

# Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada's Fledgling Privacy Tort

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*Traditionally, no tort of invasion of privacy is known to the common law—a position now being reconsidered by the Ontario Court of Appeal. The author argues that before such a tort is recognized, three fundamental issues need to be addressed. Is invasion of privacy itself a prima facie wrong? What is the appropriate doctrinal basis for such an action? How is the privacy interest to be balanced with freedom of expression?*

*Resolving these issues calls for a closer theoretical analysis of what is meant by privacy. In the author's view that analysis should be guided by three concepts: intimacy, social norms and the acute sensitivity of the subject. This would make clear that wrongful disclosure of information should not be the only actionable form of invasion of privacy, and that there should also be a remedy for physical intrusions on privacy.*

*The author considers the importance of privacy from two perspectives: the deontological perspective, which focuses on the inherent value of privacy to an individual's dignity, autonomy and inviolability as a person; and the consequentialist perspective, which sees privacy as instrumental to the individual's well-being and relations with others, and to society as a whole. The two perspectives inform each other, and should be used together in working out the basis for and the scope of an independent privacy tort.*

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## Introduction

Although invasion of privacy has been a tortious wrong in the United States for more than a century,<sup>1</sup> Commonwealth courts have historically turned away from recognizing any such action arising at common law.<sup>2</sup> Until recently that is. In 2004, both the New Zealand Court of Appeal<sup>3</sup> and the House of Lords<sup>4</sup> formally extended the

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1. The first case is probably *Pavesich v New England Life Insurance*, 50 SE 68 (Ga Sup Ct 1950), 69 LRA 101. Dozens of cases emerged in the early to mid-20th century, influenced by Warren and Brandeis' seminal article, Samuel Warren & Louis Brandeis, "The Right to Privacy" (1890) 4:5 Harv L Rev 193, which argued for the common law to protect privacy. See also American Law Institute, *Restatement of the Law (Second): Torts (2d)*, vol 3 (St Paul, Minnesota: American Law Institute, 1977) at 376 [Restatement] (general principles set out); William Prosser, "Privacy" (1960) 48:3 Cal LR 383 (discussing the seminal American jurisprudence).

2. See generally Allen Linden, *Canadian Tort Law*, 7th ed (Toronto: Butterworths, 2001) at 56 (discussing this reluctance). Historically, privacy has been protected indirectly by pressing a farrago of torts into service. For a review of this approach in England, see David J Seipp, "English Judicial Recognition of a Right to Privacy" (1983) 3:3 Oxford J Legal Stud 325. For a Canadian approach, see Peter Burns, "The Law and Privacy: The Canadian Experience" (1976) 54:1 Can Bar Rev 1.

3. *Hosking v Runtig*, [2004] NZCA 34, [2005] 1 NZLR 1 [*Hosking*].

4. *Campbell v MGN Ltd*, [2004] UKHL 22, [2004] 2 AC 457 [*Campbell*]. Since *Campbell*, there have been a number of important decisions which have fleshed out the elements of the cause of action. See especially *McKennitt v Ash*, [2006] EWCA Civ 1714, [2008] QB 73 [*McKennitt*]. See also *Mosley v News Group Newspapers Ltd*, [2008] EWHC 1777, [2008] All ER 135 (QB) [*Mosley*]; *Murray v Big Pictures (UK) Ltd*, [2008] EWCA Civ 446, [2008] All ER (D) 70 [*Murray*]; *LNS v Person Unknown*, [2010] EWHC 119, [2010] All ER 197 (QB) [*LNS*].

common law to provide a remedy for the misuse of private information. Three years earlier, the High Court of Australia signalled its willingness to consider recognizing a similar cause of action in the future.<sup>5</sup> In Canada, a handful of trial level decisions in Ontario and Nova Scotia have tentatively recognized invasion of privacy as a common law wrong.<sup>6</sup> Owing, however, to the interlocutory nature of recent decisions, and in light of a recent trial level decision in Ontario that rejected a common law privacy tort, the status of this action in Canada remains insecure and its scope uncertain.<sup>7</sup>

Treating the invasion of privacy as an actionable wrong raises three principal issues. Most fundamentally, courts are divided over the prima facie scope of the action. There is disagreement over whether invasions of privacy that do not involve the subsequent disclosure of information should be actionable. In the United States, such physical intrusions (as in the case of a peeping tom) have long been treated as falling within the scope of the privacy action.<sup>8</sup> In contrast, both the English<sup>9</sup> and New

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5. *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd*, [2001] HCA 63, 208 CLR 199 [*Lenah*]. Gleeson CJ preferred the English approach to restraining the misuse of private information, i.e. by developing breach of confidence doctrine (*ibid* at paras 34-39). Gummow and Hayne JJ were careful not to foreclose the development of an independent privacy tort (*ibid* at para 132). Callinan J seemed to prefer the vehicle of tort law (*ibid* at para 335). See also *Doe v Australian Broadcast Corp*, [2007] VCC 281; *Grosse v Purvis*, [2003] QDC 151 (two subsequent trial level decisions recognizing invasions of privacy as tortious wrongs).

6. See especially *Somwar v McDonald's Restaurants of Canada Ltd* (2006), 79 OR (3d) 172, 263 DLR (4th) 752 [*Somwar*]. See also *Caltagirone v Scozzari-Cloutier*, [2007] OJ no 4003 (QL) (Sup Ct) [*Caltagirone*]; *MacDonnell v Halifax Herald Ltd et al*, 2009 NSSC 187, 279 NSR (2d) 217 [*MacDonnell*]. For a review of all the Canadian cases, see Alex Cameron & Mimi Palmer, "Invasion of Privacy as a Common Law Tort in Canada" (2009) 6:11 Can Priv L Rev 105. Statutory causes of action that are modelled on the American approach (see *Restatement*, *supra* note 1) exist in British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador. *Privacy Act*, RSBC 1996, c 373 [*BC Privacy*]; *The Privacy Act*, RSS 1978, c P-24 [*Sask Privacy*]; *The Privacy Act*, RSM 1987, c P-125 [*Man Privacy*]; *Privacy Act*, RSNL 1990, c P-22 [*Nfld & Lab Privacy*].

7. *Somwar*, *supra* note 6, and *MacDonnell*, *supra* note 6, were both interlocutory decisions. See especially *Jones v Tsige*, 2011 ONSC 1475, 333 DLR (4th) 566 [*Jones*] ("[there is] no tort of invasion of privacy in Ontario" at para 57).

8. See generally *Restatement*, *supra* note 1; Prosser, *supra* note 1.

Zealand<sup>10</sup> formulations are confined to the disclosure of private information (as in tabloid disclosure of personal information). In Australia, the question remains open, although there was some suggestion in the High Court that physical intrusions may fall within the conceptual ambit of privacy.<sup>11</sup> Canadian judges grappling with an inchoate private tort have largely assumed that such physical intrusions could in principle be actionable, although there has been little analysis of why this is so.<sup>12</sup>

A second issue concerns the proper doctrinal basis for a privacy action. In the United States and New Zealand, the action is grounded in tort law. In England, a modified version of breach of confidence is used.<sup>13</sup> Australia has yet to decide which of these doctrinal paths to follow.<sup>14</sup> The Canadian case law has thus far not engaged in this debate. Our courts have been content to simply assume that if invasion of

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9. See *Campbell*, *supra* note 4 (the complainant focused her complaint entirely on the wrongful disclosure of information, not on the wrongful taking of the photograph itself). No English case has afforded a remedy for intrusions into private space. See e.g. *Wainwright v Home Office*, [2003] UKHL 53, [2004] 2 AC 406 [*Wainwright*] (rejecting the recognition of any “intrusion” tort modelled on the American approach).

10. See *Hosking*, *supra* note 3 at para 118 (Gault and Blanchard JJ left open the question of whether this tort should develop to include a physical intrusion aspect in the future).

11. *Lenah*, *supra* note 5 (where it was observed that the torts of intrusion upon seclusion and disclosure of private facts together “come closest to reflecting a concern for privacy as a ‘legal principle drawn from the fundamental value of personal autonomy’” at para 125, Gummow and Hayne JJ).

12. See *Somwar*, *supra* note 6 at paras 10-12; *MacDonnell*, *supra* note 6 at para 15; *Caltagirone*, *supra* note 6 at paras 21-22. Those Canadian provinces where statutory privacy actions are modelled on the American approach likewise treat intrusions as tortious. See *BC Privacy*, *supra* note 6; *Sask Privacy*, *supra* note 6; *Man Privacy*, *supra* note 6; *Nfld & Lab Privacy*, *supra* note 6.

13. Subsequent cases have begun to refer to the reworked action as “the tort [of] misuse of private information”. See *McKennitt v Ash*, [2005] EWHC 3003 at para 8, [2006] All ER 02. See also *LNS*, *supra* note 4 at para 54; *Mosley*, *supra* note 4 at para 184. However, it is clear from the majority opinion in *Campbell*, that despite the radical changes introduced, the reworked action remains part of breach of confidence doctrine. *Campbell*, *supra* note 4 at paras 85-87, Hope LJ, at para 134, Hale B, and at paras 162-63, Carswell LJ. This was made plain by the Court of Appeal in *Douglas v Hello!*, [2005] EWCA Civ 595, [2006] QB 125 at para 96.

14. See *Lenah*, *supra* note 5.

privacy is to be recognized as a common law wrong, it will fall under the law of tort.<sup>15</sup>

The third major issue in treating the invasion of privacy as an actionable wrong is reconciling the competing interests of privacy and freedom of expression, particularly in cases involving the media. In the United States, speech typically trumps privacy.<sup>16</sup> In New Zealand, courts will protect privacy unless a distinct public interest in disclosure can be identified.<sup>17</sup> In England, the courts undertake a broad balancing approach. So far, Canada seems to be following the New Zealand approach.<sup>18</sup>

Given the insecure, interlocutory status of Canadian “privacy tort” decisions, it is likely that an appellate court will soon clarify the scope of our emerging privacy action. When faced with the three issues identified above, our courts will likely take guidance from developments abroad.<sup>19</sup>

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15. See e.g. *Somwar*, *supra* note 6 at paras 8-22; *MacDonnell*, *supra* note 6 at para 13.

16. See generally Diane Zimmerman, “Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort” (1983) 68:6 Cornell L Rev 291; David Anderson, “The Failure of American Privacy Law” in Basil Markesinis, ed, *Protecting Privacy* (Oxford: Oxford University Press, 1999).

17. See *Hosking*, *supra* note 3 (the Court refers to a defence of “legitimate public concern” for disclosing the information anchored in the values of freedom of expression at paras 129-30).

18. See *Caltagirone*, *supra* note 6 at paras 18-19 (the Court refers to balancing privacy against any public interest reason for disclosure identified by the defendant).

19. I have suggested elsewhere a number of specific lessons that can be drawn from the English experience: Chris DL Hunt, “England’s Common Law Action for the Misuse of Private Information: Some Negative and Positive Lessons for Canada” (2010) 7:10 Can Priv L Rev 113 [Hunt, “Misuse of Private Information”].

It is possible, of course, that an appellate court could terminate these developments and reject any free-standing privacy tort, leaving litigants to fit their claims into various existing causes of action. Ontario trial courts have recently been divided over whether the Court of Appeal decision in *Euteneier v Lee* (2005), 77 OR (3rd) 621, 260 DLR (4th) 123, has this effect. In *Euteneier*, which involved a rather ambiguous and poorly pleaded claim that the police owed a duty of care in negligence to avoid careless infringements of privacy, Cronk JA accepted the plaintiff’s concession in oral argument that “there is no ‘free-standing right’ to dignity or privacy under the *Charter* or at common law” (*ibid* at para 63). In *Nitsopoulos v Wong* (2008), 298 DLR (4th) 265, 60 CCLT (3d) 318, the Court noted this dicta in *Euteneier*, but concluded, in agreement with *Somwar*, *supra* note 6, that it nevertheless remains unsettled whether Ontario has a common law privacy tort. The

While such cross-pollination of principles should be encouraged, it is important that our judges ask two fundamental questions before setting the legal boundaries of the privacy action: what exactly is privacy and why is it important? The purpose of this article is to suggest answers to these questions.

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recent case of *Jones* rejected this view, holding that the appellate decision bars the recognition of a privacy tort in Ontario. *Jones*, *supra* note 7 at paras 49, 57.

There are two key problems with the traditional hodgepodge approach to protecting privacy, which could be overcome if privacy were protected under a discrete common law tort. The first is that numerous gaps in protection exist. Consider informational privacy. This can be protected by breach of confidence, defamation and passing off (among others). But each action has its limits. Breach of confidence traditionally requires that information be communicated in a relationship of confidence, so it would not provide protection where private information is taken surreptitiously by a stranger. For a discussion of how England dropped this requirement, thereby doing violence to the equitable basis of this action, see Chris DL Hunt, "Rethinking Surreptitious Takings in the Law of Confidence" [2011] 1 IPQ 66 [Hunt, "Rethinking"]. Defamation meanwhile suffers from the practical limit that truth is a complete defence, which makes it unavailable in the paradigmatic privacy case involving the disclosure of truthful facts. See Warren & Brandeis, *supra* note 1 at 197-98. Passing off suffers from the limit that the claimant must be a "trader in the trade", which most litigants are plainly not. See *Kaye v Robertson* (1990), [1991] FSR 62 (available on WL UK) (EWCA) [*Kaye*]. Physical intrusions are protected by trespass to property, nuisance and potentially by battery. The first two are limited however by the requirement that the claimant have an interest in the property in question, which would not protect guests in a person's home or any claimant whose privacy is invaded while in a public place. Battery suffers from the requirement that some physical touching occur, making it unavailable where telephoto lenses capture even the most intimate of acts. These practical limits suggest a second principled problem with protecting privacy through a hodgepodge of existing torts: that those whose privacy has been invaded must have recourse to such a multiplicity of actions, each with its own requirements and limitations, is hardly conducive to clear analysis. To the contrary, this approach, which has been aptly characterized as "patchy, capricious and . . . uncertain" is conceptually confusing and inevitably impedes the development of a coherent and principled law of privacy. Basil S Markesinis, "Our Patchy Law of Privacy—Time to Do Something about It" (1990) 53:6 Mod L Rev 802 at 805. See also Eric Descheemaeker, "Veritas non est defamatio? Truth as a Defence in the Law of Defamation" (2011) 31:1 LS 1 at 19. If privacy is to be taken seriously, it is surely better to protect it directly, through a distinct tort, rather than indirectly, through a farrago of existing actions, none of which has privacy as its core value.

