

*University of Southern California Law
School*

Legal Studies Working Paper Series

Year 2014

Paper 111

What Is the Right to Privacy?

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Abstract

A philosophical account of the right to privacy should explain what is the distinct interest that the right is there to protect, what it takes to secure it, and what would count as a violation of the right. In this paper I argue that the right to privacy is grounded on people's interest in having a reasonable measure of control over ways in which they present themselves (and what is theirs) to others; I argue that in order to secure this kind of interest we need to have a reasonably secure and predictable environment about the flow of information. And then it follows that a violation of the right to privacy consists in the manipulation of the environment in ways which unjustifiably diminish one's ability to control how one presents herself to others. An account of the right to privacy should also explain, however, what makes it the case that people have wildly differing views about privacy and about what counts as a violation of the right. The paper aims to answer some of those questions as well.

What Is the Right to Privacy?

Andrei Marmor

The right to privacy is a curious kind of right. Most people think that we have a general right to privacy. But when you look at the kind of issues that lawyers and philosophers label as concerns about privacy, you see widely differing views about the scope of the right and the kind of cases that fall under its purview.¹ Consequently, it has become difficult to articulate the underlying interest that the right to privacy is there to protect—so much so that some philosophers have come to doubt that there is any underlying interest protected by it. According to Judith Thomson, for example, privacy is a cluster of derivative rights, some of them derived from rights to own or use your property, others from the right to your person or your right to decide what to do with your body, and so on. Thomson’s position starts from a sound observation, and I will begin by explaining why. The conclusion I will reach, however, is very different. I will argue that there is a general right to privacy grounded in people’s interest in having a reasonable measure of control over the ways in which they can present themselves (and what is theirs) to others. I will strive to show that this underlying interest justifies the right to privacy and explains its proper scope, though the scope of the right might be narrower, and fuzzier in its boundaries, than is commonly understood.

I am grateful to Scott Altman, Stephen Bero, Alon Harel, Greg Keating, Noga Marmor, Jonathan Quong, Joseph Raz, and the journal's reviewers for very helpful comments on earlier drafts

¹ A very wide range of views exists on what the right to privacy protects and what it covers. I cannot do justice to all of them here. For a survey of the interests identified as concerns about privacy, see, for example, R. Gavison, “Privacy and the Limits of Law,” *Yale Law Journal* 89 (1980): 421; and J. DeCew, *In Pursuit of Privacy* (Ithaca: Cornell University Press, 1997). Some see the right to privacy as a right that protects anything that concerns concealment of some sort, even such things as voting in a ballot booth. See A. Lever, *Privacy* (New York: Routledge, 2012). A. Allen and J. Rosen have argued for the view that the right to privacy should protect people from unwanted sexual advances, slurs, and even some forms of physical contact (particularly of a sexual nature). See A. Allen, *Uneasy Access: Privacy for Women in a Free Society* (Totowa, N.J.: Roman and Littlefield, 1988); and J. Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (New York: Random House, 2000). As far as I can tell, these writers, and many others, regard the underlying interests protected by privacy as multifarious and loosely connected to ideas of intimacy, unwanted contact, protection of personal reputation (Rosen), some proprietary interests, and others.

I.

Thomson observes that “there is no such thing as violating a man’s right to privacy by simply knowing something about him.” And that is so because “none of us has a right over any fact to the effect that that fact shall not be known by others.”² If there is any violation of your right to privacy in knowing something about you, it must derive from the way in which the truth has been obtained; it is about the how, not the what, that is known about you. This, I will assume here, is quite right. The challenge, therefore, is to explain the interest we have—that is worthy of protection by imposing obligations on others—in the ways in which information is obtained about us, over and above the familiar interests protected by rights of ownership.³ In other words, if violation of privacy is about ways in which information is obtained, and not about the content of the information per se, then the idea that there is an independent right to privacy might become difficult to defend. What would seem to be wrong about putative violations of privacy may lend itself to an explanation of wrongs that consist in violating our rights to ownership, including, presumably, self-ownership and rights extending from it.

Let me give a couple of familiar examples to bring this challenge into focus. Suppose you have an intimate photo of yourself saved on your laptop. You keep it for yourself, and you really do not want anyone to see it. One day you learn that Janet happened to see your photo. Has she violated your right to privacy? We cannot tell; it all depends on how she got to see it. If Janet hacked into your computer, then she clearly violated your right. If it turns out, however, that you emailed her (and perhaps many others) the photo by mistake, then it is not so clear that she violated your right.⁴ Notice,

² J. J. Thomson, “The Right to Privacy,” *Philosophy & Public Affairs* 4 (1975): 295, at p. 307.

³ I am assuming here that rights, in general, are grounded in interests, understood as aspects of a person’s well-being. And I am assuming that only interests that justify the imposition of duties on others are protected by rights. The details of this view, called the interest theory of rights, should not matter for our purposes. I take it as a widely accepted assumption that any moral right, worthy of that name, must protect certain interests persons have—something that contributes to their well-being.

⁴ Suppose that it is not a photo but a document, say, a diary you wrote, that you happened to send to Janet by mistake, and she read the whole thing. Of course, we might think that it was not very nice of her to read the stuff; it is a temptation that Janet should have resisted. But I doubt that she violated any right of yours. However, I have come to learn that people have very different intuitions about this. My own sense is that

however, that if she got the photo by hacking into your laptop, then she violated your right whether she actually saw the photo or not. And that is so because it would seem that the right she violated has something to do with your ownership of the computer and what you keep on it. She used or manipulated something that is yours, without your permission.

