

Privacy, Rights, and Moral Value

Steven Davis  
Philosophy Department  
Carleton University  
Ottawa, ON K1S 5B6  
[davis@connect.carleton.ca](mailto:davis@connect.carleton.ca)

Abstract: First, I set out the nature of rights and distinguish legal and moral rights. Second, I show in what sense privacy is a legal right in Canada and argue that it does not follow from this that it is a moral right. Third, I discuss various attempts to specify the nature of privacy and raise counter examples to these analyses. Third, I set out what I take to be an analysis of privacy and show how it relates to a loss of and an intrusion into one's privacy. Fourth, I distinguish a loss of privacy from a loss of solitude. Finally, I discuss whether there is a moral right to privacy and distinguish it from privacy.

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Rights come in many different kinds: legal, moral, human, natural, and civil. I shall take it that the two main categories of rights are legal and moral and the other rights fall into one or another of these two categories. In Canada, there appears to be at least a partial legal right to privacy with respect to personal information held by the government. The question I wish to raise is whether there is also a moral right to privacy. I shall begin with one view about the general nature of rights and the status of privacy as a legal right in Canada. I shall then move on to a brief discussion of the nature of privacy. Finally, I shall close with some remarks about whether privacy has moral value and is a moral right.<sup>1</sup>

A right is a claim that a person, a right-holder, has against another, the duty-holder, with respect to a benefit. The right-holder's claim against the duty-holder entails that the duty-holder has a duty with respect to the right-holder and that if he does not fulfill his duty, he is open to a penalty. Let us consider an example of a legal right. In the *Charter of*

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<sup>1</sup> From something's having moral value, it does not follow that anyone has a right to it. My being charitable, for example, has a moral value, but no one has the right to my charity. Hence, an argument has

*Rights and Freedoms* in the Canadian constitution in section 2<sup>2</sup> under *Fundamental Freedoms* everyone is guaranteed 'freedom of conscience and religion.' The latter part of this freedom can be put in rights language and taken to mean that everyone has a right to practice what religion he wishes. The right-holders in this case are those who reside in Canada, both citizens and non-citizens, the duty-holders are governments, the benefit is the practice of religion, the duty is that duty-holders not interfere with right-holders practicing their religions, and the penalty for interference is a legally mandated sanction against those who interfere, for example a ruling directing the government to cease applying an unconstitutional law.

Rights can be overridden and hedged in various ways. They can be overridden by other. Female circumcision might be regarded to be a religious practice among certain groups, but it could be claimed that young girls who are subjected to the practice have another right violated namely, the rights in section 7 of the Canadian constitution,<sup>3</sup> which among other rights guarantees everyone the right to security of the person. It could be argued that in this case section 7 takes precedence over section 2(a).<sup>4</sup> In addition, the rights in the Canadian Charter are hedged by section 1 which subjects them to

such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.<sup>5</sup>

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to be given to show that if privacy has a moral value, then people have a right to their privacy. The converse of course is true, since if there is a moral right to something, then it has moral value.

<sup>2</sup> *Constitution Act 1982*, < <http://laws.justice.gc.ca/en/const/index.html>>, Part I. 2.

<sup>3</sup> *Constitution Act 1982*, Part I. 7.

<sup>4</sup> *Constitution Act 1982*, Part I. 2 (a)

<sup>5</sup> *Constitution Act 1982*, Part I. 1.

and the rights in section 2 and 7-15<sup>6</sup> can be overridden by an act of Parliament or legislature by section 33,<sup>7</sup> the famous notwithstanding clause.

Who or what then can be right-holders and duty-holders? Right-holders can include persons, both moral and natural, governments, countries, nations, linguistic and religious groups, and free associations. On some views, plants and animals, both individual and species, are included within the range of right-holders, but in Canada, they are not within the range of legal right-holders. Duty-holders are entities that have the capacity to meet the obligations prescribed by a duty. This in turn necessitates actions, both positive and negative, which require on the part of the duty-holder the capacity to form intentions, since having the ability to have intentions is a necessary condition for actions.<sup>8</sup> Thus, only some of the right-holders can be duty-holders. This would include some but not all persons and governments, and perhaps countries, nations, and free associations, but probably not such entities as linguistic groups, unless there were a representative body that could act on behalf of the group. Children of a certain age and non-human animals fall within the category of those things that cannot be duty-holders, since it is thought that they cannot form the requisite intentions that are required for certain actions.

A benefit can be anything that is in the interest of a right-holder, the duties can be not to interfere with a right-holder's enjoying a benefit or to provide him with a benefit, and the penalties can range from criticism and shunning to the full range of sanctions that can

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<sup>6</sup> *Constitution Act 1982*, Part I. 2 and 7-15

<sup>7</sup> *Constitution Act 1982*, Part I. 33.

flow from the judicial system, including prison and in some countries the death penalty. Benefits can be, then, goods, services, or actions; the duties correspondingly are to perform actions that provide either the goods, services, or actions required by the right or to desist from actions that prevent the right-holder from enjoying the goods and services or performing the actions to which he has a right. The distinction between the kinds of duties required on the part of a duty-holder give rise to positive and negative rights. Some rights are rights to receive the provision of benefits, a positive right, and some rights are rights to be free from interference, a negative right. In Canada, an example of the former is the right of English and French speaking citizens to have their children receive primary and secondary school instruction in their mother tongue in the provinces in which they reside, numbers warranting; an example of the latter is the right of citizens and permanent residents to reside in any province. The educational rights give rise to a duty on the part of provincial governments to provide the required type of education, since in the Canadian system education is a provincial power. Mobility rights give rise to a duty on the part of both provincial and federal governments to refrain from preventing citizens and permanent residents from residing in any province in which they wish to reside.

I have taken legal and moral rights to be the main distinction between kinds of rights. It is obvious that moral and legal rights are not co-extensive. Not all legal rights are moral rights and not all moral rights are legal rights. At one time in the United States, citizens

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<sup>8</sup> Corporations can be duty-holders. They have intentions indirectly through the intentions of their management.

had the legal right to own slaves. Surely, they had no moral right to do so.<sup>9</sup> My wife has a moral right to my fidelity, and I have the corresponding duty not to perform certain acts. But in Canada I have not broken a law if I am not faithful to my wife and hence, my wife has no legal right to my fidelity.

How then do legal and moral rights differ? I would suggest that one difference between legal and moral rights is the grounding or justification for the right. What makes something a legal right is a law that decrees implicitly or explicitly something to be a right. This requires a positive act of the entity empowered to make laws, that is, a legislature, an elected official, or even a king. In addition to those empowered to make laws, the justice system plays a role in grounding rights. By finding in existing laws rights that perhaps are not explicitly mentioned in the law, judges play a role in discovering or creating legal rights, depending on one's views about judicial interpretation. So we can say that the justification for something's being a legal right is that it is found in the law either implicitly or explicitly.

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<sup>9</sup> Many who owned slaves might well have thought that they had a moral right to own them. This is, however, irrelevant as to whether the institution at that time was moral. Believing some action or institution to be moral does not make it so. To think that it does is to adopt moral relativism, the view that what makes an action or an institution moral for a given society is that people in that society believe it to be moral. If this were what makes something moral, then those in the United States at the time when slavery was regarded to be morally acceptable by the majority would have to have been mistaken in criticizing the institution as being immoral. Moreover, we would have no grounds to criticize another society's actions or institutions from a moral point of view, since it would be enough for them to be moral that most people in the society believed the actions or institutions to be morally acceptable. One of the marks of morality, as Kant has taught us, is universalizability (Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals*, eBooks@Adelaide, 2004 <<http://etext.library.adelaide.edu.au/k/kant/immanuel/k16prm/>>). If some action is moral/immoral for some individual or society, then it is moral/immoral for everyone and every society. Moreover, moral principles are not time bound. If some principle is a moral principle at one time, it is a moral principle at all times. This can be seen when we consider the way in which we use moral

There is much debate about what makes something a moral right. What is fundamental is that it involves an important interest, an interest that can be connected to some other value, for example the right of freedom of speech and its connection to a democratic form of government, or it can be something that is of value in itself that is intrinsic to having a life that is of value, for example, for some people, the right to practice the religion of their choosing. We can say that the connection between a right and some interest grounds the right.

