
# Defining Privacy

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# Contents

# Preface

This is the second in the Victorian Law Reform Commission's Occasional Paper series. It is published as part of the Commission's reference on workplace privacy. Occasional Papers provide background information relevant to particular areas of law reform, but do not necessarily reflect the Commission's views and do not contain policy recommendations.

The Occasional Paper has been written by Kate Foord, Policy and Research Officer at the Commission. It provides a rigorous discussion and analysis of approaches to defining privacy, with a particular emphasis on the consequences of the definitional difficulties for the protection of privacy. The Paper argues that although privacy is notoriously difficult to define, legal theory must attempt to provide a working definition in order to establish a regulatory framework capable of protecting privacy.

The Commission has also published an Issues Paper, *Workplace Privacy*, which is intended to provide information, promote discussion and solicit submissions. The Issues Paper discusses the meaning of privacy, provides examples of privacy issues which may arise in workplaces and discusses the existing laws relevant to these issues. The discussion in this Occasional Paper forms the basis of Chapter 2 in the Issues Paper.

A number of people have provided assistance in the development of this Paper. The Commission would like to thank Scott Beattie, School of Law, Victoria University; Professor David Kinley, Castan Centre for Human Rights, Monash University; and David Lindsay, Centre for Law and Media, University of Melbourne for participating in a roundtable discussion of an earlier draft of the Paper.

# Abbreviations

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| ***ALRC*** | Australian Law Reform Commission |
| ***CJ*** | Chief Justice |
| ***HCA*** | High Court of Australia |
| ***ICCPR*** | International Covenant on Civil and Political Rights |
| ***J*** | Justice (JJ pl) |
| ***LJ*** | Lord Justice |
| ***s*** | section (ss pl) |
| ***SDA*** | *Surveillance Devices Act 1999* (Vic) |

## INTRODUCTION[1]

Privacy has been declared as notoriously, even impossibly, difficult to define.[2] As Justices Gummow and Hayne of the High Court of Australia state in their recent joint judgment in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*:[3] 'The difficulties of obtaining in this field something approaching definition rather than abstracted generalisations have been recognised for some time.'[4] In this Occasional Paper, some of the difficulties involved in defining privacy are examined and analysed, with a particular emphasis on understanding the consequences of such difficulties for the protection of privacy. It is argued here that although privacy is a slippery term for which there is no adequate legal definition, legal theory must nevertheless attempt to come to terms with the problem of privacy, and find ways of determining how the law can best regulate those values that are mobilised in the name of privacy. Currently, the law offers little of such protection: where it is acknowledged that privacy is difficult to define it is also often conceded that, in the face of competing interests, 'privacy almost always loses'.[5]

This Paper argues that developing a rigorous definition of privacy will assist in achieving a balance between these interests, a balance that is necessary to protect privacy values. In attempting to develop such a definition, this Paper investigates those values associated with privacy and argues that they represent key social values. These values are articulated here partly because, in the absence of an Australian bill of rights, there is no overarching legal definition of a right to privacy in Australian law. There is therefore no general field in which the meaning of a right to privacy is established. At the outset, then, two features of the privacy debate at least seem to be clear: on the one hand, privacy is difficult to define and

1 Several scholars working in privacy and human rights joined the Commission in a roundtable discussion of an earlier draft of this Paper. Many thanks to Scott Beattie (Victoria University), David Lindsay (University of Melbourne) and Professor David Kinley (Monash University). Commissioners and staff of the Commission who participated in the discussion included Sangeetha Chandrashekeran, Chris Dent, Stephen Farrow, Kate Foord, Nicky Friedman, Trish Luker, Professor Marcia Neave, Professor Sam Ricketson and Jamie Walvisch.

2 The literature on this subject is vast. See, for example, Australian Law Reform Commission, *Privacy*, Report No 22 (1983), especially Part I: 'Elusive Privacy'; Ruth Gavison, 'Privacy and the Limits of the Law' (1980) 89 *Yale Law Journal* 421; and Raymond Wacks, 'The Poverty of Privacy' (1980) 96 *Law Quarterly Review* 73.

3 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63.

4 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [116].

5 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [119].

therefore to protect; on the other, privacy is both meaningful and valuable and people do not want to lose it.

In its progress towards a working definition of privacy, this Occasional Paper begins with the various ways in which legal authorities have approached the problem of definition. Many point out that the term itself remains impermeable, and that it is better defined with reference to other concepts.[6] This common strategy in privacy discourse might be called 'black-boxing' privacy, after Bruno Latour who developed this notion to describe the phenomenon that there are some ideas that we rely on but do not examine.[7] Here, the problem of defining privacy as a singular term is avoided by treating it as a principle which organises a set of terms, a set which includes but is not confined to autonomy and dignity, and which extends to anonymity, freedom or liberty, control and consent. The question remains, however, if privacy is to be black-boxed, what are the minimal terms by which it is defined? In much of the discourse on privacy, these minimal terms are autonomy and dignity.

Justices Gummow and Hayne link the concept of privacy to autonomy and dignity. Following the lead of Lord Justice Sedley's judgment in *Douglas v Hello!*,[8] the High Court Justices propose that both autonomy and dignity are fundamentally personal, and are features that only 'natural' persons exhibit: artificial persons, such as corporations, therefore do not possess these qualities. If we establish that autonomy and dignity (and therefore privacy) are features that distinguish us as human beings, we are still left with the question of what conception of human being, or human subjectivity, we are working with. For instance, Jeb Rubenfeld argues that 'autonomy' and 'dignity' are chimeras: they do not exist as fundamental to human subjectivity in the sense of existing *before law*, rather they are *produced by law*.[9] Following from this, the point for Rubenfeld of privacy law is not the *protection* of privacy but the *production* of privacy.

The Australian Law Reform Commission's (ALRC) report on privacy asks what the basic human rights are and what is common to these and the right to privacy. The report concludes that the common element can be described thus:

6 See Gavison, above n 2; and Raymond Wacks, *Law, Morality and the Private Domain* (2000).

7 Many thanks to Scott Beattie for suggesting the work of Latour and in particular the notion of the black box.

8 An English case concerning claims by the actors Michael Douglas and Catherine Zeta-Jones relating to the taking of unauthorised photographs of their wedding.

9 Jeb Rubenfeld, 'The Right of Privacy' (1989) 102 *Harvard Law Review* 737.

> Each of these rights can be seen as an expression of the claim that each individual has to be treated as an autonomous human person, not just as an object or as a statistic. Violation of these rights involves in some sense *treating a person as a thing rather than a person.*[10]

In Europe, interpretation of the right to privacy has also been based on the notion of a human being as having a right not to be reduced to the status of thing. The European Commission of Human Rights, in its first decision on privacy, found that this right to privacy also involves rights to have relations with others:

> It comprises also, to a certain degree, the right to establish and develop relationships with other human beings, especially in the emotional field for the development and fulfillment of one's own personality.[11]

Again, however, following the logic that human being is produced by, rather than pre-exists, the law, human rights too are produced and are not 'fundamental' or intrinsic. In the context of considering privacy law, the question becomes: what law produces this human being, the human being who has these fundamental rights; or, to put it another way, what law produces the subject who is subject not object, not 'thing'; what law produces the subject who can establish and develop relationships?

Returning to the black box of privacy, we might say that the two key features of the black box, autonomy and dignity, also represent two key values, human being as subject, not thing, and human being as a subject in relationship with others. These are social values, describing not so much an individual's interest in privacy, but the kind of human subject we want to produce when we make privacy laws or regulations. In determining the interests relevant in achieving these rights to privacy, so defined, there are other terms, in addition to autonomy and dignity, that mark the parameters of the black box of 'privacy'. These terms inform the determination of the specific interests involved in privacy.

In light of this approach to privacy, this Occasional Paper:

- asks how these rights to privacy can be guaranteed;
- proposes a test for invasion of privacy based on the working definition of privacy outlined; and

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10 Australian Law Reform Commission, above n 2, 13.

11 *X v Iceland*, (1976) 5 Eur Comm HR 86.87, quoted in Privacy International, *Privacy and Human Rights: An International Survey of Privacy Laws and Practice*, Global Internet Liberty Campaign, available from <www.gilc.org/privacy/survey/> (March 2002).

- analyses the context in which a worker's right to privacy and the test of invasion of that privacy must be considered.

First, we turn to the question of defining privacy.

## DEFINING PRIVACY

### Resisting Definition

In exploring the definitional difficulties we begin with Raymond Wacks, a prominent scholar in the privacy field and a forceful critic of any move to define privacy. For Wacks, the attempts at definition are futile because they frequently proceed from different standpoints, and the definitions themselves usually beg more questions than they answer.[12]

Wacks argues that the meaning of privacy is often already embedded in legal process: where there is a common law right to privacy (or its equivalent), the meanings attributed to privacy are those entrenched in the vocabulary of the courts; and where privacy has statutory protection, it is defined in the legislation.[13] That is, meanings are being attributed to privacy wherever it is mobilised in legal discourse.

There are, however, several problems with this approach. Wacks' theory that the term does not need to be defined because it is already embedded and operational implies that the fundamental values attached to privacy are adequately or comprehensively expressed in these various causes of action[14] or statutory measures. Yet, in Australia, where there is no common law right to privacy (although there are causes of action which cover privacy) and no statutory right to privacy, privacy legislation is directed towards quite specific interests in information privacy and does not provide any general statutory right. Many commentators have remarked on the inadequacies of such a piecemeal approach to privacy protection.[15]

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12 Wacks, above n 6, 214.

