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## Privacy and the Limits of Law

Ruth Gavison<sup>†</sup>

Anyone who studies the law of privacy today may well feel a sense of uneasiness. On one hand, there are popular demands for increased protection of privacy, discussions of new threats to privacy, and an intensified interest in the relationship between privacy and other values, such as liberty, autonomy, and mental health.<sup>1</sup> These demands have generated a variety of legal responses. Most states recognize a cause of action for invasions of privacy.<sup>2</sup> The Supreme Court has declared a constitutional right to privacy, a right broad enough to protect abortion and the use of contraceptives.<sup>3</sup> Congress enacted the Privacy Act of 1974<sup>4</sup> after long hearings and debate. These activities<sup>5</sup>

<sup>†</sup> Visiting Associate Professor of Law, Yale Law School. This Article develops some of the themes of my doctoral thesis, *Privacy and Its Legal Protection*, written under the supervision of Professor H.L.A. Hart. Much of the inspiration of this piece is still his. I am grateful to Bruce Ackerman, Bob Cover, Owen Fiss, George Fletcher, Harry Frankfurt, Jack Getman, Tony Kronman, Arthur Leff, Michael Moore, and Barbara Underwood, who read previous drafts and made many useful comments.

1. The best general treatment of privacy is still A. WESTIN, *PRIVACY AND FREEDOM* (1967). For treatment of a variety of privacy aspects, see NOMOS XIII, *PRIVACY* (R. Pennock & J. Chapman eds. 1971) (Yearbook of the American Society for Political and Legal Philosophy) [hereinafter cited as NOMOS].

2. W. PROSSER, *THE LAW OF TORTS* 804 (4th ed. 1971).

3. *Roe v. Wade*, 410 U.S. 113, 152-55 (1973) (right to privacy cited to strike down abortion statute); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (right to privacy includes right of unmarried individual to use contraceptives); *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965) (right to privacy includes right of married couple to use contraceptives). See generally Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281 (1977); Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CALIF. L. REV. 1447 (1976) (developing constitutional right to privacy).

4. 5 U.S.C. § 552a (1976). For a discussion of the privacy exception to the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C) (1976), see J. O'REILLY, *FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS AND THE LAW* §§ 20.01-21.10 (1977); Cox, *A Walk Through Section 552 of the Administrative Procedure Act: The Freedom of Information Act; The Privacy Act; and the Government in the Sunshine Act*, 46 U. CIN. L. REV. 969 (1978).

5. Several constitutional and statutory provisions explicitly recognize the right to privacy. See, e.g., CAL. CONST. art. I, § 1 (1974 amendment recognizing, *inter alia*, right to privacy); *PRIVACY PROTECTION STUDY COMM'N*, *PERSONAL PRIVACY IN AN INFORMATION SOCIETY* (1977) (report on various aspects of privacy in U.S. with recommendations for additional protection of privacy).

seem to imply a wide consensus concerning the distinctness and importance of privacy.

On the other hand, much of the scholarly literature on privacy is written in quite a different spirit. Commentators have argued that privacy rhetoric is misleading: when we study the cases in which the law (or our moral intuitions) suggest that a "right to privacy" has been violated, we always find that some other interest has been involved.<sup>6</sup> Consequently, they argue, our understanding of privacy will be improved if we disregard the rhetoric, look behind the decisions, and identify the real interests protected. When we do so, they continue, we can readily see why privacy itself is never protected: to the extent that there is something distinct about claims for privacy, they are either indications of hypersensitivity<sup>7</sup> or an unjustified wish to manipulate and defraud.<sup>8</sup> Although these commentators disagree on many points, they are united in denying the utility of thinking and talking about privacy as a legal right, and suggest some form of reductionism.<sup>9</sup>

This Article is an attempt to vindicate the way most of us think and talk about privacy issues: unlike the reductionists, most of us consider privacy to be a useful concept. To be useful, however, the concept must denote something that is distinct and coherent. Only then can it help us in thinking about problems. Moreover, privacy must have a coher-

6. For studies of legal protection in this vein, see, e.g., Davis, *What Do We Mean by "Right to Privacy?"* 4 S.D. L. REV. 1 (1959); Dickler, *The Right of Privacy*, 70 U.S. L. REV. 435 (1936); Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROB. 326 (1966); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). For a similar study of moral intuitions, see Thomson, *The Right to Privacy*, 4 PHILOSOPHY & PUBL. AFF. 295 (1975).

7. See, e.g., Kalven, *supra* note 6, at 329 & n.22.

8. This aspect of privacy has been emphasized by Richard Posner. See, e.g., Posner, *Privacy, Secrecy, and Reputation*, 28 BUFFALO L. REV. 1 (1979) [hereinafter cited as *Secrecy*]; Posner, *The Right to Privacy*, 12 GA. L. REV. 393 (1978) [hereinafter cited as *Privacy*]. Other commentators have followed his lead. See, e.g., Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455 (1978).

9. All reductionists claim that the concept of privacy does not illuminate thoughts about legal protection. Professor Posner's version is the most extreme: he denies the utility of all "intermediate" values, and advocates assessing acts and rules by the single, ultimate principle of wealth maximization. E.g., *Secrecy*, *supra* note 8, at 7-9; *Privacy*, *supra* note 8, at 394.

The commentators cited in note 6 *supra* accept the utility of some differentiating concepts to denote different interests, such as property, reputation, and freedom from mental distress, but claim that privacy should be reduced to these "same-level" concepts. This form of reductionism is consistent with an acknowledgment that people want privacy, and that satisfaction of this wish does denote an important human aspiration. The essence of this reductionism is the claim that description and evaluation of the law or moral intuitions are clarified by pointing out that we do not have an independent "right to privacy." See, e.g., Davis, *supra* note 6, at 18-24; Kalven, *supra* note 6, at 333-41. This position is frequently found in the literature on privacy. See, e.g., Epstein, *supra* note 8, at 474; Freund, *Privacy: One Concept or Many*, in *Nomos*, *supra* note 1, at 182, 190-93.

## Privacy

ence in three different contexts. First, we must have a neutral concept of privacy that will enable us to identify when a loss of privacy has occurred so that discussions of privacy and claims of privacy can be intelligible. Second, privacy must have coherence as a value, for claims of legal protection of privacy are compelling only if losses of privacy are sometimes undesirable and if those losses are undesirable for similar reasons. Third, privacy must be a concept useful in legal contexts, a concept that enables us to identify those occasions calling for legal protection, because the law does not interfere to protect against every undesirable event.

Our everyday speech suggests that we believe the concept of privacy is indeed coherent and useful in the three contexts, and that losses of privacy (identified by the first), invasions of privacy (identified by the second), and actionable violations of privacy (identified by the third) are related in that each is a subset of the previous category. Using the same word in all three contexts reinforces the belief that they are linked. Reductionist analyses of privacy—that is, analyses denying the utility of privacy as a separate concept—sever these conceptual and linguistic links. This Article is an invitation to maintain those links, because an awareness of the relationships and the larger picture suggested by them may contribute to our understanding both of legal claims for protection, and of the extent to which those claims have been met.<sup>10</sup>

I begin by suggesting that privacy is indeed a distinct and coherent concept in all these contexts. Our interest in privacy, I argue, is related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention. This concept of privacy as a concern for limited accessibility enables us to identify when losses of privacy occur. Furthermore, the reasons for which we claim privacy in different situations are similar. They are related to the functions privacy has in our lives: the promotion of liberty, autonomy, selfhood, and human relations, and furthering the existence of a free society.<sup>11</sup> The coherence of privacy as a concept and

10. This approach may also enhance our understanding and evaluation of the reductionist thesis. See pp. 460-67 *infra*.

11. The fact that my analysis demonstrates the value of privacy by showing its contribution to other goals does not make this just another type of reductionism. These instrumental justifications explain why we consider privacy a value but do not mean that we only protect privacy because of these other values. Complex instrumental arguments justify all values save ultimate ones, and perhaps we have no ultimate values in this sense at all. This does not mean that all values are reducible.

the similarity of the reasons for regarding losses of privacy as undesirable support the notion that the legal system should make an explicit commitment to privacy as a value that should be considered in reaching legal results. This analysis does not require that privacy be protected in all cases; that result would require consideration of many factors not discussed here. I argue only that privacy refers to a unique concern that should be given weight in balancing values.

My analysis of privacy yields a better description of the law and a deeper understanding of both the appeal of the reductionist approach and its peril. The appeal lies in the fact that it highlights an important fact about the state of the law—privacy is seldom protected in the absence of some other interest. The danger is that we might conclude from this fact that privacy is not an important value and that losses of it should not feature as considerations for legal protection. In view of the prevalence of the reductionist view, the case for an affirmative and explicit commitment to privacy—vindicating the antireductionist perspective—becomes compelling.

## I. The Meaning and Functions of Privacy

“Privacy” is a term used with many meanings. For my purposes, two types of questions about privacy are important. The first relates to the *status* of the term: is privacy a situation, a right, a claim, a form of control, a value? The second relates to the *characteristics* of privacy: is it related to information, to autonomy, to personal identity, to physical access? Support for all of these possible answers, in almost any combination, can be found in the literature.<sup>12</sup>

The two types of question involve different choices. Before resolving these issues, however, a general distinction must be drawn between the concept and the value of privacy. The concept of privacy identifies losses of privacy. As such, it should be neutral and descriptive only, so as not to preempt questions we might want to ask about such losses. Is the loser aware of the loss? Has he consented to it? Is the loss desirable? Should the law do something to prevent or punish such losses?

This is not to imply that the neutral concept of privacy is the most important, or that it is only legitimate to use “privacy” in this sense. Indeed, in the context of legal protection, privacy should also indicate a value. The coherence and usefulness of privacy as a value is due to a similarity one finds in the reasons advanced for its protection, a simi-

12. See pp. 425-28 & pp. 437-40 *infra*.

## Privacy

larity that enables us to draw principles of liability for invasions.<sup>13</sup> These reasons identify those aspects of privacy that are considered desirable. When we claim legal protection for privacy, we mean that only those aspects should be protected, and we no longer refer to the “neutral” concept of privacy. In order to see which aspects of privacy are desirable and thus merit protection as a value, however, we must begin our inquiry in a nonpreemptive way by starting with a concept that does not make desirability, or any of the elements that may preempt the question of desirability, part of the notion of privacy. The value of privacy can be determined only at the conclusion of discussion about what privacy is, and when—and why—losses of privacy are undesirable.<sup>14</sup>

In this section I argue that it is possible to advance a neutral concept of privacy, and that it can be shown to serve important functions that entitle it to *prima facie* legal protection. The coherence of privacy in the third context—as a legal concept—relies on our understanding of the functions and value of privacy; discussion of the way in which the legal system should consider privacy is therefore deferred until later sections.<sup>15</sup>

### A. *The Neutral Concept of Privacy*

#### 1. *The Status of Privacy*

The desire not to preempt our inquiry about the value of privacy by adopting a value-laden concept at the outset is sufficient to justify viewing privacy as a situation of an individual vis-à-vis others, or as a condition of life. It also requires that we reject attempts to describe

13. Any appearance of circularity here is misleading. To say that the coherence of the descriptive concept of privacy follows from the reasons we have for protecting it does not mean that the privacy we wish to protect is coextensive with the situation identified by the descriptive concept. *See note 14 infra.* We must start with a descriptive concept, however, in order to analyze the reasons to value some aspects of privacy.

14. Typical elements that may preempt discussion of desirability are the wishes or choices of the individuals concerned, the nature of the information, or the way in which the information is acquired. One important example is the statement that invasions of privacy are undesirable when the information disseminated is “private.” It is clear that the statement must mean that it is undesirable because the information should be seen as entitled to be kept private, that is, to not become known to the public. For clarity of thought, all of these elements should be excluded from the concept designed to identify the losses themselves. The best discussion of the need for a conceptual scheme that does not preempt questions is Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974). *See generally* R. Gavison, *Privacy and Its Legal Protection* (1975) (unpublished D. Phil. thesis on file in Oxford, Harvard Law School, and Yale Law School libraries) (discussion of Parker).

15. *See pp. 456-59 & pp. 467-71 infra.*

privacy as a claim,<sup>16</sup> a psychological state,<sup>17</sup> or an area that should not be invaded.<sup>18</sup> For the same reasons, another description that should be rejected is that of privacy as a form of control.<sup>19</sup>

This last point requires some elaboration, because it may appear that describing privacy as a form of control does not preempt important questions. Were privacy described in terms of control, for example, we could still ask whether X has lost control, and whether such loss is desirable. The appearance of a nonpreemptive concept is misleading, however, and is due to an ambiguity in the notion of control. Hyman Gross, for example, defines privacy as "control over acquaintance with one's personal affairs."<sup>20</sup> According to one sense of this definition,

16. Alan Westin has defined privacy as the "claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." A. WESTIN, *supra* note 1, at 7. For a discussion of the influence of this definition on the study of privacy, see Lusky, *Invasion of Privacy: A Clarification of Concepts*, 72 COLUM. L. REV. 693, 693-95 (1972). It is interesting to note that Professor Westin also gives a second and quite different description of privacy: "Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means . . ." A. WESTIN, *supra* note 1, at 7.

17. If we define privacy as a state of mind, we shall not be able to discuss losses of privacy that are unknown to the individual or whether such awareness is relevant to the desirability of such losses.

18. PRIVACY AND THE LAW, A REPORT BY THE BRITISH SECTION OF THE INTERNATIONAL COMM'N OF JUSTICE ¶ 19 (1970):

Accordingly, we shall use the word "privacy" in this report in the sense of that area of a man's life which, in any given circumstances, a reasonable man with an understanding of the legitimate needs of the community would think it wrong to invade. This definition is simply a conclusion, not a tool to analyze whether a certain invasion should be considered wrong in the first place. Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977), makes a similar move when he invokes the description proposed in J. STEPHEN, LIBERTY, EQUALITY, FRATERNITY 160 (1967; 1st ed. 1873): "Conduct which can be described as indecent is always in one way or another a violation of privacy." *Id.* at 242. Professor Gerety is quite conscious, however, of the difference between descriptive and normative intuitions. His own definition of privacy invokes descriptive intuitions: "Privacy will be defined here as an autonomy or control over the intimacies of personal identity." *Id.* at 236. He adds, however, that it "carries with it a set of at least preliminary conclusions about rights and wrongs." *Id.*

19. Richard Parker, who is aware of the danger that conclusory definitions may preempt important questions, defines privacy as control over who senses us. Parker, *supra* note 14, at 280-81. Similarly, Professor Fried defines privacy as control over information. C. FRIED, AN ANATOMY OF VALUES 140 (1970) [hereinafter cited as VALUES]; Fried, *Privacy*, 77 YALE L.J. 475, 482 (1968) [hereinafter cited as *Privacy*]. Other writers whose definitions of privacy can be understood in these terms are A. MILLER, THE ASSAULT ON PRIVACY 25 (1971); A. WESTIN, *supra* note 1, at 7; Beardsley, *Privacy: Autonomy and Selective Disclosure*, in NOMOS, *supra* note 1, at 56, 70; Gerety, *supra* note 18, at 236; and Shils, *Privacy: Its Constitution and Vicissitudes*, 31 LAW & CONTEMP. PROB. 281, 282 (1966).

20. Gross, *Privacy and Autonomy*, in NOMOS, *supra* note 1, at 169, 169 [hereinafter cited as *Autonomy*]. But see Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 35-36 (1967) (defining privacy as "the condition of human life in which acquaintance with a person or with affairs of his life which are personal to him is limited") [hereinafter cited as *Concept*]. Gross does not even refer to his earlier contribution in his 1971 article in NOMOS.

