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An Intrusion Theory of Privacy

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Abstract This paper offers a general theory of privacy, a theory that takes privacy to consist in being free from certain kinds of intrusions. On this understanding, privacy interests are distinct and distinguishable from those in solitude, anonymity, and property, for example, or from the fact that others possess, with neither consent nor permission, personal information about oneself. Privacy intrusions have both epistemic and psychological components, and can range in value from relatively trivial considerations to those of profound consequence for an individual's dignity, integrity, and autonomy. Thus while the focus of this theory is privacy per se—privacy as being free from certain kinds of intrusions—it has significant implications, discussed briefly, for what properly counts as the content of moral or legal rights to privacy.

Keywords Privacy · The right to privacy · Privacy as intrusion · Epistemic access · Disruptive epistemic access · Warren and Brandeis

Privacy requires others. Rather as one's reputation depends upon certain facts about her relationships with others, so too does her privacy. The details and complexity of these relationships vary, of course, and their terms are profoundly affected by social and cultural considerations. Depending on one's time and place, privacy can be established or enhanced by a remarkable range of choices and behavior regarding, for example, one's dwelling and style of dress, where, to whom, and about what one speaks, what form of security, especially computer security, one chooses, etc., and diminished by an equally remarkable range of one's own conduct and the conduct of others. But as with reputation, actions which establish, increase, or diminish privacy

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alter or aim to alter the nature of an individual's relationships to others. Even in cases where an individual is said to have lost her privacy—she is a prisoner in a 'total institution', let's say, and under constant surveillance by guards—her relationships to others are still of a certain identifiable kind, a kind incompatible with her privacy.

On the account offered here, then, privacy is taken to exist only within the confines of certain relationships, either extant or prospective, and the value and purpose of privacy are assumed to depend on certain facts about our interests and preferences given the existence of these relationships. So this account begins by focusing attention on the contexts in which these relationships are present or likely and provides reasons for distinguishing privacy from conditions or states of affairs with which it is commonly identified or confused. This sharpens intuitions about privacy by showing how privacy is, in comparison to more simple but sometimes (and explicably) related states of affairs, distinctive, and in so doing helps motivate the central hypothesis of the paper. That hypothesis is that persons have privacy in and only in those circumstances where they are free from intrusions of an identifiably epistemic kind. And the value of a person's privacy is comprised of the benefits available to or enjoyed by her as a result of her not being, in specifiable ways and under certain circumstances, intruded upon by another or others. Throughout this paper, then, 'privacy' refers generally to states of affairs in which an individual is, either with respect to particular intrusions or generally, free from these epistemic intrusions, and privacy interests consist in the benefits of being free from these intrusions. So 'privacy' can be used as a general name, as when it is encouraged that 'her privacy should be respected' without referring to any specific intrusion, or specifically, as when it is said that she enjoys her privacy when her political affiliations are, in accord with her preferences, unknown to others.

The paper proceeds by rejecting an influential epistemic state-of-affairs theory of privacy inconsistent with the paper's central hypothesis while affirming that theory's commitment to privacy's having both epistemic and personal components. An epistemic-intrusion theory (with origins in a famous legal analysis of privacy) is then developed and a formal description of privacy is provided. The theory is defended against certain objections, specifically (1) that which see losses of privacy as necessarily involving the acquisition of information and (2) that which holds that it sets the bar for privacy losses too low. Overall, and worth emphasizing, this account attempts to do justice to privacy by focusing attention on its distinctive normative function. So the question: What is privacy? is taken to ask: What, if anything, gives privacy its special value? Because certain commonplace uses of 'privacy' (or 'private') can work as distractions from this constitutively normative task, it makes sense, when sketching some implications of this theory for moral and legal rights to privacy, to insist on qualifying or eliminating these uses when their employment yields suspect normative results, such as treating anything personal, including personal insults or affronts, as a matter of privacy.[1]

[1] This is not to suggest that the trauma resulting from personal affronts—including insults and degradation—is not a serious matter, but only that such trauma does not imply a privacy loss.

Sharpening Intuitions

Privacy is commonly identified with solitude, typically associated with temporary physical isolation of an individual from others, but most accurately understood as a psychological isolation or separation from a range of phenomena and experiences. This 'being alone' or 'by oneself' is recognized to be valuable both in itself and for what it facilitates. A wilderness hiker, for example, may enjoy being away from the distractions of her daily routines, and her solitude is of benefit both for what it allows her to do (develop her climbing skills on challenging trails), and for what it allows her to experience (scents, sights, and a certain clarity of mind). Notice that the hiker's solitude can be diminished or ruined by events plainly irrelevant to her privacy: the lurch of a dangerous animal or the recollection of an unpaid bill. Notice also that while some encounters with other persons bear relevance to her solitude, others do not. In fact, she might be wholly indifferent to and undisturbed by a passing encounter with others or even to someone observing her. Notice finally that the hiker's privacy can be diminished without any consequences for her solitude. Others may have her under surveillance, record her every move and, without her knowledge or consent, provide this information to others. While her solitude remains intact, her privacy assuredly does not. But even though solitude and privacy are plainly distinguishable, it does seem that there are circumstances where losses or diminutions of solitude and privacy are connected, so it seems worth asking what solitude and privacy have to do with each other.

