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**Separation, Risk, and the Necessity
of Privacy to Well-Being:
A Comment on Adam Moore's
*Toward Informational
Privacy Rights***

KENNETH EINAR HIMMA*

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I. INTRODUCTION

I wish to focus on two areas of Adam Moore's argument in *Toward Informational Privacy Rights*.¹ In this outstanding contribution, Moore continues his approach of grounding informational privacy rights in two

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1. Adam D. Moore, *Toward Informational Privacy Rights*, 44 SAN DIEGO L. REV. 809 (2007).

claims: (1) a presumptive but defeasible right on the part of individuals to “control access to oneself and to personal information about oneself” only insofar as doing so does not make anyone else worse off; and (2) informational privacy is a quality necessary to human well-being, breaches of which are objectionable because they create risks of various kinds to human well-being.

In this essay, I want to raise doubts about certain of Moore’s premises in his argument defending information privacy rights. As always—and I say this as a continuing admirer of his skill as a philosopher, information theorist, and legal theorist—his argument is well thought out and persuasively written. But, as we will see, there are serious problems with each major plank of his schema for justifying privacy rights.

II. THE ARGUMENT SUMMARIZED

Privacy rights can be justified in virtue of a four-premise argument, with each premise being defended by a sophisticated argument. Moore states the argument as follows:

P1. The value of privacy related to human well-being grounds a weak presumptive claim to use and control personal information.

P2. Respect for persons, possessions, self-creation, and project pursuit grounds a weak presumptive claim [on the part of person] to use and control [his] personal information.

P3. If no one is worsened by such use [and control], then the weak presumptive claims generated by the value of privacy and respect for persons are undefeated—actions that pass a Pareto-based provision are permitted (no harm, no foul).

P4. It is typically the case that others are not worsened by some individual’s use and possession of their own personal information.

C5. Thus, the weak presumptive claims to use and control such information are, in many cases, undefeated, and moral claims (perhaps rights) emerge.²

As Moore focuses on the first premise, he remarks, “The ability to regulate access to our bodies, capacities, and powers, as well as sensitive personal information, is an *essential* part of human flourishing and well-being.”³

III. A THREE-PRONGED CHALLENGE TO PREMISE ONE

The first premise is largely grounded in an argument in which Moore attempts to show that privacy, conceived as “control over access to oneself and to information about oneself” is “necessary” for human well-

2. *Id.* at 819.

3. *Id.* at 818 (emphasis added).

being.⁴ Moore grounds his argument in an analysis of the need for physical separation, which Moore suggests is universal among animal species.⁵ Moore notes, “One basic finding of animal studies is that virtually all animals seek periods of individual seclusion or small-group intimacy.”⁶ Citing several studies involving rats and other animals, Moore points out that a lack of such separate space frequently results in threats to survival.⁷ Placing rats in pens with no physical barriers between one another resulted in fighting so disruptive that it threatened the survival of the very group, as only a few of the young survived.⁸

A. Separation vs. Privacy

Moore goes on to suggest, quite plausibly, that since we evolved from such animals, we share some need for separation: “The question now becomes, is separation a necessity for well-being, and is it found in human cultures? If so, like other basic requirements for living, we may plausibly conclude that privacy is valuable.”⁹ Moore goes on to note the deleterious effects of overcrowding rats. He concludes, “Given all of this, one can, with great confidence, claim that privacy is valuable for beings like us.”¹⁰

Indeed, Edward Hall confirms the points that human beings need separation between one another and that a lack of separation leads to physical disorders in both humans and nonhumans:

The disorders of Calhoun’s overcrowded rats bear a striking resemblance to . . . Americans who live in densely packed urban conditions. . . . Chombart de Lauwe . . . has gathered data on French workers’ families and has demonstrated a statistical relationship between crowded living conditions and physical and social pathology. In the United States a health survey of Manhattan showed that only 18% of a representative sample were free of emotional disorders while 23% were seriously disturbed or incapacitated.¹¹

4. *Id.* at 811, 812.

5. *Id.* at 815–18.

6. *Id.* at 815 (quoting ALAN F. WESTIN, *PRIVACY AND FREEDOM* 8 (1967)).

7. *Id.* at 815–17.

8. WESTIN, *supra* note 6, at 10.

9. Moore, *supra* note 1, at 816.

10. *Id.* at 818.

11. *Id.* at 817 (quoting Edward T. Hall, *Proxemics*, 9 *CURRENT ANTHROPOLOGY* 83, 87 (1968) (citation omitted)).

A conceptual mistake is being made here. A need for physical space and separation is not obviously tantamount to a need for privacy. For example, I was at a concert the other night and found myself near the stage surrounded by people who seemed to keep packing themselves in more and more tightly. At some point, people began to mosh,¹² and I was occasionally bumped, though not in a particularly violent way.

