IMMUNITY FROM THE ILLEGITIMATE FOCUSED ATTENTION OF OTHERS:

An Explanation of Our Thinking and Talking About Privacy

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I.

My remarks here today were conceived in modesty, but will be presented in a manner that I fear may strike some of you as downright arrogant. My own belief is that our understanding of personal and legal privacy, after over a hundred years of reflection and investigation on the part of philosophers and academic lawyers, remains conceptually fragile. We don't understand the nature of privacy very well, and our appreciation of its normative importance is equally shaky. Many very bright and articulate thinkers have addressed these issues, of course, and it is impossible to look at this literature without being impressed with the subtleties and insights it contains. The problem with our collective understanding is twofold. As is apparent to everyone who studies privacy, there is a complete lack of philosophical consensus about what it is, and why we should care about it. Some scholars see it as a derivative, almost artificial, concept that unites quite distinct moral and legal concerns under a common name, but with no underlying conceptual unity.(1) Others argue that there is a common essence to our thinking about privacy, but totally disagree with one another about what it is. Perhaps the desire for true consensus is a vain hope for any interesting normative concept. But this brings us to the second problem with the privacy literature. I know of no single model of the concept that is really adequate. As insightful and promising as some of the models seem, they either completely ignore central parts of the way we use the language of privacy in colloquial speech and the law, or they make ad hoc stipulations to avoid the problem. This problem of incompleteness and artificiality is particularly distressing to me, since I include most of my earlier work on privacy within its parameters.

Rather than cataloguing all of the problems and disagreements in the privacy literature in tedious detail, however, I intend today to lay out for your consideration and feedback yet another model of personal and legal privacy. I am sadly aware that this model, too, will probably be found wanting. But I know of no other way of proceeding in the quest for an adequate understanding of this important, but

underappreciated, moral and legal notion. I hope, therefore, that you will excuse a rhetorical voice that speaks with false confidence.

The professional philosopher should avoid two common errors in articulating a conceptual model of privacy, or any other interesting notion, for that matter. Philosophical analysis is not a quasi-empirical business on par with lexicography. For conceptual analysis to be valuable there must be a level of interpretation and abstraction that one would never find in a good dictionary. The philosopher must generalize, synthesize, and somehow get at the conceptual core of personal privacy. Furthermore, consideration of the full implications of the model may cause us to rethink the way people sometimes speak. To take one trivial example, people in the United States often describe rude neighbors who play their stereos too loud as intruding on others' privacy. This seems to me, at best, an unhelpful metaphor. But it is better to err in the direction of allowing too much, than to artificially exclude legitimate, if not central, aspects of personal privacy. The philosopher must never fall prey to the professional temptation of semantic legislation. The last thing we need is to be told how we should think or talk. For one thing, no academic article or book could ever reach a large enough audience to have any real impact. But more importantly, even if it could, we would have, at best, an analysis of a new concept - the semantically improved one - and we would still be left in the dark about the old one, presumably the one still being used and debated in colloquial speech and the law.

I know of no better way of thinking about conceptual analysis, and its extension to moral philosophy, than with an analogy to scientific explanation. We want to know what caused the air crash, or the extinction of the dinosaurs. Different hypotheses are proposed for our consideration. Sometimes these hypotheses will suggest ways of gathering new data that will help confirm or disconfirm a particular candidate. Often times, however, experts will be left in the position of simply trusting their professional competence to make judgments of explanatory superiority based only on the data at hand. Philosophers of science yearn for some standard and objective method for making these calls, but I believe the truth is that best we can hope for is careful subjective judgments that somehow coalesce into inter-subjective agreement. Gilbert Harman has seen this as clearly as anyone.

> There is, of course, a problem about how one is to judge that one hypothesis is sufficiently better than another hypothesis. Presumably such a judgment will be based on considerations such as which hypothesis is simpler, which is more plausible, which explains more, which is less ad hoc, and so forth. I do not wish to deny that there is a problem about explaining the exact nature of these considerations.[(2)]

I propose that we evaluate philosophical theories of privacy against these four very abstract and vague criteria for general explanatory virtue. We should seek analyses that minimize ad hoc-ness, while simultaneously maximizing simplicity, completeness, and plausibility. There is a healthy tension between these criteria, of course. The simplest and most elegant theories will often leave things out, and therefore be both ad hoc and incomplete. The challenge, therefore, is to find models that score well as possible on all of these virtues at the same time. I am confident that we possess the requisite skills

to recognize explanatory and analytic plausibility when we see it. I am even optimistic enough to think that we can discover inter-subjective agreement about the least ad hoc, simplest, most complete, and ultimately most plausible analysis of personal and legal privacy.

II.

Although I promised not to focus on the negative task of criticizing competing models of privacy, I must renege just a bit. There is one standard view of the essential nature of personal privacy that is so pervasive that it must be confronted at the outset. W. A. Parent states this view with admirable elegance.

> Privacy is 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. . . . A full explication of the personal knowledge definition requires that we clarify the concept of personal information. My suggestion is that it be understood to consist of facts about a person which most individuals in a given society at a given time do not want widely known about themselves.[(3)]

The association of privacy with epistemological concepts like information, facts, and knowledge seems, at first glance, to be unexceptionable. A little further reflection reveals, however, two flaws that when taken together prove fatal to information models of personal privacy. The easiest case to make against this approach to privacy simply enumerates the myriad ways in which a person's privacy can be compromised in circumstances that have little, if anything, to do with knowledge and information. You tap my phone and therefore clearly violate my privacy. As chance would have it, there are no incoming or outgoing calls - you gain no knowledge or information. The victim of the voyeur feels her privacy egregiously violated, but not because the Peeping Tom has gained knowledge about her. His motives were perverse and sexual; her offense was not connected to information about the appearance of her naked body. Legal concerns about reproductive freedom, sexual preference, or the right to die, are connected only in the most indirect ways to notions of information and knowledge possessed by the state.

