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THEORETICAL INQUIRIES IN LAW is a biannual English-language law journal published by the Cegla Center for Interdisciplinary Research of the Law at the Buchmann Faculty of Law, Tel Aviv University. The journal specializes in the application to legal problems of insights developed in other disciplines, such as moral and political theory, epistemology, history, cultural studies, social sciences, economics and game theory, probability theory, and cognitive psychology. The range of issues dealt with by the journal is virtually unlimited, in line with its commitment to the cross-disciplinary cultivation of ideas. Contributors to the journal are distinguished legal scholars working in different "law and . . ." areas. The journal also strives to offer a forum for contributions to legal theory by scholars working in disciplines outside of law.

The previous issues of the journal have been devoted to the following topics: Restitution and Unjust Enrichment; Judgment in the Shadow of the Holocaust; Contemporary Legal Scholarship: Achievements and Prospects; Protecting Investors in a Global Economy; Economic Analysis of Constitutional Law; Negligence in the Law (Parts 1 & 2); Writing Legal History; Liberty, Equality, Security; The Palestinian Refugees and the Right of Return: Theoretical Perspectives; The Role and Limits of Legal Regulation of Conflicts of Interest (Parts 1 & 2); The Excessive Use of Force; Personal Bankruptcy in the 21st Century: Emerging Trends and New Challenges; Critical Modernities: Politics and Law Beyond the Liberal Imagination; Why Citizenship?; Moral and Legal Luck; Legal Pluralism, Privatization of Law and Multiculturalism; Community and Property; Histories of Legal Transplantations; Money Matters: The Law, Economics, and Politics of Currency; Comparative Tax Law and Culture; Copyright Culture, Copyright History; Rights and Obligations in the Contemporary Family: Retheorizing Individualism, Families and the State; Back to the State? Government Investment in Corporations and Reregulation; International Courts and the Quest for Legitimacy; Public and Private, Beyond Distinctions?; New Approaches for a Safer and Healthier Society; Sovereignty as Trusteeship for Humanity: Historical Antecedents and Their Impact on International Law; Labor Organizing the Law; The Constitution of Information: From Gutenberg to Snowden; Law, Economy and Inequality; Sovereignty and Property; Fifty Years of Class Actions – A Global Perspective; The Tragedy of the Commons at 50: Context, Precedents, and Afterlife. Forthcoming issues will include: Freedom, Choice & Contracts; Elder Law & its Discontents; Legal Discontinuity: Fitting a Smooth World into Discrete Categories; and How Law Changes What You Want: Positive and Normative Effects of Law on Values and Preferences.

An online version of the journal, as well as comments on articles published in the journal, are available in the *Theoretical Inquiries in Law* website (http://en-law.tau.ac.il/til). All articles are also indexed and available on HeinOnline, LegalTrac, Lexis-Nexis, and Westlaw.

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The Problem of Theorizing Privacy

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Introduction

More than a century after the publication of the seminal article by Samuel Warren and Louis Brandeis, the right to privacy continues to raise manifold theoretical questions. In the 1890s, Warren and Brandeis recognized the right to privacy in different spheres of the law, such as copyright law, property law and trust law.[1] They articulated the right to privacy as the right to be let alone, thus focusing on the individual. But the theorizing of privacy didn't stop there. The theory of privacy as control, presented by Alan Westin in 1967, set the individual as the main parameter in the privacy equation.[2] Westin claimed that our right to privacy is compartmentalized into four states governed by physical and psychological barriers: solitude, intimacy, anonymity, and reserve. Privacy as control, according to Westin, gives the subject a claim over identification and social disclosure in relation to personal information. A decade later, Ruth Gavison conceptualized the right to privacy in its perfect form when one's mind is fully secluded from the outside world.[3] It is a question of who has access to the individual and who does not, and of one's own accessibility to others. Gavison divided privacy into three situations in relation to others: solitude, anonymity, and secrecy. In other words, her theory constructs privacy as limited access, which is the common denominator of various situations that we call privacy.

With the rise of the digital era in the 1990s and onwards, the right to privacy began to take on a new form and meaning. New technological and societal challenges signaled a shift in privacy scholarship from the focus on the individual's need for withdrawal from other individuals and from public interests regarding his or her personal information and conduct, toward a broader, social understanding of privacy. Privacy scholarship now conceptualizes the interest in protection regarding the collection and use of data not only by other individuals and states, but also by global, information-giant corporations that innovatively utilize data, some of which escape traditional conceptions of privacy. The scholarship on privacy produced from this point on is abundant, and every listing will miss some key strands and figures. Nonetheless, some of these strands are particularly relevant for the purposes of this issue.