## Privacy

a voluntary, knowing disclosure does not involve loss of privacy because it is an exercise of control, not a loss of it.<sup>21</sup> In another, stronger sense of control, however, voluntary disclosure is a loss of control because the person who discloses loses the power to prevent others from further disseminating the information.

There are two problems here. The weak sense of control is not sufficient as a description of privacy, for X can have control over whether to disclose information about himself, yet others may have information and access to him through other means. The strong sense of control, on the other hand, may indicate loss of privacy when there is only a threat of such loss.<sup>22</sup> More important, "control" suggests that the important aspect of privacy is the ability to choose it and see that the choice is respected. All possible choices are consistent with enjoyment of control, however, so that defining privacy in terms of control relates it to the power to make certain choices rather than to the way in which we choose to exercise this power. But individuals may choose to have privacy or to give it up.<sup>23</sup> To be nonpreemptive, privacy must not depend on choice. We need a framework within which privacy may be the result of a specific exercise of control, as when X decides not to disclose certain information about himself, or the result of something imposed on an individual against his wish, as when the law prohibits the performance of sexual intercourse in a public place. Furthermore,

21. It will clearly not be a loss in Edward Shils's definition:

[P]rivacy exists where the persons whose actions engender or become the objects of information retain possession of that information, and any flow outward of that information from the persons to whom it refers (and who share it where more than one person is involved) occurs on the initiative of its possessors.

Shils, *supra* note 19, at 282. The control necessary here is over the outward flow of information, not control over those who receive the information. Hyman Gross has a more complex picture. He suggests that whether voluntary disclosure involves loss of privacy depends on whether the recipient is bound by restrictive norms. *Autonomy*, *supra* note 20, at 171.

22. People may simply be uninterested in an individual, and thus not care to acquire information about him. Such an individual will have "privacy" even if he resents it. To say that an individual controls the flow of information about himself is thus not enough to tell us whether he is known in fact. We also must know whether there are restrictive norms, whether these are obeyed, how the individual has chosen to exercise his control, and whether others have acquired information about him in other ways or at all. The view of privacy presented by Alan Westin is not vulnerable to this difficulty. See A. WESTIN, *supra* note 1.

23. For example, an individual may voluntarily choose to disclose everything about himself to the public. This disclosure obviously leads to a loss of privacy despite the fact that it involved an exercise of control. This much is conceded even by Professor Gross. *Autonomy*, *supra* note 20, at 171. Moreover, to prohibit the individual from making disclosures is a limitation of his control that would seem to increase his privacy. A similar problem confronts those who seek to promote liberty of action when they are asked whether an individual should be allowed to sell himself into slavery. The sale may be a free exercise of liberty, but the result is a restriction on liberty.

the reasons we value privacy may have nothing to do with whether an individual has in fact chosen it. Sometimes we may be inclined to criticize an individual for not choosing privacy, and other times for choosing it. This criticism cannot be made if privacy is defined as a form of control.

Insisting that we start with a neutral concept of privacy does not mean that wishes, exercises of choice, or claims are not important elements in the determination of the aspects of privacy that are to be deemed desirable or of value. This insistence does mean, however, that we are saying something meaningful, and not merely repeating the implications of our concept, if we conclude that only choices of privacy should be protected by law.

Resolving the status of privacy is easier than resolving questions concerning the characteristics of privacy. Is privacy related to secrecy, freedom of action, sense of self, anonymity, or any specific combination of these elements? The answers here are not constrained by methodological concerns. The crucial test is the utility of the proposed concept in capturing the tenor of most privacy claims, and in presenting coherent reasons for legal protection that will justify grouping these claims together. My conception of privacy as related to secrecy, anonymity, and solitude is defended in these terms.

## 2. *The Characteristics of Privacy*

In its most suggestive sense, privacy is a limitation of others' access to an individual. As a methodological starting point, I suggest that an individual enjoys *perfect* privacy when he is completely inaccessible to others.<sup>24</sup> This may be broken into three independent components: in perfect privacy no one has any information about X, no one pays any attention to X, and no one has physical access to X. Perfect privacy is, of course, impossible in any society. The possession or enjoyment of privacy is not an all or nothing concept, however, and the total loss of privacy is as impossible as perfect privacy. A more important concept, then, is *loss* of privacy. A loss of privacy occurs as others obtain information about an individual, pay attention to him, or gain access to him. These three elements of secrecy, anonymity, and solitude are distinct and independent, but interrelated, and the complex concept of privacy is richer than any definition centered around

24. I use "enjoys" although individuals would doubtless suffer if exposed to "perfect privacy," and may resent privacy that is imposed on them against their will. "Perfect" privacy is used here only as a methodological starting point. There is no implication that such situations exist or that they are desirable.

## Privacy

only one of them. The complex concept better explains our intuitions as to when privacy is lost, and captures more of the suggestive meaning of privacy. At the same time, it remains sufficiently distinctive to exclude situations that are sometimes labeled "privacy," but that are more related to notions of accountability and interference than to accessibility.

### a. *Information Known About an Individual*

It is not novel to claim that privacy is related to the amount of information known about an individual. Indeed, many scholars have defined privacy exclusively in these terms,<sup>25</sup> and the most lively privacy issue now discussed is that related to information-gathering. Nevertheless, at least two scholars have argued that there is no inherent loss of privacy as information about an individual becomes known.<sup>26</sup> I believe these critics are wrong. If secrecy is not treated as an independent element of privacy, then the following are only some of the situations that will not be considered losses of privacy: (a) an estranged wife who publishes her husband's love letters to her, without his consent; (b) a single data-bank containing all census information and government files that is used by all government officials;<sup>27</sup> and (c) an employer who asks every conceivable question of his employees and yet has no obligation to keep the answers confidential. In none of these cases is there any intrusion, trespass, falsification, appropriation, or exposure of the individual to direct observation. Thus, unless the amount of information others have about an individual is considered at least partly determinative of the degree of privacy he has, these cases cannot be described as involving losses of privacy.

To talk of the "amount of information" known about an individual is to imply that it is possible to individuate items or pieces of information, to determine the number of people who know each item of in-

25. E.g., Professor Fried in *VALUES*, *supra* note 19, at 140; A. MILLER, *supra* note 19, at 25; A. WESTIN, *supra* note 1, at 7; Beardsley, *supra* note 19, at 56; Professor Gross in *Autonomy*, *supra* note 20, at 172-74; Shils, *supra* note 19, at 282.

26. Professor Gerety argues that information is part of privacy only if it is "private"—related to intimacy, identity, and autonomy. Gerety, *supra* note 18, at 281-95. Professor Parker suggests that there are times when loss of control over information does not mean loss of privacy, e.g., examinations in which it is revealed the student did not study. Parker, *supra* note 14, at 282.

27. See Benn, *Privacy, Freedom, and Respect for Persons*, in *NOMOS*, *supra* note 1, at 1, 11-12 (data banks as paradigmatic privacy issue). Unused data banks do not cause a loss of privacy, of course, because the mere existence of information on file does not make it known to anyone. Access to such data banks does create a threat that losses of privacy may occur. See generally Farhi, *Computers, Data Banks and the Individual: Is the Problem Privacy?* 5 ISRAEL L. REV. 542 (1970).

formation about *X*, and thus to quantify the information known about *X*. In fact, this is impossible, and the notion requires greater theoretical elaboration than it has received until now. It is nevertheless used here because in most cases its application is relatively clear. Only a few of the many problems involved need to be mentioned.

The first problem is whether we should distinguish between different kinds of knowledge about an individual, such as verbal as opposed to sensory knowledge, or among different types of sensory knowledge. For example, assume *Y* learns that *X* is bald because he reads a verbal description of *X*. At a later time, *Y* sees *X* and, naturally, observes that *X* is bald. Has *Y* acquired any further information about *X*, and if so, what is it? It might be argued that even a rereading of a verbal description may reveal to *Y* further information about *X*, even though *Y* has no additional source of information.<sup>28</sup>

A related set of problems arises when we attempt to compare different "amounts" of knowledge about the same individual. Who has more information about *X*, his wife after fifteen years of marriage, his psychiatrist after seven years of analysis, or the biographer who spends four years doing research and uncovers details about *X* that are not known either to the wife or to the analyst?<sup>29</sup>

A third set of problems is suggested by the requirement that for a loss of privacy to occur, the information must be "about" the individual. First, how specific must this relationship be? We know that most people have sexual fantasies and sexual relationships with others. Thus, we almost certainly "know" that our new acquaintances have sexual fantasies, yet they do not thereby suffer a loss of privacy. On the other hand, if we have detailed information about the sexual lives of a small number of people, and we are then introduced to one of them, does the translation of the general information into personal information about this person involve a loss of privacy? Consider the famous anecdote about the priest who was asked, at a party, whether he had heard any exceptional stories during confessionals. "In fact,"

28. Professor Parker suggests the example of an astronaut whose actions in a spaceship are thoroughly monitored by electrodes that feed data to a control desk. In addition, people at the control desk can observe the astronaut through a television camera. Parker argues that a prohibition against switching off the camera would result in further loss of privacy for the astronaut even though the camera provides no additional information. Parker, *supra* note 14, at 281. Parker seems correct, but not necessarily because loss of control over sensing is involved. The camera may provide people at the control desk with an additional, qualitatively different way to obtain the "same" information, and this may be equivalent to additional information.

29. The "amount" of information may not be as important as the quality and extent of the information. There is a difference between knowing a person, and knowing about him.

## Privacy

the priest replied, "my first confessor is a good example, since he confessed to a murder." A few minutes later, an elegant man joined the group, saw the priest, and greeted him warmly. When asked how he knew the priest, the man replied: "Why, I had the honor of being his first confessor."

The priest gave an "anonymous" piece of information, which became information "about" someone through the combination of the anonymous statement with the "innocent" one made by the confessor. Only the later statement was "about" a specific individual, but it turned what was previously an anonymous piece of information into further information "about" the individual. The translation here from anonymous information to information about X is immediate and unmistakable, but the process is similar to the combination of general knowledge about a group of people and the realization that a certain individual is a member of that group.<sup>30</sup>

Problems of the relationship between an individual and pieces of information exist on another level as well. Is information about X's wife, car, house, parents, or dog information about X? Clearly, this is information about the other people, animals, or things involved, but can X claim that disclosure of such information is a loss of his privacy? Such claims have often been made.<sup>31</sup> Their plausibility in at least some of the cases suggests that people's notions of themselves may extend beyond their physical limits.<sup>32</sup>

A final set of problems concerns the importance of the truth of the information that becomes known about an individual. Does dissemination of false information about X mean that he has lost privacy? The usual understanding of "knowledge" presupposes that the information is true, but is this sense of "knowledge" relevant here? In one sense, X has indeed lost privacy. People now believe they know more about him. If the information is sufficiently spectacular, X may lose his anonymity

30. Another example might be cross-cultural. If we know something about the psychological make-up of a certain class, does a person whom we meet lose further privacy when we learn that he is a member of that class? We certainly may know more "about" him than he might suspect, depending on the probability that he is typical of the class.

31. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (parent alleged that his right to privacy was invaded by identification of daughter as victim of rape-murder); *Corliss v. E.W. Walker Co.*, 57 F. 434 (C.C.D. Mass. 1893), *injunction dissolved*, 64 F. 280 (C.C.D. Mass. 1894) (plaintiffs alleged publication of biography and picture of dead husband and father constituted injury to their feelings).

32. This "extension of self" is a complex phenomenon, and seems highly culture-dependent. In some cases, it may be based on the idea that a person's choices reflect on him; my spouse, my car, and my clothes are part of me in this sense. In cases in which no choice is involved, such as those involving disclosures about parents, children, or siblings, the "extension of self" may be based on a feeling of responsibility for or identification with the other person. See Benn, *supra* note 27, at 12.

and become the subject of other people's attention.<sup>33</sup> In another sense, however, X is not actually "known" any better. In fact, he may even be known less, because the false information may lead people to disregard some correct information about X that they already had.<sup>34</sup> Another difficulty is revealed when we consider statements whose truth is not easily determinable, such as "X is beautiful" or "X is dumb and irresponsible." Publication of such statements clearly leads to some loss of privacy: listeners now know what the speaker thinks about X, and this itself is information about X (as well as about the speaker). But does the listener also know that X is indeed beautiful? This is hard to tell.<sup>35</sup>

### b. *Attention Paid to an Individual*

An individual always loses privacy when he becomes the subject of attention. This will be true whether the attention is conscious and purposeful, or inadvertent. Attention is a primary way of acquiring information, and sometimes is essential to such acquisition, but attention alone will cause a loss of privacy even if no new information becomes known. This becomes clear when we consider the effect of 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.

Here too, however, some elaboration is needed. X may be the subject of Y's attention in two typical ways.<sup>36</sup> First, Y may follow X, stare at him, listen to him, or observe him in any other way. Alternatively, Y may concentrate his thoughts on X. Only the first way of paying attention is directly related to loss of privacy. Discussing, imagining, or thinking about another person is related to privacy in a more indirect way, if at all. Discussions may involve losses of privacy by communicat-

33. This explains the way in which defamation involves loss of privacy, or at least the threat of such a loss. Even if the defamatory information is false, it attracts attention to the person in ways that may involve loss of privacy.

34. See Roberts & Gregor, *Privacy: A Cultural View*, in *NOMOS*, *supra* note 1, at 199, 214 (promotion of privacy through systematic denial of truth).

35. The answer depends on our theories about evaluations. To the extent that some evaluations are susceptible to interpersonal assessment, we may say that such evaluations transmit "objective knowledge." To the extent we consider evaluations subjective only, any informational content is much more complex and limited. The distinction between fact and opinion is important in defamation law's doctrine of "fair comment." Fair comment is privileged, but the facts on which it is based must be accurate. The distinction is notoriously difficult to draw. See, e.g., Titus, *Statement of Fact versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203 (1962).

36. See generally THE SOCIAL STRUCTURE OF ATTENTION (M. Chance & R. Larsen eds. 1976) (theories of attention).

## Privacy

ing information about a person or by creating an interest in the person under discussion that may itself lead to more attention. Thinking about a person may also produce an intensified effort to recall or obtain information about him. This mental activity may in turn produce a loss of privacy if new information is obtained. For the most part, however, thinking about another person, even in the most intense way, will involve no loss of privacy to the subject of this mental activity. The favorite subject of one's sexual fantasies may have causes for complaint, but it is unlikely that these will be related to loss of privacy.<sup>37</sup>

### c. *Physical Access to an Individual*

Individuals lose privacy when others gain physical access to them. Physical access here means physical proximity—that *Y* is close enough to touch or observe *X* through normal use of his senses. The ability to watch and listen, however, is not in itself an indication of physical access, because *Y* can watch *X* from a distance or wiretap *X*'s telephone. This explains why it is much easier for *X* to know when *Y* has physical access to him than when *Y* observes him.

The following situations involving loss of privacy can best be understood in terms of physical access: (a) a stranger who gains entrance to a woman's home on false pretenses in order to watch her giving birth;<sup>38</sup> (b) Peeping Toms; (c) a stranger who chooses to sit on "our" bench, even though the park is full of empty benches; and (d) a move from a single-person office to a much larger one that must be shared with a colleague. In each of these cases, the essence of the complaint 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>39</sup>

### d. *Relations Among the Three Elements*

The concept of privacy suggested here is a complex of these three independent and irreducible elements: secrecy, anonymity, and solitude.<sup>40</sup>

37. It could be argued that the individual who fantasizes about another person is really thinking about a fictional entity, because the subject of the fantasies has been created by the fantasizer. But cf. Van den Haag, *On Privacy*, in *NOMOS*, *supra* note 1, at 149, 152 (arguing that publication of fantasies should be considered invasion of privacy).

