

---

---

## PRIVACY SPACES

*Bert-Jaap Koops\**

	ABSTRACT .....	612
I.	INTRODUCTION.....	613
II.	SPACE AND THE SPATIAL CONTEXT OF PRIVACY .....	618
	A. <i>The Concept of Space</i> .....	618
	B. <i>The Importance of Space in Privacy Theory</i> .....	619
III.	AN ARRAY OF PRIVACY SPACES.....	622
	A. <i>Personal Zone</i> .....	623
	1. Mind.....	623
	i. <i>Thoughts</i> .....	623
	ii. <i>Mental Bubble</i> .....	624
	iii. <i>Personal Writings and Other Expressions of the</i> <i>Mind</i> .....	627
	2. Body.....	629
	i. <i>Body as Bounded by Skin</i> .....	629
	ii. <i>Personal Space</i> .....	630
	iii. <i>Personal Possessions: The Extended Self</i> .....	632
	3. A Room of One's Own .....	634
	B. <i>Intimate Zone</i> .....	635
	1. Home.....	635
	2. Private Communications Space .....	637
	i. <i>Private Conversation Space</i> .....	637
	ii. <i>Letters</i> .....	639
	iii. <i>Telecommunications</i> .....	640
	3. Car .....	641
	C. <i>Semi-private Zone</i> .....	643

---

\* Bert-Jaap Koops is Professor of Law (Regulation and Technology) at TILT – Tilburg Institute for Law, Technology, and Society, Tilburg University, the Netherlands. In 2016/17, he was Distinguished Lorentz Fellow at NIAS, the Netherlands Institute for Advanced Study. The research for this paper was made possible by a VICI grant from the Netherlands Organisation for Scientific Research (NWO), project number 453-14-004. All translations in this article are mine, except where otherwise indicated.

I thank discussants Norberto Andrade and Maša Galič and the participants at PLSC-Europe (Tilburg, 18 May 2017) for valuable suggestions; all 2016/17 NIAS fellows for stimulating discussions, helpful (also non-Hegelian) literature suggestions, and comments; and Maša Galič, Bryce Newell, Ivan Škorvánek, and Tjerk Timan for valuable comments on a draft version of this paper and many inspiring discussions.

1.	Private Places .....	644
i.	<i>Private Clubs</i> .....	644
ii.	<i>Temporarily Occupied Publicly Accessible Places</i> ..	644
iii.	<i>Professional Privacy Spaces</i> .....	646
iv.	<i>Offices and Work Spaces</i> .....	648
2.	Publicly Accessible Places: Cafés, Public Transport, Etc. ....	648
D.	<i>Public Zone</i> .....	650
1.	Public Places .....	650
2.	Political Privacy Places .....	652
E.	<i>Overview of Traditional Privacy Spaces</i> .....	653
IV.	THE PROBLEM OF DIGITAL PRIVACY SPACES .....	655
A.	<i>The Complex Relationships Between Digital and Physical Spaces</i> .....	656
B.	<i>The Role of Social Norms</i> .....	659
C.	<i>Compounding Technological Developments</i> .....	662
V.	CONCLUSION .....	663

#### ABSTRACT

Privacy literature contains conceptualizations of privacy in relation to role-playing and identity construction, and in relation to access control and boundary-management. In this paper, I combine both strands to introduce the concept of *privacy spaces*: spaces in which you can play, in your own way, the relevant role(s) you have in social life. Drawing from privacy conceptions in legal scholarship, philosophy, sociology, anthropology, human geography, and psychology, a systematic overview of traditional privacy spaces is offered, including mental bubbles, the body, personal space, personal writings, the home, private conversation space, cars, stalls, intimacy bubbles, professional black boxes, coffee house spaces, public places, and political privacy places.

This overview yields important insights: privacy is an infrastructural condition relevant in all zones of social life (from personal to public); privacy boundaries can be visible or invisible, fluid or stable, impenetrable or permeable; privacy protection relies on complementary mechanisms of access restriction and discretion (a distinction that captures privacy protection more accurately than that between access and control); and, most importantly, privacy protection is primarily a process of social regulation rather than legal regulation.

These insights are used to briefly discuss why digital, online, and *onlife* spaces pose privacy challenges. While traditional spaces of social interactions are being scrambled and rehashed into digital and *onlife* spaces, associated social norms do not necessarily co-evolve. Because digital spaces are often interconnected and interoperable, fewer boundaries avail to clearly delimit

---

---

privacy boundaries, and digital spaces more often trigger different partial identities than traditional spaces do. Moreover, the co-habitation of service providers in digital spaces contrasts with traditional physical spaces, where “space providers” do not usually or systematically observe what people do. Thus, digital, or *onlife*, impression management virtually requires people to be aware of all their selves all of the time, severely hampering their feeling they can safely be “themselves” in any given situation, and leading to a demise of backstage spaces where people can relax from impression management.

**Keywords**

privacy, identity, space, place, impression management, boundary management, social norms, discretion, digital privacy, *onlife*

I. INTRODUCTION

One of the reasons why *Nineteen Eighty-Four* remains a powerful novel is that Winston Smith, against the odds, is a round, complex character—in contrast to the flat characters pervading the novel who have been disciplined into submission by ubiquitous surveillance. He is a complex character because he retains some space in which he can enjoy a form of privacy, and therewith remain true to himself:

[b]y sitting in the alcove, and keeping well back, Winston was able to remain outside the range of the telescreen, so far as sight went. He could be heard, of course, but so long as he stayed in his present position he could not be seen. It was partly the unusual geography of the room that had suggested to him the thing that he was now about to do. . . . The thing that he was about to do was to open a diary.<sup>1</sup>

Thus, Winston actually has two privacy spaces. Not only is the alcove a place into which he can withdraw, the diary is also a space in which Winston can immerse himself, putting his thoughts in order and making some sense of himself and his surroundings. Both spaces are invaded in the end, but for as long as they last, they allow Winston to remain and further develop himself in a hostile world.<sup>2</sup>

---

<sup>1</sup> GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 10–11 (Penguin Books 1984) (1949).

<sup>2</sup> Ultimately, also Winston’s third and most personal privacy space—his mind—will be invaded; *see infra* Section III.A.1.i.