In section one, I consider the nature of privacy. My goal is to establish a *theoretical* rather than a *legal* definition. A number of prominent conceptions of privacy will be analyzed, including those that see it as the “right to be let alone”, as the right to control personal information, as the right to inaccessibility and as the right to subjectively desired inaccess. Drawing on the strengths of each of these conceptions, and attempting to compensate for their weaknesses, I propose a novel definition that in my view accurately identifies what types of access offend privacy.

In section two, I discuss deontological and consequentialist perspectives on the value of privacy. Deontological arguments link privacy to the concepts of dignity, autonomy and personhood. Consequentialist arguments value privacy for the various benefits it has for the individual and for society more generally. I assert that a comprehensive review of the importance of privacy requires that insights from both of these perspectives be taken into account.

Before turning to these two tasks, a few preliminary points should be emphasized. First, what is attempted in section one is not a *legal* but rather a *theoretical*, definition of privacy. A purely theoretical definition “does not of itself ‘solve’ any privacy problems”;<sup>20</sup> at most it tells us that something is private, but it does not dictate any particular legal result. Nevertheless, sketching a theoretical definition is of obvious importance, since we need a clear idea of what privacy is before we can attempt to value it<sup>21</sup> or craft legal doctrine to protect it. Furthermore, as a practical matter, it is best to begin by considering privacy in the

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20. Edward J Bloustein, “Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser” (1964) 39:6 NYUL Rev 962 at 1004 [Bloustein, “Answer to Prosser”]. See also Stanley I Benn, “Privacy, Freedom, and Respect for Persons” in J Roland Pennock & John W Chapman, eds, *Nomos XIII: Privacy* (New York: Atherton Press, 1971) 1 at 13.

21. See generally, Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001) at 63-64; Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 14-15 (Dworkin emphasizes the importance of conceptual clarity when deciding whether the law should protect a putative privacy violation); Paul A Freund, “Privacy: One Concept or Many” in J Roland Pennock & John W Chapman, eds, *Nomos XIII: Privacy* (New York: Atherton Press, 1971) 182 at 193-94 (Freund discusses the value of clear concepts when assessing legal responses to new privacy threats).

abstract for two reasons. First, assessing a legal definition requires us to consider whether, in the circumstances, invasions of privacy should be actionable, bearing in mind other competing values<sup>22</sup> and the practical workability of any legal test. Such questions are not necessary for a purely theoretical definition,<sup>23</sup> and will serve only to encumber our efforts to create one. The two concepts should thus be kept distinct.

Second, there is a necessary fluidity in this article between sections one and two. By considering why privacy is important, we reveal the fundamental interests lying at the core of our theoretical conception of privacy. This helps both delineate and justify the scope of our theoretical definition, since what is properly a private matter is necessarily influenced by why one claims it as such.<sup>24</sup> In other words, identifying the importance of privacy by reference to the values it protects (and the worthwhile practices such protection encourages) serves to illuminate the edges of the concept of privacy itself<sup>25</sup>—and demonstrates its coherence—by showing that losses of privacy in various contexts are undesirable for similar reasons.<sup>26</sup>

Finally, a few words should be said about the practical importance of these broad conceptual questions. Having a clear idea of what privacy is and what values it protects serves not only to inform the debate about the legal protection of privacy but should also assist in resolving the three doctrinal divisions identified above. I argue throughout this article that a coherent understanding of privacy must include both a physical

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22. See Bloustein, "Answer to Prosser", *supra* note 20 at 1004.

23. See Richard Parker, "A Definition of Privacy" (1974) 27:2 Rutgers L Rev 275 at 279.

24. See WL Weinstein, "The Private and the Free: A Conceptual Inquiry" in J Roland Pennock & John W Chapman, eds, *Nomos XIII: Privacy* (New York: Atherton Press, 1971) 27 at 29. See also Hyman Gross, "Privacy and Autonomy" in J Roland Pennock & John W Chapman, eds, *Nomos XIII: Privacy* (New York: Atherton Press, 1971) 169 at 170-72.

25. See Daniel J Solove, "Conceptualizing Privacy" (2002) 90:4 Cal L Rev 1087 [Solove, "Conceptualizing Privacy"] ("[o]ne of the most integral aspects of conceptualizing privacy is to discern the value of privacy. The value of privacy . . . illuminates what privacy is . . ." at 1143).

26. See Ruth Gavison, "Privacy and the Limits of Law" (1980) 89:3 Yale LJ 421 ("[t]he coherence and usefulness of privacy as a value is due to a similarity one finds in the reasons advanced for its protection" at 424).



and an informational dimension. Once this is appreciated, we see that the American approach to scoping the action is preferable to the unduly narrow informationist approach adopted in England and New Zealand.<sup>27</sup> Appreciating the importance of physical privacy also points to the proper doctrinal basis for a privacy action. This is because breach of confidence is, as a matter of principle, concerned with the wrongful disclosure of information. Because confidence law cannot extend to protect physical intrusions that do not involve the subsequent disclosure

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27. It should be noted that the American privacy torts extend beyond (i) disclosure of private information and (ii) intrusions into privacy, to also include (iii) appropriation of name or likeness and (iv) publicity which places a person in a false light in the public. See *Restatement*, *supra* note 1. See also Prosser, *supra* note 1. The statutory privacy torts in several Canadian provinces include the first three of these, but not the fourth. *BC Privacy*, *supra* note 6; *Sask Privacy*, *supra* note 6; *Man Privacy*, *supra* note 6; *Nfld & Lab Privacy*, *supra* note 6.

Many commentators argue that (iii) and (iv) are not really about privacy at all. See Prosser, *supra* note 1; Hilary Delany & Eoin Carolan, *The Right to Privacy: A Doctrinal and Comparative Analysis* (Dublin: Thompson Round Hall, 2008) at 94; Des Butler, "A Tort of Invasion of Privacy in Australia?" (2005) 29:2 *Melbourne UL Rev* 339 at 368; Australian Commonwealth, New South Wales Law Reform Commission, *Report 120: Invasion of Privacy* (Sydney: New South Wales Law Reform Commission, 2009) at para 4.5 [NSW Law Reform]. For the contrary view asserting that all four instances are concerned with privacy, see Bloustein, "Answer to Prosser", *supra* note 20.

Instance (iii) is said to be a complaint not of privacy but of property. Cases here involve the defendant using the claimant's image for commercial gain (often by implying some type of celebrity endorsement). Because the claimant is asserting an exclusive right to exploit his image for commercial gain, critics argue that the core complaint here is economic, not dignitary, and the remedy (if one is given) should lie in the rules governing intellectual property rights rather than in a dignitary tort of privacy. Instance (iv) is said to concern the right not to privacy but to reputation, which is conceptually distinct since reputation concerns the esteem with which others regard the complainant, unlike privacy which concerns the esteem with which he regards himself. See generally, Warren & Brandeis, *supra* note 1. Furthermore, instance (iv) is criticized on the basis that it sails too close to (and potentially undermines) the tort of defamation. I agree with these criticisms, and think the judicial development of Canada's fledgling common law privacy tort should be confined to instances (i) and (ii). There is broad agreement among virtually all commentators that instances (i) and (ii) form the conceptual core of privacy, as will be explained in detail below. Accordingly, this article is confined to instances (i) and (ii), and makes no further comment on (iii) and (iv).

of information,<sup>28</sup> it is not capable of forming the basis of a comprehensive law of privacy.<sup>29</sup> This suggests that tort law is the doctrinally preferable foundation for any privacy action.<sup>30</sup> Finally, it is important, when balancing privacy with expression, to have a clear idea of the values underpinning the former. The point is straightforward: before a court can properly evaluate the strength of (and consequently accord weight to) the privacy interest engaged in the particular case, it ought to have a clear idea of how and to what extent the specific intrusion at hand conflicts with that interest. For all of these reasons, the conceptual questions pursued in this article are of the utmost practical importance for Canadian jurists when settling the legal foundations and scope of our emerging privacy tort.

## I. Conceptualizing Privacy

There is a vast body of literature attempting to elucidate the concept of privacy. Somewhat dauntingly, many—if not most—of these accounts begin by noting the theoretical disarray currently plaguing the field.<sup>31</sup> In

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28. This view has been expressed by a number of commentators. See Basil Markesinis et al, “Concerns and Ideas about the Developing English Law of Privacy (and How Knowledge of Foreign Law Might Be of Help)” (2004) 52:1 Am J Comp L 133 at 182 [Markesinis, “Concerns and Ideas”]; Butler, *supra* note 27 at 352; Jonathan Morgan, “Privacy, Confidence and Horizontal Effect: ‘Hello’ Trouble” (2003) 62:2 Cambridge LJ 444 at 457. It is also implicit in the judgment of Lord Hoffmann in *Wainwright*, *supra* note 9 at para 30, and in the trial decision of Buxton LJ in the Court below. *Wainwright v Home Office*, [2001] QB 1334 at paras 96-99, [2003] All ER 943.

29. Morgan, *supra* note 28. See also Hilary Delany, “Breach of Confidence or Breach of Privacy: The Way Forward” (2005) 27 Dublin U LJ 151 at 166-68 [Delany, “The Way Forward”].

30. I have argued elsewhere that breach of confidence is a doctrinally inappropriate foundation for the protection of informational privacy as well. Hunt, “Rethinking”, *supra* note 19.

31. See Parker, *supra* note 23 (“no consensus in the legal and philosophical literature” at 275-76); WA Parent, “A New Definition of Privacy for the Law” (1983) 2:3 Law & Phil 305 (privacy jurisprudence is in “conceptual shambles” at 305); Tom Gerety, “Redefining Privacy” (1977) 12:2 Harv CR-CLL Rev 233 (privacy has a “protean capacity to be all things to all lawyers” at 234); Robert Post, “Three Concepts of Privacy” (2001) 89:6 Geo

this section I discuss a number of prominent conceptions of privacy by drawing on what others have written, and conclude by offering my own definition, which attempts to overcome the various conceptual difficulties that have emerged in the literature.

#### *A. What Makes for a Good Definition?*

Before establishing what the definition of privacy should be, it is worth considering what makes such a definition acceptable. Parker identifies the following criteria:

First, it should fit the data. Data . . . means our shared intuitions of when privacy is or is not gained or lost. . . . A second criterion . . . is that of simplicity. . . . The standard of simplicity dictates that if some characteristic common to all or some of these evils (i.e. intuitive examples of when privacy is lost) could be found . . . so much the better. . . . The point of the criterion of simplicity is theoretical elegance . . .<sup>32</sup>

Parker's notion of shared intuitions of privacy plays an important role in the definitions that he and other theorists offer.<sup>33</sup> These shared intuitions serve to control the scope of any definition (for example, what is private<sup>34</sup>), and also justify treating privacy as a coherent and thus

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LJ 2087 [Post, "Concepts"] (" . . . I sometimes despair whether [privacy] can be usefully addressed at all" at 2087).

32. Parker, *supra* note 23 at 276-77. This idea of simplicity finds expression also in Ockham's razor, which is considered by Bloustein. Edward J Bloustein, "Privacy is Dear at Any Price: A Response to Professor Posner's Economic Theory" (1978) 12:3 Ga L Rev 429 [Bloustein, "Dear"] (describing Ockham's razor as the "methodological principle of [seeking] parsimony in explanation" at 429-30). Note that Parker sets out a third criterion. Parker, *supra* note 23 (defining the criterion as "applicability by lawyers and courts" at 277). This is the criterion that aids the transition from a *theoretical* to a *legal* definition, and thus is not directly relevant here.

33. See Gavison, *supra* note 26 at 429; Gerety, *supra* note 31 at 236; Russell Brown, "Rethinking Privacy: Exclusivity, Private Relation and Tort Law" (2006) 43:3 Alta L Rev 589-606; James Rachels, "Why Privacy is Important" (1975) 4:4 Phil & Pub Aff 323 ("an adequate account of privacy should help us understand what makes something . . . 'none of your business'" at 325-26). Moreham notes that nearly all privacy theorists place "informational privacy" at the core of their definitions based largely on instinct. NA Moreham, "Privacy in the Common Law: A Doctrinal and Theoretical Analysis" (2005) 121:4 Law Q Rev 628 at 641 [Moreham, "Doctrinal"].

34. See Gavison, *supra* note 26 at 429; Gerety, *supra* note 31 at 236.

definable concept.<sup>35</sup> That said, it may be that the reliance on intuition is responsible for much of the existing theoretical confusion, as intuitions are not universally shared and are not provable in any event.<sup>36</sup> Be that as it may, reference to intuition is probably unavoidable when attempting to define any concept.<sup>37</sup> Furthermore, Parker mitigates these concerns by appealing to shared, or widely held, intuitions about what is private. As Gerety explains: “The point at which certainty [based on intuition] is felt, it might be argued, is subjective, but *shared* certainties are at least [inter-subjective]: if enough people share them—and act on them—we say we *know* them to be so”.<sup>38</sup>

Such shared intuitions often find concrete expression in the social norms operating in society, some of which take the form of “quite explicit social rules” that we all recognize to be anchored in our mutual understanding of and concern for privacy.<sup>39</sup> We can and probably must<sup>40</sup> turn to these social norms to guide our understanding of what is private.<sup>41</sup>

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35. See *ibid* at 236.

36. See *ibid* at 236, n 15; Ronald A Cass, “Privacy and Legal Rights” (1991) 41:3 Case W Res L Rev 867 at 868.

37. See Gerety, *supra* note 31 (“[t]his is a simple point going back to Kant: concepts without intuitions are, as he put it, empty (and intuitions without concepts blind). . . . At some point a concept simply applies, and we recognize that point not by arguments alone but by arguments aided by intuitions, by felt certainties of one kind or another” at 236, n 14), citing Immanuel Kant, *Critique of Pure Reason*, translated by Norman Kemp Smith (New York: St. Martin’s Press, 1965) at A51/B75.

38. Gerety, *supra* note 31 at 236, n 14 [emphasis in original]. See also *ibid* (“[i]ntuition need not be a purely personal and variable affair; on some questions it may yield a consensus within definite limits. Our intuitions, after all, respond to shared values and shared conditions of life” at 242).

39. Thomas Scanlon, “Thomson on Privacy” (1975) 4:4 Phil & Pub Aff 315 (these rules are said to include the social prohibition against “going through other people’s drawers or suitcases” at 316). See especially Robert C Post, “The Social Foundations of Privacy: Communication and Self in the Common Law Tort” (1989) 77:5 Cal L Rev 957 at 968-69 [Post, “Social Foundations”].

