The moral content of the concept of privacy

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I'm just an average man, with an average life

I work from nine to five. Hey hell, I pay the price

All I want is to be left alone, in my average home, but

But why do I always feel like I'm in the twilight zone, and

I always feel like somebody's watching me

And I have no privacy

I always feel like somebody's watching me

Tell me is it just a dream?

Rockwell, 1984

Cover image: La Pedrera, Barcelona

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Summary

In this thesis I investigate the moral contents of the concept of privacy, moral contents interpreted broadly as those elements that directly concern value or a moral obligation or right, as well as those that concern the preconditions for a moral framework, and the concept of privacy understood, wherever it cannot be understood in the abstract, as it is used (in all its variety) in contemporary liberal societies.

I adopt the view that the concept of privacy is better understood in terms of family resemblance than in terms of necessary and sufficient conditions, as well as that privacy's value is instrumental rather than intrinsic. This also leads me to the view that the moral content of privacy does not include moral obligations or rights. The moral content of privacy, I argue, is to be found in the existing moral frameworks that presume it. I choose to investigate two particular moral frameworks, those of Immanuel Kant and John Stuart Mill, and link their thought with the different existing types of privacy. For both frameworks, I argue, the most fruitful path is that of investigating the moral legitimation of state authority, and Kant's and Mill's positions can be seen as converging on at least one point, namely that they are able to show that certain specific privacy violations are wrong, not because they are themselves wrong, but because the violator is the state operating outside of its moral authority. In chapter four, I show that this applies to at least several existing privacy violations. I consider what this means for the legal protection of privacy in general, and make one specific proposal for a better protection of privacy in respect to these new insights.

Table of contents

0 Introduction 5
1 Approaching the concept of privacy 8
1.1 Privacy debates of the 20th century
1.2 Solove's alternative approach to privacy 9
2 Distinguishing the moral contents of privacy 12
2.1 Value, moral obligations and rights
2.2 Elements of privacy presumed by existing moral frameworks 14
Virtue ethics and historical changes in the concept of privacy 17
A stipulative mapping of privacy 18
The moral frameworks 20
Kantian ethics
Millian ethics 23
2.3 Preliminary conclusions 27
3 The applicability of the moral frameworks 29
3.1 The consequences of privacy violations
In Kant
In Mill 31
3.2 The legitimacy of state action 32
In Kant
In Mill 35
3.3 Aggregating Kant and Mill 37
4 Conclusions for existing legal contexts 39

5 Conclusions 43
6 References 45

0 Introduction

In recent years it has come to light that the monitoring of our everyday lives is taking place on an unthinkably massive scale. Not only do commercial organizations build accurate data profiles of their customers and potential customers to provide “targeted” advertisements to increase service and profit, government agencies employ a wide range of technologies for purposes like the improvement of public health and the collection of financial records for taxation purposes, but also the minimization of the risk of terrorist attacks. Anyone not excessively suspicious leaves enough material for businesses and governments to compose a relatively accurate profile of that person, including present and past locations, bodily characteristics, consumer behaviour, political preference, sexual preference, et cetera. Social networks can now know a person is gay before he does. Increasingly, these practices of data tracking, monitoring, camera surveillance, radio frequency identification, et cetera have been classified as problematic, and specifically as concerning *privacy*.

Whereas among some segments of the populations of the countries in which this has taken place, these revelations have led to outrage, taking the form of protests, heavy discussions and a significant growth of counter-movements, in others they have merely caused indifference. Some people ask why monitoring is a problem at all. After all, it is said, they have nothing to hide. But even without employing this “nothing to hide argument,” not everyone shares the feeling of discomfort that the knowledge of these practices gives others. Indifference, especially in these cases, is a curious attitude, for it does not take a firm position for or against a practice. It displays a considerable degree of acceptance towards the status quo or a lack of willingness to change it, but without a thorough justification. The underlying reasons and causes, especially when the scope is as wide as the entire Western world, are very hard to grasp.

There thus is not one stance of public opinion on the matter. But those who have turned to law in the hope to solve privacy problems have run into various problems as well. Since Samuel Warren and Louis Brandeis’s influential article *The Right to Privacy* in 1890, a debate has taken shape on questions like whether one right to privacy should protect all instances of privacy (as Warren and Brandeis argued), multiple rights together should

cover all instances of privacy (as many European constitutions currently do), or whether existing laws already protect all relevant instances of privacy (as, some have argued, the US Constitution does). Some ask why privacy should be protected at all. There is little agreement on what is the best way to approach the problems at hand, mostly because each position can show how other positions have overlooked aspects of privacy. Not one approach seems to have managed to capture all the problems generally conceived to be privacy problems at once.

Because of the ambiguous position of public opinion on the subject of privacy and the unclarity as to how the law should approach it, an investigation into the specifically moral nature of the concept is worthwhile. Privacy is often understood as either a purely legal concept, or as an emotion or need, present or absent in human beings (and how this is embedded in social systems). Philosophical contributions to the debate have often followed these discussions of sociology and legal theory. Several theorists have described privacy's value, and provided moral arguments for a legal right to privacy. But moral content is not only value. Moral obligations and rights also fall under the heading of moral content, as well as those of its elements that are presumed by existing moral frameworks. No such investigations have yet been done, and an account of the moral content of privacy in this broader sense is lacking.

This is remarkable. If a defence of privacy on moral grounds would be possible, this would make the case for further-reaching or possibly *absolute* privacy protections in law stronger. It is precisely because privacy defenders have not yet managed to convince critics that there are strong reasons for protecting it that in the balancing of privacy and security in law and policy, it is usually privacy that yields first. If a defence of privacy on moral grounds would not be possible, there would be a strong case for a re-evaluation (or even abolition) of the current privacy laws of many jurisdictions, possibly involving more liberty and less privacy. There is thus much to be gained from an investigation into the distinctive moral elements of privacy

An inquiry into the possibility of a fully developed moral defence of privacy is not in my capacity here. What does lie within my capacity is to investigate what the moral contents of the concept of privacy are, moral contents interpreted broadly as those elements that directly concern value or a moral obligation or right, as well as those that concern the

preconditions for a moral framework, and the concept of privacy understood, wherever it cannot be understood in the abstract, as it is used (in all its variety) in contemporary liberal societies. Having the moral contents of the concept of privacy mapped out is a vital step in any attempt to provide a moral defence of privacy, as well as for the reverse claim that such a defence is impossible.

I restrict myself (again, wherever the concept of privacy cannot be understood in the abstract) to liberal societies because it is predominantly in these societies where privacy problems occur. I suspect this is because privacy is often sacrificed for safety, and that in less liberal or illiberal societies where people are legitimately concerned about their safety, it is understandable that privacy concerns tend to weigh less. I restrict myself to a *contemporary* concept of privacy, since it is to recent debates on the changing definition and value of the concept of privacy that I think I can make more of a contribution.

I will thus ask the question: *what are the moral contents of the concept of privacy, and what do these contents tell us about the protection of privacy in law?* In the first chapter, I will discuss how to conceptualize privacy. In the second and third, I will then attempt to discover the moral content of the concept, and how this relates to existing types of privacy. I will then arrive at a preliminary conclusion, which I apply to existing legal contexts in chapter four.

1 Approaching the concept of privacy

1.1 Privacy debates of the 20th century

Privacy today is much more than just the state of being (in the) private, the property one would suspect the term to refer to given its form (compare: accuracy; being accurate, affluency; being affluent, et cetera). Its incredibly broad usage has caused trouble for many authors from different academic disciplines. Since Warren and Brandeis's *The Right to Privacy* in 1890, but with a particular growth since the 1950's, legal-philosophical debates have taken shape on all possible aspects of the question how to conceptualize privacy.[1] There have been several critical accounts of the notion of privacy or its value, from feminist perspectives but also from philosophical points of view.[2] Still, a majority of authors has attempted to defend privacy. Charles Fried, as one example, maintains that "privacy is closely implicated in the notions of respect for others and oneself, as well as love, friendship and trust."[3] Jeffrey Reiman holds the related view that privacy functions "as a means of protecting freedom, moral personality, and a rich and critical inner life."[4] Edward Bloustein wrote that privacy is an interest of human personality, independence, dignity and integrity.[5] Possibly even more authors have attempted to define privacy in terms of control.[6] Alan Westin holds that privacy is a claim of individuals, groups, or institutions to determine for themselves when, how and to what extent information about them is communicated to others.[7] Similar views are held by Gavison, Allen, Gross and Moore.[8]

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[1] A comprehensive overview of these debates is given by Judith DeCew. Judith DeCew, "Privacy," in *The Stanford Encyclopedia of Philosophy* (*Fall 2013 Edition*), ed. Edward N. Zalta, URL = <http://plato.stanford.edu/archives/fall2013/entries/privacy/> (visited 07-17-2014). See also Alexandra Rengel, *Privacy in the 21st Century* (The Hague: Martinus Nijhoff, 2013).

[2] Catharine MacKinnon, *Towards a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989). Judith Jarvis Thompson, "The Right to Privacy," *Philosophy & Public Affairs*, Vol. 4, No, 4 (1975).

[3] Charles Fried, "Privacy," *Yale Law Journal*, Vol. 77, No. 3 (1968), 482. A similar view is held by James Rachels. James Rachels, "Why Privacy is Important," *Philosophy & Public Affairs*, Vol. 4, No. 4 (1975), 323-333.

[4] Jeffrey Reiman, "Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future," *Santa Clara High Technology Law Journal*, Vol. 11, No. 1 (1995), 42.

