Triangulating Intrusion in Privacy Law

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Keywords

Privacy, Semantics, Common Law Development, Tort

Abstract

This essay concerns two interrelated, persistent problems for privacy law. The first is the failure of academic scholarship to get adequately to grips with the meaning of privacy. The second is the apparent inability of the English judiciary to resolve the common law lacuna in respect of intrusion-type privacy violations. The two problems are related in that the former is a significant contributor to the latter.

Mainstream scholarship has long insisted on pursuing the One True Meaning of Privacy, thereby overlooking valid, alternative conceptualisations and creating a melange of theories that provides little assistance to judges. However, by adopting a novel, triangulation-based approach to understanding privacy of the sort proposed herein, it is possible to locate points of consensus between these rival theories in respect of particular privacy-violating activities. This consensus can provide the certainty common law judges require for the elaboration of further doctrine in this field.

1. Introduction

Two significant, interrelated problems in both legal scholarship and English common law doctrine relating to individual privacy rights have thus far received insufficiently focused attention. The first problem concerns privacy theory. It is an inability, in privacy scholarship, to get to grips properly with what 'privacy' means. Many scholars have attempted to define privacy.[1] However, each mainstream privacy theory manages to cover only limited ground and they generally present as mutually exclusive. Thus, having failed in its own mission to provide a precise definition of privacy, mainstream scholarship seems unable to move beyond the impasse it has created.

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[1] This essay discusses contributions from some of the leading theorists in the privacy field. These theorists can, in large part, be considered to contribute to mainstream (western) privacy theory. However, it is not the aim of the essay to exhaustively examine all contributions to privacy theory. The aim is, rather, to point up an area of methodological similarity between leading mainstream theorists.

The second problem is one of doctrine. It is the lack of a privacy tort of 'intrusion into a person's seclusion' in English law. Intrusion-type violations of privacy are those that involve physical intrusions into personal space or property, as well as unwanted watching, recording or accessing of a person or their private information. It has been suggested that there have recently been some, limited indications that English courts are willing to recognise and remedy privacy violations that go beyond the doctrine of 'misuse of private information' (MPI) and which resemble pure intrusions.[2] However, even brief scrutiny of such suggestions shows them to be premature.

There are two key cases around which these suggestions centre. The first is the phone hacking case of *Gulati v Mirror Group Newspapers Ltd*.[3] In *Gulati*, damages were awarded to claimants whose voicemail accounts had been compromised by the defendant, even though much of the information thereby gleaned was never published. But to conclude from this case that English law now adequately guards against intrusions into privacy is premature for three reasons. First, the decision was rendered exclusively under the doctrine of MPI, and thus does not recognise a novel head of liability; there is no explicit acknowledgement by the court that finding the defendant liable in this case extends the law beyond its established limits. Second, even if there had been some expansion of the doctrine's limits, *Gulati* would still be firmly focused on the obtaining of *information*; there is nothing in the case to suggest that an intrusion through which no *information* was obtained has become actionable. Third, although the level of damages awarded was confirmed on appeal, the issue of liability was uncontested even at first instance; the defendant admitted – perhaps unwisely – the its conduct amounted to a misuse of private information.[4]

The second case giving rise to the impression, amongst some, that intrusion is now covered by English law is *PJS v Associated Newspapers Ltd*.[5] In *PJS*, the Supreme Court continued an MPI injunction despite the information to which it related being in the public domain. In so doing, it cited heavily Tugendhat J's first instance judgment in *Goodwin v News*

[2] The term 'misuse of private information' first appears in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, [14] (Lord Nicholls).
[3] [2015] EWHC 1482 (Ch), [2015] WLR(D) 232. Suggestions that *Gulati* exemplifies a novel, intrusion facet of the MPI doctrine can be found in NA Moreham, 'Liability for listening: why phone hacking is an actionable breach of privacy' (2015) 7(2) Journal of Media Law 155, and John Hartshorne, 'The need for an intrusion upon seclusion privacy tort within English law' (2017) 46(4) Common Law World Review 287. cf Jacob Rowbottom, 'A landmark at a turning point: *Campbell* and the use of privacy law to constrain media power' (2015) 7(2) Journal of Media Law 170.
[4] See further Rowbottom, ibid.
[5] [2016] UKSC 26, [2016] 1 AC 1081.

Group Newspapers Ltd in which he discussed frequent judicial uses of the term 'intrusion' at length.[6] One scholar has recently suggested that the references to 'intrusion' in *PJS* indicate that MPI now 'also covers intrusion'.'[7] This is not the place in which to dissect *PJS* in detail, but we can briefly note that the court's reference to 'intrusion' takes place in the context of a discussion of the intrusive impact upon the claimants' family life that the *publication* of the information has had, and which further public discussion would generate – particularly online: 'if there was no injunction in this case, there would be greater intrusion on the lives of [the claimants] through the internet.'[8] As in *Gulati*, there is no suggestion in the case that an MPI claim could succeed in a 'pure' intrusion situation where there was neither non-consensual acquisition nor dissemination of private information. As such, *PJS* cannot be said to have opened up the MPI doctrine into anything even close to a full-blown intrusion tort.

Scholars have long lamented the intrusion lacuna in English law.[9] However, not enough has been done to uncover the *roots* of English law's failure to remedy it. One key factor – which has too often been overlooked – is the first problem outlined above: the conceptual difficulty that the seemingly amorphous term 'privacy' poses for common law judges.

This conceptual difficulty is made all the more intense by the House of Lords' judgment in *Wainwright v Home Office*.[10] It is one of the few occasions upon which our highest court has rendered a judgment in a privacy case, and one of only two such cases where the very nature – and future direction – of English law's privacy protections was in issue.[11] In *Wainwright*, the House of Lords rejected the opportunity to develop a broad privacy tort and, by implication, further rejected the future potential to develop discrete heads of liability *other* than that which already existed (equitable confidentiality[12]). Giving the leading judgment, Lord Hoffmann expressly doubted the amenability of the term 'privacy' to legally useful definition:

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[6] [2011] EWHC 1437 (QB), [2011] EMLR 27, cited in *PJS*, ibid, at [58]-[59].
[7] Paul Wragg, 'Recognising a Privacy-Invasion Tort: The Conceptual Unity of Informational and Intrusion Claims' (2019) 78(2) CLJ (forthcoming).
[8] *PJS*, n 5, [63].
[9] See eg NA Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 LQR 628. See also David Eady, 'A statutory right to privacy' (1996) 3 EHRLR 243, Basil Markesinis et al, 'Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)' (2004) 52 American Journal of Comparative Law 133.
[10] *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406 (*Wainwright*).
[11] The second being *Campbell* (n 2).
[12] The relationship between equitable confidence and the 'tort' of 'misuse of private information' subsequently recognised in *Campbell* (ibid) – which may or may not be a tort at all – remains unclear. The leading judicial pronouncement on this relationship, in *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2016] QB 1003, fails to resolve the conceptual murkiness surrounding the elaboration of doctrine in this field. See Thomas DC Bennett, 'Judicial Activism and the Nature of "Misuse of Private Information"' (2018) 23(2) Communications Law 74.

> The need in the United States to break down the concept of 'invasion of privacy' into a number of loosely-linked torts must cast doubt upon the value of any high-level generalisation which can perform a useful function in enabling one to deduce the rule to be applied in a concrete case.[13]

This is a powerful indicator to subsequent courts that the conceptual difficulties posed by the term 'privacy' may be overwhelming.[14] For jurists, like the academic theorists, have struggled to define 'privacy' with precision. And when judges turn to the scholarly literature for assistance, they find an unhelpful melange of limited, seemingly mutually exclusive theories that is of little practical use.

This essay sets out to solve the first problem, and in the process of so doing it hopes to lay some of the groundwork necessary for solving the second. Since the conceptual problem is a cause of the doctrinal one, the solution to the former will make a necessary (though not in itself sufficient) contribution to solving the latter.[15] Thus, we will focus on a solution to the conceptual problem. This solution involves developing a new methodology for approaching the task of understanding privacy. To be clear, it is not another in the long line of efforts to locate the One True Meaning of privacy. The method espoused in this essay involves making use of the purportedly mutually exclusive mainstream theories and locating points of overlap between them. For it is at these points of overlap that we can locate sufficient consensus on the meaning of privacy to provide an adequate basis for the establishment of legal doctrine (eg in

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[13] *Wainwright* (n 10) [18].

[14] In *Campbell*, ibid, Baroness Hale makes plain that the effect of *Wainwright* is to confirm that 'the courts will not invent a new cause of action to cover types of activity which were not previously covered' ([133]).

[15] The conceptual problem is not the only obstacle to the recognition of an intrusion tort in English law. However, the problem that the lack of conceptual consensus on privacy poses is nevertheless a significant factor, and one – moreover – which has received no detailed treatment (specifically in respect of common law development) in domestic privacy scholarship. Other concerns, such as the implications for the rule of law of the judicial development of a novel and controversial head of liability, also contribute to the stagnation of the law in this area. For instance, it is apparent that English courts in privacy cases have adopted a mode of developmental reasoning that tightly limits their capacity for recognising novel heads of liability. This mode of reasoning aligns broadly with accounts of 'narrow incrementalism', 'gradualism' and 'minimalism'. I have written elsewhere on the pervasiveness of this sort of reasoning in English privacy law and of the stagnation of the law it engenders. (See Thomas DC Bennett, 'Privacy and Incrementalism' in András Koltay and Paul Wragg (eds), *Research Handbook on Comparative Defamation and Privacy Law* (Edward Elgar 2020) (forthcoming).) I neither repeat nor extend that line of analysis here since my focus in this essay is on the conceptual rather than formal difficulties underpinning the non-development of an intrusion tort. See also Bennett, 'Judicial Activism' (n 12), and Thomas DC Bennett, 'Privacy, third parties and judicial method: *Wainwright*'s legacy of uncertainty' (2015) 7(2) Journal of Media Law 251. On 'narrow incrementalism' see Lesley Dolding and Richard Mullender, 'Tort Law, Incrementalism, and the House of Lords' (1996) 47(1) NILQ 12. On 'gradualism', see Keith M Stanton, 'Incremental Approaches to the Duty of Care' in Nicholas Mullany (ed), *Torts in the Nineties* (North Ryde 1997). On 'minimalism', see Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 2001).

the form of novel heads of tort liability). This is a method that resembles the notion of 'theory triangulation' as set out by the sociologist Norman Denzin. As such, we will call it the 'triangulation method'.