A space in which you can be yourselves—that is, in which you can play, in your own way, the relevant role(s) you have in social life<sup>3</sup>—is what I call a “privacy space.” The relationship between privacy, role-playing, and identity construction is an important theme in privacy literature,<sup>4</sup> and while there are, of course, numerous other conceptualizations of privacy, having a space in which you can be yourselves<sup>5</sup> is a convenient way to describe what privacy entails in its many manifestations.<sup>6</sup>

Privacy spaces are part of the private sphere. Here, the two meanings of the term “private” (hidden, inaccessible, or secluded on the one hand and own or personal on the other) are connected: “the person is allowed to refuse outsiders access to a certain sphere *because* that sphere is personal.”<sup>7</sup> The most obvious such space is the home, as geographer Tim Cresswell, writing on space and place, has observed: “Home is where you can be yourself.”<sup>8</sup> But home is not the only

---

<sup>3</sup> Cf. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959) [hereinafter *THE PRESENTATION OF SELF*] (analyzing how people conduct impression management when performing different roles in social interactions).

<sup>4</sup> See, e.g., JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 129–30 (2012) (discussing the importance of the performance of identity in the evolving subjectivity that underlies privacy interests); ALAN F. WESTIN, *PRIVACY AND FREEDOM* 13 (1967) (discussing how “individuals have conflicting roles to play in any society; to play these different roles with different persons, the individual must present a different ‘self’ at various times. Restricting information about himself and his emotions is a crucial way of protecting the individual in the stresses and strains of this social interaction”) (citation omitted); Ferdinand Schoeman, *Privacy and Intimate Information*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 410 (Ferdinand D. Schoeman ed. 1984) (arguing that privacy “may provide the contexts in which various facets of personality can develop”). Cf. Philip E. Agre, *Introduction*, in *TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE* 7 (Philip E. Agre & Marc Rotenberg eds., 1997) (defining the right to privacy as “the freedom from unreasonable constraints on the construction of one’s own identity”).

<sup>5</sup> I use “yourselves” rather than “yourself” here to indicate that people do not have a “core” self or a single, static, or “true” identity; “being yourselves” is used in this paper as shorthand for feeling free to perform, without unreasonable constraints, one or more roles that are relevant in a particular context at a particular moment in time. Cf. Russell W. Belk, *Extended Self in a Digital World*, 40 *J. CONSUMER RES.* 477, 483 (2013) [hereinafter *Extended Self*] (“there is no singular core self”); Schoeman, *supra* note 4, at 410 (discussing and defending the view “that there is no core self”).

<sup>6</sup> I elaborate the conceptualization of privacy as “having a space in which you can be yourselves” in a work-in-progress paper, provisionally entitled *Privacy as Identity Space*, where I attempt to show how such a conceptualization is able to connect many, seemingly disparate, strands in privacy theory.

<sup>7</sup> PETER BLOK, *HET RECHT OP PRIVACY. EEN ONDERZOEK NAAR DE BETEKENIS VAN HET BEGRIP ‘PRIVACY’ IN HET NEDERLANDSE EN AMERIKAANSE RECHT* 280 (2002) (translated, emphasis in original).

<sup>8</sup> TIM CRESSWELL, *PLACE: AN INTRODUCTION* 39 (2d ed. 2015).

space where people can be themselves; rather, any space in which one feels “in place” can be like home,<sup>9</sup> and thus can be a privacy space.

The variety of privacy spaces is visible in Alan Westin’s four “basic states” of individual privacy,<sup>10</sup> all of which can occur in different spatial settings. Solitude and intimacy will often be achieved in private places, typically in closed-off spaces (a bedroom, a bathroom, a private office). Nevertheless, they can also (particularly in crowded social contexts) be sought in public places, such as a park or a beach.<sup>11</sup> Anonymity and reserve are states of privacy that will usually occur in public or publicly accessible places, because these states are relevant when someone finds himself in the presence of others yet seeks to reserve a space for himself free from the curiosity or surveillance of others. Anonymity is achieved when someone “is able to merge into the ‘situational landscape’” and thus can enjoy “the sense of relaxation and freedom that men seek in open spaces and public arenas” without being under (systematic) observation.<sup>12</sup> Reserve is also spatial in that it involves “mental distance” to protect the personality.<sup>13</sup> Mental distance serves as a complement to physical distance to acquire the desired level of distance from others, in order to delineate and defend a space around oneself that is shielded from too much or undesired curiosity and surveillance.

To what extent states of privacy are associated with particular spaces or places is culturally dependent; Westin claims, for instance, that “[t]he English accomplish with reserve what Germans require doors, walls, and trespass rules to enforce.”<sup>14</sup> Yet all societies, to a greater or lesser extent, apply “distance-setting mechanisms to define territorial spacing of individuals in the group.”<sup>15</sup>

---

<sup>9</sup> *Id.* at 38–39 (observing that, in terms of a place where people can be themselves, “home acts as a kind of metaphor for place in general”).

<sup>10</sup> WESTIN, *supra* note 4, at 31–32 (discussing (1) solitude (where someone is alone and free from observation of others), (2) intimacy (where someone is part of a small unit involving a “close, relaxed, and frank relationship”), (3) anonymity (where someone is in public places or performs a public act but “seeks, and finds, freedom from identification and surveillance”), and (4) reserve (where someone has created “a psychological barrier against unwanted intrusion; this occurs when the individual’s need to limit communication about himself is protected by the willing discretion of those surrounding him”)).

<sup>11</sup> *See id.* at 15 (discussing that in cultures “where the household is crowded, or when there are communal households of large numbers of families sharing the dwelling, the sexual act is usually performed outside, so that privacy can be obtained, in bush, field, forest, or beach”); *see also* Stuart Shapiro, *Places and Spaces: The Historical Interaction of Technology, Home, and Privacy*, 14 INFO. SOC’Y 275, 278 (1998) (observing that if “one could not obtain the desired measure of privacy in the home, one might in the fields or the woods or the barn”).

<sup>12</sup> WESTIN, *supra* note 4, at 31.

<sup>13</sup> *Id.* at 32.

<sup>14</sup> *Id.* at 29.

<sup>15</sup> *Id.* at 9.

