

UNCORRECTED PROOF

Privacy and Punishment

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Abstract: Philosophers have focused on why privacy is of value to innocent people with nothing to hide. I argue that for people who do have something to hide, such as a past crime or bad behavior in a public place, informational privacy can be important for avoiding undeserved or disproportionate nonlegal punishment. Against the objection that one cannot expect privacy in public facts, I argue that I might have a legitimate privacy interest in public facts that are not readily accessible, or in details of a public fact that implicate my dignity, or in not having a public fact memorialized and spread to more people than I willingly exposed myself to.

Keywords: privacy; punishment; nonlegal punishment; Google Glass; free speech; public fact; shaming

1. Introduction

Privacy advocates are often challenged to explain why we should value privacy if we have nothing to hide. Criminals obviously want informational privacy so that they can avoid detection and punishment, but few of us would think we should create proprivacy policies merely to benefit them.¹ Philosophers and legal theorists have responded by developing arguments as to why even those with nothing to hide should care about privacy.² I examine a distinct though not mutually exclusive argument in

¹I focus on informational privacy, but there are other dimensions of privacy, such as decisional and local privacy; see Beate Rössler, *The Value of Privacy* (Malden: Polity Press, 2005), p. 9, discussed below.

²I shall refer to accounts that see privacy as a means to (1) maintain intimate relationships: see Charles Fried, "Privacy," in Ferdinand Schoeman (ed.), *Philosophical Dimensions of Privacy* (Cambridge: Cambridge University Press, 1984), pp. 203-22, and James Rachels, "Why Privacy is Important," *Philosophy & Public Affairs* 4 (1975): 323-33; (2) show respect for others and preserve human dignity: see Stanley Benn, "Privacy, Freedom, and Respect for Persons," in J. Roland Pennock and John W. Chapman (eds.), *Nomos XIII: Privacy* (New York: Atherton Press, 1971), pp. 1-26, and Edward Bloustein, "Privacy as an Aspect of Human Dignity," in Schoeman (ed.), *Philosophical Dimensions of Privacy*, pp. 156-203; (3) protect economic interests: see Richard Murphy, "Property Rights in Personal Information: An Economic Defense of Privacy," *Georgia Law Journal* 83 (1995): 2381-417, and Joseph Siprut, "Privacy Through Anonymity: An Economic

defense of privacy: informational privacy is a shield against unwanted attention for people who do have something to hide but who do not or no longer deserve to be punished.

The connection between privacy and unjust punishment is becoming increasingly apparent as the Internet and image-capturing technology makes information about one's past misdeeds or behavior in public places readily accessible to the general public in a form that is persistent, archivable, and searchable.³ I begin with the following example:

Plane Passenger: "Plane Passenger" takes the seat next to you, introduces himself, and starts a conversation. You are wearing Google Glass with face recognition software, enabling you to identify and access information about people in your sight.⁴ As you turn to him, text appears before your eyes superimposed over the man's image that tells you his name, age, and address. Then you see a news article from 10 years ago with his mugshot; the article explains that he completed a sentence in jail for causing an injury while driving when intoxicated. You then see a news photo of him when he was much younger, in which he is making an obscene gesture at a Hasidic Jew on a public street. You conclude that this person is a bad apple, clam up, frown at him, and call for a flight attendant to request a new seat, as he looks befuddled. It's not that he made an offensive comment to you or that you are irritable and want to be left alone. In neither of those cases would his interest in privacy be implicated. You frown at and shun him because you have judged him to be blameworthy; this is your way of punishing him for his past misdeeds.

You were able to punish Plane Passenger, perhaps unjustly, only because you had ready access to two distinct sorts of facts: that he once committed a crime; and that he behaved in a certain way in a public place

Argument," *Pepperdine Law Review* 33 (2006): 311-34; (4) ensure contextual integrity: see Helen Nissenbaum, "Protecting Privacy in an Information Age: The Problem of Privacy in Public," *Law and Philosophy* 17 (1998): 559-96, and *Privacy in Context* (Stanford: Stanford University Press, 2010); and, more generally (5) to be autonomous: see Rössler, *The Value of Privacy*. Other theories hold that privacy can be important for (1) promoting trust: see Scott E. Sundby, "'Everyman's' Fourth Amendment: Privacy as Mutual Trust between Government and Citizen?" *Columbia Law Review* 94 (1994): 1751-1812; (2) democracy, see Annabelle Lever, *On Privacy* (New York: Routledge, 2012), chap. 1, and "Mill and the Secret Ballot," *Utilitas* 19 (2007): 354-78; and (3) community: see Mark Tunick, "Does Privacy Undermine Community?" *Journal of Value Inquiry* 35 (2001): 517-34.

³See Zeynep Tufekci, "Can You See Me Now? Audience and Disclosure Regulation in Online Social Network Sites," *Bulletin of Science, Technology and Society* 28 (2008): 20-36, pp. 20-21.

⁴See <http://www.google.com/glass/start/>, accessed July 6, 2013.

—embarrassing facts that he wants to be forgotten. Plane Passenger’s privacy interest does not seem very substantial in the example I have given: that you frowned and shunned him should have no impact on his overall welfare. Even if you wronged him, not every wrong demands our attention. But it is not difficult to envision scenarios in which his privacy interest is weightier: perhaps the information you accessed is also discovered by others simply by googling his name, and as a result his application for a job is rejected by an employer, he is ignored by friends, and is asked to step down from a board position he held at a local charity.

Can Plane Passenger reasonably expect privacy in the fact that he committed a crime years ago, or in what he did on a public street? Many people would regard these as “public facts” in which one cannot expect privacy. Even if we thought that one could have a legitimate privacy interest in a public fact, should we recognize a moral or legal right to privacy in this information given that doing so would implicate substantial interests in free speech? In order to work through these questions it will be helpful to draw on three further examples in which someone receives unwanted attention.⁵

To Catch a Predator: Dateline NBC produced a television show in the United States called *To Catch a Predator*, in which NBC had adult decoys pose as young teens and engage in sexually explicit online exchanges with men in Internet chatrooms, and invite them to what was claimed to be the decoy’s home. If they showed up, cameras would capture their horrified reaction when they are confronted and learn that they’ve been exposed as child predators to a national television audience; they are then handed over to the police. One man, assistant district attorney Louis Conratt, did not take up the decoy’s offer to come to “her” house, so NBC came to him, and when Conratt saw a SWAT team forcibly enter his home accompanied by a film crew, he fatally shot himself, unable to bear the public humiliation.⁶

Dog Poop Girl: A Korean woman riding a subway was asked to pick up the mess that her dog left in the middle of the car. She refused. Using a cell phone camera, someone uploaded a photo of her with the dog’s defecation clearly in the foreground. Viewers then uploaded details about

⁵For additional examples, see Daniel Solove, *The Future of Reputation* (New Haven: Yale University Press, 2007), and Tom Downey, “China’s Cyberposse,” *New York Times Magazine*, March 3, 2010.

⁶See *Conratt v. NBC Universal*, 536 F. Supp. 2d 380 (2008) (episodes of the show are available online at <http://www.nbcnews.com/id/10912603/>), and Mark Tunick, “Reality TV and the Entrapment of Predators,” in Peter Robson and Jessica Silbey (eds.), *Law and Justice on the Small Screen* (Oxford: Hart Publishing, 2012), chap. 14.

who she was, and added harsh comments. She was publicly humiliated, reportedly left her university as a result, and is now known as “Dog Poop Girl.”⁷

Naked Nadia: Nadia enjoys occasionally going to an uncrowded public beach where nude sunbathing is permitted.⁸ A few days after one of these trips, she receives lewd phone calls and emails from strangers, disparaging looks from her coworkers—who start calling her “Naked Nadia”—and the daily phone calls from her mother stop. To her horror, she learns that someone had uploaded a video to a social networking website that shows her naked at the beach, and word quickly spread.

