

THE “RIGHT TO BE LET ALONE” AND PRIVATE INFORMATION

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Abstract: The definition of privacy given by Warren and Brandeis as the “right to be let alone” is described as the most comprehensive of rights and the right most valued by civilized men. Nevertheless, the formulation of privacy as the right to be let alone has been criticized as “broad” and “vague” conception of privacy. In this paper we show that the concept of “right to let alone” is an extraordinary, multifaceted notion that coalesces practical and idealistic features of privacy. It embeds three types of privacy depending on their associated: active, passive and active/passive activities. Active privacy is “freedom-to” claim where the individual is an active agent when dealing with private affairs claiming he/she has the right to control the “extendibility of others’ involvement” in these affairs without interference. This is a right/contractual-based notion of privacy. Accordingly, Justice Rehnquist declaration of no privacy interest in a political rally refers to active privacy. Passive privacy is “freedom-from” notion where the individual is a passive agent when dealing with his/her private affairs and he/she has privacy not due control –as in active privacy– but through others being letting him/her alone. This privacy has duty/moral implications. In this sense Warren and Brandeis advocated that even truthful reporting leads to “a lowering of social standards and morality.” Active/passive privacy is when the individual is the actor and the one acted on. These three-netted interpretations of the “right to be alone” encompass most –if not all- definitions of privacy and give the concept narrowness and precision.

1 INTRODUCTION

The notion of privacy is becoming an important feature in all aspects of life of modern society. “[P]rivacy will be to the information economy of the next century what consumer protection and environmental concerns have been to the industrial society of the 20th century” (Gleick, 1996). New technologies worldwide have affected different aspects of dealing with private information in the areas of security, commerce, government, etc. The situation is described as “clash between privacy and technology” (DeCew, 2002).

Several types of privacy have been distinguished in the literature including physical privacy and informational privacy (Floridi, 1998). Recent results have located ‘private information’ in true linguistic assertions about an identifiable individual. An ontological definition of private information can be developed from linguistic assertions in order to identify the basic units of private information. This definition will be briefly summarized next. The linguistic forms of information or linguistic

assertions provide us with the basic privacy components. Simply, assertions about individuals are private assertions. Consequently, linguistic assertions are categorized according to the number of their referents as follows:

(i) Zero assertion: An assertion that has no referent signifying a single individual.

(ii) Atomic assertion: An assertion that has a single referent signifying a single individual.

(iii) Compound assertion: An assertion that has several referents signifying individuals.

In (i) and (ii), the referent refers to an individual (person), but not to a specific individual. *He is shy*, *Someone is in love* are examples of atomic assertions because each has one (human) referent. They become private when “he” and “someone” are mapped to identifiable individual. On the other, hand *Spare part ax123 is in store 5*, is a zero assertion because it does not involve any individual (human). *They are in love* is a compound assertion because it has two referents.

Linguistic assertions that are limited in their possible extension to human beings become

‘private’ assertions when they are ‘coupled’ to specific individuals through the mechanism of identification. For example, The Swedish Data Act “regards every single storage of any piece of information about a person as a personal information base” (Palme, 1998). If an assertion is true, then it is said to be information, otherwise it is said to be misinformation. Consequently, there are zero information, atomic information, and compound information according to the number of referents. Atomic information becomes private if it refers to an identifiable individual. Similarly, compound information becomes private if it refers to identifiable individuals.

We identify the relationship between individuals and their own atomic private information through the notion of *proprietorship*. Proprietorship of private information is different from the concepts of possession, ownership, and copyrighting. Any atomic private information of an individual is proprietary private information of its *proprietor*. A proprietor of private information may or may not be its possessor and vice versa. Compound private information is proprietary information of its referents: all donors of pieces of atomic private information that are embedded in the compound private information. Atomic private information of an individual can be embedded in compound private information: a combination of pieces of atomic private information of several individuals. The compound assertion is produced through compound activities or situations where individuals ‘discover’ each other. Two or more individuals have the same piece of compound private information because it embeds atomic private information from these individuals. But it is not possible that they have identical atomic private information because simply they have different identities. Atomic private information is the “source” of privacy. Compound private information is “private” because it embeds atomic private information. Also, the concept of proprietorship is applied to compound private information, which represents “sharing of proprietorship” but not necessarily shared possession or ‘knowing’. Some or all proprietors of compound private information may not “know” it.

