PRIVACY, INTIMACY, AND ISOLATION. By Julie C. Inness.[1] New York: Oxford University Press. 1992. Pp. ix, 157. $24.95.

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"Quagmire, privacy as deep."

So reads an entry in the index of this book. Unlike most index entries, this one is not only useful but profound. As the author notes, privacy *seems* to be based on firm, widely shared understandings. But "the ground softens as we discover the confusion underlying our privacy intuitions." Indeed, prominent scholars have tried to escape the swamp by abandoning the concept of privacy altogether.

Professor Inness's goal in this book is to define privacy and defend its moral value. She views all of the various aspects of privacy as methods of controlling intimate aspects of life. She then seeks to provide a moral foundation for intimacy on the basic human capacity for "love, liking, and care." She contends that her theory provides a moral basis for both informational privacy and what she calls "constitutional privacy"—the rights recognized by the Supreme Court in *Roe* and *Griswold*.[3]

Part I of this review will discuss and expand upon Professor Inness's response to privacy skepticism. Part II will explain how her own view of privacy, while helpful, fails as a foundational theory. Part III closes with a discussion of the prospects for a general theory of privacy.

I

One of Professor Inness's main goals is to challenge the "privacy skeptics" who seek to escape the quagmire by abandoning the concept altogether. Her primary fire is directed against Judith Jarvis Thomson and others who have argued that privacy is a dispensable concept. Anything that is protected by the so-called right to privacy, Thomson argued, also turns out to be protected by some other moral right, such as a property entitlement. Moreover, pri-

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3. I will follow her usage in distinguishing these two types of privacy, although her terminology is somewhat inaccurate, since the Constitution gives more explicit protection to "informational privacy" in the Fourth Amendment than it does to what she calls "constitutional privacy."

vacy skeptics have argued, the various instances of privacy rights really have nothing much in common. In short, the concept of privacy does no significant analytical work.

In response to Thomson, Inness argues that some aspects of the right to privacy do not involve other rights. Although her evidence is somewhat debatable,[4] her point seems valid. For instance, the right to privacy clearly protects against a wiretap of a phone conversation, yet the wiretap may involve no invasion of the speaker's property rights. Also, as Inness argues cogently, privacy would not necessarily be a superfluous concept even if every example of privacy also could be classified as an example of some other right.[5] For example, one reason for supporting property rights may be that they protect privacy interests.

A related form of skepticism argues that informational and constitutional privacy have nothing in common. In contrast, Justice Douglas attempted in *Griswold* to link the right to use contraception with the impermissibility of police searches of the martial bedroom. Although often criticized, Douglas's effort to connect informational and constitutional privacy is not implausible. If we especially object to searches of the marital bedroom, we must believe that much of what goes on there is none of the government's business. This belief seems relevant to determining the scope of the government's regulatory power as well as the scope of its investigatory power.[6]

Abortion laws do not call for any searches of the marital bedroom, but even so, concerns about informational privacy are not wholly irrelevant. A companion case to *Roe* involved the more enlightened American Law Institute's model abortion statute, which required that the abortion decision be affirmed by a hospital committee and that the performing physician's judgment be confirmed by independent examinations of the patient by two other physicians. These are rather striking intrusions on informational privacy, particularly because psychological, emotional and familial factors were

4. Her main example is the right of the sender of a letter to control the dissemination of its contents. In our legal system, however, this right comes under the rubric of copyright law rather than privacy.

5. The best possible classification scheme may separate entities with some similarities into different categories; we may well find it useful to observe these similarities across categories. For example, butterflies and bats belong to very different zoological groups, but the concept of "flying animals" remains meaningful and useful.

6. The linkage between constitutional and informational privacy may work in the opposite direction as well. If revealing information about personal sexual practices constitutes a tort, at least one reason for preventing dissemination of the information is probably to leave individuals free from public pressure on such matters.

considered relevant.[7] In short, we should not be too quick to dismiss the possibility that informational and constitutional privacy are indeed linked at some level.

