing Solove's use of Wittgensteinian family resemblances to create a typology of privacy. Typologies require gatekeeping. Someone must say what falls in or out of the typology, or in and out of each sub-bucket.[99] Calo points out that Solove's criteria for inclusion are problematic because his criteria "involve recognition by the right sorts of authorities."[100] Solove provides a list of sources, centered on legal authorities, to which one can turn when looking for inclusion. Calo asks what happens when someone disagrees with one of these sources.[101] He asserts that "[m]ere resemblance to other privacy harms is not enough. Sometimes we want to include something on a list that resembles no other item on it."[102] New privacy concerns, and thus new uses of the word "privacy" in language, could be exactly that: new. Restricting new privacy meanings to those that have come before denies the possibility of black swans and linguistic babies.

Finally, typologies are plagued by the problem of ossification. Typologies harden, even when their creator has expressly warned against the danger. This happens even if a typology is kept soft-edged by the author through statements

---

97. *Ibid*.
98. See *e.g.* Katherine Picho & Anthony R Artino Jr, "7 Deadly Sins in Educational Research" (2016) 8 J Graduate Medical Education 483-87.
99. See Ryan Calo, "The Boundaries of Privacy Harm" (2011) 86 Ind LJ 1131 at 1141 ("To see the limitations of this [taxonomy] approach...we need to examine how privacy problems come to be included in the taxonomy in the first place....[I]t turns out to be impossible to classify without reference to an 'overarching principle'").
100. *Ibid* at 1141.
101. *Ibid*.
102. *Ibid*.

that cases might be sorted into multiple overlapping and contradictory categories, and even if a typology is expressly kept open to expansion and new use cases (as Solove wisely did in both cases).[103] Although a typology seems open when new, it will end up like William L. Prosser's four now-ossified privacy torts.[104] Prosser categorized what he considered to be all of the existing privacy harms at the time into neat groups: a typology that needed no center.[105] But the typology ossified, and the categories became more important than the contexts. If a cause of action did not meet one of the categories (and often when it did), courts excluded it because of Prosser's typology. Of course, this is completely inconsistent with Prosser's method, which gathered untyped common law cases and showed that they could be grouped into categories based on similarities. But the typology, as it was actively used by courts, became a reason to exclude claims of privacy from courts. In short, new privacy harms could not fit into the ossified structure, the typology became outdated, and new privacy harms remained undertheorized. If we stop trying to define privacy, with or without typologies, and instead focus on its actual uses in contexts and within communities, we will be better able to understand new privacy claims and new privacy harms.

It is worth reiterating that I believe Solove's work to be the cornerstone of a new way of looking at privacy. My goal is to build on the foundation created by ending the search for privacy's essence. The problem lies not with privacy in particular (indeed, it applies to all core important words) but with how lawyers feel themselves constrained by culture and training to prefer legal definitions over ordinary language and to note that, if asking lawyers to define privacy is the problem, then categorizing how lawyers have defined privacy is not the best answer.

We are interested in *new* intuitions around privacy as technology creates new contexts and problems that ordinary people face when they demand privacy. If we want to examine future meanings of words like privacy as humans encounter novel social and technological challenges, we are going to have to hang up the definitional game and instead look at the demands humans are making and the contexts in which those demands are made.

---

103. See Solove, *Understanding Privacy*, *supra* note 7 at 105 ("My taxonomy is an attempt at categorization, and all attempts at categorization are artificial....One can certainly quarrel with my taxonomy's categories. Since they are not the product of any overarching notion of privacy, they are not final and immutable").
104. "Privacy" (1960) 48 Cal L Rev 383 at 389 (laying out the four distinct kinds of tortious invasion that constitute the law of privacy).
105. Prosser explains that although the four privacy torts bear a similar name, they have "almost nothing in common" except reference to the phrase "to be let alone" (*ibid* at 389).

II. PRIVACY BEYOND DEFINITION

I undertook this project because it seemed to me that legal thinkers (myself included) say many useful and true things about privacy, yet they have an incomplete sense of the aforementioned dangers of abstraction and decontextualization, of stretching and cutting language. It was not precisely our thinking that was off, but rather the implicit thinking behind our thinking. In particular, the practice of producing definitions reproduces the philosophical mistake of viewing words as ostensive or representational.[106] The attempt to enclose words in a closed, logical system of representation, whether a definition or a typology, creates problems of legal endogeneity, mistaking legal compliance for substantive protections, mistaking the framework for the content. Yet these practices are honoured folk traditions in our guild. A lawyer, by training, respects defined terms more than living language, not less, which is odd. In everyday life, would you rather eat peas, or "peas"? Would you rather buy a leather jacket, or a "leather" jacket? A lawyer who discovers that a term has been clearly defined by an authority has been trained to feel a sense of relief, not scathing mistrust.

