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A CONCEPTUAL APPROACH TO PRIVACY

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A Conceptual Approach to Privacy

Miscellaneous Paper

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Chapter 1

Summary – A Conceptual Approach to Privacy

A 'CORE VALUES' APPROACH TO THINKING ABOUT PRIVACY

1. The aim of this paper is to establish an approach to conceptualising privacy. It does not purport to be the final word. It represents a starting point and hopefully one that is thoughtful and respectful of what is a voluminous literature. This paper sets out to build both a theoretical framework for approaching privacy and, it is hoped, a practical one against which to assess the legal regime on privacy. That is, it is a framework for future legal analysis. This process of analysis throughout the later stages in the Law Commission's review of privacy might very well point to the need for adjustment in the framework. What the framework provides is a star to navigate by and a basis for putting some assumptions on the table so that constructive discussion can emerge.
2. Having said that, this paper concludes that:
 - 2.1 There are two main options for developing an approach of privacy, each of which is valid for the purposes of considering the possibilities of law reform. These main options are as follows:
 - 2.1.1 First, an approach that begins with the core values of which privacy is a part. The framework or approach would present privacy as a subset of those core values. The right to privacy is divided into two main dimensions as one descends into further detail and particularity (the 'core values' approach). I represent this framework in a diagrammatical form in **figure 1**.
 - 2.1.2 Second, an approach that focuses upon invasions of privacy. Daniel J Solove presents a model for such an approach that is reproduced diagrammatically in **figure 2** below (the 'invasions of privacy' approach).
3. On balance, this paper supports a cascading approach to structuring a framework for privacy. Ideally, this approach begins at a level of generality. It then descends into increasing particularity and precision through sub-categories.

4. What I call the core values approach is organised as follows:
- 4.1 A normative theory of ‘privacy’ presents the concept of ‘privacy’ as a sub-category of two interconnected core values:
- 4.1.1 First, the autonomy of humans to live a life of their choosing (which might be referred to crudely as liberty claims); and
- 4.1.2 Second, the equal entitlement of humans to respect (roughly characterised as equality claims).
- 4.2 Broadly, the reason why ‘privacy’ is seen as a sub-category of these core values is that respect for ‘privacy’ and its value to human beings is conducive to autonomy and equality of respect. Thus, respecting that ‘privacy’ is something of value to humans in providing a measure of individual solitude and reflection, for example, assists both autonomy (living and ordering a life of one’s own choosing) and equality of respect for the life choices of individuals even where others might disagree with the content of those choices.¹
- 4.3 A right to privacy is described as relating to those things or aspects of one’s life that you, as an individual in a social world, would have a reasonable expectation of exerting control over in terms of dissemination or disclosure should you wish to. Relative to other people, this means in its simplest sense that ‘the protection of privacy means protection against unwanted access by other people’.² By ‘control’ this paper simply means the power of saying ‘yes’ or ‘no’ although, as with any choice, that does not necessarily mean that one gets one’s way in fact. In this sense, it is not dissimilar to Dr Nicole Moreham’s idea that ‘privacy is best defined as the state of “desired inaccess”’ or as “freedom from unwanted access”’.³
- ‘In other words, a person will be in a state of privacy if he or she is only seen, heard, touched or found out about if, and to the extent that, he or she wants to be seen, heard, touched or found out about.’⁴
- 4.4 Even if one has said ‘yes’ to access to oneself, it does not mean that one ceases to have the power of choice to re-visit the situation at a later stage (although sometimes in practice, re-visiting the decision might be physically difficult because it has happened and the consequences of the choice cannot be taken back).

1 I recognise that the concept of ‘equality of respect’ is complicated and poses a number of important issues for debate amongst scholars. Readers might wish to refer to Kwame Anthony Appiah, *The Ethics of Identity* (Princeton University Press, Princeton, 2005), 91-100 and chapter six.

2 Beate Rössler, *The Value of Privacy* (Polity, Cambridge, 2005) at 8.

3 N A Moreham ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 LQR 628, 636.

4 Ibid.

- 4.5 Nevertheless, the use of ‘control’ favoured in this conceptual approach, has to be explained with reference to what *ought* to be within one’s control or power of choice to exercise the power of ‘yes’ or ‘no’ over accessibility. That is, ‘content’ matters as opposed to mere desires or wants. The right to privacy does not cover everything one would like to have control over.
- 4.6 Thus, the right to privacy in a world of socially-situated human beings comprises two main dimensions:
- 4.6.1 Informational privacy; and
- 4.6.2 Local privacy (which can also be referred to as ‘spatial privacy’ but which is not necessarily confined to a space of one’s own inaccessible to others and may arise in ‘public places’ in certain situations).
- 4.7 At the very least, a person would have a reasonable expectation⁵ that he or she could exert control over the above aspects or dimensions of personal privacy should he or she wish to.
- 4.8 However, recognition that privacy is an important human rights value, based upon values of autonomy and equality of respect, does not automatically translate into its recognition as an enforceable legal right in every circumstance. Key issues for consideration in this law reform project include whether there are ‘gaps’ in the system of legal protection as it exists, whether those gaps should be filled and, if so, what remedies should be available.

Informational Privacy

5. By ‘informational privacy’, I mean private information or facts about ourselves (where ‘private’ denotes information concerning conduct at home, sexual relations, personal habits, personal health information). In any given circumstance, the query ought to be whether the information in question should be able to count as worthy of moral and perhaps legal protection in various instances. This is a difficult area to define with any precision but the question does need to be posed. This paper suggests that a category of ‘private facts’ or ‘private information’ is a proper subject for a normative entitlement to protection under the rubric of ‘information privacy’.
6. What this means is that not all information about you (personal information) would necessarily be regarded as ‘private’. Furthermore, society at large might be interested in the transparent disclosure and sharing of some personal information for a number of reasons. These two points immediately raise questions about the management of information about you in the social world that is not necessarily ‘private’ but is nevertheless ‘personal’. If it is not ‘private’ (and there will always be hard and easy cases about what ‘private’ information might be), there may, nevertheless, be a number of sound ways of managing the treatment of ‘personal’ information about you (by way of a statutory regime, for example).⁶

5 The concept of the claimant’s ‘reasonable expectation’ of privacy may be criticised. Nicole Moreham offers some useful criticisms of the manner in which it might be applied in the courts, for example, in her article, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’, *ibid*, at 647-648.

6 As with a Personal Information Protection [or ‘Management’] Act, for instance. The Privacy Act 1993 (NZ) might be seen in this fashion.

Local Privacy

7. ‘Local privacy’ is the privacy that one has in what the philosopher Beate Rössler describes as ‘its most genuine locus: one’s own home, which for many people still intuitively represents the heart of privacy’.⁷

Two Aspects of ‘Local Privacy’

8. Two aspects of privacy are included within this classification of ‘local privacy’:
- 8.1 First, solitude and ‘being-for-oneself’ (which is not necessarily confined to a space of one’s own inaccessible to others and may arise in ‘public places’).
- 8.2 Second, the privacy of ‘private spaces’ (including but not necessarily limited to those inhabited by intimate relations or family communities), however conceived, typically in the household but also out-of-doors (which is more controversial).
9. Both of these aspects of ‘local privacy’ require elaboration. In essence, ‘[p]rivate life in private spaces follows different rules from life outside these spaces, and these different rules are what permit and promote a different relationship to oneself and a different relationship – different behaviour – towards others.’⁸ More particularly, in ‘protected spaces we live – we are able to live – differently, doing different things, from when we are exposed to the gaze of anyone who happens to be looking (or are out in the open)’.⁹
10. The household is the *locus classicus* of this particular dimension of privacy, as it is the conventional locale for conducting one’s private life in a sense that is arguably (and perhaps profoundly) different from how one might conduct oneself out-of-doors (subject to some qualifications). Yet, while the household space *per se* is of relevance, there is also the privacy of ‘one’s flat or room, and thus the privacy of personal objects, which also form an inherent part of the privacy of these spaces’.¹⁰ There is also the right to control access to one’s body. In theory, one could be out-of-doors, in a vehicle, for instance, or in one’s front yard or with a bag containing personal objects and have a reasonable expectation that those spaces or items would remain inaccessible to others if that were one’s intention or desire, subject to any contrary lawful authority.
11. As Moreham has noted, “‘Physical inaccess’,... refers to the absence of access to one’s person (or to things closely associated with one’s person such as one’s house, clothes or wallet) either through the use of the senses or through unwanted physical proximity – Y would therefore interfere with X’s physical privacy if she installed a video camera in his house, bugged his conversations, broke into his house while he was not there, or rifled through his rubbish bags.’¹¹

7 Beate Roessler, ‘New ways of thinking about privacy’ (translated by R D V Glasgow) in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press: Oxford, 2006), at 707.

8 Rössler, *The Value of Privacy*, 142.

9 Ibid.

10 Ibid.

11 N A Moreham ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 LQR 628, 649.

12. Harder questions emerge when one is in public places. At this early stage of the Law Commission’s review, this paper does not presume to completely answer whether one can have reasonable expectations to privacy in public places. Local privacy – preventing unwanted access to oneself – can certainly work in a public place, as can informational privacy. The framework does not preclude that possibility.
13. However, whether such an expectation should then give rise to a legal right against others at all times and in all circumstances or at some times and in some circumstances is a matter of debate.¹² How the public interest in knowing things about you (if relevant at all) should be factored in is an ongoing difficulty, let alone who should determine what that public interest is. Complicated questions of unforeseen circumstances emerge should law reformers take a generic legal approach to difficult situations of this sort. The plaintive cry of ‘we did not intend such situations to be covered’ – always a danger with law reform – might be heard if the reform is not finely tuned to the range of possible circumstances. The framers of any law reform must be sufficiently humble to realise the risk of unforeseen situations and the risk of the law extending to situations not within their initial contemplation. Some might say that the common law and courts might be better placed to assess these issues on a case-by-case basis.
14. These questions will be addressed in later stages of the Law Commission’s review. In the interim, readers would be well advised to consider the provocative and thoughtful work of Moreham (although this is a starting point for discussion and debate and certainly not the last word).¹³ I understand that Moreham is of the view that it is important to protect against non-informational (“physical”) interferences with privacy but that it is preferable to define physical access by reference to the degree of access others have to him or her at the time (in other words, whether one can see, hear or touch him or her in the place in question). If the answer is no-one (or at least, no-one who is not using technological devices), then Moreham argues that his or her privacy should be protected regardless of whether that person is on private property.¹⁴ For example, a woman who is seen going to an abortion clinic or who is pictured going into labour in a public place still raises questions to do with personal privacy.¹⁵ Reasonable people may still differ on the answers to these questions: whether one ought to have a legal remedy in the courts in such cases against those who see, photograph or film these events or publish the fact of the events to others.
15. The notion of having and choosing to maintain solitude is relevant to ‘local privacy’, ‘for one may lay claim to privacy with respect to others even within spaces or relationships that already count as private, as when one asserts a right to privacy with respect to other people with whom one lives together privately’.¹⁶ From another perspective, this does mean that people cannot or should not be

12 Again, it should be noted that laws concerning the fair use of personal information or information about you (which is not necessarily private information) would still be relevant irrespective of the answer to the ‘privacy’ question.

13 N A Moreham, ‘Privacy in public places’ (2006) 65 CLJ 606.

14 Discussion between Nicole Moreham and Mark Hickford on 11 September 2007.

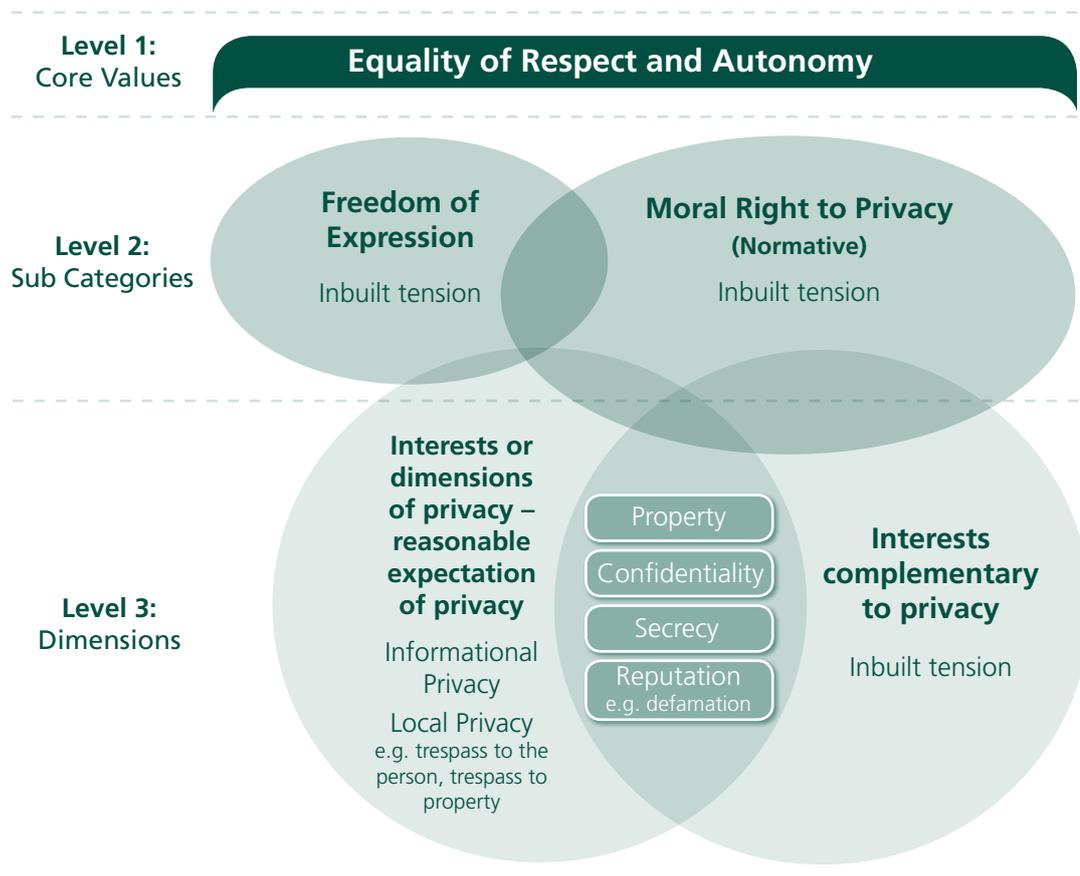
15 These specific examples emerged in a discussion between Nicole Moreham and Mark Hickford on 11 September 2007.

16 Rössler, *The Value of Privacy*, 143-144.

able to acquire information about you when you are in this particular space. But that is not the complete picture, as interference with ‘local privacy’ need not involve the acquisition of information (although it may do). One would expect non-interference generally. This corresponds to the privacy harm of ‘invasion’ that Solove identifies in his taxonomy.¹⁷ As Solove has remarked, ‘Intrusion is related to disclosure, as disclosure is often made possible by intrusive information gathering activities’.¹⁸ As noted above, Moreham has already made this sort of point: ‘Y would therefore interfere with X’s physical privacy if she installed a video camera in his house, bugged his conversations, broke into his house while he was not there...’.

16. Against this background, Rössler has said that, ‘Violations of a person’s privacy can be defined’ in three ways: illicit interference with the subject’s actions; illicit surveillance (including, one might say, in a public place); illicit intrusions in rooms or dwellings.¹⁹

Figure 1 – ‘Core Values’ Approach to Privacy



17. The focus thus far has been on a *normative* account of a right to privacy. The next question is when and how should a legal right to privacy operate. In the approach presented in this report, a legally actionable right to privacy is to be seen as a subset of the normative account.

17 Daniel J Solove, ‘A taxonomy of privacy’ 154 U Pa L Rev 477 (2006), 552 *et seq.*

18 *Ibid.*, 553.

19 Rössler, *The Value of Privacy*, 9.

A Legal Right to Privacy

18. At the outset, it is noted that the concepts of ‘local privacy’ and ‘informational privacy’ bear some resemblance to the concerns addressed in Article 8 of the European Convention for the Protection of Human Rights and Freedoms:

‘Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’
19. A key issue for consideration in the efficacy of any law reform is whether there are gaps in existing legal protection. In New Zealand we have a tort of invasion of privacy and the Privacy Act 1993. In principle, a *legal* right to privacy should at least operate wherever there are gaps in the protection of the existing law. There is an issue as to whether it should be allowed to operate where other sources of legal protection might be available and a legally actionable right to privacy would simply overlap with those tested sources of legal accountability. For instance, there will be a number of existing causes of action and remedies in law that are not about privacy (either principally or at all) but which have the collateral benefit of protecting the normative concept of privacy as understood above. Examples include actions in trespass, which are about property rights not privacy but can be seen as assisting the preservation of one’s ‘local privacy’ nevertheless. That is, the cause of action and remedy is complementary to privacy but is also legally instrumental as a means by which individuals may endeavour to maintain privacy in given circumstances. The Trespass Act 1980 (NZ) can be resorted to if required as well. Certain harms to one’s privacy, therefore, can be caught and addressed *via* other legal means. Nicola Lacey has noted that:

‘There has been both political and academic interest in the creation of a distinctive privacy-based tort to encompass intrusions that cannot be straightforwardly conceptualized in terms of existing torts such as nuisance, trespass, or negligence, though the ideas has not been endorsed by most of the official reports.’²⁰

20. Furthermore, possible law reform would need to consider whether an actionable *legal* right to privacy should arise where there has been an infringement or interference with either local privacy or informational privacy resulting in harm or damage and there is no other legal remedy available under statute or common law.²¹

20 Nicola Lacey, ‘Interpreting doctrines of privacy: A comment on Anita Allen’ in Beate Rössler (ed), *Privacies: Philosophical Investigations*, (Stanford University Press, Stanford, 2004), 47.

21 A remedy of prior restraint (such as an injunction) does not require proof of harm and it is possible that injunctive relief should be available.

21. Again, a normative and juridical distinction applies, as Rössler recognised in the context of ‘local privacy’, which is crucial to comprehending a conception such as ‘privacy’. She argued that ‘*legal* protection of the dwelling must safeguard the right to privacy and... a *moral* right to the possibility of retreating into privacy is legitimately asserted even in intimate, family relations [emphasis in original]’.²² The legal protection of the space of, say, the family dwelling against third parties, whether through legal remedies against prying or surveillance or actions in trespass, provides cover for the exercise of principally moral decisions within that space that might not be juridicalised (illustratively, the negotiation of space and time for reflective solitude within the family home as against other family members).²³ This is an important practical and theoretical observation. Here, too, Rawls might be drawn upon to assist the analysis. In 1999 he noted that, ‘we distinguish between the point of view of people as citizens and their point of view as members of families and other associations’.²⁴ He continued:

‘As citizens we have reasons to impose the constraints specified by the political principles of justice on associations; while as members of associations we have reasons for limiting those constraints so that they leave room for a free and flourishing internal life appropriate to the association in question. Here again we see the need for the division of labo[u]r between different kinds of principles. We wouldn’t want political principles of justice – including principles of distributive justice – to apply directly to the internal life of the family.’²⁵

22. Evidently, this would not absolve members of those associations from complying with legal norms concerning the abuse and neglect of children let us say. These sorts of norms would represent constraints upon any association. Subject to that necessary qualification, Rawls added that, ‘at some point society has to rely on the natural affection and goodwill of the mature family members’.²⁶ In this vein, he acknowledged that, ‘Surely parents must follow some conception of justice (or fairness) and due respect with regard to their children, but, within certain limits, this is not for political principles to prescribe.’²⁷
23. With any *legally* actionable right to privacy, there is a live question as to whether the ‘harm’ should be the interference itself or consequential loss to the aggrieved person or even both. Some torts, such as trespass to land, do not require proof of damage. There is also a question as to whether feelings of embarrassment or humility should be legally actionable. Here, the philosophical debate on what might count as constituting ‘harm’ or as ‘harmful’ remains highly relevant.²⁸ Subject to resolving these issues, a harms-based account of infringements of the two key dimensions of privacy – local privacy and informational privacy

22 Rössler, *The Value of Privacy*, 168.

23 That said, conceptually, there might be specific circumstances where one would wish to describe the entitlement to solitude in one’s own room as a potentially legal entitlement. Much might depend upon the particular nature of the family setting, for instance.

24 John Rawls, *The Law of Peoples with “The Idea of Public Reason Revisited”*, (Harvard University Press, Cambridge, Massachusetts, 1999), 159.

25 Ibid. Also refer to Joshua Cohen, ‘Okin on Justice, Gender, and Family’ *Canadian Journal of Philosophy*, 22 (1992), 278.

26 John Rawls, *The Law of Peoples with “The Idea of Public Reason Revisited”*, 160.

27 Ibid.

28 Joel Feinberg, *Social Philosophy* (Prentice-Hall, Englewood Cliffs, 1973).

regarding private facts – provides one basis for identifying when a legal right to privacy might be engaged. We say ‘*might* be engaged’ because:

- 23.1 Some existing causes of action or statutory regimes will adequately deal with some of the same interests within the local privacy and informational privacy categories; and
 - 23.2 Not all forms of infringement would necessarily warrant legal enforceability (as opposed to moral disapprobation).
24. As with any attempt at a framework, there will be peripheral areas – spaces on the margin – that are blurred and smudged. I refer to these as ‘hard’ cases. The ‘reasonable expectation’ formula is an arguably proper way in which to consider ‘hard’ or peripheral cases in public places as well. These cases could consider what ought to be within one’s control provided one starts with the understanding that the core of privacy in a social world consists of ‘information privacy’ (comprising private facts) and ‘local privacy’ (including control over access to oneself). Surrounding these two core dimensions there might be a shadowy area or penumbra made up of ‘hard’ cases.
25. There is also the distinct possibility that some further controls on the application of any legal right to privacy should be considered and the degree to which the key aspects of human interaction – the sharing of information about others conversationally is one way in which human relationship bonds are strengthened – might be subject to an unintended chilling effect were a legal right to privacy to be actionable in all cases of disclosure of ‘private facts’. While ‘privacy’ is important, so are the values of freedom of expression and transparency in a free and open society. The danger is that concrete recommendations on privacy might have unintended consequences for other highly valued features of a society organised such as ours. These are questions that would need to be addressed in the subsequent stages of the Law Commission’s project on privacy.

