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A Feeling of Unease About Privacy Law

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A FEELING OF UNEASE ABOUT PRIVACY LAW

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In response to Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006).

This essay responds to Daniel Solove's recent article, *A Taxonomy of Privacy*.[1] I have read many of Daniel Solove's privacy-related writings, and he has made many important scholarly contributions to the field. As with his previous works about privacy and the law, it is an interesting and substantive piece of work. Where it falls short, in my estimation, is in failing to label and categorize the very real harms of privacy invasions in an adequately compelling manner. Most commentators agree that compromising a person's privacy will chill certain behaviors and change others, but a powerful list of the reasons why this is a negative phenomenon that the law should seek to prevent is not a significant attribute of Solove's taxonomy. That omission left this reader a little concerned about the ultimate usefulness of the privacy framework that Solove has developed. To phrase it colloquially, in this author's view, the Solove taxonomy of privacy suffers from too much doctrine, and not enough dead bodies. It frames privacy harms in dry, analytical terms that fail to sufficiently identify and animate the compelling ways that privacy violations can negatively impact the lives of living, breathing human beings beyond simply provoking feelings of unease.

The word "taxonomy" in the title of the article suggests that the article will provide a hierarchical list of categories within which independent affronts to privacy can be compartmentalized. Per Solove's introduction, the proposed introduction is pitched at "provid[ing] a framework for how the legal system can come to a better understanding of privacy."[2] Solove does not contest the validity of pri-

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[†] Associate Professor of Law, University of South Carolina School of Law. The author notes that despite the somewhat critical tone of this response, she learns a lot from Daniel Solove's excellent privacy scholarship.

[1] Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006) [hereinafter *Taxonomy*].

[2] *Id.* at 482.

vacy torts.[3] Instead, he reports that he discerned a need to expand upon the four categories of privacy torts that were famously articulated by William Prosser.[4] Like Prosser, Solove breaks privacy down into four constitutive categories—Solove's are information collection, information processing, information dissemination, and invasion[5]—but he constructs multiple subgroupings as well.

In one sense, the ultimate test of the value of this undertaking will be in how widely Solove's taxonomy is referenced and adopted by actors within the legal community. Yet because it is fashioned as a law review article, rather than a more efficiently perusable treatise, its attractiveness to jurists and practicing attorneys may be limited.[6] It is arguably pitched most directly at other privacy law scholars, a great number of whom are quoted and cited by Solove within the text. It is certainly possible that it will prove a useful conceptual tool for future research efforts. However, independent-minded contrarians that we tend to be, it seems unlikely that too many legal scholars will uncritically adhere to Solove's taxonomy on any sort of consistent or wholesale basis. As Solove expressly observes, privacy law is "fragmented and inconsistent,"[7] and it is unlikely to smoothly merge into a coherent whole even with Solove's best efforts at taxonomy construction. What Solove could accomplish someday, given his wide-ranging knowledge of privacy law, is a catalog of powerful, compelling reasons why the legal system should care about privacy violations more than it currently appears to.

Solove has written extensively about privacy in a variety of contexts, having penned a textbook and materials aimed at practitioners as well as more theoretical works. The law review article of his that I like best is *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, which was published five years ago.[8] In it Solove re-

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[3] *But see* C. Edwin Baker, *Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment*, 21 SOC. PHIL. & POL'Y 215, 215-16 (2004), *available at* http://www.yale.edu/lawweb/jbalkin/telecom/bakerautonomyandinformationalprivacy.pdf ("[T]he privacy tort should be ignored.").

[4] *Taxonomy*, *supra* note 1, at 483.

[5] *Id.* at 489.

[6] *Cf.* Ann Bartow, *The Hegemony of the Copyright Treatise*, 73 U. CIN. L. REV. 581, 582 (2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=654661 ("[M]ajor conceptions about the appropriate structure, texture, and span of copyright protections and privileges have been fashioned by copyright treatises . . . .").

[7] *Taxonomy*, *supra* note 1, at 562.

