

Defining Privacy

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Privacy is a difficult notion to define in part because rituals of association and disassociation are cultural and species-relative. For example, opening a door without knocking might be considered a serious privacy violation in one culture and yet permitted in another. Definitions of privacy can be couched in descriptive or normative terms—we can view privacy as a condition or as a moral claim on others to refrain from certain activities. Furthermore, some view privacy as a derivative notion that rests upon more basic rights such as liberty or property.

As highlighted below, there is little agreement on how to define privacy. But like other contested concepts—for example, liberty or justice—this conceptual difficulty does not undermine its importance. If only Plato were correct and we could gaze upon the forms and determine the necessary and sufficient conditions for each of these concepts. But we can't, and neither intuitions nor natural language analysis offer much help. Not doing violence to the language and cohering with our intuitions may be good features of an account of privacy. Nevertheless, these features, individually or jointly, do not suffice to provide adequate grounds for a definition—the language and the intuitions may be hopelessly muddled.

Moreover, as indicated by the analysis of examples offered throughout this article, there are central cases of privacy and peripheral ones. Aristotle discussed this idea of central and peripheral cases in talking about “friendship”: “. . . so they are not able to do justice to all the phenomena of friendship; since one definition will not suit all, they think there are no other friendships; but the others are friendships. . . .”¹ The same may be said of privacy. Some of the core features of the central cases of privacy may not be present in the outlying cases. One of the ways a conception is illuminated is to trace the similarities and differences between these examples.²

Evaluation is a further tool that aids in arriving at a defensible conception of privacy. A perfectly coherent definition of privacy that accords faultlessly with some group's intuitions may be totally useless. In the most general terms, we are asking “what this or that way of classifying privacy is good for.” At the most abstract level the evaluation may be moral—we ask “does this way of carving up the world promote, hinder, or leave unaffected, human well-being or flourishing?” John Finnis echoes this sentiment,

There is a mutual . . . interdependence between the project of describing human affairs by way of theory and the project of evaluating human options with a view . . . to acting

reasonably well. The evaluations are in no way deduced from the descriptions; but one whose knowledge of the facts of the human situation is very limited is unlikely to judge well in discerning the practical implications of the basic values. Equally, the descriptions are not deduced from the evaluations; but without the evaluations one cannot determine what descriptions are really illuminating and significant.³

Perhaps the best that can be done is to offer a coherent conception of privacy that highlights why it is distinct and important. In this article, after a brief survey of various definitions, I will offer and defend a control over access and use account of privacy. My goal is to provide a normative definition of privacy although I will sketch a descriptive account as well. Demonstrating that this conception of privacy is important and valuable has been considered in other works, thus analysis along this dimension will be purposively minimal.⁴

Conceptions of Privacy

Privacy has been defined in many ways over the last few hundred years.⁵ Warren and Brandeis, following Judge Thomas Cooley, called it “the right to be let alone.”⁶ Pound and Freund have defined privacy in terms of an extension personality or personhood.⁷ Legal scholar William Prosser separated privacy cases into four distinct but related torts. “*Intrusion*: Intruding (physically or otherwise) upon the solitude of another in a highly offensive manner. *Private facts*: Publicizing highly offensive private information about someone which is not of legitimate concern to the public. *False light*: Publicizing a highly offensive and false impression of another. *Appropriation*: Using another’s name or likeness for some advantage without the other’s consent.”⁸

Alan Westin and others have described privacy in terms of information control.⁹ Still others have insisted that privacy consists of a form of autonomy over personal matters.¹⁰ William Parent argued that “[p]rivacy is the condition of not having undocumented personal knowledge about one possessed by others,”¹¹ while Julie Inness defined privacy as “the state of possessing control over a realm of intimate decisions, which include decisions about intimate access, intimate information, and intimate actions.”¹²

More recently, Judith Wagner DeCew has proposed that the “realm of the private to be whatever types of information and activities are not, according to a reasonable person in normal circumstances, the legitimate concern of others.”¹³ This brief summary indicates the variety and breadth of the definitions that have been offered.

Normative and Non-Normative Accounts of Privacy

There are two distinctions that have been widely discussed related to defining privacy. The first is the distinction between descriptive and normative conceptions of privacy. A descriptive or non-normative account describes a state or condition

where privacy obtains. An example would be Parent's definition, "[p]rivacy is the *condition* of not having undocumented personal knowledge about one possessed by others."¹⁴ A normative account, on the other hand, makes references to moral obligations or claims. For example, when DeCew talks about what is of "legitimate concern of others," she includes ethical considerations.

One way to clarify this distinction is to think of a case where the term "privacy" is used in a non-normative way such as someone saying, "When I was getting dressed at the doctor's office the other day I had some measure of privacy." Here it seems that the meaning is non-normative—the person is reporting that a condition obtained. Had someone breached this zone the person may have said: "You should not be here, please respect my privacy!" In this latter case, normative aspects are stressed.

Reductionist and Non-Reductionist Accounts of Privacy

Reductionist and non-reductionist accounts of privacy have also been offered. Reductionists, such as Judith Jarvis Thomson, argue that privacy is derived from other rights such as life, liberty, and property rights—there is no overarching concept of privacy but rather several distinct core notions that have been lumped together.¹⁵ Viewing privacy in this fashion might mean jettisoning the idea altogether and focusing on more fundamental concepts. For example, Frederick Davis has argued that, "[i]f truly fundamental interests are accorded the protection they deserve, no need to champion a right to privacy arises. Invasion of privacy is, in reality, a complex of more fundamental wrongs. Similarly, the individual's interest in privacy itself, however real, is derivative and a state better vouchsafed by protecting more immediate rights."¹⁶ Unlike Davis, the non-reductionist views privacy as related to, but distinct from, other rights or moral concepts.

