(GDPR) on May 25, 2018. The GDPR will be immediately binding as law in all EU Member States.[44]

In November 2004, an Asian-Pacific Economic Cooperative (APEC) Privacy Framework was endorsed by the ministers of the APEC countries. The APEC countries are more than 20 nations, mostly in Asia, but also including the United States.

[44] European Commission, Regulation 2016/670 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, O.J. L119, 1 (May 4, 2016).

CHAPTER 2

PERSPECTIVES ON PRIVACY

CHAPTER OUTLINE

A. THE PHILOSOPHICAL DISCOURSE ABOUT PRIVACY

1. THE CONCEPT OF PRIVACY AND THE RIGHT TO PRIVACY

At the outset, it is important to distinguish between the concept of privacy and the right of privacy. As Hyman Gross observed, "[t]he law does not determine what privacy is, but only what situations of privacy will be afforded legal protection."[1] Privacy as a concept involves what privacy entails and how it is to be valued. Privacy as a right involves the extent to which privacy is (and should be) legally protected.

While instructive and illuminative, law cannot be the exclusive material for constructing a concept of privacy. Law is the product of the weighing of competing values, and it sometimes embodies difficult trade-offs. In order to determine what the law *should* protect, we cannot merely look to what the law *does* protect.

[1] Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. Rev. 34, 36 (1967).

2. THE PUBLIC AND PRIVATE SPHERES

A long-standing distinction in philosophical discourse is between the public and private spheres. Some form of boundary between public and private has been maintained throughout the history of Western civilization.[2]

Generally, the public sphere is the realm of life experienced in the open, in the community, and in the world of politics. The private sphere is the realm of life where one retreats to isolation or to one's family. At its core is the world of the home. The private sphere, observes Edward Shils, is a realm where the individual "is not bound by the rules that govern public life. . . . The 'private life' is a secluded life, a life separated from the compelling burdens of public authority."[3]

According to Hannah Arendt, both spheres are essential dimensions of human life:

> . . . In ancient feeling, the privative trait of privacy, indicated in the word itself, was all-important; it meant literally a state of being deprived of something, and even of the highest and most human of man's capacities. A man who lived only a private life, who like the slave was not permitted to enter the public realm, or like the barbarian had chosen not to establish such a realm, was not fully human. We no longer think primarily of deprivation when we use the word "privacy," and this is partly due to the enormous enrichment of the private sphere through modern individualism. . . .
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> To live an entirely private life means above all to be deprived of things essential to a truly human life: to be deprived of the reality that comes from being seen and heard by others, to be deprived of an "objective" relationship with them that comes from being related to and separated from them through the intermediary of a common world of things, to be deprived of the possibility of achieving something more permanent than life itself. . . .
>
> . . . [T]he four walls of one's private property offer the only reliable hiding place from the common public world, not only from everything that goes on in it but also from its very publicity, from being seen and being heard. A life spent entirely in public, in the presence of others, becomes, as we would say, shallow. While it retains visibility, it loses the quality of rising into sight from some darker ground which must remain hidden if it is not to lose its depth in a very real, non-subjective sense. . . .[4]

John Stuart Mill relied upon a notion of the public/private dichotomy to determine when society should regulate individual conduct. Mill contended that there was a realm where people had social responsibilities and where society could properly restrain people from acting or punish them for their deeds. This realm consisted in acts that were hurtful to others or to which people "may rightfully be compelled to perform; such as to give evidence in a court of justice; to bear his fair share in the common defence, or in any other joint work necessary to the interest of the society of which he enjoys the protection." However, "there is a sphere of action in which society, as distinguished from the individual, has, if any, only an

[2] *See* Georges Duby, *Foreword*, in *A History of the Private Life I: From Pagan Rome to Byzantium* viii (Paul Veyne ed. & Arthur Goldhammer trans., 1987); *see also* Jürgen Habermas, *The Structural Transformation of the Public Sphere* (Thomas Burger trans., 1991).

[3] Edward Shils, *Privacy: Its Constitution and Vicissitudes*, 31 Law & Contemp. Probs. 281, 283 (1966).

[4] Hannah Arendt, *The Human Condition* (1958).

indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation." Conduct within this sphere consists of "self-regarding" acts, and society should not interfere with such acts. As Mill further elaborated:

> . . . I fully admit that the mischief which a person does to himself may seriously affect, both through their sympathies and their interests, those nearly connected with him and, in a minor degree, society at large. When, by conduct of this sort, a person is led to violate a distinct and assignable obligation to any other person or persons, the case is taken out of the self-regarding class, and becomes amenable to moral disapprobation in the proper sense of the term. . . . Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law.
>
> But with regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom. . . .[5]

B. THE DEFINITION AND THE VALUE OF PRIVACY

The following excerpts explore the definition and value of privacy. Those who attempt to define privacy seek to describe what privacy constitutes. Over the past four decades, academics have defined privacy as a right of personhood, intimacy, secrecy, limited access to the self, and control over information. However, defining privacy has proven to be quite complicated, and many commentators have expressed great difficulty in defining precisely what privacy is. In the words of one commentator, "even the most strenuous advocate of a right to privacy must confess that there are serious problems of defining the essence and scope of this right."[6] According to Robert Post, "[p]rivacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all."[7]

Conceptualizing privacy not only involves defining privacy but articulating the value of privacy. The value of privacy concerns its importance — how privacy is to be weighed relative to other interests and values. The excerpts that follow attempt to grapple with the complicated task of defining privacy and explaining why privacy is worth protecting.

[5] John Stuart Mill, *On Liberty* 12, 13, 74-75 (1859).

[6] William M. Beaney, *The Right to Privacy and American Law*, 31 Law & Contemp. Probs. 253, 255 (1966).

[7] Robert C. Post, *Three Concepts of Privacy*, 89 Geo. L.J. 2087, 2087 (2001).

ALAN WESTIN, *PRIVACY AND FREEDOM*

(1967)

. . . 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. Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy or, when among larger groups, in a condition of anonymity or reserve. The individual's desire for privacy is never absolute, since participation in society is an equally powerful desire. Thus each individual is continually engaged in a personal adjustment process in which he balances the desire for privacy with the desire for disclosure and communication of himself to others, in light of the environmental conditions and social norms set by the society in which he lives. The individual does so in the face of pressures from the curiosity of others and from the processes of surveillance that every society sets in order to enforce its social norms. . . .

Recognizing the differences that political and sensory cultures make in setting norms of privacy among modern societies, it is still possible to describe the general functions that privacy performs for individuals and groups in Western democratic nations. Before describing these, it is helpful to explain in somewhat greater detail the four basic states of individual privacy [solitude, intimacy, anonymity, and reserve.] . . .

The first state of privacy is solitude; here the individual is separated from the group and freed from the observation of other persons. He may be subjected to jarring physical stimuli, such as noise, odors, and vibrations. His peace of mind may continue to be disturbed by physical sensations of heat, cold, itching, and pain. He may believe that he is being observed by God or some supernatural force, or fear that some authority is secretly watching him. Finally, in solitude he will be especially subject to that familiar dialogue with the mind or conscience. But, despite all these physical or psychological intrusions, solitude is the most complete state of privacy that individuals can achieve.

In the second state of privacy, the individual is acting as part of a small unit that claims and is allowed to exercise corporate seclusion so that it may achieve a close, relaxed, and frank relationship between two or more individuals. Typical units of intimacy are husband and wife, the family, a friendship circle, or a work clique. Whether close contact brings relaxed relations or abrasive hostility depends on the personal interaction of the members, but without intimacy a basic need of human contact would not be met.

The third state of privacy, anonymity, occurs when the individual is in public places or performing public acts but still seeks, and finds, freedom from identification and surveillance. He may be riding a subway, attending a ball game, or walking the streets; he is among people and knows that he is being observed; but unless he is a well-known celebrity, he does not expect to be personally identified and held to the full rules of behavior and role that would operate if he were known to those observing him. In this state the individual is able to merge into the "situational landscape." Knowledge or fear that one is under systematic

observation in public places destroys the sense of relaxation and freedom that men seek in open spaces and public arenas. . . .

Still another kind of anonymity is the publication of ideas anonymously. Here the individual wants to present some idea publicly to the community or to a segment of it, but does not want to be universally identified at once as the author — especially not by the authorities, who may be forced to take action if they "know" the perpetrator. The core of each of these types of anonymous action is the desire of individuals for times of "public privacy."

Reserve, the fourth and most subtle state of privacy, is the creation of a psychological barrier against unwanted intrusion; this occurs when the individual's need to limit communication about himself is protected by the willing discretion of those surrounding him. Most of our lives are spent not in solitude or anonymity but in situations of intimacy and in group settings where we are known to others. Even in the most intimate relations, communication of self to others is always incomplete and is based on the need to hold back some parts of one's self as either too personal and sacred or too shameful and profane to express. This circumstance gives rise to what Simmel called "reciprocal reserve and indifference," the relation that creates "mental distance" to protect the personality. This creation of mental distance — a variant of the concept of "social distance" — takes place in every sort of relationship under rules of social etiquette; it expresses the individual's choice to withhold or disclose information — the choice that is the dynamic aspect of privacy in daily interpersonal relations. . . .

This analysis of the various states of privacy is useful in discussing the basic question of the functions privacy performs for individuals in democratic societies. These can also be grouped conveniently under four headings — personal autonomy, emotional release, self-evaluation, and limited and protected communication. . . .

Personal Autonomy. . . . Each person is aware of the gap between what he wants to be and what he actually is, between what the world sees of him and what he knows to be his much more complex reality. In addition, there are aspects of himself that the individual does not fully understand but is slowly exploring and shaping as he develops. Every individual lives behind a mask in this manner; indeed, the first etymological meaning of the word "person" was "mask," indicating both the conscious and expressive presentation of the self to a social audience. If this mask is torn off and the individual's real self bared to a world in which everyone else still wears his mask and believes in masked performances, the individual can be seared by the hot light of selective, forced exposure. . . .

The autonomy that privacy protects is also vital to the development of individuality and consciousness of individual choice in life. . . . This development of individuality is particularly important in democratic societies, since qualities of independent thought, diversity of views, and non-conformity are considered desirable traits for individuals. Such independence requires time for sheltered experimentation and testing of ideas, for preparation and practice in thought and conduct, without fear of ridicule or penalty, and for the opportunity to alter opinions before making them public. The individual's sense that it is he who decides when to "go public" is a crucial aspect of his feeling of autonomy. Without such time for incubation and growth, through privacy, many ideas and positions would be launched into the world with dangerous prematurity. . . .