Consider another example. You have a cell phone that you bought from Mobile Co. When you bought the phone, you were told that your bill will list all the calls you make, the numbers you dial, and the exact times of the calls. You are fine with this; after all, you are just an ordinary person who needs to use a cell phone and pay for what you use. At some point you learn, however, that A has the entire record of your calls from the last few months. Has A violated your right to privacy? We cannot tell. It all depends on who A is, and how the information was obtained. If A is the billing department of Mobile Co., they have not violated any right of yours. But suppose A is a private detective, hired by your spouse, trying to find out whether you are having an illicit affair. And suppose that A obtained this information from an employee at the billing department of Mobile Co. Clearly A has violated your right. (And of course, so has the employee of Mobile Co.) But again, it seems that the right that A violated has something to do with the fact that he obtained something that is essentially yours, without your permission. Perhaps the list of your calls is not quite your property, but it is close enough. It is something you let Mobile Co. maintain as part of your contract with them; it is not for them to give away without your permission, and not for others to obtain.⁵ Compare that example with this case: you bring your jacket to the dry cleaner and pick it up a few days later. But then you learn that the dry cleaner was kind enough to lend your jacket to one of their other customers, just for one evening, you are told, and then it was cleaned and it is as good as new. Clearly the dry cleaner violated your right, as did the fellow who borrowed your jacket. It does not have much to do with privacy, though. Somebody used something of yours that is not for them to use without your permission.

people can do wrong even if the wrong does not consist in the violation of another's right. The photo example, suggested to me by one of the reviewers, nicely avoids these complications.

⁵ It is important to bear in mind that we have many property interests in information that are not based on privacy concerns. Lawyers call them *intellectual property*, which includes copyright in creative work, trademarks and trade secrets, many kinds of patents, and others explicitly created by contracts. In short, not every property right in information is grounded in the kind of concerns we aim to protect by the right to privacy.

I hope that these two examples are enough for now; we can see where this is leading. It supports Thomson's intuitions, two of them in particular. One, a violation of a right to privacy is not simply about what is known but mostly about the ways in which some information is obtained. And two, when we focus on what is wrong about the way in which some fact came to be known, we can normally explain it as a violation of one's proprietary rights: somebody used something that is yours without your permission. If both of these points generally hold true, we need to come up with an explanation of what is unique about privacy that we should be concerned about.⁶ I think that the challenge can be met.

Here is one way to think about it. Suppose we found ourselves one day living in a world in which nothing can be hidden: walls are all made of glass with no blinds or shades of any kind, every conversation can be heard by others, and nothing that you say or do can be hidden from anyone. Everything is there for anyone to see, hear, or smell—a kind of global Panopticon, as it were. Whether physically possible or not, this would seem to be a horrific world to live in. Why? For one thing, we would lose the ability to do some things that we really need to do in seclusion. Most people would feel extremely uncomfortable to be seen defecating, masturbating, or having sex, and most people do not normally want to see (or smell or hear) random others doing these things. Is this need for seclusion biological, or is it socially constructed? I do not know and I doubt that it matters. So there is that. But that, whatever exactly we call it, can be isolated; a global Panopticon would still be very unpleasant even if, somehow, sex, nudity, and things like that were possible in seclusion.

What we mainly lose in a Panopticon world, I will suggest, is something that is essential for shaping our interactions with others; it is, first and foremost, our social lives that would be severely compromised, not necessarily or primarily our inner or private world, so to speak. The main interest in question here is the interest in having a reasonable measure of control over ways in which we present ourselves to others and the ability to present different aspects of ourselves, and what is ours, to different people. This

⁶ T. Scanlon, for one, doubted that Thomson's intuitions can be generalized to the extent that she thought. But I cannot say that he came up with convincing counterexamples in his response. See Scanlon, "Thomson on Privacy," *Philosophy and Public Affairs* 4 (1975): 315.

is an essential aspect of our well-being. It is something that has an important role to play in how well one's life is going.⁷

II.

Nobody can have absolute control over the ways in which others perceive this or that aspect of who and what they are, and what they have. For one thing, we have very limited control over the way we look or how we sound. Some things we can change, but many others we cannot (for example, if you do not like your height, there is not much you can do about it). And, though perhaps more controversially, the same goes for character traits: people's ability to change or to conceal some aspects of their character traits and dispositions is heavily constrained, psychologically and otherwise. In short, our ability to control the ways in which we present ourselves to others is inherently limited. And of course, that is not necessarily a bad thing. Nobody should have too much control over the way they present themselves to others, as that would make manipulation, dishonesty, and, generally, lack of authenticity all too easy. What people need, however, is to have some reasonable amount of control over the ways in which they present different aspects of themselves to others. And they need this control for a number of very important reasons.⁸

One of them, nicely articulated by James Rachels, pertains to our ability to create and maintain different kinds of relationships with different people.⁹ What is important here, Rachels argued, is the difference in patterns of social behavior and social expectations that different kinds of relationships require. Having an intimate relationship with a spouse is quite different from having an intimate friendship. And both are very different from having a good working relationship with a colleague. You do things with

⁷ The idea that one underlying interest protected by the right to privacy concerns our social interactions is not new. As far as I know, J. Rachels was the first to suggest it, which is discussed below; see also Moore, "Privacy: Its Meaning and Value," *American Philosophical Quarterly* 40 (2003): 215. My aim in this article is to defend this line of thought, articulate the main interest in question here, and show that it explains the right's appropriate scope.

⁸ E. Goffman's iconic book *The Presentation of the Self in Everyday Life* (New York: Anchor Books, 1959) showed that there is an amazing repertoire of human behavior that is driven by our need to present ourselves to others in certain ways, almost as if we are all actors on a stage, putting on different performances for different audiences. Goffman's work shows, however, that most of this behavior is not quite conscious, and not necessarily an exercise of choice. My interest in this article is in the moral reasons for having control, that is, the ability to execute some choices, under certain circumstances.

