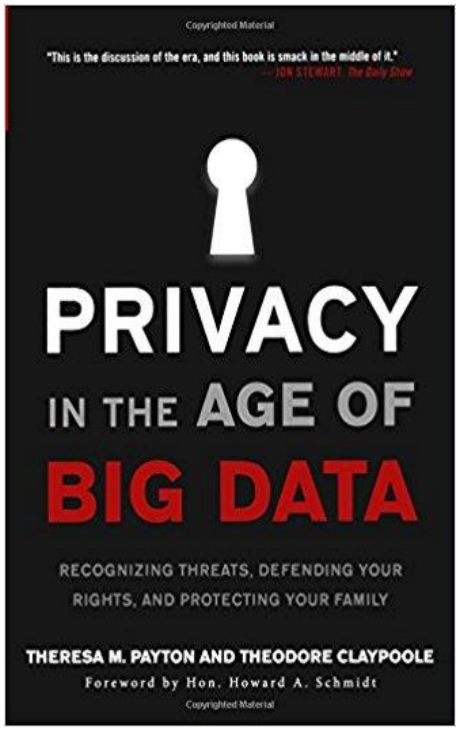
Privacy Law: A Snapshot

Michael Birnhack

In a nutshell

- The elusive nature of privacy
- Different social contexts and legal categories
- Data protection law:
  - How it evolved
  - 1st, 2nd generation
  - Non-legal measures, incl. Privacy by Design
- The GDPR's global affect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— JON STEWART, The Daily Show
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IN THE AGE OF
BIG DATA
RECOGNIZING THREATS, DEFENDING YOUR RIGHTS, AND PROTECTING YOUR FAMILY
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Foreword by Hon. Howard A. Schmidt
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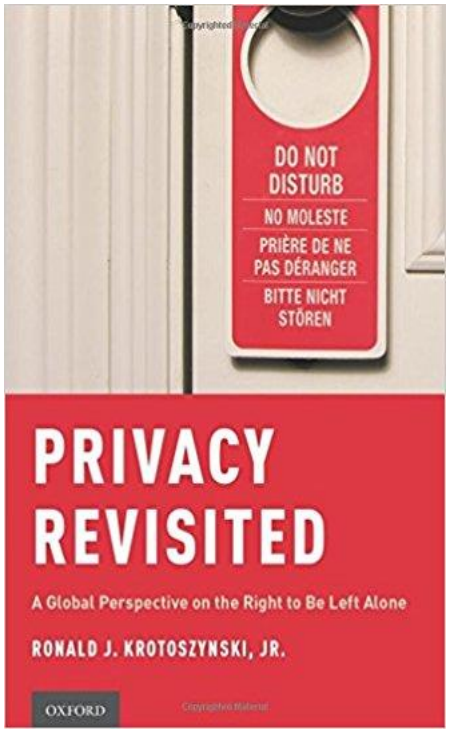
