Reconstructing the Right to Privacy

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1. Introduction

"Perhaps the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is." So begins Judith Thomson's article "The Right to Privacy."[i] Over twenty-five years later her observation stands, but with a new urgency.

Explicitly identified by Warren and Brandeis in 1890, public recognition of the right to privacy grew steadily.[ii] By the end of the 20th century- still lacking any clear idea what it is- our sensitivity to privacy violations had become remarkably acute. Unsolicited advertisements, once seen as mere annoyances were now violations of a fundamental right. Information about our personal tastes, interests, and buying habits were private property, its unpermitted collection an act of theft.

On the morning of September 12th, 2001 most of us awoke with a new perspective on the matter. Personal privacy now seemed an almost trivial concern when compared with the threat of terrorism. If protecting us from Al-Qaeda and its ilk meant submitting our own comparatively innocent activities to public scrutiny, then so be it. The very next month Congress easily passed the Patriot Act (H.R. 3162), granting government agencies previously unthinkable license to monitor the private lives of U.S. citizens.

To paraphrase Thomson: Perhaps the most striking thing about the right to privacy *today* is that nobody seems to have any very clear idea whether it is a right at all. In this essay we will show that even in a world haunted by the specter of terrorism, privacy can be conceived as a fundamental moral right, one that is completely consistent with a willingness to submit to increased surveillance of our private lives. In fact, it will follow from our analysis that we might even demand such increases in the interest of *protecting* our privacy. Of course, this will seem transparent nonsense to those who define privacy as the absence of surveillance. Clearly, if we are to erase this impression we must rethink the right to privacy at a fundamental level.

2. Assumptions

Our aim here is to develop a theory of privacy considered as a *fundamental moral right*. All three terms are essential. First, we assume that privacy is a *right* to which people are entitled, rather than a mere good that any rational person might strive to achieve. Second, we assume that privacy is a *moral* right, rather than simply a constitutional or legal right. Third, we assume that privacy is a *fundamental* right, rather than a right that can be explicated in terms of other fundamental rights (e.g., life, liberty or property). Taken together, these three assumptions actually run contrary to most of the philosophical literature on the subject. (See section 4.) Although the lay public is now accustomed to speaking of privacy as a fundamental moral right, philosophical arguments tend to suppose (or conclude) the opposite; i.e., privacy is seen either as a non-fundamental right, or as a good that falls short of being an actual right at all.

Although our assumptions accord with ordinary (20th century) intuitions our conclusions contradict a widely held view about what the right to privacy entails. A core argument of this essay can be summarized as follows: If privacy is a fundamental moral right, then the right to privacy is not sufficient to justify the claim that individuals are entitled to control over their personal information. Of course, we realize that the proponent of informational privacy may choose to treat this argument as a *reductio*. After all, if privacy considerations do not, on our analysis, justify personal control of information, then we may simply be mistaken in assuming that privacy is a fundamental moral right. This is one distinct possibility. However, we believe our analysis deserves serious consideration, even from those who are mainly concerned with the protection of personal information. Besides providing a clear and intuitive philosophical justification for treating a privacy violation as a unique type of offense, our analysis suggests illuminating solutions to a number of examples, and shows that privacy considerations are essential to a much broader range of moral issues than is usually assumed. Moreover,

we emphatically are not arguing against the protection of personal information. Our analysis implies only that arguments in support of such protections must appeal to moral considerations other than the right to privacy.

Approaches to Privacy

The right to privacy is easily and often conflated with the right to (private) property and the right to liberty (of one's private affairs). In fact, the word "private" figures into such an array of moral considerations that it is tempting to conclude, as Thompson herself does, that privacy is not a particular right at all, but a way of talking about a cluster of several rights that grant individuals sovereignty over various domains. We reject this view, and show below that the domain of privacy can be specified in a way that distinguishes it significantly from other rights.

Before presenting our approach, it will be useful briefly to summarize what has been said on the subject thus far. Although several different theories have been offered, most can be fairly characterized as claiming that the right to privacy is the right to restrict access to a personal domain. Many differences among privacy theories turn on different definitions of this domain: (1) in some theories the right to privacy is the right to restrict access to the person him or herself and (2) in other theories the right to privacy is the right to restrict access to personal information.