In each example, someone receives unwanted attention and as a result is treated harshly. I begin by discussing the nature of the privacy interest involved in these and related examples (section 2); I then address the objection that one can’t have a legitimate privacy interest in one’s prior criminal conviction or in one’s behavior in public, as they are public facts (section 3). In section 4, I point to a few considerations that are relevant in weighing this privacy interest against competing interests in free speech. I address remedies in section 5; in particular, I consider why a policy for dealing with unjust punishment should focus on privacy and the restriction of speech rather than targeting those who actually inflict punishment unjustly; and I briefly address whether it is feasible to restrict access to public facts.

2. The Privacy Interest at Stake

It might seem puzzling to think that someone can expect privacy in the fact that she was convicted of a crime or in what she does in a public place. In the United States these are generally held by courts to be “public facts,” in which one cannot reasonably expect privacy.⁹ But that posi-

⁷Solove, *The Future of Reputation*, pp. 1-4; Jonathan Krim, “Subway Fracas Escalates Into Test of the Internet’s Power to Shame,” *Washington Post*, July 7, 2005.

⁸For a related example, see Adam Moore, *Privacy Rights: Moral and Legal Foundations* (University Park: Pennsylvania State University Press, 2010), pp.123-24, citing Andrew McClurg, “Bringing Privacy Law Out of the Closet,” *North Carolina Law Review* 73 (1995): 990-1088, p. 1063.

⁹See, e.g., *McNamara v. Freedom Newspapers*, 802 S.W. 2d 901 (1991) (shielding a newspaper from liability for publishing a photo of a high school athlete playing soccer though the photo revealed his genitals, on the ground that the young man was in a public place), and *Gates v. Discovery Communications, Inc.*, 101 P. 3d 552 (2005) (citing U.S. precedents holding that one cannot expect privacy in information gleaned from public court records).

tion reflects culturally specific values and attitudes. In some European countries, public disclosure of a criminal past is regarded as degrading, access to conviction records is restricted, and the accused person's real name does not appear on the docket.¹⁰ The European Commissioner for Justice, Fundamental Rights, and Citizenship recently proposed a "right to be forgotten" that would give people a legal right to demand that photos or personal information that is publicly accessible be deleted from Internet sites if it is not necessary for exercising the right of freedom of expression.¹¹ And while some European countries were at the forefront in placing surveillance cameras in public areas, there is also some support in Europe for a right to privacy even in public places.¹² To say that one cannot expect privacy in public facts is to express not a conceptual truth but a policy choice, and that choice should reflect a considered judgment. I will point to reasons for thinking privacy can be implicated in public facts; but to appreciate the force of those reasons we must first consider the nature of the privacy interest.

The interest in avoiding unjust punishment

In each of the four examples, someone is punished by nonstate actors, by being shunned or publicly shamed. Some might object to saying that anyone in these examples was really "punished," on the ground that only the state may punish. But while only the state can mete out legal punishment, there is a socially recognized practice of nonlegal punishment that indi-

¹⁰See James B. Jacobs and Elena Larrauri, "Are Criminal Convictions a Public Matter? The USA and Spain," *Punishment and Society* 14 (2012): 3-28. The authors suggest some culturally specific factors that explain the difference between the U.S. and Spain: for example, in Spain there is a right to honor (to not be humiliated in front of others) that most Americans would find "quite strange" (pp. 11-12, 18); personal data protection is stronger; and rehabilitation is an important goal, unlike in the U.S. (pp. 14-15, 19).

¹¹See Jeffrey Rosen, "The Right to be Forgotten," *Stanford Law Review Online* 64 (February 13, 2012): 88-92, p. 90; Steven C. Bennett, "The 'Right to be Forgotten': Reconciling EU and US Perspectives," *Berkeley Journal of International Law* 30 (2012): 161-95, pp. 162, 173; Viktor Mayer-Schoenberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton: Princeton University Press, 2009); and n. 36, below.

¹²Contrast Jesper Ryberg, "Privacy Rights, Crime Prevention, CCTV, and the Life of Mrs. Aremac," *Res Publica* 13 (2007): 127-43 (defending use of surveillance cameras), with Annabelle Lever, "Mrs. Aremac and the Camera: A Response to Ryberg," *Res Publica* 14 (2008): 35-42, and *Peck v. U.K.*, 2003-I Eur. Ct. H.R. 123 (broadcasting a public surveillance photo of a man attempting suicide on a public road violates a reasonable expectation of privacy as the man could reasonably expect to be visible only to people who happened to pass by), discussed in H. Tomás Gómez-Arostegui, "Defining Private Life Under the European Convention on Human Rights by Referring to Reasonable Expectations," *California Western International Law Journal* 35 (2005): 153-202, pp. 170-71.

viduals often invoke to enforce social norms.¹³ Whereas legal punishment is hard treatment meted out by state actors upon those who violate a criminal law following an involved process to determine guilt, nonlegal punishment is hard treatment or unpleasantness meted out by ordinary people upon those they regard as blameworthy or in need of deterrence.

Punishment in both its legal and nonlegal forms is unjust if undeserved. Punishment is unjust also if it is disproportionate. If Harold spills a cup of coffee on your desk, ruining your morning newspaper, it would be wrong of you to get back at him by “accidentally” dropping a heavy object on his new iPad. Proportionality is an important limiting principle that counsels people not to exceed what justice allows and that may help avoid cycles of escalated reprisals.¹⁴ One of the ideas implied by this principle is that punishment should have an upper limit, or an endpoint, unless the crime being punished is so severe as to deserve a life sentence. Once someone receives her due punishment for her offense, she should not suffer further punishment for that offense. Besides being unjust, continued punishment of former criminals such as Plane Passenger could be counterproductive. While reporting about current criminal activities may help people avoid being a victim, or encourage unknown witnesses to come forth, and reports of notorious past crimes may prove educational, casting attention on a non-notorious crime committed long ago for which the criminal already was punished may serve little purpose and only undermine society’s interest in the rehabilitative process by making it harder for the ex-criminal to lead a socially productive life.¹⁵ He can have a difficult enough time finding work upon his release;¹⁶ extending the barrier of being known as an ex-convict for the rest of his life only makes it more difficult for him to reintegrate into society.

In each of the four examples, the nonlegal punishment is arguably unjust. You punished Plane Passenger for two reasons: he committed a crime; and he once made an obscene gesture. But he already served his time for reckless driving while intoxicated, and you may have rushed to

¹³See Leo Zaibert, *Punishment and Retribution* (Aldershot: Ashgate, 2006), and Christopher Bennett, “The Varieties of Retributive Experience,” *Philosophical Quarterly* 52 (2002): 145-63. Nonlegal punishment must be distinguished from illegal punishment, which occurs when the state punishes in violation of the law.

¹⁴I will assume this is a valid principle; however, some theorists defend disproportionate legal punishment, despite its injustice, as efficient and effective: see Louis Kaplow and Steven Shavell, *Fairness vs. Welfare* (Cambridge, Mass.: Harvard University Press, 2002); cf. Larry Alexander, “The Domsday Machine: Proportionality, Prevention and Punishment,” *The Monist* 63 (1980): 199-227.