There is no question that I experienced some discomfort—indeed, annoyance that rose to the level of anger—in response to this situation, but I would not characterize it as resulting from a breach of privacy. As far as I was concerned, nothing like that was happening. To say that I have a need for separation is simply to say that I have a need for personal space—a need for some physical distance between me and other persons. This is a contextual need; how much space I need is a function of context. At a concert, I need less personal space than I do when I am going to sleep at night. When I go to sleep at night, I need to be in a compartment from which I can exclude other people with a lock.

Moore is not, of course, the first person to equate separation and privacy, but I think this is clearly a category mistake. My sense of personal space is not a matter of my feeling of a need for privacy—at least not primarily. It is a matter of feeling physically vulnerable—and that is more a concern for my security than it is anything else. I would never want to sleep at an airport, for example, not because I am afraid of compromising my privacy, but rather because I would feel physically vulnerable to theft and other affronts to my security.

Of course, a need for separation sometimes expresses itself as a need for privacy, rather than security. I am not one to share hotel rooms with colleagues. I prefer not to have my movements constrained by the presence of other people, and I suppose this is fairly characterized as a need for privacy.

But the sort of separation supported by the studies cited by Moore is not fairly characterized as showing a need for privacy. The need for personal space is not the same as the need for privacy. My need to have a home of my own is a matter of wanting separation for the purpose of personal space, which is primarily motivated by a desire for security, not privacy.

Here is another way of seeing the point. It is highly questionable that the rats and other animals needed physical separation to ensure satisfaction of a need for privacy of any kind. Certainly, nonrational animals have no need for informational privacy because nonrational animals cannot

12. Maureen Krislov, *Determining Mosh Pit Liability at Concerts*, ENT. L. & FIN., Dec. 1995, at 3, 3 (defining “moshing” as “anarchic dancing during which music fans often forcefully thrust themselves into one another”).

process information in the relevant way. What is most likely going on here is that the rats and other animals feel physically threatened when they lack separate space, which causes the preemptive violence.

The point here may seem minor but should not be overlooked: Animals cannot, as a nomological matter, have a need for informational privacy, because animals that lack linguistic skills cannot have any way to process information, and animals would not know, one way or another, whether, and to what extent, human beings have information about them. Not even a presumptive claim to information rights can be grounded in a need for physical separation alone because (1) physical separation seems to be a different matter from privacy, even for beings like us with the capacity for information processing, and (2) most beings with a need for separation lack the relevant capacities for processing information.

Indeed, even in human beings, property rights suffice to protect the need for separation in contexts like this. Privacy rights seem superfluous. As long as I have a physical space from which I can exclude other people as a matter of property right, my need for separation is satisfied. Of course, there are some instances in which a need for separation is about protecting privacy. That is why I shut the bathroom door. But the argument, as framed by Moore, is simply too broad to prove his claim that privacy, conceived only as a need to control access to our physical selves, is necessarily valuable.

In any event, a need for personal space, however conceived, does not imply anything more than a need to control physical access to one's person. It does not clearly imply a need to control access to information about one's person. While my need for separation explains, in terms of information privacy concerns, my closing the bathroom door, there are very few examples like this that would adequately show how excluding people from purchasing patterns, preferences, et cetera is the result of a privacy need to control access to information about oneself that requires some special legal or moral protection. If there were such a need, people would find ways to shield this information from other people. For example, when I do not want someone to have my social security number, and she lacks legal entitlement to it, she does not get it.

The absence of a convincing example that illustrates the need for a special mechanism for protecting privacy is a crucial omission in Moore's argument, because the privacy right of real concern involves the controversy over the agent's ability to control access to personal information about herself relative to other parties who will not necessarily be harmed by

informational privacy rights. More is needed here than just some version of the Pareto principle to validate such rights.

B. The Universality of Privacy as a Cultural Value

The claim that privacy is essential to human well-being commits Moore to the second claim that privacy is a universal value across cultures. But it is important to note that both claims are *empirical* claims needing sociological or medical support that cuts across cultures in the United States, which are conditioned by *contingent* cultural practices that might make privacy protections a practical necessity.

While I cannot do justice to the empirical claim here, I should point out that the value attributed to privacy varies widely across cultures. Western cultures are far more likely to feature robust protections of privacy as conducing to well-being because they are purely contingent features of those societies. Although Moore is correct in thinking that the precise content of the value varies from culture to culture, that does not imply that the value is not essential to well-being. For example, everyone values food as a means to survival, but cuisines differ greatly from one culture to the next.

