PRIVACY, INTIMACY, AND ISOLATION

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New York *Oxford*
OXFORD UNIVERSITY PRESS
1992

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Information, Access, or Intimate Decisions about Our Actions? The Content of Privacy

An agent possesses privacy to the extent that she has control over certain aspects of her life. But which aspects? In other words, what is the content of privacy? Three potential lines of response to these questions emerge from the legal and philosophical literature. First of all, privacy might regulate information about ourselves[1]; second of all, privacy might concern access to ourselves[2]; and finally, privacy might focus on intimate decisions about our actions.[3] I term these responses, respectively, ''information-based,'' ''access-based,'' and ''decision-based'' accounts of privacy's content.[4] In what follows, I argue that the content of privacy cannot be captured if we focus exclusively on either information, access, or intimate decisions because privacy involves all three areas. Furthermore, I suggest that these apparently disparate areas are linked by the common denominator of intimacy—privacy's content covers ***intimate*** information, access, and decisions. I conclude by offering a definition of privacy that cuts across the standard categories of information, access, or intimate decisions: privacy is the state of the agent having control over a realm of intimacy, which contains her decisions about intimate access to herself (including intimate informational access) and her decisions about her own intimate actions.

Though there are three contenders for the content of privacy, one stands apart from the others due to its extensive use in everyday, legal,

and philosophical discourse—privacy involves information about an agent.[5] This extensive usage is readily illustrated. In everyday life, when another learns a carefully concealed fact about our sex life, behavior at home, or personal habits, we are quick to label this dissemination of information as a privacy violation.[6] In such a case, we would explain that our privacy has been violated because it is wrong for others to distribute or obtain such personal information without our permission. Our everyday intuitions about the ties between privacy and information are mirrored in the domain of law and legislation, where privacy often assumes the role of protecting information about the individual; for example, tort privacy law is largely concerned with information protection,[7] and state privacy legislation is chiefly designed to guard certain types of information about the agent, including information about her credit, medical, and educational history.* Finally, privacy theorists put forward such a quantity of information-based privacy definitions that understanding privacy's content in terms of information has been termed a "dogma" of privacy theory.[9] In perhaps the most well-known privacy definition, Alan Westin explains that privacy is "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.''[10] Given this proliferation of appeals to information, clearly an adequate account of privacy's content must either explicitly include or exclude information. In what follows, I argue that some, but not all, information must be included within privacy's scope.

Many common claims concerning information constitute representative privacy claims. This is readily illustrated. Imagine that I claim my privacy has been violated when I learn another person has informed the world in great detail about my sexual proclivities, despite my explicit request to the contrary. Two points concerning my claim are clear. First, my protest is directed against the information dissemination that has taken place; if asked why I was protesting, I might explain that others should not know detailed information about my sexual activity without my permission. Second, my identification of this information claim as a privacy claim seems to be beyond dispute. If someone were to deny this, I would not leap to the conclusion that ***my*** definition of privacy was in error—I would question whether ***they*** understood the meaning of "privacy" and suggest that ***their*** definition of privacy was flawed. The argument underlying this example is simple—information cannot be altogether excluded from the content of privacy.

Assuming that privacy's content is partially informational, should we allow that privacy's content is exclusively informational, that privacy is nothing more than the state of possessing control over information about ourselves? Although I accept that personal information is a component of privacy's content, I do not accept it as the identifying and constraining feature. The first problem faced by an information-based definition is that the fact that something is a piece of information about an agent is not a sufficient condition for it being within the scope of privacy. In other words, privacy does not involve control over *all* information about ourselves.[11] To illustrate this, consider a variety of successful attempts to gain information about me. Imagine that a stranger wishes to find out information about my sexual proclivities. She learns the desired information from my excessively talkative friend? Imagine that the stranger wishes to learn where I park my car. She learns this information from the same revealing friend.[13] Each of these cases involves an obvious loss of control over information; however, they are not both obvious cases of lost privacy. The first case seems to involve a loss of privacy; in fact, assuming that my friend culpably distributed information, she has violated my privacy. The second case seems not to involve a privacy loss. To support these intuitions, consider what would happen if I accused my friend of lessening my privacy in the first case: the burden of proof would be on my friend to explain why a privacy loss had not occurred. If she rejected this burden, I would simply point to the nature of the information she revealed, "Look at what you revealed! It's intimate!" Without extenuating circumstances, the intimacy of sexual information places it squarely within the parameters of privacy. Yet, if I made the same accusation in the second case, the burden of proof would remain with me—*despite* the fact that there has clearly been a loss of information about myself. I would still have to justify my inclusion of car-parking information within the scope of privacy. The impersonal, nonintimate nature of information about a parking place usually places it outside of privacy's reach.[14] As these examples reveal, neither the presence nor the absence of a privacy loss can be explained by citing the presence of absence of information distribution. We must look at the *type* of information disseminated; it is the intimacy of this information that identifies a loss of privacy.[15]