Compound private information is privacy-reducible to a set of atomic assertions but it has more than that. It is a “bind” that does not only contain atomic assertions but also asserts something about its own assertions. Privacy-reducibility of compound information to atomic information means that “no known atomic information” of an individual implies “no known compound information” of that individual. Because if the compound information is known then its atomic assertions are known. Reducing a compound assertion to a set of atomic

assertions refers to isolating the privacy aspects of the compound assertion. This means that, if we remove the atomic assertion concerning a certain individual, from the compound assertion then the remaining part will not be a privacy-related assertion with respect to the individual involved.

Suppose we have the compound private information, *John saw Mary’s uncle, Jim*. The privacy-reducibility process produces the following three atomic private assertions:

Assertion-1: John saw someone’s uncle.

Assertion-2: Mary has an uncle.

Assertion-3: Jim is an uncle of someone.

Additionally, we can introduce the zero-information meta-assertion: *Assertion-1, assertion-2, and assertion-3 are assertions of one compound private information*, from which it is possible to reconstruct the original compound assertion. The methodology of syntactical construction is not of central concern here.

We have defined every piece of information that includes an identifiable person as private information. The private information can be sensitive, confidential, ordinary, trivial, etc. but all of these types are encompassed by the given definition: they refer to identifiable individuals. It seems that privacy “should come, in law as in life, too much less ... [than] all information about oneself” (Gerety, 1977). Here we can introduce the notion of ‘sensitive’ private information. However, while identifiability is a strict measure of what is private information, ‘sensitivity’ is a notion that is hard to pin down. It is “context dependent and thus global measures of sensitivity cannot be adopted” (Fule and Roddick, 2004). In this work we defer different levels of sensitivity of private information to further study.

Three categories can be applied to any type of activities and situations. For private information, we apply them to the act of processing private information. Suppose that we define each individual as a private information agent capable of processing his/her own private information. The individuals can process (e.g., control uses of) his/her private information in dealing with others (active role); can process his/her private information autonomously (passive-active role); or can be the source of private information processed by others (passive role).

Accordingly, we categorize proprietary private information into two basic categories:

Known: This is the set of atomic private information that is known by others (in possession of others). In this category the individual can be an active processor of his/her information through, for example, releasing it to some but not others, selling it, controlling its uses, etc. Alternatively, the individual can be a passive agent where others

process his/her private information without his/her involvement.

Not Known: This is the set of atomic private information that is only known by the proprietor and no one else. Here the individual can be an active/passive agent processing autonomously his/her own private information. Privacy intrusion can occur in this domain by such techniques as brain washing, forced propaganda, subliminal advertisements, etc.

Next section introduces our new contribution in this paper. We review the notion of “right to be let alone” in preparation for generalizing private information to private affairs. We will use the resultant divisions of passive, active, and active/passive activities to develop three interpretations of the right to be let alone.

2 THE RIGHT TO BE LET ALONE

Samuel Warren and Louis Brandeis 1890 famous article (Warren and Brandeis, 1890) is described as “the most influential law review article ever published” (Etzioni, 1999). “[I]t spawned at least four common law tort actions to protect privacy; and it framed the discussion of privacy in the United States throughout the twentieth century” (Solove, 2002). Warren and Brandeis described the notion of privacy as the right to be let alone. On the authority of Justice Louis Brandeis “the right to be let alone is the most comprehensive of rights and the right most valued by civilized men” (Brandeis, 1928).

Originally, describing privacy as the right to be let alone came out of concern mainly with expanding communication and new media technologies in the United States in 19th century (e.g., instant photographs and the widely distributed tabloid press). Those technologies were invading “private and domestic life” through publishing idle gossip in sensational news (Ruiz, 1997). Accordingly, it is claimed that the aim of privacy laws should be to protect “the privacy of private life” from unwanted publication of information about the private lives of individuals. According to Warren and Brandeis “... modern enterprise and invention have, through invasions upon his [man] privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury” (Warren and Brandeis, 1890). Warren and Brandeis noted that tort law did not typically protect privacy-based harm. While the law of defamation protected injuries to reputations, privacy-based harm is “injury to the feelings” “that was difficult to translate into the tort law of their times, which focused more on tangible injuries” (Solove, 2002).