The value of Solove’s pragmatic taxonomy – adapting Solove to a core values conceptual approach

26. Solove’s taxonomy in **figure 2** below is useful by way of comparison at this level. It possibly provides a way of considering the potential subset of the ‘core values’ conceptual approach referred to above in **figure 1**. That is, this paper adapts Solove’s taxonomy and considers whether parts of it can be used as a sub-category to the dimensions of ‘local privacy’ and ‘informational privacy’. It can assist analysis of the concept of ‘privacy’ in terms of what may be considered appropriate for legal protection and thus legal remedies (as opposed to moral disapprobation). It is important to appreciate that aspects of Solove’s taxonomy do not neatly fall within our normative approach to ‘privacy’, as he refers to the breach of confidence as one example of an infringement through information disclosure but not all that is confidential is necessarily ‘private’. Also, some of the examples of ‘harm’ that Solove discusses should not necessarily be legally actionable at all or are already dealt with under legal headings that are not so much to do with ‘privacy’. For instance, under the ‘information dissemination’ category, he refers to:
- 26.1 disclosure (which ‘involves the revelation of truthful information about a person that impacts the ways others judge her character’);

- 26.2 exposure (which ‘involves revealing another’s nudity, grief, or bodily functions’);
- 26.3 increased accessibility (‘amplifying the accessibility of information’);
- 26.4 blackmail; appropriation (‘the use of the data subject’s identity to serve the aims and interests of another’); and
- 26.5 distortion (the ‘dissemination of false or misleading information about individuals’).
27. Usefully, Solove’s approach indicates the way in which some existing causes of action in law address matters complementary or allied to ‘privacy’. Thus, Solove notes that ‘distortion’ (above) is dealt with *via* the law of defamation,²⁹ as well as the United States’ law on false light (which protects against giving ‘publicity to a matter concerning another that places the other before the public in a false light’ that is ‘highly offensive to a reasonable person’).³⁰
28. Perhaps more controversial, however, would be his notion of disclosure, as the ‘revelation of truthful information about a person’ that has an impact upon the ways others judge an individual’s character might well be considered highly relevant information to evaluating that individual’s qualities for employment or for election to public office. If such material is to be used, then that individual should know about its use and should have some opportunity to contextualise the information, if the interpretation of the material is misplaced or unsophisticated relative to the original context. Either way, context and specific circumstances matter. That is, while an interest in the values of good faith, transparency and openness will always tend to apply or be relevant in various human dealings some might even query whether the ‘revelation of truthful information’ need be regarded as a privacy harm at all unless it is truly private information (such as confidential health information) or acquired improperly without knowledge or consent of the data subject. All this goes to show that it is not possible to unqualifiedly say that a normative or moral right to privacy need automatically translate into a legally enforceable right against third parties, whether strangers or intimates.
29. Solove identifies four distinct groups of activity that may occasion harm to one’s privacy. Together the following groupings constitute his taxonomy of privacy:
- 29.1 First, information collection (in the form of surveillance and interrogation).
- 29.2 Second, information processing (*via* aggregation,³¹ identification,³² insecurity or the careless protection of stored information from leaks and improper access, secondary use of the information for a purpose that differs from that for which it was collected, and exclusion or the failure to allow the data subject to know about the data that others have about her and to participate in its handling and use).

29 Daniel J Solove, ‘A taxonomy of privacy’ 154 U Pa L Rev 477 (2006), 549 *et seq.*

30 *Ibid.*, 549 (citing the Restatement (Second) of Torts §652E).

31 Which ‘involves the combination of various pieces of data about a person’: *ibid.*, 490.

32 ‘*Identification* is linking information to particular individuals [emphasis in original]’: *ibid.*

- 29.3 Third, information dissemination.³³ This category involves a range of matters, including breach of confidentiality (‘breaking a promise to keep a person’s information confidential’); disclosure (which ‘involves the revelation of truthful information about a person that impacts the ways others judge her character’); exposure (which ‘involves revealing another’s nudity, grief, or bodily functions’); increased accessibility (‘amplifying the accessibility of information’); blackmail; appropriation (‘the use of the data subject’s identity to serve the aims and interests of another’); and distortion (the ‘dissemination of false or misleading information about individuals’).
- 29.4 Fourth, invasions of people’s private affairs, comprising ‘intrusion’ and ‘decisional interference’. This category ‘need not involve personal information (although in numerous instances, it does)’.³⁴ He adds that ‘*Intrusion* concerns invasive acts that disturb one’s tranquil[li]ty or solitude [emphasis in original]’ whereas ‘*Decisional interference* involves the government’s incursion into the data subject’s decisions regarding her private affairs [emphasis in original]’.³⁵ According to Solove’s approach, intrusion does not necessarily require ‘spatial incursions’ on the part of a prying third party. He describes ‘spam, junk mail, junk faxes and telemarketing’ as ‘disruptive in a similar way, as they sap people’s time and attention and interrupt their activities’.³⁶ He also added that ‘[w]hile many forms of intrusion are motivated by a desire to gather information or result in the revelation of information, intrusion can cause harm even if no information is involved.’³⁷

Blending ‘Local Privacy’ and Solove’s conception of harms

30. An interference with ‘local privacy’, therefore, could easily involve any of the above aspects of Solove’s harms to privacy-based taxonomy. Primarily, any interference with ‘local privacy’ would be expected to activate either singly or both of the following activities in the first instance:
- 30.1 Information collection (in the form of surveillance and interrogation).
- 30.2 Invasion of a person’s private affairs, comprising ‘intrusion’ in the sense of ‘invasive acts that disturb one’s tranquillity or solitude’ and (or) ‘decisional interference’, which ‘involves the government’s incursion into the data subject’s decisions regarding her private affairs’.³⁸ (This last point arises in the legal context of the United States of America – as with the abortion issue - and might be especially controversial in New Zealand law. It is noted here so as not to pre-empt later discussion).

33 All quotes in this sub-paragraph are extracted from Daniel J Solove, ‘A taxonomy of privacy’ 154 U Pa L Rev 477 (2006), 490.

34 Ibid, 491.

35 Ibid.

36 Ibid, 477.

37 Ibid.

38 Ibid, 491.

31. Where information is acquired *via* an infringement of one's 'local privacy', it could then form the basis for secondary infringements, such as information dissemination (an illustration might be the exposure of another's 'nudity, grief, or bodily functions').³⁹ There is an issue, however, of whether 'information dissemination' might indeed be a form of primary infringement, at least in a normative or moral sense, when intimate information is supplied to a family member or an intimate other obtains an image of you naked through a photograph (with your consent) but the information or image is then published to others beyond the setting of the intimate relationship (as a result of a rupture in the relationship, for example).

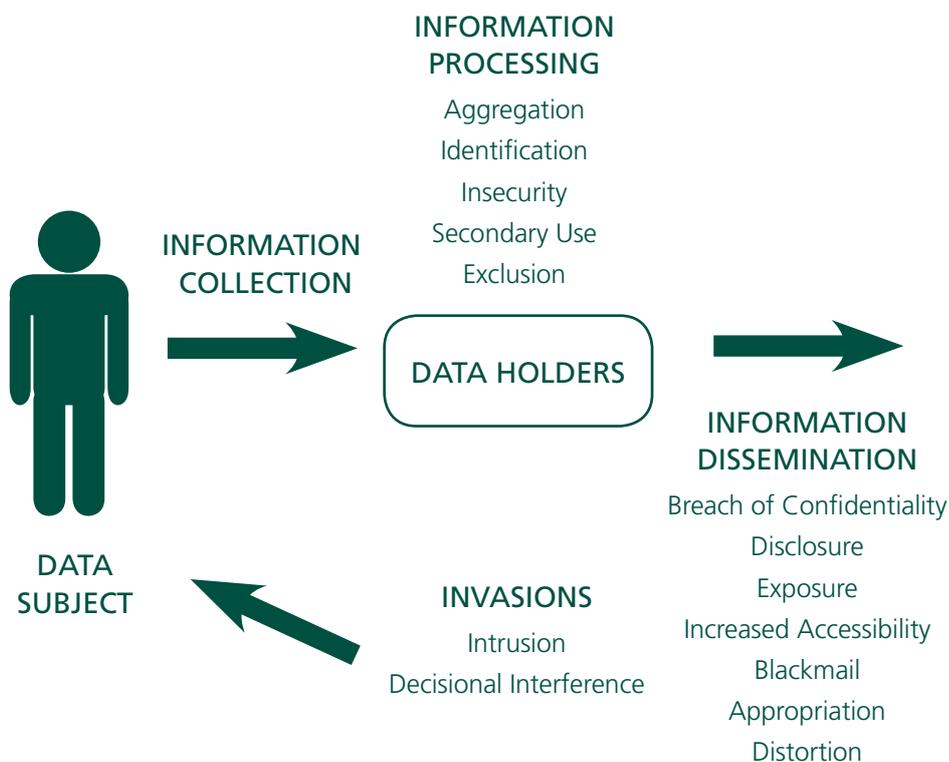
Blending 'Informational Privacy' and Solove's conception of harms

32. Adapting Solove, interference with 'informational privacy' is likely to engage any of the activities that he identified, whether information collection, processing or dissemination or even the 'intrusion' element of the invasion of an individual's private affairs.

The Right to Privacy is not an Absolute Right

33. A 'right to privacy', as understood in this approach, is not an absolute right. It is to be weighed in the balance with other values, including values to do with the public interest in freedom of expression. That said, this paper's approach acknowledges that there are not only points of tension between privacy and these other values but also areas of overlap.

Figure 2 – 'Taxonomy of Privacy' (Daniel J Solove)



39 Ibid.

Chapter 2

Pursuing Privacy – 'privacy is a concept in disarray'⁴⁰

METHODS FOR
CONSTRUCTING
A CONCEPTUAL
APPROACH
TO PRIVACY
– 'PRAGMATIC'
APPROACHES
AND APPROACHES
IN PURSUIT OF
CORE VALUES

34. Three issues appear to be relevant to thinking about preparing a conceptual approach to analysing privacy and looking forward to how it might help to isolate areas for further reflection:
- 34.1 First, what is 'privacy'? What interests constitute it? What are its incidents and dimensions?
- 34.2 Second, what is the status of a claim to privacy? That is, is a claim to privacy of such a type or value to justify a right to privacy per se or a right to aspects of privacy? A number of subordinate or second-order questions then emerge.
- 34.2.1 If there were a right to privacy or aspects of privacy that might require the status of a right, would such a right be a 'stringent right'⁴¹ or a weaker form of right?⁴² Would it be a claim right or a liberty right? (A theory of rights is required).

40 Daniel J Solove, 'A taxonomy of privacy' 154 U Pa L Rev 477 (2006), 477 (abstract).

41 I will define what I mean by a 'stringent' right below in the section entitled 'Privacy and a theory of rights'.

42 It is worth pointing out that, to date, the New Zealand courts have treated it as a weaker form of the right that is to be weighed in the balance with other values and occasionally overcome as a result. Refer to *Hosking v Runting* [2005] 1 NZLR 1 (CA) at paragraph [129] per Gault P and Blanchard J, for instance, where there is discussion of legitimate public concern as a defence: 'There should be available in cases of interference with privacy a defence enabling publication to be justified by a legitimate public concern in the information. In *P v D*, absence of legitimate public interest was treated as an element of the tort itself. But it is more conceptually sound for this to constitute a defence, particularly given the parallels with breach of confidence claims, where public interest is an established defence. Moreover, it would be for the defendant to provide the evidence of the concern, which is the appropriate burden of proof if the plaintiff has shown that there has been an interference with his or her privacy of the kind we have described'. In addition, Gault P and Blanchard J observed at paragraph [130] that: 'Furthermore, the scope of privacy protection should not exceed such limits on the freedom of expression as is justified in a free and democratic society. A defence of legitimate public concern will ensure this. The significant value to be accorded freedom of expression requires that the tort of privacy must necessarily be tightly confined.' Also refer to *Marfart v Television New Zealand* [2006] 3 NZLR 534 (CA) at paragraph [52] ('In this particular case we consider that there are clearly two sets of competing interests: privacy interests and what, for convenience, we will call freedom of information interests') and paragraph [60]: "'Privacy' is a difficult and often amorphous concept. The phrase cannot be used in a vacuum. It always requires closer examination, to see just exactly what is being said to be intruded upon. Obviously, in today's circumstances some degree of "rubbing up against" the conditions of modern life is inevitable. So generally speaking, in whatever area of the law a "breach of privacy" is said to have occurred, Courts and statutes have required that the intrusion must be to an unreasonable extent upon the personal affairs of the individual concerned (see, for instance, principle 4, s 6 of the Privacy Act 1993).'

- 34.2.2 What is the relationship of a claim to privacy to other values?
- 34.2.3 In what circumstances, if any, should a claim to privacy have a particular legal status, justifying legal intervention?
- 34.2.4 In what circumstances, if any, should a claim to privacy be regarded as non-justiciable and a matter of, say, normative requirements or of courtesy and manners rather than legal interest.
- 34.3 Third, would a claim to privacy be better illuminated and addressed through other sorts of specific claims, such as existing causes of action in other established fields of law? At one extreme, this is sometimes called the ‘reductionist’ question, as it reduces the underlying value of ‘privacy’ to other treasured values or aspects of human life. Thus, the philosopher, Judith Thomson, contended that the so-called ‘right to privacy’ was, in effect, an inapt bundling of rights better explained as deriving from established rights of confidentiality, rights to the integrity and safety of the human person and rights of property.⁴³ A refined and less sceptical version of this thesis, however, might simply note that, although assuming a core value of ‘privacy’ exists, the attributes or dimensions of such a value might be sufficiently protected through a range of existing legal categories of action, such as breach of confidence, trespass to property or trespass to the person.
35. In what follows, the discussion will propose some possible answers to the first two issues above but will refrain from determining final answers to any of the second-order questions listed in paragraph 34.2 or any of the subsequent questions. It is overly premature to present any concluded positions on those issues but it is important to be aware of them at this introductory phase of the Law Commission’s review on privacy.
36. On balance, this report prefers a cascading approach to structuring a conceptual framework for privacy. Ideally, this approach begins at a level of generality. It then descends through subsets or sub-classifications into levels of increasing particularity and precision. At the very least, the effort ought to highlight where there are ongoing difficulties of classification. Yet, to have a conceptual approach requires devising a plausible account of the value of privacy, as well as a persuasive normative theory, at the outset.
37. Grasping ‘privacy’ as an analytical concept that might then be used to anticipate or to predict and design policy outcomes has proven complicated. Even certain commentators who have endeavoured to analyse and define ‘privacy’ have conceded that it is a ‘notoriously elastic concept’,⁴⁴ or that it has a ‘protean capacity to be all things to all lawyers’,⁴⁵ or that it is ‘infected with pernicious ambiguities’,⁴⁶ or that there are ‘few concepts more vague or less amenable to definition’.⁴⁷

43 Judith Jarvis Thomson, ‘The right to privacy’, *Philosophy and Public Affairs*, IV, (1975), 295.

44 Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (Random and Littlefield, Totowa, 1988), at 16.

45 T Gerety, ‘Redefining privacy’ (1977) Harv CR-CLL Rev 233 at 234.

46 Hyman Gross, ‘The concept of privacy’ 34 NYU L Rev 34, 53 (1967).

47 R Dixon, ‘The *Griswold* penumbra: constitutional charter for an expanded right of privacy?’ 64 Mich L Rev 197, 199.

The ‘pragmatic’ method in pursuit of a conceptual approach to privacy

38. Some authors resist the attempt to pursue definition, saying that, ultimately, the imprecision of the concept yields little that is focused and is unable to do any predictive work in law and policy whatsoever. It is better, some say, to simply describe the garden variety of dimensions to privacy. Aspects or attributes of privacy drive descriptions and analysis rather than an allegedly chimerical core concept.
39. In a wide-ranging issues paper, the Australian Law Reform Commission has recently suggested that this scholarly scepticism makes sense. It has observed that, ‘Despite the best efforts of legal scholars, the term “privacy” eludes a universally accepted definition.’⁴⁸ With a view to ‘pragmatic’ guidance in law reform, it has resolved as follows:

‘While it is important to recognise that the pragmatic approach advocated by theorists such as Professor Solove has limitations, it does provide a useful template for law reform. Rather than focusing on an overarching definition of privacy—the privacy grail—that inevitably will be so general as to be of limited use to policy makers, perhaps it makes more sense, to use Professor Solove’s terms, to focus on particular points in the web and formulate a workable approach to deal with the disruption (citing D Solove, ‘A Taxonomy of Privacy’ (2006) *University of Pennsylvania Law Review* 477, 485–486]. Provided the underlying policy approach is transparent, this focus may be a more useful conceptualisation of privacy than the search for an all encompassing definition.’⁴⁹

The ‘pragmatic’ approach at its least satisfactory – describing what is there

40. At its base and least satisfactory level, however, this sceptical approach may simply lead policy-makers to describe what exists in the here and now.
41. In New Zealand, for instance, one would merely resort to the embryonic tort of privacy and the ambitions of the Privacy Act 1993. One might look at relevant international documents and instruments. Thus, in one sense, there is a certain degree of artificiality to the process of building a conceptual approach from the ground up, as the New Zealand courts have accepted a tort of privacy⁵⁰ in certain circumstances and the Privacy Act 1993 (NZ) deals with information use and protection.
42. This can be a very arid approach albeit very practical and positivistic from an immediate point of view. It readily aligns with a path dependency⁵¹ approach to policy analysis and policy formulation. The legacy of previous decisions and their consequences (agreed principles in legislation, for instance) can set the constraints and frame for subsequent decisions. As Heclo said in 1974,

48 Australian Law Reform Commission, *Issues Paper 31 – Review of Privacy* (IP 31, October 2006), at paragraph 1.96, footnoted to the following reference: ‘L Introna, ‘Privacy and the Computer: Why We Need Privacy in the Information Society’ (1997) 28 *Metaphilosophy* 259. One commentator suggests that a reason the legal definition of privacy is so elusive is due to the fact that “privacy has generally much more to do with politics than with law”: B Mason, *Privacy Without Principle* (2006), xii.’

49 Ibid at paragraph 1.115.

50 *Hosking v Runting* (2005) 1 NZLR 1 (CA).

51 P Pierson, ‘Increasing returns, path dependence, and the study of politics’, 94 *American Political Science Review* 251 (2000); S Steinmo and J Watts, ‘It’s the institutions stupid! Why comprehensive national health insurance always fails in America’, 20 *Journal of Health Politics, Policy and Law* 329 (1995).

‘What one learns depends on what one does... In both its self-instruction and self-delusions, the cobweb of socioeconomic conditions, policy middlemen, and political institutions reverberates to the consequences of previous policy in a vast, unpremeditated design of social learning’.⁵²

43. Some might say that an illustration of this type of approach is to be found in the policy underlying the Births, Deaths and Marriages Registration Amendment Bill currently before the House of Representatives. In the questions and answers for this Bill relating to registers on births, deaths and marriages, a section on ‘access to information’ simply says things like: ‘The Bill proposes some new processes to safeguard privacy and ensure that access to or release of information is in line with the purposes of the registers.’⁵³
44. Sometimes profound difficulties can then emerge if these path dependent approaches are not sufficiently networked with other areas of policy concern specialising in other values, such as defences to allegations of defamation, media investigation or freedom of speech or addressing the better protection of children in families or the improved health care of patients through information sharing about those families. Some of these values might be in conflict or at odds with analytical and policy conceptions of ‘privacy’ at certain times, requiring very deliberate and careful balancing (possibly even on a fact-specific basis). This sort of path dependency can occur not only in policy and legal analysis but also in subject areas that generate their own internal conversations and self-referential literature.
45. It is regrettable that the concept of privacy has not been treated as multi-disciplinary (encompassing fields of philosophy, political theory, policy studies, history, and cultural studies) as much as it ought to have been in some of the legal literature.
46. Certainly, Colin J Bennett and Charles Raab have noted that the ‘links between the vast tradition of political theory, including its rich and multifaceted critique of the many varieties of liberalism, and the theoretical and practical literature on privacy are, therefore, tenuous’.⁵⁴ This criticism has considerable merit. It is for this reason that I will address a possible underlying political theory for the value of ‘privacy’ in the second section of this paper. This treatment will be non-exhaustive but is intended to prompt discussion and debate with reference to ‘privacy’ as a subset or category of broader, overarching values.
47. Beyond the bare description of positive laws and existing secondary literature on the subject of ‘privacy’ in law, however, it is highly problematic to ascertain what ‘privacy’ means and what work it does and is meant to do in the daily cut and thrust of social life unless you use a method to get at it analytically. Otherwise, the dropping-in of non-analysed phrases and labels into conversation amongst policy-makers – such as ‘right to privacy’ or ‘privacy is a value of a civil society’ – does not

52 H Hecho, *Modern Social Politics in Britain and Sweden: From relief to income maintenance* (Yale University Press, New Haven, Connecticut, 1974) at 316.

53 Refer to [http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Births-Deaths-and-Marriages-Births-Deaths-Marriages-and-Relationships-Registration-Amendment-Bill-\(BDMRR-Bill\)?OpenDocument#four](http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Births-Deaths-and-Marriages-Births-Deaths-Marriages-and-Relationships-Registration-Amendment-Bill-(BDMRR-Bill)?OpenDocument#four). (Last accessed 22 May 2007). This measure is still before the House of Representatives and, at the time of publication, various amendments had been proposed.

54 Colin J Bennett and Charles Raab, *The Governance of Privacy: policy instruments in global perspective* (MIT Press, Cambridge, Massachusetts, 2006), 17.

necessarily tell you much in terms of what to do, let alone when and how. A description of what is available might yield a veritable list of possibilities but not an assured basis for policy-makers to add to or subtract from that list.

48. On one view, however, the ongoing failure of a value-proposition or concept to predict concrete outcomes or ways of doing things or when or how to intervene in one case but not another would imply the disorganisation and disarray of the core concept. It would suggest the need to jettison the effort to strive for a definition of privacy. This report is conscious of that cautionary point.
49. However, this paper will at least try to get at the heart of what ‘privacy’ stands for conceptually. Underlying this effort is the view that it is not helpful to start analysing the characteristics or features of ‘privacy’ without first coming to some view on what ‘privacy’ might be.
50. Nevertheless developing a core concept that generates large principles for general application is always risky. The ‘large principles’ might begin to ‘travel’ and apply to situations not initially intended to have been covered at the point of creation.⁵⁵ That is inevitably a risk when seeking to uncover and develop first principles in order to assist possible law reform or to commit a set of norms to law, whether in legislation or otherwise. In this vein, John Burrows QC has recognised this risk of coverage or application ‘creep’ in a recent lecture on the tort of privacy itself, citing the Fair Trading Act 1986 as a statute that possibly out-distanced the initial intentions of its framers.⁵⁶
51. This sort of risk lends itself to support for the incremental approach of the common law method but one cannot be satisfied with that position on legal reform until one has tested it forthrightly. It might be that the process of searching for underlying values or principles leads us to conclude that an *ad hoc* approach or the inductive method of the common law is indeed preferable.
52. That said, the challenge is to tie a core concept to the dimensions of privacy, some of which might be treated as giving rise to actionable legal rights.