13 Ibid 215.

14 A cause of action is defined as 'the whole set of facts which give rise to an enforceable claim. In a cause of action, the plaintiff must prove every fact which is challenged in order to obtain judgment: *Bennett v White* [1910] 2 KB 643': *Butterworths Australian Legal Dictionary*, (eds) The Honourable Dr Peter E Nygh and Peter Butt (1997). The causes of action that may protect privacy include breach of confidence, defamation and negligence.

15 See, for example, Ronald C McCallum and Greg McCarry, 'Worker Privacy in Australia' (1995) 17 *Comparative Labor Law Journal* 13.

It is argued in this Paper that it is necessary to address the problems which arise in defining privacy in order to assess whether the process that Wacks relies on—the embedded and operational notion of privacy in legal processes—can in fact protect any or all interests in, and rights to, privacy. How can we know whether privacy is adequately protected if we do not understand the boundaries of the concept? There are compelling reasons, then, for examining what privacy means in the context of an inquiry such as that which the Commission has been asked to undertake, because:

- it prevents usage of the term as if it had a transparent and uncontested meaning (which it clearly does not);
- by preventing usage of the term in any simple way, it compels examination of the values carried by privacy protection; and
- it enables us to ask a crucial question: if the term 'privacy' cannot be defined, how do we identify that which any privacy law aims to regulate?

## Problems with Defining Privacy

Clearly there is no operational definition of privacy in legal discourse; however, the word itself can be minimally defined, or defined at the outset, as always involving a boundary, which is transgressed in any breach of privacy.[16]

It is commonly understood that this boundary is the boundary relating to the individual, and that invasion of privacy is the transgression of that boundary. There are, however, four immediate problems, or questions, with basing any law of privacy on individual experience. The first is the difficulty of extrapolating general privacy criteria based solely on the experience of the individual. This is problematic because:

- the boundary is subjective, or varies within the one culture: what is private to one person may carry no such meaning for another;
- the boundary varies across cultures: what is private in one culture is not in another;
- the boundary is contextual: what is private in a workplace, at least for some people, might be freely shared outside that context;
- the boundary is historical: differences in privacy thresholds and priorities are evident, for example, between generations; and

16 See the discussion on the difficulty of defining privacy in Australian Law Reform Commission, above n 2, in particular Part I: 'Elusive Privacy'.

- the aspect of a person to which privacy is attached is indeterminate: is there an inviolable centre of the self that could be equated with the private domain? Is it my feelings that are private, my mind, my relationships, a certain zone around my body, or a mixture of all of these?

The second question raised by basing a law of privacy on individual experience is a question that would be raised in any approach, given the fundamental link between privacy and human existence. There are different ways of conceiving of the human subject and the limits to the freedom of that subject. Who is the subject of which we speak?

The third problem is that although privacy itself can be defined as involving a boundary and its transgression, and privacy invasion is identifiable via the individual's experience of this transgression, this does not assist in identifying the social values involved in privacy. Can individuals' interests in privacy simply be aggregated to ascertain the dimensions of the concept of privacy as it relates to our society as a whole?

The fourth, related, problem is that placing the individual's experience at the centre of the definition raises the question of the relationship between individuals' rights and society's interests.

- If privacy is defined with regard to the individual or natural person, can there be collective interests in or rights to privacy and, if so, how are they determined?
- If there are collective interests or rights to privacy, can these outweigh or overrule the individual's claim to a right to privacy or a countervailing right, such as the right to consent to a privacy invasion?

The third and fourth problems and the questions of the social value of privacy will be discussed later in the Paper.[17] This section concentrates on the first two questions: What kind of conception of privacy provides the basis for a definition that can be applied in a legal and regulatory framework? What kind of conception of the subject underpins that definition?

17 See below page 23.

## Approaches to the Problem of Privacy

### PERSONHOOD AND PRIVACY

Some people argue that using 'privacy' as a way of speaking about certain human interests and circumstances is no longer beneficial. These critics want to go beyond privacy, and create new terms to deal with the array of problems that privacy discourse itself leaves unattended.[18] For many, privacy discourse is so dominated by a certain way of looking at privacy itself that it cannot do the work of understanding and protecting those values that are at stake.

The Commission is not in a position to jettison privacy itself: the terms of reference for this inquiry asks the Commission to examine the privacy, autonomy and dignity of workers. This Paper begins from the premise that the Commission must therefore determine not only what values privacy carries, but also why there is such criticism of the use of the notion of privacy at all.

In much of the literature written on privacy, there is a tension that remains implicit most of the time. This element that so troubles privacy discourse is nothing less than the idea of human subjectivity itself. This is a significant part of what people are arguing about when they argue about privacy, but it is an argument that tends to be conducted implicitly rather than enunciated and explicitly examined. Much of the traditional literature on privacy relies on the paradigm of subjectivity that is usually employed by the law itself: the liberal notion of the subject. This model is founded upon the liberal humanist concept of the person, whose two essential characteristics are autonomy (free will or self-determination), and dignity (an inviolable or uncommodifiable 'centre'). Like the law itself, privacy discourse rarely questions its reliance of this idea of the human subject. The problems that arise in this way of understanding human subjectivity are also therefore not brought to the surface.

For the purposes of this discussion, the crucial problems arise in how the limits to people's autonomy are understood. Within the liberal notion of the subject, these limits are understood to come into force where a person's actions conflict with those of other people's: until this time the person is free. Against this, others argue that these limits are always present, even before a person comes up against the will of others, and that freedom is much scarcer than many people suppose. It is

18 See, for example, *City State: A Critical Reader on Surveillance and Social Control*, conference program for Citystate conference and Surveillance: Beyond Privacy forum, UTS Community Law and Legal Research Centre, University of Technology, Sydney.

important to discuss these ideas because the way in which the subject and the subject's freedom or agency is understood will influence decisions regarding methods of privacy protection. If people are seen as free agents except where they come into conflict with other free agents, certain directions in protection will follow; if people are seen as having very limited freedom in the first place, other directions will be more logical.

Rubenfeld's work is an exception to this trend: he explicitly addresses the question of how the subject of privacy is conceived, and draws out the problems with the traditional conception of the subject within privacy discourse. Rubenfeld[19] critiques the personhood, or traditional, model of privacy, founding his argument on the conception of the subject as precisely not autonomous. Instead, the subject is posited as having a radically limited capacity to choose; as not free, and as largely produced by the set of forces or discourses into which he or she is born. Moreover, this subject does not possess an inherent dignity and can indeed be propertised. Autonomy, dignity, free will, within this conception of the subject, are chimeras in this sense: *they do not exist as essential aspects of human being*.

This conception of the subject has very real and practical implications for law. If the liberal subject is assumed to be the subject before the law, whereby autonomy and dignity are essential qualities, autonomy and dignity are, firstly, taken to be inalienable and secondly, and perhaps most significantly for law, do not need to be *produced* through law. The problem for the personhood model of privacy law, therefore, is that it seeks to protect what it should produce. That is, in seeking to *protect* autonomy and dignity it misses its real object, to *produce* people's capacity to maintain autonomy and dignity. It thereby, arguably, fails to formulate laws which would guarantee them.

### BLACK-BOXING PRIVACY

When questions of the meaning of privacy are raised, the term is often defined with reference to other terms. For scholars like Wacks and Gavison, privacy is deliberately not defined, but is understood in its relation to other terms. It is not seen as a singular concept or entity capable of meaningful independent definition for legal purposes, but instead is viewed as a principle that organises a number of concepts, including those terms traditionally associated with privacy—that is,

19 Rubenfeld, above n 9.

autonomy and dignity—but also anonymity, control,[20] consent, freedom, liberty and secrecy.

We might refer to this mode of conceiving privacy, after Latour, as 'black-boxing' privacy. This notion describes the fact that there are ideas we rely on but do not examine. As Gavin Kendall and Gary Wickham explain, 'black box' is a term used in cybernetics:

> when something is too complex to be fully explained or represented, a black box is drawn to replace the complex arrangement; arrows indicate what goes into the black box, and what goes out, but the actual contents and workings of the box are not examined.[21]

When something has been 'black-boxed', it is used in a chain of arguments, but the concept itself is not elaborated in those arguments. It is a way of simplifying the social world.[22]

There are advantages and limitations in conceiving of privacy as a black box. As we've seen, conceiving of privacy as a stand-alone term is not particularly useful in attempting to establish a legal definition. Black-boxing privacy ensures that privacy will only ever be defined with reference to other terms, acknowledging that we must seek other terms in order to understand privacy itself.

The notion of privacy as a black box prevents the equation of privacy with any one term in the set: it is impossible to say, for instance, that privacy equals autonomy, for example, if in the set of terms that privacy includes there is also the term 'consent'. That is, it is clear that the terms are related, but they do not mean the same thing. The notion of privacy as a black box is useful, then, in obtaining a set of terms by which privacy interests can be identified.

Black-boxing privacy, while useful, tends to place the set of terms associated with privacy in the foreground, at the expense of defining the principle which organises them. 'Privacy' then becomes the name of a set of terms whose relationship to each other, and the reasons for their inclusion in the set, is left under-theorised. What feature in the terms that surround it founds the meaning of the principle

20 Alan Westin's definition of privacy, very influential at the time, posited control of information as *the* issue in privacy. There have been many critiques of this foregrounding of control. See in particular Wacks, above n 6, 237.

21 Gavin Kendall and Gary Wickham, *Using Foucault's Methods* (1999) 73.

22 Ibid 74.

itself? In this Paper it is argued that it is necessary to come to some understanding of what it means to propose privacy as a principle.

What, then, are the minimal terms that constitute the black box of privacy? Can we identify all the terms in this set?

