

Understanding Privacy

On the nature and value of privacy

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Abstract: As information technologies continue to rapidly develop, the discussion regarding privacy is becoming increasingly more important. When we speak of privacy, we are actually simply referring to the ability to control our own personal information; to be able to determine who possesses what information about ourselves. This description by itself does not provide any intrinsic value to privacy at first glance. But privacy is something necessary for some key aspects of human life. One such aspect is intimate relationships; without privacy our ability to have meaningful intimate relationships becomes limited. But the value of privacy cuts deeper to the human experience. Without privacy, our ability to act fully autonomously or live a flourishing life becomes severely hampered or outright impossible.

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Introduction

Privacy has become an increasingly important topic of discussion in recent years, with the rise of the internet and social media, as well as more pervasive government monitoring programs in the name of security. Yet whenever the topic is discussed in public discourse there exist strong differences in opinions on exactly what is meant by privacy and why privacy is valuable in the first place. Before any right to privacy can be argued, clarity on these two points is necessary. The idea of a separation between public and private affairs has been around for several millennia already; Aristotle was one of the first to argue a distinction between public life, the *polis*, and private life, the *oikos*. But it was in the late nineteenth century that privacy was first argued in the modern sense. This first argument was in response to the invention of the printing press and print media, such as newspapers. The parallels between this time and our modern age make privacy such an interesting and relevant subject of discussion. In 1890 Samuel Warren and Louis Brandeis wrote their paper *The Right to Privacy*.¹ In this paper, they argued for “the right to be let alone.” This right was needed to provide peace of mind that certain aspects of a person, such as their thoughts or emotions, would be protected from the eyes of others one may not wish to share these with. Later William Prosser developed an alternative account and described four privacy rights people should have legal protection from, in his paper *Privacy*.² These four rights are:

1. Intrusion upon a person's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about an individual.
3. Publicity placing one in a false light in the public eye.
4. Appropriation of one's likeness for the advantage of another.

Much of the academic discussion on the subject of privacy refers back to the work of these authors.

In this paper I will propose a general conception of privacy, which can be used to further the discussion on the subject. I will not argue for any specific kind of right to privacy, merely create clarity on what privacy is. To establish a viable conception of privacy two basic criteria must be fulfilled. First, privacy needs to refer to something relatively specific. Having an overly broad or abstract idea of what privacy actually refers to is not useful to us, while at the same time it needs to be broad enough to be applicable in a variety of cases. Second, privacy must refer to something of value; otherwise we shape the subject beyond recognition. We already value our privacy, to a lesser or greater extent depending on the individual, and what we need to establish is exactly why we value our privacy. Answers to these questions are valuable not only because it may provide clarity in discussions on the subject of privacy, but also because there can be no argument for a right to privacy if the nature and the value of privacy are unclear.

¹ S. Warren, and L. Brandeis, “The Right to Privacy,” *Harvard Law Review*, 4: 193–220

² W. Prosser, “Privacy,” *California Law Review* 48 (1960), 383–423.

In the first part of this paper I will explore the nature of privacy itself. To do this I refer to the work of William Parent. Parent provides one of the most comprehensive accounts of an interpretation on privacy, which builds upon the foundations laid by Warren, Brandeis and Prosser. Parent distinguishes between documented and undocumented personal information, and this account focusses primarily on the condition of privacy being not having undocumented personal information known by others. Documented information is the kind that is readily available to the public in public records or newspaper articles. Undocumented information is the kind of information not publicly available, even if this information is physically on a document such as health records. The importance of this distinction is that the sharing of documented personal information can never be a breach of privacy; this information is after all already publically available. According to Parent, we speak of an infringement of privacy only when previously undocumented personal information changes to being documented information. What is most valuable of this account is how comprehensive it is in regards to the nature of privacy being personal information. And while I share this view of privacy as personal information, there are a few problems with the account given by Parent. With Parent's focus being primarily on the state of privacy, it has some unfortunate implication for cases we would normally consider an invasion of privacy and some where we would not.

Fried shares in large part the view with Parent that privacy is concerned with one's personal information. Unlike Parent however, Fried give a value to privacy by arguing its connection to intimacy and personal relationships, and stressing the importance of exercising control over personal information. The central argument Fried provides posits privacy as a necessary component for intimacy. To a large extent our personal relationships are defined by the degree to which we entrust others with certain personal information. Close friends and relatives will have more information about you than complete strangers or simple work acquaintances. The closeness of a relationship is in a large part defined by this differing access to personal information. Losing such a difference would remove an integral part of these relationships. However, a strong criticism levied against this view is that Fried fails to argue that personal relationships cannot survive without privacy. On this Robert Gerstein improves on Fried by showing exactly how privacy is a necessary component of different levels of personal relationships. He argues that spontaneous expressions and actions are integral to intimate relationships, which becomes impossible under constant observation from others. The method of connecting privacy to personal relationships provides a very strong basis for the value of privacy. We naturally consider relationships an integral part of a healthy human life, which means we value the things we need to have such relationships. The problem I find with view is that I do not think it provides a full understanding of all cases involving privacy, there are other cases of privacy that do not immediately affect our relationships. When our privacy is violated we do not immediately consider the effects it will have on our relationships, nor do we feel like these relationships have somehow been harmed. What we more often experience is like we ourselves are violated in some way, exposed if you will. The relationship between privacy and intimacy is

certainly part of what makes privacy valuable, but it is not everything. The value of privacy is something that must connect to a more fundamental part of our being human, like our human dignity for example.