The approach of Daniel J Solove – focusing on ‘invasions’ of, or harms to, privacy

53. Subject to that overall caution, one possibility is to use the cautious and self-consciously pragmatic ‘invasions of privacy’ or harm-orientated approach of Daniel J Solove. He has started from the premise that ‘privacy’ as a value or concept is so confused and is in such chaotic disarray that it is pointless to construct a usable legal model from an underlying notion of ‘privacy’.
54. Rather, Solove has used Ludwig Wittgenstein’s concept of ‘family resemblances’. Wittgenstein stated that: ‘... if you look at (games) you will not see something that is common to all, but similarities, relationships, and a whole series of them at that... we see a complicated network of similarities overlapping and criss-crossing: some times overall similarities, sometimes similarities of detail’.⁵⁷ In elaborating this point,

55 The classic case of the unintended consequences of a particular conception or design.

56 John Burrows QC, ‘The tort of invasion of privacy’, *Media Law* (seminar organised by LexisNexis Professional Development in partnership with the Media Law Association), Auckland, 7 March 2007, at 10.

57 Ludwig Wittgenstein, *Philosophical Investigations* (the German text, with a revised English translation), translated by G E M Anscombe, (Blackwell Publishers Limited, Oxford, 3rd ed, 2001), section 66.

Wittgenstein invoked the expression of ‘family resemblances’, ‘for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc. etc overlap and criss-cross in the same way – And I shall say: “games” form a family’.⁵⁸ Wittgenstein has long influenced the work of legal scholars and philosophers of language, including H L A Hart⁵⁹ and J L Austin,⁶⁰ as well as historians of political thought, like James Tully.⁶¹ There is a risk to this approach in legal method as opposed to philosophical or historical method, which Nicola Lacey has elucidated in her biography of H L A Hart:

‘if fully pursued, the Wittgensteinian message – as Wittgenstein himself saw – undermines the pretensions of philosophy as the “master discipline” which illuminates our access to knowledge about the world. For once the notion of “context” is broadened out, the inexorable conclusion is that illumination of legal practices lies not merely in an analysis of doctrinal language but in a historical and social study of the institutions and power relations within which that usage takes place.’⁶²

55. Solove is perfectly aware that the notion of ‘privacy’ has generated a vast literature spanning a variety of disciplines and methodological approaches. In Solove’s view, the ‘problem of discussing the value of privacy in the abstract is that privacy is a dimension for a wide variety of practices each having a different value – and what privacy is differs in different contexts’.⁶³
56. This is a methodology well suited to inductive common law method. Solove’s fundamental point is that abstract references to privacy or attempts to conceptualise privacy often fail to assist in generating solutions to practical, every-day, or even novel legal and policy problems.
57. Solove constructs a taxonomy based on identifying things that are harmful to the concept of privacy. ‘I focus on the activities that invade privacy’, he says.⁶⁴ This seems rather odd, as it appears to presume something knowable and identifiable as ‘privacy’ that is capable of invasion. So it would seem to presume the existence of a knowable concept of ‘privacy’. This would be the main flaw to Solove’s method.
58. Nevertheless, Solove continues and confesses that, ‘declaring that an activity is harmful or problematic does not automatically imply that there should be legal redress, since there may be valid reasons why the law should not get involved or why countervailing interests should prevail’.⁶⁵

58 Ibid, section 67.

59 H L A Hart, *The Concept of Law* (Clarendon Press, Oxford, 2nd ed, 1994) 15-16, 280. Hart noted the general importance of a theory of language to conceptualisation in *The Concept of Law*, at v: ‘In this field of study it is particularly true that we may use, as Professor J L Austin said, “a sharpened awareness of words to sharpen our perception of the phenomena”.’ As Timothy Endicott has said of Hart’s approach, ‘we can understand people’s practices (and resolve philosophical puzzles about them) if we understand the language that people use from their own point of view’: Timothy Endicott, ‘Law and language’, in Jules Coleman and Scott Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, Oxford, 2004) at 946.

60 J L Austin, *How to do Things with Words* (Clarendon Press, Oxford, 1962), 4 (note 2).

61 J Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge University Press, Cambridge, 1995).

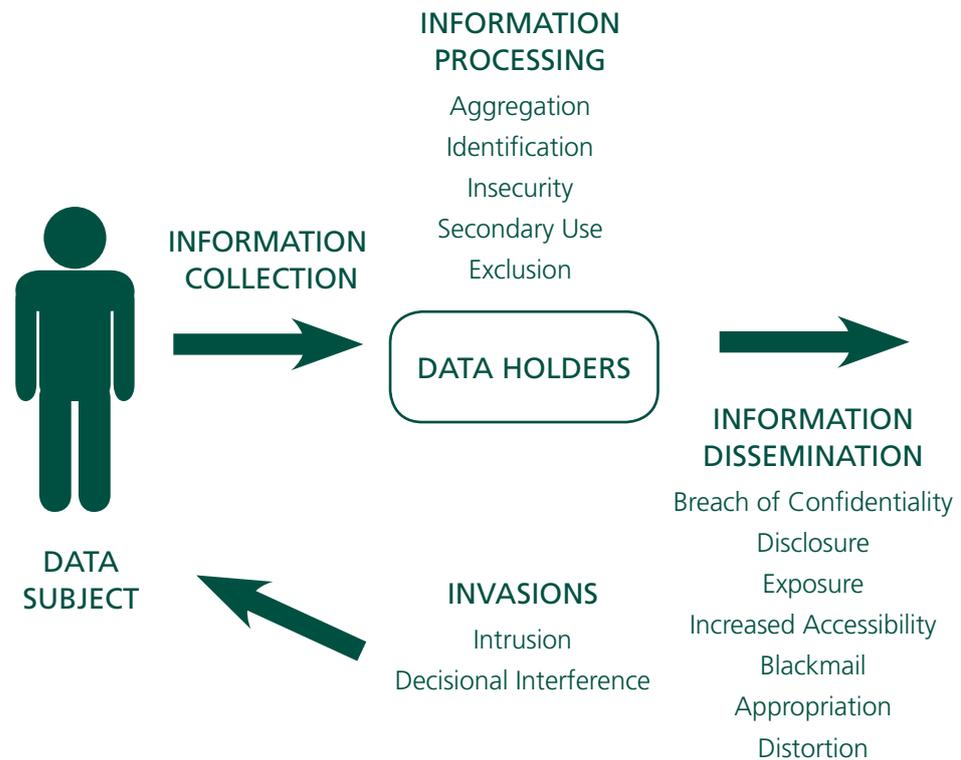
62 Nicola Lacey, *A Life of H. L. A. Hart: The Nightmare and the Noble Dream* (Oxford University Press, Oxford, 2006), 219.

63 Daniel J Solove, ‘Conceptualizing privacy’ (2002) 90 Cal L Rev 1087 at 1146.

64 Daniel J Solove, ‘A taxonomy of privacy’ 154 U Pa L Rev 477 (2006), 485.

65 Ibid.

Figure 3 – Taxonomy of Privacy (Daniel J Solove)



59. Solove identifies four distinct groups of activity that may occasion harm to one's privacy. Together the following groupings constitute what he calls his 'taxonomy' of privacy:

59.1 First, information collection (in the form of surveillance and interrogation).

59.2 Second, information processing (*via* aggregation,⁶⁶ identification,⁶⁷ insecurity or the careless protection of stored information from leaks and improper access, secondary use of the information for a purpose that differs from that for which it was collected, and exclusion or the failure to allow the data subject to know about the data that others have her and to participate in its handling and use).

59.3 Third, information dissemination.⁶⁸ This category involves a range of matters, including breach of confidentiality ('breaking a promise to keep a person's information confidential'); disclosure (which 'involves the revelation of truthful information about a person that impacts the ways others judge her character'); exposure (which 'involves revealing another's nudity, grief, or bodily functions'); increased accessibility ('amplifying the accessibility of information'); blackmail; appropriation ('the use of the data subject's identity to serve the aims and interests of another'); and distortion (the 'dissemination of false or misleading information about individuals').

66 Which 'involves the combination of various pieces of data about a person': *ibid*, 490.

67 '*Identification* is linking information to particular individuals (emphasis in original)': *ibid*.

68 All quotes in this sub-paragraph are extracted from Daniel J Solove, 'A taxonomy of privacy' 154 U Pa L Rev 477 (2006), 490.

- 59.4 Fourth, invasions of people's private affairs, comprising 'intrusion' and 'decisional interference'. This category 'need not involve personal information (although in numerous instances, it does)'.⁶⁹ He adds that '*Intrusion* concerns invasive acts that disturb one's tranquil (l)ity or solitude [emphasis in original]' whereas '*Decisional interference* involves the government's incursion into the data subject's decisions regarding her private affairs [emphasis in original].'⁷⁰
60. In presenting his taxonomy, Solove has aimed to 'provide a clearer and more robust account of privacy – one that provides us with a framework for understanding privacy problems'.⁷¹ The approach is of considerable use, but in noting that there is 'no common denominator' linking 'all of the privacy harms', which are nevertheless related, Solove does beg the underlying question of the notion of 'privacy' that ties them together. The taxonomy presumes something that might be categorised as 'privacy' connects the various harms through a tissue of resemblances. All of this effort would still appear to suggest that there is something of a beast within the room that no-one dare recognise or gaze upon.
61. In spite of the attraction of the Solove approach, there are other ways of uncovering the meaning of 'privacy'. A M Honoré famously analysed and constructed the umbrella concept of 'ownership' and its relationship to property rights through collecting and naming its constituent incidents. Thus, there were the rights of use and of management; the right to possess, to an income, to security, and to capital; transmissibility, absence of term; prohibition of harmful use; liability to execution; and residuary character.⁷² It is not clear that we can achieve a comparable sort of precision insofar as 'privacy' is concerned.

69 Ibid.

70 Ibid.

71 Ibid, 562.

72 A M Honoré, 'Ownership' in A G Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, Oxford, 1961), 107-147.

Chapter 3

Why is Privacy Important, if at all?

62. According to Graeme Laurie of the University of Edinburgh,⁷³ the importance of privacy to humans may be explained from two distinct but related perspectives:
- 62.1 First, private interests linked to oneself as an individual person – privacy as an individual good; and
- 62.2 Second, public interests of the community in individuals making up that community having privacy. That is, privacy as a social or communal good.
63. In Laurie’s account, five features of ‘privacy as an individual good’ are potentially relevant:
- 63.1 Trust – an element that is critical to the establishment and nurturing of ongoing human relationships – requires not only a measure of intimacy between individuals but also inextricably the sharing of personal information that might be very private. Laurie notes that ‘Individuals trade private information both as a sign of trust and on the basis of trust.’⁷⁴ He adds that the ‘security of the information is guaranteed by the tacit understanding that it will not be noised abroad’.⁷⁵ Colin J Bennett and Charles Raab have observed that the ‘rhetoric of policy’ has ‘amply recognized’ the ‘relevance of trust to processes involving personal data’.⁷⁶ They perceive the promotion of public trust in commercial practices and in government as having become ‘something of a mantra’.⁷⁷ They added that:

‘In both the public and the private sector – and, indeed, in the increasingly important interchange between them – there is an emerging international consensus on the importance of trust and confidence in

73 Graeme Laurie, *Genetic Privacy: A challenge to medico-legal norms* (Cambridge University Press, Cambridge, 2002), 6-10.

74 *Ibid.*, 7.

75 *Ibid.* (Laurie is drawing upon Charles Fried, ‘Privacy’ 77 Yale LJ 475 (1968) and C Fried, *An Anatomy of Values: Problems of Personal and Social Choice* (Harvard University Press, Cambridge, Massachusetts, 1970), 142.

76 Colin J Bennett and Charles Raab, *The Governance of Privacy: policy instruments in global perspective*, 52.

77 *Ibid.*

modern information and communication technologies and their application to online transactions. There is a particularly prevalent concern for creating trustworthy conditions for electronic transactions among businesses, in which the authenticity of contractual documents, the validity of electronic signatures, and the confidentiality of business-to-business information exchanges have been seen as crucial.⁷⁸

- 63.2 A measure of individual solitude – of withdrawing from the world – is of value in that it affords an individual ‘time to assimilate life experiences and to identify her own individuality’.⁷⁹ In this sense, one could add, privacy may assist freedom of expression, as it affords the space and solitude to compose thoughts and to consider how to express them free from scrutiny or disturbance.
- 63.3 There is also a claim that the mental stability of humans requires the accessibility of time and space for solitude or refuge given that public life often requires one to construct a *persona* or ‘personae in order to integrate successfully with others’.⁸⁰
- 63.4 Fourth, the absence of privacy can occasion harm to individuals. Thus, Laurie observes that ‘unauthorised invasion of the body is disrespectful of the individual and may cause physical harm’.⁸¹
- 63.5 Finally, the dissemination of private information about oneself (including ‘one’s personal condition, behaviour or habits’) can also lead to harm to oneself on account of third party individuals expressing their distaste and ostracising the individual at issue or subjecting them to violence and discrimination.⁸²
64. As for the public interest in privacy, some care does have to be taken, as will become clear in the following section of this paper. Laurie claims that ‘Important and valuable information [such as medical information between doctor and patient] will not be communicated if the element of trust that is so crucial to the development of relationships is lost because individuals cannot be guaranteed security of information.’⁸³ There is truth in that claim but there is also the risk that the rationale of privacy can be used to fragment information supply and to silo-ise its use and provision with the possible consequence that relevant considerations are not taken into account and there is the suspicion of the concealment and suppression of information.

78 Ibid, 54.

79 Graeme Laurie, *Genetic Privacy: A challenge to medico-legal norms*, 7.

80 Ibid.

81 Ibid, 8.

82 Ibid.

83 Ibid, 10.

65. The conclusion is that privacy is of value.⁸⁴
66. Unsurprisingly, and as a cautionary note, the value and meaning of ‘privacy’ has shifted over time and has not remained constant. Michael Warner has noted that:

‘The private (from *privatus*, deprived) was originally conceived as the negation or privation of public value. It had no value in its own right. But in the modern period, this has changed, and privacy has taken on a distinctive value of its own, in several different registers: as freedom, individuality, inwardness, authenticity, and so on. Public and private sometimes compete, sometimes complement each other, and sometimes are merely parts of a larger series of classifications that includes, say, local, domestic, personal, political, economic or intimate.’⁸⁵

84 Also refer to Australian Law Reform Commission, ALRC Discussion Paper 72: Review of Australian Privacy Law (2007) at 1.36; refer to <http://www.austlii.edu.au/au/other/alrc/publications/dp/72/> (last accessed on 18 September 2007).

85 Michael Warner, *Publics and Counterpublics* (Zone Books, New York, 2002), 28.

Chapter 4

What is Privacy? A Normative Account

67. In this section I start to develop the beginnings of a conceptual approach to privacy. It is then developed further in subsequent parts of this paper, as the discussion proceeds. There are two possible accounts of privacy:
- 67.1 First, an account that describes what privacy is; and
 - 67.2 Second, an account that is a normative theory of privacy – what one ought to have privacy in relation to (even though, descriptively, one might not always have it).

The meaning and complexities of ‘privacy’ in fact – the linkages to equality, autonomy and individuality within a community

68. In approaching the meaning and complexities of ‘privacy’ in fact, the purpose of this section is to orientate the perspective towards the complicated explanatory and predictive work that a conceptual approach would have to be mindful of if it were to be applied or to be capable of application.
69. The aim is not to fall into what G E Moore characterised as the ‘naturalistic fallacy’, the mistake David Hume purportedly identified in attempting to derive an ‘ought’ proposition from an ‘is’, confusing facts with conceptions of value. As Professor Andrew Sharp has said:

‘Nothing can be inferred about values from an array of past (or present) facts. How things were (or are) do not speak to what ought to be. They will not tell us what is right or wrong, just or unjust, authoritative or the weightless, praiseworthy or blameworthy – though they will of course tell us what people thought about these matters. “If the example of what hath been done, be the rule of what ought to be”, John Locke suavely argued, then the Peruvians’ fattening and eating their male war victims, breeding on their women, and eating both them and their children should be

an example to us.⁸⁶

70. On this basis, this paper focuses upon a normative approach to privacy rather than a matter of fact description as to what it might be objectively or in practice although it is certainly aware of the literature based upon an allegedly value-neutral or objective description of ‘privacy’. In attempting to do this, the paper will draw a distinction between what a normative (moral) account and theory of ‘privacy’ might say and what aspects or dimensions of it might be entitled to legal status.

Privacy has a social value – human selfhood, autonomy and sociality

71. For this paper, the starting point of ‘privacy’ in a conceptual approach is twofold and is linked to what it is to be a human being situated in a social context. Against this social background (which is vital to appreciate), privacy ought to be approached normatively as a subset of:

71.1 First, the autonomy of humans to live a life of their choosing (which might be referred to crudely as liberty claims); and

71.2 Second, the equal entitlement of humans to respect (roughly characterised as equality claims).

72. ‘Privacy’ is a sub-category or subset of the two values of autonomy and equality of respect. The reason for this view is that respect for ‘privacy’ and its value to individuals are conducive to autonomy and equality of respect. In this sense, Laurie’s comment above that respecting ‘privacy’ and the point that it is of value to people, in providing, for example, a measure of individual solitude and reflection, assists both autonomy (living and ordering a life of one’s own choosing) and equality of respect for the life choices of individuals. To quote David Gauthier in another context, equal respect simply requires that ‘each respect the identity and aims of her fellows, willingly according them equal place in their common affairs with her own’.⁸⁷

73. For reasons that will become clear as the discussion proceeds, we differ from the conclusion of the New South Wales Law Reform Commission in its recent and very helpful consultation paper that it is ‘highly problematic’ to identify values such as ‘either “dignity” or “autonomy” as the basis for privacy’.⁸⁸ There is no doubt that the task of tying a satisfactory or plausible account of privacy to core values such as ‘autonomy’ and the ‘equal entitlement of humans to respect’ is indeed challenging. Nonetheless, we see privacy as merely one sub-category of these values and one that must coalesce with other highly cherished values in an inextricably complicated social world of human interaction: for instance, the key value of one’s right to

86 Cited from Andrew Sharp, ‘Philosophy, law, history and the Treaty of Waitangi’, (Paper for The fourth British World Conference, *Broadening the British World*, University of Auckland on 13-16 July 2005). The full passage from Locke is as follows: ‘But if the example of what hath been done, be the rule of what ought to be, history would have furnished our A_ with instances of his absolute fatherly power in its height [sic] and perfection and he might have shown us in Peru, people that begot children on purpose to fatten and eat them.’ (John Locke, *Two Treatises of Government* (1698), Peter Laslett ed, (Cambridge University Press, Cambridge, 1963), book I, §57.

87 David Gauthier, ‘Constituting democracy’, in David Copp, John E Roemer, Jean Hampton (eds), *The Idea of Democracy* (Cambridge University Press, Cambridge, 1995) at 318.

88 New South Wales Law Reform Commission, *Consultation Paper 1: Invasion of Privacy*, (May 2007), at 8.

freedom of expression, which facilitates human autonomy. To perceive privacy anchored in this way is to begin to approach it as something that must live with other matters of high value to humans as individuals and as members of communities.

74. One must begin with the context of social life, as this is arguably foundational. ‘Privacy’, if it has any value at all, has a social value. This much is intuitive. It would be erroneous to see it as simply tied to the single individual *per se*. Nor is it something that is necessarily enjoyed on one’s own as a soloist completely inaccessible to others. It is understood, properly speaking, with reference to others and the polity and community as a whole.⁸⁹ Hence, one commentator acutely noted that, ‘[w]ithout society there would be no need for privacy’, as ‘the need for privacy is a socially created need’.⁹⁰ Herein lies the beginning of both practical and theoretical complication. ‘Privacy’ like ‘individuality’ presupposes some condition of sociability rather than its absence. This is not a crude communitarian assertion against either libertarianism or a straw person in the form of an atomist approach to liberalism. Rather, it is an aspect of late twentieth century and early twenty-first century liberalism that consciously draws upon ancient insights and has responded to the scepticism of the communitarian critique, together with that of other discourses, such as feminist political thought. Indeed, Maeve Cooke has rightly complimented Jean L Cohen on pointing out ‘that many conceptions of rights are readily compatible with a view of the self as inescapably situated in webs of communicative relationship (as are, similarly, many conceptions of autonomous agency)’.⁹¹
75. As Aristotle once averred, humans are creatures of the *polis* (πολις) and are social beings. To be ‘private’, then, need not and should not represent a refusal to acknowledge the dependence of the good for each individual on relationships of varying intimacy with others.
76. Amartya Sen has warned that there are two forms of reductionism to avoid in the realms of social and economic analysis (let alone, I would add, policy and legal analysis). One he has typified as ‘identity disregard’, which assumes ‘the form of ignoring, or neglecting altogether, the influence of any sense of identity with others, on what we value and how we behave’.⁹² A second and different type of reductionism is that of ‘singular affiliation’, which represents the assumption that ‘any person pre-eminently belongs, for all practical purposes, to one collectivity only – no more and no less’.⁹³ He explained that the ‘intricacies of plural groups and multiple loyalties are obliterated by seeing each person as firmly embedded in exactly one affiliation, replacing the richness of leading an abundant human life with the formulaic narrowness of insisting that any person is “situated” in just one organic pack’.⁹⁴ Charles Taylor states that the ‘crucial feature of human life is its fundamentally dialogical character’. Thus, he continues, ‘[w]e become full human agents, capable of understanding ourselves, and hence of defining our identity, through our acquisition of rich human

89 Charles D Raab, ‘Privacy, democracy, information’, in B Loader (ed), *The Governance of Cyberspace* (Routledge, London, 1997), 155 at 161-165.

90 Barrington Moore Jr, *Privacy: Studies in Social and Cultural History* (M E Sharp, 1984) at 73.

91 Maeve Cooke, ‘Privacy and autonomy: A comment on Jean Cohen’ in Beate Rössler (ed), *Privacies: Philosophical Investigations* (Stanford University Press, Stanford, 2004), at 98-110, 101.

92 Amartya Sen, *Identity and Violence: The illusion of destiny* (W W Norton & Company, New York, 2006) at 20.

93 Ibid.

94 Ibid.

languages of expression'.⁹⁵ Taylor acknowledged that, 'We are of course expected to develop our own opinions, outlook, stances towards things, and to a considerable degree through *solitary reflection* [emphasis added]'.⁹⁶ Having privacy can assist this process of developing life plans or projects.