"The right to be let alone," Warren and Brandeis' famous (1890) formulation of the right to privacy, is an example of the first type of theory.[iii] Many authors seem to think this view of the right to privacy is subject to an easy counterexample. Thomson, for example, observes:

> If I hit Jones on the head with a brick I have not let him alone. Yet, while hitting Jones on the head with a brick is surely violating some right of Jones's, doing it should surely not turn out to violate his right to privacy. Else, where is this to end? Is every violation of a right a violation of the right to privacy?[iv]

We suggest that the answer to Thomson's rhetorical question is yes. There is no absurdity in assuming that Thomson hitting Jones on the head with a brick violates several, or even all, of his rights at once. This would actually explain why an unprovoked hitting of someone on the head with a brick is such an egregious offense. All that really follows from this example is that sometimes the fact that an action violates a person's privacy is not the worst thing about it. If Thomson were to burst into Jones' home unannounced and uninvited she would violate his privacy. If she were then to tie him up, steal his belongings, and torture him to death she would still have violated his privacy. It would just no longer be Jones' main complaint.[v]

In our view, the idea that the right to privacy consists in the right to prevent access to our person is substantially correct. It is just not the whole story. The real problem with this approach is that there are intuitive examples of privacy violations that do not involve such access. Clandestine surveillance is the most obvious example. Most people will count spying as a clear violation of privacy, even when it is completely unintrusive. It is possible to respond to this objection by defining access to the person broadly enough to include access to information about the person, but then it is difficult to explain why simply glancing at someone across the quad is not a violation of privacy.

The second type of theory, which defines the right to privacy as the right to restrict access to personal information,[vi] can avoid the above problem by restricting the domain to include only those social contexts in which a person has a reasonable expectation of such control. Such theories can also accommodate the fairly strong intuition that our privacy has been violated when people obtain information, not about our persons, but about our personal affairs (e.g., medical records, financial holdings, video rental habits, etc.)

This informational concept of privacy is appealing because it has direct application to the privacy issues that vex us most today; viz., the easy access to sensitive personal information made possible by information technology. Still, this view of

privacy simply cannot serve as the basis of a general theory of privacy. The reason is just that it does not explain how it can be a violation of the right to privacy to intrude physically into a person's private domain. It is not plausible to say that the violation consists in the information that one acquires in doing so. I may learn nothing whatever from such an intrusion, and still be violating your privacy. The problem is my very presence.

Most people think of privacy as a right to restrict both physical and informational access. Perhaps this is why many theorists, such as Judith Wagner DeCew, follow Gavison's example and favor a "cluster" view which explicates the right in terms of restricting informational access, access to the person and her decision making process, and as needed to prevent the myriad of harms that people cause by prying into other's lives. Working primarily from a legal framework, DeCew argues that

> …the desire to protect a sanctuary for ourselves, a refuge within which we can shape and carry on our lives and relationships with others – intimacies as well as other activities – without the threat of scrutiny, embarrassment, judgment, and the deleterious consequences they might bring, is a major underlying reason for providing *both* information control and control over decision making.[vii]

Two interesting recent theories do not appear to fit neatly into our characterization. Julie Inness argues persuasively against what she calls "separation-based" accounts of privacy, which focus on the right "to be let alone." Instead, in *Privacy Intimacy and Isolation,* she grounds privacy rights in the need for individuals to control the conditions of intimacy and intimate relationships.[viii] While Inness has many insights about the theoretical limitations of taking "separation" to be the *goal* of a right to privacy, she conceives of privacy in terms of control of a sacrosanct domain. In a similar fashion, Ferdinand Schoeman's *Privacy and Social Freedom* shows more attentiveness than previous theorists to the social function of privacy. Schoeman argues that privacy is

important "largely because of how it facilitates associations and relational ties with others, not independence from people."[ix] As with other accounts which articulate the "goods," social or otherwise, which flow from privacy, Schoeman is giving us interesting reasons for valuing the ability to restrict access of others to our personal domain. While Inness's and Schoeman's work is better or more explicitly informed by social theory, they ultimately defend the same underlying view of the *nature of privacy* as earlier theorists.

The basic task of any account of the right to privacy, then, is to capture what is correct in both of the above approaches within a clear and unified account of the domain of privacy itself. Specifically we must:

(1) extend the domain of privacy in a way that explains why both physical intrusions and surreptitious collection of personal information can result in violations of privacy;

(2) restrict the domain of privacy so that it does not claim as private areas that are clearly a matter of legitimate public interest and access[x]; and

(3) define the domain of privacy in a way that shows clearly whether it is an independent domain or fully contained within the domain of other rights.

In the following pages we produce an analysis of the right to privacy that accomplishes all three of the above aims.

3. Privacy as a Fundamental Moral Right

The core claim in our theory is that privacy is a fundamental moral right. The argument to support this claim is simple, but the consequences and implications of the argument are not. In this section, we focus on establishing the right to privacy as a fundamental moral right and elucidating some of the most obvious implications of the view. We leave further development of the view and an exploration of objections to the next section.