⁹ J. Rachels, "Why Privacy Is Important," *Philosophy and Public Affairs* 4 (1975): 323.

your spouse that you probably do not want to do with a friend, and you tell a good friend things you would not tell the colleague you are working with or the plumber who comes to fix your sink. Different kinds of social expectations about what aspects of yourself you reveal to others are constitutive of different kinds of human relations. It is constitutive of friendships that friends are expected to be relatively open with each other, sometimes revealing intimate information that they would not be willing to share with just about any random person. Similarly, certain expectations of distance and concealment are constitutive of professional relations between people. Certain kinds of things about yourself you really should not be telling the students in your class, for example; they do not need to hear about your sexual fantasies or your difficulties with your spouse. Without having some control over things you reveal about yourself and ways in which you do it, different kinds of relationships with people would be much more difficult to create and maintain. This is one of the main reasons to regard an interest in controlling the ways we present ourselves to others as an important aspect of our well-being.

Another, perhaps closely related, reason to regard the interest in question as important has to do with the limited values of honesty and intimacy. A world that would be almost as horrific as a global Panopticon is a world of Total Honesty, in which every thought that comes to your mind is immediately communicated to others. That is not necessarily or exclusively an issue of privacy, of course, but it has a privacy correlate; some concealment and the ability to interact with people at arm's length are really quite essential for us to operate in the complex societies we live in.¹⁰ Like honesty, intimacy involves considerable costs, such as responsibilities and the need to care for the other. When those responsibilities and willingness to care are voluntarily undertaken, they foster good relationships. But when they are imposed involuntarily, especially on a large scale, the results might be quite oppressive. We can only operate in the complex societies we live in if we are allowed to deal with others at arm's length, keeping some distance. The need to keep some distance is partly physical—we often feel very uncomfortable being too close to strangers¹¹—but it is also, perhaps primarily, social; closeness to

¹⁰ Cf. T. Nagel, "Concealment and Exposure," *Philosophy & Public Affairs* 27 (1998): 3.

¹¹ See, for example, Rosen, *The Unwanted Gaze*, pp. 15–17, citing research by Goffman and others about our need to keep physical distance. One familiar example we all experience is the embarrassment in riding in an elevator with strangers; one never knows where to look.

another typically involves expectations and responsibilities that one should, by and large, only undertake voluntarily. Having some reasonable measure of control over the distance we keep with others is essential for our ability to have reasonable control over the responsibilities we undertake in our everyday lives. Countless social interactions without the ability to keep personal distance would be rather oppressive.¹²

Finally, another reason for regarding the interest in control over what you reveal about yourself to others as important pertains to people's willingness to subject various aspects of themselves to social scrutiny. Sometimes we invite social scrutiny, particularly when we take pride in an achievement or an accomplishment, or when we welcome outside appraisal and criticism. Sometimes, however, we want to shield ourselves from social scrutiny, either because we think we failed or because we need the space to experiment, to work out some issues on our own, or perhaps just to indulge in something without inviting potential criticism. Choice is not always possible about such matters, of course, but often it is, and often it is important. A clear example, though luckily losing its significance these days, is the decision of gay persons to make their sexual preferences public. "Coming out of the closet" used to be a fairly momentous decision for many people (and still is in many societies), not because they were ashamed of their sexual preference or thought there was anything wrong with it, but mostly because it immediately subjected the individual in question to public scrutiny and, unfortunately, a considerable amount of social pressure, not to speak of discrimination and persecution. As social norms change, and social scrutiny loses its edge about such matters, the decision to make one's homosexuality public loses its dramatic aspect. And that, of course, is a good thing. But such decisions do not have to be dramatic; we make them all the time, on a smaller scale. It is important for me to choose, for example, whether (and when) to publish this article. By publishing it I obviously invite public scrutiny (granted, "public" is sometimes a very small set); by keeping the article on my laptop, I choose to avoid such scrutiny, perhaps limiting it to those individuals I choose to show the draft to.

¹² It may follow from this that privacy is not just a right. In some cases there might be a duty to exercise it by concealing something you might have been inclined to reveal. Sometimes you ought to retain your privacy, as it were, even if you would rather not. This does not sound strange to me at all. See, for example, an argument to that effect by A. Allen, "An Ethical Duty to Protect One's Own Information Privacy?," *Alabama Law Review* 64 (2013): 845. I think we have similar results in other cases where we think that a right should be exercised, perhaps even as a matter of moral obligation (for example, the right to vote, at least under certain conditions).

Most people do not write articles, of course, but many like to sing in the shower, for example. They do it in the shower because they are not particularly proud of their voice, and would rather have fun without inviting criticism. The interest in question here is part of what it takes to ensure that we can engage in various innocuous activities without incurring unnecessary social costs. Furthermore, the different kinds of social costs involved, which are often very culture specific, would normally explain why people care about keeping some kinds of facts about themselves concealed more than they care about others. In a society largely hostile to homosexuality, gays would tend to have more reasons to conceal their sexual preferences than in a liberal and more tolerant society. Similarly, if you happen to be illiterate in, say, the United States, you would be much more inclined to keep that to yourself than someone who is illiterate in a country where the levels of literacy in the population are much lower.