In order to make the argument, the essay proceeds through several stages. The first and second sections lay the conceptual groundwork necessary to make sense of the triangulation method outlined in the third. In the first section, the essay draws on Ludwig Wittgenstein's account of 'aspect perception' and 'aspect blindness'. This account is useful since it enables us, in the second section, to point up the nature of the difficulty encountered by scholars endeavouring to define privacy. In focusing on only one 'aspect' of privacy each, their individual theories exhibit 'aspect blindness' to alternative perspectives. This leads to the problem identified by Daniel Solove – that each of the mainstream theories is either too broad or too narrow.[16] None manages to encapsulate the entirety of what privacy is whilst excluding non-privacy matters and, as a result, privacy scholarship is left in a state unhelpful to judges contemplating the expansion of common law privacy protections.

With this groundwork in place, the essay proceeds, in the third section, to outline the proposed novel method for triangulating an understanding of privacy. It then exemplifies the way in which this method may be used to locate sufficient consensus between mainstream theories to enable the courts to be satisfied that behaviour that intrudes into a person's personal space, property or affairs amounts to a violation of privacy. It does this by examining three cases as putative privacy violations. These are the English case of *Kaye*,[17] the Canadian case of *Jones*[18] and the New Zealand case of *Holland*.[19] Each of these cases involves an intrusion into a person's private space or affairs that would not attract liability under English tort law as it currently stands. Upon examination of them through the lens of the triangulation method, however, it becomes apparent that there is strong consensus between a number of scholars that the defendants in each of these cases committed a violation of the claimants' privacy.

The identification and exemplification of this triangulation method suggests that it ought to be possible, at a practical level, to develop legal doctrine capable of responding to unwarranted intrusions, notwithstanding the lack of agreement over the nature of 'privacy' at a higher level of philosophical abstraction. Thus, whilst the search for privacy's 'true' nature

[16] Daniel J Solove, *Understanding Privacy* (Harvard University Press 2009) ch 2.
[17] *Kaye v Robertson* [1991] FSR 62.
[18] *Jones v Tsige* 2012 ONCA 32, 108 OR (3d) 241.
[19] *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.

is almost certainly a false errand, it does not excuse the stagnation of the law in respect of remedying wrongful intrusions into individuals' seclusion.[20]

2. Aspect Perception and Aspect Blindness

Ludwig Wittgenstein emphasises the importance of context in establishing a concept's meaning. His accounts of 'aspect perception' and its correlative opposite, 'aspect blindness', highlight the necessity of prior experience for our ability to appreciate and comprehend complex concepts (of which privacy is an example). Introducing these accounts lays the necessary groundwork for the analysis of mainstream privacy scholarship that follows.

In his later work, Wittgenstein explores the different ways in which we 'see' objects. In a famous example, he referred to Joseph Jastrow's puzzle picture (which might be interpreted as depicting a duck or a rabbit).[21] He noted that a person looking at the picture might initially see a duck, but then also 'see' a rabbit. Wittgenstein labelled each of these possible perceptions an 'aspect' of the picture. The form of the picture itself, lacking any objective meaning, is imbued with the meaning that the observer brings to it; 'one [brings] a concept to what one sees'.[22] The meanings we attribute to observable phenomena are neither objective nor fixed to the form in which we observe them. Thus, 'one and the same content can intelligibly exhibit many alternative forms, which are themselves contingent.'[23]

Wittgenstein realised that our ability to 'see' multiple aspects in the phenomena we observe is contingent upon our experience. An individual who has never encountered a rabbit would 'see' only a duck in the picture. We recognise that which we observe only because we are able to draw links between the observed and similar phenomena to which we have previously been exposed. Modern psychiatry concurs; as Arnold Modell explains, memory involves a metaphoric process whereby the mind unconsciously draws parallels between its own experience and apparently novel phenomena.[24] Most – if not all – phenomena can thus be

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[20] Nor indeed to excuse the failure to develop further discrete heads of liability protecting privacy interests, such as those found in the USA. On the US position, see *Restatement of the Law (Second): Torts* (2d), vol 3 (American Law Institute, 1977), and William Prosser, 'Privacy' (1960) 48(3) Cal LR 383.

[21] Ludwig Wittgenstein, *Philosophical Investigations* (Revised 4th edn, GEM Anscombe, PMS Hacker and Joachim Shulte tr, PMS Hacker and Joachim Shulte eds, Wiley-Blackwell 2009) 204, para 118. The duck-rabbit grapheme first appears in Joseph Jastrow, *Fact and Fable in Psychology* (London 1900) 295.

[22] Ludwig Wittgenstein, *Remarks on the Philosophy of Psychology*, Volume 1 (GEM Anscombe and GH von Wright eds, GEM Anscombe tr, Basil Blackwell 1980) 169, para 961.

[23] Emilia Mickiewicz, 'An Exploratory Theory of Legal Coherence in Canengus and Beyond' (2010) 7 The Journal Jurisprudence 465, 474.

[24] Arnold H Modell, *Imagination and the Meaningful Brain* (MIT Press 2006).

said to have multiple aspects.[25] This account has clear relevance to our concerns about privacy. Mainstream efforts have tried but failed to identify a single, objective meaning for 'privacy' because, when we consider privacy, we do so bringing our own 'aspect' to bear upon it.

Wittgenstein talks about the 'field of a word' (*das Feld eines Wortes*).[26] By this he means a field of interpretative possibility; the normative space that the word creates and within which we may interpret it in different ways.[27] The parameters of this field are flexible. It is constituted by the ways in which the word is generally used and understood – its users' experiential background. Within this field there is plenty of room for 'reasonable pluralism'.[28] Thus, for example, Alan Westin thinks privacy is to do with informational control.[29] Paul Freund thinks it is about respect for 'personhood'.[30] Both conceive of privacy very differently – they perceive it as possessing different aspects. Nevertheless, they are likely also to share sufficient common ground to conduct a sensible discussion about privacy and indeed to recognise certain acts as violating privacy. The commentators' common ground comes from overlaps in their individual (contingent) experiences of privacy. Assuming the commentators have grown up in the same or similar cultural circumstances, however, their experiences will share sufficient common ground to make potentially fruitful discussion of this sort possible.

As Wittgenstein worked through his concept of aspect perception, he developed the further notion of 'aspect blindness'.[31] This would afflict a person who, by virtue of not having the necessary experience to appreciate a particular aspect, would be unable to 'see' it (as in our example of the person who had never encountered a rabbit). This notion proves illuminating when we use it to critique the various theories that claim fully to conceptualise privacy. For when we scrutinise them (in the next section), it will become apparent that, when they claim to secure a knock-out blow in terms of understanding privacy, they in fact exhibit symptoms of aspect blindness. These symptoms manifest as inattentiveness to the aspects of privacy identified by rival theories.

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[25] It does not really matter, for our purposes, whether any phenomena have objective meaning or whether all meaning is contingent upon the experience of the observer. For with many commonly-encountered phenomena, the experiences of those encountering them will be sufficiently similar that observers will perceive sufficiently similar aspects that communication will not be overly obstructed. In this way, commonly-encountered phenomena can, by virtue of the similar collective experience of those encountering them, be said to possess a sufficiently strong core of certain meaning to enable broad understanding.

[26] ibid para 297. (Original German text found on page 229, English translation on page 230.)

[27] On the nature of a field of interpretative possibility, see Richard Mullender, 'Judging and Jurisprudence in the USA' (2012) 75(5) MLR 914, 921-923.

[28] John Rawls, *Political Liberalism* (Columbia University Press 1993).

[29] Alan Westin, *Privacy and Freedom* (IG Publishing 1967).

[30] Paul Freund, Address to the American Law Institute, 23 May 1975.

[31] Wittgenstein (n 21) 225, para 206ff.

Wittgenstein's notion of aspect perception, then, shines light on the ways in which words may be interpreted in a variety of ways within their fields of interpretative possibility. Whether we are interpreting a simple noun, a duck-rabbit puzzle picture or a complex conceptual phenomenon such as privacy, we need to bring the field of interpretative possibility into view if we are to understand – as well as we are able – what we are observing or considering. If there appear to be multiple aspects of privacy, we should not simply assume that all but one aspect are 'wrong' in the manner that mainstream theorists often end up doing. Such an assumption is not only blind to other identifiable aspects of privacy, but denies that other aspects might exist. It thus dulls rather than enriches our understanding of privacy. It may not be legally convenient, but privacy is a pluralistic concept.[32] And it behoves us to understand it as fully as we can.

3. Privacy Theories as 'Aspects'

In this section, we will see that mainstream theories tend to focus on one (or a very limited number) of privacy's aspects.[33] This suggests that these theories exhibit the symptoms of aspect blindness,[34] and such a diagnosis explains their failure to locate a definitive understanding of privacy.[35] The major exception to this tendency is found in the work of Daniel Solove, who expressly sets out to challenge the approach taken by mainstream scholars. However, as we shall see, Solove's approach – whilst it has the benefit of recognising privacy's pluralistic

[32] Solove (n 16) 40.