In arguing for privacy as a fundamental moral right, we obviously assume that a scheme of rights and correlative duties is a well-justified way to describe social relations among individuals. Specifically, moral rights describe the legitimate exercise of power, both of individuals and others, severally and collectively. Rights can be thought of negatively as mutual protection schemes and positively as a reflection of our best understanding of how individuals establish and maintain their moral agency.[xi]

At the heart of our understanding of moral agency is a belief about the ability of moral individuals to be "self-legislating" or autonomous. We will look at important differences of emphasis in different definitions of autonomy in a moment, but at present the important point is that in a system of rights and duties the concept of the self-legislating individual is central. In fact most basic moral rights can be understood as explications of the concept of a self-legislating agent, or the implications of how such a person necessarily interacts with a physical and social world. For example, rights of due process are fundamental moral rights because in an environment in which I could not be guaranteed a rational (due) process for losing rights and privileges, I could not formulate rational rules for my own conduct.

Privacy plays a fundamental and ineliminable role in constructing personal autonomy. To see this it may help to extend the juridical metaphor at the heart of the notion of autonomy. What kinds of law do agents legislate? To what realm of objects does such law apply? Of course, these are questions that Immanuel Kant posed and answered extensively.[xii] Kant demonstrated that a basic heuristic of moral life is an analogy between physical space and the laws of nature that govern it, on the one hand, and moral space and the moral law on the other hand. This analogy lies at the heart of "rights talk." It is common to speak of rights as law-like background conditions from which we can predict the outcome of claims and torts. Jurists and legislators use rights instrumentally – for good and ill – to establish various kinds of space: a private space of property relationships and private social relationships, a public space of communal

expectations for fair treatment and access. When we grant "privilege" to specific kinds of relationships, such as the confidential conversations between priests and confessors or lawyers and their clients, we are using moral laws to configure moral space just as a divine creator might be imagined to configure physical space from a set of possible physical laws.

Whether or not we grant moral space any ontological significance, it still helps to elucidate our basic theoretical framework. The rich analogy between moral and physical also reminds us of the need to configure the moral space needed for individuals to become autonomous agents upon a realistic view of how individuals actually develop, both cognitively and emotionally. We can criticize competing explications of moral space by reference to our background knowledge of human behavior and development.

Facts about our psychology do not by themselves justify moral rights. However, our understanding of the moral space that an autonomous agent inhabits and the moral laws which govern that space must cohere with our understanding of the laws of the physical world, especially those governing the psychological development of human animals and the physical conditions of their existence. Within these constraints we make a variety of choices about which aspects of our physical and psychic environment to value, and in so doing we construct the specific moral space that governs social life.

Our concept of moral space shows two influences: an idealized conception of rational choice, which forms the core content of all definitions of autonomy, and an acknowledgement of the physical environment within which moral life must make sense. Moral space is the rule-governed domain defined by the interaction between our concept of an ideal rational agent and the physical constraints within which we try to realize this ideal. A remarkable number of moral rights, rules, and conventions of civility can be explicated in terms of the demands of moral space understood in this way. Even minor conventions of civility, such as how loud we should speak in public and what we can ask

of strangers can be thought of as resolutions of the tensions inherent in the task of realizing an ideal of rational agency in a world with specific physical constraints.

The analogy between physical and moral space is a commonplace of privacy discussions. As we indicated in the first section, privacy theorists almost always use spatial metaphors, such as “domains,” to explicate their notion of privacy. Disputes about privacy rights can often be articulated in terms of how far to extend the "domain of privacy" surrounding the individual. On the other hand, theories of privacy often go wrong precisely by confusing the moral space of this domain with physical space. They move too easily from the well-founded view that individuals need some control of their physical environment to the conclusion that some physical space or some set of personal information must be a sacrosanct "domain" of privacy. Likewise, people have a right to go about their normal daily transactions without physical interference. But it does not follow from this that the information trails created by our transactions (e.g. video recordings from surveillance cameras, sales data, web sites visited, radio stations listened to)[xiii] are part of the zone of privacy. Many theories of privacy seem to infer from the fact that our personal physical space in some sense "feels" private that it must be a space that we are entitled to regulate. Our approach, by contrast, will be to try to first isolate the moral justification for personal moral space and then ask what this implies about our physical relationships.

Using the metaphor of moral space, we can discuss different privacy theories as offering competing views of which laws should govern moral space, especially the particular kind of moral space we will call *personal space*. We define personal space as the space a person requires in order to reason, especially about their practical choices. Our reasoning activity is the basic link between rational agency and moral autonomy. To deprive a person of her ability to reason is to interfere in the most fundamental way possible with a person's capacity for self-government. Privacy, then, is the condition of

having secured one's personal space, by which we mean *the right to exercise our practical reason without undue interference from others*.

The connection between autonomy and rational agency is very well established, and, as we will see below, several other philosophers have explored the connection between autonomy and privacy. Interestingly, however, our suggestion that the right to privacy is a function of rationality is largely unexplored. We will defend this view in detail below, but, having learned from experience that the proposal strikes most people as unintuitive at first, we offer the following intuition adjustment before proceeding.