One response to this question focuses upon a person's interests—in the sense of what benefits her, what is good for her to have—and attending preferences, especially as they are manifest in her reasons for: separating or isolating herself from others, engaging in certain conduct only when in isolation from others, or withholding or wishing to withhold, concealing or wishing to conceal, information about herself from others. Thus if the hiker hikes *so as to* assure the denial of certain kinds of access to her—she seeks out infrequently travelled trails *so as to* avoid the gaze and attention of others—her behavior indicates concerns with privacy and not simply solitude. Undoubtedly persons often seek the solitude attending isolation because of its value as a state of affairs they know can be destabilized by the presence or activities of others. But when the benefits of solitude are rendered insecure or lost because of certain kinds of intrusive conduct by others, privacy can be endangered or lost. The benefits of being alone can depend on being let alone, and when this occurs privacy is at stake. The same is true about anonymity. A person's being in a place where no one knows or recognizes him bears no automatic relevance to his privacy. But if he requests anonymity when donating money to a political cause, his conduct indicates that the value of his anonymity is augmented by the absence of an epistemic intrusion. Privacy interests with respect to or in solitude or anonymity are thus additional interests, quintessentially those requiring the exclusion of others from access to or information about oneself.[2]

[2] The above comments pertain to privacy and privacy interests, and not to any moral or legal rights which function to protect these interests.

Of course this does not mean that someone has a legitimate claim against certain intrusions only if he has successfully excluded others from sensory access to him. Social conventions commonly recognize minimal efforts to count as establishing a presumption of legitimate claims to privacy: a couple at a café table lean forward and speak more quietly, a woman deletes certain of her emails, etc. Given their experiences and the presence of the relevant social norms, persons reasonably believe and can legitimately expect that numerous states of affairs and kinds of conduct are or should be regarded as presumptively off-limits to others whether or not they have taken every possible affirmative step to place that conduct or state of affairs beyond the sensory reach of others.[3] So while, as numerous commentators from the earliest discussions of privacy to the present assert, increasingly sophisticated technological innovations require greater vigilance and increased effort to protect privacy, it does not follow that individuals establish and secure the legitimacy of their claims against privacy intrusions only if they successfully bear the burden of staying one step ahead of technology.

Admittedly, securing or protecting privacy often requires that certain steps be taken to deny others access to or information about oneself, and having taken such steps can determine whether or not a person's privacy is protected. But it is a mistake to think that even successful efforts to secure immunity from these intrusions assure that one's privacy remains intact. Moving out of earshot of an eavesdropper does not assure that her persistent efforts to hear do not constitute a privacy intrusion. A similar, and perhaps more serious mistake consists in identifying or reducing privacy interests to other interests such as those of property or to one's person which, when functioning as the content of a right, protect privacy coincidentally or collaterally. Here privacy rights can depend upon (or be normatively indistinguishable from) an ownership relationship to something or oneself.[4] Certain ownership rights can thus facilitate the protection of privacy, and thus certain ownership rights can and do function to protect privacy interests collaterally. So it may work out that in some circumstances, the exercise of an ownership right provides the same benefits as does the exercise of a privacy right. But it does not follow that the interests protected by these rights are indistinguishable and thus that the rights do exactly the same work. Owning a newspaper can secure the value of certain of the owner's rights of free expression, but it does not follow that the owner's property rights in the newspaper have the same function as do her rights of free expression. While a right of ownership may coincidentally protect interests against certain kinds of intrusions because it affords grounds on which others are to be excluded from access to certain places and things, it does not follow that the normative work done by a right of privacy can be done by property rights.[5]

[3] Thus the standard employed here to determine whether a presumption of privacy is reasonable parallels, but is lower than, the legal standard in American law pertaining to searches and seizures in criminal proceedings. See *Katz v. United States*, 389 U.S. 347 (1967).

[4] This view of privacy is offered in an oft-cited paper by Thomson (1975).

[5] Early critics of the idea that privacy is derivative from property include Rachels (1975), Scanlon (1975), Reiman (1976), and Parent (1983a).

So it seems reasonable to understand privacy in terms of those circumstances or states of affairs in which persons are free from intrusions.[6] And on this understanding, the absence of intrusion comports not only with certain commonplace associations with privacy, where privacy is taken to be imperiled or diminished as a result of others intruding upon one's physical or psychological space so as to gather certain information, but also with early legal analyses which took the content of the right to privacy to consist in not being intruded upon—in being let alone.[7] This, then, presses the question of the sense in which privacy intrusions are distinctive, that is, of how these intrusions can be distinguished from other kinds of intrusions and whether, as such, privacy interests have a normatively distinct function. And one effective way to address this question consists in considering both the defects and insights of a view denying that privacy involves freedom from intrusion.

Privacy as an Epistemic State of Affairs

If William Parent's (1983a) influential account of privacy is correct, then the hypothesis of this paper—that privacy is a matter of freedom from certain kinds of intrusions—is false. For on Parent's view, privacy is not a matter of intrusions, but is rather 'the condition of not having undocumented personal knowledge about one possessed by others' (Parent 1983a, p. 269). This complex condition includes a set of preferences, presumably in varying degrees of strength, that certain (often most all) persons not possess undocumented personal information about oneself. Note that personal information comprises information about ourselves which, in certain societies and at certain times, most persons 'do not want widely known', and would be a cause of concern should it be circulated beyond a small circle of friends, relatives, or colleagues (Parent 1983a, p. 270). To the extent to which others do not have undocumented personal information about him, the man's privacy is intact.

