

Privacy and Private Law: the Dilemma of Justification

Lisa M. Austin¹
University of Toronto Faculty of Law
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1. Introduction

It is rare for the tabloids to produce anything of interest to legal theorists. And yet it seems to be the fate of privacy law that many significant developments have been motivated by the prurient practices of celebrity gossip. For example, in 2004 the House of Lords ruled that Naomi Campbell could recover damages for breach of confidentiality on account that her privacy had been violated by a British tabloid for detailing her alleged drug treatment accompanied by a photograph of her purportedly leaving a narcotics anonymous meeting. The headline read: “Naomi: I am a drug addict.”² In 2004 the New Zealand Court of Appeal ruled that it was willing to recognize an independent tort of publication of private facts even though it would not extend its protection to the children of celebrity couple Mr. and Mrs. Hoskings who were photographed while being pushed in a stroller by their mother.³ These cases are reminiscent of Warren and Brandeis’

¹ I would like to thank Bruce Chapman, David Dyzenhaus, Arthur Ripstein, Ernie Weinrib and participants in the Faculty Workshop at the University of Toronto Faculty of Law for their helpful comments on earlier versions of this work.

² *Campbell v. MGN Ltd.*, [2004] 2 A.C. 457 (H.L.) [*Campbell*].

³ *Hosking v. Runting*, [2005] 1 N.Z.L.R. 1 (N.Z.C.A.) [*Hosking*]. The children were conceived through IVF treatment and the Hoskings had been open with the press about Mrs. Hosking’s pregnancy. After the twins were born, they declined further interviews or photographs.

concern regarding the practices of yellow journalism and their claim, in 1890, that

[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the rooftops.”⁴

The remedy, they argued, was for the common law to recognize a right to privacy, a right that American courts have subsequently protected through the law of torts.⁵ However, this paper will argue that even if tabloid journalism has inadvertently forged a consensus regarding the need to respect privacy it is still not clear whether, in what manner, and to what extent, the private law should be enlisted in this endeavor.

One of the difficulties regarding private law protection for privacy is that this emerging consensus regarding the need for legal protection is nonetheless fragile and masks deep tensions. It would be tempting to explain these tensions as simply the inchoate rumblings of an as-yet ill-defined interest. This paper, however, will argue that the tensions evident in the private law regarding privacy stem not from definitional problems but rather justificatory ones: the private law faces a significant hurdle in justifying a right to privacy. The important question is whether privacy is the *type* of interest that can justify the coercive power of the state against another individual for the vindication of this interest rather than simply moral censure. As this paper will outline, the answer to this question is far from clear.

The first section of this paper will outline the tensions now evident in private law protection for privacy in the U.S., the U.K. and New Zealand, both in terms of whether to recognize a tort of invasion of privacy as well as in the details of the substance of the

⁴ Samuel Warren and Louis Brandeis, “The Right to Privacy,” (1890) 4 *Harv. L. Rev.* 193 at 195.

⁵ While often cited for the view that privacy *is* “the right to be let alone”, this in fact is not a good interpretation of their argument. See Ruth Gavison, “Privacy and the Limits of Law,” (1980) 89 *Yale L. J.* 421 at 437 and note 48.

action. I argue that while there is a clear “privacy impulse” which is responsible for the emerging consensus regarding privacy protection, there is also a “containment anxiety” at play in the case law whereby judges seek to contain the legal protection for privacy that the “privacy impulse” seems to call for. This “containment anxiety” takes different forms and is responsible for the tensions and differences now evident in private law protection for privacy.

There are different ways we can try to understand this “containment anxiety.” The most straightforward way is to argue that this anxiety is motivated by the definitional dilemma of privacy—that privacy is an elusive and vague concept. The second section of this paper disputes this understanding and argues that the problem with privacy is not that it is vague but that it is equivocal. In order to understand what a non-equivocal account of privacy might look like, I argue that we need to switch our focus from definitional questions to justificatory ones. In other words, our question should not be “what is privacy?” but rather “when does the gossip and curiosity of others constitute a wrong of the type that justifies legal sanctions?”

The third section of this paper explores this justificatory dilemma through focusing on two major liberal strategies of justification for legal rights: a focus on harm or a focus on autonomy. That is, the state is justified in assisting an individual who has been harmed or coerced by another. The justificatory question is then whether the gossip and curiosity of others ever crystallizes into the kind of harm or coercion that can justify a legal right to privacy. This paper argues that it rarely does but that the perceived need to find either harm or coercion can explain the particular contours of the different versions of the “containment anxiety” present in private law jurisprudence regarding privacy much

more convincingly than appeals to a definitional dilemma.

The fourth section of this paper will argue that understanding the way in which the justificatory dilemma of privacy is connected to the “containment anxiety” in the case law can also help us to understand what kind of privacy interest the law is justified in protecting. It suggests that the potential legal wrong involved in the practices of curiosity and gossip—especially when practiced in the mass media—is not a wrong that should be understood in relation to coercion or harm. Instead, I suggest that the wrong is better understood in relation to an individual’s capacity to participate in the formation of his or her identity and not have it simply imposed from the “outside.” Privacy understood in terms of protecting the capacity for self-presentation provides us with both a non-equivocal definition of privacy as well as the best justification for a private law right to privacy.

2. Unraveling the Tort Claim

Many of the major common law jurisdictions are beginning to converge on recognizing a private law right to privacy of some sort. Courts in the United States have recognized a tort of invasion of privacy since 1905⁶, New Zealand now also recognizes this tort at least as it applies to the publication of private facts, and courts in the UK have held that the law of confidentiality protects privacy. Canadian courts have made numerous encouraging statements regarding common law protection for privacy,

⁶ *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190 (Georg. Sup. Ct. 1905). Note that this would be considered to fall under the “false light” branch of the American Tort and not publication of private facts.

although most of these have arisen in very different contexts from the publication of private facts situation in both *Campbell* and *Hosking*.⁷

However, this apparent convergence also masks important areas of disagreement and confusion. For example, the House of Lords has resisted creating a tort of invasion of privacy and instead has chosen to protect privacy interests under breach of confidentiality—arguably necessitating some extension of the traditional confidentiality claim. In *Hosking*, the New Zealand Court of Appeal rejected this approach and opted instead to develop a tort of invasion of privacy, at least insofar as it applies to publication of private facts. Despite this, two of the judges argued that “in substance the law in New Zealand developed at the High Court level is very close to the position now reached (or approached) by the English courts, though different terminology is used.”⁸ Moreover, both the New Zealand and UK position differ from the US in several key areas. The privacy tort in the US covers more different kinds of privacy invasions than publication of private facts, including intrusions upon seclusion, false light advertising and the appropriation of name or likeness. However, when the focus is on publication of private facts, the US common law in fact provides protection to a far narrower class of

⁷ See, for e.g., *Motherwell v. Motherwell*, [1976] 1 A.R. 47 (C.A.) arguably extending the law of nuisance to capture privacy interests; in *Roth v. Roth* (1991), 4 O.R. (3d) 740 (Ont. Gen. Div.) the court recognized the possibility that invasion of privacy might be actionable in the context of harassment in the enjoyment of property. More recently, *Somwar v. McDonald's Restaurant of Canada* (2006), 79 O.R. (3d) 172 (Ont. Sup. Ct.) has indicated a willingness to recognize a tort of invasion of privacy to deal with an employee credit check without consent. *Saccione v. Orr* (1981), 34 O.R. (2d) 317 (Ont. Co. Ct.) recognized the tort in the context of the publication of a private telephone conversation. Several Canadian provinces have created a statutory tort that would cover the publication of private facts context: *An Act Respecting the Protection of Personal Privacy*, R.S.N. 1990, c.P-22 (Newfoundland); *The Privacy Act*, R.S.M. 1987, c. P125 (Manitoba); *An Act Respecting the Protection of Privacy*, R.S.S. 1978, c. P-24 (Saskatchewan); *Privacy Act*, R.S.B.C. 979, c. 336 (British Columbia). Quebec recognizes a privacy right in the *Civil Code of Quebec*, S.Q. 1991, c.64, art. 36. and in the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c.C-12, s.5. For an interesting Quebec *Charter* case dealing with the publication of private facts, see *Aubry v. Éditions Vice-Versa Inc.*, [1998] 1 S.C.R. 591. In Australia, the High Court has specifically left open the possibility: *Australia Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, [2001] HCA 63.

⁸ *Hosking*, *supra* note 3 ¶7, per Gault P and Blanchard J

publications than the other jurisdictions.

The following two sections will outline some of these inconsistencies and disagreements in detail in order to determine what the key tensions and questions are regarding private law protection for privacy. The first of these sections examines these tensions in the context of the question of whether to recognize tort of invasion of privacy and the second of these sections examines these tensions in the context of the substance of the action. I argue that what these cases have in common is a “privacy impulse”—that is, an intuition that privacy refers to an interest that is worthy of legal protection. However, these cases also exhibit a “containment anxiety” regarding the consequences of providing the legal protection that seems called for by that “privacy impulse.” It is this containment anxiety that is responsible for these tensions in the case law, both at the level of recognition of a tort action and at the level of the substance of the action.

(a) recognition of the tort

Apart from courts in the United States, most jurisdictions have been unwilling to recognize what Lord Hoffman, in *Wainright*, calls a “high-level principle” of invasion of privacy justifying a general tort of invasion of privacy.⁹ Indeed, the difficulties that US courts have faced in delineating the content of the American tort of invasion of privacy are a central reason for the hesitation on the part of the House of Lords to follow the American example. For example, in *Wainright*, Lord Hoffmann stated:

The need in the United States to break down the concept of “invasion of privacy” into a number of loosely-linked torts must cast doubt upon the value of any high-level generalization which can perform a useful function in enabling one

⁹ *Wainright v. Home Office*, [2004] 2 A.C. 406 (H.L.) [*Wainright*].

to deduce the rule to be applied in a concrete case. ... There are a number of common law and statutory remedies of which it may be said that one at least of the underlying values they project is a right of privacy. ... But there are gaps; cases in which the courts have considered that an invasion of privacy deserves a remedy which the existing law does not offer. Sometimes the perceived gap can be filled by judicious development of an existing principle. The law of breach of confidence as in recent years undergone such a process[.]¹⁰

In the UK, therefore, privacy is protected by the private law only insofar as courts can fashion discrete developments in existing legal categories.