Although the spatial setting of privacy has been recognized in privacy literature, and extensive discussions are available of particular privacy spaces, a systematic overview of privacy spaces is lacking. In this paper, I offer such a systematic overview for two reasons. First, it enables a relatively comprehensive, bird's-eye overview of the many settings in which privacy matters—settings that have developed over considerable periods of time with their own practices, norms, expectations, and mechanisms to protect privacy. Analyzing how privacy functions, or has functioned, in these traditional spatial settings can teach us something important about privacy protection, such as its reliance in many situations on social norms and others' discretion. Second, it sheds new light on the challenge of digital or online privacy. Focusing on the spatial setting of privacy helps to remind us that privacy is a condition of human beings and that humans are *embodied* beings, living in four-dimensional space/time.<sup>16</sup> The rise of digitized, networked interactions and the increasing emphasis in the privacy debate on personal data often seem to suggest that only bits and bytes matter; but cyberspace cannot exist without meatspace,<sup>17</sup> and we have quickly outlived the period in which cyberspace and meatspace, the “virtual” and the “real,” could be seen as separate realms. “Bits don't just sit out there in cyberspace, to be visited occasionally like pictures in a gallery . . . . It makes more sense to recognize that invisible, intangible, electromagnetically encoded information establishes new types of relationships among *physical* events occurring in *physical* places.”<sup>18</sup>

<sup>16</sup> COHEN, *supra* note 4, at 132 (observing that “processes of self-construction are geographically mediated”), 216 (arguing that people live in a networked society where information and digital flows are increasingly important, yet people remain embodied and part of physical space, which implies that the room people need for boundary management involves physical (bodily and territorial) spaces as well as digital spaces, and hybrids thereof); EDWARD T. HALL, *THE HIDDEN DIMENSION* 186 (Anchor Books 1990) (1966) (emphasizing that “man and his environment . . . [are] part and parcel of one interacting system”) (citation and italics omitted); Margot E. Kaminski, *Regulating Real-World Surveillance*, 90 WASH. L. REV. 1113, 1130 (claiming that “[i]dentifying what was valuable in past privacy intuitions is particularly important as boundaries between home and not-home, and the physical and online world, become fuzzier and more fluid in light of technological and social change”); Robert Sommer, *Personal Space in a Digital Age*, in *HANDBOOK OF ENVIRONMENTAL PSYCHOLOGY* 647, 654 (Robert B. Bechtel & Arza Churchman eds., 2002) (emphasizing that “at some point, this virtual world intersects with the real world”).

<sup>17</sup> “Meatspace” refers to the “physical world, as opposed to cyberspace or a virtual environment.” *Meatspace*, OXFORDDICTIONARIES.COM, <https://en.oxforddictionaries.com/definition/meatspace> (last visited Nov. 1, 2018). The term can be traced back to William Gibson, who coined the term cyberspace and contrasted this with the “meat” environment of bodies in physical space. See WILLIAM GIBSON, *NEUROMANCER* 77 (Ace Books 1984) (observing, for instance, that “[t]ravel is a meat thing”).

<sup>18</sup> WILLIAM J. MITCHELL, *ME++: THE CYBORG SELF AND THE NETWORKED CITY* 4 (2003) (emphasis in original); see also Shapiro, *supra* note 11, at 276 (using the home, and more broadly a spatial framework, to discuss the interaction of technology and privacy, and arguing that while “no single analytical approach can hope to encompass the range of privacy issues posed by new

---

Through focusing not on personal data but on the spaces where personal data are processed, and highlighting how these relate to traditional privacy spaces, the complexities of online privacy can be better understood.

My aim in this Paper is therefore to present the broad array of spaces in which privacy can be enjoyed and to enhance our understanding of the challenges of digital and online privacy. The emphasis will be on the first, because this part needs to be developed in depth to lay the groundwork for the second (which is to be elaborated in future research). This gives the Paper something of a twentieth-century feel—I want particularly to sketch the privacy spaces as they have developed in the physical world, because online spaces can only be understood in relation to social interactions rooted in the physical world. Part of my argument rests on the claim that online spaces are not intrinsically new and *sui generis* spaces but rather combinations, adaptations, and extensions of existing spaces.<sup>19</sup> The kernel of the paper therefore consists in an extensive discussion of traditional, “real-world” spaces.

The Paper is based on desk research, drawing from privacy conceptions in legal scholarship and philosophy, but also from sociology, anthropology, human geography, and psychology. Most examples in these bodies of literature stem from Western societies, implying that the overview has a Western focus. Nevertheless, I hypothesize that the overview is fairly comprehensive, possibly even for non-Western societies—my intention is to sketch something like the smallest common multiple of privacy spaces, that is, the most succinct set of privacy spaces that includes all major privacy spaces prevalent in some or more (Western) societies.<sup>20</sup> These are *types* of spaces, which may have quite divergent manifestations in different cultures (such as different dwelling constructions) but share a general characteristic in social life (such as home). Not all spaces discussed here will function as privacy spaces in all (Western) societies; but if a type of space functions as an important privacy space somewhere, it should be included in the overview. Whether the hypothesis of relative comprehensiveness holds up is to be tested in future research.

---

information and communication technologies, the boundary work performed by the home is a widely useful vantage point”).

<sup>19</sup> In slightly different terms, this claim has been defended by Helen Nissenbaum. HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* 223 (2010) (where she “*reject[s]* the idea that social networking sites define a newly emergent, *sui generis* social context with its own internal rules and, accordingly, . . . that there are no entrenched norms with which we need to contend. What seems to make more sense is a conception of these sites as a medium of interaction, transaction, information exchange, communication, and much more, serving and *extending the transactional range of a diverse variety of social contexts*”) (emphasis added); see also text accompanying *supra* note 18.

<sup>20</sup> In mathematics, the smallest common multiple (not to be confused with the largest common denominator) of a set of integers is the smallest integer that is divisible by each of them. See *Least Common Multiple*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Least\\_common\\_multiple](https://en.wikipedia.org/wiki/Least_common_multiple) (last visited Nov. 1, 2018).

---

Besides the Western focus, another limitation needs to be emphasized here. This paper is descriptive, not normative. That is to say, I describe types of places that, in some or many societies, tend to function as important spaces where people (in general) may be able to be themselves. Some types of spaces will foster privacy more for certain (privileged) groups than for other (marginalized) groups, and some people will feel highly restrained in their behavior in settings where others feel free to be themselves. Although unequal access to spaces and individual differences give rise to important normative questions, I do not discuss whether or to what extent certain spaces *should* function as privacy spaces, in general or in relation to particular groups. My concern in this Paper is conceptual rather than legal or ethical: I want to map spaces that typically function as privacy spaces, which can serve as groundwork for further normative analyses of how the right to privacy applies or should apply in particular spaces.