Whatever makes something a moral right, most theorists hold that moral rights take precedence over legal rights. The commonly held view is that any law that is adopted should either be morally acceptable or morally neutral. It follows from this that any right a law gives rise to should not contravene a moral right and any legal right that is also a moral right is thereby doubly grounded. There are fierce battles about legal and moral rights and the relation between the two. Think of the debates around abortion, which is a legal right in many jurisdictions, but which some think to be immoral.

Another difference between moral and legal rights is that the latter place an obligation on the part of the state in which the legal right is in effect either to protect the right-holder from the interference of others, including the state itself, if the right is a negative right, or to provide a benefit to the right-holder, if the right is a positive right. The former has given rise to the modern state's extensive police powers and elaborate justice system; the latter in many states to a range of social welfare and public services, including parks,

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discourse. When we say that some action is immoral, we are taken to mean that the action has this property

roads, schools, hospitals, airports, and various forms of social insurance. Moral rights, which are not legal rights, place no such obligations on the state, although they place obligations on duty-holders not to interfere or to provide benefits. Take having children, something that might be regarded to be of intrinsic moral value and something to which people have a moral right. If it is a moral right, it is of course, a negative right, since no one has an obligation to provide people with children. That it is a negative right means that no one should interfere with two people wanting to have children from having them. The formal structure, then, of moral rights is exactly the same as the formal structure of legal rights.

I now want to turn to a consideration of privacy as a legal right in Canada. There are two federal laws that explicitly govern privacy, the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act* or *Pipeda* for short. In addition most of the provinces have privacy legislation. There are other laws that protect privacy, the laws against trespass and against unlawful search and seizure, for example. I shall however concentrate on the two recent federal laws. The purpose of the original federal act governing privacy

... is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.<sup>10</sup>

There is very little explicitly about rights in the legislation, except an individual's right to have access to information about himself that is held by the government and the right to

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whenever and wherever it is found.

request correction of information held by the government that the individual thinks is erroneous. This would not mean that the law does not implicitly contain a right to privacy; it could, if it contained the other elements laid out for a claim right, for example an explicit duty for an official to protect the privacy of citizens. In section 71.1,<sup>11</sup> the duties of the minister under which the Privacy Commissioner's Office falls are laid out, but these are not duties to protect the privacy of citizens with respect to the information held in the hands of government agencies. There are partial protections contained in the law in sections 7 and 8. Government institutions can collect personal information about individuals without their consent, but without their consent it cannot be used for other purposes than for which it was collected and it cannot be disclosed except under the conditions laid out 8.2. Perhaps, the right of privacy is implicit in the law for which there is case law that makes it explicit or is explicitly contained in other laws, but I shall leave this to lawyers to work out.

In 2001 under *Pipeda* the act was expanded to cover private sector organizations. This act recognizes a right to privacy. The purpose of the act is

... to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.<sup>12</sup>

and

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<sup>10</sup> *Privacy Act*, <<http://laws.justice.gc.ca/en/P-21/index.html>>, Chapter P-21. 2.

<sup>11</sup> *Privacy Act*, Chapter P-21, 71.1.

<sup>12</sup> *Personal Information Protection and Electronic Documents Act*, (2000), c. 5, <<http://laws.justice.gc.ca/en/P-8.6/index.html>>, Part I, 3.

...to provide Canadians with a right of privacy with respect to their personal information that is collected, used or disclosed by an organization in the private sector in an era in which technology increasingly facilitates the collection and free flow of information.<sup>13</sup>

Although the act applies to organizations in the private sector, it however excludes ‘any government institution to which the *Privacy Act* applies.’<sup>14</sup> But it does contain all the elements that are involved in a claim right. The right-holders are individuals residing in Canada; the duty-holders are organizations that collect personal information for commercial activities, the privacy commissioner, and the courts; the benefit is protection of an individual’s privacy; there are duties laid out for the duty-holders and there are penalties for the duty-holders who violate the law. The act contains many exceptions for various provisions, but even given these, it is clear that there is a partial legal right to privacy to Canada. It is partial since the two acts do not seem to cover personal information collected by federal government institutions to the same extent they cover personal information collected by commercial organizations. The right is a negative right, since it is not incumbent on the state to provide an individual with a service or a good, but rather to protect the individual from intrusions into or violations of his right to privacy.

That there is a legal right to privacy in Canada says nothing about whether there is a moral right to privacy. Before this question can be considered something should be said about what privacy is, since a discussion about the nature of the right to privacy and whether there is such a right should rest on a clear conception of the nature of privacy.

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<sup>13</sup> "Purpose," *Privacy Provisions Highlights*, <<http://canada.justice.gc.ca/en/news/nr/1998/attback2.html>>, p. 1.

Privacy is something that is possessed by individuals or groups. It is something that can be lost and in which there can be an intrusion or invasion. The first two are morally neutral. A loss or an intrusion does not imply that a moral harm has occurred. ‘Invasion,’ however, is morally loaded. If privacy is invaded, then it seems to imply that a moral harm has occurred and perhaps, that a right has been violated. So, if we want to ask whether privacy has moral value and is a moral right, we cannot set out in describing its loss to include within the very description a presupposition that it is something which has a moral value to which a right attaches. This of course leaves it open as to whether the very nature of privacy gives it a moral value. I shall argue that it does not, but there are those who think by its very nature it has moral value.<sup>15</sup>

There have been a number of attempts to define the notion of privacy. The central definitions that have had the most influence in the law and philosophy are those that turn on the concepts of *leaving alone, control, both physical and informational, limited access, and possession of information*. I shall critically consider each of these, paying special attention to the last, since it is connected to the definition that I shall offer. There are many variants of each category, but the counterexamples that I shall offer can also be applied to the variants. The first attempt to lay out the nature of privacy and the reasons for its importance is contained in the famous article by Samuel Warren and Louis Brandeis.<sup>16</sup> They take the right to privacy to be one instance of the right to be let alone,<sup>17</sup>

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<sup>14</sup> *Personal Information Protection and Electronic Documents Act*, Part I, 4.(2).

<sup>15</sup> See Tom Gerety, “Redefining Privacy,” (1977) 12 *Harvard Civil Rights-Civil Liberties Law Review* p. 236.