This has led to some problems regarding the scope of protection available to potential claimants. For example, prior to the *Campbell* case the House of Lords denied Mrs. Wainright a remedy for being strip searched while visiting her son in prison, despite the court having found the search to be gratuitous and distressing. Nonetheless, one year later the House of Lords was willing to grant Naomi Campbell a remedy for the Daily Mirror article and photos. In fact, because Ms. Campbell had made public statements that she was not a drug addict, the House of Lords unanimously held that the newspaper was fully entitled to “set the record straight” by reporting that she was a drug addict and was receiving treatment. However, three of the five judges held that the newspaper nonetheless violated Ms. Campbell’s privacy when it further reported

the fact that the treatment which she was receiving was provided by Narcotics Anonymous; ... details of the treatment—for how long, how frequently and at what times of day she had been receiving it, the nature of it and extent of her commitment to the process; and ... a visual portrayal by means of photographs of her when she was leaving the place where treatment had been taking place.¹¹

The difference in treatment between Mrs. Wainright and Naomi Campbell was that in the *Campbell* case the court could invoke the breach of confidence action to protect her privacy instead of some “high-level principle.” On its face this result seems anomalous in

¹⁰ *Ibid.* ¶18.

¹¹ *Campbell*, *supra* note 2 ¶88.

permitting serious violations of privacy and punishing much more minor ones, making the broad sweep of the American tort appear preferable despite its many difficulties.

The New Zealand Court of Appeal explicitly disagreed with the House of Lord's adaptation of the law of breach of confidence in order to protect privacy:

Privacy and confidence are different concepts. To press every case calling for a remedy for unwarranted exposure of information about the private lives of individuals into a cause of action having as its foundation trust and confidence will be to confuse those concepts.¹²

They were particularly concerned about the implications for such an expansion on more traditional areas of the law of confidentiality. However, they also thought that confidentiality provided too limited a protection for privacy. For example, *Peck v. UK* highlighted for the court the limitations of the law of confidence.¹³ In that case, the European Court of Human Rights held that the law of confidentiality could not plausibly catch the broadcast of footage of an attempted suicide captured by a closed circuit television camera even though this was a violation of privacy. Because of these concerns, the New Zealand Court of Appeal rejected the House of Lords' reliance upon confidentiality and instead recognized a tort of invasion of privacy—at least as it applied to the publication of private facts.

However, despite this difference in terminology—and the substantive concerns underlying this difference—the New Zealand position follows the UK in not recognizing a general tort of invasion of privacy as is found in American jurisprudence. Perhaps this fact, and the overlap in concerns as will be detailed below, led the Court to indicate that it believed its approach to be “very close” to that of the House of Lords.

Like the House of Lords decision in *Campbell, Hoskings* was a split decision (3-

¹² *Hosking*, *supra* note 3 ¶ 48.

¹³ *Ibid.* ¶ 51, citing *Peck v. UK*, (2003) 36 E.H.R.R. 41 [*Peck*].

2) with two strong dissents that are revealing of a number of further tensions surrounding the recognition of the tort of invasion of privacy. Keith J. held that no cause of action for the publication of private facts should exist in the common law of New Zealand. For him, the reasons for this encompassed “the central role in our society of the right to freedom of expression; the array of protections of relevant privacy interests in our law against disclosures of private information and the deliberate and specific way in which they are in general elaborated; and the lack of an established need for the proposed cause of action.”¹⁴ Anderson J. agreed, and added additional emphasis to the concern for the effect of such a tort on freedom of expression.¹⁵ As he states: “this new liability, created in a sidewind, is amorphous, unnecessary, a disproportionate response to rare, almost hypothetical circumstances and falls manifestly short of justifying its limitation on the right to freedom of expression”.¹⁶

Ironically, this dissenting concern to *not* recognize any tort of invasion of privacy out of concern for freedom of expression is more in line with actual judicial practice in the United States where, as has been outlined, a much broader tort is recognized. A particularly striking example of privacy interests being overridden by freedom of expression is the *Florida Star* case.¹⁷ In that case, the United States Supreme Court overturned a lower court decision imposing damages on a newspaper for publishing the name of a rape victim. Despite the fact that such publication was in violation of a Florida statute, as well as the newspaper’s policy, the court ruled that damages would violate the

¹⁴ *Ibid.* ¶177

¹⁵ *Ibid.* ¶270.

¹⁶ *Ibid.* ¶271.

¹⁷ *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989). The decision was split 6-3. The Court held that because the police report had inadvertently and erroneously named the victim, the newspaper reporter had not unlawfully obtained the information. It was up to the government (police) to handle the information properly and potentially compensate victims for their loss of privacy. *Florida Star* at 541 and 536

First Amendment. As Justice White states, in dissent:

At issue in this case is whether there is any information about people, which-though true-may not be published in the press. By holding that only “a state interest of the highest order” permits the State to penalize the publication of truthful information, and by holding that protecting a rape victim’s right to privacy is not among those state interests of the highest order, the Court accepts the appellant’s invitation ... to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of publication of private facts. ... Even if the Court’s opinion does not say as much today, such obliteration will follow inevitably from the Court’s conclusion here. If the First Amendment prohibits wholly private persons (such as B.J.F.) from recovering for the publication of the fact that she was raped, I doubt that there remain any “private facts” which persons may assume will not be published in the newspapers or broadcast on television.¹⁸

Justice White’s concern is echoed by a number of commentators.¹⁹

Judicial reluctance to recognize a tort of invasion of privacy is therefore still strong and can be summarized through reference to a number of interrelated concerns that show a judicial anxiety regarding the ability to contain legal liability arising out of privacy violations: that privacy is too vague a concept upon which to create a general tort; that freedom of expression is important and should not be easily limited by such vague concerns; and that if the common law develops to protect privacy it should do so through expanding upon existing causes of action. As the following section outlines, this “containment anxiety” is also present once a tort of some sort is recognized, appearing in the disputes regarding the required elements of the action.

¹⁸ *Ibid.* at 550-551.

¹⁹ See e.g. Peter B. Edelman, “Free Press v. Privacy: Haunted by the Ghost of Justice Black,” (1990) 68 Tex. L. Rev. 1195 and Jacqueline K. Rolfs, “The Florida Star v. B.J.F.: The Beginning of the End for the Tort of Public Disclosure” (1990) Wis. L. Rev. 1107. For a general discussion of the relationship between the tort of invasion of privacy and freedom of expression in the United States, see Diane L. Zimmerman, “Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort” (1983) 68 Cornell L. Rev. 291 and C. Edwin Baker, “Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment” (2004) 21 Soc. Phil. & Pub. Pol’y 215.

(b) substance of the action

Although The U.S., the U.K. and New Zealand all recognize some form of common law protection for the violation of privacy, there are important differences between the different approaches. This section will outline those differences as well as how these differences may be cast as different versions of a judicial “containment anxiety” with respect to privacy.

The two major differences between the American tort of invasion of privacy and the New Zealand tort have to do with the scope of the tort and the role of freedom of expression in providing a limit to the tort. As already mentioned, the U.S. courts recognize four different branches to the tort of invasion of privacy: publication of private facts, intrusions upon seclusion, false light advertising and the appropriation of name or likeness. In contrast, the New Zealand Court of Appeal restricted its recognition of the tort to the publication of private facts. As also already mentioned, the U.S. courts have signaled an unwillingness to let privacy concerns outweigh freedom of expression. The New Zealand Court of Appeal indicated that both interests were worthy of protection and one should not be subsumed by the other.²⁰

Apart from these two differences, the New Zealand tort of publication of private facts is quite similar to the “publicity given to private life” branch of the American tort of invasion of privacy. According to Gault P and Blanchard J, there are two requirements for a successful claim for interference with privacy:

1. The existence of facts in respect of which there is a reasonable expectation of privacy; and

²⁰ *Hosking, supra* note 3.

2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.²¹

This is very similar to the American position, which provides:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.²²

The New Zealand Court of Appeal did not make absence of legitimate concern an element of the tort but rather held that a legitimate public concern in the information was a defence to the tort.

Despite a 3-2 split, the House of Lords in *Campbell* understood itself to be in agreement regarding the recognition of breach of confidentiality as a cause of action capable of protecting privacy and split instead on its application to the facts of the case. One way to understand the House of Lords decision in *Campbell* is in terms of shifting the breach of confidentiality action from one that traditionally focused on protecting a relationship of confidence to one that instead focuses on protecting a particular type of information: private facts. This makes the resulting breach of confidentiality action in the U.K. strikingly similar to a tort of publication of private facts in both the U.S. and New Zealand. There are two complications to this story. The first is that the House of Lords rejects the requirement of highly offensive publicity as a necessary element of the action, as it is in the tort of publication of private facts (N.Z.) or publicity given to private life (U.S.). The second is that the relationship between “private” information and “confidential” information is not clear. It is not clear in the *Campbell* decision but it is

²¹ *Ibid.* ¶117. Tipping J. would have required that the second element require only a “substantial” degree of offence.

²² *Restatement (Second) of the Law of Torts* § 652D (1997).

also not clear in *Hoskings* where the court explicitly distances itself from a confidentiality approach to privacy. Both of these complications are important, for they speak to a judicial “containment anxiety” regarding privacy.

To understand what is at stake with respect to both the debate regarding the requirement of highly offensive publicity as well as the relationship between “private” information and “confidential” information it is important to understand the extent to which the *Campbell* decision extended the traditional breach of confidence action in response to what I have been calling a “privacy impulse.”

Originally understood as an equitable doctrine,²³ until *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*²⁴ the cases regarding breach of confidentiality “are significant for their lack of any uniform jurisprudential basis. The confidences were mostly commercial and arose generally in the context of contracts, such as contracts of partnership, employment, agency or sale.”²⁵ *Saltman Engineering* is significant in that it affirmed that there could be an obligation of confidence without a contractual relationship. *Saltman* also defined when the information at issue had the necessary quality of confidence about it. As Lord Greene M.R. stated, “[t]he information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely it must not be something which is public property and public knowledge.”²⁶ Confidential information therefore refers to the fact that the information is kept secret rather than any more intrinsic quality to the information itself.

²³ *Prince Albert v. Strange*, (1849) 1 Mac. & G. 23, 41 E.R. 1171. The plaintiff in that case won on both the grounds of breach of trust and infringement of property. Interestingly, in their highly influential article regarding the creation of a common law right to privacy, Warren and Brandeis, *supra* note 4 at 199-205, pointed to *Prince Albert v. Strange* as a common law copyright case that was in fact protecting a right to privacy that now required an independent grounding.

²⁴ (1948) 65 R.P.C. 203 (C.A.) [*Saltman*].

²⁵ R.G. Toulson and C.M. Phipps, *Confidentiality* (London: Sweet & Maxwell, 1996) at 9.

²⁶ *Supra* note 24 at 215.

The classic statement of breach of confidence, now understood to stand independently of contract, is found in *Coco v. AN Clark (Engineers) Ltd*, where Megarry J., as he then was, identified three elements for a successful breach of confidence claim:

- (1) the information must have the necessary quality of confidence about it;
- (2) the information must have been imparted in circumstances importing an obligation of confidence; and
- (3) there must be an unauthorized use or disclosure of that information to the detriment of the party communicating it.²⁷

One major question has always concerned the second element, and what kinds of circumstances import an obligation of confidence. More specifically, can there be an obligation where the parties are not in a *relationship* of confidence?