Emotional Release. Life in society generates such tensions for the individual that both physical and psychological health demand periods of privacy for various types of emotional release. At one level, such relaxation is required from the pressure of playing social roles. Social scientists agree that each person constantly plays a series of varied and multiple roles, depending on his audience and behavioral situation. On any given day a man may move through the roles of stern father, loving husband, car-pool comedian, skilled lathe operator, union steward, water-cooler flirt, and American Legion committee chairman — all psychologically different roles that he adopts as he moves from scene to scene on the social stage. Like actors on the dramatic stage, Goffman has noted, individuals can sustain roles only for reasonable periods of time, and no individual can play indefinitely, without relief, the variety of roles that life demands. There have to be moments "off stage" when the individual can be "himself": tender, angry, irritable, lustful, or dream-filled. . . .

Another form of emotional release is provided by the protection privacy gives to minor non-compliance with social norms. Some norms are formally adopted — perhaps as law — which society really expects many persons to break. This ambivalence produces a situation in which almost everyone does break some social or institutional norms — for example, violating traffic laws, breaking sexual mores, cheating on expense accounts, overstating income-tax deductions, or smoking in rest rooms when this is prohibited. Although society will usually punish the most flagrant abuses, it tolerates the great bulk of the violations as "permissible" deviations. If there were no privacy to permit society to ignore these deviations — if all transgressions were known — most persons in society would be under organizational discipline or in jail, or could be manipulated by threats of such action. The firm expectation of having privacy for permissible deviations is a distinguishing characteristic of life in a free society. At a lesser but still important level, privacy also allows individuals to deviate temporarily from social etiquette when alone or among intimates, as by putting feet on desks, cursing, letting one's face go slack, or scratching wherever one itches.

Another aspect of release is the "safety-valve" function afforded by privacy. Most persons need to give vent to their anger at "the system," "city hall," "the boss," and various others who exercise authority over them, and to do this in the intimacy of family or friendship circles, or in private papers, without fear of being held responsible for such comments. . . . Without the aid of such release in accommodating the daily abrasions with authorities, most people would experience serious emotional pressure. . . .

Limited and Protected Communication. The greatest threat to civilized social life would be a situation in which each individual was utterly candid in his communications with others, saying exactly what he knew or felt at all times. The havoc done to interpersonal relations by children, saints, mental patients, and adult "innocents" is legendary. . . .

Privacy for limited and protected communication has two general aspects. First, it provides the individual with the opportunities he needs for sharing confidences and intimacies with those he trusts — spouse, "the family," personal friends, and close associates at work. The individual discloses because he knows that his confidences will be held, and because he knows that breach of confidence violates social norms in a civilized society. "A friend," said Emerson, "is someone

before . . . [whom] I can think aloud." In addition, the individual often wants to secure counsel from persons with whom he does not have to live daily after disclosing his confidences. He seeks professionally objective advice from persons whose status in society promises that they will not later use his distress to take advantage of him. To protect freedom of limited communication, such relationships — with doctors, lawyers, ministers, psychiatrists, psychologists, and others — are given varying but important degrees of legal privilege against forced disclosure. . . .

NOTES & QUESTIONS

1. ***Privacy as Control over Information.*** A number of theorists, including Westin, conceive of privacy as a form of control over personal information.[8] Consider Charles Fried's definition of privacy:

> At first approximation, privacy seems to be related to secrecy, to limiting the knowledge of others about oneself. This notion must be refined. It is not true, for instance, that the less that is known about us the more privacy we have. Privacy is not simply an absence of information about what is in the minds of others; rather it is the *control* we have over information about ourselves.
>
> To refer for instance to the privacy of a lonely man on a desert island would be to engage in irony. The person who enjoys privacy is able to grant or deny access to others. . . .
>
> Privacy, thus, is control over knowledge about oneself. But it is not simply control over the quantity of information abroad; there are modulations in the quality of the knowledge as well. We may not mind that a person knows a general fact about us, and yet feel our privacy invaded if he knows the details.[9]

   Is this a compelling definition of privacy?

   In contrast to privacy-as-control, Christena Nippert-Eng, a sociologist, talks about the managerial dimension of privacy. Based on her wide-reaching field interviews, Nippert-Eng concludes that "participants find it incumbent upon themselves to create their own pockets of uninterruptible time and space, or take make decisions without letting anyone else unduly pressure them into a particular choice."[10] She adds that "a need to *manage* one's privacy" runs through all the definitions of privacy offered by her interview participants.

2. ***Privacy as Limited Access to the Self.*** Another group of theorists view privacy as a form of limited access to the self. Consider Ruth Gavison:

> . . . Our interest in privacy . . . is related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention. This concept of privacy as concern for limited accessibility enables us to identify when losses of privacy occur. Furthermore, the reasons for which

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[8] *See* Adam Carlyle Breckenridge, *The Right to Privacy* 1 (1970); Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1810–1990*, 80 Cal. L. Rev. 1133 (1992). For a critique of privacy as control, see Anita L. Allen, *Privacy as Data Control: Conceptual, Practical, and Moral Limits of the Paradigm*, 32 Conn. L. Rev. 861 (2000).

[9] Charles Fried, *Privacy*, 77 Yale L.J. 475 (1968).

[10] Christena Nippert-Eng, *Islands of Privacy* 7 (2010).

> we claim privacy in different situations are similar. They are related to the functions privacy has in our lives: the promotion of liberty, autonomy, selfhood, and human relations, and furthering the existence of a free society. . . .
>
> The concept of privacy suggested here is a complex of these three independent and irreducible elements: secrecy, anonymity, and solitude. Each is independent in the sense that a loss of privacy may occur through a change in any one of the three, without a necessary loss in either of the other two. The concept is nevertheless coherent because the three elements are all part of the same notion of accessibility, and are related in many important ways.[11]

How does this theory of privacy differ from the notion of privacy as "the right to be let alone"? How does it differ from privacy as control over information? How much control should individuals have over access to themselves? Should the decision depend upon each particular person's desires? Or should there be an objective standard — a reasonable degree of control over access?

3. ***Privacy as Intimacy.*** A number of theorists argue that "intimacy" appropriately defines what information or matters are private. For example, Julie Inness argues that "intimacy" is the common denominator in all the matters that people claim to be private. Privacy is "the state of the agent having control over decisions concerning matters that draw their meaning and value from the agent's love, caring, or liking. These decisions cover choices on the agent's part about access to herself, the dissemination of information about herself, and her actions."[12]

   Jeffrey Rosen adopts a similar view when he writes:

> . . . Privacy protects us from being misdefined and judged out of context in a world of short attention spans, a world in which information can easily be confused with knowledge. True knowledge of another person is the culmination of a slow process of mutual revelation. It requires the gradual setting aside of social masks, the incremental building of trust, which leads to the exchange of personal disclosures. It cannot be rushed; this is why, after intemperate self-revelation in the heat of passion, one may feel something close to self-betrayal. True knowledge of another person, in all of his or her complexity, can be achieved only with a handful of friends, lovers, or family members. In order to flourish, the intimate relationships on which true knowledge of another person depends need space as well as time: sanctuaries from the gaze of the crowd in which slow mutual self-disclosure is possible.

[11] Ruth Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421 (1980); *see also* Edward Shils, *Privacy: Its Constitution and Vicissitudes*, 31 Law & Contemp. Probs. 281, 281 (1996); Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* 10-11 (1982); Ernest Van Den Haag, *On Privacy*, in *Nomos XII: Privacy* 149 (J. Ronald Pennock & J.W. Chapman eds., 1971); Sidney M. Jourard, *Some Psychological Aspects of Privacy*, 31 L. & Contemp. Probs. 307, 307 (1966); David O'Brien, *Privacy, Law, and Public Policy* 16 (1979); Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. Rev. 34 (1967).

[12] Julie C. Inness, *Privacy, Intimacy, and Isolation* 56, 58, 63, 64, 67 (1992). For other proponents of privacy as intimacy, see Robert S. Gerstein, *Intimacy and Privacy*, in *Philosophical Dimensions of Privacy: An Anthology* 265, 265 (Ferdinand David Schoeman ed., 1984); James Rachels, *Why Privacy Is Important*, in *Philosophical Dimensions of Privacy: An Anthology* 290, 292 (Ferdinand David Schoeman ed., 1984); Tom Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L. L. Rev. 233 (1977).

> When intimate personal information circulates among a small group of people who know us well, its significance can be weighed against other aspects of our personality and character. By contrast, when intimate information is removed from its original context and revealed to strangers, we are vulnerable to being misjudged on the basis of our most embarrassing, and therefore most memorable, tastes and preferences. . . . In a world in which citizens are bombarded with information, people form impressions quickly, based on sound bites, and these impressions are likely to oversimplify and misrepresent our complicated and often contradictory characters.[13]

Does "intimacy" adequately separate private matters from public ones? Can something be private but not intimate? Can something be intimate but not private?

In reaction to Rosen's views on privacy, Lawrence Lessig restates the problem of short attention spans in this fashion: "Privacy, the argument goes, would remedy such a problem by concealing those things that would not be understood with the given attention span. Privacy's function . . . is not to protect the presumptively innocent from true but damaging information, but rather to protect the actually innocent from damaging conclusions drawn from misunderstood information."[14] Lessig notes his skepticism regarding this approach: privacy will not alone solve the problem with the information market. Moreover, there "are possible solutions to this problem of attention span. But what should be clear is that there is no guarantee that a particular problem of attention span will have any solution at all."

JULIE E. COHEN, *EXAMINED LIVES: INFORMATIONAL PRIVACY AND THE SUBJECT AS OBJECT*

52 Stan. L. Rev. 1373 (2000)

Prevailing market-based approaches to data privacy policy — including "solutions" in the form of tradable privacy rights or heightened disclosure requirements before consent — treat preferences for informational privacy as a matter of individual taste, entitled to no more (and often much less) weight than preferences for black shoes over brown or red wine over white. But the values of informational privacy are far more fundamental. A degree of freedom from scrutiny and categorization by others promotes important noninstrumental values, and serves vital individual and collective ends.