Before the right to privacy became a part of our normative vocabulary, philosophers used the term "private" in a fundamentally descriptive sense to characterize the nature of conscious experience. A fundamental tenet of the Cartesian world-view is that no one can really know the thoughts and feelings of another person. Indeed the concept of a person as an autonomous agent has its origin in this worldview, and its metaphysical plausibility rests to some degree on the privacy of consciousness: Our essential inscrutability guarantees both our individuality and immunity to control by others. We now understand the Cartesian world-view to rest on an untenable rationalism and a mind/matter dualism that, however appealing it remains to lay intuitions, we must reject on philosophical and scientific grounds. We suggest that this realization may help to explain the emergence of privacy as a right. Perhaps it is because we now understand that there is no metaphysical boundary between mind and body that we have reasserted the principle of privacy at a normative level. Since we are not inscrutable, because others can, with due diligence, know and, to some extent, control our thoughts and feelings, that we now insist on our moral right to privacy. It is this intuition – that privacy is about

preventing others from compromising the independence of our consciousness – that our theory of privacy is best suited to capture.

4. Relation to Other Theories of Privacy

Before discussing different ways of understanding autonomy, and what it means to interfere with autonomy, we should locate our basic theoretical commitment in relationship to other theories of privacy. Earlier we distinguished theories of privacy according to the way they restrict access to different domains of an individual's life. Another useful distinction concerns the respect such theories give to ordinary intuitions about the nature of privacy. Using this criterion, most current views of privacy can be roughly divided into two camps. "Intuitionists" use theory to support our basic intuitions that privacy protects a wide range of decisions and an extensive "domain" of personal physical space and personal information. Adherents include U. S. Supreme Court jurists such as Justices Warren and Brandeis, Justice Blackmun in his dissent in *Bowers v. Hardwick*,[xiv] most legal theorists who defend the penumbral theory of privacy rights "emanating" from a variety of Supreme Court decisions involving liberty, expression and due process, and philosophers such as James Rachels,[xv] Ruth Gavison,[xvi] and W. A. Parent.[xvii] Many people writing on the topic of computer ethics and privacy also assume a version of the intuitionist position. Not surprisingly, discussions of autonomy are important to this group, but intuitionists are not uniformly concerned about whether privacy is a *fundamental* moral right. They deploy a wide range of considerations that are much more practical and less basic, from a moral point of view.

The other main group of privacy theorists we characterize as *reductionist*. In his excellent article, "Privacy," for the *Encyclopedia of Applied Ethics*, Edmund Byrne

(1998) identifies reductivist privacy theorists in the legal field as those who believe that legal claims to privacy can all be resolved by other areas of law.[xviii] The major theorist of this group is William Prosser, who argues that privacy claims can be resolved into various tort claims. Prominent among philosophers in the reductivist camp is Judith Jarvis Thompson, who, as noted earlier, tries to reduce or eliminate privacy by analyzing it in terms of a variety of non-privacy moral and legal rights.

To locate our view within this wealth of theoretical work, one only has to isolate and compare several of the definitions of autonomy at work among intuitionists. Since on our view privacy is a fundamental moral right we are not wholesale reductionists. On the other hand, we hold that privacy is about protecting personal space, understood narrowly in relationship to autonomy. So we do not begin, as intuitionists do, with much partiality to the wide range of contexts in which people use the word privacy to make a moral claim. Our basic view is that privacy is the condition of having secured personal space, personal space is the space a person requires to reason, and individuals have a fundamental moral right to reason as a means of securing personal autonomy. Autonomy itself is assumed in our view as part of a well-justified scheme of rights and duties in a liberal culture, but assuming this does not end discussion of what autonomy includes. Since autonomy does so much work in the theory, we need to compare different conceptions of it with an eye to the different kinds of personal space these authorize.

John Rawls defines autonomy in the following way: "Acting autonomously is acting from principles that we would consent to as free and equal rational beings, and that we are to understand in this way." [xix] Ruth Gavison has a somewhat broader view: "Moral autonomy is the reflective and critical acceptance of social norms, with obedience based on an independent moral evaluation of their worth."[xx] She states three requirements for autonomy: 1) it is a capacity to make an independent moral judgement, 2) a willingness to exercise it, and 3) the courage to act on the results of this exercise

even when the judgement is not popular. As different as these definitions are, the core content of both is the same. Rawls does less than Gavison to contextualize his definition, but a person satisfying Rawls' definition would have to have made a "reflective and critical" evaluation of social norms in order to "consent" to them. Since Rawls is defining autonomy as behavior, the first two requirements of Gavison's definition are also satisfied. The big difference is the inclusion of "supporting" virtues such as "courage." For Gavison, there is an easy movement of thought from this psychological aspect of autonomy to other psychological goals of privacy, including: reducing the pressure on individuals to conform, feel ridicule, experience disapproval from others for some of their private behaviors. Gavison even lists the general promotion of "mental health" as one of the goals of protecting privacy in the broad sense.