¹⁵*Briscoe v. Reader’s Digest*, 4 Cal. 3d 529 (1971), 537-38 (overruled in *Gates*).

¹⁶See, e.g., Devah Pager, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (Chicago: University of Chicago Press, 2007).

judgment without having all the facts concerning the gesture.¹⁷ Neither Nadia nor Dog Poop Girl is a criminal. Nadia was punished for conduct that isn't clearly blameworthy. Dog Poop Girl deserves some blame but not the harsh treatment she received. The men in *To Catch a Predator* are punished by NBC by being publicly shamed before they were convicted or had an opportunity to defend themselves. These men deserve punishment; but many of them were eventually punished by the state, and for them any additional nonlegal punishment may be undeserved;¹⁸ for the rest, the nonlegal punishment they received may be grossly disproportionate.

I want to be clear that my purpose is not to determine what amount of nonlegal punishment wrongdoers deserve. I will argue in section 5 that determining that, or whether the just amount already has been meted out, may be an impossible task and that these are reasons establishing a legal cause of action against unjust punishers would be impractical, and why we should focus instead on privacy as a remedy. But while we may not be able to say precisely what justice demands, there is good reason to think that widespread exposure of a person's misdeeds is likely to result in excessive punishment. The reason has to do with a fundamental problem with nonlegal punishment. The punishment any particular individual inflicts cannot hope to be proportionate unless it is part of a coordinated response, and apart from what we might call private punishment of private offenses, nonlegal punishment is incompatible with the project of issuing a coordinated response. This may be one reason why John Locke believed we all must give up our natural right to punish when we join society.¹⁹ Private punishment, such as punishing your spouse for leaving the kitchen a mess, can be carefully measured, because by definition the offense and response stays between the parties involved. But the more wide-reaching and long-lasting the exposure of one's past misdeed is, the more likely nonlegal punishment will be disproportionate. Because of the coordination problem, there can be no assurance it will be measured or have an end. The very fact that one's misdeeds are readily accessible to anyone whom one knows or might eventually encounter can weigh heavily on all but the most thick-skinned, and that unpleasantness itself can be excessive punishment, as was apparently the case for Conradt.

¹⁷See Jeffrey Rosen, *The Unwanted Gaze* (New York: Random House, 2000), arguing that privacy protects against people forming rash judgments based on "snippets" of information taken out of context.

¹⁸Nearly half of 256 arrestees were convicted and are now registered as sex offenders; see Luke Dittrich, "Tonight on Dateline this Man will Die," *Esquire* 148 (2007): 233-44.

¹⁹John Locke, *Two Treatises of Government*, ed. Peter Laslett (New York: Cambridge University Press, 1980), §130.

My argument is that each of the recipients of unwanted attention in the four examples has a legitimate privacy interest in avoiding unjust punishment, and this interest should be taken into account in deciding whether it is ethical or ought to be legal to disseminate certain public facts. The privacy interest each possesses is in part an interest in not bearing the hard treatment that their punishers inflict, an interest that carries its own sometimes substantial weight. It can also be understood as an interest in not being treated unjustly regardless of how much the treatment hurts. But it is important to see that this privacy interest can be distinguished from an interest simply in avoiding unpleasant treatment or injustice. We all have an interest in not receiving hard treatment from those who are just mean-spirited but who aren't punishing us. But that is not a privacy interest. Privacy is implicated only when the hard treatment is a response to one's behavior in the past, behavior one wishes were forgotten.

Some of the existing accounts of why privacy is of value can also help explain what may be wrong with providing unwanted attention in the examples above, although it has not been emphasized up to now how the interests these accounts point to are associated with the interest people have in avoiding unjust punishment.

Reputation and autonomy interests

Beate Rössler and others have identified as an essential reason to value privacy that it contributes to our autonomy—our ability to determine and pursue our own objectives.²⁰ Privacy is valuable for enabling us to be autonomous in a number of ways: decisional privacy lets us set our own goals and act on them; local privacy lets us exclude others from our own spaces.²¹ Informational privacy is important to our autonomy in part by protecting us from potentially harsh economic consequences, not only for former criminals who may have trouble reintegrating into society but for noncriminals as well.²² It is also important by not putting us at the mercy of the judgment of others.²³ Informational privacy is particularly important for people who do have something to hide but who do not or no longer deserve punishment. Without this privacy, they can become de-

²⁰Rössler, *The Value of Privacy*, pp. 1, 10, 63, 185. Cf. Nissenbaum, *Privacy in Context*, chap. 4; Ferdinand Schoeman, *Privacy and Social Freedom* (New York: Cambridge University Press, 1992).

²¹Rössler, *The Value of Privacy*, pp. 52, 62-3, 71-72.

²²Boudewijn de Bruin, "The Liberal Value of Privacy," *Law and Philosophy* 29 (2010): 505-34, pp. 509-10, 16 (discussing, among other things, the risks of identity theft).

²³Rössler, *The Value of Privacy*, p. 63.

fined by their misdeeds. I now want to consider how losing the ability to control access to information about one's past can make it harder for these people to reinvent themselves and form new connections, can subject them to manipulation, and can make it harder to maintain their present intimate relationships and friendships.

Rössler, Helen Nissenbaum, and M.J. van den Hoven all have noted the importance of privacy to our capacity for self-presentation and identity formation.²⁴ When unwanted attention exposes someone to unjust punishment, these capacities can be greatly diminished. Many of us have to struggle to be the sort of person we aspire to be. Considerate, generous, kind, honest, and patient people may belie some of these virtues from time to time. If one is always under public scrutiny whenever one goes outside or appears before strangers, one risks being judged and punished for behavior that may not accurately reflect one's character and results instead from a momentary weakness or pressures not visible to others. Someone caught acting badly at such a moment can appropriately be blamed by those who bear the brunt of the bad behavior; and if she causes harm, it might be appropriate to intervene or notify the police. But to memorialize the moment so that it persists and is readily accessible for her lifetime is to diminish the ability of that person to redefine herself. Whoever singled out Dog Poop Girl among all the people who act uncivilly, in order to teach her a lesson, has defined her uncharitably in the public's eye. Not only is this unfair;²⁵ it could undermine her ability to forge new ties by creating self-doubt in herself and resistance from others who base their first impressions on the public persona someone else has constructed for her. The same can be said of the producers of *To Catch a Predator*, and of whoever uploaded the photo of Plane Passenger making an obscene gesture in his youth.

Another way in which privacy in one's past misdeeds can contribute to one's autonomy is by shielding one from being manipulated. The website Florida.arrests.org posts mugshots and booking information of people who are arrested, which the site owner gathers from local police databases. By posting this information, it now becomes visible to web crawlers used by search engines; if you were arrested, anyone who happens to google your name can easily find out. In response, other websites, such as RemoveSlander.com, offer to remove the embarrassing

²⁴Rössler, *The Value of Privacy*, p. 116 (on control over one's "self-presentation"); Nissenbaum, *Privacy in Context*, pp. 81-82; and M.J. van den Hoven, "Privacy and the Varieties of Moral Wrong-Doing in an Information Age," *Computers and Society* (September 1997): 33-37, p. 36 (referring to moral self-determination and the need to "undo" one's "previous determinations").