38. See *De May v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881) (finding for plaintiff on these facts). Note that *De May* preceded what is considered the seminal article on privacy, Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), by almost a decade.

39. For a comparative study of "spacing" and ways of maintaining physical distances, see E. HALL, *THE HIDDEN DIMENSION* (1966).

40. "Secrecy, anonymity, and solitude" are shorthand for "the extent to which an individual is known, the extent to which an individual is the subject of attention, and

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. The three elements may coexist in the same situation. For example, the psychiatrist who sits next to his patient and listens to him acquires information about the patient,<sup>41</sup> pays attention to him, and has physical access to him. At the same time, none of the three elements is the necessary companion of the other two.

Information about *X* may of course be acquired by making *X* the subject of *Y*'s attention. When *Y* follows, watches, or observes *X* in any way, he increases the likelihood of acquiring information about *X*. Similarly, when *Y* is in physical proximity to *X*, he has an opportunity to observe and thus obtain information about *X*. Nevertheless, information about *X* may be obtained when *Y* has no physical access to *X*, and when *X* is not the subject of *Y*'s attention. It is possible to learn information about an individual by questioning his friends and neighbors, and thus without observing the individual or being in his physical proximity. It is also possible to learn information about an individual entirely by accident, when the individual is not even the subject of attention.<sup>42</sup>

the extent to which others have physical access to an individual." The fit between these phrases is close but not perfect, and some comments about the different connotations should be noted. "Secrecy" has an unpleasant sense, and "solitude" conjures up an image that may be quite different from the one connoted by "physical access to an individual." For the most part, however, these are small differences. The difference is much greater between "anonymity" and "being the subject of attention." I may stare hard, focusing all my attention on an individual, without knowing who he is. The subject of my attention is therefore anonymous. On the other hand, even the President has times when he is not the subject of anyone's attention, but we would not call him an anonymous individual. Nevertheless, the aspect of anonymity that relates to attention and privacy is that of being lost in a crowd. If the President could ever be lost in a crowd, he would be anonymous in this context. To draw attention to him in such a case will cost him his anonymity—and his privacy.

41. The psychiatrist acquires information that the patient tells him, and information that the patient furnishes through his gestures, tone of voice, facial expressions, and demeanor. See E. GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 2 (1959) (distinguishing between "giving" and "giving off" information). Observation is a key source of information because we always transmit information about ourselves, even in situations in which no verbal communication occurs.

42. This suggests that it may be possible to compare the relative intrusiveness of ways to obtain certain information, *A*, about an individual, *X*. The least intrusive way to acquire the information is to have *X* volunteer it without being asked. A slightly more intrusive way to acquire the information is to ask *X* to provide it. *X* then has control over which questions to answer, and can challenge any that he feels are not necessary or appropriate. Observation of *X* is more likely to generate an amount of information greater than *A*, and thus to create loss of more privacy in this sense. It is also likely to

## Privacy

Attention may be paid to *X* without learning new information about him. The mother who follows her child in order to make sure the child does not harm himself is not interested in gaining new information about the child, nor will she necessarily obtain any new information. Pointing *X* out in a crowd will increase the attention paid to *X*, even in the absence of any physical proximity.

Finally, an individual can be in physical proximity to others without their paying attention or learning any new information about him. Two people may sit in the same room without paying any attention to each other, and yet each will experience some loss of privacy.

The interrelations between the three elements may be seen when we consider the different aspects of privacy that may be involved in one situation. For instance, police attempt to learn of plans to commit crimes. Potential criminals may raise a privacy claim concerning this information, but are unlikely to gain much support. The criminal's desire that information about his plans not be known creates a privacy claim, but not a very convincing one. We might be more receptive, however, to another privacy claim that criminals might make concerning attention and observation, or the opportunity to be alone. If constant surveillance were the price of efficient law enforcement, we might feel the need to rethink the criminal law. The fact that these are two independent claims suggests that concern for the opportunity to have solitude and anonymity is related not only to the wish to conceal some kinds of information, but also to needs such as relaxation, concentration, and freedom from inhibition.<sup>43</sup>

Yet another privacy concern emerges when we talk about the right against self-incrimination. Again, the essence of the concern is not simply the information itself; we do not protect the suspect against police learning the information from other sources. Our concern relates to the way the information is acquired: it is an implication of privacy that individuals should not be forced to give evidence against

involve physical access, and both observation and physical access may have costs to the individual's concentration, relaxation, and intimacy. See p. 447 *infra*. Questioning other individuals about *X* may also elicit an amount of information greater than *A*, and may attract attention to *X* that leads to further loss of privacy. This explains the intrusiveness of "rough shadowing," which is public surveillance that draws attention to the fact that the individual is being followed. See *Schultz v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 151 Wis. 537, 139 N.W. 386 (1913). It is not surprising that courts have found "rough shadowing" actionable as an invasion of privacy. E.g., *Pinkerton Nat'l Detective Agency, Inc. v. Stevens*, 108 Ga. App. 159, 132 S.E.2d 119 (1963). In contrast, courts have permitted less obvious forms of following and watching for purposes of investigation. E.g., *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970); *Forster v. Manchester*, 410 Pa. 192, 189 A.2d 147 (1963).

43. For a detailed examination of these reasons, see p. 447 *infra*.

themselves. Similarly, evidentiary privileges that may also be defended in terms of privacy do not reflect concern about the information itself. The concern here is the existence of relationships in which confidentiality should be protected, so that the parties know that confidences shared in these relationships will not be forced out. In some cases, disclosure will not be sought, and in others the law may even impose a duty against disclosure.

The irreducibility of the three elements may suggest that the complex concept of privacy lacks precision, and that we would do better to isolate each of the different concerns and discuss separately what the law should do to protect secrecy, anonymity, and solitude. Such isolation may indeed be fruitful for some purposes.<sup>44</sup> At present, however, the proposed concept suggests a coherent concern that is generally discussed in extra-legal contexts as "privacy." It therefore seems justified to prefer the complex notion of accessibility to the loss of richness in description that would result from any more particularistic analysis.

#### e. *What Privacy Is Not*

The neutral concept of privacy presented here covers such "typical" invasions of privacy as the collection, storage, and computerization of information; the dissemination of information about individuals; peeping, following, watching, and photographing individuals; intruding or entering "private" places; eavesdropping, wiretapping, reading of letters; drawing attention to individuals; required testing of individuals; and forced disclosure of information. At the same time, a number of situations sometimes said to constitute invasions of privacy will be seen not to involve losses of privacy *per se* under this concept. These include exposure to unpleasant noises, smells, and sights; prohibitions of such conduct as abortions, use of contraceptives, and "unnatural" sexual intercourse; insulting, harassing, or persecuting behavior; presenting individuals in a "false light"; unsolicited mail and unwanted phone calls; regulation of the way familial obligations should be discharged; and commercial exploitation.<sup>45</sup> These situations are all described as

44. In a general sense, the similarity of the reasons for protecting all three elements of privacy is sufficient to justify the coherence of the unitary concept. This coherence does not dictate treating all privacy cases the same way, however. It is plausible that legal protection of privacy may emphasize certain aspects more than others. See pp. 456-59 *infra* (limits of law) & pp. 465-67 *infra* (rise of new privacy claims). Treatment of the privacy issues raised by data systems, for example, may require specific legislation and regulation that is not universally applicable.

45. See, e.g., COMMITTEE ON PRIVACY, REPORT 17-22, 327-28 (1972) (compiling definitions of privacy) [hereinafter cited as YOUNGER COMMITTEE].

## Privacy

“invasions of privacy” in the literature, presumably indicating some felt usefulness in grouping them under the label of “privacy,” and thus an explanation of the reasons for excluding these cases from my argument seems appropriate. Such an explanation may also clarify the proposed analysis and its methodological presuppositions.

The initial intuition is that privacy has to do with accessibility to an individual, as expressed by the three elements of information-gathering, attention, and physical access, and that this concept is distinct. It is part of this initial intuition that we want and deem desirable many things, and that we lose more than we gain by treating all of them as the same thing.<sup>46</sup> If the concepts we use give the appearance of differentiating concerns without in fact isolating something distinct, we are likely to fall victims to this false appearance and our chosen language will be a hindrance rather than a help. The reason for excluding the situations mentioned above, as well as those not positively identified by the proposed analysis, is that they present precisely such a danger.<sup>47</sup>

There is one obvious way to include all the so-called invasions of privacy under the term. Privacy can be defined as “being let alone,” using the phrase often attributed—incorrectly—to Samuel Warren and Louis Brandeis.<sup>48</sup> The great simplicity of this definition gives it rhetorical force and attractiveness, but also denies it the distinctiveness that is necessary for the phrase to be useful in more than a conclusory sense. This description gives an appearance of differentiation while

46. I do not question the value of analyzing legal decisions and rules with a single measure, such as maximizing utility or wealth. *See, e.g., Privacy, supra* note 8, at 394. The price we pay for this illumination is high, however. First, it leads us to assume that we may reach the correct decision by maximizing only one value. Second, it wrongly suggests that we should never create “exclusionary reasons”—concepts, rights, rules, and principles that incorporate some kind of calculus in order to limit the need to consider certain questions in detail. *See, e.g., Rawls, Two Concepts of Rules, 64 PHILOSOPHICAL REV. 3 (1955).*

47. Adjudicative techniques may cause the coherence of legal concepts to blur. For example, an early case may establish a “right to privacy.” This “right” will be invoked in later cases, and as long as the situations are analogous the invocation is proper and illuminating. If a court relies on this right in situations that are significantly different from the early ones, however, it will be for different reasons than those that impelled the original court to grant recovery. The court may be encouraged to do so if it sees this as a way to rationalize a just result that cannot be reached in another way. Even with a just outcome, however, the concept loses its coherence, perhaps irrevocably, because we can no longer know what set of considerations is relevant for invoking it. This loss of coherence has already affected the development of privacy law. *See pp. 438-40 infra.*

48. Warren & Brandeis, *supra* note 38, never equated the right to privacy with the right to be let alone; the article implied that the right to privacy is a special case of the latter. *Id.* at 195. The notion of a right “to be let alone” was first advanced in T. COOLEY, *LAW OF TORTS* 29 (2d ed. 1888).

covering almost any conceivable complaint anyone could ever make.<sup>49</sup> 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 of the obvious examples.

For similar reasons, we must reject Edward Bloustein's suggestion that the coherence of privacy lies in the fact that all invasions are violations of human dignity.<sup>50</sup> We may well be concerned with invasions of privacy, at least in part, because they are violations of dignity.<sup>51</sup> But there are ways to offend dignity and personality that have nothing to do with privacy. Having to beg or sell one's body in order to survive are serious affronts to dignity, but do not appear to involve loss of privacy.<sup>52</sup>

To speak in privacy terms about claims for noninterference by the state in personal decisions is similar to identifying privacy with "being let alone." There are two problems with this tendency. The first is that the typical privacy claim is not a claim for noninterference by the state at all. It is a claim for state interference in the form of legal protection against other individuals, and this is obscured when privacy is discussed in terms of noninterference with personal decisions.<sup>53</sup> The second problem is that this conception excludes from the realm of privacy all claims that have nothing to do with highly personal decisions, such as an individual's unwillingness to have a file in a central data-bank.<sup>54</sup> Moreover, identifying privacy as noninterference with private action, often in order to avoid an explicit return to "substantive due process,"<sup>55</sup> may obscure the nature of the legal decision and

49. See W. PROSSER, *supra* note 2, at 804 (only characteristic all privacy cases share is right to be let alone). This is not true of only explicit privacy cases, however. Actions for assault, tort recovery, or challenges to business regulation can all be considered assertions of the "right to be let alone." See Thomson, *supra* note 6, at 295. Requests for the government to take positive action may be the only claims that cannot be covered under this label; in a contract action, for example, the claim in effect is that the plaintiff should not be left alone to his own devices.

50. See Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964).

51. See pp. 444-56 *infra* (reasons to protect against losses of privacy).

52. For a similar critique of Bloustein, see *Concept*, *supra* note 20, at 51-53.

53. See MacCormick, *A Note Upon Privacy*, 89 LAW Q. REV. 23, 25-26 (1973).

54. But cf. Gerety, *supra* note 18, at 286-88 (effort to explain why files in data banks are related to intimacy, in order to justify seeing them as involving privacy, defined as control over intimate decisions). In fact, this conception of privacy has already created problems in the interpretation of the privacy exception to the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C) (1976). See Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329, 351-56 (1979); Kronman, *The Privacy Exemption to the Freedom of Information Act* (forthcoming in J. LEGAL STUD. (1980)).

55. See, e.g., Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965) (reasons that led Court to base *Griswold v. Connecticut*, 381 U.S. 479 (1965), on

## Privacy

draw attention away from important considerations.<sup>56</sup> The limit of state interference with individual action is an important question that has been with us for centuries. The usual terminology for dealing with this question is that of "liberty of action." It may well be that some cases pose a stronger claim for noninterference than others, and that the intimate nature of certain decisions affects these limits. This does not justify naming this set of concerns "privacy," however. A better way to deal with these issues may be to treat them as involving questions of liberty, in which enforcement may raise difficult privacy issues.<sup>57</sup>

Noxious smells and other nuisances are described as problems of privacy because of an analogy with intrusion. Outside forces that enter private zones seem similar to invasions of privacy. There are no good reasons, however, to expect any similarity between intrusive smells or noises and modes of acquiring information about or access to an individual.<sup>58</sup>

Finally, some types of commercial exploitation are grouped under privacy primarily because of legal history: the first cases giving a remedy for unauthorized use of a name or picture, sometimes described

right to privacy); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 937-43 (1973) (criticizing use of privacy doctrine in abortion cases as misguided effort to avoid discredited "substantive due process" doctrine).

56. See, e.g., *Autonomy*, *supra* note 20, at 180-81 (danger that corruption of concepts of privacy will have dire consequences); Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1426-32 (1974). The prediction that privacy would be used to obscure questions of liberty came true in *People v. Privitera*, 23 Cal. 3d 697, 591 P.2d 919, 153 Cal. Rptr. 431 (1979) (prohibition of laetrile treatments does not violate privacy rights of cancer patients or doctors). The *Privitera* court's conclusion seems correct as far as it goes, but it is arguable that privacy issues were not involved in the case at all. The question was not whether decisions to use laetrile were "personal," but whether the state had a sufficient interest to justify prohibition of a drug that was not proven dangerous. The court's conclusion that privacy was not involved made it oblivious to the liberty and paternalism issues of the case.

57. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965); P. DEVLIN, THE ENFORCEMENT OF MORALS 1-25 (1968).

58. See, e.g., *Van den Haag*, *supra* note 37, at 152-53, 166-67 (privacy includes "intrusion" by mail, noise, and smells); *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting) (music, news, and propaganda played in transit system buses violated privacy rights of "captive audience"). It seems likely, however, that Justice Douglas's notion of privacy relates more closely to liberty of choice; the Court's opinion held that privacy was not involved because buses are public places. *Id.* at 464-65.