## DETERMINING PRIVACY RIGHTS AND PRIVACY INTERESTS

Wacks argues for an identification of *interests* in privacy as an approach to privacy protection, as against a rights-based model. He resists the term privacy, arguing that: 'It adds little to our understanding either of the interest that it seeks to protect or of the conduct that it is designed to regulate' and instead favours a model which isolates the essential interests giving rise to privacy claims.[23] Privacy is valued, he argues, because of specific interests which are embedded in and enabled by it. It is these interests, therefore, which can be protected, rather than privacy or the right to privacy.

This argument finds support in the decision of Gleeson CJ in *Lenah Game Meats*, who argued that: 'The law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy'.[24] Chief Justice Gleeson goes on to caution that 'the lack of precision of the concept of privacy is a reason for caution in declaring a new tort' of such a kind.[25]

In their decision in *Lenah Game Meats*, Gummow and Hayne JJ refer to the decision in *Australian Consolidated Press Ltd v Ettingshausen*,[26] in which Kirby P stated:

> The result of legislative inaction is that no tort of privacy invasion exists. Thus, whilst the value of privacy protection may generally inform common law developments, it would not be proper to award Mr Ettingshausen compensation for the invasion of his privacy as such.[27]

23 Wacks, above n 6, 240–1.

24 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [40].

25 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [41].

26 *Australian Consolidated Press Ltd v Ettingshausen* (Unreported, Court of Appeal of New South Wales, Gleeson CJ, Kirby P and Clarke JA, 13 October 1993) available from Butterworths Unreported Judgments BC 9302147.

27 *Australian Consolidated Press Ltd v Ettingshausen* (Unreported, Court of Appeal of New South Wales, Gleeson CJ, Kirby P and Clarke JA, 13 October 1993) 15 (Kirby P, during argument), cited in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [106].

Whilst the High Court decision in *Lenah Game Meats* does not preclude the development of such a tort, nor does it affirm one. Evident in the *Ettingshausen* case, however, are the limits of expecting privacy to be protected by a cause of action which only secondarily covers privacy concerns.

The decision in *Victoria Park Racing and Recreation Grounds v Taylor*[28] is generally understood to have established that no right to privacy exists in Australian common law. While the issue in *Victoria Park* was actually a commercial one—whether the defendant could broadcast the races taking place at Victoria Park from the vantage point of a platform erected on land adjoining the race track—lawyers for Victoria Park raised the plaintiff's right to privacy in argument. In his decision in *Lenah*, Kirby J suggests that more may have been read into the decision in *Victoria Park* 'than the actual holding required'.

> However, because of the general understanding of what the decision stood for (encouraged by the wide language in which Latham CJ, at least, expressed his opinion), legislatures and law reform bodies have, for more than 50 years, proceeded on the footing that no enforceable right to privacy exists in the law of this country. Indeed the Australian Law Reform Commission concluded that a general statutory right to privacy, as had been enacted in some places overseas, should not be recommended in Australia.[29]

In subsequent discussion of the possible emergence of a tort of privacy invasion in recent years, Kirby J identifies two major influences: invasions of privacy deemed unacceptable to society; and the development of modern human rights jurisprudence in which the right to individual privacy is recognised. In this context, courts have again examined an actionable wrong of invasion of privacy. There is no need, for the purposes of the decision in *Lenah*, to consider the question of the existence of an actionable wrong of invasion of privacy, and so Kirby J 'postpones' its consideration.[30] However, the context for this should also be understood as the development of recent case law in other common law countries.[31]

Chief Justice Gleeson points out that to talk of the right to privacy may be question-begging,

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28 *Victoria Park Racing and Recreation Grounds Company Limited v Taylor* (1937) 58 CLR 479.

29 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [187].

30 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [189].

31 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [324–7] (Callinan J).

> especially in a legal system which has no counterpart to the First Amendment to the United States Constitution or to the *Human Rights Act 1998* of the United Kingdom. The categories that have been developed in the United States for the purpose of giving greater specificity to the kinds of interest protected by a 'right to privacy' illustrate the problem. The first of those categories, which includes intrusion upon private affairs or concerns, requires that the intrusion be highly offensive to a reasonable person. Part of the price we pay for living in an organised society is that we are exposed to observation in a variety of ways by other people.[32]

Chief Justice Gleeson's argument against a right to privacy is founded on what he sees as a scarcity of theoretical or conceptual coherence with regard to privacy.

Wacks too argues that a right to privacy cannot be sustained in law. Wacks is not arguing against rights as such, nor is he saying they should not be formulated in broad terms. Rather, he agrees with Hixson, a United States commentator, who posits that:

> a natural 'right' to privacy is simply inconceivable as a legal right—sanctioned perhaps by society but clearly not enforceable by government… Privacy itself is beyond the scope of the law.[33]

Nevertheless, in the Australian context, privacy is already a term that has gained legal currency. There is federal and state legislation relating to privacy, and there are common law causes of action that are associated with the protection of privacy. Given that we do not have a bill of rights, or any constitutional right to privacy, are rights to privacy better formulated as interests, and the current piecemeal approach to their protection endorsed and pursued?

### EXPLORING THE BLACK BOX: PRIVACY INTERESTS—INFORMATION AND BEYOND

Wacks takes a very particular definition of the interests inhering in privacy and its protection. For Wacks, 'at the core of the preoccupation with the "right" to privacy is protection against the misuse of personal, sensitive information'.[34] For Wacks, information remains 'personal' regardless of context. This is one advantage his approach offers over those which describe information as 'private', where private is understood to be contextual. That is, what is private in one context may

32 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [41].

33 R F Hixson, *Privacy in a Public Society: Human Rights in Conflict* (1987) 98, quoted in Wacks, above n 6, 237.

34 Wacks, above n 6, 237. Wacks does identify other interests in privacy, but information is the fundamental interest in his approach.

not be in another; however, the information is always personal. Wacks suggests that one means of resolving some of the problems encountered in regulating information privacy is to identify what *specific interests* of the individual we think the law ought to protect.[35] Wacks then opens up the question: what is personal, and under what circumstances is a matter to be regarded as personal?[36]

Wacks' model meshes descriptive and normative models.[37] 'Personal information' should refer both to the *quality* of the information as well as the reasonable expectations of the individual as to its use. It is normative because the concept of 'personal' relates to social norms; descriptive because it takes account of the particular situation in which the privacy concern arises.

> It may be objected that, by resting the notion of 'personal information' on an *objective* determination of an individual's expectations, the definition is actually an exclusively normative one and therefore preempts enquiries concerning the desirability or otherwise of protecting 'personal information'. But any attempt to classify information as 'personal', 'sensitive' or 'intimate' proceeds on the assumption that such information warrants special treatment.[38]

This Paper returns later to the problems of defining the normative as an objective criterion, in the context of a discussion of tests for invasion of privacy.

### *Interests Beyond Information*

As seen above, for Wacks, information is at the core of privacy and its protection. However, the interests in privacy can be widened beyond this. If the Commission is to adequately assess all the practices outlined in the terms of reference for this inquiry—surveillance, monitoring, testing and searching—the interests in privacy *must* be widened beyond information. At least four such interests are in use in much of the literature on privacy: bodily, territorial, information and communication interests.[39]

In its report, the ALRC lists a number of further possibilities. These include 'privacies of attention' and 'associational privacy'. The latter is identified by the ALRC report as a category arising from United States law in the context of the

35 Ibid 237.

36 Ibid 242.

37 Normative models arrive at standards designed to regulate right and wrong conduct.

38 Wacks, above n 6, 243.

39 See Victorian Law Reform Commission, *Privacy Law: Options for Reform*, (Information Paper, 2001), and Australian Law Reform Commission, above n 2, 21–2.

protection afforded by the First Amendment. The report suggests that it is not an appropriate category in the Australian context, and that in our context this aspect of privacy comes under the information category.

'Privacies of attention' is identified by Benn as a privacy interest. He begins by explaining privacies of attention as:

> the ability to exclude intrusions that force one to direct attention to them rather than to matters of one's own choosing. Clamorous noises, unpleasant smells, and importunate solicitations, in person or by telephone, can be a nuisance anywhere and at any time; they are additionally objectionable as invasions of privacy when they penetrate into private places, or intrude upon one's attention at times one calls one's own.[40]

Whilst nuisance may be an inadequate concept with which to elaborate the category of privacy of attention, what is embedded in this description is an invasion of one's mind not necessarily with a specific purpose. The effect of the invasion is to leave the person feeling that there is no part of her or his attention which is not claimed by this force. The category of bodily privacy, as it is elaborated in the Victorian Law Reform Commission's Information Paper, *Privacy Law: Options for Reform*, covers aspects of the mind where the mind is invaded for specific purposes, for instance, psychological testing and honesty testing, where these are understood as possible invasions of privacy. The question raised here is, if a model of specific interests in privacy were to be used in this reference, bodily privacy may need explicit expansion to adequately cover this notion of privacies of attention. Later, this Paper examines the applicability of these variously identified interests in privacy to the particular case of surveillance and asks whether they are sufficient in this case.

Another privacy interest is anonymity. Anonymity is enshrined into our political processes in the right to anonymous voting. The National Privacy Principles, as set out in Schedule 3 of the *Privacy Act 1988*, included a provision covering anonymity:

> Wherever it is lawful and practicable, individuals must have the option of not identifying themselves when entering transactions with an organization.

Even where anonymity is not a right, it is clearly a taken-for-granted aspect of everyday life. We perform numerous transactions, for instance, without the exchange of identifying information. Until recently, we could make complaints by

40 S I Benn, 'The Protection and Limitation of Privacy', (1978) 52 *Australian Law Journal* 601, 608.

telephone, for example, assuming that unless we revealed our personal details they would not be retrievable: with digital displays on telephone systems, this is no longer the case. These examples attest to a decline in the possibility of being and remaining anonymous when one chooses.