Notice that on this account it is largely irrelevant to an individual's privacy just how knowledge (and presumably true beliefs) of undocumented personal information is acquired. So it makes no difference with respect to an individual's privacy if the undocumented personal knowledge of another is acquired as a result of an intrusion (computer hacking, for example) or someone's simply having stumbled upon it. Privacy is an epistemic state of affairs such that others do not have undocumented personal knowledge about oneself, and while an intrusion may be the usual cause of a privacy loss, the process should not be confused with the product.

[6] Thomas Scanlon (1975) appears to be the first to state that the 'common foundation' of certain diverse rights to privacy is the special interests persons have to be 'free from certain kinds of intrusions'.

[7] In the first systematic paper on the legal right to privacy, Warren and Brandeis (1890) famously employed the phrase 'the right to be let alone' attributing it, out of context, to Judge Thomas Cooley. Cooley's brief discussion surveys tort actions and expresses concerns that an ill-defined right to privacy could engender excessive tort actions, including a tort of insult. Cooley's primary concern was with the nonconsensual use of images or information and the damage resulting from their promulgation. Cf. Cooley (1907, p. 192).

While, as shall be argued below, this account correctly affirms that all privacy intrusions have an epistemic component, it fails to capture adequately the normatively distinctive function of privacy. For accounts of this kind cannot explain why considerations other than or in addition to the possession of personal information by others cannot constitute or augment losses of privacy.[8] When a teenager goes to her room and with the door barely ajar speaks on her phone to a friend, it would certainly seem that she has a bona fide privacy complaint should someone enter her room (without notice or permission) and disrupt her conversation. Her complaint would certainly appear to be a privacy complaint even if the intruder acquires virtually no information about the young woman, her surroundings, or the content of the conversation. Thus independent of whether true beliefs or knowledge are acquired, the fact of someone's gaining access to another can constitute a loss or reduction of privacy. Admittedly, what counts as the sort of gaining of access which constitutes a privacy intrusion can vary depending on the relevant social norms and differing expectations about what constitutes a proper as opposed to improper intrusion. But this does not undermine the fact that the young woman's privacy complaint can be grounded in her not being subjected to certain kinds of intrusions. So since her privacy interest is both independent of and distinguishable from whether the intruder formed true beliefs or acquired personal knowledge about her, she correctly expresses a privacy complaint should she say, 'I don't care whether you heard and saw anything, I care that you could hear and see it'.

It can be responded here that whatever loss the teenager endures, it is not a loss of privacy. But then what sort of loss is it? Since she is neither threatened or physically injured, nor sexually violated, the interests at stake are not those against assault, battery, or rape.[9] Nor is her interest one against harassment which usually requires repeated and persistent intrusions forming a pattern of disruptive or threatening behavior. And it is assuredly not a property interest given that she neither owns nor rents her room. Indeed, her privacy loss is no more tied to property than is that which a person using a public restroom endures when someone negligently pushes in the toilet stall door. Notice that this does not deny that privacy interests can be accompanied by interests against harassment and property interests, but it insists that privacy interests are distinguishable from them. There could be repeated intrusions into the teenager's room or the restroom user's stall, for example, and so privacy intrusions can be accompanied by harassment. But the interests at stake remain distinguishable because, unlike harassment, privacy is inextricably connected to the acquisition of personal information or, as is relevant here, insecurity regarding whether information which an individual prefers remain unknown will become known by another or others.

Thus it would seem that persons can endure a loss of privacy even though neither true beliefs nor undocumented personal knowledge about them were formed or

[8] See Scanlon (1975, p. 317) and Ruth Gavison (1980), who favor an intrusion-based theory on this ground. Judith Wagner DeCew criticizes Parent directly on this point (DeCew 1999, p. 32–33).

[9] Parent warns against confusing privacy with interests such as those of rape, assault, and battery. Parent (1983a, p. 271–274) and (1983 b).

possessed by another. And this is especially important here because the counter-examples employed to demonstrate that possession by others of this kind of undocumented knowledge is not a necessary condition of a diminution of privacy all involve appeals to intrusions. The apparent defect, then, of an epistemic state-of-affairs theory of privacy is that it neglects or denies the connection between losses of or reduction in privacy and those intrusions which might not result in personal information being possessed by others.[10]

This conclusion is consistent with Parent's important insight that even when undocumented information is possessed by others, the nature and extent of one's privacy loss can vary depending on a person's preferences regarding both the nature or kind of information obtained and the identity of those obtaining the information. The intruder in the case of the teenager may have learned that she is speaking with a friend and that she is putting off her homework. But the teenager might care only about his learning the latter. And while she may be indifferent as to whether any of this information is passed along to her father, she may have a strong preference that her grandmother, a pest and Budinsky, be excluded from knowing any of this.