It is my view that the normative and non-normative distinction is important and crucial for conceptual coherence—it is possible and proper to define privacy along normative and descriptive dimensions. Liberty is also defined descriptively and normatively. We may, for example, define liberty without making any essential references to normative claims. Thomas Hobbes defines liberty as "the absence of external impediment."¹⁷ In this example, as with Hobbes's conception of the state of nature, there are no moral "oughts" or "shoulds" present. Alternatively, J. S. Mill defends a normatively loaded account of liberty opening his classic work *On Liberty* with "The subject of this essay is . . . civil, or social liberty: the nature and limits of the power which can be legitimately exercised by society over the individual."¹⁸ Privacy may also be defined descriptively or normatively.

Second, assuming a normative definition, without considering the justification of the rights involved it is unclear if privacy is reducible to other rights or the other way around. This point has been made by Parent and others.¹⁹ Moreover, given the arguments that I offer elsewhere, it is not surprising that there are close

connections between privacy, liberty, and self-ownership rights.²⁰ The very same sort of justification that is offered for privacy rights could be offered for property rights or life rights.²¹ It is also true that the kind of rights involved will be intimately tied to the form of justification—it would be surprising to find hard-line Kantians and crude consequentialists arriving at the same conception of “rights.” And even if the reductionist is correct, it does not follow that we should do away with the category of privacy rights. The cluster of rights that comprise privacy may find their roots in property or liberty yet still mark out a distinct kind. Finally, if all rights are nothing more than complex sets of obligations, powers, duties, and immunities, it would not automatically follow that we should dispense with talk of rights and frame our moral discourse in these more basic terms.

A Control- and Use-Based Definition of Privacy Rights

I favor what has been called a “control”-based definition of privacy rights.²² A privacy right is an access control right over oneself and to information about oneself. Privacy rights also include a use or control feature—that is, privacy rights allow me exclusive use and control over personal information and specific bodies or locations.

The term “control” may also be given a descriptive or normative treatment. A descriptive account of “control” would likely highlight the power to physically manipulate an object or intangible good. If it is within Smith’s power to limit access or use of some object, then we may say that the condition of control obtains. A normative account of “control” would focus on moral claims that should hold independent of the condition. As with the notion of a state or condition of privacy, I think that purely descriptive accounts of control are largely uninteresting.

One feature of the account that I defend is that it can incorporate many of the features found in the aforementioned definitions. Controlling access to ourselves affords individuals the space to develop themselves as they see fit. Such control yields room to grow *personally* while maintaining *autonomy* over the course and direction of one’s life. Moreover, each of Prosser’s torts contains elements of access control. While there are interesting connections between privacy and autonomy, I do not think that either is more fundamental than the other or that privacy is valuable simply because it is connected to autonomy. In any case, there are numerous competing theories of autonomy and it would be uninteresting to simply assume that one of these views is correct and then note that privacy falls out of the view.

William Parent has attacked non-normative control-based definitions of privacy arguing,

All of these definitions should be jettisoned. To see why, consider the example of a person who voluntarily divulges all sorts of intimate, personal, and undocumented information

about [her]self to a friend. She is doubtless exercising control . . . But we would not and should not say that in doing so she is preserving or protecting her privacy. On the contrary, she is voluntarily relinquishing much of her privacy. People can and do choose to give up privacy for many reasons. An adequate conception of privacy must allow for this fact. Control definitions do not.²³

Parent maintains that it is implausible to exercise control by giving up control. But why should we say that someone who does this is “preserving or protecting . . . privacy” rather than “giving up” privacy? In this case, by yielding control to others the condition of privacy is diminished or no longer obtains. Similarly, someone may freely limit their own liberty. An exercise of liberty may limit liberty while an exercise of control may limit control.

Moreover, yielding control over access does not automatically yield control over use. For example, Ginger may allow Fred access to sensitive personal information, yet still have the power to stop him from broadcasting this information. Thus, non-normative views of access and use are not undermined by Parent’s worries.

Moving to normative accounts, Parent is quick to add in a footnote that those who defend a control definition of privacy might be worried about a *right* to privacy rather than the *condition* of privacy.²⁴ He charged that if so they should have made this explicit and in any case are confusing a liberty right with a privacy right.

Parent’s argument, however, is anemic. On these grounds we could complain that control definitions of property rights or life rights are similarly confused with liberty rights. Following Hohfeld and others, the root idea of a “right” can be expressed as follows:

To say someone has a right is to say that there exists a state of affairs in which one person (the right-holder) has a claim on act or forbearance from another person (the duty-bearer) in the sense that, should the claim be exercised or in force, and the act or forbearance not be done, it would be justifiable, other things being equal, to use coercive measures to extract either the performance required or compensation in lieu of that performance.²⁵

This broad characterization holds of both moral rights and legal rights. For example, property is a bundle of rights associated with an owner’s relation to a thing where each right in the bundle is distinct.²⁶

Given this, it should be clear that Parent’s attack on normative control-based definitions is based on an overly simplistic account of rights. Ginger’s property right to a Louisville Slugger yields her a particular sort of control right over the baseball bat in question. It also justifiably limits the liberty of everyone else—they cannot interfere with Ginger’s control of the bat without her consent. A liberty right is not a freedom to do whatever one likes—it is not a license. Liberty rights, like property rights, are limited by the rights of others. In the most basic terms, rights, liberty, and control come bundled together. When one gives up control and yields access in an intimate relationship, for example, one is giving up privacy within a limited domain. Parent’s attack thus misses the mark—he assumes,

without argument, that liberty, property, and control rights are conceptually distinct. As noted earlier, without some account of the justification of these rights it is quite contentious to claim that they must be conceptually distinct.²⁷

Parent offers the following definition for privacy: “Privacy is the condition of not having undocumented personal knowledge about one possessed by others.”²⁸ A person’s privacy is diminished exactly to the degree that others possess this kind of knowledge about him. Documented information is information that is found in the public record or is publicly available. For example, information found in newspapers, court proceedings, and other official documents open to public inspection would be considered publicly available according to Parent.