40. See Benn, *supra* note 20 at 2.

41. See Parent, *supra* note 31 at 307; Raymond Wacks, “Why There Will Never be an English Common Law Privacy Tort” in Andrew T Kenyon & Megan Richardson, eds,

## *B. Some Prominent Theoretical Definitions*

### (i) The Right to Be Let Alone

The “right to be let alone” occupies a hallowed place in privacy discourse. Although the phrase was coined by Judge Cooley<sup>42</sup>—who used it not to justify a right to privacy, but rather to explain why tort law regards trespass to the person as wrongful—it is now generally attributed to Warren and Brandeis, who invoked it throughout their seminal 1890 article.<sup>43</sup> The latter authors analyzed numerous cases of trespass, defamation, confidence, and especially common law copyright, and identified a latent principle of privacy—operating unarticulated—which they argued should thenceforth be protected independently, as a distinct tort.<sup>44</sup> This principle of privacy, expressed as a “right to be let alone”, is anchored in the more fundamental interest of an “inviolate personality”.<sup>45</sup>

The Warren and Brandeis formulation has come under much academic criticism. The first problem is its vagueness.<sup>46</sup> Because neither the “right to be let alone” nor the concept of “inviolate personality” is adequately defined,<sup>47</sup> the article gives no practical or conceptual guidance

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*New Dimensions in Privacy Law* (Cambridge: Cambridge University Press, 2006) 154 at 179-80.

42. Thomas M Cooley, *A Treatise on the Law of Torts*, 2d ed (Chicago: Callaghan, 1888) at 29.

43. On the influence of Warren and Brandeis’s article, see Irwin R Kramer, “The Birth of Privacy Law: A Century Since Warren and Brandeis” (1990) 39:3 *Cath U L Rev* 703; Richard C Turkington, “Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy” (1990) 10:3 *N Ill UL Rev* 479 (“[t]he article has acquired a legendary status in the realm of legal scholarship” at 481-82).

44. Warren & Brandeis, *supra* note 1 at 213.

45. *Ibid* at 205.

46. Gavison, *supra* note 26 at 461, n 120.

47. See generally Richard B Bruyer, “Privacy: A Review and Critique of the Literature” (2006) 43:3 *Alta L Rev* 553 at 559; Ferdinand Schoeman, “Privacy: Philosophical Dimensions of the Literature” in Ferdinand David Schoeman, ed, *Dimensions of Privacy: An Anthology* (Cambridge: Cambridge University Press, 1984) 1 at 14; Bloustein, “Answer to Prosser”, *supra* note 20 at 970-71 (noting that Warren and Brandeis do

on the scope of the right.<sup>48</sup> A related criticism is that the phrase “right to be let alone” itself appears to be less a definition of privacy than simply a description of one example of it.<sup>49</sup>

The second criticism, stemming from the above mentioned vagueness, is that this conception of privacy is overly broad. As Gavison explains:

[It] cover[s] almost any conceivable complaint anyone could ever make. A great many instances of “not letting people alone” cannot readily be described as invasions of privacy. Requiring that people pay their taxes or go into the army, or punishing them for murder, are just a few . . . examples.<sup>50</sup>

This conceptual over breadth is evident in how the “right to be let alone” has been used in American constitutional jurisprudence, where it is often equated with privacy<sup>51</sup> and is taken to encompass the right to “live one’s life as one chooses”.<sup>52</sup> This includes the “privilege of an individual to plan his own affairs . . . [and] do what he pleases”.<sup>53</sup> This “substantive”<sup>54</sup> conception of privacy confers a zone of decisional autonomy, and currently forms the basis for the right to abortion in American constitutional law.<sup>55</sup> It has been much criticized as being

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provide that violations of privacy cause “spiritual” not “material” harm, and, unlike defamation, privacy violations damage the esteem with which a man regards himself, rather than that which the community regards him).

48. See Solove, “Conceptualizing Privacy”, *supra* note 25 (“[b]eing let alone does not inform us about the matters in which we should be let alone” at 1101).

49. See Delany & Carolan, *supra* note 27 at 8.

50. Gavison, *supra* note 26 at 438. See also Parent, *supra* note 31 at 321.

51. See especially *Time, Inc v Hill* (1967), 385 US 374, 87 S Ct 534, Fortas J dissenting (“[the right to privacy] is, simply stated the right to be let alone” at 413).

52. *Ibid.*

53. *Doe v Bolton (AG of Ga)*, 410 US 179 at 213 (1973), 93 S Ct 739, Douglas J.

54. Helen Fenwick & Gavin Phillipson, *Media Freedom Under the Human Rights Act* (Oxford: Oxford University Press, 2006) at 662.

55. *Roe v Wade*, 410 US 113 at 153, 93 S Ct 705 (1973); *Eisenstadt v Baird* 405 US 438, 31 L Ed 2d 349 (1972) (striking down a law prohibiting the use of contraceptives by unmarried couples: “If the right to privacy means anything, it is the right of the individual . . . to be free from unwarranted government intrusion into [fundamental matters such as] . . . the decision to bear or beget a child” at 453 [emphasis added]).

really an “assertion of liberty *per se* [rather] than one of privacy”.<sup>56</sup> A narrower and clearer definition of privacy is needed.

## (ii) Control of Personal Information

This theory of privacy is prevalent in the legal and philosophical literature.<sup>57</sup> Westin, an influential early commentator, wrote that privacy is “the claim of individuals . . . to determine for themselves when, how and to what extent information about them is communicated to others”.<sup>58</sup> Fried, another important commentator, later wrote that “privacy is not simply an absence of information about us in the minds of others; rather, it is the *control* we have over information about ourselves”.<sup>59</sup> Gross and Miller took a similar view and, like Fried, focused on privacy as a *state* of control one has over the circulation of his personal information rather than as a *claim* to control.<sup>60</sup> Understanding privacy as a claim to control personal information lies at the core of the recently created action for the misuse of private information developed by the House of Lords in *Campbell v. MGN*.<sup>61</sup> It also features prominently in the jurisprudence of the European Court of Human Rights, which interprets the scope of Article

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56. Delany & Carolan, *supra* note 27 at 8. See also Parent, *supra* note 31 at 316; Gavison, *supra* note 26 at 439; Gross, *supra* note 24 (claiming that arguments about reproductive freedom are about autonomy not privacy, as they represent “government [attempts] to regulate personal affairs, not get acquainted with them” at 180-81).

57. For a useful compendium of authors espousing this definition, see Solove, “Conceptualizing Privacy”, *supra* note 25 at 1110, n 112.

58. Alan F Westin, *Privacy and Freedom* (New York: Atheneum, 1967) at 7 [Westin, *Freedom*].

59. Charles Fried, “Privacy” (1968) 77:3 Yale LJ 475 at 482 [Fried, “Privacy”] [emphasis in original]. See also Charles Fried, *An Anatomy of Values* (Cambridge: Harvard University Press, 1970) at 140.

60. Gross, *supra* note 24 at 169; Arthur R Miller, *The Assault on Privacy: Computers, Databanks and Dossiers* (Ann Arbor: University of Michigan Press, 1971) at 25.

61. *Campbell*, *supra* note 4 at para 51. Note that Lord Hoffmann refers to the “right to control” personal information as a “value” underpinning this action, rather than as a definition of privacy *per se*. I explore the “value” aspect in section two, below.

8 of the European Convention on Human Rights to guarantee respect for private life.<sup>62</sup>

Conceiving of privacy as a claim to control personal information gets us very close to understanding its essence.<sup>63</sup> Simply put, we intuit privacy as a claim to control, and this intuition is reflected in the social norms that surround us.<sup>64</sup> We feel that this conception of privacy is the reason someone has a moral claim to keep the contents of his diary secret; and reasonable people reflect that understanding by respecting this right, or at least by intuiting that reading a person's diary violates something we all sense to be private. Furthermore, as I explain in section two, the claim to control personal information is closely associated with the values underpinning privacy (especially the values of dignity and autonomy).

However, there are three significant problems with control-based definitions. The first problem is that insofar as they concentrate on

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62. *Von Hannover v Germany*, No 59320/00, [2004] VI ECHR at paras 72-73, [2004] 21 EMLR 379 [*Von Hannover*] (paparazzi photographs widely published); *Peck v United Kingdom*, No 44647/98, [2003] I ECHR at para 62, [2003] 15 EMLR 287 [*Peck*] (broadcast of closed circuit television footage capturing claimant on national television). The latter case stands for the proposition that exposure of private facts to an audience far larger than reasonably foreseeable violates Article 8 because it deprives the person of the ability to control such personal information. See Fenwick & Phillipson, *supra* note 54 at 758. This interpretation is consistent with early conceptual writing on the nature of privacy as control of information. See Ernest Van Den Haag, "On Privacy" in J Roland Pennock & John W Chapman, eds, *Nomos XIII: Privacy* (New York: Atherton Press, 1971) 149 ("privacy is violated if it is abridged beyond the degree which might be reasonably expected . . . by one's activity. If one's image . . . is displayed to a wider public . . . than could reasonably be expected to perceive it, one's privacy is violated" at 157-58). See also Gross, *supra* note 24 at 170-72.

63. See Elizabeth L Beardsley, "Privacy: Autonomy and Selective Disclosure" in J Roland Pennock & John W Chapman, eds, *Nomos XIII: Privacy* (New York: Atherton Press, 1971) 56 at 70 (expressing this idea in terms of "selective disclosure" of information, which she argues forms the "conceptual core" of privacy).

64. See Post "Social Foundations", *supra* note 39 at 968-69 (arguing that to properly understand privacy we must have regard to such widely observed "norms of behaviour"). See also Scanlon, *supra* note 39 at 316-18.



information,<sup>65</sup> they are too restricted.<sup>66</sup> We all recognize, intuitively, that privacy can be invaded even where information is not communicated, such as where a peeping tom trains his telescope on a woman's bedroom to watch her undress. A definition of privacy that fails to capture such physical intrusions simply lacks intuitive coherence. It might be suggested that informational control can capture this example, the argument being that the tom has in fact received information about his victim (in the sense that he has learned what she looks like without clothes). This argument is problematic however, owing to its artificiality. Parker responds to it by asking us to imagine that the tom and the woman are lovers.<sup>67</sup> Is it still sensible to regard the tom, when he sneaks a peak at his lover through the window after leaving her side, as obtaining information about what she looks like naked—information he already has?<sup>68</sup> If the answer is no, then such peeping falls outside this definition of privacy, resulting in an intuitive under-inclusiveness. Even if we strain and answer yes because the man has learned that his lover remains undressed or is in a different pose, this information-based approach clearly fails to capture the true essence of the invasion.<sup>69</sup> It is not that *information* has been acquired but rather that she is being “*looked at . . . against her wishes*”.<sup>70</sup> Wacks explains:

What is essentially in issue in cases of intrusion is the frustration of the legitimate expectations of the individual that he should not be seen or heard in circumstances where

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65. See Parent, *supra* note 31 at 306; Raymond Wacks, “The Poverty of Privacy” (1980) 96:1 Law Q Rev 73 at 88-89 [Wacks, “Poverty”].

66. See Solove, “Conceptualizing Privacy”, *supra* note 25 at 1110; Parker, *supra* note 23 at 280.

67. *Ibid.*

68. Moreham offers a similar example—that of a movie fanatic who, having seen his favourite star naked in numerous movies, knows what she looks like in the nude. But surely his peeping through her window constitutes a “serious invasion of privacy”, even if no new “information” is gleaned. Moreham, “Doctrinal”, *supra* note 33 at 651.

69. See Parker, *supra* note 23 at 280; Gavison, *supra* note 26 at 433.

70. Moreham, “Doctrinal”, *supra* note 33 at 650-51 [emphasis added]. See also Parker, *supra* note 23 (the essence of the woman's complaint here is the “loss of control over who . . . can see her body” at 280); Gavison, *supra* note 26 (the invasion is characterized as the diminishment of the woman's “spatial aloneness” at 433).

he has not consented to or is unaware of such surveillance. The quality of the information thereby obtained, though it will often be of an intimate nature, is not the major objection.<sup>71</sup>

These observations lead to a related point. As Moreham has convincingly argued, by failing to appreciate the true essence of the complaint, this information-based approach necessarily fails to appreciate the gravity of the privacy violation itself, and therefore must logically undervalue it.<sup>72</sup> This is because, to be internally coherent, the information-based approach must regard the information learned as the only relevant factor when assessing the gravity of an invasion; but if we consider Parker's peeping lover example, we see that very little new information has in fact been communicated. Consequently, as the information learned was negligible, so too must be the violation of privacy. Such an approach is clearly inadequate if we regard this example as a serious violation of privacy.<sup>73</sup>

So, the first major problem with the "control over information" approaches is their narrowness, in that they fail to adequately capture what we intuit—that physical intrusions violate privacy for reasons unrelated to, and irrespective of, any information that may also be gleaned (or subsequently published) as a consequence of an intrusion. It is the looking (or listening or touching) itself, not the acquisition of information, that is offensive to our intuitive sense of privacy. Furthermore, as I explain in section two, the values underpinning privacy, and the reasons why it is important, strongly support including a physical intrusion dimension in our definition. Before moving to the remaining criticisms, it is worth noting that there is widespread academic<sup>74</sup> and law commission<sup>75</sup> recognition, and some judicial<sup>76</sup>

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71. Moreham, "Doctrinal", *supra* note 33 at 651, citing Raymond Wacks, *Personal Information: Privacy and the Law* (Oxford: Clarendon Press, 1989) at 248.

72. Moreham, "Doctrinal", *supra* note 33 at 650-51.

73. This inadequacy is even more apparent if we consider Moreham's fan and movie star example. *Ibid* at 651.

74. See Gerety, *supra* note 31 at 263-65; Daniel J Solove, "A Taxonomy of Privacy" (2006) 154:3 U Pa L Rev 477 at 552-55 [Solove, "Taxonomy"]; Bloustein, "Answer to Prosser", *supra* note 20 at 973-77; Van Den Haag, *supra* note 62 at 149; Gavison, *supra* note 26 at 428; Moreham, "Doctrinal", *supra* note 33 at 636.

recognition, that physical intrusions lie at the conceptual core of privacy.