77. Autonomy and equality are certainly linked in spite of both the practical and imagined tensions between them in some accounts: to value autonomy is to respect the conceptions that others have of themselves and their life plans or projects. The political and normative position of humans as having equal dignity is premised upon the idea that all humans have an entitlement to equal respect. Whether we are strangers or intimates, each and everyone of us is worthy of such respect. The potential of humans, 'rather than anything a person may have made of it, is what ensures that each person deserves respect'.⁹⁷ At a high level of abstraction, the concept of democracy, as understood in elements of contemporary theory, also tends to operate with the notion of moral equality in the context of political action: 'because each individual life is an end in itself, collective decisions ought to recognize, respect, and benefit individuals' interests and values equally, insofar as possible'.⁹⁸
78. There are undoubted tensions (perceived and real) in liberal political thought. Samuel Scheffler has warned that 'associative duties', which he has described as 'duties that the members of significant social groups and the participants in close personal relationships are often thought to have toward one another', represent a potential tension point in liberal thought for both autonomy and equality values.⁹⁹ Scheffler counsels that 'most of us... believe that our family relations and social affiliations can be a source of responsibilities that do not derive solely from choices we have made'.¹⁰⁰ Nevertheless, he believes that there is the 'potential for genuine conflict in our thinking about the extent of our responsibilities to different individuals and groups'.¹⁰¹
79. Yael Tamir has commented that 'associative duties' are not 'grounded in the idea that what is mine is more valuable than what is yours'.¹⁰² Hence, '[w]hen I claim that charity begins at home I do not intend to imply that the poor of my town are better but merely that... I have a greater obligation toward them than to strangers because they are members of *my* community... [Such] claims do not... imply an objective hierarchy among different forms of life [emphasis in original]'.¹⁰³ Scheffler is right to say that, while not all liberals necessarily accept the existence of

95 Charles Taylor, 'The politics of recognition' in Amy Gutman (ed), *Multiculturalism: Examining the politics of recognition* (Princeton University Press, Princeton, 1994) at 32.

96 Ibid.

97 Ibid, 41.

98 Mark E Warren, 'Democracy and the state', in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press: Oxford, 2006) at 385.

99 Samuel Scheffler, 'Introduction' in his *Boundaries and Allegiances: Problems of justice and responsibility in liberal thought* (Oxford University Press, New York, 2001), 4-5. By way of comparison, refer to Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press, Cambridge, 1982), 179; Neil MacCormick, 'Nation and Nationalism', in his *Legal Right and Social Democracy: Essays in legal and social philosophy* (Clarendon Press, Oxford, 1982), 247-264.

100 Ibid, 5.

101 Ibid.

102 Yael Tamir, *Liberal Nationalism* (Princeton University Press, Princeton, 1993), 100.

103 Ibid, 100-101.

associative duties, ‘they would surely agree with Tamir that such particularism is not excluded by a commitment to the equal worth of persons’.¹⁰⁴

80. Susan Mendus of the University of York says that ‘although the relationship between husband and wife is (we must hope) governed by considerations of love rather than considerations of impartial justice, the requirement to treat one’s spouse as an autonomous individual, deserving of equal respect still holds’.¹⁰⁵ In clarifying this observation further, she explains that while ‘impartiality’, as part of a ‘commitment to equality’, ‘permits favored treatment for some others, it draws limits to that favouritism, and the limits are set, in part, by a distinction between private life and official duty; in part by the requirement to acknowledge that all are deserving of respect’.¹⁰⁶
81. There are three important senses of sociality within which privacy, amongst other interests and values, operates. One form of sociality is that of mutual dependence.¹⁰⁷ In essence, the claim of this particular type is that humans are incapable of truly developing on their own ‘because we need human nature, moral and intellectual education, practice with language, if we are to develop into a full person’. Second, there is also ‘sociality as an end’ on account of what the philosopher Kwame Anthony Appiah has characterised as a ‘natural’¹⁰⁸ desire for relationships with others, whether partners, friends, parents, children, colleagues or neighbours. Finally, there is ‘instrumental sociality’ in the sense that ‘many of the things we value – literature, and the arts, the whole world of culture; education; money; and in the modern world, food and housing – depend essentially on society for their production’.¹⁰⁹ There are many morally permissible options in life.
82. Appiah has recognised that ‘identity’ in and of ourselves and in conjunction with others (groups, for instance) may provide a means for sorting through a range of options and preferring some over others. ‘To adopt an identity, to make it mine, is to see it as structuring my way through life.’¹¹⁰ In essence, in shaping ourselves, some of the material that we are responding to is not within us but outside of us.¹¹¹ This is certainly social but the social aspects that inform the complex *potpourri* of individual identities are often ‘peculiar to who we are as individuals, and so represent a *personal* dimension of our identities [emphasis added]’.¹¹² A key point is that ‘people should be left to find their own way in the world, and that we should value [and respect] the different ways they will

104 Samuel Scheffler, ‘Liberalism, nationalism and egalitarianism’ in Scheffler (ed), *Boundaries and Allegiances: Problems of justice and responsibility in liberal thought*, 79.

105 Susan Mendus, ‘Impartiality’, in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory*, at 427.

106 Ibid.

107 For these passages on ‘sociality’, I am following the philosopher, Kwame Anthony Appiah’s approach in ‘Citizens of the world’ in Matthew Gibney (ed), *Globalizing Rights: Oxford Amnesty Lectures* (Oxford University Press, Oxford, 2003) at 219.

108 Ibid, note 17 to chapter six. Appiah observes that ‘I mean it is natural to us only in the sense that a normal upbringing produces creatures with such desires’ (ibid).

109 Ibid at 219.

110 Ibid, 225.

111 Kwame Anthony Appiah, *The Ethics of Identity*, 21.

112 Ibid.

choose'.¹¹³ John Stuart Mill encapsulated the point neatly in saying that: 'If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his experience is best, not because it is the best in itself, but because it is his own mode.'¹¹⁴ He also said that, 'Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest'.¹¹⁵ In Mill's account, the 'appropriate region of human liberty' comprised three constituent elements:

82.1 First, 'the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part of the same reasons, is practically inseparable from it'.¹¹⁶

82.2 Second, 'the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong'.¹¹⁷

82.3 Third, 'from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose, not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived'.¹¹⁸

83. In a classical exposition on 'liberty' in the twentieth century, Isaiah Berlin summarised his contention that freedom is about the absence of interference in the following way:

'[T]he criterion of oppression is the part that I believe to be played by other human beings, directly or indirectly, with or without the intention of doing so, in frustrating my wishes. By being free in this sense I mean not being interfered with by others. The wider the area of non-interference the wider my freedom'.¹¹⁹

84. As Berlin summarised: 'the essence of the notion of liberty, in both the "positive" and the "negative" senses, is the holding off of something or someone – of others who trespass on my field'.¹²⁰

113 Kwame Anthony Appiah, 'Citizens of the world' in Matthew Gibney (ed), *Globalizing Rights: Oxford Amnesty Lectures*, at 218.

114 John Stuart Mill, 'On Liberty' (1859) in H B Acton (ed), *Utilitarianism, Liberty and Representative Government* (Everyman's Library, London, 1972), 135.

115 Ibid, 81.

116 Ibid, 80-81.

117 Ibid, 81.

118 Ibid.

119 Berlin, 'Two concepts of liberty' in Henry Hardy (ed), *Liberty* (Oxford University Press, Oxford, 2002), 166-217, at 170.

120 Ibid, 204.

85. 'Privacy', in my view, must be seen as a subset of this broader concern for the value of human individuality and autonomy occurring within, and sustained by, an interconnected social world. This does not devalue or deform one's account of privacy. Rather, it situates privacy within a broader field of human and social concern with a view to ascertaining what, if anything, it adds for the purposes of possible law reform. As should be clear from the above, the approach in this paper does not subscribe to a consequentialist view about privacy; that is, assessing the consequences in terms of the greater or lesser relative benefit to a community as a whole.
86. In 2004 Nicola Lacey rightly observed that accounts of the functions of privacy and the interests that it purports to protect, at least in relation to the analysis of United States law, would suggest a connection to the value of human autonomy.¹²¹ Jeffrey Reiman has counselled that the absence of functional privacy 'makes people vulnerable to having their behavio[u]r controlled by others'.¹²² Anita Allen has said that, '[b]asic opportunities for privacy and the free exercise of privacy-related liberties are human goods that contribute to the flourishing of individuals'.¹²³ Gavison has suggested that 'In addition to providing freedom from distractions and opportunities to concentrate, privacy also contributes to learning, creativity, and autonomy by insulating the individual against ridicule and censure at early stages of groping and experimentation.'¹²⁴ Errors of judgment are invariably made in human life. It is noteworthy that some forty years ago, Westin identified the ongoing tensions and dynamism inherent in the fluid boundaries between 'privacy' and disclosure. Westin remarked that:

'Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy or, when among larger groups, in a condition of anonymity or reserve. The individual's desire for privacy is never absolute, since participation in society is an equally powerful desire. Thus each individual is continually engaged in a personal adjustment process in which he balances the desire for privacy with the desire for disclosure and communication of himself to others, in light of the environmental conditions and social norms set by the society in which he lives. The individual does so in the face of pressures from the curiosity of others and from the processes of surveillance that every society sets in order to enforce its social norms.'¹²⁵

87. The social context of human interaction is critical. It supplies the requisite sensitivity that is required to test the usefulness of 'privacy' as a concept in the human world. On certain accounts, for example, it is conceivable that questions of privacy might be viewed as arising in, say, an initially bilateral situation –

121 Nicola Lacey, 'Interpreting doctrines of privacy: A comment on Anita Allen' in Beate Rössler (ed), *Privacies: Philosophical Investigations* (Stanford University Press, Stanford, 2004), at 41-42.

122 Jeffrey Reiman, 'Driving to the Panopticon: A philosophical exploration of the risks to privacy posed by the information technology of the future' in Beate Rössler (ed), *Privacies: Philosophical Investigations*, 201.

123 Anita Allen, *Uneasy Access: Privacy for Women in a Free Society*, at 1.

124 R Gavison, 'Privacy and the limits of law' 83 Yale LJ 421 (1980) at 448.

125 Alan F Westin, *Privacy and Freedom*, (Atheneum, New York, 1967) at 7.

matters shared between two individuals by way of conversation, whether as friends or as family members or co-employees.¹²⁶

88. These situations raise the inevitable difficulty associated with one or both participants sharing the content (or their personal interpretation) of the conversation with others not privy to the initial discussion. Different loyalties might be engaged and not all members of a social or professional circle might necessarily approve of, or have affinities with, the same people as others within the same circle. It is not always the case that my friends are your friends, even though the two of us might be the closest of friends to each other. What if the initial conversation was an especially unpleasant experience for one participant and they need to seek therapy or advice from a good friend as a sounding board? Is the content of the discussion regarded as potentially 'public' because it was shared with one other person? Is the identity of the other participant in the first conversation privileged from disclosure? Both the social advantages and disadvantages of what is colloquially referred to as 'gossip' come into play.¹²⁷ What about situations that can be both formal and informal, such as oral references about third parties in pre-employment situations? Would the individual discussed have any right of accessing the information and exercising a right of reply?¹²⁸ Would matters be different if the disclosed information was released to the media beyond the immediate social and professional circle of each of the two individuals in the first conversation? If relevant,¹²⁹ how would processes of natural justice ameliorate the issue if at all?
89. There are very few hardened lines or boundaries in human interaction and a general, legally actionable right to privacy, if not carefully thought through, could readily have a chilling effect upon other cherished values in an open society.¹³⁰ This sense of complication and complexity points to the real dangers of developing hard and fast juridical (as opposed to purely ethical and non-juridical) norms about what might be described as 'privacy'. It raises the fundamental question as to whether we are talking about 'privacy' at all.¹³¹
90. Many situations amongst and between individuals might simply justify accountability or consequences through the ongoing adjustment of inter-personal relations rather than legal sanctions in the event of a sense of privacy having been breached or undermined. Thus, friendships might cool in intensity, wither or cease altogether: the elements of trust and confidence might have been

126 The concept of 'shared privacy' emerges (refer to Julie C Inness, *Privacy, Intimacy, and Isolation* (Oxford University Press, New York, 1992), at 43, 45-46, 47, 48, 51). I address the issue of 'shared privacy' below in more detail. I acknowledge that there is a live issue as to whether such matters can said to be genuinely 'private', as they are known by more than one individual. I leave that question for the moment.

127 Sisela Bok in *Secrets: On the ethics of concealment and revelation* (Pantheon, New York, 1982) at 91 has defined 'gossip' as an 'informal personal communication about other people who are absent or treated as absent'.

128 Cf. section 29(1)(b) of the Privacy Act 1993 (NZ).

129 Its relevance cannot be assumed.

130 I have not yet had an opportunity to review Archon Young, Mary Graham, and David Weil, *Full Disclosure: the perils and promise of transparency* (Cambridge University Press, Cambridge, 2007) or Daniel J Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (Yale University Press, New Haven, 2007) which examines the relationship between privacy and free speech on the internet.

131 I will return to the technique of posing queries premised on factual circumstances at various points in this paper. The object at this early stage is not to provide hardened answers but to provoke discussion and to problematise the notion of 'privacy'.

significantly undermined. This is not that unusual perhaps, as many human relationships, depending upon the bonds of affinity and dispositional characteristics of the individuals involved,¹³² change over time. A juridical ‘right to privacy’ could become exceedingly onerous and oppressive if it were to apply to many of the private conversational situations between individuals, even in the event of disclosure to other individuals. Either way, it will not do to be overly schematic or rigid about such things.

91. The concept of ‘privacy’, therefore, is not an uncomplicated ‘social’ value – there are many sides to the issue. It is hard to disagree with Ruth Gavison’s statement that privacy ‘cannot be said to be a value in the sense that the more people have of it, the better’.¹³³ As already suggested above, the place of privacy must be seen in the context of human interaction as a whole, including political and social interaction. A balance has to be struck. There should be no absolute right to privacy. ‘[E]xcessive regard for private life endangers civil liberties by leaving the body politic unattended’.¹³⁴ Charles Raab has suggested that democratic processes may be assisted predominantly through a ‘significant asset’ in the form of the ability of ‘electronic media [to] make much more *non-personal information* available to many more people [emphasis added]’.¹³⁵ Raab observes that new forms and applications of technology raise the ‘spectre of “Orwell” in the midst of the realisation of “Athenian” ideals’.¹³⁶ His stimulating argument is that the ‘claim that democracy and privacy reinforce each other means that the information-openness of democracy is not necessarily achieved at the expense of privacy’s information-restriction’.¹³⁷ Fundamentally, though, a democratic polity tends to be predicated upon, and to support the liberty of citizens to express themselves and to communicate *inter se*, as well as with the state. Here, one must be mindful of the caution of Justice Anderson’s dissenting judgment in *Hosking v Runting*:

‘Freedom of expression is the first and last trench in the protection of liberty. All of the rights affirmed by the NZBORA are protected by that particular right. Just as truth is the first casualty of war, so suppression of truth is the first objective of the despot. In my view, the development of modern communications media, including for example the worldwide web, has given historically unprecedented exposure of and accountability for injustices, undemocratic practices and the despoliation of human rights. A new limitation on freedom of expression requires, in my respectful view, greater justification than that a reasonable person would be wounded in their feelings by the publication of true information of a personal nature which does not have the quality of legally recognised confidentiality.’¹³⁸

132 Certain individuals might tolerate the risks of disclosure or forgive possible breaches. There is no template or pre-ordained response.

133 R Gavison, ‘Privacy and the limits of law’ 83 Yale LJ 421 (1980) at 440.

134 C Bryant, ‘Privacy, privatisation and self-determination’ in J Young (ed), *Privacy* (Wiley, New York, 1978).

135 Charles Raab, ‘Privacy, democracy and information’, in Brian D Loader (ed), *The Governance of Cyberspace: Politics, technology and global restructuring*, 155 at 158.

136 *Ibid*, 156.

137 *Ibid*.

138 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at paragraph [267] per Anderson J.

92. His Honour added that:
- ‘Nor is there any demonstrable need for an extension of civil liability. Peeping, peering, eavesdropping, trespassing, defaming, breaking or exploiting confidences, publishing matters unfairly, are already covered by the legislative array. What is left to justify the breach of the right to freedom of expression?’¹³⁹
93. It is also arguable that the cosmopolitan theorists are correct to say that the basic liberal-representative model of democracy, which focuses principally upon complying with legal norms and participating in the electoral process, does not make sufficient demands of its citizens. For one thing, some of these theorists would have us expanding our imaginations so as to be actively publicly-minded and other-regarding.¹⁴⁰ I do not comment in detail on these observations in this paper. They certainly warrant thought and attention, especially in view of the gathering discussions on republican theories of citizenship,¹⁴¹ *virtù* and civic duties and what it means to have a civil society. Concepts of ‘privacy’ are certainly a part of that sort of analysis. But what it is to be an engaged and enfranchised citizen is not completely or exhaustively addressed *via* privacy concerns.¹⁴²
94. There is the added and perennial complexity of whether exemptions ought to be made in favour of national security interests. Principles and conceptual resources of some antiquity (and which precede the twenty-first century democratic state) come into play here. In the present-day climate, Professor Bruce Ackerman of Yale University has dramatically put forward his prognosis of a threatening ‘downward cycle’ of increasingly repressive legal responses to terrorist assaults such that, ‘[e]ven if the next half-century sees only four or five attacks on the scale of September 11, this destructive cycle will prove devastating to civil liberties by 2050’.¹⁴³ Any developments on privacy need to be aware of this overall context and the developing literature on the rule of law and the powers of the state to address terrorism, money laundering and other forms of behaviour considered to be undesirable.¹⁴⁴
95. ‘Privacy’ therefore may be as much an issue in terms of the manner in which individuals talk about details personal to you (but not necessarily properly contextualised or even accurate) in your absence. This can be particularly apparent in national security settings. In Canada, the Immigration and Refugee Protection Act 2001 allows the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness to issue a certificate declaring that a foreign national or permanent resident is inadmissible to Canada on grounds of

139 *Ibid*, paragraph [268].

140 Refer to Michael Saward, ‘Democracy and citizenship: expanding domains’, in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory*, at 412.

141 For instance, those associated most recently with Quentin Skinner, amongst others: Quentin Skinner, ‘States and the freedom of citizens’ in Q Skinner and Bo Stråth (eds), *States and Citizens: History, theory, prospects* (Cambridge University Press, Cambridge, 2003); Paul Rahe, ‘Situating Machiavelli’ in James Hankins (ed), *Renaissance Civic Humanism: Reappraisals and Reflections* (Cambridge University Press, Cambridge, 2000).

142 Refer to the contributions in W B H J van de Donk, I Th M Snellen and P W Tops (eds), *Orwell in Athens: A perspective on informatization and democracy* (IOS Press, Amsterdam, 1995).

143 Bruce Ackerman, ‘The emergency constitution’ 113 Yale LJ 1029 (2004) at 1030.

144 Refer to David Dyzenhaus, *The Constitution of Law: Legality in a time of emergency* (Cambridge University Press, Cambridge, 2006).

security, among others (section 77), and leading to the detention of the person named in the certificate. The certificate and the detention are both subject to review by a judge of the Federal Court, in a process that may deprive the person of some or all of the information on the basis of which the certificate was issued or the detention ordered (section 78). Once a certificate is issued, a permanent resident may be detained, and the detention must be reviewed within 48 hours; in the case of a foreign national, the detention is automatic and that person cannot apply for review until 120 days after a judge determines the certificate to be reasonable (sections 82-84). The judge's determination on the reasonableness of the certificate cannot be appealed or judicially reviewed (section 80(3)). If the judge finds the certificate to be reasonable, it becomes a removal order, which cannot be appealed and which may be immediately enforced (section 81).

96. In February 2007, the Supreme Court of Canada held in *Charkaoui v. Canada (Citizenship and Immigration)* that

‘Although the judge may ask questions of the named person when the hearing is reopened, the judge is prevented from asking questions that might disclose the protected information. Likewise, since the named person does not know what has been put against him or her, he or she does not know what the designated judge needs to hear. If the judge cannot provide the named person with a summary of the information that is sufficient to enable the person to know the case to meet, then the judge cannot be satisfied that the information before him or her is sufficient or reliable. Despite the judge's best efforts to question the government's witnesses and scrutinize the documentary evidence, he or she is placed in the situation of asking questions and ultimately deciding the issues on the basis of incomplete and potentially unreliable information.’¹⁴⁵

97. In that case, the Supreme Court concluded that procedures under the Immigration and Refugee Protection Act 2001 breached the right to a fair hearing under section 7 of the Canadian Charter of Rights and Freedoms. The right to a fair hearing comprises the right to a hearing before an independent and impartial magistrate who must decide on the facts and the law, the right to know the case put against one, and the right to answer that case.

98. Chief Justice McLachlin noted that ‘Section 7 of the *Charter* requires that laws that interfere with life, liberty and security of the person conform to the principles of fundamental justice — the basic principles that underlie our notions of justice and fair process.’¹⁴⁶ She added that ‘These principles include a guarantee of procedural fairness, having regard to the circumstances and consequences of the intrusion on life, liberty or security’.¹⁴⁷ Her Honour stated that less intrusive alternatives developed in Canada and abroad, notably the use of special counsel to act on behalf of the named persons, illustrate that the government can do more to protect the individual while keeping critical information confidential than it has done in the Immigration and Refugee Protection Act 2001.¹⁴⁸

145 Refer to *Charkaoui v. Canada (Citizenship and Immigration)* [2007] 1 SCR 350; 2007 SCC 9 at paragraph 63 per McLachlin CJC.

146 *Ibid* at paragraph 19.

147 *Ibid*.

148 *Ibid*, paragraphs 66-87.

99. It is important to appreciate that the federal government was concerned to keep the identities of its informants secret as well. The Chief Justice said that:

‘Mechanisms developed in Canada and abroad illustrate that the government *can do more to protect the individual while keeping critical information confidential* than it has done in the IRPA. Precisely what more should be done is a matter for Parliament to decide. But it is clear that more must be done to meet the requirements of a free and democratic society [emphasis added].’¹⁴⁹

The inadequacy of ‘inaccessibility’ and ‘isolation’ as normative definitions of privacy

100. The implications of ‘privacy’ as a social value and as a subset of autonomy and equality of respect values are manifold.
101. Most importantly, it reveals the analytical paucity of merely understanding ‘privacy’ as objective inaccessibility or isolation, unless one wishes to restrict the meaning and normative significance of the ‘truly private’ to the state of inaccessibility *per se* (a condition of non-disclosure perhaps). I say this while acknowledging that both ‘inaccessibility’ and ‘isolation’ can only really be understood relative to other people in the first place. The ‘right to be left alone’ is often, albeit mistakenly, attributed as the favoured expression of Warren and Brandeis in their seminal article of 1890.¹⁵⁰ Following Isaiah Berlin’s analytical category, this would be a very broad form of ‘negative liberty’ indeed if the state were regarded as subject to the normative obligation to leave individuals as individuals alone.
102. Ruth Gavison has approached the question of ‘privacy’ from the controlling perspective of the measure of an individual’s accessibility to others. Notably, she said that, ‘[a]n individual enjoys perfect privacy when he is completely inaccessible to others’, a notion that could then be divided into three component parts as follows: there is perfect privacy when no one has any information about *x*; no one pays any attention to *x*; and no one has physical access to *x*.¹⁵¹ According to Gavison, this analysis gave rise to the three constituent elements of ‘privacy’: secrecy, anonymity, and solitude. Gavison accepted that ‘perfect privacy’ was ‘impossible in any society’.¹⁵² In a carefully worded footnote, she states that the adjective ‘perfect’ in ‘*perfect* privacy’ was used only as a ‘methodological starting point’.¹⁵³ Conversely, the complete loss of privacy was ‘as impossible as perfect privacy’.¹⁵⁴ For her, ‘[a] more important concept... is *loss* of privacy [emphasis in original]’ and it was relative.¹⁵⁵
103. Gavison was clear that she was attempting to devise a ‘neutral’ and ‘descriptive’ concept of privacy rather than engineering a value proposition (the ‘value’ of privacy) that would potentially yield insights into when we might claim legal

149 Ibid, paragraph 87.

150 Warren and Brandeis, ‘The right to privacy’ 4 Harv L Rev 193 (1890) at 195. The notion of a right ‘to be let alone’ was first advanced in T Cooley, *Law of Torts* (2nd ed, 1888).