<sup>16</sup> Samuel Warren and Louis Brandeis, “The Right to Privacy,” (1890) 4 *The Harvard Law Review* 193-220.

which they claim is a species of the right to life. So we can take it that someone has privacy when he is let alone and loses it when he is not let alone. A problem with this is that it is not clear what it is for someone to be let alone. Do we let someone alone when we have access to information about him at a distance with an x-ray machine about which he is unaware? If this suffices for him to be left alone, then as Judith Jarvis Thomson<sup>18</sup> points out, there is a loss of his privacy, but he has been left alone. In addition, as Thomson notes, if I hit someone over the head with a brick, I have not let him alone, but he does not thereby suffer a loss of his privacy.<sup>19</sup> Thus, letting someone alone cannot be an account of privacy.<sup>20</sup>

I now wish to turn to control definitions concentrating on Alan F. Westin's<sup>21</sup> account that has had great weight in legal circles.<sup>22</sup> He takes privacy to be "...the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent

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<sup>17</sup> The Warren – Brandeis definition has been taken up by others. See William Douglas, *The Rights of the People*, (Westport, CT: Greenwood Press, 1958), Edward Bloustein, "Group Privacy: The Right to Huddle," *Individual and Group Privacy* (New Brunswick, N.J.: Transaction Books, 1978) 123-86, Paul Freund, "Privacy: One Concept or Many," In J. Pennock and J. Chapman (eds.), *Nomos XIII: Privacy*. (New York: Atherton Press, 1971) 182-98, Henry Paul Monaghan, "Of 'liberty' and 'property,'" (1977) 62 *Cornell Law Review* 405-14, and Richard A. Posner, *The Economics of Justice* (Cambridge, Mass.: Harvard University Press, 1981).

<sup>18</sup> Judith Jarvis Thomson, "The Right to Privacy," (1975) 4 *Philosophy and Public Affairs* p. 299 - 300.

<sup>19</sup> Thomson, "The Right to Privacy," p. 295.

<sup>20</sup> See W. A. Parent, "Recent Work on the Concept of Privacy," (1983) 20 *American Philosophical Quarterly* pp. 341-342 for further criticisms.

<sup>21</sup> Alan F. Westin, *Privacy and Freedom* (New York: Atheneum Press, 1967).

<sup>22</sup> See also Elizabeth Beardsley, "Privacy, Autonomy, and Selective Disclosure." In J. Pennock and J. Chapman (eds.), *Nomos XIII: Privacy*. (New York: Atherton Press, 1971) 56-70, Charles Fried, *An Anatomy of Values*, (Cambridge, Mass.: Harvard University Press, 1970), Robert Gerstein, "Privacy and Self-incrimination," (1970) 80 *Ethics* 87-101, Arthur Miller, *The Assault on Privacy* (Ann Arbor: the University of Michigan Press, 1971), Geoffrey R. Stone, "The Scope of the Fourth Amendment: Privacy and the Police Case of Spies, Secret Agents, and Informers," (1976) *American Bar Foundation Journal* 1191-1208, and Richard Wasserstrom, "Privacy: Some Arguments and Assumptions." In Richard N. Bronough, (ed.), *Philosophical Law: Authority, Equality, Adjudication, Privacy*, (Westport, CT: Greenwood Press, 1978) 148 – 166.

information about them is communicated to others”.<sup>23</sup> Westin holds that privacy is a claim of individuals, groups, and institutions to something, that what is claimed is their determining for themselves something, and lastly what is determined are the conditions under which information about themselves is communicated to others. Consider the first aspect of the definition. Privacy is the sort of thing that can be possessed, lost, and into which and of which there can be intrusions and invasions, but it makes no sense to say that a claim is something that is possessed, can be lost, or into which and of which there can be intrusions and invasions.<sup>24</sup> Perhaps what Westin should have said is that the privacy of individuals, groups, or institutions is their ability to determine for themselves when, how, and to what extent information about themselves is communicated to others. A decrease then in this ability would be a loss of privacy. Suppose that the government passes a law that allows the tapping of telephones and permits any information so obtained to be disseminated, but no one has tapped anyone’s telephone under the new law. Clearly, there is a loss in our capacity to determine when, how and to what extent information about us is to be communicated to others, but there is no loss in our privacy since no one has acted on the law. Consider this example drawn from W. A. Parent.<sup>25</sup> Suppose that I tell a friend a great deal of personal information about myself. In doing so, I have not given up my control of this information, since I have determined when, by whom, and how it would be known. In fact in telling my friend, I am exercising the

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<sup>23</sup> Westin, *Privacy and Freedom*, p. 7.

<sup>24</sup> See Louis Lusky, “Invasion of privacy: a clarification of concepts,” (1972) 87 *Political Science Quarterly* pp. 195-197 for a similar criticism of Westin. Had Westin been giving an analysis of the right to privacy, then ‘claim’ would be appropriate, since a right is a claim against others. This is not to suggest that Westin’s inadequate analysis of privacy could be transformed into an acceptable account of the right to privacy. There is much confusion in the literature between privacy and the right to privacy.

<sup>25</sup> W. A. Parent, “Privacy, Morality, and the Law,” (1983) 12 *Philosophy and Public Affairs* p. 273.

control that I have over the information.<sup>26</sup> With respect to the information divulged I have given up my privacy. Hence, there can be a loss of control without a loss of privacy and a loss of privacy without a loss of control.<sup>27</sup>

There is an additional aspect of Westin's definition that deserves comment. His definition of privacy presupposes that if there is a loss of privacy, then something has been communicated. Not all losses of privacy, however, involve communication. Suppose that I am in my bedroom without any clothes on and someone peeps into the window. Clearly, there is a loss of privacy. The Peeping Tom has come to know what I look like without my clothes on, but nothing has been communicated to the Peeping Tom. Information

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<sup>26</sup> Countering this criticism of Westin, Ruth Gavison, "Privacy and the Limits of Law," (1980) 89 *The Yale Law Journal* p. 247 remarks that "in another, stronger sense of control... voluntary disclosure is a loss of control because the person who discloses loses the power to prevent others from further disseminating the information." This defense of Westin's control theory can easily be met. Imagine that the friend to whom the information is revealed is the only other sentient creature that exists. Thus, there is no loss of control since the person revealing the information has determined to whom, when and how much information to communicate, but there is a loss of privacy with respect to the person to whom the information is revealed and the information that is communicated.

<sup>27</sup> Westin restricts his definition to control over the dissemination of information, but there are influential definitions that equate privacy with control over important decisions effecting one's life, for example decisions about having access to information about the use of contraceptives (See *Griswold v. Connecticut*, 381 U.S. 479 (1965)), about using contraceptives (See *Eisenstadt v. Baird*, 405 U.S. 438 (1972)), about having an abortion (See *Roe v. Wade*, 410 U.S. 113 (1973)), and about having access to information about abortions (See *Planned Parenthood of Central Missouri v. Danforth* 428 U.S. 52 (1976)). As W. A. Parent, "A New Definition of Privacy for the Law," (1983) 2 *Law and Philosophy* p. 316 points out, these cases do not involve privacy, but rather liberty. Moreover, the equation of privacy with the control of important decisions affecting one's life are open to counter examples similar to the ones given above against Westin's definition.

Another variant of the control theory is control over cognitive access to one's body. Jeffrey Reiman, "Privacy, Intimacy, and Personhood," (1976) 5 *Philosophy and Public Affairs* p. 42 claims that privacy "requires that the individual have control over whether or not his physical existence becomes part of someone else's experience." See also Vern Countryman, "The Diminishing Right to Privacy: The Personal Dossier and the Computer" (1977) 49 *Texas Law Review* 837-971, Stephen Margulis, "Conceptions of Privacy: Current Status and Next Steps," (1977) 33 *The Journal of Social Issues* 5-19, and James Rachels, "Why Privacy is Important," (1975) 4 *Philosophy and Public Affairs* 323-33. This view is also subject to the counterexamples to Westin's control theory. By hearing my telephone conversations, someone can 'experience my physical existence.' Hence, if my telephone can be tapped at will, I have lost control over whether someone can 'experience my physical existence', but until someone taps my telephone and listens

however is involved. In learning what I look like without my clothes on, the Peeping Tom has acquired information about me, but it has not been communicated to him. Although, as I shall argue, information about a person is involved in privacy, not any information about him is relevant. If I am walking in the street and someone, who is not acquainted with me, notices what I look like, the person has acquired information about me, but I have not lost my privacy. What is required for there to be a loss of privacy is that it is personal information that is transferred.