Edward Bloustein, in a response to Prosser, argues just that by showing there exists a common value connecting the many diverse legal cases defending privacy. This value, he argues, is the “inviolable personality” which is the social value protected by privacy. Bloustein defines inviolable personality as a person’s essence as a human being and it includes individual dignity, personal autonomy and independence. It is the respect for the quintessential human values that grounds and unifies the concept of privacy. Bloustein further defends the four privacy rights identified by Prosser, arguing that each of these rights is important because they protect from acts demeaning to personality and human dignity. He shows that the common thread linking a variety of privacy cases, such as surveillance, wiretapping and spread of confidential information, is the value of protection against infringing on personal freedom and human dignity. This account by Bloustein has the fatal weakness of being far too vague and broad to be of any real value. What Bloustein does well in my mind, is argue the existence of a common value between different cases of privacy. But as I will show, this is not something nebulous as human dignity, although it can be connected to such. I will show that there are two distinct ways in which we can establish why we value privacy, which is the connection between privacy and autonomy or human flourishing. I believe either one will suffice, although I have my preference.

Section 1: Privacy as personal information.

Everyone will have some sense of what it feels like to have their privacy invaded. It can be something minor such as someone opening a changing room as one is trying on new clothes or when someone wilfully reads a personal journal. Every person must have at least once experienced an event wherein they felt their privacy had been invaded. Having one’s privacy invaded can result in the experience of many different emotions, such as shame or anger. But the feeling that is present in each case of privacy infringement there is a sense of having been harmed. This sense of harm can vary on a case by case basis, but we always feel ourselves harmed in some way when our privacy is invaded. But why exactly do we feel this way? It is not like we are being physically harmed in these cases, or having our property damaged or stolen from us. Yet there is this sense that we are harmed in some way. The reason we feel this way is, I will show, because when our privacy has been invaded we have been put in a position where someone can learn, or has learned, something we were not willing to share with them. In other words, when we speak of having our privacy invaded, we speak of a situation in which another person has gained some kind of information about ourselves.

The idea of privacy being concerned with personal information was first introduced in the work by Warren and Brandeis in 1890. As such, much of the following work discussing privacy adopted such an understanding of privacy, although this particular conception has become rather outdated. A more modern conception of this interpretation of privacy is given by William Parent in the paper *Privacy, Morality and the Law* (1983), a conception I agree with in large part.

Parent defines privacy succinctly as: “the condition of not having undocumented personal knowledge about one possessed by others. A person's privacy is diminished exactly to the degree that others possess this kind of knowledge about him.”³

This definition further requires understanding of what exactly is meant by personal information. Parent uses a broad definition, with which I am in full agreement:

“Let us, then, say that personal information consists of facts which most persons in a given society choose not to reveal about themselves (except to close friends, family, . . .) or of facts about which a particular individual is acutely sensitive and which he therefore does not choose to reveal about himself, even though most people don't care if these same facts are widely known about themselves.”⁴

There are three noteworthy aspects of this, reasonably broad, definition. Firstly, it is culturally relativistic. What is considered as personal information may change depending on the majority of a society's culture. This may change between existing cultures, but this definition may also change depending on the culture's development itself, meaning that the kinds of information that is commonly considered as private may very well change over the course of time in a given society. We already see this happening in our present day; with the rise in popularity of social media we see a rapid change in what information people are comfortable with sharing on a large public platform, especially among young people. Secondly, this definition accounts for differences between individuals. Some people may have no qualms about sharing information like their height or weight, but some may. Just because the majority does not consider something as being deeply personal information, does not mean individuals may want to keep this information private anyway. This also accounts for religious differences, as many Muslim women or Sikh are not comfortable with showing their hair in public, for example. The third noteworthy aspect is specifically the application of the word “facts.” There can only be a breach of privacy if certain *facts* are made known to a wider than desired audience. In case untruths are spread we do not speak of an infringement of privacy, as these purported “facts” are not true they cannot constitute as being a part of someone's personal information. Such cases would fall under the category of defamation, slander or harassment, not the realm of privacy.

³ W. A. Parent, “Privacy, Morality, and the Law,” *Philosophy & Public Affairs* 12 (1983), 269.

⁴ *Ibid*, 270.

This understanding of personal information does bring into question information which is part of the public record, meaning information which can be publically accessed such as newspapers or other official public documents. It is not uncommon for personal information to be part of these publically available documents and thus can be considered as such. However, because these documents are publically available, part of the public record, sharing or further spreading this information without the consent of the concerned party cannot be considered as an infringement of privacy. Parent refers to personal information existing in this public record as “documented” personal information, and this documented personal information is excluded from his definition of privacy. The reason for this exclusion is simple; to do otherwise would blur the distinction between the private and public sphere. Imagine reading an old article in which a past event is described concerning a friend or acquaintance, an event which this person had not shared previously. We would not consider this being an invasion of privacy. The information itself was public and can therefore never be considered private; to claim otherwise would be paradoxical. Therefore when we speak of privacy we only consider undocumented information as relevant.