On the other hand, there is one form in which the possibilities for anonymity have seemingly been enhanced, and this is the internet, with all the ambiguities this entails. Opportunities arise in two forms: not providing any identifying information; or, providing false identifying information, such as a false name. There is also significant development of privacy-enhancing technology in this area, with such techniques as encryption, digital signatures, anonymous re-mailers and memory protection software, or the 'blinding' techniques which are at the basis of David Chaum's development of Digicash.[41] On the other hand, of course, the new electronic technologies have also raised new questions in relation to privacy and its protection.[42]

## Evaluating the Specific Interests in Privacy Model

Wacks' model foregrounds interests in privacy as they pertain to the individual. His analysis does not extend very far into considering collective interests in privacy. At what point does such a model allow a collective vision of privacy; at what point does it define privacy as a collective or public value? Further, if a shared value or right is not named, how is an argument for not ceding a particular interest in privacy in the face of a competing interest sustained?[43]

Broadly speaking, an interest can be defined as a claim which receives some form of legal recognition. In his judgment in *Victoria Park*, Dixon J describes the process by which litigation works. In order for an action brought by a plaintiff against a defendant to be heard by the court, there must be a category within which that cause of action is recognised. For a plaintiff to ask the court to recognise a complaint as a new cause of action is, according to Dixon J, 'to reverse the proper order of thought in the present stage of the law's development'.[44]

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41 Raymond Wacks, 'The Death of Online Privacy' (Paper presented at the 13th Annual British & Irish Legal Education Technology Association Conference, Trinity College, Dublin, Ireland, 27-8 March 1998) available from <www.bileta.ac.uk/98papers/wacks.html> (October 2002); Simon G Davies, 'How Biometric Technology Will Fuse Flesh and Machine' (1994) 7 *Information Technology and People* 4, available from <www.privacy.org/pi/reports/biometrics.html> (April 2002).

42 Wacks names anonymity and identity as key components of what he calls the 'new privacy': ibid.

43 A Michael Froomkin, 'The Death of Privacy' (2000) 52 *Stanford Law Review* 1461.

44 *Victoria Park Racing and Recreation Grounds Company Limited v Taylor* (1937) 58 CLR 479.

Some interests are underpinned by legal rights. A right may be an already existing category within law; it may also be a claim that there should be a category in law that recognises this particular right or human circumstance. Rights claims[45] are sometimes based on the argument that protecting certain qualities or attributes is essential for meaningful human life. In addition, the idea of a right may be used to justify a claim for a new form of legal protection. In this sense rights have a symbolic value.[46]

Both interests and rights are formulated in order to enunciate and enforce social values. However, interests are usually not seen as fundamental to existence as a human being, so that it is not seen as wrong to allow them to be exchanged or traded. By contrast, some rights are seen as fundamental to human existence, so that giving them up or selling them is inconsistent with being human. For example, a person cannot agree to sell herself into slavery. Rights of this kind are more powerful than interests, because they cannot be traded.

It is acknowledged, however, by many commentators that current privacy protection is piecemeal, and therefore inadequate. So while such an approach may make good use of what currently exists, where existing categories cannot cover the relevant issues there is little hope of extending privacy protection beyond current limits. The problem in an interest-based model which legislates for the protection of particular interests in privacy—for instance, the individual's interest in the control of personal information—is that 'privacy' as a wider concept, a right even, can be erased. This approach would therefore seem to produce significant gaps in privacy protection. It is also possible that this model favours the transgressor of privacy, because in balancing competing interests against each other it is likely that the more powerful set of interests prevails.

One of the deficiencies of this model is that one interest in privacy can be selected, as Wacks selects information as the 'core' privacy interest, and other key features of privacy do not need to be explored in order to advance the arguments in favour of this particular interest. Again, privacy itself, whatever it may mean, is foreclosed

45 The distinction the law makes between subjects, 'who are individual entities holding rights and duties, and objects, which are external to the person, incapable of having rights, and defined by the fact that they are owned, controlled or dominated by legal subjects' is a distinction that is not always rigorously maintained by the law itself: Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates about Property and Personality* (2001) 24.

46 This discussion of the meaning of rights and interests is necessarily limited. There is a vast literature on these topics. For more detailed definitions of these terms, see <www.xrefer.com>. On rights theory, see Jeremy Waldron (ed) *Theories of Rights* (1984) .

from consideration, and so too is the question of how specific interests in privacy might relate to that general conception.

There is a further distinction to be made between interests and rights. Where interests fit into already existing categories that represent particular aspects of a human subject's life, rights tend towards representing the human subject as a whole. Formulating rights is a process that tends to resist the 'cutting-up' of the human subject that is a necessary corollary of defining specific interests. Rights are claims that are more capable of addressing the whole human being.

Having argued for the importance of conceiving of privacy itself, the discussion will now turn to what privacy as a legal principle might mean with particular reference to the key terms in the black box of privacy and the relationship between these key terms and the basic human rights outlined in international human rights law.

## PRIVACY RIGHTS

### *Privacy, Autonomy, Dignity: Fundamental Aspects of Being Human*

#### *What is Autonomy?*

The subject of law is the liberal subject: the rational subject of free will. It is to this idea of subjectivity that the term 'autonomy' refers, both within and outside legal discourse. There is no second-level definition of 'autonomy' that does not at the same time refer directly to this notion of human being. This is clear in legal usage of the term, for example as the basis for decisions in case law, where it is generally used as if it had an assumed and uncontested meaning. This assumption can be made because this notion of the subject itself is often uncontested in the legal context.

In his judgment in *Douglas v Hello!*,[47] Sedley LJ recognised a right to privacy in English law on the basis that the law can 'recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy'.[48] Justices Gummow and Hayne take up Sedley LJ's invocation of autonomy in consideration of the claim made in *Lenah Game Meats* that the company had a right to privacy:

47 *Douglas v Hello!* (2000) EWCA Civ 353.

48 *Douglas v Hello!* (2000) EWCA Civ 353, [126].

> Lenah can invoke no fundamental value of personal autonomy in the sense in which that expression was used by Sedley LJ. Lenah is endowed with legal personality only as a consequence of the statute law providing for its incorporation. … But, of necessity, this artificial legal person lacks the sensibilities, offence and injury to which provide a staple value for any developing law of privacy.[49]

Neither Gummow and Hayne JJ nor Sedley LJ define the parameters of this concept 'autonomy'. This failure to define a fundamental term upon which legal decisions are made is one of the problems in the legal concept of privacy. If it is pinned to terms which are themselves not defined, the difficulty of enshrining any general right to privacy is re-confirmed. The case law, therefore, may not provide the basis upon which such a right can be extrapolated.

The common aspect to various theories of autonomy is 'the idea of self-determination or self-government, which is taken to be the defining characteristic of free moral agents'.[50] This is why autonomy is often said to mean people's ability to make their own choices and control their own destinies. The liberal subject is not absolutely autonomous, so how are the limits to autonomy conceived? The freedom of the liberal subject is curtailed by the individual's responsibilities and by the rights of others. That is, freedom (to choose, for example) is not limited by any internal function of the subject, but rather is limited by the freedom of others.

There are other theories of subjectivity that propose that the limits to the subject's autonomy arise from sources quite other than those just described. We have already described Rubenfeld's critique of the notion of the autonomous subject. On the contrary, argues Rubenfeld, the subject has a radically limited capacity to choose, being not so much an agent within discourse as an effect of it. Autonomy, dignity, free will, within this conception of the subject, are chimeras in this sense: *they do not exist as essential aspects of human being*. They are ideas about human being, ideas that have developed historically and that continue to evolve. Nevertheless the question remains, if *these* ideas do indeed represent the kind of human being we wish to produce by the laws we enact, what laws best accomplish this?

As Rubenfeld points out, autonomy only takes us a small part of the way to understanding the right to privacy and what it might protect:

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49 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [126].

50 Catriona Mackenzie and Natalie Stoljar, 'Autonomy Refigured' in Natalie Stoljar (ed), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (2000) 5.

> [T]o call an individual autonomous is simply another way of saying that he is morally free, and to say that the right to privacy protects freedom adds little to our understanding of the doctrine. To be sure, the privacy doctrine involves the 'right to make choices and decisions,' which, it is said, forms the 'kernel' of autonomy. The question, however is *which* choices and decisions are protected.[51]

### *What is Dignity?*

Chief Justice Gleeson, in his decision in *Lenah Game Meats*, notes that 'the foundation of much of what is protected, where rights of privacy, as distinct from rights of property, are acknowledged, is human dignity'.[52] Such a definition of the dignity of human being is informed by the conception expressed most famously in Immanuel Kant's idea that man is an end in himself:

> Man and generally any rational being exists as an end in himself, not merely as a means to be arbitrarily used by this or that will, but in all his actions whether they concern himself or other rational beings, must be always regarded at the same time as an end.[53]

Dignity is associated with privacy because privacy must involve a conception of human being as such, and the concept of dignity is the one that marks the difference between people and property. Dignity is that which resists exchange; it is a thing that cannot be replaced by an equivalent. That is, there is a quality that renders human being that which cannot be commodified; to commodify this essential element is to strip the subject of his or her humanity, for dignity is one of humanity's essential qualities.

> The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.[54]

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51 Rubenfeld, above n 9, 750–1.

52 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [43].

53 Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals* (1785), full text available at <etext.library.adelaide.edu.au/k/k16prm/prm3.html>.