There are several problems with this conception of privacy. First, this definition leaves the notion of privacy dependent upon what a society or culture takes as documentation and what information is available via the public record. Parent acts as if undocumented information is private while documented information is not, and this is the end of the matter. But surely the secret shared between lovers is private in one sense and not in another—this secret is private in the sense of being held in confidence between two individuals and not known by others; it is not private in the sense of being known by a second person. To take another case, consider someone walking in a public park. There is almost no limit to the kinds of information that can be acquired from this public display. One’s image, height, weight, eye color, approximate age, and general physical abilities are all readily available. Moreover, biological matter will also be left in the public domain—strands of hair and the like may be left behind. Since this matter, and the information contained within, is publicly available, it would seem that all of one’s genetic profile is not private information.

Furthermore, the availability of information is dependent upon technology. Telescopes, listening devices, heat imaging sensors, and the like, open up what most would consider private domains for public consumption. What we are worried about is what *should* be considered a “private affair”—something that is no one else’s business. Parent’s conception of privacy is not sensitive to these concerns.²⁹

Parent could counter, by claiming that he is presenting a definition that is not normatively loaded—privacy is a state or condition that holds or not. For Parent, the state or condition of not having undocumented personal information about oneself possessed by others is a state of privacy. Similarly, liberty might be described as the state or condition of not having restraints on what one may do or think.

Insisting on this way of defining privacy falls prey to what I call the “so what” objection. In general, we are not worried about whether a state of privacy obtains or not—we are concerned about the normative aspects of disassociation or leave taking. When can I justifiably restrict access to myself? When are others morally permitted to cross into private domains? So what does it matter—if a state or condition of privacy exists given Parent’s definition? What we want to know is if the state or condition in question is morally justified.³⁰

Finally, Parent's view of privacy completely ignores what might be called "physical" or "locational" privacy. Suppose someone with severe amnesia wanders into your room while you are sleeping and proceeds to pet your head. Independent of documented or undocumented information, many would argue that this is an egregious violation of privacy.³¹ Given that no information is involved, it would fall outside of Parent's non-normative account. Furthermore, this deficiency along with Parent's failure to include a use dimension—use after access is also important—points to an even deeper failing. Having the capacity and right to regulate access to and use of bodies, locations, and personal information is essential for human well-being.³² In this way, the account of privacy being offered links nicely with value theory and drives home what I have called the "so what" objection—the distinction between documented and undocumented personal information does not usefully capture the relevant value-based concerns.

Like Parent, Judith Jarvis Thomson finds control-based definitions of privacy puzzling. She argues that a loss of control does not always mean that we have lost privacy.

If my neighbor invents an X-ray device which enables him to look through walls, then I should imagine I thereby lose control over who can look at me: going home and closing the doors no longer suffices to prevent others from doing so. But my right to privacy is not violated until my neighbor actually does train the device on the wall of my house.³³

First, it is important to note how Thomson slides between non-normative and normative control-based accounts of privacy in this case. At the start of the case control is lost, but privacy is maintained because the individual who now has control does not exercise it. A control-based *condition* of privacy no longer obtains, yet a privacy right has not been violated. Sure enough this sounds odd—but it is odd because I do not think that control-based privacy theorists actually intend to support a purely non-normative conception of privacy. To put the point another way, if we sprinkle normativity, so-to-speak, throughout the definition—privacy is an access control and use right to places, bodies, or personal information—then Thomson's attack loses its force. Simply put, a condition of privacy obtains when others do not have access while a right to privacy affords control over access and use.

Thomson continues with a second example. "Suppose a more efficient bugging device is invented: instead of tapes, it produces neatly typed transcripts (thereby eliminating the middlemen). One who reads those transcripts does not hear you, but your right to privacy is violated just as if he does."³⁴ But this case fits well with the view of privacy rights as justified control over access to objects and information. Information may take many forms and thus it may be accessed in many different ways. If an individual has a right to control access to and uses of some bit of information, then it does not matter *how* the information was accessed—what matters is *that* it was accessed. Thomson claims, while "[y]ou may violate a man's right to privacy by looking at him or listening to him; there

is no such thing as violating a man's right to privacy by simply knowing something about him."³⁵ This seems true enough. However, by *looking* or *listening* you may be violating his right to control access to information—information that provides the foundation for “knowing.”³⁶ Moreover and more importantly, you may be violating a use control right. If correct, it would seem that Thomson's critique of control-based definitions of privacy fails.³⁷

Privacy Rights and Property Rights

If property rights and privacy rights are both essentially about control, then maybe privacy rights are simply a special form of property rights. Thomson tends to agree, “. . . the right to privacy is itself a cluster of rights, and it is not a distinct cluster of rights but itself intersects with . . . the cluster of rights which owning property consists in.”³⁸ Thomson is a reductionist about privacy.

It is obvious that property may come in several forms. Intellectual property is generally characterized as non-physical property where owner's rights surround control of physical manifestations. Intellectual property rights surround control of physical items, and this control protects rights to ideas—for example, no matter how a specific poem is instantiated (written, performed orally, or saved on a website), copyright would apply. Rights to control physical goods, on the other hand, allow control over one physical object.

Privacy may be understood as a right to control access to places and ideas independent of instantiation. In terms of location, privacy yields control over access to one's body, capacities, and powers. A privacy right in this sense is a right to control access to a specific object or place. In Prosser's terminology, *intrusions* would violate rights to control access to a specific object. But we may also control access to sensitive personal information about ourselves. In this sense, a privacy right affords control over ideas no matter how these ideas are instantiated. For example, when a rape victim suppresses the dissemination of sensitive personal information about herself, she is exercising a right to control a set of ideas no matter what form they take. It matters not if the information in question is written, recorded, spoken, or fixed in some other fashion. More importantly, even if someone has justifiably accessed sensitive personal information about another, it does not follow that any use of this information is permitted. Again, taking up Prosser's categories, publishing *private facts*, putting someone in a *false light*, or *appropriating* someone's image or style would violate a right to control an entire class of ideas.