²⁵See Lever, *On Privacy*, p. 38: it is "invidious" to single out one person to be a lesson for others when perhaps thousands might have been chosen.

mugshots for a fee. The owner of Florida.arrests.org is not the same person who owns RemoveSlander.com, though he does receive a fee from that site for helping to remove the information.²⁶ It is not hard to envision an ethically challenged entrepreneur who gathers and posts mugshots of people who were arrested, and then himself charges these individuals to have the information removed. While this looks like blackmail, that charge might be technically avoided as long as it is within one's rights to gather and post the mugshots.

Still another way in which informational privacy contributes to our autonomy is by helping us maintain intimate relationships with friends and loved ones.²⁷ Those involved in intimate relationships value privacy because it lets them share things between themselves that remain inaccessible to the rest of the world,²⁸ but privacy also lets each of them keep certain information from the other if they believe this will protect their relationship.²⁹ After *Reader's Digest* published an article in 1968 mentioning that Marvin Briscoe hijacked a truck 12 years earlier, a crime for which he already had received punishment, his daughter and friends found out about his past crime, which he had kept a secret, and scorned and abandoned him.³⁰ We don't know if they scorned him for his past crime or for his deception. He may have been ill-advised to keep this fact about his past a secret from them. But that was his choice. When *Reader's Digest* exposed his past crime they diminished his autonomy by taking the decision of what information about himself to reveal to others out of his hands. Informational privacy contributes to autonomy by letting us control which circles of people have access to particular information about ourselves.³¹

A further example of how important this control can be, widely discussed by privacy theorists, is the case of Oliver Sipple. He became a national hero when he grabbed the arm of Sara Jane Moore as she attempted to shoot President Ford in Union Square, San Francisco in 1975. After this event, a news article revealed that Sipple was gay. Sipple had voluntarily disclosed this fact to people in certain circles by being a prominent member of the San Francisco gay community, appearing in

²⁶David Kravets, "Mug-Shot Industry will Dig up Your Past," *Wired.com*, August 2, 2011. I thank Maxwell MacEachern for bringing this article to my attention.

²⁷Fried, "Privacy"; and Rachels, "Why Privacy is Important."

²⁸See David Flaherty, *Privacy in Colonial New England* (Charlottesville: University of Virginia Press, 1972), p. 44 (on how architectural innovations afforded privacy to colonial families against external observation).

²⁹Fried makes a related observation in "Privacy," p. 212.

³⁰*Briscoe v. Reader's Digest*, 4 Cal. 3d 529 (1971).

³¹Schoeman, *Philosophical Dimensions of Privacy*, chap. 9.

gay magazines, and marching in gay parades.³² But he did not grant his family in Detroit access to this fact, and when they found out, the family became estranged. After the outing he led a troubled life and was found dead at the age of 47.³³ Controlling *who* knew about his sexual orientation was important to him.

Privacy's relationship to autonomy is ambivalent, however.³⁴ Knowing of your past crimes or misdeeds lets me be more autonomous by enabling me to make more informed decisions about who I interact with, or who I should trust. In many cases, your privacy interest may be outweighed by such countervailing interests. A school principal, for example, might with good reason refuse to hire as a bus driver anyone who ever had a DUI conviction.³⁵ A medical patient might reasonably choose not to select a surgeon who was ever found guilty of serious malpractice.³⁶ To grant a doctor the right to have his past malpractice forgotten might not be in the interest of potential patients. But if we adopted a blanket rule that individuals forever forfeit their good reputation because of their past misdeeds we would violate a principle of justice that requires that punishment be proportional to the offense and therefore have an endpoint; when we continually stigmatize former criminals, we could impede their reintegration into society. In section 4 I return to this ambivalence about privacy.

Dignity interests

When Nadia's body was exposed to viewers of the video, she suffered what in her society, given its attitudes toward the body, is a paradigmatic example of an indignity: having one's naked body exposed to strangers without one's consent. Edward Bloustein has argued that the wrong in-

³²*Sipple v. Chronicle Publishing Company*, 154 Cal. App. 3d 1040 (1984) (ruling that Sipple could not reasonably expect privacy in a fact he made known to others).

³³Rosen writes that Sipple committed suicide (*The Unwanted Gaze*, p. 48); a newspaper account says he died of pneumonia: see Lynne Duke, "Caught in Fate's Trajectory," *Washington Post*, Dec. 31, 2006. Sipple's case is discussed in Lever, *On Privacy*, pp. 31-33, Schoeman, *Philosophical Dimensions of Privacy*, pp. 154-55, and Moore, *Privacy Rights*, pp. 147-48.

³⁴Cf. Rössler, *The Value of Privacy*, chap. 7, on the "ambivalence of privacy" generally; and Nissenbaum, *Privacy in Context*, p. 62.

³⁵Cf. Jacobs and Larrauri, "Are Criminal Convictions a Public Matter?" p. 5.

³⁶Whether a doctor has a right to have references to his past misconduct deleted is currently being discussed in Europe, where a plastic surgeon fought Google in the EU Court of Justice because references to his allegedly botched surgery over 20 years ago keep appearing when one googles his name, setting back his professional career over what he claims is an isolated incident. An advocate general recently ruled for Google. See David Roman and Frances Robinson, "Google Gets Boost in EU Privacy Case," *Wall Street Journal*, June 25, 2013.

volved when one is exposed in this way is the wrong of failing to respect someone as a human being;³⁷ and this is certainly an appropriate way to characterize what an indignity involves.³⁸ But to understand cases like Nadia's, it may be helpful to characterize an "indignity" more narrowly. One is not shown respect whenever one's moral or legal rights are violated, as when one's property is stolen, or one is lied to. Yet the indignity Nadia experiences involves something more specific: being exposed or accessed by others without one's consent. Indignities like the one she suffered often involve exposure of or intrusion into one's body, as happens when prison guards conduct body cavity searches of inmates;³⁹ or might happen if one were to lift the veil of a Muslim woman without her consent.⁴⁰ But there are other ways to make someone suffer an indignity in this more specific sense besides exposing her physical body; for example, exposing the deepest inner thoughts of the men shown on *To Catch a Predator*.⁴¹ These men did not want information about themselves to be revealed, and Nadia might have had an embarrassing tattoo she didn't want her friends to know she had. But their reputational interest in informational privacy is distinct from their interest in personal dignity. Preserving their dignity does not require controlling access to information about their past; but it involves autonomy in another way: controlling who has access to their person.

While exposing someone in a way that takes away her dignity can itself constitute punishment insofar as that exposure constitutes hard treatment intended to express blame, this need not be the case. When a television station broadcast footage of an automobile accident victim saying to a helicopter flight nurse, "I just want to die," it caused her to suffer an indignity by exposing her suffering to others;⁴² but this in itself did not constitute punishment, as the woman was not being blamed; nor would it lead viewers to punish her. Those who exposed Nadia may not

³⁷Bloustein, "Privacy as an Aspect of Human Dignity"; cf. Benn, "Privacy, Freedom, and Respect for Persons," p. 234.

³⁸See Thomas Hill, *Dignity and Practical Reason in Kant's Moral Theory* (Ithaca: Cornell University Press, 1992); and Denise Réaume, "Indignities: Making a Place for Dignity in Modern Legal Thought," *Queen's Law Journal* 28 (2002): 61-94, p. 79.

³⁹*Bell v. Wolfish*, 441 U.S. 520 (1979), 576-78 (Justice Marshall, in dissent, characterizing this practice as "one of the most grievous offenses against personal dignity").