First, informational autonomy comports with important values concerning the fair and just treatment of individuals within society. From Kant to Rawls, a central strand of Western philosophical tradition emphasizes respect for the fundamental dignity of persons, and a concomitant commitment to egalitarianism in both principle and practice. Advocates of strong data privacy protection argue that these principles have clear and very specific implications for the treatment of personally-identified data: They require that we forbid data-processing practices that treat individuals as mere conglomerations of transactional data, or that rank people as prospective customers, tenants, neighbors, employees, or insureds based on their financial or genetic desirability. . . .

[13] Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* 8-9 (2000).

[14] Lawrence Lessig, *Privacy and Attention Span*, 89 Geo. L.J. 2063, 2065 (2001).

Autonomous individuals do not spring full-blown from the womb. We must learn to process information and to draw our own conclusions about the world around us. We must learn to choose, and must learn something before we can choose anything. Here, though, information theory suggests a paradox: "Autonomy" connotes an essential independence of critical faculty and an imperviousness to influence. But to the extent that information shapes behavior, autonomy is radically contingent upon environment and circumstance. . . . Autonomy in a contingent world requires a zone of relative insulation from outside scrutiny and interference — a field of operation within which to engage in the conscious construction of self. The solution to the paradox of contingent autonomy, in other words, lies in a second paradox: To exist in fact as well as in theory, autonomy must be nurtured.

A realm of autonomous, unmonitored choice, in turn, promotes a vital diversity of speech and behavior. The recognition that anonymity shelters constitutionally-protected decisions about speech, belief, and political and intellectual association — decisions that otherwise might be chilled by unpopularity or simple difference — is part of our constitutional tradition. . . .

The benefits of informational privacy are related to, but distinct from, those afforded by seclusion from visual monitoring. It is well-recognized that respite from visual scrutiny affords individuals an important measure of psychological repose. Within our society, at least, we are accustomed to physical spaces within which we can be unobserved, and intrusion into those spaces is experienced as violating the boundaries of self. But the scrutiny, and the repose, can be informational as well as visual, and this does not depend entirely on whether the behavior takes place "in private." The injury, here, does not lie in the exposure of formerly private behaviors to public view, but in the dissolution of the boundaries that insulate different spheres of behavior from one another. The universe of all information about all record-generating behaviors generates a "picture" that, in some respects, is more detailed and intimate than that produced by visual observation, and that picture is accessible, in theory and often in reality, to just about anyone who wants to see it. In such a world, we all may be more cautious.

The point is not that people will not learn under conditions of no-privacy, but that they will learn differently, and that the experience of being watched will constrain, ex ante, the acceptable spectrum of belief and behavior. Pervasive monitoring of every first move or false start will, at the margin, incline choices toward the bland and the mainstream. The result will be a subtle yet fundamental shift in the content of our character, a blunting and blurring of rough edges and sharp lines. . . . The condition of no-privacy threatens not only to chill the expression of eccentric individuality, but also, gradually, to dampen the force of our aspirations to it. . . .

. . . [T]he insulation provided by informational privacy also plays a subtler, more conservative role in reinforcing the existing social fabric. Sociologist Erving Goffman demonstrated that the construction of social facades to mediate between self and community is both instinctive and expected. Alan Westin describes this social dimension of privacy as "reserve." This characterization, though, seems incomplete. On Goffman's account, the construction of social personae isn't just about withholding information that we don't want others to have. It is about defining the parameters of social interaction in ways that maximize social ease,

and thus is about collective as well as individual comfort. We do not need, or even want, to know each other that well. Less information makes routine interactions easier; we are then free to choose, consensually and without embarrassment, the interactions that we wish to treat as less routine. Informational privacy, in short, is a constitutive element of a civil society in the broadest sense of that term. . . .

NOTES & QUESTIONS

1. ***Privacy and Respect for Persons.*** Julie Cohen's theory locates the purpose of privacy as promoting the development of autonomous individuals and, more broadly, civil society. Compare her theory to the following theory by Stanley Benn:

> Finding oneself an object of scrutiny, as the focus of another's attention, brings one to a new consciousness of oneself, as something seen through another's eyes. According to [Jean-Paul] Sartre, indeed, it is a necessary condition for knowing oneself as anything at all that one should conceive oneself as an object of scrutiny. It is only through the regard of the other that the observed becomes aware of himself as an object, knowable, having a determinate character, in principle predictable. His consciousness of pure freedom as subject, as originator and chooser, is at once assailed by it; he is fixed as *something* — with limited probabilities rather than infinite, indeterminate possibilities. . . .
>
> The underpinning of a claim not to be watched without leave will be more general if it can be grounded in this way on the principle of respect for persons than on a utilitarian duty to avoid inflicting suffering. . . . But respect for persons will sustain an objection even to secret watching, which may do no actual harm at all. Covert observation — spying — is objectionable because it deliberately deceives a person about his world, thwarting, for reasons that *cannot* be his reasons, his attempts to make a rational choice. One cannot be said to respect a man as engaged on an enterprise worthy of consideration if one knowingly and deliberately alters his conditions of action, concealing the fact from him. . . .[15]

   How is Cohen's theory similar to and/or different from Benn's?

   Benn argues that privacy is a form of respect for persons. By being watched, Benn contends, the observed becomes "fixed as *something* — with limited probabilities rather than infinite indeterminate possibilities." Does Benn adequately capture why surveillance is harmful? Is Benn really concerned about the negative consequences of surveillance on a person's behavior? Or is Benn more concerned about the violation of respect for another?

2. ***Privacy as an Individual Right and as a Social Value.*** Consider the following argument from Priscilla Regan:

> . . . [The] emphasis of privacy as an individual right or an individual interest provides a weak basis for formulating policy to protect privacy. When privacy is defined as an individual right, policy formulation entails a balancing of the individual right to privacy against a competing interest or right. In general, the competing interest is recognized as a social interest. . . . It is also assumed that the individual has a stake in these societal interests. As a result, privacy has

[15] Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, from *Nomos XIII: Privacy* (J. Ronald Pennock & J.W. Chapman eds., 1971).

been on the defensive, with those alleging a privacy invasion bearing the burden of proving that a certain activity does indeed invade privacy and that the "social" benefit to be gained from the privacy invasion is less important than the individual harm incurred. . . .

Privacy is a *common value* in that all individuals value some degree of privacy and have some common perceptions about privacy. Privacy is also a *public value* in that it has value not just to the individual as an individual or to all individuals in common but also to the democratic political system. . . .

A public value of privacy derives not only from its protection of the individual as an individual but also from its usefulness as a restraint on the government or on the use of power. . . .[16]

DANIEL J. SOLOVE, *CONCEPTUALIZING PRIVACY*

90 Cal. L. Rev. 1087 (2002)

Despite what appears to be a welter of different conceptions of privacy, I argue that they can be dealt with under six general headings, which capture the recurrent ideas in the discourse. These headings include: (1) the right to be let alone — Samuel Warren and Louis Brandeis's famous formulation for the right to privacy; (2) limited access to the self — the ability to shield oneself from unwanted access by others; (3) secrecy — the concealment of certain matters from others; (4) control over personal information — the ability to exercise control over information about oneself; (5) personhood — the protection of one's personality, individuality, and dignity; and (6) intimacy — control over, or limited access to, one's intimate relationships or aspects of life. Some of the conceptions concentrate on means to achieve privacy; others focus on the ends or goals of privacy. Further, there is overlap between conceptions, and the conceptions discussed under different headings are by no means independent from each other. For example, control over personal information can be seen as a subset of limited access to the self, which in turn bears significant similarities to the right to be let alone. . . .

The most prevalent problem with the conceptions is that they are either too narrow or too broad. The conceptions are often too narrow because they fail to include the aspects of life that we typically view as private, and are often too broad because they fail to exclude matters that we do not deem private. Often, the same conceptions can suffer from being both too narrow and too broad. I contend that these problems stem from the way that the discourse goes about the task of conceptualizing privacy. . . .

Most attempts to conceptualize privacy thus far have followed the traditional method of conceptualizing. The majority of theorists conceptualize privacy by defining it *per genus et differentiam*. In other words, theorists look for a common set of necessary and sufficient elements that single out privacy as unique from other conceptions. . . .

[Philosopher Ludwig] Wittgenstein suggests that certain concepts might not share one common characteristic; rather they draw from a common pool of similar characteristics, "a complicated network of similarities overlapping and criss-

[16] Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* 213, 225 (1995).

crossing: sometimes overall similarities, sometimes similarities of detail." . . . Wittgenstein uses the term "family resemblances," analogizing to the overlapping and crisscrossing characteristics that exist between members of a family, such as "build, features, colour of eyes, gait, temperament, etc." For example, in a family, each child has certain features similar to each parent; and the children share similar features with each other; but they may not all resemble each other in the same way. Nevertheless, they all bear a resemblance to each other. . . .

When we state that we are protecting "privacy," we are claiming to guard against disruptions to certain practices. Privacy invasions disrupt and sometimes completely annihilate certain practices. Practices can be disrupted in certain ways, such as interference with peace of mind and tranquility, invasion of solitude, breach of confidentiality, loss of control over facts about oneself, searches of one's person and property, threats to or violations of personal security, destruction of reputation, surveillance, and so on.

There are certain similarities in particular types of disruptions as well as in the practices that they disrupt; but there are differences as well. We should conceptualize privacy by focusing on the specific types of disruption and the specific practices disrupted rather than looking for the common denominator that links all of them. If privacy is conceptualized as a web of interconnected types of disruption of specific practices, then the act of conceptualizing privacy should consist of mapping the typography of the web. . . .

It is reductive to carve the world of social practices into two spheres, public and private, and then attempt to determine what matters belong in each sphere. First, the matters we consider private change over time. While some form of dichotomy between public and private has been maintained throughout the history of Western civilization, the matters that have been considered public and private have metamorphosed throughout history due to changing attitudes, institutions, living conditions, and technology. The matters we consider to be private are shaped by culture and history, and have differed across cultures and historical epochs.

Second, although certain matters have moved from being public to being private and vice versa, the change often has been more subtle than a complete transformation from public to private. Particular matters have long remained private but in different ways; they have been understood as private but because of different attributes; or they have been regarded as private for some people or groups but not for others. In other words, to say simply that something is public or private is to make a rather general claim; what it means for something to be private is the central question. We consider our Social Security number, our sexual behavior, our diary, and our home private, but we do not consider them private in the same way. A number of aspects of life have commonly been viewed as private: the family, body, and home to name a few. To say simply that these things are private is imprecise because what it means for them to be private is different today than it was in the past. . . .