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A Global Perspective on the Right to Be Left Alone
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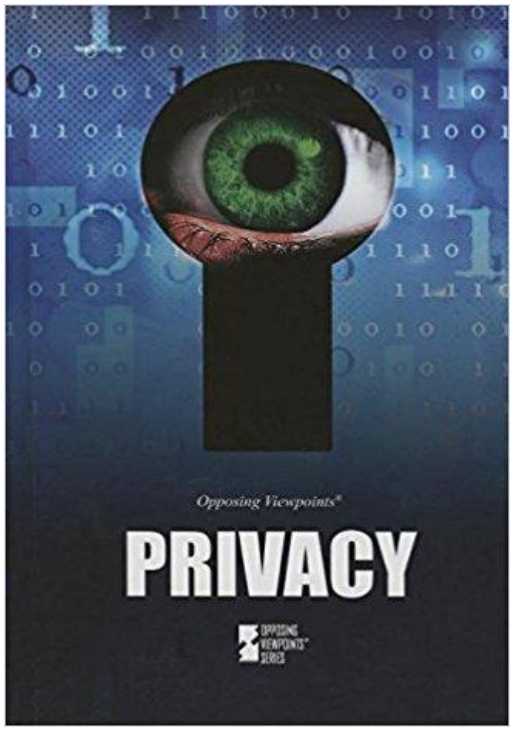
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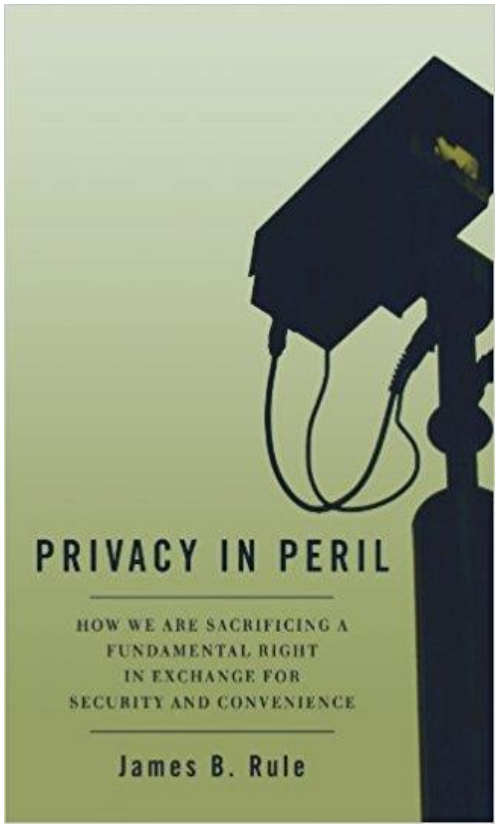
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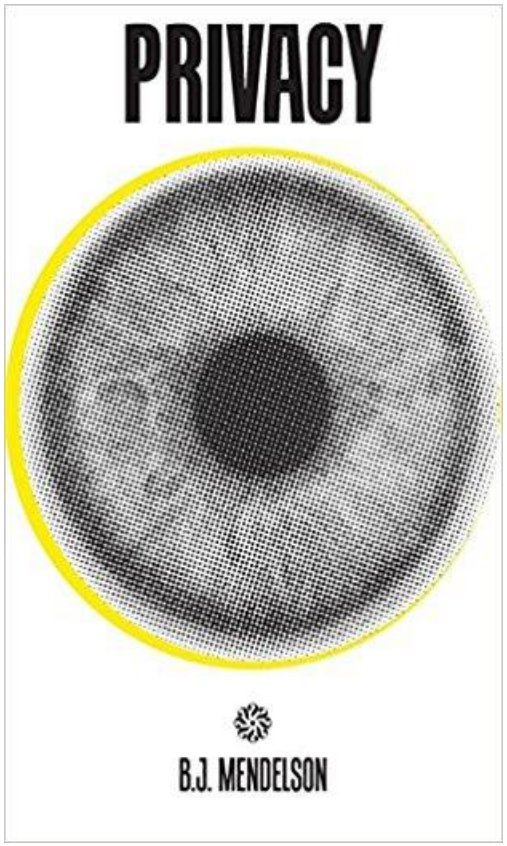
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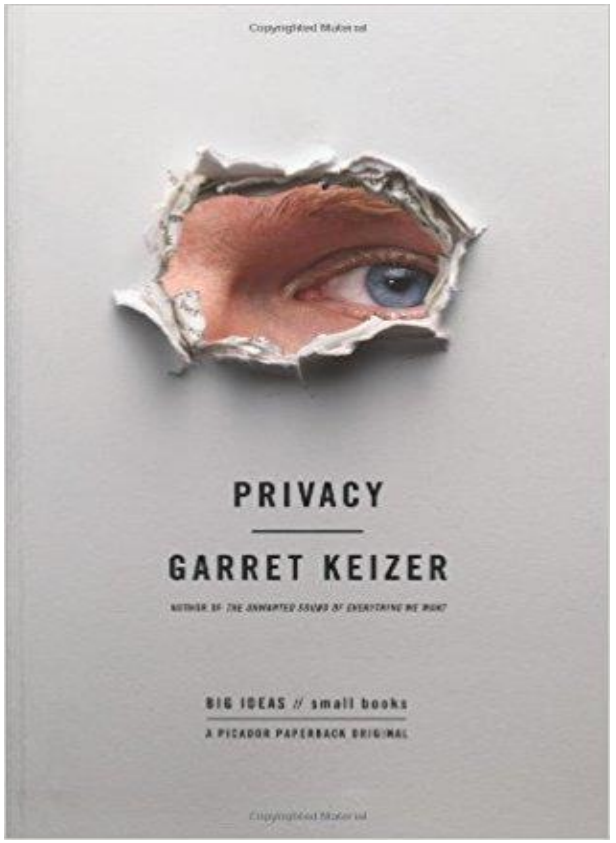
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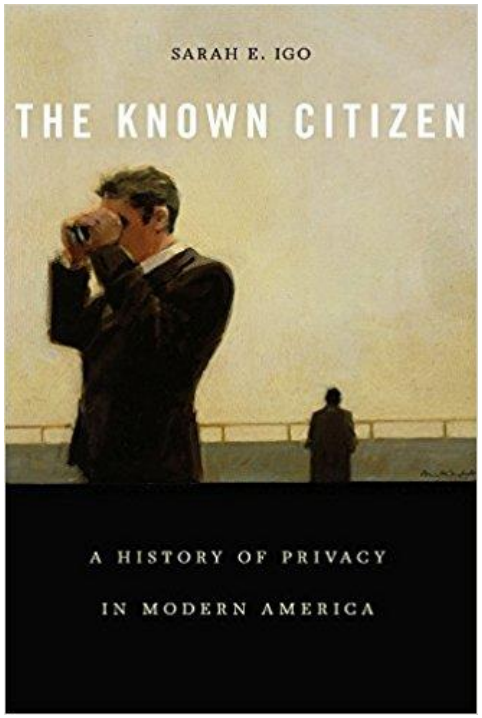
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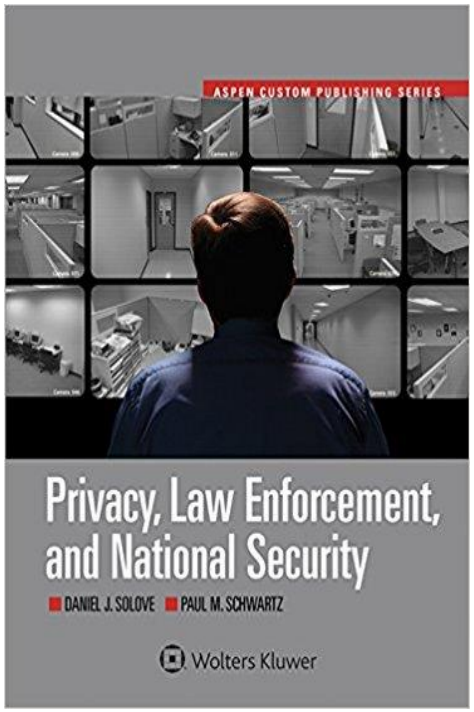