Limited access theories come in different forms.<sup>28</sup> I shall consider Ruth Gavison's definition as representative of the view. She defines privacy as "...the limitation of access to an individual."<sup>29</sup> She further qualifies her definition by specifying that what she calls 'perfect privacy' for X has three components: "no one has information about X, no one pays any attention to X, and no one has physical access to X."<sup>30</sup> She relates these to what she takes to be three elements that are components of privacy: secrecy, anonymity, and solitude. There are several objections to a limited access definition of privacy. Take informational privacy. It is possible to have a limitation on access with respect to information about X and for X not to have privacy with respect to this information. Suppose that for a police officer to obtain information through a telephone tap she must have a court order, which means that her access to the information is limited. She then

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to my conversations, I have not lost my privacy. The second counterexample to Westin also applies to Reiman's definition.

<sup>28</sup> See Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (Totowa, NJ: Rowman and Littlefield, 1988), Roland Garrett, "The Nature of Privacy," (1974) 18 *Philosophy Today* 263-84, Hyman Gross, "Privacy and Autonomy." In J. Pennock and J. Chapman (eds.), *Nomos XIII: Privacy*. (New York: Atherton Press, 1967) 169-81, and David O'Brian, *Privacy, Law, and Public Policy* (New York: Praeger, 1979) for further limited access definitions of privacy.

<sup>29</sup> Ruth Gavison, "Privacy and the Limits of Law," (1980) 89 *The Yale Law Journal* p. 428

obtains the court order, taps X's telephone and obtains the information about X. Hence, although access to the information is limited, since the police officer now has the information, X does not have privacy with respect to the information.<sup>31</sup> There can be unlimited access to information without a loss of privacy. Imagine that I have a device that can access any information I might wish about X. It can read his mind, see through walls, track his every movement, etc. But I never turn on the device. Hence there is unlimited access to information about X without X losing any of his privacy.<sup>32</sup>

I want to turn to possession of information theories of privacy for which W. A. Parent's account is the most interesting representative. Parent takes privacy to be "... the condition of not having undocumented personal knowledge about one possessed by others".<sup>33</sup> Personal knowledge or information "... consists of facts about a person which most individuals in a given society at a given time do not want widely known about them...or facts about which a particular individual is acutely sensitive and which he therefore does not choose to reveal about himself."<sup>34</sup> A fact is documented if it belongs to the public record. The thought is that if someone comes to know some information about me that I might wish he did not have through the public record, there is no loss to my privacy, since the information is already in the public record.

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<sup>30</sup> Gavison, "Privacy and the Limits of Law," p. 428.

<sup>31</sup> This counterexample is due to W. A. Parent, "Recent Work on the Concept of Privacy," p. 346.

<sup>32</sup> As we have seen, Gavison thinks that secrecy, anonymity, and solitude are ingredients of privacy. See Parent, "Recent Work on the Concept of Privacy," pp. 347-348 for arguments, which show the difference between privacy and each of secrecy, anonymity, and solitude.

<sup>33</sup> W. A. Parent, "Privacy, Morality and the Law," pp. 269-271.

<sup>34</sup> "Privacy, Morality and the Law," pp. 369-370.

There are several problems with Parent's definition and with his account of personal information. Imagine that there is a rabbi who does not want anyone to know that he ate blood pudding, a non-kosher food, but this information had been published in the newspapers and it is, thereby, a matter of the public record. But it is long ago and everyone who knew what had appeared in the newspapers has passed away. So no one now knows his secret. Parent's account would have it that with respect to this information the rabbi has no privacy, but since no one now knows that he ate blood pudding, this fact is something about him that is now private. What is missing from Parent's analysis is that for a certain piece of information not to be private now someone must now have the information. Hence, there can be a loss of privacy in the past with respect to a certain piece of information when others find out about it, but the privacy can be regained if no one any longer possesses the information, even though the information is in the public record.<sup>35</sup>

An additional problem with Parent's definition is connected with knowledge being a necessary condition for the loss of privacy. There are cases in which there can be a loss of privacy for someone when others come to have personal information about him that they believe rather than know.<sup>36</sup> Suppose that Joe sees Sam with a woman who is not his wife and correctly surmises from the way that they are talking together, that Sam is having an affair with her. Joe is not certain that this is the case and for this reason does not know that Sam is having the affair. Despite his doubts, Joe reports what he believes about Sam

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<sup>35</sup> The criticism is due to David Matheson, "Privacy, Knowledge, and Knowableness," <<http://anonequity.org/en3/research.progress.php>>, p. 12.

to his friends. Word gets back to Sam who can rightly regard Joe to have intruded into his private life and to take it that he has suffered a loss of his privacy with respect to the information that he is having an affair with the woman with whom he had lunch.<sup>37</sup>

Another problem with Parent's analysis of privacy is that it is stated in terms of a single individual, but there is information that belongs to a group, rather than to an individual. Suppose that there is a secret society that has rituals, information about which the society wishes to keep from the public eye. If the rituals of the group were reported in the newspaper, but no names of members were reported, the group could claim that it had suffered a loss of its privacy, but no member could so claim a loss.

Lastly, Parent's definition turns on something being in the public record, but someone can suffer a loss of privacy if a government agency comes to obtain personal information about him, but do not put it into the public record.<sup>38</sup> Consequently, Parent's definition is neither necessary nor sufficient for privacy. Someone can have privacy with respect to certain personal information and it still be documented and information about someone

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<sup>36</sup> Parent, "A New Definition of Privacy for the Law," p.309 seems to recognize this point, but it is not included in his definition of privacy.

<sup>37</sup> There might be other information that Joe and his friends know about Sam, for example, that he had lunch with a woman, he had lunch at Chez Pierre, etc., but this is irrelevant. All that is required for there to be a counterexample to Parent's claim that knowledge is necessary for a loss of privacy is that there be some personal information about Sam that he does not wish others to have and that others believe, but not know. Thus, because Joe and his friends believe that Sam is having an affair, Sam has suffered a loss of privacy with respect to this information.

<sup>38</sup> Although there is a loss of privacy when the government legally collects personal information, there need be no violation of a person's right to privacy, if the collection of the information serves the public interest and there are safe guards for protecting the confidentiality of the information collected. In this case, the right to privacy would be overridden by the right the government has to collect certain sorts of information about its citizens. To think that there is no loss of privacy when the government collects information, even when it is undocumented, is to confuse privacy with the right to privacy.

can be undocumented or not known and the person can suffer a loss of privacy with respect to it.

There is also a problem with Parent's account of personal information. It is not that people do not want information about them widely known that makes it personal information; it is that people do not want certain information known by anybody except perhaps a limited number of people with whom they have a special relation and whom they choose as recipients of the information. Surely, if a government agent obtains information about me that I do not consent to him having, there is a loss of my privacy, even though the information is not widely disseminated and even if it is not documented. It is sufficient for my loss of privacy that he has information about me that I rather he not have.

I would now like to turn to my account of the nature of privacy, which I believe avoids the problems that I have raised for the other definitions of privacy that I have considered. It comes in two parts, an analysis of the nature of privacy and of the nature of personal information.

In society  $T$ ,  $S$ , where  $S$  can be an individual, institution,<sup>39</sup> or a group, possess privacy with respect to some proposition,  $p$ , and individual  $U$  if and only if

- (a)  $p$  is personal information about  $S$ .<sup>40</sup>
- (b)  $U$  does not currently know or believe that  $p$ .