[33] I do not claim that the way I categorise mainstream privacy theories is the only way in which they may be categorised. I simply adopt the categorisation that follows in order to highlight one set of distinctions between the aspects of privacy upon which scholars agree and disagree. Alternative categorisations might well point up further aspects of privacy, which would only further demonstrate its pluralistic nature.

[34] I do not suggest that the theorists themselves *personally* suffer from aspect blindness. This would be impossible to prove (and, no doubt, offensive). Instead I make the less pointed claim that, in purporting to exclude the possibility of rival theories being valid, these mainstream *theories* manifest a lack of attentiveness to any aspects of privacy other than the one (or the limited number) upon which they themselves fasten.

[35] There is broad similarity between my approach and that which Solove advocates in *Understanding Privacy* (n 16). However, there are two key differences between Solove's approach and mine. First, my approach is informed by an understanding of 'aspect perception' and 'aspect blindness', derived from Wittgenstein's work. Whilst Solove draws on Wittgenstein in his book, he draws only on Wittgenstein's theory of 'family resemblances'. As such, his work does not attribute the faults he finds in mainstream privacy scholarship with an inattentiveness to context in quite the same way that my approach does, though there is nothing in his critique that is incompatible *per se* with my approach. Second, when I utilise the 'triangulation' method (see section 3, below), I look for areas of overlap between the theorists I have examined. Whereas Solove seeks to cast aside scholarship that he finds methodologically limited, I seek to make use of it whilst acknowledging its deficiencies.

nature – leads him to reject mainstream scholarship entirely. This is unfortunate. For considerable value remains in the observations of those whose work he rejects.

A. Singular Theories

Singular or 'top-down'[36] theories insist that privacy can be conceptualised properly only by locating a common denominator between all matters private. Singular theorists see privacy as a single distinct right or interest, often underpinned by a distinct value. Thus, for some, privacy interests are linked by virtue of the type of thing being interfered-with, such as private information.[37] For others, this common denominator is a more abstract value, such as respect for individuals' 'personhood'.[38] Whatever the common denominator proposed, however, the analytic method of the singular theorists is essentially the same. They seek the necessary and sufficient conditions of privacy, such that they can define the concept in a way that enables us to include and exclude matters that fit and do not fit (respectively) with the definition. There are many such theories which we will not attempt to list exhaustively; we will instead pick out some prominent examples.

Samuel Warren and Louis Brandeis, who borrowed a phrase from Thomas Cooley that was to become synonymous with their work, argued for greater protection for 'the right to be let alone', which they attributed to a principle of 'inviolate personality'.[39] Edward Bloustein, making use of this principle, gives a deontological account of privacy, focusing on 'the individual's independence, dignity and integrity; [which] defines man's essence as a unique and self-determining being.'[40] Stanley Benn, whose theory is grounded in similar deontological

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[36] Solove (n 16) 9.

[37] Theorists who conceptualise privacy as the interest in controlling information about oneself fall into this category. It is a point of commonality between the view of privacy as the ability to maintain secrecy, and that of privacy as a broader interest in controlling personal information (views which are otherwise in a number of ways divergent). The notion of privacy as an ability to maintain secrecy is espoused by scholars including Richard A Posner (*The Economics of Justice* (Harvard University Press 1981) 272-273; *Economic Analysis of Law* (5th edn, Aspen Publishers Inc 1998) 46), Sidney M Jourard ('Some Psychological Aspects of Privacy' (1966) 31 Law and Contemporary Problems 307) and Amitai Etzioni (*The Limits of Privacy* (Basic Books 1999)). The notion of privacy as control over a broader class of personal information is preferred by scholars such as Alan Westin (*Privacy and Freedom* (IG Publishing 1967)), Charles Fried ('Privacy' (1968) 77 Yale LJ 475) and Richard B Parker ('A Definition of Privacy' (1974) 27(2) Rutgers Law Review 275, 277).

[38] Roscoe Pound, 'Interests of Personality' (1915) 28 Harv L Rev 343, 363; Paul Freund, Address to the American Law Institute, 23 May 1975.

[39] Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 Harv L Rev 193, 195 and 205; Thomas McIntyre Cooley, *A Treatise on the Law of Torts: Or the Wrongs which Arise Independent of Contract* (2nd edn, Callaghan & Co. 1888) 29.

[40] Edward J Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 New York University LR 962, 971.

territory, sees privacy as safeguarding 'respect for [a person] as one engaged on a kind of self-creative enterprise'.[41] Building upon this, Paul Freund sees privacy as primarily concerned with the protection of 'personhood'.[42]

Some see privacy as more instrumental. These theorists tend to focus on control over private information. Thus, for Alan Westin, '[p]rivacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.'[43] For Charles Fried, '[p]rivacy is … the control we have over information about ourselves.'[44] Richard Parker's conceptualisation of privacy sits between this group (control over information) and another (limited access to the self). For Parker, privacy is concerned with control over something broader; it includes 'control over when and by whom the various parts of us can be sensed by others.'[45]

It is actually this aspect of privacy – control over information – that English courts have latched onto in deploying equitable confidentiality as a privacy-protecting device, and in developing MPI. In *Campbell*, Lord Hoffmann focused on this aspect of privacy, stating that the cause of action being developed

> focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.[46]

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[41] Stanley I Benn, 'Privacy, Freedom and Respect for Persons' in *Nomos XIII: Privacy* (J Roland Pennock and John W Chapman eds, Atherton Press 1971) 26.
[42] Freund (n 38).
[43] Westin (n 37) 7.
[44] Fried (n 37) 482-483.
[45] Parker (n 37) 281. Parker elaborates: 'By "sensed," is meant simply seen, heard, touched, smelled, or tasted. By "parts of us," is meant the parts of our bodies, our voices, and the products of our bodies. "Parts of us" also includes objects very closely associated with us. By "closely associated" is meant primarily what is spatially associated. The objects which are "parts of us" are objects we usually keep with us or locked up in a place accessible only to us. In our culture, these objects might be the contents of our purse, pocket, or safe deposit box, or the pages of our diaries.'
Priscilla Regan adopts this sort of definition of privacy (see *Legislating Privacy: Technology, Social Values, and Public Policy* (University of North Carolina Press 1995) 4). Although her adoption of it does not amount to a ringing endorsement, her main concern is with the manner in which privacy's *value* is conceptualised, and not the way in which privacy itself is defined.
[46] *Campbell* (n 11) [51]. Baroness Hale likewise described equitable confidentiality as embracing 'the protection of the individual's informational autonomy', in the course of distinguishing this aspect of privacy from 'the sort of [physical] intrusion into what ought to be private which took place in *Wainwright*' (an improperly conducted strip-search – to which she says that English law is 'powerless to respond' at [133]-[134]).

A further group of singular theorists focus on privacy as a limit upon accessibility.[47] Ruth Gavison separates the *concept* of privacy (neutral and purely descriptive) from the *value* of privacy (which provides prescriptive guidance on how to balance it against competing interests).[48] For her, privacy is the condition of 'limited access' of others to the self, comprising 'three independent and irreducible elements: secrecy, anonymity and solitude.'[49] Here, 'limited access' becomes the common denominator – the singular 'essence' of privacy.[50] Nicole Moreham argues for a modification to Gavison's conceptualisation, suggesting that the 'inaccess' should be 'desired'.[51] This is in order to avoid the incongruity of a person who is stranded down a well being described as experiencing perfect privacy.[52]

Arnold Simmel and Kirsty Hughes draw on behavioural and social science in order to refute the notion that privacy can be conceptualised independently from its role in society.[53] They both identify a particular aspect of privacy: privacy as an aspect of the self in interaction with others.[54] Moreover, this aspect contains a distinctive feature: it conceptualises privacy as created and maintained by the use of 'barriers'.

Simmel, a sociologist, observes that individual privacy interests exist within a 'continual competition with society over the ownership of our selves.'[55] He identifies 'boundaries' and individual choice (the desire to maintain these boundaries) as the cornerstones of privacy's existence.

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[47] Sisela Bok finds that privacy is 'the condition of being protected from unwanted access by others – either physical access, personal information, or attention.' See *Secrets: On the Ethics of Concealment and Revelatio*n (Pantheon Books 1983) 10-11.
[48] Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89(3) Yale LJ 421, 424.
[49] ibid 433.
[50] ibid 433.
[51] Moreham, 'Privacy in the Common Law' (n 9) 636ff.
[52] This is a criticism levelled at Gavison by Patrick O'Callaghan in *Refining Privacy in Tort Law* (Springer-Verlag 2013) 12.
[53] See Arnold Simmel, 'Privacy is Not an Isolated Freedom' in *Nomos XIII: Privacy* (n 41), and Kirsty Hughes, 'A Behavioural Understanding of Privacy and its Implications for Privacy Law' (2012) 75(5) MLR 806. Daniel J Solove also presents an approach to understanding privacy that regards it as a social interest, and there are therefore features of his work that exhibit commonality with that of Simmel and Hughes. However, since his approach is avowedly pluralistic rather than singular, his work is dealt with in a subsequent section, below.
[54] Julie Cohen also argues that privacy must be understood as an aspect of the self. In her work, she calls for a recalibration of the way in which the 'self' is conceptualised. Ultimately, this leads her to argue in favour of an understanding of privacy as an aspect of a self that exists in a symbiotic relationship with society. As such, Cohen's theory aligns more closely with that which Solove ultimately proposes (and with my own critique) than with the views of the other mainstream theorists examined in this essay. However, since the aim of this essay is to examine the deficiencies within some of the leading, mainstream conceptual accounts of privacy that exhibit an inattentiveness to context, I do not dwell on Cohen's work further. See generally Julie Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (Yale University Press 2012).
[55] Simmel (n 53) 72.