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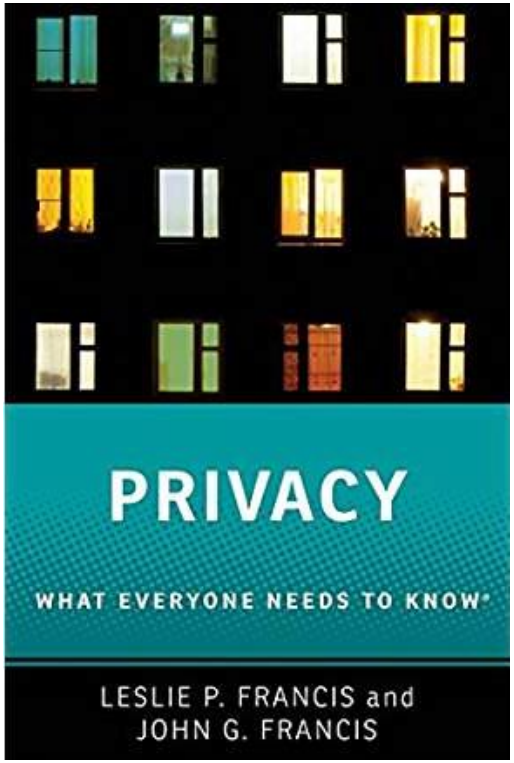
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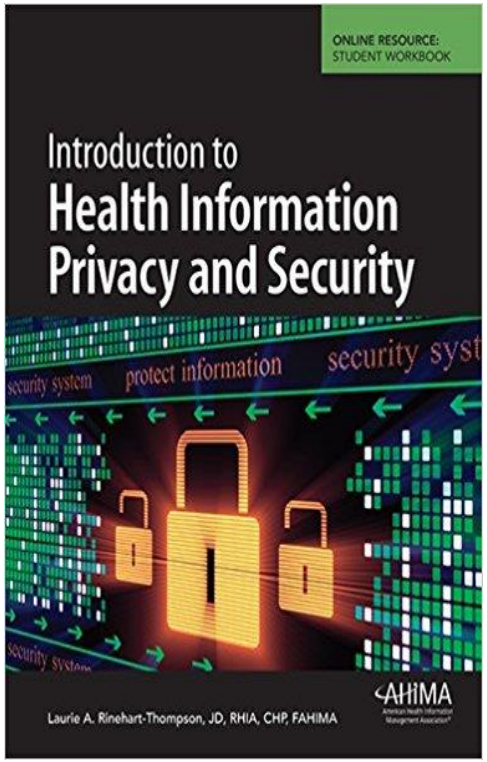
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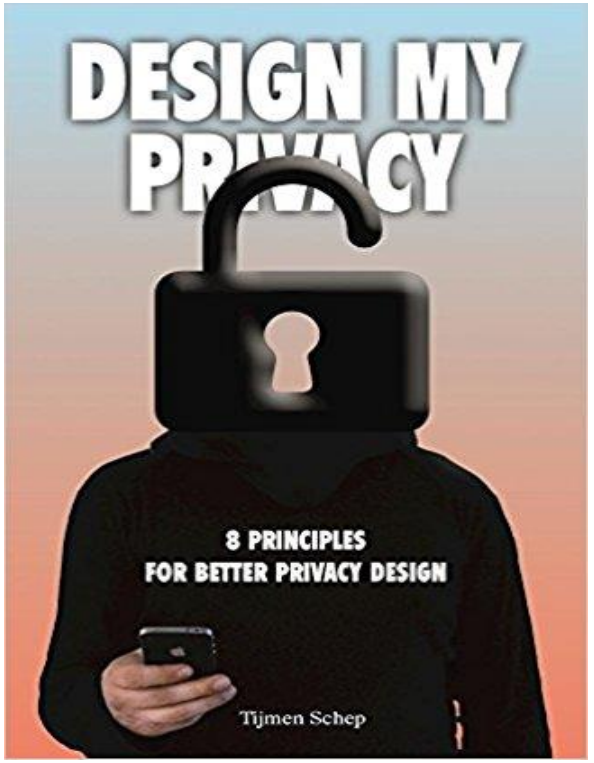
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FOR BETTER PRIVACY DESIGN
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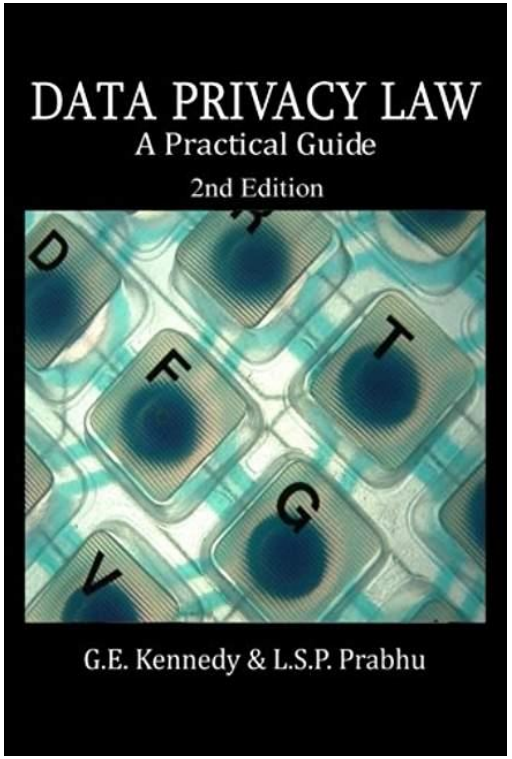
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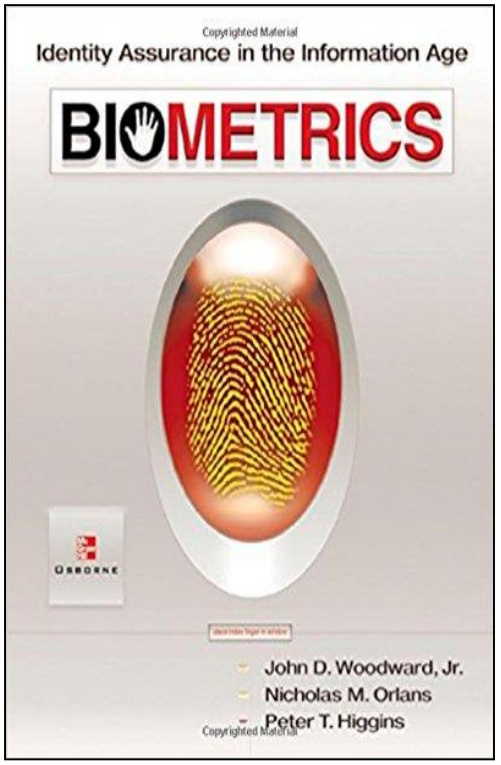
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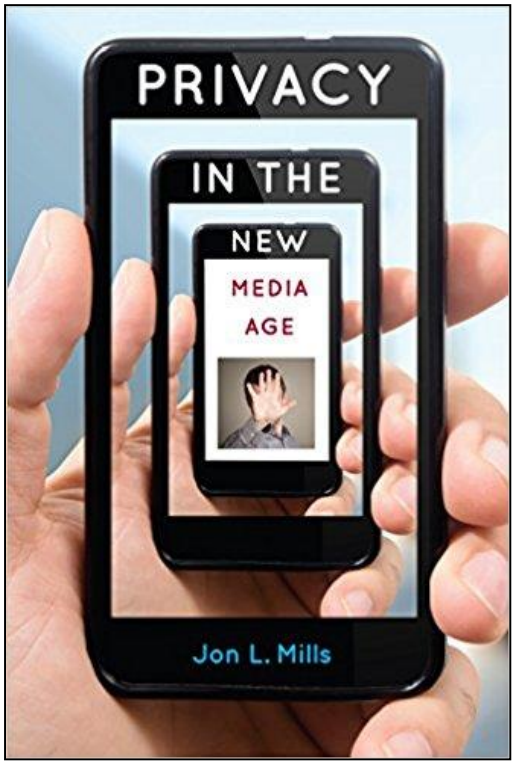
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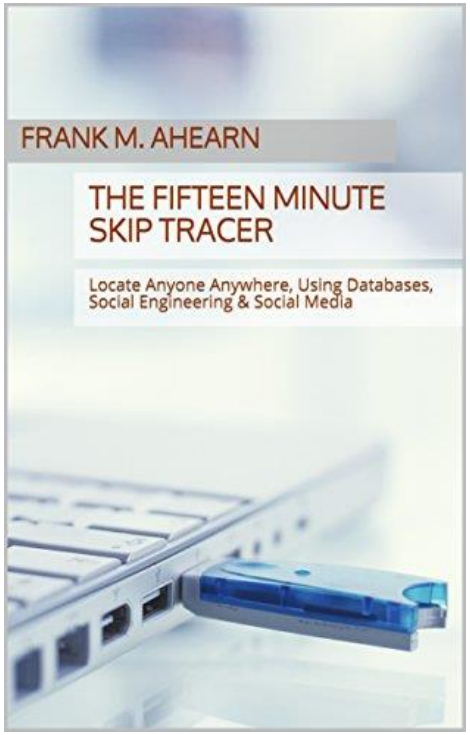