With this distinction between documented and undocumented personal information we can have a clearer understanding when there is a case of privacy infringement. We can say there is a case of privacy infringement when undocumented personal information first becomes documented personal information, even with permission there is a loss of privacy. Parent writes: “I hasten to add that a person does lose a measure of privacy at the time when personal information about him first becomes a part of the public record, since the information was until that time undocumented.”⁵ At the time the information is made public, privacy is infringed upon if this information was previously not publicly available. However, there is no case of privacy infringement when afterwards this specific information is referred to; it is at that point part of public record. It is important to be clear that documented personal information as Parent uses only refers to publicly available records. Records that are kept but not publicly available is still considered undocumented personal information, such as health records. Such information is generally under some measure of protection to prevent it from becoming public.

This is the point where my views and those of Parent begin to diverge. Parent’s concept of privacy is limited to “cases involving the acquisition of undocumented personal knowledge.”⁶ Matters of consent or permission are irrelevant on whether or not there is a loss of privacy. Rather, I will argue that an exercise of control over one’s personal information, by consenting to releasing or willingly sharing certain personal information, is defining for privacy. Parent strongly disagrees with these kinds of control definitions of privacy, arguing that people frequently relinquish their privacy for a variety of reasons and that control definitions do not allow for this. He illustrates this point with the following example:

⁵ Ibid. 271.

⁶ Ibid. 272.

“[C]onsider the example of a person who voluntarily divulges all sorts of intimate, personal, and undocumented information about himself to a friend. She is doubtless exercising control, in a paradigm sense of the term, over personal information about herself as well as over (cognitive) access to herself. But we would not and should not say that in doing so she is preserving or protecting her privacy. On the contrary, she is voluntarily relinquishing much of her privacy.”⁷

With this I do not agree, she is not relinquishing much of her privacy. The ability to freely decide who to share certain personal information with is exactly what exercising control over one’s personal information is. It is a part of exercising one’s privacy to share certain information with others. It is expected in a relationship that certain personal information is shared between people.⁸ If she were to tell her friend to document and publish the information she shares with her then there is a case of her relinquishing privacy. But sharing intimate details with a close friend is not. If this friend were to share this information with others without her express consent, then there is a case for a breach of trust as well as an invasion of privacy.

Parent argues that privacy as a form of control is “a conceptual confusion, the mistaking of privacy for a part of liberty.”⁹ The crux of his argument is that what many control advocates consider as part of privacy can better be considered as part of liberty. Parent writes: “we can meaningfully say that the right to liberty embraces in part the right of persons to make fundamentally important choices about their lives and therewith to exercise significant control over different aspects of their behavior.”¹⁰ According to Parent, only the unwarranted acquisition of undocumented personal knowledge can be considered as the subject of privacy.

Unfortunately this strict conception by Parent has several important implications. For one, under this conception of privacy there is only a case of infringement of privacy when previously undocumented personal information is acquired. This means that potentially a person could aim a high powered microphone and telescope on another person’s house, and so long as no new personal information is obtained we cannot speak of an infringement on another person’s privacy. We should consider the act of such spying in itself to be an act of privacy infringement; regardless of whether or not no new personal information is obtained, nor if the person being spied upon never becomes aware of the spying, this act is still an invasion of privacy. Consider the example a woman who has previously modelled for a nude magazine. If someone were to secretly install cameras in this woman’s bathroom to take naked pictures of her whilst being unaware, would this not be an invasion of this woman’s privacy? Considering the person viewing the cameras could much more easily obtain the relevant magazine to see her naked, no real new personal information is obtained. It could

⁷ Ibid, 273.

⁸ This connection between relationships and privacy I will discuss in the next section of this paper.

⁹ Ibid.

¹⁰ Ibid. 274.

be argued that photographing this woman in her private bathroom makes it obtain new personal information, but what if the original magazine photo-shoot was done in the same space? Then no new information is obtained, but it is still an infringement of privacy. Now consider this woman being aware of this spying. She purposefully let the other person install the cameras with her consent, because she enjoys being seen by this person. Now the same situation no longer is a case of privacy infringement. The crucial difference is that in the latter case the person in question exercises control over who sees what the camera sees. If later the other person decides to spread the photos taken from these cameras without the woman's consent, then we enter an infringement of privacy again.

To this example I believe Parent would simply respond as it being simply a severe case of harassment and trespass. There is only a case for a loss of privacy if undocumented personal information becomes documented. An account of privacy that does not recognise the above example as an invasion of privacy is an account that has no value to us.

Another problem with Parent's conception is that it does not allow for degrees of privacy. I think we would all agree that there is a very clear distinction between the sharing of private thoughts and feelings with people very close to one another, like friends or family, and sharing these with complete strangers. It may very well be that such personal interactions are part of liberty, but that does not exclude them from also being a subject of privacy.

