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SURVEILLE

Surveillance: Ethical issues, legal limitations, and efficiency

Collaborative Project

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SURVEILLE Deliverable D4.8 Ethical Analysis of the Right to Privacy in Different Locations

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Executive Summary

- Private spaces are not just spaces to carry out a range of activities free from uninvited scrutiny – romantic, family and associational life, for example – but also to carry out no activity at all, where the obligation to fall in with public standards of acceptable behaviour is weakest. The privacy of different rooms within a home may also be fine grained, with bedrooms meriting stronger protections than kitchens, say.
- The acceptability of watching people also varies greatly in different kinds of public space. Private establishments like bars and restaurants are public in the sense that they are theoretically available to all (possibly subject to the discretion of their owners or management) but at the same time are places for the pursuit of leisure and associational life. Places of worship likewise often make themselves publically available to any member of the public. Nevertheless there may be very weighty reasons for regarding the interaction of individuals and groups in places of worship as meriting strong normative protection from observation, particularly state observation.
- Facts about our location are usually voluntarily disclosed to others merely in virtue of appearing in public space – by appearing in the park or at in a particular café I accept that others may see me and know that I am there. However, location tracking applications create an additional kind of information that would usually only be available by following people around public space.
- Social networking, like observation of public or semi-public spaces, is another case where people might wish to take the view that associational activity should not be subject to uninvited observation. The distinction between public and private space has parallels in the distinction between open source material – postings viewable by anyone with an Internet connection – and closed source material – postings to a limited audience of recipients. However, this must be weighed against the ease with which people posting open source material may be mistaken about how public their behaviour is. Mistakes may occur both through a failure to understand privacy settings of social networking services, or in the case of open source material, because it is easy for one's conversation to be viewed by far more people than one expects, whereas these judgments are easier to make in physical spaces.
- The privacy of locational information and social networking data both arise in so called 'secure smart space' applications. These are applications for combining both kinds of information either for criminal investigations after the fact or to give real time tactical support to policing of ongoing events like policing of public disorder.

The moral entitlement to privacy is most widely acknowledged in the case of the home. How the moral right to privacy ought to be conceived in a range of different varieties of public space, however, remains controversial. For example,

some have argued against the legitimacy of the rapid expansion of CCTV across cities, and do so precisely on the grounds that it is an unacceptable violation of privacy, and one all the more objectionable for indiscriminately intruding on the population as a whole. Others, meanwhile, claim the concept of privacy in public is inherently incoherent, and that behaviour we carry out in public space is behaviour we consent to others seeing.

This paper explores the ethical right to privacy in different locations and extends this analysis to current technological law enforcement applications. Part one defends the moral distinction between private and public spaces. In reality both public spaces and private spaces are more complex categories than are often acknowledged, and both contain a number of different gradations of reasons to leave people unobserved. Part two discusses some particular kinds of public space and how the right to privacy might govern norms of surveillance of them. Part three then extends this analysis to two further issues first considered separately, and then in combination: locational privacy and social networking.

§1 Public and Private Spaces

Norms of privacy incorporate at least two cases of sharp boundaries, where normative obligations and entitlements one side of the boundary are very different simply by virtue of being on one side of the boundary. One is any case of observation or recording of the naked body, and the other are the literal physical boundaries of the home.

§1.1 The body

Many societies grant special normative privacy protection to the naked body. Watching, recording and touching of the naked body are activities against which there is a strong normative presumption, unless the owner of the body explicitly cancels the presumption, usually in relation to intimates. Such activities may be permissible only with consent, and even then they are usually reserved specifically for relations of intimacy. The individual's physical body is treated as if it were wrapped in a bubble that prevents watching, touching or recording. This 'bubble' travels around with the individual wherever they go, concealing a particular zone of information from public view.¹ As we will see, normative protection of the body is only one of a number of such bubbles in play, which may at the same time overlap, multiplying the protections to which the individual is entitled.

¹ I take my characterization of privacy as a kind of 'bubble' from Stalder, who employs the term as part of an argument that privacy is much less important than other ethical issues raised by surveillance: "Following this definition, privacy is a kind of bubble that surrounds each person. And the dimensions of this bubble are determined by one's ability to control who enters it and who doesn't. Privacy is a personal space; space under the exclusive control of the individual. Privacy, in a way, is the informational equivalent to the (bourgeois, if you will) notion of 'my home is my castle'" (Stalder, 2009, 121). In what follows it shall become clear that I think the bubble metaphor is helpful, and argue that privacy protects morally and politically important values.

This protective 'bubble' is constituted by a shared acknowledgement of norms of behaviour, and understanding that deviations from these at the very least stand in need of some special justification. Often these norms of privacy do not require anything more from the individual as potential intruder beyond respecting other people's clearly communicated wishes with regard to observation of their bodies – communicated tacitly by keeping covered up, keeping one's physical distance and so on. Occasionally, however, norms of privacy call on the individual to actively refrain from watching – to look the other way. For example, should one happen to come across someone naked in unexpected circumstances – outside in the street, for example – there is strong presumption against looking, and if the naked individual were not in control of their faculties – unconscious or disorientated, say – norms of bodily privacy would also provide a reason to help cover the individual up.