54 EJ Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' in Ferdinand Schoeman (ed), *Philosophical Dimensions of Privacy* (1984) 971.

If we agree with Rubenfeld that autonomy and dignity are chimeras, and that human dignity must be produced by law, not protected, we are nevertheless still faced with the question of defining what it is that should be produced. Can it rest any longer on the famous definition proffered by Samuel Warren and Louis Brandeis, the right to the inviolate personality?[55]

## Defining Privacy as a Human Right

As we have seen, Wacks argues that legislating privacy as a fundamental human right should be avoided. His argument is that specific interests in privacy should be recognised, and that these should be underpinned by the fundamental human value of privacy. This is also the approach taken by the ALRC in its inquiry into privacy. The ALRC's approach was to identify privacy interests, to weigh them against competing interests and to recommend ways of resolving competing claims. According to the report, this resulted in 'proposals for new rules of law, and modification of existing rules, creating what might be termed "rights to privacy"'.[56] The ALRC report did not advocate enacting a right to privacy in Australian law, and Australian privacy legislation, both federal and state, stops short of enacting a statutory right to privacy.

There is, however, a substantial body of jurisprudence pertaining to privacy as a fundamental human right, which in turn is influencing the recognition of a tort of invasion of privacy in common law countries. Privacy is a human right under public international law: the major international declarations of human rights all mention privacy. Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) outlines the right to privacy in these terms:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.[57]

55 Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review*, available from <www.lawrence.edu/fac/boardmaw/Privacy_brand_warr2.html>.

56 Australian Law Reform Commission, above n 2, 24.

57 Opened for signature 19 December 1966, Australian Treaty Series 1980 No 23 (reprinted), entered into force (except Article 41) 23 March 1976, entered into force in Australia (except Article 41) 13 November 1980, available at <www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>. The *Privacy Act 1988* (Cth) gives effect to Australia's obligations under Article 17 of the ICCPR.

Article 12 of the *Universal Declaration of Human Rights*[58] refers to privacy in almost identical terms to the ICCPR, and Article 16 of the *Convention on the Rights of the Child* applies these terms specifically to the rights of children.[59]

The ALRC report on privacy asks: what are the basic human rights, and what is common to these and the right to privacy? It lists the basic human rights that overlap with privacy as:

- the right to freedom of thought, conscience and religion;
- the right not to be enslaved;
- the right to equal treatment with other persons;
- the inherent right to life; and
- the right to freedom of association and peaceful assembly.

The report concludes that the common element can be described thus:

> Each of these rights can be seen as an expression of the claim that each individual has to be treated as an autonomous human person, not just as an object or as a statistic. Violation of these rights involves, in some sense, treating a person as a thing rather than as a person.[60]

In Europe, interpretation of the right to privacy has also been based on the notion of a human being as having a right to not be reduced to the status of thing, a right linked to the freedom to form relations with others—the social cohesion aspect of privacy. Article 8 of the 1950 *Convention for the Protection of Human Rights and Fundamental Freedoms*, states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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58 Adopted and proclaimed by Resolution 217A (III) of the General Assembly of the United Nations, 10 December 1948, available at <www.un.org/Overview/rights.html>.

59 Opened for signature 20 November 1989, Australian Treaty Series 1991 No 4, (entered into force generally 2 September 1990, entered into force in Australia 16 January 1991) available at <www.austlii.edu.au/au/other/dfat/treaties/1991/4.html>.

60 Australian Law Reform Commission, above n 2, 13. The Canadian Ministry of Labour's 1979 discussion paper on electronic surveillance also linked privacy with not being a thing: 'Concern about personal privacy in the workplace is directly related to one of the basic principles of the concept of quality of working life (QWL): that the individual worker is a whole human being and should be treated as such.': Ministry of Labour, Research Branch, *Electronic Surveillance: A Discussion Paper* (1979), cited in International Labour Office, *Workers' Privacy: Part II—Monitoring and Surveillance in the Workplace*, (Conditions of Work Digest, Vol 12, No 1, 1993) 10.

2. There shall be no interference by a public authority with the exercise of this right except as 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.[61]

The Convention created the European Commission of Human Rights and the European Court of Human Rights to oversee enforcement. A Privacy International report cites opinion that both have been particularly active in the enforcement of privacy rights and have consistently viewed the protections offered by Article 8 expansively and the restrictions narrowly.[62] The Commission found in its first decision on privacy:

> For numerous Anglo-Saxon and French authors, the right to respect for 'private life' is the right to privacy, the right to live, as far as one wishes, protected from publicity. In the opinion of the Commission, however, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and develop *relationships with other human beings*, especially in the emotional field for the development and fulfillment of one's own personality.[63] [my emphasis]

In applying a rights-based approach to definition, two distinct aspects of privacy have emerged that would remain hidden in an interests-based model. These are:

- the right not to be turned into an object or statistic, that is, the right of people not to be treated as if they are things; and
- the right to establish and develop relationships with other human beings, in short, the right to relationships.

Framed in this way, this right to privacy recognises and encompasses the two fundamental aspects of privacy described above, namely those of autonomy and dignity.

61 *Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4.XI.1950, available at <www.coe.fr/eng/legaltxt/5e.htm>.

62 Nadine Strossen, 'Recent US and Intl. Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis' (1990) 41 *Hastings Law Journal.* 805, quoted in Privacy International, above n 11.

63 *X v Iceland*, (1976) 5 Eur Comm HR 86.87, quoted in Privacy International, ibid.

## Privacy as a Social Value

### PERSON AS PROPERTY

Since 1890, when Warren and Brandeis ushered privacy into United States legal history and into the legal lexicon more broadly, the importance of coming to terms with the relationship between privacy and property has been acknowledged. In their landmark article on privacy,[64] Warren and Brandeis determined the steps that should follow, in protecting the rights of the individual, from Judge Cooley's identification of 'the right to be let alone'.[65] They extended this notion, and conceived of the right to privacy 'as a part of the more general right to the immunity of the person,—the right to one's personality'.[66] This article, and the notion of the inviolate personality which it developed, has been influential in the development of privacy as a legal concept, outside the United States as well as within it.

Warren and Brandeis gave a great deal of attention to the relationship between the right to an inviolate personality and a right to property:

> The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested.[67]

However, Warren and Brandeis also pointed out that the principle of private property is to be distinguished from that of an inviolate personality. They insisted that the only way to use the concept of property to describe the rights to which they referred is to use that word 'in an extended and unusual sense.'

Robert Post's account of the Warren and Brandeis article, one hundred years after it was published, examines the attempt made in the article to go beyond a concept of privacy as property, and shows that privacy and property have never been clearly delineated. With the emergence of privacy as a legal term came its association with the category of property.

64 Warren and Brandeis, above n 55, 195.

65 Ibid n 10.

66 Warren and Brandeis, above n 55.

67 Ibid.

> In fact the central thrust of Warren and Brandeis' article on 'the right to privacy' is to disentangle privacy from property, and the subsequent influence of the piece rests in great measure upon its success in that effort. As one court remarked, duly noting the leading contribution of Warren and Brandeis' article: 'Basically, recognition of the right to privacy means that the law will take cognizance of an injury, even though no right of property or contract may be involved and even though the damages resulting are exclusively those of mental anguish.' There is no small irony in this. Warren and Brandeis acknowledged as one of the chief motivations for their article the 'feeling,' which had been growing '[f]or years,' that 'the law must afford some remedy for the unauthorized circulation of portraits of private persons.' They therefore advanced as the 'simplest case' of their proposed right of privacy the 'right of one who has remained a private individual, to prevent his public portraiture.' Yet many of the early privacy cases that recognized this claim against 'public portraiture' did so explicitly on the grounds that 'one has an exclusive right to his picture, on the score of its being a property right of material profit.' Moreover seventy years after the publication of The Right to Privacy, when William Prosser magisterially divided the privacy tort into four distinct causes of action, he wrote that 'appropriation,' or the claim that a defendant has taken 'for the defendant's advantage, … the plaintiff's name or likeness,' ought to be founded upon an interest that is 'not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity.' What we now call the tort of appropriation, what Warren and Brandeis would have called the right to prevent public portraiture, has thus all along lurched precariously between formulations of privacy and of property.[68]

Privacy is thus both conceptually linked with property and delineated from property in United States law, and the seeds of this ambivalence were sown in the Warren and Brandeis argument, despite the contrary intention.

### EXCLUSIONS FROM THE CATEGORY OF PROPERTY

On what legal basis is something excluded from the category of property? This emerges as an important question in the context of the Commission's reference and its considerations of workers' privacy and employers' interests. In this context, the question is raised: is there any aspect of workers' person not potentially available for use in the employers' pursuit of their legitimate interests? In the context of this question, property law may provide the parameters for

68 Robert C Post, 'Rereading Warren and Brandeis: Privacy, Property, and Appropriation' (1991) 41 *Case Western Reserve Law Review* 647, 648–9.

distinguishing between that which is legitimately classified as property—and which can therefore be traded in the labour market—and that which can or should be excluded from that category.[69]

Kevin Gray describes three grounds on which a resource may be left outside the threshold of property.[70] The third of these is the ground of moral non-excludability, a notion resting on the premise that:

> there are certain resources which are simply perceived to be so central or intrinsic to constructive human coexistence that it would be severely anti-social that these resources should be removed from the commons. To propertize resources of such social vitality is *contra bonos mores*: the resources in question are non-excludable because it is widely recognized that undesirable or intolerable consequences would flow from allowing any one person or group of persons to control access to the benefits which they confer.[71]

Gray refers to this as setting the moral limits of property.[72]

Gray's discussion refers to goods or resources that cannot be taken out of the public or common domain and commodified, that is, which cannot become private property. They are non-excludable for what Gray calls 'moral' reasons. They are moral in that they assert a value higher than a property value, and Gray refers to this value as the need to attain more highly rated social goals.[73] These goals, to which property values defer, often relate to fundamental human freedoms. While there is a significant debate, which will not be covered here, about what is properly designated 'moral', for the sake of simplicity, what Gray calls 'moral' values will be referred to as 'social' values. This may well be a more accurate characterisation of the values to which he points. As he himself remarks, the test of non-excludability

> is much more closely concerned with those social conventions or *mores* which promote integrative social existence than with any normative judgment about individual human conduct'.[74]

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69 On the question of person as object, see also Julie E Cohen, 'Examined Lives: Informational Privacy and the Subject as Object' (2000) 52 *Stanford Law Review* 1373.