Furthermore, Parent does not seem to consider the re-emerging of previously documented personal information to be an invasion of privacy. The example Parent himself uses is as follows:

“Suppose that A is browsing through some old newspapers and happens to see B's name in a story about child prodigies who unaccountably failed to succeed as adults. B had become an obsessive gambler and an alcoholic. (...) A might decide to turn the information about B's gambling and drinking problems over to a reporter who then publishes it in a popular news magazine. Isn't B's privacy diminished by this occurrence?”¹¹

Parent's answer to this question is a resounding “no” simply because the information in question was already part of the public record, or documented. On the first part I agree with Parent, that when A happens upon the old articles he does not infringe on B's privacy. However, by contacting a journalist and spreading B's current life situation in order for it to be put under a public spotlight his privacy has been infringed. B clearly had decided to live in anonymity and pointing a spotlight on his previously anonymous life has decidedly infringed on his wish of privacy. Even if all information concerned could easily be accessed simply by moving in certain public spaces, the fact that an unwanted spotlight had been aimed at a private citizen is an infringement of privacy, because the control over who gets to know

¹¹ Ibid. 270-271.

what about B has been taken away from him. It would be different if B chose to live a life in the public spotlight such as a politician or TV personality, but such is not the case for B. And even for these examples there exists some level of privacy, of which personal information is warranted to be made public.

To a similar objection Parent answers with a counter example: “suppose that A walks in the nude around his block and is spotted by one of his neighbors who photographs him and publishes the picture in the local paper. Now many more people know more about A than they did before but we should not condemn the publication on privacy grounds given the decidedly public nature of the photographed behavior.”¹² I would agree with this argument, yet this counter example is not the same situation as in the first example in some key ways. For one, the public information found by A concerns a long time past in the life of B, where the newly published information of B’s current life was not widely made public previously and is only valuable in context with the information found by A. The reporter would not be interested if B was just another average person with drinking and gambling problems. A more accurate counter example would be if someone found a picture of A streaking sometime in the past, perhaps during a football game or in protest, the context does not really matter. At the time publishing this picture would not be a privacy concern and would be of some interest to the public as part of current events. It would however be an invasion of privacy to republish the picture with a story of A’s current life, without A’s consent. We would not want to be stigmatised by every one of our past actions. This case is very similar to one presented to the EU courts in 2006, from which the “right to be forgotten” has emerged. Legally, the right to be forgotten is distinct from the right to privacy, but what this illustrates is the idea that stigmatisation and scrutiny based on old public personal information, that no longer bear any reasonable relevance to the present, is a form of privacy invasion.

Fundamentally the problems with Parent’s account result from his somewhat simplistic view of liberty. Parent’s criticism to a control based interpretation of privacy is that it is a “conceptual confusion, the mistaking of privacy for a part of liberty.”¹³ The problem with Parent’s criticism is that he regards liberty in a purely negative sense: “liberty is the absence of external restraints or coercion.”¹⁴ I will grant that if we consider liberty purely and only in the negative sense, then yes, privacy as control appears to be incompatible. But should we consider liberty also in a positive sense, then privacy as control becomes perfectly compatible with liberty. Negative liberty concerns itself with the absence of something, most often outside influence. In contrast, positive liberty is concerned with the presence of something, which can be control. If we then consider privacy as being able to exercise control over our own personal information, it is quite clear that privacy is itself a part of liberty. Violating someone’s right to privacy then in turn becomes a violation of their liberty.

¹² William Parent, “Book Reviews,” *Ethics* 109 (1999), 438.

¹³ Parent, “Privacy, Morality and the Law,” 273.

¹⁴ *Ibid.*

When it comes to these questions of the value of privacy, Parent falls woefully short. Parent sets out to propose a conception of privacy that is consistent with ordinary language and that does not overlap with any other fundamental terms. However, in restricting his conception by not allowing any overlap with other concepts he manages to remove privacy further from how it is used in ordinary language. This results in certain problematic normative implications. Yet, this does not mean his work has no value. The most important thing Parent provides is a clear understanding and articulation of the exact subject of privacy, that being personal information, and in this I believe we are in agreement. When we speak of an invasion of privacy, it is the acquisition of our previously private personal information by another. However, positive exercise of control over this information is a part of privacy as well, we are free to share personal information with others if we so choose. Only when this control is taken from us without our consent do we speak of invasion of privacy. Having established what it is exactly when we speak of privacy, we do not yet have a clear idea of why this would be valuable. In the next section I will show one possible theory on why we value privacy as we do.

Section 2: Privacy as integral to intimacy

Having established what the exact subject is when we refer to privacy, the next step is considering if and why privacy even has any value to begin with. A widespread view on the value of privacy is the argument of its connection to intimacy, a strong account of which is provided by Charles Fried. In his book *An Anatomy of Values* Fried posits privacy as an integral part to intimacy and human relationships. Similar to Parent, Fried holds the view that privacy is fundamentally concerned with personal information, although Fried does not explore this aspect of privacy in nearly as much depth as Parent. In contrast to Parent however, Fried views privacy as the ability to exercise control over this personal information just as I have argued in the previous section. It is not the case that the less personal information is documented the more privacy a person enjoys; it would be hard to argue that a person stranded on a desert island enjoys a great amount of privacy. Privacy only exists in context between people where there is a possibility of privacy being invaded. Fried writes: “The person who enjoys privacy is able to grant or deny access to others. Even when one considers private situations into which outsiders could not possibly intrude, the context implies some alternative situation where intrusion is possible.”¹⁵