There is something natural and intuitive about extending the domain of privacy from the conditions needed for reasoning to the conditions needed to make it easy for people to control information about themselves or limit access of others to them. One of the first things we do when we want to think about our choices is secure a space to do just that, preferably without interruption. Often people do feel more courageous if they are protected from having people know that they in fact did a particular thing. For example, people often defend the need for keeping letters of recommendation and appraisal confidential from candidates and employees because such confidentiality gives referees the "courage" to act on their real beliefs.

Despite the intuitive appeal of this view, we believe such wholesale extensions of personal space must be resisted, not because doing so is never justified, but because moving beyond the basic protections of personal space needed to enable rational reflection and autonomy brings in a diverse range of moral and practical considerations, many of which have nothing to do with fundamental moral rights. If it is a reasonable goal of moral theory to distinguish basic from less basic moral claims, then there is good reason to resist the slide from the core value of autonomy -- promoting rational agency --

to the myriad social and cultural goals that become relevant when personal space is extended to include a blanket protection of individuals from access by others or from having information about them known by others. We need to emphasize (and here we are somewhat sympathetic to reductionists) that there may be many good reasons for protecting people from unwelcome intrusions or giving people control of information about them, but these reasons only bear on the *fundamental* right of privacy if lacking such protection compromises their ability reason about their choices. Questions about empowering weak-willed referees, protecting people from having others learn shameful information about their habits, distinguishing acceptable from unacceptable eavesdropping or gossiping all depend upon complex and diverse considerations that are at least one big step from the basic moral right to the personal space needed to reason about personal choices. [xxi]

We do not dispute the fact that people use the word "privacy" to include a much broader understanding of personal space than we defend, and we are not proposing a program of popular linguistic reform to correct this. Undoubtedly there are philosophically interesting uses of the word "privacy" that do not touch on *fundamental* privacy rights. Our claim is just that *theories* of privacy that do not distinguish this sense of the term will be hopelessly muddled and vague. Autonomy is a basic, trans-cultural norm of moral agency, but different cultures choose different ways of enabling or supporting the actual choices people make. To use the example of confidentiality of recommendation letters, reasonable people might disagree about whether protecting the "privacy" of referees is enabling courage or protecting the weak-willed, but it is doubtful that anyone would disagree that such a person has a fundamental right to the personal space needed to reflect on the content of their evaluation. The personal space required to think about our choices is so central to autonomy that it captures that part of our intuition of privacy that constitutes a fundamental moral right.

Other intuitionist privacy theorists, such as Thomas Scanlon[xxii] and James Rachels,[xxiii] base their defense of privacy on grounds unrelated to autonomy, and so their theories are of less central concern to us. However, their approach has a liability similar to Gavison's over-broad definition of autonomy. For Scanlon, we have direct moral interests in privacy itself, not only as a means of constructing autonomy. When it comes to determining the source of these interests, Scanlon looks to conventions and existing social norms, and, in some cases, direct inspection of the legitimacy of those interests. This approach locates most privacy claims, quite reasonably, as the outcome of prudential and moral weighing of interests. Likewise, James Rachels gives an account of privacy that treats it as a non-basic social and moral value. He argues for the "close connection between our ability to control who has access to us and to information about us, and our ability to create and maintain different sorts of social relationships with different people."[xxiv] This works at a descriptive level, but cannot ground any critical judgement about the importance or priority of privacy claims. When, for example, is promoting some kinds of social relationships (for instance, between adulterers trying to conceal their rendezvous) more important than promoting others? For Rachels, these questions must be decided on a case-by-case basis with reference to other moral and practical considerations. This is a reasonable way to proceed as long as one has already determined that privacy is not a matter of fundamental moral right. This, of course, is where we disagree.

5. Implications

Although we believe that our view provides an excellent basis for thinking of privacy as a fundamental moral right, the plausibility of this analysis ultimately rests on its ability to satisfy the criteria set out in Section 1. What does our theory have to say about the domain of privacy? What kind of protection does it afford individuals? How

does it restrict the liberty of others? These questions require a great deal of space to answer fully. We focus here on only the most salient implications of the view.