The Paper is structured as follows. In Part II, I start by discussing the notion of “space” and explaining the importance of approaching privacy through a spatial lens. Subsequently, in Part III, I discuss a wide array of spaces in which it can be important to be able to be yourselves, including mind, body, personal writings, home, private conversation space, car, various places in the semi-private zone, publicly accessible places, and public places. Finally, in Part IV, I go into the problem of digital privacy spaces. The challenges of digital privacy are partly related to the fact that digital space comprises (and collapses) different types of personal, intimate, semi-private, and public spaces, which are less visibly separated than their equivalent traditional physical spaces. I discuss how framing the problem of digital privacy in spatial terms helps to better understand digital privacy’s challenges, which is a precondition for addressing them. I end with drawing conclusions from this analysis and offering a brief outlook on future research.

## II. SPACE AND THE SPATIAL CONTEXT OF PRIVACY

In this Part, I will first discuss the concept of space in general, and subsequently its significance in privacy theory in particular.

### A. *The Concept of Space*

The concept of space has been extensively discussed and conceptualized in different ways in geography and related fields.<sup>21</sup> In this paper, I use “space” in

---

<sup>21</sup> See generally KEY THINKERS ON SPACE AND PLACE (Phil Hubbard & Rob Kitchin eds., 2d ed. 2011); Bert-Jaap Koops & Maša Galič, *Conceptualizing Space and Place: Lessons from Geography for the Debate on Privacy in Public*, in PRIVACY IN PUBLIC SPACE: CONCEPTUAL AND REGULATORY CHALLENGES 19 (Tjerk Timan et al. eds., 2017) (providing an overview of concepts and theories of space and place in human geography for legal, governance, and other scholars).



the classic sense of “a backdrop against which human behaviour is played out.”<sup>22</sup> This consists of a location (coordinates on the Earth’s surface) and a locale, that is, “the material setting for social relations.”<sup>23</sup> When the space is made meaningful, by and for people, it becomes a place.<sup>24</sup> The terms “space” and “place” are therefore used in this paper literally rather than metaphorically, and distinct from the more abstract concept of “context.” It should be noted that spatial backdrops are not pre-existing neutral containers but are socially produced, implying that spaces are perceived, conceived, and lived by people in a process of co-production.<sup>25</sup> While all spaces are physical in the sense of having a location somewhere on Earth, some spaces can have a locale that lacks fixed, material boundaries: spaces can also be delimited by fluid, immaterial boundaries. For instance, personal space is delimited by an invisible bubble surrounding a person, which fluctuates depending on the circumstances.<sup>26</sup> Nevertheless, all spaces discussed in this paper have a “real-world” location and an environmental setting.

### B. *The Importance of Space in Privacy Theory*

Spaces where privacy can be found have always been important. As Vincent observes, “[t]here are no beginnings” in the history of privacy, because “there was surely never a time when individuals, families or groups did not sometimes claim the right to withdraw from public scrutiny into a space of their own.”<sup>27</sup> It is therefore unsurprising that spatial conceptions of privacy form a key strand in privacy theory. Indeed, as Julie Cohen has observed, although spatial metaphors for privacy are often rejected as ill-suited for the networked information age, “spatial metaphors continually recur in privacy discourse,”<sup>28</sup> and this “insistent recurrence . . . suggests that something about the experience of privacy, and that of privacy invasion, is fundamentally and irreducibly spatial.”<sup>29</sup> Many scholars<sup>30</sup> build on Irwin Altman’s account of privacy as

---

<sup>22</sup> Phil Hubbard & Rob Kitchin, *Introduction: Why Key Thinkers?*, in *KEY THINKERS ON SPACE AND PLACE* 1, 4 (Phil Hubbard & Rob Kitchin eds., 2d ed. 2011).

<sup>23</sup> CRESSWELL, *supra* note 8, at 13.

<sup>24</sup> *Id.* at 12 (defining “place” as “a meaningful location”).

<sup>25</sup> See generally HENRI LEFEBVRE, *THE PRODUCTION OF SPACE* (Donald Nicholson-Smith trans., 1991) (describing how space is constructed).

<sup>26</sup> See *infra* Section III.A.2.ii.

<sup>27</sup> DAVID VINCENT, *PRIVACY: A SHORT HISTORY* 2 (2016) (quoting DIANA WEBB, *PRIVACY AND SOLITUDE IN THE MIDDLE AGES* ix (2007)).

<sup>28</sup> COHEN, *supra* note 4, at 109.

<sup>29</sup> *Id.* at 139.

<sup>30</sup> See, e.g., SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 10–11 (Vintage Books 1989) (1983) (defining privacy as “the condition of being protected from unwanted

boundary management,<sup>31</sup> which in turn partly built on Edward Hall's theory of four distances that people (and other animals) maintain from each other: intimate, personal, social, and public distance.<sup>32</sup> Although not always phrased in explicitly spatial terms, the prevalent conceptualization of privacy as some form of inaccessibility or restricted accessibility<sup>33</sup> is essentially spatial in character, as it presumes a boundary that precludes access. Thus, people manage the boundaries of the spaces surrounding them in order to modulate the interaction with other people, a process that fluctuates over time and depends on the types of relationships people maintain.

People enact many different roles in social life, and privacy spaces encompass—in Erving Goffman's terms—both frontstage and backstage settings: people actively manage the impressions they give off on-stage (being aware how their audience will perceive them), but they relax off-stage, leaving behind the different roles they play in their various on-stage social interactions.<sup>34</sup> Also, Westin has emphasized the role of privacy in playing social roles,<sup>35</sup> and, following Goffman's metaphor, the necessity of relief from always having to be on-stage:

There have to be moments “off stage” when the individual can be “himself”: tender, angry, irritable, lustful, or dream-filled. Such moments may come in solitude; in the intimacy of family, peers, or woman-to-woman and man-to-man relaxation; in the

---

access by others—either physical access, personal information, or attention”); COHEN, *supra* note 4, at 131 (building on Altman's “model of privacy as a dialectical process of boundary regulation by embodied subjects”); Kaminski, *supra* note 16, at 1113 (using Altman's framework as a jumping-off point to conceptualize privacy harm in relation to physical-space surveillance); Anne Uteck, *Ubiquitous Computing and Spatial Privacy*, in LESSONS FROM THE IDENTITY TRAIL: ANONYMITY, PRIVACY AND IDENTITY IN A NETWORKED SOCIETY 83, 92–96 (Ian Kerr et al. eds., 2009) (discussing privacy and space).