[5] Edward Bloustein, "Privacy as an aspect of human dignity: An Answer to Dean Prosser," in *Philosophical Dimensions of Privacy: An Anthology*, ed. Ferdinand David Schoeman (Cambridge: Cambridge University Press, 2007).

[6] W. A. Parent, "Privacy, Morality, and the Law," *Philosophy & Public Affairs*, Vol. 12, No. 4 (1983), 269-288.

[7] DeCew, "Privacy." Alan F. Westin, *Privacy And Freedom* (London: The Bodley Head, 1970).

These authors represent some corners of the much larger debate on the value and role of privacy, in general or in specific societies.[9] However, even where the scope and aims are similar, authors often clash over the precise nature and definition of the concept.

1.2 Solove's alternative approach to privacy

An influential reply to the debates concerning the definition of privacy was given in 2002, in an article called *Conceptualizing Privacy* by Daniel J. Solove. Contrary to critics, Solove maintains that the concept of privacy does serve a useful function, but that if we want to understand it, we need to approach it differently. Solove recognizes the need for a better understanding of privacy in concrete legal and policy debates and provides his answer first and foremost aimed at those debates, but his article is still sufficiently general to apply it to much broader discussions of privacy.

His first claim is that the debate so far has tried to understand privacy by looking for necessary and sufficient conditions, or essential or core characteristics. He maps the debate, categorizing definitions of privacy under six headings: (1) the right to be let alone; (2) limited access to the self; (3) secrecy; (4) control of personal information; (5) personhood; and (6) intimacy.[10] The definitions that have arisen from this debate are often too narrow or too broad, he says, and have by and large been unable to transcend their common difficulties. I take Solove to be correct in the separate criticisms of these definitions of privacy, although I should clarify why this does not weaken my argument. I hold that in case one or more of the criticisms of the six definitions of privacy would be successfully refuted, the necessity for a different approach would be taken away, but nothing would be taken away from the alternative Solove offers, which would still stand in its own right. In the following, I hope to demonstrate its applicability in a theoretical investigation into the concept of privacy.

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[8] Ruth Gavison, "Privacy and the Limits of Law," *Yale Law Journal*, Vol. 89, No. 3 (1980), 421-471. Anita Allen, "Coercing Privacy," *William and Mary Law Review*, Vol. 40, No. 3 (1999), 723-757. Hyman Gross, "The Concept of Privacy," *New York University Law Review*, Vol. 42, No. 1 (1967), 35-36. Adam D. Moore, "Privacy: Its Meaning and Value," *American Philosophical Quarterly*, Vol. 40 (2003), 365-378.

[9] Many authors relate privacy directly to constitutional law (this is most common for authors from the United States). Thomson, "The Right to Privacy." Grant B. Mindle, "Liberalism, Privacy, and Autonomy," *The Journal of Politics*, Vol. 51, No. 3 (1989), 575-598. W.A. Parent, "Privacy, Morality, and the Law."

[10] Daniel J. Solove, "Conceptualizing Privacy," *California Law Review*, Vol. 90, No, 4 (2002), 1094.

According to Solove, privacy should be understood in terms of family resemblance, an approach drawing from Wittgenstein's *Philosophical Investigations*. In this view, various instances of privacy draw from "a pool of similar elements."[11] Meaning, according to Wittgenstein, is not an objectively true link between a word and the things to which it refers. The meaning of a word comes from the way a word is used in language, not from any inherent connection between the word and what it signifies. Different instances of a concept (like privacy) are not connected by necessary and sufficient conditions, possibly not even by one single core feature. "We have a web of connected parts, but with no single center point. Yet the parts are still connected."[12]

Applying the idea of family resemblance to the concept of privacy leads Solove to the view that in conceptualizing privacy we should employ a pragmatic approach in understanding privacy, such that its "contextual and dynamic nature" is taken into account.[13] "If we no longer look for the essence of privacy," he states, "then to understand the 'complicated network of similarities overlapping and criss-crossing,' we should focus more concretely on the various forms of privacy and recognize their similarities and differences."[14] This way we can still look for these similarities and differences, without committing ourselves to a singular view of the concept. Such a view of privacy has led courts and policymakers to conflate distinct privacy problems despite significant differences, or even to fail to recognize some problems completely, Solove claimed in a later article.[15] Literally, his works *approach* privacy, rather than that they *define* it. They conceptualize privacy in different contexts, not in the abstract.[16]

As a side note, it has to be said that Solove's view as discussed above commits us at least to descriptive moral relativism, the claim that people do in fact disagree about what is moral.

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[11] Solove, "Conceptualizing Privacy," 1090-1091.
[12] Solove, "Conceptualizing Privacy," 1098.
[13] Solove, "Conceptualizing Privacy," 1091-1092, 1126-1129. Solove emphasizes the strong connection between Wittgensteinian family resemblances and pragmatism.
[14] Solove, "Conceptualizing Privacy," 1126.
[15] Daniel J. Solove, "A Taxonomy of Privacy," *University of Pennsylvania Law Review*, Vol. 154, No. 3 (2006), 481-482.
[16] Solove, "Conceptualizing Privacy," 1129.

Admittedly, the family resemblance approach comes with its own defects. The most important point to be clear about is that family resemblance or the family resemblance approach is a metaphor. It does not explain how to distinguish new members of a set (family) in the future. In privacy issues, this would mean that it helps us describe and understand current privacy problems and their relations, but that we cannot use it to judge whether or not future technologies violate privacy. Neither is it a way of defining; it can only be used to describe the grammar of a word as not revolving around a common feature to all its instances in a language. In concrete terms, this means the approach Solove coins is a way of understanding the complexities surrounding the concept of privacy. If we want a method of distinguishing new instances of privacy (harm) or simply a definition of the concept (although these two are strongly related), we need something else (I will come back to this later). However, it have been the failed attempts to arrive at a definition capable of serving these functions that led Solove to approaching the problem differently in the first place. This is the trap Ryan Calo seems to have fallen in. In *The Boundaries of Privacy Harm*, he claims to understand the idea of family resemblance but insists it still needs an overarching principle.[17] Although his notion of subjective privacy harm sheds some light on the difficulties of the debate, his attempt to define objective privacy harms is downright ignoring the warning of Wittgenstein that was echoed by Solove.

A clearer account of privacy will require at least a careful historical investigation of the different contexts (and corresponding histories) of the concept, and probably continuous maintenance if it is to remain “future proof.” Here, I will only focus on the former task, and only insofar this is necessary for indexing the moral contents of the concept.

[17] Ryan Calo, “The Boundaries of Privacy Harm,” *Indiana Law Journal*, Vol. 86, No. 3 (2011).

2 Distinguishing the moral contents of privacy

Given the above, where should we now look for the moral contents of privacy? In my introduction I have said that with moral contents, I mean value, moral obligations or rights, or even elements that are preconditions for moral frameworks, and that with privacy, I aim at privacy as it is understood in contemporary liberal societies. Still, I mean to commence this search as open minded as possible, so I do not per se presume these "contents" to exist in advance. I am attempting to provide an overview of the moral contents of a concept, and the mapping I will ultimately come up with later in this chapter, as a result, open for additions (or subtractions).

2.1 Value, moral obligations and rights

First, let me elaborate on the most general term of the above: value. In this, too, I follow Solove, who maintains that the value of privacy is above all instrumental (I will discuss possible objections later in this paragraph). The value of privacy depends upon the purposes of the practices that are involved. Privacy, according to Solove, is an issue of power. "(I)t affects how people behave, their choices, and their actions."[18] The decisions we make about the protection, creation, disruption or halting of practices are based on our view of how important the purposes of these practices are. "Practices are activities and modalities of living that have purposes, which means that practices are performed for particular reasons, aims, and goals." The importance of the purposes of the practices determines the value of privacy, which thus does not have intrinsic value. Solove responds to authors who have attempted to locate the value of privacy in a form of respect that must be provided to all rational beings.[19] Privacy, in his view, is valued as a means for achieving certain other ends that are valuable. Solove picks up John Dewey's point that "ends are not fixed, but are evolving targets, constantly subject to revision and change as the individual strives toward them."[20] There is no end that is furthered by all practices of privacy. Discussing the value of privacy in the abstract will always be problematic, because privacy

[18] Solove, "Conceptualizing Privacy," 1143.
[19] Solove, "Conceptualizing Privacy," 1145.
[20] John Dewey, in Solove, "Conceptualizing Privacy," 1145.

is "a dimension of a wide variety of practices each having a different value." The meaning of 'privacy' shifts between different contexts. His approach of conceptualizing privacy does not focus on the value of privacy generally, but focuses specifically on the value of privacy within particular practices.[21]

So far, there is thus no distinct moral content to the concept of privacy, because the way we shape practices revolving around concepts like privacy depends upon our vision of the good, and this vision of the good informs "how we wish to structure power in society and how we want to empower the self."[22] This does not mean that a person cannot decide that for him, privacy is an end in itself, but it does mean that this is not necessarily the case for everyone, and consequently, that lawmakers can establish legal protections for privacy, but are not morally obliged to do so (or so can be concluded from this part of my inquiry).

If the above holds, we can also establish that there are no moral obligations or rights directly following from privacy. The definition of privacy is, as we have seen, dependent on its use, and as such, it cannot entail moral duties or rights. There may, however, be existing legal rights implying privacy. I will come back to that question later in this chapter.