In society  $T$ ,  $p$  is personal information about  $S$  iff and only most people in  $T$  would not want it to be known or believed that  $q$  where  $q$  is information about them which is similar to  $p$ ,<sup>41</sup> or  $S$  is a

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<sup>39</sup> 'Institution' is meant to cover companies, governments, universities, etc.

<sup>40</sup> For the proposition,  $p$ , to be about  $S$ , there must be a sentence,  $s$ , that contains a singular term,  $t$ , that were  $s$  to be used,  $t$  would be used referentially with  $S$  as its referent and on this use,  $s$  would express  $p$ . The proposition,  $p$ , then would be what is called a singular proposition. See Steven Davis and Brendan Gillon, *Semantics: A Reader*. (New York: Oxford University Press, 2004) pp. 83-88.

very sensitive person who does not want it to be known or believed that  $p$ .<sup>42</sup> In both cases, an allowance must be made for information that most people or  $S$  make available to a limited number of others.<sup>43</sup>

Referring to a particular person,  $U$ , in the analysis of privacy, is to account for the fact that one can possess privacy with respect to one person, but not with respect to another.<sup>44</sup>

If I tell my wife something about myself that I tell no one else, I do not have privacy with respect to her and the information that I impart to her, but I have privacy with respect to others. We can say that someone has absolute privacy with respect to some information about himself if no one has the information and partial privacy if there are others who possess the information, but it is not widely known or believed.

The analysis above says nothing about what it is for someone to suffer a loss of his privacy. But it is easy enough to see how this would go. Let us return to the example of the rabbi and his eating blood pudding, a report of which has appeared in a newspaper, and about which the rabbi wishes no one knows. Currently, no one has the information about the event, since everyone connected to the newspaper article has either forgotten it or passed away. Ruth reads the newspaper and discovers what the rabbi did. The rabbi would then suffer a loss of his privacy, since Ruth's coming to know about the event is

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<sup>41</sup> This is in the conditional, since there could be information most people have never considered, but were they to become aware of it, it would be information that they would not want to be known or believed, except perhaps by a limited number of others.

<sup>42</sup> This is adapted from Parent, "Privacy, Morality and the Law," p. 269 - 270.

<sup>43</sup> On my account of privacy, someone has privacy to personal information about him, even if the personal information involves his having committed an illegal act, murdering someone, for example. If the police find out that  $S$  is the murderer, he has lost his privacy with respect to this information, but his right to privacy has not been violated, since his right to privacy about the murder is overridden by the legitimate state interest in protecting public security. This point is in reply to a criticism of the definition raised by Heidi Maibom and Fred Bennett, private communication.

<sup>44</sup> This point is taken from David Matheson's paper, "Privacy, Knowledge, and Knowableness," p. 1.

sufficient for there to be a loss of the rabbi's privacy.<sup>45</sup> In the rabbi example, the rabbi wishes that others not know about his eating food that is not kosher, but this is not necessary for a loss of privacy. A loss can occur even when the person who loses his privacy is indifferent about whether others have certain personal information about him. All that is necessary is that in his society most people would not want similar information about themselves to be known or believed, except by those to whom they choose to reveal the information. A loss can occur even when the disclosure is not documented or public, for example, when I tell a friend something that I regard to be personal, who does not pass on the information or when a Peeping Tom looks through my window, who keeps what he sees to himself.<sup>46</sup>

I would like to answer a number of criticisms that have been raised and could be raised against my account of privacy. The first criticism is that a change of mind could engender a loss of privacy. Suppose that there is some personal information about a person that he does not wish others to know or believe, but about which most people in his society are indifferent about whether others know or believe it. Further suppose that he changes his mind and is no longer sensitive about the information. It is counter-intuitive that he has lost his privacy with respect to the information, as my account would seem to suggest. What this criticism fails to take into consideration is that on my account a loss of privacy with respect to certain information can only occur if the information is personal

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<sup>45</sup> Although as David Matheson (private communication) has noted, Ruth's coming to believe that the rabbi has eaten blood pudding, because she had a dream about the rabbi will not do. For the rabbi to have suffered a loss of privacy, Ruth must have some warrant for her belief about him.

<sup>46</sup> The second of William L. Prosser, "Privacy," (1960) 48 *California Law Review* p. 389 torts involving privacy is that a loss occurs if there public disclosure of embarrassing private facts and Parent, "A New

information. After the person changes his mind, the information about him is not something about which he is currently sensitive nor are others in his society. Hence, it is not personal information about him and consequently, there is no loss of his privacy once he changes his mind. What we can say is that by changing his attitude towards the information, although he does not suffer a loss of privacy, he no longer has privacy with respect to the information. He and others in his society are indifferent as to whether it is known or believed by others. To this sort of information that is not personal the concept of privacy does not apply.<sup>47</sup>

The second criticism of my account turns on surveillance cameras that can record our activities about which we might be sensitive. It could be argued that there is a loss of our privacy even without there being someone who views the recorded tapes of our activities, something that is required by my account of privacy and loss of privacy.<sup>48</sup> This criticism confuses a loss of privacy with a fear of a loss of privacy. Imagine the following cases in which there are surveillance cameras taking pictures, but in which there is no loss of privacy. There are surveillance cameras that someone has set up which records personal information about us, but before he is able to look at the recordings, he dies. There are surveillance cameras set up to record personal information about me, but I am the only

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Definition of Privacy for the Law,” p. 306 takes it as a necessary condition for a loss of privacy that personal information has to be documented.

<sup>47</sup> This objection is due to David Matheson, private communication.

<sup>48</sup> This was suggested as an objection to my analysis by Steve Mann when I delivered a version of this paper in Toronto in October 2004 at the *On the Identity Trail: Understanding the Importance and Impact of Anonymity and Authentication in a Networked Society* research group.

person in the world. In neither case is there a loss of privacy. Thus, surveillance is not sufficient for a loss of privacy.<sup>49</sup>

The third criticism is that the analysis does not cover everything that is included in privacy, for example what is called physical privacy. Someone comes into my home uninvited. Clearly, there is a loss of my privacy. The analysis, I believe, covers this case. The intruder has gained some information about me that I do not wish him to have, namely, visual information about what the inside of my house looks like, what sorts of possessions I have, how I arrange my dwelling etc.<sup>50</sup> A similar case that some might think is not covered in the analysis is the following. Imagine that I want to be alone and seek solitude by walking far out on a promontory to watch the bounding surf and think about the meaning of life. Someone who knows me spies me from afar and comes out to where I am sitting and plunks herself down beside me. She already knows what I look like and so does not come to have any personal information about me that I wish to keep from others, but some might think that she has intruded into my privacy. I think that this confuses solitude with privacy.<sup>51</sup> It is the former that is lost in this case, not the latter.<sup>52</sup>

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<sup>49</sup> I shall argue that in these sorts of cases there is a violation of a person's right to privacy without there being a loss of his privacy.

<sup>50</sup> This point was made in David Matheson's "Privacy, Knowledge, and Knowableness," p. 22.

<sup>51</sup> On some views, for example, Ruth Gavison, in "Privacy and the Limits of Law," p. 433 solitude is a kind of privacy. If this were the case, then whenever one's solitude is lost, so too should one's privacy. In the scenario I present, my solitude is lost, but not my privacy. Hence, solitude is not a kind of privacy.

<sup>52</sup> See Parent, "Recent Work on the Concept of Privacy," p. 348 for a similar point.