70 Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252, 269.

71 *Contra bonos mores* is a Latin term meaning contrary to the accepted canons of decent behaviour: *Butterworths Australian Legal Dictionary* (eds) The Honourable Dr Peter Nygh and Peter Butt (1997).

72 Gray, above n 70, 280–1.

73 Ibid 281.

74 Ibid 280.

If privacy is underpinned by the right not to be made into a thing and a principle of social cohesion, then this conception of privacy as non-property may be a valid model. As Gray says, it is in the definition of non-excludability 'that the law of property most closely approaches the law of human rights.'[75]

### PROBLEMS WITH THE NOTION OF PRIVACY AS A NON-EXCLUDABLE ASPECT OF PROPERTY

A conception of privacy as a morally non-excludable aspect of property proposes that privacy be deliberately excluded from the set of resources which can be legitimately commodified. In this model it is acknowledged that human being can be propertised. Those aspects of human being which are determined to be non-tradeable, because they represent higher values than those of property, must not be made into property, or made into an object, by extraction from the public sphere. The individual does not have the right to trade these aspects, because the interests of social cohesion are above those of the right or interest of the individual in that property.

There are disadvantages of this model of privacy 'protection'. By regarding what cannot be excluded from the commons as 'resources', it proposes that everything is potentially property unless held otherwise. Human being is therefore also property unless held otherwise. The value of privacy as a fundamental *human* right, and the emphasis on the *person* as right-holder that Rubenfeld foregrounds, recedes in such a model. In addition, because the model applies to property rather than privacy, it includes no test of invasion of privacy. It therefore produces no privacy-specific criteria by which an assessment of what counts as a non-excludable item can be determined. Those criteria must be found elsewhere.

Clearly then, privacy as a morally non-excludable aspect of property is not a stand-alone model. It is useful, however, as part of a larger conception of privacy. This larger conception is summarised below.

### PRIVACY: A WORKING DEFINITION?

So far it is clear that privacy cannot function as a stand-alone term in legal discourse. Privacy might be best conceived of as a black box because it is always defined in its relationship to other terms. The two terms that minimally constitute the black box of privacy are autonomy and dignity, where autonomy means self-determination and dignity means non-commodifiability. If property law gives us a

75 Ibid 281.

way forward here, it is in Gray's theory that some resources are too valuable to be propertised, and that these values in order to be protected must be named. In order to understand how to name these terms and how to conceive of them in terms of possible legal rights, we turn to human rights law and find that privacy, autonomy and dignity can be identified in two rights: the right not to be turned into a thing, and the right to relationships. Both these rights suggest that privacy protection is protection from commodifying human being, depriving people of the ability to *be* a certain kind of subject. The question for privacy protection is how to produce the subject who is autonomous and dignified.

In summary, then, we might say that we have generated a working definition of privacy. Because privacy always includes and refers to autonomy and dignity, the protection of privacy will always encompass the rights:

- not to be turned into an object or thing, that is, not to be treated as anything other than an autonomous human being; and
- not to be deprived of the capacity to form and develop relationships.

These rights name the social values of privacy; they are aimed not just at the protection of the individual's privacy, but at protecting privacy social cohesion.

## PROTECTING PRIVACY AS A HUMAN RIGHT

Once we have defined privacy as a human right, we must return to the question of who is the subject of this right to privacy. As we have already seen, Rubenfeld is critical of the personhood model, the traditional paradigm in conceiving of privacy, in which individuals remain free, within constraints, to define their own identities, to be self-determining. In his critique Rubenfeld draws extensively on the work of Michel Foucault whose work theorises the productive capacity of power, including juridical power. This way of conceiving of power in turn affects the way the human subject is understood. Power, in this conception, does more than produce the limits to individuals' lives. The autonomy of the subject is now understood to be, largely, an illusion; people's daily lives and decisions are determined not by them as free agents but by the set of possibilities established by the operation of power.[76] Rubenfeld states:

76 See Michel Foucault, *Discipline and Punish* (1977); and Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (1994), 3–36 .

> Suppose we looked not to the negative aspect of the law—the interdiction by which it formally expresses itself—but at its positive aspect: the real effects that conformity with the law produces at the level of everyday lives and social practices.[77]

Rubenfeld takes the example of the United States case *Roe v Wade*,[78] which was run as a privacy case. In this case it was argued that the state, in seeking to intervene in a woman's choice to proceed with or terminate a pregnancy, was transgressing that woman's right to privacy in this matter. Rubenfeld uses this example to show the 'productivity' of the law. The state, through seeking to prohibit the woman from terminating her pregnancy, would have produced a particular subject condition, that of mother. For Rubenfeld, this amounts to an attempt to *occupy* the subject's life to an intolerable extent. We might say that it produces this subject as object because it strips her of autonomy in denying her a right to choose, and of dignity in denying her control of her body.

The individual is no longer the focal point of privacy in Rubenfeld's view. The focal point instead must be the productive effect of the law. Rubenfeld's paradigm raises the possibility of a different model of assessing invasion of privacy, one not predicated on a normative, reasonableness test but rather on the question of what is produced by permitting an action which might be said to 'invade privacy'. If the right to privacy can be described in the way we have described it, then we must ask, is the subject of this action made into an object, a thing, by it; is the subject deprived of the capacity to form and maintain relationships? This model consequently provides a different way of developing any regulatory or legislative scheme. It allows us to ask: what kind of subject are we producing in making and reforming privacy laws?

## INVASION OF PRIVACY

### What is a Private Act?

The *Surveillance Devices Act 1999* (Vic) (SDA) defines private activity as:

> an activity carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves, but does not include
>
> (a) an activity carried on outside a building; or

77 Rubenfeld, above n 9, 783.

78 *Roe v Wade* (1973) 410 US 113.

(b) an activity carried on in any circumstances in which the parties to it ought reasonably to expect that it may be observed by someone else.

'Building' includes any structure, for the purposes of the Act.[79]

This narrow definition of private activity means that employers can use covert or overt surveillance devices in most areas of a workplace without infringing 'reasonable' expectations of privacy.[80] The SDA also allows for the use of listening devices, optical surveillance devices and tracking devices with the express or implied consent of the parties concerned.[81] With an employee's consent, therefore, an employer could install surveillance devices in the employee's home.

In looking at the question more broadly, however, it is clear that the lack of clarity regarding the legal definition of privacy informs considerations of the nature of a private act. Chief Justice Gleeson, in his judgment in *Lenah Game Meats,* addresses this question of a fundamentally private act.

> 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.[82]

If we cannot provide universal categories of private activity, do some activities require more protection than others? Should our inquiry address itself to this question?

Rubenfeld questions the relevance of ascertaining whether there are fundamental human activities that are private. This, for Rubenfeld, is not the point; the point is rather to ascertain the limits to the intrusion of the state, or another apparatus of power (in the case of our enquiry, the employer), on people's right to privacy. How, then, should we assess invasion of privacy? What are the tests that might apply, and what assumptions would underpin any such test?

The ALRC's report on privacy makes the breadth of the differences between people's privacy thresholds clear:

79 *Surveillance Devices Act 1999* (Vic) s 1.

80 See also Victorian Law Reform Commission, above n 39, 37.

81 *Surveillance Devices Act 1999* (Vic) Pt 2, ss 6, 7, 8.

82 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [42].

> Some people hate to receive junk mail. Others…delight in receiving it. Indeed, it is for them a valued contact with the outside world. Some people wish their details to remain strictly private and are strongly against use of these details even by medical researchers. Others welcome such use. Some will even sell their abnormal medical histories, or those of members of their family, to the mass media, for publication to the community at large.[83]

## Test for Invasion of Privacy on the Individual Model

Chief Justice Gleeson, in his decision in *Lenah Game Meats*, outlined a test of invasion of privacy based on 'reasonableness':

> 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. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.[84]

The test of 'reasonableness' requires a value judgment. This value judgment is usually based on what the average person would regard as reasonable. Who might this average person be? The concept of the 'ordinary person' has caused much difficulty in areas such as the criminal law.[85] And the reason is clear: despite its apparent neutrality, the 'ordinary person' is not a universal subject at all, but is rather a subject with qualities that are generally those of a white, middle-class, heterosexual male. This severely limits the ordinary person test as a benchmark for assessing invasions of privacy.

Developing a notion of invasion of privacy along such lines would result in privacy protection for some, not all. By definition, these models always represent some peoples' interests better than others. Recourse to 'the ordinary person' could mean that, for example, white males would be better represented than white

83 Australian Law Reform Commission, above n 2, 11.

84 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [42].

85 In partial excuses to homicide, for example, what constitutes reasonable grounds for killing is different for men and women. See Adrian Howe, 'Reforming Provocation (More or Less)', (1999) 12 *The Australian Feminist Law Journal* 127, and Jenny Morgan, 'Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them', (1997) 21 *Melbourne University Law Review* 237.

females, or Indigenous males.[86] Such models must push non-normative categories to the margins.