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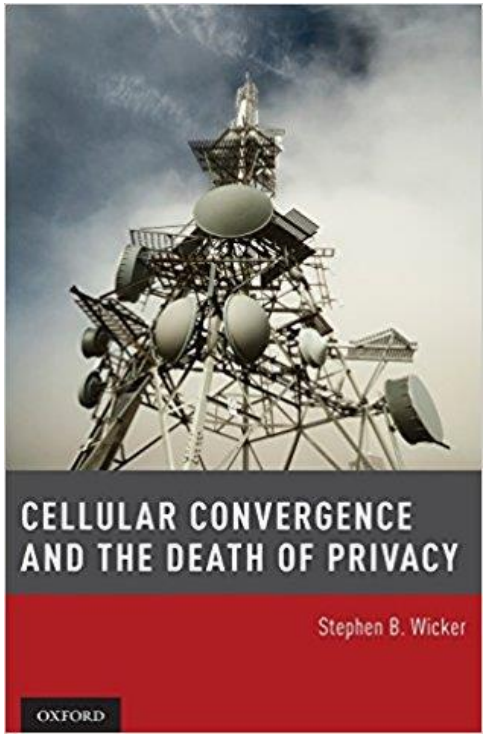
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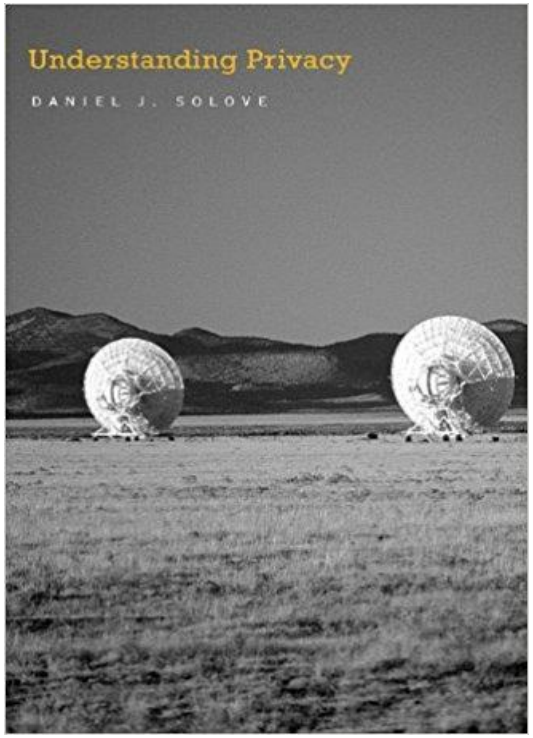
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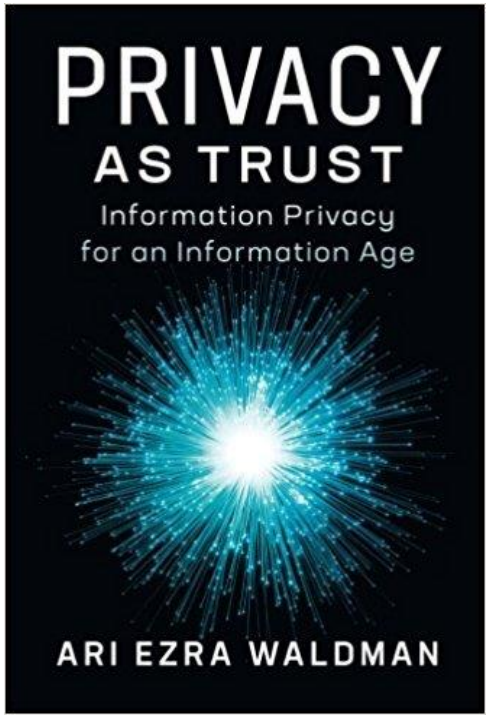
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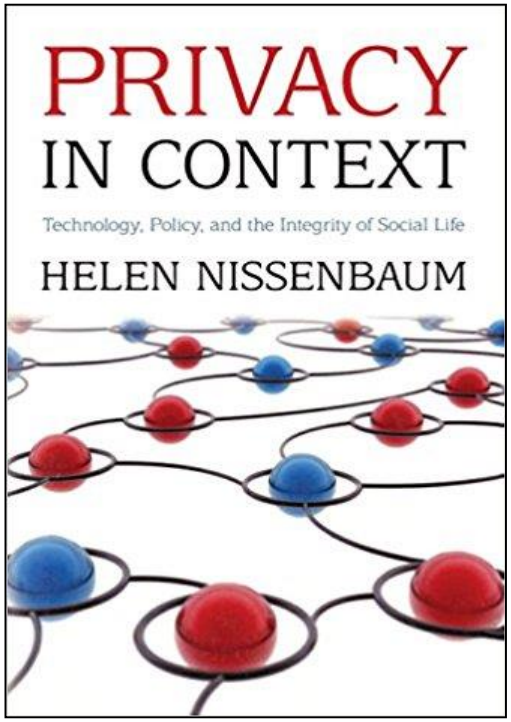
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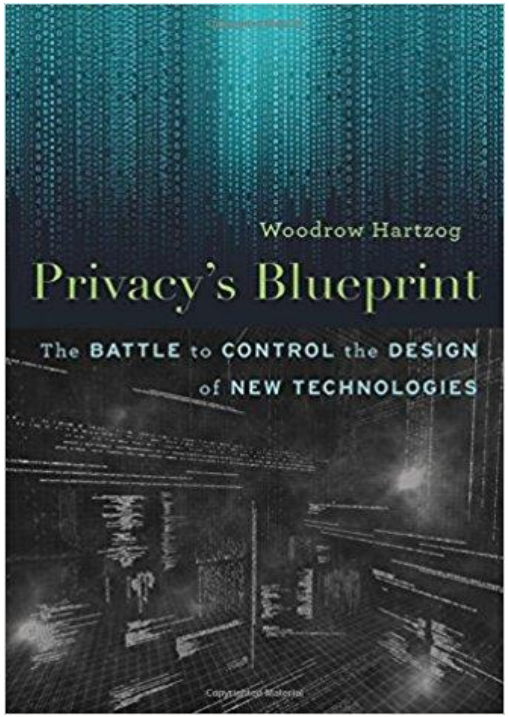
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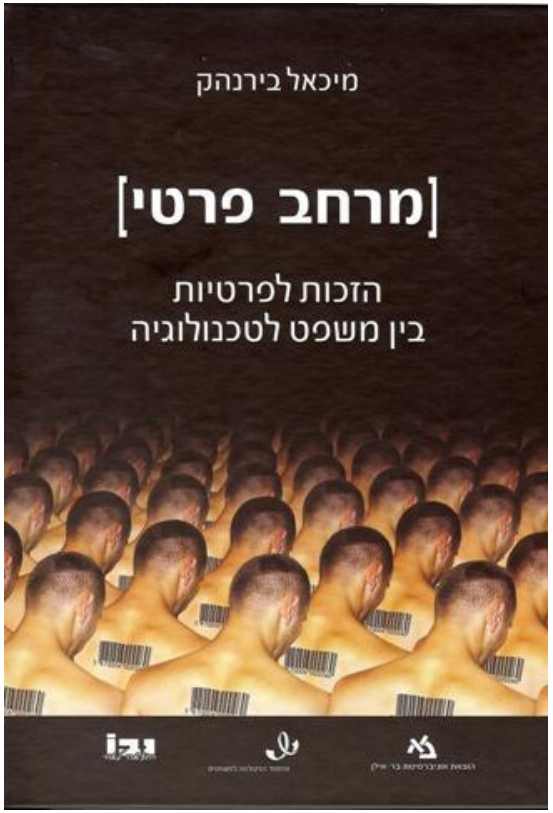
of NEW TECHNOLOGIES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משפט
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On the Internet, Nobody Knows You're a Dog