> Every assertion of our right to personal privacy is an assertion that anyone crossing a particular privacy boundary is transgressing against some portion of our self.[56]

For Simmel, the individual's own understanding of her self is contingent upon social interaction. But whilst '[w]e need to be part of others … we need also to confirm our distinctness from others, to assert our individuality'.[57] Individual development, in the context of social interaction, requires the effective maintenance of boundaries, to 'develop, over time, a firmer, better constructed, and more integrated position in opposition to the dominant social pressures.'[58] Not all boundaries are physical; social norms play a boundary-determining role.[59] Thus, in determining how it is that individuals come to respect each other's boundaries, '[w]e have to look for the answer … in the structure of society, the patterns of interaction, the web of norms and values.'[60]

Hughes' conceptualisation of privacy shares a number of features with Simmel's work. Drawing on social interaction theory, her work also overlaps in many instances with that of Gavison and Moreham. Indeed we might also see it (just as we might see Simmel's) as an extension of the basic premise that privacy concerns the limitation of access to the self.[61]

Hughes emphasises the centrality of experience to understanding privacy. Like Simmel, the experience which is of utmost relevance to her is that of the interaction between the individual and others in society. Privacy cannot, in her view, be understood in isolation from society, arguing that '[i]nstead of regarding privacy as an individualistic right, we need to appreciate the fundamental role that privacy plays in facilitating social interaction.'[62] Drawing on the social interaction research of Irwin Altman, Hughes presents a privacy theory based on the notion of 'barriers'.[63]

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[56] ibid.
[57] ibid 73.
[58] ibid 73-74.
[59] ibid 83-84.
[60] ibid 84.
[61] A related theory, which sits as something of a halfway house between the Gavison/Moreham position and the broad Simmel/Hughes position, is found in the work of James Moor and Herman Tavani. Eventually labelled the 'Reduced Access/Limited Control' theory (RALC), this theory is based on the classic limited access premise, but recognises (like Hughes) that norms play a role in defining private situations. However, Moor and Tavani are only concerned with informational privacy rather than with pure intrusions. See James H Moor, 'Towards a Theory of Privacy in the Information Age' (1997) (27(3) Computers and Society 27; James H Moor and Herman T Tavani, 'Privacy Protection, Control of Information, and Privacy-Enhancing Technologies' (2001) 31(1) Computers and Society 6.
[62] ibid 823.
[63] ibid 810.

The three types of barriers identified by Hughes are: '(i) physical barriers; (ii) behavioural barriers; and (iii) normative rules (which also act as a form of barrier).'[64] Hughes explains that the 'normative rules … may derive from a number of sources including social practices and codified rules, such as laws or codes of practice.'[65] She conjectures that, if normative barriers were not protected by law, individuals would become over-cautious, deploying increasingly drastic methods to protect their privacy. This would, she cautions, '[r]equir[e] individuals to be 'on guard' [and] is likely to break down trust and community, as neighbours and citizens are all characterised as potential intruders.'[66]

Each of these singular theories, then, adopts the same basic methodology. They focus on *one* aspect of privacy and treat all others as either wrong or unnecessary. But there is clear disagreement between the writers in term of substance. The aspects they identify differ, and no one aspect manages to satisfy all contributors to the debate (indeed, it seems unlikely that any singular theory would manage to satisfy even a single other commentator in the debate).

B. Reductionist Theories

Reductionist theorists refute the idea that privacy can be usefully conceptualised as a distinct right or interest.[67] Instead, they see it as encompassing a cluster (or set of clusters) of discrete interests. As such, they see talking of 'privacy' as if it were distinct to be 'pointless, a waste of time and mental capital.'[68] Lilian BeVier asserts that '[p]rivacy is a chameleon-like word' embracing 'a wide range of wildly disparate interests'.[69] For Judith Jarvis Thomson, privacy is 'not a distinct cluster of rights but itself intersects with the cluster of rights which the right over the person consists in and also with the cluster of rights which owning property consists in.'[70] A *right* to privacy, Thomson argues, derives from these higher-order interests.[71] Raymond Wacks' dismissal of privacy as an impoverished concept also emanates from a concern that it

[64] ibid 812.
[65] ibid.
[66] Hughes (n 53) 813. See also Elizabeth Paton-Simpson, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50(3) The University of Toronto Law Journal 305.
[67] This is the same sense in which Solove uses the term 'reductionist' (n 16, 37-38).
[68] Amy L Peikoff, 'The Right to Privacy: Contemporary Reductionists and their Critics' (2006) 13(3) Virginia Journal of Social Policy & the Law 474, 509. See also Julie C Inness, *Privacy, Intimacy and Isolation* (OUP 1992) 36-37.
[69] Lillian R BeVier, 'Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection' (1995) 4(2) William & Mary Bill of Rights Journal 455, 458.
[70] Judith Jarvis Thomson, 'The Right to Privacy' (1975) 4(4) Philosophy & Public Affairs 295, 306.
[71] ibid.

has no distinct meaning other than as an umbrella term for other, discrete interests. Writing in 1980, he argued that privacy had 'become almost irretrievably confused with other issues'.[72] Discussion of privacy, in the view of these scholars, should be *reduced* to the discussion of discrete, conceptually smaller rights and interests.

Another scholar whom we might also see as a reductionist is William Prosser. His famous taxonomy of four privacy torts fed into the USA's *Second Restatement of Torts* continues to form the basis for American tort privacy to this day.[73] Prosser exhibits a strong reductionist tendency because he sees the four privacy torts as being 'distinct' from one another; they have nothing in common, he insists, other than a loose notion that they protect the vague 'right to be let alone'.[74] Whilst Prosser was sceptical about the usefulness of conceiving of privacy as a unified concept, he did contribute significantly to American privacy jurisprudence by 'creat[ing] clear and distinct categories where once only a whirling, undifferentiated chaos had been.'[75]

Reductionists thus flag up some quite different aspects of privacy from the singular and interdisciplinary scholars. For they focus on the qualities of distinct interests that distinguish those interests from one another. It is not the similarities between them that matter to reductionists, but their differences. This reminds us that the search for a unifying theory of privacy – so sought after by singular scholars – is likely to encourage a potentially troubling degree of shoe-horning.

C. The Pragmatic Taxonomy of Daniel Solove

Having given a broad overview of major contributors to 'mainstream' privacy scholarship, we come now to the unique perspective of Daniel Solove. In *Understanding Privacy*, Solove offers a pertinent critique of rival privacy theories and proposes to understand privacy in a 'pragmatic' fashion.[76] He claims to recognise and reflect privacy's 'pluralistic' nature (suggesting that,

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[72] Raymond Wacks, 'The Poverty of Privacy' (1980) 96 LQR 73, 78. Notably, Wacks has, in recent years, been far more positive about the prospect of adequately protecting privacy through legal mechanisms, even going so far as to work up a draft Privacy Bill in *Privacy and Media Freedom* (OUP 2013).
[73] Prosser analysed over 300 cases and from this body of jurisprudence determined the existence of the four torts: public disclosure of private facts, intrusion upon seclusion, misappropriation of image, and placing the plaintiff in a 'false light'. See *Restatement of the Law (Second): Torts* (2d), vol 3 (American Law Institute 1977) 376, and William Prosser, 'Privacy' (1960) 48(3) Cal LR 383.
[74] Prosser, ibid 389.
[75] Peikoff (n 68) 479.
[76] Solove (n 16).

unlike most other scholars, he is alive to privacy's multiple aspects). Given this, it is worth engaging with his work in some detail.[77]

Solove is deeply critical of the 'top-down' method of conceptualising privacy.[78] According to Solove, this method invariably results in theories that are over-inclusive (identifying, as private, matters that ought not ordinarily to attract that label) or under-inclusive (matters that ought to be considered private are excluded). Indeed, Solove charges two prominent theories with falling into error on both counts.[79] When he criticises theories in this way, he might be taken as charging them with exhibiting aspect blindness, in that they fail to recognise other aspects of privacy.

Solove argues that any effort properly to understand privacy must be pragmatic, rooted in our *experience* of privacy.[80] Rather than proceeding in a top-down fashion, Solove endeavours to conceptualise privacy from the 'bottom-up'. In so doing, he aims to act like a cartographer, 'mapping the terrain of privacy by examining specific problematic situations rather than trying to fit each situation into a rigid predefined category.'[81]

In his search for an adequate understanding of privacy, Solove presents us with two key tools. First, he exhorts us to view privacy through the experiential lenses of actual 'privacy problems'. This is because 'philosophical inquiry begins with problems in experience, not with abstract universal principles.'[82] For Solove, then, '[c]onceptualizing privacy is about understanding and attempting to solve certain problems.'[83]

Second, Solove employs one of Wittgenstein's concepts – that of 'family resemblances'[84] – as an alternative to locating common denominators between these 'privacy problems'. According to Wittgenstein, not all related phenomena necessarily possess a common feature. But this does not prejudice the idea that such phenomena *are* in fact related. Like siblings, parents and grandparents, related phenomena can be expected to share certain