<sup>31</sup> IRWIN ALTMAN, *THE ENVIRONMENT AND SOCIAL BEHAVIOR: PRIVACY, PERSONAL SPACE, TERRITORY, CROWDING* 18 (1975) (defining privacy as “selective control of access to the self or to one's group”) (emphasis omitted).

<sup>32</sup> HALL, *supra* note 16, at 113–29.

<sup>33</sup> See, e.g., BLOK, *supra* note 7, at 278 (conceptualizing privacy as “the inaccessibility of the personal sphere of life”); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 423 (1980) (conceptualizing privacy “as a concern for limited accessibility”).

<sup>34</sup> GOFFMAN, *supra* note 3, at 112–34 (discussing “backstage” as “a place, relative to a given performance, where the impression fostered by the performance is knowingly contradicted as a matter of course.” Thus, it is a place where “the performer can relax; he can drop his front, forgo speaking his lines, and step out of character.”) Cf. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196, 200 (1890) (arguing that “solitude and privacy have become more essential to the individual” because the “intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world” and connecting this retreat from the world with peace of mind).

<sup>35</sup> See WESTIN *supra* note 4.

anonymity of park or street; or in a state of reserve while in a group. Privacy in this aspect gives individuals, from factory workers to Presidents, a chance to lay their masks aside for rest.<sup>36</sup>

This quotation shows how privacy is spatially situated. The access control and boundary management of spaces—which embody privacy as a negative freedom (*freedom from*)<sup>37</sup>—is vital for fostering the positive freedom (*freedom to*) that privacy also entails,<sup>38</sup> to foster autonomy, self-development, and identity construction.<sup>39</sup> Modulating the social interactions taking place within certain spaces gives people room for autonomy and self-development. The link between access control and self-development is already visible in the emergence and rise of privacy in the nineteenth century. As Peter Gay observed in his study of Victorian bourgeois culture, “[p]rivate space meant space for genuine choices,” and “the rising possibilities for privacy . . . were intimately linked to a widespread fascination with the self.”<sup>40</sup> Similarly, Adam Moore has argued that privacy, as controlling access to ourselves, “affords individuals the space to develop as they see fit.”<sup>41</sup>

This illuminates the infrastructural character of privacy: having privacy spaces is an important presupposition for autonomy, self-development, and the

---

<sup>36</sup> *Id.* at 35.

<sup>37</sup> The negative aspect of privacy is visible in its etymology: *privatus* (withdrawn from public life) stems from *privare*, meaning to bereave and deprive. See BOK, *supra* note 30, at 287–88.

<sup>38</sup> See Bert-Jaap Koops et al., *A Typology of Privacy*, 38 U. PA. J. INT’L L. 483, 556–58 (2017) (showing that privacy includes types on both the negative and the positive side of the spectrum of freedom).

<sup>39</sup> See Ciarán Mc Mahon & Mary Aiken, *Privacy as Identity Territoriality: Re-Conceptualising Behaviour in Cyberspace* 14–15 (Working Paper No. 14.1, February 4, 2014), <https://ssrn.com/abstract=2390934> (conceptualizing privacy as “territoriality of identity” and emphasizing that the self is fundamentally a locative system); see also Bart Eeckhout, *Why Would the Spatial Be So Special? A Critical Analysis of the Spatial Turn in American Studies*, in *AMBASSADORS: AMERICAN STUDIES IN A CHANGING WORLD* 19, 23 (Massimo Bacigalupo & Gregory Dowling eds., 2006) (observing that because identities are “seen as socially constructed, the environments in which they are constructed must be closely monitored and extensively analyzed down to the smallest detail”); cf. WESTIN, *supra* note 4, at 33 (discussing autonomy in the context of an “individual’s relations with others in terms of a series of ‘zones’ or ‘regions’ of privacy leading to a ‘core self’”), 36 (observing that “[e]very individual needs to integrate his experiences in a meaningful pattern and to exert his individuality on events”).

<sup>40</sup> PETER GAY, *SCHNITZLER’S CENTURY* 276–77 (2002).

<sup>41</sup> Adam D. Moore, *Toward Informational Privacy Rights*, 44 SAN DIEGO L. REV. 809, 812–13 (2007); see also COHEN, *supra* note 4, 109 (arguing that “[p]rivacy concerns the boundary conditions between self and society and the ways that those conditions mediate processes of self-formation”); WOLFGANG SOFSKY, *PRIVACY: A MANIFESTO* 30 (Steven Rendall trans., Princeton University Press 2008) (2007) (observing that “[p]rivacy is the citadel of personal freedom. . . . It keeps unauthorized persons out. The fortress ensures independence and self-determination”).

other values to which privacy contributes. Thus, privacy spaces create opportunities that people may or may not want to take.<sup>42</sup> And it is *because* privacy can serve many other values that it is also a value in itself: its infrastructural character makes privacy so precious to preserve, as a vital condition of human life as a social animal. In that sense, “[p]rivacy is like oxygen. We really appreciate it only when it is gone.”<sup>43</sup>

In the next part, I will elaborate the connection between privacy and spaces by building on these earlier accounts in privacy theory and I will enrich them with insights from other streams of literature to show the broad spectrum and variety of privacy-relevant spaces.

### III. AN ARRAY OF PRIVACY SPACES

What are the typical spaces where privacy can be enjoyed? Although the first thing that springs to mind might be the “room of one’s own,” some people may think rather of the shower, the public library’s reading room, or the pub around the corner. There is a vast array of possible spaces in which people can feel comfortable enough to be who they want to be at that moment—and much will depend, of course, on the context (e.g., how many and what other people are present, what the relationship is with them, which mood you are in, etc.).

To make some sense of the vast number of privacy spaces, in this section I present types of spaces that I consider important, perhaps prototypical, for achieving a condition of privacy. The overview is based on the spaces I found discussed in key sociological and human-geography literature on privacy-relevant spaces, complemented with insights from other privacy-related literature, as well as from a typology of objects of the right to privacy.<sup>44</sup>

Privacy spaces might roughly be conceived of as a series of concentric circles,<sup>45</sup> from the smallest and most isolated space to ever larger and more social spaces. Thus, “the individual can be seen to be situated at the core of a multi-layered shell, surrounded by an onion-shaped structure of layers of protection.”<sup>46</sup>

---

<sup>42</sup> Cf. SOFSKY, *supra* note 41, at 34 (observing that “[n]o one is obliged to actually exercise the freedom offered by the private sphere”).