It now appears that the relationship between a state of affairs where others simply have undocumented personal knowledge of oneself and losses or damage to one's privacy is not one of identity, but rather of indication or amplification. While the teenager's privacy can be diminished without the intruder having acquired any undocumented personal information about her, as shall be argued below, the fact that he was positioned to gain certain information about her could indicate that his intrusion is of the distinctive kind which diminishes the teenager's privacy. And should the information be gathered and further disseminated, this could amplify the extent and seriousness of the teenager's privacy loss.[11] However, and importantly, both indication and amplification are defeasible. An individual's responses to and preferences regarding who has information about him, how they acquired it, and what they do with it, can make or break the relevance of another or others having that information to the extent of his privacy loss. In this way, the *value* of an individual's privacy should be taken to have an ineliminable personal component which consists primarily in not being subjected to intrusions which disrupt (or threaten to disrupt) or interfere (or threaten to interfere) with oneself as a self-conscious agent, a specific individual with her own projects, plans, or activities.

Privacy as Epistemic Intrusion

The idea that the normatively distinctive component of privacy is personal, that it includes (at minimum) an individual's interests in and preferences regarding the protection of her personal and psychological well being against intrusions, originates with Warren's and Brandeis' seminal analysis of the right to privacy. Elements of their analysis serve here as the catalyst for an intrusion theory of

[10] Parent's (1983b, p. 344) 'threatened loss counterexample' to this criticism will be considered below.

[11] DeCew (1999, p. 30) criticizes Parent's account for not being able to accommodate this fact as does Samuel C. Rickless (2007, p. 784).

privacy which avoids the defects of epistemic state-of-affairs theories, extends beyond the narrow confines of the content of the legal right to privacy, and incorporates both the personal and related epistemic dimensions of privacy into an account which identifies privacy's distinctive normative function.

Warren and Brandeis took the common law right to privacy to have emerged in response to the developing recognition that the enjoyment of the full value of life requires protections in addition to those against physical injury, attempts to injure, or various nuisances. Human beings have a spiritual nature, they asserted, which includes their feelings and intellect, and with the increasing awareness of the relationship between this nature and the quality of an individual's life, the common law properly increased its protections against personal intrusions—it created immunities extending 'beyond the body of the individual'. (Warren and Brandeis 1890, p. 194) These immunities concern several distinguishable interests against intrusion including those an individual has with respect to how she is regarded in the public domain (protected by the torts of slander and libel) and other antecedent interests; i.e., interests a person has against another or others engaging in conduct that would intrude upon or disrupt one's 'private life'—that domain one has chosen to keep from the public eye.

Privacy rights protect against intrusions resulting from the undesired presence (broadly conceived) of another who gathers and then makes public information about an individual's private life. What makes a difference with respect to the fact and then degree of the privacy loss are matters pertaining to *how* personal information is acquired and the disruptive and destabilizing effect on the individual of the acquisition and subsequent promulgation of personal information. The extent or degree of harm or injury attending losses of privacy begins with the negative reaction of an individual to an intrusion whereby another or others gain access to or learn about that sphere of one's life which she prefers remain unknown. Thus privacy interests in one's thoughts, ideas, and expressions are plainly antecedent to any property interests therein. Only by the author's conscious decisions can her love songs or poetry enter the public domain as 'products of the intellect' in which there can be a property interest (Warren and Brandeis 1890, p. 205). Privacy interests are those in the health and security of the intellect itself.

So privacy requires assurances that when a woman works on a poem for her lover or, when deliberating a course of action, scribbles a note to herself, her behavior (including her thought processes) is insulated from the kind of interference which results from the combination of nonconsensual appropriation and public dissemination contrary to her preferences. For the intrusion a person endures from the making public of that which she prefers remain unknown can disrupt or derail precisely those mental activities—those intellectual, creative, and deliberative processes—which are of value to *that* woman as a distinct individual in maintaining and developing herself as the person she is, as herself. When they famously characterized the principle which protects 'personal writings and all other personal productions' by appeal to the vague notion of 'an inviolate personality' (Warren and Brandeis 1890, p. 204), Warren and Brandeis were interested in affirming a distinct right of privacy, a right against those intrusions resulting or threatening to result in

reductions or losses of an individual's personal and psychological integrity, of her 'peace of mind'(Warren and Brandeis 1890, p. 200).

With the above in mind, the following would seem a fair but bare bones description of the Warren/Brandeis analysis of the content of the legal right to privacy:

An individual's privacy consists in her being free from those intrusions by which, contrary to her preferences and without her permission,

1. another or others gain access to and gather information about her and,
2. disseminate that information to another or others.

And with a bit of sympathetic license, the following seems a fair statement of why privacy was taken to be sufficiently valuable as to require rights-protection:

> The value of privacy consists in the benefits afforded individuals when they are free from certain kinds of intrusions which will, or are likely to, disturb, disrupt, or disorient them when: considering, developing, or acting in accord with their own plans, sustaining or cultivating their identity or sense of self, and identifying and pursuing life-paths of their own choosing.

Worth emphasizing here, Warren and Brandeis were concerned to identify and give substance to a distinct *legal* right of privacy. So when they wrote of privacy's value, they did so with an eye to what might be referred to as privacy's full normative force. That is, they wrote in terms of those significant benefits accruing to an individual when her privacy is formally protected as a matter of legal right, and of the significant losses that would be endured by her when this is not the case. So they provided arguments for the distinctiveness of this right vis-à-vis other similar rights against intrusion, and in so doing, showed why the right to privacy ought to be disentangled from those rights with which it could and had been confused.