[8] Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393 (2001) [hereinafter *Metaphors*]. *See also* DANIEL J. SOLOVE, THE DIGITAL PERSON: PRIVACY AND TECHNOLOGY IN THE INFORMATION AGE 27-55 (2004) (reprinting the article in revised form).

jects the "Big Brother" metaphor, in which privacy invasions are conceptualized as largely surveillance-related, and attendant harms are assumed to flow from the self-censorship that results when people feel that their private lives are being continually scrutinized. Instead, he argues that a more apt metaphor can be drawn from Franz Kafka's novel *The Trial,* writing:

> Kafka's *The Trial* best captures the scope, nature, and effects of the type of power relationship created by databases. My point is not that *The Trial* presents a more realistic descriptive account of the database problem than Big Brother. Like [*1984*], *The Trial* presents a fictional portrait of a harrowing world, often exaggerating certain elements of society in a way that makes them humorous and absurd. Certainly, most people are not told that they are inexplicably under arrest and they do not expect to be executed unexpectedly one evening. *The Trial* is in part a satire, and what is important for the purposes of my argument are the insights the novel provides about society through its exaggerations. In the context of computer databases, Kafka's *The Trial* is the better focal point for the discourse than Big Brother. Kafka depicts an indifferent bureaucracy, where individuals are pawns, not knowing what is happening, having no say or ability to exercise meaningful control over the process. This lack of control allows the trial to completely take over Joseph K.'s life. *The Trial* captures the sense of helplessness, frustration, and vulnerability one experiences when a large bureaucratic organization has control over a vast dossier of details about one's life. At any time, something could happen to Joseph K.; decisions are made based on his data, and Joseph K. has no say, no knowledge, and no ability to fight back. He is completely at the mercy of the bureaucratic process.
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> As understood in light of the Kafka metaphor, the primary problem with databases stems from the way the bureaucratic process treats individuals and their information. It is a problem that is at its heart about the nature of certain relationships in our society and their effects on individuals.[9]

Yet in his privacy harm taxonomy, Solove seems to be moving away from Kafka and back toward Orwell in his conception of privacy issues. Consider his first subcategory within "Information Collection," which he denotes "Surveillance." After parsing the raft of quotations about surveillance that he provides, one gets the sense that surveillance is a unitary evil that fairly uniformly provokes uneasiness, and causes self-censorship among the surveilled. The other subcategory, "Interrogation," framed as the forced disclosure of personal informa-

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[9] *Metaphors*, *supra* note 8, at 1421.

tion, largely overlaps analytically with "Surveillance" in terms of the iterated harms, which once again are self-restricting effects on behavior and a sense of personal discomfort. Self-censorship and thought control are the associative impacts.

In *The Trial*, the protagonist Joseph K. is arrested in the very first sentence.[10] Willem, one of the men who apprehends Joseph K., tells him: "Our officials, so far as I know them . . . never go hunting for crime in the populace, but, as the Law decrees, are drawn toward the guilty and must then send out us warders. That is the Law."[11] Joseph K. is presumed to be guilty of something, he just does not know what. He is victimized by corruption in the police and judiciary, and ill-served by an incompetent attorney. The novel powerfully illustrates the profoundly demoralizing effect that an accusation of crime can have upon a person. In consequence, "Kafka-esque" is how one might describe it when a non-dangerous person is not allowed to board an airplane,[12] despite the purchase of a ticket and acquiescence to security searches,[13] or detained at an airport after a flight.[14] Joseph K. was

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[10] FRANZ KAFKA, THE TRIAL 1 (Willa Muir & Edwin Muir trans., Schocken Books 1988) (1925).

[11] *Id.* at 6.

[12] *See* Posting of Cosmic Iguana to SIVACRACY.net, http://www.nyu.edu/classes/siva/archives/000933.html (Mar. 21, 2005, 10:27 EST) (discussing a man who was denied air travel for wearing a shirt with a picture of a gun); Ryan Singel, *The Great No-ID Airport Challenge*, WIRED NEWS, June 9, 2006, http://www.wired.com/news/technology/0,71115-0.html (discussing security measures for air travel without identification); *Woman Booted off Flight for Anti-Bush Shirt*, LOCAL6.COM, Oct. 6, 2005, http://www.local6.com/print/5066135/detail.html (discussing a woman denied air travel for wearing an anti-Bush shirt).

