CHAPTER 3
MEANING, NATURE AND SCOPE OF RIGHT TO PRIVACY

3.1 Introduction

The researcher in the previous Chapter discussed the historical perspectives of the concept of ‘Privacy’. In the Chapter, the researcher found that the concept of ‘Privacy’ has its historical roots in various anthropological and sociological studies about different cultures and societies. The anthropologists studied different cultures, and observed that such societies protect their privacy through concealment, seclusion, or by restraining strangers’ accesses to their rites and ceremonies. However, the concept of ‘Privacy’ varies from time to time, society to society, culture to culture, and community to community. Irrespective to the variation in its extent, each section of our society gives value to such sacred concept. While discussing the historical origins, many writers also noticed the roots of the concept of ‘Privacy’ in the past well-known philosophical discussions. For example, Aristotle’s differentiation of public and private sphere in a city-state is one of the earliest philosophical discussions. In the state of nature, as John Locke said, nobody had exclusive rights to the earth and other natural resources. People had common control over the property. However, each person had a right to his own person and a right to self-preservation. Moreover, an individual could make his own private property, distinct from the common property, by doing labour.1

Another example of a distinction between public and private in philosophical literature is evident in John Stuart Mill’s On Liberty. He asserted his famous ‘harm principle’ and said that the only purpose for which power can be rightly exercised over any member of a civilized community, against his will, is to prevent harm to others.2 In doing so, he focuses on that realm of activity where one’s behavior affects others, and where government may intervene to prevent harm, namely a sphere of action that is open to public scrutiny. This realm is distinguished from the sphere of actions that affect oneself only, or if they affect others, only with their free, voluntary, and undeceived consent. This latter sphere of activity, self-regarding actions, is the arena where governmental or social interference is unjustified, and thus this sphere of action is

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not legitimately open to public concern and is in this sense private. J.S. Mill said that the individual is sovereign over himself, over his own body and mind.

Moreover, in the furtherance of the recognition to the concept of ‘Privacy’, legal discussion was also started with the article entitled ‘Right to Privacy’ published in Harvard Law Review in the year of 1890. The authors of the article were Samuel Warren and Louis Brandeis. They really initiated a debate in the legal field, which culminated into the constitutional recognition to the ‘right to privacy’ in 1965.

Indeed, Ferdinand Schoeman observed:

[D]espite the fact that privacy has been identified by contemporary philosophers as key aspect of human dignity, or alternatively as something even more basic than rights to property or than rights over one’s own person, there was no major philosophical discussion of the value of privacy until the late 1960s.

Therefore, almost all of the philosophers are agreed on the universal value of the concept of ‘Privacy. However, they have the divergent viewpoints regarding the definition of ‘Privacy’. It has also been said that because individuals' understandings and experiences of privacy vary by socio-historical contexts, privacy is difficult to define and even more challenging to measure.

The literature on privacy can be divided into two main categories i.e. reductionism and coherentism. By doing this, the conception of ‘privacy’ can be easily understood. Reductionists are generally critical of privacy, while coherentists defend the coherent fundamental value of privacy interests. Ferdinand Schoeman (1984) introduced somewhat different terminology which makes it easier to understand this distinction.

In order to explain it, Ferdinand Schoeman stated:

[T]here is something fundamental, integrated, and distinctive about the concerns traditionally grouped together under the rubric of

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4 supra note 2 at 14.

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“privacy issues.” In opposing this position, some have argued that the cases labeled “privacy issues” are diverse and disparate, and hence are only nominally or superficially connected. Others have argued that when privacy claims are to be defended morally, the justifications must allude ultimately to principles which can be characterized quite independently of any concern with privacy. Consequently, the argument continues, there is nothing morally distinctive about privacy. I shall refer to the position that there is something common to most of the privacy claims as the “coherence thesis.” The position that privacy claims are to be defended morally by principles that are distinctive to privacy I shall label the “distinctiveness thesis.”

He further continued to say:

Theorists who deny both the coherence thesis and the distinctiveness thesis argue that in each category of privacy claims there are diverse values at stake of the sort common to many other social issues and that these values exhaust privacy claims. The thrust of this complex position is that we could do quite well if we eliminated all talk of privacy and simply defended our concerns in terms of standard moral and legal categories.

The theorists, who are against the coherent and distinctive characteristic of ‘Privacy’, may be referred to as reductionists. They do not consider privacy as a separate concept. They said that there is nothing coherent, distinctive or illuminating about privacy interests. Whereas, another category of theorists believe in the fundamental, distinctive and coherent characteristics of various claims that have been called privacy interests. Those who endorse this view may be called coherentists. Nevertheless, it is important to recognize that coherentists have quite diverse, and sometimes overlapping, views on what it is that is distinctive about privacy and what links diverse privacy claims.

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9 Supra note 6 at 5.
10 Ibid.
3.2. Critiques of Right to Privacy

3.2.1 Reductionists’ Viewpoints on Right to Privacy

Since the time of the original debate about privacy there have been “reductionists” who argue that there should not be a distinct legal right to privacy, i.e., that the right to privacy derives from other rights – the rights to property, to liberty, or over one’s person – and is therefore superfluous. During the original debate itself, reductionist legal practitioners and scholars held, with respect to the cases then at issue, either that the existing law of property and contract could provide legal recourse or that no legal right of the plaintiffs had been violated.\footnote{Amy Peikoff, No Corn on this Cobb: Why Reductionists Should be All Ears for Pavesich, 42 Brandeis L.J. 751, 774-83 (2004). Cited in Amy L. Peikoff, "Beyond Reductionism: Reconsidering the Right to Privacy," N.Y.U. Journal of Law & Liberty (Vol. 3:1 2008), 1-47, at 3. Available at \url{http://www.law.nyu.edu/ecm/dh/groups/public/@nyu_law_website_journals_journal_of_law_and_liberty/documents/ecm_pro_060963.pdf} accessed on November 11, 2012, at 5:00 p.m. IST.}

William Prosser and Judith Jarvis Thomson, as reductionists, took the concept of ‘privacy’ in a very limited sense. Prosser analyzed many cases to understand ‘right to privacy’. He found no coherence in the cases he examined. Finally, he observed that these cases fall into mainly four distinct and separate torts: intrusion, public disclosure of private facts, false light, and appropriation. Prosser said:

\[ \text{The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except each represents an interference with the right of the plaintiff ‘to be left alone.'} \]\footnote{William L. Prosser, “Privacs.” 48 Cal. L. Rev. 383, 389 (1960).}

Brandeis and Warren thought that privacy represented one coherent and distinctive value. Whereas, Prosser regards it as a complex of different interests, themselves like values the law seeks to protect generally and thus not particularly distinctive in function.\footnote{Supra note 6 at 17.}

Refusing to give special position to the ‘right to privacy’, Judith Jarvis Thomson in her arguments said:

\[ \text{The right to privacy is itself a cluster of rights, and that it is not a distinct cluster of rights but itself intersects with the cluster of} \]
In order to support her arguments, she gave number of examples. For example, if someone owns a picture, he or she is vested with a cluster of rights. The cluster includes both positive as well as negative rights in respect of the picture. It means that if the owner has a right to look at the picture, he or she can also claim of right to not be looked at the picture. Similarly, she gave an example of an opera singer. The opera singer may sell her right to listen to people. But where she doesn’t want to be listened, then her ‘right to not be listened’ gets violated if anybody listen her unlawfully.

According to Thomson, the ‘right to not be looked at’ is both one of the rights which the right to privacy consists in and also one of the rights which property-ownership consists in. Again, the ‘right to not be listened to’ is both one of the rights which the right to privacy consists in and also one of the rights which the right over the person consists in. Thomson suspected that there aren’t any rights in the right to privacy cluster which aren’t also in some other cluster. And the right to privacy is everywhere overlapped by other rights. To support her suspicion, she discusses more instances. She doesn’t think that her privacy gets violated in a case where neighbours cook foul-smelling stuff. But even if it violates any right, then it is not her ‘right to privacy’ rather it is her ‘right to be free of annoyance in her house’. Similarly, in case of installation of loudspeakers in all buses and subways, Thomson said that it would be violation of her ‘right to be free of annoyance in public places’ and not of any ‘right to privacy’. Moreover, she suggested celebrities to claim their ‘right to be free of annoyance in public places’ against photographers and crowds. Judith Thomson gives another interesting example to distract us from the ‘right to privacy’. It is as follows:

A state legislature makes it illegal to use contraceptives. Do they violate the right to privacy of the citizens of that state? No doubt.