A second criticism of control-based definitions concerns ambiguity in the manner in which “control” is used by various commentators.<sup>77</sup> If control is used, as Fried uses it,<sup>78</sup> to mean actual control, and privacy is thus the *state of controlling* information, it follows that a person who cannot exert control cannot enjoy privacy.<sup>79</sup> But surely this cannot be correct, for it would mean that a person could not assert a right to privacy even in relation to highly sensitive personal information

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75. See United Kingdom, *Report of the Committee on Privacy and Related Matters* (London: HMSO, 1990) (the Committee adopted the following definition of privacy: “[T]he right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information” at 7); NSW Law Reform, *supra* note 27 at para 4.3 (the two “elemental” dimensions to privacy are disclosure of personal information and physical intrusion upon private affairs when it is approached from a tort law perspective); New Zealand Law Commission, *Privacy: Concepts and Issues* (Wellington: Law Commission, 2008) at 53-68 (emphasizing the physical and informational dimensions of privacy); Canada, Departments of Communications and Justice Task Force, *Privacy and Computers* (Ottawa: Information Canada, 1972) at 13 (identifying three dimensions of privacy: “Territorial Privacy”, referring to one’s home; “Privacy of the Person”, anchored in dignity and protecting a person from physical and sensorial harassment; and “Informational Privacy”, referring to the right to control access to and the dissemination of personal information); *Restatement*, *supra* note 1 at 378-80 (including physical intrusion into solitude as a tortious violation of privacy).

76. See *Campbell*, *supra* note 4 (“privacy can be invaded in ways not involving publication of information. Strip searches are an example” at para 15, Nicholls LJ); *Browne v Associated Newspapers*, [2007] EWCA Civ 295 at para 28, [2008] 1 QB 103, citing *R v Broadcasting Standards Commission*, [2001] QB 885, [2000] 3 All ER 989 (CA) (which held that privacy denotes the personal “space” which should be free from “intrusion” at para 48, Mustill LJ); *Lenah*, *supra* note 5 (“the disclosure of private facts and unreasonable intrusion upon seclusion come closest to reflecting a concern for privacy ‘as a legal principle drawn from the fundamental value of personal autonomy’” at para 125, Gummow and Hayne JJ). But see *Hosking*, *supra* note 3 at para 118 (the question of whether this tort should develop to include a physical intrusion aspect is left open by Gault and Blanchard JJ).

77. See Bruyer, *supra* note 47 (“what is meant by ‘control?’” at 565).

78. Fried, “Privacy”, *supra* note 59 at 482-83; See also Miller, *supra* note 60 at 25.

79. See Parent, *supra* note 31 at 326-27 (claiming that a comatose patient deserves some privacy despite his complete inability to exert control).

gathered while she is in a public place<sup>80</sup>—a position roundly rejected by academics,<sup>81</sup> the House of Lords,<sup>82</sup> the European Court of Human Rights,<sup>83</sup> the New Zealand Court of Appeal<sup>84</sup> and the Supreme Court of Canada.<sup>85</sup> A related problem here is that treating privacy as a state of actual control over information may suggest a loss of privacy where there is only the *threat* of a loss.<sup>86</sup> Moreham illustrates this by noting that if X had a machine capable of reading all of Y's emails, and also of seeing Y's naked body through her clothes, Y could not be said to have actual control over that information. So even if X *never actually used* the hypothetical device, the mere fact that he had it would violate Y's privacy.<sup>87</sup> In short, "[c]ontrol-based definitions therefore fail to distinguish between those situations where there is a *risk* of unwanted

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80. See Gross, *supra* note 24 at 170-72. I am not suggesting that events occurring in a public place should always be protected under a privacy tort. To the contrary, the fact that the claimant was in a public place can sometimes militate against the reasonableness of her expectation of privacy. The most sensible way to approach this issue is to apply a multi-factorial analysis, drawing on the totality of circumstances in the case at hand, including the location of the claimant, the nature of the activity, whether he is a public figure, the sensitivity of the information or activity observed, etc. Recent English authority follows such an approach. See *Murray*, *supra* note 4 at para 36. The courts must also be especially sensitive to the effect the alleged violation has on the claimant. What the courts should not do is draw bright lines by rejecting a priori all public place privacy claims. Such an approach would seem to be based on some equation of privacy with secrecy, which has been criticized by commentators as conceptually problematic. See Post, "Social Foundations", *supra* note 39 at 986, n 141. It would also fail to acknowledge that the values underlying privacy are not inexorably tied to the claimant's location, because privacy should be conceived as a *claim* to control access, not a factual *state* of controlling same (discussed immediately below).

81. See Andrew Jay McClurg, "Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places" (1995) 73:3 NCL Rev 989; Elizabeth Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000) 50:3 UTLJ 305; NA Moreham, "Privacy in Public Places" (2006) 65:3 Cambridge LJ 606.

82. *Campbell*, *supra* note 4.

83. *Peck*, *supra* note 62 at paras 62-63; *Von Hannover*, *supra* note 62.

84. *Hosking*, *supra* note 3.

85. *Aubry v Editions Vice-Versa Inc*, [1998] 1 SCR 591, 157 DLR (4th) 577.

86. *Gavison*, *supra* note 26 at 427; *Parent*, *supra* note 31 at 327.

87. Moreham, "Doctrinal", *supra* note 33 at 638.

access and those where unwanted access has in fact been obtained".<sup>88</sup> A better conception of privacy is thus to formulate it, as Westin does, as a *claim* to control information, rather than a *state* of control itself.<sup>89</sup>

A third criticism of control-based definitions concerns their potential over breadth.<sup>90</sup> This stems from the fact that many authors fail to identify with precision the types of information falling within a control-based conception of privacy. Simply put, defining privacy as a claim to control information relating to one's self does little to help us know what information is in fact private. On a plain reading, it could mean that any information about a person is private, including the colour of her eyes or even her name—information that, to be sure, few would intuit to be private. What is needed is some conceptual device to guide us in ascertaining what information is private. I return to this issue, as well as to the concept of privacy as a claim to control, after considering the remaining conceptions of privacy.

### (iii) Inaccessibility

This theory sees privacy as "limited access' to the self".<sup>91</sup> Its most influential proponent is probably Gavison, although she was preceded by Van Den Haag<sup>92</sup> and O'Brien<sup>93</sup> and was followed in large measure by Moreham.<sup>94</sup>

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88. *Ibid* [emphasis in original].

89. Westin, *Freedom*, *supra* note 58 at 7. Accord Gavison, *supra* note 26 at 427, n 22 (noting that Westin's definition *is* able to distinguish between threatened and actual losses of privacy).

90. Solove, "Conceptualizing Privacy", *supra* note 25 at 1114; Bruyer, *supra* note 47 at 565; Gerety, *supra* note 31 at 263.

91. Solove, "Conceptualizing Privacy", *supra* note 25 at 1102.

92. Van Den Haag, *supra* note 62 ("[p]rivacy is the exclusive access of a person . . . to a realm of his own . . . [it] entitles one to exclude others from . . . watching . . . [and] intruding upon . . . his private realm" at 149).

93. David M O'Brien, *Privacy Law and Public Policy* (New York: Praeger, 1979) ("[p]rivacy may be understood as fundamentally denoting an existential condition of limited access to an individual's life experiences and engagements" at 16).

94. Moreham, "Doctrinal", *supra* note 33 ("privacy is best defined as the state of 'desired inaccess' or as 'freedom from unwanted access'" at 636).

Gavison's version of this theory is probably the richest,<sup>95</sup> and will be discussed in some detail. She begins by noting that the clearest way to conceptualize our intuitive sense of privacy is to begin with an admittedly artificial notion of "perfect privacy" and then consider how this perfect state may be compromised, thus suggesting a loss of privacy.<sup>96</sup> Perfect privacy exists when a person is "completely inaccessible to others".<sup>97</sup> According to Gavison:

This may be broken into three independent components: in perfect privacy no one has any information about X, no one pays attention to X, and no one has physical access to X. . . . [Accordingly, a] loss of privacy occurs as others obtain information about an individual, pay attention to him, or gain access to him.<sup>98</sup>

Gavison refers to these three components of privacy as "secrecy", "anonymity" and "solitude". They refer respectively to "the extent to which an individual is known, the extent to which an individual is subject to attention, and the extent to which others have physical access to an individual".<sup>99</sup> She justifies each component by reference to intuition, and by showing how invasions of each component offend the values supporting privacy.

*Secrecy*, Gavison says, must stand as an independent head within any definition of privacy, or else we will fail to understand the core complaint at stake when, say, secret love letters are published in the media.<sup>100</sup> It is the dissemination of this information itself that is intuitively invasive to privacy, even if no other intrusion occurs (such as trespass in the initial acquisition of the letters).

Regarding *anonymity*, Gavison asserts that "an individual always loses privacy when he becomes the subject of attention";<sup>101</sup> and this must

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95. See Solove, "Conceptualizing Privacy", *supra* note 25 ("Gavison . . . develops the most compelling conception of privacy as limited access" at 1104).

96. Gavison, *supra* note 26 at 428.

97. *Ibid.*

98. *Ibid.*

99. *Ibid* at 433-34, n 40.

100. *Ibid* at 429.

101. *Ibid* at 432.

be treated independently of any information obtained. This, she says, “becomes clear” if we consider

the effect of [a person] calling, “Here is the President”, should he attempt to walk the streets incognito. No further information is given, but none is necessary. The President loses whatever privacy his temporary anonymity could give him. He loses it because attention has focused on him.<sup>102</sup>

Regarding *solitude*, Gavison explains that “[i]ndividuals lose privacy when others gain physical access to them”.<sup>103</sup> By access, she means physical proximity, which for her means only access gained through the normal use of one’s senses.<sup>104</sup> In her view solitude must stand as an independent component of any definition of privacy, since “the essence of the complaint [in cases such as peeping toms] is not that more information about us has been acquired, nor that more attention has been drawn to us, but that our spatial aloneness has been diminished”.<sup>105</sup>

Gavison’s approach has four advantages. The first is that it is simple and accords with our intuitions. It captures the tenor of most invasions of privacy, and it draws special attention to our intuitive sense that physical intrusions must lie at the core of any comprehensive definition, without relying on an artificial information-based approach. It therefore overcomes the problem of narrowness associated with informational control theories.

Second, by creating three sub-components of privacy, Gavison enables us to concentrate on the differences between breaches of secrecy, anonymity and solitude, while avoiding a reductionist trap. Each component is linked by the concept of access and each is at bottom a

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102. *Ibid.*

103. *Ibid* at 433.

104. *Ibid.* Gavison later includes technologically-aided intrusions as falling within her definition, referring to wiretapping and photographing as “typical” invasions of privacy (*ibid* at 436). Moreham and Parker also include technologically-aided access in their definitions of privacy. Moreham, “Doctrinal”, *supra* note 33 at 639-40; Parker, *supra* note 23 at 283-84.

105. Gavison, *supra* note 26 at 433.

complaint about privacy.<sup>106</sup> The components are simply species of a genus.

A third advantage of Gavison's approach—shared by other sensorial access theorists—is that it necessarily excludes “substantive” or “decisional” privacy claims. Since laws limiting zones of decision-making (such as reproductive choice) do not involve sensorial access, they are not captured by Gavison's definition. This definition thereby avoids the over breadth of the “right to be alone” conception, which conflates privacy with liberty.<sup>107</sup>

Fourth, defining access as involving *sensorial* perception (whether technologically aided or not) necessarily avoids treating the exposure to noxious smells and unwelcome noises as violations of privacy. This is important, since such exposures do not accord with our intuitive understanding of privacy's *core* meaning. Other access theorists however, have taken the counter-intuitive step of equating these examples of unwanted access with breaches of privacy.<sup>108</sup>

Despite these positives, Gavison's approach suffers from at least two important deficiencies. The first is that, like Fried's information control

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106. *Ibid* at 436 (“[this] concept of privacy . . . is a complex of these three independent and irreducible elements: secrecy, anonymity, and solitude. Each is independent in the sense that a loss of privacy may occur through a change in any one of the three, without a necessary loss in either of the other two. The concept is nevertheless coherent because the three elements are all part of the same notion of accessibility, and are related in many important ways” at 433-34). I discuss the relationship between these conceptions in more detail in section two.

107. Gavison explicitly excludes “decisional privacy” from her definition. *Ibid* at 438-39. Parker's hybrid control/access definition impliedly excludes “decisional” privacy. Parker, *supra* note 23 (“privacy is control over when and by whom the (physical) parts of us (as identifiable persons) can be seen or heard (in person or by use of photographs, recordings, TV, etc.), touched, smelled, or tasted by others” at 283-84). Likewise, Rachels defines privacy as control over who has access to us, and information about us. Rachels, *supra* note 33 at 326. Moreham defines access as: “perceiving a person with one's senses (*i.e.* seeing, hearing, touching . . . her), obtaining physical proximity . . . and/or obtaining information about . . . her”. Moreham, “Doctrinal”, *supra* note 33 at 640.

108. See e.g. Van Den Haag, *supra* note 62 at 161 (omitting a sensorial aspect to his access definition, and thus regarding exposure to noxious smells as a violation of privacy). *Contra* Gavison, *supra* note 26 at 439.



conception,<sup>109</sup> Gavison's sensorial access conception regards privacy as an existential *state*, rather than as a *claim*. In this respect her access conception is similar to O'Brien's.<sup>110</sup> As mentioned above, it follows from this that if a person cannot actually control access, they cannot enjoy privacy. This is plainly too narrow, for the reasons discussed above in relation to informational control theories. A related problem here is that conceiving of privacy as a *state*—and in particular by employing the device of “perfect privacy” and locating solitude at the core—Gavison's approach begins to collapse the concept of privacy into that of isolation,<sup>111</sup> although the concepts are not in fact the same. As Delany and Carolan explain:

Privacy is . . . a relational rather than a solipsistic concept. To be private, a matter must be private against another party. Solitude, on the other hand, is a self-regarding and self-supporting concept. Whereas privacy presumes the existence of others, no other is needed to be alone.<sup>112</sup>

Simply put, by emphasizing existential solitude Gavison's approach is not only too narrow but also too broad. It would regard the lonely man stranded on a desert island as enjoying the quintessential essence of privacy—something Fried aptly regards as rather absurd.<sup>113</sup>

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109. Fried, “Privacy”, *supra* note 59 at 482-83.

110. O'Brien, *supra* note 93 (“[p]rivity may be understood as fundamentally denoting an existential condition of limited access to an individual's life experiences and engagements” at 16).