The connection between relationships and privacy as described by Fried is an interesting one. To be a friend or a lover naturally means to have a different degree of intimacy; we would consider it strange if someone shared the same level of intimacy with a friend as their lover. And intimacy, Fried writes, is “the sharing of information about one’s actions, beliefs or emotions which one does not share with all, and which one has the right

¹⁵ Charles Fried, *An Anatomy of Values*, 2nd ed. (Cambridge: Harvard University Press, 1970), 140.

not to share with anyone. By conferring this right, privacy creates the moral capital which we spend in friendship and love.”¹⁶ Certainly there are other ways in which people show and develop their intimate relationships, such as by spending time with one another or physical gifts. But without sharing of intimacy, the sharing of one’s personal thoughts, feelings, etc. we cannot be considered friendship or love. If we did, there would be no real difference in the relationships between lovers and those of prostitutes and their clients.

Privacy furthermore allows for the modulation of different degrees of intimacy. The more intimate someone is with another, the more we would consider these people to know of one another. The knowledge a friend has of someone is quite different from that of a family member or a lover. We would find it quite strange if someone shared the same level of intimacy with their friends as she does with her lovers. By granting others access to more information of one’s person, the more intimate this relationship invariably becomes. Because these relationships require one to voluntarily share private information, we cannot know what has been chosen to not be shared. If a third party were to intervene and share previously unknown information between the two, the relationship could very easily be destroyed.

This leads to another aspect of privacy, where privacy does not serve to grant others more personal information, but rather to withhold personal information. There are many thoughts and feelings we have which can be considered hostile to our relationships which we never express. For expressing these thoughts would be to ratify and adopt them as part of ourselves. Prior to expressions these thoughts are simple musings, possibilities for us to choose. Only by expressions do these become real. Part of privacy is the ability to keep these thoughts to ourselves and control which thoughts we choose to express, and in so doing define ourselves and our relationships. “To be deprived of this control over what we do and who we are is the ultimate assault on liberty, personality, and self-respect.”¹⁷

Besides intimate relationships, Fried argues one more thing to which privacy is necessary: trust. Trust can only exist in a world where the possibility of failure exists. We do not have trust in animals or machines in the same way we do in other humans. We ensure machines work as well as possible and take precautions in case something goes wrong. When we trust others, we assume their good nature and expect others to do as they say. By removing privacy and introducing surveillance, we could instead be completely sure of others. We could see what others do and thus if they do what they say. But in so doing trust is removed. There is no longer a possibility for failure when under constant surveillance. The value of having trust placed in oneself is the knowledge that we can betray others’ trust. Without privacy this possibility is removed. Fried writes: “Without privacy and the possibility of error which it protects that aspect of his humanity is denied to him.”¹⁸

¹⁶ Ibid, 142.

¹⁷ Ibid, 143.

¹⁸ Ibid, 143.

The value of privacy is thus, according to Fried, it being a necessary component of human relationships. By application of privacy we can fundamentally have and define our relationships with others. Or in other words: "Privacy allows one the freedom to define one's relations with others and to define oneself."¹⁹

With this added connection between intimate relationships and privacy we can take another look at the previously explored examples. If we take a look at Parent's example of A coming across old newspaper articles regarding B we can now better explain why there is a case for an invasion of privacy and why this would be egregious. The fact that A found information regarding B without B having voluntarily shared this information is in itself not an invasion of privacy. While the information did not come directly from B himself, the information in question was already publically visible; it was documented information. But by approaching a reporter about B's current life, A did breach his privacy. In republishing the old information and spreading it, B is robbed of his ability to freely share this past with whom he chooses to grant this information to. This in turn also reduces the intimacy B has with anyone he chose to confide this past in. Perhaps B considered his past as very intimate information he only shares with those closest to him. This exclusivity makes the information special and with it the relationship it brings more intimate. By spreading the information without the consent of B, his control over these intimate relationships is also removed. Furthermore, while B's drinking and gambling problems could easily be discovered by moving in certain public spaces, such as bars and casinos, the public he is visible to is limited to those who visit these same spaces. Let's change the scenario slightly: what if B were to only drink and gamble in his own home? He would still possess the same problems and this would still be interesting for A to pass along to a reporter. Yet in this case there is intuitively a stronger case for this being an invasion of privacy, it concerns actions B takes in his own home. What makes this different from B visiting bars and casinos to do the same? I would say that it does not.

Now let's look at the other example, of the woman being spied on in her own home. The entire case fundamentally changes depending on the relationship between the two. If the one spying on her is unknown to the woman it is a clear violation of her privacy. The knowledge of this woman in the privacy of her own home, how she acts or what she looks like, is illegitimately obtained by someone. The control of this personal information is taken from her. Even if the woman was to never become aware of this spying, and thus might not ever directly influence any of her relationships, the fact is she does not have full control over her personal information. By taking away this control shows a level disrespect for her as an autonomous person and her ability to freely moderate her relationships. It is not possible to communicate freely and openly without the knowledge that information shared between the people in question stays between them. But if the woman has given permission and is aware of the spying, this is an expression of intimacy, although many would find this an odd

¹⁹ Judith DeCew, "Privacy," in *The Stanford Encyclopedia of Philosophy* (Spring 2015 Edition), ed. Edward N. Zalta, <https://plato.stanford.edu/archives/spr2015/entries/privacy/> (referenced on November 30 2016)

way to express intimacy. The key point is, however, that the woman in question has granted another access to this part of her person, her life, willingly and freely. The exclusivity of this access is a defining part the relationship. This relationship would in turn drastically change if this same access were granted freely to anyone through the internet for example. The intimacy granted through this would be considerably less than if it were granted to just one person.