Generally speaking, then, having a reasonable measure of control over ways in which we present ourselves to others is an important aspect of our well-being. It enables a whole range of choices about the constitution of one's social environment, without which life would be either too stifling or too alienated. People need to be able to determine, at least to some extent, the amount and the kind of personal distance they maintain with others. That is not because everyone has something to hide (though that may be true as well), but because everyone needs some choice about how close or how distant they want to be from different others. A reasonable amount of control over ways in which we present ourselves to others is necessary for the kind of choices we want to make about the social interactions we have with different people. It is part of what enables us to shape the social life we want to have.¹³

Let me add a few words here about the relations between persons and their things. The kind of control over ways in which you present yourself to others that I have in mind here would naturally extend to some of the things you have, to what is yours, not only to what and who you are. That is mainly so because things we have and care about are often

¹³ Suppose, for example, that we came to learn that there is an alien civilization, galaxies away, that is watching us closely; they cannot establish any contact with us, and never will, but they are watching. Some people might find it disturbing, others might not; either way, it would be very difficult to point to any interest of ours that might be affected here. If we cannot establish any contact with the aliens, then we cannot have an interest in how we present ourselves to them. How would our lives go less well, in any sense whatsoever, by knowing that the aliens are watching? I take it as a confirmation of my argument that it results in the conclusion that the aliens are not violating our right to privacy.

essential to ways in which we think about ourselves, about who and what we are. People's perceptions of themselves are often partly shaped by the things they have (and, presumably, by things they desperately want to have but lack). But of course, this does not extend to everything you might own or possess, even if you regard all of your possessions as an extension of yourself. If you have a beach house or a bank account in the Cayman Islands, the tax authorities should know about it, whether you like it or not. Naturally, it is difficult to draw the line; the legitimate public interest in our material possessions is extensive and varied. And people care about their things differently and sometimes irrationally. No doubt, a balancing of conflicting interests is often called for in such cases. However, it is reasonable to assume that some measure of control over ways in which you present to others some of the things you have, and what you do with them, is part of the interest to have control over ways in which you present yourself to others.¹⁴

III.

The interest in having a reasonable measure of control over how we present ourselves to others can only be secured if the environment shaping the normal flow of information is reasonably predictable. I can only make choices about what I reveal to others if I can predict the causal relations between my conduct and others' uptake. When you pick up the phone to call your friend, you assume that it is only your friend at the other end of the line, and that nobody else is listening. If you suspected otherwise, perhaps you would not have called. Either way, to make a choice, you need to have a pretty good sense of the relevant environment: you need to know who is listening to this or that means of communication, for example. In short, and I take it as fairly obvious, people cannot make choices about how and what they present to others without being able to predict the causal chain of information flow. What may be a bit less obvious is the qualifier "reasonable," and it operates at two levels. First, as we noted, nobody has a right to an absolute or a maximal level of control about what aspect of themselves they reveal to

¹⁴ See, for example, Gavison, "Privacy and the Limits of Law," p. 431.

others. From the start, the interest in question here is one of a reasonable amount of control, which is pretty rough and vague, of course.

Second, there is also some reasonableness qualifier for the predictability of the environment. Things do not always happen the way you predict, and, up to a point, that is fine. Suppose, for example, that you want to have an intimate conversation with your friend; you go out to a secluded bench in the park, assuming that nobody is likely to overhear your conversation. Well, as (bad) luck would have it, your obnoxious colleague happens to be having his lunch on a nearby bench that you do not see, and he overhears your conversation. You cannot complain that your right to privacy, or to anything, has been violated. Perhaps if it turns out that the colleague has been stalking you, or that he has been lingering surreptitiously on the nearby bench for too long, then your right to privacy may have been violated.¹⁵

There may be a type-token distinction that is relevant here. An interest in the predictability of the environment relates to types of situations and information flow, not necessarily to each particular token of a type. Even within the normal environment, abnormalities exist, and that itself is generally predictable enough. Secluded benches in the park are usually safe enough not to be overheard, but you cannot assume that each token of the type matches the general expectation. It is part of ordinary life that there are small (or sometimes grave) risks we must assume in relying on generalizations that do not always hold in each particular instance of a type. Reasonable predictability includes the predictability of anomalies and unpredictable deviations from normality.

Another important caveat is this: a legitimate interest in reasonable predictability of normal patterns of information flow does not entail that a changing environment is necessarily problematic. Technology changes all the time, these days more rapidly than ever, and some of those technological changes bring about changes in the normal flow of information that people can reasonably predict. In itself, this is not problematic. It becomes a problem only when people are not aware of the change and get caught by surprise. Many of the practical problems about privacy we face these days are due to the

¹⁵ I actually do not think so, but I have come to learn that people's intuitions about this last point vary considerably: some people think that if the colleague lingers for a while, eavesdropping on your conversation, he violates your right to privacy; others think that the colleague has behaved badly but not violated any right of yours. Since the intuitions about this variant of the case are not so clear, I do not want to make too much of it.

uncertainty about the environment of information flow that is created, and constantly modified, by Internet services and mobile phone technology. A huge amount of information flows through these mediums, yet most people are ignorant or confused about who gets to know the information they reveal. But again, it is not the changing environment that is problematic but our difficulties in following the changes and understanding their practical implications.¹⁶

IV.

The right to privacy, I argued, is there to protect our interest in having a reasonable measure of control over ways in which we present ourselves to others. The protection of this interest requires the securing of a reasonably predictable environment about the flow of information and the likely consequences of our conduct in the relevant types of contexts. So what would count as a violation of a right to privacy? The answer is that your right to privacy is violated when somebody manipulates, without adequate justification, the relevant environment in ways that significantly diminish your ability to control what aspects of yourself you reveal to others. Two main types of cases come to mind. One typical case is this: you assume, and have good reason to assume, that by doing X you reveal Y to A; that is how things normally work. So you can choose, on the basis of this assumption, whether to X or not. Now somebody would clearly violate your right if he were to manipulate the relevant environment, without your knowledge, making it the case that by doing X you actually reveal Y not only to A but also to B et al., or that you actually reveal not just Y but also W to A (and/or to B et al.), which means that you no longer have the right kind of control over what aspects of yourself you reveal to others; your choice is undermined in an obvious way.