The formulation of privacy as the right to be let alone has been criticized for failing in providing a balanced view concerning other important notions, such as free speech, effective law enforcement (Solove, 2002). It is described as ‘too broad’ and “never define what privacy is” (Schoeman, 1984). “While the right to be let alone has often been invoked by judges and commentators, it still remains a rather broad and vague conception of privacy” (Solove, 2002).

3 “TO BE LET ALONE” AS INFORMATIONAL PRIVACY

In order to include all private affairs implied by the notion of “to be let alone” we propose three spheres of privacy as shown in figure 1.

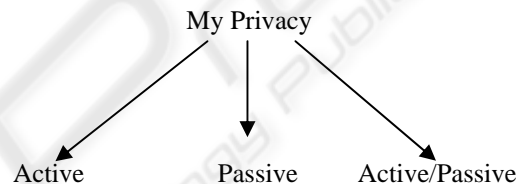


Figure 1: Categories of privacy-related activities of any individual.

The categories represent all privacy-related activities of the individual. We will concern here with “self” private affairs of the individual represented in *My Privacy*. “Self” here refers to proprietary private activities as in the informational context where atomic private information is proprietary information of the individual. Next we will explain this notion of “self” privacy-related activities in terms of “self” private information.

4 ANATOMY OF PRIVATE INFORMATION

Let $p(V)$ be an atomic private assertion about the individual V . A private assertion ‘about’ V is an assertion whose subject (agent) is V or his/her ‘things’. For example, the subject of the assertion *John’s horse is brown* is not John himself but his horse; however, the subject of *John’s blood type is A*, is John himself. This later type of assertions informs about the individuals themselves not about things in this world that are associated with them. The atomic private information *John’s horse is brown* is ‘infected’ by zero-information. Atomic

private information is said to be self-atomic private information (self-information) if its subject is its proprietor and only its proprietor. For example, *John’s house is burning* expresses two pieces of information: (a) *John has a house*, and (b) *The house is burning*. Assertion (a) is self-information because its subject is its proprietor. The assertion (b) is zero-information because its subject is not a person but a house. The term ‘subject’ here means the ‘thing’ about which the information is communicated.

Also, if the police inquired about my dog’s certificate or examined the soil of my land then these are ‘personally owned information’ not self private information about me. The only privacy-related information in these cases is that I own the dog or the land. However, if the inquiries are about my identity (e.g., the police asks to produce identification as an owner of the dog, alcohol level in my blood, my beliefs, etc.) then this information is in my self-private domain. So when we use terms such as ‘private affairs’ we mean “self affairs” that are proprietary of the individual not ‘personally owned affairs’ such as pieces of information (or affairs) about a company or a job, etc. that are in possession of or related to the individual.

Furthermore, we concern ourselves here with information/affairs in *My Privacy* that includes the individual’s private information/affairs and not private information/affairs of others that are in his/her possession. This *My Privacy* can be divided according to the kinds of “freedom” available to the individual as follows:

Active Privacy: This is the type of privacy where the individual is an active agent when dealing with his/her private affairs claiming he/she has the right to control the “extendibility of others’ involvement” in these affairs without interference. So “right to be let alone” means freedom “to” control private affairs that involve others. The difficulties here stem from conflict between the individual and others over who controls what private information about the individual and the extent of this control.

Passive Privacy: This is the type of privacy where the individual is a passive agent when dealing with his/her private affairs and he/she has privacy that is not due his control –as in active privacy– but through others being letting him/her alone. So “right to be let alone” means freedom “from” being subjected to others’ activities with regard to private affairs. The difficulties here stem from the intrusion by others on what the individual consider his/her privacy arena.

Active/Passive Privacy: This is the type of privacy where the individual is simultaneously active and passive agent when dealing with his/her private affairs. So “right to let alone” means freedom

“in” doing whatever he/she wants with his/herself private affairs that do not involve others. The difficulties here stem from others preventing the individual from acting on his/herself. Consider the following examples:

(a) The individual has an active role: presenting oneself in “false light”, giving his/her private information, filing an application for government benefits, flashing.