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16 Id., at 299.
17 Id., at 304.
18 Id., at 306.
19 Id., at 310.
20 Ibid.
21 Id., at 311.
22 Ibid.
certain techniques for enforcing the statute (e.g., peering into bedroom windows) would be obvious violations of the right to privacy; but is there a violation of the right to privacy in the mere enacting of the statute in addition to the violations which may be involved in enforcing it? I think not. But it doesn’t matter for the simplifying hypothesis if it is: making a kind of conduct illegal is infringing on a liberty, and we all of us have a right that our liberties not be infringed in the absence of compelling need to do so.\textsuperscript{23}

Ultimately, she proposed that if every right in the right to privacy cluster is also in some other right cluster, there is no need to find out that common right in the right to privacy cluster. It means that it is easy to explain a right in the cluster without even mentioning the right to privacy. Finally, she claimed that the right to privacy is ‘derivative’ in this sense. Indeed, the wrongness of every violation of the right to privacy can be explained without ever once mentioning it.\textsuperscript{24}

However, many authors have criticized the Thomson’s viewpoints. For example, Thomas Scanlon emphasized on the fact that ‘cluster of property rights’ and ‘rights over the person’ had been derived from the ‘right to privacy’. He believes in the unique and special status of ‘privacy’. Indeed, he said:

\begin{quote}
[F]or us, ownership is relevant in determining the boundaries of our zone of privacy, but its relevance is determined by norms whose basis lies in our interest in privacy, not in the notion of ownership.\textsuperscript{25}
\end{quote}

3.2.2 Posner's Economic Theory of Privacy

Richard A. Posner considered ‘Privacy’ as a withholding or concealment of information. He said that since the study of information has become an important field of economics, every economist is interested to know such control on private information.\textsuperscript{26} He argued in his two skeptical essays that kind of interests protected under are nondistinctive. He further argued that

\begin{footnotes}
\textsuperscript{23} Id., at 312.
\textsuperscript{24} Id., at 313.
\textsuperscript{25} Thomas Scanlon, “Thomson on Privacy,” Philosophy & Public Affairs, Vol. 4, No. 4 (Summer, 1975), 315-322, at 318. Available at \url{http://www.jstor.org/stable/2265076} accessed on November 12, 2012 at 05:34 p.m. IST.
\textsuperscript{26} Richard A. Posner, “The Right of Privacy,” 12 Ga. L. Rev. 393 1977-1978, 393-422, at 393. Available at \url{http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1021&context=lectures_pre_arch_lectures_sibley} accessed on November 24, 2012, at 05:00 p.m. IST.
\end{footnotes}
the ways, which are being used to protect privacy, are economically inefficient. So he advised to protect only economically based legal right of privacy. He said:

[T]he essential elements of an economically based legal right of privacy: (1) Trade and business secrets by which businessmen exploit their superior knowledge or skills would be protected. (The same principle would be applied to the personal level and would thus, for example, entitle the social host or hostess to conceal the recipe of a successful dinner.) (2) Facts about people would generally not be protected. My ill health, evil temper, even my income would not be facts over which I had property rights, though I might be able to prevent their discovery by methods unduly intrusive under the third category. (3) Eavesdropping and other forms of intrusive surveillance would be limited (so far as possible) to the discovery of illegal activities.\(^{27}\)

With respect to information, according to Posner, privacy should only be protected when access to the information would either eliminate the communication or reduce its value. He cited an example as follows:

A good example of legislative refusal to respect the economics of the privacy problem is the Buckley Amendment, which gives students (and their parents) access to their school records. The amendment permits students to waive, in writing, their right to see letters of recommendation, and most students do so. They do so because they know that letters of recommendation to which they have access convey no worthwhile information to the recipient. The effect on the candor and value of communication is the same as would be that of a rule that allowed C to hear A and B’s conversations about him. Throwing open faculty meetings or congressional conferences to the public has the identical effect of reducing the value of communication without benefitting the

public, for the presence of the public deters the very communication they want to hear.\textsuperscript{28}

At the same time, Posner is in favour to provide greater protection to private business information than the personal information. He reasoned that the secrecy is an important method of appropriating social benefits to the entrepreneur who creates them, while in private life it is more likely simply to conceal legitimately discrediting or deceiving facts.\textsuperscript{29}

Richard A. Posner observed that people conceal information about themselves because they want to manipulate or mislead others for some private economic gains. One’s discrediting information, if gets disclosed, it could reveal many frauds.\textsuperscript{30} Therefore, it is beneficial for consumers as well for society at large. Whereas, nondiscrediting information does not change others’ bases for interactions with the person, and thus is not socially useful.

3.2.3 Richard Wasserstrom in ‘Privacy: Some Arguments and Assumptions’

Richard Wasserstrom, being suspicious of ‘privacy’, suggests that not revealing information about oneself may be morally equivalent to deception and thus presumptively improper. He reviewed numerous rationales for valuing privacy. An individual hides those thoughts and acts which if get disclosed, may lead him or her to feel embarrassed or ashamed. Wasserstrom suggests that such individual should not accept this very notion because it makes him or her unnecessarily vulnerable. He said that we would be less vulnerable if we were to discover that others are similarly structured and that we are not uniquely defective or unusual. According to him, privacy encourages hypocrisy and deceit. If people were more comfortable with who they were as private beings, their personalities would become more integrated and they would come to feel less threatened and less pressured to present themselves as other than they really are.\textsuperscript{31}

3.2.4 Robert Bork’s View on ‘Privacy’

In 2012, Robert H. Bork supported Mitt Romney in the United States’ President’s election. Basically, he is a think tank of ‘conservative party’. Moreover, he favours judicial philosophy of ‘Originalism’.\textsuperscript{32} In his book, he strongly criticized constitutional right to privacy.

\textsuperscript{28} Id. at 26.
\textsuperscript{29} Id. at 25.
\textsuperscript{30} Id. at 21.
\textsuperscript{31} Supra note 6 at 29.
\textsuperscript{32} Originalism is a principle of Constitutional Interpretation. The principle emphasizes on the original meaning of the Constitution, and restricts the judiciary not to create or amend any law. The term ‘originalism’ was initially used by Paul Brest in his article entitled ‘The Misconceived Quest for the Original Understanding,’ which was published in Boston University Law Review in the year 1980. Later on, the philosophy of ‘originalism’ was increasingly
established by the Supreme Court in 1965. He argued that Justice William O. Douglas, in the decision of *Griswold v. Connecticut*, merely created a new right to privacy with no foundation in the Constitution or Bill of Rights. He said that the Supreme Court never clarified the scope of ‘privacy’, and a majority of justices protected privacy rights as per according their own personal will. And such invention of new right, as Bork said, showed us that the judges overstepped their bounds. Indeed, he said:

Justice Douglas’s majority opinion dealt with the case as if Connecticut had devoted itself to sexual fascism. “Would we allow the police to search the sacred precincts of marital bedroom for telltale signs of the use of contraceptives? The very idea is repulsive the notions of privacy surrounding the marriage relationship.” That was both true and entirely irrelevant to the case before the court. Courts usually judge statutes by the way in which they are actually enforced, not by imagining horrible events that have never happened, never will happen, and could be stopped by courts if they ever seemed to happen. Just as in *Skinner* he had treated a proposal to sterilize three-time felons as raising the specter of racial genocide, Douglas raised the stakes to the sky here by treating Connecticut as though it was threatening the institution of marriage. “We deal with a right of privacy older than the Bill of Rights- older than our political parties, older than our school system.” The thought was incoherent. What the right of privacy’s age in comparison with that of our political parties and school system had to do with anything was unclear, and where the “right” came from it not from the Bill of Rights it is impossible to understand. No court had ever invalidated a statute on the basis of the right Douglas described. That makes it all the more perplexing...
that Douglas in fact purported to derive the right of privacy not from some pre-existing right or law of nature, but from Bill of Rights.

However, some conservatives like Harry Jaffa criticized Bork’s opinion. Jaffa attacked Rehnquist and Scalia and Bork for ignoring the doctrine of natural rights that is embedded in the Constitution.36

Moreover, it is pertinent to note some other facts about Robert H. Bork. President Reagan nominated Bork for Associate Justice of the Supreme Court on July 1, 1987. But his nomination ignited a very hot debate. Indeed, the day after Bork was nominated to the nation’s highest court, Sen. Edward M. Kennedy (D-Mass.) made a nationally televised speech on the Senate floor in which he declared:

Robert Bork’s America is a land in which women would be forced into backalley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens’ doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim of government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.37

During debate over his nomination, Bork’s video rental history was leaked to the press. Writer Michael Dolan, who obtained a copy of the hand-written list of rentals, wrote about it for the Washington City Paper, a local newspaper. Dolan justified accessing the list on the ground that Bork himself had stated that Americans only had such privacy rights as afforded them by direct legislation.38 The paper published the records likely in an attempt to embarrass Bork, but succeeded more in scaring Congress into enacting protective legislation. Therefore, in reaction to Bork’s tapes, the Video Protection Privacy Act of 1988 was passed.39

38 http://en.wikipedia.org/wiki/Robert_Bork accessed on December 02, 2012, at 05:33 p.m. IST.
39 http://epic.org/privacy/vppa accessed on December 02, 2012, at 05:40 p.m. IST.
3.2.5 Edmund Leach’s *A Runaway World* and Paul Halmos’ *Solitude and Privacy*

Preoccupation with privacy— in particular with the privacy of family relations— has been criticized by some writers, however, as an unhealthy feature of post-Renaissance bourgeois society. For example, Edmund Leach’s asserted:

> In the past, kinsfolk and neighbors gave the individual continuous moral support throughout his life. Today the domestic household is isolated. The family looks inward upon itself; there is an intensification of emotional stress between husband and wife, and parents and children. The strain is greater than most of us can bear. Far from being the basis of the good society, the family, with its narrow privacy and tawdry secrets, is the source of all our discontents.