. . . [P]rivacy is not simply an empirical and historical question that measures the collective sense in any given society of what is and has long been considered to be private. Without a normative component, a conception of privacy can only provide a status report on existing privacy norms rather than guide us toward shaping privacy law and policy in the future. If we focus simply on people's current expectations of privacy, our conception of privacy would continually shrink given

the increasing surveillance in the modern world. Similarly, the government could gradually condition people to accept wiretapping or other privacy incursions, thus altering society's expectations of privacy. On the other hand, if we merely seek to preserve those activities and matters that have historically been considered private, then we fail to adapt to the changing realities of the modern world. . . .

NOTES & QUESTIONS

1. ***Core Characteristics vs. Family Resemblances.*** Is there a core characteristic common in all the things we understand as being "private"? If so, what do you think it is? Can privacy be more adequately conceptualized by shifting away from the quest to find the common core characteristics of privacy?
2. ***Context.*** Solove contends that the meaning of privacy depends upon context, that there is no common denominator to all things we refer to as "privacy." Does this make privacy too amorphous a concept?

   Consider Helen Nissenbaum:

   > Specifically, whether a particular action is determined a violation of privacy is a function of several variables, including the nature of the situation, or context; the nature of the information in relation to that context; the roles of agents receiving information; their relationships to information subjects; on what terms the information is shared by the subject; and the terms of further dissemination.
   >
   > . . .
   >
   > [N]orms of privacy in fact vary considerably from place to place, culture to culture, period to period; this theory not only incorporates this reality but systematically pinpoints the sources of variation. A second consequence is that, because questions about whether particular restrictions on flow are acceptable call for investigation into the relevant contextual details, protecting privacy will be a messy task, requiring a grasp of concepts and social institutions as well as knowledge of facts of the matter.[17]

3. ***Revising the Prosser Taxonomy.*** Daniel Solove contends that the taxonomy of four privacy interests identified by William Prosser, *supra,* must be revised as well as expanded beyond tort law. Solove identifies 16 different kinds of activity that create privacy harms or problems:

   > The first group of activities that affect privacy involve information collection. *Surveillance* is the watching, listening to, or recording of an individual's activities. *Interrogation* consists of various forms of questioning or probing for information.
   >
   > A second group of activities involves the way information is stored, manipulated, and used — what I refer to collectively as "information processing." *Aggregation* involves the combination of various pieces of data about a person. *Identification* is linking information to particular individuals. *Insecurity* involves carelessness in protecting stored information from being leaked or improperly accessed. *Secondary use* is the use of information collected for one purpose for a different purpose without a person's consent. *Exclusion* concerns

[17] Helen Nissenbaum, *Privacy as Contextual Integrity,* 79 Wash. L. Rev. 119, 155-56 (2004). For a more complete account of Nissenbaum's theory, see Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (2010).

> the failure to allow people to know about the data that others have about them and participate in its handling and use. These activities do not involve the gathering of data, since it has already been collected. Instead, these activities involve the way data is maintained and used.
>
> The third group of activities involves the dissemination of information. *Breach of confidentiality* is breaking the promise to keep a person's information confidential. *Disclosure* involves the revelation of truthful information about a person which impacts the way others judge that person's character. *Exposure* involves revealing another's nudity, grief, or bodily functions. *Increased accessibility* is amplifying the accessibility of information. *Blackmail* is the threat to disclose personal information. *Appropriation* involves the use of another's identity to serve the aims and interests of another. *Distortion* consists of the dissemination of false or misleading information about individuals. Information dissemination activities all involve the spreading or transfer of personal data — or the threat to do so.
>
> The fourth and final group of activities involves invasions into people's private affairs. Invasion, unlike the other groupings, need not involve personal information (although in numerous instances, it does). *Intrusion* concerns invasive acts that disturb one's tranquility or solitude. *Decisional interference* involves the government's incursion into people's decisions regarding their private affairs.[18]

4. ***Reductionists.*** Some theorists, referred to as "reductionists," assert that privacy can be reduced to other concepts and rights. For example, Judith Jarvis Thomson contends that there is nothing particularly distinctive about privacy and to talk about things as violating the "right to privacy" is not all that useful. Privacy is really a cluster of other rights, such as the right to liberty, property rights, and the right not to be injured: "[T]he right to privacy is everywhere overlapped by other rights."[19] Is there something distinctive about privacy? Or can privacy be explained in terms of other, more primary rights and interests? What does privacy capture that these other rights and interests (autonomy, property, liberty, etc.) do not?

ANITA L. ALLEN, *COERCING PRIVACY*

40 Wm. & Mary L. Rev. 723 (1999)

. . . The final decades of the twentieth century could be remembered for the rapid erosion of expectations of personal privacy and of the taste for personal privacy in the United States. . . . I sense that people expect increasingly little physical, informational, and proprietary privacy, and that people seem to prefer less of these types of privacy relative to other goods. . . .

One way to address the erosion would be to stop the avalanche of technology and commercial opportunity responsible for the erosion. We could stop the avalanche of technology, but we will not, if the past is any indication. . . . In the

[18] Daniel J. Solove, *A Taxonomy of Privacy,* 154 U. Pa. L. Rev. 477 (2006). For a more complete account of Solove's theory, see Daniel J. Solove, *Understanding Privacy* (2008).

[19] Judith Jarvis Thomson, *The Right to Privacy*, 4 Phil. & Pub. Aff. 295 (1975).

United States, with a few exceptions like government-funded human cloning and fetal tissue research, the rule is that technology marches on.

We could stop the avalanche of commercial opportunity by intervening in the market for privacy; that is, we could (some way or another) increase the costs of consuming other people's privacy and lower the profits of voluntarily giving up one's own privacy. The problem with this suggested strategy is that, even without the details of implementation, it raises the specter of censorship, repression, paternalism, and bureaucracy. Privacy is something we think people are supposed to want; if it turns out that they do not, perhaps third parties should not force it on them, decreasing both their utility and that of those who enjoy disclosure, revelation, and exposure.

Of course, we force privacy on people all the time. Our elected officials criminalize public nudity, even to the point of discouraging breastfeeding. . . . It is one thing, the argument might go, to force privacy on someone by criminalizing nude sun-bathing and topless dancing. These activities have pernicious third-party effects and attract vice. It would be wrong, the argument might continue, to force privacy on someone, in the absence of harm to others, solely on the grounds that one ought not say too much about one's thoughts, feelings, and experiences; one ought not reveal in detail how one spends one's time at home; and one ought not live constantly on display. Paternalistic laws against extremes of factual and physical self-revelation seem utterly inconsistent with liberal self-expression, and yet such laws are suggested by the strong claims liberal theorists make about the value of privacy. Liberal theorists claim that we need privacy to be persons, independent thinkers, free political actors, and citizens of a tolerant democracy. . .

For people under forty-five who understand that they do not, and cannot, expect to have many secrets, informational privacy may now seem less important. As a culture, we seem to be learning how to be happy and productive — even spiritual — knowing that we are like open books, our houses made of glass. Our parents may appear on the television shows of Oprah Winfrey or Jerry Springer to discuss incest, homosexuality, miscegenation, adultery, transvestitism, and cruelty in the family. Our adopted children may go on television to be reunited with their birth parents. Our law students may compete with their peers for a spot on the MTV program The Real World, and a chance to live with television cameras for months on end and be viewed by mass audiences. Our ten-year-olds may aspire to have their summer camp experiences — snits, fights, fun, and all — chronicled by camera crews and broadcast as entertainment for others on the Disney Channel.

Should we worry about any of this? What values are at stake? Scholars and other commentators associate privacy with several important clusters of value. Privacy has value relative to normative conceptions of spiritual personality, political freedom, health and welfare, human dignity, and autonomy. . . .

To speak of "coercing" privacy is to call attention to privacy as a foundation, a precondition of a liberal egalitarian society. Privacy is not an optional good, like a second home or an investment account. . . .

A hard task seems to lay before us — namely, deciding which forms of privacy are so critical that they should become matters of coercion. . . .

As liberals, we should not want people to sell all their freedom, and, as liberals, we should not want people to sell all their privacy and capacities for private

choices. This is, in part, because the liberal conceptions of private choice as freedom from governmental and other outside interference with decision-making closely link privacy and freedom. The liberal conception of privacy as freedom from unwanted disclosures, publicity, and loss of control of personality also closely links privacy to freedom. . . .

Government will have to intervene in private lives for the sake of privacy and values associated with it. . . . The threat to liberalism is not that individuals sometimes expose their naked bodies in public places, display affection with same-sex partners in public, or broadcast personal information on national television. The threat to liberalism is that in an increasing variety of ways our lives are being emptied of privacy on a daily basis, especially physical and informational privacy. . . .

NOTES & QUESTIONS

1. ***Should Privacy Be an Inalienable Right?*** Allen argues that people regularly surrender their privacy and that we should "coerce" privacy. In other words, privacy must be seen as an inalienable right, one that people cannot give away. What if a person wants to live in the spotlight or to give away her personal information? Why shouldn't she be allowed to do so? Recall those who defined privacy as control over information. One aspect of control is that an individual can decide for herself how much privacy she desires. What would Allen say about such a definition of privacy?
2. ***Privacy and Publicity.*** Consider also whether a desire for publicity and a desire for privacy can coexist. Does the person who "tells it all" on the Jerry Springer talk show have any less expectation of privacy when she returns home to be with her family and friends or picks up the telephone to make a private call?
3. ***Eroding Expectations of Privacy and Privacy Paternalism.*** Allen contends that our society is changing by becoming more exhibitionistic and voyeuristic. The result is that expectations of privacy are eroding. In 2011, Allen further develops these themes in a book, *Unpopular Privacy*. She argues that "privacy is so important and so neglected in contemporary life that democratic states, though liberal and feminist, could be justified in undertaking a rescue mission that includes enacting paternalistic privacy laws for the benefit of uneager beneficiaries."[20]

   If people no longer expect privacy in many situations, then why should the law continue to protect it? If people no longer desire privacy, should the law force privacy upon them? Under what circumstances?

[20] Anita L. Allen, *Unpopular Privacy* (2011).

PAUL M. SCHWARTZ, *PRIVACY AND DEMOCRACY IN CYBERSPACE*

52 Vand. L. Rev. 1609 (1999)

. . . Self-determination is a capacity that is embodied and developed through social forms and practices. The threat to this quality arises when private or government action interferes with a person's control of her reasoning process. . . . [P]erfected surveillance of naked thought's digital expression short-circuits the individual's own process of decisionmaking. . . .