⁴⁰Cf. *Freeman v. Dept of Highway Safety*, Case No. 5D03-2296 (Florida, 2005). For related examples, see Judith Jarvis Thomson, "The Right of Privacy," *Philosophy & Public Affairs* 4 (1975): 295-314, p. 304.

⁴¹The concept of an indignity deserves further attention that it is not possible to give here. One might begin by looking at what Samuel D. Warren and Louis D. Brandeis refer to as "spiritual" rather than "material" interests, in "The Right to Privacy," in Schoeman (ed.), *Philosophical Dimensions of Privacy*, pp. 78-83; cf. n. 51, below.

⁴²These are the facts in *Shulman v. Group W Productions*, 18 Cal 4th 200 (1998).

have intended to punish her; but by exposing her literally, they exposed her to the blaming punishment of others. The producers of *To Catch a Predator* did intend to punish the men they exposed, and that exposure was also likely to lead others to treat these men harshly. They, like Nadia—but unlike Plane Passenger or Dog Poop Girl—had a privacy interest in not being exposed in a way that violates their dignity, and for them—though not for the accident victim—this interest is associated with an interest in avoiding unjust punishment.

3. Privacy in Public Facts

Someone who already received just punishment for her offenses no longer deserves further punishment and has an interest in informational privacy regarding those offenses. But can one have a legitimate privacy interest in information that is in the public record, or in public facts generally? And even if one could, how could we possibly limit access to public facts? I address the latter question in section 5. As to the former question, it may seem puzzling to even ask it. One might think that a public fact is by definition one in which no one can have a legitimate privacy interest. As I hope to make clear shortly, I think the question is sensible and that we need a definition that lets us ask it.

There is no standard definition of “public fact.” One might plausibly use the term to describe only information that is known or is at least readily accessible to the general public through legitimate means; a public fact, so defined, would not be one in which you could reasonably expect privacy. By this definition, Plane Passenger’s gesture, and the behavior of Dog Poop Girl, Nadia, and the men on *To Catch a Predator*, are all public facts only if we think it is legitimate to disseminate photos or video of them so they are readily accessible to the general public—otherwise they are not. Whether a means of acquiring or sharing information is legitimate will depend on numerous factors including existing norms and practices, laws, architecture, and technology, as well as our assessment of the value of privacy. Even if certain practices of observation or of disseminating information are accepted in a society, one might argue that they are not legitimate if they undermine important values.⁴³

But I think we need a definition that recognizes how we do sometimes speak of what one does in front of just a few strangers—such as the behavior in each of our four examples—as a public fact even if it is not made known to the general public. On the definition I propose, a public

⁴³For further discussion, see Mark Tunick, *Practices and Principles* (Princeton: Princeton University Press, 1998), chap. 5.

fact is information that is readily accessible to the public through legitimate means, where “the public” refers not to the general public but to one or more persons who could observe the information through legitimate means and could not be expected or trusted to keep it private. Apart from the qualification that the information must be readily accessible and not merely accessible, this is a definition U.S. courts implicitly rely on.⁴⁴ According to this definition, a court record that is readily accessible to any citizen is a public fact, as is information about what someone did or said that is in plain view or earshot from a location where the public has a right to be. Information accessible only by violating laws or accepted norms against eavesdropping or other surveillance is not. My argument is that there are contexts in which one can have a legitimate privacy interest in information that may be accessible but is not *readily* accessible to others through legitimate means; and there are contexts in which one can have a legitimate privacy interest even in information that *is* readily accessible to others, that is, even in public facts. I begin with the latter claim.

Something can be a public fact in the sense that it is in plain view of others who have a right to be where they are. That Nadia sunbathed nude is a public fact because she could be seen by others who had a right to be where they could see her and who could not be expected to avert their eyes. But that you expose yourself or information about yourself in one context should not entail that you completely yield control over that information or access to yourself.⁴⁵ Taking the step of videotaping Nadia and then uploading the video to the Internet seems to implicate privacy interests that are weightier than any legitimate interest the general public might have in having access to this information. Similarly, it was proper of a television station to broadcast video showing an automobile accident victim being transported by helicopter to a hospital, as this is in plain view and it is newsworthy and appropriate for the general public to be made aware of how rapidly emergency medical teams respond; but it seems inappropriate for the station to broadcast the victim saying in

⁴⁴The U.S. Supreme Court has ruled repeatedly that one cannot reasonably expect privacy in information that is in plain view of anyone using legitimate means of observation: see, e.g., *U.S. v. Knotts*, 460 U.S. 276 (1983); *California v. Greenwood*, 486 U.S. 35 (1988); and cases cited in n. 47; cf. n. 9. While one cannot reasonably expect privacy in information that is readily accessible to the general public by legitimate means, the Court assumes that this is the case also for information that can be observed by just one or a few people, that is, information that is a public fact according to the definition that I propose; this is an assumption I challenge.

⁴⁵Similarly, giving someone access to data for a particular purpose does not mean that the data may be used for other purposes. The value privacy has in preserving contextual integrity is emphasized by Nissenbaum in “Protecting Privacy in an Information Age,” and *Privacy in Context*; cf. n. 53.

anguish to the flight nurse, “I just want to die.”

Drawing on these intuitions and on the discussion in section 2, I now want to consider two ways in which I might have a legitimate privacy interest even in a public fact. First, I might have a legitimate privacy interest in very personal details about an event that implicate my dignity, even though the event itself is a public fact; when that fact is memorialized (by being photographed or videotaped) and shared, it gives others access to me, and that can violate me more than when others are merely told about the event. Second, I might have a legitimate privacy interest in not having the public fact memorialized and then spread to broader circles of people than the circles I willingly exposed myself to—an autonomy interest in controlling who has access to information about me. If we agree, we may be able to say that the videos of Nadia and of the men on *To Catch a Predator*, or the photos of Dog Poop Girl or of Plane Passenger’s gesture, are not readily accessible to the general public by legitimate means, because we may not regard it as legitimate to upload this material to the Internet or televise it given the privacy interests at stake.

Privacy in readily accessible facts that implicate one’s dignity

It is tempting to explain why aspects of a public fact might reasonably be expected to remain private by reasoning that while an event (such as a car accident) may be readily accessible to the public using permitted means of observation, some of its details (such as what the victim says on the way to the hospital) may not be. But while that explanation works in some cases, it fails in others: what Nadia’s videographer captured was in plain view in all its detail. Moreover, what is readily accessible is a function of available technology, and the legitimacy of privacy interests should not simply rise and fall as technologies of surveillance get more or less sophisticated.⁴⁶ Rather, one reason there can be a legitimate privacy interest in such personal details of a public fact, even if technology could make these details readily accessible to others, is that those details implicate a person’s dignity.

When you memorialize information about me by capturing my image or recording our conversation, and then share it with others without my consent, you have acted in a way that is fundamentally different from your merely seeing or hearing me and then conveying verbal descriptions of what you saw or heard based on your memory.⁴⁷ The accident victim

⁴⁶For further discussion, see Mark Tunick, “Privacy in Public Places: Do GPS and Video Surveillance Provide Plain Views?” *Social Theory and Practice* 35 (2009): 597-622, pp. 608-14.

⁴⁷The U.S. Supreme Court has refused to recognize this distinction; it has held that

might not be able reasonably to expect that the flight nurse to whom she expressed her anguish will not relate the incident to the nurse's spouse; but she does have a legitimate privacy interest that a recording of her words not be broadcast to the world. Nadia must live with the possibility that someone she knows will happen to see her at the beach and will tell others—to avoid this possibility she might choose to go to a beach far away from where she and the people she knows live. But she needn't accept that a video of her at the beach is made and shown to others.