Rubenfeld's analysis of the right to privacy includes a thorough critique of a normative framework. He shifts the emphasis in the right to privacy from the actions of the privacy transgressor to those of the privacy right-holder.[87] Rubenfeld asks: what is the effect on the privacy right-holder of a particular action rather than asking: has there been a transgression of a 'fundamental', that is, normative, privacy? In the Australian context, an example might be the case that applies in relation to some Indigenous communities where speaking the name of a dead person is a transgression of customary law but where the name of that person is not 'fundamentally' private in a normative sense.

Rubenfeld insists on a crucial point here which he claims traditional analyses of privacy invariably miss:

> The principle of the right to privacy is not the freedom to do certain, particular acts determined to be fundamental through some ever-progressing normative lens. It is the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state.[88]

## Test for Invasion of Privacy on the Social Model

The question addressed in this section is, how to go beyond a normative test? Rubenfeld's argument is that a right of privacy applies not only to the private realm, but to all instances in which the test of invasion of privacy applies. This means that an invasion of privacy can occur in an instance where what is at stake is not something that is traditionally labelled private at all.

These invasions of privacy are executed by those laws or practices that force individuals into roles, activities, values, social and emotional relations in such a way as to substantially shape the totality of a person's daily life and consciousness.[89] This notion of privacy is privacy as the fundamental right not to

86 The Office of the Federal Privacy Commission collaborated with Social Justice Commissioner Mick Dodson to produce a protocol for application of the *Privacy Act 1988* (Cth) to Northern Territory Aboriginal communities. See Office of the Federal Privacy Commissioner, *Minding Your Own Business: Privacy Protocol for Commonwealth Agencies in the Northern Territory Handling Personal Information of Aboriginal and Torres Strait Islander People* (1998).

87 Rubenfeld, above n 9, 740.

88 Ibid 784.

89 Ibid 801–2.

be reduced to an object. Rubenfeld calls this reduction of the subject to an object the 'occupying effect' of the practice or law:

> The distinguishing feature of the laws struck down by the privacy cases has been their profound capacity to direct and to occupy individuals' lives through their affirmative consequences. This affirmative power in the law, lying just below its interdictive surface, must be privacy's focal point.[90]

There is no doubt that this a highly conflictual area. For some people the practices that the Commission will investigate in its inquiry represent progress; for others, decline. In questions of workers' privacy, these beliefs *may* be polarised between employers and employees, with the former tying privacy-invasive measures to their legal obligations and legitimate interests, and workers (and their representatives) holding to a notion that not everything can be brought into the service of those aims. Employers, on the other hand, do not want employees who are deprived of their subjectivity to such an extent that they cannot work to capacity. The question in privacy workplace reform is: where the practices in Western industrialised economies such as ours do actually reach into people's lives to an occupying extent, what are the regulations that act to preserve the human status, the subjectivity, of workers?

The test of invasion of privacy could then be established as being the extent to which the person in any given situation or as the result of any particular practice, is being made into a thing, or being deprived of her or his capacity to develop and maintain relationships. Such a test would not mean that the individual's right to privacy is absolutely preserved, but rather that this human right, the right to privacy, is placed at the centre when formulating principles and methods of privacy protection. In instituting practices that may invade privacy, employers and others would have to ask: does this practice reduce that subject to an object; does this practice inhibit people's capacity for relationships?

#### EXAMPLE ONE

Earlier, Benn's category of privacies of attention was outlined. He offers a workplace example as an indication that there are areas in which privacy of attention does not prevail:

90 Ibid 740.

> Interference by the boss with one's day-dreams in the office, however, is not such an intrusion, because at that time and place one is not at liberty to attend to matters of one's own choosing.[91]

Implicit in Benn's account is that the employer does indeed 'own' the attention of the worker whilst he or she is at work. His description of the workplace carries for the contemporary reader signs of the shifting nature of the workplace and the possibilities of workers having privacy within it. It is predicated on the belief in the reasonableness of the employer's actions in setting workplace policy in relation to privacy, and a congruence between the employer's actions and the workers' belief that they are reasonable. People's freedom to do and to think, however, is brought under increasing commodification and scrutiny. For more people in today's working environments, a basic level of privacy of attention cannot be assumed. In the contemporary workplace there are concerns for privacy and the possibilities of its transgression and erosion which Benn, in 1978, did not imagine for the middle-class worker he describes.

Applying Rubenfeld's test, we would ask: is this policy of prohibiting workers from day-dreaming an occupying one? The answer might be: to the extent that the workers' attention should be engaged in work, it is reasonable to assume that their attention should be engaged to the degree necessary for them to perform their tasks; to the extent that such attention is not required, to require it would be to 'occupy' that person, to call upon that part of themselves that would ordinarily remain private.

Gray notes that:

> In most societies…there is a general consensus that no attempt should be made to propertize certain ranges of human, intellectual or sensory experience. There is no 'property' in the right to listen to Chopin nocturnes; or to play the saxophone; or to engage in sexual intercourse; or to reproduce children.[92]

About these and other examples, Gray goes on to point out: 'it is salutary to reflect that none of this need be so'.[93]

Recently, international printing and copying company Kinko introduced a revised workplace policy according to which a range of activities could result in termination of employment. The company policy prohibits:

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91 Benn, above n 40, 608.

92 Gray, above n 70, 298.

93 Ibid 298.

- solicitation, including non-work-related requests for funds, and donations;
- distribution of non-work-related materials, including materials associated with children's school or athletic fundraisers, Avon, Amway, religious or political causes, and free publications;
- changing radio and television stations of units at work without the approval of branch managers, and tuning in to stations other than CNN, easy-listening, all-news stations.[94]

Is Kinko's workplace policy a propertisation of human sensory experience? If radio and television is allowed in the workplace, on what grounds can an employer regulate the content as opposed to the volume of that output? Kinko's policy is underpinned by the protection of its image: in prohibiting the distribution of non-company materials, the policy document states that all such materials cited detract from its professional location, appearance and potentially jeopardise Kinko's non-political standing.

What is the 'occupying' effect of Kinko's workplace policies? Does the employer's right to protect its interest in making a profit verge on an absolute right in this instance? Can we gauge this by assessing the occupying effect of the rules instituted?

#### EXAMPLE TWO

The report of the New South Wales Law Reform Commission into surveillance assumes that covert surveillance is a much more serious invasion than overt surveillance:

> Since covert surveillance is conducted without the knowledge of the subject, and is thereby more intrusive than surveillance conducted overtly, it should be regulated more stringently.[95]

This assumption is part of the context for the particular legislative outcomes in the *Workplace Video Surveillance Act 1998* (NSW). This Act establishes covert surveillance by employers of employees as possible only under a strict regime which includes:

- employers receiving authority from a magistrate to conduct the surveillance;

94 Natalie Davison, 'Kinko's printing firm takes Big Brother to next level', Australian Associated Press, 8 February 2002.

95 New South Wales Law Reform Commission, *Surveillance: An Interim Report*, Report No 98 (2001), xvi.

- there needing to be suspicion, of which the magistrate is satisfied, of unlawful activity;
- a licensed security operator to oversee the operation; and
- all tapes to be destroyed after three months.[96]

The legislation deems the surveillance to be covert unless it is conducted within the following parameters:

- the employer must give 14 days notice of the surveillance;
- the majority of employees must have agreed to the surveillance;
- warning signs must be visible in the workplace; and
- video cameras must be visible.[97]

If these conditions are established, the surveillance is overt. In order to conduct such surveillance there need be no suspicion of unlawful activity, nor is the magistrate's permission required.

The different requirements regarding covert and overt surveillance are significant, yet the report offers no reason or evidence for its assumption of a marked distinction in effect between overt and covert surveillance. The reasoning may be that if video surveillance is overt, people have the opportunity to modify their behaviour in such a way that their privacy is not seriously compromised; that is, they then act as if they are not alone. If surveillance is covert, there would be no such opportunity. If Rubenfeld's test of invasion of privacy is applied to overt video surveillance, however, the outcome is quite different. Instead of basing the criteria for the practice on whether people have consented, been given proper notice and whether they can see the source of the surveillance, the criteria turn on the effects on the public realm, on the collective and the subject produced in its midst. That is, it asks the question: what are the broader effects of the practices of surveillance?

This is less a question about what it makes the subject of the surveillance *feel* than about what kind of subject the practice produces. While there is evidence that suggests that overt video surveillance increases levels of depression, tension and

96 Belinda Harding, 'Surveillance in the Work Place' (2001) available from <www.findlaw.com.au/articles/default.asp?task=read&id=2484&site=LE> (21 February 2002). See *Workplace Video Surveillance Act 1998* (NSW), Part 2 and Part 3. Section 14 provides that the magistrate must consider the privacy of the employee when assessing the application for installation of covert surveillance.

97 *Workplace Video Surveillance Act 1998* (NSW) s 4(1)(a)–(c).

anxiety, and actually lowers productivity levels,[98] these are secondary considerations in this approach to privacy. They remain secondary because there may well be measures that do not necessarily have these effects, but which would constitute serious privacy invasions. Covert surveillance is one such measure.

There are other questions about whether the distinctions made between overt and covert surveillance always apply. Operators of overt surveillance can use the technology in covert ways, for example, zooming in on particular parts of bodies would be a covert act in the operation of overt surveillance. Using a rule which places the subject produced by a particular practice or law at the centre, rather than emphasising the intention or interests of the operator at the centre of the inquiry, assists in redressing the imbalance already discussed in various sections of this Paper: that maintaining the right and value of privacy in the face of competing claims and interests is extremely difficult.