151 R Gavison, ‘Privacy and the limits of law’ 83 Yale LJ 421 (1980) at 428.

152 Ibid.

153 Ibid, at note 24.

154 Ibid.

155 Ibid.

protection for privacy.¹⁵⁶ For this reason, Gavison was of the view that incorporating issues of ‘control’ or of choice (want or desire) would not give rise to a value-neutral notion of ‘privacy’.¹⁵⁷ Moreover, once one begins to ascertain when legal remedies ought to be available, one is no longer dealing with a ‘neutral’ account of privacy as a ‘concept’. Thus, Gavison concluded that the ‘value of privacy can be determined only at the conclusion of discussion about what privacy is, and when – and why – losses of privacy are undesirable’.¹⁵⁸

104. Similarly, Anita Allen has noted in 1988 that, although no definition of ‘privacy’ has been universally accepted in the scholarly literature, the notion of ‘restricted-access’ has played a central role in the attempts to characterise what ‘personal privacy’ is. Allen developed her own ‘restricted-access’ definition of ‘privacy’ as follows: ‘Personal privacy is a *condition* of inaccessibility of the person, his or her mental states, or information about the person to the senses or surveillance devices of others [emphasis added]’.¹⁵⁹ Allen said that, ‘[t]o say that a person possesses or enjoys privacy is to say that, in some respect and to some extent, the person (or the person’s mental state, or information about the person) is beyond the range of others’ five senses and any devices that can enhance, reveal, trace, or record human conduct, thought, belief, or emotion.’¹⁶⁰ In elaborating upon this point further, she has stated that, ‘[a] person can be inaccessible in at least three senses: physically, dispositionally, and informationally.’¹⁶¹ Allen proposes the view that ‘privacy losses occur when a person (or the person’s mental states or information about the person) is to some degree or in some respect made more accessible to others’.¹⁶² ‘[P]rivacy losses occur’, says Allen, ‘when a person (or the person’s mental states or information about the person) is to some degree or in some respect made more accessible to others.’¹⁶³ The types of access that one may have, according to Allen, can be either ‘direct’ or ‘indirect’. ‘Direct access is possible through one of the five senses unaided; indirect access is possible through a surveillance device capable of contemporaneous sensory enhancement (for example, binoculars) or recordation (such as a tape recorder).’¹⁶⁴
105. As with Gavison’s starting point, this is very much a descriptive approach to ‘privacy’ rather than a normative analytical account. Hence, Allen’s use of the term ‘condition’ in *describing* a state of ‘personal privacy’. Other scholars have recognised that, in certain contexts, words such as ‘private’ and ‘public’ do not operative normatively at all; at other times, there might be a conflation between the descriptive and the prescriptive. If, for instance, a letter is described as ‘secret’, one is pointing to ‘a *de facto* restriction on access, as well as to the desire of someone to keep it restricted’.¹⁶⁵ Jeffrey Reiman is careful to point out that ‘[h]aving privacy is not the same thing as having a *right* to privacy [emphasis

156 Ibid, at 424-425.

157 Ibid, 426-428.

158 Ibid, 425.

159 Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (Random and Littlefield, Totowa, 1988), at 15.

160 Ibid.

161 Ibid 16.

162 Ibid, 17.

163 Ibid.

164 Ibid.

165 Stanley I Benn and Gerald Gaus, ‘The public and the private: concepts and action’, in Stanley I Benn and Gerald Gaus (eds), *Public and Private in Social Life* (Croom Helm Ltd, London, 1984), 11.

added]’,¹⁶⁶ which is an underlying thesis of this paper. ‘For there to be a right to privacy, there must be some valid norm that specifies that some personal information about, or experience of, individuals, should be kept out of other people’s reach.’ Yet, a descriptive approach to definition has little to say about a person’s power over, say, information about themselves once it leaves the space or zone¹⁶⁷ that is properly called ‘inaccessible’ in the sense described by Allen. This is an important challenge to any workable definition of ‘privacy’, as much of its work in policy and legal terms (if it is to have any), would occur in the realm of interaction with third parties where inaccessibility is reduced, and sometimes considerably so. A state of seclusion or solitude barely exhausts the relevant field of privacy in the conduct of human affairs. It is certainly an important dimension of the umbrella concept of ‘privacy’ but that is all it is. It does, as Gavison intended, cause us to bear in mind what is objectively private in a theoretical and practical sense.

106. Nevertheless, its utility appears to be mainly that of comparing the pure or ‘neutral’ notion of objective inaccessibility with situations where hard questions of ‘privacy’ tend to be principally engaged – human interaction and third party witnesses to human interaction. In short, privacy, if described as restricted-access *per se*, yields no necessary moral connotations in the world of both strangers and intimates beyond the narrow and perhaps even rare possibilities of solitude behind the walls of one’s dwelling. It is highly individualistic, almost in an atomistic sense, in that at one extreme it starts with the logically (if not factually) prior position of a person in complete isolation: any time that person encounters another, irrespective of the nature or sort of interaction, privacy is necessarily lost through reduced ‘inaccessibility’. As an account of privacy, separation or seclusion from the world of controlled or uncontrolled human interaction might appear intuitively sound at first sight given its conformity with the image of an individual dwelling alone in an apartment. Because this version of seclusion coincides factually with restricted or limited access, there is a temptation to regard the two aspects as synonymous, perhaps inviting a resort to the sort of thesis that Gavison has promoted.
107. Alternatively, one might be inclined to support a very narrow reading of Gavison’s thesis on the basis that the truly ‘private’ is an exceedingly narrow field of concern; that is, the stuff that is internal to you and that no-one else knows about or has sensory access to, including your partner(s), your parents, or close friends. This type of material might include your deepest psychological anxieties or some anatomical difference from the norm that developed with puberty and that has not been discovered by a physician or anyone else. I do not think that this is what Gavison was necessarily getting at and I do not personally support this sort of analysis. But I wish to flag it as a possible albeit extraordinarily circumscribed option for understanding truly private matters as opposed to matters that are disclosed and might not be properly considered as ‘private’ in

166 Jeffrey Reiman, ‘Driving to the Panopticon: A philosophical exploration of the risks to privacy posed by the information technology of the future’ in Beate Rössler (ed), *Privacies: Philosophical Investigations*, 199.

167 For these specific purposes, I am using a spatial metaphor on account of Anita Allen’s reference to ‘the person (or the person’s mental state, or information about the person)’ being, in some respect or to some extent (therefore, not necessarily completely) ‘beyond the range of others’ five senses and any devices that can enhance, reveal, trace, or record human conduct, thought, belief, or emotion’. In doing so, I am familiar with the criticisms of the use of a concept of space when describing the value of ‘privacy’.

the strict sense. As Richard Bruyer had considered in a different context, '[b]y limiting the ambit of privacy, we may indeed strengthen it.'¹⁶⁸

108. Crucially, however, Allen has accepted that while a 'degree of inaccessibility' is a 'necessary condition' for 'privacy to aptly apply', it is not a sufficient condition 'for the proper use of privacy'. Something more than 'inaccessibility' is required. She explains that 'privacy' and 'inaccessibility' are not synonymous.¹⁶⁹ There is, in her view, rough if not exact correspondence between the two. Examples of synonymy and discordance between 'privacy' and 'inaccessibility' are supplied.

'A person is physically inaccessible if others are unable to experience her directly through at least one of the five senses. Conversely, a person whose body can be directly seen, touched, tasted, heard, or smelled is physically accessible. Persons who are physically inaccessible by virtue of physical structures or distance possess the form of privacy called "seclusion" and sometimes "solitude". Thus, some familiar senses of privacy do correspond to the first familiar sense of "inaccessibility".'¹⁷⁰

109. Allen adds that 'Of course, "privacy" and "inaccessibility"... do not carry precisely the same meanings and connotations in each and every context'.¹⁷¹ For one thing, ' "privacy" has many "warm" associations, "inaccessibility" many "cold" ones'; for another, '[w]e cannot exchange every occurrence of "privacy" in an English-language sentence with "inaccessibility" and preserve the truth, value, and meaning of the sentence'.¹⁷² Nevertheless, Allen insists that 'inaccessibility' supplies insights. Thus, an individual might be physically accessible in one or more of the senses – by direct sight, physical contact, scent, taste, or aurally – but be 'dispositionally inaccessible' or unforthcoming.¹⁷³
110. Gavison's approach has certainly been influential. For instance, Burrows and Cheer in *Media Law in New Zealand* observe (after Ruth Gavison) that the three elements of 'privacy' are 'secrecy, solitude, and anonymity'.¹⁷⁴ Yet its failure is that it supplies a descriptive account that does not adequately address the subtleties of accessibility and individual choice in a social world. I now turn to examine this question.

168 Richard B Bruyer, 'Privacy: A review and critique of the literature' (2006) 43 Alberta Law Rev 553, at 553 (abstract) and 588.

169 Anita Allen, *Uneasy Access: Privacy for Women in a Free Society*, 16.

170 *Ibid.*, 16-17.

171 *Ibid.*, 16.

172 *Ibid.*

173 *Ibid.*, 17.

174 Ursula Cheer, 'Privacy' in John Burrows and Ursula Cheer, *Media Law in New Zealand* (Oxford University Press, Melbourne, 5th ed, 2005) at 234.

Chapter 5

Core dimensions of a right to privacy – ‘Informational privacy’, ‘Local privacy’ and ‘Private Facts’

111. In this section, I will further particularise the developing framework for approaching privacy. Here, I will suggest the shape of the subset of privacy, which forms part of the overarching values that I have called autonomy and the entitlement of individuals to equal respect.

A ‘core values’ theory of a right to privacy – ‘Informational privacy’ and ‘Local privacy’

112. It is arguable that there are two key dimensions comprising the heart of privacy in the ordinarily understood sense of the word:
- 112.1 First, ‘informational privacy’; and
- 112.2 Second, ‘local privacy’ (or ‘spatial privacy’).
113. Each of these dimensions, I argue, lies at the heart of a normative theory of ‘privacy’. It is possible to infringe both ‘informational privacy’ and ‘local privacy’ at the same time. Each dimension could also provide the platform for legal causes of action although it could be suggested that where existing causes of action or the criminal law adequately protect aspects of the relevant dimension (such as trespass),¹⁷⁵ then there might be no need to use a separate cause of action in privacy. Whether there is a demonstrable need for a separate cause of action to overlap with other remedies in the areas of either ‘informational privacy’ or ‘local privacy’ is an issue that could be considered. That is an issue that remains

¹⁷⁵ Even though trespass is about property rights that may be complementary to privacy and an action in trespass might have the collateral effect of protecting privacy.

to be explored but is strictly beyond the scope of this paper on a possible conceptual framework for analysing privacy.

114. At the very least, however, one *ought* to have control in respect of the following interconnected dimensions of privacy (subject to override on the part of other important values):

114.1 ‘Informational privacy’, which consists of private information about ourselves (where ‘private’ denotes information concerning conduct at home, sexual relations, personal habits, personal health information). As John Burrows QC has observed ‘the expression “private facts” suggests intimately private personal facts about me: things such as the state of my health, physical and mental, my intimate bodily appearance, my sexual activity, my family, my domestic relations, and so on’.¹⁷⁶ This approach arguably accords, in substance, with Article 8 in the European Convention on Human Rights: Article 8 of the convention provides that everyone has the right to respect for his private and family life, his home and his correspondence. Informational privacy relates to managing threats and harms to the ‘fabric of a person’s expectations, knowledge and autonomy in her relations with unspecified others, in other words threats to individual self-determination connected above all with the new information technologies’.¹⁷⁷ The protection of informational privacy is also intrinsic to the protection of one’s relations with ‘specified others’: ‘[t]his applies both to the privacy of relations and to privacy *within* relations [emphasis in original]’.¹⁷⁸

114.2 ‘Local (or spatial) privacy’, including access to our persons. Two aspects of privacy are included within this classification. First, solitude and ‘being-for-oneself’. Second, the privacy of ‘private spaces’, however conceived, typically in the household but also out-of-doors in certain circumstances. In theory, one could be out-of-doors, in a vehicle, for instance, or in one’s front yard or with a bag containing personal objects and have a reasonable expectation to those spaces or items remaining inaccessible to others, subject to any contrary lawful authority.

115. I assume that a person would intuitively have an expectation that he or she could exert control over the above aspects or dimensions of personal privacy should he or she wish to.

116. Invariably there will be peripheral areas – spaces on the margin – that are blurred and smudged. These are what can be called ‘hard’ cases in the conceptual approach that this paper is suggesting – these cases will tend to emerge in the areas where one is interacting with other humans in the social world and/or in

176 J Burrows QC, ‘Invasion of privacy – *Hosking* and beyond’ [2006] NZ Law Rev 389 at 392.

177 Beate Rössler, *The Value of Privacy*, at 129.

178 *Ibid*, 130.

public places. One of those areas thought to come within the ‘informational privacy’ category is the entitlement to control one’s self-presentation to others (which includes the entitlement not to disclose ‘private facts’ about oneself).¹⁷⁹

Not a fully-fledged ‘privacy in public places’ thesis

117. Importantly, the dimensions of privacy adumbrated above do not give rise to a *fully-fledged* ‘privacy in public places’ thesis of the sort that certain scholars might see as implicit in the developing court-led jurisprudence on privacy. The term ‘fully-fledged’ is emphasised because this is an area of some debate. As noted in the summary of this paper, harder questions emerge when one is in public places, as opposed to one’s private room at home with the door closed. At this early stage of the Law Commission’s review, this paper does not presume to completely answer whether one can have reasonable expectations to privacy in public places and in what circumstances. The view of ‘local privacy’ and ‘informational privacy’ that this paper has taken, however, would suggest that a reasonable expectation of privacy can arise in public places. There remains the issue of whether and in what circumstances one should have a legal right to privacy or whether the observers should follow certain practices that might be enforceable within a certain industry – for example, pixillating images of the faces of people or any other identifying features. These are matters on which reasonable people may differ.
118. In a recent and provocative think piece in the *Cambridge Law Journal*, Nicole Moreham suggests further areas where one might have a reasonable expectation to privacy in public places that is legally actionable against others.¹⁸⁰ The potential application of Moreham’s privacy in public places thesis is suggested through a number of illustrations. In her conclusion, she claims that ‘People should be presumed to have a reasonable expectation of privacy if they are involuntarily experiencing an intimate or traumatic experience in public, they are in a place in which they reasonably believe themselves to be imperceptible to others, or the defendant has used technological devices to penetrate his or her clothes or other self-protection barriers.’¹⁸¹ Reading this passage, one gets the feeling that the use of the word ‘or’ in the last sub-clause suggests that satisfaction of any of the sub-clauses would give rise to an action in privacy. It is assumed that this sort of injunction of refraining to film or to photograph or to disseminate would have applied to the media’s publication of the Zapruder film recording the assassination of President John Kennedy in 1963 (which not only included images of the fatal head shot but Jacqueline Kennedy’s obvious anguish in the rear of the Lincoln Continental limousine).
119. Moreham goes on to argue that ‘even where people are caught up in events of national or international significance (such as a terrorist bombing or a devastating hurricane), it would not be unduly restrictive to insist that the media refrain from publishing images of individuals whose intimate body parts are exposed, who are being treated for serious injuries, or who are plainly trying to avoid the gaze of the camera’.¹⁸² On Moreham’s reasoning, the infamous photograph of Vietnamese

179 Subject to various exceptions concerning criminal convictions and such like.

180 N A Moreham, ‘Privacy in public places’ (2006) 65 CLJ 606.

181 *Ibid*, 635.

182 *Ibid*, 627.

children exposed to napalm or perhaps documentaries of the victims of the Holocaust in the Second World War might be caught by this sort of situation.

120. In some of the above cases, it might be felt that the public interest in having access to such images outweighs the interest in privacy that the subject might have (although there will be debates as to what is in the public interest and who ought to decide that question). Needless to say, hard questions emerge when one is in public places. For example, a woman who is seen going to an abortion clinic or who is pictured going into labour in a public place still raise questions to do with personal privacy in public places.¹⁸³

The importance of concepts of intention and ‘control’ to a normative theory of privacy in a social world

121. In my view, a state of isolation or of physical, informational or mental inaccessibility from others is neither a sufficient nor even a particularly helpful definition of the concept of privacy or of being private.
122. It certainly describes the very core or central concern of privacy and that can form part of the conceptual approach that this paper is developing. We can call this the narrow form of privacy. But it says little about the choices of the human agent *vis-à-vis* the degree of inaccessibility or the relevance of such choices. Thus, there will be some areas where control over access to oneself or information about oneself will be of the utmost importance. There will be areas where you have disclosed something of yourself or given access to yourself, as a result of making a decision over something within your control and you wish to retain control over that disclosure. Of comparative interest here is the position taken in the United States courts regarding the disclosure of so-called ‘private facts’:

‘The limits of this branch of the right of privacy have been marked out by the United States Courts. First, the disclosure of the private facts must be a public disclosure, not a private one. The requirement of “publicity” means that the matter must be communicated to the public at large, or to so many persons that it must be regarded as substantially certain to become one of public knowledge. An action will not succeed if the alleged disclosure was to only one or two people.’¹⁸⁴

123. By ‘control’ in these circumstances, I mean the desire or intention to exercise such control, as well as the actual exercise of such control. Accordingly, I am not focusing upon the factual capability or actuality of control in all cases but whether one *ought* to have the power to determine access to something about oneself, including information. If one used what I have called ‘factual capability’ to control access or the actuality of control, then one would readily allow factual violations or threatened violations of the ability of *x* to determine access to defeat *x*’s intention to have privacy. This risk is heightened in 2007 by virtue of the technological ability of others to access you without your awareness or say so. Whether one ought to have privacy, as opposed to whether one actually has it, should be ascertained in terms of how one would wish to exercise a power of control over relative inaccessibility with reference to others if one had full information.

183 These examples emerged in a discussion between Nicole Moreham and Mark Hickford on 11 September 2007.

184 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at paragraph [70] per Gault P and Blanchard J.

124. This differs from the acceptance of a purely subjective measure of an intention to be inaccessible. For the value proposition to operate effectively in a society there will have to be some assurance that the moral and potentially legal elements of privacy are not activated simply through subjective wants or desires. If there are no express terms disciplining the human interaction in question, then one’s wishes would have to be communicable to others in some fashion, particularly in the space outside of one’s internal world. Objective criteria, such as having a reasonable expectation of privacy, would then have to come into play. Underlying all of this is an appreciation that individuals are socially situated beings. Leaving to one side the question of whether something known about you by others is genuinely private, one’s life generally begins in a family group situated in still larger groupings or communities.
125. In addition, the use of ‘control’ favoured in this paper, has to be explained with reference to what *ought* to be within one’s control or power of choice to exercise control over accessibility. This is a question of proper content and tends to invite references to so-called ‘private facts’ about oneself, as well as the notion of a ‘private domain’. Julie C Inness is of some assistance here although she effectively advocates a partly spatial conception of the content of ‘privacy’ in her use of ‘intimacy’.¹⁸⁵ Inness suggests three possible responses to the question ‘what is the content of privacy?’, presented as follows:
- ‘First of all, privacy might regulate information about ourselves; second of all, privacy might concern access to ourselves; and finally, privacy might focus on intimate decisions about our actions.’¹⁸⁶
126. Whilst the relevance of a particular realm or space has fallen out of favour in some of the recent scholarship,¹⁸⁷ it does supply some potentially useful insights that correspond with various intuitions that at least some individuals have when asked about what is ‘private. Hannah Arendt, who took what has been characterised as a ‘modern Aristotelian’ stance, perceived the conventional private domain to be the realm of the household, as it was ‘the sphere where the necessities of life, of individual survival as well as of continuity of the species, [are] taken care of and guaranteed’.¹⁸⁸ The metaphor of a spatial realm is one important aspect of privacy but the weight of the definition that is advocated falls upon ‘control and unwanted access’,¹⁸⁹ as well as, in the first instance, the particular content of the core intuitions about privacy (what I shall refer to as ‘informational privacy’ and ‘local privacy’).¹⁹⁰

185 Julie C Inness, *Privacy, Intimacy, and Isolation* (Oxford University Press, New York, 1992), at 56 *et seq.*

186 *Ibid.*, 56 (footnotes within text omitted).

187 Refer to Beate Roessler, ‘New ways of thinking about privacy’ (translated by R D V Glasgow) in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press: Oxford, 2006) at 702 (expressing a preference for the language for ‘dimensions’ of privacy rather than ‘realms’); Elizabeth Paton-Simpson, for instance, in her ‘Private circles and public squares: Invasion of privacy by the publication of “private facts”’ (1998) 61 MLR 318.

188 Refer to Hannah Arendt, *The Human Condition* (Chicago University Press, Chicago, 2nd ed, 1998), 45. The reference to ‘modern Aristotelian’ is extracted from Beate Roessler, ‘New ways of thinking about privacy’ in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press: Oxford, 2006).