As well as normatively proscribing touching, respect for bodily privacy also mandates keeping an appropriate distance physically – we often say 'keeping out of someone's personal space'. This presumption may then come up against other considerations in negotiating, for example, appropriate ways to respect bodily privacy on a crowded commuter train in rush hour.

The norms of bodily privacy extend to respect for use of rooms reserved for functions where some degree of nakedness is necessary, such as a toilet, changing room or bedroom. Entering any of these kinds of rooms when they are 'in use' or 'occupied' is strongly presumed against in the same way that viewing or touching of a naked body would be. To do so would be to presume or – even worse – coerce intimacy: widely understood as one of the morally worst varieties of intrusive behaviour. Ownership of the room in question is secondary – it would be a poor defence to say 'it is my toilet' to burst into a room in use. Likewise the owner of a tailors who were to spy into the changing rooms would behave outrageously. He might morally refuse entry, if the premises were closing for the day for example, but having granted entry for the purpose the individual changing is entitled to the privacy they want to carry out this function.

However, the many practices of 'looking the other way' required to avoid this kind of unwanted intimacy are practices that have to be learned – one can imagine having to tell a child in a communal changing room at a public pool that 'you aren't supposed to stare', or explaining that 'you always knock to check that it's okay to go into a toilet', for example.

§1.2 The home

The other sharp boundary is that between the home and the outside world. A person's home is a physical space in which the individual resides, and where admittance of others is at their own discretion. The home is the space where an individual has the greatest margin to behave without regard to the expectations of others and norms of behaviour.

'Home' is a well understood boundary.² Outside the communicated limits of the boundary – the walls of a brick house, for example – the same protection does not exist, which is to say that there is not the same entitlement to privacy, and corresponding obligations to withhold from watching (as I point out in section 2, this does not mean that any watching that happens outside the home is fair game – a series of additional and distinct privacy norms obtain in a range of situations). However, even within the home there may be further subdivisions entitling particular rooms to additional protections – as discussed in relation to bodily privacy, bedrooms and bathrooms in particular as sites for bodily functions, excretion, washing, sex and sleep, are normatively off limits.

Where 'homes' as normatively protected physical spaces are different from rooms such as bedrooms and bathrooms, is that their normative protection does not only apply when they are 'occupied' but remains even when they set out into public space.

Further understandings of subdivision may obtain in a shared house, depending on the relations between the inhabitants. A house of cohabiting students, or young professionals, living together to keep down their costs, might well treat bedrooms as a further 'home within the home', and the boundary between bedrooms and common areas like living rooms will be much sharper than would be the case with a couple living alone. The picture may become more nuanced still in the case of a family with children at different ages. As adolescents approach adulthood they have a stronger claim on space of their own, and control over access. Thus entering one of these rooms while the resident in question is out will be intrusive, and *prima facie* wrong.

However, although the normative protection may be retained in the home left behind, at the same time the protective 'bubble' can also be carried by the individual to a new space entitled to the same strong protections. This could be another house or flat, but it could also be a more temporarily employed space like a hotel room, or a caravan used on holiday. The bubble will now cover this new space as well as the old, normatively protecting both from outsiders entering, or excessively interrupting the individual while they are within.

§1.3 Justifying these boundaries

So far I have only described the operation of these norms. Now I will consider the normative question of their justification. What is the point of bodily privacy or that of the home? Side questions that come out of consideration of the normative question are whether privacy itself is a coherent concept, and whether privacy 'protects' or 'secures' one particular good, or several.³

² 'Home' is very broadly defined in the General Comment on Article 17 of ICCPR, which expresses the right to privacy. See also SURVEILLE deliverable D4.7 on the legal right to privacy in different locations.

³ See, for example, Ferdinand Shoeman, who defends the claim that "...there is something fundamental, integrated, and distinctive about the concerns traditionally grouped together under the rubric of '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

Consider first why conventions protecting the naked body from unwanted viewing and touching might be valuable. Part of why such conventions will be valuable will be their role in preserving sexual autonomy. The naked body is often arousing, and touching of the human body is usually a sexual act. Furthermore, the naked body may also reveal evidence of sexual arousal.

Conventions of bodily privacy don't just preserve moral entitlements against unwanted sexual encounters; they help to keep sexual relations as a topic out of mind for all involved. It removes it from the set of topics that are commonly known to both interlocutors involved in a social contact – that is to say the set of facts where not only are both aware of the relevant fact *F*, but each is aware of the other's awareness of *F*, and then each other's awareness of that fact, and so on.⁴

The naked body is also often revealing about highly personal facts about ourselves. Scars from injuries and operations, and the results of aging will often be apparent to the observer of a body. Conventions of bodily privacy take these facts out of the pool of common knowledge in everyday social encounters, reserving them as facts that need only be commonly acknowledged between people in more intimate relationships, whether professional, in the case of a patient and doctor, romantic, in the case of lovers, or familial, in the case of a mother and a young child.