Moreover, some Western Social Scientists consider privacy as an unhealthy obsession of contemporary liberal society. Philip Slater claims that an individual would feel highly isolated if he seeks more and more privacy.

Increasingly, Paul Halmos spoke of ‘a hypertrophied family devotion and ‘family insularity’, and has the view that the insistence on the privacy causes neurotic maladjustments. Liberal ideology postulates (and a market culture of possessive individualism creates) man as an egoistic isolated atom, unwilling and unable to participate in cooperative community projects because of his ruthless competitiveness:

> In our Western society, the basic pattern of living is rightly home centred; the daily and nightly retirement into solitude or the family circle shows up the only things which have remained concrete and tangible to modern man: his freedom in privacy and his belonging to the family circle. One lives one's life in the family and one has social contacts, makes social excursions, instead of the other way...

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round, that is, instead of living in society and withdrawing from it occasionally according to one's needs.43 Therefore, the social scientists argued that an excessive emphasis on the value of privacy produces social pathology rather than social health. The effects of too much privacy are very dangerous. For example, it may cause personal isolation, alienation, loneliness, antisocial behaviour, and the progressive withering of public-spiritedness.44

It has been proved that one cannot live in completion isolation. Similarly, an individual has to sacrifice some degree of his privacy in the society. It is so because of the fact that, while living together, individuals have to share common experiences, gain innumerable benefits, and accept certain common burdens. However, it is very necessary to balance the individual's claim to privacy against the community's claim to regulate conduct for the general good, against the claim of other individuals to exercise their legitimate rights, and against the individual's own need for participation in wider communities. Continuous adjustments will have to be made, and the balance between privacy and disclosure/ intrusion/publicity / participation/involvement will change as the circumstances and cultural norms of society change. Because there must inevitably be a large discretionary element in the adjudication of competing value claims, it is important that rational criteria be established for assessing the relative weight of the values involved. In the process of adjudication, the true value of privacy should not be diminished.45

3.2.6 H. W. Arndt’s Cult of Privacy

H. W. Arndt is also one of the critics of ‘privacy’. However, he admits that privacy serves useful and important social ends in certain spheres. For example, secrecy should be maintained between lawyer and his client (i.e. accused person), otherwise it would jeopardize the rights of the accused person. And it is very obvious that it is against the fair administration of justice. Similarly, secrecy is necessary in the relationship between doctor and patient. But, as Arndt argued, with these, and perhaps one or two other exceptions, insistence on secrecy inevitably provokes the suspicion that there is something to hide.46

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45 Id., at 20.
Arndt thinks that, apart from few exceptions, the cult of privacy has been designed to protect anti-social behavior of the people. He said that most of the laws, moral rules, and social taboos serve to protect individuals and society against anti-social acts.

He further said:

[The cult of privacy rests on an individualist conception of society, not merely in the innocent and beneficial sense of a society in which the welfare of individuals is conceived as the end of all social organisation, but in the more specific sense of "each for himself and the devil take the hindmost". The individualist in that sense will concede to others, as he will claim for himself, the right to fight for their interests, provided they keep to certain rules of the game: homicide and breach of contract are ruled out, secrecy and certain forms of sharp practice admitted. An individualist of this sort sees "the Government" where we might see "the public interest"; and this Government will appear to him often as no more than one antagonist in the battle of wits which is life-or business.]

3.2.7 The Feminist Critique of Privacy

It has been observed that many feminists argue against the darker side of privacy. They are of the view that the use of privacy has always been used as a shield to cover up domination, degradation and abuse of women and others. Catharine Mackinnon, a feminist, stated:

[The law of privacy treats the private sphere as a sphere of personal freedom. For men, it is. For women, the private is the distinctive sphere of intimate violation and abuse, neither free nor particularly personal. Men’s realm of private freedom is women’s realm of collective subordination.]

However, Anita Allen argues that MacKinnon cannot have meant what she said. As Anita Allen noticed, MacKinnon accepted that the experience of privacy of the sort that is protected by tort law can have value for women. Anita Allen recognized the fact that privacy can be a shield for...
abuse. However, she refused to reject privacy completely based on harm done in private. A total rejection of privacy makes everything public, and leaves the domestic sphere open to complete scrutiny and intrusion by the state. Yet women surely have an interest in privacy that can protect them from state imposed sterilization programs or government imposed drug tests for pregnant women mandating results sent to police, for instance, and that can provide reasonable regulations such as granting rights against marital rape.  

For feminists’ satisfaction, the State should take initiative to prevent the domestic abuse that used to be allowed in the name of privacy. At the same time, another challenge is the preventing the state from insinuating itself into all the most intimate parts of women’s lives.  

3.3 Views on the Meaning and Value of the Concept of ‘Privacy’

3.3.1 Privacy and Human Dignity

Samuel Warren and Louis Brandeis wrote:

[T]he intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Although Warren and Brandeis refer to aspects of privacy such as solitude and control over other’s access to one’s private thoughts, the real focus of their essay is the violation of privacy occasioned by the publication or public dissemination of information relating to the private domains of a person’s life.

The authors said that the recent inventions and business methods have alarmed the society to take initiatives for protecting the individual’s personality, and for securing the individual’s ‘right to be let alone’. They further mentioned about the misuses of technological features of the instantaneous photographs and newspaper enterprise which had invaded the

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51 Supra note 3 at 411. 
52 Id., at 412. 
54 Supra note 6 at 14. 
55 Supra note 53 at 195.
sacred precincts of private and domestic life\textsuperscript{56} and exceeded the bounds of propriety and
decency.\textsuperscript{57}

The authors cemented the basis of the ‘right to privacy’ on and individual’s right to let
alone and an individual’s inviolate personality.\textsuperscript{58} Warren and Brandeis argue for recognizing
right to privacy legally so that it would be well protected. They suggest that although various
strategies, including the laws of property, of copyright, of contract, and of breach of confidence,
have been employed in the past to protect privacy interests, the law should explicitly entitle
persons to determine the extent to which their thoughts, sentiments, emotions, and productions -
independent of their commercial or artistic value - become available to the world at large. The
point of a shift to explicit legal entitlement is to underscore that the law recognizes the moral and
spiritual integrity of individuals, as well as their material interest. The authors claimed of a
specific privacy interest, connected in a profound way with the recognition of human moral
character, and that for historical reasons this interest is more compelling at the present time than
it was in the past.\textsuperscript{59}

However, Warren and Brandeis’ article did receive strong criticisms from many authors.
As early as 1967, Harry Kalven argued that fascination with the great Brandeis trade mark,
excitement over the law at a point of growth, and appreciation of privacy as a key value have
combined to dull the normal critical sense of judges and commentators and have caused them not
to see the pettiness of the tort they have sponsored.\textsuperscript{60}

Harry Kalven argues that Warren and Brandeis leave their readers with no sense of what
kinds of publications are wrongful, except perhaps the over inclusive criterion that any
unauthorized reference to a person is a prima facie violation of that individual’s right to
privacy.\textsuperscript{61} Harry Kalven wrote:

\begin{quote}
[T]here is no effort to specify what will constitute a prima facie case; no
concern with how damages are to be measured; no concern other than to
dismiss actual malice, with what the basis of liability will be; and finally
there is the projection of a generous set of privileges but no effort to assess
\end{quote}

\textsuperscript{56} Ibid.
\textsuperscript{57} \textit{Id.}, at 196.
\textsuperscript{58} \textit{Id.}, at 205.
\textsuperscript{59} \textit{Supra} note 6 at 15.
\textsuperscript{60} Harry Kalven, Jr., Privacy in Tort Law—Were Warren & Brandeis Wrong?, 31 \textit{Law & Contemp. Probs.} 326, 328
(1966).
\textsuperscript{61} \textit{Supra} note 6 at 15.
whether they do not engulf the cause of action. And, of course, there is no hint that any but gentlemen will ever be moved to use the new remedy. Kalven suggested that had Warren and Brandeis limited themselves to making actionable those public disclosures that outrage the common sense of decency, one would then have had a comprehensible profile of what is wrongful publication. By not limiting themselves to such a threshold, according to Kalven, they show themselves insensitive to issues that people in fact find newsworthy, and to the importance of maintaining a free press.

William Prosser analysed all the decisions adopted in Warren and Brandeis’ formulation, and concluded that it did not represent one tort, but comprises:

- Four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, “to be let alone.”