My argument is open to the criticism that I have drawñ privacy's content closer to our linguistic intuitions only to abandon our moral intuitions: defining privacy in terms of intimate information, rather than

information as a whole, fails to account for certain of our moral intuitions. The argument supporting this criticism consists of two steps. The first step points out that including intimate information within the content of privacy allows us to morally condemn another when she culpably damages our control over intimate information—she has violated our privacy. However, excluding nonintimate information from the content of privacy has the opposite effect: we cannot condemn another for culpably lessening our control over nonintimate information since the damage does not truly constitute a privacy loss due to the nature of the information involved. The second step is prescriptive: since it is factually true that damaging someone's control over nonintimate information about herself is often morally reprehensible, it is incorrect to limit privacy's protection to intimate information. It renders us unable to condemn morally reprehensible instances of lessening another's control over nonintimate infomation. In order to analyze this argument, two questions must be addressed. Does an agent ever possess a moral claim to control nonintimate information about herself? If so, is this protection best described in terms of privacy?

The answer to the first question is not open to significant debate. The moral culpability of lessening or destroying an individual's control over nonintimate information in certain circumstances is readily illustrated. Imagine that a talkative friend of mine asks me what I am doing tomorrow. I reply that I am giving a surprise party for a mutual friend. My talkative friend conveys this information to others, ruining the surprise. Similarly, imagine that I tell a friend that I have taken a new job. I warn her not to repeat this information, as I wish to tell people myself. Despite this warning, she does inform others, frustrating my desire to provide the news. Do each of these examples involve morally blameworthy damage to the agent's control over nonintimate information? Yes. First of all, each of these cases involves an obvious information loss. Second of all, the information lost in both cases is not intimate. According to our society's norms, general information about a person's party plans and employment is not sufficiently personal to merit the heading of "intimate."[16] If a casual acquaintance asked me about the date of a non-surprise party I was giving or the nature of my job, I might deny her this information for reasons of my own, but an exclamation of, "That's not something you should ask me about!" would be a puzzling and incomplete explanation of the reasons for my denial.[17] Finally, assuming a lack of mitigating factors, both of these examples involve morally blamewor-

thy action on the part of the information spreader. The information-damaged individual can justifiably make a moral claim against the damager, on the grounds that the party or job information *ought* not to have been distributed without prior permission. These two examples demonstrate that my critic is at least partially correct. There are cases in which damaging someone's control over nonintimate information is morally culpable; hence, the agent does possess a moral claim to control nonintimate information about herself in certain circumstances. But is privacy a suitable foundation for this claim?

Given the chaos that surrounds privacy, it is not surprising that privacy appeals are often used to ground claims to control nonintimate information. For example, many laws and government regulations prohibiting the unauthorized distribution of nonintimate information about citizens are couched in terms of privacy.[18] However, I believe this common usage confuses privacy with secrecy. An appeal to secrecy serves as an appropriate descriptive and normative foundation for our claims to control nonintimate information about ourselves and our moral condemnation of those who damage this control. To illustrate this, reconsider my previous example of the talkative friend and the surprise party information. When I tell my friend about the planned party and add, "It's a secret," my added comment conveys two meanings to my friend—the descriptive implication that the party plans are concealed information and the normative implication that she ought not inform others about my plans. If my friend proceeds to tell others, spoiling my party plans, I can explain her moral culpability by pointing to the fact that she has unjustifiably destroyed my secrecy. As this example shows, secrecy can be used to accurately describe our regulation of nonintimate information and to capture the prescriptive significance of such regulation.