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[77] ibid 40.
[78] ibid ch.2.
[79] ibid 29 (on privacy as 'control over personal information'), and 37 (on privacy as 'intimacy').
[80] Solove is particularly inspired by the work of John Dewey, one of the fathers of American pragmatic philosophy, amongst others. He cites (n 16, 46-47) John Dewey, *Logic: The Theory of Inquiry* (1938) in vol. 12 *The Later Works of John Dewey* (Jo Ann Boydston ed, SIU Press 1988); *Experience and Nature*, in vol. 1 *The Later Works of John Dewey* (Jo Ann Boydston ed 1988). Solove later cites (at 91) *Ethics* (1908) in vol. 5 *The Middle Works of John Dewey* (Jo Ann Boydston ed, SIU Press 1978); *Liberalism and Civil Liberties* (1936) in vol. 11 *The Later Works of John Dewey* (Jo Ann Boydston ed, SIU Press 1991).
[81] Solove, ibid 44.
[82] Solove (ibid 75) citing John Dewey, *Experience and Nature*, in vol. 1 *The Later Works of John Dewey*, ibid, 9; and Michael Eldridge, *Transforming Experience: John Dewey's Cultural Instrumentalism* (Vanderbilt University Press 1998) 4.
[83] ibid 75.
[84] Wittgenstein, *Philosophical Investigations* (n 21) 36, para 67.

features. Yet, whilst each will share one or more characteristics with another, they will not all share *the same* characteristics. Solove's point is that we need not expect all privacy-related matters to share the same common features, and in searching for them we can easily overlook others in the privacy family.[85]

Having thus gotten to grips with Solove's basic pragmatic methodology, we must now endeavour to determine the aspect(s) of privacy that his approach illuminates. In order to do so, we must consider the manner in which he conceptualises privacy's value. Solove seeks to distinguish himself from both liberal and communitarian positions. Liberal theories of privacy traditionally focus on the individual's privacy as a right in tension with the interests of the community; that is, they see the relationship between the individual and society as an atomistic one. As a pragmatist, Solove finds these liberal theories deficient on the basis that, when privacy is conceived as an individual's right against the community, it tends to be undervalued, since 'protecting the privacy of the individual seems extravagant when weighed against the interests of society as a whole.'[86] Solove also rejects communitarian approaches to valuing privacy, since these 'view the private sphere as antagonistic to the public sphere', and '[pit] the individual against the common good.'[87]

According to Solove, both the liberal and communitarian views of privacy (prevalent in mainstream scholarship) provide us with a particular aspect of privacy: privacy as an individualistic interest, in conflict with that of the community. It is important to note at this point that Solove does not try to embrace but instead rejects this aspect, since – as we shall shortly see – his doing so is at odds with his stated aim to 'reconstruct' a *comprehensive* understanding of privacy.[88]

His own preferred approach to valuing privacy is to recognise the role of the individual *within* society and to ascribe a value to her rights insofar as they promote the collective common good; '[i]ndividualism should be incorporated into the conception of the common good, not viewed as outside it.'[89] Seeing individual privacy as a social good can thus serve to enhance protection for individuals' privacy interests. In this way, Solove identifies a distinct aspect of

[85] This is not, of course, a prescriptive argument, merely a descriptive tool that justifies broadening the search for an understanding of privacy that transcends common denominators.
[86] ibid 89.
[87] ibid 90.
[88] ibid ch 3.
[89] ibid 91. Some might think that this is, *prima facie*, difficult to distinguish from a communitarian position. I comment on this sort of objection immediately below.

privacy that runs counter to the antagonistic, individualistic aspect that he associates with liberalism and communitarianism.

Solove's claim is that the individual's interest is itself part of the broader societal interest: '[p]art of what makes a society a good place in which to live is the extent to which it allows people freedom from the intrusiveness of others.'[90] His claim, inspired by Dewey's pragmatism, refuses to see the individual's interests as separate from society's: 'we cannot separate the idea of ourselves and our own good from the idea of others and of their good.'[91] It is important that we examine this claim closely, because it points up the most important and unique element of Solove's scholarship. We must draw out this element if we are to accurately appraise the contribution that his work and pragmatic method can make to our triangulation-based method of understanding privacy.

Solove is best understood as endeavouring to bring a *basic* understanding of privacy to the fore. It is this that makes plain the 'aspect' of privacy that is unique to Solove's work. We can tease out the basicness of his understanding by adopting a distinction between 'functional' and 'conceptual' meanings of words that features in the work of Martin Heidegger.[92] In order to do so, it is necessary briefly to explain this distinction.

The *functional* meaning of a phenomenon is that instinctive, intuitive meaning concerned with its purpose or the use to which it is put; it is a something-in-order-to-X. Thus, the functional meaning of a screwdriver is a something-to-screw-things-in-with; a mug a something-to-drink-coffee-from. Identifying this functional type of meaning raises two further important points. First, the functional meaning comes into view against the phenomenon's 'background of intelligibility';[93] a screwdriver is only a something-to-screw-things-in-with because there is a thing that needs to be screwed in.[94] Second, the functional meaning is the

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[90] ibid.
[91] Dewey, *Ethics* (n 80) 268.
[92] There is no particular need to dwell on Heidegger's philosophy at any great length in order to make this observation about Solove's understanding of privacy, and so I simplify the key points in the text. Heidegger contrasts what I term 'functional' with 'conceptual' understandings of phenomena, although he uses different terminology to do so. The terms used in the best known translation of Heidegger's work are: 'ready-to-hand' ('functional') and 'present-at-hand' ('conceptual'). I have chosen not to use this terminology, since it is not particularly intuitive when translated into English and risks unnecessary confusion. See Martin Heidegger, *Being and Time* (John Macquarrie and Edward Robinson tr, Blackwell 1962) 98.
[93] This notion of a 'background of intelligibility' is implicit in Heidegger's work. The phrase, although not directly taken from Heidegger, is widely used in scholarly analyses of his work in order to encapsulate the context within which the phenomenon under scrutiny sits. As an example of its use in the jurisprudential field, see Brian Leiter, 'Heidegger and the Theory of Adjudication' (1996) 106 Yale LJ 253, 264 and 274-276.
[94] Likewise, a mug is only a something-to-drink-coffee-from because there is some freshly-brewed coffee waiting to be drunk.

most *basic* meaning that we attach to phenomena. It is the meaning we intuitively attach first to an object – often without even thinking about it.

For Heidegger, the *conceptual* meaning – the label which we attach to the phenomenon – always arrives later; it becomes a short-hand term for a particular class of object that fulfils a particular function. Thus whilst, at a functional level, we would not distinguish between a mug, a tea-cup and a small bowl (each being potentially useful as a something-to-drink-coffee-from), we attach different conceptual meanings – names – to each in order to construct and define a class to which each belongs.[95] The conceptual meaning is therefore *parasitic* upon the functional one. So, according to Heidegger, a background of intelligibility (a contextual situation) yields a basic, functional meaning that we ascribe, intuitively, to a given phenomenon. Later, we ascribe one or more conceptual meanings to that phenomenon, which assist us in labelling and categorising it. This conceptual, labelling exercise is possible *only* because of an awareness of the more basic, functional meaning.[96] This functional meaning is itself possible *only* because of an awareness of the object's background of intelligibility. An intuitive understanding of an object *in its context* thus precedes any conceptual understandings of that object.

Solove brings into focus the individual-in-society in a *functional*, rather than conceptual, sense. This distinguishes him from those who espouse liberal and communitarian conceptions of privacy – including 'top-down' privacy theorists. For they view the individual and the community as conceptual, rather than functional, objects. In conceptualising the individual and the community, however, it becomes easy to be inattentive their more basic, functional meanings. Solove's work alerts us to this. When, instead, we view the individual as a *functional* phenomenon, we necessarily see the individual against her background of intelligibility.[97] That is, we appreciate the role of the individual *within* society. Moreover, because the individual is born into society, and cannot help but be a constituent part of that society, the individual *also* provides a background of intelligibility against which to view the community as a functional phenomenon, as the community is comprised of individuals. Each

[95] We do this because there are other reasons – beyond mere functionality – why we might want to distinguish a mug from a bowl. These reasons might include things such as social norms (it being unusual to slurp coffee publicly from a bowl).
[96] Leiter (n 93), 267.
[97] Some might feel uncomfortable thinking of individuals as possessing a 'functional' meaning. The term is not possessed of great political significance, however. It might assist instead to think of an individual's 'functional' meaning as being concerned with what a human being *does* (rather than what they are *for*). To exist as a social being is the basic 'function' of an individual, in the view of pragmatists (such as Solove).

provides a background of intelligibility against which to view – in the most *basic* way possible – the individual *and* society, and thus to understand their interrelationship *at its most basic*.

Assuming this analysis is accurate, through Solove we have uncovered an aspect of privacy that – far from being more conceptually sophisticated than the singular theories – is actually more *basic*. This is its strength. It is this that gives his work a unique position in this field of scholarship. Seen in the light of the foregoing analysis, the individual-in-society *is* the base, experiential phenomenon, upon which the conceptual individualistic and communitarian views of privacy (including the mainstream, 'top-down' theories) have parasitically developed. Unless their proponents at some intuitive (possibly pre-conscious) level were aware of this background, their theories would have no basis. In other words, the conceptual theories of the singular theorists *necessarily* imply (and are contingent upon) *some degree* of awareness of the basic phenomenon that is the individual-in-society. In arguing in favour of conceptualising privacy in this basic, functional way, Solove is actually making (by implication) a broader argument for a recalibration of the way in which we conceptualise individual rights. He suggests that we should view them as deriving neither from atomistic nor communitarian relationships between the individual and society, but rather from the background painted by their interrelationship.[98]

4. Triangulating Privacy

Having examined the aspects of privacy identified (and overlooked) by mainstream privacy theory (and the counter-mainstream work of Solove), we are now in a position to sketch out the triangulation-based method advocated in this essay.