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1 Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

2 Alan Westin, Privacy and Freedom (1967).

3 Ruth Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. (1980).

Daniel Solove recognized that the term *privacy* is elusive and defies any formal definition. His answer was to offer a pluralistic conception of privacy based on the idea of family resemblance, which has its roots in pragmatist philosophy and Wittgensteinian hermeneutics. Solove argued that a pluralistic conception and a more detailed taxonomy could provide "a way out of the thicket," by helping to identify privacy-related problems and enriching the field with an adequate framework.[4] A different approach was offered by Helen Nissenbaum who focused on context. Nissenbaum argued that living in a technology-saturated era with its privacy perils demands following data flows throughout different stages of their transmission. Nissenbaum offered *Contextual Integrity* as a tool to help us define informational norms and identify privacy problems due to transgressions of context.[5] In turn, this approach enables us to identify and classify changes in data flows as a *prima facie* violation of privacy. Another response to the challenges was offered by Julie Cohen who argued that a dynamic account of the self is key to understanding networked information society in general, individual privacy in particular. Cohen stressed that selfhood is developed and practiced in socially situated and embodied ways. From this perspective, subjectivity "emerges at the interface between individual and culture."[6] Accordingly, Cohen argued, privacy in a society that enables and even promotes surveillance and self-exposure should be understood, to a large extent, as the interest that enables subjects to engage in boundary management between the individual and society, a process that is central to defining and redefining subjects.

The numerous definitional and conceptual attempts to explain the right to privacy indicate that the literature — and the law — have not reached a conclusion on the matter. The complexity seems to be inherent, changing across contexts and contingent on a given society's norms. Hence, we present *The Problem of Theorizing Privacy*, which aims to contribute to the ongoing discussion about privacy's theory by both problematizing privacy and its manifestations and by offering — some supplementing and some contradicting — theoretical arguments to the field.

Each article offered in this issue has its own argument, and can be helpful to academics, students, lawyers and policymakers. Yet we believe there is

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4 Daniel J. Solove, Understanding Privacy 196 (2008).

5 Helen Nissenbaum, Privacy in Context: Technology, Policy, and the Integrity of Social Life (2009).

6 Julie E. Cohen, Configuring the Networked Self 128 (2012). For a predecessor of the boundary management conception of privacy, see Irwin Altman, *Privacy: A Conceptual Analysis*, 8 Env't & Behav. 7 (1976).

merit in reading them together, even though — and perhaps because — they come from a variety of normative convictions and intellectual backgrounds.

We have classified the articles into six sections, even though at the end of this introduction we offer another way of grouping them. Here we distinguish: *Privacy Theories: Revisited*, exploring leading theories and theoretical approaches and pushing them forward or adapting them for the current age; *Technological Others*, reviewing the implications of recent advances and applications of machine learning in decision-making and the proliferation of the Internet of Things for the right to privacy; *Privacy and Political Economy*, exploring the way in which the digital economy shapes both privacy affordances and the possibilities of action; *Data Dynamics*, emphasizing the importance of the different stages of data harvest, refinement, transfer and anonymization; *Privacy and Other Social Values*, demonstrating the tension between privacy and competing social values; and lastly, *Privacy in Action*, exploring how some courts apply privacy theories in reviewing cases of alleged infringements of the right to privacy.

In the first section, *Privacy Theories: Revisited*, Julie Cohen kicks off the issue by further advancing her own approach to privacy. Building on the concepts of sematic discontinuity and operational transparency, first articulated in her 2012 book,[7] Cohen claims that focusing on individuals and their control over their privacy when trying to theorize the concept of privacy raises contradictions and may make the right irrelevant. She therefore suggests reconstructing the understanding of privacy by turning it inside out: decentering the individual and focusing on the surrounding conditions. This is done on two levels — theoretical and institutional. On the theoretical level, the analysis is required for establishing an adequate conceptual vocabulary regarding privacy; and designing a protective atmosphere is needed on the institutional level. As Cohen argues, developing privacy theory within this framework, while paying attention to the relationships within it, will lead to a more sustainable and sufficient protection of privacy.