111. See Delany & Carolan, *supra* note 27 (“[a] person in a state of solitude may also be enjoying a state of privacy, but it does not follow that the two states are the same” at 9).

112. *Ibid.* See also Solove, “Conceptualizing Privacy”, *supra* note 25 at 1104, citing Barrington Moore Jr, *Privacy: Studies in Social and Cultural History* (Armonk, New York: ME Sharpe, 1984) (“[w]ithout society there would be no need for privacy” at 73); David Feldman, “Secrecy, Dignity or Autonomy? Views of Privacy as Civil Liberty” (1994) 47:2 *Curr Legal Probs* 41 at 51, n 47 [Feldman, “Secrecy”].

113. Fried, “Privacy”, *supra* note 59 (“[t]o refer . . . to the privacy of a lonely man on a desert island would be to engage in irony” at 482). See also Moreham, “Doctrinal”, *supra* note 33 at 636-37 (noting that the stranded islander, desperate for human contact, is more aptly described as being in a state of isolation or even loneliness and that few would call this privacy); Arnold Simmel, “Privacy is not an Isolated Freedom” in J Roland Pennock & John W Chapman, eds, *Nomos XIII: Privacy* (New York: Atherton Press, 1971) 71.

The second important deficiency in Gavison's approach mirrors a criticism of information control conceptions discussed above: namely, that it fails to elucidate sufficiently the types of access that offend privacy. Gavison does offer some help here by developing the three components of privacy, but within each component we are left without any guiding principles. What types of information are private, and what types of physical intrusions offend privacy?

(iv) Subjectively Desired Inaccess

Moreham attempts to overcome the deficiencies of Gavison's approach by developing a sensorial access theory that emphasizes the importance of the individual's *subjective desires*. According to Moreham, privacy is best defined as follows:

[T]he state of "desired 'inaccess'" or as "freedom from unwanted access". In other words, a person will be in a state of privacy if he or she is only seen, heard, touched or found out about if, and to the extent that, he or she wants to be seen, heard, touched or found out about. Something is therefore "private" if a person has a desire for privacy in relation to it: *a place, event or activity will be "private" if a person wishes to be free from outside access when attending or undertaking it and information will be "private" if the person to whom it relates does not want people to know about it.*<sup>114</sup>

Moreham's emphasis on subjectivity offers two advantages.<sup>115</sup> First, the subjective focus is important, as a matter of principle, because privacy itself is fundamentally a subjective concept. As Moreham explains:

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114. Moreham, "Doctrinal", *supra* note 33 at 636 [emphasis added].

115. Moreham's work is built on the foundations laid by other theorists. See Parent, *supra* note 31 ("personal information is facts about a person which most individuals in a given time do not want widely known . . . or . . . facts about which, *a particular individual feels acutely sensitive*" at 306-07 [emphasis added]); Michael A Weinstein, "The Uses of Privacy in the Good Life" in J Roland Pennock & John W Chapman, eds, *Nomos XIII: Privacy* (New York: Atherton Press, 1971) 88 at 94-95 [Weinstein, "Good Life"] (Weinstein emphasizes the necessity of choice and desire in bringing about privacy); Wacks, "Poverty", *supra* note 65 ("[p]ersonal information . . . [is] those facts, communications or opinions which relate to the individual and which would be reasonable to expect *him to regard as intimate* . . ." at 88-89 [emphasis added]); Edward Shils, "Privacy: Its Constitution and Vicissitudes" (1966) 31:2 *Law & Contemp Probs* 281

[W]hat is private to one person is not necessarily private to another: Y, the impecunious academic, might regard her annual income as an intensely private matter while X, the braying City banker, will boast about his to anyone who will listen. Conversely, X might regard the intimate details of his medical misadventures as intensely private while Y will recount hers to the barest of acquaintances. A comprehensive definition of privacy must therefore recognize that different people have different [subjective] reactions to different types of disclosures.<sup>116</sup>

Second, Moreham's subjective conception goes some way to overcoming the three criticisms levelled against Gavison's approach. By emphasizing subjective desires, Moreham avoids the pitfalls that arise when privacy is characterized as an existential state. This is because, under her definition, the desire to limit access is a "means of bringing privacy about rather than . . . privacy itself".<sup>117</sup> Thus, an interest in privacy can be asserted by a person even if he cannot actually control access to himself in fact, such as an inmate who is under constant surveillance in his jail cell. Intuitively, we all recognize that this inmate's most intimate acts—such as weeping in desperation—are quintessentially private moments, even if he cannot actually prevent his jailers from watching. In short, by stressing subjective desires, Moreham moves our understanding of privacy from describing a state or condition to framing it as a claim. It is a shift, really, from a *descriptive* to a *normative* conception of privacy,<sup>118</sup> and in this respect it echoes Westin's approach, which was touched on above.<sup>119</sup> Conceiving of privacy as a claim, arising from subjective desires, has the added benefit of being able to distinguish between actual losses and the mere threat of a loss (recall Moreham's computer hacker example), as it is anchored in desired inaccess rather

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at 282-83 (privacy held to be invaded where access occurs to a person or his information without his subjective consent).

116. Moreham, "Doctrinal", *supra* note 33 at 641-42.

117. *Ibid* at 639.

118. See Delany & Carolan, *supra* note 27 (describing the shift from description to normativity as follows: "[t]he question raised by a privacy claim is not whether the individual retains exclusive control over the subject-matter in question but rather whether they ought to be able to control another's access to, or use of, that subject-matter" at 23).

119. Westin, *Freedom*, *supra* note 58 at 7.

than in the actual ability to prevent access.<sup>120</sup> In these respects, Moreham's formulation overcomes the narrowness of Gavison's definition.

Importantly, Moreham also overcomes one aspect of Gavison's overbreadth, namely the irony of regarding the lonely island castaway as being in a state of privacy. This is because, under Moreham's formulation, we will only describe that castaway as enjoying privacy if he desires it: if he is stranded and desperate for human contact, we characterize his condition as "aloneness" or isolation; but if he deliberately retreated to the island to "escape it all", then we may sensibly say he is "experiencing a good deal of privacy".<sup>121</sup> In short, "aloneness . . . becomes privacy when it is chosen or desired".<sup>122</sup> This approach is both theoretically elegant in its simplicity and intuitively sound in its comprehensiveness and coherence.

But does Moreham's approach overcome the third criticism levelled against Gavison? Does it provide adequate conceptual guidance on what types of access are privacy-invading? It is apparent from the excerpt quoted above that Moreham divides access into two categories: physical and informational. *Any unwanted sensorial access* (including that which is technologically aided<sup>123</sup>) will violate privacy. Physical access includes simply looking at, photographing, or gaining physical proximity to another person, and informational access includes collecting, storing and disseminating any information about that person.<sup>124</sup> The guiding principle is the individual's *subjective desires*: if he or she does not want to be accessed in these ways, privacy is invaded, but if he or she desires such access, or is indifferent to it, privacy is not invaded.

While the simplicity of this approach is attractive, its intuitive veracity is dubious. I say this for two reasons. First, under Moreham's approach, completely innocuous or trivial access is automatically regarded as raising a privacy claim based on nothing more than the individual's desire to be free from such access. But this simply does not

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120. Moreham, "Doctrinal", *supra* note 33 at 639.

121. *Ibid* at 636-37.

122. *Ibid* at 637.

123. *Ibid* at 637, 640.

124. See generally *ibid* at 637-41.

accord with our intuitive understanding of privacy. Few people would regard it as a violation of *physical* privacy if a fleeting glance is cast their way on a public street, or if fellow passengers stand close to them on a crowded bus, even if, in each example, they would in fact prefer not to be looked at or stood next to. The same is true if someone disseminates innocuous *information*, such as the fact that Y dislikes tomatoes. Simply put, Moreham's definition is overly broad, and it is intuitively unconvincing as a result.<sup>125</sup>

My second criticism follows from the first: By *equating* privacy with desired inaccess, Moreham's approach fails to distinguish between the different reasons a person might desire inaccess—some of which, to be sure, might have nothing to do with privacy. X, our man on the crowded bus, suffering from halitosis, might prefer that nobody stands close to him simply because, out of politeness, he does not want to inflict the after-effects of his lunch on his fellow passengers; or Y, our tomato-hater, who is given a basket of garden grown tomatoes by her neighbour, would likely not want her neighbour to know she dislikes tomatoes, simply to spare her feelings. In both cases, it is rather inaccurate to say X and Y are asserting a privacy interest since their desire for inaccess (physical in the case of X and informational in the case of Y) stems entirely from a concern they have for *someone else*. An additional problem with *equating* privacy with desired inaccess is that it fails to capture cases where the individual, for example, as a comatose or incoherent patient, is incapable of forming any subjective desires at all, yet we must agree that she is still entitled to have her privacy respected.<sup>126</sup> In this respect, Moreham's approach is too narrow.

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125. See also Bruyer, *supra* note 47 (“[w]e are frequently overheard or seen saying or doing things in our daily lives without ever *feeling* that our privacy has somehow been invaded. One would surmise that only access to specific dimensions of ourselves or to particular matters or information would be worthy enough to attract privacy” at 561 [emphasis added]).

126. See Parent, *supra* note 31 at 325-27; Kaye, *supra* note 19 (photograph taken of celebrity lying in hospital and only in “partial command of his faculties” was described as a “monstrous invasion of privacy” at 70, Gladwell LJ).

### C. A Novel Conception of Privacy

What we need, then, is something more specific—some device or devices—which better guide our assessment of what types of sensorial access offend privacy, while still retaining the important emphasis Moreham and others place on the individual's subjective desires. I believe there are three such devices which can be used in combination: intimacy, social norms and acute sensitivity.

Gerety (who defines privacy as a claim to control the intimacies of personal identity<sup>127</sup>) identifies several advantages to using intimacy as a guiding concept. First, there can be no doubt that intimate information and activities are quintessentially private information and activities, and that unwanted access to these invades privacy. By identifying that which is intimate, we are able to ascertain the conceptual core of privacy.<sup>128</sup> This gives us a definitional starting point from which to guide our analysis outward.<sup>129</sup> Furthermore, although (as Gerety concedes) intimacy cannot be defined with absolute precision, it nevertheless has “an immediately felt and almost unanimously shared”<sup>130</sup> meaning—a meaning, moreover, that is “sufficiently plain in its applications”, especially when guided by our intuitions,<sup>131</sup> such that it can give meaningful content to the notion of privacy. A related advantage of intimacy is its capacity to act as a conceptual anchor, in a limiting sense, since it is not readily susceptible to over-expansion in the same way or

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127. Gerety, *supra* note 31 at 281. See also Wacks, “Poverty”, *supra* note 65 (suggesting that “personal information” be defined as information “which . . . relate[s] to the individual and which it would be reasonable to expect him to regard as *intimate* . . . and therefore to want to . . . restrict . . . circulation” at 89 [emphasis added]); Julie C Inness, *Privacy, Intimacy and Isolation* (New York: Oxford University Press, 1992) at ch 5.

128. Gerety, *supra* note 31 at 281, n 175; Inness, *supra* note 127 at 56.

129. Gerety, *supra* note 31 at 281, n 175. “Intimately” is described as meaning “very deeply or inwardly; in a way that affects one’s inmost self”. *The Oxford English Dictionary*, 2d ed, *sub verbo* “intimately”.

130. Gerety, *supra* note 31 at 281, n 175.

131. *Ibid* (“[t]here must be intuition here, as in any value judgment, but a limiting and necessary intuition: at some point we have to say just what parts of our physical and mental lives *are* intimate and so private” at 269 [emphasis in original]).

to the same degree as privacy is.<sup>132</sup> In other words, we all intuit intimacy to refer to something clearer and narrower than privacy.<sup>133</sup> A final advantage of using intimacy as a conceptual anchor is that, as I discuss in section two, several commentators rely on it when explaining the values underpinning the importance of privacy.

So, intimacy is our definitional starting point and conceptual anchor. But it alone is not enough. This is because, although intimate information is quintessentially private information, the reverse is not always true: people may assert a legitimate privacy interest in information and activities that are not properly characterized as intimate, such as details of their finances<sup>134</sup> or photographs of them shopping with their children.<sup>135</sup> To capture such cases, and to do so without abusing the concept of intimacy, we should deploy a second device. Here we may turn, as Parent does, to widely shared “cultural norms and social practices”;<sup>136</sup> using these as our backdrop, we can say that private activities and information are those activities and information concerning a person which (even though not intimate) most people in our society would not want widely known or widely observed. This conception is wider than intimacy, for it would capture the details of one’s salary; and by not *depending* on subjectivity, it would

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132. *Ibid* at 281, n 175.

133. The critic might object here that “intimate” is not on my account sufficiently defined and that I have simply pushed definitional difficulties from the concept of “private” to that of “intimate”. I give two reasons in reply. First, I think the concept of “intimate” is sufficiently plain in its applications that few quarrels should arise as to its meaning and scope. Second, on my account, “intimate” need not be defined with precision in any event since it simply forms the first of three conceptual considerations guiding our understanding of “private”. This means that where marginal cases do arise (which may or may not fit within the idea of “intimate” access), we simply look to the next consideration.

134. See Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Ithaca, NY: Cornell University Press, 1997) at 56.

135. See *Murray*, *supra* note 4 at para 46 (photographs of JK Rowling’s child taken on public street arguably violating a reasonable expectation of privacy).

136. Parent, *supra* note 31 at 306-07. Note that Parent limits his application of this definition to informational privacy. He does not include a physical intrusion dimension. I have simply extended his definition to encompass a physical aspect.

afford privacy to the comatose patient.<sup>137</sup> Furthermore, the emphasis on widely shared norms and practices would properly exclude labelling a fleeting glance in a public place as privacy-invading, but if a photograph was taken of someone and posted on the internet, this likely would offend privacy. This latter distinction has the further advantage of being consistent with the control-based conception of privacy employed by the European Court of Human Rights and endorsed by early theorists.<sup>138</sup> Finally, lest it be objected that such community norms are too vague to provide conceptual guidance to the content of private activities and information, it is worth noting that Post<sup>139</sup> has convincingly illustrated in some detail that the American torts of intrusion upon privacy and disclosure of private information are in fact shaped in large measure by social norms and community standards of decency. This is because, under each tort, the touchstone of liability is whether intrusions/disclosures are highly offensive to a reasonable

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137. It might be objected that defining privacy so that it routinely applies to a comatose patient is not necessary, and that this unusual situation could be dealt with better by way of a limited exception to a general rule applicable to more usual cases. While there is some merit in this criticism, I think it is important to remember that privacy claims have arisen in various situations where the victim is not capable of forming a subjective desire for privacy. See *Murray*, *supra* note 4 (a case where very young children of famous parents were targeted by the paparazzi); *Andrews v TVNZ*, [2006] NZHC 1586, [2009] 1 NZLR 220 (where victims of car accidents were filmed in the immediate aftermath of their ordeal); *Kaye*, *supra* note 19 (where reporters attempted to interview a semi-conscious man recovering from surgery and in only partial command of his faculties). These cases, like the comatose patient, highlight the importance of defining privacy so that it does not depend on subjectively desired inaccess.