The less obvious consideration, but ultimately more telling criticism of information models of privacy concerns circumstances where information does seem center stage. You clandestinely gain access to my medical records and publish the dire state of my health in your tabloid. You violate my privacy twice over. At first it does seem that the source of my distress is that others - you and your readership - possess information about me that you did not before. But why am I not concerned that medical professionals already possess this same data, and indeed, have carefully documented it in my medical records? It is certainly something more profound than the fact that I gave my consent to the medical team's access to the information, but not to your rag or your voyeuristic readers.

In almost every instance where privacy concerns intersect with issues of information and knowledge, I think we will discover that we are not concerned with the cognitive

states of those who may have violated our privacy - their knowledge and awareness - but with other affective states - their emotions, focus, and evaluation. This may strike some of you as the splitting of semantic hairs, especially since any good cognitive psychologist would tell you that the distinction between what I am calling cognitive, or epistemological, states and affective states is quite artificial. Still, I remain confident that by redirecting our concern from what people know about us, to other feelings and attitudes they have about us, we both expand the concept of personal privacy in ways that will naturally include non-informational privacy violations, and get closer to privacy's normative core.

III.

The realm of the private is often circumscribed in colloquial speech as that which is no one else's concern,[(4)] or no one else's business. James Rachels gets at this in almost a throwaway line.

> An adequate account of privacy should help us to understand what makes something "someone's business" and why intrusions into things that are "none of your business" are, as such, offensive.[(5)]

What is it for me to concern myself with another? What is it for me to make your business, my business? A cinemagraphic metaphor is helpful here. There is a kind of zooming in, or tightening of cognitive and emotional focus. The cocktail party is crowded and noisy; I hear random bits of several scattered conversations. All of the sudden I am struck with your animated exchange with your lover. I move in and actively listen to what you're discussing. I have concerned myself with your particular conversation; I've made it my business. And, of course, in the context imagined, I have done all of this quite illegitimately.

Building on the metaphor of cognitive focus, I want to expand on a very helpful suggestion from the work of Ruth Gavison.

> Our interest in privacy, I argue, is related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others attention. This concept of privacy as concern for limited accessibility enables us to identify when losses of privacy occur. Furthermore, the reasons for which we claim privacy in different situations are similar. They are related to the functions privacy has in our lives: the promotion of liberty, autonomy, selfhood, and human relations, furthering the existence of a free society.[(6)]

Professor Gavison emphasizes the spatial metaphor of accessibility, but my interest is the psychological notion of attention. I propose that we test the hypothesis that all of our central concerns with personal and legal privacy can be brought together under the following general model. Privacy encompasses those very limited, and culturally defined, areas of our lives where we are entitled to immunity from the focused attention of others. The focused attention may be sensory, with or without the aid of

instruments, or more generally psychological. The others may include casual strangers, colleagues, newspaper readers and writers, or the government. And the nature and contours of the immunity will undoubtedly vary from context to context, and culture to culture. These crucial differences account for the often expressed view that privacy is an ambiguous, or perhaps, a completely incoherent moral and legal concept. I am suggesting, however, is that there is a single, clear enough, conceptual core that can be articulated in a relatively concise general formula.

Before going on to test the immunity from focused attention model in practical and legal contexts, I want to call attention to a potentially troubling aspect of the proposed definition. The concept of privacy is clearly normative, whether the norms be cultural, legal, or moral. It may seem, therefore, unsatisfying that at the heart of the illegitimate focused attention perspective there lies another, undefined normative concept. There used to be an expectation in analytic philosophy that conceptual models should have a kind of theoretical purity - that an analysis of causation, for example, would not contain other causal notions. We now recognize, however, that the components of our conceptual scheme are so thoroughly interconnected that this sort of purity may prove impossible.

There is clearly a difference between simple focused attention and privacy violations. Not only is focused attention permitted in some circumstances, it is required. It would be rude not to focus on your partner in an intimate conversation, and I expect my students yo focus on me when I lecture. We do not desire, nor do we expect, a blanket immunity from the focused attention of others. Thus we need to further explore the contexts in which individuals are granted this immunity. Part of our investigation will be almost anthropological - seeking to discover the cultural parameters of the concept, and its potential variation from society to society. We will also need to engage in normative and political exploration in order to identify the values that both support and partially define personal and legal privacy.

IV.

The immunity from the illegitimate focused attention of others model of privacy seems promising on grounds of simplicity and elegance. A single, complex, culturally defined, but still readily identifiable, condition is offered as capturing the conceptual core of personal and legal privacy. Unfortunately, simplicity is often purchased at the expense of completeness in conceptual analysis. We see this time and again in the privacy literature. The control of personal information is offered as definitional of privacy, but counter-examples abound. Personal and associational intimacy is proposed,[(7)] but personnel consultations are private, but normally not intimate. My own speculations about privacy and immunity from the judgment of others seem vulnerable to the very same objections I raised against Parent and informational models - there is nothing particularly judgmental about the actions of the voyeur. A full test of the immunity from illegitimate focused attention of other account is only possible after allowing plenty of time for bright and imaginative thinkers to try their hands at articulating problems and counter-examples. The following catalogue of the ways in which the model incorporates a surprisingly wide range of issues in legal privacy is offered only in the spirit of circumstantial evidence, not full confirmation.

In the United States there are at least four distinct legal sources for immunity from the illegitimate focused attention of others - statutory law, common law, and two quite separate constitutional provisions (the Fourth Amendment and the Fourteenth Amendment). Most jurists and academic lawyers who have studied privacy law have either found it to be, in Judge Bigg's famous phrase, "a haystack in a hurricane,"(8) or they have succumbed to the instinct for conceptual revision, and have sought to exclude certain kinds of issues and cases as not "really" having to do with privacy. I am struck, however, with the surprising conceptual continuity that the immunity from illegitimate focused attention of others model of privacy allows us to see in the disparate areas of the law.