Ryan Calo explores privacy law in light of legal realism. He finds privacy scholars' lack of attention to legal realism to be unfortunate, and he claims that privacy law and theory have strong realist origins. To support his argument, Calo demonstrates how privacy law provides interesting and complex examples of legal realism. He focuses mainly on four characteristics of privacy law, which he identifies as sources of indeterminacy: technical affordances, competing values, hungry exceptions, and narrow conceptions of harm. Calo then demonstrates how privacy law can further develop the plot of legal realism theory — as

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7 Cohen, *supra* note 6 at 239-241.

the application of privacy law is highly dependent on the social sciences, which in turn are deeply indeterminate, *secondary indeterminacy* is revealed.

Lisa Austin revisits Westin's influential characterization of privacy as control and offers a comprehensive contemporary account thereof. Austin suggests that the definition of privacy, so famously associated with Westin, fails to fully capture what Westin sought to explain. In her re-reading of Westin, Austin analyzes the effects of social and environmental factors on individuals' ability to choose between social disclosure and withdrawal. Austin emphasizes the importance of the availability of these choices, aiming to infuse a new normative thinking about our existing legal models and structures with regard to privacy. Although she suggests that Westin's definition is insufficient in order to address all informational problems in the twenty-first century, she elaborates on what we can still learn from it, long after it was first written.

The *Technological Others* section is launched by Mireille Hildebrandt's article regarding the right to privacy in the era of data-driven decision-making based on machine learning. This article can also be read as a revisiting and exploration of theories of privacy, thus bridging the previous and current sections. Hildebrandt begins by arguing that the right to privacy can be seen as protection of the foundational incomputability of human identity, which is underdetermined due to its relational nature and ongoing reinvention. She then extends the relational conception of privacy to an ecological conception, highlighting the crucial role played by the technological environment, which shapes the relationality of human identity and thus co-constitutes us as human beings. Hildebrandt goes on to investigate how machine learning affects human identity and privacy, arguing for agonistic machine learning, i.e., rejecting unhelpful objectivist accounts of machine learning as agnostic with regard to potential bias, and contending that taking the output of machine learning for granted threatens the natality that is core to human identity. Hildebrandt ties the notion of agonistic machine learning to the notion of legal protection by design, which requires us to build adversariality and democratic participation into the research design of machine learning. Finally, the article examines the EU General Data Protection Regulation (GDPR) as a source of effective and practical rights to resist and contest problematic overdetermination by machine learning decision systems.

Ian Kerr discusses another aspect of how transformations in technology challenge traditional perceptions of privacy others. Kerr begins with a brief review of central privacy theories that focus on the relational aspect of privacy. By reviewing these theories, Kerr sheds light on the *other* in a privacy relationship — the party that gains information about data subjects. He points out that privacy can only be lost where the other reaches a certain epistemic level regarding the private information. The main question that

arises is whether Artificial Intelligence (AI) and robots, which are diffusing at an accelerated pace with the commercial application of the so-called Internet of Things, can reach the cognitive level that diminishes one's privacy. The Article concludes that artificial cognizers have the epistemic capability to diminish one's privacy, at least in a narrow sense, thus paving the way for a relational theory of privacy that includes robots and AI.

Tal Zarsky opens the *Privacy and Political Economy* section by critically analyzing aspects of manipulation in relation to the information privacy discourse in the digital age. Zarsky explores manipulation as a process in which different actors, specifically corporate firms, motivate individuals into making decisions in ways that are perceived as socially unacceptable. He argues that although the manipulation-based argument is intuitively appealing, its theoretical and practical rationales need to be developed. For this purpose, he notes that the application of the manipulation argument could overcome some of the theoretical and doctrinal pitfalls that currently bedevil privacy theories. On the theoretical side, such pitfalls include the control-based theory and the consent doctrine. Zarsky also tackles several shortcomings of the manipulation-based argument, such as the autonomy presumption and the competing value of free speech. He concludes by suggesting that manipulation-based regulation might replace, or at least supplement, information privacy laws and regulations.

Orla Lynskey further demonstrates how neither privacy law nor competition law provide satisfactory ways to deal with what she defines as *data power* — the power of private economic entities to profile users and to influence opinion formation. Thereafter, she outlines a new normative way to examine the privacy problem in the age of informational capitalism, which derives from her interpretation of the latest European Union regulations, regulatory proposals and judgments of the Court of Justice of the European Union. Finally, Lynskey offers practical ways to measure the level of liability that should be imposed upon such technology companies, depending on the extent, depth, variety and volume of the information they collect.