The maintenance of a democratic order requires both deliberative democracy and an individual capacity for self-determination. . . . [T]he emerging pattern of information use in cyberspace poses a risk to these two essential values. Our task now is to develop privacy standards that are capable of structuring the right kind of information use. . . .

Most scholars, and much of the law in this area, work around a liberal paradigm that we can term "privacy-control." From the age of computer mainframes in the 1960s to the current reign of the Internet's decentralized networks, academics and the law have gravitated towards the idea of privacy as a personal right to control the use of one's data. . . .

. . . [One flaw with the "privacy-control" paradigm is the "autonomy trap."] [T]he organization of information privacy through individual control of personal data rests on a view of autonomy as a given, preexisting quality. . . .

As a policy cornerstone, however, the idea of privacy-control falls straight into the "autonomy trap." The difficulty with privacy-control in the Information Age is that individual self-determination is itself shaped by the processing of personal data. . . .

To give an example of an autonomy trap in cyberspace, the act of clicking through a "consent" screen on a Web site may be considered by some observers to be an exercise of self-reliant choice. Yet, this screen can contain boilerplate language that permits all further processing and transmission of one's personal data. Even without a consent screen, some Web sites place consent boilerplate within a "privacy statement" on their home page or elsewhere on their site. For example, the online version of one New York newspaper states, "By using this site, you agree to the Privacy Policy of the New York Post." This language presents the conditions for data processing on a take-it-or-leave-it basis. It seeks to create the legal fiction that all who visit this Web site have expressed informed consent to its data processing practices. An even more extreme manifestation of the "consent trap" is a belief that an initial decision to surf the Web itself is a self-reliant choice to accept all further use of one's personal data generated by this activity. . . .

The liberal ideal views autonomous individuals as able to interact freely and equally so long as the government or public does not interfere. The reality is, however, that individuals can be trapped when such glorification of freedom of action neglects the actual conditions of choice. Here, another problem arises with self-governance through information-control: the "data seclusion deception." The idea of privacy as data seclusion is easy to explain: unless the individual wishes to surrender her personal information, she is to be free to use her privacy right as a trump to keep it confidential or to subject its release to conditions that she alone wishes to set. The individual is to be at the center of shaping data anonymity. Yet, this right to keep data isolated quickly proves illusory because of the demands of the Information Age. . . .

NOTES & QUESTIONS

1. ***Privacy and Personhood.*** Like Schwartz, a number of theorists argue that privacy is essential for self-development. According to Jeffrey Reiman, privacy "protects the individual's interest in becoming, being, and remaining a person."[21] The notion that privacy protects personhood or identity is captured in Warren and Brandeis's notion of "inviolate personality." How does privacy promote self-development?

   Consider the following: "Every acceptance of a public role entails the repression, channelizing, and deflection of 'private' or personal attention, motives, and demands upon the self in order to address oneself to the expectations of others."[22] Can we really be ourselves in the public sphere? Is our "public self" any less part of our persona than our "private self"?
2. ***Privacy and Democracy.*** Schwartz views privacy as essential for a democratic society. Why is privacy important for political participation?
3. ***Privacy and Role Playing.*** Recall Westin's view of selfhood:

   > Each person is aware of the gap between what he wants to be and what he actually is, between what the world sees of him and what he knows to be his much more complex reality. In addition, there are aspects of himself that the individual does not fully understand but is slowly exploring and shaping as he develops. Every individual lives behind a mask in this manner; indeed, the first etymological meaning of the word "person" was "mask," indicating both the conscious and expressive presentation of the self to a social audience. If this mask is torn off and the individual's real self bared to a world in which everyone else still wears his mask and believes in masked performances, the individual can be seared by the hot light of selective, forced exposure.

   Is there a "true" or "core" or "authentic" self? Or do we perform many roles and perhaps have multiple selves? Is there a self beneath the roles that we play?

   Daniel Solove contends that "[s]ociety accepts that public reputations will be groomed to some degree. . . . Society protects privacy because it wants to provide individuals with some degree of influence over how they are judged in the public arena."[23] To what extent should the law allow people to promote a polished public image and hide the dirt in private?
4. ***Individual Autonomy, Democratic Order, and Data Trade.*** In a later article, Schwartz argues from the premise that "[p]ersonal information is an important currency in the new millennium."[24] He rejects arguments that opposed

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[21] Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, in *Philosophical Dimensions of Privacy: An Anthology* 300, 308 (Ferdinand David Schoeman ed., 1984).

[22] Joseph Bensman & Robert Lilienfeld, *Between Public and Private: Lost Boundaries of the Self* 174 (1979).

[23] Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure,* 53 Duke L.J. 957 (2003).

[24] Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 Harv. L. Rev. 2055 (2004).

control threaten the very fabric of democracy. Yet, despite the incontestable importance of its technical aspects, informatization, like industrialization, is primarily a political and social challenge. When the relationship between information processing and democracy is understood, it becomes clear that the protection of privacy is the price necessary to secure the individual's ability to communicate and participate. Regulations that create precisely specified conditions for personal data processing are the decisive test for discerning whether society is aware of this price and willing to pay it. If the signs of experience are correct, this payment can be delayed no further. There is, in fact, no alternative to the advice of Horace: Seize the day, put not trust in the morrow. . . .

NOTES & QUESTIONS

1. ***Privacy and Democracy.*** As Simitis and other authors in this section observe, privacy is an issue about social structure. What is the relationship between privacy and democracy according to Simitis?
2. ***Privacy Law and Information Flow.*** Generally, one would assume that greater information flow facilitates democracy — it enables more expression, more political discourse, more information about the workings of government. Simitis, however, contends that privacy is "necessary to secure the individual's ability to communicate and participate." How are these two notions about information flow to be reconciled? Consider Joel Reidenberg:

> Data privacy rules are often cast as a balance between two basic liberties: fundamental human rights on one side and the free flow of information on the other side. Yet, because societies differ on how and when personal information should be available for private and public sector needs, the treatment and interaction of these liberties will express a specific delineation between the state, civil society, and the citizen.[27]

Privacy, according to Reidenberg, involves establishing a balance between protecting the rights of individuals and enabling information flow. Do you think these interests always exist in opposition? Consider financial services, communications networks, and medical care. Does privacy impair or enable information flow?[28]

[27] Joel R. Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace,* 52 Stan. L. Rev. 1315 (2000).

[28] For additional reading about philosophical theories of privacy, see Judith W. DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (1997) (surveying and critiquing various theories of privacy); Anita L. Allen, *Uneasy Access: Privacy for Women in a Free Society* (1988) (same); Ferdinand David Schoeman, ed., *Philosophical Dimensions of Privacy* (1984) (anthology of articles about the concept of privacy).

C. CRITICS OF PRIVACY

RICHARD A. POSNER, *THE RIGHT OF PRIVACY*

12 Ga. L. Rev. 393 (1978)

People invariably possess information, including facts about themselves and contents of communications, that they will incur costs to conceal. Sometimes such information is of value to others: that is, others will incur costs to discover it. Thus we have two economic goods, "privacy" and "prying." . . .

[M]uch of the casual prying (a term used here without any pejorative connotation) into the private lives of friends and colleagues that is so common a feature of social life is also motivated, to a greater extent than we may realize, by rational considerations of self-interest. Prying enables one to form a more accurate picture of a friend or colleague, and the knowledge gained is useful in one's social or professional dealings with him. For example, in choosing a friend one legitimately wants to know whether he will be discreet or indiscreet, selfish or generous, and these qualities are not always apparent on initial acquaintance. Even a pure altruist needs to know the (approximate) wealth of any prospective beneficiary of his altruism in order to be able to gauge the value of a transfer to him.

The other side of the coin is that social, like business, dealings present opportunities for exploitation through misrepresentation. Psychologists and sociologists have pointed out that even in every day life people try to manipulate by misrepresentation other people's opinion of them. As one psychologist has written, the "wish for privacy expresses a desire . . . to control others' perceptions and beliefs vis-à-vis the self-concealing person." Even the strongest defenders of privacy describe the individual's right to privacy as the right to "control the flow of information about him." A seldom remarked corollary to a right to misrepresent one's character is that others have a legitimate interest in unmasking the deception.

Yet some of the demand for private information about other people is not self-protection in the foregoing sense but seems mysteriously disinterested — for example, that of the readers of newspaper gossip columns, whose "idle curiosity" Warren and Brandeis deplored, groundlessly in my opinion. Gossip columns recount the personal lives of wealthy and successful people whose tastes and habits offer models — that is, yield information — to the ordinary person in making consumption, career, and other decisions. . . . Gossip columns open people's eyes to opportunities and dangers; they are genuinely informational. . . .

Warren and Brandeis attributed the rise of curiosity about people's lives to the excesses of the press. The economist does not believe, however, that supply creates demand. A more persuasive explanation for the rise of the gossip column is the secular increase in personal incomes. There is apparently very little privacy in poor societies, where, consequently, people can easily observe at first hand the intimate lives of others. Personal surveillance is costlier in wealthier societies both because people live in conditions that give them greater privacy from such observation and because the value (and hence opportunity cost) of time is greater—too great to make a generous allotment of time to watching neighbors worthwhile. People in

wealthier societies sought an alternative method of informing themselves about how others live and the press provided it. A legitimate and important function of the press is to provide specialization in prying in societies where the costs of obtaining information have become too great for the Nosey Parker. . . .

Transaction-cost considerations may also militate against the assignment of a property right to the possessor of a secret. . . . Consider, for example, . . . whether the law should allow a magazine to sell its subscriber list to another magazine without obtaining the subscribers' consent. . . . [T]he costs of obtaining subscriber approval would be high relative to the value of the list. If, therefore, we believe that these lists are generally worth more to the purchasers than being shielded from possible unwanted solicitations is worth to the subscribers, we should assign the property right to the magazine; and the law does this. . . .

Much of the demand for privacy . . . concerns discreditable information, often information concerning past or present criminal activity or moral conduct at variance with a person's professed moral standards. And often the motive for concealment is, as suggested earlier, to mislead those with whom he transacts. Other private information that people wish to conceal, while not strictly discreditable, would if revealed correct misapprehensions that the individual is trying to exploit, as when a worker conceals a serious health problem from his employer or a prospective husband conceals his sterility from his fiancée. It is not clear why society should assign the property right in such information to the individual to whom it pertains; and the common law, as we shall see, generally does not. . . .