The most straightforward kind of privacy protection we find in the law is statutory. Legislators occasionally become concerned with specific sorts of focused attention and take direct steps to address the problem. In the United States, for example, Congress became concerned with vast amount of personal records that were being amassed by federal agencies. They were specifically worried about highly personal information in the form of employment, academic, and medical records. The result was the Privacy Act of 1974 which was designed to safeguard the individual against an invasion of privacy through the misuse of these government records. It gave citizens the right to know about these records - how they were collected, maintained, used, and disseminated - and most importantly, to see their own records and seek amendment of inaccurate, untimely, or irrelevant information.(9)

The authors of the 1974 Privacy Act would, no doubt, be surprised to have their intentions characterized as a concern with legally enforcing an area of immunity for the illegitimate focused attention of others. They would be more comfortable, I'm sure, with the kind of information model so pervasive in the privacy literature. Still, I claim there is nothing stipulative, nor misleading, about such an interpretation of their motives, or the effects of their legislative action. The advantage of my approach is that other legal issues dealing with privacy, but having little or nothing to do with information, now become part of the same legal concern, and not simply equivocation.

There was virtually no academic discussion of privacy in American law before Warren and Brandeis' seminal article in 1890.(10) Their explicit goal was not to chronicle, or analyze, the current state of the law, but to advocate change and expansion. Their focus was on the common law, since it remained in the direct control of judges.

> The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth of which characterizes the common law enabled the judges to afford the requisite protection without the interposition of the legislature.(11)

The article was successful beyond anyone's wildest dreams; privacy case law did, indeed, expand, and Warren and Brandies' arguments were consistently cited by courts

as justification. By 1960, Dean William L. Prosser, the foremost academic expert on torts in the United States wrote another extremely influential article on legal privacy, one that was intended as an analysis of the (then) current state of privacy torts, though it was also a stinging critique.(12) He identified four distinct privacy concerns in the common law, and despaired finding much that unified them, besides the appellation of privacy.

> The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by a common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in a phrase coined by Judge Cooley, "to be let alone." Without any attempt to exact definition, these four torts may be described as follows:
>
> 1. Intrusion upon the plaintiff's seclusion or solitude, or his private affairs.
>
> 2. Public disclosure of embarrassing private facts about the plaintiff.
>
> 3. Publicity which places the plaintiff in a false light in the public eye.
>
> 4.. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.(13)

I don't want to fall into the trap of trying to defend the often haphazard way in which the common law has developed. I partially agree with the many commentators who have worried about how central, or even relevant, the concept of personal privacy was to the facts of the specific cases, or even the family of cases in Prosser's schematization. At the same time, however, the charges that whole categories in this model have nothing to do with privacy,(14) or Prosser's original complaint that there was no underlying conceptual unity, seem unfounded. Edward Bloustein hypothesized that the underlying commonality was provided by the fact that the privacy issues in each category were concerned with protecting and honoring "an aspect of human dignity."(15) Although I don't disagree with his analysis, I think we gain clearer normative and semantic insight by seeing these apparently diverse cases as all dealing with the illegitimate focused attention of others.

The intrusion cases all have to do with sensory or epistemological access to the individual. The notion of intrusion is, of course, primarily a spacial concept. And in some of the earliest examples of this tort the violation of norms regarding spacial and locational norms seems to have been the court's major concern. But as soon as the tort is expanded to cover electronic intrusion by wiretapping, for example, it becomes apparent that the court is protecting something much broader than physical space and security. The notion of intrusion now becomes metaphorical - we are granted immunity from many sorts and extensions of sensory focused attention.

It's bad enough when one person violates your privacy, but it's much worse when a whole group of strangers is collectively involved in the violation. In the public disclosure cases, however, the focused attention is more passive. The voyeur, snoop,

private eye, paparazzi, and the like, intentionally focus their attention on individuals against their will. If there is indeed a privacy violation in these cases, if the focused attention is illegitimate, then the person who focuses his or her attention bears normative responsibility. This is not usually the case in the second set of privacy torts. The wrong here, is not the intrusion, exactly, but sharing the of information - often the result of the intrusion - with others in an illegitimate and public manner and thereby causing them to focus their attention illegitimately.

I may focus the attention of others on you in a direct and personal way that may count as illegitimate by publicizing some intimate or embarrassing fact about you, but I can also focus the attention of others by spreading lies, inaccuracies, or unreliable data. According to some commentators, when alleged facts turn out to be errors, privacy is no longer implicated.(16) The courts, here, seem to have better intuitions than some philosophers. A pair of influential, and closely related, cases involved a photograph of a couple embracing in public. The first is discussed by Bloustein as a disclosure case. The court dismissed this case on the reasonable enough grounds that by embracing in public, the couple had voluntarily consented to be viewed by others.(17) In the terms suggested here, the published photograph may have focused the attention of others on the man and wife, but this focused attention was not illegitimate because of the location and context of the embrace. The second case, however, shows how natural it is to include false light as an aspect of personal privacy. The same photograph was used to illustrate an article on "the wrong kind of love, . . . [involving] wholly sexual attraction and nothing else."(18) The focused attention of viewers of the photograph was then deemed illegitimate, precisely because the alleged facts implied in the article and photograph turned out not to be facts at all.

Celebrities, sports stars, actors, and models often allow others to focus attention on themselves indirectly through the use of their name or image in advertisements and endorsements. But if the same use of a person's name or image occurs without his or her permission, the focused attention of others becomes actionable. Legitimate focused attention can be turned into illegitimate focused attention by unscrupulous business practices and a kind of theft. Some have seen the inclusion of the appropriation cases under privacy as a kind of devaluing of the legal concept.(19) What the courts have correctly seen, however, is that a person's name and likeness, and the attendant focused attention of others that goes with publishing this name or likeness, is a kind of commodity. One that can be misappropriated, and is deserving of legal protection because the focused attention of others comes at a real personal cost, and individuals who allow this attention to be directed toward themselves deserve compensation.

It is one thing for private citizens, individually or collectively, to illegitimately focus their attention on you. It is quite another for government, with the coercive power of the law, to illegitimately focus its attention on you. The Bill of Rights within the United States Constitution seems to clearly articulate one relevant standard for when such focused attention is legitimate.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath

> or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[(20)]

In a perfect world the only government searches - the systematic focusing of the law's attention on the individual - would be those where there was a valid warrant. A judge or magistrate would already have determined that there was probable cause for the search, and the scope of the search would be clearly articulated. In such a world citizens' would have a good deal more privacy in their dealings with government, and Fourth Amendment jurisprudence would be a good deal less interesting.