Note that by taking this position we are not only committed to descriptive moral relativism (as already noted), but also to a form of meta-ethical moral relativism, since we have to accept that there is no objective truth regarding the moral value of privacy: it depends on the vision of the good of the society in question.[23]

Objecting to the above argument, one could argue that privacy does have intrinsic value. Solove does address some theorists of intrinsic value, but may not have ruled out all the arguments this position can offer.[24] This is a valid point, since the argument Solove presents is convincing (or at least to some), but far from irrebuttable. However, I suspect that there is little that I can add to it substantially. Indeed, I suspect that there is little substantive to be said at all that can convince those who hold the opposite thesis. What I can do is argue for the thesis of instrumental value on the basis of another quality. The

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[21] Solove, "Conceptualizing Privacy," 1146.

[22] Solove, "Conceptualizing Privacy," 1143-1144.

[23] Solove himself does not speak in ethical or meta-ethical terms. These categorizations are only meant to clarify his position in the light of my following argument.

[24] Solove mentions Ronald Dworkin, Stanley Benn and Julie Inness as defendants of the thesis that privacy has intrinsic value. His argument does not depend on their positions per se, so I will not discuss these authors myself.

thesis of instrumental value, I argue, is able to account for the plurality of views that objectively speaking exists in the debate, whereas theses of intrinsic value, which aim to describe in the exact the value of the concept, are unable to do so. The thesis of intrinsic value, by claiming that privacy has intrinsic value, has to claim that, even when the exact nature of this value is unknown, only one substantive view of the value of privacy can be correct, and thus that others (including the views of those attaching no value whatsoever to their privacy) are incorrect. For example, suppose that I claim that privacy is valuable because I have the moral right to do what I want in my home without the observation of anyone, and my neighbour claims that privacy is valuable because he cannot function as an autonomous being without it. The thesis of intrinsic value would then have to say that at least one of us is partially or wholly incorrect in assessing the value of privacy, and that we would have to drop that claim. The thesis of instrumental value, on the other hand, can offer a clear account of the value of privacy, claiming that it is instrumental and context-dependent, and can thereby explain why different people can maintain different but nonetheless valid views about privacy. The claims of me and my neighbour can both be correct.

On top of the substantive claim that none of the ends described by intrinsic value theorists is furthered by all practices of privacy, I thus want to argue for the thesis of instrumental value on the basis of its capacity to give an account of the existing plurality of views on the value of privacy, without having to claim that the majority of them is incorrect.

But then, it might be still wondered, is demonstrating privacy's instrumental value (as I have done) enough to demonstrate its lack of moral content? The answer is: it depends. Privacy is best seen as a means, but that means we also have to be clear about to what end(s) it is a means. Solove speaks of "our vision of the good." It is this vision of the good I am looking for here.

2.2 Elements of privacy presumed by existing moral frameworks

The consequent question, thus, is what elements of the concept of privacy are presumed in existing moral frameworks. At this point, one could already raise the objection that if (probably deceased) philosopher x or y happens to have said something about privacy

violations, that does not necessarily mean his conclusions also apply to "us." The Æsirian Code, to take an exotic example, tells us that we should "have no remorse in the savagery of conflict." But why should we do what long-deceased thinkers want us to do? Also, to whom does "us" refer? Do the reasons given apply to all or only to some, and if so, to whom?

To address this question, I will specifically motivate my choices for certain moral frameworks. The frameworks I choose to investigate are those of Immanuel Kant (commonly called Kantian ethics) and John Stuart Mill (commonly called utilitarianism). In the first place, I have chosen specifically these frameworks because Kant and Mill have been, each in their own way, major influences not only on ethical theory, but also on the development of liberalism. Although their ideas of individual liberty and especially its relation to the state were in several respects controversial in their own times, they have been influential on and are still strongly connected to ours, that is; a significant portion of contemporary liberal societies, and the institutions of the corresponding states.[25] They were not only moral theorists, but also developed ideas on how the state should relate to the individual, and how it should deal with the freedom and autonomy of human beings, or, in other words, they developed theories on how ethics, politics and law (specifically in a liberal context) relate to each other. The point to take from this, is that since we agree on these views about the relation between the state and the individual, we should also take these views on what this means for privacy violations into consideration. This also answers the question of the scope of application of my conclusions. They apply to all who endorse the basic core of liberalism, which arguably means all inhabitants of countries committed to liberalism (but that question does not need to be settled here and now).

As noted in my introduction, I do not think it a problem per se that my conclusions do not apply to a larger audience (for example, the entirety of human beings). Since we have established that privacy has no intrinsic value, we have to recognize that what may be a

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[25] On the controversy about Kant's theory of the state, see Jeremy Waldron, "Kant's Theory of the State," in Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (London: Yale University Press, 2006). On the controversy about Mill's theory of the state, see John Gray, *Mill on Liberty: A Defence* (London: Routledge, 1996). For the influence of Kant and Mill on liberal thought see (among others) Rachel S. Turner, *Neo-Liberal Ideology: History, Concepts and Policies* (Edinburgh: Edinburgh University Press, 2008). Paul Starr, *Freedom's Power: The History and Promise of Liberalism* (New York: Basic Books, 2007). Gerald Gaus and Shane D. Courtland, "Liberalism," in *The Stanford Encyclopedia of Philosophy* (*Spring 2011 Edition*), ed. Edward N. Zalta, URL = <http://plato.stanford.edu/archives/spr2011/entries/liberalism/> (visited 23-06-2014).

privacy concern in one society, may not be a privacy concern in another. Possibly, this is because privacy only assumes value within a political system that draws a strong boundary between the public and private spheres, like liberalism, but for my argument, I only need the observation that privacy problems are not universal, and that investigating their moral content for a political ideology as influential as liberalism is to attain as wide a scope as possible.

It also needs some clarification why I choose Kantian ethics rather than the broader category of deontological theories and why I have chosen to investigate Millian ethics rather than the broader category of consequentialism or even utilitarianism. The reasons are largely the same. The first is that the specific theories are representative for their broader categories. For Kantian ethics, I think I do not have to demonstrate its immense influence on deontology and moral philosophy at large, and Millian utilitarianism, if not equally influential in general, is at least regarded as one of the better representations, if not the best, of consequentialism as a whole. The second reason is that these accounts are the most well-developed of their kind. The literature on both Kant and Mill is immense, and by far outnumbers that of the other authors who have written on the same topics. Kantian scholars have at some points diverged from Kant himself to such an extent that some have found it elucidating to speak of 'Kant's ethics' (with apostrophes) and Kantian ethics besides Kant's ethics (without apostrophes).[26] And thirdly, I, among many, consider these accounts of respectively deontology and consequentialism much stronger in their own right than those of any of their colleagues. To be able to stay as close to their original intentions as possible, I will restrict myself to the primary literature and some of the secondary literature insofar as it analyses, not interprets, the primary literature. As I will demonstrate, I think the arguments presented by Kant and Mill themselves have not diminished in strength a bit since the day they were written.

[26] Onora O'Neill, "Kantian Ethics," in *A Companion to Ethics*, ed. Peter Singer (Oxford: Blackwell, 1993), 175-85.

Virtue ethics and historical changes in the concept of privacy

Also, I cannot proceed without elucidating why I choose not to consider Aristotelian virtue ethics as a moral framework in this investigation. Virtue ethics has undoubtedly been among the most influential frameworks in Western moral and political thinking, being a major influence on Christian ethics in the Middle Ages, and recurring in the 20th century in the works of influential authors like Hannah Arendt and Martha Nussbaum. It may be for this reason that although it may not technically be the first culture to employ some notion of the private, ancient Greece is often taken as a starting point in historical overviews of privacy and privateness. Many influential authors (Arendt as well as Jürgen Habermas, Barrington Moore and others) have recognized the Greek notions of public and private to be fundamental to our understanding of the public and private spheres today.[27]

I argue that although we should understand it as part of the history of the concept of privacy, virtue ethics (or even ancient views on privacy at large) will be unfruitful for an investigation of the moral content of the concept of privacy. This is mainly because Greek views are in opposition to contemporary views on the public-private dichotomy, at least to the extent that we cannot easily distinguish a clear view on the public and private corresponding to contemporary views.[28] This is not merely a problem of translation. There has occurred a fundamental change in the way the public and private spheres are conceptualized. This change has been demonstrated effectively by Beate Roessler, in her article *New Ways of Thinking About Privacy*.[29] New ways of thinking about privacy, she claims, differ from old ways of thinking about privacy in that in the "old view," the private and the public realms were regarded as given by nature, whereas in "new view," they are drawn by convention. The old view (although this is not only the Greek view), she holds, has often separated the two realms in (quasi-)natural terms, as if "to the realm of privacy belong feelings, hearth and home, emotional care for the male members of society, as well

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[27] Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, Massachusetts: The MIT Press, 1991). Barrington Moore, *Privacy: Studies in Social and Cultural History* (New York: Random House, 1984). Hannah Arendt, *The Human Condition* (Chicago: Chicago University Press, 1998).

[28] Larry Peterman, "Privacy's Background," *The Review of Politics*, Vol. 55, No. 2 (1993). Peterman even claims that in her discussion of the origins of the public and private spheres, Arendt would have done better to ignore ancient Greece entirely. Peterman, "Privacy's Background," 231.