1993

© Peter Steiner, The New Yorker (Vol.69, 1993)

“You have zero privacy anyway, get over it”

--- Scott McNealy,

CEO, Sun Microsystems

1999

Mark Zuckerberg, Facebook

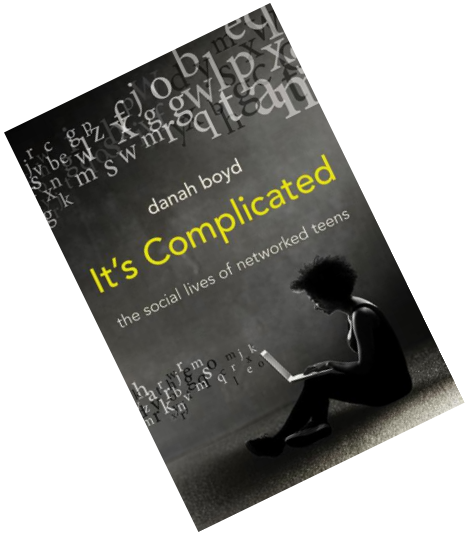
2018

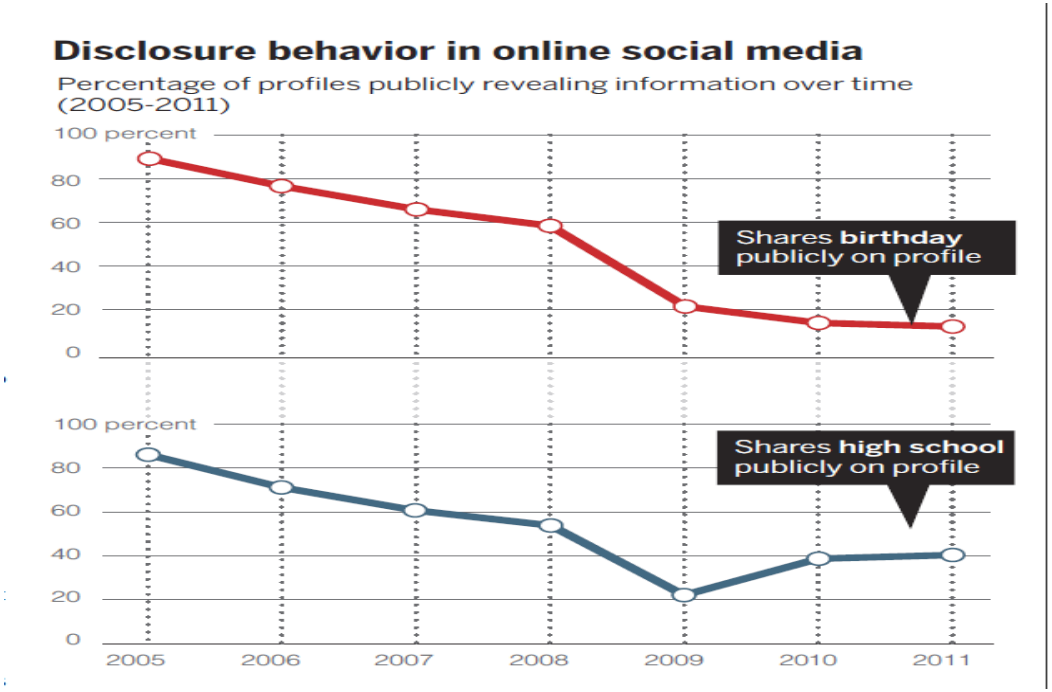
"I think the feedback that we've gotten from our community and from the world is that privacy and having the data locked down is more important to people than maybe making it easier to bring more data and have different kinds of experiences"

Cambridge Analytica

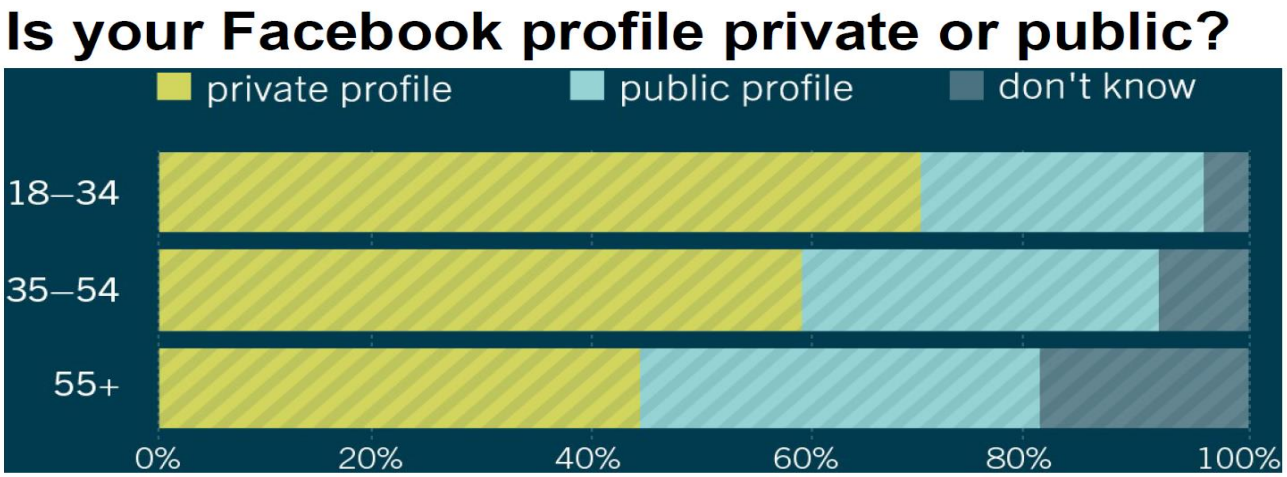
Digital Natives, Digital Immigrants

- Acquisti, Brandimarte, Loewenstein, 347 Science 511 (2015)