A question remains unanswered: why should we prefer "secrecy" to "privacy"? After all, privacy can be used as I described above.[19] Secrecy has several advantages over privacy when it comes to accurately describing control over nonintimate information. First, secrecy does not possess underlying suggestions of intimacy, as is the case with privacy. Hence, using secrecy to describe our control over nonintimate information allows us to preserve the link between privacy and intimacy. Second, secrecy is not an inherently positive concept, unlike privacy: we lack a fundamental right or claim to secrecy.[20] This accords with the fact that regulating nonintimate information about ourselves is not always morally acceptable—we have no right to control nonintimate information simply

qua nonintimate information; to establish such a claim, we have to explain the plans that somehow justify this control. If a census taker asks me about the number of rooms in my house, I cannot usually justifiably respond, "You have no business knowing that information!" In contrast, the positive value accorded to privacy makes privacy claims valid largely independently of our plans; the foundation of such claims lies in the fact that intimate information is, indeed, ***intimate*** information. Third, distinguishing secrecy from privacy allows us to distinguish between what we fear from a loss of secrecy and a loss of privacy. Secrecy involves concealing information from a specific class of people, those who could potentially damage your interests if they knew the information. As Morton Levine notes, secrecy involves concealing "information which one feels would render one vulnerable to some kind of damage. . . . If the limits of your assets were known to a potential landlord, he might not grant you a lease."[21] The same type of concealment is also what is at stake in the case of nonintimate information regulation. For example, when I appeal to my friend not to tell others about my surprise party or new job, my goal is to conceal this information from specific others—if the people from whom I wished to conceal the information somehow learned about it, I would no longer be concerned about its concealment because I would no longer fear having my plans damaged. This contrasts with privacy, since our concern in privacy cases is to control information, not simply conceal it from those who might damage us with it. Control requires regulating information with respect to others whether or not they present any threat of damaging our interests; when I seek privacy with respect to my diary, I seek to control it with respect to humanity as a whole—I fear ***anyone*** accessing it without my permission. Given these points, it is clear that secrecy is capable of explaining why violating another's control over nonintimate information is morally questionable; it also provides a more satisfactory account than that provided by privacy. Hence, the conclusion is clear: privacy need not include nonintimate information within its scope if we are to explain morally reprehensible curtailments of nonintimate information control.[22]

At this point, I have modified the sufficient condition for something to be within the scope of privacy—it must not be merely information about an agent, but intimate information. However, even with this modification, information-based accounts of privacy's content still face a problem—an information loss, even a loss of intimate information, does not constitute a necessary condition for a privacy loss. It can be lost

without another actually gaining information. There are two ways in which this can occur. First of all, a privacy loss can occur when the loss of information is only threatened. My previous example of a peeping Tom failing to see a person concealed under a bed illustrates how this might happen. In this case, the peeping Tom might be construed as having gained some form of access to the concealed individual, but clearly this has not taken the form of information acquisition. Yet the privacy loss nevertheless exists.[23] Second of all, privacy can be lost when access is breached without a gain of information. For example, when a peeping Tom looks in a person's window for the ***second*** time, it is conceivable that he might acquire absolutely no new information about the victim. Despite this failure, the peeping Tom clearly violates the victim's privacy with the second, as well as the first, inspection. When he is charged with the second violation, he cannot escape with the explanation, "I've seen it all before!"

An intimate information-based definition of privacy will necessarily be incomplete because the loss of privacy need not involve the loss of information; yet the tie between intimate information and privacy cannot be escaped. Faced with this need to preserve the link between intimate information and privacy, while denying that intimate information is the sole constituent of privacy, let us consider the privacy accounts that claim to accomplish this: access-based definitions.

Access-based privacy definitions come in a multitude of forms. For example, Thomas Scanlon suggests that privacy provides us with a zone within which we need not be on the alert against intrusions and observation. James Rachels and Jeffrey Reiman contend that privacy provides us with control over who has access, including informational access, to us.[25] Despite such variations, access-based definitions share an assumption about the content of privacy: it covers access to the agent.[26] Hence, the generic model of a control-based, access-focused privacy definition amounts to the following: privacy is the state of an agent possessing control over access to herself. With this model in mind, let us consider two questions. Does defining privacy's content in terms of access avoid the difficulties that beset information-based definitions? Does access to an individual cover all aspects of privacy's content? I believe that access-based privacy definitions are only partially successful at capturing privacy's content.