Another critique of privacy has come from feminists. In arguing that "the personal is the political," they have often denied (or at least seemed to deny) the existence of any genuine separation between the private and public. Somewhat contradictorily, they have also argued that privacy does exist but that it is bad, because it shields the abuse of women within the home from public scrutiny and control. Both aspects of the feminist position have recently been the subject of a thoughtful critique by Ruth Gavison.[8] She shows that most feminist writing, on close analysis, exhibits an effort toward a deeper understanding of the public/private distinction and advocates redrawing the boundary, instead of abolition. Those few feminists who actually seek abolition of privacy, rather than reform, have failed to make a plausible case.

Other attacks on privacy have come from those at the opposite end of the political spectrum from feminists. Conservative skeptics argue that privacy is merely a personal preference with no special moral standing. Richard Posner has suggested that even informational privacy may actually be undesirable, since it allows people to conceal secrets and thereby defraud others in economic and social transactions.[9] Regarding constitutional privacy, Robert Bork compared a state law regulating contraceptives (to protect those who were offended by contraception) to a pollution regulation (protecting those who are adversely affected by smog). He found no difference except personal preference between the two.[10]

Posner's intensely skeptical initial views have been somewhat modified in later economic analyses.[11] The justifications for informational privacy are even stronger if we relax the traditional economic assumption of complete human rationality. In reality, rather than responding rationally, others might well overreact to a dramatic episode of misconduct in a person's past. Cognitive psycholo-

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7. *Doe v. Bolton*, 410 U.S. 179 (1973). Similarly, judicial bypass procedures involve a judge's inquiry into the intimate personal aspects of a minor's life. See *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

8. Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 Stan. L. Rev. 1 (1992).

9. See Richard A. Posner, *The Right of Privacy*, 12 Ga. L. Rev. 393, 399-400 (1978).

10. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 8-10 (1971).

11. See Richard A. Posner, *Privacy, Secrecy, and Reputation*, 28 Buff. L. Rev. 1, 14-15, 22-23 (1979); John P. Gould, *Privacy and the Economics of Information*, 9 J. Legal Stud. 827 (1980); Frank H. Easterbrook, *Privacy and the Optional Extent of Disclosure Under the Freedom of Information Act*, 9 J. Leg. Stud. 775, 787-96 (1980).

gists have collected a rich menagerie of human irrationalities. Among the most common is the tendency to overweigh data which is recent and dramatic, at the expense of more reliable background information. For example, people are more afraid of flying than of driving, even though flying is safer, in part because airplane crashes are highly dramatic and visible events. For the same reason, a vivid example of prior misconduct is also likely to be given too much weight.[12] Thus, restricting access to such information may be socially desirable.

Bork's position seems to view preferences as essentially fungible, whether we are considering the moralistic preferences of religious groups versus the preference of couples for family planning, or the preference of industry for higher profits versus that of pollution victims for clean air.[13] In this respect, his analysis seems consistent with the general flattening of human values that often characterizes economic analysis. Since any human culture necessarily treats some preferences as more fundamental than others, this rhetorical skepticism is inevitably jarring; Bork sounds almost like a visitor from another planet, who simply doesn't understand how we experience our lives.

However useful this treatment of preferences may be for economic analysis, it seems lacking as a normative approach. By treating all values as merely "tastes," it assumes that values cannot be the subject of rational discussion, and therefore must be treated as arbitrary preferences. Yet, we do find it possible to discuss moral issues. Whether the reason is that moral values have some objective existence or that our shared culture generates some fundamental consensus, we are often able to find some common ground on which to form judgments.