A criticism levied against this conception of Fried's is that it does not make privacy a necessary component of intimacy. Intimacy requires much more than just privacy and Fried does not show intimacy cannot exist without it. Parent is one such critic where he argues thusly: "Intimacy involves much more than the exclusive sharing of information. It also involves the sharing of one's total self-one's experiences, aspirations, weaknesses, and values. This kind of emotional commitment, and concomitant giving, is entirely overlooked by Fried. He furnishes no argument for the claim that it cannot survive the loss of privacy."²⁰

While Fried does in fact note privacy is not the only important aspect to intimacy, I will grant that perhaps his argument as provided is not sufficient to counter this criticism. It is however possible to build from the connection between privacy and intimacy as proposed by Fried, as Robert Gerstein does in his paper *Intimacy and Privacy*. Where Fried showed privacy as being an important part to intimacy, Gerstein shows intimacy cannot develop without it.

Gerstein explains that the act of being observed changes several key aspects of any activity. When someone is taking part in an activity they cannot at the same time function as observers of this activity without losing our immersion of this activity. Or as Gerstein put it: "We cannot at the same time be lost in an experience and be observers of it."²¹ At the same time, the act of being observed changes the dynamic as well. While being observed we are aware of how our actions appear to the observer. Gerstein writes: "When we intend our actions to be observed our sense of them is very much of the same sort as that of the observers. We watch ourselves to see what sort of a point our actions appear to be making, just as they watch us in order to get the point."²²

Being observed during intimacy introduces a stronger awareness of one's actions, of how they appear to the observer and the idea of how best to reflect the impression one wishes to reflect. It takes the person out of the act of intimacy, but more importantly it removes an aspect of spontaneity vital to intimacy. Part of intimacy is spontaneous action, to act not on rational thought but by being in the moment and acting purely by what feels right to do. This becomes impossible when every action is under scrutiny and the constant concern with appearances is part of the act of intimacy. An example used by Gerstein is that of sexual intimacy. When combined with a love relationship, every act during a sexual

²⁰ Parent, 275.

²¹ Robert S. Gerstein, "Intimacy and Privacy," *Ethics* 89 (1978), 77.

²² *Ibid*, 78.

encounter becomes a spontaneous expression and development of the meaning of the relationship. By introducing an observer this dynamic is completely destroyed.

This connection between personal relationships and privacy as argued by both Fried and Gerstein is one I find builds a strong case for the value of privacy. However, I do think tying the value of privacy to personal relationships to be too limiting. There are cases I can think of that do not sufficiently fit within this framework.

Take the example of a novelist. This novelist is in the process of writing a book, which will inevitably receive several revisions and edits over the course of writing. What would happen if every such revision were to be published and scrutinised publicly? Every word the novelist writes will be published and reviewed by others, even if the novel is far from being completed. Perhaps if this were an experienced novelist he would not care, secure in his own ability and previous works. But what if this was a beginning novelist? One who is only just starting and perhaps susceptible to harsh criticism? Would he not give up, afraid to show his immature work to the general public? It is only by choosing to publish a work that an author invites public scrutiny. Perhaps a more common example would be of a person singing in the shower, feeling free to do so in the knowledge no one will hear them. But take this privacy away and this person may well choose to not sing, for fear of embarrassment.

It is possible to explain these examples in terms of their social effects, and thus in essence affecting intimacy and personal relationships. According to Andrei Marmor a degree of privacy is necessary for us to engage in innocent activities, such as singing in the shower, without incurring any social costs. We need a degree of control over how we present ourselves, as Marmor writes: “having a reasonable measure of control over ways in which we present ourselves to others is an important aspect of our well-being. It enables a whole range of choices about the constitution of one’s social environment, without which life would be either too stifling or too alienated.”²³ From this it is apparent privacy is valuable because it allows us to engage in innocuous activities which we may enjoy, but do not wish unnecessary social scrutiny from.

However, is privacy really only valuable to us due to its connection to relationships? I do not believe it is. When we experience having our privacy invaded we do not immediately feel like it has lessened our relationships or necessarily damaged our social standing, I think we feel harmed in a more fundamental way. It seems to me that the value of privacy lies deeper than just its connection to relationships and intimacy, although relationships are certainly an important component of it. The value of privacy must come from some deeper connection to the human experience itself. And what deeper connection to the human experience can there be than human dignity itself?

²³ Andrei Marmor, “What is the Right to Privacy?” *Philosophy & Public Affairs* 43 (2015), 8.

Section 3: Privacy as an Aspect of Human Dignity

Connecting a need for privacy to human dignity should not be a controversial statement. We do not consider animals as having a need for privacy when we keep them in a zoo, but I think most people will think differently when it comes to putting humans in a similar position. A strong case for this connection is made by Edward Bloustein in his paper *Privacy as an Aspect of Human Dignity*, written mainly as a response to Prosser's work and a defence of the work by Warren and Brandeis.