Taking cognisance of each of the major theories' aspects enriches our understanding of privacy's nature. By doing so, we can make room for 'reasonable pluralism' within the privacy debate,[99] enabling us to accommodate a 'degree of reasonable disagreement' about what privacy means.[100] Reasonable disagreement of this sort is helpful, for it points up privacy's pluralistic nature – something that only rarely emerges in privacy scholarship. One way in which we can do this is by categorising different theorists in the way we outlined earlier

[98] Regan proposes a similar recalibration of the way in which privacy is understood. She too argues that the relationship between the individual and society are intertwined: 'a dynamic relationship exists between the two' (n 45, 217).
[99] Rawls (n 28).
[100] O'Callaghan (n 52) 1.

(identifying categories of singular theorists, reductionists and so forth). Such categorisation is possible because there is sufficient similarity between their theories that we can treat them as sharing broadly the same aspect perception in relation to the concept theorized.[101]

Beyond grouping theorists together, however, there is another, significantly more helpful way in which we can make use of their work. This is to locate points of confluence – areas of overlap – between these different approaches to conceptualising privacy. One way in which we might characterise this approach is by reference to a notion of 'triangulation'. In the sciences, triangulation refers – at a level of generality – to 'the combination of methodologies in the study of the same phenomena'.[102] The practice involves identifying areas of confluence between multiple sources of information. Such areas indicate the veracity of the conclusion upon which the various sources concur, in part because they help to alleviate the problem of agent-relativity that may arise when only a single source is considered.

The approach outlined in this essay is not *derived* from any single, existing model of triangulation. It is instead an attempt to construct afresh a methodology that attends to the pluralistic nature of privacy and avoids falling victim to aspect blindness. However, perhaps unsurprisingly, the approach proposed herein does have a broad, pre-existing correlate in 'theory triangulation', a term coined by the renowned American sociologist Norman Denzin.[103] This refers to locating 'multiple [as opposed to] single perspectives in relation to the same set of objects'.[104] Denzin, who produced the leading taxonomy of triangulation methods in qualitative research, advocates approaching the analysis of data without the hindrance of a single, preferred theory. He prefers 'approaching data with multiple perspectives and hypotheses in mind.'[105] By proceeding in this way we can avoid being 'aspect blind' to analytical perspectives beyond our single, initially preferred theory and to the interpretations of the data they can provide. This is particularly useful when seeking to understand privacy. Denzin tells us that theoretical triangulation is necessary 'in those areas characterised by a high degree of theoretical incoherence'.[106] Privacy would appear to be a prime example of such an area since, as we have seen, mainstream theories tend to assume mutual exclusivity with one another.

[101] O'Callaghan also engages in an exercise of this sort. See O'Callaghan (n 52), 8-18.
[102] Norman K Denzin, *The Research Act* (first published 1970, AldineTransaction 2009) 297.
[103] ibid.
[104] ibid 301.
[105] ibid 303.
[106] ibid.

The triangulation approach proceeds along the following lines. If we can locate particular acts (or 'problems', in Solove's terminology) that scholars agree violate privacy – notwithstanding their different conceptualisations of the overarching concept – then these provide the areas of theoretical confluence that give us confidence in their veracity. We might term these areas of 'strong consensus'. Such areas would provide us with pockets of sufficient certainty for us to take cognisance and make use of them, whilst still allowing for reasonable pluralism in respect of underlying rationales. Put simply, if numerous scholars agree that act X constitutes a *prima facie* privacy violation, we can be confident that, whatever 'privacy' means (and its meaning is of course contingent on the perceptual stance of its observer), it is broadly accepted as covering act X. So, what we need to do is look for areas of overlap between the different aspects we examined in the preceding section. This will enable us to triangulate an understanding of particular privacy problems that ought to be sufficiently determinate to form the basis of future legal doctrine.

There is some similarity here with Solove's approach. Solove talks of 'mapping' privacy, and expressly aims to provide an understanding of privacy capable of driving legal development.[107] However, Solove sees no use for the mainstream scholarship that he criticises for its over- and under-inclusivity. He rejects it entirely, rooting his analysis solely in experiential 'privacy problems'. There is undoubtedly great value in focusing on experiential problems – they give us the basic, *functional* understanding of the phenomena we are contemplating. But there is also considerable value in the scholarship that Solove rejects, for each scholar points up a relevant aspect of privacy.

The practical usefulness of contextual, experiential analysis underpins its appeal to Solove.[108] It is important to remember, however, that this mode of analysis involves a broad attentiveness to background context,[109] which entails attending not just to the basic, functional aspects of a phenomenon, or to its conceptual aspects, but to *both*.[110] For each provides a background of intelligibility against which to understand the other. It is for this reason that the mainstream privacy theories that are individually (and on their own terms) deficient must nonetheless be put to use. Rejecting them outright, as Solove does, amounts to a refusal to attend to privacy's conceptual aspects. Ultimately, this will hinder both our understanding of

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[107] Solove (n 16) 44 (on 'mapping'), and 11 (on driving forward legal development).
[108] This is reflected in pragmatic philosopher John Dewey's self-identification as a 'contextualist'. See John Dewey, 'Experience, knowledge and value: A rejoinder' in Paul Schilpp (ed), *The Philosophy of John Dewey* (Northwestern University 1939) 603.
[109] John Dewey, 'Context and Thought' in *University of California Publications in Philosophy*, vol 12, no 3 (University of California Press 1931).
[110] See pp [TBC], above (on Heideggerian analysis).

privacy and our efforts to shape legal doctrine in such a way as to protect it effectively. Identifying functional aspects of privacy, whilst also useful, does not render an appreciation of privacy's conceptual aspects redundant.

Mainstream theories may appear to be mutually exclusive, but they are mutually exclusive only in so far as they represent incompatible attempts to conceptualise privacy in an ultimate, all-encompassing way. The fact that these frameworks fail on their own terms to locate the mythical One True Meaning of privacy does not render them useless. They can be very useful, providing we are willing to use them in a way other than that for which they were intended. By doing something else with them, we can avoid their supposed mutual exclusivity. The mainstream theorists give us the *conceptual* understandings of privacy that complement Solove's functional understanding. They establish frameworks by which the basic, functional understanding of privacy can be cognitively identified, separated, categorised and individuated in the manner that the development of particular legal rules tends to demand.

Since the major doctrinal matter with which this essay aims to grapple is the absence of an 'intrusion' tort in English law, we will focus – for the purpose of exemplifying the method – on triangulating intrusion-type problems.[111] That the act of intruding upon a person's seclusion or private affairs violates that person's privacy (and thus is, in a tortious sense, wrongful) can be shown to be an area of strong consensus. We will demonstrate this strong consensus by postulating the facts of three cases – *Kaye*,[112] *Jones*[113] and *Holland*[114] – as putative, privacy-invading intrusions, and looking at the ways in which both mainstream scholars and Solove would respond to them.

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[111] The method, however, is not limited simply to looking at intrusion-type privacy problems. The whole point of the triangulation method is that it can bring into view types of privacy violation upon which there is broad agreement that would otherwise go unnoticed, given the well-known differences between the theorists upon whose work we have dwelt.

[112] In *Kaye* (n 17), a well-known television actor was photographed and 'interviewed' by journalists from the Sunday Sport who, without permission, gained access to the hospital room in which he was receiving intensive care following a serious road accident.

[113] *Jones* (n 18) is a case from Ontario, Canada, in which the defendant accessed (without permission) the plaintiff's confidential bank records at least 174 times over a four year period. The defendant made no use of the information gleaned thereby, nor did she disseminate the information further. For further analysis of this case see Chris DL Hunt, 'Privacy in the Common Law: A Critical Appraisal of the Ontario Court of Appeal's Decision in *Jones v. Tsige*' (2012) 37(2) Queens LJ 665; Thomas DC Bennett, 'Privacy, Corrective Justice and Incrementalism: Legal Imagination and the Recognition of a Privacy Tort in Ontario' (2013) 59(1) McGill Law Journal 49.

[114] *Holland* (n 19) is a New Zealand case in which the defendant was discovered to have surreptitiously video-recorded the plaintiff in a state of undress having installed a hidden camera in their shared bathroom for that purpose. See further Thomas DC Bennett, 'Emerging privacy torts in Canada and New Zealand: an English perspective' (2014) 36(5) European Intellectual Property Review 298.

All three cases represent variants on the classic intrusion scenario. In the 1991 English case of *Kaye*, journalists intruded into the hospital room of a vulnerable person receiving intensive medical care. *Jones* was a 2012 appellate case from the Canadian province of Ontario, in which the defendant accessed the plaintiff's confidential bank records without either the plaintiff's knowledge or permission. *Holland*, a New Zealand High Court case also from 2012, involved an act of voyeurism (video-recording a person in the shower). Each of these cases involves intrusive acts that would currently fall outside the reach of English tort law as it currently stands.[115] If the information gleaned in each case were to be disseminated, these claimants would undoubtedly have valid claims for misuse of private information.[116] But the intrusive acts themselves, without subsequent publication of information obtained, would not attract liability.

A. Putative Intrusions and Scholarly Responses

Gavison's theory clearly embraces *Holland*-type intrusions as privacy violations, for they cause the plaintiff's 'spatial aloneness [to be] diminished'.[117] Parker's definition also picks out intrusions of this sort as offences against privacy. He himself gives the example of a woman who is spied upon while naked by a former lover.[118] He regards this intrusive act as a privacy violation, but insists that it is so because more than control over *information* has been lost; she has lost control over who *senses* her. Parker's treatment of this sort of Peeping Tom scenario aligns with Gavison's, who likewise finds the act a privacy violation going beyond the mere acquisition of information.[119] Whilst these writers dwell on the Peeping Tom scenario (rather than the non-sexual *Kaye*-type scenario) the fact that neither sees the violation as concerned

[115] There would be avenues of redress in other causes of action, which might provide some relief. For example, *Jones* could be dealt with under data protection law (albeit more obviously against the bank than against the individual wrongdoer), whilst *Holland* would incur criminal liability for voyeurism. This does not mean, however, that English tort law ought not to develop its own protections for pure intrusions. I do not develop this point myself because it is not the purpose of this essay to argue *for* an intrusion tort, but rather to offer a solution to a conceptual problem currently inhibiting the development of one (assuming, *arguendo*, that such a move is desirable). An argument that liability would arise under *Gulati* for a *Jones*-type violation in England suffers from the problems discussed earlier (see n 3 and accompanying text).