[13] *See* Rachel L. Swarns, *Senator? Terrorist? A Watch List Stops Kennedy at Airport*, N.Y. TIMES, Aug. 20, 2004, at A1 (discussing misidentification of Senator Kennedy as a terrorist on the list); Paul Boutin, *Disputed Air ID Law May Not Exist*, WIRED NEWS, Aug. 15, 2002, http://www.wired.com/news/privacy/0,1848,54464,00.html (reporting on a passenger's near-arrest for failure to show identification); Posting to Schneier on Security, http://www.schneier.com/blog/archives/2005/08.html (Aug. 19, 2005) (discussing the misidentification of children on the terrorist watch list); Ryan Singel, *Due Process Vanishes in Thin Air*, WIRED NEWS, Apr. 8, 2003, http://www.wired.com/news/privacy/0,1848,58386,00.html (discussing misidentification of people on the terrorist watch list); *cf.* Dipesh Gadher, *Plane Passengers Shocked by Their X-Ray Scans*, TIMES ONLINE, Nov. 7, 2004, http://www.timesonline.co.uk/article/0,2087-1348172,00.html (discussing the x-ray machines used to check passengers and their bags); Posting of Edward Hasbrouck to The Practical Nomad, http://hasbrouck.org/blog/archives/001065.html (June 6, 2006, 18:58 EST) (discussing rules for identification and air travel); Lisa Myers et al., *Airline Screeners Fail Government Bomb Tests*, MSNBC.COM, Mar. 17, 2006, http://www.msnbc.msn.com/id/11863165/ (reporting that federal investigators were able to carry bomb-making materials through airport security).

[14] *See, e.g.*, David Epstein, *Another Scholar Turned Back at JFK*, INSIDE HIGHER ED,

executed at the end of the novel, and his last words described his own death: "Like a dog!"[15] Very real harms flowed from the "guilty emanations" that Joseph K. somehow emitted.

In contrast, Winston Smith, the main character in George Orwell's *1984*, spends most of the novel trying to escape Big Brother's surveillance, and the uneasy self-censorship to which it leads. Constantly being watched so closely that his observers can practically read his mind is the trauma against which Winston rebels. Solove's taxonomy characterizes privacy harms as creating a nation of Winstons: people unhappily living with "the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized."[16] The consequence of Winston's deviation was official discovery of his independent thinking, and reprogramming to bring him back into the groupthink fold. To reframe the example from above, this is why airport security is labeled "Orwellian" by everyone who flies on commercial airlines, not just those who encounter difficulties. Even though travelers may know that they are not legally required to present certain documents[17] or undergo particular screening rituals that quite possibly are ineffective[18] as well as invasive, they generally submit to authority, and conform to whatever security norms that government agents are promulgating.[19] Intrusive searches may be unsettling, but as long as an individual is ultimately able to board her plane, she

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June 21, 2006, http://www.insidehighered.com/news/2006/06/21/milios (describing the inability of a foreign scholar to enter the United States); Posting of Jeremy Wright to The End of the Story, http://www.ensight.org/archives/2005/03/17/the-end-of-the-story/ (Mar. 17, 2005) (discussing the denial of the author's entry into the United States).

[15] KAFKA, *supra* note 10, at 229.

[16] GEORGE ORWELL, 1984 3 (Irving Howe ed., Harcourt, Brace & World 1963) (1949).

[17] *See, e.g.*, Posting of Siva to SIVACRACY.net, http://www.nyu.edu/classes/siva/archives/002939.html (Mar. 24, 2006, 15:03 EST) (asserting that there is no public law requiring travelers to show government-issued identification before boarding a plane, and anecdotally describing a process for boarding a flight without such documentation); Sarah Lai Stirland, *Informal Survey Shows Lax ID Checks for Air Travelers*, GOVERNMENT EXECUTIVE, Mar. 23, 2006, http://www.govexec.com/dailyfed/0306/032306tdpm1.htm (confirming that travelers may legally pass through airport security checkpoints without presenting valid, government-issued identification, provided they submit to a secondary screening process).

[18] *See* Posting of Michael to Discourse.net, http://www.discourse.net/archives/2006/05/tsa_puffery.html (May 3, 2006, 14:52 EST) (arguing that much of the current airport security regime is "useless"); Lisa Myers et al., *supra* note 13 ("[F]ederal investigators recently were able to carry materials needed to make a . . . homemade bomb through security screening at 21 airports.").