(b) The individual has a passive role: unsolicited mail and unwanted phone calls, commercial exploitation of his/her private information, filing a compulsory government form, compulsory stripping and exposure.

(c) The individual has active/passive role: tattooing oneself, burning own dairy, masturbation, suicide.

5 ACTIVE PRIVACY: “TO BE LET ALONE” AS “FREEDOM TO”

‘To be let alone’ can be interpreted as a type of freedom qualified, usually, with “to”. It is freedom “to associate”, “to distribute”, “to express”, “to possess”, “to receive information and ideas”, “to educate (children)”, “to reveal beliefs, thoughts, possessions”, “to communicate with others”, etc. The “material” of this activity is one’s own private affairs such as his/her own private information; the practice of the activities is “expending” private affairs in the social exchange with others; and the target of the activities is to maximize social-life benefits with minimum expenditure of privacy. This active freedom -whenever used with the term “from”- reflects restricting individual’s activity as in freedom “from interference”, “from unwarranted governmental intrusion”, “from obstacles”, etc. Privacy here means “the ability to control” private affairs hence it is termed in the informational context as “control” over information. It also means “freedom of choice” in how to expend private affairs.

With respect to private information active freedom is manifested in:

(a) The individual transfers his/her private information from *Not Known* to *Known*.

(b) The individual controls the distribution of private information in possession of subsets of others in *Known*.

This type of privacy entangles directly with the troublesome concept of the limitation of ‘personal freedom’. In its absolute sense, ‘*I have the right to be let alone*’ means ‘I have the right that: (a) others do not pay attention to my private affairs whatever these private affairs are, and (b) I control the limits

of others' attention. This meaning of control does not refer to "control over when and by whom the various parts of us can be sensed by others" (Parker, 1974) but to control what we ourselves put it under different levels of spotlight for others. In ordinary situations "various parts" of us that are sensed by others do not attract attention, but attention arises when we become active in some 'unordinary' way. On the other hand passivity in passive privacy does not embed any control notion.

5.1 "Natural" State of Privacy

There are reservations concerning the type of affairs and the control of limits in active privacy. First, the freedom in active privacy is at odd with the 'natural' state of privacy. The default case of privacy is that others 'pay attention and simultaneously do not pay attention' to people. Here privacy and non-privacy are inseparably intertwined since active freedom by its nature 'attracts attention'. Attracting attention has many obvious facets and also non-obvious aspects. There is a minimum and 'usual' levels of attention arise from living in any community. Then come such aspects as becoming "quasi-public figures" or "participants, even though unwilling, in a newsworthy event", "a subject in public documentation (e.g., official court records)", etc. that attract attention by their very nature. Many legal cases have been understood according to this factor. For example, a case against publishing a photograph of a couple embracing in public is dismissed on the grounds that by embracing in public, the couple had voluntarily consented to be viewed by others (Prosser, 1984). According to Charles Fried, "Privacy is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves" (Fried, 1970).

Hence active privacy/freedom where an individual tries "to control" the consequences of attention would results in more attention. For example in what is called "privacy-based harm", the more the victim express dissatisfaction or resentment for his/her injury the more he/she is victimized. On the other hand there are activities (of passive privacy) that are clearly 'non-attracting attention' activities such as "using contraceptives in the privacy of marriage", "making phone conversation", etc. In these activities the individual is a passive agent who aims at freedom "from" intrusion in his/her privacy.

5.2 Active Freedom

Active freedom associated with active privacy refers to being an active entity in the social "private affairs fair" and exercising control over others' dealings with own private affairs. Privacy in this case is "the right to exercise some measure of control over information about oneself" (Westin, 1967). "Control over information" means that "individuals have the right to decide "when, how, and to what extent information about them is communicated to others" (Westin, 1967). In this case privacy is the "right to decide how much knowledge of [a person's] personal thought and feeling . . . private doings and affairs . . . the public at large shall have" (Godkin, 1980). Clearly our analysis generalizes this notion to the "right to control over others attention about one's private activity." This type of privacy is the so-called 'limiting access to the Self' conception of privacy, which embraces the demand for "freedom from government interference as well as from intrusions by the press and others" (Solove, 2002) without "constraining" private activities of the individual. Freedom here means exercising activities and controlling attentions about these activities. As we mentioned previously this activity is, by itself, naturally information-producing and attention-attractive activity. One feels "free" when he/she does 'naturally attention-attracting activity' and be - at the same time- in charge of the amount and type of the attention of others. He/she desires to be in control of how others pay notice to him/her. The meaning of freedom is 'controlling others' as much as controlling own activity.