I concluded my criticism of information-based accounts of privacy with a question: how can we include intimate information within the

scope of privacy, while acknowledging that the dissemination of information is not necessary for the loss of privacy? Explaining privacy's content in terms of access to an individual enables us to explain how it can be lost both with *and* without the actual loss of information. On the one hand, if we accept that privacy is concerned with the regulation of access to an agent, then information loss is not necessary for the loss of privacy because an agent can damage another's access control without learning information about her; for example, a peeping Tom who looks at a victim for the tenth time is clearly damaging the victim's control over access to herself, even if no new information is revealed. On the other hand, a loss of control over intimate information can still be a privacy loss because an agent can access another by learning information about her. In other words, learning information about another can be understood as informational access, a subset of access.[27] To illustrate how a revelation of information might be an access violation, imagine that an individual manages to obtain another's love letters, which she reads without the owner's permission. This act of information acquisition is an access violation—the letter reader unjustifiably gains access to another through learning the information contained in the letters. In short, access-based definitions explain why the loss of control over information is a possible, but not necessary, route to a privacy loss—information is only one way to gain access to another.

However, access-based definitions of privacy are not without problems. The first one is familiar: access is not always a sufficient condition for a privacy loss. Not all forms of access diminish privacy. On the one hand, intimate access to another clearly lessens her privacy, for example, staring persistently at her, grabbing her breast, listening intently to her discussion with a friend, or learning about her sexual habits. On the other hand, nonintimate forms of access do not involve the loss of privacy. Consider the countless ways in which others access us in the course of an ordinary day: glancing at us, brushing against us in passing, hearing fragments of our conversations, learning pieces of information about our dress, hair color, and posture. Such casual, nonintimate forms of access differ in kind, rather than only in degree, from privacy-lessening forms of intimate access. To illustrate this, consider what would be a reasonable response to a person who protested her privacy was lessened by such forms of nonintimate access. We would point to the ***type*** of access involved, stressing the point that this ***type*** of access does not constitute a decrease of privacy. If she rejected this explanation, the burden of proof

would be on *her* to convince us that these apparently nonintimate, nonprivate forms of access were, in reality, sufficiently intimate to merit privacy. If privacy claims concerning access have to be couched in terms of intimacy, then we must reject unmodified access definitions of privacy.[28]

We have found a sufficient condition for a loss of privacy in the form of violating another's control over intimate access to herself. However, although many privacy issues revolve around access regulation, that does not exhaust the field of privacy. Intimate decisions also appear to fall within the scope of privacy, as is evident in both law and our everyday intuitions; for example, questions of access are peripheral to the majority of constitutional privacy cases. Constitutional law focuses on "a privacy interest with reference to certain ***decisions*** that are properly for the individual to make.''[29] The decisions that the Supreme Court has protected under the rubric of privacy include those about such intimate activities as child rearing and education, family relationships, procreation, marriage, contraception, and abortion.[30] The Court's rationale for including an agent's decisions about such activities within the content of privacy explicitly appeals to their ***intimacy;*** according to the Court, it is ***because*** such decisions are intimate that they belong within the sphere of an agent's constitutional right to privacy. This inclusion is not peculiar to the Supreme Court. We commonly distinguish between intimate and nonintimate decisions about our actions, characterizing intimate decisions as "private" or "personal"—unfit subjects for the state's regulatory power. Consider the difference between being informed that the social welfare mandates that we must engage in sexual activity with specified individuals and being informed that the social welfare mandates that we must pay taxes. Our liberty of action is curtailed in each case, yet these curtailments are not identical. Decisions concerning sexual activity and sexual partners are not the type of decisions that can be dictated by the social welfare, barring extraordinary social hardship, while the social welfare seems a reasonable justification for taxes. If asked to justify these different conclusions, we might respond that the decision to engage in sex with a particular individual is a private matter—our privacy is damaged if the decision is forced—while decisions about taxes are neither intimate nor private. This response constitutes an understandable defense. It accords with our underlying intuition that intimate decisions about our actions belong with the realm of privacy, while nonintimate decisions about our actions fall outside of this realm. Given this legal and everyday

intuition that constitutional privacy issues are part of privacy's content, must we discard our definition of privacy in terms of the agent's control over intimate access?[31] Not necessarily.