[19] *See* Posting of Brian Tamanaha to Balkinization, http://balkin.blogspot.com/2005/12/undisclosed-prisons-detention-without.html (Dec. 12, 2005, 09:22 EST) (arguing for increased transparency of airport screening regulations).

is likely to tolerate them, especially if she believes that mounting a challenge is likely to disrupt her journey. The privacy harms Solove described in his taxonomy were similar in nature; people feel uneasy about privacy violations and may change their behaviors to avoid scrutiny or its consequences, but ultimately the main trajectories of their lives remain logistically undisturbed.

Solove's section on information processing focuses on how information processing (which presumably has been collected through either surveillance or interrogation, since those are the only two choices the taxonomy proffers) is "handled." He asserts that information is "aggregated" to develop a profile of a subject, and then "identified," by which he means connected to particular individuals. However, he never explains why identification must follow aggregation. It is possible that things proceed in this order, but it also seems likely that in many instances identification precedes aggregation, as individuals of interest are specifically identified as worthy subjects for collection of portfolios of information. In other words, it may be select pieces of identifiable information that trigger desires for aggregation (this person appears to be wealthy, so let's find out more about her retail purchasing proclivities), but Solove's taxonomy does not effectively leave room for this prospect. This is not a terrifically important point substantively, but it does suggest the limitations of taxonomy to the extent that it imposes a certain rigidity (or at least linearity) of thought about privacy issues.

The harms of identification and aggregation are intuitively impossible to separate, and Solove wisely declined to attempt to do so. Instead, he points to the fact that in tandem they lead to impairment of a person's ability to obscure personal information, or to speak or act anonymously, again leading to chilling effects and uneasiness. This is precisely the point at which the taxonomy seems to fall short in terms of its ultimate utility. Why is the possibility that a person will be linked to her own volitional words and actions a harm that law should pay attention to? Are not the behaviors that get chilled by a fear of accountability likely to be socially undesirable ones? I am sure that Solove has excellent answers to these questions, but I wish he had integrated them more explicitly into his taxonomy. Like the old cliché about it being better that a thousand guilty people go free than for one innocent individual to be imprisoned, this privacy taxonomy needs, but lacks, a compelling rhetorical framework that encapsulates the values at stake in privacy law.

One privacy-related issue that viscerally grabs the public imagination (and for which the public expects assistance from the govern-

ment) is identity theft.[20] "Insecurity" is Solove's term for facilitation of identity theft, which in turn leads to actual theft from a victim, either directly or by fraudulently imputing debts to her. Solove appropriately noted that there are specific laws that "require that information be kept secure."[21] He did not, however, choose to make statutory violations a separate taxonomical category, despite the fact that whether or not a particular type of information insecurity is addressed by statutory authority seems to have a tremendous effect upon whether or not a court will attribute an actionable harm to an act of insecure information handling. Identity theft is a privacy harm that helps focus attention on privacy violators as heinously bad actors, and away from the conception of privacy-seekers as those with unwholesome informational agendas. For this reason, Solove could have productively expanded the visibility of identity theft issues in the taxonomy.

Solove next carves out another information handling subcategory, which he terms "Secondary Use." Certainly identity theft is a form of secondary use, so the line between the two categories is hazy. How or why the law should address insecurity independently from the harms generated by harmful secondary use is never clearly explained by Solove. As with Insecurity, Solove notes that some secondary uses are governed by targeted statutes, while others are not. Solove characterizes the harms of Secondary Use as causing "fear and uncertainty."[22] My guess is that people would primarily be fearful and uncertain about identity theft in this context, and the very real dangers of resource theft and life disruption that it poses.

"Exclusion" is the subcategory Solove contrived to cabin "failure to provide individuals with notice and input about their records."[23] The harm of Exclusion is that people do not know what information is

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[20] *See* Federal Trade Comm'n, Take Charge: Fighting Back Against Identity Theft, http://www.ftc.gov/bcp/conline/pubs/credit/idtheft.htm (last visited Aug. 27, 2006) (providing resources for victims of identity theft); Federal Trade Comm'n, Your National Resource About ID Theft, http://www.consumer.gov/idtheft/ (last visited Aug. 27, 2006) (suggesting ways to "Deter, Detect, and Defend against identity theft"); U.S. Dep't of Justice, Identity Theft and Fraud, http://www.usdoj.gov/criminal/fraud/idtheft.html (last visited Aug. 27, 2006) (providing answers to basic questions about identity fraud); Privacy Rights Clearinghouse, Identity Theft Resources, http://www.privacyrights.org/identity.htm, (last visited Aug. 27, 2006) (providing links and fact sheets on identify theft); Social Security Online, Electronic Fact Sheet, http://www.ssa.gov/pubs/idtheft.htm (Jan. 2006) (providing links to other government resources for identity theft victims); U.S. Dep't of Educ., Identity Theft, http://www.ed.gov/about/offices/list/oig/misused/idtheft.html (last visited Aug. 27, 2006) (providing information about identity theft tailored to students).