189 Beate Rössler, *The Value of Privacy* (translated by R D V Glasgow; Polity, Cambridge, 2005) at 8.

190 Adapting the contribution of Rössler in her book *The Value of Privacy* (Polity, Cambridge, 2005).

Why 'private facts' are important

127. As Burrows notes, the formula of 'facts in respect of which I have an expectation of privacy', favoured in the New Zealand case law on the tort of privacy, embraces a more extensive class of information than the 'private facts' category referred to above. That is correct. Indeed, a majority of the Court of Appeal has expressly said so in *Television New Zealand Ltd v Rogers*:

'we are clear the tort is not confined to facts about private life; that is, inherently private matters. Obviously inherently private facts will ordinarily attract a reasonable expectation of privacy. But so may facts which do not have an inherent quality of privacy. We think that is implicit in the observation of Gleeson CJ in *Lenah Game Meats* which is reproduced at para[graph] [49] above.¹⁹¹ That said, we make the obvious point that the privacy value to be attributed to the facts in issue in this case is at the low end of the scale, and certainly much lower than would be the case for inherently private facts. This has importance for the balancing exercise to which we come later in this judgment.'¹⁹²

128. I believe that the 'reasonable expectation' formula is an arguably proper way in which to consider hard or peripheral cases in public places or in the social world, as well as the core cases (such as the solitude of one's own room).¹⁹³ These cases could consider what ought to be within one's control provided one starts with the understanding that the core of privacy in a social world consists of 'information privacy' (comprising private facts) and 'local privacy' (including control over access to oneself). Surrounding these two dimensions there might be a penumbra made up of 'hard' cases, which may arise in public places, for example.
129. Inness notes that her argument in favour of truly private or intimate information as forming a critical part of the content of privacy is 'open to the criticism that I have drawn privacy's content closer to our linguistic intuitions only to abandon our moral intuitions: defining privacy in terms of intimate information, *rather than information as a whole*, fails to account for certain of our moral intuitions [emphasis added]'.¹⁹⁴ She notes that:

'The argument supporting this criticism consists of two steps. The first step points out that including intimate information within the content of privacy allows us to morally condemn another when she culpably damages our control over intimate information – she has violated our privacy. However, excluding nonintimate information from the

191 The passage cited from *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 per Gleeson CJ was as follows: 'There is no bright line which can be drawn between what is private and what is not. Use of the term 'public' is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved.'

192 *Television New Zealand Ltd v Rogers* [2007] 1 NZLR 156 (CA) at paragraph [59].

193 Cf. the discussion on 'reasonable expectation' in N A Moreham 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 LQR 628, 647-648.

194 Julie C Inness, *Privacy, Intimacy, and Isolation*, at 58.

content of privacy has the opposite effect: we cannot condemn another for culpably lessening our control over nonintimate information since the damage does not truly constitute a privacy loss due to the nature of the information involved.¹⁹⁵

130. The so-called ‘second step’ in the criticism of the centrality of private information that is intimate as opposed to the possibility of non-intimate information that might also warrant normative protection is seen as ‘prescriptive’. Inness says:

‘Since it is factually true that damaging someone’s control over nonintimate information about herself is often morally reprehensible, it is incorrect to limit privacy’s protection to intimate information. It renders us unable to condemn morally reprehensible instances of lessening another’s control over nonintimate information.’¹⁹⁶

131. In spite of these doubts, Innes is of the view that they are refutable. She admits that the ‘moral culpability of lessening or destroying an individual’s control over nonintimate information in certain circumstances is readily illustrated’ (although I am not so convinced by this, as I am not certain that one’s *moral* concern would necessarily be engaged at all times but that could be because I am excessively tolerant).¹⁹⁷ Hence, she raised the image of ‘a talkative friend’ asking her what she is ‘doing tomorrow’ whereupon she replies that she is ‘giving a surprise party for a mutual friend’.¹⁹⁸ ‘My talkative friend conveys this information to others, ruining the surprise’.¹⁹⁹ In addition, ‘imagine that I tell a friend that I have taken a new job’ and ‘I warn her not to repeat this information, as I wish to tell people myself’.²⁰⁰ Still, despite the request, the friend does advise others, thereby ‘frustrating my desire to provide the news’.²⁰¹ Inness concludes that, ‘assuming a lack of mitigating factors, both of these examples involve morally blameworthy action on the part of the information spreader’.²⁰² She states that the ‘information damaged individual can justifiably make a moral claim against the damager’, on the grounds that the information concerning the social occasion or the new employment opportunity, ‘*ought* not to have been distributed without prior permission [emphasis in original]’.
132. This sort of language is of immense interest, as it corresponds with the ‘reasonable expectation’ formula, and suggests the limits of juridification of a moral right to privacy. That is, it raises the question of whether the ‘talkative friend’ should or could be proceeded against at law or whether moral disapproval should be the consequence of her disclosure of the information. It would suggest the prudence of having some agreement as to the content of areas of truly private concern, especially were one to proceed on the basis that those narrower fields of relevance could be properly juridified. Accordingly, having presented her ‘ought-to’-proposition in respect of the disclosure of non-intimate material, Inness queries whether ‘privacy’ would be a ‘suitable foundation’ for such a

195 Ibid, 58-59.

196 Ibid, 59.

197 Ibid.

198 Ibid.

199 Ibid.

200 Ibid.

201 Ibid.

202 Ibid, 59-60.

claim.²⁰³ She says that it would not and seeks to draw a distinction between ‘privacy’ and what she couches as ‘secrecy’. Inness avers that ‘[a]n appeal to secrecy serves as an appropriate descriptive and normative foundation for our claims to control nonintimate information about ourselves and our more condemnation of those who damage this control’.²⁰⁴ For ‘secrecy’, one might substitute ‘in confidence’ or ‘confidential’. Depending upon the context, including the precise nature of the relationship between the information giver and the recipient, the relationship and the information imparted might attract legally justiciable qualities.

The importance of intention and control to the distinction between a descriptive definition of ‘privacy’ and a normative or moral theory of ‘privacy’

133. While ‘inaccessibility’ is a significant characteristic of objective ‘privacy’, it does not grasp the human quality required for a reliably normative account of the conceptual value of privacy within communities of human conduct and interaction. Something has to be said about the power to deny physical or informational access to oneself as well as the discretion to allow an individual or a certain class of people access to oneself. Voluntary withdrawal of one’s person from a state of affairs denotes a power to determine the time of retreat or retirement from public view or interaction. As we shall see, Ruth Gavison’s approach to developing a definition of privacy as opposed to a value proposition or normative theory of privacy, would acknowledge that one could be factually inaccessible as a ‘result of the specific exercise of control’.²⁰⁵ Justice Anderson, although dissenting in *Hosking v Runting*, also stressed the functionality of desire in the construction and maintenance of privacy.

‘What is meant by “privacy” and what is the nature of a right to it? In a strict sense “privacy” is a state of personal exclusion from involvement with or the attention of others. More important than its definition is the natural human desire to maintain privacy. Only a hermit or an eccentric wishes to be utterly separated from human society. The ordinary person wishes to exercise choice in respect of the incidence and degree of social isolation or interaction. Because the existence of such a choice is a fundamental human aspiration it is recognised as a human value. The issue raised in this case is the extent to which the law does, and the common law may, give effect to that aspiration.’²⁰⁶

134. Justice Tipping in *Hosking v Runting* said that privacy was ‘the right to have people leave you alone if you do not want some aspect of your private life to become public property [emphasis added]’.²⁰⁷ Justice Tipping is speaking normatively, not descriptively. Charles Fried has characterised the power as effectively giving us a scarce resource value - disciplining access to ourselves.²⁰⁸ Access to ourselves is distributed at our discretion, whether for commercial consideration or not. While he proceeds too far in seeing this control over the distribution of

203 Ibid, 60.

204 Ibid.

205 R Gavison, ‘Privacy and the limits of law’ 83 Yale LJ 421 (1980) at 427.

206 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at paragraph [264] per Anderson J.

207 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at paragraph [238].

208 Charles Fried, ‘Privacy’ in Ferdinand Schoeman (ed), *Philosophical Dimensions of Privacy* (Cambridge University Press, Cambridge, 1984), 211.

‘information about one’s actions, beliefs or emotions’ as a predicate for intimate relations,²⁰⁹ it is a persuasive account of privacy if not of the true richness and variety of human intimacy. Jeffrey Reiman convincingly argues that ‘intimate relations are a function of how much people care about each other, [and] not how much they know about each other’.²¹⁰

135. The issue of ‘control’ and what it means is also where Nicole Moreham’s approach is of some value by way of comparison. Moreham has suggested that ‘privacy is best defined as the state of “desired ‘inaccess’” or as “freedom from unwanted access”’.²¹¹

‘In other words, a person will be in a state of privacy if he or she is only seen, heard, touched or found out about if, and to the extent that, he or she wants to be seen, heard, touched or found out about.’²¹²

136. This paper agrees with that view. There is much in the last sub-clause of Moreham’s statement – ‘if, and to the extent that, he or she *wants* to be seen, heard, touched or found out about [emphasis added]’ – which assists in explaining the role of ‘control’ in privacy. ‘Wants’ is a large and ambitious word suggestive of subjective desire unless it is disciplined externally in some way, whether through the ‘reasonableness’ of the ‘want’ or otherwise. ‘Desire’ and ‘want’ are functions of choice as an individual. Indeed, Moreham has accepted that ‘a legal interest based entirely on a claimant’s subjective desires would be unacceptably far-reaching’.²¹³ As such, she argues that ‘an objective requirement of reasonableness should be added to any *legal* right [emphasis in original]’.²¹⁴
137. Moreham very helpfully identifies two main categories of access: physical and informational. Physical access includes ‘intrusions involving unwanted access to X’s *person* (or things closely associated with his person) either through use of the senses or physical proximity’ (which could be regarded as broadly analogous to the “local privacy” dimension identified in this paper), while informational access ‘encompasses the collection, storage and dissemination of *information* about X’.²¹⁵
138. Reiman has started with the definition of ‘privacy’ as the ‘*condition* in which other people are deprived of [or have no] access to either some information about you or some experience of you [emphasis added]’.²¹⁶ Again, this is not a value proposition but an exercise in definition. Reiman has no issue with the desert island scenario, disagreeing with Fried’s suggestion that it would be ‘ironic to

209 Ibid: ‘But intimacy 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 not to share with anyone. By conferring this right, privacy creates the moral capital which we spend in friendship and love’.

210 Jeffrey Reiman, ‘Driving to the Panopticon: A philosophical exploration of the risks to privacy posed by the information technology of the future’ in Beate Rössler (ed), *Privacies: Philosophical Investigations*, 198.

211 N A Moreham ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 LQR 628, 636.

212 Ibid.

213 N A Moreham, ‘Privacy in public places’ (2006) 65 CLJ 606 at 617.

214 Ibid.

215 N A Moreham ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 LQR 628, 640.

216 Jeffrey Reiman, ‘Driving to the Panopticon: A philosophical exploration of the risks to privacy posed by the information technology of the future’ in Beate Rössler (ed), *Privacies: Philosophical Investigations*, 197.

say that a person alone on an island has privacy'.²¹⁷ In some cases, but not all, one will have 'privacy' in fact because one has exercised 'control'. Presumably, this would reflect a desire to have exerted such 'control' in the first place.

139. Unsurprisingly, a number of practical matters intrude when one introduces 'control' to the question of privacy (private facts or information about you, or intimate decisions that you make within, say, the family home). The exercise of control in favour of disclosure or access to oneself need not indicate a zero-sum game, where losses of privacy are seen as permanent or complete losses of privacy. One's prior immersion in the public view need not imply a loss of privacy *per se* but simply a loss of relative privacy at that point in time in respect of certain things. It might be recoverable, for instance, through the sheer inattention and forgetfulness of people or the irrelevance of the disclosed information.
140. Against this comment, the case of *Television New Zealand Ltd v Rogers* is of interest (although it does not concern what might be characterised as 'private facts'). That case concerned the intention of Television New Zealand Limited to broadcast a video containing a police reconstruction of Mr Rogers' alleged murder of Katherine Sheffield in Mangonui. In particular, the Court said that 'At the place where Ms Sheffield was killed, Mr Rogers was further advised of his rights and cautioned, this time recorded on video.'²¹⁸ It added that 'A reconstruction of the alleged crime was then filmed, in which Mr Rogers gave an account of the manner in which he had killed Ms Sheffield and disposed of her body.'²¹⁹ At the preliminary hearing of the murder charge against Mr Rogers, the reconstruction videotape was produced in evidence. It was subsequently ruled inadmissible. In December 2005 Mr Rogers was found not guilty of the murder. The majority of the Court of Appeal concluded that:

'we are not persuaded that the Full Court was wrong in concluding that a reasonable expectation of privacy existed in relation to the videotape as at mid-December 2005, following Mr Rogers' acquittal. We accept that Mr Rogers must have had an understanding and expectation when the videotape was recorded that its contents would be made public in the context of the criminal process. But, as the majority of the Supreme Court of Canada said in *Vickery v Nova Scotia (Prothonotary of the Supreme Court)* [1991] 1 SCR 671, a suspect who participates in a police interview surrenders his privacy rights for the duration of the trial process, *but not necessarily for all time* [emphasis added].'²²⁰

141. As always, though, it is important to appreciate that, *ceteris paribus*, information about oneself is rarely settled. If anything, it is an interpretative field, vulnerable to potentially discordant (and perhaps mistaken) understandings on the part of others. This is the human condition. Factual circumstances are more than likely to be messy and untidily complicated. Subsequent disclosure of a single instance of one's own relatively 'private' (or is it relatively 'public'?) disclosure in limited circumstances some hours, days, months or even years previously

217 Ibid, referring to Charles Fried, 'Privacy' in Ferdinand Schoeman (ed), *Philosophical Dimensions of Privacy* (Cambridge University Press, Cambridge, 1984), 209-210.

218 *Television New Zealand Ltd v Rogers* [2007] 1 NZLR 156 (CA) at paragraph [22].

219 Ibid.

220 Ibid, paragraph [55].

might be de-contextualised in the subsequent disclosure and cast in a negative light resulting in embarrassment or ridicule.²²¹ Does one always take the risk of disclosure and, therefore, one should simply be careful about disclosure at all times in one’s interaction with people? Some might be inclined to say ‘yes’ and to rely on specific remedies (such as defamation law), if they exist, or moral pressure (if appropriate). But a range of reasonable views is possible on this vexed question.

142. Importantly, even in human interaction, not all of us (who we are and what we are about) is disclosed to another and becomes ‘public’ or ‘published’. There always remains some form of an internal world that is not completely communicable (for any number of reasons, such as because we cannot articulate it or do not wish to or it is not convenient to do so). This does not even begin to get into the difficulties of others accurately interpreting that internal world, as it seems to you, should you try to articulate it (even to partners or close friends). Insofar as material is knowable and public, such as your reputation, then you may control such things about you to the extent of their falsity *via* an action in defamation. At some times, however, how people interpret information about your personal and otherwise private behaviour might not be known to you at all and might not be published beyond the marketing division of certain companies. The accumulation of disparate pieces of information (material in some publicly accessible registers or electronic records of private purchasing patterns) can assist in constructing a relatively detailed, if far from complete, image of a person’s private life: what books they acquire; what food is purchased.
143. Depending upon the moral quality or strength of a subject’s (*x*’s) claim to exercise a power of choice as to whether or not to assert control, the claim of *x* might be considered to be subject to exceptions that correspond to other, potentially countervailing, values.²²² Of course at some point, there will be an overwhelming public interest in not yielding to claims of privacy, such as suppressed details of sexual or other forms of abuse within a family.²²³ The Crown may act through criminal proceedings against an alleged perpetrator and any accessories. Moreover, ‘privacy’ should not be used as a shield from the negotiation, conversation and occasionally fraught debate that marks human relations. The fragility or brittleness of a complainant ought not to determine outcomes in allegations of privacy breaches, which suggests the importance of applying objective criteria to the desires of a complainant. ‘Wants’ or ‘desires’ can be highly idiosyncratic. As Solove has remarked, ‘privacy is not freedom from all forms of social friction’.²²⁴

221 A photographic image of someone in certain garb or a form of dress might have been originally produced for the limited purpose of political satire or intense criticism of a cult or a secret society or a particular political creed for a small audience but be distributed to a broader audience and construed subsequently (and mistakenly) as an endorsement of the position criticised or ridiculed. Alternatively, an individual might have donned the form of dress in what he or she thought was a controlled social situation but was photographed and the photograph was subsequently distributed with the upshot of embarrassment to the subject. Furthermore, the distribution might affect the subject’s opportunities for preferment in applications for senior roles in employment. That is a definite undermining of autonomy and raises the question of the subject’s ‘culpability’.

222 An alternative view might be that ‘privacy’ is a specific exception to the overriding values of openness and transparency in human relations.

223 Although there are examples of potential complainants who do not complain and keep the secret even after the death of the alleged perpetrator.

224 Daniel J Solove, ‘A taxonomy of privacy’ 154 U Pa L Rev 477 (2006), 484.

144. If autonomy and liberty are relevant to understanding ‘privacy’ normatively, then agency must have some relevance to ‘privacy’. Otherwise, any objective loss of ‘inaccessibility’ might be construed as an ethically negative loss of privacy with potential consequences in terms of disapprobation and perhaps legal remedy in certain circumstances.²²⁵ The tripwire would be very sensitive indeed, particularly where the person likely to complain of a privacy loss is perhaps somewhat brittle or fragile. This is where the subjectivity of control or choice might be ameliorated by formally agreed conditions or terms or, alternatively, the imputation of objective criteria (such as the reasonableness of one’s expectation in given circumstances).
145. Furthermore, I agree that it is possible to experience shared privacy in intimate and other human relationships. In these instances, we are often admitting others into our private realm. Increasing access to oneself does not, therefore, necessarily imply a loss of privacy (unless one is resorting to a narrow definition of the private as incommunicable or uncommunicated and internal to oneself). This is a complexity to the value proposition of privacy in view of the potential for humans to live in intimate relationship-based groupings of varying sizes and types. Lessening our inaccessibility to others is not necessarily undesirable in and of itself. Nor is it always inconsistent with the retention of a certain form of privacy. Inness provides some interesting thought-examples. On the ‘restricted-access’ thesis, says Inness, ‘I lose privacy when I willingly invite a close friend into my home, when I initiate mutual sexual activity with another, and when I allow a trusted friend to read a personal letter.’²²⁶ She added that, ‘The claim that these situations involve a privacy loss is opposed by both our linguistic and moral intuitions about privacy.’²²⁷ Allen has written that, ‘Opportunities for individual privacy help make persons fit for lives of social participation and contribution; opportunities for shared privacy facilitate bonds of affection and common interest.’²²⁸ As such, she concluded that privacy ‘has value for friendships, families, organizations, and democratic government’.²²⁹
146. Gavison has cautioned that ‘control’ cannot be part of a ‘neutral’ (or ‘non-pre-emptive’) definition of the concept of privacy. She points out that “‘control’ suggests that the important aspect of privacy is the ability to choose it and see that the choice is respected’.²³⁰ This stress upon personal choice would fit with an account of privacy based upon autonomy and equality of respect. For Gavison, the reference to ‘control’ gives rises to difficulties in defining ‘privacy’. It is important to proceed through her reasoning step-by-step, as it represents a key counterpoint to the relevance of human agency to understanding the concept and value of privacy.

225 The circumstances are yet to be ascertained.

226 Julie C Inness, *Privacy, Intimacy, and Isolation* (Oxford University Press, New York, 1992), 46.

227 Ibid.

228 Anita Allen, *Uneasy Access: Privacy for Women in a Free Society*, at 2.

229 Ibid.

230 R Gavison, ‘Privacy and the limits of law’ 83 Yale LJ 421 (1980) at 427.

147. Gavison notes that at least two types of ‘control’ are mentioned in the relevant literature – a ‘strong’ sense and a ‘weak’ sense. In Gavison’s assessment, the ‘weaker’ sense of ‘control’ occurs in circumstances such as the following: a voluntary, knowing disclosure does not involve a loss of privacy because it is an exercise of control, not a loss of *it* [emphasis added].²³¹ I assume the point that Gavison is making here is that the ‘it’ refers to ‘control’ (the exercise of autonomous choice or discretion) and whether it is lost or not, as opposed to privacy. As such, the formulation says more about an individual’s power of choice rather than ‘privacy’. In what she calls the ‘stronger sense of control’, ‘voluntary disclosure is a loss of control because the person who discloses loses the power to prevent others from further disseminating the information’.²³² Gavison says that the ‘strong sense of control... may indicate loss of privacy when there is only a threat of such loss’, because one has already disseminated the information about oneself.²³³ The ‘weak sense of control is not sufficient as a description of privacy, for *X* can have control over whether to disclose information about himself, yet others may have information and access to him through other means’.²³⁴ These other means might never have been subject to the control of *X*, as he might not have been conscious of the access.
148. Generally, she says that, ‘[a]ll possible choices are consistent with enjoyment of control, however, so that defining privacy in terms of control relates it to the power to make certain choices rather than to the way in which we choose to exercise this power.’ As such, ‘individuals may choose to have privacy or to give it up’.²³⁵ Gavison argues that, ‘We need a framework within which privacy may be the *result* of a specific exercise of control, as when *X* decides not to disclose certain information about himself, or the *result* of something imposed on an individual against his wish, as when the law prohibits the performance of sexual intercourse in a public place [emphasis added]’.²³⁶
149. As noted above, Gavison points out that, with a control-based account of privacy, ‘a voluntary, knowing disclosure does not involve loss of privacy because it is an exercise of control, not a loss of *it* [that is, “control”]’.²³⁷ She states that, ‘Sometimes we may be inclined to criticize an individual for not choosing, and other times for choosing it.’²³⁸ Controversially, in my view, Gavison concludes that such a criticism ‘cannot be made if privacy is defined as a form of control’.²³⁹ Moreham agrees with these criticisms and says that a focus on ‘desire’ rather than ‘control’ addresses the weaknesses of the ‘control’ thesis. She says that:

‘Both of the problems I have identified – the inability to separate risk from actual interference and the difficulty of actually exercising control over information – are avoided if control is seen as a *means* of bringing privacy about rather than as privacy itself [emphasis in original]’.²⁴⁰

231 Ibid.

232 Ibid.

233 Ibid.

234 Ibid.

235 Ibid.

236 Ibid.

237 R Gavison, ‘Privacy and the limits of law’ 83 Yale LJ 421 (1980) at 427.

238 Ibid, at 428.

239 Ibid.

240 N A Moreham ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 LQR 628, 639.

150. I would agree that ‘control’, seen as an expression of choice or desire to say ‘yes’ or ‘no’, is indeed a ‘*means* of bringing privacy about’ in practice. I would say that this is very important. It is also the case that one ought to have the ability to say ‘yes’ or ‘no’ over access to oneself, for example.
151. I would disagree that ‘control’, in the particular sense I have described, is necessarily problematic on account of ‘the inability to separate risk from actual interference and the difficulty of actually exercising control over information’. There are four difficulties with this sort of criticism. First, ‘control’ is not always used in the purely descriptive sense of physical capability of ‘control’ as opposed to the important and subtler sense of an intention to have the power to control. Moreham potentially sets up a straw person in terms of some of the accounts of ‘control’ reviewed for this discussion paper. I believe that the ‘control’ thesis is or can be much more sophisticated than Moreham appears to allow. That is, it is, in essence, another name for her own approach.
152. Second, in the case of Moreham, ‘desire’ does not assist in answering both of her criticisms of ‘control’ in a definition of ‘privacy’. If, to cite one of her examples, an internet hacker, *y*, had the technological ability to access all of the personal emails of *x*, then *y* would not only have lost factual (as opposed to normative) ‘control’ over access to information contained in those emails, even if *y* never actually broke into the account.²⁴¹ Arguably, the desire of *y* not to have *x* access the emails is rendered irrelevant, as *x* could access the emails should he so desire at any time and *y* would not be aware one way or the other. Nor would the desire of *y* be relevant to *x*. It is even doubtful whether the threat of *x* accessing the personal emails through technological ability means that *y* has actually lost control or whether the control is purely contingent on a further event occurring, namely the act of accessing the emails. One is able to break and enter into my house should they so wish. The technology is available and a professional burglar would certainly have the ability but would not necessarily care either for my desires or for my capability or otherwise to exert control. I am not certain whether that means that I have no privacy in respect of my house. Reiman’s descriptive definition is much more persuasive. I suspect that Moreham, in speaking of ‘desire’, is really establishing a normative account about privacy rather than a successfully descriptive account: *x* would desire that *y* not access the personal emails of *x* even if *y* does access them or is capable from doing so for a time. This paper would say that *x* has a reasonable expectation on the basis of both ‘local privacy’ and ‘informational privacy’ to have the ability to say ‘yes’ or ‘no’ to such access.
153. Third, and more importantly, it conflates the descriptive (what one can ‘control’ or exercise power over) while omitting the critical issue of whether one ought to have ‘control’ or the power to determine access (which, presumably, would be decision exercised in accordance with one’s choice or want) – the normative account of ‘control’. There are invariably violations of things one would wish to control but cannot for some reason or another. The absence of factual control might indeed suggest a loss of privacy but it does not mean that one should never assert a wish to exercise a power of control.