<sup>43</sup> CHARLES J. SYKES, *THE END OF PRIVACY* 4 (1999).

<sup>44</sup> Koops et al., *supra* note 38, at 540–42.

<sup>45</sup> See WESTIN, *supra* note 4, at 33 (conceiving of a “core self . . . as an inner circle surrounded by a series of larger concentric circles”).

<sup>46</sup> ALI MADANIPOUR, *PUBLIC AND PRIVATE SPACES OF THE CITY* 25 (2003); see also ERVING GOFFMAN, *RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER* 29–41 (1971) [hereinafter *RELATIONS IN PUBLIC*] (discussing different “territories of the self” as “preserves”); HALL, *supra* note 16, at 115 (seeing “man as surrounded by a series of expanding and contracting fields which provide information of many kinds”); PLACE ATTACHMENT xi (Irwin Altman & Setha M. Low eds., 1992) (discussing place attachment in relation to “a variety of environments: small-scale objects,

---

---

To provide some structure, I have classified the privacy spaces according to the four zones of social interactions that can be distinguished in privacy literature: the personal, the intimate, the semi-private, and the public zone.<sup>47</sup> This classification serves to help the reader navigate from the most secluded to the most social types of places, but it should be borne in mind that some places (such as mental bubbles or cars) do not fit neatly within a particular zone of social interaction; I have classified these pragmatically under the zone where they seem to fit best from the perspective of onion-shaped layers of protection.

#### A. *Personal Zone*

The personal zone is characterized by isolation: situations in which a person is on her own, with no interaction with others. Spaces in this zone involve “all those multiple aspects of private life that, by their nature, allow a total isolation . . . or, in any case, do not suppose any relation with other persons.”<sup>48</sup>

##### 1. Mind<sup>49</sup>

The mind’s personal zone consists of three main types of personal spaces: thoughts, mental bubbles, and personal writings and other expressions of the mind.

##### i. *Thoughts*<sup>50</sup>

In a world of ubiquitous surveillance, the mind is the last bastion of privacy. George Orwell’s Winston, while ostensibly conforming with what he is supposed to do and enacting the kind of person he is supposed to be, can still think what he wants and be a different person in his own mind; this space for thinking is extremely important for him to remain human. However, feeling completely free in your thoughts is easier when you are alone than when you are with others. In principle, you can present yourself to others in one way and think in another way, keeping your thoughts, literally, to yourself. However, as

---

moderate-scale environments such as homes, larger-scale communities and neighborhoods, and very large-scale cities and regions”).

<sup>47</sup> Koops et al., *supra* note 38, at 545–54.

<sup>48</sup> FERRANDO MANTOVANI, DIRITTO PENALE. PARTE SPECIALE I. DELITTI CONTRO LA PERSONA 585 (5th ed., CEDAM 2013) (translated); *see also* Koops et al., *supra* note 38, at 546–48.

<sup>49</sup> The separation of mind and body in this section is not intended to suggest dualism (in fact, there are close connections between violations of privacy of mind and privacy of body), but it serves the pragmatic goal of showing different aspects and different emphases of mental privacy and bodily privacy.

<sup>50</sup> For a discussion of the relationship between freedom of mind and privacy, *see generally* NEIL RICHARDS, INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE (2015).

Wolfgang Sofsky points out, “[s]elf-representations not only tell us who someone is. They also conceal his intentions, thoughts, or feelings. Staging one’s own inner life is a particularly delicate task. . . . As a rule, people reveal more than they can control.”<sup>51</sup> Indeed, to perceptive observers, people “innumerable times betray their most secret thoughts and qualities, not only *although*, but often *because*, they anxiously try to guard them.”<sup>52</sup>

Moreover, thoughts may not only be inferred from outside appearances, they may also be influenced in a way that someone can no longer be said to be herself.<sup>53</sup> This is what Winston ultimately experiences, in the last part of *Nineteen Eighty-Four* where he is brainwashed—a far more harrowing part of the novel than those depicting ubiquitous surveillance:

‘They can’t get inside you,’ she had said. But they could get inside you. ‘What happens to you here is *for ever*,’ O’Brien had said. That was a true word. . . . But it was all right, the struggle was finished. He had won the victory over himself. He loved Big Brother.<sup>54</sup>

If the mind is no longer a space in which you can be yourselves, then privacy is truly, definitively, lost.

ii. *Mental Bubble*

A related but slightly different type of space is the mental bubble: the space most typically inhabited when you are, as the expression has it, “lost in thought” or “absent-minded,” that is, when your body is here but your mind is “elsewhere.” When someone snaps their fingers in your face, your mind returns to the here and now of the body. While thoughts may be seen as being contained in the (hyper)space bounded by the skull, the mental bubble stretches beyond the skull to some physical distance surrounding the person—a psychological equivalent of personal space.<sup>55</sup> When someone is “lost in thought,” there is an

---

<sup>51</sup> SOFSKY, *supra* note 41, at 96–97. *See also* Warren & Brandeis, *supra* note 34, at 205–06 (arguing that the “general right of the individual to be let alone” comprises “the protection afforded to thoughts, sentiments, and emotions,” based on the principle of inviolate personality, and that and these “thoughts, emotions, and sensations . . . should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression”).

<sup>52</sup> GEORG SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* 323–24 (Kurt H. Wolff transl. & ed., The Free Press 1950) (1908) (emphasis in original).

<sup>53</sup> *See* SOFSKY, *supra* note 41, at 14 (observing that “[t]otalitarianism attacked the private sphere, because it sought to eradicate any independent thinking”), 109 (“People can always withdraw into their inner worlds, into the private realm of the imagination, to which no one else has direct access. Thought control is directed against this bastion.”).

<sup>54</sup> ORWELL, *supra* note 1, at 250, 256 (emphasis in original).

<sup>55</sup> *See infra* Section III.A.2.ii.

invisible barrier surrounding her that suggests to others to keep some—physical and behavioral—distance lest they disturb her.