In short, one of the major reasons that privacy has been mulcted for its lack of definition is that lawyers have played an outsized role in the search for privacy meanings. Lawyers have been trained to look for definitions first and to trust defined terms over undefined ones. Definition is one of the primary language games of our guild, and our guild has been, for the most part, in charge. The problem with defining privacy is that lawyers have been playing our own definitional language game, not observing the use games of others. These guild practices make us susceptible to the kinds of mistakes we have discussed here: the wasteful and damaging search for a universal definition for privacy; when no definition can be found, the attempt to capture all the use cases in abstracted and logically complete and consistent typologies; and the reliance on our own legal community of meaning (which is still seeking to define the term) over communities of meaning that are using the term in ordinary language.

I do not suggest that lawyers and legal academics cannot or have not said anything useful about the meaning of privacy—precisely the contrary!—but without a counterweight, lawyers' own professional training may badly mislead them. If one's main tool is a hammer, one is prone to grasp it unconsciously even though other good tools are available. Without new tools for discovering how a

106. See Wittgenstein, *Philosophical Investigations*, *supra* note 3 at 2-3 ("Every word has a meaning. This meaning is correlated with the word. It is the object for which the word stands").

word is actually used, lawyers are no more likely to successfully determine what privacy means by using the process of definition than they are to successfully perform open-heart surgery by using their knowledge of estates in land and future interests. Their go-to tools and techniques are foreign to the task. My point is that analogical, narrative, and interpretive tools that seek to understand and explain what is going on when someone makes a demand for privacy will serve the legal profession far better than attempting to define privacy.

A. IDENTIFY THE RIGHT TOOLS FOR THE TASK

Closed logical systems and empirical observations are unsuited to the task of understanding what humans do when they use language and, as a result, are unsuited to the task of understanding privacy. The missing piece that has developed in the social sciences is neither pure logical derivation nor pure empirical observation; it is *interpretation*, as used in the social sciences, for reasons that are set forth in the investigations themselves.

Academics, especially legal academics, stand at the crossroads of three scientific traditions, not two. Therein lies hope. A lawyer has their choice of epistemologies, but presently that choice trends towards chaos and misunderstanding rather than flexibility and innovation. Once scholars steeped in the legal tradition see the available tools cleanly and understand their uses, it is my hope that they will be less likely to mangle methods and more likely to use the right tool for the right job.

Our failure to convince one another of privacy definitions has nothing to do with the word "privacy" and everything to do with the use of the wrong tools for the job of determining what people mean when they demand privacy.[107]

---

107. See *e.g.* Wittgenstein's "beetle in a box" experiment in *Philosophical Investigations*, *supra* note 3. Wittgenstein says that

> Suppose everyone had a box with something in it: we call it a "beetle". No one can look into anyone else's box, and everyone says he knows what a beetle is only by looking at his beetle.—Here it would be quite possible for everyone to have something different in his box. One might even imagine such a thing constantly changing.—But suppose the word "beetle" had a use in these people's language?—If so it would not be used as the name of a thing. The thing in the box has no place in the language-game at all; not even as a *something*: for the box might even be empty (*ibid* at 100).

Wittgenstein uses this example to explain the fruitlessness of an ostensive theory of language, in which all of the people with boxes use the same word to "point" to different objects. However, this thought experiment also shows the futility of conversing about philosophy or word meanings when each participant in the conversation has a different epistemology interpreting what is in their "box." In fact, "all meaning-designation goes through an individual's perception and thus is subject to the distortion factor inherent in that individual's mental 'box.'" Rebecca Schuman, "Kafka's *Verwandlung*, Wittgenstein's *Tractatus*, and the Limits of Metaphorical Language" (2011) 44 Modern Australian Literature 19 at 27.

Mathematicians convince each other of proofs by stating the axioms and deriving theorems. This is successful because of a shared epistemology: a shared way of determining what is true. Empiricists convince each other of the validity of experimental observations by publicizing their experimental design and results, which permits examination and replication. Again, this works because of a shared way of knowing and weighing truth.

But when there is no shared understanding of the limits of each scientific approach, things become horribly muddled. It is as if an empiricist attempted to convince a mathematician that two plus two equals five based on studies of student answers. The empiricist's argument fails to convince the mathematician because it employs a method that, although valid for the empiricist, cannot possibly be allowed to contaminate the rational structures that mathematicians build. We as lawyers fail to convince one another of the inherent validity of legal definitions because, although our profession draws richly on all three scientific traditions, we do not talk cleanly about the proper reach and role of each tool we use.