241 Ibid.

154. Fourth, to adapt a comment by Inness, the criticism of Gavison in particular confuses the value of privacy with the value of particular actions performed under the protection of privacy, which might (of course) be criticised but be respected nevertheless (subject to what other conflicting values might say).²⁴² Likewise, Allen has admitted that the ‘possibility that privacy might be used for condemnable ends does not eliminate respect for privacy as a moral constraint’.²⁴³ Thus, the potential fallacy is to conflate the description of an objective condition or state of affairs (such as ‘inaccessibility’ to others through solitude or the absence of control over a stalker following your every move) with a normative or ‘ought’-proposition. For instance, it might be correct that a stalker proceeds to gaze at you through the windows of your home but one would not wish to say that your inability to exercise ‘control’ in a factual sense²⁴⁴ meant that your normative power to determine who and when someone could have access to you was rendered irrelevant or meaningless. The point would be that, as a value proposition, one ought to have the power to control the stalker’s access to you and this power could be supplied through a number of legal remedies (in trespass, for instance) that serve this proposition (subject to any countervailing values).²⁴⁵ By way of analogy, not every instance of trespass in property law needs to be challenged in order to demonstrate that one ought to have the ability to control access to one’s property. Again, it would be curious for a single instance of an alleged violation, or an illustration of factual incapability to control a certain state of affairs, to undermine your claim to have some moral entitlement.
155. The other matter to be careful about is that one should not conflate personal and political ideals, and assume that these are identical in their demands on individual conduct merely because there are connections between the two.²⁴⁶ Equality of respect in the objective sense denotes a regulative ideal for political conduct *vis-à-vis* subjects or citizens but not necessarily for ethical behaviour (although this is not to say that some individuals might endeavour to conduct themselves in that way as well).²⁴⁷ Relationships that are significant or matter to us provide reasons for partiality, for unequal treatment in a sense. Sophisticated analyses of ethical behaviour in a liberal setting note that having special (including intimate) relationships is a human good. Many non-instrumental or innately valuable relationships, including relatively private relations that differ qualitatively from acquaintance-based or purely professional relationships, require partiality. As Appiah has said, ‘Special responsibilities make sense with truly thick relations (with lovers, family, or friends) but not within the imaginary fraternity we have with our conationals.’²⁴⁸ This is one way of resolving the apparent conundrum of tensions between several of the core values of liberalism: of autonomy (concern for liberty), moral equality (the notion that persons are due equal respect) and loyalty (associational life, with all of its richness, attendant

242 Cf. Julie C Inness, *Privacy, Intimacy, and Isolation* (Oxford University Press, New York, 1992), 45.

243 Anita Allen, *Uneasy Access: Privacy for Women in a Free Society*, at 2.

244 Assuming that you are physically incapable of preventing the stalker from gazing at you.

245 In New Zealand, depending upon a range of particular facts, including the stalker’s disposition towards you (and the possible engagement of self-defence), it might not be proper to fatally wound the stalker.

246 Here, I am following Kwame Anthony Appiah in *The Ethics of Identity*, at 230.

247 Cf. Samuel Scheffler, at ‘Choice, circumstance, and the value of equality’, *Politics, Philosophy and Economics* (2005), IV, 5 at 22-23

248 Kwame Anthony Appiah, *The Ethics of Identity*, at 237.

obligations, and vagaries). Samuel Scheffler has observed that, ‘Associative duties do not merely permit the assignment of priority to the interests of associates; they require it.’²⁴⁹ Certainly, we owe something to every individual – respect for their status as a person of ongoing potentiality – but it is not inconsistent to say that we also owe more to some individuals than to others, due to the communal relations and the practices we are particularly engaged in, together with the past histories that connect us to these individuals. These special ties are integral to who we are and to the relationships at issue, in the way in which friendship would be impossible to nourish and ‘to sustain without giving special weight to the needs and interests of our friends’.²⁵⁰

156. In contrast to Gavison and Allen, Innes has said that an, ‘agent possesses privacy to the extent that she has control over certain aspects of her life’.²⁵¹ Other scholars, including Jeffrey Reiman, James Rachels, Elizabeth Beardsley, Robert Gerstein and Richard Wasserstrom, have rejected the restricted-access based definition and have preferred an account of privacy premised upon the control that an individual possesses (or ought to possess) over a realm of her life.²⁵² The usefulness of a control-based account of privacy is that it is not restricted to a stark dichotomy between physical, informational or dispositional inaccessibility and isolation and the ‘to and fro’ of human interaction. I concur with Innes to the extent that I agree that a focus upon a restricted-access theorem of privacy tends to ‘deform’ the nature and value of privacy.²⁵³
157. Certainly, certain people might consider some choices disagreeable. Still, there is a distinction to be made between the assumption of a steady-state form of ‘privacy’ in fact at any given time (for instance, when one is completely alone in a study), the dynamism of ‘privacy’ in the sense that one might lose it in fact, and the question of what form of privacy one *ought* to have as a moral agent even though the actual degree of privacy might alter from time to time. One might disclose information about oneself to others but intend to keep it ‘private’ or, let us say, less accessible than other pieces of information. It might be disclosed for a limited purpose and to a limited audience. Accordingly, I agree with Hyman Gross’ noting that whether or not a voluntary disclosure involves loss of privacy depends on whether the recipient or recipients are bound *via* restrictive norms or conditions.²⁵⁴ The degree of accessibility can be determined by terms applying to the nature and extent of the disclosure. Existing areas of the law are comfortable with this notion of varying degrees of ‘privacy’ shared

249 Samuel Scheffler, ‘Liberalism, nationalism and egalitarianism’ in his *Boundaries and Allegiances: Problems of justice and responsibility in liberal thought*, 79.

250 David Miller, ‘Nationalism’, in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press: Oxford, 2006) at 540.

251 Julie C Innes, *Privacy, Intimacy, and Isolation* (Oxford University Press, New York, 1992), 57.

252 Jeffrey Reiman, ‘Privacy, intimacy and personhood’, *Philosophy and Public Affairs*, VI, (1976), 26-44; Rachels, ‘Why privacy is important’, 323-333; Elizabeth Beardsley, ‘Privacy: Autonomy and self-disclosure’ in J Roland Pennock and John W Chapman (eds), *Privacy: Nomos XIII* (Atherton Press, New York, 1971), 56-70; Robert Gerstein, ‘Intimacy and privacy’ *Ethics*, LXXXIX, (1978), 86-91; Richard Wasserstrom, ‘Privacy: some arguments and assumptions’ in Richard Bronaugh (ed), *Philosophical Law* (Greenwood Press, Westport, Connecticut, 1978), 148-166.

253 Julie C Innes, *Privacy, Intimacy, and Isolation*, 41.

254 Hyman Gross, ‘Privacy and autonomy’ in *Privacy: Nomos XIII*, at 171.

between people (if that is not an oxymoron). One example is the breach of confidence doctrine. There are also formal contractual relationships where clauses requiring confidentiality are agreed.²⁵⁵

158. The challenge, as with *Andrews v Television New Zealand Limited*,²⁵⁶ is where there are no express terms governing disclosure or the treatment of ‘private’ facts about oneself. I suggest that is where issues of ‘reasonableness’ might helpfully intrude. What would a person reasonably expect in the circumstances of the case? The tort in New Zealand has not precisely echoed this position but the factual background to a number of the cases on the tort are of interest. The *Andrews* case concerned the operation of the tort of privacy in circumstances where the broadcaster screened a documentary on the fire service and showed footage of their operations at the scene of a car accident. The occupants of the motor vehicle, Mr and Mrs Andrews, were portrayed being extracted from a considerably damaged car, he more severely injured than she was. The plaintiffs were unaware at the scene, or indeed thereafter until the programme was screened, that they were being filmed.²⁵⁷ Viewers of the television programme could hear Mrs Andrews talking to her husband, showing great concern for him: ‘Mrs Andrews in particular was naturally distressed and there were expressions by her of her concern and love for her husband, and exhortations to him to “stay with her”’.²⁵⁸ The Andrews sued for damages for invasion of their privacy. The ‘private nature of the conversations which took place’ was particularised in the statement of claim.²⁵⁹ The plaintiffs failed. The High Court held that while they had a reasonable expectation of privacy, the footage was not highly offensive (both of the plaintiffs acknowledged that was the case), and in any event the public concern defence could be made out.
159. Thus, the absence of terms conditioning access might arise because there is no conscious awareness of the need to do so (as with the use of the Radio Frequency Identification devices inserted into an item of clothing purchased at a store) or because the relationship in which the information was initially imparted was that of friendship and formal contractual negotiations appeared out of place. Practical and theoretical difficulties emerge where one has ostensibly volunteered a disclosure of visual information about oneself to a particular and physically limited audience in a given public area, such as a beach or a street or a café, but not to an Internet audience. To what extent, would such visually transmissible information, either in the first disclosure or the subsequent disclosure (or disclosures), be considered as ‘private’ (if at all)?²⁶⁰ I understand that it is not unheard of to photograph strangers using a mobile telephone and to transmit the images to others.

255 Although it is appreciated that an imbalance of power in the relationship can be present in such circumstances and the risks faced by ‘whistle-blowers’ *vis-à-vis* employers are well-known. Refer to the Protected Disclosures Act 2000 (NZ).

256 Unreported, High Court, Auckland; CIV 2004–404-3536; 15 December 2006; Allan J.

257 *Ibid*, paragraph [12].

258 *Ibid*, paragraph [14].

259 *Ibid*, paragraph [18].

260 Nicole Moreham has expressed some views on this very issue in N A Moreham, ‘Privacy in public places’ (2006) 65 CLJ 606.

160. There might be a practical and logical inability to negotiate the conditions of initial disclosure at all points, not merely through the logistical difficulty of formally entering into terms when interacting with others but through sheer inequality in bargaining power, as with a bank or a set of retail outlets. This is where the question of a value proposition for privacy intrudes: in spite of the practical and logical impediments, would one wish to say that an individual *ought* to have control over casual or determined eavesdroppers in a café setting or in respect of in-store technologies that might monitor your purchasing patterns and network with other collections of information about you? This is exactly the area where the tort might come into play in the sense of assessing whether there would have been (or *ought* to be) a ‘reasonable expectation’ (or a legitimate expectation)²⁶¹ that certain norms would be observed in the handling of the information at issue. It is also an area where legislation might set out and regulate the courtesies of managing non-intimate or non-private information about people and the uses to which it is put once it is disclosed to others. In many cases though, courtesy and manners would address the norms of behaviour.
161. For all of the above, one ought not to lose sight of scepticism about privacy as a distinct source of claim in *law* (whatever its status in a normative or moral account). Sir Kenneth Keith in his dissent in *Hosking v Runting* (2005) elaborated upon his view that ‘a separate cause of action for giving unreasonable publicity to private facts does not exist in the common law of New Zealand’.²⁶² Sir Kenneth Keith said that:

‘The reasons for that conclusion can be assembled under three headings: the central role in our society of the right to freedom of expression; the array of protections of relevant privacy interests in our law against disclosures of private information and the deliberate and specific way in which they are in general elaborated; and the lack of an established need for the proposed cause of action. Such matters of principle, policy, the existing pattern of the law (including defences and remedies), and the statutory context help resolve questions about whether liability in tort is to be recognised or imposed: see, for example, *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282. In this context they also relate directly to the operation of the New Zealand Bill of Rights Act 1990 and in particular to the limits that may be imposed under it on the rights and freedoms it affirms.’²⁶³

EQUALITY AND LIBERTY AT THE CORE – PRIVACY AS AN INSTRUMENT FOR REALISING AND FACILITATING EQUALITY AND LIBERTY RIGHTS

162. As noted at the outset, I support a cascading approach to any conceptual approach to privacy. I believe that the general stance of Gavison, Allen and Rössler is in accord with this sort of approach.

261 This term is not used in the strict sense with which it is used and understood in administrative law.

262 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at paragraph [176].

263 *Ibid*, paragraph [177].

163. Beate Rössler²⁶⁴ has said that the core concept of privacy can be expressed as follows:

‘Something counts as private if one can oneself [and/or should]²⁶⁵ control the access to this “something”. Conversely, the protection of privacy means protection against unwanted access by other people. The term “access” can here have both the direct, concrete, physical meaning, as when I demand to be able myself to control the access to my home, but it can also be meant metaphorically. This metaphorical sense refers both to the control I have over who has what access to knowledge about me, such as who knows which (relevant) data about me, and the control I have over which people have “access” in the form of the ability to interfere or intervene when it comes to decisions that are relevant to me.’²⁶⁶

164. As noted previously, a quarter century before Rössler, Gavison doubted the utility of the notion of ‘control’ (or of choice) in getting at the core, ‘neutral’ or ‘non-pre-emptive’ concept of privacy (as opposed to the value of privacy). Yet, for reasons already outlined, choice or desire (specifically expressed through a conception of whether one ought to control something) is a preferable account for a normative as opposed to a descriptive approach to privacy.

THE DIMENSIONS
OF PRIVACY
– ‘INFORMATIONAL
PRIVACY’ AND
‘LOCAL PRIVACY’

165. It has become almost conventional to speak of a variety of dimensions to privacy. These dimensions are meant to go some way towards accounting for and describing the underlying interests that privacy as a concept purports to protect and to facilitate. Hence, Beate Rössler conceives of three broad categories or dimensions of privacy that ‘serve’ (or from a normative standpoint, ‘should serve’) ‘to protect, facilitate, and effectuate individual liberties in a variety of respects’.²⁶⁷ It is, classically, a form of negative liberty to use the analytical category of Isaiah Berlin. These three dimensions are ‘decisional privacy’, ‘informational privacy’ and ‘local privacy’. Each is subject to constraints and limitations but the dimensions can be explained as follows:

165.1 ‘Decisional privacy’ or the privacy of one’s decisions, as well as one determined or decided actions. This dimension engages the privacy of those decisions and actions that concern the intimate sphere of individuals, including religious or spiritual belief (or the absence of such belief), political choices, sexual decisions (such as sexual orientation), reproductive interests and relationship choices. The opinion of the United States Supreme Court in *Roe v Wade* was premised upon the formulation of a ‘right to privacy’, which was sufficiently broad to ‘encompass a woman’s decision whether or not to terminate her pregnancy’.²⁶⁸ My own

264 Spelt alternatively as ‘Roessler’ in some of the secondary literature.

265 Rössler says subsequently that ‘Moreover, the concept of “control” also brings to light the inherent normative moment, for the term “private” is not normally used in a purely descriptive manner, but always has prescriptive elements. The word “can” must thus be understood in the sense of “can and/or should and/or may”. Not always when I can in fact control the access to “something” is this “something” also “private” (as when, for example, I have stolen someone else’s diary), and vice versa’: Rössler, *The Value of Privacy* (Polity, Cambridge, 2005) at 8.

266 Rössler, *The Value of Privacy*, 8.

267 Refer to Beate Roessler, ‘New ways of thinking about privacy’ (translated by R D V Glasgow) in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press: Oxford, 2006) at 702.

268 *Roe v Wade* 410 US 113 (1973), 153 per Blackmun J.

view is that this is much better characterised as part of the liberty of autonomy or of self-determination. Indeed, it corresponds with the first and second attributes of what John Stuart Mill viewed as the ‘appropriate region of human liberty’.²⁶⁹ It will not always be the case that decisions of the sort referred to above will be ‘private’, can be ‘private’ or ought to be ‘private’. They will be your personal decisions but not necessarily ‘private’ in the sense of undisclosed to others outside of your intimate relationships. This comes back to the normative point. If you desired to retain privacy, then the state could not compel you to disclose your substantive view although, clearly in some areas, it will simply be the case that your behaviour is an external manifestation of your decision: for instance, having a child in an unmarried state, or attending a certain church.²⁷⁰ Yet, if you ‘control’ something about you in terms of, say, your sexual preferences, then one would expect that respect for you as an autonomous, choice-making agent and equality of respect for you as a human would suggest, normatively, that one ought to respect that decision. Insofar as such a decision is relevant to privacy, it would seem to invoke the ‘informational privacy’ category because, in my view, ‘decisional privacy’ is something of a misnomer. Whether the consequence of a violation would be treated as a breach of a normative right to privacy or a legal right to privacy or a breach of another right (such as freedom from discrimination) is another question.²⁷¹

- 165.2 ‘Informational privacy’, which invokes the notion of a person exercising control over their self-presentation to others. The German Federal Constitutional Court surmised in 1983 that ‘A person who cannot tell with sufficient certainty what information concerning him in certain areas is known to his social environment, or who is unable to assess in some measure the knowledge of his communication partners, may be substantially restricted in his freedom to make plans or take decisions in a self-determined way’.²⁷²
- 165.3 ‘Local privacy’ is the privacy that one has in what Rössler describes as ‘its most genuine locus: one’s own home, which for many people still intuitively represents the heart of privacy’. Two aspects of privacy are included within this classification. First, solitude and ‘being-for-oneself’. Second, the privacy of ‘private spaces’, however conceived, typically in the household but also out-of-doors. Incidentally, this dimension of ‘privacy’ does not rely upon a discussion of rights of property according to Rössler, as ‘[a] claim to the protection of private spaces on conventional or moral grounds by no means necessarily entails a claim of ownership’.²⁷³

269 John Stuart Mill, ‘On Liberty’ (1859) in H B Acton (ed), *Utilitarianism, Liberty and Representative Government*, 80-81

270 Although what attendance at a church might suggest about your religious or spiritual beliefs is a moot point. One might simply enjoy the ceremonial and community aspect of church.

271 Associate Professor Ursula Cheer at the University of Canterbury provided the interesting hypothetical example of a rugby player who wishes to keep his homosexuality concealed and the possibilities of his position being harmed should such information be disclosed to his fellow players and the rugby watching public. (Discussion between Associate Professor Ursula Cheer and Mark Hickford on Thursday, 22 March 2007).

272 BverfGE 65, 1 (43).

273 Rössler, *The Value of Privacy*, 142.

Nevertheless, such rights can assist in securing ‘local privacy’. An illustration might be the *Entick v Carrington*²⁷⁴ decision. Lord Camden famously mused in that case: ‘Papers are the owner’s goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect’.²⁷⁵ In characterising ‘local privacy’, Rössler says:

‘the privacy of the household provides the opportunity for people to deal with one another in a different manner, and to take a break from roles in a way that is not possible when dealing with one another in public. As is known, however, this is a dimension of privacy that is especially prone to generate conflict. From the outset, this has been an important starting-point for feminist criticism, which has associated this realm and the understanding of privacy that accompanies it with the oppression of women, on account of the gender-specific division of labor, domestic violence, and in general, the notion that the home constitutes a pre-political space’.²⁷⁶

Rössler casts doubt on the validity of such a criticism in circumstances where the historical conception of gender-specific division has nothing to do with the protection of privacy predicated upon a clearly thought through reorientation of privacy towards values of liberty (I would say autonomy and equality of respect).

166. On ‘local privacy’ Rössler concludes that ‘Violations of a person’s privacy can be defined, therefore’, in three ways: illicit interference with one’s actions; illicit surveillance; illicit intrusions in rooms or dwellings.²⁷⁷
167. Rössler explains the overall concept of ‘local privacy’ in further detail as follows:

‘The term “local privacy”... does indeed refer to an area, and the diversity of private life finds expression not only in the opportunity it presents for different modes of conduct towards oneself and (intimate) others, but also in the spatial arrangement itself. Spaces become private, that is, not only through the control I have over who can enter them and when, but also because I am able to arrange them in my own way, the objects within these spaces are ordered in a certain manner, and these objects are themselves specific ones: that is, the arrangement of the interior constitutes a meaning which is my very own, a private meaning.’²⁷⁸

168. Moreham has also noted that ‘people quite reasonably adapt their self-presentation efforts according to their assessment of who can observe them and will usually have fewer inhibitions and make fewer self-presentation efforts when fewer

274 *Entick v Carrington* (1765) 19 St Tr 1029.

275 *Ibid*, 1065-1066. Refer to the discussion in Kenneth J Keith, ‘Privacy and constitutions’ in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law: International and comparative perspectives* (Cambridge University Press, Cambridge, 2006), at 232-234.

276 Beate Roessler, ‘New ways of thinking about privacy’ in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory*, at 707.