It is the perceived need for a relationship of confidence that led Warren and Brandeis, in their seminal article, to reject breach of confidentiality as a means of protecting privacy and call for the recognition of a more general tort. As they argued, such a doctrine

may have satisfied the demands of society at a time when the abuse to be guarded against could rarely have arisen without violating a contract or a special confidence; but now that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation.²⁸

When the only way to have a photograph taken was to pose in a studio, then the law of contract or confidentiality could control its dissemination. However, with modern photographic technology this is no longer the case—the photographer can take a subject’s picture without there being any relationship of confidentiality involved.

However, the law of confidentiality did evolve to catch cases where there is no

²⁷ [1969] RPC 41 at 47-48 (H.L.).

²⁸ Warren and Brandeis, *supra* note 4 at 210-211.

relationship of confidence between the parties.²⁹ The first development along these lines applied to cases where a third party discloses information he has received from someone whom he knows is under a duty of confidence.³⁰ The second development can be traced to Lord Goff in *Attorney-General v. Guardian Newspapers Ltd. (No. 2)*, where he states that a duty of confidence can arise independently of a relationship of confidence “where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place and is then picked up by a passer-by”³¹ The question is whether this evolution properly catches the kinds of privacy cases Warren and Brandeis were concerned about when they rejected breach of confidentiality. And this depends upon whether disclosure of “an obviously confidential document” catches the same cases as the publication of “private facts” does.

The argument that it does not is an argument that an action for breach of confidentiality, even when not explicitly requiring the breach of a confidential *relationship*, is still ultimately concerned with protecting confidences. The reasons for protecting confidences are numerous. As several of the judgments in the House of Lords pointed out, the details of Ms. Campbell’s treatment needed to be protected in order to protect the therapeutic relationship. As Lord Hope of Craighead stated,

[t]he therapy is at risk of being damaged if the duty of confidence which the

²⁹ For a good overview of some of the ambiguities in English law regarding the requirement of confidentiality in such “privacy” cases, both pre- and post-*Campbell*, see: Raymond Wacks, “Why there will never be an English common law privacy tort” in Andrew T. Kenyon and Megan Richardson, eds., *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge: Cambridge University Press, 2005) 154 and Gavin Phillipson, “The ‘right’ of privacy in England and Strasbourg compared” in Kenyon and Richardson, *ibid.* 184.

³⁰ *Attorney-General v. Guardian Newspapers Ltd. (No. 2)*, [1990] 1 AC 109. This general proposition was widely agreed upon by the various Lords.

³¹ *Ibid.* at 281. See Gavin Phillipson, “Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act” (2003) 66 Mod. L. Rev. 726.

participants owe to each other is breached by making details of the therapy, such as where, when and how often it is being undertaken, public.³²

In other words, even if the press learned of Ms. Campbell's therapy without there being a violation of the confidential relationship between the participants in that therapy, publication of this information can nonetheless damage that relationship.³³

But there may be information that is "private" but where its publication does not threaten any kind of confidence or relationship of trust.³⁴ If the House of Lords is protecting "private" information rather than "confidential" information, then it is shifting the breach of confidence action away from even where Lord Goff placed with his willingness to impose a duty of confidence regarding "obviously confidential" documents. Some of the Lords use confidentiality and privacy interchangeably, and so either do not provide a clear view regarding this shift or resist it.³⁵ However, the judgments of Lord Nicholls of Birkenhead and Lord Hoffman embrace this shift. Lord Nicholls of Birkenhead argued that

The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.³⁶

Lord Hoffmann also felt that the law of confidentiality had shifted in a fundamental manner. In addition to no longer requiring the violation of a confidential relationship, there has been

³² *Campbell*, *supra* note 2 ¶ 95.

³³ Some commentators argue that a focus on confidentiality, because of its emphasis on relationships, can catch cases that the American tort of invasion of privacy cannot. See Neil M. Richards and Daniel J. Solove, "Privacy's Other Path: Recovering the Law of Confidentiality" (2007) 96 *Geo. L. J.* (forthcoming).

³⁴ See, for e.g. *Peck*, *supra* note 13.

³⁵ See, for e.g. *Campbell*, *supra* note 2 ¶ 85 (Lord Hope of Craighead) and ¶ 134 (Baroness Hale of Richmond).

³⁶ *Ibid.* ¶ 14.

the acceptance, under the influence of human rights instruments such as art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ... of the privacy of personal information as something worthy of protection in its own right.³⁷

Further,

What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity. ...

The result of these developments has been a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information. It recognizes that the incremental changes to which I have referred do not merely extend the duties arising traditionally from a relationship of trust and confidence to a wider range of people. ... Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity-the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.³⁸

The shift in breach of confidentiality, although stated differently in both of the judgments referred to, concerns a shift in the nature and status of the information that is protected.

The traditional breach of confidence action concerns confidential information, which is information that is kept secret rather than public, and is protected because of the importance of protecting confidences and relationships of trust. However, for Lord Nicholls of Birkenhead, this no longer adequately describes the information at issue. Lord Hoffman goes further and argues that the protection of "private" information is necessary for human autonomy and dignity.

Lord Hoffman also sees this shift as requiring answering further questions regarding the nature of the publicity required and the requirement of an injury.³⁹ For example, the breach of confidence model suggests that all that is required is an

³⁷ *Ibid.* ¶46.

³⁸ *Ibid.* ¶50-51.

³⁹ These questions do not arise on the facts of *Campbell*, because it fits within both the traditional breach of confidence action and the purported extension into an action for misuse of private information.

unauthorized use or disclosure of the confidential/private information—not widespread publicity as required by both the New Zealand and American versions of the tort of invasion of privacy. Similarly, the breach of confidence model suggests that this misuse of private information result in “detriment” but the New Zealand and American versions of the tort instead require that the publication be highly offensive. Indeed, the idea that private information is only protected from publicity that is highly offensive was rejected in *Campbell*. At most, the U.K position is that the test for publicity that is highly offensive is relevant only to help identify information as private when it is not easily identified as such.⁴⁰ It is not an *additional* requirement that narrows tort protection to private information, the publication of which is highly offensive.

If the shift away from liability rooted in the breach of a particular kind of relationship to liability rooted in a particular kind of information is motivated by a “privacy impulse,” the subsequent temptation is to contain this impulse. The court in *Campbell* did not have to face this issue directly because the case could be decided on the basis of both the theory that the information as issue was “confidential” and the theory that it was private”. However, the court in *Hoskings* spoke of its “containment anxiety” in explicit terms. For example, Gault P and Blanchard J, argued:

In theory, a rights-based cause of action would be made out by proof of breach of the right irrespective of the seriousness of the breach. However, it is quite unrealistic to contemplate legal liability for all publications of all private information. It would be absurd, for example, to consider actionable merely informing a neighbour that one’s spouse has a cold. By living in communities individuals necessarily give up seclusion and expectations of complete privacy. The concern of the law, so far as we are presently concerned, is with wide-spread publicity of very personal and private matters. Publication in the technical sense, for example as applies in defamation, is not in issue.

Similarly publicity, even extensive publicity, of matters which, although private, are not really sensitive should not give rise to legal liability. The concern

⁴⁰ *Ibid.* ¶53 (Lord Hope of Craighead).

is with publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned. The right of action, therefore, should be only in respect of publicity determined objectively, by reference to its extent and nature, to be offensive by causing real hurt or harm. ...

We consider that the test of *highly offensive to the reasonable person* is appropriate. It relates, of course, to the publicity and is not part of the test of whether the information is private.

We do not see personal injury or economic loss as necessary elements of the action. The harm to be protected against is in the nature of humiliation and distress.⁴¹

In this way, the court endeavoured to ask first, whether the information at issue was private and, second, whether it met a certain kind of threshold of seriousness in order to engage legal protection. This second, threshold, question is separate from the issue of balancing privacy against other interests such as freedom of expression for Gault P and Blanchard J also recognized a defence of legitimate public concern, which can take into account freedom of expression.⁴²

Apart from requiring a threshold of seriousness, there is a second strategy of containment at play in the *Hoskings* case, although it is not explicitly understood as such by the members of the court, and that is to revert to an idea of confidentiality when determining whether information is private. For example, Gault P and Blanchard J argued:

The photographs taken by the first respondent do not disclose anything more than could have been observed by any member of the public in Newmarket on that particular day. They do not show where the children live, or disclose any information that might be useful to someone with ill intent. The existence of the twins, their age and the fact that their parents are separated are already matters of public record.⁴³

The emphasis on the idea that the information was already in some sense public goes to

⁴¹ *Hosking*, *supra* note 3 ¶125-128. Tipping J. argued that the question of offensiveness should be part of the test for reasonable expectation of privacy and that it should be “substantial” level of offence rather than a “high” level of offence. *Ibid.* ¶1257.

⁴² *Ibid.* ¶129.

⁴³ *Ibid.* ¶164.

the test for confidential information (is it public rather than secret, does its publication violate a confidence) and not necessarily a more normative approach to privacy.⁴⁴ Indeed, many commentators have indicated that there can be a privacy interest in “public” information and this is also backed up by judicial opinion.⁴⁵ The fact that the court did not even feel the need to discuss this point highlights how much it continued to operate from within a confidentiality paradigm despite in other ways departing from it.

In sum, what I have been calling the “privacy impulse” is responsible for jurisdictions such as the U.S. and New Zealand recognizing some form of the tort of invasion of privacy. It is also responsible for a shift in the breach of confidentiality action in the U.K. away from a concern for confidential information and towards the protection of private information, although this shift is far from settled law. However, this privacy impulse is often curtailed by what I have called the judges “containment anxiety.” This takes several forms in the cases. In the U.K., it pushes some judges to resist the shift from confidential information to the potentially broader category of private information, understood to protect different interests than confidences. Indeed, even courts in jurisdictions that explicitly recognize “privacy” as the interest protected often implicitly appeal to confidentiality norms and so narrow the scope of protection for privacy. In the U.S. and New Zealand, the containment anxiety also pushes the courts to require, in

⁴⁴ See, for e.g. Jonathan Morgan, “Privacy, Confidence, and Horizontal Effect: “Hello” Trouble” (2003) 62 Cambridge L. J. 444, arguing that photographs of individuals in public places cannot be protected by the law of confidentiality.