Faced with the apparent conflict between decisional and access accounts of privacy, some have argued that "decisional privacy" is a misnomer: it is actually nothing more than liberty or freedom attached to a misleading description. As Ruth Gavison explains, "identifying privacy as noninterference with private action . . . may obscure the nature of the legal decision and draw attention away from important considerations. 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.'''[32] According to this view, claiming that intimate decisions are protected by privacy is identical to claiming intimate decisions are protected by "liberty of action.'' Furthermore, the rubric "liberty of action" has the advantage of historical precedent. Assuming, as does Gavison, that matters of regulating access are at the conceptual core of privacy, matters that are conceptually distinct from liberty of action (since they involve duties of noninterference on the part of others), we merely muddy the theoretical waters by speaking of privacy with respect to intimate decisions. Thus, although we should retain intimate access for privacy's content, we should exclude decisional matters as best belonging within the sphere of liberty of action.

The argument that we should abandon constitutional privacy on the grounds that it is nothing more than liberty of action is initially plausible. After all, even cursory consideration shows that the intimate decisions protected by constitutional privacy delineate a realm of liberty of action. For example, if I have a privacy right to control my childbearing, I can also be said to possess liberty of action with respect to childbearing. Similarly, if I have a privacy right to control my sexual expression in most situations, I can also be said to possess liberty of action with respect to my sexuality. Despite its initial plausibility, the argument that attempts to dissolve decisional privacy into liberty of action suffers from three flaws. First, it does not provide a defense against the argument that decisional/constitutional privacy involves liberties that possess a feature distinguishing them from nonprivacy liberties. Second, it offers no explanation of how we have come to confuse privacy and liberty of action. Third, if we accept this argument, it also undermines access-based privacy theories, pulling the rug out from under itself. Let me

expand upon these points. According to the first criticism, the link between constitutional privacy and liberty of action can be interpreted in two ways—as indicating that decisional privacy is a confused concept or as pointing to something distinctive about privacy-protected liberty of action. Given that we *do* distinguish between privacy-invoking liberty of action and liberty of action not protected by privacy, surely it is more plausible to seek the basis for this distinction than to abandon it as confused. Turning to the second criticism, we possess no particular reason to believe that we have indeed confused liberty of action with decisional privacy—Ruth Gavison's argument lacks any explanation of the birth of our "confusion." Finally, if we were to accept her argument (in the spirit of Ockham), our razor would cut too far for the access theorist. Although constitutional privacy most clearly covers certain liberties, the same can be said of access-based definitions of privacy; for example, if I have a privacy claim to control access to myself, thus limiting a peeping Tom's access, I can also be said to have a certain liberty, namely, the liberty to exercise this control. Thus, if we reject decisional privacy because of its tie to liberty, we also have grounds to reject access-control definitions of privacy. Given the centrality of access regulation to privacy, we have every reason to reject an argument that leads to its abandonment. Faced with these criticisms, a privacy theorist cannot abandon decisional privacy by merely linking it to liberty of action.

Once again, we are faced with a quandary. Changing privacy's content from intimate information to intimate access has its advantages. By so doing, we retain intimate information (in the guise of informational access) within the scope of privacy, while broadening privacy's scope to include noninformational intimate access. Nevertheless, this change does not help us when we are faced with privacy that involves protecting an agent's intimate decisions about her own actions; these decisions cannot be compressed into access matters. Yet the tie between an individual's intimate decisions about her actions and privacy has resisted criticism. Therefore, explaining privacy's content in terms of access does not encompass its entire content. How are we to resolve the apparently conflicting demands of decisional and access privacy?

An agent's intimate decisions about her own actions seem to be inescapably within the domain of privacy. Yet matters of intimate access also seem to be within this domain. There are two ways in which the conflict between these apparently disparate aspects of privacy can be

resolved. First of all, intimate access can be rejected as part of privacy; privacy involves *only* control over intimate decisions about an individual's own actions. Second of all, both intimate access and intimate decisions can be included within privacy's content by offering an explanation of what ties together these disparate areas. In what follows, I argue that explaining privacy's content only in terms of an agent's intimate decisions about her actions is unsatisfactory since matters of intimate access and informational access also fall within privacy's domain, but including intimate access and an agent's intimate decisions about her actions within privacy's content is satisfactory. The factor tying together these seemingly disparate areas of privacy is their intimacy.