1. THREE TOOLS FOR THREE TASKS

Consider a debate between a mathematician, an empiricist, and a cultural anthropologist. On what grounds does each base assertions of truth and expect others to accept them? Is the process by which the mathematician confidently states that the tangent of a forty-five degree angle is one the same as the process by which an empiricist confidently states that, given certain low p-values, it is clear that cigarettes cause lung cancer, or the process by which an anthropologist confidently states that when someone answers, "I'm good," in response to a polite offer of food or service, the person means "no"? What is each profession's way of knowing? What conversational moves would each speaker make to those in their profession in order to convince them that a statement is accurate?

The mathematician reasons from arbitrary axioms that they assume are true and builds a closed formal logical system by rules of inference, an epistemological commitment that I will call rationalism.[108] The core logic is deductive. The typical white-coated, clipboard-toting scientist, by contrast, constructs experiments

108. See James Fieser, "Continental Rationalism" (1 September 2017, last modified 1 June 2020), online: *University of Tennessee Martin* <www.utm.edu/staff/jfieser/class/110/7-rationalism.htm> ("Rationalism is the philosophical view that knowledge is acquired through reason, without the aid of the senses. Mathematical knowledge is the best example of this, since through rational thought alone we can plumb the depths of numerical relations, construct proofs, and deduce ever more complex mathematical concepts").

and observes the results in a process commonly termed empiricism.[109] The core logic is inductive. By further contrast, a cultural anthropologist constructs an interpretive framework by observing the subject community and recording their observations through a process of thick description that may or may not include the anthropologist's own participation in the community.[110] I adopt Clifford Geertz's terminology describing the method of cultural anthropology and call this epistemology interpretive.[111]

I suggest that lawyers ought to use each tool where it is strongest. Rational systems are best for closed, logical, made-up systems that can tolerate no contradiction, like mathematics. Empirical observations are best for looking at the world and attempting to guess what causes what. Neither of those approaches help us interpret what someone means. There, we must use interpretive methods and examine the webwork of language and culture in which meanings are suspended.

In particular, rationalist accounts of law—like legal positivism, or seeking the meaning of privacy in definitions—appear deeply flawed. Certainly, law (and laws) cannot be reduced to formal logic, and what passes for informal logic within legal decisions and legal academic writing is closer to rhetoric. As Oliver Wendell Holmes states, "The life of the law has not been logic: it has been experience."[112] He continues, "[T]he law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[113] I suggest here that it may be more appropriate to follow the better angels of our nature away from rationalist and positivist accounts of law (which see law as a closed, logical system) and towards the intentional creation of a community of meaning in which privacy demands are directly made, understood as being made, and responded to in good faith.

2. INTERPRETATION

Assume, for example, that we wish to know not what the next Mersenne prime is, or whether smoking causes cancer, but what a cultural artifact like *Harry Potter*

---

109. See Peter Markie, "Rationalism vs. Empiricism" (19 August 2004, last modified 6 July 2017), online: *Stanford Encyclopedia of Philosophy Archive* <plato.stanford.edu/archives/fall2017/entries/rationalism-empiricism>.
110. See Albert J Mills et al, "Thick Description" in *Encyclopedia of Case Study Research* (Sage Publications, 2010) at 942 ("Thick description is a term used to characterize the process of paying attention to contextual detail in observing and interpreting social meaning when conducting qualitative research") [emphasis omitted].
111. See *The Interpretation of Cultures* (Basic Books, 1973) at 5.
112. "The Common Law" (1881) at para 1.
113. *Ibid*.

and the Philosopher's Stone is.[114] There are good, scientific answers to the question: It is a book, and more specifically a *bildungsroman* in the tradition of British public school novels, that describes the fictional life of a young wizard and his friends. This answer truthfully and informatively answers the question, but that truth, as a whole, is neither derived by deduction nor observed in an experiment. The truth of the answer comes from the speaker's understanding of the network of cultural, linguistic, and literary traditions involved.

When scientists seek to create those insights, they do not use the methods of mathematics or the laboratory but the tools of linguists and cultural anthropologists: deep ethnographic study, thick description (which itself is a term of art for a method), participant observation, and so on. As Geertz, a central figure in the methodology of cultural anthropology writes, "[M]an is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning."[115]

Geertz discusses a situation in which there are three boys.[116] One winks as an involuntary eye twitch. The second winks as a conspiratorial signal to his friend.[117] A third boy makes fun of the first by mimicking the wink to amuse his cronies; or, to complicate matters, the third boy could rehearse his parody abilities by first practicing his mocking wink at home in a mirror.[118]

Consider how one would credibly explain the meaning of the winks.[119] The point is *rendering intelligible what is going on* when humans use culture or language to communicate. Geertz's idea was that humans use language to parse behaviour, to describe it and make it intelligible, to situate behaviour and language in its spoken context, and translate it:

> Behavior must be attended to, and with some exactness, because it is through the flow of behavior—or, more precisely, social action—that cultural forms find articulation. They find it as well, of course, in various sorts of artifacts and various states of consciousness; but these draw their meaning from the role they play (Wittgenstein would say their "use") in an ongoing pattern of life, not from any intrinsic relationships they bear to one another.[120]

---

114. JK Rowling (Bloomsbury, 1997).
115. *Supra* note 111 at 5.
116. *Ibid* at 6-7.
117. *Ibid* at 6.
118. *Ibid* at 6-7.
119. *Ibid*.
120. *Ibid* at 17.