Refusing to give any exact definition, Prosser described these four torts as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Prosser noted that Warren and Brandeis were concerned with the evils of publication only, and they did not consider any such thing as intrusion upon the plaintiff's seclusion or solitude. Prosser repudiates Warren and Brandeis by suggesting that privacy is not an independent value at all but rather a composite of the interests in reputation, emotional tranquility and intangible property. It has been noted that Warren and Brandeis were writing their normative views about what they felt should be protected under the rubric of privacy, whereas Prosser was describing

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62 Supra note 60 at 331.
63 Supra note 6 at 15.
64 Supra note 13 at 389.
65 Ibid.
66 Ibid.
what courts had in fact protected in the 70 years following publication of the Warren and Brandeis paper. Obviously, the descriptions given by them over privacy differ. Because the Supreme Court has been explicit in ruling that privacy is a central reason for Fourth Amendment protection, privacy as control over information about oneself has come to be viewed by many as also including protection against unwarranted searches, eavesdropping, surveillance, and appropriation and misuses of one's communications.68

Analyzing Warren and Brandeis’s article, Edward J. Bloustein asked himself about the basis of the wrong (which was claimed by the learned authors). Bloustein did not hesitate to mention that the learned authors were not as successful in describing the interest violated by publicity concerning private lives as in saying what it was not. And this explains, in part, the fact:

[T]hat after hundreds of cases enforcing Warren and Brandeis' 'right to privacy,' Dean Prosser, Harper and James, the Restatement of Torts, and other learned authorities predicate the right on bases expressly rejected by Warren and Brandeis.69

However, Bloustein relied on the statement in which the learned authors said that it was the principle of ‘inviolate personality’ which protected personal writings and personal productions, and prevented their publication in any form. Therefore, the rampant press would destroy individual dignity and integrity and emasculate individual freedom and independence. Bloustein took the principle of ‘inviolate personality’ to posit the individual's independence, dignity and integrity. Respect for individual dignity, personal autonomy and independence unifies the concept of privacy. The principle of ‘inviolate personality’ defines man's essence as a unique and self-determining being.70 Bloustein wrote:

[I]f this is so, Dean Prosser's analysis of privacy stands clearly at odds with 'the most influential law review article ever published,' one which gave rise to a 'new tort,' not merely to a fancy name for 'old torts.'71

Contrary to Prosser’s belief of tort cases involving ‘not one tort, but a complex of four,’ Bloustein believes that the tort cases involving privacy are of one piece and involve a single tort.

69 Supra note 67 at 162.
70 Id., at 163.
71 Ibid.
Bloustein continued to say that a common thread of principle binds the tort cases, the criminal cases involving the rule of exclusion under the fourth amendment, criminal statutes prohibiting peeping toms, wiretapping, eavesdropping, the possession of wiretapping and eavesdropping equipment, and criminal statutes or administrative regulations prohibiting the disclosure of confidential information obtained by government agencies. Bloustein argued that what distinguishes the invasion of privacy as a tort from the other torts which involve insults to human dignity and individuality is merely the means used to perpetrate the wrong.

Discussing Prosser’s four types of privacy rights, Bloustein argues that these cases involve an interference with individuality, an interference with the right of the individual to do what he will. The difference is in the character of the interference. In one category of cases, an individual’s human dignity gets affected by physical interference with his person, and in other cases it is being affected by physically intruding on personal intimacy and by using techniques of publicity to make a public spectacle of an otherwise private life. Bloustein further says that 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. Bloustein wrote about such an individual as follows:

\[\text{Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.}\]

Like Bloustein and like Warren and Brandeis before him, Stanley Benn argues that something basic to our notion of respect for persons is engaged when we explore the role privacy plays in human interaction. Benn suggests that a general principle of privacy might be grounded on the more general principle of respect for persons. According to Benn, ‘a person’ means a subject
with a consciousness of himself as agent, one who is capable of having projects, and assessing his achievements in relation to them.\textsuperscript{77} Stanley Benn continued to say:

\begin{quote}
[T]o conceive someone as a person is to see him as actually or potentially a chooser, as one attempting to steer his own course through the world, adjusting his behavior as his apperception of the world changes, and correcting course as he perceives his errors.\textsuperscript{78}
\end{quote}

Benn further explained his idea which is as follows:

\begin{quote}
[T]o respect someone as a person is to concede that one ought to take account of the way in which his enterprise might be affected by one's own decisions. By the principle of respect for persons, then, I mean the principle that every human being, insofar as he is qualified as a person, is entitled to this minimal degree of consideration.\textsuperscript{79}
\end{quote}

Benn mentions some close areas of privacy by explaining the liberal individualist tradition’s three personal ideals, i.e. the ideal of personal relations, the Lockian ideal of the politically free man in a minimally regulated society, and the Kantian ideal of the morally autonomous man, acting on principles that he accepts as rational.\textsuperscript{80} According to Stanley Benn, personal relations mean relations between persons that are considered valuable and important at least as much because of the quality of each person's attitude to another as for what each does to, or for, another.\textsuperscript{81} It is further said that all human relations involve some element, however small, of role-expectancy. As Benn argues, we structure our relations with others according to an understanding of what they are and what accordingly is due to them and from them.\textsuperscript{82} Explaining second personal ideal, i.e. of the free man in a minimally regulated society, Benn says that it is a way of life where, first, the average individual is subject only within reasonable and legally safeguarded limits to the power of others, and, second, where the requirements of his social roles still leave him considerable breadth of choice in the way he lives.\textsuperscript{83} The third personal ideal is that of the independently minded individual, whose actions are governed by principles that are his own. Benn describes such an individual as the man who resists social pressures to conform if
he has grounds for uneasiness in doing the conformist thing. In order to explain the need for privacy as a safeguard against conformism, Stanley Benn cites Hubert Humphrey who wrote:

We act differently if we believe we are being observed. If we can never be sure whether or not we are being watched and listened to, all our actions will be altered and our very character will change.

Therefore, Benn stresses on a closed environment which is open only to the trusted people, who do not reveal the individual's details to others. Of course, such closed environment is needed for preserving an individual's saneness.

Jeffrey Reiman says that Privacy is a social ritual by means of which an individual's moral title to his existence is conferred. Privacy is an essential part of the complex social practice by means of which the social group recognizes-and communicates to the individual-that his existence is his own. And this is a precondition of personhood. To be a person, an individual must recognize not just his actual capacity to shape his destiny by his choices. He must also recognize that he has an exclusive moral right to shape his destiny. And this in turn presupposes that he believes that the concrete reality which he is, and through which his destiny is realized, belongs to him in a moral sense.

Jeffrey Reiman stresses on the fact that privacy is essential to the creation and maintenance of 'selves'. Privacy is necessary where social practices mortify an individual's self by penetrating his private reserve. Reiman wrote:

The right to privacy, then, protects the individual's interest in becoming, being, and remaining a person. It is thus a right which all human individuals possess-even those in solitary confinement. It does not assert a right never to be seen even on a crowded street. It is sufficient that I can control whether and by whom my body is experienced in some significant places and that I have the real possibility of repairing to those places. It is a right which protects my capacity to enter into intimate relations, not because it

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84 Id., at 241.
86 Ibid.
88 Id., at 311.
protects my reserve of generally withheld information, but because it enables me to make the commitment that underlies caring as my commitment uniquely conveyed by my thoughts and witnessed by my actions.\textsuperscript{89}

3.3.2 Privacy and Control over Information

It is believed that the concept of ‘privacy’ has been narrowly construed by some authors who focus mainly on control over information about oneself. And such narrow views which were defended by Warren and Brandeis and by William Prosser are also endorsed by more recent commentators including Charles Fried and William Parent. According to Alan F. Westin\textsuperscript{90}, the functions of privacy in democratic societies can be grouped under the following headings: (a) personal autonomy (b) Emotional release (c) Self-evaluation and (d) Limited and Protected communication.\textsuperscript{90} Alan F. Westin defines Privacy as the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.\textsuperscript{91}

For William Parent, Privacy is the condition of not having undocumented personal knowledge about one possessed by others.\textsuperscript{92} William Parent maintains that ‘Personal information’ consists of facts which most persons in a given society choose not to reveal about themselves (except to close friends, family, etc.) or of facts about which a particular individual is acutely sensitive and which he therefore does not choose to reveal about himself, even though most people don’t care if these same facts are widely known about themselves.\textsuperscript{93} And these facts which persons choose not to reveal about themselves may be facts about health, salary, weight, sexual orientation, etc.