What this discussion shows is that conventions of privacy are not just about keeping others out of certain places, but also a matter of keeping them out of mind. By keeping my identity as a sexual identity out of the set of immediately relevant topics that others talking to me might think about, I free myself from reasons to be aware of it myself, and from thinking about it when other topics are more important to consider.

I now move on to the topic of homes and home spaces. Why would conventions enabling one to carve out a space for oneself – with discretion over the entry of others – be valuable? There are a number of answers. Rest and relaxation seems one important reason. At the simplest level sleep is an activity most will find much more difficult in the presence of other people (except those whose presence one has explicitly consented to). Rest short of sleep may also be

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' (Schoeman, 1984)

⁴ See, for example, Thomas Nagel's 'Concealment and Exposure': "The essential function of the boundary between what is acknowledged and what is not is to admit or decline to admit potentially significant material into the category of what must be taken into consideration and responded to *collectively* by all parties in the joint enterprise of discourse, action, and justification that proceeds between individuals whenever they come into contact. If something is not acknowledged, then even if it is universally known, it can be left out of consideration in the collective social process." (Nagel, 1998, 12)

impossible for some in the presence of strangers. Some of the reasons why will also refer ultimately to mental considerations – if a stranger is present while I am trying to relax I may find it impossible to put the stranger out of mind, partly because I cannot know what the stranger themselves is thinking, and focussed awareness of them (including awareness of their awareness of me) may occupy my attention so much that effective relaxation is impossible.

This is also true of recreation more widely. Part of the value of time spent recreationally is precisely to be able to act without one's mental attention being directed to what others may be thinking of one, or how they may respond to one's behaviour. This does not have to be a consequence of engaging in recreational activity that others might disapprove of – expending mental effort on what others may be thinking of one's behaviour at all, is sufficient for the cost I am identifying here.

Romance and intimacy are widely understood as private matters – as matters where the scrutiny of others is likely to be unwelcome. Sex above all is an activity where the scrutiny of a third party will for many make the activity impossible to enjoy. However, much intimate activity will not be sexual in any way. Intimacy involves dispensing with displays and performances intended for a public audience in favour of authentically expressing oneself to another person. A conversation can be deeply intimate, for example, and a person might easily care far more about being able to keep such a conversation private than the privacy of anything bodily, or even sexual.

Discretion over entry into a home space assists us in developing and maintaining a wide range of associations of the subject's own choosing. Home spaces are often important sites of all sorts of associational relationship, and our ability to develop relationships with a wide range of different kinds of people often depends on being able to meet with people independent of the presence of others. How could one develop a relationship with a person who was greatly disapproved of by the majority of people in one's society without being able to meet with them independently of their detractors? In some cases disapproval may be so strong that the only chance for associational autonomy is to be able to meet with a person without it becoming generally known.⁵

This also speaks to the wider issue of moral and political autonomy.⁶ Autonomy is a matter of thinking through one's moral and political beliefs for oneself rather than unreflectively relying on the values of powerful agents with influence over

⁵ See also Lever (2011) on the cliché that 'an Englishman's home is his castle' – which she analyses as entitling the individual to "*refuse to admit* other people to their home...*to invite* people into their home...*to dispose* of their personal possessions, *to marry* and have children...[granting one]...liberty and opportunity to form ties and affections, influence and convenience without consulting one's superiors. The importance of being able to marry and to dispose of one's property without consulting a superior is...even more critical to one's ability to act autonomously...if your superiors can forbid you to marry, they will have deprived you of the ability to pass on your name and genes...advance your interests and protect yourself against the threats posed by old age, illness and infirmity." (48-50)

⁶ Alan Westin also elaborates on the role privacy plays in personal liberty in his (1967) *Privacy and Freedom*.

you, whether one's parents, employer, one's church or the state.⁷ Autonomously deciding for oneself sometimes requires that one make one's choices free from the scrutiny of others. Under the scrutiny of others there is a powerful influence towards conformity, and departures from what is expected are likely to attract attention and stand in need of justification.

Beliefs are not just affirmed or rejected independent of one another. Challenging conventionally affirmed beliefs therefore usually involves challenging a series of other beliefs. It is an extended activity, which requires a certain amount of back and forth, determining which other of one's beliefs must go, or possibly concluding that one has been mistaken.⁸ As well as reflective thought, it may also involve seeking out new information. The privacy of the home provides a safe place in which both thinking and researching can take place without pressure or the possibility of demands for instant answers for any deviation from societal expectations.