Privacy based on active privacy is the type of privacy that seems to conceal domination over others. "Right" in this context has its base in Thomas Hobbes' right of nature. This type of privacy makes people players in the control game, free in selecting plays that they desire. Each person can cling to or display some or all of his/her private affairs. "It's a game for people who choose a form of existence impossible in the old world, maybe hermits at that, hiding in digitally equipped homes, visiting by telecam" (Gleick, 1996). This active freedom is 'social' freedom that involves using various types of measures of shielding (e.g., isolation, solitude, hiding, concealment, etc.) and various forms of exposing (straight publicity, leaking information, ... flashing). "Privacy" here may mean freedom to expose "everything" and controlling what part should be publicized. A flasher may object to announcing his/her name, a witness of a murder may volunteer for a newspaper interview but may object to publish anything about him/her in a crime magazine. This right to be let alone does not

only view privacy as “a type of ... seclusion” but also a type of exposure. It does not only involve feeling of insecurity, fear from risk or danger, safety, anxiety, etc. but also involves feeling of showiness, extravaganza, impressiveness, etc. that reflects ironically over-security. It is an ‘aggressive privacy’ where people want “a right to remain anonymous, hiding their own numbers when placing telephone calls” and on the Internet, they “insist on a right to hide behind false names while engaging in verbal harassment or slander” (Gleick, 1996). And may boldly exhibit themselves and object if others misuse this exhibition.

However a certain minimum level of this active privacy is necessary and may be naturally essential for any human being to live in a society. According to Frank Askin “the right to control information about oneself is an essential ingredient of a secure personality” (Smith, 2000). The society usually sets some limits on the minimal privacy and maximal publicity. For example, regulations that prevent flashing are measures to limit individual’s active privacy. The control-game of privacy involves not only individual, but also society and others as control-players (Allen-Castellitto, 1999).

5.3 Active Privacy and Freedom

It is said that privacy is important in its aim of providing the environment of freedom to act. Thus, protecting privacy is a prerequisite for the exercise of freedom (Ruiz, 1997). This freedom is related to “the area within which the subject is or should be left to do or be what he is able to do or be without interference by other persons [or the State]” (Berlin, 1969). The active privacy is an interpretation of “to be let alone” that coincides with one meaning of the notion of “liberty” which includes the condition of being able to act in any desired way without restraint; and power to do as one likes. Liberty implies the right and ability to control our own lives in terms of work, religion, beliefs, etc. It is claimed that the (constitutional) right to privacy more aptly described as a right to liberty (Thomson, 1975).

We see that in active privacy, the notion of ‘intrusion’ on privacy means conflict between the individual and others (e.g., government) on the limits of the freedom of action in private affairs. In the context of informational privacy this conflict is materialized in terms of:

- (a) Forcing the individual to disclose private information in *Not Known*.
- (b) Limiting the individual control of transferring his/her private information from one set of others in *Known* to another.

It is claimed that “[t]he theory’s [privacy as control over personal information] focus on information, ... , makes it too narrow a conception, for it excludes those aspects of privacy that are not informational, such as the right to make certain fundamental decisions about one’s body, reproduction, or rearing of one’s children” (Solove, 2002). Our approach positions this notion of control-over-information as one aspect of “activity-based” privacy. Additionally, active privacy is but one facet of the conceptualization of the right to be let alone.