[116] This liability would arise under the *Campbell* (n 11) doctrine. For reasons Moreham elaborates upon, describing what the 'Peeping Tom' gains or obtains by viewing or recording the victim's naked form as 'information' is not particularly intuitive nor comfortable. I use the term 'information' here to describe what is obtained in such situations here simply to make the point that *disseminating* such footage would attract liability under MPI. See Moreham, 'Beyond Information: Physical Privacy in English Law' (2014) 73(2) CLJ 350, 355.

[117] Gavison (n 48) 433.

[118] Parker (n 37) 280. Moreham also uses this example: see 'Liability for listening' (n 3) 166.

[119] Gavison (n 48) 433.

with the acquisition of information but rather as an intrusion into physical proximity (Gavison) or loss of sensory control (Parker) demonstrates that both would also see *Kaye* as a privacy violation. Moreover, Parker's definition of privacy, which includes control over others' ability to sense 'objects very closely associated with us',[120] expressly includes safety deposit boxes within a list of typical such objects. As such, it is reasonable to postulate he would see the *Jones*-type intrusion into banking records as violating privacy. For Gavison, the *Jones* scenario would come under the element of secrecy and thus also constitute a privacy violation.[121] Likewise, Moreham sees these sorts of intrusion as very much concerning privacy:

> Privacy can … be breached by unwanted watching, listening or recording even if little information is obtained and none is disseminated. Peering through a person's bedroom window … or surreptitiously taking for one's own purposes an intimate photograph or video recording are … examples of this kind of intrusion.[122]

These three scenarios would also breach privacy as conceptualised by Hughes. In the *Kaye*-type scenario, the defendants have breached both a physical barrier (by entering his room without permission) and a normative barrier (in that there is a social norm dictating that those recovering from serious injury ought not to be photographed and pressed for comment). In the *Holland*-type scenario, there is a clear breach of all three of Hughes' barriers: physical (installing the camera in a place the plaintiff believes she is unobserved), behavioural (the plaintiff has intentionally secluded herself in order to use the bathroom) and normative (as evidenced by the fact the defendant realised he could succeed in his voyeuristic endeavours only by secreting the camera in a location where it could not easily be seen). As for the *Jones*-type scenario, this may constitute the breach of a physical barrier (if the definition of physical covers the kinds of electronic walls present in secure computer systems – and there seems no reason why it should not) and also the normative barrier (in that the defendant has abused her position of trust as an employee of the bank in order to pry into the plaintiff's affairs).[123]

Benn, whose non-consequentialist theory is based on the value of human dignity and respect for the individual 'as a person, as a chooser, … as one engaged on a kind of self-creative

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[120] Parker (n 37) 281.
[121] Gavison (n 48) 433.
[122] Moreham, 'Beyond Information' (n 116) 351, and 'Privacy in the Common Law' (n 9) 649-650.
[123] Bok (n 47). Bok's conception of privacy embraces freedom from 'unwanted access' – including 'physical access' – and thus also covers these sorts of intrusive acts.

enterprise',[124] also agrees. The right to privacy extends, he tells us, to (and, indeed, beyond) 'the claims not to be watched, listened to, or reported upon without leave.'[125] Bloustein would concur, based on his similarly dignity-based aspect whereby violations of privacy are found in conduct that amounts to 'an affront to personal dignity'.[126] Both the *Kaye* and *Holland* scenarios fall squarely under their conceptions. As for *Jones*, it is not hard to square with Benn's approach. For when the defendant accessed the plaintiff's bank records, she failed to respect her victim as a 'chooser' – as a person who has the capacity to decide for herself with whom she shares her financial information.

Solove places intrusion openly within his taxonomy and so we have no doubt that he views it as a privacy problem.[127] He would see the *Holland* scenario as a problem not only of intrusion (of 'disturb[ing] the victim's daily activities, alter[ing] her routines, destroy[ing] her solitude and … mak[ing] her feel uncomfortable and uneasy'[128]) but also one of surveillance: '[i]ntrusion into one's private sphere can be caused not only by physical incursion and proximity but also by gazes (surveillance)'.[129] Solove openly characterises Peeping Toms as engaged in surveillance,[130] and cites a case[131] in which a couple successfully sued their landlord for installing a recording device in their bedroom as one of surveillance.[132] As for the *Kaye* scenario, this would fall squarely under both Solove's 'intrusion' and 'interrogation' problems. The defendants both destroyed Kaye's solitude and interrogated him (in conducting their 'interview').[133]

It is slightly harder to pinpoint where in his taxonomy Solove would place the *Jones* scenario. Because it involved accessing data records, one might expect him to place it within his 'information processing' group of problems. However, Solove makes plain that he sees this group as 'not involv[ing] the disclosure of the information … to another person.'[134] Rather, this group deals with privacy problems involving data 'transferred between various record systems and consolidated with other data.'[135] Nevertheless, given his thesis that privacy should

[124] Benn (n 41) 26.
[125] ibid 3.
[126] Bloustein (n 40).
[127] Solove (n 16) 161-165.
[128] ibid 162.
[129] ibid 163.
[130] ibid 107.
[131] *Hamberger v Eastman* 206 A 2d 239, 241-42 (NH 1964).
[132] Solove (n 16) 111.
[133] *Kaye* (n 112) 64-65.
[134] Solove (n 16) 117.
[135] ibid.

be conceptualised from the bottom-up, we can expect him to find (or create) a place for the *Jones* scenario. It might well fit under his intrusion category, given his observation that '[i]ntrusion need not involve spatial incursions'.[136] It might also be characterised as a form of (non-consensual) interrogation.[137]

Even the reductionists tend to agree that intrusive acts are wrongful, though they do not see it as a *privacy* issue *per se*, so it is worth examining what they might make of our three cases. Prosser was in no doubt when constructing his taxonomy that intrusion was wrongful (albeit as an empirical, rather than normative, exercise in observing the courts' treatment of intrusion cases).[138] All three cases would fit within that category. Indeed, in both *Jones* and *Holland*, the courts expressly made reference to the elements of Prosser's intrusion tort when devising novel intrusion torts in Ontario and New Zealand, respectively.[139] The *Kaye* scenario would constitute a classic Prosser-type intrusion: Kaye had a reasonable expectation of privacy whilst in his room, and the intrusion would be highly offensive to a reasonable person.[140]

Thomson similarly finds intrusive acts to be objectionable, since she finds that individuals have rights 'to not be looked at and … not be listened to'.[141] This clearly covers the *Kaye* and *Holland* scenarios. However, her treatment of *Jones*-type scenarios would be slightly different. For in instances of acquiring private information, Thomson considers the rights breached to be of the property genus: a person has a right to conceal property – including information – from others. Any unauthorised accessing of this concealed information constitutes a breach of that right.[142] Her reasoning thus gives yet another rationale for the *Jones* scenario constituting a privacy violation – but her theory would agree with the others that it does constitute a wrongful act.

B. Defending the Triangulation Method

The analysis in this essay demonstrates that, despite the differences between the aspects of privacy that each scholar identifies, there is strong consensus surrounding the issue of intrusive acts. Methodologically, this is every bit as simple as it sounds. Intrusion is an issue

[136] ibid 163.
[137] ibid 112-117.
[138] Prosser (n 73) 389.
[139] *Jones* (n 113), [18]; *Holland* (n 114), [94].
[140] This 'highly offensive' element is perhaps just another way of 'seeing' Hughes' notion of a normative barrier. See Prosser (n 73) 390-392; Hughes (n 53) 812.
[141] Jarvis Thomson (n 70) 304. Thomson does not see these as privacy rights as such, but rather as rights over the self akin to those people have in property.
[142] ibid 302-303.

where multiple aspects of privacy overlap. In order to engage in this sort of analysis, it is necessary to exhibit broad attentiveness to privacy theories in the manner we have done. The discussion of privacy theories in earlier sections of this essay is not, and was not intended to be, exhaustive, but it is broadly representative of the most influential privacy theories of the last century.

The triangulation approach has the advantage of being able to satisfy those with quite different views on the nature of judicial practice – something that has significant implications in terms of promoting its usefulness as a basis upon which to elaborate common law doctrine. For example, Hartian positivists may find satisfaction because a strong degree of consensus between otherwise divergent theories provides something close to a 'core' of (relatively) certain meaning.[143] Meanwhile those who prefer a realist understanding of adjudication can take this emergent consensus as indicative of broader social mores surrounding privacy.

Much of classic, formal legal method involves separating and filtering things out – distinguishing that which is 'relevant' from that which is not. The triangulation approach cuts against the grain of this traditional common law method because it directs that we should not filter particular theories of privacy out of our reasoning simply because they are not obviously and on their own terms compatible with a view of privacy that we have come to accept. We should instead regard *all* privacy theories as relevant, and from there move to ask whether this multitude of relevant material displays any degree of consensus on a particular issue.