Bloustein works primarily from a legal perspective and attempts to propose a general theory of individual privacy which connects the different strands of legal cases, as defined by Prosser, with one common value. This value was already identified by Warren and Brandstein, according to Bloustein, as that of *inviolable personality*. Bloustein understands this concept of inviolable personality as being "the individual's independence, dignity and integrity; it defines man's essence as a unique and self-determining being."²⁴ It is the respect of these human values that binds the different cases of privacy violation together.

Throughout the paper, Bloustein discusses the four types of Prosser's privacy rights in turn, defending that each of these rights is important as they protect against actions that are demeaning to personality and against affronts to human dignity. Bloustein describes the damage of a privacy violation as follows: "The injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered."²⁵ Damage to privacy is different from other civil wrongs in that it directly damages a person's dignity and is not so easily replaced or repaired through monetary means. According to Bloustein, a person who suffers an invasion of privacy experiences a similar indignity as someone who is touched inappropriately, assaulted or involuntarily locked up, the only difference being means by which the person is wronged.

The problem with this position is that the terms used are rather vague, as Bloustein himself admits, going so far as to claim it is actually necessary:

"The words we use to identify and describe basic human values are necessarily vague and ill-defined. Compounded of profound human hopes and longings on the one side and elusive aspects of human psychology and experience on the other, our social goals are more fit to be pronounced by prophets and poets than by professors."²⁶

This may be true for lawyers and legal scholars, but these are exactly the kinds of subjects that fall under philosophy's area of expertise. As it stands, Bloustein's account is far too broad and vague to be of any real applicable value.

²⁴ Edward J. Bloustein, "Privacy as an Aspect of Human Dignity: an answer to Dean Prosser," *New York University Law Review* 39 (1964) 971.

²⁵ Ibid, 1003.

²⁶ Ibid, 1001.

However, the important argument to take away from Bloustein is that an invasion of privacy harms a uniquely human value, in his case human dignity. As Bloustein's account is too vague for us to properly attribute a value to privacy, I propose an alternative approach. Depending on your preferred perspective, I argue that there are two distinctly human values harmed by an invasion of privacy: personal autonomy or human flourishing.

Before we continue further, let me first explain what exactly I mean by the terms autonomy and human flourishing. Autonomy I understand as the ability to act according to one's wishes and desires without external limitations being imposed on one's actions. Or in other words the ability of self-determination. Of course there are certain limits to be imposed upon autonomy, such as when an action harms another's autonomy or well-being. The concept of human flourishing I consider in much the same way as Martha Nussbaum. Nussbaum describes several human functionings, or capabilities, required for a flourishing human life. These functionings include autonomy, referred to by Nussbaum as practical reason, but also things such as bodily health, political participation and leisure. To live a flourishing human life means to be able to enjoy these human functionings. One person might choose to dedicate part of their life to appreciating the arts where another might dedicate the same amount of time to mastering a game. Both are a valid part of a flourishing human life, but must be part of a whole that encompasses human flourishing.

With this understanding of personal autonomy and human flourishing, if we take a look at some of our previously used examples, the implications of an invasion of privacy harming these values should become clear. First we consider the implications for autonomy. In the example of the man whose gambling and drinking problem suddenly becomes a public focus his autonomy is harmed in several ways. For one, his decision to live in relative obscurity and anonymity was undone by another person, someone else made a decision which had significant effects on his life. Furthermore, the man in question no longer has the ability to exercise control over how he now presents himself to others, affecting his autonomy as well. The example of the woman being spied on has similar implications for her autonomy. Although she may never know she is being spied on, the decision of whom to share her private life with has been made by someone else. Unknown to her, she now has a strange kind of relationship to her voyeur. This clearly violates her autonomy by removing her ability to regulate her relationships. The two less extreme examples of the innocuous acts like singing in the shower or writing a novel. By removing the necessary privacy in both cases, a person's actions are directed not only by their own desire to pursue a given activity, but also the added factor of public scrutiny. Many people will refrain from certain acts when they know others are watching for fear of embarrassment or some other social cost, which they would otherwise do in the privacy of their home or like-minded others. It can be argued that in these two cases autonomy is not harmed, as there is nothing directly preventing someone from doing these things. They are not directly being threatened nor is either activity illegal. But this is considering autonomy purely in a negative sense; autonomy as the absence of direct interference in someone's actions. I consider autonomy in the positive

sense as persons being to act on their desires without outside limitations. In this case we have two conflicting desires: the desire to write or sing in the shower and the desire to not be subject to embarrassment. Whichever desire is chosen in the end, without the presence of privacy only one of these desires can be acted upon, which in effect establishes certain limitations and thus harms autonomy.

This connection between privacy and autonomy has not gone unnoticed by either Fried or Gerstein, yet neither of them goes any further with the idea. Gerstein explicitly argues that “it is clear that anyone who intrudes uninvited on the intimacy of another person interferes with his autonomy in a very serious way.”²⁷ And Fried writes that “the most complete form of privacy is perhaps also the most basic, since it is necessary not only to our freedom to define our relations with others but also to our freedom to define ourselves.”²⁸ Both Fried and Gerstein identified the connection between privacy and autonomy, but only in context of human relationships. Instead, I wish to broaden the connection so as to include those invasions of privacy which do not necessarily involve relationships directly. Not to say that autonomy cannot exist without privacy, but simply that a loss of privacy at the very least limits or negatively influences personal autonomy.