Because of its specifically legal purposes, the Warren/Brandeis account has obvious defects as a general theory of privacy, a theory sufficiently attentive to the non-legal but especially moral dimensions of privacy. For purposes of adjudication and remedy, privacy intrusions require evidence that access to an individual has been gained, that certain information about him has been gathered, and that this information has been disseminated. But as the examples of the teenager and public restroom user show, this tri-parte conjunction is too demanding. Surely the privacy of these individuals is diminished—even if the intrusion is momentary or inadvertent and of little lasting consequence—independent of whether information about them is gathered or disseminated. But this concern underestimates the flexibility of their account by treating the content of the *legal* right to privacy as if it alone were derivable from their view of the *value* of privacy. The full normative force of privacy is best assured when the legal right to privacy is taken to have the content they prescribed. But privacy can be described more broadly and with greater moral coverage for non-legal purposes.

With this in mind, a revised description of privacy should include a provision such that losses of privacy do not require the actual gathering and dissemination of information. On this provision, privacy is still a matter of being free from certain kinds of intrusions, but the intrusions include those where one or more persons gain

a certain kind of access—epistemic access—to someone else. How should this be understood? Innocuously, one person gains epistemic access to another when she becomes positioned so that she can, either directly or by use of various technological aids, gather information, form beliefs, or have knowledge of or with respect to someone else. Now this commonplace gaining of epistemic access is plainly too broad to count as the threshold to privacy concerns. For assuredly it is false that matters of privacy are at hand whenever someone cranes her neck to see whether the person across the street is her sister. But intentions, context, conventions, and effects make the difference. When a reporter gains epistemic access to a man by learning where he is staying, going to his hotel, sitting next to him in the bar and pressuring him about whether assertions in a confidential document regarding his sexual abuse as a child are true, privacy interests plainly seem to be at stake even if the reporter fails to gain confirmation of the assertions. And this is the case because of the intrusive effect of the inquiry—that it pressures a person for personal information or renders a person insecure with respect to information which he can reasonably expect is secure from acquisition. Now determining when such an expectation is reasonable can involve considerable complexity, especially when norms governing these expectations are vague or in flux-is the man in the bar intruded upon in the relevant sense if he agreed to be interviewed by the reporter but did not specify a precise time or place for the interview and did not place limits on its subject matter? But, as shall be argued below, it does not follow from the fact of these complexities that there are not ways of determining when clear cases of the relevant kind of intrusion are present. So it is important to acknowledge that one's gaining this kind of intrusive epistemic access—henceforth 'disruptive epistemic access'—can result in a loss of privacy.

So it would seem that all privacy intrusions have an epistemic component, either immediate or prospective, and that it is in the combination of this component with the sometimes powerful psychological aversion to another or others being positioned to gather, actually gathering, or disseminating information about oneself that significant losses of privacy are best understood. So with these considerations in mind, the following description of privacy is offered with the proviso that it *not* be read as a description of the content of a moral or legal rights to privacy, but as an account of privacy *simpliciter*—privacy as freedom from certain kinds of intrusions ranging from those of relative insignificance to those of sufficient gravity to serve as the content of rights.

Privacy is an individual's freedom from those intrusions in or by which, contrary to his preferences and reasonable expectations, and without his permission,

1. another or others gain disruptive epistemic access to that individual or,
2. another or others gain either simple or disruptive epistemic access to, and acquire personal information about, that individual.

Unlike the Warren's and Brandeis' analysis, the clauses designating the sorts of intrusions with respect to which persons have privacy interests are set out as a disjunction rather than a conjunction. This accommodates the facts that: (1) privacy losses can result when disruptive epistemic access has been gained and no information about an individual is gathered or that (2) privacy losses can occur

when epistemic access has been gained and personal information has been gathered. Notice that condition 2 includes a disjunction that treats as a privacy loss an intrusion resulting from another gaining either simple or disruptive epistemic access and acquiring personal information even if the victim is ignorant of the intrusion. The question of whether there has been a privacy loss is, under either condition, distinguishable from that of the nature and extent of the loss and thus of whether the loss is morally or legally objectionable. Only given the fact of a privacy loss do questions concerning the extent or value of that loss arise.

This is consistent with the fact that persons can endure losses of privacy as a result of unintentional, careless, or even negligent intrusions of the relevant kind, and the nature and value of these losses can vary considerably as when, for example, personal information is gathered (even inadvertently) and then disseminated beyond those who acquired the information. The extent and harmfulness of a privacy loss can be greatly exacerbated when the possession or dissemination of the information results in embarrassment or a loss of esteem. Intuitively, then, the extent and significance of privacy losses and the attending negative consequences for the individual are likely to be less when only disruptive epistemic access is gained. Losses increase or worsen when either simple or disruptive epistemic access is gained and information is gathered and disseminated to embarrassing effect or loss of esteem. As a rule of thumb, this is probably correct. But keeping in mind that the value of privacy is rooted in the disorienting and destabilizing effect of either actual or prospective privacy intrusions on particular individuals, there are other factors which can and do affect the extent and severity of a privacy loss. For example, it might make no difference to a gay man if his sexual orientation were made known to his friends, but he could care deeply, and his loss could be profound if his father were informed of this fact.