6 PASSIVE PRIVACY AS “FREEDOM FROM”

‘To be let alone’ can be interpreted as not being an object (subjected by others), which mandates duties on others not to make the individual an object (of their activities). Notice that Brandeis and Warren used the term “subjected” in referring to the individual when his/her privacy is invaded (Warren and Brandeis, 1890). This second notion of ‘to be let alone’ can be written as “the right of not-being an object’ or it is the duty of any ‘other’ to control his/her/its activities that subject an individual to intrusion on privacy. This right to privacy is “founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers; and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise. The theory that everyone has a right to privacy and that the same is a personal right growing out of the inviolability of the person. The right to one’s person may be said to be a right of complete immunity, to be let alone” (See Ballentine Law Dictionary, 1969).

In the context of informational privacy, passive freedom means that the individual is not subjected to the following:

- (a) Someone transfers the individual’s private information from *Not Known* to *Known*.
- (b) Someone transfers the individual’s private information from one subset in *Known* to another.

The distinction between active and passive forms of privacy has been recognized to a certain extent in the literature. According to Nockleby “This capacity to control information is a power; if you possess the power to control information about yourself we can call it a “right” of privacy. If someone else possesses the power to control information about

you, we can say that person has the power of control" (Nockleby, 2002). In our approach these types of privacy are variations of privacy as the right to be alone. We can notice that active privacy is a 'right-base' privacy while passive privacy is a 'duty-based' privacy. In the classical rights theory, positive rights are rights to "caring actions" from other people while negative rights, by contrast, are rights of non-interference. Negative rights are classified as (a) Active rights (or liberty rights) which are rights to do as one chooses (b) Passive rights which involve the right to let alone. We claim that the "to-be-let-alone" apparatus encompasses what is called negative rights. Also, passive privacy appears in different fashions. According to O'Brien (O'Brien, 1979) privacy "may be understood as fundamentally denoting an existential condition of limited access to an individual's life experiences and engagements." This statement has passivity ingredient. Similar feature of passivity appears when Justice Douglas wrote in 1967, "Those who wrote the Bill of Rights believed that every individual needs both to communicate with others and to keep his affairs to himself. That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets" (Smith, 2000).

It can be noted that many dictionaries mention two senses of privacy: a type of freedom (from intrusion) and a quality of a state (e.g., seclusion). Our active and passive features of privacy offer clearer classification of the notion. Freedom also has two senses: active (unrestricted activity) and passive (the absence of outside pressure or constraint).

It is interesting here to explore the notion of "passive freedom" further. "Privacy is not identical with control over access to oneself, because not all privacy is chosen. Some privacy is accidental, compulsory, or even involuntary" (O'Brien, 1979). This passive freedom is usually qualified with the term "from" such as freedom "from intrusion", "from unwarranted publicity", "from using one's name or likeness", "from unnecessary attacks on reputation", etc. Sometimes it is stated in terms of "free of" as in the right to be free of door-to-door solicitors. Passivity here denotes being in a state in which the individual does not have immediate control over the resultant freedom as this freedom depends on how others respect their duties. When "to" is used with this passive freedom it refers to "others" doing some activities that affect the privacy of the individual. For example, others attempt "to control the moral content of a person's thought", "to search or seizure private...", etc. Clearly, in these situations the individual is a passive agent. Also "to" may be used in conjunction with a very general sense of freedom that includes active and passive

freedom; for example, freedom "to enjoy a private life" means freedom "from" bodily restraint, and freedom "to" engage in any of the common occupations of life, etc.

The interpretation of the "right to be let alone" as "freedom from" or passive privacy means "the right to not-being an object to (others') activities". Hence, "to be let alone" is sometimes rephrased as to be "left" alone where 'left' means untouched or hands off. This sense of freedom is in line with the Kantian notion of human beings as ends in themselves and the need to define and pursue one's own values free from the impingement of others. Also, Justice Louis Brandeis in his much quoted statement "[T]he right to be let alone is the most comprehensive of rights and the right most valued by civilized men" may refer largely to this type of freedom. This freedom has also a touch of the existentialist's view of man as "a free being" that must be left alone to realize his/her true nature. Passive freedom has no control element; just one wants others not paying attention since he/she does not do any activities that attract attention. Passivity here refers to no extra-activity besides normal activities. This freedom means to be 'free to enjoy good life' while 'melting in the crowd' and having immunity from the focused attention of others including the State. The assumption here is that if one doesn't attract the attention of others then others will not subject him/her to their activities. There is no sense in "relinquishing privacy" in this case because "relinquishing" contradicts passivity. This type of freedom can be classified under what is called "inalienable rights" that cannot be surrendered. Brandeis and Warren used 'natural law' as a base for the right to privacy in this sense. It is a special type of the general Freedom advocated by many great men as the right that "consists in a Freedom from any superior Power on Earth, and not being under the Will or legislative Authority of Man, and having only the Law of Nature (or in other Words, of its MAKER) for his Rule" (Williams, 1744).