We think it wrong (and inefficient) that the law should permit a seller in hawking his wares to make false or incomplete representations as to their quality. But people "sell" themselves as well as their goods. They profess high standards of behavior in order to induce others to engage in social or business dealings with them from which they derive an advantage but at the same time they conceal some of the facts that these acquaintances would find useful in forming an accurate picture of their character. There are practical reasons for not imposing a general legal duty of full and frank disclosure of one's material. . . .

. . . [E]veryone should be allowed to protect himself from disadvantageous transactions by ferreting out concealed facts about individuals which are material to the representations (implicit or explicit) that those individuals make concerning their moral qualities.

It is no answer that such individuals have "the right to be let alone." Very few people want to be let alone. They want to manipulate the world around them by selective disclosure of facts about themselves. Why should others be asked to take their self-serving claims at face value and be prevented from obtaining the information necessary to verify or disprove these claims?

NOTES & QUESTIONS

1. ***Posner's Conception of Privacy.*** What is Posner's definition of privacy? How does Posner determine the value of privacy (i.e., how it should be weighed relative to other interests and values)? In what circumstances is Posner likely to defend a privacy claim?

2. ***Irrational Judgments.*** One economic argument for privacy is that sometimes people form irrational judgments based upon learning certain information about others. For example, an employer may not hire certain people based on their political views or associations, sexual orientation, mental illness, and prior criminal convictions — even though these facts may have no relevance to a potential employee's abilities to do the job. These judgments decrease efficiency. In *The Economics of Justice*, Posner offers a response:

> This objection overlooks the opportunity costs of shunning people for stupid reasons, or, stated otherwise, the gains from dealing with someone whom others shun irrationally. If ex-convicts are good workers but most employers do not know this, employers who do know will be able to hire them at a below-average wage because of their depressed job opportunities and will thereby obtain a competitive advantage over the bigots. In a diverse, decentralized, and competitive society, irrational shunning will be weeded out over time. . . [29]

Will the market be able to eradicate irrational judgments?

3. ***The Dangers of the "Masquerade Ball."*** Consider Dennis Bailey:

> . . . [I]t is interesting to consider the ways in which the world has become like a giant masquerade ball. Far removed from the tight knit social fabric of the village of the past, we've lost the ability to recognize the people we pass on the street. People might as well be wearing masks because we are likely to know very little about them. In other words, these strangers are anonymous to us, anonymous in the sense that not only their names, but their entire identities, are unknown to us — the intimate details of who they are, where they have come from, and how they have lived their lives.[30]

Are we living in a "masquerade ball"? Businesses and the government have unprecedented new technologies to engage in surveillance and gather information. Should the law facilitate or restrict anonymity?

Also consider Steven Nock:

> Any method of social control depends, immediately, on information about individuals. . . . There can be no social control without such information. . . .
>
> Modern Americans enjoy vastly more privacy than did their forebears because ever and ever larger numbers of strangers in our lives are legitimately denied access to our personal affairs. . . . Privacy, however, makes it difficult to form reliable opinions of one another. Legitimately shielded from other's regular scrutiny, we are thereby more immune to the routine monitoring that once formed the basis of our individual reputations.[31]

Does too much privacy erode trust and lessen social control in detrimental ways?

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[29] Richard A. Posner, *The Economics of Justice* (1981). Posner further develops his theories about privacy in Richard A. Posner, *Overcoming Law* 531-51 (1995). Posner first set out his views on privacy in Richard A. Posner, *An Economic Theory of Privacy*, Regulations (May/June 1978).

[30] Dennis Bailey, *The Open Society Paradox* 26-27 (2004).

[31] Steven L. Nock, *The Costs of Privacy: Surveillance and Reputation in America* (1993).

4. ***Information Dissemination and Economic Efficiency.*** Does economic theory necessarily lead to the conclusion that more personal information is generally preferable? Consider the following critique of Posner by Edward Bloustein:

> We must remember that Posner stated in *Economic Analysis of Law* that economics "cannot prescribe social change"; it can only tell us about the economic costs of managing it one way or another. . . . [Posner's] characterization of the privacy of personal information as a species of commercial fraud . . . [is an] extension[ ] of a social value judgment rather than implications or conclusions of economic theory. . . .Our society, in fact, places a very high value on maintaining individual privacy, even to the extent of concealing "discreditable" information. . . .[32]

Also consider Richard Murphy's critique of Posner:

> [D]emarcating a relatively large sphere for the private self creates an opportunity for discovery or actualization of a "true" nature, which may have a value beyond the utility of satisfying preferences. . . . As Roger Rosenblatt put it, "Out of our private gropings and self-inspections grow our imaginative values — private language, imagery, memory. In the caves of the mind one bats about to discover a light entirely of one's own which, though it should turn out to be dim, is still worth a life." Unless a person can investigate without risk of reproach what his own preferences are, he will not be able to maximize his own happiness.[33]

When can the circulation of less personal information be more economically efficient than greater information flow?

5. ***Why Don't Individuals Protect Their Privacy?*** Empirical studies frequently report on growing privacy concerns across the United States. Yet, individuals seem willing to exchange privacy for services or small rewards and generally fail to adopt technologies and techniques that would protect their privacy. If people are willing to sell their privacy for very little in return, isn't this evidence that they do not really value privacy as much as they say they do?

Alessandro Acqusiti and Jens Grossklags have pointed to a number of reasons for this divergence between stated privacy preferences and actual behavior:

> First, incomplete information affects privacy decision making because of externalities (when third parties share personal information about an individual, they might affect that individual without his being part of the transaction between those parties), information asymmetries (information relevant to the privacy decision process — for example, how personal information will be used — might be known only to a subset of the parties making decisions), risk (most privacy related payoffs are not deterministic), and uncertainties (payoffs might not only be stochastic, but dependent on unknown random distributions). Benefits and costs associated with privacy intrusions and protection are

[32] Edward J. Bloustein, *Privacy Is Dear at Any Price: A Response to Professor Posner's Economic Theory*, 12 Ga. L. Rev. 429, 441 (1978). For another critique of Posner's approach, see Kim Lane Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* (1988).

[33] Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy,* 84 Geo. L.J. 2381 (1996).

> complex, multifaceted, and context-specific. They are frequently bundled with other products and services (for example, a search engine query can prompt the desired result but can also give observers information about the searcher's interests), and they are often recognized only after privacy violations have taken place. They can be monetary but also immaterial and, thus, difficult to quantify.
>
> Second, even if individuals had access to complete information, they would be unable to process and act optimally on vast amounts of data. Especially in the presence of complex, ramified consequences associated with the protection or release of personal information, our innate bounded rationality limits our ability to acquire, memorize and process all relevant information, and it makes us rely on simplified mental models, approximate strategies, and heuristics. . . .
>
> Third, even if individuals had access to complete information and could successfully calculate optimization strategies for their privacy sensitive decisions, they might still deviate from the rational strategy. A vast body of economic and psychological literature has revealed several forms of systematic psychological deviations from rationality that affect individual decision making. . . . Research in psychology . . . documents how individuals mispredict their own future preferences or draw inaccurate conclusions from past choices. In addition, individuals often suffer from self-control problems — in particular, the tendency to trade off costs and benefits in ways that damage their future utility in favor of immediate gratification. Individuals' behavior can also be guided by social preferences or norms, such as fairness or altruism. Many of these deviations apply naturally to privacy-sensitive scenarios.[34]

FRED H. CATE, *PRINCIPLES OF INTERNET PRIVACY*

32 Conn. L. Rev. 877 (2000)

Perhaps the most important consideration when balancing restrictions on information is the historical importance of the free flow of information. The free flow concept is one that is not only enshrined in the First Amendment, but frankly in any form of democratic or market economy. In the United States, we have placed extraordinary importance on the open flow of information. As the Federal Reserve Board noted in its report to Congress on data protection in financial institutions, "it is the freedom to speak, supported by the availability of information and the free-flow of data, that is the cornerstone of a democratic society and market economy."

The significance of open data flows is reflected in the constitutional provisions not only for freedom of expression, but for copyrights — to promote the creation and dissemination of expression, and for a post office — to deliver the mail and the news. Federal regulations demonstrate a sweeping preference for openness, reflected in the Freedom of Information Act, Government in the Sunshine Act, and dozens of other laws applicable to the government. There are even more laws requiring disclosure by private industry, such as the regulatory disclosures required by securities and commodities laws, banking and insurance laws, and many others. This is a very basic tenet of the society in which we live. Laws that restrict that free flow almost always conflict with this basic principle. That does not mean that

[34] Alessandro Acquisti & Jens Grossklags, *Privacy and Rationality in Decision Making*, IEEE, Security and Privacy 24 (2005).

such laws are never upheld, but merely that they face a considerable constitutional hurdle.

This is done with good reason. Open information flows are not only essential to self-governance; they have also generated significant, practical benefits. The ready availability of personal information helps businesses "deliver the right products and services to the right customers, at the right time, more effectively and at lower cost," Fred Smith, founder and President of the Competitive Enterprise Institute, has written. Federal Reserve Board Governor Edward Gramlich testified before Congress in July 1999 that "[i]nformation about individuals' needs and preferences is the cornerstone of any system that allocates goods and services within an economy." The more such information is available, he continued, "the more accurately and efficiently will the economy meet those needs and preferences."

Federal Reserve Board Chairman Alan Greenspan has been perhaps the most articulate spokesperson for the extraordinary value of accessible personal information. In 1998, he wrote to Congressman Ed Markey (D-Mass.):

> A critical component of our ever more finely hewn competitive market system has been the plethora of information on the characteristics of customers both businesses and individuals. Such information has enabled producers and marketers to fine tune production schedules to the ever greater demands of our consuming public for diversity and individuality of products and services. Newly devised derivative products, for example, have enabled financial institutions to unbundle risk in a manner that enables those desirous of taking on that risk (and potential reward) to do so, and those that chose otherwise, to be risk averse. It has enabled financial institutions to offer a wide variety of customized insurance and other products.
>
> Detailed data obtained from consumers as they seek credit or make product choices help engender the whole set of sensitive price signals that are so essential to the functioning of an advanced information based economy such as ours. . . .