[21] *Taxonomy*, *supra* note 1, at 516.

[22] *Id.* at 522.

[23] *Id.* at 523.

collected about them, what is done with that information, and whether the information is even correct. Solove explores these harms in much greater detail in his above-referenced law review article, *Privacy and Power: Computer Databases and Metaphors for Information Privacy.*[24] In his *A Taxonomy of Privacy*, however, with respect to consequential harms, he simply reiterates negative impacts such as chilling effects and unease.

Solove's third major category is "Information Dissemination." Given that he already covered dissemination issues in previous subcategories, particularly Secondary Use, there is substantial overlap between the seven iterated categories and the privacy issues isolated previously. Reading the subcategorical descriptions reminds the reader that courts primarily act to prevent or punish privacy harms where there has been a statutory violation or a breach of a duty of confidentiality.

One Information Dissemination subcategory is "Disclosure," which Solove asserts differs from "Breach of Confidentiality" because the harm is somehow different,[25] but the distinctions he makes are somewhat unconvincing. "Damage to Reputation" is certainly a possible harm of disclosure, but how this would arise without dissemination and secondary use is not explained. This definitional fuzziness illustrates another limitation of a taxonomical approach to privacy law. The formulation of a taxonomy requires arbitrary line drawing and forced compartmentalization that could filter into legal practice in the form of lengthy and redundant pleadings. The taxonomy risks serving as a shopping list, rather than a menu, for pleadings purposes for cautious attorneys who would reasonably choose to err in favor of being overinclusive.

The difficulties and limitations of the taxonomy are further evidenced by Solove's next subcategory, "Exposure." He distinguishes Exposure from Disclosure based not on the volitional act itself, nor in terms of the harm, which remains rooted in unease and damage to self-esteem. Instead, he distinguishes Exposure from Disclosure based on the information at issue, which he describes as "not revealing of anything we typically use to judge people's character."[26] While it is true that, using his example of unintentional exposure of genitalia, such an occurrence might not directly underpin a character assessment, the context of the exposure (for example, sexual or excretory

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[24] *Metaphors*, *supra* note 8, at 1424-30.

[25] *See Taxonomy*, *supra* note 1, at 531.

[26] *Id.* at 536.

activities in a public place, wardrobe malfunctions, or failures to close curtains) might lead to character judgments. The reactions to the inadvertent exposure would certainly be assumed to reflect the character of the exposed. Myriad other concerns are likely to arise. Privacy did not play a significant role in the public dialogue that followed the exposure of Janet Jackson's breast during the halftime show of the 2004 Super Bowl.[27] One might expect that a focus on the effect that an exposure has on viewers or readers would be factored into this privacy harm.

Oddly, Solove lists "Increased Accessibility" as his next subcategory of privacy violation. This term pertains to information that is already publicly available, but is somehow rendered even more publicly available by an act that Solove seems to argue may be deemed actionable if it is harmful. How the law should react to claims related to acts that enhance the availability of information that the law has either left uncontrolled or has affirmatively recognized a right of public accessibility to is not squarely addressed. Solove no doubt correctly asserts that information can be used for reasons other than those for which law and policy concerns have made it accessible. He criticizes a binary approach under which information is either publicly available or not, suggesting that the law should recognize a middle ground in which a legally recognized compensable harm can arise from acts that make publicly accessible information too easily accessible. He stops short, however, of constructing a subtaxonomy that proposes variable degrees of availability for different forms of information. If he is correct about the need for a middle ground of accessibility, then it is a project that needs to be undertaken.

Eventually Solove segues into topics such as blackmail,[28] a subject that seems to intrigue criminal legal scholars as well as privacy law aficionados, and appropriation,[29] which overlaps with intellectual property constructs. His taxonomy is clearly very thorough in terms of cataloging the wide variety of contexts in which privacy concerns arise. It is in the chronicling of associative harms that his approach is disappointing.