I have defended the justifiability of both sets of conventions around bodies and homes. However, both sets of conventions are questionable, and subject to a certain amount of cultural variability. Some European countries have quite different practices with regard to situations in which it would be appropriate to appear naked in front of others.⁹ And the degree to which people are able to claim homes or even home like spaces of their own will vary enormously from society to society, inevitably subject to economic factors. There are people who actively seek to challenge the norms of bodily concealment and separate living arrangements in the form of naturism and movements that practice communal living. However, it is worth noting the true scope of the challenge and variation involved here. The naturist, for example, denies neither the importance of autonomy, nor that of being able to interact with others on a non sexual basis: rather she denies the bodily concealment is necessary to achieve this. Even in countries where nakedness in public bathing areas is common, there may well still be quite rigid norms segregating areas reserved for nudity by gender, or proscribing watching or touching. My argument is not that these norms are

⁷ Classic arguments in favour of the individual's exercise of autonomous reason can be found in Mill's *On Liberty* defending the moral priority of coming to one's own view even if this results in error: "The human faculties of perception, judgment, discriminative feeling, mental activity and even moral preference are exercised only in making a choice. He gains no practice in either in discerning or desiring what is best. The mental and the moral, like the muscular powers, are improved only in being used. The faculties are called into no exercise by doing a thing merely because others do it, no more than by believing a thing merely because others believe it. If the grounds of an opinion are not conclusive to the person's own reason, his reason cannot be strengthened, but is likely to be weakened, by his adopting it." (Mill, 1859, 70-1) and "It will probably be conceded that it is desirable people should exercise their understandings, and that an intelligent following of custom, or even occasionally an intelligent deviation from custom, is better than a blind and mechanical devotion to it." (ibid, 72)

⁸ There is an analogy here with the creative process – rather than new works being created first time round in their finished form, more commonly a number of different attempts to be made, some of which are rejected as not worth public exposure. Gavison (1980, 448n) gives the example of practicing musicians who will not permit an audience.

⁹ See, for example, this article on norms of bodily privacy in Germany written from the perspective of a British journalist <http://www.bbc.co.uk/news/magazine-18021714>

necessary, inevitable or natural, merely that they are defensible, and aim at the protection of important values.

§2 Privacy in Different Public Spaces

§2.1 Public enclosed spaces

Outside the doors of a home a person loses certain entitlements to privacy. However, there are a number of kinds of space where the individual reacquires some similar norms against being observed. Some of what may count as public space is enclosed, as in the case of private businesses that make themselves open to the public, or public buildings that are designated as community spaces. In what follows I consider the privacy conventions that may be attached to individuals in these kinds of spaces.

Consider for example a couple having dinner in a restaurant, or somebody sitting alone reading a newspaper in a café. It is widely understood that although a café or restaurant may be open to 'the public', that an individual in a restaurant is to be left alone by default, and joined only by negotiation and consent. This is not to say that making contact is forbidden – spotting a friend by chance and joining them for a coffee is a common experience, but this will be by negotiation, whether by words or gestures, and both will be understood to have a kind of 'right of veto' over any social interaction prolonged beyond the pleasantries of an initial greeting. If anything there is even more reason to leave alone a group, or especially a couple, and thus it is understood that there are strong reasons not to impose oneself.

These are norms of privacy in operation, and ones that are linked to a particular building or space, but they are different and much weaker than those operating over any kind of home space. They don't forbid entry, or even peering in through a window, say, in a way that would be out of order in the case of a person's home.

These particular kinds of space seem to confer an entitlement to protection from prolonged watching against people outside the premises and also from other people there. They acquire a new 'bubble', protecting their chair and table from scrutiny or too much proximity. However, this protection is time limited to the duration of their visit to the premises, and on leaving the bubble is burst and they have no further claim.

Another special kind of public space is certain places of worship – churches, synagogues and mosques. These often present themselves as open to all, or open to all professing faith (or at least the faith in question). Some might be more closed, where all present are known to each other, in which case the privacy conventions of the space will more closely resemble those of a private function. However, consider the case of a place of worship presenting itself as open to the public – is entering and watching people in this context be any different to watching in a busy street?

Furthermore, watching or recording in a place of worship can count as invasive distinct from the intrusion to any particular worshiper – there is a sense in which a religious community can be intruded upon by subjecting its activities to scrutiny.¹⁰ There will be difficult questions to ask here about who counts as the religious community in question, whether only regular participants in services at the place of worship in question, or some wider subset of adherents – some might even want to claim a wider category still of ‘the religious’ in an expansive sense not restricted to a particular faith.

The activities of churches have come under public scrutiny on a number of occasions in recent years when broadcasting videos of church sermons with controversial content has been justified on the basis that politicians were regular participants and that such public figures should be answerable for statements seemingly at odds with their public utterances. Examples include videos that emerged during the 2008 US election campaign of two churches where Barack Obama¹¹ and Sarah Palin¹² had been members respectively, and more recently a church in Northern Ireland frequented by the First Minister and many senior members of the main governing party.¹³

These cases have prompted claims that people’s religious lives should not be regarded as fair game for scrutiny, and what goes on in them should not be subjected to the same level of scrutiny as public discussion. Clearly a number of further factors are in play in these cases, in particular the question of how these videos came to be in the public realm. For our purposes we need only note that the activities inside a place of worship are usually regarded as not automatically subject to public scrutiny – it is only because these were public figures that scrutiny was regarded as fair game, and even then some thought they should remain off limits.