The problem of unsolicited mail also raises few if any privacy issues. The sender has acquired the name and address of the recipient, but this may be done through the telephone directory and thus the loss of privacy appears negligible. The sale of mailing lists is more troublesome. Professor Posner in *Privacy*, *supra* note 8, at 411, concludes that the economics of the situation justifies such sales without compensation for the recipients, but ignores the possible desire of individuals to be removed from mailing lists. But see PRIVACY PROTECTION STUDY COMM'N, *supra* note 5, at 125-54.

as invasions of privacy,<sup>59</sup> usually involved commercial exploitation.<sup>60</sup> The essence of privacy is not freedom from commercial exploitation, however. Privacy can be invaded in ways that have nothing to do with such exploitation, and there are many forms of exploitation that do not involve privacy even under the broadest conception.<sup>61</sup> The use of privacy as a label for protection against some forms of commercial exploitation is another unfortunate illustration of the confusions that will inevitably arise if care is not taken to follow an orderly conceptual scheme.<sup>62</sup>

### B. *The Functions of Privacy*

In any attempt to define the scope of desirable legal protection of privacy, we move beyond the neutral concept of "loss of privacy," and seek to describe the positive concept that identifies those aspects of privacy that are of value. Identifying the positive functions of privacy is not an easy task. We start from the obvious fact that both perfect privacy and total loss of privacy are undesirable. Individuals must be in some intermediate state—a balance between privacy and interaction—in order to maintain human relations, develop their capacities and sensibilities, create and grow, and even to survive. Privacy thus cannot be said to be a value in the sense that the more people have of it, the better. In fact, the opposite may be true.<sup>63</sup> In any event, my purpose

59. See, e.g., Prosser, *supra* note 6, at 401-07. For the development of the right to privacy and the nature of the first cases, see W. PROSSER, *supra* note 2, at 802-04; Dickler, *supra* note 6, at 448-52. Dickler's article was the first scholarly attempt to "redefine" the right to privacy, noting that the cases could be grouped under three labels (trespass, defamation, unfair trade practices). *Id.* at 435.

60. See, e.g., Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905). As Edward Bloustein argues, there is an element of loss of privacy in at least some of these cases. Advertisements may attract attention even when the subjects are anonymous. See Bloustein, *supra* note 50, at 985-91.

61. For example, individuals may be commercially exploited if they are compensated for their services at rates below the market price, but this does not seem to involve loss of privacy. Similarly, governmental wiretapping is an obvious example of an invasion of privacy that has not a hint of commercial exploitation.

62. A number of these cases have no relation to privacy whatsoever; the essence of the complaint is not that the plaintiff wants to prevent the use of his identifying features, but simply that he wants to be paid for such use. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Gautier v. Pro-Football, Inc.*, 278 A.D. 431, 106 N.Y.S.2d 553 (1951), *aff'd*, 304 N.Y. 354, 107 N.E.2d 485 (1952). In such cases, the doctrine of privacy is completely inappropriate, as noted in Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954).

63. Some critics of contemporary society frequently complain that we suffer from too much privacy, that we exalt the "private realm" and neglect the public aspects of life, and that as a result individuals are alienated, lonely, and scared. See, e.g., H. ARENDT, THE HUMAN CONDITION 23-73 (1958); Arndt, *The Cult of Privacy*, 21 AUSTL. Q., Sept. 1979, at 68, 70-71 (1949). Other social critics emphasize the threat to privacy posed by modern society. See, e.g., V. PACKARD, THE NAKED SOCIETY (1964). Indeed, much of the privacy

## Privacy

here is not to determine the proper balance between privacy and interaction; I want only to identify the positive functions that privacy has in our lives. From them we can derive the limits of the value of privacy, and then this value can be balanced against others.

The best way in which to understand the value of privacy is to examine its functions. This approach is fraught with difficulties, however. These justifications for privacy are instrumental, in the sense that they point out how privacy relates to other goals. The strength of instrumental justifications depends on the extent to which other goals promoted by privacy are considered important, and on the extent to which the relationship between the two is established. In most cases, the link between the enjoyment of privacy and other goals is at least partly empirical, and thus this approach raises all the familiar problems of social science methodology.

Two possible ways to avoid these difficulties should be discussed before I proceed further. One approach rests the desirability of privacy on a want-satisfaction basis, and the other argues that privacy is an ultimate value. The want-satisfaction argument posits the desirability of satisfying wishes and thus provides a reason to protect all wishes to have privacy.<sup>64</sup> It does not require empirical links between privacy and other goals. Moreover, the notion that choice should be respected is almost universally accepted as a starting point for practical reasoning.<sup>65</sup> The want-satisfaction argument cannot carry us very far, however. It does not explain why we should prefer X's wish to maintain his privacy against Y's wish to pry or acquire information. Without explaining why wishes for privacy are more important than wishes to invade it, the want-satisfaction principle alone cannot support the desirability of privacy. Indeed, some wishes to have privacy do not enjoy even *prima facie* validity. The criminal needs privacy to complete his offense undetected, the con artist needs it to manipulate his victim; we would not find the mere fact that they wish to have privacy a good reason for

literature seems to share the assumption that additional legal protection is needed. Taken together, these two sets of complaints suggest that something is wrong with the contemporary balance between privacy and interaction. Contributions remain to be made to this critical literature.

64. See, e.g., Beardsley, *supra* note 19, at 58 (principle that invasions of privacy are wrong derived from general principle that choice should be respected); Benn, *supra* note 27, at 8-9 (general principle of respect for persons, including principle of respect for their choices, explains our objection to invasions of privacy). To some extent, Benn's discussion goes beyond the want-satisfaction argument when he suggests that there is something especially disrespectful in certain invasions of privacy. *Id.* at 10-12. For a general discussion of want-satisfaction arguments, see Gavison, *supra* note 14.

65. See, e.g., B. BARRY, POLITICAL ARGUMENT 38-43 (1965) (nature of want-regarding justifications and their importance in politics).

protecting it. The want-satisfaction principle needs a supplement that will identify legitimate reasons for which people want and need privacy. This is the task undertaken by an instrumental inquiry. These reasons will identify the cases in which wishes to have privacy should override wishes to invade it. They will also explain why in some cases we say that people need privacy even though they have not chosen it.<sup>66</sup> Thus, these instrumentalist reasons will explain the distinctiveness of privacy.

The attractiveness of the argument that privacy is an ultimate value lies in the intuitive feeling that only ultimate values are truly important, and in the fact that claims that a value is ultimate are not vulnerable to the empirical challenges that can be made to functional analyses.<sup>67</sup> But these claims also obscure the specific functions of privacy. They prevent any discussion with people who do not share the intuitive belief in the importance of privacy. Given the current amount of skeptical commentary, such claims are bound to raise more doubts than convictions about the importance and distinctiveness of privacy.

Thus it appears that we cannot avoid a functional analysis. Such an analysis presents an enormous task, for the values served by privacy are many and diverse. They include a healthy, liberal, democratic, and pluralistic society; individual autonomy; mental health; creativity; and the capacity to form and maintain meaningful relations with others. These goals suffer from the same conceptual ambiguities that we have described for privacy, which makes it difficult to formulate questions for empirical research and very easy to miss the relevant questions. More important, the empirical data is not only scant, it is often double-edged. The evaluation of links between privacy and other values must therefore be extremely tentative. Nevertheless, much can be gained by identifying and examining instrumental arguments for privacy; this is

66. This is true because we can judge some of the effects of loss of privacy as bad, even if the individual has chosen that loss. An obvious example is the cheapening effect of life in the limelight. Public life, especially in a publication-oriented culture, involves a serious risk that individuals will receive almost constant publicity. Even though a person is insensitive to his own need for privacy, he may nonetheless need it.

67. See, e.g., Bloustein, *Privacy is Dear at Any Price: A Response to Professor Posner's Economic Theory*, 12 GA. L. REV. 429, 442 (1978); Professor Fried in *Privacy*, *supra* note 19, at 476-78. Both writers stress that the claim of ultimacy strengthens the case for privacy by freeing it from links to other values. At the same time, both conclude by providing justifications that are at least partly instrumental. *Id.* at 478 (trust, love, friendship); Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?* 46 TEX. L. REV. 611, 618-19 (1968) (dignity, individuality, inviolate personality). Professor Fried's current position is unclear, however. See Fried, *Privacy: Economics and Ethics—A Comment on Posner*, 12 GA. L. REV. 423, 426 (1978) ("I am prepared to grant both Posner's and Thomson's attack upon the view which I stated earlier.")

## Privacy

the indispensable starting point for any attempt to make sense of our concern with privacy, and to expose this concern to critical examination and evaluation.

It is helpful to start by seeking to identify those features of human life that would be impossible—or highly unlikely—without some privacy. Total lack of privacy is full and immediate access, full and immediate knowledge, and constant observation of an individual. In such a state, there would be no private thoughts, no private places, no private parts. Everything an individual did and thought would immediately become known to others.

There is something comforting and efficient about total absence of privacy for all.<sup>68</sup> A person could identify his enemies, anticipate dangers stemming from other people, and make sure he was not cheated or manipulated. Criminality would cease, for detection would be certain, frustration probable, and punishment sure. The world would be safer, and as a result, the time and resources now spent on trying to protect ourselves against human dangers and misrepresentations could be directed to other things.

This comfort is fundamentally misleading, however. Some human activities only make sense if there is some privacy. Plots and intrigues may disappear, but with them would go our private diaries, intimate confessions, and surprises. We would probably try hard to suppress our daydreams and fantasies once others had access to them. We would try to erase from our minds everything we would not be willing to publish, and we would try not to do anything that would make us likely to be feared, ridiculed, or harmed. There is a terrible flatness in the person who could succeed in these attempts. We do not choose against total lack of privacy only because we cannot attain it, but because its price seems much too high.<sup>69</sup>

In any event, total lack of privacy is unrealistic. Current levels of privacy are better in some ways, because we all have some privacy that

68. The notion of an ever-present, omniscient God exhibits to some extent a willingness to accept, in some context, life with a total lack of privacy. These features of God explain both the comfort and the regulatory force of religious belief.

69. See, e.g., Bloustein, *supra* note 50, at 1003:

The 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. Such an individual merges with the mass. 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.

For a similar analysis, see Bazelon, *Probing Privacy*, 12 GONZ. L. REV. 587, 592 (1977).

cannot easily be taken from us.<sup>70</sup> The current state is also worse in some ways, because enjoyment of privacy is not equally distributed and some people have more security and power as a result. The need to protect privacy thus stems from two kinds of concern. First, in some areas we all tend to have insufficient amounts of privacy. Second, unequal distribution of privacy may lead to manipulation, deception, and threats to autonomy and democracy.<sup>71</sup>

Two clusters of concerns are relevant here. The first relates to our notion of the individual, and the kinds of actions we think people should be allowed to take in order to become fully realized. To this cluster belong the arguments linking privacy to mental health, autonomy, growth, creativity, and the capacity to form and create meaningful human relations. The second cluster relates to the type of society we want. First, we want a society that will not hinder individual attainment of the goals mentioned above. For this, society has to be liberal and pluralistic. In addition, we link a concern for privacy to our concept of democracy.

Inevitably, the discussion of functions that follows is sketchy and schematic. My purpose is to point out the many contexts in which privacy may operate, not to present full and conclusive arguments.

### 1. *Privacy and the Individual*

Functional arguments depend on a showing that privacy is linked to the promotion of something else that is accepted as desirable. In order to speak about individual goals, we must have a sense of what individuals are, and what they can and should strive to become. We do not have any one such picture, of course, and certainly none that is universally accepted. Nonetheless, privacy may be linked to goals such as creativity, growth, autonomy, and mental health that are accepted

70. The contents of our thoughts and consciousness, now relatively immune from observation and forced disclosure, may not always be free from discovery. Lie detectors are only one kind of technological development that could threaten this privacy. See, e.g., Note, *People v. Barbara: The Admissibility of Polygraph Test Results in Support of a Motion for New Trial*, 1978 DET. C. L. REV. 347; Note, *The Polygraph and Pre-Employment Screening*, 13 Hous. L. Rev. 551 (1976). It is this sense of privacy that George Fletcher uses when he argues that the rule that people cannot be punished for thoughts alone serves to protect privacy. Fletcher, *Legality as Privacy*, in LIBERTY AND THE RULE OF LAW 182-207 (R. Cunningham ed. 1979).

71. It is arguable that only the first concern necessitates legal protection of privacy, whereas the second will be satisfied by any equalization of privacy no matter where the balance is drawn. It is possible, however, that very low levels of privacy are inconsistent with an autonomous and democratic society, even assuming that privacy is equally distributed. See pp. 451-56 *infra*. The dangers of unequal distribution of knowledge are dramatically described in G. ORWELL, 1984 (1949).

## Privacy

as desirable by almost all such theories, yet in ways that are not dictated by any single theory. This may give functional arguments for privacy an eclectic appearance, but it may also indicate the strength of these arguments. It appears that privacy is central to the attainment of individual goals under every theory of the individual that has ever captured man's imagination.<sup>72</sup> It also seems that concern about privacy is evidenced in all societies, even those with few opportunities for physical privacy.<sup>73</sup> Because we have no single theory about the nature of the individual and the way in which individuals relate to others, however, it should be recognized that the way in which we perceive privacy contributing to individual goals will itself depend on the theory of the individual that we select.

In the following discussion, I will note where a difference in perspective may dictate different approaches or conclusions. These different perspectives relate to theories of human growth, development, and personality. It is easy to see that different answers to questions such as the following may yield different arguments for privacy: Is there a "real self" that can be known?<sup>74</sup> If there is, is it coherent and always consistent? If not, can we identify one that is better, and that we should strive to realize? Are human relations something essential, or a mere luxury? Should they ideally be based on full disclosure and total frankness? Or is this a misguided ideal, not only a practical impossibility?<sup>75</sup>

### a. *Contextual Arguments*

Some arguments for privacy do not link it empirically with other goals. These arguments contend that privacy, by limiting access, creates the necessary context for other activities that we deem essential. Typical of these contextual arguments is the one advanced by Jeffrey Reiman that privacy is what enables development of individuality by allowing individuals to distinguish between their own thoughts and

72. There are advantages to working within a single such theory; the conceptual scheme is clear, and may provide a richness of association. On the other hand, because such theories are so different in conceptual scheme and coverage of the human condition, it would require enormous efforts to translate between them. Moreover, adherents of different theories tend to resist other theories as inadequate. It thus seems preferable not to choose a single framework of discussion.

73. See, e.g., Roberts & Gregor, *supra* note 34, at 199-225.

74. Many therapeutic techniques stress the identification of the "real self," explaining deviations from it as inhibitions or repressions. It only makes sense to speak of self-realization and identification if there is a way to separate this self from behavior, which is affected by rationalizations, sublimations, and social controls.

75. The ideal of frankness as the only basis for human relations has been practiced by some participants in the encounter-group movement. See, e.g., W. SCHUTZ, *Joy* (1969). For a criticism of this ideal of total frankness, see E. SCHUR, *THE AWARENESS TRAP* (1976); J. Silber, *Masks and Fig Leaves*, in *NOMOS*, *supra* note 1, at 226, 228-31.

feelings and those of others.<sup>76</sup> Similarly, Charles Fried advanced a contextual argument that privacy is necessary for the development of trust, love, and friendship.<sup>77</sup> Contextual arguments are instrumental, in that they relate privacy to another goal. They are strengthened by the fact that the link between privacy and the other goal is also conceptual.

A similar argument can be made about the relationship between privacy and intimacy. Here too, it is not simply the case that intimacy is more likely with increasing amounts of privacy. Being intimate in public is almost a contradiction in terms.<sup>78</sup> Such contextual arguments highlight an important goal for privacy, similar to that indicated by examining the possible consequences of a total loss of privacy. We can now move to a detailed examination of more specific functions of privacy.<sup>79</sup>

### b. *Freedom from Physical Access*

By restricting physical access to an individual, privacy insulates that individual from distraction and from the inhibitive effects that arise

76. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHILOSOPHY & PUB. AFF. 26, 31-36 (1977).