[29] Beate Roessler, "New Ways of Thinking About Privacy," in The Oxford Handbook of Political Theory, ed. John S. Dryzek, Bonnie Honig and Anne Phillips (Oxford: Oxford University Press, 2006).

as the raising of the children, while reason, 'brains,' and professional life, by contrast, characterize the (male) public realm."[30] This change has occurred from authors like Mill onward. Roessler witnesses that even early liberalism postulates "a necessary link between a natural concept of privacy and a gender-specific division of labor, and designates the household as the sphere appropriate to women." Roessler notes that even in Arendt, as a "contemporary" Aristotelian, we find a social ontology that makes it seem natural "for certain things, persons, and activities to be regarded as private and others as public."[31]

More recent theories of privacy, however, relate the private (in varying ways) with personal freedom and autonomy. She considers not only philosophical theories, but also jurisprudence and feminist accounts of the private. In these theories, in contrast with the old ones, have also connected privacy with freedom from interference from the state in general.[32]

I accept this position, and hold that old ways of thinking about privacy (Greek, but also Roman, Christian and even early liberal ways of thinking) are different from new ways of thinking about privacy (as we can distinguish from about Mill onward) such that an investigation of their corresponding moral frameworks is not fruitful in understanding the moral contents of privacy today.

A stipulative mapping of privacy

To recapitulate, I will investigate to what extent the moral frameworks of Kantian and Millian ethics provide a reason against privacy violations. For both I will develop a thesis involving a purely moral claim, concerning why the privacy violations themselves would be wrong, and a claim involving the moral legitimation of state authority. Before I do so, however, I do need at least a stipulative list of the contents of privacy, to be able to identify the elements of privacy in the moral frameworks discussed. This is not to say that the elements have to match those included in the (stipulative) definition, but rather to have a tool for being able to identify them. Where I think the frameworks presume privacy in some way, I will in each case explain carefully the context and the aspect of privacy involved.

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[30] Roessler, "New Ways of Thinking About Privacy," 696.
[31] Roessler, "New Ways of Thinking About Privacy," 696-697.
[32] Roessler, "New Ways of Thinking About Privacy."

For a stipulative list of the contents of privacy, there are at least two candidates. Solove's own taxonomy is one candidate, but a lesser fit one because of its focus on privacy problems rather than on a positive identification of what privacy is. Both a more recent one and a theoretically well-developed is given by Rachel Finn, David Wright and Michael Friedewald. Based on their research for the Privacy and Emerging Sciences and Technologies project, funded under the European Commission's 7th Framework Programme for research and technological development, they have presented a contemporary conceptualization of privacy, of which they say that they believe it "provides academics and other privacy experts with a useful, logical, well-structured and coherent typology in which to frame their privacy studies."[33] They base this conceptualization on the categorization of Roger Clarke, who distinguished four different categories of privacy.[34] This categorization, published in 1997, has been very influential. It appears, for example, in the privacy impact assessment handbooks of Australia and the United Kingdom.[35]

Finn, Wright and Friedewald add to Clarke and present seven types of privacy:

1. Privacy of the person
2. Privacy of behaviour and action
3. Privacy of communication
4. Privacy of data and image
5. Privacy of thoughts and feelings
6. Privacy of location and space
7. Privacy of association (including group privacy)

Corresponding to each type, the authors speak of a right, usually a right to keep certain information, communications, thoughts, feelings, et cetera hidden from others. Indeed, they seem to define the types of privacy solely as rights. But it remains unclear whether they

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[33] Rachel L. Finn, David Wright, Michael Friedewald, "Seven Types of Privacy," in *European Data Protection: Coming of Age*, ed. S. Gudwirth et al. (Dordrecht: Springer Science+Business Media, 2013), 10.
[34] Roger Clarke, *Introduction to Dataveillance and Information Privacy, and Definitions of Terms* (Canberra: Xanax Consultancy, 1997, revised 2013). URL=<http://www.rogerclarke.com/DV/Intro.html> (visited 07-17-2014).
[35] Finn et al, "Seven Types of Privacy," 4.

mean each type of privacy actually is or should be protected, and whether it should be protected by one right or by multiple rights (one specific for each type of privacy). In the following investigation, I aim to employ the categorization without reference to rights or even legal contexts in general. Rather, I will regard this list of types of privacy as an index of the things (information, communications, thoughts, feelings, et cetera) that many people want to keep private. This does not mean that their violations - those actions disabling or hindering the abovementioned types of privacy - are wrong or illegit, they are simply the aspects of the concept of privacy as it is generally used. Also, the fact that one type of privacy is being disabled does not mean privacy in full is disabled. And if it were to be proven that within some moral framework, one specific privacy violation is considered morally wrong, it does not mean that the others are.

Also, it is not an exhausting list, far from it: it is stipulative. I accept that if it can be convincingly argued that the list should include more or less types of privacy, that has consequences for my argumentation. However, I suspect this categorization of privacy to be relatively robust and indeed a consensus representing the many instances in which the concept of privacy is called upon.

The moral frameworks

Kantian ethics

In Kant, we find no explicit stance on privacy or the private. Of course, I could defend an account of privacy deriving directly from Kant's Categorical Imperative, but doing so will inevitably mean walking on thin ice. Looking at his works on ethics as well as *An answer to the question: 'What is enlightenment?'*, I will attempt to approach the subject from a different angle (although I will return to the Categorical Imperative).[36] This view is based on the claim that a free individual has a will bound to his reason and not by that of another.

[36] Immanuel Kant, *Critique of Practical Reason*, ed. and tr. Mary Gregor (Cambridge: Cambridge University Press, 1997). Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals*, tr. Thomas Kingsmill Abbott (Project Gutenberg, 2004). Immanuel Kant, *The Metaphysics of Morals*, ed. and tr. Mary Gregor (Cambridge: Cambridge University Press, 1996). Immanuel Kant, "Toward Perpetual Peace," in Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*. Immanuel Kant, "On the Common Saying: This May Be True in Theory, But It Does Not Hold in Practice, Parts 2 and 3," in Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*.

Such an individual is, in Kant's view, autonomous. Being autonomous is a precondition for being able to act morally, and freedom, in Kant, is the only legitimate basis for the exercise of state power over the individual.[37]

What does it mean for a person to have his will bound to his own reason? Persons can act on principles. But Kant makes the distinction between principles that are internal and principles that are external to a person's will. A person can be made to act on principles external to his own will, for example through force. The authority of the principle at hand, in such a case, is external to that person. When a person acts on principles he imposes on himself, he literally *wills* them, and the authority of the principles is internal to his will. Only in such a case can a person be said to act autonomously. As Robert Johnson explains it, in Kant, the moral legitimacy of the categorical imperative is grounded in its being an expression of each person's own rational will. "It is because each person's own reason is the legislator and executor of the moral law that it is authoritative for (him)."[38] Being autonomous, for Kant, is being free.[39] And for a will to be free is for it to be physically and psychologically unforced in its operation.[40]

We have seen that new ways of conceptualizing privacy connect the concept with freedom and autonomy. If an interpretation of Kant on the subject of privacy in this sense can be made at all, it is thus likely around his notion of autonomy. Autonomy is central in Kant's ethics, but also, according to Finn et al, in privacy issues. Indeed, they claim that "(t)he ability to behave in public, semi-public or one's private space without having actions monitored or controlled by others contributes to 'the development and exercise of autonomy and freedom in thought and action.'"[41] Presumably, their definitions of autonomy and freedom will not be the same as Kant's, and to talk them together would do injustice to

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[37] Immanuel Kant, "Theory and Practice," 45, Frederick Rauscher, "Kant's Social and Political Philosophy," in *The Stanford Encyclopedia of Philosophy* (*Summer 2012 Edition*), Edward N. Zalta, ed., URL = <http://plato.stanford.edu/archives/sum2012/entries/kant-social-political/> (visited 6-17-2014). Robert Johnson, "Kant's Moral Philosophy," *The Stanford Encyclopedia of Philosophy* (Summer 2014 Edition), Edward N. Zalta, ed., URL = <http://plato.stanford.edu/archives/sum2014/entries/kant-moral/> (visited 6-17-2014).
[38] Johnson, "Kant's Moral Philosophy."
[39] Kant, "Fundamental Principles of the Metaphysics of Morals," 52.
[40] Kant, "Fundamental Principles of the Metaphysics of Morals," 62. Johnson, "Kant's Moral Philosophy."
[41] Rachel L. Finn, David Wright, Michael Friedewald, "Seven Types of Privacy," in S. Gudwirth et al, eds., *European Data Protection: Coming of Age* (Dordrecht: Springer Science+Business Media, 2013), 8. Nissenbaum cited in Finn et al. Helen Nissenbaum, *Privacy in Context: Technology, Policy and the Integrity of Social Life* (Stanford: Stanford University Press, 2010), 82 in Finn et al., "Seven Types of Privacy."

both. But we can claim that, insofar privacy violations (as privacy violations) force a will, physically or psychologically, in its operation, Kant's moral framework provides us with a moral reason to forbid these violations, since they hinder autonomy and freedom, and consequently a person's capacity for moral action.[42]

But this is not the only way we can connect Kant's ethics to privacy violations. To explain what I have in mind, I should elaborate on how Kant thinks freedom relates to the power of the state, mostly with the question in mind whether actions that obstruct or harm freedom also take away the legitimacy of state power.

First, what is legitimacy? I have arrived at the term through the literature on Kant, but continue to employ it in my current argument (also in my discussion of Mill) because it captures at once an aspect of legal justification and an aspect of moral authority. Asking for the legitimacy of state authority inescapably involves a moral question, since in a state with a constitution prescribing the basis for the state's legal authority, it may still be asked whether this authority is legitimate (moral).

So how does Kant relate freedom to the power of the state? According to Kant, particular conceptions of happiness cannot be the basis of any "pure" principle of the state, whereas the general notion of happiness is too vague to serve as the basis of a law.[43] Hence, a "universal principle of right" cannot be based upon happiness "but only on something truly universal, such as freedom."[44] The "universal principle of right" Kant offers is: "Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law"[45] A state can only exercise power over individuals legitimately insofar it is a means to freedom.