Interpretation works for these problems; rationalism does not. "Nothing has done more," Geertz writes, "to discredit cultural analysis than the construction of impeccable depictions of formal order in whose actual existence nobody can quite believe."[121]

We can avoid interpretation by drafting our own definitions, typologies, and other beautiful logical constructs, but these fail to help with the problems at hand. As Geertz puts it:

> A good interpretation of anything—a poem, a person, a history, a ritual, an institution, a society—takes us into the heart of that of which it is the interpretation. When it does not do that, but leads us instead somewhere else—into an admiration of its own elegance, of its author's cleverness, or of the beauties of Euclidean order—it may have its intrinsic charms; but it is something else than what the task at hand…calls for.[122]

We have constructed beautiful castles in the sky instead of tools that help us see the lay of the land. Culture and language, including the cooperative fictions of law, are played out within and understood only by reference to Geertz's "webs of significance" that we ourselves have spun.

Law is language. The core tool of law is interpretive. And law is a robust language, used and described within a community of meaning that shares interpretive inclinations, with a specific task and context: As Lon L. Fuller puts it, "subjecting human conduct [] to rules."[123] These rules are not the abstract rules of formal logic; they are negotiated results in specific contexts. As Robert M. Cover notes in his famous article, "Foreword: Nomos and Narrative," law is organic; it springs into being as the result of community negotiation over rules.[124] Law bubbles up as a result of arguments between people trying to get something done in a context. The inputs to the legal system are the minute fraction of cases in which the community has failed to negotiate a rule that works for everyone and must turn to an arbiter under a community rule of decision.

Despite the undeniable influence of rationalism (*e.g.*, legal positivism) and empiricism (*e.g.*, empirical legal studies) on the discipline of law, lawyers and legal scholars are among the most gifted and persuasive interpreters of language. A trained legal mind is a cultural harp upon which harmonies of human cooperation are played. Ask a lawyer what a word means, and their unguarded response is the best one: "It depends." What does it depend on? The community,

---

121. *Ibid* at 18
122. *Ibid.*
123. *The Morality of Law* (Yale University Press, 1969) at 106.
124. (1983) 97 Harv L Rev 4 at 11 (suggesting a social basis for jurisgenesis).

task, and context, of course. That is, to my mind, a better response to what privacy means than any other response given thus far. Faced with an assertion like "give me privacy," a lawyer can choose to define the term themselves or interpret the speaker's meaning. I argue that the second is the more fruitful path, if far less commonly employed. Lawyers need not render words like "privacy" down to an essential meaning. We have other powerful tools.

Why, then, have lawyers abandoned their own tools of interpretation and analogy? My best sense is that law, as a discipline, has an inferiority complex regarding method. Law recognizes no method or complex of methods as its own. This inferiority complex maps to a misplaced preference for rational and empirical methods and the exclusion of interpretation as a valid approach. But unlike articles in *Applied Physics Letters*, law review articles must contain and construct serious normative arguments. The bulk of legal academic arguments are still interpretations, even when they are gussied up with the language of logic or empiricism. Re-embracing law's interpretive core can help the discipline embrace new and non-legal meanings of privacy.

3. RATIONALISM'S PROPER ROLE

The proper understanding of the act of definition is not as the foundation of language that must be set in place before any progress is possible, but as a limited linguistic sub-game that helps when precision of language is a requirement for other reasons. Definition is not a tool to explore what the meaning of a word is because it replaces the use of the word with the definition. A good analogy is the medical procedure of a hip replacement: We do it under certain circumstances when there is no other choice, and it helps with walking under those circumstances, but no one would argue that everyone must have a hip replacement before they can walk. That would be a misuse of the tool of hip replacement caused by misunderstanding its role.

Getting the relationship between definition and language correct is a critical step in formulating a way forward. Once we understand that definition is a small tool and a limited linguistic sub-game, rather than the foundation of meaning, we can use it when it is appropriate and not worry about needing to have precise definitions when seeking them is counterproductive.