The most obvious feature of our analysis is that a violation of privacy consists in a form of interference with a person's activities. To this extent it resembles J.S. Mill's principle of liberty. Mill argued for both the liberty of conduct and the liberty of thought and expression, but in both cases he carefully distinguished between the attempt to influence certain forms of behavior and the attempt to coerce them, restricting the application of his principle to the latter. Our theory of privacy does not reduce to a theory of personal liberty simply because intruding into someone's personal space is not reasonably construed as a form of coercion. My presence in your space may influence you to act differently, but strictly speaking you remain free to behave as you choose. The right to privacy, then, secures a zone in which individuals are protected from both coercion and unwanted influence.[xxv]

One particularly appealing aspect of our approach is that it provides a novel way to understand the moral significance of offensive speech and conduct. Some philosophers have argued that our high regard for personal liberty requires us to be too tolerant of such behavior.[xxvi] Because there is no sharp line to be drawn between the merely offensive and the truly harmful, it is tempting to accommodate such criticisms by counting *very* hurt feelings as real harms. But this, guardians of liberty are quick to point out, is the first step down a slippery slope to totalitarianism. It is precisely because our theory of privacy does not in any sense rest on the distinction between private and public spaces, which figures so critically in this debate, that it may provide the resources for its resolution. The right to reason without interference is something that a person retains regardless of physical location[xxvii]. Because of this, it is perfectly legitimate to argue that

speech offensive enough to compromise a person's ability to reason, whether in public or in private, is a violation of the right to privacy. [xxviii]

Our analysis of privacy also supports the Warren and Brandeis view that a person has a right to be let alone- indeed, it may be profitably understood as an explication of this idea. Importantly, however, a person's unwanted physical presence is, on our view, neither necessary nor sufficient for violating this right. It is not necessary because an individual may find it impossible to conduct his practical affairs in a rational way if he knows you are observing his every move from a physically remote location. It is not sufficient because an individual may have a variety of reasons for objecting to someone's physical presence, though it in no way interferes with his ability to reason.

This analysis both extends and restricts the domain of privacy in illuminating and provocative ways. We noted at the beginning of this paper Thomson's *reductio* of privacy as the right to be let alone. We can now see that the *reductio* does fail. Hitting Jones on the head with a brick certainly interferes with the exercise of his reason; hence it counts *inter alia* as a violation of privacy. We noted in our brief discussion of Thomson's example that the fact that an action violates privacy may not be the worst thing about it. However, when we consider the extraordinary practical importance of the ability to reason, such a stipulation may not even be necessary.

Consider other morally repugnant activities the harm of which can be very difficult to characterize: painless brainwashing, blackmailing people with the truth, lying. All may be fairly characterized as interfering with the exercise of rationality. Of course, the potential of our analysis to apply to such issues also exposes a potential problem: What *isn't* a possible violation of privacy on our model? Exceptional ugliness, unrequited affection, peculiar habits, all can drive a person to distraction under the right

circumstances. Are they therefore to be counted as violations of the right to privacy? This is a fair question which must be dealt with at length, but the form of the answer must be this: Many things may violate privacy (i.e., interfere with the ability to reason) without violating a *right* to privacy. Our ability to make this distinction will ultimately depend on certain (inherently cultural) standards of psychological normalcy. In addition, it should be noted that we are in no way committed to the idea that the right to privacy is absolute. The right to privacy of one individual may sometimes conflict with the rights of another. It is an important problem in rights theory, but not for the right to privacy *per se*.

6. Conclusion: Informational Privacy and the Problem of Discrete Surveillance

Our analysis extends the domain of privacy in some ways, but restricts it in others. The most striking and potentially problematic restriction relates to the informational concept of privacy discussed earlier. Although on our analysis any attempt to gain personal information in a way that interferes with the exercise of an individual's rationality will count as a violation of privacy, discrete, undetected observation of a person's private affairs will not. If Tom Peeper's activities are never noticed and his peeping pleasures remain purely solipsistic, i.e., he does nothing with the information that could plausibly count as undermining the exercise of his victim's reason, then privacy has not been violated.

We are aware that this conclusion will strike some as awkward, if not patently absurd. Against this view it will be claimed that the act of spying itself- regardless of its consequences- is the absolute epitome of an invasion of privacy. From this point of view, any theory that fails to recognize this is simply a non-starter. This, of course, is the

primary advantage of the informational concept of privacy, which prohibits discrete peeping by its very formulation. We offer the following defense of our position.

First, we remind the reader that, considered as a *general* theory of privacy, the informational approach is itself a non-starter. Contrary to the above claim, we believe that the epitome of a privacy violation does not consist in *coming to know* things about a person, but rather, like Warren and Brandeis, in *invading* a person's space. There is in our view no plausible sense in which simply observing an individual can count as an invasion of his or her personal space. However suggestive we find the metaphor of a piercing stare, a credible philosophical account of privacy must cohere with what we know about the causal structure of the world, viz., that we are always, however unintentionally, constantly transmitting information about our private activities to the remotest parts of the universe.