But here is the difference. It is not clear that every culture attributes great value or even any value to privacy. In this limited space, it will have to suffice to note that there are various existing African cultures that do not seem to regard privacy as a value of moral significance. Hanno N. Ollinger, Johannes J. Britz, and Martin S. Olivier studied the Ubuntu philosophy among various African tribes and examined both the lifestyles and writings of such cultures.¹³ The authors, in a not unprecedented finding, discovered that in the writings expressing the worldview and morally significant values of the society, privacy is never mentioned.¹⁴ The key ethical values of these tribes express a commitment to the communitarian idea that the common good always outweighs the individual good, and so interests in privacy, if any, yield to the interests in common good.¹⁵ As the authors put the point:

When analysing the concepts and values of Ubuntu one can infer directly the implications for privacy and the attitude towards personal privacy. The statements made earlier about the welfare of the community (or group) being more important than that of the individual immediately shows that there is a tension between privacy and social good. The case here is that personal privacy might be regarded as not being beneficial for the good of the community. An individual

13. Hanno N. Ollinger, Johannes J. Britz & Martin S. Olivier, *Western Privacy and/or Ubuntu? Some Critical Comments on the Influences in the Forthcoming Data Privacy Bill in South Africa*, 39 INT'L INFO. & LIB. REV. 31 (2007).

14. *Id.* at 35.

15. *Id.* at 32–33.

right will only be accepted if it serves the community and in Ubuntu it is difficult to make the case for the social benefit of personal privacy. The culture of transparency and openness in Ubuntu would not understand the need for personal privacy or be able to justify it. Thus personal privacy would rather be interpreted as “secrecy.” This “secrecy” would not be seen as something good because it would indirectly imply that the Ubuntu individual is trying to hide something instead of protecting something—namely her personhood.¹⁶

The authors conclude, “The core definition of Ubuntu, ‘people are people through other people’, indicates that there is little room for personal privacy because the person’s identity is dependent on the group.”¹⁷

One cultural study is probably not sufficient to ground an argument refuting Moore’s claim that privacy is essential to well-being, but if this study is correct, and there are other empirically grounded papers exploring the Ubuntu’s resistance to assigning significant value to privacy, Moore’s contention becomes questionable. Insofar as the Ubuntu enjoy a form of well-being and flourishing different from ours, there is a pretty good reason to think that privacy falls short of being a universal cultural principle, at least once you get beyond the notion of physical separation, which is misconceived as a privacy interest.

C. The Risk Argument

Perhaps the most compelling argument for the idea that privacy is essential to human well-being comes in the form of Moore’s risk argument. The most persuasive part of Moore’s case for the claim that privacy is needed to ensure well-being—at least in societies like ours—is the risk argument. As Moore describes it:

Central to the risk argument is the claim that in connected societies where information trading is both efficient and nearly costless, disclosure of personal information opens individuals up to certain risks, for example, being controlled by entities with their own agendas. Typically, such control comes in two flavors. First, governments use such information to retain domination and expand power. Second, corporations may use personal information to overwhelm individuals in a sea of solicitations and promotional advertisements or to control their employees. Sharing personal information about someone else with a third party—say a home address and religious affiliation—may have serious consequences. German Jews in the 1940s, and more recently American Muslims, know this all too well.¹⁸

16. *Id.* at 35–36.

17. *Id.* at 36.

18. Moore, *supra* note 1, at 823–24 (footnotes omitted).

Now this, unlike the argument for physical separation, is an argument that concerns informational privacy as a moral value that is both foundational and *essential*. The argument for physical separation, since applicable to beings not capable of processing information, simply cannot support anything more than the assertion that humans also have a right to physical separation, which is easily protected by property rights. Moore gives a number of compelling examples where the personal information of one person may be used to cause harm or damage to the interests of another person.¹⁹

But here is the problem. None of this can show that information privacy is essential to well-being, because it presumes that unauthorized disclosure of private information necessarily creates risks to the victim—and this might be true as a contingent matter given the kind of society we live in, but it is not *necessarily* true. If people did not discriminate against religious affiliations, an unfortunate but *contingent* fact about us, then disclosure of such information would present no risks. While Moore is clearly correct that control over personal information conduces to human well-being, he is simply incorrect in thinking that the connection is essential or necessary, rather than contingent. There will be no privacy in heaven, but this will not matter because no one will be inclined to do harm or damage to anyone by disclosure; in fact, there will be no secrets in heaven (if such there be). The risk argument fails because, as an empirical claim about what is merely contingent, it lacks the logical resources to do the work it purports to do.