This yields two insights into the remaining reach and role of rationalist definition in legal theory. First, placing definitionalism in a gatekeeping role for an emerging legal field—as we have done for the study of privacy—is a bad move. It cuts off two-thirds of the progress we can make. Law is not a defined rational system, and both empirical and interpretive accounts do not particularly

suffer when words have multiple and overlapping meanings. An empiricist can survey people and observe how they use words. An interpretive approach might attempt to build an interpretive interface, a set of two-way understandings that permit communication (however flawed) between one culture and another by interacting with and interpreting the subject linguistic community. Both might use definitions in an informal way to aid communication, but neither would treat the failure to provide a constrained and widely accepted definition of a word like "*zeitgeist*" or "*panne d'oreiller*" as foundational, much less particularly interesting, given that language works perfectly well without definitions.

The second insight is slightly more dangerous. There remain a number of legal linguistic communities, contexts, and tasks—*e.g.*, attorneys negotiating over contract provisions—where good, old-fashioned definitions serve well and promote understanding precisely because they exclude all but the defined meaning. Once we understand that definitionalism is a little deal, we can use it for the little tasks for which it is well suited, without the risk that problems of definition will hold up progress across the board. If properly constrained to its community, task, and context, the act of defining terms can be non-pathological and indeed quite valuable.[125]

B. STOP USING THE WRONG TOOLS

Many legal academic articles on privacy begin with a generic statement that privacy lacks a widely accepted definition (true but not relevant) or that privacy is uniquely undefinable (neither true nor relevant) as a kind of throat-clearing exercise. They do not offer the statement for its truth but as a way of introducing the author's own contribution to the literature.[126]

One small step toward reducing the problems of definitionalism in privacy would be to stop saying that. It is quite possible to substitute more accurate (and equally good) throat-clearing moves. With adequate alternatives, legal academics may no longer feel the need to define before making their own contributions. For example, an article can begin with the throat-clearing statement, "Privacy has been widely studied from a range of perspectives. [The instant approach], however, remains undertheorized." This is much better than the inaccurate and misleading, "Privacy lacks a complete and consistent definition," and similar statements.

A similar technique can function to help reframe, and thus reuse and recycle, past scholarship. The best privacy "definitions" are not actually definitions at all,

125. See *e.g.* Wittgenstein, *Philosophical Investigations*, *supra* note 3 at 122.

126. See, *supra*, notes 17-38 and accompanying text for a discussion and run-down of numerous scholars who state that privacy has no definition or cannot be easily or broadly defined.

but rather interpretive perspectives that offer a new view of the privacy elephant. Each of the major approaches of privacy—the "right to be let alone," contextual integrity,[127] privacy as control,[128] privacy by design,[129] and so on—operate less like definitions and more like lenses through which to view the problem. Consider a compelling and very recent approach: Ari Ezra Waldman's work on privacy as trust.[130] If one were to treat "privacy as trust" as definitional (that is, "privacy" equals "trust"), and exclude other explanations, then it would be much less useful. But it is clear that Waldman intended his analysis of trust to work well with other approaches, to be an all-purpose upgrade to our understanding of how privacy pragmatically works. Taking "privacy as trust" to be offering a lens, not a definition, is in fact the best way to read the work, and the way the author intended. Most successful privacy work offers perspective, not definition, and in reading and citing texts, scholars should attend to that important distinction. Even the simple act of *not* writing "Warren and Brandeis define privacy as…" will help the field.

This practical change in practice—eschewing definitional language and reframing influential approaches as perspectives rather than definitions—will have one additional salutary effect. Academic handwringing over the definition of privacy has been a useful cover for data industry lobbyists, who argue, in essence, that if privacy has no clear definition, we cannot enact privacy legislation or regulation. If scholars do not wish their work to be repurposed by concern-trolling lobbyists, they should state clearly that the search for a single definition or constrained typology is asking the wrong question. This will leave the lobbyists on their own and expose their sealioning.[131]

---

127. See generally Helen Nissenbaum, "Privacy as Contextual Integrity" (2004) 79 Wash L Rev 119.
128. See generally Westin, *supra* note 10 at 7 ("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"). See also Charles Fried, "Privacy" (1968) 77 Yale LJ 475 at 483 ("Privacy...is control over knowledge about oneself"). See generally Richard B Parker, "A Definition of Privacy" (1974) 27 Rutgers L Rev 275.
129. See generally Ira S Rubinstein, "Regulating Privacy by Design" (2011) 26 BTLJ 1409; Hartzog, *supra* note 36.
130. See *Privacy as Trust: Information Privacy for an Information Age* (Cambridge University Press, 2018).
131. Sealioning means to troll by asking questions with the purpose of exhausting the explainer and making them look unreasonable. Sealioning is itself a new word, the meaning of which is being negotiated in the ways described by this article.