77. *Privacy*, *supra* note 19, at 484. Fried suggests that human relations are determined by personal information shared with a partner but no one else. Privacy, which permits individual control over this information, provides the "moral capital" we spend in love and friendship. *Id.* at 484-85. It is not clear from Fried's analysis, however, whether it is useful in assessing the importance of a relationship to examine the amount of personal information shared by the parties. For example, two chess players preparing for a world championship may spend a great deal of time and money in order to acquire a vast amount of information about each other, but we would not say that they had an intimate relationship. Moreover, Fried's argument invokes the weak sense of "control" over information—control over the decision to disclose it, rather than control over the amount of information others actually have. See pp. 426-28 *supra* (distinction between two notions of control). Fried's argument at best supports only the right not to disclose personal information, which is usually not threatened anyway. It does not support arguments against gossip, for example. See *id.* at 490. Finally, it may be misleading to suggest that information about ourselves is capital that we spend to create love and friendship, because such information is always being generated and is thus inexhaustible. See Reiman, *supra* note 76, at 31-36 (critique of Fried's argument); Rachels, *Why Privacy is Important*, 4 PHILOSOPHY & PUB. AFF. 323, 325 (1975).

78. The need for privacy is sufficiently strong, however, that even individuals in "total institutions" develop ways to achieve some intimacy despite near-constant surveillance. See E. GOFFMAN, *ASYLUMS* 173, 223-38 (1961).

79. There are several ways that one can organize functional arguments for privacy. One obvious approach is to focus on the goals to which privacy is allegedly linked. Despite the clear attractions of this approach, the functional analysis I employ is structured around the ways in which privacy functions to promote goals, rather than on the goals themselves. Thus the contribution of privacy to autonomy or human relations, which is achieved in various ways, is mentioned in a number of different places. This organization is illuminating in identifying the ways in which privacy operates, which in turn suggests both the possibilities and the limits of regulation. The repetition in goals is a cost of this approach, but it saves repetition of functions. Furthermore, this structure points out clearly one of the important aspects of privacy: the way in which arguments for privacy are related to its function as a promoter of liberty.

## Privacy

from close physical proximity with another individual. Freedom from distraction is essential for all human activities that require concentration, such as learning, writing, and all forms of creativity. Although writing and creativity may be considered luxuries, learning—which includes not only acquiring information and basic skills but also the development of mental capacities and moral judgment—is something that we all must do.<sup>80</sup> Learning, in turn, affects human growth, autonomy, and mental health.

Restricting physical access also permits an individual to relax. Even casual observation has an inhibitive effect on most individuals that makes them more formal and uneasy.<sup>81</sup> Is relaxation important? The answer depends partially upon one's theory of the individual. If we believe in one coherent "core" personality, we may feel that people should reflect that personality at all times. It could be argued that relaxation is unimportant—or undesirable—because it signals a discrepancy between the person in public and in private. The importance that all of us place on relaxation suggests that this theory is wrong, however, or at least overstated. Whatever the theory, people seem to need opportunities to relax, and this may link privacy to the ability of individuals to maintain their mental health. Furthermore, freedom from access contributes to the individual by permitting intimacy. Not all relationships are intimate, but those that are tend to be the most valued. Relaxation and intimacy together are essential for many kinds of human relations, including sexual ones. Privacy in the sense of freedom from physical access is thus not only important for individuals by themselves, but also as a necessary shield for intimate relations.<sup>82</sup>

Because physical access is a major way to acquire information, the power to limit it is also the power to limit such knowledge. Knowledge and access are not necessarily related, however. Knowledge is only one of the possible consequences of access, a subject to which we now turn.

80. The role of privacy in learning is underscored by the fact that one of the features of underprivileged families considered responsible for their children's failures in school is that most cannot provide the opportunity for privacy. See J. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY 298-302 (1966) (influence of student's background on educational achievement).

81. Relaxed behavior does not necessarily include undesirable conduct; most kinds of relaxation are not prohibited even though they are unlikely in public. See, e.g., J. BARTH, THE END OF THE ROAD 57-58 (1960) (character who thinks he is alone is observed behaving in ridiculous but not objectionable manner); Rachels, *supra* note 77, at 323-24 (analyzing this scene in privacy terms).

82. See, e.g., Bloustein, *Group Privacy: The Right to Huddle*, 8 RUT.-CAM. L.J. 219, 224-46 (1977).

### c. *Promoting Liberty of Action*

An important cluster of arguments for privacy builds on the way in which it severs the individual's conduct from knowledge of that conduct by others. Privacy thus prevents interference, pressures to conform, ridicule, punishment, unfavorable decisions, and other forms of hostile reaction. To the extent that privacy does this, it functions to promote liberty of action, removing the unpleasant consequences of certain actions and thus increasing the liberty to perform them.

This promotion of liberty of action links privacy to a variety of individual goals. It also raises a number of serious problems, both as to the causal link between privacy and other goals, and as to the desirability of this function.

*Freedom from censure and ridicule.* In addition to providing freedom from distractions and opportunities to concentrate, privacy also contributes to learning, creativity, and autonomy by insulating the individual against ridicule and censure at early stages of groping and experimentation. No one likes to fail, and learning requires trial and error, some practice of skills, some abortive first attempts before we are sufficiently pleased with our creation to subject it to public scrutiny. In the absence of privacy we would dare less, because all our early failures would be on record. We would only do what we thought we could do well. Public failures make us unlikely to try again.<sup>83</sup>

*Promoting mental health.* One argument linking privacy and mental health, made by Sidney Jourard,<sup>84</sup> suggests that individuals may become victims of mental illness because of pressures to conform to society's expectations. Strict obedience to all social standards is said inevitably to lead to inhibition, repression, alienation, symptoms of disease, and possible mental breakdown. On the other hand, disobedience may lead to sanctions. Ironically, the sanction for at least some deviations is a social declaration of insanity. By providing a refuge, privacy enables individuals to disobey in private and thus acquire the strength to obey in public.

Mental health is one of the least well-defined concepts in the litera-

83. For example, many pianists refuse to practice in the presence of others, and not simply to avoid distraction, inhibition, or self-consciousness. They practice alone so that they are the ones to decide when they are ready for an audience. It could be argued that privacy thus has its costs in terms of what the world learns about human achievement; some perfectionists are never sufficiently pleased with their creations, yet their work may be superior to much that is made public by others. Even if this were true, it does not prove that the lost masterpieces would have been created in the absence of privacy. Perfectionists are just as vulnerable to criticism as anybody else, perhaps even more so.

84. Jourard, *Some Psychological Aspects of Privacy*, 31 LAW & CONTEMP. PROB. 307, 309-11 (1966). A similar argument is made by Benn, *supra* note 27, at 24-25.

## Privacy

ture.<sup>85</sup> It appears that Professor Jourard's argument for privacy uses the term in a minimalistic sense: avoiding mental breakdown. Whether mental breakdown is always undesirable is questionable.<sup>86</sup> More serious problems are raised when we examine the link between mental health and privacy. Must chronic obedience always lead to mental breakdown? This is plausible if individuals obey social norms only because of social pressures and fear of sanctions, but this is not the case. Professor Jourard identifies a need for privacy that applies only to those who do not accept the social norms. The strength of his argument thus depends on the likelihood that people reject some norms of their society, and may be adequate only for extremely totalitarian societies. It will probably also depend on the nature of the norms and expectations that are not accepted. Moreover, even if pressures to conform to social norms contribute to mental breakdown, the opposite may also be true. It could be argued that too much permissiveness is at least as dangerous to mental health as too much conformity. One of the important functions of social norms is to give people the sense of belonging to a group defined by shared values. People are likely to lose their sanity in the absence of such norms and the sense of security they provide.<sup>87</sup> Nevertheless, some individuals in institutions do complain that the absence of privacy affects their mental state, and these complaints support Jourard's argument.<sup>88</sup>

*Promoting autonomy.* Autonomy is another value that is linked to the function of privacy in promoting liberty. Moral autonomy is the reflective and critical acceptance of social norms, with obedience based on an independent moral evaluation of their worth.<sup>89</sup> Autonomy requires the capacity to make an independent moral judgment, the willingness to exercise it, and the courage to act on the results of this exercise even when the judgment is not a popular one.

85. See B. WOOTON, SOCIAL SCIENCE AND SOCIAL PATHOLOGY 210-21 (1959) (definitions of "mental health"). It is notable that this concept has been used in ways that include all the other individual goals mentioned above. For example, some see autonomy as a sign of mental health; others see the incapacity to form and maintain human relations as a sign of mental illness.

86. For privacy's contribution to be desirable, we must value X. Is the avoidance of mental breakdown always desirable? Would we prefer a person who could adjust to any society, or one who would break down if he had to cope with the requirements of life in a Nazi regime?

87. See E. DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY (1951) (mental breakdown may be affected by absence of social cohesiveness).

88. See E. GOFFMAN, *supra* note 78, at 4, 23-25 (individuals are "mortified" and "violated" in mental hospitals).

89. See D. RIESMAN, FACES IN THE CROWD 736-41 (1952) (relationship between autonomy and nature of society); Benn, *supra* note 27, at 24-26 (argument for privacy in terms of autonomy).

We do not know what makes individuals autonomous, but it is probably easier to be autonomous in an open society committed to pluralism, toleration, and encouragement of independent judgment rather than blind submissiveness. No matter how open a society may be, however, there is a danger that behavior that deviates from norms will result in harsh sanctions. The prospect of this hostile reaction has an inhibitive effect. Privacy is needed to enable the individual to deliberate and establish his opinions. If public reaction seems likely to be unfavorable, privacy may permit an individual to express his judgments to a group of like-minded people. After a period of germination, such individuals may be more willing to declare their unpopular views in public.

It might be argued that history belies this argument for privacy in terms of autonomy: societies much more totalitarian than ours have always had some autonomous individuals, so that the lack of privacy does not mean the end of autonomy. Even if we grant that privacy may not be a necessary condition for autonomy for all, however, it is enough to justify it as a value that most people may require it. We are not all giants, and societies should enable all, not only the exceptional, to seek moral autonomy.<sup>90</sup>

*Promoting human relations.* Privacy also functions to promote liberty in ways that enhance the capacity of individuals to create and maintain human relations of different intensities. Privacy enables individuals to establish a plurality of roles and presentations to the world. This control over "editing" one's self is crucial, for it is through the images of others that human relations are created and maintained.

Privacy is also helpful in enabling individuals to continue relationships, especially those highest in one's emotional hierarchy, without denying one's inner thoughts, doubts, or wishes that the other partner cannot accept. This argument for privacy is true irrespective of whether we deem total disclosure to be an ideal in such relations. It is built on the belief that individuals, for reasons that they themselves do not justify, cannot emotionally accept conditions that seem threatening to them. Privacy enables partners to such a relationship to continue it, while feeling free to endorse those feelings in private.<sup>91</sup>

90. Professor Posner suggests an argument of this sort in *Privacy*, *supra* note 8, at 407. Such an argument could be made about creativity and human relations as well as autonomy. See Bloustein, *supra* note 50, at 1006.

91. See *Privacy*, *supra* note 19, at 485; Sheehy, *Can Couples Survive?* NEW YORK MAGAZINE, Feb. 19, 1973, at 35 ("Privacy is disallowed as being disloyal. But if the couple wants intimacy, both partners need to refresh themselves with privacy. That implies also being allowed to withdraw without guilt.")

## Privacy

Each of these arguments based on privacy's promotion of liberty shares a common ground: privacy permits individuals to do what they would not do without it for fear of an unpleasant or hostile reaction from others. This reaction may be anything from legal punishment or compulsory commitment to threats to dissolve an important relationship. The question arises, then, whether it is appropriate for privacy to permit individuals to escape responsibility for their actions, wishes, and opinions.

It may be argued that we have rules because we believe that breaches of them are undesirable, and we impose social sanctions to discourage undesirable conduct. People are entitled to a truthful presentation and a reasonable consideration of their expectations by those with whom they interact. Privacy frustrates these mechanisms for regulation and education; to let it do so calls for some justification. In general, privacy will only be desirable when the liberty of action that it promotes is itself desirable, or at least permissible. It is illuminating to see when we seek to promote liberty directly, by changing social norms, and when we are willing to let privacy do the task.

Privacy is derived from liberty in the sense that we tend to allow privacy to the extent that its promotion of liberty is considered desirable. Learning, practicing, and creating require privacy, and this function is not problematic.<sup>92</sup> Similarly, because we usually believe that it is good for individuals to relax and to enjoy intimacy, we have no difficulty allowing the privacy necessary for these goals.

The liberty promoted by privacy also is not problematic in contexts in which we believe we should have few or no norms; privacy will be needed in such cases because some individuals will not share this belief, will lack the strength of their convictions, or be emotionally unable to accept what they would like to do. Good examples of such cases are ones involving freedom of expression, racial tolerance, and the functioning of close and intimate relations. The existence of official rules granting immunity from regulation, or even imposing duties of nondiscrimination, does not guarantee the absence of social forces calling for conformity or prejudice.<sup>93</sup> A spouse may understand and even support a partner's need to fantasize or to have other close relations, but may still find knowing about them difficult to accept. In such situations, respect for privacy is a way to force ourselves to be as tolerant as we

92. We may, however, question privacy that promotes the learning of skills we consider dangerous, or the development of opinions we consider outrageous, such as opinions favoring bigotry or genocide.

93. See G. ALLPORT, THE NATURE OF PREJUDICE 326-39 (1954) (difficulty of making ourselves disregard known prejudices).

know we should be. We accept the need for privacy as an indication of the limits of human nature.

A related but distinct situation in which privacy is permitted is that in which we doubt the desirability of norms or expectations, or in which there is an obvious absence of consensus as to such desirability.<sup>94</sup> Treatment of homosexual conduct between consenting adults in private seems to be a typical case of this sort.<sup>95</sup> Another context in which we sometimes allow privacy to function in this way is when privacy would promote the liberty of individuals not to disclose some parts of their past, in the interest of rehabilitation or as a necessary protection against prejudice and irrationality.<sup>96</sup>

Privacy works in all these cases to ameliorate tensions between personal preferences and social norms by leading to nonenforcement of some standards.<sup>97</sup> But is this function desirable? When the liberty promoted is desirable, why not attack the norms directly? When it is not, why allow individuals to do in private what we would have good reasons for not wanting them to do at all?

Conceptually, this is a strong argument against privacy, especially because privacy perpetuates the very problems it helps to ease. With mental health, autonomy, and human relations, the mitigation of surface tensions may reduce incentives to face the difficulty and deal with it directly. When privacy lets people act privately in ways that would have unpleasant consequences if done in public, this may obscure the urgency of the need to question the public regulation itself. If homosexuals are not prosecuted, there is no need to decide whether such conduct between consenting adults in private can constitutionally be

94. The distinction between the two types of cases may be illusory, however, if our incapacity to act on our convictions simply indicates doubt in our judgment.

95. Some states still have laws against homosexual relations between consenting adults, see Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613, 1613-14 (1974), and the Supreme Court has refused to declare them unconstitutional, e.g., *Doe v. Commonwealth*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976); see *Richards, supra* note 3, at 1319-20. These laws, however, are rarely if ever enforced against consenting adults; the decision not to enforce these laws is thus a decision to let the privacy of the relationship protect the participants from legal sanctions.

96. See *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931) (revelation that woman was former prostitute and defendant in murder trial); *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (publication of prior record); cf. *Privacy, supra* note 8, at 415-16 (criticizing *Melvin*); *Epstein, supra* note 8, at 466-74 (deliberate concealment of information as misrepresentation).