This passive freedom in private affairs is the one described as valuable to maintain intimacy. Love, friendship and trust are possible not in the controlling mode of one's affairs (free in doing whatever one wants) but in the context of 'living one's affairs' where one expects no others' attention (free from subjection by others). It does not embed domination over others. An intimate relationship such as love grows naturally in the middle of the crowd, spontaneously, uncontrollable (by ones involved), and free. The lovers feel uninhibited (hiding it/ announcing it) because others are basically and non-negatively don't care. Freedom here is not 'control' because the lovers are passive – they are not playing the control game: allowing or

preventing others, but they hide/announce their love as part of the love game.

In passive privacy others may ‘know’ private affairs, yet they don’t ‘possess’ it. ‘Passive seeing’, in this privacy does not lead to ‘subjection’. That is, people who are being seen are not subjected to or immune to any consequences of this seeing. Thus we can understand Warren and Brandeis position when they advocated that even truthful reporting about private affairs was causing “a lowering of social standards and morality.”

Passive freedom in this sense is ‘social’ freedom that does not involve seclusion, isolation, solitude, hiding, concealment, withdrawal, aloneness, alienation, and all other negative implications. It is also the privacy that involves feeling of security, freedom from risk or danger, safety, etc. This privacy-related security and freedom have been identified as an inalienable right to privacy, based on the Fourth Amendment to the United States Constitution: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated... This refers to any ‘penetrations of individual privacy’.

Also, the root of this privacy can be found to a great deal in the liberal notion of negative liberty. “I am normally said to be free to the degree to which no man or body of men interferes with my [passive] activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others. If I am prevented by others from doing what I could otherwise do, I am to that degree unfree; and if this area is contracted by other men beyond a certain minimum, I can be described as being coerced, or, it may be, enslaved. Coercion is not, however, a term that covers every form of inability. If I say that I am unable to jump more than ten feet in the air, or cannot read because I am blind...it would be eccentric to say that I am to that degree enslaved or coerced. Coercion implies the deliberate interference of other human beings within the area in which I could otherwise [passively] act” (Berlin, 1969).

7 PASSIVE/ACTIVE FREEDOM

It remains the third categories in figure 1 where the individual is the actor and the one acted on. This type of activity appears in such expression as “to control of his own person”, “to control own body”, “to remain silent”, “to develop one’s intellect, interests, tastes, and personality”, “to keep his/her affairs to him/herself”, “to care for one’s health and person, to walk, stroll, or loaf”, “to sit on a park

bench or to stroll in a city”, “to testify against oneself” (The Fifth Amendment), and “the right of every individual to the possession and control of his own person” (Union v Botsford, 1891). Justice Douglas linked some of these rights with “personal autonomy” as “rights protected by the First Amendment and ... they are absolute, permitting of no exceptions...” This active/passive privacy is a special type of autonomy. Its side of Autonomy includes decisions related to property-based activities that can be categorized under property rights. As mentioned previously, a property (e.g., a pet) can become a public attraction without any intrusion on the privacy of its owner. When the owner is implicated in the publicity then the issue moves to the active privacy domain. A self-based autonomy includes decisions about proprietary affairs. When I tattoo myself then I am the actor and the one acted on. I may use others to help in this tattooing action but they are only instruments in this operation since they don’t have to know me and I don’t have to know them. However when the tattoo attracts the attention of others then the issue moves to the active privacy domain. Similarly shopping is in the domain of active/passive privacy when I use cash. Shopping in this case is an autonomous and private operation. When I use credits then the issue moves to the active privacy domain. Also identifying oneself is an active/passive privacy right. When the individual volunteers his/her identification or does an activity that results in others requiring his/her identification then the issue moves to the active privacy domain.