- Rasmussen College, Il. 2015



Digital Trail

Privacy Challenges

State vs. Citizen

- Law enforcement
- Cyber security
- Fighting terror
- Managing the state
- Managing pandemics

AADHAAR

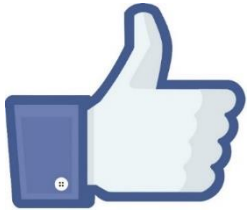
Legal solution

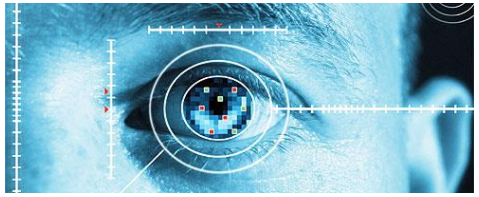
- **Constitutional law** [EU Charter, Art. 7, 8; Germany: Basic Law; Israel: Basic Law; US, India: judicial interpretation]

- Administrative law

Corporation vs. Citizen

- Communication metadata
- Location
- Internet usages
- Biometrics

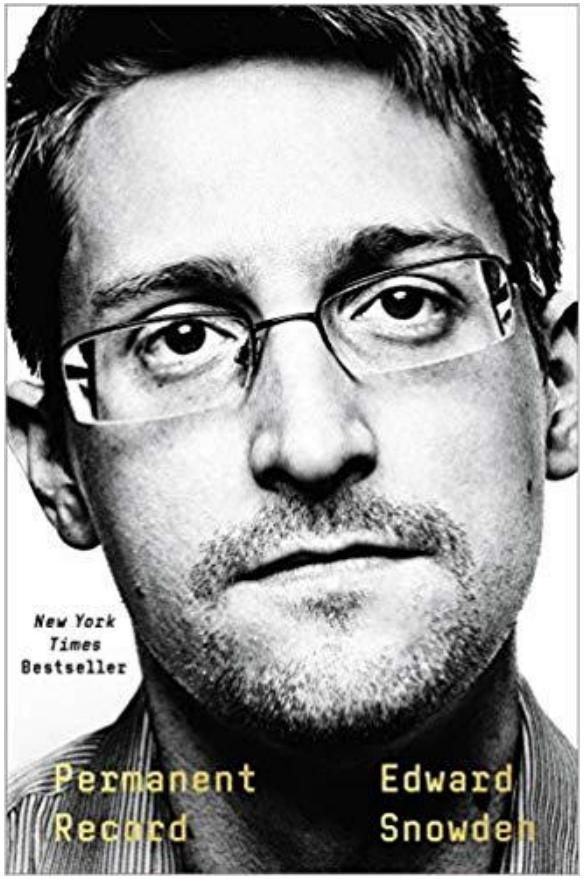




Legal solution

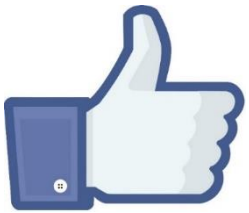
- Data Protection law

Invisible Handshake



Privacy 2.0

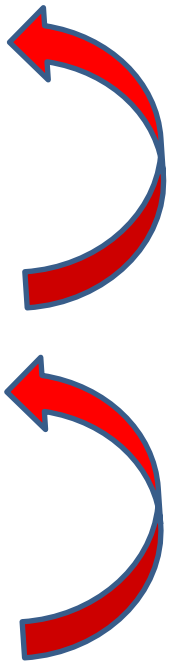
truecaller



Cambridge Analytica

Interim Summary

Citizen – state	Constitutional & Administrative Law
Consumer – corporation	Data protection law
Individual – individual	Tort law Social norms



Data Protection Law

FIPs 1.0

- 1970 Hesse, Germany
- 1974 US Privacy Act (post-Watergate)
- 1980 OECD Guidelines
- 1981 Council of Europe Convention 108 +

- 1995 EU Data Protection Directive
- 2000 EU Charter of Fundamental Rights
- 2018 General Data Protection Regulation

  + European Court of Justice
- Data protection laws: 140+ countries

Challenges

- Profiling, subjects' loss of control
- Data collected without consent
- Without knowing the uses
- Anonymization no longer reliable
- Huge benefits for medical research, governance, management, efficiency, market, security?

FIPs 1.0

- **Notice**
  - Prior to monitoring' meaningful and actionable
- **Choice / Consent**
  - Informed; free
- **Data Collection Limitations**
  - Legitimate purpose; Minimization principle
- **Data Use Limitations**
  - Only for original use; data security; confidentiality;
- **Access, amendment rights**
- **Enforcement** (public, by DPA; private)

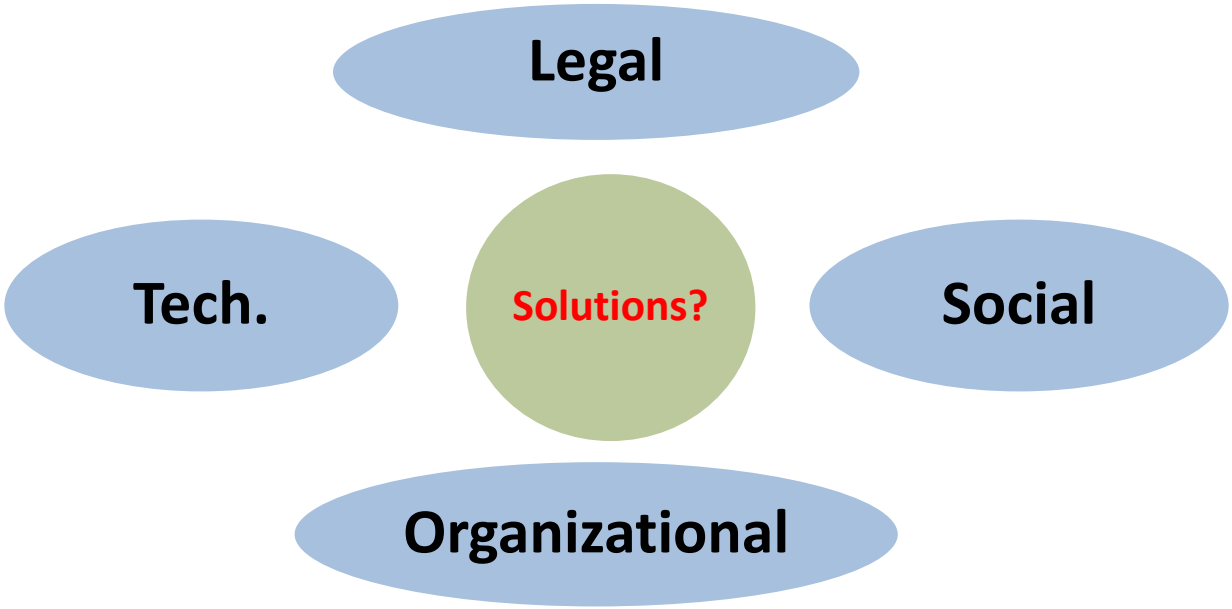
GDPR (May 25, 2018)

- Transparency & Accountability
- Breach notification duty
- Data Protection by Design
- Right to be forgotten
- Data portability
- Reliance on tech. & org.