Like Inness, I find the case for privacy skepticism unpersuasive. Apart from our shared intuitions about the importance and scope of privacy, the strongest evidence that there *is* "something there" is provided by the scholarship in the field. There have been a number of important efforts to provide an intellectual foundation for privacy. Although none of them has been wholly successful, they have uncovered connections between various privacy rights

12. For a survey of the literature, see Jonathan Baron, *Thinking and Deciding* 198-217 (Cambridge U. Press, 1988).

13. Bork could well respond that he is speaking only of the requirements of neutrality for judges in constitutional cases. But if our culture embodies some strong distinctions between various types of preferences, it is difficult to see why "neutrality" should require judges to treat as identical preferences that are culturally defined as radically different. Treating unlike things as if they were alike is just as much a violation of neutrality as treating like things differently.

and have linked those rights to central cultural values. While they fall short of their intellectual ambitions, the partial successes of these theories indicate that "privacy" is not merely an arbitrary collection of unrelated preferences for certain activities. In particular, as we will see, while Professor Inness's theory is only partially successful, it incorporates some genuine insights about the nature of privacy.

II

If privacy is not an empty concept or an arbitrary preference, just what is it? Professor Inness rejects efforts to define privacy as the equivalent of seclusion. As she observes, it would be ironic to compliment a prisoner in solitary confinement on the extent of his privacy. Similarly, we would not say that a dissident enjoyed the luxury of perfect privacy if her government had banned all public mention of her existence. Thus, seclusion and secrecy do not aptly define privacy; there seems to be an important element of personal control as well. On the other hand, information control extends beyond privacy; trade secret law, for example, does not seem to involve privacy, even though it involves control over information. Consequently, Inness limits privacy to a narrower domain. She defines privacy as "the state of possessing control over a realm of intimate decisions, which includes decisions about intimate access, intimate information, and intimate actions." In turn, she defines an action as intimate if it "draws its meaning and value for the agent from her love, liking, or care" for another person.[14]

This analysis contains some important insights. In classifying an action as intimate, Inness properly focuses on its "meaning or value to the agent." Thus, intimacy is not necessarily an inherent aspect of certain acts; it may well have a cultural component. Moreover, Inness also seems right to view privacy as relating to emotional relationships. Her theory fails, however, to account for some other important aspects of privacy.

To begin with, while voluntariness is an important aspect of privacy, the concept of control requires elaboration. Privacy would seem to cover nudity as an aspect of intimacy; the Peeping Tom is a classic invader of privacy. If privacy includes the right to "control" visual access to one's body, then it should include not only the right to preclude such access but also the right to allow it. Yet, it seems decidedly odd to say that public indecency laws violate a flasher's

14. Conceivably, these same emotions might have a nonhuman focus, as in the situation of a beloved pet. Although Inness does not discuss this possibility, expanding the concept of intimacy in this way would seem consistent with her analysis.

right to privacy. If anything, the flasher seems to be invading the privacy of others with an unwanted intimacy. In other settings, "privacy as control" fails to work because the conduct in question is inherently nonindividualistic: as the old saying goes, it takes two to tango. If privacy is defined as control and extends to marriage, we would have to say that it incorporates the power to control whom you marry—a right that no individual has in a society where marriage requires the consent of both parties.[15] We need to say either that privacy is the mutual right of both partners to exercise joint control, or else that it is the individual right to offer or accept intimacy.

Inness's definition of intimacy also needs refinement. She defines intimacy on the basis of emotional significance. But this definition seems both too broad and too narrow. It is too narrow, because such paradigmatically private activities as sexual acts may or may not be motivated by "love, liking, or caring," depending on the context. Yet, privacy does not include only long-term, emotionally meaningful sexual relationships. On the other hand, this definition is also too broad. People express "love, liking, or caring" in many ways such as buying gifts or cooking meals, but these would not normally be considered intimate acts.