The fourth criticism is that the account of personal information that I have offered is not necessary for privacy. All that is needed is (a) and (b).<sup>53</sup> On this view, a person has privacy with respect to some information about himself and someone else just in case she is not aware of the information about him. Desires do not come into the picture. There are difficulties, however, with this view. Suppose that Jones has never seen me and does not know what I look like. How I look then is information that Jones lacks, but it is not the sort of information about which others in my community and I are sensitive. On the view that (a) and (b) are sufficient for privacy, I have privacy with respect to my appearance and Jones. If he were to see me in the street and thus, come to know how I look, it would follow from this analysis of privacy that I have lost my privacy about my appearance with respect to Jones, a clearly counter intuitive result. Worse still, there are rather trivial truths about me that I certainly do not care whether anyone knows, nor does anyone in my community care whether similar propositions are known about them. Consider the proposition that I am self-identical<sup>54</sup> and suppose that no one has entertained this proposition about me. On the view under consideration, I have absolute privacy with respect to this proposition and would suffer a loss of privacy were someone to come to believe it about me. Thus, an account of personal information that turns on desires about information is necessary for an account of privacy.

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<sup>53</sup> If (a) and (b) are taken to be sufficient, then there will have to be an account of what makes information personal. One way of understanding personal information is to take it to be information about a person that can be known empirically. This is the account of privacy and personal information that David Matheson offers in "Privacy, Knowledge, and Knowableness" and "The Personal and the Empirical," (2005) *On the Identity Trail* <<http://www.anonequity.org/weblog/archives/000255.php>>. Matheson's theory of privacy is open to the counterexamples that I offer here.

<sup>54</sup> This proposition is an empirical proposition, since it presupposes that I exist, something that can only be known by empirical means. See footnote 53.

The last two criticisms of my analysis against which I wish to defend my definition are criticisms that Madison Powers<sup>55</sup> has raised against Parent's account,<sup>56</sup> which because of the similarity between my view and Parent's might be thought to apply to my analysis.<sup>57</sup> The first objection is the repeat offender criticism.<sup>58</sup> I have claimed that someone loses privacy with respect to personal information, *p*, about himself, and cognizer, *U*, if *U* comes to know or believe that *p*. It might appear that no privacy loss has occurred if *U* already knows that *p*. Contrary to my account, there is a loss of my privacy, it is argued, each time a Peeping Tom looks through my window and sees how I look without my clothes on. He already knows how I look and thus does not acquire new information about me beyond the first time that he peers through my window. This criticism has an impoverished view of information. The Peeping Tom acquires new information about me every time he looks at me in my undressed state. He comes to know how I look at each time at which he peers through the window. Since these are different times, he acquires different information.<sup>59</sup> The second of Power's objections against Parent that could be applied to my view is that my analysis is normative and not descriptive. Thus, it is not a

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<sup>55</sup> Madison Powers, "A Cognitive Access Definition of Privacy," (1996) 15 *Law and Philosophy* pp. 377-379.

<sup>56</sup> W. A. Parent, "A New Definition of Privacy for the Law," pp. 306-309.

<sup>57</sup> Powers, "A Cognitive Access Definition of Privacy," p. 379 offers a third criticism against Parent, "A New Definition of Privacy for the Law," pp. 306-309, but it involves an editing error in Parent's paper. In criticizing the view that privacy is freedom from intrusion, Parent, "Recent Work on the Concept of Privacy," p. 342 presents the following scenario that Powers takes to be a counter example to his own view that privacy is a limitation of cognitive access. In the main body of the text, Parent asks us to imagine that a blind and dumb person, *A*, accidentally enters into an operating room where *B* is undergoing an operation. He claims that there has been an intrusion, but no loss of privacy. But clearly, as Powers notes, *A*, not being blind could have seen *B*, thereby, having cognitive access to her and could even have acquired personal information about her, thereby, bringing it about that *B* has suffered a loss of privacy. The problem is that it is evident that 'deaf and dumb' is a typographical error, since in a footnote Parent, "Recent Work on the Concept of Privacy," p. 351, n. 9 uses 'deaf and blind.'

<sup>58</sup> Powers, "A Cognitive Access Definition of Privacy," p. 377.

separate question, as I claim, whether privacy has moral value. The normative notions, supposedly, are smuggled in by appealing to what the majority of the people in a given society would rather not have known or believed about themselves, since such an appeal, one could argue, has an implicit reference to the norms of a society.<sup>60</sup> Contrary to this criticism, to say that something is a norm or a social practice in a society is not a normative claim, but descriptive of the normative claims of the society.

This of course leaves it open as to whether privacy has a moral standing and whether there is a moral right to privacy. Certainly, privacy is something that most people in our society value and have an interest in. There is information about them that they do not want to be known or believed, except by those with whom they have a special relation and to whom they choose to reveal the information. Wanting something and having an interest in it does not endow it with moral properties. Someone might want an expensive bottle of wine and take an interest in it, but this does not give the bottle of wine moral value. What gives privacy a moral value are the kinds of interests that are involved. Once it is clear what these are we can then raise the question as to whether they are the sorts of interests that have moral weight. Once we have settled on this, we can consider whether privacy is a moral right that should be protected, since for there to be a moral right to privacy, privacy itself must have moral value or it must be instrumental in promoting or protecting interests which have moral value.

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<sup>59</sup> To be more precise what *U* comes to know is an indexical proposition that involves some reference to the time of the acquisition. We can say that is the thought *he looks like that now*, where the proposition is thought by *U* and ‘he’ refers to me and ‘now’ to the time at which *U* looks through my window.

<sup>60</sup> See Madison, “A Cognitive Access Definition of Privacy,” p. 377. Parent, “Privacy, Morality and the Law,” p.307 does make such an appeal.

Different accounts of privacy yield different interests. If, for example, we take privacy to be control over when and by whom our bodies can be perceived, it could be argued that any interest that is affected by a loss of such control is a privacy interest. If my freedom of movement is limited, I have lost control over when and by whom I can be perceived. And conversely if my privacy is enhanced, on this analysis of privacy, my freedom of movement is increased.<sup>61</sup> Thus, privacy would be seen to be instrumental in promoting freedom of movement. Since the latter has great value for people, so too should privacy. Or if we take privacy to be lack of intrusion,<sup>62</sup> two ways in which someone would not be let alone, then the interests connected to having seclusion or solitude would be connected to privacy. Since these analyses of privacy are inadequate, any interests that are supposedly connected to privacy through these definitions cannot serve to ground the moral value of privacy.

If privacy is to be shown to have moral worth, it must be grounded on its conceptual connection with knowledge of or belief about personal information and not on the confusion of privacy with other states like seclusion and solitude. There are, however, a number of accounts of the interest we have in privacy through its connection with knowledge about personal information, which I believe to be inadequate. Fried<sup>63</sup> claims that intimate relations such as friendship, love, and trust are inconceivable without

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<sup>61</sup> See Richard B Parker, "A definition of Privacy," (1974) 27 *Rutgers Law Review* p. 281 for a definition that turns on control of perceptual access to our bodies and the connection with freedom of movement.

<sup>62</sup> See William L. Prosser, "Privacy," (1960) 48 *California Law Review* p. 389 for an account of privacy that connects it with an absence of intrusion into one's seclusion and solitude.