I have profound misgivings with many of the Supreme Court's rulings which have eroded requirements for both warrants, and more seriously, probable cause. I think they have been much too concerned with perceived state needs in the areas of public safety and law enforcement, and have tended to under emphasize the fundamental importance of a citizen's right to privacy. But, liberals and conservatives alike can rejoice in the undisputed fact that the Fourth Amendment's protection from "unreasonable" searches provides some very tangible immunity from government's focused attention on the private citizen.

V.

Government has the power to focus its attention on individuals in ways that have nothing to do with search and seizure. It can concern itself with you - it can make your business, its business - by criminalizing behavior that you engage in. Usually this focused attention on you will be indirect. It will be extremely rare for government to care that you, personally, engage in some behavior it desires to proscribe. The typical case will be that the behavior, generally, is made a crime and you get caught up in government's focused attention on anyone engaged in the behavior almost by accident. Defenders of constitutional privacy claim that some instances of this sort of governmental focused attention are illegitimate.

This line of thinking has struck many commentators as downright dangerous. They point out that any real system of laws will proscribe certain forms of personal behavior. Almost any law will implicate what the Supreme Court calls an individual's "liberty interest." But since government and law are absolute necessities, the state's rational interest in the public good must almost always override those of individuals who would desire to engage in the proscribed behavior anyway. As a general point about law, sovereignty, and individual legal freedom, all of this is unexceptionable. But the question remains whether there might be a class of behavior that is somehow special and deserving of constitutional protection on the grounds that government's focusing its attention here counts as constitutionally illegitimate.

The United States Supreme Court has famously ruled that there is indeed a class of behavior that is deserving of immunity from the focused attention of the state. Like many important issues in constitutional law all of this has developed piecemeal, and coherence and conceptual unity is only possible in hindsight. The Court's first attempts at articulating such a right of privacy focused on concepts of place and interpersonal relationship. Justice Harlan writing in 1961 summarizes the Court's historical privacy concerns, as follows.

> Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. . . . Of this whole 'private realm of family life' it is difficult to imagine what is more private or intimate than a husband and wife's marital relations.(21)

The issue before the Court was laws criminalizing the use and dissemination of birth control. By 1965 the Court explicitly recognizes certain immunity from the focused attention of the state within the marital relationship.

> We deal with a right of privacy older than the Bill of Rights - older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.(22)

But even here, we see in Justice Douglas's opinion a continuing concern with notions of place, and Fourth Amendment privacy concerns.

> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.(23)

The sort of behavioral, or decisional, immunity from the focused attention of government only clearly enters American constitutional law 1972 in a case that also deals with the legal proscription of birth control.

> It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the married couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child.(24)

We must clearly distinguish two totally separate issues at this point. My concern is with characterizing legal and constitutional question of privacy. The Supreme Court has identified a narrowly defined range of decisions which "fundamentally affect a person" as being constitutionally immune from the focused attention of the state. Decisions about bearing or begetting a child are important examples of such illegitimate focused attention. All I am arguing at this point is the language of privacy seems natural, historically coherent, and appropriate. All of this is quite distinct from the jurisprudential questions of whether the United States Constitution does contain such a right to privacy, where such a right, if it does exist, finds its constitutional home, or

what the appropriate range of decisional immunity is. I have strong opinions on these latter issues. I have argued elsewhere that a "Due Process" home for decisional privacy makes interpretive sense, and that the Court's extension of this immunity from governmental attention to abortion is philosophically and constitutionally valid.(25) I lament the Court's reluctance to extend such immunity to decisions about sexual preference,(26) or explicitly to the controversies regarding "the right to die."(27) But, as I've said, these are separate issues and controversies, and are not the direct subject of today's remarks.

VI.

One of the most persistent mistakes in normative philosophy, generally, and philosophical jurisprudence, in particular, is the instinct to see consequentialist and deontological reasoning as antagonistic, and mutually exclusive.

> [I]s privacy's value best described in consequentialist or deontological terms? Case law mentions that privacy is valuable for such diverse purposes as "promotion of free discourse," "to secure conditions favorable to the pursuit of happiness," "leading lives in health and safety" in the home, "to keep secret or intimate facts about oneself from the preying eyes of ears of others," and the promotion of personal relationships. With claims such as these, the courts suggest that privacy is valuable because of its desirable consequences. Yet there is also a deontological strand in legal privacy theory. The law contains suggestions that privacy's value stems from respect for "man's spiritual nature," "individual dignity," and "inviolate personality." Since a consequentialist account of privacy's value will ultimately clash with a deontological account, we must arbitrate between them if we decide that privacy does possess an independent value.(28)

Arbitration is not only unnecessary, it will prove misleading. Privacy rules, like moral and legal rules generally, embody both forward-looking and backward-looking perspectives.

Any system of rules must have at least a superficial perspective on the future. If we assume that maximal freedom and autonomy are basic goods, and that any genuine system of rules constrains possible behavior to some extent, then there must always be some reason why we should have the rules rather than do without them. The justification of a system of rules will always encompass the argument that the world will be better with the rules than it was without them. From the very general perspective of political theory, we see such an appeal in the classical social contract argument. We see it in a much more focused form in the debates on tougher criminal sentencing as a tool for controlling violent crime. It may well be that extending legal protection from the illegitimate focused attention of others is partially justified in different contexts by all of the consequentialist reasons that Julie Inness recounts from privacy law.

None of this is incompatible with the equally tangible perception of a backward perspective to a system of rules. Once we have a system of rules, once the constraints

are recognized as binding, then violations will engender a temptation to go back in time and "make things right." When someone fails to respect my immunity from their illegitimate focused attention my moral feelings have little to do with making the world a better place in the future. The miscreant had a duty to respect privacy conventions and laws, a duty that was egregiously violated. My concerns tend more to what justice demands, to what is fair and right.

John Rawls saw this simultaneous backward and forward looking aspect of rules as clearly as anyone. His particular focus is philosophical defenses of criminal punishment, but the point is generalized later in his classic article, "Two Concepts of Rules."