In a recent report on public record information, Richard Varn, Chief Information Officer of the State of Iowa, and I examined the critical roles played by public record information in our economy and society. We concluded that such information constitutes part of this nation's "essential infrastructure," the benefits of which are "so numerous and diverse that they impact virtually every facet of American life. . . ." The ready availability of public record data "facilitates a vibrant economy, improves efficiency, reduces costs, creates jobs, and provides valuable products and services that people want."

Perhaps most importantly, widely accessible personal information has helped to create a democratization of opportunity in the United States. Anyone can go almost anywhere, make purchases from vendors they will never see, maintain accounts with banks they will never visit, and obtain credit far from home all because of open information flows. Americans can take advantage of opportunities based on their records, on what they have done rather than who they know, because access to consumer information makes it possible for distant companies and creditors to make rational decisions about doing business with individuals. The open flow of information gives consumers real choice. This is what the open flow of information principle reflects, not just the constitutional importance of information flow**s,** but their significant economic and social benefits as well.

NOTES & QUESTIONS

1. ***The Pros and Cons of the Free Flow of Information.*** In a striking passage, Cate points out that free flows of information create a "democratization of opportunity in the United States." With this phrase, he reminds us that part of the equality at the basis of American life concerns economic opportunity, and that, in his view, a certain kind of flow of personal information will contribute to this goal. While privacy can be problematic, can open access to information also raise difficulties? How should one establish a baseline for open access or restricted access to personal information?
2. ***The Costs of Privacy.*** Can you think of some of the other important values with which privacy might conflict and the costs that privacy can impose? What should be the baseline in measuring costs?
3. ***The Business of Data Trade.*** The trade in personal information is now a valuable part of the U.S. economy. As a single example, Google reached an agreement on April 14, 2007, to purchase DoubleClick, an online advertising company, for $3.1 billion. The deal was driven by Google's interest in behavioral advertising, in which companies use digital data collection techniques to track individuals around the Internet and serve them targeted ads. Should consumers be allowed to sign up for a National Do Not Track List?
4. ***The Benefits of Information Collection and Use.*** Consider Kent Walker:

> Having some information about yourself out there in the world offers real convenience that goes beyond dollars and cents. Many people benefit from warehousing information — billing and shipping addresses, credit card numbers, individual preferences, and the like — with trustworthy third parties. Such storage of information can dramatically simplify the purchasing experience, ensure that you get a nonsmoking room, or automate the task of ordering a kiddie meal every time your child boards a plane. Likewise, most people prefer to use a credit card rather than a debit card, trading confidentiality of purchases for the convenience of deferred payment. . . .
>
> While there's often little individual incentive to participate in the aggregation of information about people, a great collective good results from the default participation of most people. The aggregation of information often requires a critical mass to be worth doing, or for the results to be worth using. (A phone book with only one out of ten numbers would hardly be worth using, let alone printing.) . . .
>
> Another example is Caller ID, which pits different privacy claims against one another. Many people like the notion of an electronic peephole, letting them know who's at the electronic door before they decide whether to pick up the phone. Yet many people block transmission of their own numbers, valuing protection of their privacy. Neither choice is necessarily right, but it's worth recognizing that the assertion of the privacy claim affects the contending desires of others. The classic Tragedy of the Commons aspects are clear. From my selfish perspective, I want access to information about everyone else — the identity of who's calling me, their listed phone number, etc. I want to be able to intrude on others without their knowing who I am (which I can accomplish by blocking Caller ID), and don't want others to be able to intrude on me unbidden

(which I can accomplish by unlisting my phone number). The gain in privacy makes it harder to find the people you want to reach, and harder to know who's calling you.[35]

D. THE FEMINIST PERSPECTIVE ON PRIVACY

Has the legal concept of privacy hurt or helped women throughout history? What is the impact of privacy on women today?

STATE V. RHODES

1868 WL 1278 (N.C. 1868)

[The defendant was indicted for an assault and battery upon his wife, Elizabeth Rhodes. The jury returned the following special verdict: "We find that the defendant struck Elizabeth Rhodes, his wife, three licks, with a switch about the size of one of his fingers (but not as large as a man's thumb) without any provocation except some words uttered by her and not recollected by the witness." The lower court found that the defendant "had a right to whip his wife with a switch no larger than his thumb, and that upon the facts found in the special verdict he was not guilty in law." Judgment in favor of the defendant was entered from which the State appealed.]

The laws of this State do not recognize *the right of the husband to whip his wife,* but our Courts will not interfere to punish him for moderate correction of her, even if there had been no provocation for it.

Family government being in its nature as complete in itself as the State government is in itself, the Courts will not attempt to control, or interfere with it, in favor of either party, except in cases where permanent or malicious injury is inflicted or threatened, or the condition of the party is intolerable.

In determining whether the husband has been guilty of an indictable assault and battery upon his wife, the criterion is the *effect produced,* and not the manner of producing it or the instrument used. . . .

READE J. The violence complained of would without question have constituted a battery if the subject of it had not been the defendant's wife. The question is how far that fact affects the case.

The courts have been loath to take cognizance of trivial complaints arising out of the domestic relations — such as master and apprentice, teacher and pupil, parent and child, husband and wife. Not because those relations are not subject to the law, but because the evil of publicity would be greater than the evil involved in the trifles complained of; and because they ought to be left to family government. . . .

In this case no provocation worth the name was proved. The fact found was that it was "without any provocation except some words which were not

[35] Kent Walker, *Where Everybody Knows Your Name: A Pragmatic Look at the Costs of Privacy and the Benefits of Information Exchange,* 2000 Stan. Tech. L. Rev. 2, 39, 46, 48 (2000).

recollected by the witness." The words must have been of the slightest import to have made no impression on the memory. We must therefore, consider the violence as unprovoked. The question is therefore plainly presented, whether the court will allow a conviction of the husband for moderate correction of the wife without provocation.

Our divorce laws do not compel a separation of husband and wife, unless the conduct of the husband be so cruel as to render the wife's condition intolerable, or her life burdensome. What sort of conduct on the part of the husband, would be allowed to have that effect, has been repeatedly considered. And it has not been found easy to lay down any iron rule upon the subject. In some cases it has been held that actual and repeated violence to the person, was not sufficient. In others that insults, indignities and neglect without any actual violence, were quite sufficient. So much does each case depend upon its peculiar surroundings.

We have sought the aid of the experience and wisdom of other times, and of other countries.

Blackstone says "that the husband, by the old law, might give the wife moderate correction, for as he was to answer for her misbehavior, he ought to have the power to control her; but that in the polite reign of Charles the Second, this power of correction began to be doubted." . . . The old law of moderate correction has been questioned even in England, and has been repudiated in Ireland and Scotland. The old rule is approved in Mississippi, but it has met with but little favor elsewhere in the United States. In looking into the discussions of the other States we find but little uniformity. . . .

Our conclusion is that family government is recognized by law as being as complete in itself as the State government is in itself, and yet subordinate to it; and that we will not interfere with or attempt to control it, in favor of either husband or wife, unless in cases where permanent or malicious injury is inflicted or threatened, or the condition of the party is intolerable. For, however great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber. Every household has and must have, a government of its own, modeled to suit the temper, disposition and condition of its inmates. Mere ebullitions of passion, impulsive violence, and temporary pain, affection will soon forget and forgive; and each member will find excuse for the other in his own frailties. But when trifles are taken hold of by the public, and the parties are exposed and disgraced, and each endeavors to justify himself or herself by criminating the other, that which ought to be forgotten in a day, will be remembered for life.

It is urged in this case, that as there was no provocation the violence was of course excessive and malicious; that every one in whatever relation of life should be able to purchase immunity from pain, by obedience to authority and faithfulness in duty. . . . Take the case before us. The witness said, there was no provocation except some slight words. But then who can tell what significance the trifling words may have had to the husband? Who can tell what had happened an hour before, and every hour for a week? To him they may have been sharper than a sword. And so in every case, it might be impossible for the court to appreciate what might be offered as an excuse, or no excuse might appear at all, when a complete justification exists. Or, suppose the provocation could in every case be known, and

the court should undertake to weigh the provocation in every trifling family broil, what would be the standard? Suppose a case coming up to us from a hovel, where neither delicacy of sentiment nor refinement of manners is appreciated or known. The parties themselves would be amazed, if they were to be held responsible for rudeness or trifling violence. What do they care for insults and indignities? In such cases what end would be gained by investigation or punishment? Take a case from the middle class, where modesty and purity have their abode but nevertheless have not immunity from the frailties of nature, and are sometimes moved by the mysteries of passion. What could be more harassing to them, or injurious to society, than to draw a crowd around their seclusion. Or take a case from the higher ranks, where education and culture have so refined nature, that a look cuts like a knife, and a word strikes like a hammer; where the most delicate attention gives pleasure, and the slightest neglect pain; where an indignity is disgrace and exposure is ruin. Bring all these cases into court side by side, with the same offence charged and the same proof made; and what conceivable charge of the court to the jury would be alike appropriate to all the cases, except, That they all have domestic government, which they have formed for themselves, suited to their own peculiar conditions, and that those governments are supreme, and from them there is no appeal except in cases of great importance requiring the strong arm of the law, and that to those governments they must submit themselves.

It will be observed that the ground upon which we have put this decision, is not, that the husband has the *right* to whip his wife much or little; but that we will not interfere with family government in trifling cases. We will no more interfere where the husband whips the wife, than where the wife whips the husband; and yet we would hardly be supposed to hold, that a wife has a *right* to whip her husband. We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence. Two boys under fourteen years of age fight upon the play-ground, and yet the courts will take no notice of it, not for the reason that boys have the *right* to fight, but because the interests of society require that they should be left to the more appropriate discipline of the school room and of home. . . . The standard is the *effect produced,* and not the manner of producing it, or the instrument used.

Because our opinion is not in unison with the decisions of some of the sister States, or with the philosophy of some very respectable law writers, and could not be in unison with all, because of their contrariety, — a decent respect for the opinions of others has induced us to be very full in stating the reasons for our conclusion.