138. See *Von Hannover*, *supra* note 62 at paras 72-73; *Peck*, *supra* note 62 at para 62. *Peck* has been interpreted—correctly in my view—to stand for the proposition that exposure of private facts to an audience far larger than reasonably foreseeable violated Article 8 because it deprived the claimant of the ability to control such personal information (*ibid*). See Fenwick & Phillipson, *supra* note 54 at 758. This interpretation is consistent with early conceptual writing on the nature of privacy as control of information. See Van Den Haag, *supra* note 62 (“[p]rivacy is violated if it is abridged beyond the degree which might be reasonably expected . . . by one’s activity. If one’s image . . . is displayed to a wider public . . . than could reasonably be expected to perceive it, one’s privacy is violated” at 157-58); Gross, *supra* note 24 at 170-72.

139. Post, “Social Foundations”, *supra* note 39 at 959-84.



person; and in assessing this, the courts must, of necessity, concern themselves not with the impact on the actual plaintiff, but with the impact on a *reasonable person* “who is meant to embody the general level of moral judgment of the community”.<sup>140</sup> Judges in both the High Court of Australia and the New Zealand Court of Appeal have similarly endorsed using “contemporary standards of morals and behaviour”<sup>141</sup> and “contemporary societal values”<sup>142</sup> to guide the legal determination of what information falls within a reasonable expectation of privacy.

But what if the information is neither intimate (as conventionally and intuitively understood) nor that which most people in a given society would regard as private? An example here may be innocuous photographs of a woman’s uncovered head while she is in public. Can this ever be private? According to Moreham, the answer is *always* yes if inaccess is subjectively desired. A better approach, in my view, is to adopt a third, more limited conceptual device; such activities or information can be private (even if not intimate or widely regarded as private in a particular community) if the particular individual feels *acutely sensitive* about this activity/information and considers it *private for that reason*.<sup>143</sup> This refined subjective approach would mean that if the woman is a devout Muslim (who feels that exposure of her hair is deeply personal and who in public wears a head-scarf, but which happened to blow off), then the colour of her hair is private, even if she is in a non-Muslim community that does not share this view. But if she is not devout, and does not cover her head in public, but simply desires

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140. *Ibid* at 974, 984. See also Jeffrey Rosen, “The Purposes of Privacy: A Response” (2001) 89:6 *Geo LJ* 2117 at 2128. Post also justifies this approach in principle. This is because dignity, which is a core value underpinning privacy, mandates a respect for persons based on shared standards of decency. Post, “Concepts”, *supra* note 31 (“[i]f privacy is understood as a form of dignity, there can ultimately be no other measure of privacy than social norms that actually exist in our civilization” at 2094); Beardsley, *supra* note 63 (“if . . . most human beings cherish autonomy [which, for her is the ultimate moral principle justifying a right to privacy] in certain kinds of situation[s] with a special fervour, [the] moral rules of thumb [recognizing a privacy interest here] are justified” at 63).

141. *Lenah*, *supra* note 5 at para 42.

142. *Hosking*, *supra* note 3 at para 250.

143. See Parent, *supra* note 31 at 307.

inaccess because her hair is wind-blown, then the colour/appearance of her hair is not private. In the former case she is asserting a claim of privacy; in the latter, she is simply asserting her preference not to be observed.

I appreciate that this consideration of acute sensitivity is open to the criticism that it may lead to “unfettered relativism”.<sup>144</sup> Privileging the claimant’s subjective desires, it may be argued, would let her claim a privacy interest in *any* information or activity, and this would be manifestly too broad. In response, I would make three points. First, the claimant would not simply have a claim that she desires inaccess, but rather that she *feels acutely sensitive* about the information or activity and regards it as private for that reason. The latter sort of claim will inevitably be influenced by social norms on the meaning of privacy operating within her community.<sup>145</sup> This internally limits the operation of this conceptual device, because the claimant’s assertion is not one of desired inaccess but one of privacy, socially understood.

Second, acute sensitivity is probably the best option available. Its job is to bridge the gap between two largely irreconcilable demands. On the one hand, conceptualizing privacy demands that we capture the tenor of most privacy claims while avoiding over breadth. On the other hand, most theorists emphasize that privacy is essentially a subjectively determined concept. My conceptual device seeks to retain the first point while respecting the second.

Third, it is important to reiterate that this paper is concerned with developing a purely conceptual rather than a legal account of privacy. Obviously, any legal test will have to have an objective component most likely turning on the claimant’s *reasonable* expectations of privacy. This will largely address any concerns about over breadth. However, if the test is to properly reflect my conceptual account of privacy, it should also have a subjective focus.<sup>146</sup>

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144. Inness, *supra* note 127 at 87.

145. See *ibid* at 88.

146. The test developed in England, which is a mixed subjective/objective test, does just this. See Hunt, “Misuse of Private Information”, *supra* note 19 at 117-18.

My conception of privacy can thus be viewed as three concentric circles, radiating outward. Privacy refers to X's claim to be free from unwanted sensorial access (including that which is technologically aided) in relation to information and activities which are intimate; and, if not intimate, personal in the sense that most people in our society would not want them widely known or widely observed; and, if neither of these applies, information and activities can still be private if X feels acutely sensitive about them and claims a privacy interest in them for that reason. This compound definition, which is framed as a claim rather than a state, and which emphasizes—but does not depend on—subjective desires, and which makes a clear commitment to physical as well as informational privacy, is reasonably simple and would seem to capture the intuitive tenor of most privacy claims. In these respects, it accords with Parker's criteria of a good definition, and it provides a sufficiently clear conceptual starting point to begin thinking about how best to frame the legal elements of any privacy tort.<sup>147</sup>

## II. Why Privacy is Important

### A. Overview

Having identified what privacy is, I now turn to discuss why it is important. In *Campbell v. MGN*, Lord Hoffmann identified the

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147. It is worth observing that, where conceptual questions—like defining privacy—are at issue, searching for consensus among theorists simply asks too much. There is no consensus as to the meaning and scope of any rights, as students of jurisprudence are well aware. For a discussion of the near impossibility of “proving” one definitional concept to be better than another (since concepts are not “falsifiable”), see Brian Bix, “Conceptual Questions and Jurisprudence” (1995) 1:4 *Legal Theory* 465 at 465-66 (discussing the theoretical difficulty of defining “art” or “games” or “rights”); Gerety, *supra* note 31 at 235, n 13 (noting that all legal concepts are inherently “defeasable”—being subject to excuses or exception—and thus are “largely indefinable” in the sense of finding a perfect definition), citing HLA Hart, “Definition and Theory in Jurisprudence” (1954) 70:1 *Law Q Rev* 37; Brown, *supra* note 33 at 608; Eric Barendt, “Privacy as a Constitutional Right and Value” in Peter Birks, ed, *Privacy and Loyalty* (New York: Oxford University Press, 1997) 1 at 2 (noting that uncertainties of definition are inherent in all rights and that it is the job of courts to resolve them).

“underlying value[s]” of the reworked breach of confidence action (which provides a civil remedy for the unjustified disclosure of private information) as focusing on the “protection of human autonomy and dignity—the right to control the dissemination of information about one’s private life and the right to the esteem and respect of other people”.<sup>148</sup> Lord Nicholls observed that “[a] proper degree of privacy is essential for the [well-being] and development of an individual”.<sup>149</sup> In *Von Hannover v. Germany*, the European Court of Human Rights discussed the minimum content of Article 8 of the European Convention on Human Rights, which states that everyone has a right to respect for his private life and which now guides the development of the reworked English confidence action.<sup>150</sup> The Court held that the scope of protection under Article 8 “includes a person’s physical and psychological integrity . . . [and] is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings”.<sup>151</sup>

The different emphasis placed on the values of privacy by the House of Lords and the European Court of Human Rights reflects a basic division in the academic literature—the division between what may be called deontological and consequentialist approaches.<sup>152</sup> In essence, deontologists offer rights-based arguments; they concentrate on the inherent worth of privacy (typically as an aspect of dignity, autonomy and personhood) and they assert that respect for it, as a fundamental value, is an obligation imposed on others as a moral duty.<sup>153</sup> On this account, privacy is a value inherent to an individual’s existence as a

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148. *Campbell*, *supra* note 4 at para 51.

149. *Ibid* at para 12. See also *Hosking*, *supra* note 3 (identifying privacy’s underlying values as the protection of dignity, autonomy, and the “[well-being] of all human beings” at para 239, Tipping J).

150. See *Campbell*, *supra* note 4 at para 17; *McKennitt*, *supra* note 4 at para 11; *A v B & C*, [2002] EWCA Civ 337 at para 4, [2003] QB 195.

151. *Von Hannover*, *supra* note 62 at para 50.

152. See generally David Lindsay, “An Exploration of the Conceptual Basis of Privacy and the Implications for the Future of Australian Privacy Law” (2005) 29:1 Melbourne UL Rev 131 at 144.

153. See *ibid* at 144.

“human person”.<sup>154</sup> Consequentialists, in contrast, offer utility-based arguments; for them, the importance of privacy lies primarily in the promotion of various goods (both for the individual and for society) that flow from its protection or are undermined by its violation.<sup>155</sup>

Below, I elucidate various dimensions of deontological and consequentialist arguments. Before doing so, it is first worth emphasizing that despite the different focus of these arguments, they should not be understood as mutually exclusive. To the contrary, a full appreciation of the multifarious values underpinning privacy is probably best achieved when these different arguments are seen together rather than in opposition.<sup>156</sup> What follows is largely descriptive. Its primary contribution lies, I hope, in pulling together a vast literature and providing a clear and comprehensive exposition which should facilitate better analysis of privacy problems in the future.

## *B. Deontological Arguments*

### (i) Dignity and Autonomy

Commentators taking a deontological view of the value of privacy typically refer to dignity and autonomy, and anchor their discussions in Kantian ethics.<sup>157</sup> For Kant, at the core of dignity is the notion that each individual be treated as an end in himself, rather than as a means to furthering another person’s (or society’s) ends. There is a *prima facie* moral injunction against *using* people:

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154. Delany & Carolan, *supra* note 27 at 12.

155. See Lindsay, *supra* note 152 at 144.

156. See Wacks, “Poverty”, *supra* note 65 at 76; David Feldman, “Privacy-related Rights and Their Social Value” in Peter Birks, ed, *Privacy and Loyalty* (Oxford: Oxford University Press, 1997) 15 [Feldman, “Social Value”] (“[a]ny attempt to identify a *single* interest at the core of privacy is doomed to failure, because privacy derives its weight and importance from its capacity to foster the conditions for a wide range of . . . aspects of human flourishing” at 21 [emphasis in original]).

157. See e.g. for instance, Benn, *supra* note 20 at 16-26; Fried, “Privacy”, *supra* note 59 at 477-78; Beardsley, *supra* note 63 at 64-70; Feldman, “Secrecy”, *supra* note 112 at 54-55.

“[M]an . . . [as a] rational being, exists as an end in himself and not merely as a means to be arbitrarily used by this or that will. He must in all his actions, whether directed to himself or to other rational beings, always be regarded at the same time as an end . . . Persons are, therefore, not merely subjective ends, whose existence as an effect of our actions has a value for us; but such beings are objective ends, i.e., exist as ends in themselves”.<sup>158</sup>

It is apparent that both physical intrusions into privacy (arising from the actions of a peeping tom) and informational intrusions into privacy (arising from the tabloid disclosure of personal information) offend this elementary principle of dignity; in each case the wrongdoer is treating the victim as simply a *means* to an end (that is, to his own titillation, for the tom, and to boosting magazine sales, for the tabloid) rather than as an *end in himself*. It is for this reason that many authors regard invasions of privacy as offenses to dignity, in the Kantian sense.<sup>159</sup>

Disclosing personal information or peeping at someone offends dignity in three ways. First, the wrongdoer is placing his own choices above the victim's, and thereby sending the message that the latter's choices are neither important nor deserving of respect.<sup>160</sup> Second, in both examples, the wrongdoer's contempt for his victims is further evidenced by his lack of concern for their *feelings*. He wants to peep, so he peeps; he wants to publish, so he publishes. In both cases the wrongdoer knows the victim may very well suffer distress as a consequence.<sup>161</sup> Third, as Rosen notes, peeping and other forms of

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158. NA Moreham, “Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort” in J Finn & S Todd, eds, *Law, Liberty, Legislation: Essays in Honour of John Burrows QC* (Wellington: LexisNexis NZ, 2008) 231 at 235 [Moreham, “Important”], citing Immanuel Kant, *Grounding for the Metaphysics of Morals; with On a Supposed Right to Lie Because of Philanthropic Concerns*, 3d ed translated by James W Ellington (Indianapolis: Hackett, 1993) at 35-36.

159. See Fried, “Privacy”, *supra* note 59 at 478-79; Feldman, “Secrecy”, *supra* note 112 at 55, n 53; Moreham, “Important”, *supra* note 158 at 235-36; Gross, *supra* note 24 at 178.

160. See Moreham, “Important”, *supra* note 158 at 236-37.

161. See *ibid* at 237. This is true whether or not the victim actually suffers distress. The contemptuous disregard for dignity arises simply because the wrongdoer is indifferent to the likely deleterious effects his actions will have on his victim.

covert observation offend human dignity by “transform[ing] the self from *subject* to *object*”.<sup>162</sup> Benn explains why this is insulting:

[It treats] people as objects or specimens . . . and not as subjects with sensibilities, ends, and aspirations of their own, morally responsible for their own decisions, and capable, as mere specimens are not, of reciprocal relations with the observer . . . [To spy is therefore] to show less than a proper regard for human dignity.<sup>163</sup>

The concept of dignity is closely linked to that of autonomy. Autonomy refers to each individual’s capacity to be self-determining, in the sense of being free to “live their life in accordance with their own particular ideas of the individual good”.<sup>164</sup> This in turn requires the ability to “make an independent moral judgment, the willingness to exercise it, and the courage to act on the results of this . . . judgment”.<sup>165</sup> Benn links the concepts of dignity and autonomy through the bridging principle of “respect for persons”, which he sees as the fundamental ethical rule in which the principle of privacy is anchored.<sup>166</sup> According to Benn, to “respect someone as a person” (in other words, to treat them with dignity) requires seeing them as an autonomous moral agent—as a person entitled to make her own decisions and to choose how much of herself to reveal.<sup>167</sup> In Kantian terms,<sup>168</sup> a peeping tom (or a paparazzo) disregards his victim’s autonomy, and offends against her dignity, when he casts an unwanted gaze into his victim’s bedroom or when he publishes details of a celebrity’s drug treatment against her wishes.