## THE TEST FOR INVASION OF PRIVACY IN CONTEXT

### The Importance of Considering Context in Balancing Interests in the Workplace

In the above examples, it is clear that establishing any meaningful test of whether the practices described are invasions of privacy must involve careful consideration of the context in which the practices occur. This is just as important as understanding the core features of the practice in question itself. The same practice occurring in two different contexts may be regarded as privacy-invasive in one context, and not so in the other. For example, the compulsory administration of drug testing may be regarded as legitimate if the person subject to that test is a bus driver on country roads; drug testing may be viewed much less favourably if compulsorily administered to office workers in order to ascertain their use of recreational drugs outside office hours.

There are many factors that make up any one context. In this section, we identify the factors in the work context from the most general to the most specific. The employment relationship—between employer and employee—is perhaps the most decisive of these. There are also other relationships to consider within the workplace, in particular those amongst employees, and those between employees and others in their private lives. Balancing privacy rights and interests against

98 Harding, above n 96.

competing claims in the work setting is partly a matter of understanding these sets of relationships.

Employers themselves are operating within an institutional context. As we have seen, particularly in discussion of Rubenfeld's work, analysing the exercise of institutional power is crucial in formulating adequate responses to privacy invasion. What is an institution, how do its practices and rules come to be set and how do they affect the relations that pertain there?[99] Specifically, practices and rules that prevail in a workplace are predicated partly on the legal delimitations and descriptions of the obligations of employees and employers. There are also rules and customs in the workplace which have grown up as the institutional culture of the workplace which, while employees often come to regard them as standard, are not actually binding.[100]

At a more general level, John Rawls defines an institution as 'a public system of rules which defines officers and positions with their rights and duties, powers and immunities and the like'.[101] This is an institution; it is also an apparatus of power which operates in the context of Western industrial practices. Unlike earlier forms of economic organisation, the form that predominates in the globalised context of the so-called first world, might be defined as a system of exchange that is no longer grounded on agents or even nations.[102] The 'agent' in this context is capital itself. If we have indeed described the logic of what prevails in this globalised context, then the very system within which work takes place has a tendency to divest its subjects of privacy as it has been defined in this Paper. If the agent of this economic form is capital itself, then people tend to be displaced as agents within this system: that is, they are more objects than subjects; if they are more objects than subjects, their capacity to develop and maintain relationships with others is diminished.

The aim of reforming privacy laws for application in the workplace, then, is to develop laws that have the capacity to work in this context—to produce *subjects*, subjects whose relationships with others are not compromised to such an extent

99 See Julian Sempill, 'Under the Lens: Electronic Workplace Surveillance' (2001) 14 *Australian Journal of Labour Law* 111.

100 Marilyn Pittard, 'Individual Aspects of the Employment Relationship' (Lecture, Leo Cussens Institute, Melbourne, 2002).

101 John Rawls, *A Theory of Justice* (c1971) 55.

102 Claire Colebrook, 'Modernism' (Lecture, University of Edinburgh, Department of English Literature, 2002) available at <www.ed.ac.uk/englit/studying/undergrd/scottish_lit_2/Handouts/cmc_modernism.htm>.

that they are in danger of disappearing. This must mean, to some extent, resisting the logic that tends to see the human subject as being legitimately subordinate to a culture that affects what it is to *be* human in these basic ways. It is important to point out that there are many factors that produce the context in which people live and work, and the economic forms produced under globalisation are one major identifiable factor. It is equally important, however, in the context of an investigation into privacy and work, that the prevailing discourse regarding work, which is that described above, is examined.

What emerges from this analysis is that it is not only workers who are subject to this logic, but all those participating in the employment relationship. The imbalance of power traditionally recognised by labour law, then, can no longer be seen as operating solely between the two parties to this relationship, with employers often enjoying an advantage. Most importantly, there is the action of capital itself on parties to this relationship, acting not only on the employee but also on the employer, constraining and producing the possible actions of management itself.

## Balancing Competing Rights and Interests

The factor always at issue in privacy is how to keep a right to privacy alive in the face of competing claims made against it. Justices Gummow and Hayne, in the judgment in *Lenah Game Meats,* quote one academic on this issue of the privacy balance in the United States. The law protects expectations that pertain to freedom of speech, to government accountability and to media integrity. When these expectations collide with those of privacy,

> privacy almost always loses. Privacy law in the United States delivers far less than it promises, because it resolves virtually all these conflicts in favour of information, candour, and free speech. The sweeping language of privacy law serves largely to mask the fact that the law provides almost no protection against privacy-invading disclosures … [T]he law is more successful in protecting against commercial exploitation, although for reasons that have more to do with commerce than privacy. [103]

The definitional difficulties canvassed earlier in this Paper, combined with this pressure on privacy from other rights and interests, make it a difficult right to assert.

103 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [119].

Wacks' approach, that privacy should be kept alive despite the conceptual difficulties, suggests that 'privacy' carries value that is not expressed in other fundamental human rights. As discussed earlier, his model may nevertheless be skewed away from this right, and towards a scheme that actually unbalances the two sides of the privacy equation, in favour of the transgressor and at the expense of the transgressed. If, however, that balance is formulated in terms of the transgressor and the right-holder, as Rubenfeld would have it, and these rights are deemed to be collective rights, then the balance is perhaps restored. If we do not conceive of privacy as sets of interests which must be balanced, but rather sets of interests that must be tested for their validity against incursions on the right and the right-holder, then privacy may not 'always lose' in competing claims against it.

Focussing on individual interests in privacy compromises the conception of privacy as a public value, and does little to protect privacy from this ever-diminishing fate. It is, perhaps paradoxically, by focussing on privacy as a public or collective value that privacy is best protected. As Maurizio Passerin D'Entrèves comments in his explication of the work of Hannah Arendt:

> The interests of the world are not the interests of individuals; they are the interests of the public realm which we share as citizens and which we can pursue and enjoy only by going beyond our own self-interest. As citizens we share that public realm and participate in its interests: but the interests belong to the public realm, to the realm that we have in common 'without owning it', to that realm which transcends our limited life-span and our limited private purposes.[104]

And Rubenfeld:

> The right to privacy is a political doctrine. It does not exist because individuals have a sphere of 'private' life with which the state has nothing to do. The state has everything to do with our private life; and the freedom that privacy protects equally extends…into 'public' as well as 'private' matters. The right to privacy exists because democracy must impose limits on the extent of control and direction that the state exercises over the day-to-day conduct of individual lives.[105]

When privacy is conceived of as a group value, this right to privacy is not just the aggregation of the rights and interests of individuals. It is qualitatively different: they are rights held in a shared domain, the public domain. The absence of a right

104 Maurizio Passerin D'Entrèves, 'Public and Private in Hannah Arendt' in Ursula Vogel (ed), *Public and Private: Legal, Political and Philosophical Perspectives* (2000) 76.

105 Rubenfeld, above 9, 804–5.

to privacy, then, is more than a matter of failing to protect some specific interests in privacy not protected under common law or by statute. It is to compromise the process whereby these limits are set.

People's fear about having their privacy invaded is often more than the effect of the specific invasion of privacy felt at the time; it is that there may be no limits to the process. This fear of the potential limitlessness of invasion arises in the context of uncertainty regarding what attributes of human being may be commodified. In advanced capitalist societies it has become increasingly difficult to differentiate between material and immaterial goods, with significant ambivalence regarding the latter category, a category that might include, for example, knowledge, feelings, image. What is at stake here is precisely 'the set of attributes of "the person" and the personal which have defined in our society the protected domain of the human'.[106]

## CONCLUSION

In this Paper, following consideration of the definition of privacy in legal discourse, two essential aspects to be protected in privacy laws or regulatory schemes have been identified: these are, firstly, the conditions of human being regarded as fundamental for social life, and, secondly and consequently, social cohesion.

Legal discourses on privacy and human rights identify autonomy and dignity as qualities which must be protected to preserve the status of the human *as* human. That is, autonomy and dignity preserve the subject as subject, not object. Preserving this subjectivity is concerned with something more than the experience of the individual, however. It has a broader aim, and that is the maintenance of social relations and social cohesion. This Paper identifies the public interest in privacy protection, emphasising the notion that it is by positing privacy as a value in the *public* realm that it is best understood and best protected.

The Paper proposes that in order to protect this human being with these capacities, the law must make its goal to produce such a subject. The argument has been that defining privacy as a right assists in formulating specific privacy laws that have the capacity to achieve this aim. It also enables the formulation of specific tests for invasion of privacy that do not rely solely on the judgments made by a representative figure—whether a judge, a privacy commissioner, or a panel of

106 John Frow, 'Elvis' Fame: The Commodity Form and the Form of the Person' (1995) 7 *Cardozo Studies in Law and Literature* 131, 142.

people—but insists that any one person or group of people has quite specific criteria by which to assess whether a practice is privacy-invasive. These criteria aim to enable the continuance and enhancing of privacy as a social value.

A general grounding for a definition of privacy and its invasion is an important basis for assessing privacy-invasive practices. Such an assessment cannot be adequate, however, without a thorough consideration of the context in which any practice identified as problematic is to be carried out. This Paper has argued that there are several indispensable factors in attaining proper minimum standards for privacy for workers:

- defining privacy itself;
- formulating a test for invasion of privacy on the basis of such a definition; and
- examining context as a crucial part of assessing privacy invasion.

With all these criteria, the reasonable person who will make these assessments will have an adequate basis upon which to make informed and fair decisions that protect workers and support employers in pursuing their legitimate interests.

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