> One can say, then, that the judge and the legislator stand in different positions and look in different directions: one to the past, the other to the future. The justification of what the judge does, qua judge, sounds like the retributive view; the justification of what the (ideal) legislator does, qua legislator, sounds like the utilitarian view. Thus both sides have a point (this is as it should be since intelligent and sensitive persons have been on both sides of the argument); and one's initial confusion disappears once one sees that these views apply to persons holding different offices and duties, and situated differently with respect to the system of rules that make up the criminal law.[(29)]

I fear Rawls' desire for a strictly institutional separation between consequentialism and deontology is just too tidy. Ideal legislators will certainly place heavy emphasis on the short and long-term consequences of enacting a new rule. But they may also justify their actions on deontological considerations of justice, fairness, and intrinsic value. Clearly trial and appellate judges feel bound to some degree by past law and precedent. But what could be more obvious than the fact that good adjudication requires some consideration of the social and precedential consequences of particular rulings? The truth is, I believe, that any robust system of rules will always depend on both the forward-looking perspectives of utilitarianism, economic efficiency, and the like, while at the same time equally embodying the backward-looking perspectives of concerns with duty, virtue, and corrective and retributive justice.

VII.

The forward-looking approach to the value of personal privacy directs us toward discovering those things that privacy contributes to our personal and social well-being. It seems clear to me that privacy conventions and rules make two fundamental contributions - they make us happier and more content, and they allow us greater social and legal freedom. Any adequate explanatory account of privacy must acknowledge both of the functions of a culturally defined immunity from the focused attention of others.

Privacy scholars occasionally suggest that privacy concerns have origins that are ultimately biological.

> Man likes to think that his desire for privacy is distinctively human, a

> function of his unique ethical, intellectual, and artistic needs. Yet studies of animal behavior and social organization suggest that man's need for privacy may well be rooted in his animal origins, and that men and animals share several basic mechanisms for claiming privacy among their fellows.[(30)]

Alan Westin, writing thirty years ago and clearly ahead of his time, cites some of nascent literature in human ecology and evolutionary psychology that suggests a deeper, genetic source for privacy needs and desires. My argument need not take sides on the grand questions of nature versus nurture, but I have to confess that I am sympathetic to the relevance of human biological history in providing insight into the importance of personal privacy. At least two distinct lines of reasoning support such a hypothesis.

Consider, first, the following thought experiment. You are out to dinner with a close friend and having an enjoyable meal. There is nothing particularly private about what's going on. In our culture, consuming a meal, or conversing with a friend, is something that can be, and often is, done in public. There is nothing embarrassing, shameful, discomforting, in others observing you engaged in these activities - though, of course, we can imagine other cultures where this would not be true. But, imagine that you become aware that a rude patron across the dining room is staring at you. At first you try to ignore it, but as the meal progresses you become preoccupied with this person's focused attention on you. Such behavior is inappropriate, the focused attention is indeed illegitimate, but why is it so disquieting? It seems easy to imagine this apparently inconsequential act of rudeness completely ruining the meal, causing you to leave early, and perhaps leading to verbal or physical confrontation. Why?

The relativist's argument is clear. Without rules making such focused attention illegitimate, not only would the restaurant patron's behavior not implicate your privacy, it would not be psychologically troubling at all. I find this hard to buy. Perhaps we can imagine cultures where being stared at by total strangers would be a form of flattery, or respect, and therefore the cause of no negative emotions on the part of the object of the focused attention. If there are such cultures - perhaps Hollywood is such a culture - I think it might be a case of environmental conditioning needing to overcome basic biological instincts. Many species are keenly attuned to the direction of an individual organism's gaze - both individuals of the same species, rivals, or potential mates - and individuals of different species - potential predators or prey. It would be in some sense surprising that a socially sophisticated species such as our own would not have developed very acute sensitivity to focused attention of others. And since so much of the focused attention of other organisms in nature is an occasion of danger for the object of that attention, one might expect that natural selection would result in the awareness of such attention being a cause of agitation and warning pain.

A totally different strategy for defending a biological role for privacy concerns goes directly to the "social constructionist's" home court. Ethnographic research is a mixed blessing for the cultural relativist's position on personal privacy. On the one hand, of course, anthropologists note the amazingly different privacy conventions, and the embarrassing fact that some cultures seem much less concerned with privacy than others. But, in marked contrast to this direction in the argument, is the ubiquity,

perhaps universality, of privacy conventions.

> Needs for individual and group privacy and resulting social norms are present in virtually every society. Encompassing a vast range of activities, these needs affect basic areas of life for the individual, the intimate family group, and the community as a whole. . . . [T]he norms vary, but the functions which privacy performs are crucial for each of these areas of social life.(31)

It is a distressingly common misunderstanding of genetic and biological views of behavior to suppose that nature and nurture are rival explanations. In fact, they are partners in full accounts of virtually everything of interest regarding individual organisms. We know, for instance, that the disposition to sing has clear genetic origins in song birds. At the same time, however, the songs they sing are learned. Indeed, if individuals are deprived an environment where they are exposed to the songs of their own species, they are doomed to producing a pitifully simple outline of the beautiful and individually unique compositions of their socially trained fellows. It may well be that the focused attention of others is capable of producing biologically based discomfort and agitation, while at the same time conceding that cultural conditioning both teaches us to accept this focused attention in many contexts, and that it defines culturally specific areas of immunity.

As Justice Brandeis saw so clearly, privacy takes account "of man's spiritual nature, of his feelings and his intellect;" "only a part of the pain, pleasure and satisfactions of life are to be found in material things." Because of this, humans desire "protect[ion] . . . in their beliefs, their thoughts, their emotions and their sensations."(32) The focused attention of others can cause tangible pain and unhappiness. Rules that limit such psychological discomfort enjoy legitimacy for this reason alone.

VIII.