Opening the section on *Data Dynamics*, Helen Nissenbaum further elaborates on the practices of data markets. Her article discusses the theoretical aspects of the right to privacy through the analogy of a *data chain*, equivalent to the primal food chain, in which each higher link derives from the ones below it. This analogy serves to explain the hierarchy and directionality whereby the current challenges of data collection and analysis differ from those of earlier times. The Article uses contextual integrity as its theoretical basis, to explain the links and differences that have evolved due to big data technological developments and their implications for the perception of privacy norms, particularly with regard to privacy in the public sphere and the data types that

are collected within it. The article stresses the semantic differences between these details and their contextual meaning, which in turn serves to reveal the importance of regulatory systems in preventing wrongful practices of data collection and analysis.

Michael Birnhack proposes another dynamic approach to informational privacy, which is based on the theoretical perspective of privacy as control. Focusing on the emerging field of big medical data, Birnhack analyses the shortcoming of current medical research practices in which big medical data are often exempt from the requirement of consent, because of deidentification of personal data or because the study was conducted retrospectively. Birnhack argues that this emerging practice does not uphold the privacy of the data subjects and uses them as a means to an end. Instead, he proposes a process-based approach, while upholding privacy as control, which requires more points of contact between the subject and researcher. Specifically, he insists that data subjects should provide free and informed consent for their medical data to be included in a medical research, in the initial phase — that of anonymization. Birnhack argues that ex-post deidentification does not suffice.

Frederik Zuiderveen Borgesius and Wilfred Steenbruggen open the next section, about *Privacy and Other Social Values*, by analyzing whether separate rules are needed in order to protect the right to communications confidentiality in Europe, in addition to those for data protection which are set out in the GDPR. They first turn to the origins of the right to communications confidentiality and to the underlying rationales for the protection of this right: privacy, freedom of expression, and trust in communication services. They then present the current European framework for the protection of the right to privacy in general and the right to communications confidentiality as part of that right, encompassed in the European Convention on Human Rights (ECHR), the Charter of Fundamental Rights of the EU, and more specifically in the ePrivacy Directive. Their investigation into the scope of the right to communications confidentiality and the social values protected by it leads them to conclude that a separate ePrivacy Regulation, alongside the GDPR, is justified and necessary to adequately promote both freedom of speech and trust in communication services.

Valerie Steeves addresses the problem of the erosion of privacy protection in Canada. Steeves focuses on the categorization of privacy as an individual liberal right, rather than a collective democratic right which defines the citizens' relationship with the government. To this end, her article suggests reviewing the conceptions of privacy, liberty and democracy and the links between them, by tracing how judicial decisions transform these conceptions over time, taking note of the different justifications given for privacy protection in the face of different privacy violations and infringements. This in turn suggests

a process of reevaluating the individual right to privacy and its value in the face of changing demands posed by the state and other enterprises, moving from the theoretical justifications and connections developed in political theory to the implications for concrete practices of democratic governance.

Finally, Anita Allen signs off this issue with the last section on *Privacy in Action* by analyzing *Puttaswamy v. Union of India* (2017), a landmark judgement of the Supreme Court of India, which holds that the people of India have a constitutional, fundamental right to privacy, and obligates the Indian government to adjust accordingly its massive national biometric project, *Aadhaar*. Allen focuses on the question of the influence that academic philosophers and other Western scholars have on courts' decisions. Allen is satisfied to see that the *Puttaswamy* case acknowledged different privacy theories and sees it as a sign of honoring philosophical inquiry. However, she notes that the Court synthesized the varying formulations of the right, and their underling theories, with little regard to the contradictions and tensions that such synthesis brings to the fore, thus signaling that the role of theory in case law is sometimes more as a justification of a known end rather than a meaningful influence.

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Juxtaposed, these scholarly pieces interact and connect to each other on various levels. Thus, as noted above, the suggested order of reading does not exhaust the themes and inner connections of this scholarship. We therefore offer our readers an alternative order: The articles by Anita Allen, Lisa Austin, Ryan Calo and Valerie Steeves can all be read as experimenting with existing theoretical settings and frameworks in order to test the limits of our privacy rights in a certain context or regarding a particular subject. Julie Cohen and Mireille Hildebrandt push the limits of classic privacy theories and challenge the accepted scholarship and frameworks in an attempt to reorient the discussion in a broader sense. Ian Kerr, Tal Zarsky, Orla Lynskey and Helen Nissenbaum each chose a certain theme entrenched in the theorization process of privacy, each taking their scholarly work down their own path. Lastly, Michael Birnhack and Frederik Zuiderveen Borgesius together with Wilfred Steenbruggen each review a certain field and focus on a particular context pervaded by privacy.

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