While there may be substantial overlap between the notions of property and privacy, it is advantageous to retain the category as we do with intellectual property. If I am correct, privacy claims include claims to control access to places and ideas. This fact alone marks a significant category even if it is a category that falls under the umbrella of property rights.

Consider the following worry raised by Thomas Scanlon: “Suppose someone used . . . [an] X-ray device to examine an object in my safe. It seems clear to me

that the right which is violated in such a case does not depend on my owning the object examined. Suppose it is your object . . . ; suppose it is someone else's; suppose there is no object in the safe at all . . . None of these possibilities removes the wrongfulness of the intrusion."³⁹ Scanlon concludes that ownership and privacy pull apart in this case. Scanlon adds:

Suppose, for example, that each person was assigned a plot in the common field to use as a place to bury valuables. Then anyone who . . . [X-rayed] . . . my plot without special authority would violate a right of mine. . . . For us, ownership is relevant in determining the boundaries of our zone of privacy, but its relevance is determined by norms whose basis lies in our interest in privacy, not in the notion of ownership.⁴⁰

Assuming, however, that privacy rights are rights to control access to and uses of locations and ideas, these examples do not undermine a control-based view of privacy or the view that the concepts of privacy and ownership have significant overlap. If the object or objects were unowned, assuming that the safe and the plot of land are unowned as well, then there would be no privacy invasion. Imagine that the object was a painting of a sunset painted by some long dead artist who gave the work to all of humankind. On the other hand, if we assume that the safe and the plot are owned, then wrongness can be found in interfering with the control conferred by ownership.⁴¹

Scanlon may reply by arguing that the wrongness is found when someone unjustifiably intrudes and obtains knowledge about someone else—say Crusoe finds out, by using an X-ray device, that Friday is keeping an unowned item in a safe. Such a reply, however, would seem to support a control-based definition of privacy. The wrongness in this case lies in the fact that Friday has a right to control access to certain kinds of information and Crusoe has violated this control—in this case, the item examined may not be yours but the information that it is in your possession may be.

Or consider another case provided by Thomson and discussed by Scanlon. In this case, suppose that you steal a publicly owned subway map and put it in your pocket or briefcase. Scanlon contends that if I were to view the map with my X-ray device I would violate your privacy rights independent of ownership. I am not entitled to look into your pocket or briefcase even if I do not interfere with your property rights to these items.

I would agree with Scanlon if in acquiring the information on the subway map I also acquired, inadvertently or not, personal information about you—for example, the fact that you possessed the map. But if my device were calibrated to only acquire the information found on the publicly owned subway map, then I would not agree that this acquisition includes a privacy violation.

One of the problems with both Scanlon's and Thomson's analysis of privacy is that they provide few arguments. They both offer numerous examples that test and sometimes strain our intuitions about privacy. But perhaps our intuitions about these cases are unclear. Absent an argument justifying some view or other, little is

gained.⁴² If privacy is understood as having accessibility and control over use dimensions, then it is not surprising that there would be overlap with the notion of property.

A Final Definition⁴³

Richard B. Parker writes:

*... privacy is control over when and by whom the various parts of us can be sensed by others. By "sensed," is meant simply seen, heard, touched, smelled, or tasted. By "parts of us," is meant the part of our bodies, our voices, and the products of our bodies. "Parts of us" also includes objects very closely associated with us. By "closely associated" is meant primarily what is spatially associated. The objects which are "parts of us" are objects we usually keep with us or locked up in a place accessible only to us.*⁴⁴

A right to privacy can be understood as a right to maintain a certain level of control over the inner spheres of personal information and access to one's body, capacities, and powers. It is a right to limit public access to oneself and to information about oneself. For example, suppose that I wear a glove because I am ashamed of a scar on my hand. If you were to snatch the glove away, you would not only be violating my right to property (the glove is mine to control), you would also violate my right to privacy—a right to restrict access to information about the scar on my hand. Similarly, if you were to focus your X-ray camera on my hand, take a picture of the scar through the glove, and then publish the photograph widely, you would violate a right to privacy. While your X-ray camera may diminish my ability to control the information in question, it does not undermine my right to control access.

Privacy also includes a right over the use of bodies, locations, and personal information. If access is granted accidentally or otherwise, it does not follow that any subsequent use, manipulation, or sale of the good in question is justified. In this way, privacy is both a shield that affords control over access or inaccessibility and a kind of use and control right that yields justified authority over specific items—like a room or personal information.

The normative claims surrounding control over access and use are relative to culture and species.⁴⁵ Judith Wagner DeCew argues that this sort of definition fails because "if a police officer pushes one out of the way of an ambulance, one has lost control of what is done to one, but we would not say that privacy has been invaded. Not just any touching is a privacy intrusion."⁴⁶ I think this sort of attack is too quick. First, whether or not a privacy invasion will have occurred in a case of "touching" will depend on the privacy norms found within the culture in question. A right to control access and use may take many forms. Thus, one cannot refute this definition by finding a single example where a loss of control over bodily access does not include a loss of privacy. Second, the case that DeCew presents may simply be an example of a slight privacy invasion being overridden by other more weighty considerations.

As I have noted throughout this article, in addition to a *right* to privacy it may also be helpful to define a condition of privacy. In defining a condition of privacy we are trying to be descriptive rather than normative. My contention is that a plausible non-normative account of privacy begins with accessibility. That is, the condition of privacy obtains when an individual, place, or personal information is inaccessible. More often than not, individuals voluntarily seek this condition. Weinstein notes, “[i]f the condition is entered involuntarily, it is isolation when a matter of circumstance and ostracism when a result of the choice of others. Either isolation or ostracism may become loneliness when accompanied by a desire for communication.”⁴⁷ In many instances privacy is a condition of voluntary seclusion or walling off—individuals seek situations where they are inaccessible. The condition of privacy obtains when an individual freely separates herself from her peers and restricts access. For those entities that lack free will, we may talk of separation rather than privacy. When an individual restricts access to himself and to personal information, we may say that a condition of privacy obtains. But there is more to a condition of privacy than voluntary seclusion—for example, one may have a measure of privacy simply by not being noticed. James Moor and Herman Tavani note that a condition of privacy obtains “[i]n a situation in which one is naturally protected or shielded from intrusion and access by others. . . .”⁴⁸ I would add that artificial protections and shielding would establish a condition of privacy as well. In any event, if my earlier critique of Parent’s non-normative conception of privacy is compelling, then we should not be overly worried about defining a state or condition precisely. We are, and should be, concerned with the normative aspects of privacy.