REVA B. SIEGEL, *"THE RULE OF LOVE": WIFE BEATING AS PREROGATIVE AND PRIVACY*

105 Yale L.J. 2117 (1996)

. . . The Anglo-American common law originally provided that a husband, as master of his household, could subject his wife to corporal punishment or "chastisement" so long as he did not inflict permanent injury upon her. During the nineteenth century, an era of feminist agitation for reform of marriage law, authorities in England and the United States declared that a husband no longer had

the right to chastise his wife. Yet, for a century after courts repudiated the right of chastisement, the American legal system continued to treat wife beating differently from other cases of assault and battery. While authorities denied that a husband had the right to beat his wife, they intervened only intermittently in cases of marital violence: Men who assaulted their wives were often granted formal and informal immunities from prosecution, in order to protect the privacy of the family and to promote "domestic harmony." In the late 1970s, the feminist movement began to challenge the concept of family privacy that shielded wife abuse, and since then, it has secured many reforms designed to protect women from marital violence. . .

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Until the late nineteenth century, Anglo-American common law structured marriage to give a husband superiority over his wife in most aspects of the relationship. By law, a husband acquired rights to his wife's person, the value of her paid and unpaid labor, and most property she brought into the marriage. A wife was obliged to obey and serve her husband, and the husband was subject to a reciprocal duty to support his wife and represent her within the legal system. . . .

As master of the household, a husband could command his wife's obedience, and subject her to corporal punishment or "chastisement" if she defied his authority. In his treatise on the English common law, Blackstone explained that a husband could "give his wife moderate correction." . . .

During the 1850s, woman's rights advocates organized numerous conventions throughout the Northeast and Midwest, published newspapers, and conducted petition campaigns seeking for women the right to vote and demanding various reforms of marriage law. And in time the movement did elicit a response. Legislatures and courts began to modify the common law of marital status — first giving wives the right to hold property in marriage, and then the right to their earnings and the rudiments of legal agency: the right to file suit in their own names and to claim contract and tort damages. . . .

. . . By the 1880s, prominent members of the American Bar Association advocated punishing wife beaters at the whipping post, and campaigned vigorously for legislation authorizing the penalty. Between 1876 and 1906, twelve states and the District of Columbia considered enacting legislation that provided for the punishment of wife beaters at the whipping post. The bills were enacted in Maryland (1882), Delaware (1901), and Oregon (1906). . . .

We are left with a striking portrait of legal change. Jurists and lawmakers emphatically repudiated the doctrine of marital chastisement, yet responded to marital violence erratically — often condoning it, and condemning it in circumstances suggesting little interest in the plight of battered wives. Given this record, how are we to make sense of chastisement's demise? . . .

A key concept in the doctrinal regime that emerged from chastisement's demise was the notion of marital privacy. During the antebellum era, courts began to invoke marital privacy as a supplementary rationale for chastisement, in order to justify the common law doctrine within the discourse of companionate marriage, when rationales rooted in authority-based discourses of marriage had begun to lose their persuasive power. . . .

To quote a North Carolina chastisement opinion:

> We know that a slap on the cheek, let it be as light as it may, indeed any touching of the person of another in a rude or angry manner — is in law an assault and battery. In the nature of things it cannot apply to persons in the marriage state, it would break down the great principle of mutual confidence and dependence; throw open the bedroom to the gaze of the public; and spread discord and misery, contention and strife, where peace and concord ought to reign. It must be remembered that rules of law are intended to act in all classes of society. . . .

In *Rhodes*, the defendant whipped his wife "three licks, with a switch about the size of one of his fingers (but not as large as a man's thumb)"; the trial court ruled that a husband had the right to chastise his wife and so was not guilty of assault and battery. On appeal, the North Carolina Supreme Court upheld the verdict but justified it on different grounds. Opening its opinion with the blunt observation that "[t]he violence complained of would without question have constituted a battery if the subject of it had not been the defendant's wife," the court explained why it would not find the defendant guilty:

> The courts have been loath to take cognizance of trivial complaints arising out of the domestic relations — such as master and apprentice, teacher and pupil, parent and child, husband and wife. Not because those relations are not subject to law, but because the evil of publicity would be greater than the evil involved in the trifles complained of; and because they ought to be left to family government. . .
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> .

. . . By now it should be clear enough how privacy talk was deployed in the domestic violence context to enforce and preserve authority relations between man and wife. . . .

. . . By the early twentieth century, numerous state supreme courts had barred wives from suing their husbands for intentional torts — typically on the grounds that "the tranquility of family relations" would be "disturb[ed]." . . .

It was not until the late 1970s that the contemporary women's rights movement mounted an effective challenge to this regime. Today, after numerous protest activities and law suits, there are shelters for battered women and their children, new arrest procedures for police departments across the country, and even federal legislation making gender-motivated assaults a civil rights violation. . . .

There is remarkably little scholarship on the social history of privacy discourses; consequently, we know very little about the ways in which conceptions of privacy shaped popular understandings of marriage, or marital violence, in the nineteenth century. But there is no reason to assume that, before demise of the chastisement prerogative, married persons understood a traditional prerogative of marriage, rooted in notions of a husband's authority as master and head of his household, in a framework of "privacy" and "domestic harmony." It seems just as likely that legal elites devised the story linking "privacy" and "domestic harmony" to wife beating in the wake of chastisement's demise (or in anticipation of it). . . .

CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989)

The liberal ideal of the private holds that, as long as the public does not interfere, autonomous individuals interact freely and equally. Privacy is the ultimate value of the negative state. Conceptually, this private is hermetic. It means that which is inaccessible to, unaccountable to, unconstructed by, anything beyond itself. By definition, it is not part of or conditioned by anything systematic outside it. It is personal, intimate, autonomous, particular, individual, the original source and final outpost of the self, gender neutral. It is defined by everything that feminism reveals women have never been allowed to be or to have, and by everything that women have been equated with and defined in terms of men's ability to have. To complain in public of inequality within the private contradicts the liberal definition of the private. . . . Its inviolability by the state, framed as an individual right, presupposes that the private is not already an arm of the state. In this scheme, intimacy is implicitly thought to guarantee symmetry of power. Injuries arise through violation of the private sphere, not within and by and because of it.

In private, consent tends to be presumed. Showing coercion is supposed to avoid this presumption. But the problem is getting anything private to be perceived as coercive. This is an epistemic problem of major dimensions and explains why privacy doctrine is most at home at home, the place women experience the most force, in the family, and why it centers on sex. Why a person would "allow" force in private (the "why doesn't she leave" question raised to battered women) is a question given its insult by the social meaning of the private as a sphere of choice. For women the measure of the intimacy has been the measure of oppression. This is why feminism has seen the personal as the political. The private is public for those for whom the personal is political. In this sense, for women there is no private, either normatively or empirically. Feminism confronts the fact that women have no privacy to lose or to guarantee. Women are not inviolable. Women's sexuality is not only violable, it is — hence, women are — seen in and as their violation. To confront the fact that women have no privacy is to confront the intimate degradation of women as the public order. . . .

When the law of privacy restricts intrusions into intimacy, it bars changes in control over that intimacy through law. The existing distribution of power and resources within the private sphere are precisely what the law of privacy exists to protect. . . . [T]he legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited domestic labor. It has preserved the central institutions whereby women are deprived of identity, autonomy, control, and self-definition. It has protected a primary activity through which male supremacy is expressed and enforced. . . .

This right to privacy is a right of men "to be let alone" to oppress women one at a time. . . .

ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY*

(1988)

Critiques of privacy such as MacKinnon's go wrong at the point where the historic unequal treatment of women and the misuse of the private household to further women's domination is taken as grounds for rejecting either the condition of privacy itself or the long-overdue legal rights to effective decision-making that promote and protect that condition. Privacy, here broadly defined as the inaccessibility of persons, their mental states, or information about them to the senses and surveillance devices of others . . . does not pose an inherent threat to women. Nor do sex, love, marriage, and children any longer presume the total abrogation of the forms of privacy a woman might otherwise enjoy. On the contrary, women today are finally in a position to expect, experience, and exploit real privacy within the home and within heterosexual relationships. The women's movement, education, access to affordable birth control, liberalized divorce laws, and the larger role for women in politics, government, and the economy have expanded women's opinions and contributed to the erosion of oppressively nonegalitarian styles of home life. These advances have enhanced the capacity of American men and women, but especially and for the first time women, to secure conditions of adequate and meaningful privacy at home paramount to moral personhood and responsible participation in families and larger segments of society. Instead of rejecting privacy as "male ideology" and subjugation, women can and ought to embrace opportunities for privacy and the exercise of reproductive liberty in their private lives.

NOTES & QUESTIONS

1. ***Privacy and Gender.*** As the *Rhodes* court stated in 1868: "We will not interfere with family government in trifling cases. We will no more interfere where the husband whips the wife, than where the wife whips the husband; and yet we would hardly be supposed to hold, that a wife has a *right* to whip her husband." Is this decision really a neutral one? Does the right to privacy described by Warren and Brandeis apply equally to men and women?[36]
2. ***The Uses of the Public/Private Distinction.*** Reva Siegel points out the troubling use of privacy to protect the oppression of women in the home, which Catharine MacKinnon has discussed at length elsewhere. Is MacKinnon's negative response to the public/private distinction justifiable given the prior uses of this distinction? Or do you agree with Anita Allen that privacy should not be abandoned as a value despite its checkered past?[37]

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[36] For a feminist critique of the Warren and Brandeis article, see Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. Ill. U. L. Rev. 441 (1990).

[37] For an overview of the feminist critique of privacy, see generally Judith W. DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* 81-94 (1997); Patricia Boling, *Privacy and the Politics of Intimate Life* (1996); Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 Const. Commentary 327 (1993); Ruth Gavison, *Feminism and the Public/Private Distinction,* 45 Stan. L. Rev. 21 (1992).

3. ***To What Extent Can Law Change Social Practices?*** According to Frances Olsen, "The notion of noninterference in the family depends upon some shared conception of proper family roles, and 'neutrality' [of the State] can be understood only with reference to such roles."[38] This idea suggests that privacy, within or without the family, might also depend on shared views as to proper social roles. Do you agree?

   Olsen also notes: "The theory of the private family, like free market theory, includes the assertion that particularized adjustments of seemingly unfair or inhumane results will not actually serve anybody's long run interests." Specifically, "it is claimed that state intervention to protect the weaker family members from abuse by the stronger is ineffective because powerful, underlying 'real' relations between family members will inevitably reassert themselves." This argument, which one might term the argument from futility, was rejected in the course of the twentieth century by the powerful social movement to stop spousal abuse and mistreatment of children. Are similar arguments from futility being made today about the "inevitable" erosion of privacy?

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[38] Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497, 1506 (1983).