The norms ruling out scrutiny here don’t seem to only attach to acts of worship but also to anything else that might go on in the place of worship – that there would be a strong presumption against an outsider unconnected with the community entering or peering in from the outside except by explicitly stating that this is what they were doing and negotiating their presence.

In both the cases of restaurants and cafés and places of worship there is a sense in which particular activities are protected as well as buildings, or rather that the protection of the building is in some way dependent on the protection of particular activities. In the next section I consider norms that may attach to people in public spaces by virtue of their engagement in particular activities. However, as we shall see, ‘activity’ here must be conceived broadly.

¹⁰ See, for example, Travis Dumsday (2008) ‘Group Privacy and Government Surveillance of Religious Services’

¹¹ See, for example, <http://abcnews.go.com/Blotter/story?id=4443788>

¹² See, for example,

<http://edition.cnn.com/2008/POLITICS/09/08/palin.pastor/index.html?eref=onion>

¹³ See, for example, <http://www.belfasttelegraph.co.uk/news/local-national/northern-ireland/video-belfast-pastor-james-mcconnell-denounces-islam-as-the-devils-doctrine-at-whitewell-metropolitan-tabernacle-church-sermon-30291041.html>

§2.2 Private activities in public

There is an additional reason why our couple in the restaurant were entitled to a measure of privacy: this is that nature of the activity they were engaged in. It is widely understood that if we see a couple sharing an evening together they probably want minimal scrutiny or interference from others, and we certainly understand the interest to be had in being able to have an evening out where we are for the most part left alone.

Is the situation any different if one comes across a couple sitting together on the grass in a public park, far away from any other people, and they are holding hands or otherwise provide visible confirmation that they are enjoying a romantic afternoon together. They may no longer have the protections deriving from the fact of being in a restaurant, but nonetheless there is still good reason to withhold from any kind of extended watching or undue interruption.

Romance is not the only activity that benefits from pursuit in public space and simultaneous understanding that although it is pursued in public, watching or other scrutiny is often to be avoided. Although home spaces and private premises are highly beneficial to associational life because of the privacy and discretion they afford to social engagements, an enormous amount of associational life takes place in public spaces, and norms of privacy are clearly valuable here for many of the same reasons. If I want to associate with people others disapprove of, or even just want to make up my own mind about a person rather than rely entirely on the judgment of others, I will benefit from privacy conventions. Obviously privacy conventions in public space are quite different from conventions attached to enclosed spaces like homes, or even quasi-public spaces like restaurants or churches. Outside in 'the open' it can never be a matter of withholding from entering, or 'peering in', instead it might simply be reflected in an understanding that social encounters are not automatically the business of others, and reports of spotting individual socialising the sort of information to be passed on to anybody without a moments thought. Or that when people are socialising together there is an additional reason to withhold from extended scrutiny, or approaching and joining a social interaction, except by negotiation and explicit consent.

Recreation is an activity that is often pursued in public as well as in private, and benefits from similar conventions of leaving another alone unless we have good reason. The same problem arises as when talking about the privacy of home spaces of appearing to focus on particular activities, when the nature of much that is important about time spent recreationally is that it is time spent doing nothing in particular: time spent leafing casually through the Sunday papers rather than reading. Time spent browsing aimlessly around some shops rather than going to purchase a specific item. Undirected time spent in this way in public space requires absence of scrutiny.

Activity in public space can also be important for autonomous thought itself. The conventions that will assist here will consist of norms protecting the privacy of the individual's choices of information sources, and protecting the space to think matters through for oneself. Often important choices about what sources of information to use are made in public. This might be a matter of going to listen to what a speaker has to say at an explicitly political rally, or it might be selecting what books to read on a topic, purchasing, borrowing or reading in bookshops libraries and elsewhere. Of course, there is a sense in which a person reading a book in a café or on a park bench advertises what they are reading, and it surely cannot be a violation to notice an openly displayed cover. However, when it is not openly displayed looking over somebody's shoulder to find out what they are reading encroaches on their privacy.

With technological change a large quantity of what information people make use of they acquire via websites and communications online. In §3.2 I will consider whether some communications via social networking technologies can be conceived as taking place in a kind of virtual public space, for now I will restrict myself to the issue of people looking up information on websites. Certainly finding out what somebody is looking up by 'looking over their shoulder' without permission is intrusive behaviour.

The matter of leaving a person 'the space to think through things for themselves' will take different forms in different circumstances. It's yet another reason to leave people alone unless there's a good reason when they communicated their tacit wish not to be interrupted. It can also take the form of not demanding instant responses when asking about difficult or controversial topics, or pressuring people to give particular answers rather than replies which reflect a settled result of considered thought.

The same goods that are protected by habits of concealment, exposure and withholding from looking may be protected by comparable norms covering certain kinds of behaviour distinct from any particular location.¹⁴ That said, it is still appropriate to talk about the kind of location nevertheless as not every kind of activity can be appropriately pursued in every kind of space, thus although it is the kind of activity that merits the protection, the area in which it is pursued has an influence on how great a claim to privacy one has, and what respecting a person's privacy will entail.