8 NON-PRIVACY FREEDOM

The types of freedom discussed above are privacy-related types of freedom. They are different from non-privacy related types of freedom. For example, non-privacy related ‘freedom of speech/expression’ deals with non-private matters such as freedom of expression in politics, religion, social affairs, etc. Privacy related freedom of this type is a freedom where its subject matter is private information of individuals. This privacy related freedom of speech should not be considered as a special type of non-privacy related freedom of speech. There has been no doubt regarding the social value of the later type of freedom as has frequently been the case in human history, while there have been questions about the social value of some or all of the former type of freedom. Treating them separately clarifies many of the issues related to privacy.

The classical free speech claim is given by Mill, “there ought to exist the fullest liberty of professing

and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered" (Mill, 1978). This freedom is restricted if it causes harms to others.

Example: According to Mill, the claim that corn dealers are starvers of the poor is permissible free speech, however, it is not permissible to express the same view to an angry mob that has gathered outside the house of the dealer because this action is "a positive instigation to some mischievous act" (Mill 1978). There is a dispute about what Mill had in mind; however, the example illustrates our notion of privacy-related freedom. Giving the speech outside a particular dealer can cause a direct harm to a specific identifiable person. Unique identification through the house of the dealer is clear. The cause of illegitimate personal harm is not the angry mob but the subjecting of particular individual to a privacy related speech act. The first case, where the accusation is published in the press and may cause non-personal harm (e.g., financial loss to ALL dealers), is a non-privacy related freedom of expression, assuming that no individual dealer is identified in the article.

Non-privacy freedom of speech can be related to privacy from another perspective. Preserving one's privacy may motivate anonymous publications concerning public issues (McIntyre v Ohio, 1995).

9 CONCLUSION

Using the general notion of private activities we developed three types of privacy dependent on the kind of activities of the individual: active, passive and active/passive private activities. According to Justice Rehnquist "Citizens attending a political rally have no privacy interest" (Smith, 2000). According to our classifications, he means here active privacy. He also objected to count "arrests" as "a private occurrence" even when there is no "conclusive evidence of wrongdoing" (Smith, 2000). The assumption in this case is that the act is counted as an active private act where the individual did something, however minor it is, to motivate considered it as "a relevant factor by law enforcement authorities." The notions of "relevancy", "a probable cause", "a valid warrant", etc. are obviously related to this issue in the context of active privacy not passive privacy. The passive privacy notion appears when the "arrest" was an absolutely 'passive privacy event' - say, the police made a mistake and arrested a citizen sleeping at his/her home; then the arrest may be treated differently. These explicit refinements of privacy as special cases of the right to be alone can clarify

many privacy-related issues. Advocates of informational privacy can argue that police ought not release records of arrests in passive private events.

Warren and Brandeis did 'net' the three ingredients of privacy in the concept of the right to be let alone. The individual is one of the "others" thus he/she has freedom as an individual and has duty as an entity in the society. Active privacy has 'right' and contractual base while passive privacy has 'duty' and moral context. The latter is an "ideal privacy" that requires that all others abide by a strict respect to privacy, thus it depends upon how others may discharge this duty. Clearly this is unattainable in human society especially with respect to effective enforcement of this duty on all members. The individual may also not be receptive to this type of privacy. "Except for a few very eccentric, and probably dangerous, individuals, no one desires to be let entirely alone" (Johnson, 2003). Hence Warren and Brandeis did not net it with active privacy where the individual is not completely a passive party with regard to his/her privacy. Thus the "right to be let alone" has a utilitarian touch that aims at maximizing benefits to the society and individuals.

These active and passive interpretations of the right to be let alone have no right/duty correlativity. The right to be actively free correlates with the duty of non-interference by others; and the duty of others of not subjecting the individual to privacy intrusion correlates with the right of the individual to immunity in private affairs. So Warren and Brandeis' "right to be let alone" integrates two rights and two duties. Beside these double facets of privacy, "to be let alone" encompasses the "real" right to "self": active/passive privacy. This concept of "to be let alone" with its multi-rights and duties is a genius apparatus for describing the private realm of humans.

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