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[42] I am careful not to talk about a private sphere in this context, since Kant employs the concept of privacy with a different meaning. In *What is Enlightenment?*, he says that an individual can use his reason in two ways, publicly and privately. He thus distinguishes public reason from private reason, private reason being the reason employed in an official capacity (like that of a teacher or a clergyman). This definition of private is rather different from most contemporary definitions of private, Kant does not elaborate on a sphere of home and family lying behind his "private" sphere, or whether we need such a sphere to be able to employ our reason in our public and private capacities.

[43] Rauscher, "Kant's Social and Political Philosophy."

[44] Rauscher, "Kant's Social and Political Philosophy."

[45] Kant, "Religion Within the Boundaries of Mere Reason," in Immanuel Kant, *Religion and Rational Theology* (New York: Cambridge University Press, 1996), 133.

State action that hinders freedom can, however, support and maintain freedom, if that state action hinders actions that would themselves hinder the freedom of others. "Such state coercion," Frederick Rauscher explains, "is compatible with the maximal freedom demanded in the principle of right because it does not reduce freedom but instead provides the necessary background conditions needed to secure freedom."[46]

Beyond merely defending freedom and autonomy, Kant thus connects these concepts tightly to that of state authority. One fundamental step in this line of reasoning is the claim that for state authority to be legitimate, the state not only *can* be a means to freedom, but in fact *is* a means to freedom. That is its only basis for its moral authority over the individual. Adding this to the earlier claim, we come to the following, to which I will hereafter refer as the Kantian thesis;

insofar privacy violations (as privacy violations) force a will, physically or psychologically, in its operation, and

insofar privacy violations (as privacy violations) by the state have as a consequence that that state is no longer a means to (or: enables) freedom, Kant's moral framework provides us with a moral reason to forbid these violations.

Millian ethics

Looking at John Stuart Mill's work, the most relevant lead seems to be the principle that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection," and "(t)hat the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[47] Joel Feinberg called this two-faceted principle "the harm principle," and it has widely been called such ever since.[48] Although I will use the term 'harm principle' to refer to the above claim, I will not draw on the literature arguing from this harm principle, since it has been contested that the way it is

[46] Rauscher, "Kant's Social and Political Philosophy."
[47] John Stuart Mill, "On Liberty," in John Stuart Mill, *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991), 14.
[48] Joel Feinberg, "Harm to Others" (New York: Oxford University Press, 1984).

understood by Feinberg and later authors is in line with Mill's broader doctrine of liberty.[49] It seems as if Mill tries to protect a sphere in which the individual is free, in which we could read an attempt to protect privacy. To give this guesswork some more substance, I will make three claims about Mill's work, from which I will make the step to privacy.

It will be good to take a moment to consider that to some, 'utilitarianism' has a connotation of representing a simple-minded doctrine, cold, rash and disrespectful to humanity. Presenting the many separate arguments for and against is not my business here, and is not likely to convince critics any more than Mill's own discussion in *Utilitarianism* will do. Aside from encouraging those holding these opinions to give Mill's works another reading, I will thus simply assume this version of utilitarianism to sufficiently withstand these criticisms. After all, I am not defending utilitarianism but merely an account of it, which in the third part of this investigation, I will relate to the legal contexts that have - in fact - relied on utilitarian arguments.

Firstly, Mill maintains the principle commonly denoted as the harm principle throughout his entire work, even though different views exist on how he would have squared it with other elements of his thought. In *On Liberty*, he says that "I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being. Those interests, I contend, authorize the subjection of individual spontaneity to external control, only in respect to those actions of each, which concern the interest of other people."[50] Mill's ethics precedes his liberal doctrine, but that does not withhold him from maintaining that individuals are themselves free, autonomous and thus morally responsible, and that they should have a sphere of liberties to be able to do so.

Secondly, although this is strongly related to my first claim, Mill's positions on liberty, justice and morality are strongly connected, such that morality covers both justice and beneficence and/or virtue and/or generosity. Again, I will argue for this point using Mill's own words. His position on the relation between justice and morality is that "a right in some person, correlative to the moral obligation- constitutes the specific difference

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[49] Daniel Jacobson, "Mill on Liberty, Speech and the Free Society," *Philosophy & Public Affairs*, Vol. 29, No. 3 (2000), 276.
[50] Mill, "On Liberty," 15.

between justice, and generosity or beneficence."[51] The idea of justice, Mill holds, supposes two things. First, a rule of conduct, which must be supposed common to all, and second, a sentiment which sanctions the rule, "a desire that punishment may be suffered by those who infringe the rule."[52] Justice, then, "implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right. No one has a moral right to our generosity or beneficence, because we are not morally bound to practise those virtues towards any given individual. And it will be found with respect to this, as to every correct definition, that the instances which seem to conflict with it are those which most confirm it."[53] Mill once more confirms his belief in this position when he says that "(i)f the preceding analysis, or something resembling it, be not the correct account of the notion of justice; if justice be totally independent of utility, and be a standard per se, which the mind can recognise by simple introspection of itself; it is hard to understand why that internal oracle is so ambiguous, and why so many things appear either just or unjust, according to the light in which they are regarded."[54]

From the above we can conclude, and this will be my third and last claim about Mill's work, that the argument presented for the harm principle is ultimately a moral argument. I take it that drawing this conclusion can be done unproblematically, since it follows from the above two claims, for which I have argued more extensively.

Finally, we have to establish the connection with privacy. Let me focus on Mill's claim that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection." For those actions of each that do not concern the interest of other people, it thus seems, Mill wants to protect a sphere which we could call private. In this sphere, the individual is free to do what he wants. In principle, this concerns multiple aspects of privacy. Indeed, it has applications in every aspect of privacy Finn et al describe. The principle implies that an individual's sphere of basic liberties is not only to be respected by the state, but by all. If it applies to privacy, it thus applies to persons spying on each other in their homes (to take one example) as well

[51] John Stuart Mill, "Utilitarianism," in John Stuart Mill, *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991), 185.
[52] Mill, "Utilitarianism," 188-189.
[53] Mill, "Utilitarianism," 185.
[54] Mill, "Utilitarianism," 190.

as to governments tracking people's location by their mobile phones. Still, however, the size and shape of this sphere of basic liberties is not fully clear. First of all, with 'basic liberties' I mean (formally speaking) a number of liberties that exists within a liberal state that a government does not have the moral authority to interfere with unless the individual induces a reasonable suspicion that he could harm public health or safety; (substantively speaking) liberties like those of conscience, speech, association, movement, et cetera.[55] The crucial question is where to determine the point where an action stops to concern the self and starts to concern others. To take an extreme example, in the making of a plan to bomb a public building; at which point is the plan only a thought experiment with which the government cannot legitimately interfere, and where does it start becoming a real threat to others, at which point the government *can* legitimately interfere. And how can a government legitimately place itself in a position where it can know about these plans early on enough without violating the liberties (or the private sphere) of the individuals planning the bombing? This fine-graining is a task Mill reserved largely for politics, but we can investigate the scale with some more precision.

The clear two points are, of course, the extremes. On the one hand, there is the point at which the government cannot legitimately interfere with the individual's liberties. A person with no criminal past or relations, a regular nine-to-five office job and a few hobbies and personal interests involving no harm to others (let's take stamp collecting) has, in this view, a right not to have his liberties interfered with. On the other hand, there is the point where the government can legitimately interfere with the individual's liberties. Someone who has been convincingly proven to have committed a serious crime has suspended his right to (some of) these liberties.

The key point to take from this is that theoretically, there is a point where no interference at all is legitimate. The individual has a sphere of liberties, and when he does not harm others in any way, others including the state do not have the moral authority (are not legitimated to) interfere with these liberties. In practice, there is no such point, since, for example, the government can always legitimately collect taxes, because if citizens do not

[55] I am aware that Rawls (among others) also employs the term 'basic liberties'. However, I do not intend to make a Rawlsian point, and at least postpone taking a position towards the principles of Justice as Fairness, although I may agree on the substantive contents of the concept.

pay taxes, politics, law and enforcement are themselves hindered. But such interference with the liberty of spending one´s money as one likes does not entail interference with other liberties, like that of movement. Thus, it still seems that there are certain liberties that can never be legitimately interfered with (unless, of course, there is for an individual an explicit reason to think that he could harm public health or safety).

Drawing from utilitarianism's basic claim, we can in the first place deduce that insofar privacy violations (as privacy violations) harm rather than promote total utility, Mill's moral framework provides us with a moral reason to forbid these violations. But, concluding from my discussion of the harm principle, we can also state that insofar privacy violations (as privacy violations) interfere with the sphere of liberties of a person who does not do harm to others, Mill's moral framework provides us with a moral reason to forbid these violations. To the combination of these two claims I will hereafter refer as the Millian thesis.

2.3 Preliminary conclusions

To sum up, we now have established two theses:

1. The Kantian thesis: insofar privacy violations (as privacy violations) force a will, physically or psychologically, in its operation, and insofar privacy violations (as privacy violations) performed by the state have as a consequence that that state is no longer a means to (or: enables) freedom, Kant's moral framework provides us with a moral reason to forbid these violations.

2. The Millian thesis: insofar privacy violations (as privacy violations) harm rather than promote total utility, and insofar privacy violations (as privacy violations) interfere with the sphere of liberties of a person who does not do harm to others, Mill's moral framework provides us with a moral reason to forbid these violations.

These theses are structured alike, inquiring firstly about the consequences of the privacy violation itself, secondly about the privacy being violated legitimately or not, and then, thirdly, establishing whether the literature applies to it.