§3 Locational Privacy and Virtual Spaces

3.1 Locational Privacy

¹⁴ Lever (2011) argues similarly for public spaces as an important site of relaxation, association and intimacy: "...the privatisation of public space and of public property can threaten, rather than promote, privacy. For many of us, living in cramped and crowded conditions – or with noisy neighbours and families – public gardens, squares, parks, libraries and museums are places where we can go for a bit of peace and quiet, or for a 'private chat' or heart-to-heart with our friends." (Lever, 2011, 78)

Locational privacy seems to be a genuinely new concept that has arisen from the technological changes that have made it possible to have an overview of a person's movements over time. This may encroach on people's privacy in the same way that certain observations in public spaces do, by revealing particularly intimate facts about an individual. In the same way that one might spot someone entering a gay bar, one might be able to deduce that someone had been there by seeing from the record of their movements that they had been in the near vicinity (if there were not other explanations – suppose it was located in a remote area).

Locational privacy can encroach on privacy in another way that is much harder to achieve by mere observations in public space. It can reveal what we might label 'the shape of a life'. Rather than exposure being packed into a particular moment, facts are revealed about patterns of behaviour – like the fact that a person always goes to an ice cream parlour after going to the gym. Furthermore, location tracking technology can provide full coverage of a person's movements through public space for whatever extended period of data has been recorded. In this way one might establish that a person never went to visit his mother, or has stopped going to church.

There is nothing inevitable about the general availability of locational data, the question of whether anybody ought to be able to see that data, and under what circumstances, is a matter of public policy. This is different to a large extent from the issue of the privacy of public space, where inevitably some information about one's comings, goings and activities are openly disclosed to whoever happens to be there in public space with you. Locational data can clearly be highly revealing in ways that encroach on privacy of autonomous thought and associational privacy. They may also arguably encroach on bodily privacy: consider a case where access to locational data reveals visits to sexual health clinics, for example – recall that we explained the wrong of invasions of bodily privacy partly in terms of the likely consequence of making the intruded party excessively self-conscious about their body, to the detriment of both autonomy and functional social interaction. We can conclude that any non-consensual access to it will be an invasion of privacy, and insist that this could only be justified for prevention of significant threats to welfare or investigation of serious crime.

§3.2 Virtual Spaces

Much associational life now takes place, not in physical locations, but in a variety of physical locations, some homes, some public spaces, communication facilitated by modern technology. Often we come to think of this as contact in a distinct location, talking about being 'on Facebook' or in a particular chat room or forum, as if these were physical places. Some even talk of the Internet as a whole as a space, talking about being 'online'. Such talk is more than just a metaphor, as virtual spaces have some of the same features of physical spaces, including features relevant to the justification of our moral intuitions about norms of concealment, exposure and withholding from watching. Online 'spaces'

in this sense simply require means for all those participating to 'speak' and 'hear', thus having conversations in the view of others and watching the conversations of others play out. In particular, forums and social networking technology can replicate the experience of discussions in entirely public forums (where anyone could anyone could listen, or for that matter contribute) and private spaces where all potential interlocutors are already known, or in some way 'vetted'. However, while these online spaces replicate some features of forums for social exchange in the real world, it is also important to note a number of differences, as I shall go on to emphasise.

Much online discussion takes place over time among a number of people often already known to each other. This online discussion often, seamlessly continues the ongoing social interaction they have with friends in physical space. Some also develop friendships that mostly, or even entirely take place online rather than face to face, and with people that they met in the first place online.

However, although there are analogies with social encounters that take place in a single physical location there are often important disanalogies. For one thing, in the vast majority of encounters in the physical world, every individual who is present and might take part in the conversation is at least visible, and may be taken account of in deciding what one will or will not say. For one thing it is much easier to take part in online spaces on an anonymous basis. This indeed, is a large part of why it has been so transformative for a large number of people – providing ways to make social contact with others on embarrassing topics where the individual might well find it more intimidating to seek out contact in person. However, the converse of this is the difficulty of knowing with any certainty exactly who one is speaking to. Furthermore, in a number of online forums one cannot know exactly who else is able to see what one is posting, or even that unknown, anonymous others are watching. And another great disanalogy with social exchanges in physical locations is that exchanges are typically recorded, and the record of the exchange very often continues to be displayed and remain available to others long after the statement is made. Both these differences mean that it is much harder, as a speaker, to know who might read one's words.

The analogy with public spaces is a useful starting point, but cannot be the end of the matter. The discussion must be supplemented by wider consideration of what values norms of privacy protect and how their relative weights in different situations. I have identified the values that privacy aims at preserving as rest, recreation, romance and intimacy, association and moral and political autonomy. In determining the legitimate uses that can be made of the outputs of social networking technologies, limitations should aim at the preservation of these goods.