Protection from the personal pain and agitation of illegitimate focused attention is a forward-looking justification that is directed toward the individual, as a unique individual. The second, and for our purposes more significant, consequentialist account of the value of personal privacy sees individuals as fundamentally social. Privacy performs a crucial social and political function in a species that has evolved to live in close proximity and association with one another. This has been appreciated in fits and starts within the privacy literature, but has most clearly been articulated in the last decade in the brilliant and important final work of Ferdinand Schoeman.(33)

Many scholars have noticed the connection between the robust protection of personal privacy and the moral and political ideals of freedom and autonomy. Their primary focus has been on political and legal liberty. This is hardly surprising, since they are all writing from within highly structured, but basically liberal, political and legal cultures. We are all rightly concerned with the focused attention of government. It's gaze is almost always evaluative, or judgmental. Are you doing something wrong? Are you obeying the rules? Is your behavior something that others should concern themselves with? Obviously this sort of institutionalized focused attention will produce

significant limitations on personal choice and liberty. Liberal political cultures honor basic values that have a healthy, but profound, tension between themselves. We all desire a life of peace, tranquility, and social stability. We want to live in a genuine community where others care about us, and where everyone plays by agreed upon rules. At the same time, we desire to maximize individual freedom and autonomy. The clear political function of privacy is to allow certain very limited areas where the individual is granted immunity from the judgment of state.(34) Though the true significance of privacy as a source of political freedom continues to be under-appreciated, privacy scholars have done a pretty good job of identifying this forward-looking social function of granting individuals immunity from the illegitimate focused attention of law and government.

What has not been clearly enough seen until very recently is that the focused attention of others who have nothing to do with institutionalized authority may be even more detrimental to individual freedom. Schoeman argues that living in close association with others and being subject to their control through focused attention is actually a precondition for freedom and autonomy.

> Much of what is most important about our life would be lost, would be inaccessible to us, were we uninfluenced - unpressured, if you will - by what we see around us. Most, if not all, of our effectiveness as social agents would be undermined by the elimination of the kinds of pressures and influences that philosophers in the analytic tradition treat as rationally corrupting. . . . Most of our protections from a monolithic social and political tyranny depend on participation in associations. The survival and effectiveness of these associations presuppose the availability of forces to bring about conformity with group norms - forces such as loyalty to group participants, methods, and ends.(35)

Granted that social pressure is a good thing in both the culture as a whole, and in smaller associations like family and friends. Focused attention helps produce adherence to group-defined norms. At the same time, however, too much focused attention produces blind conformity and a loss of individual autonomy. According to Schoeman, the most important function of personal privacy is to regulate the fine line between the appropriate social pressure that produces order and genuine associations, from the excessive social pressure that precludes freedom and autonomy. And as important as it is to have immunity from legal and governmental pressure, immunity from a more amorphous social pressure is even more crucial to genuine social freedom and individual liberty.

> I aim to understand the dimensions of privacy that arise in our social encounters. I argue that privacy in the contexts of our social relations protects us from social overreaching - limits the control of others over our lives.(36)

This sort of forward-looking functional account of the value of privacy conventions does not, of course, imply any sort of conscious awareness of the salutatory effects on the part of anyone. The subtle forces of cultural selection, just like many of the factors

in natural selection, may operate at levels far removed from the cultural and normative justifications familiar to most members of the society, or even to humanists and social scientists producing scholarly analyses of the conventions. The beauty of an account such as Schoeman's "overreaching hypothesis" is that it allows us to get a glimmer of the cultural mechanisms that must have been at work, even though it is hard to imagine any conclusively confirming data to be discovered, or any crucial experiment to be conducted.

IX.

From the backward looking perspective on rules we seek to understand our attitudes toward breaches of normative responsibility. How serious are they? What should be done about them? Many of us feel that violations of the social and legal norms that define privacy are very serious offenses. They make us uncomfortable, unhappy, and angry. But certainly it is more than the pain that victims feel that explains why the violation of society's defined conditions for immunity from the focused attention of others is so profoundly wrong. I think we do better to see the psychological pain, not as the normative focus of the wrong, but as a collateral symptom.

I have come to believe that what is so wrong with failing to respect a person's privacy is that we have failed to respect them generally as a person. This thesis underlies Stanley Benn's important work on personal privacy.

> I am suggesting that a general principle of privacy might be grounded on the more general principle of respect for persons. By a person I understand a subject with a consciousness of himself as an agent, one who is capable of having projects, and assessing his achievements in relation to them. To conceive someone as a person is to see him as actually or potentially a chooser . . . To respect someone as a person is to concede that one ought to take account of the way in which his enterprise might be affected by one's own decisions. By the principle of respect for persons, then, I mean the principle that every human being, insofar as he is qualified as a person, is entitled to this minimal degree of consideration.(37)

Privacy violations are a very serious form of disrespect. Respect and disrespect, of course, form an affective continuum, and disrespect - both felt and showed - comes in varying degrees. I am suggesting that the disrespect shown in the kinds of privacy violations we have been discussing fall to the extreme end of this spectrum - the constitute a kind of insult to, or even assault on, the person.

The hypothesis that privacy violations constitute a kind of disrespect or insult to the victim helps explain a number of things that have puzzled scholars. We can now easily explain why it is not necessary for the victim to be tangibly harmed by the violation because she is indifferent, or simply fails to know of the assault. You can intentionally insult me, but I may simply not care. Another may violate an area of immunity from focused attention, and I may simply be unaware of the fact. But, just as it is possible for you to grievously insult me without my knowledge, you can similarly violate my privacy while I remain in blissful ignorance.

> But respect for persons will sustain an objection even to secret watching, which may do no actual harm at all. Covert observation-spying-is objectionable because it deliberately deceives a person about his world, thwarting, for reasons that cannot be his reasons, his attempts to make a rational choice. . . . C is unaware of A. . . . the significance to him of his enterprise, assumed unobserved, is deliberately falsified by A. He may be in a fool's paradise or a fool's hell; either way A is making a fool of him.[(38)]

The disrespect hypothesis also beautifully accounts for the clear cultural component of personal privacy. What actions, gestures, and words, constitute an insult is clearly a matter of convention. This in no way softens the pain, or the moral importance, of the insult. One can easily imagine a culture where raising the middle finger is understood to communicate - "You're number one, you're the best." Not in our culture, however. The areas of our lives where we expect immunity from the focused attention of others is no cultural, or biological, universal. But given a particular culture where these expected areas of immunity exist, it is easy to see why the failure to honor this immunity counts as an attack on the victim's moral core.