In the Kantian thesis, the first part is about whether privacy violations have as a consequence that they force a will in its operation. In the Millian thesis, this part is about

whether privacy violations have as a consequence that they promote or harm total utility. In the Kantian thesis, the second part is about whether the state is a means to freedom. If a state violates instances of privacy such that it stops being a means to freedom (whatever that may mean), we have no moral argument against the privacy violation in itself, but a moral argument against state violating privacy at that particular point, since it does not at that point have the moral authority to do so. Admittedly, this does not enable us to criticize privacy violations directly, but that doesn't make it any less of a relevant point. Similarly, in the Millian thesis, the second part is about whether privacy violations (notice that Mill regards his harm principle as applicable on individuals as well as on the state) interfere with the sphere of liberties of a person who does not do harm to others. If certain privacy violations do, that does not mean the privacy violations are wrong in themselves, but rather that that instance of privacy is violated illegitimately.

The question now remains what kind of reasons precisely we are dealing with. I have claimed that insofar certain states of affairs are the case, the moral frameworks discussed provide us with a moral reason, but what does this mean specifically, and how strong an argument can be made from it? Basically, it means that the practice in question is wrong. If the first part of any of the two theses is the case, it means that the practice in itself is, according to the frameworks at hand, immoral. If the second part of any of the two theses is the case, it means that the practice is immoral, but indirectly, since the state is acting, at that point, without the moral authority to do so.

3 The applicability of the moral frameworks

We now need to establish that the states of affairs are actual, and the moral reasons thus apply, or in other words: whether the privacy violations we have established to be immoral actually occur. Let me repeat them. For Kant's moral framework, we are investigating whether it can be established that privacy violations force a will, physically or psychologically, in its operation, and that privacy violations by the state have as a consequence that that state is no longer a means to (or: enables) freedom. For Mill's moral framework, we are investigating whether it can be established that privacy violations harm rather than promote total utility, or interfere with the sphere of liberties of a person who does not do harm to others. As noted in the previous chapter, these states of affairs are of two kinds, one about the consequences of the privacy violations, and one about instances of privacy being legitimately violated (or not). Investigating the former, for both Kant and Mill I will argue in the next paragraph, leads to all kinds of problems. For this reason, I will focus mostly on the latter.

3.1 The consequences of privacy violations

In Kant

To take the first state of affairs from the Kantian thesis first, are there any privacy violations that force people's wills, physically or psychologically, in their operation?

Under 'physically forcing people's wills in their operation' would presumably fall physical threatening, forced starvation, dehydration or sleep deprivation, among others. This has no connection with privacy violations as we have stipulated them earlier on. Of course, there is the case of an interrogator threatening to harm a person not willing to give certain information, but in that instance the enforcement of the operation of the will is connected with the threat, not with privacy (the information the person wants to keep to himself). Saying "Give me the information now" in a friendly voice would amount to the same (alleged) privacy violation as threatening a person with a beating, but would not force a person's will in its operation, and would consequently not be immoral (at best an inappropriate thing to say).

Under 'psychologically forcing people's wills in their operation' will also fall the abovementioned practices, but different aspects of them. Whereas with physical enforcement of the operation of the will in starvation, et cetera, we are concerned with the brain lacking the substances to function, like oxygen, in the case of psychological enforcement we are concerned with the mind being tricked into believing false realities, fearing or simply being annoyed or confused. But these practices, similar to the physical enforcement, have no direct connection to privacy violations.

However, there are many more kinds of ways of psychologically forcing people's wills. One of these is more closely connected to privacy, and has been called *decisional interference* by Solove. Although Solove himself does not discuss it, the clearest case is the extensively proven claim that camera surveillance alters people's behaviour.[56] Decisional interference entails that the individual in question would choose differently if he would not be aware of certain surveillance or data collection. Most of the time, the main function of a camera is simply *hanging there*, letting people know that they are being watched. If it were not for the relatively few cases that recordings are actually used in criminal investigations, the cameras could be replicas and the effect would be the same. The same applies to many more security methods that allegedly violate privacy, like body scanners at airports and body searchings at event entrances. It also applies to the possibility of saved medical records becoming publicly known (which was the case in *Whalen v. Roe* in the US), and even to the ability of the government to wiretap phone conversations or open letters, even though it officially needs warrants to do so.[57] The knowledge of the fact that checks and monitoring are possible is enough to alter behaviour, and constitutes interference with decision-making. Philosophers and sociologists (among others) will know this as the panopticon effect.[58]

Kant's moral framework seems to provide a moral reason to forbid these violations. But aside from the claim whether this actually is the case, we can ask whether it also provides a

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[56] Edna Ullmann-Margalit, "The case of the camera in the kitchen: surveillance, privacy, sanctions, and governance," *Regulation & Governance*, Vol. 2, No. 4 (2008).
[57] Whalen v. Roe, United States District Court for the Southern District of New York, 429 U.S. 589 (1977). Solove, "A Taxonomy of Privacy," 491-498, 557-561. Reiman, "Driving to the Panopticon."
[58] See also Reiman, "Driving to the Panopticon." Eamon Daly, "Personal Autonomy in the Travel Panopticon," *Ethics and Information Technology*, Vol. 12, No. 2 (2010). The metaphor of the panopticon has been developed by Michel Foucault in Michel Foucault, *Discipline & Punish* (New York: Vintage Books, 1995).

moral reason against the same practices if they were hidden, unknown of, or failsafe. In the case of body searchings, this is a little harder to imagine, but cameras can be easily hidden from sight. And when it comes to medical records, there is a strong argument to be made for the storage of the records as long as the administration and safety of the storage is in order (as was argued in Whalen v. Roe).

Still, we have to be clear about the precise connection between the enforcement of the will and privacy. In the above, the connection with the enforcement of wills is in the knowledge of (the possibility of) being surveilled or monitored, or even in the knowledge that records that in themselves constitute no privacy violations may leak. The surveillance and monitoring are indeed privacy violations (at least as I have defined them), but they bear no direct connection to the enforcement of the will as outlined above. Kant's moral framework, in conclusion, does provide a moral reason against these practices for which it can be established that they force wills in their operation, but not as privacy violations. They are wrong, *not because they are privacy violations, but because they hinder the ability of the person to act morally (free)*.

In Mill

Then for the state of affairs mentioned first in the Millian thesis, are there any privacy violations that harm rather than promote total utility? My discussion of the first part of the Kantian thesis already involved some empirical evidence, but for the Millian thesis, doing the same would make an accurate discussion incredibly more difficult. We should bear in mind that even Mill himself did not think it easy or perhaps even possible at all to know for all actions whether they do actually promote total utility. Also, several authors have suggested that looking at privacy problems from the angle of harms and total utility only troubles a good view of what is really at stake.[59] To see why, consider that privacy violations by governments, are often justified by reference to the harm they prevent. But the problem is that there is little positive proof that they actually do, and whether the case would be worse if they did not violate the instances of privacy. Even if no terrorist attacks

[59] Boudewijn de Bruin, "The Liberal Value of Privacy," *Law and Philosophy*, Vol. 29, No. 5. Daniel J. Solove, "'I've Got Nothing to Hide' and Other Misunderstandings of Privacy," *San Diego Law Review*, Vol. 44, No. 4.

occur in a country for an extended period, that is no proof they would have occurred if privacy had not (or to a lesser extent and/or on a lesser scale) been violated. In addition, in legal-philosophical circles, proponents nor defenders of privacy seem to want to express the value of privacy (or the absence of privacy violations) in terms of harm and utility, for reasons relating to the above.[60] The harm that privacy violations supposedly present is still more tangible than the more difficult to grasp harm (or perhaps 'harm' is not even a fitting word) that is caused by privacy violations that do not prevent public health and safety risks.

I do not want to say that an investigation into the utility of privacy violations is useless, but I do say that it does need to tread very carefully. For now, I will skip over it and go down the more fruitful path of the question whether the privacy is violated legitimately. This, I argue, is where a distinctively moral approach to privacy sheds light where a legal or sociological investigation does not.

3.2 The legitimacy of state action

In Kant

Looking at the Kantian thesis, we can now ask: are there any privacy violations by the state that have as a consequence that that state is no longer a means to (or: enables) freedom? But first it has to be asked: how can we measure whether a state promotes or harms freedom? Does it do so as long as it prevents us from dying early, or does it need to actively protect our freedom in the many aspects of our lives in which we can exercise it? Or, specific to my investigation, does a state harm freedom when it violates privacy? At this point, we face the contradictions that some have spotted in the aggregate of Kant's ethical works and his theory of the state, the ethical works seemingly pleading against and the theory of the state in favour of certain interferences with individual liberties. I cannot and will not perform a thorough analysis of Kant's many works on the subject (aside from the abovementioned works, we also find remarks on ethics in *Anthropology from a Pragmatic*

[60] De Bruin, "The Liberal Value of Privacy." Solove, "I've Got Nothing to Hide." Nick Taylor, "To find the needle do you need the whole haystack? Global surveillance and principled regulation," *The International Journal of Human Rights*, Vol. 18, No. 1 (2014).

Point of View and *Religion within the Boundaries of Mere Reason)*.[61] Rather, I will attempt to present a somewhat general interpretation, attempting to avoid the known controversies.

First, to look at privacy violations from the perspective of the state. Let me recapitulate first on how Kant justifies interferences of individual liberties by the state. In Kant, there is an idea of freedom - defined as independence from being constrained by another's choice - enabled by the state.[62] Without the state, in this (somewhat but not fully contractarian) sense, we would be less free, since there is no authority to protect us from arbitrary attacks by others, and the constant expectation and consequences of attacks by others - injury or death - are greater obstructions to freedom than the interference of the state in some of our life's affairs. This freedom, again, is the only legitimate basis for state authority (the moral authority to interfere with the individual's liberties).