97. Alan Westin sees this as one of the major functions of privacy. A. WESTIN, *supra* note 1, at 23-51. It is important to note that this function would not be as strong in cases in which the level of legal enforcement was high. See note 98 *infra*.

## Privacy

prohibited.<sup>98</sup> If people can keep their independent judgments known only to a group of like-minded individuals, there is no need to deal with the problem of regulating hostile reactions by others. It is easier, at least in the shortrun and certainly for the person making the decision, to conceal actions and thoughts that may threaten an important relationship. Thus, privacy reduces our incentive to deal with our problems.

The situation is usually much more complex, however, and then the use of privacy is justified. First, there are important limits on our capacity to change positive morality,<sup>99</sup> and thus to affect social pressures to conform. This may even cause an inability to change institutional norms. When this is the case, the absence of privacy may mean total destruction of the lives of individuals condemned by norms with only questionable benefit to society. If the chance to achieve change in a particular case is small, it seems heartless and naive to argue against the use of privacy.<sup>100</sup> Although legal and social changes are unlikely until individuals are willing to put themselves on the line, this course of action should not be forced on any one. If an individual decides that the only way he can maintain his sanity is to choose private deviance rather than public disobedience, that should be his decision. Similarly, if an individual prefers to present a public conformity rather than unconventional autonomy, that is his choice. The least society can do in such cases is respect such a choice.

Ultimately, our willingness to allow privacy to operate in this way must be the outcome of our judgment as to the proper scope of liberty individuals should have, and our assessment of the need to help ourselves and others against the limited altruism and rationality of individuals. Assume that an individual has a feature he knows others may find objectionable—that he is a homosexual, for instance, or a communist, or committed a long-past criminal offense—but that feature is

98. The fact that such laws are not enforced, *see note 95 infra*, may explain why the Supreme Court intervened in the more morally complicated issue of abortion, *Roe v. Wade*, 410 U.S. 113, 116 (1973), but not in that of consensual homosexual conduct. A ruling on homosexuality would have purely symbolic effect, whereas judicial noninterference in abortion issues would have perpetuated a situation in which safe abortions were difficult to obtain. Cf. *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (refusing to strike down statute prohibiting sale of contraceptives because state did not enforce law).

99. *See H.L.A. HART, THE CONCEPT OF LAW* 171-73 (1961) (distinction between law and morality is that law may be deliberately and consciously changed, whereas morality can not).

100. To take a famous historical example, Socrates' trial did not make the case for the principle of academic freedom to the Athenians. Thus, his public declaration that he would continue teaching was heroic but could not have been demanded of him.

irrelevant in the context of a particular situation.<sup>101</sup> Should we support his wish to conceal these facts? Richard Posner<sup>102</sup> and Richard Epstein<sup>103</sup> argue that we should not. This is an understandable argument, but an extremely harsh one. Ideally, it would be preferable if we could all disregard prejudices and irrelevancies. It is clear, however, that we cannot. Given this fact, it may be best to let one's ignorance mitigate one's prejudice. There is even more to it than this. Posner and Epstein imply that what is behind the wish to have privacy in such situations is the wish to manipulate and cheat, and to deprive another of the opportunity to make an informed decision. But we always give only partial descriptions of ourselves, and no one expects anything else. The question is not whether we should edit, but how and by whom the editing should be done.<sup>104</sup> Here, I assert, there should be a presumption in favor of the individual concerned.

It is here that we return to contextual arguments and to the specter of a total lack of privacy. To have different individuals we must have a commitment to some liberty—the liberty to be different. But differences are known to be threatening, to cause hate and fear and prejudice.<sup>105</sup> These aspects of social life should not be overlooked, and oversimplified claims of manipulation should not be allowed to obscure them.

The only case in which this is less true is that of human relationships, where the equality between the parties is stronger and the essence of the relationship is voluntary and intimate. A unilateral decision by one of the parties not to disclose in order to maintain the relationship is of questionable merit. The individual is likely to choose what is easier for him, rather than for both. His decision denies the other

101. The notion of relevance is crucial, of course. There may be a number of borderline cases, but some will fall neatly in one of the categories. The fact that X is sterile is clearly relevant for Y, who wants children and considers marrying X. The fact that X prefers to have sex with people of his own gender does not seem relevant, however, to his qualifications as a clerk or even as a teacher.

102. *Privacy*, *supra* note 8, at 394-403; *Secrecy*, *supra* note 8, at 11-17.

103. Epstein, *supra* note 8, at 466-74.

104. For example, we would have less sympathy for an employer who demanded a "yes or no" answer from his employee to the question of whether the employee had a criminal record or was a member of the Communist Party. Such an employer may draw unwarranted inferences if the employee has no opportunity to explain his answer. Professor Posner has suggested that any such "irrational" conduct by prejudiced employers will ultimately be corrected by the market, because the victimized employees will command below-average wages, and the unprejudiced employers who hire them will obtain a competitive advantage. *Secrecy*, *supra* note 8, at 12 (example of ex-convicts). This is beside the point, however, because in the interim the employee suffers from high emotional and economic costs (in the form of irrational stigma and lower wage rates).

105. See generally G. ALLPORT, *supra* note 93 (nature of prejudice).

## Privacy

party an understanding of the true relationship and the opportunity to decide whether to forgive, accommodate, or leave. Although we cannot rely on the altruism and willingness to forgive of employers or casual acquaintances, to deny a life partner the opportunity to make informed decisions may undermine the value of the relationship. This is another point at which our theories about human relations become relevant. The extent to which paternalistic protection should be a part of relationships between adults, and the forms such concern may appropriately take, are relevant in deciding this issue.

*Limiting exposure.* A further and distinct function of privacy is to enhance an individual's dignity, at least to the extent that dignity requires nonexposure. There is something undignified in exposure beyond the fact that the individual's choice of privacy has been frustrated.<sup>106</sup> A choice of privacy is in this sense distinct from a choice to interact. Rejection of the latter frustrates X's wish, but there is no additional necessary loss of dignity and selfhood. In exposure, there is. It is hard to know what kind of exposures are undignified, and the effect such unwanted exposures have on individuals. The answer probably depends on the culture and the individual concerned,<sup>107</sup> but this is nonetheless an important function of privacy.

### 2. *Privacy and Society*

We desire a society in which individuals can grow, maintain their mental health and autonomy, create and maintain human relations, and lead meaningful lives. The analysis above suggests that some privacy is necessary to enable the individual to do these things, and privacy may therefore both indicate the existence of and contribute to a more pluralistic, tolerant society. In the absence of consensus concerning many limitations of liberty, and in view of the limits on our capacity to encourage tolerance and acceptance and to overcome prejudice, privacy must be part of our commitment to individual freedom and to a society that is committed to the protection of such freedom.

Privacy is also essential to democratic government because it fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy. Part of the justification for majority rule and the right to vote is the assumption that individuals should participate in political decisions by forming judgments and expressing preferences. Thus, to the extent that privacy is important for autonomy, it is important for democracy as well.

106. See, e.g., Benn, *supra* note 27, at 6-7; Reiman, *supra* note 76, at 38-39.

107. See generally H. LYND, ON SHAME AND THE SEARCH FOR IDENTITY (1958).

This is true even though democracies are not necessarily liberal. A country might restrict certain activities, but it must allow some liberty of political action if it is to remain a democracy. This liberty requires privacy, for individuals must have the right to keep private their votes, their political discussions, and their associations if they are to be able to exercise their liberty to the fullest extent. Privacy is crucial to democracy in providing the opportunity for parties to work out their political positions, and to compromise with opposing factions, before subjecting their positions to public scrutiny. Denying the privacy necessary for these interactions would undermine the democratic process.<sup>108</sup>

Finally, it can be argued that respect for privacy will help a society attract talented individuals to public life. Persons interested in government service must consider the loss of virtually all claims and expectations of privacy in calculating the costs of running for public office. Respect for privacy might reduce those costs.<sup>109</sup>

## II. The Limits of Law

One of the advantages of this analysis is that it draws attention to—and explains—the fact that legal protection of privacy has always had, and will always have, serious limitations. In many cases, the law can-

108. Cf. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (First Amendment freedom of association includes privacy of political association in order to guarantee effective expression of political views). See generally A. WESTIN, *supra* note 1, at 23-51 (relation between privacy and democracy); Bazelon, *supra* note 69, at 591-94 (same).

109. See, e.g., Galella v. Onassis, 353 F. Supp. 196, 207-10 (S.D.N.Y. 1972), *aff'd and modified in part*, 487 F.2d 986 (2d Cir. 1973) (plaintiff was photographed at restaurants, clubs, theater, schools, funeral, and while shopping, walking down street, and riding bicycle); B. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979) (detailed account of working relationships of Supreme Court Justices). At the same time, it is important to note that restrictions on invasions of public figures' privacy may conflict with the First Amendment. See, e.g., T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970); Friedrich, *Secrecy versus Privacy: The Democratic Dilemma*, in NOMOS, *supra* note 1, at 105.

The constitutional right to privacy suffers from a split personality. On one hand, the Supreme Court has established a right that covers at least some tort actions. See note 3 *supra*. The right may include "the individual interest in avoiding disclosure of personal matters." Whalen v. Roe, 429 U.S. 589, 599 (1977). But see Paul v. Davis, 424 U.S. 693, 712-14 (1976) (state circulation of flyer publicizing plaintiff's arrest on shoplifting charges did not violate plaintiff's constitutional right to privacy). On the other hand, it has been suggested that First Amendment developments indicate that those aspects of privacy that conflict with the right to publish true information may be unconstitutional. The issue is far from closed. See Emerson, *supra* note 54, at 334-37; Comment, *First Amendment Limitations on Public Disclosure Actions*, 45 U. CHI. L. REV. 180 (1977). Some have gone so far as to suggest that the conflict between privacy and the First Amendment is illusory, because "privacy" is simply a conclusory word used by the courts. See Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1585-88 (1979).

## Privacy

not compensate for losses of privacy, and it has strong commitments to other ideals that must sometimes override the concern for privacy. Consequently, one cannot assume that court decisions protecting privacy reflect fully or adequately the perceived need for privacy in our lives.

Part of the reason for this inadequate reflection is that in many cases actions for such invasions are not initiated. The relative rarity of legal actions might be explained by expectations that such injuries are not covered by law, by the fact that many invasions of privacy are not perceived by victims, and by the feeling that legal remedies are inappropriate, in part because the initiation of legal action itself involves the additional loss of privacy. When these factors are forgotten, it is easy to conclude that privacy is not such an important value after all. This conclusion is mistaken, however, as the proposed analysis stresses. Understanding the difficulty of legal protection of privacy will help us resist the tendency to fall victim to this misperception.

It is obvious that privacy will have to give way, at times, to important interests in law enforcement, freedom of expression, research, and verification of data. The result is limits on the scope of legal protection of privacy. I shall concentrate on less obvious reasons why the scope of legal protection is an inadequate reflection of the importance of privacy.

To begin, there are many ways to invade an individual's privacy without his being aware of it. People usually know when they have been physically injured, when their belongings have been stolen, or when a contractual obligation has not been honored. It is more difficult to know when one's communications have been intercepted, when one is being observed or followed, or when others are reading one's dossier.<sup>110</sup> This absence of awareness is a serious problem in a legal system that relies primarily on complaints initiated by victims.<sup>111</sup> In

110. An interesting problem of this sort arises in the context of the disclosure exception to the Privacy Act of 1974, 5 U.S.C. § 552a(b) (1976), under which the guarantor of third parties' privacy interests is the government. If people request information about others, the individuals concerned are not notified, and information from files may be disclosed without their permission if the government does not decide to withhold it. See, e.g., Boyer, *Computerized Medical Records and the Right to Privacy: The Emerging Federal Response*, 25 BUFFALO L. REV. 37 (1975) (medical files). The courts are now beginning to examine these problems. E.g., Providence Journal Co. v. FBI, 460 F. Supp. 762, 767 (D.R.I. 1978) (standing under Privacy Act given to individual whose file was sought under Freedom of Information Act); Tax Reform Research Group v. IRS, 419 F. Supp. 415 (D.D.C. 1976) (ordering disclosure of officials involved in White House harassment of "enemies," but keeping targets' identities secret unless they express consent).

111. The problem may be aggravated by the fact that a major invader of privacy is the government, whose interest in exposing its own misconduct is always uncertain. See, e.g., Weidner, *Discovery Techniques and Police Surveillance*, 7 UCLA-ALASKA L. REV. 190 (1978).

some cases, victims learn of invasions of their privacy when information acquired about them is used in a public trial, as was the case with Daniel Ellsberg.<sup>112</sup> In most situations, however, there is no need to use the information publicly, and the victim will not be able to complain about the invasion simply because of his ignorance. The absence of complaints is thus no indication that invasions of privacy do not exist, or do not have undesirable consequences. Indeed, because deterrence depends at least partly on the probability of detection,<sup>113</sup> these problems of awareness may encourage such invasions.

Ironically, those invasions of privacy that pose no problem of detection, such as invasions through publication, have different features that make legal proceedings unattractive and thus unlikely for the prospective complainant. Legal actions are lengthy, expensive, and involve additional losses of privacy. In the usual case, plaintiffs do not wish to keep the essence of their action private. In a breach of contract suit, for example, the plaintiff may not seek publicity, but usually does not mind it. This is not true, however, for the victim of a loss of privacy. For him, a legal action will further publicize the very information he once sought to keep private, and will thus diminish the point of seeking vindication for the original loss.<sup>114</sup>

Moreover, for the genuine victim of a loss of privacy, damages and even injunctions are remedies of despair.<sup>115</sup> A broken relationship, exposure of a long-forgotten breach of standards, acute feelings of shame and degradation, cannot be undone through money damages. The only benefit may be a sense of vindication, and not all victims of invasions of privacy feel sufficiently strongly to seek such redress.

The limits of law in protecting privacy stem also from the law's commitment to interests that sometimes *require* losses of privacy, such as freedom of expression, interests in research, and the needs of law enforcement. In some of these cases, we would not even feel sympathy for

112. See N.Y. Times, April 28, 1973, at 1, col. 4 (reporting break-in to Ellsberg's psychiatrist's office).

113. See, e.g., Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 960-64 (1966) (risk of detection, apprehension, and conviction is of paramount importance to preventive effects of penal law).

114. A similar problem exists in defamation cases. In such cases, however, the plaintiff seeks a declaration that the publication was not true. Even the successful plaintiff in a privacy action has no guarantee of similar satisfaction. The trend in defamation law has reduced this difference. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 377 (1974) (White, J., dissenting) (trend began with *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

115. See Kalven, *supra* note 6, at 338-39 (suggesting that "privacy will recruit claimants inversely to the magnitude of the offense to privacy involved," and thus that law does not need a cause of action that exerts chilling effect on media but does not help worthy plaintiffs). Kalven also draws an analogy between actions for invasion of privacy and actions for breach of promise to marry. *Id.*

## Privacy

the complainant: the criminal does not need privacy for his autonomy, mental health, or human relations. In other situations, however, the injury is real but legal vindication is considered too costly. Victims realize these facts, and this in turn reduces the tendency to seek vindication through law.

Finally, perhaps the most serious limit of legal protection is suggested by the instrumentalist analysis of privacy above. Privacy is important in those areas in which we want a refuge from pressures to conform, where we seek freedom from inhibition, the freedom to explore, dare, and grope. Invasions of privacy are hurtful because they expose us; they may cause us to lose our self-respect, and thus our capacity to have meaningful relations with others. The law, as one of the most public mechanisms society has developed, is completely out of place in most of the contexts in which privacy is deemed valuable.