<sup>63</sup> Charles Fried, "Privacy," (1968) 77 *Yale Law Review*, p. 477.

privacy. As many have pointed out, what is important for friendship, love, and trust is not necessarily the sharing of personal information, but caring about and caring for someone, meeting one's obligations to them, doing things for them, etc.<sup>64</sup> Trust, for example, can be established between two people by their meeting their obligations to one another, not necessarily by exchanging intimate details about their lives. Another inadequate account of the connection between privacy and our interest in it is Reiman's who takes privacy, in the sense of control over information about the existence of one's body,<sup>65</sup> to be necessary for having a fully developed sense of self. Without it, he claims, we would not know that our body is our own different from the body of others. There is no argument given for this rather contentious claim. In some societies, it is dangerous to be out of sight of others and people in these societies live in constant perceptual proximity with one another.<sup>66</sup> At any moment, there is always someone in their society that has perceptual access to them. Consequently, they have no control over who knows about their physical existence. It is difficult to believe that people in these societies do not have a fully developed sense of self, that is, of their bodies being their own 'unlike any other body present'.<sup>67</sup>

Parent<sup>68</sup> thinks that are many interests that privacy serves in societies like ours. It protects us from the power that others might have over us, if they were to find out certain sorts of personal information about us; it prevents us from being embarrassed or held up to

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<sup>64</sup> See Parent, "Privacy, Morality and the Law," p. 275, Reiman, "Privacy, Intimacy, and Personhood," pp. 32-33, and Posner, "The Right of Privacy," (1978) 12 *Georgia Law Review*, p.408, among others, for criticisms along these lines.

<sup>65</sup> Reiman, "Privacy, Intimacy, and Personhood," p. 42. See footnote 27 for a criticism of this view of privacy.

<sup>66</sup> It has been said that Louis XIV was never out of the sight of someone in his entourage. It can hardly be maintained that he did not have a fully developed sense of self, even perhaps an exaggerated sense of self.

<sup>67</sup> Reiman, "Privacy, Intimacy, and Personhood," p. 42.

ridicule or scorn by those who might be intolerant of the way that we live our lives; and it reinforces the value we place on the individual having autonomous lives with their own goals and ways of reaching these goals without the interference of the state. According to Parent, the last of these has its place in a liberal polity that gives individual rights special importance. Parent's way of connecting privacy with things that have moral value lacks a certain level of generality, since they do not tell us why privacy would be of value in societies very different from our own, in Saudi Arabia for example, where privacy is important, but is as far from a liberal political order as one could imagine.

A necessary condition for someone to have privacy with respect to information is that the information is about him and it is personal. For information to be personal there has to be sensitivity about the information. That is, either the person whom the information is about must desire that others not have the information except those to whom he chooses to reveal the information or most of the people in the person's society must have a similar desire about information about themselves. Let us call this desire a desire for privacy.

Desires<sup>69</sup> have as their objects possible states of affairs that if realized, fulfill the desire.<sup>70</sup>

We can say that a desire is instrumental if its fulfillment is a necessary or sufficient condition for satisfying another desire. For example, I might decide to play golf only if it does not rain. Because of my decision, I desire that it not rain. If this desire is fulfilled,

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<sup>68</sup> Parent, "Privacy, Morality, and the Law," pp. 276-277.

<sup>69</sup> Wanting and wishing also have as their objects possible states of affairs. It might seem that my wanting something can be directed towards objects and not states of affairs. When I want a glass of water, what I want is to have a glass of water and hence, the object is a possible state of affairs. If I want it to rain or wish that it would, I get what I want or wish for if the state of affairs obtains, that is, it rains.

<sup>70</sup> That someone's desire is fulfilled is not sufficient for him to be satisfied with respect to his desire. In addition, he must know or be entitled to believe that it is. In what follows, this condition on what it takes for someone to be satisfied by one of his desires being fulfilled will be assumed to hold.

then a necessary condition for my playing golf is realized. Or consider my decision that if I win the lottery, then I shall give ten thousand dollars to each of my friends. Because of this decision, I desire to win the lottery and fulfillment of this desire is sufficient for the fulfillment of my desire to give my friends some money. In the first case, we can say that the desire that it does not rain is a necessary condition for my playing golf; in the second case we can say that my winning the lottery is a sufficient condition for my giving money to my friends. In neither case, however, are these conditions logically necessary for the fulfillment of some other desire. That is, it is not necessary that if I play golf, it does not rain or that if I win the lottery, I shall give money to my friends. In the first case, despite the rain, I could still play golf and in the second case even though I have won the lottery, I might not give money to my friends. There are cases, however, where it is logically necessary that if the desire that  $p$  is fulfilled, then the desire that  $q$  is fulfilled and that the desire that  $p$  is fulfilled, only if the desire that  $q$  is fulfilled.<sup>71</sup> Suppose that I desire to read all of Mark Twain's books and desire to read all of Samuel Clemens' books,<sup>72</sup> not knowing that Mark Twain is Samuel Clemens. Fulfilling one desire is logically necessary and sufficient for fulfilling the other. In the three examples, the fulfillment of one desire is instrumental in the fulfillment of another desire. To distinguish these I shall call the instrumental relation illustrated by the first two examples, 'contingent instrumentality' and the instrumental relation illustrated by the second 'necessary instrumentality.' Not all desires are instrumental. A desire is not instrumental

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<sup>71</sup> We can say then that there are two ways in which one state of affairs,  $p$ , is necessary for another,  $q$ . If the conditional, 'If  $p$ , then  $q$ ,' is true, then the truth of  $q$  is a necessary condition for the truth of  $p$ . Of course, if the conditional is false, then  $p$  would be true and  $q$  false. If the conditional is a necessary truth, then it is impossible for it to be false and thus, there is no case in which  $p$  is true and  $q$  false.

if the state of affairs that obtains in its fulfillment is not a condition for the fulfillment of a further desire. For example, if I desire to have gustatory pleasure in having a good meal and my desire is fulfilled, then the pleasure that I have in having the good meal might be an end in itself. The point is that the fulfillment of the desire for the pleasant taste sensations need not serve as a necessary or sufficient condition for the fulfillment any other desire.

Are our privacy desires instrumental or non-instrumental? If instrumental, for what other desires is their fulfillment necessary or sufficient for their fulfillment? If they are not instrumental, what is the nature of the satisfaction that we have by virtue of their being fulfilled? Let us consider the last question first. Suppose that my privacy desires are fulfilled; no personal information about me is known or believed, except by people with whom I have a special relation and to whom I have revealed the information. Thus, I am satisfied in the fulfillment of the desires. What is the nature of the satisfaction? I might have peace of mind or a feeling of security in knowing that my desires for privacy are fulfilled, because I know that others cannot use personal information to embarrass, ridicule, or harm me in some other way. Or it might be because I am secure in the knowledge that I shall be in position to compete or bargain with others, since they would not know information about my competitive or bargaining position. These considerations, however, show that our privacy desires are not non-instrumental, since in each case, there is a further desire that the fulfillment of my privacy desire serves to fulfill, the desires not

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<sup>72</sup> It could be argued that these are the same desire, even though I believe them to be different. I shall not discuss this here, since a discussion of this issue would take us too far a field from the topic at hand. See Scott Soames, *Beyond Rigidity*, (Oxford: Oxford University Press, 2002) pp. 55 – 96 for a discussion.

to be embarrassed or to be ridiculed and the desires to compete or to bargain. It is difficult to see in what way the fulfillment of our privacy desires could be an end in themselves without consideration of what further purpose they might serve. So, the conclusion is that such desires are instrumental.

What further desires then would their fulfillment serve in satisfying? Are they any desires such that the fulfillment of them is logical necessary or sufficient for their fulfillment?