Objections and Responses

As suggested earlier, the view defended here does not succumb to an influential objection leveled at theories which understand the right to privacy as control over or access to personal matters or personal information.[12] The 'threatened loss counterexample' insists on distinguishing losses of privacy from threats of losses of or to privacy (Parent 1983b, p. 344). So rather as someone with a high tech viewing device diminishes the privacy of another only if he uses the device and succeeds in gathering information, the reporter who pressures someone for personal information effects a loss of privacy only if her questions are answered. On this objection, the reporter does not invade the man's privacy, her inquiries only threaten to do so. Now this objection assumes that the only bona fide privacy losses are those an individual has in others not gaining or having personal information about her. But why does not a state of affairs where the presence of the device trained on oneself radically increases the chances of a loss of personal information and thus creates reasonable insecurity in or with respect to that which a person prefers remain unknown count as a loss of privacy? Does not a loss of security with respect to

[12] See Rickless (2007, p. 782–784) on this point.

personal information count as a bona fide privacy interest, especially when the nature and severity of the loss can be of the same kind and as great as that attending a loss of personal information? The answers here cannot be that such losses are better described in other terms (those of liberty, property, or personal space, for example). For these losses do not seem to be inextricably tied to a critical component of privacy, viz., security in or with respect to information which is properly about oneself and is valued as such.

The above argument emphasizes a distinctive component of the value of privacy in determining whether and when a privacy intrusion is present, and thus rejects as too narrow accounts of privacy that do not count losses resulting from another's gaining disruptive epistemic access (without acquiring personal information) as losses of privacy. One such account, that of Samuel Rickless (2007, p. 787), takes the right to privacy to be infringed only if one person learns or experiences some personal fact about another 'by breaching a barrier' used by the latter to prevent this from occurring. Rickless defends this contention against counterexamples where (1) a barrier has been breached but, for one reason or another no information has been gathered or (2) a barrier has been breached but a person takes certain steps which successfully thwart the gathering of personal information. Consider these in turn.

Rickless considers an example where a couple meets on a secluded park bench so as to have a conversation they wish not to be overheard. A man 'creeps around in the bushes behind them to listen'(Rickless 2007, p. 788). When the intruder hears at least some of the conversation, he violates a privacy right. But when the case is modified so that the sound of a loud woodpecker makes hearing the couple and the gathering of information about them impossible, Rickless denies that there has been a loss of privacy. But if the example is modified yet again, this conclusion is unconvincing. For imagine that as the woodpecker pecks, the couple becomes aware of the presence of the intruder, and correctly recognizes that he has been there for some time with hands cupped around his ears in an obvious attempt to hear their conversation. Here it would seem that though he did not hear them, the intruder diminishes the couple's privacy because his presence and intentional conduct—his intrusion—breaches their security with respect to matters they correctly believe are properly theirs.

Rickless then considers an example provided by Inness (1992, p. 34) in which a stranger on a train sneaks up to watch someone who takes evasive action and hides under a bed before being seen. Here Rickless agrees that a privacy right has been infringed but only because careful investigation would reveal that the stranger has acquired what is necessary for the infringement—information the stranger gets by 'looking through the blinds', facts about the compartment, for example (Rickless, p. 792). Only because the stranger has indeed learned such 'personal facts' has there been an infringement of the right to privacy. But this response has at least two problems. First, it works only if one so expands the notion of 'personal information' as to render it irrelevant to privacy. How, exactly, are facts about a train compartment personal information in the relevant sense?[13] The point here is not to

[13] Worth recalling, Parent defines 'personal information' as that which most persons 'do not want widely known' (Parent 1983b, p. 270). Parent's definition is compelling because it focuses on a person's preferences concerning what is properly theirs and what they can reasonably expect about the protection thereof.

insist that only highly intimate information counts as personal, but rather that justification must be provided for whatever criteria are employed to determine when information is sufficiently personal that acquisition of it by another constitutes a breach of the 'relevant barrier'. Otherwise, the maneuver appears ad hoc. And this facilitates the second more serious problem. Why is the gathering of information about a train compartment sufficient to show a breach of the 'relevant barrier' while gaining disruptive epistemic access is not? What if the stranger persisted, obtaining no information, but requiring that the occupant hide personal effects from view? Would not this gaining of epistemic access be sufficiently disruptive so as to constitute a breach of a privacy barrier especially since relevant losses to an individual are of precisely the sort with which rights of privacy should be concerned?

So someone's simply gaining disruptive epistemic access can entail a privacy loss, and here the examples of the teenager and public restroom user remain illustrative. A person entering the room in which the teenager speaks or the stall in which the restroom user sits gains disruptive epistemic access to these individuals in that his conduct undermines their security with respect to personal information in precisely those circumstances where they can reasonably expect that this will not occur. Thus the fact that disruptive epistemic access has been gained, even if negligently or carelessly, can constitute an intrusion which disturbs, disorients or destabilizes a person in ways relevantly similar or equivalent to cases where simple epistemic access is gained and information is both gathered and disseminated.

This focuses attention on an important underlying empirical assumption about the value of privacy taken, as it is here, as a circumstance or state of affairs in which a person is free from certain kinds of intrusions. Roughly that assumption is that human beings are sufficiently sensitive (indeed hypersensitive) to what others may think, believe, or know about them that the *prospect* of another or others being positioned to gain certain information about them can have negative psychological consequences. This prospect does not always or even usually constitute a loss or reduction of privacy as innocuous cases of others gaining simple epistemic access show. Nor does it always constitute as psychologically destabilizing an effect as do those intrusions resulting in information being gathered and disseminated generally. And finally this does not mean that relevant distinctions cannot be drawn between or among privacy intrusions. But the vulnerability that attends even the prospect of taking to the public (even if the public is comprised only of the intruder) that which a person prefers remain unknown and has reasonable expectations that this will endure, helps to explain why the intruded upon teenager and restroom user endure a loss of privacy even though no information about them is gathered or disseminated.