277 Rössler, *The Value of Privacy*, 9.

278 Rössler, *The Value of Privacy*, 142-143.

people are around'.²⁷⁹ It is also broadly comparable to the classifications of the 'intimate sphere' and the 'private sphere' in German privacy law.²⁸⁰

169. In discussing the notion of 'local privacy', one must be mindful of historical shifts in attitudes to the respective roles of humans in private and public spaces and the controversial nature of the disjunction wrought between what is allegedly 'private' and what is 'public'. Rössler has cautioned that:

'[I]t is normatively inappropriate and under liberal premises unfeasible to adopt the traditional and conventional distinction between a private realm to which women are consigned and a public sphere belonging to men... Expressed in different terms, the problem that is interesting from a normative standpoint is how to conceptualize privacy in a way that can do justice on the one hand to our relations based on care and love and on the other hand to the modern, liberal and post-traditional recognition of substantially equal rights to freedom and the proposal of a life of autonomy of equal value for all.'²⁸¹

170. As Rössler implies, tying the conception of privacy to the overarching values, such as autonomy and the equal entitlement of humans to respect, assists in responding to concerns regarding the potential for oppressiveness where privacy is to be protected in a family grouping, for instance. John Rawls made a balder observation in saying:

'political principles do not apply directly to [the family's] internal life, but they do impose essential constraints on the family as an institution and so guarantee the basic rights and liberties, and the freedom and opportunities, of all its members. This they do, as I have said, by specifying the basic rights of equal citizens who are the members of families. The family as part of the basic structure cannot violate these freedoms. Since wives [for example] are equally citizens with their husbands, they have [or ought to have] all the same basic rights, liberties, and opportunities as their husbands; and this, together with the correct application of the other principles of justice, suffices to secure their equality and independence.'²⁸²

What each dimension does

171. Each dimension 'realizes and facilitates distinct aspects of individual freedom, and is thus also characterized by a distinct potential for conflict with other rights or values'.²⁸³ Rössler is of the view that there is a 'normative nexus between freedom and privacy': 'conceptions of privacy based upon a notion of individual freedom' provide the 'most interesting and forward-looking possibilities for the term'. Rössler's argument is that theories of privacy – of whatever stripe – 'are always

279 N A Moreham, 'Privacy in public places' (2006) 65 CLJ 606 at 622.

280 N Nolte and J D R Craig, 'Privacy and free speech in Germany and Canada: Lessons for an English privacy tort' (1998) 2 *European Human Rights Law Review* 162; Rosalind English, 'Protection of privacy and freedom of speech in Germany' in Madeleine Colvin (ed), *Developing Key Privacy Rights* (Hart Publishing, Oxford, 2002), 77.

281 Rössler, *The Value of Privacy*, 143.

282 John Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited"*, 159. Cf. Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books, New York, 1989), 90-93, who appears to be sceptical of the sort of claim that Rawls and Rössler have set up.

283 Beate Roessler, 'New ways of thinking about privacy' in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory*, at 702.

at the same time theories about the protection of individual liberty’.²⁸⁴ In this sense, privacy is seen as instrumental in protecting, facilitating and effectuating other things of value, specifically ‘individual liberties’. If this is correct, then it raises the question about what sort of strength or status ‘privacy’ should attract relative to other values. Does it, for example, deserve the status of a ‘legal right’ so that one would speak of a ‘right to privacy’ that is legally enforceable against others? What would be the relative strength of a ‘right’ *vis-à-vis* other rights and other values? If it does acquire the status of a ‘right’ in certain circumstances, but not others, what would such circumstances look like?

172. While ‘privacy’ might be recognised as an instrumental value, there is also the question of whether ‘privacy’ is a thing of value in itself. There is disagreement on this fundamental point, which reveals considerable disagreement about the starting point of how one conceptualises privacy. Thus, the important commentator Daniel J Solove, has written:

‘I contend that there is no over arching value of privacy’.²⁸⁵

173. Gavison suggests that ‘privacy’ is indeed a ‘distinct and coherent concept’.²⁸⁶ I agree but I believe that it is an instrumental value: it is facilitative of other things of core value to us as human beings, namely autonomy and equality of respect.

PRIVACY AND A THEORY OF RIGHTS

174. Wesley N Hohfeld supplied an especially acute account of rights, which is outlined in **figure 4** below. For a start, though, moral rights are those that are said to exist independently of any legal system. These rights can include a certain sub-category or class, referred to as ‘human rights’, which are owed to human persons *qua* human persons. These rights need not be juridicalised although, clearly, for such rights to be particularly efficacious in securing outcomes, juridification does assist.
175. A particularly weighty form of right in the Hohfeldian scheme is that of a claim right residing in a person (*x*) such that *y* has a duty *A* in respect of that claim right. An example might be a duty that *y* exit your property (certainly after you – *x* – have made it clear that any implied licence to be on the property in question does not exist any longer). ‘Privileges’, another class of rights under the Hohfeldian model, are explained as follows: *x* has a privilege relation to *y* with respect to *A*, if *x* has no duty to *y* with respect to *A*. So *x* is at liberty to do or not do something regarding *A*. A ‘privilege’, therefore, may be construed as a ‘liberty right’. Importantly, for many rights in the privacy context, the liberty right of *x* does not entail a duty on the part of any one else to refrain from interfering with *x*’s actions concerning *A*.

284 Ibid.

285 Refer to Daniel J Solove, ‘Conceptualizing privacy’ 90 Cal L Rev 1087 (2002) at 1145.

286 Ruth Gavison, ‘Privacy and the limits of law’ 85 Yale LJ 421 (1980) at 423.

Figure 4 (Source: Wesley N Hohfeld, 'Fundamental legal conceptions as applied in judicial reasoning', 26 Yale LJ 710 (1916-1917) at 710).

Jural Opposites			
right	privilege	power	immunity
no right	duty	disability	liability
Jural Correlatives			
right	privilege	power	immunity
duty	no right	liability	disability

176. There is ongoing debate as to whether rights are explained *via* an interest-based theory or one that is tied to the status of a person as a person ('status-as-a-person' theory). The interest-based theory is associated with Joseph Raz, amongst others. The philosopher, Frances M Kamm, has cautioned that 'the importance of a right can outstrip any interest it protects' as 'some rights are a response to the good (worth, importance, dignity) of the person and/or his sovereignty over himself, rather than a response to what is good *for* the person (what is in his interests) [emphasis in original]'.²⁸⁷ A 'stringent' right is defined as one that completely excludes the calculation of overall goods and evils in deciding how to treat the holder of the particular right. Any sort of right is a type of 'exclusionary reason' in that it ordinarily presents a way of excluding other assessments of the aggregated good for others. A 'stringent' right is simply an absolute form. It is conceivable – indeed common – to have rights that have 'thresholds beyond which calculation of goods and evils is reintroduced'.²⁸⁸ Kamm observes that, 'the more good we must sacrifice rather than transgress the right, the more *stringent* is the right [emphasis in original]'.
177. Certain so-called fundamental rights or human rights can be a source for deliberation, argument and debate, or other forms of conversation rather than being highly determinate in their application. That is a particular strength of rights-talk. They can affect the shape and behaviour of politics. They can, depending upon the municipal law of a given country and those human rights it has incorporated within its law, oblige state actors to adopt justificatory language and reasons in the event of any perceived or real violation.
178. 'Privacy' *per se* ought not to be seen as a right in its most stringent form or a 'trump'. That is, 'privacy' should not necessarily be treated simply as a principle that assigns entitlements to someone against another or something else, so powerful that it automatically trumps claims made by that other party or the aggregative benefits that would otherwise accrue to an entire community.²⁸⁹
179. Thus, the right to privacy is not an absolute right but is a subject to balance with other important values, including freedom of expression.

287 F M Kamm, 'Rights', in Jules Coleman and Scott Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, Oxford, 2004) at 487. Also see Matthew Kramer and Hillel Steiner, 'Theories of rights: Is there a third way?' (2007) 27 OJLS 281.

288 Ibid, at 489.

289 See R Dworkin, 'Rights as trumps' in J Waldron (ed), *Theories of Rights* (Oxford University Press, Oxford, 1984) and R Dworkin, *Taking Rights Seriously* (Harvard University Press, Cambridge, Mass, 1977).

Chapter 6

A Legal Right to Privacy – Descending to the next level of detail in the conceptual approach

No automatic transition from a normative account of privacy to a legal right to privacy

180. Much of the above discussion has concentrated upon developing a normative theory of a right to privacy; that is, a set of moral ('ought to') propositions rather than a scheme of legal accountability and liability. Whether and in what circumstances a normative account might generate a right that merits legal enforceability remains an outstanding issue.
181. If anything, the foregoing sections of the discussion have cast further light on the fact that it is far too risky to simply indulge in an unqualified statement that what constitutes a moral entitlement ought to be transmuted into an enforceable legal right against others.
182. The thematic concern coursing through this entire report has been the possibility of a 'legal right to privacy' outrunning the genuinely motivated and honourable intentions of those who conceive of it and having a chilling effect on cherished aspects of human interaction in areas where one would not wish people to be the subject to legal actions but to exhibit qualities of transparency and openness in a community setting. The risk to be mindful of is where individuals are deterred from displaying such qualities in social conduct through anxiety or wonderment as to whether they might be proceeded against in the courts. This theme of concern is especially pertinent in the early twenty-first century where a disparate literature is emerging in certain quarters that expresses worry at the so-called decline in the 'public domain' and, in other areas of scholarship,

advocates certain conceptions of what it is to be a publicly engaged citizen.²⁹⁰ Emeritus Professor David Marquand has enunciated two broad theoretical propositions in his own provocative (and controversial) work on the value of the ‘public domain’:

‘The first is that the public domain has its own distinctive culture and decision rules. In it citizenship rights trump both market power and the bonds of clan or kinship. Professional pride in a job well done or a sense of civic duty or a mixture of both replaces the hope of gain and the fear of loss (and, for that matter, loyalty to family, friends or dependants) as the spur to action. The second proposition is that the public domain is both priceless and precarious – a gift of history, which is always at risk. It can take shape only in a society in which the notion of a public interest, distinct from private interests, has taken root; and, historically speaking, such societies are rare breeds. Its values and practices do not come naturally, and have to be learned. Whereas the private domain of love, friendship and personal connection and the market domain of buying and selling are the products of nature, the public domain depends on careful nurture.’²⁹¹

183. As discussed above, privacy is certainly one way of boosting the ability of citizens to actively engage in the public domain but ‘privacy’ does not completely address what it is to be an engaged and fully enfranchised citizen. Bearing all of this in mind, I have tried to isolate privacy as a concept that is a subset of two key human values in the real life of the social world, specifically autonomy and one’s equal entitlement to respect. These values are functionally useful (as well as things of intrinsic value), *ceteris paribus*, in what they permit people to become and do.
184. What ought to be clear, however, is that this report would consider the realm of a legal right to privacy to be a smaller sub-category of the normative right. That is, this paper sees no necessary identification between the two in the sense that what might be described as a normative right is automatically worthy of legal protection and enforceability.
185. Depending upon how carefully a legal entitlement is framed and analysed, the concept of ‘privacy’ can readily cut both ways. A number of illustrations have been provided throughout the foregoing sections – conversations amongst friends and acquaintances; bullying in familial or other social situations although a plausibly charming exterior might be displayed to others out-of-doors – where a ‘legal right to privacy’ in relation to truthful information about the perpetrator might be misused. As it is, the potential for power imbalances in relationships to obtain further protection in such situations ought to be guarded against.

290 Aspects of this recent trend are not novel (as indicated by the fact that a number of the relevant contributions draw upon historical illustrations). For recent examples (which come at this sort of question from different perspectives), refer to David Marquand, *Decline of the Public: The hollowing-out of citizenship* (Polity, London, 2004); Quentin Skinner, ‘A third concept of liberty (Isaiah Berlin Lecture)’, *Proceedings of the British Academy*, CXVII, (2001), 239; Avital Simhony and David Weinstein (eds), *The New Liberalism: Reconciling Liberty and Community* (Cambridge University Press, Cambridge, 2001).

291 David Marquand, *Decline of the Public: The hollowing-out of citizenship*, 1-2.

The efficacy of law reform – Issues to consider

186. A key issue for consideration in the efficacy of any law reform is whether there are gaps in existing legal protection. In principle, a *legal* right to privacy should at least operate wherever there are gaps in the protection of the existing law. There is an issue as to whether it should be allowed to operate where other sources of legal protection might be available and a legally actionable right to privacy would simply overlap with those tested sources. For instance, there will be a number of existing causes of action and remedies in law that are not about privacy (either principally or at all) but which have the collateral benefit of protecting the normative concept of privacy as understood above. Examples include actions in trespass, which are about property rights not privacy but can be seen as assisting the preservation of one's 'local privacy' nevertheless. That is, the cause of action and remedy is complementary to privacy but is also legally instrumental as a means by which individuals may endeavour to maintain privacy in given circumstances. The Trespass Act 1980 (NZ) can be resorted to if required as well. Certain harms to one's privacy, therefore, can be caught and addressed *via* other legal means.
187. Furthermore, possible law reform would need to consider whether an actionable *legal* right to privacy should arise where there has been an infringement or interference with either local privacy or informational privacy resulting in harm or damage and there is no other legal remedy available under statute or common law.²⁹²
188. With any *legally* actionable right to privacy, there is a live question as to whether the 'harm' should be the interference itself or consequential loss to the aggrieved person or even both. Some torts, such as trespass to land, do not require proof of damage. There is also a question as to whether feelings of embarrassment or humility should be legally actionable. Here, the philosophical debate on what might count as constituting 'harm' or as 'harmful' remains highly relevant.²⁹³ Subject to resolving these issues, a harms-based account of infringements of the two key dimensions of privacy – local privacy and informational privacy regarding private facts – provides one basis for identifying when a legal right to privacy might be engaged. We say '*might* be engaged' because some existing causes of action or statutory regimes will adequately deal with some of the same interests within the local privacy and informational privacy categories.
189. As with any attempt at a framework, there will be peripheral areas – spaces on the margin – that are blurred and smudged. I refer to these as 'hard' cases. The 'reasonable expectation' formula is an arguably proper way in which to consider 'hard' or peripheral cases. These cases could consider what ought to be within one's control provided one starts with the understanding that the core of privacy in a social world consists of 'information privacy' (comprising private facts) and 'local privacy' (including control over access to oneself). Surrounding these two core dimensions there might be shadowy area or penumbra made up of 'hard' cases.

292 A remedy of prior restraint (such as an injunction) does not require proof of harm and it is possible that injunctive relief should be available.

293 Joel Feinberg, *Social Philosophy*.

190. There is also the distinct possibility that some further controls on the application of any legal right to privacy should be considered and the degree to which the key aspects of human interaction – the sharing of information about others conversationally is one way in which human relationship bonds are strengthened – might be subject to an unintended chilling effect were a legal right to privacy to be actionable in all cases of disclosure of ‘private facts’. While ‘privacy’ is important, so are the values of freedom of expression and transparency in a free and open society. The danger is that concrete recommendations on privacy might have unintended consequences for other highly valued features of a society organised such as ours. These are questions that would need to be addressed in the subsequent stages of the Law Commission’s project on privacy.

The value of Solove’s pragmatic ‘taxonomy’ – adapting Solove to a ‘core values’ conceptual approach to privacy

191. It appears that the so-called ‘invasions of privacy’-based ‘taxonomy’ that Daniel J Solove developed can be usefully adapted to assist analysing the application of what I have referred to as the ‘core values’ conceptual approach to privacy. That is, this paper proposes the adaptation of Solove’s ‘taxonomy’ and considers whether parts of it can be used as a sub-category to the dimensions of ‘local privacy’ and ‘informational privacy’. It is important to appreciate that aspects of Solove’s taxonomy do not neatly fall within our normative approach to ‘privacy’, as he refers to the breach of confidence as one example of an infringement through information disclosure but not all that is confidential is necessarily ‘private’. Also, some of the examples of ‘harm’ that Solove discusses should not necessarily be legally actionable at all or are already dealt with under legal headings that are not so much to do with ‘privacy’. For instance, under the ‘information dissemination’ category, he refers to:
- 191.1 disclosure (which ‘involves the revelation of truthful information about a person that impacts the ways others judge her character’);
 - 191.2 exposure (which ‘involves revealing another’s nudity, grief, or bodily functions’);
 - 191.3 increased accessibility (‘amplifying the accessibility of information’);
 - 191.4 blackmail; appropriation (‘the use of the data subject’s identity to serve the aims and interests of another’); and
 - 191.5 distortion (the ‘dissemination of false or misleading information about individuals’).
192. Usefully, Solove’s approach indicates the way in which some existing causes of action address matters complementary or allied to ‘privacy’. Thus, Solove notes that ‘distortion’ (above) is dealt with *via* the law of defamation,²⁹⁴ as well as the United States’ law on false light (which protects against giving ‘publicity to a matter concerning another that places the other before the public in a false light’ that is ‘highly offensive to a reasonable person’).²⁹⁵

294 Daniel J Solove, ‘A taxonomy of privacy’ 154 U Pa L Rev 477 (2006), 549 *et seq.*

295 *Ibid.*, 549 (citing the Restatement (Second) of Torts §652E).

193. Perhaps more controversial, however, would be his notion of disclosure, as the ‘revelation of truthful information about a person’ that has an impact upon the ways others judge an individual’s character might well be considered highly relevant information to evaluating that individual qualities for employment or for election to public office. If such material is to be used, then that individual should know about its use and should have some opportunity to contextualise the information, if the interpretation of the material is misplaced or unsophisticated relative to the original context. Either way, context and specific circumstances matter. That is, while an interest in the values of good faith, transparency and openness will always tend to apply or be relevant in various human dealings some might even query whether the ‘revelation of truthful information’ need be regarded as a privacy harm at all unless it is truly private information (such as confidential health information) or acquired improperly without knowledge or consent of the data subject. All this goes to show that it is not possible to unqualifiedly say that a normative or moral right to privacy need automatically translate into a legally enforceable right against third parties, whether strangers or intimates.
194. As discussed above, Solove identifies four distinct groups of activity that *may* occasion harm to one’s privacy. It is worthwhile repeating the passages on these groupings for the sake of convenience. Together the following groupings constitute Solove’s taxonomy of privacy:
- 194.1 First, information collection (in the form of surveillance and interrogation).
- 194.2 Second, information processing (*via* aggregation,²⁹⁶ identification,²⁹⁷ insecurity or the careless protection of stored information from leaks and improper access, secondary use of the information for a purpose that differs from that for which it was collected, and exclusion or the failure to allow the data subject to know about the data that others have her and to participate in its handling and use).
- 194.3 Third, information dissemination.²⁹⁸ This category involves a range of matters, including breach of confidentiality (‘breaking a promise to keep a person’s information confidential’); disclosure (which ‘involves the revelation of truthful information about a person that impacts the ways others judge her character’); exposure (which ‘involves revealing another’s nudity, grief, or bodily functions’); increased accessibility (‘amplifying the accessibility of information’); blackmail; appropriation (‘the use of the data subject’s identity to serve the aims and interests of another’); and distortion (the ‘dissemination of false or misleading information about individuals’).

296 Which ‘involves the combination of various pieces of data about a person’: *ibid*, 490.

297 ‘*Identification* is linking information to particular individuals [emphasis in original]’: *ibid*.

298 All quotes in this sub-paragraph are extracted from Daniel J Solove, ‘A taxonomy of privacy’ 154 U Pa L Rev 477 (2006), 490.

194.4 Fourth, invasions of people's private affairs, comprising 'intrusion' and 'decisional interference'. This category 'need not involve personal information (although in numerous instances, it does)'.²⁹⁹ He adds that '*Intrusion* concerns invasive acts that disturb one's tranquil[l]ity or solitude [emphasis in original]' whereas '*Decisional interference* involves the government's incursion into the data subject's decisions regarding her private affairs [emphasis in original]'.³⁰⁰ According to Solove's approach, intrusion does not necessarily require 'spatial incursions' on the part of a prying third party. He describes 'spam, junk mail, junk faxes and telemarketing' as 'disruptive in a similar way, as they sap people's time and attention and interrupt their activities'.³⁰¹ He also added that '[w]hile many forms of intrusion are motivated by a desire to gather information or result in the revelation of information, intrusion can cause harm even if no information is involved'.³⁰²

Blending 'Local Privacy' and Solove's conception of harms – An illustration of its usefulness

195. An interference with 'local privacy', therefore, could easily involve any of the above aspects of Solove's harms to privacy-based taxonomy. Primarily, any interference with 'local privacy' would be expected to activate either one or both of the following activities in the first instance:

195.1 Information collection (in the form of surveillance and interrogation).

195.2 Invasion of a person's private affairs, comprising 'intrusion' in the sense of 'invasive acts that disturb one's tranquillity or solitude' and (or) 'decisional interference', which 'involves the government's incursion into the data subject's decisions regarding her private affairs'.³⁰³ (This last point arises in the legal context of the United States of America – as with the abortion issue - and might be especially controversial in New Zealand law. It is noted here so as not to pre-empt later discussion).

196. Where information is acquired *via* an infringement of one's 'local privacy', it could then form the basis for secondary infringements, such as information dissemination (an illustration might be the exposure of another's 'nudity, grief, or bodily functions').³⁰⁴ There is an issue, however, of whether 'information dissemination' might indeed be a form of primary infringement, at least in a normative or moral sense, when intimate information is supplied to a family member or an intimate other obtains an image of you naked through a photograph (with your consent) but the information or image is then published to others beyond the setting of the intimate relationship (as a result of a rupture in the relationship, for example).

299 Ibid, 491.

300 Ibid.

301 Ibid, 477.

302 Ibid.

303 Ibid, 491.

304 Ibid.

Blending 'Informational Privacy' and Solove's conception of harms

197. Adapting Solove, interference with 'informational privacy' is likely to engage any of the activities that he identified, whether information collection, processing or dissemination or even the 'intrusion' element of the invasion of an individual's private affairs.

CONCLUSION

198. Privacy is important because it protects interests of autonomy and recognises the entitlement to equality of respect for all people.
199. Privacy should be divided into two main dimensions: 'informational privacy' and 'spatial' or 'local privacy'. These categories are intended to be used as overarching organising tools. The details of what falls within each will need to be worked out in ever increasing detail: this is what is meant by the cascading approach taken to developing a conceptual approach to analysing privacy.

Informational privacy

200. As discussed in the summary of this paper, by 'informational privacy', this paper means private information or facts about ourselves (where 'private' denotes information concerning conduct at home, sexual relations, personal habits, personal health information). In any given circumstance, the query ought to be whether the information in question should be able to count as worthy of moral and perhaps legal protection in various instances. This is a difficult area to define with any precision but the question does need to be posed. This paper suggests that a category of 'private facts' or 'private information' is a proper subject for a normative entitlement to protection under the rubric of 'information privacy'.

Local or spatial privacy

201. This aspect of the privacy interest is concerned with unwanted access to oneself. It recognises that not all invasions of privacy involve, or have as their purpose, the collection or use of information. This is particularly important given that privacy and other values of importance have to operate in the context of a social world.

The role of 'control'

202. The paper favours a definition of privacy which includes the notion of choice or control.

The need for harm

203. This paper asks but does not answer the question of whether a breach of privacy should be actionable *per se* or whether it would only be actionable if some kind of 'harm' can be established.

No automatic transition from a normative account of privacy to a legal right to privacy

204. It was concluded that, while there might be a moral entitlement to privacy, there is no automatic or easy shift from that position to a legal right to privacy in all circumstances. There will need to be a careful consideration of whether the current range of legal protection relating to privacy is sufficient or whether further protection is required.