Let us imagine that nothing is private. Suppose that we knew everything that there was to know about anyone else. What would each of us lose? Some regard privacy to be necessary for human dignity, respect for others, and the possibility of intimate relations.<sup>73</sup>

The view is that if we had access to people's passing thoughts about themselves and others, it would be difficult for them to maintain their dignity and for others to respect them. Think of all the libidinous or nasty thoughts that we have that are undignified and that we think would probably cause others to lose respect for us and consider us as not being worthy of being treated with dignity. Moreover, since everyone knows our thoughts, including some of our most intimate thoughts, there would be no information that we could share only with those with whom we wish to have intimate relations. If having intimate relations with someone demands that there is some information that we share only with those with which we wish to have close relations, we could no longer have intimate relations with others. If everyone knows everything about us, then there is no personal information to share with our friends, lovers, spouses, etc. that would make

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<sup>73</sup> It seems that Fried, "Privacy," p. 477 takes there to be such a necessary connection between respect, love, friendship and trust and privacy. He says, "...privacy...is necessarily related to ... respect, love,

the relationship with them special. It seems that without privacy we cannot have the respect of others; we cannot live lives with dignity; and we cannot have intimate relations with others, which would exclude love and friendship from our lives. Clearly, all these are of moral worth and hence, it would seem that privacy has moral value since it seems necessary for respect, dignity, friendship, and love.

I do not think that this shows that privacy has a necessary connection to our desires for respect, dignity, friendship, and love. If someone finds out something about me that I do not wish him to know, because I am afraid of how it would affect my reputation, the information that he gains by itself does not have an affect on how he thinks about me. It is the information that the person has about me and his own attitudes towards it that might lead to his losing respect for me and to my reputation's being tarnished. If the person had a positive or indifferent attitude about the information, then he would not have lost respect for me and my reputation would not have been affected. So, it is not the loss of privacy that determines how others regard and treat us. It is rather the attitude that they have towards the information that is determinant. If this is correct, it shows that privacy is not logically necessary for the satisfaction of our desires for dignity and respect, but it is contingently instrumental in making it possible that we are respected and can maintain our dignity. It is after all a contingent fact about societies how their members regard certain information about others. Think about how homosexuality was once regarded in our society and how is now regarded by most members of our community. Moreover, how these facts are regarded changes over time. We have already

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friendship and trust ... without privacy they are simply inconceivable." See also Rachels, "Why Privacy is

seen that intimate relations are possible without privacy. This does not mean, however, that there are no societies in which privacy might not serve to foster and maintain intimate relations.

There is one desire that we have the fulfillment of which logically requires privacy. We cannot fulfill our desire to bargain with others had we no privacy, since our final bargaining position would be known to others. It is similar to playing poker. It would be logically impossible to play poker, if all the hands were open for the players to see. There are, however, not many desires the fulfillment of which logically require the fulfillment of our privacy desire.

That there are very few desires for which privacy is necessarily instrumental has no bearing on whether there are desires and thus, interests for which it is contingently instrumental. Privacy desires have contingent connections to the desires for respect, dignity, love, friendship, trust, freedom, autonomy, democracy, religious piety, sexuality, modesty, honour, family life, etc., connections that vary across cultures. It is the range and importance of the objects of the desires, the state of affairs which are realized if the desires are fulfilled, to which privacy is contingently related that give moral grounding and thus, moral value to privacy. Since we place great moral value on respect, dignity, love, etc., we should place moral value on those states and activities that promote them, even if their promoting them is not necessary but contingent on the structure and attitudes of different societies.

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Important,” p. 326.

This does not show that there is a right to privacy, but I think that it is an easy step to show that there is such a right. Given the importance of the values that privacy promotes, some of which themselves are moral rights, respect, and dignity for example, it would follow that privacy is a right in those societies in which it plays a role in fostering these important values.<sup>74</sup> What then is the right of privacy? As is any right, it is a claim of the right-holder against another, the duty-holder, with respect to a benefit. The duty-holder has then an obligation with respect to the right-holder and if he does not fulfill his obligations, he is open to a penalty. In the case of privacy, everyone is a right-holder, including those who are not capable of having privacy desires, except perhaps for prisoners who have forfeited their right to privacy, because of their convictions for crimes. Privacy right-holders, as with all right-holders, can waive their right to privacy by voluntarily recounting personal information to others or consenting to a request from others for access to the information.<sup>75</sup>

In a society in which there is a right to privacy everyone, who is capable of understanding what the right is and acting in accordance with it, is a duty-holder.<sup>76</sup> The benefit of the right-holder is that others refrain from using illicit or illegitimate means for obtaining personal information about the right-holder. The *prima facie* obligation<sup>77</sup> then on the part

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<sup>74</sup> This is not to be a relativist about the right to privacy. It is an absolute, but conditional right. It is a right only in those societies in which privacy would promote other important values. In a society in which people were indifferent about the wealth of others and did not care who knew about their wealth, there would be no point in having privacy about one's financial worth.

<sup>75</sup> Privacy rights, as with all rights, can be lost, relinquished, waived, forfeited, and overridden.

<sup>76</sup> This is meant to exclude children and those with psychological problems from the range of duty-holders.

<sup>77</sup> The obligation is *prima facie*, since the right to privacy can be overridden, for example, if the right holder has committed or is going to commit a crime.

of the duty-holder is not to attempt to obtain or to obtain personal information about right-holders. This includes trying to obtain personal information about others without their consent by tapping their telephone, putting cameras into their house, filming them as they go about their daily activities, peering into their windows, etc. Moreover, if a right-holder reveals personal information about himself to someone, then without his consent, the duty-holder is under an obligation not to disseminate the information or to do anything that could lead to its dissemination.<sup>78</sup>

No actual loss in privacy need occur for there to be a violation of a right connected to a person's right to privacy. If we have a moral right to something, then others are under an obligation that they not threaten to put the right in jeopardy. For example, since I have a right to my life and liberty, others are under an obligation not only not to take my life or liberty, but also not to threaten to take them. There are two rights here, the right to life and liberty and the right to enjoy these rights without a threat to my life or liberty. Were someone to threaten my life or liberty, he would not violate my right to life or liberty, neither has been taken, but it would violate my right to be free from the threat of a violation of that right.<sup>79</sup> This also holds for the right to privacy. If there is a threat to the

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<sup>78</sup> The duty-holder is not under an obligation to cease engaging his normal perceptual and cognitive capacities by which he gains information, since he has a *prima facie* right to gain information via these capacities. For example, if the duty-holder is in a crowded restaurant and someone is talking loudly about her private life, a conversation that he cannot help over hearing, then if he comes to know something about the person's private life in this way, he has not violated her right to privacy. His normal cognitive capacities are engaged and he has not done anything to intrude on her privacy. The matter would be different if he focused his attention on her conversation and eavesdropped on it. That would be an intrusion and a violation of her right to privacy.

<sup>79</sup> A right to something and the right to be free from a threat to it are connected in the following way. If I have the right to something, that gives me the right to enjoy the benefit that the right bestows on me. But if there is a threat to my right, it reduces the enjoyment in the benefit and hence, adversely affects the right. When my life is threatened, this reduces the enjoyment I have in the benefit of the right to my life and my right to life, although not violated is diminished.

right, for example, a camera has been placed in my house, but no pictures have been taken, then there is no loss of my privacy, but there is a threat to it which reduces the security I have with respect to the right and thereby, the enjoyment of the benefit connected to the right.

We see then that a right to privacy bestows on the right-holder control over to whom and when his personal information be given to others, control that flows from his right to waive his right to privacy by consenting that others have access to his personal information. In addition, the right to privacy places limitations on the access of duty-holders to personal information about privacy right-holders, a duty not to obtain or try to obtain personal information about a right-holder without his consent. We see then that some of the analyses of privacy – those that turn on control of or limitation of access to personal information – confuse privacy with the right to privacy. Progress will be made in understanding privacy and its related right if they are kept distinct.<sup>80</sup>

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