These factors indicate that it is neither an accident nor a deliberate denial of its value that the law at present does not protect privacy in many instances. There are simply limits to the law's effectiveness. On the other hand, this does not indicate that there is nothing distinct behind claims for privacy. Emphasis of this point is important, for we must resist the temptation to see privacy as adequately reflected in the law or in reductive accounts. This is also an important reason to seek an explicit commitment to privacy as part of the law.

### III. Privacy as a Legal Concept

My analysis has shown that privacy is a coherent and useful concept in the first two contexts: losses of privacy may be identified by reference to the central notion of accessibility, and the reasons for considering it desirable are sufficiently similar to justify adopting it as a value. Most reductionists do not deny these facts;<sup>116</sup> they assert, however, that privacy is not a useful *legal* concept because analysis of actual legal protection, and claims for protection, suggests that it is not and is not likely to be protected simply for its own sake. I believe this denial of the utility of privacy as a legal concept is misleading and has some unfortunate results. To counteract that view, I therefore argue that the law should make an explicit commitment to privacy.

116. See note 6 *supra*. Richard Posner, however, does not consider privacy a value per se, and this is what makes his version of reductionism extreme. See note 8 *supra*. Although some of the points made here apply to Professor Posner's analysis as well, I deal only with moderate reductionists. For a criticism of Posner's approach, see Bloustein, *supra* note 67, at 429-42; Baker, *Posner's Privacy Mystery and the Failure of Economic Analysis of Law*, 12 GA. L. REV. 475 (1978).

### A. *The Poverty of Reductionism*

One way to think about “the law of privacy” is to start by asking what privacy is, and proceed to question to what extent the law protects it. This approach raises questions as to why people want privacy, why it is that although they want it they do not make claims for legal protection, and, if they do, why the law is reluctant to respond. Answering these questions gives us a fuller understanding of the scope of actual legal protection and the way the law reflects social needs, the limits of the law in protecting human aspirations, and the need for further legal protection created by changes in social and technological conditions. In contrast, another approach to privacy starts from the legal decisions—or moral intuitions<sup>117</sup>—that define the scope of legal protection for privacy. The practical benefit of this approach is obvious: by reducing decisions to a small number of principles of liability, lawyers and judges are able to rely on legal tradition without having to consult all the cases anew each time a privacy claim is made.

In principle, the starting point should not affect the results of our attempt to find an adequate description of the scope of actual legal protection of privacy. It should not be surprising, however, that those starting from judicial decisions tend to conclude with a reductionist account. First, despite the common use of the term “privacy,” the two starting points define different data to be explained. Those scholars who start from decisions, without an external concept of privacy, are led to rely on the concept that may be derived from the decisions themselves. One of the advantages of their enterprise is that their account seeks to explain *all* those cases in which the courts have explicitly invoked the concept of privacy.<sup>118</sup> There is no guarantee that the con-

117. Starting from legal decisions or moral intuitions about the scope of the right to privacy, or the scope of legal protection of privacy, is similar: in both cases what we study is the *conclusion* of a discussion of whether some action is actionable or a violation of a moral right. Thus Thomson’s analysis, *see* Thomson, *supra* note 6, shares most of the weaknesses of legal analysis mentioned here. It also shares a similarity of purpose—to give a coherent description of what we have been doing under a single label.

118. Thus, Dean Prosser, the most influential of the reductionists, could offer as a strength of his description that analysis of more than 400 cases of privacy showed that they could all be neatly grouped under four categories of recovery, none of which primarily protects privacy. *See* W. PROSSER, *supra* note 2, at 804-14 (setting out four privacy categories of intrusion, disclosure, false light, and appropriation). But in fact, reductionist analyses fail in even their limited attempt to explain precedents. Some cases, frequently discussed in privacy terms, cannot be included under these categories without straining them and weakening their power of description and guidance. For example, Prosser’s categories do not encompass claims by individuals under the Privacy Act, 5 U.S.C. § 552a(d)(2)(B) (1976), that some information about them should be deleted or corrected. Moreover, it is unclear whether Prosser could accommodate the “constitutional” right to privacy decisions because he does not have a category for noninterference in his account. Other accounts do provide such a category, however. *See* Gerety, *supra* note 18, at 261-81; Comment, *supra* note 3, at 1447.

## Privacy

cepts arising from adjudication will be coherent,<sup>119</sup> however, especially when the theoretical basis for the concept is not settled.<sup>120</sup> An attempt to impose coherence on the use of a single concept in judicial decisions is bound to be misleading when such a coherence does not in fact exist. The reductionists have perceived this lack of coherence in the case of privacy, and have concluded that the best way to describe existing law is with several separate categories of recovery, all designed to protect interests other than privacy and having little else in common.

It is here that the reductionists' starting point has blinded them to other ways to deal with the lack of coherence in judicial decisions. In some cases, the label of privacy has indeed been used to protect interests other than privacy because of the promise and limits of legal categories. In most cases in which a claim of privacy has been made, however, a loss of privacy has been involved. It is for this reason that there are many common features to liability in privacy cases despite the disparate principles that are used as an adequate account of the law. The reductionists cannot explain this unity, and their account obscures it.<sup>121</sup> On the other hand, dealing only with explicit privacy decisions blinds the reductionists to those cases in which the law is in fact used to protect privacy, albeit under a different label.

A second problem with reliance on actual decisions is that the data base is narrow. We deal only with claims that have actually been made, and primarily with cases in which the court has granted recovery. This may be misleading, particularly in areas such as privacy, because there are numerous disincentives for invoking legal protection.<sup>122</sup> Finally, seeking to explain the scope of legal protection in order to identify when courts are likely to give a remedy can obscure the reasons why a remedy is not given, which may be crucial for understanding the larger issues.<sup>123</sup>

119. The reasons for this are well known by any student of adjudication. Judges tend (and are encouraged) to prefer a just result based on weak doctrine to an admission that current law does not provide a way to justify an otherwise deserved recovery. The price of justice is thus often the coherence of the concepts involved. Privacy is an example of this, as I argue below. Similarly, I suspect that any concept of liberty derived from the constitutional adjudication of the last 100 years will not have much coherence either.

120. Warren & Brandeis, *supra* note 38, is notoriously vague on the conceptual question. For example, the authors never explicitly defined or described what they meant by "privacy." Compare Prosser, *supra* note 6, at 392 (Warren and Brandeis meant freedom from publicity) with Bloustein, *supra* note 50, at 971 (Warren and Brandeis meant freedom from affronts to human dignity).

121. Dean Prosser himself acknowledges the existence of these "common features," W. PROSSER, *supra* note 2, at 814-15, but does not explain why there should be four different torts, dealing with different invasions, and designed to protect interests as distinct as those in reputation, property, and mental tranquility.

122. See pp. 456-59 *supra*.

123. One major difficulty is that the cases relied upon by the reductionist in order to derive his concept of privacy will not accurately reflect all the fact situations in which a

Starting from the extra-legal concept of privacy enables us to avoid these pitfalls. The account of legal protection resulting from this approach is at least as helpful to practitioners, and also has additional advantages over the reductionist account: it brings to the fore many important observations about privacy and its legal protection, and helps to draw attention to privacy costs.

The primary advantage the approach advocated here exhibits over even the best reductionist account<sup>124</sup> is that it will include within it all legal protection of one coherent value—privacy—in all branches of the law,<sup>125</sup> and under any label. Limited disclosures about individuals,

valid privacy claim could be advanced. This is true because there are many ways to defeat a possibly valid claim based on an alleged invasion of privacy. For instance, conduct may be actionable, but not constitute an invasion of privacy. *See, e.g.*, *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 367 P.2d 284 (1961). A loss of privacy may have occurred, but not as the result of conduct considered undesirable, as in the case of a loss of privacy resulting from certain research activity and from investigations to verify plaintiff's statements or damage claims. *See, e.g.*, *FED. R. Civ. P.* 35 (court may order parties to submit to mental or physical examination by physician). Even when the conduct is undesirable, it may not be actionable because it has not passed a certain threshold. *See, e.g.*, *Virgil v. Sports Illustrated, Inc.*, 424 F. Supp. 1286, 1289 (S.D. Cal. 1976) (publication of fact plaintiff extinguished cigarettes in his mouth, dove off stairs to impress women, hurt himself in order to collect unemployment benefits, spent his time body-surfing, ate insects, and participated in gang fights as youngster, was "not sufficiently offensive" even to create jury question). Finally, courts may deny recovery even when the conduct is *prima facie* actionable because the defendant can establish a defense, which usually means that some competing interest is judged to be more important in the circumstances. The most important such defense raises the First Amendment, claiming that publication is of sufficient public interest to override individual privacy. *See, e.g.*, *Time, Inc. v. Hill*, 385 U.S. 374, 388-91 (1967) (First Amendment bar to invasion of privacy claim).

124. Dean Prosser's account has been incorporated into the *RESTATEMENT (SECOND) OF TORTS* § 652A (1976), but it is not the best of the reductionist works. For example, there are explicit privacy cases that do not fit neatly into any of his categories, and Prosser's attempt to accommodate them strains the categories and deprives them of much force. One such group of privacy cases is that in which the plaintiff has attention attracted to him against his will. Prosser does not have such a category and must squeeze these cases into "intrusion." W. PROSSER, *supra* note 2, at 808-09. Another group of cases is that in which the plaintiff must answer certain questions as a condition of employment. Prosser groups one such case, *Reed v. Orleans Parish School Bd.*, 21 So. 2d 895 (La. App. 1945), under "public disclosure of private facts," W. PROSSER, *supra* note 2, at 810 n.89, although no public disclosure was involved. Similarly, he groups Fifth Amendment cases of impelled self-incrimination under "intrusion." *Id.* at 807. For a detailed exposition of his account and its shortcomings, see R. Gavison, *supra* note 14.

125. One of Prosser's problems is that he deals only with the law of torts, and cannot adequately discuss protection of privacy in other contexts. There is nothing illegitimate about dealing with one branch of the law for practical purposes, of course. For an example of the broader perspective gained through a synoptic view, however, see Bloustein, *supra* note 50.

There is no doubt that the only way to defeat the dangerous hegemony of Dean Prosser's account of legal thinking is by actually working out the description of the law of privacy that would follow from the proposed analysis, including sufficient detail so that practitioners and judges could rely on this description. I have tried to outline such a description in R. Gavison, *supra* note 14. For the gains of this analysis in the much simpler context of Israeli law, see R. Gavison, *The Minimum Area of Privacy—Israel*, in *ISRAELI REPORTS TO THE TENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW* 176 (1978).

## Privacy

breaches of confidence, the reasons behind testimonial privileges, the right against self-incrimination, and privacy legislation—which have all been discussed in privacy terms but excluded by Prosser's reductionism—will be included.<sup>126</sup> So will be the exclusionary rule and rules of trespass and defamation to the extent they have been used to protect privacy. At the same time, this approach excludes those cases that explicitly refer to privacy in which the concept is invoked misleadingly. Some claims of appropriation,<sup>127</sup> and some claims of immunity from interference,<sup>128</sup> will be excluded. This description thus provides a better picture of current legal protection than does the reductionist account.

The reductionist approach fails even on its strongest claim to adequacy—the exposure of the limits of legal protection of privacy. The primary insight of these accounts is that the law never protects privacy *per se*, as is indicated by the fact that whenever a remedy for invasion of privacy is given, there is another interest such as property or reputation that is invaded as well. This insight, in general,<sup>129</sup> is quite true, and is certainly important. It reflects the limits of law discussed above. It is nonetheless misleading. It may be true that the law tends to protect privacy only when another interest is also invaded, whereas invasions of other interests may compel protection on their own. It does not follow from this that the presence of privacy in a situation does not serve as an additional reason for protection. Privacy, property, and reputation are all interests worthy of protection. The law grants none of them absolute protection. When two of them are invaded in one situation, recovery may be compelled even though neither alone would suffice. In such cases, the plaintiff would not have recovered had not his privacy been invaded. This operation of privacy is completely obscured by the reductionists.<sup>130</sup>

126. See, e.g., Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977); Note, *Medical Practice and the Right to Privacy*, 43 MINN. L. REV. 943 (1959). Dean Prosser excludes cases of limited disclosure because he insists that one element of the "genuine" privacy tort is publicity, and that limited disclosure is not enough. W. PROSSER, *supra* note 2, at 809-12.

127. See p. 440 *supra*.

128. See p. 439 *supra*.

129. There are at least some cases in which recovery for invasion of privacy has been given in which no other interest was involved (unless we take "freedom from mental distress" to be a distinct interest, which would engulf all privacy claims and many others as well). See, e.g., *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931) (motion picture disclosed current identity of former prostitute who had been acquitted in murder trial seven years earlier).

130. *De May v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881), is probably best explained in such terms. Such a combination of motives appears in many of the appropriation

Besides obscuring the extent of current legal protection, reductionist accounts obscure the continuity of legal protection over time. They give the erroneous impression that the concern with privacy is modern, whereas in fact both the wish to invade privacy and the need to control such wishes have been features of the human condition from antiquity. The common-law maxim that a person's home is his castle; early restrictions on the power of government officials to search, detain, or enter; strict norms of confidence; and prohibition of Peeping Toms or eavesdropping all attest to this early concern.<sup>131</sup> Even when the explicit label of privacy has not been invoked, the law has been used to protect privacy in a variety of ways. Warren and Brandeis, in their famous plea for explicit legal protection of privacy, traced much of this earlier protection by the law of contract, trespass, defamation, and breach of confidence.<sup>132</sup> They offered this tradition of protection as a ground for arguing that the courts could provide remedies for invasion of privacy without legislating a new cause of action in tort.<sup>133</sup> Awareness of this continuity helps us to understand the functions of

cases. See, e.g., *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905). For the relevance of privacy rhetoric in explaining decisions, and as an argument against Posner's reductionism, see Epstein, *supra* note 8, at 461-65.

131. A certain sphere of privacy has been protected from the earliest times. Anglo-Saxon law and German tribal law protected the peace that attached to every freeman's dwelling, and offered compensation for damage to property, insulting words, and the mere act of intrusion. 1 DIE GESETZE DER ANGELSACHSEN Abt. 8, 15, 17, Hl. 11, Af. 40, Ine 6-6.3 (F. Liebermann ed. 1903); 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 45 (2d ed. 1968).

The notion that one's home is protected from arbitrary intrusions by government officials finds little support in the polemics of reformers until the late 16th century and no support in case law until the 18th century. Medieval kings did not make available writs *de cursu* against lawless royal officials, though periodically they did permit inquiry into such official misconduct. See H. CAM, THE HUNDRED AND THE HUNDRED ROLLS, AN OUTLINE OF LOCAL GOVERNMENT IN MEDIEVAL ENGLAND (1930). Manorial bailiffs, subject to local custom, the sheriff, tax collectors, and creditors, subject to the limits on distraint proceedings, could enter a freeman's home restrained more by trespass liability than by any requirement of a warrant. 2 F. POLLOCK & F. MAITLAND, *supra*, at 575-78.

We know less about entry into the home to gather evidence for criminal law enforcement. The procedure for neighbors, jurors, and later magistrates to conduct such investigations is hidden by the use of the general issue, the rudimentary law of evidence, and the informality and local context of the criminal law. See S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 357, 360 (1969); Baker, *Criminal Courts and Procedure at Common Law 1550-1800*, in CRIME IN ENGLAND 1550-1800 at 15, 16-17, 38-39 (J. Cockburn ed. 1977). It is unlikely that there were any real checks on evidence-gathering other than general tort liability. But see Samaha, *Hanging for Felony: the Rule of Law in Elizabethan Colchester*, 21 Hist. J. 763, 768-71, 774-75 (1978) (claiming early notions of rule of law and evidence procedure).