FIPPs 2.0

Disclosure

Multiple options



Law-Norms-Technology-Organization

- **Legal**
  - FIPs 2.0
- **Social**
  - Education: citizens, consumers, engineers
  - Public protest #DeleteFacebook
- **Technological**
  - PETs, PbD
- **Organizational**
  - PIA, CPO, PbD

PIA

- Study the issue *ex ante*
- Note: Privacy is not only data security
- Follow the *data's life-cycle*:
  - Collection, storage, use, new uses, transfer, end.
- Measure vis-à-vis FIPs 1.0, 2.0
- Risk analysis

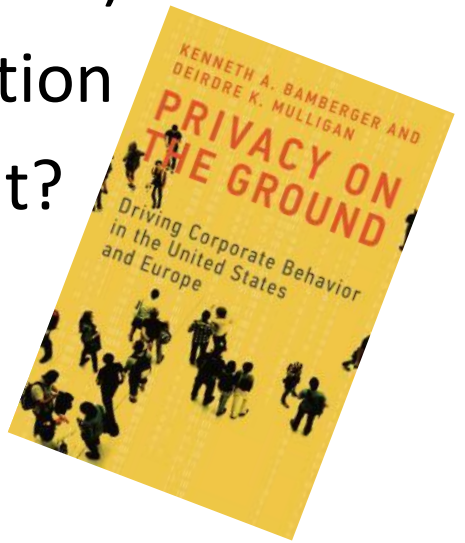
CPO / DPO

- New profession (55k in U.S.; 70k(?) in the EU)
- Combination of law, technology, organization
- compliance mentality or risk management?
- Mulligan & Bamberger

  (1) high level attention on board's agenda

  (2) powerful CPO

  (3) PbD



- CPO in Gov. – DPA, but also specific project-CPO + CPO in Corp.

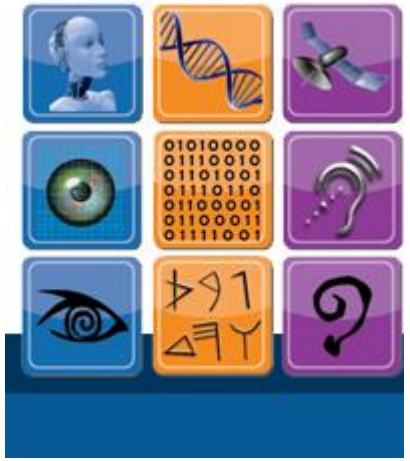
PbD

embedding privacy into the design specifications of technologies, business practices, and physical infrastructures

1. Proactive not Reactive; Preventative not Remedial
2. Privacy as the Default Setting
3. **Privacy Embedded into Design**
4. Full Functionality – Positive-Sum, not Zero-Sum
5. End-to-End Security – **Full Lifecycle Protection**
6. Visibility and Transparency – Keep it Open
7. Respect for User Privacy – Keep it User-Centric

Jerusalem Resolution, 2010

32nd Int'l Conference of Data Protection & Privacy Commissioners



Recognize Privacy by Design as an essential component of fundamental privacy protection

US – FTC Privacy Report, 2012

- **Companies** should incorporate substantive privacy protections into their practices, such as data security, reasonable collection limits, sound retention and disposal practices, and data accuracy

- **Companies** should maintain data management procedures comprehensive throughout the life cycle of their products and services

→ private ordering

EU: General Data Protection Regulation

- Art. 25: Data protection by design and by default

  1. Data controllers shall implement appropriate technical and organisational measures designed to implement data protection principles.

  2. by default, only personal data are processed which are necessary for each specific purpose of the processing re amount, extent of processing, period of storage, accessibility