Why the distinction? One reason is simply that it would be impractical to attempt to prevent people from telling others what they see or hear; but it is not impractical to prohibit people from making and distributing unauthorized recordings, and some laws currently do. But there are principled reasons for this distinction. A recording usually reveals details that can't readily or as effectively be conveyed merely by reporting. But it is not just that: some interlocutors might have extraordinary recall and narrative skills and could recount every detail they hear or observe. It is that the recording allows a different kind of exposure. It doesn't merely convey information; it gives the audience an experience of its subject.⁴⁸ Charles Fried illustrates the significance of this distinction between showing and telling by noting the difference between a good friend of mine knowing I am sick, and her actually seeing me in that condition: for her to actually witness my suffering would violate my privacy in a way that her merely having information about my condition would not.⁴⁹

Having her naked image accessible to others is a qualitatively different sort of intrusion that violates Nadia's dignity in a way that reporting about her activity does not. Similarly, showing the accident victim's words on television is more intrusive than if the flight nurse were to report what happened in a public blog. Both may implicate her privacy interest in dignity, but broadcasting her words does so to a much greater degree, as it lets others witness her suffering.

because my interlocutor can reveal my conversation to the police, it makes no difference whether the police secretly record it: see *Hoffa v. U.S.*, 385 U.S. 293 (1966), and *U.S. v. White*, 401 U.S. 745 (1971). But a European court held that police can't secretly record someone to get a voice sample, even though the voice was knowingly exposed to others: *P.G. and J.H. v. U.K.*, 2001-IX Eur. Ct. H.R. 546, discussed in Gómez-Arostegui, pp. 167-68.

⁴⁸Elizabeth Pater-Simpson, "Private Circles and Public Squares: Invasion of Privacy by the Publication of 'Private Facts,'" *Modern Law Review* 61 (1998): 318-40, pp. 337-38, drawing on Jeffrey Reiman, "Driving to the Panopticon," *Santa Clara Computer and High Technology Law Journal* 11 (1995): 27-44.

⁴⁹Fried, "Privacy," p. 210. The example suggests that unwanted exposure of one's person to some friends could not only affront one's dignity but damage those friendships; this might be true for Nadia as well.

Spreading information to wider circles than you willingly exposed yourself to

That Plane Passenger made an obscene gesture on a public street or the Korean woman did not clean up her dog's mess on the subway are not deeply personal facts that implicate their dignity, and so that cannot be the basis for claiming that these facts should be kept private. Rather, they may have a legitimate claim to privacy because a public fact was memorialized and disseminated to a wider circle of people than the one to which they willingly exposed themselves, diminishing their autonomy and exposing them to disproportionate punishment.

Dog Poop Girl's behavior, for example, was readily accessible to several other subway riders, who may have expressed their disapproval to her. But memorializing her behavior by taking her picture and then broadly disseminating it makes this fact about her permanently available to a much wider audience and exposes her to potentially lifelong punishment that is grossly disproportionate to her offense.⁵⁰ The more people with access to this information, the harder it will be for her to reinvent herself, form new connections, or maintain her self-esteem. The magnitude of the intrusion is multiplied by the fact that information on the Internet can be searched and archived, and is persistent.

Memorializing and sharing Nadia's image both exposes her to an indignity and subjects her to unjust punishment. The wider the viewership of the video, and each additional day it is publicly available, the more extended is the indignity Nadia suffers. But the widespread dissemination of the video also exposes her to punishment. It gives friends, coworkers, family members, and acquaintances access to information about Nadia that she did not agree to make available to them, access to which it is important for Nadia to control. If the persons who filmed Nadia kept the video to themselves for their own use, they may not have punished her, though they arguably still violated her dignity.⁵¹ But by sharing the video, they made it available to others who would punish her. Punishment, here, refers to shunning or otherwise inflicting unpleasantness on Nadia for conduct regarded as blameworthy. Such treatment, even if we think it is undeserved because Nadia did nothing wrong, is

⁵⁰Cf. Moore, *Privacy Rights*, pp. 40-43, on the "magnitude" of an intrusion being a factor in deciding the relative value of privacy versus free speech.

⁵¹While Nadia's dignity is not violated if she is casually observed by others at the beach because she consents to that, she did not consent to being videotaped. Even if the videotape is not shared and she is unaware of it, a case can be made that she still was violated: see Benn, "Privacy, Freedom, and Respect for Persons," p. 230 (on how secret observations can fail to respect someone as a person); and Rössler, *The Value of Privacy*, pp. 113-14; but this is a harder question I can't address here.

still punishment, and feels like punishment to Nadia.

Accessible vs. readily accessible information

It may seem more problematic to restrict access to information in Plane Passenger's case because the prior conviction he wants to be forgotten appears in a public court record. But the legitimacy of privacy interests in such information should depend not on whether that information is accessible, but on whether it is *readily* accessible by legitimate means. Court records in the United States may be accessible to the public unless they are sealed by a judge. But if they remain filed away in the basement of a building and are not scanned and uploaded to the Internet where they are made freely available, they may not be readily accessible.⁵² Information about a crime that is reported in a local newspaper in 1979 may not be readily accessible to anyone today. If so, few people may be aware of this information and could use it to inflict unjust punishment. The information would be no obstacle to someone wanting to reinvent himself and form new connections; the choice of whether to reveal this part of his past would be left to him. If we recognize the weight of this privacy interest, including society's interest in rehabilitating criminals, we might conclude that it would be wrong of a reporter, after sifting through newspaper archives, to write an article about a person's crime decades ago so as to make the information readily accessible to anyone who uses a search engine to find out about the person.⁵³ But this conclusion is subject to one crucial proviso to which I now turn: that details about the crime are not newsworthy.

4. Weighing the privacy interest against free speech interests

In section 2, I noted that there is an ambivalence to privacy: being able to control access to information about my past misdeeds can be valuable to my autonomy and let me avoid punishment I may not deserve; but it can limit your autonomy by making it more difficult for you to decide whether or how to interact with me. In deciding whether I should lend you my car for the night, I may want to know whether you were ever convicted of a DUI. Parents with children may want to know if their neighbors have a sexual preference for underage teenagers. One defender

⁵²Cf. Pater-Simpson, "Private Circles and Public Squares," pp. 327-30.

⁵³It might also be illegitimate to make information in court records readily available in other contexts, such as allowing doctors to search for medical malpractice claims to avoid treating litigious patients, see Nissenbaum, *Privacy in Context*, pp. 53-58; and van den Hoven, "Privacy and the Varieties of Moral Wrong-Doing," p. 35.

of free speech has argued that knowing that Marvin Briscoe committed a crime 12 years ago might be important in deciding whether to leave your child in his care for the day, or to conduct business with him.⁵⁴ Some may see the distribution of the photo of Dog Poop Girl as a proper deterrent to uncivil behavior.⁵⁵ More generally, some economists argue, to avoid fraud we should encourage rather than prevent disclosure of truthful information: we are all better off when we can accurately assess the reputations of those with whom we interact.⁵⁶ In any case, trying to restrict access to information that has already been exposed to the public may seem futile.