In this essay, we have focused on the issue of intrusion. We have not encountered any mainstream privacy theory that would deny that a pure intrusion into a person's seclusion is a violation of that person's privacy. Even the reductionists, whilst sceptical of the term 'privacy', regard intrusions as wrongful. However, even if we did locate such a theory, there would still be strong consensus amongst the vast majority of privacy scholarship that intrusions amount to wrongful invasions of privacy. There will, of course, be other issues – beyond intrusion – upon which there is far less consensus. Whether a brain-dead person has a right to privacy, for example, would attract far less consensus; some of the theories we have examined would say there would be such a right (eg on dignity grounds), whilst a focus on 'desired inaccess' might deny such a right on the basis that the victim is incapable of holding any such desire.[144]

There will be theories of privacy not herein discussed which would weigh in on one or other side of that argument. According to the triangulation method, all such theories are

[143] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) ch 7.
[144] See Moreham (n 51). I should be clear that I am not attributing such a view to Moreham but merely pointing up one conclusion that the broad thrust of her 'desired inaccess' theory might point towards.

relevant to the decision of whether to recognise such a right or interest. If there is no discernible consensus on a particular issue, then this approach will not provide a solid basis to *develop* the law in respect of that issue. But in such circumstances, the classic, top-down approach adopted by much of the mainstream would also fail to provide a solid basis for legal development; picking one amenable theory over others would be arbitrary and beset by agent-relativity. Thus, in the worst case scenario (no consensus) the triangulation method leaves us no worse off, whilst in cases where a degree of consensus can be located, it assists by pointing up that consensus where, under a top-down methodology, it would go unnoticed.

I anticipate at least three objections to my argument, which ought to be pre-emptively dealt with. It might be objected that my assertion that 'all' privacy theories are relevant to the triangulation method asks too much of the courts. An objection along these lines might also point out that this essay has not referred to all of the scholarly privacy theories in the world, which calls into question the practicality of attending to them and also flags up the potential for relativistic selectivity. To this, I make two points. First, the assertion that all privacy theories are relevant is intended as a corrective to the unhelpful practice (pursued by those thinking along top-down theoretical lines) of filtering out theories that do not align with a preconceived notion of privacy. It is also an invitation to cast a wide net and exhibit broad attentiveness to the range of theories that are out there, whilst allowing for novel theories to emerge (and to disclose hitherto unseen aspects of privacy). It is not a directive to make a decision only once we are sure that we have located every possible theory. All of this must fall within the overarching schema of a standard of proof that is, in English and Welsh civil law, set at the balance of probabilities. The point is simply that a greater amount of theoretical evidence is of more use than a lesser amount. Beyond that, it is not desirable to set absolute limits. Second, agent-relative selectivity is nothing new in judging. Fully objective adjudication is not humanly possible. Given this, the problem of selectivity may be present, but only because it is pervasive in law. My proposed approach makes the problem far less acute than persevering with the top-down method which is, of course, not only also coloured by selectivity but which encourages the selection of only one theory. For '[t]riangulation … is a plan of action that will raise [observers] above the personalistic biases that stem from single methodologies.'[145]

A second objection to my argument might point out that I have not given any precise indication of just how much 'consensus' there needs to be around a concept before it amounts

[145] Denzin, n 102, 300.

to ‘strong consensus’ and becomes useful. This would be a charge of vagueness. My response to such a charge would be that there can be no definite, bright-line definition of ‘strong consensus’. It is a matter of degree. The more consensus there is, the stronger it is.[146] The test of the usefulness of the triangulation method in pointing up areas of consensus is whether it proves useful for elaboration of the common law. All I am claiming is that areas with the strongest consensus provide pockets of reasonable certainty as to privacy’s scope and that these may prove useful to courts as they consider recognising novel heads of liability to deal with putative privacy violations.

It might also be objected that the lack of a consistent message from these scholars in respect of an underlying rationale explaining the wrongfulness of intrusion weakens the level of consensus on the matter. To such an objection I would say that the consensus necessarily exists only at a level of generality, and does not – indeed cannot – exist at the level of a rationale for privacy. For the very notion that privacy has a single, true rationale *is* the myth that causes mainstream theories to be mutually exclusive. It is this that we must move beyond. Commentators may (and, no doubt, will) continue to disagree on a number of issues – for instance, the point at which the ‘intrusion’ takes place, what makes it an ‘intrusion’ in the first place and the reason why it is wrongful. There continues also to be disagreement as to how we are to define the areas of life that are thought to be worth protecting from intrusion. In arguing that there is strong consensus on the issue of intrusion, I do not deny that these disagreements persist.

However, it is necessary to recall that a key feature of the common law is that it is reactive. Courts deal with cases after the fact. And they deal with those cases by examining fact-patterns holistically. Each of the scholars upon whom we have dwelt (in this section) would agree that the *totality* of the circumstances that came to bear on the claimants in the cases outlined above represented intrusions into those claimants’ privacy and that the intrusions were wrongful. They may agree on this for different reasons. They may, individually, believe that the ‘intrusions’ take place at different points (when the camera is placed in the shower,[147]

[146] See Gerald J Postema, ‘Protestant Interpretation and Social Practices’ (1987) 6 Law and Philosophy 283, 298.

[147] At the point at which the perpetrator installs a camera with the aim of recording the victim in a state of undress (at some point in the future), the perpetrator has acted with wilful disregard for the dignity of the victim. For those theorists, such as Bloustein (n 40), who see privacy as an aspect of personal dignity, the activity is at this point objectionable.

when the camera begins to record,[148] when the video file is accessed,[149] and so forth). Such disagreements are inevitable and should not trouble us unduly. For none of these distinctions matter much to the courts when they are dealing, reactively, with a complete set of circumstances that has been laid before them. What matters is whether the totality of the circumstances can clearly be seen to amount to an intrusion and whether that intrusion is wrongful (in the sense that it ought to attract civil liability).[150]

5. Conclusion

The analysis offered in this essay demonstrates that it is possible to deal with privacy in a workable fashion more usefully than seems to have been widely appreciated – particularly by theorists engaged in top-down analyses. By triangulating the various aspects of privacy we have encountered, we can locate pockets of certainty in areas where there is strong consensus on the privacy-violating nature of the activity under scrutiny. Intrusive conduct, on this analysis, falls within such a pocket; notwithstanding widespread disagreement about the nature of privacy, there is widespread agreement that intrusive conduct of the sort identified in our three example cases is (a) a violation of privacy and (b) wrongful.

This demonstrates that the apparent conceptual difficulty inhibiting the recognition of broader or novel privacy torts at common law is, in reality, an illusion. Nothing about our capacity for understanding privacy absolutely prevents us from using it as a basis for the

[148] Solove would say that, at this point, a process of surveillance is in operation, which raises a privacy problem. He would also see the recording of a person who is in a secluded space as an invasion of that space. See Solove (n 16) 107 and 164.

[149] At the point at which the video file is accessed, the perpetrator is, in essence, observing the victim. For Moreham (n 122), an intrusion has at this point occurred.

[150] From a Razian perspective, this might sound rather troubling. For if one starts from the basis that it is a fundamental requirement of law that it provide clear and prospective guidance to its addressees, in order that they may regulate their conduct, a lack of clarity as to the point at which an intrusion took place (for example) within a given set of circumstances might seem insufficient. However, the Razian perspective is by no means universally accepted (see eg EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (CUP 2005). If one were to accept, alternatively, Stephen Perry's notion that law is a by-product of an often messy adjudicative process (for example), then one would not seek such precise, forward-looking formal guidance. Instead, one might be open to the notion that, over time, a precedent set in rather broad terms could form the basis for incremental elaboration and refinement. And if such a perspective were to be adopted (which would require courts to be attentive and open to that perspective), we would find that there is a *sufficient* degree of consensus on the matter of intrusion (as set out above) to provide a basis for that initial, and perhaps broad, precedent. Such a precedent is, of course, something that English privacy law is currently lacking. See Joseph Raz, *The Authority of Law* (OUP 1979); *Practical Reason and Norms* (Princeton University Press 1990), Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2001-2004) 10 Otago Law Review 493, Stephen R Perry, 'Judicial Obligation, Precedent and the Common Law' (1987) 7(2) OJLS 215, 240-241, and Michael Tugendhat, 'Privacy, judicial activism and democracy' (2018) 23(2) Communications Law 63.

development of legal doctrine. Yet the illusion remains a powerful one. Its power mainly comes from the obvious lack of agreement on the abstract nature of privacy and the widespread scholarly divergence on this point, itself largely driven by a narrowly-focused, insular insistence on trying to locate the One True Meaning of privacy. This has clearly troubled the courts.[151] The solution required to overcome the apparent conceptual difficulty is, then, relatively simple: the adoption of this approach of triangulation to understanding privacy on a problem-by-problem basis.

Recently, it has once again become fashionable amongst privacy academics to argue for the recognition of an intrusion tort in English and Welsh law. Recent such arguments centre on the notion that the existing misuse of private information doctrine has already reached the point where it encompasses a proto-intrusion tort and could be extended with no great difficulty by way of further judicial fudging of the sort that gave rise to the action for misuse of private information in the first place.[152] Such arguments implicitly accept the existence of the apparent conceptual difficulty with which this essay has been concerned, starting from the basis that the separate recognition of a stand-alone intrusion tort is judicially unthinkable.

The triangulation-based method indicates, however, that we need not accept such a starting point. There is no need for those urging the courts to recognise an intrusion tort to resign themselves to arguing for ever greater shoe-horning of intrusion-type violations into the misuse of private information doctrine. The idea that a standalone intrusion tort is unworkable on conceptual grounds is a false one. And since arguing for the recognition of an intrusion tort is now back in vogue, there is no better time to challenge this long-standing illusion.

ENDS

[151] *Wainwright* (n 10).
[152] NA Moreham, 'Beyond Information' (n 116) and Hartshorne (n 3). On the problems that result from this sort of judicial fudging, see Bennett (n 12).