Given the apparent dissimilarity between an agent's intimate decisions about her actions and questions of intimate access, it is tempting to "explain" this dissimilarity by simply excluding intimate access from the content of privacy. This is not an uncommon path to follow; constitutional privacy cases never explain how decisional privacy relates to tort law (access) privacy, leaving the impression that decisional privacy is "true" privacy. This impression is strengthened when we turn to the work of several theorists who have commented on constitutional privacy. These privacy theorists attempt to provide a coherent theoretical framework for constitutional privacy, but they neglect to provide a framework large enough to include matters of intimate access.[33] However, can access matters simply be removed from the scope of privacy, given their prevalence within the field of privacy? Certainly not without an argument; but the only plausible one has previously proven to be unsuccessful. We could reverse the "liberty argument" provided by access theorists against decisional privacy (in other words, control over intimate access could be described as a matter of liberty, and hence, not a privacy issue), but this reversal would fall victim to the criticisms I directed at it in its original form. Barring this move, intimate access issues cannot be removed from the content of privacy, due to their prevalence in ordinary linguistic usage and tort law, and our lack of any reason to think that this prevalence is based on confusion.

There remains one final route: we must incorporate both intimate access to an agent and an agent's intimate decisions about her own actions into the content of privacy. The obstacle standing in the way of this incorporation is the apparent lack of a conceptual tie between decisional and access privacy issues. Ruth Gavison believes that the lack of such an apparent tie entails a rejection of decisional privacy:

> 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 [decisional privacy situations] is that they present precisely such a danger.[34]

Although Gavison's argument is designed to exclude decisional privacy, it can be reversed to exclude matters of access from privacy's content (assuming we reject Gavison's intuition that access matters are more basic to privacy than decisional matters). Either way, the crux of it remains the same—assimilating decisions about actions and access matters under the common heading of "privacy" represents a loss of conceptual focus.

Fortunately, after considering the nature of the decisions and matters of access that have been brought within the scope of privacy in this book, the force of this criticism is lost. I have ***not*** argued that all forms of access or decisions about actions are included in privacy's content. I have argued that ***intimate*** access and decisions about actions fall within privacy's domain. Hence, there is a conceptual focus uniting the decisional and access aspects of privacy—the shared focus on intimacy. Rather than seeing privacy as composed of two disparate elements, we should understand it as protecting a realm of intimacy, a realm that happens to have both access and liberty of action aspects. Given that intimacy is the "something distinct" about decisional and access privacy, Gavison's argument collapses.

Having argued that both an agent's intimate decisions about her own actions and intimate access to the agent (including intimate informational access) belong within privacy's content, I now wish to perform a curious backtrack. As I have previously indicated, many privacy theorists assume that there is an important structural distinction between decision and access-based privacy.[35] It is simple to see what underlies this assumption. On the one hand, privacy restrictions on intimate access (including intimate informational access) are primarily designed to give rise to duties of noninterference on the part of ***others.*** For example, when I seek privacy with respect to access to areas of my body, I seek to impose duties on others not to access my body without permission. On the other hand, the intimate decisional privacy issues protected by constitutional privacy law concern the ***agent's*** own intimate actions. For example, when I seek privacy with respect to my decisions about contraception, I am primarily concerned with possessing freedom of action with regard to

my use of contraceptives. However, this division is not as distinct as it initially appears. Consider a privacy claim concerning a matter of intimate access, for example, with respect to being touched by others or with respect to having a diary read by others. In making such a claim, we do not seek to avoid all access by others; we seek control over ***decisions*** about intimate access to ourselves. We wish to be free to decide who may access us. Consider also a privacy claim concerning a matter of "decisional privacy," for example, concerning a decision about abortion or a decision about sexual activity with a consenting partner. Such claims are claims to have control over ***decisions*** concerning our intimate actions. We wish to be free to decide how to act with respect to intimate situations. In short, both "access" and "decisional" privacy claims are claims to have control over ***decisions;*** hence, the distinction between decision-based and access-based privacy collapses. Rather than understanding privacy's content in terms of intimate access ***and*** intimate decisions, we should draw together these seemingly disparate areas: privacy's content covers intimate decisions, including the agent's decisions concerning intimate access to herself (including informational access) and her decisions about her own intimate actions.[36] In the following chapters, my discussion of intimate decisions will cover both types of decision.

It may appear that I have provided all the pieces necessary for an adequate definition of privacy. Starting with the initial assumption that privacy provides the individual with control over certain aspects of her life, I have shown that the content of privacy includes our decisions about intimate informational access, intimate access, and our own intimate actions. The intimacy of these aspects of privacy constitutes the conceptual focus of privacy. Putting together these pieces, privacy can be defined as the state of an agent possessing control over a realm of intimacy, which includes her decisions about intimate informational access, intimate access, and intimate actions. Yet there remains a deficiency in this privacy definition: it depends upon the notion of intimacy, yet I have not defined intimacy. The next chapter supplies this definition.