Of course, as we stated at the beginning of this essay, it is still possible to argue for informational privacy on other grounds. Indeed, the most common approach is to try to demonstrate a sense in which people *own* their personal information, so that coming to learn it against their will constitutes a form of theft. We are admittedly skeptical of such arguments, but for the purposes of this essay it is sufficient to note that there is no necessary conflict here. To repeat, our aim has been to develop a theory of privacy as a fundamental moral right. Those who seek to establish ownership of personal information thereby seek to reduce certain matters of privacy to matters of property.

Second, it is important to understand that we have not provided a theory that absolves all acts of spying which in no way interfere with the spied upon. Our theory only implies that it is not a violation of *privacy* to do so. Although we are strongly inclined to defend curiosity about the private activities of others as a natural, pleasurable

and generally benign human propensity, it is consistent with our view to regard excessive indulgence in such as a vice that, if nothing else, may cause significant harm to the character of the peeper herself. [xxix]

Third, some may suggest that we are just insufficiently sensitive to the pain involved in the loss of private information and hence blind to an obvious way of extending our model to protect it. For people who care deeply about privacy, just the thought of strangers knowing about their private affairs will be distracting. For such people simply living in a society that does not protect informational privacy could induce paranoia, thereby meeting our own criteria of interference with rationality to an exceptional degree. This might be regarded as a friendly revision, but we are not currently tempted to extend the model in this way. We have already noted that our theory makes implicit use of standards of psychological normalcy. We have not formulated such standards here, but we are skeptical of the suggestion that normal people could not function in a society that does not view informational privacy as a fundamental right. Indeed, public response to the September eleventh tragedy provides strong evidence to the contrary. What most of us discovered is that it is impossible to exercise our practical reason in an environment that promises random acts of violence. In this environment- and in *our* terminology- Big Brother's watchful eye is no longer experienced as a threat to privacy, but as a precondition of securing it. (Of course, there continues to be an enormous market for informational privacy, serviced primarily- and somewhat ironically- by information technology itself. In a recent article of *The Atlantic Monthly* [March 2001] Toby Lester documents the way in which anonymizing software now provides a veritable Ring of Gyges to those who work and play in the public cyberspace of the

internet.[xxx] But reading the article today, what strikes one most, is the virtual absence of concern about the value of cyberanonymity to criminals.)

Finally, we remind the reader that our conception of the right to privacy is silent on the prospect of protecting informational privacy on *consequentialist* grounds. Absent a compelling argument that we have a fundamental right to control personal information (and we believe these arguments really are absent), the most compelling considerations in favor of restricting access to such information are consequentialist in nature. The harm is not the simple fact that other people know things about us that we prefer they didn't; rather, it is that they may use this information in a way that we prefer they wouldn't. Such fears are often reasonable and they can be sufficient to justify many of the privacy statutes that have been passed in recent decades. But if we acknowledge a fundamental *right* to control personal information, then we are no longer compelled to demonstrate such harms. Laws that prevent efficient marketing practices, speedy medical attention, equitable distribution of social resources, and criminal activity could all be justified by appeal to informational privacy as a fundamental right. This, we believe, would be the truly absurd excess of a legitimate concern for privacy.[xxxi]

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[i] Judith Jarvis Thomson, "The Right to Privacy," *Philosophy & Public Affairs*, 4.4 (1975): 295-314.

[ii] Warren., Samuel D. and Louis D. Brandeis, "The Right to Privacy." In Schoeman, Ferdinand David, ed., Philosophical Dimensions of Privacy: An Anthology. Cambridge, Massachusetts: Cambridge University Press, 1984: 75-103.

[iii] Although Warren and Brandeis do argue for restricting access to personal information, they does so mainly on the basis of the intrusiveness of the actions required to acquire that information, as well as the personal harm that can result from its publication. They do not suggest that the right to privacy logically entails the right to restrict access to personal information.

[iv] Thomson, “The Right to Privacy,” p. 295.

[v] Thomson's work on privacy has received a great deal of critical attention. See, for example: Scanlon, Thomas. "Thomson on Privacy." *Philosophy & Public Affair*s 4.4 (1975): Reiman, (Missing reference on Reiman)

and Inness, J., 1992, *Privacy, Intimacy and Isolation*, Oxford: Oxford University Press.

[vi]See, for example: Charles Fried, "Privacy," in Schoeman, Ferdinand David, eds., *Philosophical Dimensions of Privacy: An Anthology*. (Cambridge, Massachusetts: Cambridge University Press, 1984) p. 203-222 and Alan Westin, *Privacy and Freedom*, (New York, Atheneum: 1967) .

[vii] Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology*. (Ithaca, New York: Cornell Univeristy Press, 1997) p. 64.

[viii] Julie Inness, *Privacy, Intimacy, & Isolation* (Oxford: Oxford University Press, 1992), p. 74.