William Parent gives several reasons for valuing ‘privacy’. Firstly, if someone manages to obtain sensitive personal knowledge about an individual he acquires power over the individual. Such power could be misused against the individual. William Parent argues that the definite connection between harm and the invasion of privacy explains why we place a value on not having undocumented personal information about ourselves widely known. Secondly, the

\textsuperscript{89} Id., at 314.
\textsuperscript{90} Alan F. Westin, Privacy and Freedom, 32 (1967).
\textsuperscript{91} Id., at 7.
\textsuperscript{93} Id., at 270.
desire for privacy becomes more profound where individuals in a society have intolerable life
styels, habits, and ways of thinking that differ significantly from their own, and where human
foibles tend to become the object of scorn and ridicule. No one wants to be laughed at and made
to feel ashamed of himself. Thirdly, individuals desire for privacy out of a sincere conviction that
there are certain facts about them which other people, particularly strangers and casual
acquaintances, are not entitled to know.94

Personal information is documented, on Parent’s view, only when it belongs to the public
record, that is, in newspapers, court records, or other public documents. Thus, once information
becomes part of a public record, there is no privacy invasion in future releases of the
information, even years later or to a wide audience, nor does snooping or surveillance intrude on
privacy if no undocumented information is gained. In cases where no new information is
acquired, Parent views the intrusion as irrelevant to privacy, and better understood as an
abridgment of anonymity, trespass, or harassment.95

However, William Parent’s definition of privacy excludes knowledge of documented
personal information.96 Parent gives an example of documented information an item in an old
newspaper. Thus, according to Parent, if A finds out by browsing through an old newspaper that
B was a convicted felon, then A has not invaded B’s privacy for this information is
documented.97

Parent’s definition of privacy focuses on the content of information, not the control of
information. As a result, his definition avoids some of the criticisms of the control theory of
privacy. To criticize the control theory, Parent imagines a situation in which A has a fantastic X-
ray device that allows A to look through walls. If A aims the machine at B’s house but doesn’t
look through the machine, then A has deprived B of control of personal information but has not
invaded B’s privacy. In Parent’s example, A threatens B’s privacy but has not gained any
undocumented personal information about B, and so on Parent’s account, B’s privacy remains
intact. But there are other cases in which Parent’s undocumented personal knowledge theory
fares less well than the control theory. Suppose while B is away from her personal computer, A
uses it to call up B’s personal diary and lists the contents of the diary on the screen. Also suppose

94 Id., at 276.
95 Supra note 68.
96 Supra note 92 at 270.
97 Id., at 271.
A is distracted so A does not read the screen and does not gather any undocumented personal knowledge of B. This surely seems to be a violation of B’s privacy and would be so classified by the control theory of privacy but not by the undocumented personal information theory.98

Parent’s personal information view not only misses some cases of privacy violations but also includes some cases which do not seem to be privacy violations at all. If in a public meeting A notices that B, who happens to be ultra-sensitive about his height, is wearing elevator shoes and A concludes that B is short, then A has gained some undocumented personal knowledge about B, but clearly A hasn’t invaded B’s privacy. If A learns from casual conversation a widely known, but undocumented fact that B is an alcoholic, then A has gained some undocumented personal knowledge about B, but again A has not invaded B’s privacy.99

3.3.3 Privacy and Interpersonal Relationships

Many authors argue that privacy is important to maintain important interpersonal relationships and intimate parts of life. Without valuing privacy, intimacy is not possible. Giving intrinsic value to the conception of privacy, Charles Fried puts his thesis and says that privacy is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. He further argues that such fundamental relations i.e. love, friendship and trust are simply inconceivable without valuing privacy. The fundamental relations require a context of privacy or the possibility of privacy for their existence. Thus, an attack over privacy inevitably threatens our very integrity as persons.100 Charles Fried said:

[T]o respect, love, trust, feel affection for others and to regard ourselves as the objects of love, trust and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion.101

He further wrote:

Love and friendship, as analysed here, involve the initial respect for the rights of others which morality requires of everyone. They further involve the voluntary and spontaneous relinquishment of something between friend

99 Ibid.
101 Id, at 478.
According to Charles Fried, privacy, is control over knowledge about oneself. But it is not simply control over the quantity of information abroad; there are modulations in the quality of the knowledge as well. An individual may not mind that a person knows a general fact about him, and yet feel his privacy invaded if somebody knows the details. Fried cites an example, i.e. there is no violation of privacy where a casual acquaintance may comfortably know about the sickness of an individual, but it would violate the individual’s privacy if another person knew the nature of his illness.

Fried’s analysis of the importance of privacy in terms of its role in intimacy has come under attack because to some it seems to place too much emphasis on informational sharing and not enough on personal caring. Whether or not this criticism is warranted, Fried's theory has formed the foundation for a number of other defenses of privacy that base their analyses on notions of integrity or the prospects for intimacy.

Robert Gerstein, like Fried, argued that intimate relationships simply could not exist without privacy. Gerstein argues that intimacy is an experience of a relationship in which one is deeply engrossed and in which one fully and wholly participates. Intimacy shapes our consciousness and action. It is a relationship where we relinquish our role as independent observer to lose ourselves in the experience. The key point is that we cannot at the same time be lost in an experience and be observers of it. We cannot continue to be immersed in the experience of intimacy if we begin to observe ourselves or other things around us. Thus, as Gerstein wrote:

> [W]hen I have been involved in intimate communication and then am made suddenly aware that I am being observed [physically or electronically]. I also am suddenly brought to an awareness of my own actions as object of observation...

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102 id., at 483.
103 Ibid.
104 Supra note 6 at 22.
106 id., at 77.
107 Ibid.
The temptation now to appraise the appearance I make, and to change my actions so that they will reflect to the observer what I would like them to, would certainly be very strong. To do this would be to kill the spontaneity which is essential to intimacy.\textsuperscript{108}

Gerstein’s analysis contrasts two relationships that a person might have to a situation: the participant role and the observer role. To be a participant is to immerse oneself fully in a situation; to become involved to the extent that one loses the sense of oneself as independent of the situation; to become enflamed and engulfed by the situation. In contrast, to be an observer is to distance oneself from a situation and adopt an objective attitude toward it. With this distinction in mind, Gerstein argues that intimate communication, and intimate relationships generally, involves the parties as participants and not as observers. However, involvement as a participant can be transformed by becoming aware that one is being observed and judged. The very possibility of the sense of abandon that flourishes within an intimate relationship is undermined by a consciousness of oneself as an object of observation. Intimacy for Gerstein also involves a kind of ecstatic inner focus that is distracted or corrupted by objective judgment. Judgment typically imposes independent and non personal standards for assessing the value of a relationship.\textsuperscript{109}

In addition, number of commentators also give importance to the links between privacy and interpersonal relationship with others. James Rachels acknowledges that it is not simple to answer why privacy is important to us. He says that the concept of privacy protects our number of interests. For example, Privacy may be necessary to protect people’s interests in competitive situations, or to protect one from embarrassment, or to protect one’s medical records, or to protect credit-applicants from irrelevant inquiries.\textsuperscript{110} Despite the fact i.e. privacy protects people’s various interests, James Rachels criticizes Thomson’s reductionist view and regards the right to privacy as a distinctive sort of right in virtue of the special kind of interest it protects.\textsuperscript{111} James Rachels says that there is a close connection between our ability to control who has access

\textsuperscript{108} Id., at 79.
\textsuperscript{109} Supra note 6 at 24.
\textsuperscript{111} Id., at 333.
to us and to information about us, and our ability to create and maintain different sorts of social relationships with different people. He wrote:

[According to this account, privacy is necessary if we are to maintain the variety of social relationships with other people that we want to have and that is why it is important to us. By a ‘social relationship’ I do not mean anything especially unusual or technical; I mean the sort of thing which we usually have in mind when we say of two people that they are friends or that they are husband and wife or that one is the other's employer.]

Many other theorists reject reductionism’s claim and argue that privacy is a coherent concept. In this view, there is something fundamental and distinctive about the various claims that have been called privacy interests. Among these theorists, Julie Inness also considered the arguments of Judith Jarvis Thompson, who has maintained that the right to privacy must be abandoned because it is merely a composite of more basic property rights and rights over the person. Inness rejected this claim. Although privacy violations may also be infringements of other rights, they cannot always be reduced in this way. Privacy rights may adhere to personal objects even where property rights have been relinquished. For example, by writing and sending love letters to another person, I have relinquished possession, yet my privacy will still be violated if my lover distributes them to others without my consent.

Showing her concern, Julie Inness wrote:

[Our vital privacy claims might diminish under sceptical attacks, perhaps even vanish, unless supported by a strong theoretical foundation.]

According to Julie Inness, privacy amounts to the state of the agent having control over decisions concerning matters that draw their meaning and value from the agent's love, caring, or liking. These decisions cover choices on the agent’s part about access to herself, the dissemination of information about herself, and her actions. Since matters draw their meaning and value from the agent's love, liking, or care according to the role they play for the agent, the construction of intimacy lies on the agent's shoulders. Therefore, privacy claims are claims to possess autonomy with respect to our expression of love, liking, and care.