The mental bubble is associated with the mechanism of psychological distance. This mechanism allows people to set “necessary boundaries of mental distance in interpersonal situations ranging from the most intimate to the most formal and public.”<sup>56</sup> The boundaries of mental bubbles are set when someone “withdraw[s] into privacy” as expressed by “facial expressions, bodily gestures, conventions like changing the subject, and by exchanging meaning in ways which exclude others present, such as private words, jokes, winks, and grimaces.”<sup>57</sup> Mental bubbles are therefore not limited to situations of being “lost in thought;” they also play in social interactions where people want their communication partners or by-standers not to penetrate into their inner being. Interestingly, in Westin’s conception of psychological distance, this is a mechanism of reserve enacted *by others* rather than by the person herself: it is the communication partners and by-standers who create psychological distance to respect the privacy of the person when she indicates a desire for withdrawal into privacy, or simply because of social conventions of propriety.<sup>58</sup> By not penetrating through someone’s mental bubble, people preserve the other’s privacy, and allow them to concentrate on a private activity, such as reading, writing, or smartphone-gazing.<sup>59</sup>

Mental bubbles are also the main space for another aspect of privacy: freedom from intrusion by undesired sensory signals. This is what so-called “nuisance laws” aim to protect against. The best-known example is noise, a major theme in earlier privacy literature,<sup>60</sup> but mental bubbles can also be pierced by unwanted smells or sights.<sup>61</sup> Freedom from undesired sensory perceptions not

---

<sup>56</sup> WESTIN, *supra* note 4, at 38.

<sup>57</sup> *Id.* at 39 (quoting Alan P. Bates, *Privacy—A Useful Concept?*, 42 SOC. FORCES 429, 432).

<sup>58</sup> See also SIMMEL, *supra* note 52, at 322 (distinguishing “an intellectual private-property, whose violation effects a lesion of the ego in its very center. Discretion is nothing but the feeling that there exists a right in regard to the sphere of the immediate life contents . . . but conventionally and discreetly, the other individual, nevertheless, does not trespass it by questions or other invasions”).

<sup>59</sup> Cf. Sommer, *supra* note 16, at 656 (noting that “typing on a keyboard, like reading, is a silent, self-absorbed activity that would be only minimally affected by the close presence of other people”).

<sup>60</sup> See, e.g., Bruno Bettelheim, *Some Comments on Privacy*, in SURVIVING AND OTHER ESSAYS 399 (1979) (previously unpublished paper originally presented in 1966). He begins this essay by discussing “innocuous invasions of my private domain” such as being “quite annoyed if I have to listen to some music in an elevator or airplane, because it may jar with my mood of the moment, stop me from pursuing private thoughts, or interfere with a conversation,” annoyances “indicative of a much larger issue,” namely the freedom to decide for yourself which music you want to hear. *Id.*

<sup>61</sup> See Warren & Brandeis, *supra* note 34, at 194 n.2 (noting that the law of nuisance offers “qualified protection of the individual against offensive noises and odors, against dust and smoke,

only allows you to pursue private thoughts, but is also relevant for feeling comfortably yourself in human interactions. Hall has noted how the American “extensive use of deodorants and the suppression of odor in public places results in a land of olfactory blandness and sameness,”<sup>62</sup> which creates problems if an American communicates with people from different olfactory cultures.<sup>63</sup>

Mental bubbles can take diverse shapes in different settings (and therefore may also have different boundaries or different boundary-markers). An historically important example is the *religious mental bubble* in which people withdraw to communicate with a higher being. To achieve the isolation necessary for “the contemplative and holy mood for religious communication,” someone “seeks privacy—usually by physical solitude in forest, beach, or church, but also by psychological isolation through self-induced trance or reverie, or even dreams, if the individual cannot escape the physical presence of others.”<sup>64</sup>

Another, more recent type of mental bubble is the *acoustic cocoon* in which increasing numbers of people are withdrawing when moving around in public spaces, afforded by wearable music players and comfortable earphones. Apparently, for many, an acoustic cocoon enhances the feeling that they can be themselves while moving around in public, particularly in crowded, noisy surroundings that would otherwise distract them from being in the personal zone that they, at that moment, like to be in. Interestingly, people “involved in acoustic cocooning in public space” feel less visible to others: “[b]locking out unwanted sounds . . . and playing one’s desired music thus has the remarkable effect of feeling oneself ‘out of view’—a paradoxical auditory retreat from other people’s views.”<sup>65</sup> This seemingly synesthetic effect might be due to the fact that people shutting out others’ sounds may feel others to be less close than they actually are: at a distance where voices speaking at normal level cannot be heard—say ten meters or more—also details of the person’s face can no longer be seen,<sup>66</sup> so that withdrawing into an acoustic cocoon might give people a feeling that they are also no longer a visibly recognizable or noteworthy individual.

---

and excessive vibration[s]” and that this “involves also a recognition of the value of human sensations”).

<sup>62</sup> HALL, *supra* note 16, at 45.

<sup>63</sup> *Id.* at 49 (noting how an American traveling in Mediterranean or Arab countries “experiences difficulty when he is within olfactory range of another person with whom he is not on close terms . . . and has trouble paying attention to what is being said and at the same time coping with his feelings”).

<sup>64</sup> WESTIN, *supra* note 4, at 19 (citation omitted).

<sup>65</sup> SOUND AND SAFE: A HISTORY OF LISTENING BEHIND THE WHEEL 189 (Karin Bijsterveld et al. eds., 2014) [hereinafter SOUND AND SAFE] (referring to findings of MICHAEL BULL, SOUND MOVES: IPOD CULTURE AND URBAN EXPERIENCE (2007)).

<sup>66</sup> See HALL, *supra* note 16, at 125.



*iii. Personal Writings and Other Expressions of the Mind*

The diary is an important type of privacy space, as we have seen with Winston Smith. It is the prototype of purely private expressions of the mind.<sup>67</sup> Similar to conversations you can have with yourself within your mind, you can also talk with yourself on paper—an important form of emotional release, of putting one’s thoughts in order, of making sense of what happened, or of constructing the narrative that you want to remember of special or ordinary events—in short, of finding out who you are and who you want to be. The diary and other private writings are spaces: they are physical objects with a particular location and locale; intrusions into these spaces (such as opening the diary, leafing through the letters stored in someone’s desk drawer, or shoulder-surfing to snoop on what someone is privately writing) will usually be experienced as serious privacy violations.

The importance of the diary can be seen in the fact that Gay structures his history of nineteenth-century bourgeois culture around Arthur Schnitzler, aged 16, finding that his father has discovered and read his diary, a “violation of his boyish private space [that] rankled and helped to shape his outlook on the world.”<sup>68</sup> For Schnitzler (as for many others), the diary was a means to acquire self-knowledge,<sup>69</sup> and the “struggle over the sanctity of diaries” was a major arena in the nineteenth-century conquest of privacy spaces.<sup>70</sup> The diary was (and is) an important space to be free from the judgment of others:<sup>71</sup> “[a] diary did not criticize, it did not bully, it did not complain, it did not betray secrets.”<sup>72</sup> As in your thoughts, in your diary, you can be truly yourself.