So this is one typical case. But there is another type of violation: suppose that the government kindly informs us that from now on it plans to listen to every phone conversation we have and keep a digital recording of them on a giant computer. The

¹⁶ Up to a point, of course. Perhaps some years ago people were caught by surprise when learning that their location is traceable if they use a cell phone. Nowadays people should know this; if you pay any attention at all, you know that the location of any cell phone is very easily traceable at all times. If you do not want to be located, just turn your phone off or leave it at home. I do not see that as a reason for concern.

government does not want to surprise us, so it duly informs the public that this is how things are going to work from now on. There is a clear sense that, due notice notwithstanding, such a government policy would amount to an unacceptable infringement of our right to privacy. Why is that? Evidently because it diminishes the space in which we can control what we reveal about ourselves to an unacceptably small amount in an important domain of human activity. It just excludes too much from the ordinary means of communication available to us that we can control to a reasonable degree. You may wonder what exactly makes this case seem like an unreasonable restriction of the environment in which we can exercise control over aspects of ourselves that we reveal to others. Presumably, it is the combination of two main factors: the relative importance of the type of activity in question, and the drastic way in which the policy restricts people's ability to have any control in that domain over ways in which they can present themselves to others. Using telephones has become an absolutely essential commodity that people rely on in their everyday activities. Given the major roles that such means of communication play in our ordinary lives, losing control over information we disclose to others whenever we use a telephone is too drastic a restriction of our ability to control what we reveal about ourselves, how we do it, and to whom.

To sum up: two main ways exist in which A can violate B's right to privacy. Both involve A's manipulation of B's environment, without adequate justification, by diminishing B's ability to control what aspects of herself she reveals to others. In one type of case, the manipulation of the environment consists in making it the case that B entertains false beliefs about the choices she faces. (Whether the action has to be deliberately manipulative in some sense remains to be seen; I will get to that shortly.) In the second type of violation, the manipulation of the environment consists in limiting B's scope of choice by significantly reducing the options B can choose from. The first type of violation, by its nature, involves a certain element of deceit; it requires A to make it the case that B entertains false beliefs. The second type of violation is typically on the surface; B knows that her options are limited, so no deceit is involved. This does not necessarily make the violation of the right less objectionable; as the example discussed above suggests, violations of the second type can be rather severe. And, of course, particular cases can involve both types of violation, to various degrees.

Actual cases tend to be more complicated. Suppose, for example, that the government does not listen to all our phone conversations, only to a random and tiny sample of them. And it does not keep a record of the content of our phone conversations on a giant computer, only the (so-called) metadata.¹⁷ This is what we are told is actually happening in the United States these days. Is it a violation of our right to privacy? People have very different responses: some think that it obviously is; others shrug their shoulders, not so sure why they should care. Two main reasons exist for these differing attitudes. First, remember that the underlying interest protected by the right to privacy is one of having a reasonable measure of control over ways in which we present ourselves to others. Reasonableness is a rough and vague criterion; people may have different views and different attitudes about how much control they want to have with respect to different aspects of their lives.

Second, and more importantly, in many cases of putative violations of privacy, there is an additional concern about the possibility of abuse of the information obtained. Many people are concerned about information obtained by the government because they do not trust the government; they fear that governments will abuse information they possess, putting people in jeopardy of unwarranted governmental scrutiny or even persecution. Others are equally worried about information gathered by private corporations. Either way, the concern here is not directly about privacy; it is a concern about abuse of power that might follow from the fact that some particular kind of entity knows too much about you. The concern is that the entity in question may *do things* that it should not be doing with the information it has, in ways that would be detrimental to your interests. Think about your credit card information: there is nothing wrong with somebody having it—after all, we hand it out to strangers all the time—as long as they only charge you for what you owe. You do not want your credit card information in the wrong hands only because you fear that it will be misused.

The concern about possible abuse of the information people might have about us pervades many of the privacy protections we have in law.¹⁸ The stringent protection of

¹⁷ Namely, the data about numbers dialed, their time and location, and so on—the kind of data that cell phone providers have anyway.

¹⁸ Following the disclosures of Edward Snowden, the concern about government surveillance and the many possibilities of its abuse has gained a lot of attention. It turns out that the laws regulating government

medical privacy, for example, is clearly motivated by the fear of abuse: we fear that employers, insurance companies, credit agencies, and others may rely on such information to our detriment. If you know that I have cancer, you might not give me a job or, if I already work for you, you may be reluctant to promote me. Most of these concerns, however, are not directly about matters of privacy; the interest they protect is an additional concern that is specific to the kinds of abuse of information that particular entities are suspected of.

To see that the fear of abuse is additional and somewhat tangential to concerns about privacy, consider this example: Mary has a painting she keeps hidden in her safe. At some point she finds out that Bob the neighbor, using some fancy X-ray device, manages to see the painting in the safe. Now compare these two cases: Mary-(1) keeps the painting in the safe because it is a nude painting of her husband, and not a very flattering one at that, so she would rather keep it from prying eyes. In the case of Mary-(2), the painting is a genuine Picasso that is worth a fortune. Granted, in both cases Bob the neighbor violates Mary's right to privacy. In both cases he manipulates the environment in ways that undermine Mary's ability to control how she presents herself or, actually, what is hers to others. In the second case, however, Mary-(2) clearly has an additional worry; the more people know about the Picasso she keeps at home, the more likely it is that it may be stolen. Perhaps Bob the neighbor is a shady character who might steal the Picasso or give the information to others who might steal it. Clearly this is an additional concern, over and above the concern about privacy; it is about protecting her property. Bob the neighbor violates Mary's right to privacy regardless of what is in the safe. The fact that in one case it is a Picasso, and thus vulnerable to theft, is an additional concern, tangential to the issue of privacy per se. I think that the case generalizes: the concern about the possibility of abuse that often accompanies concerns about privacy is like the Mary-(2) case.