⁴⁵ See, for e.g., Helen Nissenbaum “Protecting Privacy in an Information Age: The Problem of Privacy in Public.” (1998) 17 Law & Phil. 559; Lisa M. Austin, “Privacy and the Question of Technology” (2003) 22 Law & Phil. 119. The United States Supreme Court recognized a privacy interest in a compilation of public records in *Reporters Committee for Freedom of the Press v. United States Department of Justice* 489 U.S. 749 (1989) and the Canadian Supreme Court recognized a privacy right attaching to one’s image even where the photograph was taken in a public place (*Aubry v. Éditions Vice-Versa*, [1998] 1 S.C.R. 591, interpreting the Quebec Charter). The Canadian Judicial Council’s *Model Policy for Access to Court Records in Canada* (2005), recognizes that broad electronic access to public court records raises a number of privacy concerns (<http://www.cjc-ccm.gc.ca/article.asp?id=2985>).

addition to the publication of private facts, that this publicity be “highly offensive.” In some jurisdictions, such as the U.S., it motivates courts to privilege other interests, such as freedom of expression, over privacy.

3. The Definitional Dilemma

The simplest explanation for the containment anxiety displayed both at the level of recognizing some form of common law protection for privacy and at the level of defining the elements of the action is that this anxiety is motivated by the definitional difficulties surrounding privacy. These definitional problems have been well-catalogued by numerous theorists.⁴⁶

But the definitional problems that seem to plague privacy law and theory are also puzzling. After all, the distinction between public and private has been at the heart of liberalism in general and privacy, in particular, has been heralded as a right that is at the very heart of liberty in a modern state. Although other central ideas are also hotly contested – autonomy and equality, for example – they do not seem to fall into the same quagmire of such disparate and vague associations that courts can seriously entertain the proposition that the interest should receive no legal protection. The argument of this paper is that part of the answer to the puzzle of privacy is to determine the relationship between the private sphere and the concept of “privacy” as it operates in the cases previously outlined. Once this is clarified then it can be seen that the dilemma of privacy

⁴⁶ See, for e.g., Ruth Gavison, “Privacy and the Limits of Law” (1980) 89 Yale L. J. 421; Daniel Solove, “A Taxonomy of Privacy” (2006) 154 U. Pa. L. Rev. 477; Judith Jarvis Thomson, “The Right to Privacy” in Ferdinand David Schoeman, ed., *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, 1984) 272.

is not simply that it is a vague and contested notion but that it in fact often trades on the meaning and importance of other values. Isolated from such equivocation, privacy becomes a concern to be insulated from the gossip and curiosity of others. This, in turn, brings a much more significant dilemma into focus: it is not clear that the private law can justify a right to privacy that protects this interest. In this way, the definitional dilemma masks a much deeper justificatory dilemma. As the next section will outline, this justificatory dilemma can explain the containment anxiety in the case law at a much more profound level.

In what way is the idea of privacy riddled with equivocations? Liberal theory in its many guises seeks to define a private sphere within which the state may not interfere with an individual's pursuit of various ends. The public/private divide, however cast in its particularities, demarcates a line between the legitimate exercise of the state's coercive authority on one side and protected individual liberty on the other. It is this sense of the private as a sphere free from state interference that is responsible for what may sometimes appear to be peculiarities in the use of the language of privacy and, in particular, its close alignment with the value of autonomy. For example, constitutional jurisprudence in some jurisdictions holds that the right to privacy (as held against the state) includes a right to decisional autonomy – that is, a right to make a decision without the interference of the state.⁴⁷ This close connection with liberty is also likely responsible for the very strongly-held view that privacy “is at the heart of liberty in a modern state”.⁴⁸

The question then is what privacy in this sense, as a subset of liberty as

⁴⁷ For example, this is the way that abortion rights are understood in the United States: Anita L. Allen, “Privacy in American Law,” in *Privacies: Philosophical Evaluations*, ed. Beate Rössler (Stanford: Stanford University Press, 2004), 19-39.

⁴⁸ *R. v. Dymnt*, [1988] 2 S.C.R. 417 ¶81, citing Alan F. Westin, *Privacy and Freedom* (1970) at 349-50.

traditionally defined by the liberal notion of the private sphere, has to do with privacy in the sense of rights as between individuals outside of the relationship between state and individual. And here another set of meanings with respect to “private” and “public” become apposite. For example, we use the term “private law” as opposed to “public law” precisely to demarcate the difference between the legal regulation of the relationship between individuals from the legal regulation of the relationship between the individual and the state. However, this does not mean that the sphere of private law is one free of state coercion—indeed, the entire point of private *law* is to determine when state coercion may be enlisted in this relationship between individuals. Private rights asserted against other individuals are therefore claims by an individual for the invocation of state authority to protect a particular kind of interest against incursion by others. The idea of the “public” within the sphere of private law, rather than as a contrast to this sphere, is the idea of the social realm within which individuals interact. For example, the market can be “public” in this sense of the social without necessarily being “public” in the sense of strong state intervention and regulation.

These different understandings of the private sphere, no matter how implicit, various or contested the particular boundaries might be, have deeply influenced our sense of privacy where privacy is understood as a particular individual right rather than as a sphere defining individual liberty more generally. For example, Warren and Brandeis are often invoked for the proposition that the right to privacy consists in the “right to be let alone.” In fact, Warren and Brandeis proposed that privacy is one aspect of a broader interest in the right to enjoy life and to be left alone, recognized in a variety of private law doctrines including nuisance and defamation. To define privacy as the right to be let

alone is to conflate it with liberty and a more general sense of the boundaries of the private sphere.

Or consider an iconic image often invoked in debates about the right to privacy: the privacy of the home. References are often made to the privacy of one's own home. However, the home is "private" in many different, albeit overlapping ways. The most apparent sense of privacy is that within the home many activities take place that are shielded from the view of others. This is the sense of privacy invoked when people close their curtains, for example, so that their inquisitive neighbours cannot see inside. We want to keep others from watching us and telling others about what they see.

Nonetheless, the normative force of our sense that the activities of the home are "private" and should therefore be shielded from view and dissemination often trades on the many other ways in which the home may be said to be "private." The home is considered "private" in the sense of being private property. Private, as contrasted with public, property, means that the individual owner has a right to exclude others from it. This power of exclusion provides an individual with the ability to control access to his or her home, permitting her to choose to shield areas of her life from the view of others. But the activities that take place within the home may also be considered private in the sense that they are not, or should not be, open to state interference. As former Canadian Prime Minister Pierre Trudeau famously stated when he was Justice Minister, "there's no place for the state in the bedrooms of the nation."⁴⁹ Feminists have often contested this sense of the home as private, arguing that it has shielded men from accountability for their actions within the home, including domestic violence, but have also sought to

⁴⁹ Pierre Elliot Trudeau, media scrum outside the House of Commons, broadcast by CBC Television News, Dec. 21, 1967. Trudeau was speaking about an Omnibus Bill that he introduced in the House of Commons to change the Criminal Code, including the decriminalization of "homosexual acts" performed in private.

reimagine a less oppressive sense of what privacy in the home might mean.⁵⁰ Apart from this relationship between the individual and the state, describing the home as “private” rather than “public” also invokes the contrast between the individual (or family) and the broader social sphere. The home forms an important boundary between the individual and the broader social sphere and its privacy in this sense is arguably disturbed by persistent telephone calls, or mass emails, that bring the social into the home and contribute to a feeling that privacy has been invaded.⁵¹

It is these many different senses of “private” operating in the image of the home that influence how privacy is defined. Outside of the context of the relationship between the individual and the state, the paradigmatic example of “private” information is information regarding intimate and sensitive activities and relationships such as those affiliated with the family and the home. That is, if we try to get beyond simple appeals to social conventions regarding privacy and ask the *normative* question of “what is private?” then the answer has traditionally been some form of: that which is within the private, rather than the public, sphere.

Is there a way of understanding “privacy” in a manner that does not trade on these different meanings of the “private sphere” or return us to a simple description of existing social practices and expectations? The strategy proposed here is to focus on the behavior complained of in the type of case that has given rise to a publication of private facts type of tort claim and then ask the question of when the law should hold a party liable for that

⁵⁰ Ruth Gavison, “Feminism and the Public/Private Distinction,” (1992) 45 *Stan. L. Rev.* 1; Iris Marion Young, “A Room of One’s Own: Old Age, Extended Care, and Privacy,” in *Privacies: Philosophical Evaluations*, ed. Beate Rössler (Stanford: Stanford University Press, 2004), 168-186.

⁵¹ See, for e.g. *Motherwell v. Motherwell*, *supra* note 7, expanding nuisance to include protection from the invasion of privacy resulting from harassment from phone calls. “Spam” is also often characterized as an invasion of privacy in these terms.

kind of behavior.⁵² This is a justificatory question, not a definitional one. It is the contention of this paper that the major hurdle with respect to judicial recognition of a private law right to privacy is in fact justificatory not definitional and that this justificatory problem is at the root of the problems implicit in the jurisprudence. As the following section will outline, traditional liberal justifications for the imposition of legal liability only permit a very limited right to privacy.

If we return to Warren and Brandeis' original set of concerns in 1890, we can see that they were concerned with the practice of gossip and its transformation by advances in photography and newspaper publication. Indeed, gossip and curiosity captures many of our more contemporary concerns regarding privacy in relation to ICT. As John Perry Barlow, co-founder of Electronic Frontier Foundation, wrote:

I have lived most of my life in a small Wyoming town, where there is little of the privacy which both insulates and isolates suburbanites. Anyone in Pinedale who is interested in me or my doings can get most of the information he might seek in the Wrangler Café. Between them, any five customers could probably produce all that is known locally about me, including a [sic] quite a number of items which were well known but not true.

...

Barring government regulation of information, for which I have no enthusiasm, it seemed inevitable that the Global Village would resemble a real village at least in the sense of eliminating the hermetic sealing of one's suburban privacy. Everyone would start to lead as public a life as I do at home.⁵³

The practices of gossip and curiosity are also at stake in the celebrity publicity cases already discussed. The publication of photos in the tabloids exposes the subject to increased curiosity and spreads information about them similar to other practices of gossip. The following section therefore asks the question of why might the gossip and

⁵² This strategy appears to bypass the question of defining privacy. As Gavison has pointed out, *supra* note 46, identifying a loss of privacy is a separate question from determining when the law should be concerned about such a loss.

⁵³ John Perry Barlow, "Private Life in Cyberspace," *Communications of the ACM*, June, 1991 (http://www.eff.org/Misc/Publications/John_Perry_Barlow/HTML/private_life.html).

curiosity of others constitute a wrong of the sort that justifies the imposition of a legal sanction on this behaviour. However, there is also a persistent intuition—also reflected in the case law—that it is the technological augmentation and/or transformation of the social practices of gossip and curiosity that merit legal attention. Therefore, to focus the justificatory question further: why and when do the activities of gossip and curiosity, and in particular their transformation through modern technology such as publication in the mass media, justify the imposition of legal liability?