Definition: A right to privacy is a right to control access to and uses of—places, bodies, and personal information.

Test Cases and Illustrations⁴⁹

Aside from the examples already mentioned, there are numerous other cases that may be helpful in illustrating and clarifying the account of privacy being defended. Another function of the cases already discussed and the ones that follow is to present a series of “on pain of rationality” arguments. If you agree with me on this or that case, and there are no relevant dissimilarities in some further case, then on pain of rationality you should agree with me in the latter case. Notice this would be a powerful way to argue even if in the process we run afoul of some intuition or use of language. The overall goal is to aim at coherence as well as completeness—I take it to be a virtue of the account being offered that it is generally applicable. To begin, consider the following two cases.

The Loud Fight: Suppose that Fred and Ginger are having a fight—shouting at each other with the windows open so that anyone on the street can hear.⁵⁰

The Quiet Fight: Suppose that Fred and Ginger are having a fight—shouting at each other although the windows are closed and they have taken precautions to make sure that others cannot hear them. Suppose someone trains an amplifier on Fred and Ginger’s house and listens to them.⁵¹

In the loud fight case it would seem that Fred and Ginger have waived the right to privacy—they have via their actions allowed others who are in a public space to hear the fight. In fact, one might say that Fred and Ginger have imposed or foisted sound waves on others. In the typical case there is nothing wrong with speaking or being in public—or behaving in such a way that those in public spaces can hear or see us. Light waves and sound waves bounce around and the typical human is conditioned to perceive and interpret these inputs. Moreover, to condition ourselves otherwise would be dangerous—there are good reasons for passive reception and interpretations of sensory inputs. In these sorts of cases, privacy rights have been waived.

A variation on the loud fight case is where Fred and Ginger use a sound and light encryption device to scramble their words and images. In this example, the person on the street can hear and see something but cannot understand these inputs. Here Fred and Ginger are not waiving their privacy rights. If someone were to decrypt the words and images, then there would be a privacy violation. This is similar to the quiet fight case where technology is used to peer into a private zone.

Notice that part of what determines the boundary or scope of a right are the capacities of the individuals involved. For example, consider a case where everyone has superman ears that cannot be turned off. In this instance, any utterance will be noticed by others. If we apply the “ought implies can” principle—that is, you can only have a moral obligation to do or refrain from doing something if it is within your capacities to do or refrain from what is required—then we cannot have an obligation not to notice the words of others. Similarly, if humans were inherently clumsy and lost control of their bodies frequently, the boundary or force of property rights would have to be modified. If individuals could not help but to fall onto the property of others, then they could not have an obligation to refrain from doing so.

Developing a full account of when and how rights are waived and the extent or boundary of rights is beyond the scope of this work. Nevertheless, it seems that two tentative points can be offered. First, the boundary or extent of rights is dependent, in part, on the capacities of the agents in question. Second, rights, in part, are waived given general expectations regarding the capacities of individuals and the behavior of the right-holder. Consider a case that helps to illustrate these points.

The Loud Fight #2: Just like the first version although this time a deaf person is walking nearby and turns up his hearing aid and listens to Fred and Ginger.⁵²

While an individual uses technology in this example to hear what Fred and Ginger are saying, we should not conclude that privacy has been violated. As in the loud

fight example, Fred and Ginger have certain expectations related to the sensory inputs of their fellows and knowingly or negligently engage in behavior that places personal information into a public space. Thus, they have waived their right to privacy in this case. But if Fred and Ginger were to use a sound and light encryption device and the deaf person in question were to decrypt the words and images via technology, then we would have a violation. Consider a different sort of this case.

The Accidentally Amplified Quiet Fight: A married couple, X and Y, are having another quiet fight behind closed doors. But this time an unanticipated gust of wind sweeps through the house, knocking down the front door, carrying and amplifying the couple's voices so that Stuart, who is washing his car in his driveway across the street, hears at least some of what X and Y have been saying.⁵³

In the accidentally amplified quiet fight case the right to privacy is not waived and it also appears not to be violated. A similar case is one where an innocent is forcibly picked up by a freak gust of wind and placed in your car. You have not waived your property right and at the same time it would seem quite odd to maintain that your rights have been violated.⁵⁴ It could be argued that a right has been violated and that there are mitigating factors. But if we also say that rights violations sanction compensation for losses, then we would have a case where an innocent could be forced to pay damages to a right-holder—suppose the mere violation of a right causes a loss. I would rather say that the right has not been violated, it has just been innocently crossed and no compensation is required. To be sure, the person in your car must leave and your neighbor who has learned certain facts about you should refrain from broadcasting this information—that these innocent individuals have come to acquire something of yours does not sanction further use.

The aspect of privacy related to boundary crossings—privacy as control over access—is highlighted in cases where certain zones are penetrated.

Zone Intrusion: Suppose you look in my safe with your X-ray device to see what it holds—there could be a stolen photo, a borrowed photo, or nothing. . . .⁵⁵

Mere Zone Intrusion: Just like the first zone intrusion case although the person looking has no short-term memory and will forget any fact learned immediately.

In the case of zone intrusion a right to control access has been violated even though nothing except a bare fact has been seized. This is further illustrated by the example of mere zone intrusion. In the second case, nothing has been taken—no facts have been learned—all that has happened is that a zone or boundary has been unjustifiably crossed. A variation of the mere zone intrusion case is one where someone with no short-term memory completes a body cavity search of an individual who is temporarily unconscious. While no information is obtained or used, it seems clear that a zone or boundary has been violated—in this last

example physical or locational privacy rights have been infringed. Perhaps it is this sort of case where privacy and property begin to pull apart.