One might think that I have just confused the reasons for a particular concern with privacy with the underlying interest that the right is there to protect. One should think that the only difference between Mary-(1) and Mary-(2) is that they have different reasons for

surveillance, at least in the United States, leave a lot to be desired. See, for example, N. Richards, "The Dangers of Surveillance," *Harvard Law Review* 126 (2013): 1934.

keeping the painting in the safe. That is quite right. Reasons for choosing to keep something concealed from others do not have any direct bearing on the question of what the legitimate interest is that the right to privacy is there to protect, or on what counts as a violation of this right. Bob the neighbor would have violated Mary's right to privacy regardless of her reasons for keeping the painting in the safe or, in fact, even if she kept it there for no reason at all. As far as privacy is concerned, however, the concern about abuse and protection of property is tangential to the main underlying interest here, which is the interest in having control over concealment or disclosure. What Bob the neighbor does that is wrong, even if he is otherwise an honest fellow, is invading Mary's privacy—that is, by manipulating her environment in ways that undermine her ability to control whether she shows her painting and to whom.

The idea that a violation of a right to privacy consists in the manipulation of the environment in ways that diminish one's ability to control how one presents oneself to others may suggest something too strong; it might suggest that only deliberate actions can violate one's right to privacy.¹⁹ But that cannot be true. Surely there are cases in which one violates another's right to privacy inadvertently, by negligence or, sometimes perhaps, by an innocent mistake. Suppose, for example, that Bob the neighbor is not after Mary's safe; in fact, he has no idea that there is a safe hidden there. He just plays with his fancy new X-ray machine, aiming it at what he takes to be the bare wall in Mary's house. (Or assume, if you like, that he does not even know that he is aiming it at Mary's house, or at anything in particular.) It is not the nicest thing to do, you might think, and perhaps it is even careless and negligent, but it is not a deliberate attempt to find out anything, either. As it happens, he sees the safe and what is in it. I would be inclined to think that Bob violated Mary's right to privacy, inadvertently. Whether some level of negligence, or some misconduct, is a necessary condition for any rights violation, including privacy, I am not sure. It is quite obvious, however, that if Bob the neighbor is invited over for tea at Mary's house and gets to see what is in her safe just because she left it open, he has not violated any right of hers. And that is so because nothing he did manipulated Mary's environment in the relevant sense.

¹⁹ Perhaps the word *manipulation* implies that the relevant act has to be deliberately manipulative; I am not sure about that, but in any case, we should not derive any moral conclusions from this.

V.

My daughter told me that one of her Facebook friends, an elementary school teacher, posted on her Facebook page a detailed story about one of her pupils, full of rather disturbing facts about the pupil's personality disorders and psychological problems. Apparently the teacher sought her friends' advice about how to deal with her difficult pupil. The pupil was not identified, however. She gave no name and no other identifying features. Some of the Facebook friends who were party to this conversation were appalled by the teacher's conduct; they thought that it seriously violated the pupil's right to privacy. I think we would tend to agree that the teacher misbehaved; she clearly violated the student's trust. But has she violated her student's privacy? Can you violate someone's privacy by revealing information about them without revealing their identity? If the interest protected by the right to privacy is the interest in having a reasonable measure of control over how you present yourself to others, then the answer would seem to be *no*. If we do not know, and cannot possibly find out, who the person talked about is, then obviously that person's ability to control how he presents himself to others is not compromised in any way. Is the case I describe here a counterexample? I doubt it. I think that the concern about protection of privacy here is the concern about the possibility of identification; even if it is unlikely that anyone will find out who the pupil talked about is, the possibility of identification is not entirely ruled out, and given the public and enduring nature of the medium, the risk is not insignificant. If the pupil's identity is somehow revealed at any point, his ability to control what aspects of himself he reveals to others is seriously compromised and probably for a long time.

Perhaps other examples might seem more problematic: suppose somebody can use a fancy distance-operated camera that will take your photo nude from the neck down, without seeing who you are and without any possibility of identifying you, and suppose those photos are looked at by him and others. Is this not a violation of your privacy? I must say that I do not quite see how it would be. If your identity is absolutely not known, it is not your privacy that is being violated here, though some other right might be. Your body is being used by someone, if only for watching, without your permission. That is

wrong, and it may be a violation of your right, but it is not a violation of your privacy.²⁰ I realize that some readers might resist this conclusion; they would think that people's interest in having control over ways they present themselves to others extends to cases in which it is not known, either de re or de dicto, whose self is presented in a certain way. If it is my body that is being used here, perhaps it is enough that I know it. Notice, however, that I am not denying the fact that a right has been violated here. I just doubt that it is a right to privacy that is in question. Using something that belongs to me, including my body (or my book manuscript or whatever), without my consent, is wrong and can certainly violate my rights; we do not need to appeal to privacy to explain what is wrong about it.

The incredible ease with which people can post things on the Internet creates another problem that, in certain respects, goes beyond the issue of privacy, I think: with the very widespread availability of digital cameras, social networks, and all that, we all face the possibility of suddenly becoming an object of public ridicule or entertainment. You can slip on a banana peel in the middle of the street, and if somebody thinks it is funny and takes your picture, you might find it on the Internet in minutes, for millions to view. In addition to some concerns about privacy that I will mention in a moment, what is particularly troubling about this, I think, is the fact that people are used, against their will, as objects of public entertainment. Using people as means for the entertainment of others, without their consent, is often wrong, and sometimes seriously wrong, whether it also compromises their privacy or not.²¹

However, another interesting question in the vicinity here pertains directly to privacy, about the control we may assume about ways in which we present ourselves to

²⁰ An actual example of something similar came up with the full-body scans the Transportation Security Administration started using for security screening at airports, effectively allowing the TSA agents to see through people's clothes, almost as if naked. Many people found it very disturbing and in violation of their right to privacy. Perhaps it was (the machines, we are told, have been slightly modified since, blurring the image to some extent); but in this case, unlike in the example I mention in the text, there is some level of individuation or identification, at least de re; initially, the TSA agents could see who the person they were screening was, even if they were very unlikely to have any de dicto individuation. I find it interesting that many people were reassured by the modification introduced later by the TSA in which the screening agents can no longer see or know anything about the person they screen. If that is true, I do not see how the practice violates our right to privacy.