Current features of the way the technologies are often used which are in tension with these values include straightforwardly abusive uses for 'cyberbullying' and 'cyberstalking', the difficulty of judging just how exposed one's communications are and how quickly they can be shared widely with unpredictable results. The worst cases of cyber stalking encroach on the sphere of mental privacy – recall the argument that invasions of bodily privacy or into private spaces are so wrong

because they may leave the agent without the preconditions for autonomy. Intense and sustained cyberharassment can achieve the same outcome and is properly conceptualised a deep violation of privacy.

It is useful to keep this picture of maliciously wrong actions in mind as we move on to consider privacy entitlement in general in 'virtual spaces', as arguably people's privacy are often invaded as a result of misunderstanding the openness of the technology. As has been noted often in relation to social networking technologies, some companies do a bad job of making it easy to understand one's privacy settings, with obscure explanations of settings, which are changed without notifying the user.

The business model of social networking companies is to a large extent predicated on encouraging the users to share information with others, as facts about who they share with and when, is useful to the company. Indeed, we can see much of this in the ideal of 'frictionless sharing'.¹⁵ This is the ideal of users of social networking technologies automatically sharing information. The 'friction' the ideal seeks to remove, is individual decision-making on a case-by-case basis. Many broadsheet newspapers now offer Facebook applications that automatically publicise the fact that one has read a particular article to 'friends'. The individual consents to this initially by signing up to the service, and then is left without the need to decide whether to share the fact that they have read an article on any particular occasion. This ideal itself is morally criticisable from the perspective we have developed – sources of information, newspapers favoured and articles chosen, are exactly the sort of thing that one ought to reflect about sharing.

However, many of the most morally concerning cases of encroachment on the individual's mental sphere are cases where technology providers are largely not responsible. Rather they are cases where the intrusive activity is a matter of individual conduct. I consider cases of self-consciously vigilante campaigns of harassment online. A common modern day phenomenon is for these campaigns to arise quickly in response to genuine or alleged wrongdoing, 'crowdsourcing' efforts to identify an individual, and punish them. Because information about these campaigns can spread so quickly to so many people the 'punishment' inflicted by them can very quickly get out of hand to be completely disproportionate to the initial (claimed) wrong.

Take for example the case of Gemma Worrell, whose foolish tweet about Barack Obama was retweeted 7000 times within 12 hours, and faced vile abuse as a result.¹⁶ Resulting campaigns of harassment can be more serious still. Mary Bale was recorded putting a cat in a bin on its owners private CCTV system and the owners subsequently uploaded the footage to YouTube to ask for help

¹⁵ The term dates to a speech made by Facebook CEO Mark Zuckerberg in 2011 <http://www.independent.co.uk/life-style/gadgets-and-tech/features/cyber-culture-how-zuckerbergs-plans-for-a-sharing-society-could-help-us-and-make-him-richer-6288313.html>

¹⁶ <http://www.telegraph.co.uk/news/newstopping/howaboutthat/10682490/Blame-spellcheck-Twitter-user-misspells-US-presidents-name-as-Barraco-Barner.html>

identifying the perpetrator. The campaign quickly identified her and retribution ensued in the form of constant harassment up to and including death threats from around the world, including by phone from Australia. She was convicted of causing unnecessary suffering to an animal some time later, and fined, though by that time she had spent a period of leave from work with depression, before ultimately resigning altogether.¹⁷

Both these figures suffered a loss of privacy, on my view. But where does moral responsibility lie? In both cases it is important to emphasise as a first step that the responsibility for extended harassment and threats of violence lies with those who perpetrate them, and the fact that their may be moral blame to hand out elsewhere does not diminish the reprehensible nature of such actions. However, some communications that will add to the harassment suffered by both will be communications that could be more easily shrugged off if they were isolated instances rather than part of a stream of abuse. This is a good reason to withhold from taking part even in action that would be proportionate in a one-on-one, face-to-face context. Problem here is not that sharply expressed criticism is never appropriate. Part of why it is so easy for these campaigns to get out of hand is that people sending abusive messages cannot know how much it is affecting the victim, as might be easier to realise in a case of face to face contact.

Another aspect here is also the matter of identifying and calling attention to a person's criticisable actions in a way that contributes to the ease with which large numbers of casual participants can be involved. Here individual responsibility may make a difference. Retweeting a stranger's foolishness seems like it must always be morally permissible – after all a person's open source tweets are statements openly volunteered for the consumption of anybody, like standing on a soap box in the middle of a town square. While one might ethically question the motives of a person who retweeted an embarrassing message, it would seem strange to ever call the action 'invasive'. Mary Bale by contrast did not seek to broadcast her actions – quite the reverse: knowing that she was doing something questionable, she looked to make sure she was unobserved before she did it. It makes perfect sense to talk about uploading of video footage intruding on privacy, though at the time they uploaded it the cat owners probably could not have predicted the strength of reaction that was at risk. In the aftermath of cases like this all have strong reasons to avoid similarly calling attention to people, even though they have done wrong.