112 Id., at 326.
114 Julie Inness, Privacy, Intimacy and Isolation, i (1992).
115 Id., at 91.
3.3.4 Privacy and Restricted Access

Many theorists characterize privacy in terms of access. One of philosopher Sissela Bok defined privacy as the condition of being protected from unwanted access by others either physical access, personal information or attention.\textsuperscript{116} Expanding this view, Ruth Gavison argues that interests in privacy are related to concerns over accessibility to others, that is, the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of the attention of others. According to Gavison, this limited accessibility principle of the concept of privacy enables us to identify when losses of privacy occur.\textsuperscript{117} For Gavison, a more important concept is loss of privacy. And it is insisted that privacy can be gained in three distinct and independent, but interrelated, ways: through secrecy when no one has information about one, through anonymity, when no one pays attention to one, and through solitude, when no one has physical access to one.\textsuperscript{118} Furthermore, the reasons for which we claim privacy in different situations are similar. They are related to the functions privacy has in our lives: the promotion of liberty, autonomy, selfhood, and human relations, and furthering the existence of a free society.\textsuperscript{119}

According to Anita Allen, personal privacy is a condition of inaccessibility of the person, his or her mental states, or information about the person to the senses or surveillance devices of others.\textsuperscript{120} Given this definition, privacy is a descriptive, neutral concept. Seclusion, solitude, secrecy, confidentiality, and anonymity are forms of privacy. It is being believed that Allen knows about the problems raised by the term accessibility: it is ambiguous, nearly synonymous with ‘privacy,’ and applicable in different respects at the same time. Allen views the latter as a virtue of her theory and argues that restricted-access privacy is more illuminating than accounts that focus on control over information about oneself (Reiman), control over access or attention to oneself (Gavison), and intimacy (Gerety). In defense of her definition, Allen cites the practical link between privacy, and restrictions on access that protect it, and a common usage of the term

\textsuperscript{118} Id., at 428.
\textsuperscript{119} Id., at 423.
‘privacy’ denoting conditions of limited access. Her broader defense is that privacy is required by liberal ideals of personhood, participation of all citizens as equals, and maximal contribution in accordance with one’s capacities.\textsuperscript{121}

Adam Moore understands right to privacy as a right to maintain a certain level of control over the inner spheres of personal information and access to one’s body, capacities, and powers. Moore further explains that it is a right to limit public access to oneself and to information about oneself.\textsuperscript{122} Adam Moore confidently says that privacy is valuable for all human beings. The ability to regulate access to our bodies, capacities, and powers and to sensitive personal information is an essential part of human flourishing or well being.\textsuperscript{123}

Privacy contributes to the formation and persistence of autonomous individuals by providing them with control over whether or not their physical and psychological existence becomes part of another’s experience. Just this sort of control is necessary for them to think of themselves as self-determining. Evidence for this claim is found in studies of both identity development and deterioration.\textsuperscript{124} Psychologists such as Jean Piaget and Victor Tausk attest to the child’s growing sense of self as attendant upon an understanding of her control over information about herself. Experiencing privacy, secrecy, even lying, conveys to the child that many things remain hidden unless she chooses to reveal them. As she recognizes herself as determining whether and to what degree others have access to her, the child develops an autonomous self-concept. She sees herself as having some power to determine what happens to her.\textsuperscript{125}

3.3.5 Is Privacy Relative?

In one of the survey, the need for privacy and privacy preferences were studied from a cross-cultural perspective. The American culture and nuclear family emphasize individuality and privacy whereas the Asian Indian culture and joint family emphasize the group and togetherness.

\textsuperscript{123} Id., at 223.
\textsuperscript{125} Id., at 83.
A sample of 141 Americans and 123 Indians completed the Privacy Preference Scale to determine differences in need for privacy and privacy preferences. Results showed that for most kinds of privacy, Indians have a lower need for privacy than Americans. These results provide some support for adaptation level theory as method of predicting privacy preferences.\textsuperscript{126}

It is believed that universally known idea of behaving politely does not provide us with universal guidance on how to behave. This is because what is polite in one culture might not be polite in another. Similarly, the norm of respecting people’s privacy seems to require different acts in different cultures.\textsuperscript{127} It means that the standards for respecting individuals’ privacy vary culture to culture and society to society.

It is argued that there are two types of privacy-limiting acts i.e. harmless privacy limiting acts and \textit{prima facie} wrong privacy-limiting acts. In case of the former one, the action itself is harmless even if it is desirable. In such situation, one does not pay any attention to those harmless actions even if one’s privacy is clearly limited. For example, a touch at the time of receiving change from shop assistant, shaking hands with others, barbers touch customers’ hair, etc. do circumscribe one’s privacy, but this normally go unnoticed.\textsuperscript{128} The second class of privacy-limiting acts committed by others attracts much more attention than the first class because it involves potential violations of the right to privacy. It means acts that are considered to be violations of the right to privacy if they are not permitted by the persons who are the targets of the acts, or justified by overriding reasons, or based on accidents. Nightly phone calls are potentially violations of the right to privacy, but they are not if they are implicitly or explicitly permitted. Drug tests at work will not violate the right to privacy if there are justified reasons. It is said that the distinction between the two classes of privacy-limiting acts committed by others is drawn differently in different cultures. In some cultures entering one’s house without a specific invitation is perfectly acceptable, while in others, such behavior is being condemned. In certain cultures, relatives could enter another’s sleeping quarters without any restriction. In some communities and tribals, brothers share a single wife. In some places, medical information is not a big secret, whereas, in modern civilized societies medical privacy demands the full protection


\textsuperscript{128}Ibid.
of one’s medical records. Many authors argue on the basis of such examples and say that privacy is relative: if a given act is considered to be a potential violation of privacy in any one society, there is no way to criticize this norm. All one can do is to show that the norm is different elsewhere. As Richard T. DeGeorge wrote in *The Ethics of Information Technology and Business* (2003),

> [t]he notion of privacy is to some extent relative to one’s culture. What is right or wrong, good or bad, with respect to privacy is hence in part culturally determined, and how privacy claims are interpreted and applied in different societies depends on cultural expectations, history, accepted practices, existing law, and other factors.

Finally, Juha Rukka argues that privacy is relative in the sense that different cultures may have different but equally justified norms concerning what respecting privacy requires. This is not because people have different needs in different cultures: these needs may be morally problematic themselves. But cultures often come about in different circumstances, and privacy-limiting acts that tend to cause harm in one society, for instance, might not cause any harm in another society. This is why the distinction between harmless privacy-limiting acts and prima facie wrong privacy-limiting acts is and should be drawn differently in different cultures.

According to Schoeman, there are two issues relating to the dependence of privacy on cultural variation. Firstly, whether privacy is being considered as an important norm among all peoples. If it is deemed not, this may suggest that privacy is superfluous and hence dispensable as a social value. Secondly, whether there are any aspects of life which are inherently private, and not just conventionally so. This issue is related to the question of whether there is a criterion of the private. Most writers like Westin, Rachels, argue that all cultures do value privacy. Obviously it is possible that cultures differ in their ways of seeking and obtaining privacy, and probably do differ in the level they value privacy. Allen and Moore are especially sensitive to the ways obligations from different cultures affect perceptions of privacy. However, there is dispute on the question that whether there are some inherent private aspects of life. For some authors, matters relating to one’s innermost self are inherently private, but characterizing this realm more

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129 Id., at 535.
130 Id., at 543.
132 Supra note 127 at 543.
133 Supra note 6 at 6.
succinctly and less vaguely has remained an elusive task. Thus it may well be that one of the difficulties in defining the realm of the private is that privacy is a notion that is strongly culturally relative, contingent on such factors as economics as well as technology available in a given cultural domain.133

3.3.6 Privacy as a Phenomenal State or Condition of the Person

Even among authors who view privacy as a phenomenal state, privacy as a state of being was viewed from different perspectives. Bailey (1979) made the point that privacy is not detectable by everyone in the same way. His examination of privacy and mental phenomena evaluated competing theses that either some or all mental phenomena and only mental phenomena are essentially private- the privacy thesis, or that some or all mental phenomena and only mental phenomena are such that when they exist, there exists some person whose experienced knowledge of them is superior in some way to that of every other person-the epistemic superiority thesis. Bailey rejected both of these and offered in their stead a thesis of necessary ownership. ‘It is logically impossible that (mental phenomena) should exist without there existing some being capable of experience who has them.’134

Fischer saw privacy as a sense of being, and said:

In Summary, Privacy Is When: the watching self and the world fade away, along with geometric space, clock time, and other contingencies leaving an intensified relationship with the intentional object. The relationship is toned by a sense of at-homeness or familiarity, and its style is one of relative openness to or wonder at the object’s variable nature. It is not necessarily a defensive escape, it is a state of relative openness which allows phenomena to unfold in new ways, thus facilitating personal growth and development’.135

133 Supra note 68.
Fischer, utilizing a phenomenological methodology designed to gain an understanding of the lived experience of privacy rather than its behavioural correlates, concluded that privacy involves the diminishing of an observer stance to the world and the emergence of an intense and open focus on, and relationship with, the object of attention that is almost a full merging. The experience of privacy involves an open and unifying relation with the aspects of the world, in contrast to the previously described conception of privacy as isolation and distance. The experience of privacy could not, by definition, include a focus on boundary control because in privacy such boundaries are not in conscious awareness.136

Perhaps, because such a distinction is not generally made, privacy has been confused with concepts such as secrecy, isolation and silence. Sissela Bok’s explanation of the confusion between privacy and secrecy is that the private is such a central part of what secrecy is designed to protect that the two can be mistaken as identical. In secrecy, the withholding of disclosure is primarily intended to conceal aspects of the self that are experienced as shameful or unacceptable. In privacy, the withholding of self-disclosure is instead a part of a general attempt to be authentically in relationship. A part of being authentic in relationship is to modulate the ways in which one is made known to the other so as to genuinely reflect one’s readiness to be known.137

In secrecy, the focus is on the horizon of an anticipated disruption of privacy, and not the experience of privacy itself.138 Fischer described disrupted privacy as:

In Summary, Disrupted Privacy Is When: attention is jerked from its prior object, and shifts repeatedly among the intruder, self as caught by the other, and the peripheral world, as well as the lost object. There is a jarring aura of control being still out of grasp, with return to privacy being in the hands of...