C. BORROW BETTER TOOLS

This Part speculates as to some tools from empirical and interpretive traditions that may serve to better uncover the meaning of privacy than would writing our own definitions. I mention one from each tradition: the empirical approach of machine learning and the interpretivist penchant for rich ethnographic description and participant observation.

1. BORROW EMPIRICAL TOOLS: MACHINE LEARNING AND NATURAL LANGUAGE PROCESSING

Machine learning might help scholars study how people actually use privacy-related language.[132] Imagine if you could ask a million people about a million situations and find out from them whether they wanted privacy in that situation. Which contextual features coincide with a human demand for privacy? Which features, when shifted, do not seem to predict that a human considers the matter private? The list of features can be endless; many machine learning trees encompass hundreds or even thousands of features.[133]

Google (and others) taught computers to understand human language this way, through natural language processing.[134] Computers did not learn to parse human speech by learning formal grammar (a rationalist enterprise conducted by teaching computers formal rules). Rather, neural nets were trained through millions of human uses. The breakthrough in natural language processing was not an improvement in algorithms but an increase in the raw amount of human use data available for training.[135]

This is a direct application of the problems of definition versus attention to use-context that we have been discussing in this article. Programming computers with the grammar and definitions of language did not work because language does not work like that and because humans do not use words like that. Computers cannot learn languages by formally applying definitions and grammatical rules;

---

132. See Harry Surden, "Machine Learning and Law" (2014) 89 Wash L Rev 87 at 88 ("[C]omputer generated results have often proven useful for particular tasks where strong approximations are acceptable....Broadly speaking, machine learning involves computer algorithms that have the ability to 'learn' or improve in performance over time on some task").
133. See Surden, *supra* note 132 at 92 ("Often, such an algorithm will need data with many hundreds or thousands of examples of the relevant phenomenon in order to produce a useful internal model").
134. See Gideon Lewis-Kraus, "The Great A.I. Awakening," *The New York Times* (14 December 2016), online: <www.nytimes.com/2016/12/14/magazine/the-great-ai-awakening.html>.
135. *Ibid*.

they must follow the same fuzzy maps of meaning that we humans use in order to understand what we mean. A machine learning approach would counterbalance the penchant for defining privacy because any successful algorithm will rely on uses and contexts, not definitions.

If I mean to say—as I do mean to say—that neural nets are an important tool to understand meaning because they have demonstrated the ability to understand us, translate, predict, and so on, then I must also acknowledge the knock-on effects that the use of those techniques has on our use of language. Predictive text will change what emails we write.[136] Bots will tweet for maximum readership and reader engagement based on massive-scale A/B testing of language.[137] If meaning is use, how do we deal with the fact that Twitter bots will influence our use? If words mean how humans use them, how will we handle the fact that humans are drawing meaning from a collective pool of uses that includes how bots use words? And what to make of the fact that bots and companies will be increasingly adept at steering the conversation? What should we make of meanings of privacy crafted by companies and pushed into public discourse via automated agents?

The first point is that at least we will be looking at language as it is. Without a theory that privacy means how it is used by humans making actual privacy demands, we would not even ask why it is so problematic that Artificial Intelligence ("AI") or behavioural targeting algorithms can put uses out there to be picked up and mainstreamed by the language. We would draw false comfort from the fact that the term was well-defined and therefore would resist use-meanings proposed by bots.

The second point is that, having noticed that companies and computers will have an increasing say in how words are used, we ought to act to curtail such activity.[138] The US Federal Communications Commission should not be able to push through changes based on astroturfed, AI-generated, false comments, for

136. See Anne McCarthy, "How 'Smart' Email Could Change the Way We Talk," *BBC News* (12 August 2019), online: <www.bbc.com/future/article/20190812-how-ai-powered-predictive-text-affects-your-brain>.
137. See "A/B Testing in Chatbots" (last visited 10 January 2022), online (blog): <flow.ai/blog/kb-a-b-testing-in-chatbots> (advertising A/B testing for chatbots).
138. Yochai Benkler, Robert Farris & Hal Roberts, *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics* (Oxford University Press, 2018) at 272.

example.[139] Corporate sponsored manipulation of public conversation must also be brought to heel.[140] Humans struggle to trace the source and good faith uses of words like privacy. This is just propaganda with more bells and whistles. Neural nets can assist in detecting fakes and fake speakers, just as they can learn to speak like we do.[141] The technology can be worked to identify actors that may seek to influence the heat maps by filling the data set with false information.