To violate a person's privacy, to illegitimately focus attention on protected areas of their lives, is to show them great personal disrespect. It is to insult them, and in extreme cases, to subject them to a form of assault. These violations often produce great personal pain. But it is not the pain that makes them wrong from the backward looking perspective. It is rather that because the violations are so clearly wrong, the victim feels the pain. Privacy conventions establish a kind of trust between people. Failing to respect these conventions is, therefore, a breaking of trust - a kind of cheating. The voyeur, the paparazzi, the causal snoop, and the unscrupulous legal official, are engaged in an offensive form of injustice. The rules exist, others play by them, and they have taken advantage of the rules for their own benefit, but have ignored them as applied to others. Like all forms of moral offense, the backward looking perspective seeks some way, usually very imperfect, of redressing this past injustice.

X.

Normative philosophical analysis is tedious, sterile, and in the worst sense, academic, if it does not allow some application to genuine moral, political, and legal controversies. I want to close my remarks here today with a brief application of the immunity from the illegitimate focused attention of others model of personal and legal privacy to an on-going practical and theoretical debate within contemporary society. This controversy plays out in several different venues. My focus will be at a theoretical level - the fascinating debate between liberals and communitarians in contemporary political theory.

I have argued that personal privacy should be understood as demarcating the bounds within which individuals are granted immunity from the focused attention of others. As the language of "personal" and "individuals" clearly indicates, there is an analytical focus on, and normative concern with, unique, freestanding, persons. The forward-looking perspective justifies this normative concern with consequentialist

values such as protection from personal pain, and the furtherance of individual freedom and autonomy. The equally valid backward-looking perspective talks of respect for persons and implies a fundamental concern with the individual. All of this concern with the individual is almost definitional of contemporary liberalism. And, indeed, personal privacy is highly valued by liberals, and typically finds its strongest endorsement in liberal democracies.

Liberalism, or as Charles Taylor calls it, atomism, is a doctrine that, at least according to its critics elevates freedom and individuality above all else as fundamental political values.

> Theories which assert the primacy of rights are those which take as the fundamental, or at least a fundamental, principle of their political theory the ascription of certain rights to individuals and which deny the same status to a principle of belonging or obligation, that is a principle which states our obligation as men to belong to or sustain society, or a society of a certain type. Primacy-of-right theories in other words accept a principle ascribing rights to men as binding unconditionally, binding, that is, on men as such. But they do not accept as similarly unconditional a principle of belonging or obligation.[(39)]

I doubt that this is a fair characterization of contemporary liberalism, but I will leave for another occasion a defense of that thesis. I want, rather, to explore the counterposition that assumes it as the beginning point for analysis and critique.

Communitarian political thinkers attack the theoretical foundations of liberalism on a number of closely related grounds. According to Sandel, the "unencumbererd self" that is the starting point for classical social contract arguments is not just a fiction, but an incoherent idea.[(40)]

To be the sort of mature, reflective, thinker that Hobbes or Locke require in order to rationally bargain in a state of nature, or that Rawls explicitly demands for the decisions about justice in the original position, assumes a pre-existing social environment. One is never free of the social conditioning that so obviously fashions each of us into the persons we truly are. One, certainly, cannot leave values and conceptions of the good behind a veil of ignorance, for the purposes of determining the basic political and legal structure of some new imagined society. People are who they are, including their most basic normative and intellectual intuitions, because of the culture and social environment they have been nurtured in. In addition, as Taylor so effectively argues, liberals cannot consistently elevate liberal values like freedom, autonomy, and individual rights, to a unique first conceptual priority. The problem is not that these values are not important and deserving of honor and protection, but rather that they causally and conceptually presuppose other normative obligations. Such luxuries as freedom, privacy, and individual rights all presuppose certain forms of association or community. And if the connection between a community, society, and government, on the one hand, and important liberal values like freedom, equality, and personal privacy, on the other, is truly a necessary one, than the liberal is forced to extend equal normative importance to other group-centered political values like an

obligation to belong to and help sustain society, or a genuine acceptance of the legitimacy and need for binding legal and political authority over individuals.

Although I am extremely reluctant to grant the communitarian analysis the status of a complete and fair characterization of classical or contemporary liberalism, and I am unwilling to concede anything like a decisive refutation of liberal political theory, I do believe that communitarians have made many valid points that have tended to be ignored, or at best insufficiently addressed, by contemporary liberals. If not at its theoretical core, than at least in rhetoric and analytic attention, liberalism probably has been guilty of so emphasizing individualistic political values that it has neglected equally important group values. Although it is a dangerous metaphor to treat groups as personified organic wholes, we all understand - liberals, conservatives, and communitarians, alike - that societies have needs that are sometimes at odds with the needs and desires of the individuals who make up those societies. And the strong conception of personal and legal privacy I have been defending here, seems in some contexts to be precisely the sort of individualistic value that stands in genuine conflict with group-centered values like social efficiency, public safety and order, and effective law enforcement.

I fully concede that enthusiastic respect for personal and legal privacy will come at some genuine cost to society as a whole. This is clearest, I think, in the context of government regulation and control. But, there may be a substantial social cost to recognizing a more general immunity from the illegitimate focused attention of others, as well. The liberal defense of personal privacy must begin with a thorough exposition and analysis of the nature and value of privacy of the sort I have sketched here today. But it must also go on to acknowledge these tangible social and legal costs. Liberals will need to show that there is enough personal, but ultimately social, return to justify these costs.