Freedom, so construed, is promoted by taking away sources threatening (the exercise of) autonomy, and thus the possibility for individuals to act freely. It could be argued that minimizing public health and safety risks is thus a priority for the state, since these threaten autonomy (by means of injury and death). This is where the privacy violations come in: it is through the piling of data on individuals that a government's intelligence agencies are able to detect patterns, on the basis of which they act to prevent, for example, terrorist attacks. In recent years, the world has come to know in particular the US's National Security Agency (NSA) for this kind of behaviour. Supposedly, governments do not collect all kinds of data on all their citizens, but recent discoveries have shown that they have violated all of the seven types of privacy mentioned. Medical records involve privacy of the person.[63] Camera surveillance involves privacy of behaviour and action.[64]

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[61]Immanuel Kant, *Anthropology from a Pragmatic Point of View* (Cambridge: Cambridge University Press, 2006). Kant, "Religion within the Boundaries of Mere Reason."

[62] Rauscher, "Kant's Social and Political Philosophy." Kant's definition of autonomy can be deduced from a passage in the *Fundamental Principles* that reads: "The principle of autonomy then is: 'Always so to choose that the same volition shall comprehend the maxims of our choice as a universal law.'" Kant, "Fundamental Principles of the Metaphysics of Morals." He relates this principle to state authority in *Religion within the Boundaries of Mere Reason*. Kant, "Religion within the Boundaries of Mere Reason," 133.

[63] James Ball, Julian Borger and Glenn Greenwald, "Revealed: how US and UK spy agencies defeat internet privacy and security," *The Guardian Weekly*, Friday 6 September 2013, URL = <http://www.theguardian.com/world/2013/sep/05/nsa-gchq-encryption-codes-security> (visited 28-07-2014).

[64] Ullman-Margalit, "Surveillance, Privacy, Sanctions, and Governance." Jay Stanley, "Private Cameras Will Hurt Privacy - But Is There a Solution?," *American Civil Liberties Union*, URL =

Governments - most prominently that of the US - have requested data from social networks and email services, involving the privacy of communication (through conversation histories), the privacy of image and data (through biographical information and pictures) and the privacy of thoughts and feelings (through intimate status updates and conversation histories).[65] GPS and network location information involves the privacy of location and space, and the requesting of internet search histories from internet providers touches on the privacy of association.[66]

So from this perspective, it seems more plausible to construe Kant in favour of such excessive state protection. From the perspective of the moral actor, however, we can construe Kant differently. From this perspective, it might be said that privacy violations harm freedom, since they disrespect our autonomy. As soon as the state is in place, after all, the greatest threats to autonomy are removed. From that point, the state should only minimally interfere with the individual. Defenders of this position could employ what is known as the formula of humanity. "A matter, namely, an end, and here the formula says that the rational being, as it is an end by its own nature and therefore an end in itself, must in every maxim serve as the condition limiting all merely relative and arbitrary ends."[67] In legal contexts, this idea of humanity being an end in itself has come to be associated with the concept of objectification. By reducing individuals to pawns in a debate on public safety - where some of their liberties are interfered with to protect the safety of the whole -, it might be said, the state is treating individuals no longer as ends in themselves but as means to something "greater."

Insofar as Kant did in fact hold one definite position on this matter, we are not (yet) able to say with full certainty what that position was. But this may not be that relevant, in particular for law, since the details, the concrete filling in of the aggregation of general

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<https://www.aclu.org/blog/national-security-free-speech-technology-and-liberty/private-cameras-will-hurt-privacy-there> (visited 28-07-2014).

[65] James Risen and Laura Poitras, "N.S.A. Collecting Millions of Faces from Web Images," *The New York Times*, May 31 2014, URL = <http://www.nytimes.com/2014/06/01/us/nsa-collecting-millions-of-faces-from-web-images.html?_r=0> (visited 28-07-2014). Sam Gustin, "Tech Titans Reveal New Data About NSA Snooping," *Time*, February 3 2014, URL = <http://time.com/3902/tech-titans-reveal-new-data-about-nsa-snooping/>.

[66] Glen Greenwald and Ewen MacAskill, "NSA Prism program taps into user data of Apple, Google and others," *The Guardian*, 7 June 2013, URL = <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data> (visited 28-07-2014).

[67] Kant, "Fundamental Principles of the Metaphysics of Morals."

principles rely on particular facts about the state to which they are applied, and a modern application of Kantian (as well as Millian) thought will have to take new technological, political and other developments into consideration.

The interpretation of Kant that I hold reads as follows. Kant did hold that "state action that is a hindrance to freedom can, when properly directed, support and maintain freedom if the state action is aimed at hindering actions that themselves would hinder the freedom of others." But this state action hindering freedom (for the prevention of the hindering of the freedom of others) is not of the all-or-nothing kind. There is a point at which the ethical doctrine holds that the individual must not be limited in his freedom, whatever the gains for the freedom of others. That point is *at least* the formula of humanity (understood as a reading of the Categorical Imperative), meaning that in hindering someone's freedom, the state must still regard that person as an end in itself. Relating this to privacy violations, this means that, in Kant's moral framework, a state is legitimized to violate privacy, but only insofar as the ethical doctrine allows. Most importantly, the individual should be allowed to make his own free choices. The state should not interfere with his decision making, and thus in some sense assume him to generally act such that others are not harmed in their freedom.

In Mill

Then, for the second, are there any privacy violations that interfere with the sphere of (basic) liberties of a person who does not do harm to others?

To prevent understanding Mill wrongly, we have to remember that Mill is no libertarian. There are many cases in which he thinks liberty can be restricted, some to prevent harm but also some to provide benefits to others.[68] David Brink provides a useful overview of them:

1. *Some actions for the benefit of others may be compelled on the ground that their omission causes harm. These include (a) giving evidence in court, (b) contributing*

[68] David Brink, "Mill's Moral and Political Philosophy," in *The Stanford Encyclopedia of Philosophy* (*Fall 2008 Edition*), ed. Edward N. Zalta, URL = <http://plato.stanford.edu/archives/fall2008/entries/mill-moral-political/> (visited 6-17-2014).

one's fair share to common defense and other public goods, and (c) certain kinds of mutual aid (...).

2. *Each may be required to bear his fair share of the costs of securing public goods (...).*
3. *Government may regulate trade, because such conduct is not purely private (...).*
4. *The state should make education compulsory (...). (a) This is a form of paternalism that is consistent with Mill's scope worry (...), but also (b) a restriction on the liberty of parents that seems not to conform to the harm principle.*
5. *Mill accepts many forms of social welfare legislation. (...).*[69]

Some restrict liberty directly, others restrict it indirectly, but Mill thus does not protect certain liberties per se (although he seems to do in the case of the freedom of thought and expression). But we should nonetheless think of the above five exceptions as precisely that: exceptions. Whereas in Kant, we can construe a position defending state authority (as opposed to a position criticizing it), it is much harder to construe such a position from the works of Mill, who was highly sceptical about state power, as well as the “tyranny of the majority” that often disguises as representative government.[70] Partially, we can still hold on to the claim that determining the borders of legitimate interference is a task for politics, but Mill surely did not intend to say that whatever is agreed upon by politicians is right (which is why he coined the harm principle in the first place). Indeed, following the harm principle, we might say that in Mill, a government cannot - save the few above exceptions, most of which come in the form of taxes - legitimately interfere with the basic liberties of the individual. Mill did not mention exceptions for cases of the protection of public health and safety, and applying his framework to the privacy violations I have described in my discussion of Kant, we seem to come to the conclusion that monitoring those for which there is no explicit reason to think that they could harm public health or safety is a violation of their basic liberties and, given the connection in Mill between ethics and liberalism, immoral. A contemporary interpretation of Mill might allow for more restrictions on liberty (for example, in the face of terrorist threats), but I do not want to defend such an interpretation here and now.

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[69] Brink, "Mill's Moral and Political Philosophy."
[70] Mill, “On Liberty,” 8.

3.3 Aggregating Kant and Mill

The justifications of the Kantian and Millian framework differ greatly. But consider that when we look at what this means for what - in the end - they want to protect, we see less difference and more similarity. Kant and Mill both safeguard a sphere in which the individual is able to exercise his liberties without the hindrance of others, but only as long as the individual does not obstruct others in doing the same.

Neither Kant's nor Mill's ethics or (related) theory of the state is perfectionist. Neither wants to enforce on citizens a particular conception of happiness or the good life, or wants to prescribe them how to live. Individual, free choice (however differently conceptualized in ethical terms) is valued highly, and prioritized over not elaborately demonstrated risk of harm to others (or hindrance to the freedom of others). Kant and Mill, one could say, take the individual seriously. The fundamental belief that a government should not play an active part in shaping the life of the individual is no consequence of practical impossibility, or an alternative to tyranny, although it might be partly that. It is first and foremost a moral conviction, one that still lies at the root of many contemporary conceptions of the relation between the state and the individual.

Although neither Kant or Mill may be able to show why privacy violations - at least not all of them - are wrong, they are able to show that certain specific privacy violations are wrong, not because they are themselves wrong, but because the violator is the state operating outside of its moral authority. This could be raised as an objection. But I hold that if not the privacy violation itself is the problem but its context - or where and when it is violated and by whom (and to whom) - that does not diminish the strength of the arguments against certain violations. Indeed, it only reinforces the thesis of privacy's instrumental value in the second chapter, while it is still able to show that some privacy violations are nonetheless wrong.