4. The Justificatory Dilemma

A right to privacy, understood as a private right, is a claim by an individual to enlist the help of the state to vindicate a particular interest as against another individual. A legal right to privacy therefore—as distinct from a moral right—must be able to justify the coercive power of the state against another individual for the vindication of this interest. In response, liberal theory has traditionally offered two strategies of justification: a focus on harm or a focus on autonomy. That is, the state is justified in assisting an individual who has been harmed or coerced by another. These two strategies then suggest the contours that the argument for a legal right to privacy must take. The argumentative burden is to show that the gossip and curiosity of others, particularly in the context of the mass media, crystallizes into either harm or coercion of a nature that may justify a legal right. However, the following sections argue that this burden is very difficult to discharge. Moreover, these sections indicate that the different forms of the judicial containment anxiety already outlined follow these justificatory problems: the requirement of highly offensive publication looks like a requirement for a threshold of harm not

present simply with publication of private information; the utilizing of confidentiality norms rather than privacy norms brings the information more clearly within a coercion framework; and privacy as a limit on freedom of expression itself more clearly leads to harm or coercion than is protected by it, underscoring why achieving a balance between these values is more difficult than having one be subsumed by the other.

(a) The Harm Argument

A focus on harm can help to articulate some senses in which gossip can be said to be wrong. For example, gossip can clearly harm an individual's reputation. However, harm to one's reputation cannot ground a right to privacy. For one thing, such harm is already protected in the private law through the law of defamation. Secondly, defamation only protects against the dissemination of false information. True but "private" information does not receive protection for one is not entitled to the protection of a good reputation gained through the suppression of the truth.

A focus on reputational harm also does not capture what some see as decisive with respect to a claim for privacy. For example, Warren and Brandeis argued that the legal right to privacy involves the right to determine when and how one's thoughts, sentiments, and emotions will be communicated to others. Importantly, Warren and Brandeis thought that protection for the communication of one's thoughts, sentiments and emotions had a "spiritual" rather than material basis, which led them to reject any analogy between privacy and defamation. The common law of defamation provided an inappropriate conceptual basis from which to derive a principle of privacy, they argued, because

[i]t deals only with damage to reputation, with the injury done to the individual in

his external relations to the community, by lowering him in the estimation of his fellows. The matter published of him, however widely circulated, and however unsuited to publicity, must, in order to be actionable, have a direct tendency to injure him in his intercourse with others ... the effect of the publication upon his estimate of himself and upon his own feelings not forming an essential element in the cause of action.⁵⁴

In calling for the protection of one's thoughts, sentiments and emotions from unauthorized publication, therefore, Warren and Brandeis sought to protect an individual's sense of self and not his relationship with others in the community as protected by his reputation.

Apart from harm to reputation, there is another way to think about the harm involved in gossip and curiosity. There is some information about ourselves that, if known by others, would leave us vulnerable to harassment, discrimination, or other types of abuse. One could identify those types of information that generate such vulnerabilities and protect them from collection and dissemination through a right to privacy. This information would not necessarily be sensitive or intimate in a traditional sense, but rather would simply have to be linked to problematic practices. However, it is important to understand that in such cases privacy functions more like an anticipatory remedy than a description of the wrong.⁵⁵ By granting a privacy right over the information, we protect an individual against wrongs that are not themselves best described as invasions of privacy. For example, if an individual's HIV status is considered private in order to provide some protection against discrimination then the wrong at issue is the consequent discrimination and not the invasion of privacy. Nonetheless, by protecting against disclosure of the information, the discrimination can be prevented, providing a kind of remedy in anticipation of the harm.

⁵⁴ Warren and Brandeis, *supra* note 4 at 197.

⁵⁵ Austin, *supra* note 45.

Although this account of privacy as an anticipatory remedy can capture some important elements of harm that might arise through gossip and curiosity, it still does not capture the intuition that seems to be at play in many discussions of privacy where privacy, in insulating us from gossip and curiosity, also insulates us from forms of social pressure that do not crystallize into other, independent harms. For example, Ferdinand Schoeman argues that privacy norms “define the presumptive boundaries within which it is permissible to apply direct social pressure of accountability and of threatened social disgrace.” The question then is how to define the circumstances under which such social pressure might constitute a harm sufficient to justify a legal right to privacy.

We may be concerned about such pressure for many reasons, but the strongest reason is its inhibiting effect. For example, Gavison has argued that privacy promotes liberty by permitting “individuals to do what they would not do without it for fear of an unpleasant or hostile reaction from others.”⁵⁶ These unpleasant reactions need not themselves constitute independent wrongs such as harassment and discrimination as in the earlier concern outlined, regarding privacy in its role as anticipatory remedy. Instead, privacy in this sense protects our ability to act and think in unpopular ways; it protects individuality understood in terms of our ability to be eccentric.⁵⁷

Here, John Stuart Mill’s classic articulation of the harm principle within liberal theory is helpful to outline why it is actually difficult to ground a legal right to privacy on this approach, even if from a more sociological perspective it seems to capture something important about the relationship between gossip and privacy. Mill was in fact acutely

⁵⁶ Gavison, “Privacy and the Limits of Law,” *supra* note 46 at 423.

⁵⁷ See also Edward J. Bloustein, “Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser,” (1962) 39 N.Y.U.L.R. 962 at 1003 (“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.”).

sensitive to the conditions of modern life and the rise of the social sphere and focused on the social sphere as distinct from either the “public” understood as the state or the social understood as the interactions between discrete individuals. He argued that society understood collectively can practice “a social tyranny more formidable than many kinds of political oppression” and that there should be

a limit to the legitimate interference of collective opinion with individual independence: ... to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism.⁵⁸

Mill’s general strategy with respect to the tyranny of the social sphere is to draw a line between that which only concerns the individual and for which he is not accountable to society and that which concerns one’s relations with others. An individual is accountable to society for conduct that concerns others, and in particular, conduct that harms others. Therefore society is not justified in judging another for conduct that only concerns the individual.⁵⁹ Based upon this, we could argue that conduct that only concerns the individual should be protected by a right to privacy and thus shielded from the gossip and curiosity of others.

However, Mill’s own analysis would not support such a conclusion. For example, Mill suggests that individuals do not require insulation from the effects of being spoken about. In his discussion of the freedom of religious belief and opinion, Mill agrees that individuals should not be deprived of a livelihood because of their beliefs and the social

⁵⁸ John Stuart Mill, *On Liberty* (1859; reprint, Arlington Heights, Illinois: Harlan Davidson, 1947) at 5 [Mill].

⁵⁹ Mill’s line between what concerns the individual and what concerns others governs ethical questions as well as legal ones. However, we could argue that if law is to be used to protect the individual against unjustified interferences with individual independence at the hands of society then law may only be used in those instances that fall within the principle of only concerning the individual.

stigma that ensues from their profession of opinions not shared by the majority.⁶⁰

Nonetheless, he draws a line between social coercion aimed at depriving an individual of his livelihood and social censure that simply leads to an individual being ill-thought of, which “ought not to require a very heroic mold to enable them to bear.”⁶¹ Put another way, being ill-thought of is not an unjustified interference with individual independence. This supports privacy understood in terms of an anticipatory remedy that can help protect individuals from harms like discrimination but it does not support privacy understood in terms of insulation from social pressure that does not rise to this level of harm.

Indeed, Mill allows for a wide scope for social censure. He argues that even with respect to that which only concerns the individual—which is his boundary demarcating individual liberty from social interference—society can express its disapprobation through “advice, instruction, persuasion, and avoidance by other people if thought necessary for their own good.”⁶² He elaborates:

In these various modes a person may suffer very severe penalties at the hands of others, for faults which directly concern only himself; but he suffers these penalties only in so far as they are the natural, and, as it were, the spontaneous consequences of the faults themselves, not because they are purposely inflicted on him for the sake of punishment.⁶³

Therefore others have a right to express their own individuality, as well as their own beliefs, which will inevitably involve talking about others in a negative manner. Given this, individuals may talk about others so long as this “gossip” does not take the form of intentional punishment or go so far as to deprive an individual of his or her livelihood. Even if the gossip is about what concerns an individual and not society, an individual has

⁶⁰ *Ibid.* at 3.

⁶¹ *Ibid.*

⁶² *Ibid.* at 95.

⁶³ *Ibid.* at 77-78.

no right to be insulated from it. Such gossip is understood to be the “spontaneous consequences” of the faults themselves, or part of the right of other individuals to express their opinions. Some of these concerns might be accommodated through the requirements, such as in the American tort, that publication be extensive and offensive, making the expression about another more like the “parading” or “punishing” that Mills states is not acceptable.

However, there is still another major source of difficulty for Mill in articulating a concern for privacy: freedom of expression. A legal right to privacy looks like a legal restraint on speech and for Mill the chief protection of individual liberty and diversity in the face of social tyranny is not privacy but freedom of speech. To recognize a right not to be talked about would be to stifle the speech of others. In fact, Mill seems to recognize a tension between the intersubjective elements of speech and his division between conduct that concerns an individual and conduct that concerns others: “The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it.”⁶⁴ Mill can then be interpreted as coming down in favour of treating speech like thought, which only concerns an individual, rather than as an action that also concerns others. In doing so, speech takes primacy over any kind of concern that might ground a right to privacy.⁶⁵ This is reflected in the American experience with the tort of invasion of privacy. As discussed earlier,

⁶⁴ *Ibid.* at 12.

⁶⁵ This in fact also seems to be where the U.S. tort jurisprudence is heading. See David A. Anderson, “The Failure of American Privacy Law,” in Basil S. Markensinis, ed., *Protecting Privacy: The Clifford Chance Lectures, Volume Four* (New York: Oxford University Press, 1999).

cases like *Florida Star* call into question whether a privacy interest can ever withstand a claim to freedom of expression, and in particular, freedom of the press. Although the courts in both the UK and New Zealand have disagreed with this primacy of freedom of expression, we can see that the justification for this faces some obstacles.

For all of these reasons, grounding a legal right to privacy in an analysis of the harm of gossip and curiosity faces some significant hurdles in moving beyond an understanding of privacy as an anticipatory remedy for other harms. Claims to privacy look like claims to insulation from the social pressure resulting from others' inquisitiveness into our lives and their gossip about us, social pressure that promotes a kind of social conformity. It is difficult to justify legal coercion to vindicate this interest unless it causes some kind of injury—which explains the popularity of the test that the publicity given to private facts be highly offensive, because this singles out cases where there is significant “humiliation and distress” from those where there is not.⁶⁶ Importantly, whatever harms arise from this pressure need to be viewed in light of the speech interest of others; it is difficult to articulate why diffuse social pressure that does not rise to the level of more defined and tangible harms should take precedence over a right to speech especially when a right to speech can itself promote individual diversity, as Mill is so famous for articulating. This leaves a Millian, harm-based argument for a private law right to privacy as at most looking like the American version of the tort of publicity given to private life.

⁶⁶ In *Hoskings*, *supra* note 3 ¶128, Gault P. and Balnchard J. indicate that it is “humiliation and distress” that is the harm involved in invasion of privacy and not personal injury or economic loss.