2. BORROW INTERPRETIVE TOOLS: THICK ETHNOGRAPHIC DESCRIPTION AND PARTICIPANT OBSERVATION

Instead of telling people what privacy is, we might ask them what it means to them or observe what they expect when they make and respond to privacy demands. The most time-tested way of doing this is to borrow tools from cultural anthropologists, who have long built interpretive interfaces between linguistic and cultural communities. The epistemology of cultural anthropology provides a distinct third way that is free of the preconceptions of both rational and empirical approaches. The task of understanding privacy seems to fit well within that methodology. And, since law as a whole is a constructed social reality, the methods of cultural anthropology ought to be a strong fit for legal scholars.

Cultural-linguistic moves cannot be understood without interpretation. The goal for any responsible researcher of meaning must be to build an interpretive

---

139. See Paul Hitlin, Kenneth Olmstead & Skye Toor, "Public Comments to the Federal Communications Commission About Net Neutrality Contain Many Inaccuracies and Duplicates" (29 November 2017), online: <www.pewresearch.org/internet/2017/11/29/public-comments-to-the-federal-communications-commission-about-net-neutrality-contain-many-inaccuracies-and-duplicates>; Lorenzo Franceschi-Bicchierai, "More Than 80% Of All Net Neutrality Comments Were Sent By Bots, Researchers Say," *Vice* (23 October 2017), online: <www.vice.com/en_us/article/43a5kg/80-percent-net-neutrality-comments-bots-astroturfing>.
140. See *e.g.* Nicholas Confessore, "Cambridge Analytica and Facebook: The Scandal and the Fallout So Far," *The New York Times* (4 April 2018), online: <www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html>.
141. See Will Douglas Heaven, "Facebook just released a database of 100,000 deepfakes to teach AI how to spot them" (12 June 2020), online: *MIT Technology Review* <www.technologyreview.com/2020/06/12/1003475/facebooks-deepfake-detection-challenge-neural-network-ai>.

framework that can help them understand a nexus of cultural practice.[142] Such thick description falls naturally within lawyers' and legal academics' core competencies. Cases are contextually rich and culturally connected descriptions of facts and interpretations of the meanings of speech-actions. Lawyers have boots on the ground when it comes to applying narratives to privacy demands in a way that ethnographic researchers could only wish: Lawyers are often those who are tasked with turning demands for privacy into reality. And the result of studying privacy as a performed cultural act will produce better results than the search for one, or a set of, abstract principles, because privacy is, in the end, precisely that: a publicly and culturally interpreted action, a demand made through language, slammed doors, hedges, noise-cancelling headphones, encryption, averted eyes, and so on.

Lawyers operate through narrative. Every complaint must tell a story or else fail to get into court. And those narratives do not stand alone but are suspended in a network of meaning that includes communities of meaning well outside the law. Lawyers therefore have a ready-made set of tools to connect legal meaning with other communities of meaning. Analogy is a better tool than definition to build a rich language of privacy. Interpretation is better than rationalism to understand what people mean when they ask for privacy.[143] A change in what we think we are doing when we seek privacy meaning will change the result of that process. When we seek narrow meanings, we find them. When we seek a common thread, there is none. But when we—actual people actually demanding privacy in real contexts—weave comprehensible meanings together, we weave a vibrant tapestry of privacy that can be read clearly for all that the word is used for: different reasons in different contexts.

D. USE MIXED METHODS AND BUILD AN INTENTIONAL COMMUNITY OF MEANING AROUND PRIVACY

Students of privacy ought to use all three basic scientific approaches, and each tool for its job. Privacy scholars can leverage empirical tools, especially the machine learning tools that have already been built and designed to understand what people mean (*e.g.*, the tools behind the recent explosion in speech

142. See Barbara B Kawulich, "Participant Observation as a Data Collection Method" (2005) 6 Forum: Qualitative Soc Research, online (pdf): <www.qualitative-research.net/index.php/fqs/article/view/466/997> ("[P]articipant observation [is] used as a way to increase the validity of the study, as observations may help the researcher have a better understanding of the context and phenomenon under study").

143. See also Geertz, *supra* note 111 at 3-30.

recognition, targeted behavioural advertising, artificial intelligence, and so on).[144] Scholars of privacy should proudly assert the full and equal scientific validity of interpretive methods. Privacy scholars should engage—without any sense of methodological lack whatsoever—in thick descriptions of closely contextualized specific use-contexts, with no claim that one thick description precludes another, even when the uses seem to flatly contradict one another (*e.g.*, privacy in public). Contradiction is a rationalist bugbear, not an interpretive one.

Mixed-method research like this is currently the gold standard for those who seek government grants, for example. Proposals that include both qualitative (interpretive) and quantitative (empirical) analysis are strongly preferred by grant-writing agencies.[145] Neither approach works as well alone. Machine learning without interpretation creates a well-known "black box problem," in which a computer can produce eerily accurate results, but no one knows why and so the results provide no normative guidance.[146] Qualitative interpretive approaches alone miss connections that data-driven approaches drive to the surface. If I were advising someone how to get a government grant to study privacy, I would advise: Stop trying to define privacy or gather multiple definitions into a typology. Instead, use quantitative machine learning to surface uses and contexts, and make sure the team includes qualitative analysts (likely the best role for a legal academic) to interpret the results and provide normative guidance.