²¹ I would not want to claim that making fun of someone in public, without their consent, is always wrong. Comedians and late-night talk show hosts do that all the time, and mostly it is not objectionable. But they usually make fun of people who deliberately expose themselves to public attention, like politicians and celebrities, and thus they can hardly complain about becoming objects of public entertainment.

others in various kinds of public spaces. Suppose that I just walk through the streets of downtown Los Angeles, going about my usual business, and later I find a photo of myself taken on the street posted on the Internet, available for millions to see. There is nothing special about this photo, let us assume, just an image of me walking on Main Street. We seem to have conflicting intuitions here. On the one hand, one would think that by deciding to walk on a busy street I made the decision to reveal myself to those who happen to walk nearby, but not to the entire world. Others might think that this is a distinction without a difference: once you expose some aspect of yourself to an indefinite number of random others, the size of the group cannot matter. I am not sure what to say about this, though my inclination is to agree with the latter view. But then, would it follow that we would have no reason to be concerned about a world in which every public space is covered by CCTV cameras and potentially viewable by anyone? My intuition is that the privacy concern here is not mainly about public exposure per se; after all, we are assuming that I was in a public space. The concern is about attention and record keeping. When you take a walk on Main Street, you are perfectly aware of the fact that you have no control over who happens to be there and thus is able to see you; but you also rely on the fact that peoples' attention and memory are very limited. You do not expect to have every tiny movement of yours noticed and recorded by others. In other words, consent to public exposure is not unlimited. Voluntarily giving indefinite others the opportunity to see you is not an invitation, or even tacit consent, to gaze at you, and certainly not a consent to record your doings, digitally or otherwise. In other words, one could make a plausible case for a reasonable expectation of having some possibility of concealment even in ordinary public spaces, like walking on Main Street. It is very limited and rather minimal concealment, for sure, but it may be enough to explain why a world of CCTV cameras on every street corner would violate our right to privacy.²²

VI.

Before I conclude this article, let me answer a potential objection or two. It might be thought that my account of the right to privacy is limited to what people sometimes call

²² It is, of course, a separate question of who gets to monitor the CCTV and, if it is the government or, say, a private corporation, then, as discussed above, additional concerns about potential abuse might come into the picture as well.

informational privacy, and that it leaves out other privacy rights—in particular, the right *to do* certain things in private, and perhaps the right not to have to disclose one's reasons for doing them. Let me answer these points in reverse order, starting with the problem of disclosure of reasons. It is certainly true that in many cases, perhaps most cases, actually, even if your action is public, requiring you to disclose your reasons for doing it (or for not doing something) is wrong and, in some cases, a violation of your right. That is true about personal interactions as well as government regulations. It is wrong to approach someone on the street and ask them to give their reason for being there, or perhaps even to ask my students why they decided to take my seminar. If I want to remodel my bathroom and replace the tiles, I need to submit detailed plans to the city and seek to obtain a permit. Perhaps this is as it should be; but it would certainly be wrong if the city authorities also required me to provide my reasons for wanting to replace the tiles. It is none of their business, we should think. Just as it is none of your business to know why some random person on the street decided to be there. Is this a matter of protecting people's privacy?

My account would suggest that sometimes it is, and sometimes it is not. If the underlying interest protected by the right to privacy is the interest in having a reasonable measure of control over ways you present yourself to others, disclosing your reasons for doing or not doing something would often fall within the scope of this interest. One can think of countless examples where a requirement to disclose your reasons for doing something (for example, why do you want to replace the tiles in your bathroom?) would limit the choices you have about what aspect of yourself you reveal to others, without adequate justification. But it is worth keeping in mind that there are many other reasons to regard a request for reasons as morally misguided—besides concerns about privacy, that is. Generally speaking, asking someone to give you reasons for their action must be based on reasons.²³ If you order me to do something, I have a reason to ask you for your reasons. But if you happen to be my friend and ask me for a little favor, it might be rather inappropriate to ask you for a reason. It might just show that I do not quite understand

²³ Perhaps an argument can be made that respect for a person's dignity requires a recognition that people act for reasons they see fit and, thus, asking them to provide their reasons, without adequate justification, is disrespectful of their dignity or personhood. Needless to say, developing such an argument is beyond the scope of this article.

what friendship is, or that I do not really regard you as my friend. In other words, reasons not to ask or to require others to give reasons for their actions or choices are varied. Some of them concern the interests in privacy and others concern very different issues.²⁴

More importantly, however, the question arises of whether the right to privacy is also a right to do certain things as long as they are done in private. Does the right to privacy defend certain types of conduct? If my argument in this article is correct, then the answer is largely negative. Privacy is not there to protect conduct or actions. Our concern with privacy is not about doing things. Admittedly, the idea that the right to privacy, in one central sense of it, is the right to engage in certain types of conduct as long as the action is done in private has a long history; it is often associated with the protection of intimacy and sexual conduct, which is also why the right to privacy, in this aspect of it, became vulnerable to criticism by feminists and other critical theorists. They have long argued that privacy is the enemy of equality, putting women and other vulnerable segments of society at the mercy of the powerful, who can shield patriarchal conduct behind the veil of privacy.²⁵

So let me try to explain why privacy is not there to protect conduct or actions. First and foremost, because there is hardly anything that is *morally impermissible* or wrong to do in public but somehow permissible to do in private. If it is wrong for me to yell at my daughter in public, it is also wrong to yell at her in private. Admittedly, some things that are bad to do might be even worse if done in public. Publicity often adds a further element of humiliation or embarrassment that might be avoided in private. However, it is very rarely the case, if ever, that the moral permissibility of an act depends on it being done in private. If there is something you should not do if people know about it, doing it in private would not make it kosher.²⁶

²⁴ Here is another example: some voting procedures are conducted by a secret ballot, others are not; either way, we normally do not expect people to disclose the reasons for voting the way they did. I suspect that the protection of nondisclosure of reasons for voting often has nothing to do with concerns about privacy; it derives from the nature of the public choice in question and the reasons for having a voting procedure in place. Voting usually counts choices, not reasons.