(b) The Coercion Argument

Apart from a focus on harms, the second major liberal strategy for grounding legal rights is a focus on autonomy or freedom from the coercion of others where that coercion is understood in relation to individual freedom rather than individual harm. Of course, there are a wide variety of diverse accounts of autonomy and its relevance with respect to questions of legal rights. One dominant account is Kant's and this section will outline why such an account also faces significant hurdles in articulating why gossip and curiosity could amount to a legal, rather than an ethical, wrong.

Understanding this requires understanding Kant's division between external and internal freedom. The doctrine of right, concerning what Kant refers to as external law-giving, explicates the conditions of external freedom. Kant describes this as a matter of the reciprocal relation of choice in which the wishes, needs, and ends of the other are irrelevant: "[r]ight is ... the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom."⁶⁷ In contrast, Kant's doctrine of virtue concerns duties of inner freedom.⁶⁸ Inner freedom has to do with the motivation for action, which must be self-chosen and self-legislated rather than imposed. Because of this, the "duties of virtue are duties for which there is no external law giving."⁶⁹ Therefore for Kant a legal right is one that protects an individual's external freedom—his or her agency—from violation by others.

The boundaries of what is considered an impermissible violation are set by the

⁶⁷ Immanuel Kant, *The Metaphysics of Morals*, trans. and ed. Mary Gregor (New York: Cambridge University Press, 1996) at 6:230 (section and page citations are to the original edition).

⁶⁸ *Ibid.* at 6:406-7.

⁶⁹ *Ibid.* at 6:410. See also 6:239.

idea of the equal agency of all. A Kantian account of a legal right to privacy would therefore have to show that the gossip and curiosity of others can in some instances violate external freedom. In this regard it is important to note that the violation of external freedom need not result in an injury to an individual. For example, if another takes what is mine and uses it for his or her own purposes, then I am wronged. This is the classic articulation of a trespass to land: you cannot take and use my property without my consent even if such use causes me no injury.⁷⁰ A Kantian account of privacy therefore has the potential to reorient the debate of privacy away from a focus on the effects and harms of gossip and curiosity. Indeed, it could ground a claim for a privacy invasion where someone was surreptitiously monitored and never found out about it.

The key to a Kantian approach to privacy is therefore to ground a sense in which information about me is “mine” such that in collecting it and using it for your own purposes, you wrong me. However, as outlined below, such an approach faces a number of significant hurdles in justifying the “mineness” of such information. These hurdles can help to explain why courts face a constant temptation to move back towards a confidentiality paradigm, why concerns regarding harm continue to intrude upon the analysis, and why freedom of expression is such a potent countervailing interest.

For Kant, my reputation is “mine.” As he argues, “a *good reputation* is an innate external belonging, though an ideal one only, which clings to the subject as a person.”⁷¹ Gossip that affects another’s reputation would therefore violate that individual’s external freedom. However, as noted in the previous discussion regarding harms, this would only

⁷⁰ The common law of trespass to land reflects this by allowing an action in trespass without proof of damages. However, the common law of trespass to chattels has traditionally required proof of damages. See *Intel Corp. v Hamidi*, 30 Cal. 4th 1342 (Cal. 2003).

⁷¹ Kant, *supra* note 67 at 6:295.

ground a right against the spreading of false information, not true information and so would not protect an individual's desire to have some true facts kept from further circulation. In other words, it grounds the legal doctrine of defamation but not privacy.

What, then, about the many things which I endeavour to keep private? Here Kant's distinction between physical possession and rightful possession, as outlined in his discussion of property, is helpful. My innate right to my body means that I have a right to an apple while I am holding it – to interfere with this possession is to interfere with my right to occupy a particular space. However, if I put the apple down then you only wrong me if I can additionally claim that the apple is my *property* – that it is something over which I have rightful, and not merely actual, possession.⁷² Similarly, if I endeavour to keep my thoughts, emotions and sensations private then your interference with this is an interference with my innate right to personality. However, once I choose to communicate them then there must be a different basis for my entitlement to my thoughts, emotions and sensations. If a right to privacy is to be more expansive than something like secrecy—and that seems to be at stake in the move from confidentiality to privacy—then what is needed is an understanding of privacy analogous to the rightful possession of the apple.

One way to create such an account is to focus on the relationship between the individual who communicates her thoughts and the individual who then makes some further use of this communication. Through invoking the norms of contract or confidentiality, a Kantian account could allow that some of these uses are wrongful. For example, an individual who receives letters from you on the understanding that these are

⁷² For a helpful overview of Kant's position regarding rightful possession, see: Ernest J. Weinrib, "Poverty and Property in Kant's System of Rights," (2003) 78 *Notre Dame Law Review* 795 at 805ff.

confidential wrongs you in publishing these. But these doctrines would not catch the case of a *stranger* seeking to publish my private letters, unless this piggybacks upon the initial relationship such as when a stranger understands that the information at issue has been obtained through a breach of confidence. As discussed, this still does not catch private information per se.

Because technology permits access to an individual's thoughts, emotions, and sensations without this access violating any special relationship, Warren and Brandeis argued that what is required is a right against the world such as that afforded by property, not confidentiality or contract. By this they did not mean the traditional doctrine of property such as one's property in the home. Historically, the protection afforded by trespass went a long way to protect the privacy of the home but such protection would be vulnerable to the critique that technology makes it possible to intrude on others without actually violating any property right. Instead, they grounded their argument in common law cases regarding copyright protection for unpublished works, which granted individuals a right to prevent the publication of original expression. Warren and Brandeis argued that such cases were better understood as applications of a more general right to privacy than as intellectual property cases and should therefore be expanded to protect one's thoughts, emotions and sensations regardless of form: "whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression."⁷³

The question then is: would Kant recognize such protection for private letters and would he allow for the expansion of such protection in the manner sought by Warren and Brandeis? Kant clearly recognizes a right against the copying of books. A book, according to Kant, "represents a discourse that someone delivers to the public by visible

⁷³ Warren and Brandeis, *supra* note 4 at 206.

linguistic signs.”⁷⁴ No one else may attach his name to another’s work, for this would be to pass oneself off as the author. Similarly, if an author speaks in his own name through a book, a publisher speaks in the name of the author and may only rightfully do so with the permission of the author.⁷⁵ However, the wrong involved in publishing without the author’s permission is the wrong “of stealing the profits from the publisher who was appointed by the author.” It is not clear how this would extend to someone who is publishing previously unpublished material without the author’s permission. It is also not clear how this would extend to someone who wanted to comment on the private communication of another and so was more in the position of a journalist than a publisher who could be said to be speaking in the name of the author.⁷⁶

Furthermore, it is not clear that Kant would extend his analysis of copyright in the manner argued for by Warren and Brandeis, to include protection from the unauthorized dissemination of one’s thoughts, emotions and sensations *in whatever form*. Kant distinguishes writing from other kinds of works such as “an etching which represents a certain person in a *portrait*, or a work in plaster that is a *bust*” for these, unlike writing, are immediate signs of a concept.⁷⁷ To interfere with another’s use of such signs would presumably interfere with an individual’s freedom to communicate his own thoughts. Similarly, to grant an individual control over the dissemination of details of one’s personal appearance, acts and relationships would be to interfere with the ability to

⁷⁴ Kant, *supra* note 67 at 6:289-90.

⁷⁵ *Ibid.*

⁷⁶ Perhaps a Kantian account could accommodate some alleged misuses of images similar to what are now known as the false-light publicity and misappropriation of personality branches of the American tort of invasion of privacy. The types of cases caught by these doctrines are at least analogous to the direct passing-off example Kant discusses in his treatment of copyright; all cover situations of misattribution. If my image is used in a product endorsement, then it looks like I am being made to seem as though I am endorsing the product. Even if such false attribution does not affect my reputation and so is not defamatory, it is forcing me to speak when I have chosen to remain silent.

⁷⁷ *Ibid.* at 6:289-90.

express one's opinion about another.

In fact, there is a strong basis upon which to argue that for Kant, speaking about others is generally something that one does *as a matter of right* rather than something that violates rights. This is because the principle of innate freedom implicitly involves the authorization

to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it—such things as merely communicating his thoughts to them, telling or promising them something, whether what he says is true and sincere or untrue and insincere (*veriloquium aut falsiloquium*); for it is entirely up to them whether they want to believe him or not.⁷⁸

In a footnote to this statement, Kant elaborates that intentionally telling an untruth is considered a lie “in the sense of *bearing upon rights*” when it deprives another of what is his, such as “the false allegation that a contract has been concluded with someone.”⁷⁹

Therefore for Kant, communication to others is presumptively authorized even if it involves insincere falsehoods so long as such communication does not affect another's external freedom. As has been argued, it is difficult to determine how such communication could affect another's external freedom apart from the limited protection afforded by defamation, contract, confidentiality and copyright.

Indeed, for Kant, a general concern for how others talk about an individual falls more directly within the realm of ethics than law. Consider Kant's discussion of what he calls defamation, which is closer to the sense of gossip that we are concerned with. Kant argues:

The intentional *spreading (propalatio)* of something that detracts from another's honor—even if it is not a matter of public justice, and even if what is said is true—diminishes respect for humanity as such, so as finally to cast a shadow of worthlessness over our race itself, making misanthropy (shying away

⁷⁸ *Ibid.* at 6:238.

⁷⁹ *Ibid.* at 6:238, emphasis in original.

from human beings) or contempt the prevalent cast of mind, or to dull one's moral feeling by repeatedly exposing one to the sight of such things and accustoming one to it. It is, therefore, a duty of virtue not to take malicious pleasure in exposing the faults of others so that one will be thought as good as, or at least not worse than, others, but rather to throw the veil of benevolence over their faults, not merely by softening our judgments but also by keeping these judgments to ourselves; for examples of respect that we give others can arouse their striving to deserve it. –For this reason, a mania for spying on the morals of others (*allogriepiscopia*) is by itself already an offensive inquisitiveness on the part of anthropology, which everyone can resist with right as a violation of the respect due him.⁸⁰

Kant therefore classifies defamation, understood here as malicious gossip, as a vice that violates the duty of respect that we owe to other human beings. However, such a violation concerns the violator's inner motivation: his failure is a failure to treat another as an end-in-itself. This is why the violation is a matter of the doctrine of virtue and not the doctrine of right. In other words, one can lack respect for another without violating her external freedom.⁸¹

However, Kant does argue that one of the duties of right is the duty of rightful honor, which he expresses as, “Do not make yourself a mere means for others but be at the same time an end for them.”⁸² One could argue that this duty would allow an individual, as a matter of right, to resist being treated as a means even if this treatment falls short of constituting a violation of external freedom. That is, one might have a privilege to resist treatment that involves a lack of respect even if one does not have a right to bring a claim against the disrespectful perpetrator. This privilege appears to be the basis for Kant's statement that we can resist the offensive inquisitiveness of others “with right.” That is, I can resist the prying of others and have no obligation to cooperate

⁸⁰ *Ibid.* at 6:466, emphasis added.