Alternatively, invasions of privacy harm a person’s ability for human flourishing. We can take a similar look at the used examples and see how they affect human flourishing. In the example of B’s gambling and drinking being spread through public media negatively impacts his ability to flourish because it takes away his ability to live in obscurity as he chose. He may have been a prodigy at one point in time, but clearly something happened for him to choose a different life, one not involving his prodigious abilities. We would be hard pressed to claim a person whose choice of life becomes undone by the actions of another leads a flourishing life. At the same time, we can make the argument that someone with gambling and drinking problems can hardly lead a flourishing life, but that is a different matter altogether. The example of the woman being spied on is a bit more complicated. Her being spied on without her knowledge may not influence her behaviour at all. But in the previous section we had already established that her being constantly observed without her knowledge adversely affects her relationships, as shown by Fried’s argument. The exclusivity of intimate relationship is part of its value, which is diminished in this case. Part of any theory of human flourishing is the importance of personal relationships. Humans are social animals, and without having some control over our personal relationships we can hardly flourish as such.

The two less extreme examples I find showcase the strongest connection to human flourishing. Both cases, singing in the shower or writing a novel, concern a person who is prevented from pursuing a desired activity due to the presence of possible social costs. It is natural for us to want to present ourselves in the best possible light, and will thus refrain

²⁷ Gerstein, 78.

²⁸ Fried, 143.

from showing others aspects of ourselves we are not confident in. Both cases involve a person wanting to develop themselves or express themselves through a certain activity, but refrain from doing so for fear of embarrassment. A life in which we constantly refrain from developing certain aspects of ourselves for fear of social costs can hardly be called a flourishing human life. The value in privacy from this perspective lies in its ability to allow people to develop themselves as flourishing human beings without unwanted public scrutiny.

Either approach, whether through autonomy or human flourishing, should provide a clear argument for why we value privacy. The approach through autonomy should provide a sufficient argument for the value of privacy to anyone looking at privacy from a deontological or teleological perspective. To those approaching privacy from a virtue ethics perspective the connection with human flourishing should provide enough reason to value privacy.

It could still be argued that a society can develop post privacy. The examples I have employed so far are only hypothetical situations in a western society as it is now. However, values in societies change and develop over time. A good example of such a change is the western view on homosexuality. Thirty years ago having one's homosexual preferences revealed had quite different consequences than it generally does now. Could our society not develop in a similar way for any other preference we generally like to keep secret? I do not think this is possible. There will always be a general norm of behaviour, a baseline of what is most common, and any divergence from this norm will receive at least some degree of scrutiny. The only way to develop a society post privacy is if said society becomes a homogenous whole, with no individual differences of significance. I also do not think autonomy or human flourishing is genuinely possible in such a society.

Conclusion

Before any right to privacy can be argued it is necessary to have a clear understanding of the nature and value of privacy. In this paper I believe to have succeeded in creating this clarity. When we speak of privacy, what we are specifically concerned with is personal information. Parent provides a good starting point for the exploration of the nature of privacy as personal information. He gives a broad and well-argued definition of personal information as it relates to privacy. However, his opposition to control definitions of privacy results in several counter intuitive positions on privacy, such as that spying is not an infringement of privacy so long as no new information is uncovered. Regardless of such unfortunate consequences, his defence of privacy as personal information can serve as a jumping off point to explore the value of privacy.

The best way to establish privacy as valuable is to show it as a necessary component of something we already consider valuable. Fried does just that by arguing the connection between privacy and personal relationships. By exercising control over what personal

information is known by others we can maintain varying degrees of intimacy, where those closest to us know most about us and those more distant less. Depending on the relationship between people a situation can be an expression of intimacy or an infringement on privacy. Fried unfortunately does not fully manage to argue privacy as a necessary component of privacy, Gerstein manages to do this by showing how being observed changes the fundamental dynamics of intimate expression. While I do not argue against the arguments presented by Fried and Gerstein, I do not think their account covers every case of privacy infringement sufficiently. I find that the value of privacy stems from a more fundamental aspect of human experience.

Human dignity could potentially function as this aspect, and this is the approach argued by Bloustein. In his argument he often refers to Prosser's privacy rights and argues that each case is in some form demeaning to personality. Bloustein's account of privacy and human dignity is far too nebulous a concept to properly show why privacy is of any value. Instead, what I propose is an alternative where the fundamental value that is harmed by an invasion of privacy can be one of two values: personal autonomy and human flourishing. An infringement on a person's privacy may damage their autonomy. Similarly, privacy infringements can limit a person's ability to live a flourishing human life.

Having established clearly what privacy refers to exactly and why we value this, we can then potentially work from this understanding to establish a right to privacy. After all, we cannot argue we have right to something if we do not clearly understand what it is we have a right to and why we should have this right to begin with. Furthermore, the process of arguing a right to privacy should become easier when privacy is shown to be connected to two already established values.

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