Inness does seem correct in seeing privacy invasions as boundary crossings: something that is normally part of the intimate sphere is involuntarily transferred to the public sphere. In part, as she says, the injury is that the individual's ability to manage her intimate relationships is damaged. But there is also a correlative injury to the individual's ability to manage her public relationships, and this injury may also be substantial.[16] In our society, for example, nudity often functions as a powerful symbol of intimacy, while clothing is an important method of creating a social image. Thus, requiring a person to strip both imposes an undesired intimacy and impairs control over self-presentation in public.[17]

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15. Similarly, if we define privacy as control over intimate affairs, and include parenthood as an intimate affair, we must also conclude that men in our society do not have full privacy rights, since under *Roe* women have the ultimate legal power to control reproduction. Classifying child rearing as an aspect of privacy also seems problematic if control is the test: after a child is born, as a practical matter, the parents lose full control of the relationship, and instead are more or less committed to some form of parental relationship.

16. As Bob Post has emphasized, privacy seems closely connected with our culture's definitions of social roles; an invasion of privacy usually involves disrupting an individual's ability to manage social roles appropriately and to thereby control her social identity. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 Cal. L. Rev. 957 (1989) ("*Social Foundations*").

17. For instance, "dressing for success" won't work if others own your nude photo. Thus, privacy protects not just control over intimate relationships but also the ability to control impersonal ones.

Apart from these difficulties in Inness's definition of privacy, there are also problems with her attempt to demonstrate that privacy as so defined should be accorded any moral status. Inness seeks to connect control over intimate relationships with the nature of personhood itself:

> If personhood makes claims on the agent as both an emotional and a rational being, it follows that an adequate principle of respect for persons must incorporate respect for each aspect: to respect another as a person is to respect her as both a rational chooser and an emotional chooser, a being with the capacity to make decisions with respect to her love, care, and liking. We must respect the agent's autonomy with regard to loving, caring, and liking as well as rational choice.[18]

Here again, Inness's analysis is both illuminating and insufficient. It is illuminating in its effort to expand moral personhood beyond simple rational autonomy. There is something lacking in a purely rational concept of personhood; this lack can be seen perhaps in the flattened vision of humanity reflected in some law and economics analyses of privacy issues. Inness deserves applause for her efforts to supplement this vision of personhood, but she leaves her own vision almost undefended. Yet it seems vulnerable to at least two criticisms.

First, it is one thing to say that certain emotional capacities are important moral virtues; it is another to incorporate them into the definition of personhood. In defense of this incorporation, Inness says only that we would question whether someone who lacked these capacities was really a person or was morally responsible for her acts. Yet, there are many other traits whose absence might give rise to similar doubts. Some people might question whether an individual who completely lacked the capacity for religious awareness, or a desire to contribute to the community, or aesthetic sensibility, could be considered to have the full attributes of personhood. We are left in the dark about why, among the many moral virtues and desirable personal traits, the ones Inness identifies are the defining marks of personhood.

Second, her treatment of these attributes themselves is off-key. In her defense of "liking, loving, and caring" as basic to personhood, she says that "such positively valued emotional states as these are not commonly viewed as manifestations of rationality, yet the capacity to experience these states still seems to be intrinsic to

18. This passage might well be considered "Kantianism in a different voice," expanding Kant's effort to ground ethics in rational autonomy by adding an emotional dimension to autonomy.

personhood." It seems wrong, however, to view friendship and love as merely descriptions of *one* individual's emotional state.

Consider the following hypothetical. A drug called Affinity is developed, which induces paralysis and also has some interesting emotional effects. In particular, if taken while looking at another person's picture, the result is an intense feeling of personal attachment, which vanishes completely an hour later when the drug wears off. Many users develop the habit of taking the drug while looking at celebrity photographs. The government seeks to ban the drug. Would such a ban violate the right to privacy, if that right is defined in terms of "love, liking, or caring"?[19]

The reason Affinity does not seem to truly provide love, friendship, or caring is that none of these are properly characterized as individual emotional states. Instead, they are emotional relationships, which have to involve some actual connection between two people. Inness's definition of privacy is fundamentally individualistic, revolving around an individual's right to control her own intimate emotional life. But if moral value really resides in relationships rather than in a single individual's emotion, then the privacy right should protect relationships rather than individuals.