Privacy and free speech are not always in conflict and sometimes are mutually supporting: for example, sometimes one needs the anonymity afforded by privacy to feel free to communicate, or to participate in self-government.⁵⁷ But when privacy and free speech interests do conflict, policymakers and judges may need to balance competing interests. I have argued that once we recognize the privacy interest in avoiding unjust punishment, which is associated with reputation and autonomy interests in controlling access to information about oneself, and dignity interests in controlling access to one's person, we should recognize that one can have a legitimate interest in (as opposed to merely a misplaced desire for) privacy even in some public facts. But to have a legitimate interest in privacy is not yet to have a right to privacy. One would have a right to privacy only if the legitimate interest were sufficiently weighty.⁵⁸ While there are surely many cases in which free speech or other interests, such as the interest in controlling crime, should prevail over privacy interests, a fair balancing analysis should take into account the privacy interest in avoiding unjust punishment, and not simply assume free speech must always prevail.

The question of how we are to balance the competing interests in privacy and free speech is quite complicated, and answering it satisfactorily would involve a critical discussion of the utilitarian philosophy that

⁵⁴Eugene Volokh, "Freedom of Speech and Informational Privacy: The Troubling Implications of a Right to Stop People from Speaking about You," *Stanford Law Review* 52 (2000): 1049-124, pp. 1090-92, n. 172.

⁵⁵See Lizette Alvarez, "Spring Break Gets Tamer as World Watches Online," *New York Times*, March 16, 2012: because students now fear unflattering appearances in social media, there has been a decline in promiscuous public conduct during spring breaks.

⁵⁶See Richard Posner, "The Economics of Privacy," *American Economic Review* 71 (1981): 405-9; and Murphy, "Property Rights in Personal Information," pp. 2385-86.

⁵⁷See Lever, "Mill and the Secret Ballot."

⁵⁸I refer to interests rather than rights to privacy to avoid prejudging how the balance between privacy and free speech will tilt. Rights are often said to trump other considerations, but I want to avoid assuming that privacy necessarily trumps other values.

might be thought to justify the use of a balancing test. One of the most common arguments advanced by free speech advocates is that if you restrict some speech for what you believe to be good reasons, you risk sliding down a slippery slope leading to all-out censorship;⁵⁹ addressing that argument might require examining the distinction between act and rule utilitarianism. Answering the question would surely involve a discussion of how one can weigh the value of being treated with respect and dignity. I will not be able to address these matters here. However, I do want to point to a few of the considerations I think we need to take into account in balancing these interests.

Information that is newsworthy can have substantial social value; but information that merely entertains may not. While it is important and perhaps essential to a life worth living that we have access to entertainment, entertainers have countless ways to achieve their objective besides infringing upon legitimate privacy interests; providers of important news might not. In deciding whether information is newsworthy, we might ask whether we could avoid implicating privacy by omitting certain details without impinging on society's legitimate interest in having that information. The interest in being informed about the threat posed by adults interacting with underage teens on the Internet could adequately be met if NBC blurred the faces and did not reveal the names of the sting targets it exposed on *To Catch a Predator*. The thrill and excitement that the show's viewers apparently experienced in seeing a rabbi or district attorney caught red-handed could have been attained by numerous other forms of entertainment that are not insensitive to a person's legitimate privacy interests. We can also ask whether the information is newsworthy to the entire audience to whom the information is readily accessible, or could have been shared more selectively with those with a need to know. Annabelle Lever has noted that the general public may have an interest in knowing that Steve Jobs had cancer, as this affects the financial status of many people; but they don't have an interest in knowing that a former tennis star has HIV, even though he, too, is a public figure.⁶⁰ Those seriously considering asking Marvin Briscoe, the former hijacker, to babysit their children may have a legitimate interest in knowing if he has a criminal record, but that does not justify *Reader's Digest* identifying him and his long-past crime to a national readership.

Establishing reasonable limitations on capturing and disseminating certain public facts may require difficult case-by-case evaluation of the relative value of privacy and free speech. There is no legitimate public interest in posting a video of Nadia sunbathing nude, or the photo of Dog

⁵⁹Volokh, "Freedom of Speech"; *Winters v. New York*, 333 U.S. 507 (1948), p. 518.

⁶⁰Lever, *On Privacy*, pp. 40-41.

Poop Girl along with information that identifies who she is. There may be a legitimate public interest in setting up a sting operation to catch child predators who, upon being convicted, could be identified as sex offenders to people in their neighborhood, but not in publicly humiliating them on national television. There will be cases in which the public interest in acquiring newsworthy information is substantial, as with the arrest of a public figure or of someone accused of a notorious crime. If Nadia were a politician who speaks out against public nudity, then there could be a legitimate public interest in seeing the video of her at the beach.⁶¹ In this case merely telling others about her activity might be insufficient: people may need to see it to believe it.

Information may be readily accessible to the public through permitted means of observation simply because new technologies make that possible. But some information might be so personal, or likely to facilitate unjust punishment, and have so little newsworthiness, that as a matter of public policy, access to it ought to be restricted so that if there were people with a legitimate interest in having this information they would need to take some nontrivial measures to obtain it. Recognizing a privacy interest in such information would not imply that a defendant in a criminal prosecution for public nudity could prevent a court's access to photographic evidence at a trial, for the interest in crime control and in meting out just punishment would be substantial, and access to the evidence could be restricted to those with a legitimate need to see it so as to minimize the potential for perpetual and unjust punishment.

5. Remedies

One might think that we should address the wrong of unjust punishment not by limiting what information is put on the Internet—a solution that might seem impractical and undesirable—but by going after those who inflict it: rather than restrict a website from making available the photograph of Dog Poop Girl, we should deter people who see it from punishing her. But there are several reasons why this would not be a workable remedy.

Why not regulate nonlegal punishment directly?

At present, if I wrong you by unjustly punishing you, you have no legal remedy except in the unusual case in which I chose a method of punishment that violates an existing legal right, such as a right not to be libeled

⁶¹Cf. Siprut, "Privacy Through Anonymity," p. 326.

or physically assaulted, or a right to privacy. For example, vigilantes who attack registered sex offenders may face legal consequences not for punishing unjustly, but for committing assault.⁶² Why shouldn't the state create a legal cause of action for unjustly punishing?

One compelling objection draws on John Stuart Mill's harm principle, which holds that the state should use coercion only to prevent people from harming others.⁶³ According to this objection, we are better off when we give individuals the liberty to act and express themselves as they please, even if they offend others, or treat them unfairly, so long as they don't harm others. To harm others is not merely to hurt their feelings, but is to set back interests they have that are regarded as rights.⁶⁴ The harm principle is in this way parasitic on a conception of rights and, the objection goes, it would be impractical and undesirable for the state to recognize a legal right not to suffer undeserved or disproportionate punishment from nonstate actors.

To succeed with a cause of action to redress the wrong of being unjustly punished, I would first have to establish that my punisher was engaged in the practice. Many individuals who punish may avoid expressly declaring their intent, as in the examples where you "accidentally" damage Harold's iPad or you shun Plane Passenger. They do punish, as they inflict hard treatment with the appropriate intent. But establishing this intent in court would be difficult. I might punish you in a number of ways: ignoring you, not hiring you, or playing loud music so you can't sleep. But there are contexts in which any of these behaviors could be interpreted as something other than punishment. When the state locks someone behind bars, there is no question that punishment is taking place. But if I ignore you, I might merely be preoccupied; if I play loud music, I may just be inconsiderate. If so, you did not suffer the wrong of being unjustly punished, and no privacy interest was implicated.