A second objection is that treating intrusions resulting from the gaining of disruptive epistemic access as privacy losses sets the bar too low. For this would allow an overly broad range of intrusions, including trivial ones, to count as privacy losses. For example, the account would mistakenly count as privacy losses incidental intrusions on personal space whereby a person becomes addled by the close physical proximity of another. In response to this concern, it is important to reemphasize that disruptive epistemic access exists only if that access can reasonably be taken to create insecurity with respect to another's acquiring certain

information. Now the close proximity of one person to another (including by use of technological aids) in circumstances where persons reasonably believe and legitimately expect that this should not occur can constitute strong prima facie reason for believing that disruptive epistemic access has been gained and that a privacy intrusion has occurred. But such a belief can be falsified by evidence demonstrating that disruptive epistemic access to the person has not been gained and as result, the attending expectation is not justified. So the mere fact of the discomforting presence of one person in close physical proximity to another—even proximity that violates accepted norms of personal space—does not automatically result in a loss of privacy. For consider the cases of the teenager and restroom user yet again, but with the following modification: the intruder is without sight or hearing, and thus his presence in no way threatens the gaining or dissemination of information. Here it would seem bizarre to claim that there had been a loss or reduction of privacy. Indeed, providing a description of the intruder to the intruded upon should falsify any belief in a loss of privacy.[14]

There are, of course, innumerable and commonplace cases where it proves difficult (if not impossible) to determine the truth of claims that disruptive epistemic access has been gained. Sometimes the vagaries and instability of existing social norms and the ease with which the intentions of others can be misidentified or misunderstood mitigate against quick and final determinations. And in such cases what appears to be a legitimate expectation concerning whether and under what circumstances another should have simple epistemic access to oneself (or something about oneself) may prove to be false. Persons have reasonable beliefs attended by legitimate expectations that others not have epistemic access to them when they are in certain places or while they are performing certain actions in circumstances socially regarded as presumptively off limits to the perception of others. But it is not always clear when these beliefs are reasonable and their attending expectations legitimate. Indeed, there is probably no foolproof test for determining, in each and every case, when persons are acting in accord with the norms establishing reasonable expectations regarding permissible epistemic access or, for that matter, what sort of conduct counts as waiving privacy interests. Nor should there be, because unlike the case of the blind and deaf intruder, the relevant standard for defeating the teenager's privacy complaint is not evidence showing that her belief is false, but evidence showing her belief is, given extant norms, unreasonable. So even though there are irredeemably marginal cases where it can be difficult if not impossible to tell under precisely what circumstances the disruptive epistemic access provision applies, still, in most cases, determining whether a person's conduct is consistent with the norms of permissible epistemic access is fairly straightforward. This allows that privacy losses can be fleeting and relatively insignificant, and this is consistent with the fact that certain losses of privacy are not appropriate for moral disapprobation or legal action and remedy.

[14] Thus intrusions which are merely 'spatial' are not privacy intrusions, but can be relevant to privacy because of the role they play, given the reasonable expectations persons have regarding certain spaces, in identifying actual or likely epistemic intrusions.

Taking seriously the distinctive value of privacy requires recognizing that a broad range of intrusions are contrary to an individual's good and thus that the severity of a loss can vary wildly from case to case and person to person. But the difference is one of degree and not of kind, so it does not follow that because the disruptive effects of a privacy intrusion barely registers and has no long term consequences that it does not constitute a privacy loss. So it is a strength, not a weakness, of this account that a broad range of intrusions count as privacy intrusions. Contrary to certain rather ambitious theories of privacy, then, not all legitimate privacy complaints can be traced to or need invoke grand considerations.[15]

A Comment on Privacy, Morality, and the Law

Privacy is a matter of persons being free from those epistemic intrusions to which they can be both exceptionally sensitive and profoundly vulnerable. But not all privacy interests are matters of great weight, normatively, and they ought not all be treated as if they were. An important implication of this account is that it allows for distinctions among privacy interests, distinctions consistent with variations in the value of privacy to particular individuals in particular circumstances. Privacy interests fall along an identifiable spectrum of goods, ranging from the relatively trivial annoyance of another gaining temporary but arguably disruptive epistemic access to oneself to the profoundly important interests against unwarranted and persistent surveillance by others accompanied by the dissemination of confidential information to the public.

So while privacy intrusions are at odds with certain of a person's interests, and should thus be included in consequentialist considerations of morally correct conduct and sound social policy, the significance of these intrusions vary enough that not all are rights-protected. But some assuredly are. When a person has a moral right to privacy, she has a morally justified claim against another or others that they not, either intentionally or negligently, intrude upon her in a fashion such as to impede her abilities to conduct her life in accord with principles of her own choosing or which threaten to or in fact undermine her dignity or self esteem. Important here is the recognition that the harm of the intrusion results either from the means whereby others attempt to acquire certain information about her or the possession or dissemination of that information to others. In both kinds of circumstances, and given a set of legitimate expectations regarding when others may acquire and disseminate information about her, her privacy right can be significant—a right of great weight.