§3.3 'Smart Space'

'Smart space' is a phrase used to refer to the use of location tracking technologies with other data sources like social networking data to create a richer picture of their activities across a particular space. The combination of these technologies arguably transforms the nature of the space in which they can be tracked. Certainly, combining these data sources can be even more revealing than either independently, potentially more useful and also potentially more intrusive. Once

¹⁷ <http://www.theguardian.com/world/2010/oct/19/cat-bin-woman-mary-bale>

again it is important to consider what uses of this technology will compromise the values protected by norms of privacy: rest and recreation, romance and intimacy, association and autonomous thought.

What uses encroach on these values? The only uses that do not involve encroachment on a person's private sphere are when both the 'message' and the location data are offered to the audience receiving and combining them willingly and with genuinely informed consent as to the implications of their use. One can imagine situation where somebody might choose to do this for safety reasons: imagine a disaster response service asks people to willingly sign up to have their locational data and Twitter messages monitored for the duration of the response effort. Data from a number of volunteers in such a situation could be very useful, and is easy to justify using when volunteered knowingly. Likewise such data might also be combined consensually for large-scale events involving gatherings of many people, like music festivals or sporting occasions.

However, it will represent an intrusion whenever taken non-consensually. Locational data is sensitive, and should not be accessed without the subject's explicit consent. Likewise using closed source information, as previously argued, is already akin to eavesdropping on a private party, and is also a violation of privacy. Furthermore, one has to consider the degree to which cross referencing these datasets will compromise the values that privacy conventions protect (like autonomy). This potential makes combining locational data with other data inherently a more intrusive act, as it is foreseeable that combining the data sources may create even more intrusive data, that is to say data even more revealing of sensitive facts about their life.¹⁸

§ Conclusion

SURVEILLE deliverable D4.7 on the legal right to privacy in different locations argues that European case law supports a substantive right to privacy, protecting, for example, the value of association as part of Article 8's goal to protect a person's right to establish and develop relationships.¹⁹ The framework outlined above supports such a view from the perspective of moral analysis as well. Privacy is vital to association not just so that people can make up their minds about others for themselves. It also enables people to have different kinds of relationships with different people, as they so judge. This is because of mental privacy in a different sense than has been discussed in the text so far. Our mental states are 'private' in the sense that one can choose whether or not to share them with others. This is crucial to autonomy of thought more widely

¹⁸ A wide ethical and legal literature exists on what may constitute sensitive information. One non-exhaustive list includes "close relationships, sexual orientation, alcohol intake, dietary habits, ethnic origin, political beliefs, features of the body and bodily functions, the definition of *self*, and religious and spiritual beliefs and practices" (Gerety in Nissenbaum, 2010, p.123). Warren and Brandeis can be seen as explicitly concerned with issues of information sharing, calling for restriction to dissemination of 'the private life, habits, acts and relations of an individual' (1890, 216). For more modern treatments see Prosser (1960), Fried (1968), Parent (1983) and Gerety (1977).

¹⁹ See SURVEILLE Deliverable D4.7 p. 23

because it enables the possibility that one might think differently from others without it being immediately known. In this way we can reserve particular thoughts – the taboo, the controversial, the embarrassing – to only those with whom one is most intimate.

However, the range of possible relationships does not run from the guarded and reticent to full-blown intimacy in a linear way. On the contrary we have a range of very different kinds of relationship even just amongst those we consider closest to us. With some we might happily discuss our deepest held moral and political commitments, while any mention of sexual matters would be unthinkable. With others, one might be capable of cheerful openness on even the most unpleasant medical issue while both take care to avoid the topic of politics. Other valuable relationships may benefit from norms according to which certain thoughts must be concealed.²⁰ Relations with work colleagues will typically be more formal and involve restraint in a way both unnecessary and inappropriate to friendships outside the workplace. Concealing one's thoughts on difficult topics, such as politics or embarrassing medical conditions, for example, makes social interaction more predictable, impersonal and safe.²¹ Even interaction with family members may well be marked by deliberate reticence in areas where common ground cannot be found, and tact is necessary to maintaining functional social interaction. This nuance is important to relations that take place in public spaces just as much as it is behind closed doors. Deliverable D4.7 makes clear that this is also recognised in European case law as well. As such the virtual social spaces created by social networking technologies and the hybrid smart spaces created by the networking and tracking of objects around physical spaces need to facilitate this nuance.

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²⁰ See, in particular, Nagel (1998): "The essential function of the boundary between what is acknowledged and what is not is to admit or decline to admit potentially significant material into the category of what must be taken into consideration and responded to *collectively* by all parties in the joint enterprise of discourse, action, and justification that proceeds between individuals whenever they come into contact. If something is not acknowledged, then even if it is universally known, it can be left out of consideration in the collective social process." (Nagel, 1998, 11)

²¹ Classic studies of the ways in which individuals shift behavior between contexts with very different conventions of concealment and exposure include George Simmel (1955) *Conflict and the Web of Group-Affiliations* and Erving Goffman (1963) *Behaviour in Public Places*.

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