²⁵ See, for example, C. McKinnon, *Toward a Feminist Theory of the State* (Cambridge: Cambridge University Press, 1989), p. 191; S. Moller Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989), p. 174. But cf. R. Gavison, "Feminism and the Public/Private Distinction," *Stanford Law Review*.

²⁶ I am not denying that the very nature of an act may depend on it being done in public; I cannot humiliate or praise someone, for example, by just talking to myself in private. But I do not see how this would undermine the point about permissibility that I make in the text.

Now, you might think that the issue is not about moral permissibility but perhaps about propriety and civilized behavior; certain forms of behavior are morally permissible, yet doing them in public is just improper and socially unacceptable. It is certainly fine to defecate in your bathroom but not on the street; it is fine for you to have sex, of course, but not in the restaurant; it is fine to tell your spouse that a recently deceased colleague was really quite stupid and insufferably arrogant, but it would not be so civilized to express this thought in a public eulogy. But these kinds of examples, where we think that certain forms of conduct would be inappropriate in public though unobjectionable in private, are not about protection of privacy. On the contrary: these are cases in which it is the *public* zone that is in need of some protection, not the private. People have some legitimate expectations about what they encounter in public spaces of various kinds. It is the nature of our public spaces and communal interactions that is at stake here, not privacy.²⁷

The idea that the right to privacy does not protect forms of conduct would seem to run in the face of US constitutional doctrine. The constitutional right to privacy, famously introduced into American law by the decision in *Griswold v. Connecticut*,²⁸ is precisely about the right to do certain things in private. Or, to be more precise, it is about the right to be free from legal interference in doing some things in private. *Griswold* concerned the right to use contraceptives. The state of Connecticut sought to make contraceptive use illegal; it prohibited the use of “any drug, medicinal article or instrument for the purpose of preventing conception.” The Supreme Court decided that the state law violated a constitutional right to privacy. But as many commentators have long pointed out, this was a noble decision on the wrong grounds. No doubt there are some concerns about privacy in the *Griswold* case, but the court’s rationale that the right to use contraceptives derives

²⁷ Quite clearly, the various legal prohibitions on public nudity and similar restrictions on the kind of things people may do at home but not in public are justified (when they are) by the protection of public spaces, not by the protection of privacy. Laws in these areas operate like zoning regulations, creating different public spaces for different types of activities.

²⁸ 381 US 479, 1965. The right to privacy established in the *Griswold* line of cases runs in parallel to the long line of cases concerning Fourth Amendment protections. A discussion of Fourth Amendment jurisprudence would take us far beyond the scope of this article; some of the issues there concern the right to privacy, no doubt, but they are closely entangled with protections of private property and matters of law enforcement.

from the right to privacy seems patently wrong.²⁹ And again, as many critics over the years have pointed out, the same holds about the rationale of *Roe v. Wade*, where the court extended the *Griswold* privacy right to include women's right to have an abortion.

Many areas in life, and the ways we choose to live it, should be free from legal interference; that does not make them an issue of privacy. People should have a right to use contraceptives because it is an exercise of their right to personal autonomy. People have a right to decide whether and when to have children, just as they have many other rights about decisions and choices that shape the kind of life they want to lead. Surely we agree with the *Griswold* decision that it is not the business of the law to regulate such matters. But that does not make it an issue of privacy. It is not the business of the law to determine what career I should chose, whom I should marry, or what hobbies I should cultivate. It is not the business of the law to decide where I should live, how I spend my vacation or with whom, what books I should read, and so on and so forth. All of these issues, and countless others, should be left for people to decide for themselves, for obvious reasons. But none of these choices and decisions, essential for any reasonable exercise of personal autonomy, is necessarily related to concerns about privacy. If you equate the right to privacy with the right to personal autonomy, you just admit that no particular interest in privacy exists that is worthy of protection, distinct from the much broader and, admittedly, more important right to personal autonomy. For reasons that I have tried to articulate above, I think that this would be a mistake.

VII.

A philosophical account of the right to privacy should explain a few things. It should explain what the distinct interest is that the right is there to protect, what it takes to secure it, and what would count as a violation of the right. I argued that the interest in question is our interest in having a reasonable measure of control over ways in which we present ourselves to others. I argued that in order to secure this kind of interest we need to have a

²⁹ Arguably, there may have been some concerns about privacy with relation to the enforcement of the Connecticut law in question; perhaps the justices thought that the law would be impossible to enforce without serious violations of privacy. But this is clearly not the main moral and legal issue here. Even if the state managed to make contraceptives unavailable without any intrusions or violations of privacy, the law should have been struck down.

reasonably predictable environment about the flow of information. And then it follows that a violation of the right to privacy consists in the manipulation of the environment in ways that unjustifiably diminish one's ability to control how one presents oneself to others.

An account of the right to privacy should also explain, however, what makes it the case that people have such wildly differing views about privacy and about what counts as a violation of the right. I hope that the account offered here gives some answers to those questions as well. For one thing, we should not confuse privacy with autonomy. Secondly, remember that the interest that grounds the right to privacy is rough and vague to begin with because it is an interest in a reasonable amount of control, and people may have reasonable disagreements about what reasonableness requires. The same goes for the reasonableness qualifier concerning the predictability of the environment and what would count as reasonable risks that people should be expected to assume in their daily lives. The right to privacy is just not the kind of right that can be expected to have sharp boundaries. Finally, I argued that many of the practical and legal concerns we face about matters of privacy are driven by the fear of abuse of power, which is an additional concern and one that is specific to the particular kind of entity suspected of potential misuse of information.