Garden variety gossip cases highlight the aspect of trust or implicit agreements to withhold sharing information. Consider the following two examples:

Gossip: Two friends of yours engage in gossip about you without breaking any confidences etc. . . .⁵⁶

Gossip Case #2: Smith is recently divorced because he became impotent shortly after the wedding—he shares this information with his closest friend. Jones, also a friend of Smith's, innocently overhears Smith telling his friend and begins to gossip with other friends.⁵⁷

In the first gossip case, given that you have granted access via the relationship with your friends and no agreement or trust has been broken, there is no worry on the account of privacy being offered. In the second case, however, we have a use violation but not an access violation—Jones innocently overhears Smith. But just because there was no infringement related to access does not mean that Jones can use, manipulate, or broadcast the information in question. Thus, the account being defended can offer a defensible answer to the worry being posed in these gossip cases.

Finally, there are several examples that trade on the overlap between solitude, nuisance, coercion, and privacy.

Loud Stinky Neighbors: Your neighbors make a terrible racket all the time—or they cook foul smelling meals. . . .⁵⁸

Easy Listening Everywhere: Suppose after a vote the city where you live puts up loud speakers everywhere and plays easy listening music in all public places.⁵⁹

Sensitive Information Assault: Suppose a stranger stops you at a party and begins telling about intimate personal information and problems he is having.⁶⁰

In each of these cases there is an intrusion—a placement of unwanted information, smells, sounds, and images into an area of access control. As examples of mere access violations, it may be granted that there is an aspect of privacy involved. Nevertheless, the typical privacy violation on the account being offered contains both access and use violations—there is not a placement of unwelcome information, smells, sounds, and images but rather an unjustified taking of information or use of some physical item. Thus, there may be other, more important, aspects to these cases than privacy considerations. For example, in cases of sensitive information assault there is a kind of coercion involved—a hijacking of someone's time and consideration. Loud, stinky neighbors and invasive music in public places intrude on individual solitude, and in the worst cases violate peaceful sanctuaries of contemplation—thus, these cases may not primarily focus on privacy interests.

Conclusion

I have maintained that privacy should be defined as a right to control access to places, locations, and personal information along with use and control rights to these goods. Nevertheless, it is likely the case that any definition of a right to privacy will not satisfy everyone. It is equally true that how the right is justified will play an important role in providing the dimensions of the definition at issue—thus, any attempt to define privacy rights independent of a justifying theory will likely be incomplete.

I have also maintained that being clear about normative and non-normative definitions is crucial for understanding privacy. Many of the “so-called” counterexamples to various definitions of privacy trade on slippage between descriptive and normative accounts. The numerous cases and examples that help to clarify the conception of privacy under consideration also indicate that the boundary between privacy and other moral concepts—for example, property rights, liberty, and self-ownership—is not always clear and distinct. As noted by Aristotle, this is to be expected for “[o]ur discussion will be adequate if it has as much clearness as the subject-matter admits of, for precision is not to be sought for alike in all discussions, any more than in all the products of the crafts. . . .”⁶¹

I would like to thank Robert Ward, Elizabeth Jones, Katie Eyre, M. L. Verden, Brian Sheehan, David Steele, Janice Moskalik, and Bill Kline for their comments. Thanks as well to the two anonymous reviewers at the Journal of Social Philosophy, who provided numerous suggestions and criticisms.

Notes

¹ Aristotle, *Eudemean Ethics* in *The Complete Works of Aristotle*, vol. II, ed. Jonathan Barnes (Princeton, NJ: Princeton University Press, 1984), VII, 2: 1236a16–32.

² The idea of central cases and peripheral cases comes from Finnis who is citing Aristotle. See John Finnis, *Natural Law and Natural Rights* (New York: Oxford University Press, 1980), 11.

³ *Ibid.*, 19.

⁴ Adam D. Moore, “Privacy: Its Meaning and Value,” *American Philosophical Quarterly* 40 (2003): 215–27.

⁵ For a rigorous analysis of the major accounts of privacy that have been offered, see Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Ithaca, NY and London: Cornell University Press, 1997), chaps. 1–4. While I do not agree entirely with DeCew’s proposed definition of privacy, her analysis is insightful and thought-provoking.

⁶ See Thomas M. Cooley, *Cooley on Torts* (2nd ed., 1888); S. Warren and L. Brandeis, “The Right to Privacy,” *The Harvard Law Review* 4 (1890): 193–220.

⁷ Roscoe Pound, “Interests in Personality,” *Harvard Law Review* 28 (1915): 343; and Paul A. Freund, “Privacy: One Concept or Many?” in *Privacy Nomos XIII*, ed. Roland Pennock and John W. Chapman (New York: Atherton Press, 1971), 182.

⁸ Dean William Prosser, “Privacy,” *California Law Review* 48 (1960): 383, 389, quoted in E. Alderman and C. Kennedy, *The Right to Privacy* (New York: Alfred A. Knopf, 1995), 155–56.

⁹ Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1968); Adam D. Moore, *Intellectual Property and Information Control* (New Brunswick, NJ: Transaction Publishing, 2001, 2004). See

also Anita Allen, *Why Privacy Isn't Everything: Feminist Reflections on Personal Accountability* (Lanham, MD: Rowman & Littlefield, 2003); and Ruth Gavison, "Information Control: Availability and Control," in *Public and Private in Social Life*, ed. Stanley Benn and G. Gaus (New York: St. Martin's Press, 1983), 113–34.