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the intruder. Intentional relations are now in the styles of task, manipulation, or withdrawal. Time is lived in that future to be somehow achieved, or in helpless, fixed present or past. Both time and space thrust forth as inescapable contingencies, limitations to be suffered or reckoned with. As attention flits among its three focal objects, affect varies with felt ability and desire to do something about each of them. Specifically, the intersection of ought-must (do something) with uncertain-can't is the location of such affects as irritation, anger, and impotent, frightened rage where the focus is on object is sought, the affect includes agitated despair, inadequacy, or anxiety.  

Other authors who viewed privacy as a condition emphasized on environmental interactions and how the environment influenced individuals, referred to privacy as that marvellous compound of withdrawal, self-reliance, solitude, contemplation and concentration.

Velecky believed that any concept of privacy is a concept of a state in which persons may find themselves. He also considered that being alone was the closest to his concept of privacy. However, he made the distinction that while the concept of privacy implies that the state is regarded as valuable, the concept of being alone carried no such implication.

3.3.7 Privacy as an Attitude

Every action of an individual requires interactive processes. His experiences and plans would not be executed in a vacuum. Throughout of his life, he seeks different types of privacy under different types of circumstances. Privacy as attitude was perhaps best viewed as the present and temporary stance of the individual. Attitudes are normally subject to abrupt and
unexpected change as evocatively expressed by David Lowenthal. Past experiences, including
childhood influences, cultural norms, previous success with obtaining privacy when desired,
while contributing to the present person, were coloured by the current environment and
expectancies. Some authors like Berscheid, argues that the concept of privacy does indeed
thread throughout many traditional areas of social psychological research and that the social
psychological literature does speak to many privacy-related questions. However, the primary
privacy-related distinction made in social psychological research, the private-public distinction,
is an unrefined one, both conceptually and operationally. The operationalization of the
“private variable usually has been either solitude or, more frequently, anonymity. “Public” in
most social psychological experimentation simply means “other persons,” and the identity and
relationship of these others to the person whose behavior is under consideration varies from
experiment to experiment. The author also suggests that some people may have a greater need
for privacy than others. According to Westin, the individual seeks privacy at some times and
disclosure or companionship at other times. Westin wrote:

Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the
general society through physical or psychological means, either in a state of
solitude or small group intimacy or, when among larger groups, in a
condition of anonymity or reserve. Therefore, Westin proposed different types of privacy which reflected attitudes on the part of the
individual; solitude, reserve, intimacy, and anonymity. The self needs, above all, privacy, liberty
and a degree of sovereignty to develop. It needs to try things, to search, to explore, to test, to err.
It needs solitude- solitude-to bring sense to its experiences and thereby to create a future. For

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145 Supra note 90 at 13.
146 Id., at 7.
Reich, Solitude is necessary for consciousness. Solitude was regarded as invaluable in providing intellectual space needed for reflection and making sense of the world. Westin saw solitude as a state of privacy in which the individual was alone and unobserved. According to Pastalan, those events which elicit the individual's desire for privacy include antecedent social events, organismic or personal factors, mechanisms to achieve privacy, and environmental factors. These factors not only determine the desired level of privacy, they also determine those behavioral mechanisms by which privacy will be achieved. For Pastalan (1975) the distinguishing characteristics of solitude were solitariness and physical isolation.

A study of the development of privacy among children by Wolfe and Laufer (1974) found that children of all ages identified privacy with being alone. Maxine Wolfe and Robert Laufer of the City University of New York investigated the concept of privacy in childhood and adolescence, by questioning children aged between five and 17. The researchers found four major meanings at all ages. The first was that of being alone and uninterrupted, or of being able to be alone. The second was that of controlling access to information - being able to have secrets. Once the child goes to school, he is able to reveal some things to one set of adults, the parents, and other things to others, the teachers, and to differentiate between siblings and other children in the disclosure and withholding of information. The third meaning was that of 'no one bothering me', and the fourth was that of controlling access to spaces. Three of these four meanings were given more frequently by those children who had their own rooms - being alone, no-one bothering me, and controlling access to spaces ('no one being able to go into my room; no one can come in unless I want them to'). Keeping secrets, and not telling what you are thinking, were available to all groups, though this aspect of privacy, the control of information, is obviously important to those children who were not able to secure it physically. The researchers pointed out that 'a child who has never had a room of his own may not define privacy as a physical separation from others but may develop techniques of psychological withdrawal. A

148 Id. at 114.

Marshall (1972) in her factor analysis of neighbouring and privacy, found that a factor of ‘being alone’ was one of two major divisions. The Solitude factor contained items reflecting a desire to be alone at times, without differentiating between being alone but with others nearby (as in one’s room) and being far from others. The possibility of being alone ‘mentally,’ with others present but not intruding on one’s thoughts, was included.\footnote{Nancy J. Marshall, “Privacy and Environment,” Human Ecology, Vol. 1, No. 2 (Sep., 1972), pp. 93-110 at 99 available at \url{http://www.jstor.org/stable/4602249} accessed on August 24, 2011, at 8:48 p.m. IST.}

Another characteristic (as an attitude) of an individual’s privacy is ‘isolation’. Meaning of Isolation is different for different authors. For Kelvin, privacy is very important. Furthermore, Kelvin suggests that perceived privacy is essential to the self concept, to the development and maintenance of a sense of personal identity and, with it, personal responsibility.\footnote{P. Kelvin, “A socio-psychological examination of privacy,” British Journal of Social and Clinical Psychology, 12, 248-296 at 259, (1973). Cited in Stephen T. Margulis, “Privacy as a Behavioral Phenomenon: Coming of Age (1),” available at \url{http://www.edra.org/sites/default/files/publications/EDRA05-v6-8-Margulis-101-123.pdf} accessed on August 29, 2013, at 3:00 p.m. IST.} Kelvin says that privacy is contrasted with isolation, another concept referring to individuals on their own.\footnote{Id., 253.} Isolation is generally associated with negative aspects of separateness; is generally imposed, directly or indirectly, rather than chosen; and is, psychologically speaking, a situation in which a person needs and seeks relationships with others but cannot establish them because of an actual and/or perceived lack of choice. By contrast, privacy is associated with the positive aspects of separateness; is chosen; and is, psychologically speaking, a situation which affords a choice over otherwise constrained behavioral options. Put differently, privacy is a product of the negation of the power of others whereas isolation is characterized by an absence of a power-relationship with others.\footnote{Ibid.}

Altman regarded privacy as a process of selective control over social interaction and over access to ‘self’. As defined by Altman, isolation is the state where one’s achieved level of social contact is lower than one’s desired level of contact. Isolation differs from privacy in that privacy

\begin{footnotesize}
\footnote{Id., 253.}
\footnote{Ibid.}
\end{footnotesize}
occurs when desired and achieved interpersonal contact match. Westin (1967) did not include isolation as a type of privacy, but as an example of imbalance.

According to Alan Westin, Anonymity is constructed socially by the recognition on the part of others that the anonymous person should not be held to the full rules of behaviour that would operate if he were known to those observing him. The state of reserve-defined as a ‘psychological barrier against unwanted intrusion’-is dependent upon the interaction between the individual seeking privacy and the others with whom she is interacting: The manner in which individuals claim reserve and the extent to which it is respected or disregarded by others is at the heart of securing meaningful privacy in the crowded, organization-dominated settings of modern industrial society and urban life. Similarly, Westin says that small group intimacy is essential to achieve the basic need of human contact, which is expressed through close, relaxed, and frank relationships between two or more individuals.