Notes

1. Assuming that privacy works through control, an information-based definition of privacy would be "privacy is the state of possessing control over information about yourself." For examples of information-based definitions of

privacy, see Judith Jarvis Thomson, "The Right to Privacy," ***Philosophy and Public Affairs*** **4 (1975): 295–314;** Charles Fried, "Privacy," ***Yale Law Journal*** **77 (1968): 475–93;** Alan Westin, ***Privacy and Freedom*** (New York: Atheneum, **1967);** Elizabeth Beardsley, "Privacy: Autonomy and Selective Disclosure," in ***Privacy: Nomos XIII,*** ed. J. Roland Pennock and John W. Chapman (New York: Atherton Press, **1971), 56–70;** Richard Wasserstrom, "Privacy: Some Arguments and Assumptions," in ***Philosophical Law,*** ed. Richard Bronaugh (Westport, CT: Greenwood Press, **1978), 148–66.**

2. Assuming that privacy functions through control, an access-based definition of privacy amounts to "privacy is the state of possessing control over access to your self." For examples of access-based privacy definitions, see Jeffrey Reiman, "Privacy, Intimacy and Personhood," ***Philosophy and Public Affairs*** **6 (1976): 26–44;** James Rachels, "Why Privacy Is Important," ***Philosophy and Public Affairs*** **4 (1975): 323–33;** Richard Parker, "A Definition of Privacy," ***Rutgers Law Review*** **27 (1974): 275–96;** Thomas Scanlon, "Thomson on Privacy," ***Philosophy and Public Affairs*** **4 (1975): 315–22.**

3. Assuming that privacy functions through control, a definition of privacy based on intimate decisions amounts to "privacy is the state of possessing control over the making and implementation of intimate decisions about your actions." For examples of intimate decision based privacy definitions, see Tom Gerety, "Redefining Privacy," ***Harvard Civil Rights–Civil Liberties Law Review*** **12 (1977): 233–96;** June Eichbaum, "Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy," ***Harvard Civil Rights–Civil Liberties Law Review*** **14 (1979): 361–84;** David A. J. Richards, "Unnatural Acts and the Constitutional Right to Privacy," ***Fordham Law Review*** **45 (1977): 1312–48.**

4. Note that these labels are used only to accord with common usage in the privacy literature. Clearly, giving the agent control over information or access to herself can be described as giving her control over certain decisions. For the purposes of this chapter, decisional privacy is equivalent to constitutional privacy.

5. Information about the agent should not be narrowly construed; it can be information about her behavior, plans, or other aspects of her life.

6. The objection might be raised that I am describing a situation where privacy has been merely ***lost,*** not ***violated.*** Only if the person has gathered the information in a culpable manner should we take the additional step of describing the privacy loss as a privacy violation. I accept that a loss of privacy may not be a morally culpable violation; an agent might justifiably or simply inadvertently lessen the privacy of another. However, I believe that the term "violation" should be retained for both culpable and nonculpable cases of lessened privacy. This term makes it clear that we have a prima facie claim to privacy since privacy is a presumptive good; when someone lessens another's privacy, they violate her in a way that demands explanation. If they offer a satisfactory explanation, they may avoid blame for their violation, yet the violation still remains real: by losing privacy, the agent has lost something of value to herself; she has been damaged, even if no one is held culpable for the damage.

7. This is understandable, given that tort privacy law is claimed to have developed due to a lawyer's desire to create a legal redress against the yellow journalism of his time. See Samuel Warren and Louis Brandeis, "The Right to Privacy," ***The Harvard Law Review*** **4 (1890): 193–220.**

8. To illustrate this, consider California's Right to Privacy Law.

9. William A. Parent, "Recent Work on the Concept of Privacy," ***American Philosophical Quarterly*** **4 (1983): 343.**

10. Alan Westin, ***Privacy and Freedom*** (New York Atheneum, **1967), 7.**

11. This fact overturns a number of information-based privacy definitions, such as Alan Westin's.

12. Though I focus this example on the revelation of sexual information, my argument covers other types of intimate information, such as information about my family life, love affairs, or inner thoughts:

13. Although I focus on information concerning a parking place, any number of informational alternatives could be substituted involving other instances of impersonal information dissemination, for example, my talkative friend could reveal my car's color, the nature of my job, or the timber of my voice.