¹⁰ *Eisenstadt v. Baird*, 405 U.S. 438 (1972): 453. See also Louis Henkin, "Privacy and Autonomy," *Columbia Law Review* 74 (1974): 1410, 1425; Joel Feinberg, "Autonomy, Sovereignty, and Privacy: Moral Ideas in the Constitution?" *Notre Dame Law Review* 58 (1983): 445; Daniel R. Ortiz, "Privacy, Autonomy, and Consent," *Harvard Journal of Law and Public Policy* 12 (1989): 91; and H. Tristram Englehardt Jr., "Privacy and Limited Democracy," *Social Philosophy and Policy* 17 (Summer 2000): 120–40. "Three different senses of privacy . . . must be distinguished . . . : (1) freedom from unwanted observation or collection of information, (2) freedom from the disclosure of personal information without one's consent, and (3) freedom from unwarranted government intrusion." Englehardt, "Privacy and Limited Democracy," 123.

¹¹ W. A. Parent, "Privacy, Morality, and the Law," *Philosophy and Public Affairs* 12 (1983): 269.

¹² Julie Inness, *Privacy, Intimacy, and Isolation* (New York: Oxford University Press, 1992), 140.

¹³ DeCew, *In Pursuit of Privacy*, 58, 64. DeCew presents and defends this broad definition, in part, to capture the disparate elements of privacy that have been codified in the law. In any case, I do not think that DeCew's definition is incompatible with the account offered below.

¹⁴ Parent, "Privacy, Morality, and the Law," 269.

¹⁵ Thomson was one of the first to defend a reductionist view of privacy. See Judith Jarvis Thomson, "The Right to Privacy," *Philosophy and Public Affairs* 4 (1975): 295. For an analysis of the reduction versus non-reduction debate, see Amy Peikoff, "No Corn on This Cob: Why Reductionists Should Be All Ears for Pavesich," *Brandeis Law Journal* 42 (2004): 751.

¹⁶ Frederick Davis, "What Do We Mean by 'Right to Privacy'?" *San Diego Law Review* 4 (1959): 20.

¹⁷ Thomas Hobbes, *Leviathan*, ed. C. B. MacPherson (Harmondsworth, UK: Penguin, 1985), chap. 14, p. 189.

¹⁸ J. S. Mill, *On Liberty*, ed. E. Rapaport (Indianapolis, IN: Hackett Publishing, 1978), chap. 1, p. 1.

¹⁹ See Parent, "Privacy, Morality, and the Law," 279–80; DeCew, *In Pursuit of Privacy*, 29, citing Thomas Scanlon, "Thomson on Privacy," *Philosophy and Public Affairs* 4 (1975): 315–22; and Jeffrey Reiman, "Privacy, Intimacy, and Personhood," *Philosophy and Public Affairs* 6 (1976): 26–44.

²⁰ See Adam D. Moore, "Justifying Informational Privacy Rights," *San Diego Law Review* 45 (November/December 2007): 809–946; Moore, *Intellectual Property and Information Control*, chap. 8; and Adam D. Moore, "Intangible Property: Privacy, Power, and Information Control," *American Philosophical Quarterly* 35 (October 1998): 365–78.

²¹ See Moore, *Intellectual Property and Information Control*.

²² This account is similar to Anita Allen and Ruth Gavison's "inaccessibility" view of privacy and Ernest Van Den Haag and Richard Parker's "control" theory. See Anita Allen, *Why Privacy Isn't Everything: Feminist Reflections on Personal Accountability* (Lanham, MD: Rowman & Littlefield, 2003) and Ruth Gavison, "Information Control: Availability and Control," in *Public and Private in Social Life*, ed. Stanley Benn and G. Gaus (New York: St. Martin's Press, 1983), 113–34; Charles Fried, *An Anatomy of Values* (Cambridge, MA: Harvard University Press, 1970), chap. 9; Richard Wasserstrom, "Privacy: Some Assumptions and Arguments," in *Philosophical Law*, ed. R. Bronaugh (Westport, CT: Greenwood Press, 1979), 148; Hyman Gross, "Privacy and Autonomy," *Privacy: Nomos XIII* (1971): 170; Ernest Van Den Haag, "On Privacy," *Privacy: Nomos XIII* (1971): 147; and Richard Parker, "A Definition of Privacy," *Rutgers Law Review* 27 (1974): 280.

²³ Parent, "Privacy, Morality, and the Law," 273.

²⁴ *Ibid.*, n. 11.

²⁵ Lawrence Becker, *Property Rights, Philosophic Foundations* (London: Routledge & Kegan Paul, 1977), 19. Hohfeld distinguishes four types of rights: claim rights, liberty rights, power rights, and

immunity rights. See W. N. Hohfeld, "Fundamental Legal Conceptions," *Yale Law Journal* (New Haven, CT: Yale University Press, 1919).