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162. Rosen, *supra* note 140 at 2124 [emphasis added].

163. Benn, *supra* note 20 at 6-7. See also Gavison, *supra* note 26 at 455.

164. Beate Rössler, *The Value of Privacy*, translated by RDV Glasgow (Cambridge: Polity, 2005) at 43.

165. Gavison, *supra* note 26 at 449. See also Delany & Carolan, *supra* note 27 at 14; Feldman, “Secrecy”, *supra* note 112 at 54-55.

166. Benn, *supra* note 20 at 8-10. See also Fried, “Privacy”, *supra* note 59 at 479; Alan F Westin, “Science, Privacy and Freedom: Issues and Proposals for the 1970s” (1966) 66:6 Colum L Rev 1003 at 1022 [Westin, “Science”].

167. Benn, *supra* note 20 at 8-10.

168. See *ibid* at 16; Fried, “Privacy”, *supra* note 59 at 479, n 6; Lindsay, *supra* note 152 at 146.

Autonomous choice can also be undermined in more subtle ways. Benn, who is followed in large measure by Reiman on this point,<sup>169</sup> argues that showing proper respect for X, as a person, requires at a minimum that Y consider how his actions *may* affect X's *capacity* to act as a "chooser".<sup>170</sup> For Benn, covert watching shows a total lack of such respect, not because the wrongdoer's actions actually cause harm to X or produce a change in X's behaviour (after all, X does not know he is being watched), but because such spying undermines X's ability to exercise an autonomous choice about how to present himself in the first place. This is because anytime X, as a rational being, chooses to say or not to say something, or to behave in a particular manner, his decision is guided by an awareness of how he will be perceived by others and how he wants to manage that perception. Covert observation undermines this: because X is unaware of the presence of Y, he is deprived of the opportunity to decide for himself how he wishes to be perceived, and therefore what to say or how to behave. In short: "Covert observation . . . is objectionable because it deliberately deceives a person about his world, thwarting, for reasons that *cannot* be his reasons, his attempts to make a rational choice".<sup>171</sup> Such deliberate deception runs counter to the respect each person is due, for it deprives X of his capacity to make an informed decision about how to present himself, which thereby inhibits his autonomy.<sup>172</sup> Of course, overt (or non-surreptitious) watching also has implications for the exercise of autonomy, since people behave differently when they suspect they are being watched. As Fried explains:

A reproof administered out of the hearing of third persons may be an act of kindness, but if administered in public it becomes cruel and degrading . . . [I]f a man cannot be sure that

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169. Jeffrey H Reiman, "Privacy, Intimacy, and Personhood" (1976) 6:1 *Phil and Pub Aff* 26 at 36-39.

170. Benn, *supra* note 20 at 9.

171. *Ibid* at 10-11 [emphasis in original]. See also Reiman, *supra* note 169 at 39.

172. See Gross, *supra* note 24 (secret surveillance is offensive to the individual's role as an autonomous moral agent in the Kantian sense, because it usurps his prerogative to know who will see or hear him, and thus deprives him of the ability to deploy "editorial efforts" on his own behavior at 172-74).



third persons are not listening—if his privacy is not secure—he is denied the freedom to do what he regards as an act of kindness.<sup>173</sup>

Dignity and autonomy are related in another important respect. When Y peeps on X or publishes private information about her, Y not only fails to show proper respect for X as a person but may also undermine her self-esteem and thereby stifle her capacity to exercise her autonomy in the future. Developing a capacity for autonomy and exercising it in a meaningful way requires that individuals be able to take themselves seriously as independent moral actors.<sup>174</sup> Feldman explains:

One aspect of dignity is self respect, which . . . includes respect for one's own and other people's moral rights. . . . Dignity also encompasses a desire to be esteemed by others according to the standards of which we approve. These attributes make it possible and worthwhile for people to regard their own choices as important, and this is, in turn, a necessary condition for the exercise of autonomy.<sup>175</sup>

This point has been further developed by other commentators under the umbrella concept of personhood, the dimensions of which I now turn to discuss.

## (ii) Personhood

According to Reiman, to be a person, an individual “must recognize not just his *actual capacity* to shape his destiny by his choices. . . . He must also recognize that he has an *exclusive moral right* to shape his destiny”.<sup>176</sup> He must see himself as an autonomous moral agent. For Reiman, privacy is a “precondition of personhood”, because it is through respect for an individual's privacy that society communicates to

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173. Fried, “Privacy”, *supra* note 59 at 483. See also Solove, “Taxonomy”, *supra* note 74 at 495.

174. Feldman, “Secrecy”, *supra* note 112 at 54.

175. *Ibid* at 54-55. See also Feldman, “Social Value”, *supra* note 156 at 22; Fried, “Privacy”, *supra* note 59 at 479.

176. Reiman, *supra* note 169 at 39 [emphasis added].

the individual that his existence is his own.<sup>177</sup> This communication enables the individual to experience moral ownership of himself, as an autonomous agent who is part of (but distinct from) the mass of society. By treating him as an individual, society confers a “moral title” on him, which then affects his actual, subjectively perceived identity *as* a person.<sup>178</sup>

For Reiman, the veracity of this thesis is confirmed by considering what sociologist Erving Goffman called the “mortification of the self” that arises in “total institutions”, such as prisons where inmates are exposed to constant surveillance and all discreditable facts about their activities are compiled in dossiers readily accessible to prison staff. This total lack of privacy has the effect of “killing off” the individual’s sense of self, undermining his sense of moral autonomy,<sup>179</sup> and it greatly affects how the individual decides to act in the future, by encouraging conformity.<sup>180</sup> Bloustein makes the same point.<sup>181</sup> He argues that this concept of personhood, which encompasses one’s “independence, dignity and integrity” as an autonomous *self* is what Warren and Brandeis had in mind when they identified the principle underlying privacy as that of an “inviolable personality” and referred to the harm caused by intrusion as “spiritual” rather than “material” because it

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177. *Ibid* at 40-44 (this communication is manifested in complex social norms, such as the prohibition against publishing the contents of another person’s diary, or peeping into her private places).

178. See Francis S Chlapowski, “The Constitutional Protection of Informational Privacy” (1991) 71:1 BUL Rev 133 at 153-55.

179. Reiman, *supra* note 169 at 40-41, citing Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (New York: Anchor Books, 1961) at 23-25.

180. For a discussion of this phenomenon, known as the “Panoptic effect”, see Solove, “Taxonomy”, *supra* note 74 at 495.

181. Bloustein, “Answer to Prosser”, *supra* note 20 (“[t]he man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been *deprived of his individuality* and human dignity. . . . His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. *Such a being, although sentient, is fungible; he is not an individual*” at 1003 [emphasis added]).

involves an “effect upon . . . [a man’s] estimate of himself”.<sup>182</sup> For Bloustein, this complex conception of personhood (which he refers to as “individuality” and “dignity”) stands in opposition to “human fungibility”, and it is the fundamental interest which the American torts of intrusion upon seclusion and publicity of private facts are designed to protect.<sup>183</sup>

### C. Consequentialist Arguments

Consequentialist accounts of the value of privacy are prevalent in the academic literature. I have divided my discussion into three categories: the value of privacy to the individual qua individual; the value of privacy to individuals in their relations with others; and the value of privacy to society more generally.

However, it should first be emphasized that for both principled and practical reasons, these consequentialist arguments should play a crucial role in the proper resolution of *legal* privacy claims. When balancing the privacy interest with freedom of expression, courts assess the relative strength of freedom of expression in a particular case by considering, among other things, the “value of the speech”.<sup>184</sup> As a matter of principle, courts must also look to functional or consequentialist arguments when evaluating the strength of the privacy interest at hand. Anything less would suggest giving speech an unwarranted preference over privacy. As a practical matter, consequentialist arguments add specificity to the balancing exercise, and thereby help guide the analysis. It would be largely impossible for courts to balance privacy and expression based solely on deontological considerations; each party would simply assert its dignity and autonomy, and respect for the

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182. *Ibid* at 971, citing Warren & Brandeis, *supra* note 1 at 196-97. See also Shils, *supra* note 115 (referring to private “social space” and information as being inherent in each person’s existence as an “individual soul”, and arguing that intrusions into these dimensions of privacy thereby offend his “humanity” at 306).

183. Bloustein, “Answer to Prosser”, *supra* note 20 at 982, 1003.

184. There is specific focus on the contribution of such speech to a story of public interest. See *supra* note 4 and accompanying text. See also *Re Guardian News and Media Ltd*, [2010] UKSC 1 at para 49, [2010] 2 AC 697.

party's personhood would compel the court to vindicate its right to privacy or its right to speech.<sup>185</sup> Focusing on the functional aspects of privacy provides a way out of this dilemma. It enables courts to weigh the concrete value of one party's privacy rights against the other party's speech rights.

(i) The Value of Privacy to the Individual

Commentators have identified two broad groupings of benefits that accrue to individuals when their privacy is respected. One involves the idea of sanctuary—a place to be free from social pressures to conform. The other concerns the various types of human flourishing that are facilitated by this private space.

Sidney Jourard, a psychologist, gave an influential early account of the value of privacy as a sanctuary and its benefits for mental health.<sup>186</sup> The starting point for this analysis is the recognition of man as a socially embedded creature, with a variety of different roles. These are reflected in his age, sex, family position, occupation and social class.<sup>187</sup> Each role carries different responsibilities, and these in turn are reflected in a society's role-expectations and behavioural norms.<sup>188</sup> Failure to conduct oneself accordingly may result in a variety of social sanctions, from ridicule to the loss of status and ultimately to being ostracized.<sup>189</sup> People

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185. See generally Geoffrey Gomery, "Whose Autonomy Matters? Reconciling the Competing Claims of Privacy and Freedom of Expression" (2007) 27:3 LS 404. Note that the problem of competing autonomies does not arise where the defendant is a media body rather than a human one, since dignitary-type arguments do not apply to the former. See Eric Barendt, "Privacy and Freedom of Speech" in Andrew T Kenyon and Megan Richardson, eds, *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge: Cambridge University Press, 2006) 11 at 23 [Barendt, "Privacy and Freedom"]; Delany & Carolan, *supra* note 27 at 31.

186. Sidney M Jourard, "Some Psychological Aspects of Privacy" (1966) 31:2 Law & Contemp Probs 307 at 307.

187. *Ibid* at 308.

188. *Ibid* (referring to these roles as "codes of etiquette and morality").

189. As discussed above, to the extent that this occurs, individuals may take themselves less seriously as independent moral actors, thus undermining their personhood and

thus have a vested interest in how they appear to others. This pressure to conform can have deleterious psychological effects, producing not only anxiety, stress and depression but also leading to self-denial. People may be so desperate to appear in a certain way to others that they conceal deviant thoughts and actions, even from themselves. All of this can lead to a variety of psychological and even physical maladies.<sup>190</sup>

According to Jourard, privacy—both freedom from unwanted disclosures of personal information and from unwanted physical access—provides the necessary space for an individual to be “off-stage”, free to do and say what he likes, and “simply *be* rather than *be respectable*”.<sup>191</sup> This is a prerequisite to emotional well-being, or as Benn puts it, “remaining sane”. Privacy provides a “sanctuary” in which a person can “desist for a while from projecting . . . the image [he] want[s] to be accepted . . . an image that may reflect the values of [one’s] peers rather than the realities of [one’s] nature”.<sup>192</sup> Such “backstage” privacy also facilitates various aspects of emotional release, ranging from “blowing off steam” about one’s boss to the simple pleasures of relaxation.<sup>193</sup> The privacy of the backstage is linked to the concept of autonomy; in barring “intrusive social scrutiny”, it facilitates the freedom to behave as one chooses, without the “burden of justifying [perhaps deviant] differences”.<sup>194</sup> Craig puts it simply: “The private life

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capacity for autonomy. This shows the fluidity between consequentialist and deontological reasoning.

190. Jourard, *supra* note 186 (discussing the Freudian concept of “repression”, as the “process of concealing experience from one’s reflective self-awareness” (long recognized as a type of mental illness) as well as the physical illnesses that manifest from such an “unhealthy organism” at 309).

191. *Ibid* at 310-11 [emphasis in original].

192. Benn, *supra* note 20 at 24-25.

193. See Westin, “Science”, *supra* note 166 at 1025. See also Milton R Konvitz, “Privacy and the Law: A Philosophical Prelude” (1966) 31:2 Law & Contemp Probs 272 (referring to the importance of private “breathing space” at 277); Gavison, *supra* note 26 at 447 (linking the importance of relaxation to mental health); Freund, *supra* note 21 (privacy provides “nourishment for a feeling of uniqueness and a release from the oppression of commonness” at 195).

194. Rosen, *supra* note 140 at 2118. See also Fried, “Privacy”, *supra* note 59 at 483-84 (claiming that fear of social scrutiny will inhibit our choices to act; whereas privacy

and the independent life are so linked as to be practically synonymous".<sup>195</sup> This notion of privacy as sanctuary is also linked to personhood, in the sense that one needs some separation from society in order to develop as a "psychologically and socially distinct person".<sup>196</sup>

The second cluster of consequentialist arguments links privacy to human flourishing. Gavison, Jourard, Bloustein and Weinstein have argued that freedom from physical intrusion is a necessary condition for concentration, and thus for learning, writing and creating—what Weinstein calls "query".<sup>197</sup> Gross has noted that privacy provides a safe place to test our ideas—even foolish ones—and permits us to have "changes in mood and mind", thereby promoting "growth of the person through self-discovery and criticism".<sup>198</sup> A key concept here is self-evaluation, which includes the ethical assessment of our own behaviour. This has a "major moral dimension", Westin says, because "it is primarily in periods of privacy that [people] take moral inventory of ongoing conduct and measure current performance against personal ideals".<sup>199</sup> Privacy as sanctuary may also encourage free expression<sup>200</sup> because it facilitates freedom of conscience and belief, which are

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encourages us to do the unconventional, thereby promoting autonomy); John DR Craig, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997) 42:2 McGill LJ 355 (privacy "ensures that individuals have outlets for self-expression and can explore alternative ways-of-life away from conformist pressures" at 360).