⁸¹ Kant would probably also accept that the effect that such gossip has on an individual's self-estimation is important as a matter of moral anthropology.

⁸² *Ibid.* at 6:236.

in their inquisitiveness. But if someone finds out something about me through some other means and spreads this gossip, I have no legal claim against them.

Does the mass media make a difference such that we could make sense of the requirement of “publicity”? It may be that the significance of the mass media, or other contemporary forms of information and communications technology, is that it makes the prying of others more effective, and individual efforts at resistance less effective. For example, suppose that I enter a restaurant and see my neighbour there with a man who is not her husband. Apart from taking steps to avoid detection, my neighbour has no legal claim to prevent me from telling others about it the next day. Suppose that instead I publish this information on a community bulletin board on the Internet. This is even a greater interference with my neighbour’s attempts to avoid detection, as it dramatically expands the number of people who can now “observe” her. Nonetheless, unless these practices somehow affect the nature of the relationship between myself and my neighbour, then it is difficult to see how an individual’s external freedom is violated. She has a privilege to resist; I do not wrong her to pry, even if in doing so I act unethically.

A Kantian approach to privacy therefore faces a number of significant hurdles in articulating an account of privacy. Moreover, many of these difficulties are analogous to those that arose in the previous discussion of harm. First, it is difficult to isolate a general concern for the wrong of gossip and curiosity apart from more specific wrongs such as defamation or breach of confidentiality. Second, any attempt to do so quickly encounters conflict with freedom of speech and a strong entitlement to freedom of speech is easier to ground than a strong entitlement to privacy. The result is that any kind of strong censure against the practices of gossip and curiosity, even when enhanced by the mass media,

must be a matter of moral but not legal concern. At most, a Kantian approach would endorse breach of confidentiality. This then gives a strong account of why one recurring version of the judicial “containment anxiety” regarding privacy is to in fact to either revert to a confidentiality paradigm or to resist a shift out of it in the first place.

5. Alternatives: Identity vs. Authenticity

The justificatory dilemma, as outlined in the previous section, leaves several options open. The first option is to follow Mill and create a justification for the American version of the tort of publicity given to private life, with its requirement of harm and its threatened engulfment by freedom of expression. The second is to follow Kant and only provide protection for breach of confidentiality, with its focus on the protection of confidential relationships rather than a particular category of information. Each of the first two options has costs, because each, in its own way, considerably narrows the range of privacy claims that the law is able to protect. The third option is to reject both horns of the dilemma. Rather than using the justificatory dilemma as a means to narrow privacy protection, we can use it to shed light on the nature of what I have been calling the emerging “privacy impulse”. In other words, attention to the justificatory dilemma can help elucidate a definition of privacy that is neither vague nor equivocal.

The most important thing that the justificatory dilemma tells us is that we cannot understand violations of privacy in terms of either coercion or harm. One way to re-envision privacy’s relation to harm or coercion is to argue that privacy is an important *condition* for autonomy but is nonetheless conceptually distinct from the individual

liberties that are seen to secure freedom in a liberal democracy. Thus, for example, Beate Rössler argues that:

If we consider the *telos* of freedom to be autonomy and thus the possibility of asking oneself what sort of person one wants to be and how one wants to live, and if civil liberties guarantee just this (within the well-known limits), it is clear that – when it comes to the question of how one would like to live – violations of privacy *restrict or tie a person down* in a way that contradicts the spirit of civil liberties demanded and secured, but that for a variety of reasons is not or cannot be prevented by the civil liberties themselves.⁸³

On such a view, privacy protects individuals in their ability to reflect on the kind of person they would like to be and on how they would like to live.⁸⁴ In this sense, privacy protects aspects of one's self-relationship, one's ability to assess and appraise one's choices and live an authentic life. What is promising about this approach is that it provides us with a way of understanding the significance of being insulated from the gossip and curiosity of others, and its attendant social pressure, in a manner that relates directly to the value of autonomy without needing to establish that violations of privacy are themselves direct violations of autonomy.

Although helpful, this approach nonetheless faces difficulties in justifying a private law right to privacy, particularly of the kind at issue in the publication of private facts cases.⁸⁵ For example, Rössler views surreptitious surveillance as a paradigmatic violation of informational privacy.⁸⁶ The problem with such practices, on her account, is that they result in an individual acting upon false assumptions regarding what others

⁸³ Beate Rössler, *The Value of Privacy* (Cambridge, U.K.: Polity Press, 2005) at 73.

⁸⁴ *Ibid.* at 50-73. I have adopted an account similar to this as helpful to understand some aspects of privacy. See Austin, *supra* note 45. See also Reiman, Jeffrey H. "Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future." (1995) 11 *Santa Clara Computer & High Tech. L. J.* 27.

⁸⁵ Rössler is not making a claim about a legal right to privacy and argues that her understanding of privacy still permits one to draw further distinctions between legal, moral and conventional claims to privacy. *Ibid.* at 75.

⁸⁶ *Ibid.* at 116-117.

know about her, compromising her ability to engage in authentic behaviour towards others. However, even if one accepts this account, it does not show why the publication of private facts is problematic: prior to their publication, one acts under the true assumption that such facts are not generally known and after their publication, one acts under the true assumption that such facts are now generally known. Indeed, the problem of false assumptions can be generally remedied through widespread lack of privacy as much as through respect for privacy norms.

However, Rössler has a slightly different rationale for why *known* surveillance is problematic. When an individual knows that she is being observed, then she adapts her behaviour accordingly. This, according to Rössler, interferes with authenticity: one acts in ways one would not have acted if unobserved. Again, even if one accepts this account, it still does not show why the publication of private facts is problematic unless one can also establish that such publication, because of its predictability or prevalence, effectively amounts to a kind of anticipated surveillance that would have the effects Rössler points to.⁸⁷ Individual instances of publication generally do not have these features and so it is difficult to see how they involve an interference with authentic behaviour. Presumably, Naomi Campbell, in attending Narcotics Anonymous, was acting authentically. The subsequent publication of the details of this does not change the character of her original action. Part of the difficulty here is that if privacy protects a kind of self-relation with respect to some behaviour, then it is unclear how publicity that is unanticipated and which occurs after the fact could retroactively alter this self-relation, thereby rendering

⁸⁷ This analysis might catch a case like *Von Hannover v. Germany* (2005) 40 EHRR 1, where the European Court of Human Rights found the publications of photographs of Princess Caroline involved in a number of everyday activities to be a violation of her privacy under Article 8 of the European Convention on Human Rights, but in doing so stressed factors such as “a climate of continual harassment” that such photos induced in the particular circumstances (¶59).

the behaviour inauthentic.

Another version of the authenticity thesis is one that I have put forward in the past: in presenting yourself to others, such as when in public, your presentation is governed by the norms applicable in that particular context. We require some respite from this if we are to fully affirm those aspects of our thoughts and identity as in fact ours and not a simple response to the desire to conform to these norms of presentation.⁸⁸

Although this can account for some of our intuitions regarding why privacy is valuable, and show why a society of widespread surveillance is problematic, it also faces difficulties in accounting for the legal right to privacy as we find it in tort law. It is one thing to argue that we need some respite from the public gaze in order to forge an authentic self and quite another to assert that the particular gaze of a particular other in fact interferes with this project of authenticity.

A better account of privacy that avoids both the justificatory dilemma and the difficulties inherent in an authenticity account is one that understands privacy as a claim to protect the conditions of self-presentation rather than as a claim to insulate us from the social pressure that might result from a particular self-presentation.⁸⁹ By conditions of self-presentation I mean one's capacity for identity construction where identity is understood in terms of the "self" that one presents to others rather than any idea of a "true," "inner," or authentic self. Indeed, this "self" that is presented may or may not be different in relation to different "others," may or may not be constituted through these relationships, and may or may not vary over time and across contexts in contradictory

⁸⁸ Austin, *supra* note 45 at 146.

⁸⁹ The language of "self-presentation" involves an implicit reference to E. Goffman, *The Presentation of Self in Everyday Life* (New York: Doubleday, 1959). See also J. David Velleman for an account of how the idea of self-presentation is linked to the experience of shame: "The Genesis of Shame" (2001) 30 *Phil. & Pub. Aff.* 27.

ways. In short, this is a very “thin” notion of identity that focuses simply on one’s ability to control how one presents oneself to others. Importantly, the focus is on the *self*-presentation aspect, and not on how this presentation is received or dealt with by the intended audience, or on the social pressure that others may bring in relation to particular presentations.

This provides a potentially promising route out of the justificatory dilemma. Liberal justifications for rights based upon notions of either harm or coercion remain neutral with respect to the particular ends of individuals affected. Indeed, this is consistent with a general view of the common law, and the role of the courts, whereby the common law protects a realm of individual freedom, rather than promotes a particular vision of the good. Because of this, private law discussions often proceed in abstraction from the particularities of any individual’s actual identity, including their beliefs, desires and needs. Nonetheless, this does not mean that the law should be unconcerned with an individual’s *capacity* to construct his or her identity. Indeed, one could argue that liberal accounts of rights either presuppose or at least are strongly compatible with the idea that individuals have an identity and that individuals have the capacity to participate in its construction. The idea of identity at stake here is not my own idea of myself resulting from a process of self-reflection but rather the “public” persona that I present to others (and which may have multiple facets, varying with the different contexts and “audiences” that might be germane to my life). One can, in fact, be concerned about an individual’s capacity for identity-formation in this sense while remaining indifferent to the question of whether any particular identity created exhibits the right kind of self-relation that renders it “authentic”. Although identity, on this understanding, is always constructed in relation

with, and to, others, it is problematic from the perspective of liberalism to posit that this identity is *fully* constructed by others. Therefore, just as the claim that one has complete self-sovereignty over identity is implausible, so is the claim that one has no role in its creation. There must be some capacity to participate in the construction of one's identity, some ability to determine whether some elements are disclosed to others, who those others are, and in what circumstances. This is one's "self-presentation" and privacy rights can and should protect this capacity.⁹⁰

There is therefore a clear justification for why the law should be concerned to protect the conditions of one's self-presentation. However, how does the publication of information undermine one's self-presentation?