Assume I could establish that I had been punished. Trying to establish whether that punishment was deserved or disproportionate, and that I was therefore wronged, would also be difficult if not futile. For me to deserve punishment for a blameworthy act, I must have notice that what I did was wrong.⁶⁵ But with nonlegal punishment, my punisher and I may

⁶²"Megan's laws" require members of a community to be notified if a registered sex offender moves to their neighborhood, and many states post addresses and photos of such offenders on websites available to anyone. These laws have been challenged by sex offenders as an intrusion upon their privacy; the unwanted attention has sometimes led to violent attacks against them. See *E.B. v. Verniero*, 119 F.3d 1077 (1997); Nissenbaum, *Privacy in Context*, p. 57.

⁶³Mill, *On Liberty*, chap. 4, ¶3.

⁶⁴Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984).

⁶⁵See Alexander, "The Domsday Machine," pp. 213, 216, on the notice principle.

disagree that anyone would be on notice that my behavior was blameworthy, and there are no standards for resolving such disputes—a problem avoided in the case of legal punishment, because the state enacts criminal statutes to make clear what behavior merits punishment. In addition, whether my punishment was deserved or proportionate may depend on whether I had an excuse or was justified for the behavior that triggered it and on whether my punisher could foreseeably know that. But there would be compelling objections to expecting people such as Plane Passenger or Conradt to explain their behavior to nonstate actors under threat of punishment.

Even if we agree that I did act badly and deserve to be punished, there is no way to know whether I already received proportional punishment. If I did, any additional punishment may be unjust. This points to the difficulty with the very project of nonlegal punishment that I discussed in section 2: that apart from private punishment, it is incompatible with the project of issuing a coordinated response. With legal punishment, we defer to the legislature's determination to establish what punishment will be regarded as just. A former criminal who is forever traumatized by the experience of prison may feel that his punishment has exceeded what justice allows, but this need not mean he has been punished unjustly.⁶⁶ With nonlegal punishment, we face a potentially intractable problem: there is no such standard that could resolve the sort of disagreements that are likely to be litigated if a cause of action were created, such as whether the person claiming to have been unjustly punished was just supersensitive.

Even if lawmakers could work out these problems, there would be undesirable consequences of providing a legal cause of action. Without substantial barriers to successful suits, such as exist when one sues for libel or slander, the constructive enforcements of norms might be inhibited and free speech chilled as people become wary of being sued for unjustly punishing. Although nonlegal punishment might sometimes be more devastating than a prison sentence, the state should resist the temptation to provide remedies for over-punishing and intervene only when the punisher violates a clearly established legal right.

The feasibility of restricting access to public facts

Creating a legal cause of action to redress the wrong of unjust nonlegal punishment is unworkable and undesirable. But is the alternative remedy of limiting access to public facts any more workable? Even if an individual's prior criminal record is filed away in the basement of a brick and

⁶⁶I thank one of *Social Theory and Practice's* anonymous reviewers for this example.

mortar building and so is not a public fact because it is not readily accessible, once it becomes known—and as a public record people are entitled to access the file—what could prevent someone from posting a blog or publishing a news story conveying that information?

I will confine myself only to a few words in response to this objection. I want to be clear that my purpose here is not to assess the relative merits of various mechanisms to regulate information flow. But it is important to recognize that there are options: a society need not accede to unrestricted use of new technologies merely because the technologies are powerful and attractive and widely used. The proliferation of digital cameras and social media outlets that permit embarrassing images or damaging accusations to be shared widely with ease does not resign us to give up expectations of privacy. That some European countries preserve privacy in court records and in some images taken in public places indicates that the norm in the U.S. of treating them as if they were readily accessible to the general public by legitimate means is not inevitable, though changing this norm will be difficult, as it is deeply rooted in that society's legal culture.

Ideally, society could develop new social norms, reinforced through education and exhortation, to preempt behavior that intrudes upon privacy, behavior such as posting the images of Nadia or the Korean dog owner. These norms could encourage those with legitimate interests in free speech to find avenues of expression that are more sensitive to privacy interests. For example, to point to the need for people to be more courteous of others, one might describe what Dog Poop Girl did without identifying her; to express one's appreciation for Nadia's figure, one might write a poem instead of showing a video. Journalists are subject to professional ethics codes that might be modified to require a greater concern for privacy. Technology could also be employed. For example, "stealth clothing" is being developed that activates a beam of light when someone is taking unwanted pictures, blurring the resulting photo; or algorithms might be created that bar the uploading of videos to the Internet without the subject's consent.⁶⁷

But it may be difficult for new norms to emerge without the use of legal mechanisms. One of the central principles underlying efforts in Europe to establish a right to be forgotten is that just because information is once published needn't mean it must always be readily accessible. Laws could require website managers to remove videos or postings, or search

⁶⁷See Lawrence Lessig, *Codev2*, online at <http://codev2.cc/>, on the use of architecture such as code as an alternative to legal remedies; Jenna Wortham, "Stealth Wear Aims to Make a Tech Statement," *New York Times*, June 30, 2013; and Nick Bilton, "Shields for Privacy in a Smartphone World," *New York Times*, June 25, 2012.

engine companies to manipulate search results so that it would require some effort to find sensitive information. Any interest in deleting information must be weighed against competing free speech interests. Redacting information in news archives might seriously undermine society's compelling interest in maintaining an accurate historical record. In many cases, privacy interests might be adequately served by blurring faces or not mentioning names, or by restricting the ready access to some information. For example, privacy interests might be sufficiently served by granting a right to delete one's mugshot from websites, though the state's record of the conviction could be made accessible to potential employers if it were relevant to one's job performance.

If we were to agree that privacy interests may sometimes outweigh interests in the free flow of information, we would need to confront difficult questions regarding possible remedies: Should the law target those who create and upload intrusive images or text, or Internet Service Providers (ISPs) that refuse to remove them, or search engines?⁶⁸ Should it restrict the use of technology such as Google Glass that are only conduits for information already available online but which greatly increase the ready accessibility of that information? Perhaps a stronger case could be made for restricting the use not of Google Glass but of the face recognition software it might run. Suppose Dog Poop Girl moves to another country to start a new life under a new name. People using Google Glass with facial recognition software will learn she is Dog Poop Girl unless she can defeat it by changing her appearance; if that software is not readily available, she has a better chance of keeping her past hidden. Or rather than regulating the means of acquiring information, should we focus on legal remedies such as lowering the bar to succeed in privacy tort claims? Or should we hope that new social norms would emerge on their own? Or rely on market forces?⁶⁹

I am not concluding that we should ban Google Glass, or that the state should create prior restraints on speech, or restrict search engines. My goal has not been to conduct a weighing of privacy against free speech. It has been, rather, to argue that one can have a legitimate privacy interest in avoiding unjust punishment for behavior that may be a public fact. This interest, which can be associated with reputation, autonomy, and dignity interests, has not previously been emphasized but is of increasing

⁶⁸In the United States, ISPs currently are protected by federal law: see, e.g., *Barnes v. Yahoo!*, 570 F.3d 1096 (2009); but in other countries there are proposals to require ISPs and even search engines to comply with requests to remove information; see n. 11, above.

⁶⁹One can now pay reputation management firms to monitor one's online reputation, remove some data, and manipulate search engine results: see, e.g., www.reputation.com (accessed June 27, 2013).

importance in the age of You Tube. While one can legitimately tell others what one heard or saw in a public place, it might not be legitimate to share unauthorized recordings, or to make information that is readily accessible to a particular circle of people readily and permanently accessible to the general public. We need to recognize this interest before privacy can properly be put on the scale we use to weigh competing values.

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