III

If her approach were fully successful, Inness would have provided a powerful theory of privacy. It would connect informational privacy and constitutional privacy via the notion of control over intimate situations, and explain why that control is entitled to societal respect. Her connecting links do seem to incorporate some genuine insights, but in the end, they are not tight or secure enough to provide the kind of foundational theory of privacy she is seeking. But perhaps such a foundational theory is a quixotic goal.

Privacy is the subject of a large and highly diverse body of scholarship. Professor Inness's work is in the tradition of analytic philosophy, as are many of the works she discusses; there have also been some intriguing efforts to bring the work of Foucalt and other

19. One might argue that all mind-altering drugs are protected by the right to personal autonomy or even by the right to privacy. If so, LSD and other drugs would also be protected; the special attributes of Affinity would not be relevant. But assuming that this is not true, it seems decidedly peculiar to say that the right to privacy gives special protection to Affinity as opposed to other mind-altering drugs. Yet, if Inness is right, Affinity would be entitled to special constitutional protection because we have to respect the autonomy of people as rational emotional choosers whose personhood is defined by the emotional states of "liking, loving, and caring." After all, Affinity would augment the power to choose these emotions considerably.

continental philosophers to bear on the topic of privacy.[20] Other writers have looked beyond philosophy for insights. Economic analysis, while overlooking some of the deep cultural significance of privacy, has uncovered significant connections between privacy and other legal rules governing the dissemination of information. In Bob Post's hands, sociological theories of group interaction have illuminated the role of privacy in our culture,[21] while feminists have uncovered some of the harmful effects of privacy in our society.

The problem is not that these theories are unenlightening; the topic of privacy has not lacked for insightful analyses. Instead, the problem is an embarrassment of riches: too many incompatible theories, each seeming to contain a genuine insight about some aspect of privacy. But to the extent they attempt to provide a foundational theory of privacy, each of these theories must claim to have identified the crucial attribute shared by all instances of "privacy." Without regard to the intelligence or energy of the theorist, such an effort might well fail for any of three reasons.

First, it may be that there is no trait that uniquely characterizes the collection of entities we call private. Earlier, I rejected the argument that privacy simply denoted an arbitrary collection of otherwise unrelated actions, relationships or experiences. It is tempting to conclude, as Inness does, that if various examples of privacy are not unrelated, they must all be instances of the same essential attribute. But this is obviously a false dichotomy. For example, informational privacy may share some important characteristics with reproductive privacy, which shares other important characteristics with the right to die, which in turn resembles informational privacy in yet another way. We may be dealing with a family resemblance rather than an essence.

Second, perhaps there is some defining characteristic of the "private," but this characteristic has limited significance. This might occur because the characteristic deals with only one dimension of privacy: for example, how privacy is experienced by members of our culture, as opposed to the rules that a just society would adopt regarding the same situations. Alternatively, privacy might not be the most important aspect of many private events; their moral status, for instance, might be more heavily influenced by other facts. In this situation, we would have a unified theory of privacy, but the theory would provide only limited insight.

Finally, we might be able to identify a common characteristic that explains privacy, but we might find that we understood this

20. See, e.g., Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989).
21. See Post, *Social Foundations* (cited in note 16).

common characteristic even less well than we understand privacy itself. Because privacy does relate to fundamental aspects of our experience, we may well be unable to find anything that is both more fundamental and also more understandable. So we may be in the position of explaining the mysterious in terms of the utterly ineffable.

Foundationalism can be a useful aspiration when it goads us toward the construction of broader and more profound theories. When it fails to produce the ultimate knowledge it seeks, theory-building may still serve as a source of useful insight. But we should not be too disappointed that foundational theories like Inness's fail to capture the full complexity and richness of their subjects.