Communitarians and other privacy skeptics may argue that the social costs are simply too high, but I think this argument will prove unpersuasive in most contexts. I can easily enough imagine specific instances where a social need emerges as so central that the culture may evolve in such a way as to treat the focused attention of others as now being legitimate within a narrowly defined context, where it once was considered illegitimate. Most of us, to take one relatively trivial example, have come to see airport metal detectors as a legitimate sort of focused attention on our selves and our possessions. I can even grudgingly concede contexts in which an illegitimate focused attention by government on the individual is permitted by overriding social need. But, here, I would insist on two conditions that I think are too seldom addressed by privacy skeptics. First, such "exigent circumstances" must be clearly and narrowly defined. And, secondly, society has an obligation to thoroughly make its case that the social need is truly great enough to trump the individual's interest, if not right, in an immunity from the illegitimate focused attention of government. Vague generalities like the war on drugs, or the need to control crime, will never be sufficient by themselves. The very specific cost of society's infringing on the individual's personal privacy will have to be balanced against the equally specific advantage to the group of allowing such an infringement. And though I concede that the balance will occasionally tip to the needs of society and government, I remain optimistic, however, that it will

often lean toward individuals and their privacy.

Immunity from the focused attention of others, in very limited and culturally defined areas, is socially and legally important. Western culture and liberal democracies have long recognized its value. Liberals should not be embarrassed that honoring this value occasionally proves socially inconvenient. This is true of all important rights. Of course the complexities of modern life require some balancing of personal privacy against other social considerations. Liberals must continue to insist, however, that when such social and judicial balancing is undertaken it be in a context where the full normative and political value of privacy is given equal consideration with whatever social need that might presume to trump it. Only then will we be in a position to appreciate why a general social and legal respect for personal privacy is cost, occasionally a high cost, that we should all be willing to pay.

ENDNOTES

1. See, for example, Judith Jarvis Thomson, "The Right to Privacy," Philosophy and Public Affairs, 4 (1975): 295-314; and William Prosser, "Privacy," California Law Review, 48 (1960): 383-423. Both of these important articles are reprinted in Ferdinand D. Schoeman, editor, Philosophical Dimensions of Privacy: An Anthology (Cambridge, U.K.: Cambridge University Press, 1984).

2. Gilbert Harman, "The Inference to the Best Explanation, Philosophical Review, 74 (1965): 324.

3. W. A. Parent, "Privacy, Morality, and the Law," Philosophy and Public Affairs, 12 (1983): 269-88.

4. Thus, Judith DeCew writes, "[t]he realm of the private is whatever is not, according to a reasonable person under normal circumstances, or according to certain social conventions,, a legitimate concern of others." Judith DeCew, In Pusuit of Privacy (Ithica: Cornell University Press, 1997): 58.

5. James Rachels, "Why Privacy Is Important," Philosophy and Public Affairs, 4 (1975): 323-33. Reprinted in Schoeman, op. cit.:292.

6. Ruth Gavison, "Privacy and the Limits of the Law," Yale Law Journal 89 (1980): 421-71. Reprinted in Schoeman, op. cit.:347.

7. See, for example, Jeffrey Reiman, "Privacy, Intimacy, and Personhood," Philosophy and Public Affairs, 6 (1976): 26-44. Reprinted in Schoeman, op. cit. And Julie Inness, Privacy, Intimacy, and Isolation (New York: Oxford University Press, 1992).

8. Ettore v. Philco Television Broadcasting Co., 229 F.2d 481 (3d Cir. 1956).

9. http://www.tncrimlaw.com/foia.

10. Samuel Warren and Louis Brandeis, "The Right to Privacy," Harvard Law Review 4 (1890): 193-220. Reprinted in Schoeman, op. cit.

11. Ibid: 76.

12. Prosser, op. cit.

13. Ibid: 107.

14. See, for example, Parent, op. cit.

15. Edward Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," New York University Law Review 39 (1964): 962-1007. Reprinted in Schoeman, op. cit.

16. See, for example, Parent, op. cit.; and Anton Vedder, The Values of Freedom (Utrecht: Aurelio Domus Artium, 1995): 110.

17. Gill v. Hearst Publishing Co., 40 Cal. 2d 224, 253 P.2d 441 (1953).

18. Gill v. Curtis Publishing Co., 38 Cal. 2d 273, 239 P.2d 630 (1952).

19. See, for example, Prosser, op. cit.

20. United States Constitution, Amendment IV.

21. Griswold v. Connecticut, 381 U.S. 479 (1965), quoting from Poe v. Ulman, 367, U.S. 479, 551, 552 (1961) (Justice Harlan, dissenting). Quoted in Mary Ann Glendon, Rights Talk (New York: Free Press, 1991): 57.

22. Griswold, op. cit.

23. Ibid.

24. Eisenstadt v. Baird, 405 U.S. 479, 486 (1972).

25. Jeffery L. Johnson, "Constitutional Privacy," Law and Philosophy 13 (1994):161-93.

26. Bowers v. Hardwick, 478 U.S. 186 (1986).

27. Cruzan v. Missouri Department of Health, 110 S. Ct. 2841 (1990).

28. Inness, op. cit.: 18.

29. John Rawls, Collected Papers (Cambridge, U.S.: Harvard University Press, 1999): 23.

30. Allen Westin, Privacy and Freedom (New York: Atheneum Press, 1967). Reprinted in Schoeman, op. cit.: 56.

31. Ibid,: 61.

32. Olmstead v. United States, 277 U.S. 438 (1928) (Justice Brandeis, dissenting).

33. Ferdinand D. Schoeman, Privacy and Social Freedom (Cambridge, U.K.: Cambridge University Press, 1992).

34. Johnson, op. cit. See, also, Jeffery L. Johnson, "Privacy and the Judgment of Others," Journal of Value Inquiry 23 (1989): 157-68; and "A Theory of the Nature and Value of Privacy, Public Affairs Quarterly 6 (1992): 271-88.

35. Schoeman, 1992, op. cit.: 3.

36. Ibid: 1.

37. Stanley I. Benn, "Privacy, Freedom, and Respect for Persons," Nomos XIII: Privacy (1971): 1-26. Reprinted in Schoeman, op. cit.: 228-9.

38. Ibid: 230.

39. Charles Taylor, "Atomism," Philosophy and the Human Sciences: Philosophical Papers 2 (Cambridge, U.K.: Cambridge University Press, 1985): 188.

40. Michael Sandel, "The Procedural Republic and the Unencumbered Self," Political Theory 12 (1984): 81-96.