14. This is not to suggest that information about a parking place is ***necessarily*** outside of the scope of privacy. It is to suggest that the burden of proof is on the agent to explain why information about her parking place is intimate.

15. Of course, we ***could*** contend that all information is private, including information about a parking place. I am willing to accept this modification, but it does nothing more than reword the privacy theorist's task—she still has to determine why certain types of information are "essentially private."

I do not mean to suggest that the boundary between intimate and nonintimate information is clear; it is not. For example, a nonintimate piece of information may become intimate strictly on the basis of where it is located: if I write about the weather in my personal journal, I can still justifiably claim that my privacy was invaded if another reads my weather report without permission.

16. This is not to suggest that all information about parties and employment is necessarily nonintimate; it is only to suggest that the vague information involved in my examples does not have the status of intimate information.

17. Compare this to my reaction upon being questioned about truly private information. If I were questioned by a stranger about my sex life, an exclamation of, "That's not something you should ask me about!" would constitute a satisfactory rejoinder.

18. For an example of this, see the Federal Privacy Act.

19. I could describe what took place in both the party and job information

example as a "privacy violation" without committing an obvious verbal error. Furthermore, my description would probably successfully convey my intended meaning, including its prescriptive aspect, i.e., the teller of the information told something she ought not to have told.

20. Though we can justify secrecy claims in many circumstances. We have an expansive property-based secrecy claim with respect to much nonintimate information; for example, clearly I have a justified secrecy claim to control my own information about the profitable computer technology I have been fortunate enough to develop, since it is my property. The Constitution's protection against nonintimate search and seizure partially acknowledges the importance of protecting secrecy claims with respect to property.

21. Morton Levine, "Privacy in the Tradition of the Western World," in ***Privacy,*** ed. William Bier (New York: Fordham University Press, 1980), 19.

22. Since this work focuses on privacy, I will not discuss secrecy at greater length. For further information about the relation between privacy and secrecy, see Sissela Bok, ***Secrets: On the Ethics of Concealment and Revelation*** (New York: Random House, **1983).**

23. Assume that the victim hid sufficiently rapidly that the peeping Tom did not even learn where she had hidden, since this knowledge might be construed as an acquisition of information about the agent.

24. Scanlon, "Thomson on Privacy," 320.

25. See Rachels, "Why Privacy Is Important," **329;** and Reiman, "Privacy, Intimacy and Personhood.''

26. "Access to an individual" should be broadly construed. It should not be understood as involving only direct contact through the senses with the individual. We can also gain access through intermediary sources or even by merely entering into her "personal space." For example, reading someone's private journal without her permission would count as gaining access to the individual, as would learning a piece of information about her, which reveals the continuity between the information and access-based privacy accounts.

27. Note that this interpretation of access as including a subset of informational access will be accepted in the remainder of this work.

28. An access privacy theorist might respond that our intuitions are confused: someone glancing at a woman's hands ***does*** lessen her privacy in the same way as someone grabbing her breast since both actions involve uncontrolled access. Yet we still have to explain why certain access violations, such as breast grabbing, are so much more significant than others. The obvious answer would be that certain areas of the body, such as a woman's breasts, are "private," while others are not, but this does no more than restate the problem. The access theorist still has to explain why certain forms of access, intimate ones, are at the core of privacy.

29. See Bowers v. Hardwick, minority opinion, 85 U.S. 140 **(1986).**

30. See Bowers v. Hardwick, majority opinion.

31. Note that I use "constitutional privacy issues" as a synonym for decisional privacy with respect to our actions.

32. Ruth Gavison, "Privacy and the Limits of Law," in ***Philosophical Dimensions of Privacy: An Anthology,*** ed. Ferdinand Schoeman (New York Cambridge University Press, 1984), 358.

33. For examples, see Eichbaum, "Towards an Autonomy-Based Theory of Constitutional Privacy"; and David A. J. Richards, ***Toleration and the Constitution*** (New York Oxford University Press, **1986).**

34. Gavison, "Privacy and the Limits of Law," 357.

35. For example, see Gavison, ''Privacy and the Limits of Law.''

36. The reason why I avoided grouping together "decisional" and "access" privacy is that this move would have abandoned the divisions commonly found in privacy theory and failed to simplify the task at hand. The problem of linking together an agent's decisions about informational access, noninformational access, and intimate actions would have remained in need of a solution.