Solove consistently accords to violations of information privacy the

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[27] *See, e.g.*, Hugo Lindgren, *It's Prime Time for a Decency Campaign*, N.Y. TIMES, Mar. 7, 2006, § 4, at 4 (discussing institutional reactions concerning broadcast decency); *Apologetic Jackson Says 'Costume Reveal Went Awry,'* CNN.COM, Feb. 3, 2004, http://www.cnn.com/2004/US/02/02/superbowl.jackson/ (discussing the "costume reveal" and resulting FCC investigation).

[28] *Taxonomy*, *supra* note 1, at 541. How often "blackmail" cases arise, and what they typically involve, are questions I wish Solove had addressed.

[29] *Id.* at 545.

default harm of feelings of unease and discomfort. Though he occasionally weaves some other negative consequences through his descriptions of his taxonomical categories, he devotes substantially more energy to explaining causality than he does to explaining impact. This renders the taxonomy incomplete and unsatisfactory.

At the most superficial level, persuading observers to take privacy concerns seriously requires convincing them that people who are not engaging in illegal conduct are harmed in a significant, cognizable way when their personal information is collected and distributed against their will or without their knowledge. Toward this end, a more effective taxonomy would dramatically and thoroughly document the consequences of privacy violations in very visceral, dramatic ways.

There is no shortage of potentially gripping hypotheticals that could be developed. A perceived lack of medical privacy may lead people to avoid medical testing and treatment. An actual lack of medical privacy may cause people with particular health problems to be denied credit, employment, or housing. Real and immediate consequences of privacy violations could be cataloged along with descriptions of the violations themselves.

There are also plenty of real life examples. In *Griswold v. Connecticut*,[30] the Supreme Court placed access to contraceptives within the rubric of a type of privacy that is not readily discerned within Solove's taxonomy. However, recent practices by certain pharmacies demonstrate an attempt to dissuade women from utilizing certain forms of contraceptives such as the "morning after" pill by requiring unnecessary and intrusive personal information from those seeking them. These acts situate reproductive freedom within the realm of information privacy concerns.[31]

Roe v. Wade[32] initially fashioned access to abortion as a privacy right, but abortion later evolved into a fundamental freedom, which many jurists and legal scholars viewed as a more satisfactory and doctrinally sustainable manner of conceptualizing bodily autonomy. The

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[30] 381 U.S. 489 (1965).

[31] *Compare* Posting by Badgerbag to Badgerbag: Messy, Surly, Full of Books, http://badgerbag.typepad.com/badgerbag/2006/06/calling_all_dir.html (June 8, 2006) (describing the detailed personal information required by a specific pharmacy from consumers seeking emergency contraception) *with* Posting of Rocker Mommy to Rocker Mommy, http://rockermommy.blogspot.com/2005/12/id-like-some-plan-b-please.html (Dec. 27, 2005, 18:20 PST) (describing the ease of access to and lack of personal information required for emergency contraception at a different pharmacy).

[32] 410 U.S. 113 (1973).

linkage between abortion and privacy proved resurgent, however, when authorities attempted to chill abortions by seeking to obtain and potentially publicize the names of women who have undergone the procedure.[33] While there are clearly significant detrimental impacts of generalized feelings of unease, the prospect that women will either forgo sexual relationships or possibly even bear unwanted children as a consequence of inadequate information privacy is the sort of harm Solove's taxonomy could have taken greater notice of, with beneficial effects.

Solove's *A Taxonomy of Privacy* is an interesting and worthwhile undertaking, but its lack of blood and death, or at least of broken bones and buckets of money, distances privacy harms from other categories of tort law. It relegates privacy violations to a very low place in the taxonomy of immediate and visceral public policy concerns, and foments a feeling of unease about the importance and future of privacy law.

[33] Posting of Daphne Gilbert to Blog*on*nymity: Blogging on the Identity Trial, http://www.anonequity.org/weblog/archives/2005/03/the_power_of_pr_1.php (Mar. 29, 2005, 23:50 EST) (describing various instances in which state and federal attorneys general sought the medical records of women who had abortions); Watching Justice: An Eye on the Department of Justice, http://www.watchingjustice.org/reports/brief.php?docId=177 (Apr. 14, 2004) (reporting the Department of Justice's February 2004 attempt to subpoena the medical records of 2700 women who had abortions).