195. *Ibid* at 360. See also Rössler, *supra* note 164 at 1.

196. Simmel, *supra* note 113 at 73. See also Rosen, *supra* note 140 at 2124 (development of "individual subjectivity" requires freedom from the "gaze of pervasive surveillance"); Westin, "Science", *supra* note 166 at 1023.

197. Weinstein, "Good Life", *supra* note 115 at 101-02; Gavison, *supra* note 26 at 447; Jourard, *supra* note 186 at 314; Bloustein, "Dear", *supra* note 32 at 453. *Contra* R Posner, "The Right of Privacy" (1978) 12:3 Ga L Rev 393 at 407.

198. Gross, *supra* note 24 at 176. See also Jourard, *supra* note 186 ("[f]reedom from the experienced impact of others' physical and psychological presence is the first step in the fulfillment of the freedom to grow" at 314); Freund, *supra* note 21 (privacy provides shelter for "self-discovery and self-awareness . . . [and] self-direction" at 195).

199. Westin, "Science", *supra* note 166 at 1027. See also Rössler, *supra* note 164 at 72-74, (noting that privacy promotes moral introspection).

200. See Barendt, "Privacy and Freedom", *supra* note 185 at 23-30 (discussing the various ways in which respecting privacy promotes the free expression of ideas).

prerequisites to the development and expression of ideas.<sup>201</sup> A person who has a controversial idea may be reluctant to express it for fear of ridicule or social sanction, but may after quiet deliberation become convinced of its importance and decide to share it with the world.<sup>202</sup> Finally, Weinstein has linked this idea of creative “query” to dignity, arguing that it is offensive for someone’s intellectual and creative capabilities to be judged on the basis of half-baked ideas or incomplete drafts.<sup>203</sup> Respecting a person’s dignity means that we give him the time and space to complete his projects to his own standards before forcing them to be subjected to public scrutiny.

## (ii) The Value of Privacy to the Individual’s Relations with Others

Fried emphasizes how significant intimate relationships, principally those of love and friendship, are to personhood.<sup>204</sup> “To respect, love, trust, feel affection for others and to regard ourselves as the objects of love, trust and affection is at the heart of our notion of ourselves as persons among persons”.<sup>205</sup> He then offers an influential account of how privacy facilitates those relationships. His approach mixes consequentialist and deontological arguments, valuing privacy not only

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201. See *ibid* at 26, citing *R v Sharpe*, 2001 SCC 2 at para 26, [2001] 1 SCR 45 (where McLachlin CJC recognizes the above point in a case concerning the possession of pornographic material).

202. See Gavison, *supra* note 26 at 450; Westin, “Science”, *supra* note 166 at 1024.

203. Weinstein, “Good Life”, *supra* note 115 at 103 (noting that if an idea or work is released before it is complete people may become prejudiced against the author’s ability and perhaps take his later completed version less seriously).

204. Fried, “Privacy”, *supra* note 59 at 484-86.

205. *Ibid* (“we would hardly be human if we had to do without [these relationships]” at 484). See also Simmel, *supra* note 113 at 81 (emphasizing that intimate relationships are a necessary precondition to developing one’s own identity as a person); Jourard, *supra* note 186 at 311.

for its facilitative value<sup>206</sup> but also because it is a fundamental interest that goes to the very core of personhood.<sup>207</sup>

Fried offers two interrelated consequentialist arguments. First, respect for privacy enables an individual to withhold intimate actions, beliefs, emotions and the like from the world at large. This reserved information about oneself constitutes “moral capital” which the individual can “spend” by voluntarily sharing it with others.<sup>208</sup> It is crucial that people have such moral capital, because it is through the voluntary sharing of such intimacies of the self between “friend and friend, lover and lover” that the bonds of intimacy are forged.<sup>209</sup> It is the *exclusivity* of this sharing that distinguishes intimate relationships from relationships with mere acquaintances. Without privacy, this moral capital would be depleted as there would be fewer exclusive aspects of one’s self left to share. Accordingly, our capacity to form and sustain such relationships would be diminished.<sup>210</sup>

Fried’s second argument concentrates on the risk of damage to existing relationships from forced disclosures of private information or activities. Everyone has thoughts that may be wounding if revealed to a friend or lover. Their forced disclosure can destroy the bonds of intimacy.<sup>211</sup> Similarly, because forging intimate relationships requires that we share aspects of our *selves*, we must have the capacity to define our *selves* in the first place.<sup>212</sup> Privacy facilitates this, by giving us the

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206. Fried, “Privacy”, *supra* note 59 (“privacy is the necessary atmosphere for these attitudes and actions [i.e. love and friendship], as oxygen is for combustion” at 478).

207. *Ibid* at 478, 484 (this approach is linked to the Kantian position of respecting persons as ends in themselves).

208. *Ibid* at 484.

209. *Ibid* (“[t]he man who is generous with his possessions, but not with *himself*, can hardly be a friend, nor—and this more clearly shows the necessity of privacy for love—can the man who, voluntarily or involuntarily, shares everything about himself with the world indiscriminately” at 484 [emphasis added]). See also Benn, *supra* note 20 at 19; Freund, *supra* note 21 at 195.

210. See Craig, *supra* note 194 at 361 (emphasizing that physical intrusions undermine privacy’s facilitative role just as much as the unwanted disclosure of information does).

211. Fried, “Privacy”, *supra* note 59 at 485.

212. Charles Fried, “Privacy: Economics and Ethics: A Comment on Posner” (1978) 12:3 Ga L Rev 423 at 427.



space and time to decide whether to act on tentative thoughts and feelings before deciding whether to share them. Intrusions into privacy which compel the disclosure of those thoughts and feelings against our wishes deprive us of the opportunity to choose whether to finally adopt them as our own, and thereby compromise the development of the *self*. This in turn undermines the authenticity of our relationships, which are based upon the sharing of our *selves*.<sup>213</sup>

Privacy is instrumentally important to the formation and maintenance of relationships in two other ways. First, freedom from unwanted physical and informational access provides what Gavison calls the “necessary shield for intimate relations”.<sup>214</sup> Her point is that a zone of privacy, free from unwanted access, is a precondition to the exchange of sexual and emotional intimacies. In Simmel’s words, “[t]he pleasures of sociability, intimacy, sexual passion tend to be exclusive. Where two is company, three is a crowd”.<sup>215</sup> Without that zone of privacy, couples would be forced to either forego such intimacies or exchange them in front of others.<sup>216</sup> This logic applies also to friendships, which depend on the spontaneous sharing of other deeply personal emotions and experiences. This becomes difficult if friends cannot exclude others from their relationship.<sup>217</sup> Again, this is linked to personhood; it is through the sharing of information and experiences in intimate relationships that a person “experiences himself” and “potentiates desirable growth of his [own] personality”.<sup>218</sup>

Second, privacy enables the individual to maintain a variety of different social roles. Each of these roles may differ depending on the social conventions of propriety that are attached to the relationships she has with others, and on her desire to conform to them.<sup>219</sup> Westin and

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213. Fried, “Privacy”, *supra* note 59 at 485.

214. Gavison, *supra* note 26 at 447. See also Benn, *supra* note 20 at 17-18, 20.

215. Simmel, *supra* note 113 at 81.

216. See Rachels, *supra* note 33 at 330.

217. See Benn, *supra* note 20 (“[o]ne cannot have a personal relationship with all comers, nor carry on a personal conversation under the same conditions as an open seminar” at 17-18); Rachels, *supra* note 33 at 329-30.

218. Jourard, *supra* note 186 at 311-12.

219. See Rachels, *supra* note 33 at 327.

Rachels refer to social “masks”,<sup>220</sup> and Gross to “editorial efforts”,<sup>221</sup> but the point is basically the same: a businesswoman behaves differently in the boardroom than in the bedroom, and differently with her old university friends than with her mother-in-law. This is not deceitful, but simply reflects the realities that are a necessary part of everyday social accommodation.<sup>222</sup> Privacy enables the individual to maintain the diversity of roles that are expected of her, and that she expects of herself. It allows her to keep different aspects of her life to herself, and to project different aspects of herself depending on the context.

### (iii) The Value of Privacy to Society

Privacy is also important for society more generally. To the extent that a society tolerates *invasions* of privacy, it fails to respect its members as individuals, and departs from its commitment to humanity and civility.<sup>223</sup> This point is not merely symbolic. Many authors have emphasized that the principles of dignity and autonomy are at the very core of the liberal political tradition that forms the basis of Western society.<sup>224</sup>

The value of privacy to a healthy democracy has also been widely recognized.<sup>225</sup> It is necessary for mental health and well-being, and it promotes attributes that are needed for human flourishing, including

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220. Westin, “Science”, *supra* note 166 at 1023; Rachels, *supra* note 33 at 326-27.

221. Gross, *supra* note 24 at 173.

222. See Westin, “Science”, *supra* note 166 (“the first meaning of the word ‘person’ etymologically was ‘mask’, indicating both the conscious and expressive presentation of the self to a social audience” at 1023).

223. See Shils, *supra* 115 at 306. See also Harry Kalven Jr, “Privacy in Tort Law—Were Warren and Brandeis Wrong?” (1966) 31:2 *Law & Contemp Probs* 326 (“[p]rivacy is one of the truly profound values for a civilized society” at 326).

224. See e.g. Feldman, “Social Value”, *supra* note 156 at 27; Bloustein, “Answer to Prosser”, *supra* note 20 at 442; Delany & Carolan, *supra* note 27 at 13; *R v Dymont*, [1988] 2 SCR 417, 73 Nfld & PEIR 13, (“privacy is at the heart of liberty in a modern state” at 427, La Forest J).

225. See Craig, *supra* note 194 at 360-61; Gavison, *supra* note 26 at 455-56; Solove, “Taxonomy”, *supra* note 74 at 532; Westin, “Science”, *supra* note 166 at 1023-24; Julie E Cohen, “Examined Lives: Informational Privacy and the Subject as Object” (2000) 52:5 *Stan L Rev* 1373 at 1425-27.

creativity, moral introspection, free expression and the autonomy to act as one chooses.<sup>226</sup> Democracy depends on an autonomous, self-actualized citizenry that is free to formulate and express unconventional views. If invasions of privacy inhibit individuality and produce conformity, democracy itself suffers. In more practical terms, if public figures are not able to keep some aspects of their personal lives from media scrutiny, they may be deterred from entering and making valuable contributions to the political environment. Their loss of privacy may result in society's loss as well.<sup>227</sup>

## Conclusion

To claim an interest in privacy is to claim something important. It is to claim a right to be respected as a person, which entails being treated as an end in oneself, not as a means to other peoples' ends. It is to claim a right to decide the extent to which others may have access to one's private activities and information. In these respects, as Lord Hoffmann recognized, privacy is an assertion of basic human dignity and autonomy.<sup>228</sup>

Privacy is also important for its facilitative value. As Lord Nicholls appreciated, it is "essential for the well-being and development of the individual",<sup>229</sup> and it has important benefits for the individual's relationships with others and for society more generally.

Each of these important interests is affected as much by physical intrusions into privacy as by the disclosure of private information. It is for this reason that I have defined privacy as X's claim to be free from unwanted sensorial access in relation to information and activities which are intimate; or, if not intimate, information and activities which are

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226. Respecting privacy, and thereby promoting human flourishing in these ways, may also further productive achievement and thereby contribute to a healthy economy. For a discussion of privacy from an economic perspective, see Posner, *supra* note 197. For a powerful rejoinder, see Bloustein, "Dear", *supra* note 32.

227. See Barendt, "Privacy and Freedom", *supra* note 185 at 18.

228. *Campbell*, *supra* note 4 at para 51.

229. *Ibid* at para 12.

personal in the sense that most people in our society would not want them to be widely known or widely observed; or, if neither intimate nor personal, information and activities about which X feels acutely sensitive and in which he claims a privacy interest. This conception of privacy accords with our intuitive sense of what privacy means. Its coherence lies in the fact that the reasons why we claim a privacy interest in a particular matter are the same whether the violation arises from the disclosure of information or through unwanted access to one's private activities.

Although the conclusions put forth in this article do not in themselves dictate any particular legal result, they should nonetheless serve to inform the development of Canada's fledgling privacy tort. We ought to know what privacy is, and what interests underlie it, before we set about fine-tuning a legal test designed to protect it. The same point can perhaps be put better in the negative: without a clear conceptual account of privacy, "a legal privacy right would be", as Delany and Carolan note, "incomplete, incoherent, and liable to cause confusion".<sup>230</sup>

An appellate court tasked with determining the scope of a Canadian privacy tort will have to identify the nature of a privacy invasion, find an appropriate doctrinal basis for the action, and decide how to balance competing interests in privacy and freedom of speech. I have argued throughout this article that a coherent understanding of privacy must include both a physical and an informational dimension.

The American approach, which recognizes both the wrongful disclosure of information and intrusions on private activities, provides a more comprehensive and conceptually justified response than the narrower "informationist" approach employed in New Zealand and England.

Appreciating the importance of physical privacy also establishes tort law as the proper foundation for a privacy action. This is because breach of confidence is concerned with the wrongful disclosure of information, and cannot protect against physical intrusions that do not involve the

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230. Delany & Carolan, *supra* note 27 at 4.

disclosure of information.<sup>231</sup> It therefore cannot form the basis of a comprehensive law of privacy.<sup>232</sup>

Finally, with the values of privacy well in mind, courts will be in a strong position to gauge the significance of the privacy interest implicated in a particular case. They will be better able to balance this against the specific expression interest at hand, giving the courts a clear idea of how, and to what extent, the specific intrusion conflicts with that interest. This should make the hard work of balancing expression and privacy somewhat easier, as well as principled. For all of these reasons, the conceptual questions pursued in this article are of the utmost practical importance for Canadian jurists when settling the legal foundations and scope of Canada's emerging privacy tort.

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231. See Markesinis, "Concerns and Ideas", *supra* note 28 at 182; Butler, *supra* note 27 at 352; Morgan, *supra* note 28 at 457.

232. See *ibid*; Delany, "The Way Forward", *supra* note 29 at 166-68.