132. Warren & Brandeis, *supra* note 38, at 197-214.

133. This reliance on the history of legal protection makes Warren and Brandeis's article one that "does model better than anything in the literature the emergence of a common law principle." Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 251 (1973).

## Privacy

privacy in our lives, and the changes in circumstances that have led to new claims for protection.

There is nothing in reductionist accounts to suggest insights into why new claims for privacy arise. Nevertheless, understanding what has caused these new claims may be helpful in deciding what to do about them. Despite the tradition of legal protection, it is true that growing concern with losses of privacy is a modern phenomenon. This need not be because of any change in people's awareness, sensitivity, or conception of the essential components of the good life, as Warren and Brandeis implied.<sup>134</sup> Indeed, my analysis of privacy suggests that the functions of privacy are too basic to human life to be so sensitive to changes in perception,<sup>135</sup> and it is in any event doubtful whether modern man is more sensitive or morally sophisticated than his predecessors. Moreover, most individuals today have more opportunities for privacy than our ancestors ever did, as well as a greater ability to regain anonymity after any loss of privacy occurs.

The main reason for this modern concern appears to be a change in the nature and magnitude of threats to privacy, due at least in part to technological change. The legal protection of the past is inadequate not because the level of privacy it once secured is no longer sufficient, but because that level can no longer be secured. Advances in the technology of surveillance and the recording, storage, and retrieval of information<sup>136</sup> have made it either impossible or extremely costly for individuals to protect the same level of privacy that was once enjoyed.<sup>137</sup> "Overstepping" by the press, cited by Warren and Brandeis,<sup>138</sup> gives the old invasions of privacy via publication and gossip a new dimension through the speed and scope of the modern mass media. We can dramatize this point by noting that the loss of anonymity of public figures is of a new order of magnitude. Many old stories could not plausibly be written today: Victor Hugo's rehabilitated mayor, Shakespeare's disguised dukes, the benevolent great people who do charity in disguise, are all extremely unlikely in our modern culture.

134. Warren & Brandeis, *supra* note 38, at 193 ("Thus, in very early times, the law gave a remedy only for physical interference with life and property . . . . Later, there came a recognition of man's spiritual nature, of his feelings and his intellect.")

135. In this sense, privacy may indeed be related to defamation, which is one of the oldest concerns of law. See S. MILSOM, *supra* note 131, at 332-43; N. RAKOVER, *DEFAMATION IN JEWISH LAW* (1964).

136. See, e.g., P. HEWITT, *PRIVACY: THE INFORMATION GATHERERS* (1977); A. MILLER, *supra* note 19; J. RULE, *PRIVATE LIVES AND PUBLIC SURVEILLANCE* (1973); A. WESTIN, *supra* note 1, at 158-68.

137. See, e.g., YOUNGER COMMITTEE, *supra* note 45, at 153-76.

138. Warren & Brandeis, *supra* note 38, at 196.

The identification of technological developments as a major source of new concern may be supported by the fact that modern claims concerning the secrecy and anonymity aspects of privacy have not been accompanied by new claims concerning physical access: technological advances have affected the acquisition, storage, and dissemination of information, but gaining physical access is a process that has not changed much.<sup>139</sup> On the other hand, the increase in the number of people whose profession it is to observe and report, the intensified activity in search of publishable information, and the changes in the equipment that enables such enterprises, make it more likely that events and information will in fact be recorded and published.

Technology is not the whole story, however. The privacy concerns created by the mass media go beyond the fact that the development of scandal magazines and investigative journalism lets more people acquire more information more quickly. An additional problem is that journalism is crude, and may not do justice to the situation exposed. Partial truths are unsettling because they present a one-dimensional image of the subject, often without compassion or benevolence. This may be not unlike scandal journalism's old sister, gossip. The most important difference is that gossip usually concerns people who are already known in their other facets, and thus partial truths are less misleading. In contrast, there is no way that most readers of newspapers can correct for the one-dimensional images they receive through print.<sup>140</sup>

The new concern with privacy may also be explained, at least in part, as a tendency to put old claims in new terms.<sup>141</sup> From this perspective, part of the new interest in privacy is not caused by new needs, but rather by new doctrinal moves or hopes for legal change. Privacy has been used to overcome the limitations of defamation;<sup>142</sup> it has been used to avoid such historically loaded legal terms as "substantive due process" and "liberty";<sup>143</sup> and it has been used to avoid basing all

139. Not only has this process remained the same, but this is the area in which rising standards of living and safety have brought the most dramatic increases in privacy. See *Privacy, supra* note 8, at 396-97 (privacy increases with wealth of society).

140. A powerful literary illustration is provided by H. BÖLL, *THE LOST HONOR OF KATHARINA BLUM* (1975).

141. See notes 47, 119 *supra*.

142. Once it became established that truth was an absolute defense to a defamation claim, see Harnett & Thornton, *The Truth Hurts: A Critique of a Defense to Defamation*, 35 VA. L. REV. 425 (1949), the only way to make truthful publications actionable was to develop new privacy doctrine. See Wade, *Defamation and the Right to Privacy*, 15 VAND. L. REV. 1093, 1109, 1120 (1962) (approving use of privacy to overcome limitations of defamation).

143. Compare *Lochner v. New York*, 198 U.S. 45 (1905) (liberty of contract) and *Gris-*

## Privacy

entitlements, without differentiation, on the notion of property.<sup>144</sup>

Finally, and perhaps most importantly, reductive accounts reinforce the tendency to overlook the privacy costs that may be involved in a case. Because these accounts suggest that privacy is only a label used to protect other interests, logic would dictate that whenever a privacy question is discussed, the balancing should be among the “real” interests involved. Consequently, privacy is made redundant despite its usage. Although we talk in terms of privacy, the reductionist suggests, what we actually take into consideration are the interests to which privacy is reducible.<sup>145</sup> It is this quality of reductionism that threatens to undermine our belief in the distinctness and importance of privacy, and to have an adverse effect on our policy decisions. The proposed analysis, by clarifying the distinctness and importance of privacy through a functional analysis, enables us to challenge such reductionism.

### B. *The Case for an Explicit Commitment to Privacy*

There is much to be said for making an explicit legal commitment to privacy. Such a commitment would affirm that privacy is not just a convenient label, but a central value. An explicit commitment would put reductionist accounts in their correct perspective, as attempts to give lawyers and judges a guide to identify cases in which recovery is likely under a given heading. The legal protection of privacy is more than a mere by-product of the protection of other, more “respectable” values. An explicit commitment to privacy would recognize that losses of privacy are undesirable, at least in the circumstances in which such losses frustrate the functions and goals described above. It would recognize that such losses should be taken into account by the legal system, and that we should strive to minimize them.

Clearly, an explicit commitment to privacy does not mean that

wold v. Connecticut, 381 U.S. 479, 481-82 (1965) (refusing to apply substantive due process) *with id.* at 485-86 (right to privacy). For a critical discussion of this move, see Ely, *supra* note 55, at 937-43.

144. Warren & Brandeis, *supra* note 38, had this in mind when they insisted that privacy be protected as “personality,” not as a property interest. *Id.* at 205-08. Privacy has been used to protect property, however. See pp. 439-40 *supra*. Professor Posner in *Privacy*, *supra* note 8, at 393-404, argues for an undifferentiated conception of privacy as a kind of property, and Thomson, *supra* note 6, at 303-06, notes that much of the privacy rhetoric is based on “ownership” grounds.

145. The most extreme example of such an analysis is Posner’s. See *Privacy*, *supra* note 8; *Secrecy*, *supra* note 8. But the price that may be exacted by such an approach if it is used to make policy decisions about the scope of desirable legal protection becomes clear in works such as Kronman, *supra* note 54, and Felcher & Rubin, *supra* note 109, because these commentators actually conclude that privacy should not be considered an independent and distinct value.

privacy deserves absolute protection. It does not mean that privacy is the one value we seek to promote, or even the most important among a number of values to which we are committed. This is true for all our values, however. None is protected absolutely, not even those to which a commitment is made in unequivocal terms in the Constitution. Nor would making such a commitment suggest that invasions of privacy would generally be actionable. I have indicated many of the reasons why it is unlikely to expect the law to protect privacy extensively. Making an explicit commitment could not be understood to deny the need for balancing; it would simply identify the factors that should be considered by the legal system.

In positive terms, the case for an explicit commitment to privacy is made by pointing out the distinctive functions of privacy in our lives. Privacy has as much coherence and attractiveness as other values to which we have made a clear commitment, such as liberty. Arguments for liberty, when examined carefully, are vulnerable to objections similar to the arguments we have examined for privacy, yet this vulnerability has never been considered a reason not to acknowledge the importance of liberty, or not to express this importance by an explicit commitment so that any loss will be more likely to be noticed and taken into consideration. Privacy deserves no less.

Further insight about the need for an explicit commitment to privacy comes from study of the arguments made against this approach. First, it may be argued that the American legal system has already made this commitment, and that we should concentrate on answering questions of the scope of legal protection rather than spend time arguing for commitments that have already been made. Questions of scope are no doubt important, and had a commitment to privacy been made and its implications internalized, there would indeed be no further need for an explicit affirmation. But the reductionist literature is at least as influential as that which affirms the distinctness and importance of privacy, and although it is true that some parts of the legal system are informed by an affirmation of privacy, it is equally clear that others are not. For the latter, an explicit commitment to privacy could make an important difference.<sup>146</sup>

A more substantive argument, and one inconsistent with the first, is that we should not make a commitment to privacy because there is no need for further legal protection: we already have all the privacy we could possibly want or need. In those areas in which invasions of

146. See note 109 *supra* (conflict between privacy and freedom of expression).

## Privacy

privacy are undesirable, the law already provides a remedy. If anything, this argument goes, we need less legal protection today because rising standards of living mean that individuals enjoy more privacy than ever before. Critics emphasize the relatively small number of difficult cases in which we sympathize with the person complaining about invasion of his privacy. In the hundred years of the tort remedy's existence, there has been only one Sidis,<sup>147</sup> one Melvin,<sup>148</sup> one Barber.<sup>149</sup>

It is here that understanding the reasons for the new concern with privacy becomes crucial. It is true that individuals today enjoy more opportunities for privacy in some areas, but this observation, taken alone, is misleading. The rarity of actions is not a good indication of the need for privacy, or of the extent to which invasions are undesirable. We enjoy our privacy not because of new opportunities for seclusion or because of greater control over our interactions, but because of our anonymity, because no one is interested in us. The moment someone becomes sufficiently interested, he may find it quite easy to take all that privacy away. He may follow us all the time, obtain information about us from a host of data systems, record our conversations, and intrude into our bedrooms. What protects privacy is not the difficulty of invading it, but the lack of motive and interest of others to do so. The important point, however, is that if our privacy is invaded, it may be invaded today in more serious and more permanent ways than ever before. Thus, although most of us are unlikely to experience a substantial loss of privacy, we have an obligation to protect those who lose their anonymity. In this sense, privacy is no different from other basic entitlements. We are not primarily concerned with the rights of criminal suspects because we have been exposed to police brutality ourselves. We know that we may be exposed to it in the future, but, more generally, we want to be part of a society that is committed to minimizing violations of due process.

Even if the law had already dealt with all the situations in which privacy should be legally protected, however, an explicit commitment to privacy would still be significant. It is significant in ways that no specific, localized legal protection can be. It would serve to remind us

147. *Sidis v. F-R Publishing Corp.*, 34 F. Supp. 19 (S.D.N.Y. 1938), *aff'd*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940) (magazine story about former child prodigy describing his current activities).

148. *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931) (movie about former prostitute acquitted of murder seven years earlier).

149. *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942) (picture taken of "insatiable eater" in hospital bed).

of the importance of privacy, and thus to color our understanding of protection in specific contexts.

The result of this awareness would not necessarily or even primarily be more legal rules to protect privacy. For example, such an explicit commitment to privacy might focus attention on ways to ameliorate the difficulties resulting from the inappropriateness of current legal remedies and legal proceedings. Some thought could go into whether limits on the publicity of judicial proceedings that involve privacy claims could be established without paying too high a price in terms of freedom of expression or fair trials.<sup>150</sup> Moreover, an explicit commitment could increase individual sensitivity to losses of privacy and thus encourage people to prevent invasions of privacy without reliance on law at all. It may lead to increased efforts to make it possible to minimize losses of privacy without invoking the law, through such efforts as development of technological devices to make leaks from data systems more difficult. It would also draw the attention of those whose occupations involve systematic breaches of others' privacy, such as journalists, doctors, detectives, policemen, and therapists, to the fact that although some invasions of privacy are inevitable, a loss of sensitivity about such losses may corrupt the invader as well as harm the victim.

An explicit commitment to privacy is not vulnerable to the charge that the law should not protect privacy because its efficacy in doing so is limited. It might be argued that the contexts within which privacy has functional value are those in which the law is traditionally reluctant to interfere. This reluctance stems, at least in part, from an awareness that some questions cannot and should not be dealt with by the law. It is unlikely, for example, that the law will ever impose an obligation on parents to give their children some privacy in order to grow, develop autonomy, and explore others. We would probably find such a law an unpalatable interference with liberty. An explicit legal commitment to privacy might make such specific protection of privacy

150. Limits on the publicity of judicial proceedings, for various reasons, are not unknown. *See, e.g.*, *Gannett Co., Inc. v. DePasquale*, 99 S. Ct. 2898 (1979) (pretrial criminal hearings may be closed to press). In most situations, the imposition of criminal sanctions for truthful disclosures would probably not be upheld. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (First Amendment does not permit criminal sanctions of third persons who publish truthful information about confidential proceedings before state judicial review commission). Other measures limiting the possibility of publication may be constitutional, however. *See, e.g.*, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (although First Amendment does not permit sanctions for accurate publication of rape victim's name obtained from public records, Court reserves "broader question" whether state may "protect an area of privacy free from unwanted publicity"); N.Y. Civ. RIGHTS LAW §§ 50, 51 (McKinney Supp. 1976) (recent amendment to privacy statute in response to *Cox Broadcasting*).

## **Privacy**

unnecessary, however. Parents might then realize more fully that privacy is important for their children, and this would lead them to respect their children's privacy without any direct legal obligation to do so.

The general commitment would also help in administering the laws. It could serve as a principle of interpretation, pointing out the need to balance losses of privacy, perhaps with a presumption in favor of protecting privacy. It might also supplement existing privacy laws by identifying improper conduct and invoking the general sense of obligation to obey the laws. A general commitment may thus lead to a reduction of invasions of privacy even in situations in which the victims would not have sued had the invasions occurred, either because of ignorance or for other reasons discussed above.

The functions of a general commitment to the value of privacy as a part of the law are varied, and cannot be reduced to the amount of protection actually given to that value in the legal system. Here again, the commitment to privacy is no different than the commitment to other values, such as freedom of expression or liberty. As I have argued before, a commitment to privacy as a legal value may help to raise awareness of its importance and thus deter reckless invasions. Most importantly, however, an explicit commitment to privacy will have an educational impact. This function is of special importance, because most of us enjoy privacy without the need for legal protection. For the most part, what we should learn is how to appreciate our available privacy and use it well. A clear statement in the law that privacy is a central value could make us more aware of the valuable functions privacy can serve. Ultimately, the wish to have privacy must be in our hearts, not only in our laws. But this does not mean that a commitment to the value of privacy should not be in our laws as well.