  3. Certification mechanism can demonstrate compliance

→ **Public Ordering**

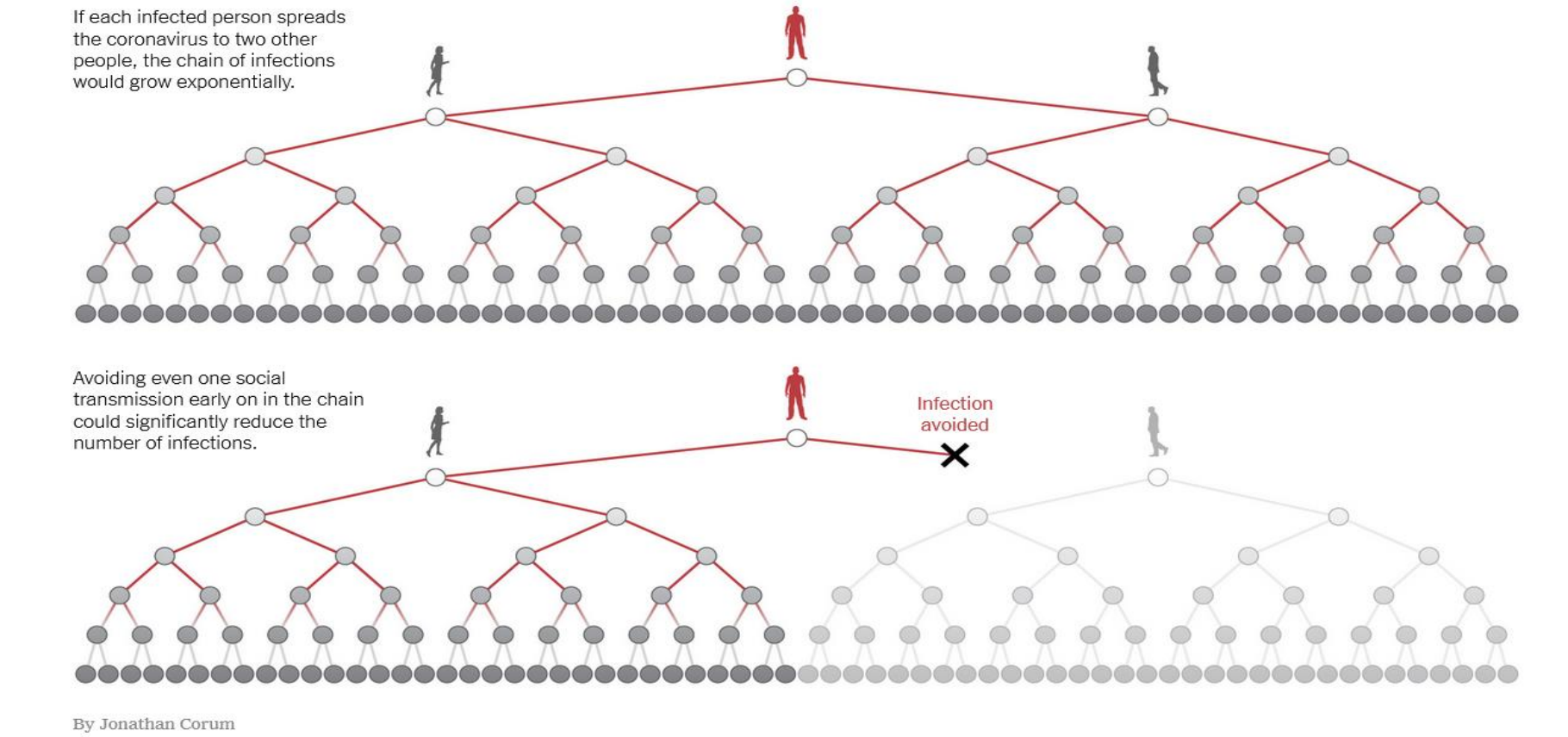
When no body took privacy into account

A PbD answer

PbD Challenges

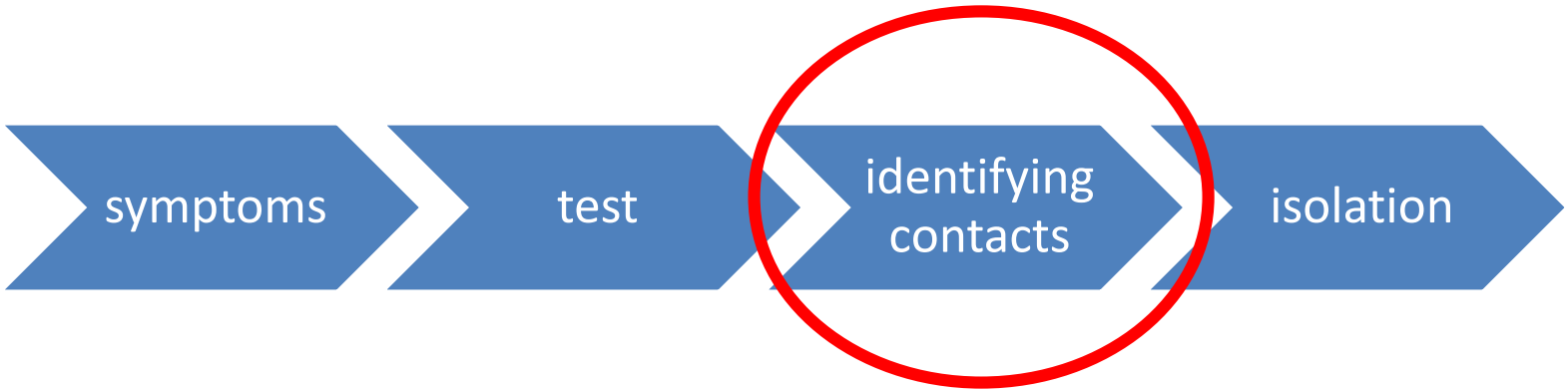
- **Conceptual**: What is Privacy?
- **Business**: Big Data incentives, not PbD
- **Technological**: How to do it?
- **Cultural**: How do engineers perceive privacy? What do they know about privacy?


COVID-1984



New York Times, March 19, 2020

Curtailing the Spread of the Virus



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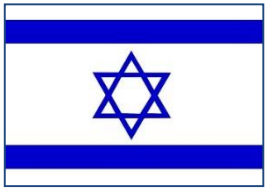
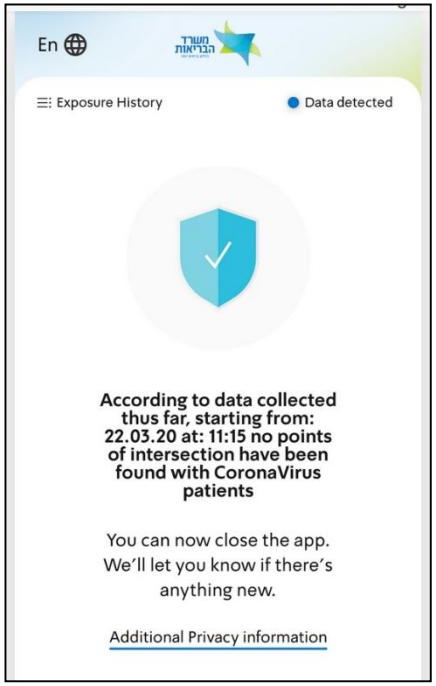
Pursuing the Unknown

HaMagen 1.0 – Shield



- **Voluntary** app; location-based, semi-centralized
- Location data saved on user's device
- MoH pushes data about infected people's whereabouts (anonymous, encrypted)
- Match – on user's device
- **Change of terms – new consent**
- User can **delete** data
- External **data security** consultants
- **Open source** – on GitHub



Trace Together

- Voluntary
- WHO, not where
- Bluetooth (2m, x min)
- Data about other devices saved locally & encrypted
- If user is infected – data about contacts → MoH → inform contacts

Soft Legal Globalization

- EU law should follow EU data
  - GDPR, Art. 45: transfers permitted to third country that ensures an *adequate* level of protection
  - Binding Corporate Rules (Art. 47)
  - Contract between controller & recipient
- Adequate:
  - Andorra, Argentina, Canada, **Israel**, New Zealand, Switzerland, Uruguay; US Privacy Shield framework; Faroe Islands, Guernsey, Isle of Man, Jersey

→ 140+ countries changes their laws

Soft Legal Globalization

- EU-US: Safe Harbor Framework, 1998
- *Schrems v. Facebook, Data Protection Commissioner , Ireland*:
  - 2015: Safe Harbor INVALID
  - 2020: Privacy Shield INVALID
- [Hi, Snowden!]

- Soft Technological globalization?

Conclusions?

- Privacy is here to stay
- And so are its challenges
- On-going search for combined-solutions
- Techies:
  - Privacy is not only data security
  - be creative!


EVACUATION ROUTE
CONSTITUTION AVE NW
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LIBERTE
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Artikel 1

Thanks!

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