- ²⁶For a lucid account of full legal ownership or property, see A. M. Honoré, "Ownership," in *Oxford Essays in Jurisprudence*, ed. A. G. Guest (London: Oxford University Press, 1961), 112–28. See also Carl Wellman, *A Theory of Rights: Persons Under Laws, Institutions, and Morals* (Totowa, NJ: Rowman and Allanheld, 1985). I should note that there are numerous competing conceptions of rights. Robert Nozick viewed rights as side-constraints on action requiring omissions. The "interest" theory, defended by Bentham, Lyons, MacCormick, Raz, and Waldron, holds that a person has rights insofar as they have a compelling interest that justifies holding others to have the appropriate duty. The "choice" theory of rights, supported by Hart, Montague, and Steiner, holds that a person has a right when others have duties that protect the right-holder's choices. Rainbolt, Feinberg, and Dworkin have also advanced their own conception of rights. See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974); David Lyons, *Rights, Welfare, and Mill's Moral Theory* (Oxford: Oxford University Press, 1994); Neil MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (New York: Oxford University Press, 1982); Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986); Jeremy Waldron, "Rights in Conflict," *Ethics* 99 (April 1989): 503–19; H. L. A. Hart, *Essays on Bentham* (New York: Oxford University Press, 1982) and *Essays in Jurisprudence and Philosophy* (New York: Oxford University Press, 1983); Phillip Montague, "Two Concepts of Rights," *Philosophy and Public Affairs* 9 (1980): 372–84; Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994); George Rainbolt, "Rights as Normative Constraints on Others," *Philosophy and Phenomenological Research* 53 (1993): 93–112; Joel Feinberg, *Rights Justice, and the Bounds of Liberty* (Princeton, NJ: Princeton University Press, 1980); R. M. Dworkin, "Rights as Trumps," in *Theories of Rights*, ed. J. Waldron (New York: Oxford University Press, 1985), 153–68.
- ²⁷DeCew puts the point the following way. "A subset of autonomy cases . . . can plausibly be said to involve privacy interests. . . . They should be viewed as liberty cases in virtue of their concern over decision-making power, whereas privacy is at stake because of the nature of the decision." Judith Wagner DeCew, "The Scope of Privacy in Law and Ethics," *Law and Philosophy* 5 (1986): 165.
- ²⁸Parent, "Privacy, Morality, and the Law," 269.
- ²⁹Samuel Rickless offers the following counterexample to Parent's view. "Goldberg trains his powerful X-ray device on Rudolf's wall-safe and learns from reading the papers therein that Rudolf was once a member of the Nazi party. As it happens, Goldberg *could* have learned the very same information about Rudolf by reading old issues of *Der Völkischer Beobachter* in the public library, but did not do so." Samuel Rickless, "The Right to Privacy Unveiled," *San Diego Law Review* 45 (November/December 2007): 773–99. Rickless contends that Goldberg violates Rudolf's privacy in this case even though no information that was not already a part of the public record was obtained. If so, possession of undocumented personal information about someone is not a necessary condition for a privacy violation. This sort of objection was also raised by DeCew. See DeCew, "The Scope of Privacy," 152.
- ³⁰Judith Wagner DeCew echoes this sentiment. "The general point is that we are not likely to view perpetrating a violation as any less of a violation just because the agent is not the first one to invade the other's privacy." DeCew, *In Pursuit of Privacy*, 30.
- ³¹Thus, on Parent's own terms—not doing violence to the language and reflecting our intuitions—his account fails.
- ³²Moore, "Privacy: Its Meaning and Value," 215–27.
- ³³Thomson, "The Right to Privacy," 304, n. 1. For a critique of Thomson's view of privacy, see Scanlon, "Thomson on Privacy," 315–22.
- ³⁴Thomson, "The Right to Privacy," 304, n. 1.
- ³⁵*Ibid.*, 307.
- ³⁶Hinting at the analysis to come, knowing something about someone without justified entitlement may be similar to accepting stolen property. I would like to thank Bill Kline for making this suggestion.

- ³⁷For a defense of control-based definitions of privacy against several objections, see Julie Inness, *Privacy, Intimacy, and Isolation* (New York: Oxford University Press, 1992), 47–53.
- ³⁸Thomson, “The Right to Privacy,” 306. See also Van Den Haag, “On Privacy,” 147. As noted above, I would add that life rights, liberty rights, and property rights overlap with each other and privacy as well.
- ³⁹Scanlon, “Thomson on Privacy,” 318.
- ⁴⁰*Ibid.*
- ⁴¹James Rachels also argues against models that conceive privacy rights as types of property rights: “. . . the right to privacy [is] a distinctive sort of right in virtue of the special kind of interest it protects.” James Rachels, “Why Privacy Is Important,” *Philosophy and Public Affairs* 4 (1975): 333. As already noted, the fact that privacy protects different sorts of interests does not by itself lead us to the conclusion that privacy and property do not come bundled together.
- ⁴²For an interesting analysis of how legal conceptions of privacy and property have been connected, see Morgan Cloud, “The Fourth Amendment During the *Lochner* Era: Privacy, Property, and Liberty in Constitutional Theory,” *Stanford Law Review* 48 (1996): 555.
- ⁴³The account of privacy that I am defending is similar to the restricted access/limited control view offered by Tavani and Moor in a recent article. See H. Tavani, “Philosophical Theories of Privacy: Implications for an Adequate Online Privacy Policy,” *Metaphilosophy* 39 (2007): 1–22.
- ⁴⁴Richard B. Parker, “A Definition of Privacy,” *Rutgers Law Review* 27 (1974): 281.
- ⁴⁵Moore, “Privacy: Its Meaning and Value,” 215–27.
- ⁴⁶DeCew, *In Pursuit of Privacy*, 53.
- ⁴⁷M. Weinstein, “The Uses of Privacy in the Good Life,” *Privacy: Nomos XIII* (1971): 94.
- ⁴⁸H. Tavani, “Philosophical Theories of Privacy: Implications for an Adequate Online Privacy Policy,” *Metaphilosophy* 39 (2007): 10. Tavani builds on an account offered in James Moor, “Towards a Theory of Privacy in the Information Age,” *Computers and Society* 27 (1997): 27–32.
- ⁴⁹Tracking the account of privacy being offered across numerous cases was inspired J. J. Thomson’s article and more recently used by Samuel Rickless. See Thomson, “The Right to Privacy,” 295; and Rickless, “The Right to Privacy Unveiled.”
- ⁵⁰Thomson, “The Right to Privacy,” 296.
- ⁵¹*Ibid.*
- ⁵²*Ibid.*, 298.
- ⁵³Rickless, “The Right to Privacy Unveiled.”
- ⁵⁴I take this to be similar to a freak gust of wind blowing mud onto a car—perhaps the owner has been damaged, but no one is morally responsible in the typical case.
- ⁵⁵Thomson, “The Right to Privacy,” 298.
- ⁵⁶*Ibid.*, 311.
- ⁵⁷James Rachels, “Why Privacy Is Important,” *Philosophy and Public Affairs* 4 (1975): 333.
- ⁵⁸Thomson, “The Right to Privacy,” 311.
- ⁵⁹*Ibid.*
- ⁶⁰*Ibid.*
- ⁶¹Aristotle, *Nicomachean Ethics*, trans. W. D. Ross, in *The Complete Works of Aristotle*, vol. II, ed. Jonathan Barnes (Princeton, NJ: Princeton University Press, 1984), 1094b 15, 1730.