[ix] Ferdinand Schoeman, *Privacy and Social Freedom*. (Cambridge: Cambridge University Press, 1984), p. 8.

[x] By "legitimate public interest" we mean any information to which public access is required for the maintenance of a just and prosperous society.

[xi]Because moral agency is the ability to act in the world as an individual that values, among other things, their own and others' rights, there is necessarily something a bit circular about rights. The assumption of a scheme of rights and correlative duties depends upon a reasonable basic understanding of moral agency, but discussions of its reasonableness will inevitably involve reference to the kinds of lives rights make possible.

[xii] *Groundwork of the Metaphysics of Morals*. ed. Mary Gregor. New York: Cambridge University Press, 1998.

[xiii]Privacy concerns were recently raised by a new technology, produced by Mobiltrak, which can determine which radio stations people are listening to as they drive. The tracking device cannot identify the proper name of the motorist, but it does operate without their awareness Catherine Greenman, "They Know What You Listened To Last Summer On Your Car Radio." *The New York Times* 20 Jan. 2000: G8.

[xiv] *Bowers v. Hardwick* 478 U.S. 186(1986).

[xv]James Rachels, "Why Privacy in Important," *Computers, Ethics, and Social Values*. eds. Deborah Nissenbaum Helen Johnson. (Upper Saddle River, New Jersey: Prentice Hall, 1995) p.351-57.

[xvi]Ruth Gavison, "Privacy and the Limits of the Law," *Computers, Ethics, and Social Values*. eds. Deborah Nissenbaum and Helen Johnson. (Upper Saddle River, New Jersey: Prentice Hall, 1995).

[xvii]W. A. Parent, "Privacy, Morality, and the Law," *Philosophy & Public Affairs* 12.4 (1983): 269-88.

[xviii]Edmund F. Byrne, "Privacy." *Encyclopedia of Applied Ethics*. editor Ruth Chadwick. Vol. 3. San Diego, CA: Academic Press, 1998. 649-59.

[xix]John Rawls, *A Theory of Justice*, (Cambridge, Mass.: Harvard University Press, 1999), p. 453.

They want a reference here regarding the textual comment on Prosser being the reductivist who resolves privacy into tort claims.

[xx] Ruth Gavison, "Privacy and the Limits of the Law," p. 344.

[xxi] One anonymous reviewer has suggested that this is a distinction of degree and that our analysis should be extended to cover more serious cases, e.g., information related to child custody or HIV infection. But the reason these cases are more serious is because of the consequences that would likely result from others acquiring the information, and the case for protecting the information should be made by appeal to these consequences. This is hard work, since the consequences turn out to be a befuddling mixture of good and bad. Our view is that the right to privacy should not function simply as a way to avoid that work.

[xxii] Thomas Scanlon, "Thomson on Privacy." *Philosophy & Public Affairs*, 4.4 (1975).

[xxiii] James Rachels, "Why Privacy in Important," *Comptuers, Ethics, and Social Values,* eds. Deborah Nissenbaum Helen Johnson (Upper Saddle River, New Jersey: Prentice Hall, 1995) p.351-57.

[xxiv] James Rachels, "Why Privacy in Important," p. 351.

[xxv] It may be possible to articulate the principle of liberty in such a way that it *would* subsume privacy. For example, one might, with Berlin [I. Berlin, *Four Essays on Liberty* (Oxford, 1969)] argue for a positive conception of liberty that promotes, rather than merely permits, freedom, and this might require the free exercise of rationality.

[xxvi]Fish, Stanley. There's No Such Thing as Free Speech, and It's a Good Thing, Too. New York: Oxford, 1994.

[xxvii]Of course, what counts as a violation of the right to privacy will depend very much on a person's physical location. For example, if I am in your home, you probably do not violate my right to privacy by walking around stark naked, however much that may compromise my rationally. ability to reason.

[xxviii]Note that the "fighting words" proviso on constitutionally protected free speech, while normally defended on the basis that fighting words provoke violence, attribute the likelihood of such to the fact that it compromises an individual's ability to behave.

[xxix] There is an interesting parallel here between spying and gossiping. Both are widely regarded as morally corrupt, even though both can be healthy manifestations of human curiosity creating a great deal of social utility. (On gossiping in particular, see Westacott, Emrys "The Ethics of Gossiping," International Journal of Applied Philosophy, Spring 2000, Vol. 14, No. 1.) The sense that there is something categorically wrong with these is perhaps best captured by virtue ethics. Most of us would agree that, considered as character types, Peeping Toms and gossips extract a pathetic degree of gratification from their voyeurism.

[xxx] Lester, Toby. "The Reinvention of Privacy," The Atlantic Monthly V.27 No. 3 (2001): 27-39.