4 Conclusions for existing legal contexts

Above, I have suggested in general which privacy violations are, in the frameworks discussed, legitimate and which are illegitimate. Below, I will spell out what this means for existing legal contexts in more concrete terms.

From my earlier argument, I argue that we can draw two general conclusions relating to existing legal contexts. That (a) an absolute right to privacy mistakenly attributes intrinsic value to privacy, and that (b) privacy, insofar it is not the privacy following from the sphere of basic liberties of individuals, is, in law, better characterized as a privilege than as a right.

A is not surprising. Few or none existing legal systems grant absolute rights to privacy. Virtually all set some clauses making it possible to make privacy violations possible if individuals suspend their right to privacy (for example: by being a threat to public safety). The US constitution does so, the European Convention on Human Rights does so, and most of the legal systems falling under that convention do too. In this respect, my conclusions affirm the correctness of the approach to privacy of those legal systems. B, however, might be more relevant. On the one hand, it speaks in favour of part of existing legal approaches to privacy, not granting explicit rights to all the specific existing types of privacy. Most European constitutions as well as the US's contain specific and explicit rights to the privacy of the home and correspondence, but not to the privacy of data and image, for example. In this respect, it is justified in doing so, since law does not need to respect privacy for its own sake, and may legitimately restrict it insofar it needs to for the protection of public health and safety. But on the other hand, B speaks against laws interfering with basic liberties, since in both Kant and Mill (to different extents), individuals should have a right to certain basic liberties, and to privacy insofar it is a part of or follows from those basic liberties.

In my interpretation of Kant as discussed in the last chapter, there are some privacy violations we can hold to fall outside the category of legitimate privacy violations by the state. Among these privacy violations are in any case the unmotivated (or even without any reasonable suspicion at all) requesting of email or social network conversations and browsing histories, as well as GPS or network tracking of a person's location. Indiscriminately investigating people's most private data constitutes a fundamental

distrust in the capacity of the individual to make his own free choices. In Kant, there is a large emphasis on giving the individual the (figurative) space he needs to choose freely and to act morally. Even the state, in Kant, must presume the individual not only capable of doing so, but also in general likely to do so. Some privacy violations, I argue at least the abovementioned, from the bottom up assume individuals to be unreliable or even incapable of acting morally.

As for Mill, it seems that the Millian framework would go even further than Kant in forbidding privacy violations. In concrete terms, it seems that Mill would say that every privacy violation, in every new instance, has to demonstrate why it would prevent harm to (or interfere with the liberty of) others.

There is a common core to these arguments. Basic liberties are connected to the concept of autonomy such that basic liberties presume that a person is autonomous to the extent that he himself knows how to exercise these liberties. Privacy violations by governments that monitor individuals who have not induced reasonable suspicion (even for the protection of public health and safety) imply the idea that the individual is not able to exercise his liberties, or have a certain way in mind in which the individual should act. Either way, they are not within the moral authority that the state has over the individual.

I have described that governments are actually violating all types of privacy (although some on a larger scale than others). There is thus a conflict between current practices and the moral frameworks discussed (regardless of the differing arguments underlying those positions). As a response, I propose that certain justifications of privacy violations (like the general motivation of the protection of public health and safety) are not sufficient and should be given more substance. Governments should put more effort in demonstrating why certain privacy violations are needed, and why they weigh up against the interference with individual liberties.

In general but concrete terms, such a proposal could look like this:

1. Assure that privacy violations are happening overtly, i.e. assure that citizens know or can know *in general terms* what kinds of privacy are violated and why, and do not want to

find out afterwards that our governments were operating a massive espionage programme on their own citizens.

2. Assure that privacy violations for the protection of public health and safety are non-discriminatory, i.e. assure that individuals or groups are targeted because there are strong reasons for seeing them as threats, not because of the individuals or groups they are.
3. Assure that if privacy is violated, it is done according to public laws.
4. Assure that privacy, if it is violated, is violated within the moral authority of the state.

I cannot provide conclusive or even convincing evidence for the merits of this particular proposal, because those merits need to be discovered in practice, and are subject to change through time. I can, however, provide a concrete example of how legal systems are in fact changing in the direction of inquiring more thoroughly in the legitimation of privacy violations by the state. In June 2014, the judges in United States v. Quartavious Davis wrote that "it cannot be denied that the Fourth Amendment (against search and seizure, JK) protection against unreasonable searches and seizures shields the people from the warrantless interception of electronic data or sound waves carrying communications."[71] The Court ruled that, although the defendant was guilty of the crimes accused, the warrantless GPS tracking by means of which his location was discovered was illegitimate. I suggest that this notion of legitimacy should take up a more central role in debates on privacy problems. The question we should be asking is not "Is privacy violation x wrong?" but "Is the state at particular point y legitimized to violate type of privacy x of this person z?" This is the direction my proposal suggests legal systems should take.

As a last note, what does the above mean for the human right to privacy? I have defended the thesis of the instrumental value of privacy, but that does not mean that we (as hypothetical authors of a human rights contract) cannot decide to make privacy a human right; it may be the only means of attaining certain ends that *have* intrinsic value (this could be argued, for example, for freedom). I thus do not explicitly criticize or defend the human right to privacy, but I do hold that it should not be mistaken to have intrinsic value. Within

[71] United States v. Quartavious Davis, United States District Court for the Southern District of Florida, 12-12928 (2014).

liberal societies there are, however, certain basic liberties that I hold to cover the most important aspects of privacy, which are not intrinsically valuable, but should be protected by law (and possibly human rights law) since governments in principle do not have the moral authority to interfere with them. In this sense, one could say I am defending the totality of human rights to these basic liberties, which we find at least in articles 2, 3, 12, 13, 18, 19 and 20 of the Universal Declaration of Human Rights, and come close to saying that privacy is simply part of the concept of liberty itself. But I will not defend an argument at the level of human rights from a strictly liberal perspective (to which I have limited myself here), since I suspect that the notion of freedom or liberty we find in human rights law resists strongly the kind of investigation I have done for that same notion within the scope of Kantian and Millian liberalism.

As a concluding remark, I wish to say just that I have not aimed to ask for the advice of philosophical idols on problems for which a satisfying solution seems to be far away, but have tried to follow the train of thought of those thinkers who (perhaps unknowingly) stood at the basis of how we ideally see the relationship between the state and the individual today, deriving from their thought a tenet that nowadays seems to be sometimes forgotten; that state authority indeed finds its basis in its ability to create an environment in which citizens are free, but that in taking those citizens by the hand through the paths of life, the state takes away precisely that freedom it attempted to create.

5 Conclusions

In this thesis I have investigated the moral contents of the concept of privacy, moral contents interpreted broadly as those elements that directly concern value or a moral obligation or right, as well as those that concern the preconditions for a moral framework, and the concept of privacy understood, wherever it cannot be understood in the abstract, as it is used (in all its variety) in contemporary liberal societies.

Firstly I have adopted Solove's view that the concept of privacy is better understood in terms of family resemblance than in terms of necessary and sufficient conditions, as well as that privacy's value is instrumental rather than intrinsic. This has also led me to the view that the moral content of privacy does not include moral obligations or rights. The moral content of privacy, I have argued, is to be found in the existing moral frameworks that presume it. I have chosen to investigate two particular moral frameworks, those of Kant and Mill, and have tried to link their thought with the different existing types of privacy (as stipulated by Finn et al.). Discussing their works, I have established two theses. The Kantian thesis: insofar privacy violations (as privacy violations) force a will, physically or psychologically, in its operation, and insofar privacy violations (as privacy violations) by the state have as a consequence that that state is no longer a means to (or: enables) freedom, Kant's moral framework provides us with a moral reason to forbid these violations. The Millian thesis: insofar privacy violations (as privacy violations) harm rather than promote total utility, and insofar privacy violations (as privacy violations) interfere with the sphere of liberties of a person who does not do harm to others, Mill's moral framework provides us with a moral reason to forbid these violations. These theses are structured alike, inquiring firstly about the consequences of the privacy violation itself, secondly about the privacy being violated legitimately or not, and then, thirdly, establishing whether the literature applies to it. For both frameworks, I have argued, the most fruitful path is that of investigating the moral legitimation of state authority, and Kant's and Mill's positions can be seen as converging on at least one point, namely that they are able to show that certain specific privacy violations are wrong, not because they are themselves wrong, but because the violator is the state operating outside of its moral authority. In chapter four, I have shown that this applies to at least several existing privacy violations. I have

considered what this means for the legal protection of privacy in general, and have made one specific proposal for a better protection of privacy in respect to these new insights.

As for further research, there is still much to be said about privacy violations by businesses. Governments are well-known for their privacy violating activities, and are especially placed in this light in the literature (most exemplary is George Orwell's *1984*), but businesses engage in similar activities on a perhaps even large scale, and a recent survey indicated that a majority of people around the world is regarding businesses as a greater threat to privacy than governments or hackers. As a bigger question, it would be interesting to see whether an overall moral defence of privacy is possible or not. I have here discussed the moral content of privacy, and shown some of the difficulties and possibilities of the Kantian and Millian moral frameworks. I have not excluded the possibility of a broader moral defence of privacy, and there are of course more moral theories than those of Kant and Mill. Other questions of interest relate to contextual changes in the concept of privacy, within and outside of liberal societies, as well as the stance of public opinion on privacy violations, and (for legal philosophers) the moral dimensions of the protection of privacy in human rights law. Those are the questions that may shed some light on the troubles we have with privacy today.

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