3.4 Scope of Privacy

In 1965, the United States Supreme Court for the first time recognized the constitutional right to privacy in the case of *Griswold v. Connecticut*. Such constitutional right to privacy was recognized independent of informational privacy and the Fourth Amendment of the United States Constitution. In this case, the court allowed the use of contraceptives to married persons. The constitutional right to privacy was described by Justice William O. Douglas as protecting a zone of privacy covering the social institution of marriage and the sexual relations of married persons. The constitutional right to privacy has been used not only to guard rights to use and distribute contraceptives, but also used as to protect right to abortion, and to defend subsequent decisions concerning funding, father’s rights, third party consent for minors, and

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156 Supra note 90 at 31-32.
157 Id. at 31.
158 Supra note 5.
159 Supra note 68.
protection of the fetus. Furthermore, the right to privacy was used for allowing ‘possession of obscene matter’ in one’s home. The right to privacy has also been associated with cases on sterilization laws, interracial marriage, and attendance at public schools.

Despite the courts’ decisions protecting individuals’ personal matters, the Coherentists (who believe privacy is a coherent concept) were not unanimous on the issue i.e. whether or not the constitutional right to privacy, and the constitutional privacy cases described involving personal decisions about lifestyle and family including birth control, interracial marriage, viewing pornography at home, abortion, and so on, delineate a genuine category of privacy issues, or merely raise questions about liberty of some sort. William Parent explicitly excludes concerns about one's ability to make certain important personal decisions about one's family and lifestyle as genuine privacy issues, saying the constitutional right to privacy cases focus solely on liberty. Among the others who take this view are Henkin, Thomson, Gavison, and Bork.

But later on, the United States Supreme Court claimed in Whalen v. Roe, that there are two different dimensions to privacy i.e. both control over information about oneself and control over one’s ability to make certain important types of decisions. The Court define the right to privacy, embracing both an individual interest in avoiding disclosure of personal matters and an interest in independence in making certain kinds of important decisions.

Finally, as the researcher observed, number of theorists adopted the court’s reasoning and, admitted that the concept of privacy has a very wider scope which includes multiple types of privacy issues. Privacy enables control over personal information as well as control over our bodies and personal choices for our concept of self.

Some authors also understand privacy as a cluster concept covering interests in (i) control over information about oneself, (ii) control over access to oneself, both physical and mental, and (iii) control over one’s ability to make important decisions about family and lifestyle in order to

163 supra note 68.
165 Supra note 124 at 87.
be self expressive and to develop varied relationships. These three interests are related because in each of the three contexts threats of information leaks, threats of control over our bodies, and threats to our power to make our own choices about our lifestyles and activities all make us vulnerable and fearful that we are being scrutinized, pressured or taken advantage of by others. Privacy has moral value because it shields us from such scrutiny, pressure and exploitation. It has also been consented that privacy is significant because it protects personal information, personal spaces, and personal choices, protection of freedom and autonomy in a liberal democratic society. Ferdinand Schoeman eloquently defended the importance of privacy for protection of self-expression and social freedom.

Analyzing United States’ Supreme Courts’ decisions, Henkin argued that:

[I]n Griswold, Baird, Wade and Stanley, the Court was not talking about my freedom from official intrusion into my home, my person, my papers, my telephone; about my right to be free from official surveillance or accosting, from questions by census-takers, officials, or congressional committees; from having to file, with governmental bodies, forms and returns containing information of varying ‘privateness’; from being mentioned and publicized, or having data about me collected, by official bodies.

For Henkin, the Court has been vindicating not a right to freedom from official intrusion, but to freedom from official regulation.

Increasingly, Rubenfeld viewed that:

The right to privacy discussed here must not be confused with the expectation of privacy secured by the fourth amendment or with the right of privacy protected by tort law. In the latter two contexts, the concept of privacy is employed to govern the conduct of other individuals who intrude in various ways upon one’s life. Privacy in these contexts can be generally understood in its familiar informational sense; it limits the ability of others

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172 Supra note 68.
174 Ibid.
to gain, disseminate, or use information about oneself. By contrast, the right to privacy that concerns us attaches to the rightholder’s own actions. It is not informational but substantive, immunizing certain conduct, such as using contraceptives, marrying someone of a different color, or aborting a pregnancy from state proscription or penalty.

According to Rubenfeld, the right to privacy has everything to do with delineating limits of governmental power. Privacy doctrine always believes judiciary as an appropriate body to determine whether a law transgresses constitutional limits. The judiciary has always gone beyond the literal constitutional text to strike down legislation.176

Daniel J. Solove said that the Fourth Amendment of the United States Constitution provides for an architecture of power, a structure of protection that safeguards a range of different social practices of which privacy forms an integral dimension177

Again, many authors view that privacy protects not only the individual interests rather it also has social value. As Priscilla Regan wrote:

I argue that privacy is not only of value to the individual, but also to society in general. Privacy is a common value in that all individuals value some degree of privacy and have some common perceptions about privacy. Privacy is also a public value in that it has value not just to the individual as an individual or to all individuals in common but also to the democratic political system. Privacy is rapidly becoming a collective value in that technology and market forces are making it hard for any one person to have privacy without all persons having a similar minimum level of privacy.178

It means that privacy is not mere an individualistic right but also involves the elements which make significant contributions in the welfare of the society. Philosopher John Dewey astutely argued that individual rights need not be justified as the immutable possessions of individuals; instead, they are instrumental in light of the contribution they make to the welfare of the society.

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176 Id., at 737.
Employing a similar insight, several scholars contend that privacy is “constitutive” of society. Constitutive privacy understands privacy harms as extending beyond the “mental pain and distress” caused to particular individuals; privacy harms affect the nature of society and impede individual activities that contribute to the greater social good.¹⁸⁰

Daniel J Solove explained:

By understanding privacy as shaped by the norms of society, we can better see why privacy should not be understood solely as an individual right.... Instead, privacy protects the individual because of the benefits it confers on society.¹⁸¹

It is believed that privacy helps the citizens in realizing their moral autonomy which is a basic requirement of governance in a democracy. The literature reflects that the privacy not only has intrinsic and extrinsic value to individuals but also fosters individuals’ social roles and relationships that contribute to a functioning society. Privacy norms help to regulate social relationships such as intimate relations, family relationships, professional relationships including those between a physician and a patient, a lawyer or accountant and a client, a teacher and a student, and so on. Thus privacy enhances social interaction on a variety of levels. A society without privacy, according to Solove, is a ‘suffocating society’.¹⁸²

Even in India, the courts have started taking the wider meaning of right to privacy. The most significant development in the personal autonomy occurred in the decision of the High Court of Delhi in *Naz Foundation v. Government of NCT of Delhi*.¹⁸³ The broadest statement of the Delhi High court’s approach, following its review of Indian case law on protection of privacy, is the right to privacy thus has been held to protect a “private space in which man may


¹⁸² Ibid.

¹⁸³ 2010 Cri.LJ 94 (Del.).
become and remain himself’. The ability to do so is exercised in accordance with individual autonomy.\textsuperscript{184}

Therefore, the approach of the Supreme Court is now towards the protection of individual privacy. By giving more and more personal autonomy to the individual, the Supreme Court is also protecting his decisional privacy. In fact in \textit{S. Khusboo v. Kanniammal}\textsuperscript{185} also, the court recognized the Live-in relationship which is again a right of decisional privacy. The rigid attitude of the courts against the practices of honour-killings is another step towards the protection of one’s right to choose his or life partner.\textsuperscript{186}

In \textit{Suchita Srivastava and Another v. Chandigarh Administration},\textsuperscript{187} the Supreme Court held that a woman’s right to make reproductive choices comes within the purview of ‘personal liberty’ under Article 21 of the Constitution of India. Considering a woman’s right to privacy, dignity and bodily integrity, the court said that there should be no restriction on the exercise of reproductive choices such as a woman’s right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods.\textsuperscript{188}

An individual’s personal autonomy has also an habitat in Article 19(1)(a) and Article 19(1)(g) of the Indian Constitution i.e. freedom of speech and expression, and freedom of trade, profession, etc. respectively. While allowing dances in Bars, hotels, etc., the Hon’ble Supreme Court in its recent judgment of \textit{State of Maharashtra v. Indian Hotel & Restaurants Association}\textsuperscript{189} recognized the dancing girls’ personal autonomy over their choices and decisions.

Therefore, it is submitted that the trend is now to expand the concept of privacy. By giving more and more personal autonomy, the State protects individuals’ privacy rights.


\textsuperscript{186} See Bhopwan Dass v. State (NCT of Delhi), (2011) 6 SCC 396.

\textsuperscript{187} AIR 2010 SC 235.

\textsuperscript{188} Ibid. at 242.

\textsuperscript{189} In the Supreme Court of India civil appellate jurisdiction, Civil Appeal No.5504 of 2013, decided on July 16, 2013. Available at http://judis.nic.in/supremecourt/imgsl.aspx?fdename=40565 accessed on July 22, 2013, at 11:00 a.m. IST.