[15] While privacy has undeniable implications for persons' abilities to define themselves and to command the requisite degree of respect for their dignity and autonomy, not all privacy intrusions are of such consequence. Nor does privacy require socially important abilities such as control over information. Thus Cf. Fried (1970, Chapter 9), Gross (1971), Wasserstrom (1979), Benn (1971), and Reiman (1976). Furthermore, this account rejects pluralistic accounts that include as privacy interests those in addition to interests against epistemic intrusions. As examples here, see Shoeman (1992, Chapter 1), DeCew (1999, Chapter 4) and, more recently, Mills (2008, Chapter 3).

With respect to legal rights, a similar point can be made, but in so doing interesting questions arise about whether certain legal claims usually regarded as privacy rights are best classified in that way.[16] And here too, not all losses of privacy should be recognized as of sufficient gravity to trigger the rights afforded in tort or constitutional law. Intrusions fulfilling condition 1 might incur but a fleeting and insignificant loss of privacy, while other losses, specifically those falling under condition 2, are those with respect to which persons can (or should) have legally recognized claims.

This point is especially important with respect to American constitutional law. Protections against government intrusions afforded by the Fourth and Fifth Amendments plainly entail privacy rights—rights against unreasonable searches and seizures of one's person, house, papers, effects, as well as rights against intrusions used to obtain self-incriminating information. For in all these cases, and in the Third Amendment's protection against nonconsensual quartering of soldiers in one's home, intrusions of the relevant kind occur.[17] However, this account would resist if not reject the classification of those rights protecting an individual's decisions to engage in certain conduct as, in and of themselves, rights of privacy. For it does not follow from the fact that a person is legally proscribed from engaging in certain behavior—purchasing contraceptives, terminating a pregnancy, marrying a person of a different race or the same gender—that her privacy is necessarily affected.[18]

Nothing said above should be read to deny that persons benefit, indeed flourish, when they are permitted as a matter of law to engage in a broad range of behavior that helps define themselves to themselves as well as to others. But the value of this benefit is distinguishable from the value attending protections against others gaining access to or acquiring information about the decisions leading to this behavior or to the fact that the behavior has occurred. This value is real—of great importance to persons—and so when the Court permits coercive state-authorized intrusions of the relevant kind—such as requirements that a person inform her parents of her intent to obtain an abortion—it facilitates violations of her privacy rights.

References

Benn, Stanley. 1971. Privacy, freedom, and respect for persons. In *Nomos XIII: Privacy*, ed. J.R. Pennock, and J.W. Chapman, 1–26. New York: Atherton Press.

Cooley, Thomas C. 1907. *A treatise on the law of tort*. Chicago: Calahan & Co.

[16] For example, the privacy torts of appropriation (nonconsensual use of an individual's name or likeness) and false light (where false or embarrassing information is, without consent, made public) should not be treated as privacy torts on this account. But they could still remain torts; a kind of theft in the case of appropriation, and defamation in the case of false light.

[17] The Supreme Court recently recognized privacy protections against intrusions of disruptive epistemic access, thus affirming that privacy intrusions need not result in the acquisition of information. See *United States v. Jones,* 10-1259 (2012).

[18] Intruding upon the confidential decision-making process resulting in such behavior would, of course, be a different matter.

DeCew, Judith Wagner. 1999. *In pursuit of privacy: Law, ethics, and the rise of technology*. Ithaca: Cornell University Press.
Fried, Charles. 1970. *An anatomy of values*. Cambridge, MA: Harvard University Press.
Gavison, Ruth. 1980. Privacy and the limits of the law. *Yale Law Journal* 89: 429–430.
Gross, Hyman. 1971. Privacy and autonomy. In *Nomos XIII: Privacy*, ed. J.R. Pennock, and J.W. Chapman, 169–181. New York: Atherton Press.
Innes, Julie C. 1992. *Privacy, intimacy, and isolation*. New York: Oxford University Press.
Mills, Jon L. 2008. *Privacy: The lost right*. New York: Oxford University Press.
Parent, William A. 1983a. Privacy, morality, and the law. *Philosophy and Public Affairs* 12: 269–288.
Parent, William A. 1983b. Recent work on the concept of privacy. *American Philosophical Quarterly* 20: 341–355.
Rachels, James. 1975. Why privacy is important. *Philosophy and Public Affairs* 4: 323–333.
Reiman, Jeffrey. 1976. Privacy, intimacy, and personhood. *Philosophy and Public Affairs* 6: 26–44.
Rickless, Samuel C. 2007. The right to privacy unveiled. *San Diego Law Review* 44: 773–799.
Scanlon, Thomas. 1975. Thomson on privacy. *Philosophy and Public Affairs* 4: 315–322.
Shoeman, Ferdinand. 1992. *Privacy and social freedom*. Cambridge: Cambridge University Press.
Thomson, Judith Jarvis. 1975. The right to privacy. *Philosophy and Public Affairs* 4: 295–314.
Wasserstrom, Richard. 1979. Privacy: Some assumptions and arguments. In *Philosophical law*, ed. Richard Bronaugh, 148–167. Westport, CT: Greenwood Press.
Warren, Samuel D., and Louis D. Brandeis. 1890. The right to privacy. *Harvard Law Review* 4: 193–220.