Even more importantly, privacy scholars should strive to weave a thick, deep, and rich language of privacy, rather than pull apart the strands. The good news is that we have already made a strong start. Although lawyers and legal

144. See *e.g.* Aaron Perzanowski & Chris Jay Hoofnagle, "What We Buy When We Buy Now" (2017) 165 U Pa L Rev 315 (applying a similar methodology to discover what consumers think they are getting when online sellers use words like "buy now" and "sell").

145. See *e.g.* Lynne S Giddings, "Mixed-Methods Research: Positivism Dressed in Drag?" (2006) 11 J Research & Nursing 195 at 197 (stating that government grant projects and private funding agencies have increasingly requested mixed-methods research, creating an economic incentive for traditional positivist researchers to switch their research modes). See generally Caitlin E Coyle et al, "Federal Funding for Mixed Methods Research in the Health Sciences in the United States: Recent Trends" (2016) 12 J Mixed Methods Research 305; JP Wisdom & MD Fetters, "Funding for Mixed Methods Research: Sources and Strategies" (2015) in Sharlene Nagy Hese-Biber & R Burke Johnson, eds, *The Oxford Handbook of Multimethod and Mixed Research Inquiry* (Oxford Handbooks, 2015) 314.

146. See *e.g.* Kieran Browne, Ben Swift & Henry Gardner, "Critical Challenges for the Visual Representation of Deep Neural Networks" in J Zhou & F Chen, eds, *Human and Machine Learning: Visible, Explainable, Trustworthy and Transparent Human-Computer Interaction Series* (Springer International, 2018) at 120 ("The term 'black box' describes a system with clearly observable inputs and outputs, but with inscrutable internal processes…the relationship between input and output is observable but unintelligible").

academics often start their contributions with a statement that privacy's lack of a core principle or set of related principles *means something* (and it should be clear by now that it does not), what usually follows the lamentable *means something* statement is a serious attempt to contribute to a much broader conversation about the multifaceted, overlapping, and often contradictory meanings of privacy.

That is precisely what we ought to be doing. Instead of impoverishing the language of privacy by applying reductionist methodologies, we ought to enrich the language of privacy by building a community within the context of understanding privacy and with the task of enriching the language of privacy. And herein is my hope: This is what we have been doing the whole time, even though we have flirted with—even given centre stage to—incorrect or incomplete theories of meaning.

Our individual conclusions are negligible. It is our *rich conversations about privacy within a community* that are invaluable. Once the legal academy realizes that it cannot control the debate through definitions, it might better contribute to the broader linguistic negotiation over privacy's meanings. With a lot of humility, and a little attention to language formation and use, lawyers and legal academics will not only have a dominant role but also an honest role in contributing to an intentional linguistic community dedicated to exploring and negotiating—not defining—the multiple and overlapping meanings of privacy.

III. CONCLUSION

Privacy needs a definition like a butterfly needs a microwave. The question of what a demand for privacy means is unanswerable without specification of task, context, and community of meaning. When those have been specified, the meaning is understood and acted upon. "Shut the damn door" is properly understood to mean that the recipient of the message should shut the damn door. "Do not track me" means—and I know this is shocking—that the speaker does not wish to be tracked.

The failure to produce a widely accepted legal definition of privacy has absolutely nothing to do with the concept of privacy. Lawyers often use the wrong tool for the job, not unlike playing soccer with hockey sticks. Privacy demands must be interpreted, not defined or categorized. The linguistic sub-games of definition and categorization can be useful, but only in specific and constrained circumstances that do not generally obtain when one asks what a specific and contextualized demand for privacy means.

The idea that privacy *must* have a definition is a power grab by lawyers and an opportunity for lobbyists. But giving up the power of definition does not mean that lawyers or judges cannot find out what privacy means. Contrarily, from the beginning, the salient test of what is private has not been a sculpted term by a lawyer or legal academic. The relevant test is, and has always been, how the word is used by people attempting to assert their privacy interests. No more, no less. We can do very sophisticated things with how the word is used. We can perform computational linguistic studies. We can perform big data analytics. We can simply ask, as judges have always done, "would a reasonable person consider this to be a privacy interest?" And we can mean it: for example, by asking how a regular person would actually demand privacy in a given context. That, for all its faults, is at least the right question. And although this may cause us to have to start over in our search for privacy's meaning, it is always better to have bad answers to the right question than a perfectly crafted and honed answer to the wrong one.