IV. WHY WE CARE ABOUT PRIVACY: BECAUSE IT CONDUCE TO SECURITY INTERESTS

Even in these cases, my principal concern is to protect some aspect of my security. I do not, for example, conceptualize identity theft, the principal concern here, as a threat to privacy. It is rather a threat to my financial security that can cause me great trouble in taking out loans or retaining property that has been paid for by loans. Much of what seems to be, on the surface, a concern with privacy is really, at bottom, a concern for material security—suggesting that, at the end of the day, privacy is not, other things being equal, as important as security.

This brings me to my second concern with the argument. I think there are a couple of problems with Moore's approach to balancing privacy and security. First, I think the requirement that probable cause be shown before privacy can be breached in the interest of security is far too onerous. Indeed, if this requirement were correct, then it would follow

19. *See id.* at 823–25.

that passenger bags could not be searched prior to check-in without obtaining a warrant based on probable cause from a magistrate. While I cannot say that I agree with every regulation that the Federal Aviation Administration has adopted with respect to airport security, or for that matter with every provision of the USA PATRIOT Act,²⁰ it seems clear that submitting all carry-on bags to x-ray inspection prior to boarding a flight is an infringement of privacy that is justified by security concerns. Moore's analysis implies that this general requirement is not justified—which strikes me as a counterexample to his analysis.²¹

Second, it seems clear to me that security trumps privacy, other things being equal—and many arguments can be, and have been, made in support of this proposition.²² One cannot, for example, enjoy the benefits of any other interest, including privacy, if security interests are not generally protected. The protection of security is a necessary prerequisite for the exercise of any other interest that gives rise to a moral right of some kind.

From an intuitive standpoint, it seems clearly rational to prefer security to privacy in cases where the most egregious breach of one or the other is threatened. I would rather disclose the most private piece of information about myself than suffer death, grievous bodily injury, or even loss of financial security (say, through loss of a job). Indeed, I would view anyone who made a conflicting valuation in need of therapy. It seems clear from an intuitive standpoint that, other things being equal, security wins in a conflict with privacy.

Finally, security interests tend to be valued intrinsically (namely, as ends in themselves), while informational privacy is generally valued instrumentally (as a means to another end). Although it is true that I sometimes value solitude for its own sake, in addition to its value in enabling me to rest, I am not convinced solitude is an interest that falls under the rubric of informational privacy. There is much information about me that I regard as private and want protected not because I value privacy for its own sake, but rather because of the problems that information might cause for me with employers or insurance companies. Much else that I value as private is contingent: people do, while dogs do not, feel a

20. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S.C.).

21. See Moore, *supra* note 1, at 842.

22. See Kenneth Einar Himma, *Privacy Versus Security: Why Privacy is Not an Absolute Value or Right*, 44 SAN DIEGO L. REV. 857 (2007).

need to use the bathroom in private. That preference on our part is not hardwired into us as necessary to our well-being, but is rather the result of social conventions that have evolved over time and might very well change in the future.

In contrast, I am hardwired to value my life and freedom from grievous bodily injury and severe pain and to value them, at least in part, as ends in themselves—rather than as means to ends. It is true that my continuing sentient existence also has instrumental value to me. I cannot have fun of any kind without being conscious. But I value it as an end in itself, to be valued for its own sake. I would not judge someone who does not care at all about privacy interests as necessarily being in need of mental therapy. I would, on the other hand, judge someone who did not care at all about security interests as being in need of mental therapy.

In closing, I should point out that no one who takes the view, as I do, that—other things being equal—security trumps privacy is committed to claiming that “any increase in security should be preferred to any increase in privacy or any decrease in privacy is to be preferred to any decrease in security.”²³ Sometimes it makes sense to give up a little security to protect a lot of privacy. I should also point out that the security trumps privacy view does not logically entail, contra Moore, that those who provide security are completely trustworthy. Indeed, I do not trust the Bush Administration very much at all these days, but I still think it is as clear as anything can be that security wins in direct conflicts with privacy. It is, of course, a difficult and contentious issue when privacy and security come into direct conflict, but I think it is clear that when they do, the security interests have to win. Civilized life is not possible otherwise.

But the main point here is that while security is *essential* to well-being, privacy is primarily valuable insofar as it conduces to security interests. And this connection is contingent, as Moore’s own risk argument makes clear. We value privacy because it is conducive to avoiding those in a society contingently organized like ours with bigots and profiteers willing to dispose of someone on the basis of private information. But this just speaks to contingent qualities of human beings. Accordingly, while well-being is not possible without security, it is possible without privacy—even if we live in a society where the contingent features of the society continue to expose risks to our well-being through disclosure of private information. But while privacy is not an essential constituent of well-being, security is. Therefore, Moore’s argument for Premise One fails.

23. Moore, *supra* note 1, at 840.