Consider the following two examples. First, suppose that you tell another academic colleague, "A was invited to visit Yale." You have disseminated information about A to another colleague, but few of us would consider this gossip. Contrast this with a second scenario, in which you instead tell your colleague, "A is having an affair with B." Now you have disseminated information about A to another colleague and most of us would consider this to be gossip. The difference between the two scenarios is that in the second you have passed along information that A would likely not want other professional colleagues to know about. It is in this sense "private" where "private" simply refers information that one would not want to be part of one's self-presentation to a particular audience. In contrast, in the first example it is unlikely that A did not want her

⁹⁰ There is some emerging legal scholarship that looks at the relationship between privacy and identity in a manner that recognizes the relational aspect of identity rather than making an identity simply a matter of one's own view. For example, Brian C. Murchison proposes that the American public disclosure action rest on a concept of privacy as "liberty to develop character through close, dialogic relationships with others." See "Revisiting the American Public Disclosure Action" in Andrew T. Kenyon and Megan Richardson, eds., *New Dimensions in Privacy Law: International and Comparative Perspective* (Cambridge: Cambridge University Press, 2006) at 55.

work colleagues to know that she had been invited to visit Yale even if she had not yet told them. The difference between the two examples— what makes the second gossip and the first merely the dissemination of social knowledge—is the fact that one involves “private” information whereas the other does not. Moreover, we can understand what “private” means through reference to the idea of self-presentation rather than some inherent features of the information itself or the delineation of a “private sphere.” For example, the things that we conventionally label “private” in relation to our professional lives are the things that most of us would not want to be part of our self-presentation in a professional context.

Nonetheless, the dissemination of private information does not necessarily imply a *violation* of privacy. If privacy is a claim to protect the conditions of self-presentation, then a violation of privacy will only occur when the dissemination of private information also undermines one’s capacity for self-presentation. It is not the case that simply passing along information about A that she would not wish to pass along undermines her own self-presentation to others. As Schoeman helpfully observes:

We surely invade a colleague’s privacy if we announce at a meeting that she and our secretary are having an affair. Norms of privacy make this sort of disclosure unconscionable. Norms of privacy, however, do not make it seem as serious, or even at all serious, if we simply privately relate the same information to each person in the department. What we mean by privacy, then, or invading a person’s privacy, is not the fact of disclosing personal information to a variety of people without the consent of the object of discourse, but the means by which the private information is distributed. Thus, characterizations of gossip as revelation are incomplete or misleading. We must differentiate dissemination from publication. Publication means dissemination plus the conversion of a matter that is personal into a matter that is “open” or acknowledges as a “public fact.”⁹¹

For Schoeman, the significance of “public facts” is that they bring with them a set of

⁹¹ Ferdinand Schoeman, “Gossip and Privacy” in Robert F. Goodman & Aaron Ben-Ze’ev, *Good Gossip* (Lawrence, Kansas: University of Kansas Press, 1994) 72 at 81.

norms whereby it is appropriate for others to hold you accountable for such facts and to use social pressure to do so. Because gossip operates “behind-the-back”, and does not deal with public facts it “permits a person to maintain a public face” insulated from this pressure.⁹² Placed in terms of an account of privacy as protecting the conditions of self-presentation irrespective of any attendant social pressure, we can say that the dissemination of “private” information only affects one’s self-presentation when it becomes a “public fact.” For example, upon “publication” that A is having an affair with B, A has little choice but to make this information part of her self-presentation, or to revise some element of her self-presentation to reflect this. Unlike in the case of the colleague who knows about the affair but does not let on that he knows, she can no longer “save face” or maintain her original self-presentation.⁹³

We can see the difference that the “publication” requirement makes by re-examining *Campbell*. Naomi Campbell did not want to disclose to the public information, either of a general or specific nature, regarding her treatment for drug addiction. Because of this, we can say that the Daily Mirror disseminated “private” information. The salient distinction is not between public and private spheres of life, but rather between the types of audiences to which Campbell did and did not want to present this aspect of her self. However, although this information is private in relation to the general public, its dissemination is only a violation of privacy upon “publication.” The significance of publication is that once published, Campbell has little choice but to make this information part of her self-presentation, or to revise some element of her self-presentation to reflect or contest this. What she cannot do is “save face” and carry on as if nothing happened.

⁹² Ibid.

⁹³ This can also explain why so many people feel shame upon such disclosures. As Velleman argues, the experience of shame is closely linked to one’s inadequacy in one’s capacity for self-presentation.

There may of course be justifications for this violation of her privacy and, indeed, in this case all of the justices agreed that the Daily Mirror was entitled to set the record straight regarding the fact that Campbell was addicted to drugs since she had publicly claimed that she was not. One could argue that if we decide to present some aspect of ourselves to a particular audience then that audience is entitled to “pry” in order to determine if those aspects are in fact accurate. The point is that we can understand the nature of the privacy violation at issue without reference to a general idea of a “private” sphere distinct from the public, or ideas of confidentiality, or ideas of harm.

This analysis of privacy as protecting the conditions of self-presentation can also show why there was a privacy violation at stake in the *Hoskings* case and why the New Zealand Court of Appeal should not have so easily dismissed the idea of privacy in “public.” The capacity for self-presentation of children as young as the Hosking twins is, of course, limited. However, we can accept the parents’ presentation of them as a reasonable proxy and agree that in pushing her children in a stroller in public, Mrs. Hoskings presents her children to the people who are in that public place. However, she does not necessarily choose the audience—because it is a public place, others are entitled to be physically present and their observation is incidental to this. Therefore from the descriptive fact of being in “public” one cannot infer the normative implication that Mrs. Hoskings would have chosen to present her children in this way to the audience of a particular publication who might view a photo of them. Because it forces a new audience upon her, it undermines her capacity for her own, and her childrens’, self-presentation. Moreover, unlike the people she meets while in a public place, the audience of a particular publication lacks an immediate justification for their observation of her and her

children.

This is not to say that there are no compelling justifications for the dissemination of private information through “publication”. There may be many justifications for what would otherwise be privacy violations. In particular, it seems reasonably clear that if you have to interact with a person in a particular context that you are entitled to information about the person that is relevant to that interaction—even if that person would not wish you to have it. The demands of others can and do limit individual claims to control over self-presentation. We might therefore claim: we all have the ability to talk about other people behind their backs and to talk in front of their faces about things that are relevant to our relationship. This suggests several conclusions regarding the relationship between privacy and freedom of expression. First, freedom of expression does not trump privacy and privacy does not trump freedom of expression. Second, even those these rights might be in tension in particular factual circumstances, they are not in fundamental opposition: both freedom of expression and privacy understood in terms of one’s capacity for self-presentation protect expressive activity.

Even if “publication” is generally necessary, is it always necessary in order to find a violation of privacy? For example, it might be that your self-presentation is affected by the dissemination of private information even in the absence of publication if your reputation is altered to such an extent that people interact with you as if you are a different person than the “self” you present. You then have no capacity to present yourself as other than this person even though in some sense this gossip retains its behind-the-back quality. The difficulty for ascribing tort liability in such a situation would lie in identifying a wrongdoer. That is, each individual who participates in the

gossip does not violate privacy merely through the dissemination of “private” information although the cumulative effect of this might be to undermine one’s capacity for self-presentation. Perhaps if the information is of such a nature that one could reasonably foresee such effects of further dissemination then it is a privacy violation even without meeting the “publication” requirement. The American tort of giving publicity to private facts does not foreclose this possibility.⁹⁴

Privacy understood as a claim to protect the conditions for self-presentation is therefore promising in that it provides a definition of privacy that is not vague and does not rely upon appeals to a “private sphere” that is distinct from a “public sphere.” Furthermore, it provides a compelling justification for why legal liability should follow from the publication of what would otherwise be gossip. In this way it responds to both the definitional and justificatory dilemmas regarding the private law right to privacy.

6. Conclusions

Although there is an emerging consensus regarding the need for private law protection for privacy interests, at least in the context of the publication of private facts, this paper has argued that the resulting jurisprudence exhibits a number of important tensions. Many of these revolve around the question of whether there needs to be a requirement of harm, whether “private” refers to a category distinct from “confidential,” and the role played by freedom of expression. This paper has argued that the tensions in

⁹⁴ “It remains to be seen whether a disclosure not equivalent to the giving of publicity will be actionable when the obtaining of the information was not tortious in character.” American Restatement (Second) of Torts § 652 D.

the case law are not best understood in terms of the “privacy impulse” that underpins this emerging consensus but rather the “containment anxiety” that motivates courts to seek strong limits upon the scope of protection provided. In turn, this “containment anxiety” is best explained through reference to the courts looking for either the kind of harm or the kind of coercion that could justify the imposition of a *legal* obligation to respect another’s privacy. In this way, the “privacy impulse” surfacing in the cases is undercut by a justificatory dilemma.

In response to this justificatory dilemma, this paper has argued that the right to privacy does not protect one against harm or coercion. Instead, it protects one’s identity where this is understood in terms of one’s capacity for self-presentation. Not only does this provide a compelling justification for the imposition of legal liability in contexts such as the publication of private facts cases, but it also provides a clear definition of privacy.

Such an account could potentially help courts to understand the connections between various types of privacy claims, providing more credence to the idea of a “high level principle” of privacy that does in fact have an accessible conceptual core. Indeed, an account of privacy as protecting the conditions for self-presentation has the potential to unite the four branches of the American tort of invasion of privacy. Apart from the publication of private facts branch, the law also provides relief against false-light advertising, misappropriation of name or likeness, and intrusions upon seclusion. Despite Prosser’s influential argument that these four branches in fact protect four separate interests, one could argue that the four branches in fact protect against four different kinds of violations of one’s capacity for self-presentation.⁹⁵ For example, publishing an advertisement that indicates an endorsement of a product puts words in the plaintiff’s

⁹⁵ William L. Prosser, “Privacy” (1960) 48 Cal. L. Rev. 383.

mouth that he or she has not chosen. Surely this is the most basic sense in which one has a capacity for self-presentation—to choose what one wishes to express and to whom. This capacity is also undermined when another “appropriates” one’s identity and uses it for an unconsented-to purpose. Similarly, intrusions upon seclusion change the audience of one’s self-presentation against one’s wishes. Such an account might also provide the basis upon which to relate the tort of invasion of privacy to statutory “privacy” regimes modeled upon fair information practices and which generally provide individuals with rights relating to the collection, use and disclosure of their personal information—a set of interests that commentators increasingly discuss in terms of protecting an individual’s “digital persona.”⁹⁶

An understanding of privacy in terms of the protection of the conditions for self-presentation, and its relationship with various types of legal regimes purporting to protect privacy, obviously requires much more elaboration. However, the claim here is that such an account is not only compatible with liberal justifications for legal rights but might help us understand a wide range of privacy claims in a manner that is difficult if we remain focused on definitional difficulties, or traditional analyses of harm or coercion. In this way, moving beyond the seeming impasse of the definitional dilemma regarding privacy and examining what I have been calling the justificatory dilemma provides not just a more compelling analysis of the “containment anxiety” present in the cases but also shape and definition to the “privacy impulse” that is emerging.

⁹⁶ See e.g., Roger Clarke, “Information Technology and Dataveillance,” in C. Dunlop and R. Kling (eds.), *Computerization and Controversy: Value Conflicts and Social Choices* (Boston: Academic Press, 1991); Daniel J. Solove, *The Digital Person: Technology and Privacy in the Information Age* (New York: K New York University Press, 2004).