More broadly, the protection of personal papers, including letters written and received as well as diaries and other personal notes, was a key aspect of nineteenth- and twentieth-century privacy. As Samuel Warren and Louis

---

<sup>67</sup> To be sure, not all diaries are written as purely private expressions; they can also be intended for others or even for publication. Then, the diary is not a space in the personal zone, but in the intimate or public zone of social life. Also in those zones, however, a diary is still eminently a space in which you can be yourselves. See how Henri-Frédéric Amiel (writing almost 17,000 diary pages) in 1864 expressed his relation to his diary:

It is my dialogue, my society, my companion, my confidant. It is also my consolation, my memory, my scapegoat, my echo, the reservoir of my intimate experiences, my psychological itinerary, my protection against the mildew of thought, my excuse for living, almost the only useful thing I can leave behind.

GAY, *supra* note 40, at 263.

<sup>68</sup> *Id.* at xxix.

<sup>69</sup> *Id.* at 279.

<sup>70</sup> *Id.* at 261.

<sup>71</sup> *Cf.* Jeffery L. Johnson, *Privacy and the Judgment of Others*, 23 J. VALUE INQUIRY 157 (conceptualizing privacy as freedom from judgment of others).

<sup>72</sup> GAY, *supra* note 40, at 264.

Brandeis argued, the right to privacy should protect “personal writings and any other productions of the intellect or of the emotions.”<sup>73</sup> This fact is fading from collective memory in privacy theory, having been pushed aside by a focus on secrecy of *communications*, as communications media have grown in importance and variety. However, it bears remembrance, because personal papers, written or read in seclusion and not intended for others’ eyes, play a key role in identity-building.<sup>74</sup> The fact that writers regarded confidential letters and intimate diaries “as nothing less than sacrosanct”<sup>75</sup> crystallized into a strong legal protection of writings and other papers in the nineteenth century. In 1849, an English court held that the common law “shelters the privacy and seclusion of thought and sentiments committed to writing, and desired by the author to remain not generally known.”<sup>76</sup> In Germany, governmental investigation of private papers was seen as “a violation of the most holy right to secrecy, as a baneful spying of thoughts, as an unmediated forcing to tell the most secret thoughts that one has only to justify to God.”<sup>77</sup> David Simons, the main Dutch commentator on criminal procedure around 1900, thought that, although times had changed since the early nineteenth century, there still should be protection “of papers and documents, that possibly contain old and venerable family secrets or intimate thoughts, which one perhaps hardly even dares to reveal to oneself.”<sup>78</sup>

Legal protection of papers served to foster the space for expressing one’s thoughts in private. In the course of the twentieth century, the emphasis in legal protection may have shifted from papers to correspondence, particularly during transit; and nowadays, in several legal systems, privately kept papers are no longer treated as a specially protected space but rather as any other object that can be uncovered during a house search.<sup>79</sup> Other systems, however, retain

---

<sup>73</sup> Warren & Brandeis, *supra* note 34, at 213.

<sup>74</sup> Cf. GAY, *supra* note 40, at 260–61 (observing how “[p]rivacy—a desk with a locked drawer, unsupervised correspondence, a diary kept inviolate, or, best of all, a room of one’s own” is important for growing up, enabling adolescents “to assert their private space,” and that, towards 1900, “parents were well advised . . . to respect their children’s privacy”) (emphasis added).

<sup>75</sup> *Id.* at 254.

<sup>76</sup> Warren & Brandeis, *supra* note 34, at 200 n.3 (quoting Knight Bruce, V.C., in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 695).

<sup>77</sup> Mittermaier (1821), quoted in D. Simons, *Papieronderzoek in strafzaken*, in *HANDELINGEN DER NEDERLANDSCHE JURISTEN-VEREENIGING* 356 (1888) (translated).

<sup>78</sup> *Id.* at 358 (translated); see also J. DE BOSCH KEMPER, *WETBOEK VAN STRAFVORDERING, NAAR DESZELFS BEGINSELEN ONTWIKKELD EN IN VERBAND GEBRAGT MET DE ALGEMEENE REGTSGELEERDHEID*, DEEL II 184 (1840) (explaining that the rationale of the additional protection of papers during a search—for which police needed separate court authorization—was that “writings contain thoughts, and that the State is not authorized to investigate someone’s thoughts, except in relation to the intent of the accused to [committing] the alleged fact” (translated)).

<sup>79</sup> For Dutch law, see briefly Bert-Jaap Koops, *Criminal Investigation and Privacy in Dutch Law* 43 (TILT Law & Tech. Working Paper Series, Paper No. 21/2016, 2016),

constitutional protection for papers alongside correspondence.<sup>80</sup> One may assume that it is still important for people to develop themselves by ordering their thoughts in private writings, so that, I would argue, privately kept personal writings remain an important privacy space also in the twenty-first century.

## 2. Body

The body is one of the most straightforward examples of a privacy space. The body bounded by the skin functions as such, but some of the space around the body—personal space—and the personal possessions that are an extension of the body, are also important privacy spaces.

### *i. Body as Bounded by Skin*

The human skin is one of the clearest possible boundary-markers of a private space.<sup>81</sup> Penetrating the skin clearly interferes with one of the most private spaces people have: their literal inner being. “[N]othing seems more private than people’s inner lives, hidden and surrounded by the shell of the body.”<sup>82</sup> Being straightforward, the inner body need not be discussed here further as a privacy space.

What is relevant to note, however, is that “skin” is not a perfect boundary-marker of the body. Legal systems need to negotiate where to put the boundary of the inner body in relation to government investigations involving body material from the outer body (hair, nail clippings, sweat, body tissue left on

---

<http://ssrn.com/abstract=2837483>. The only exception is that sealed letters are still protected more during a search than other objects. See WETBOEK VAN STRAFVORDERING [Code of Criminal Procedure], art. 102a (Neth.). Some other odd remnants of paper protection linger on, however: WETBOEK VAN STRAFRECHT [Criminal Code], art. 370(2) (Neth.) penalizes a public official “who, on the occasion of a search of places, overstepping his authority or failing to observe the formalities prescribed by law, examines or seizes documents, books or other papers.” I am not aware of substantial national or comparative studies of the complex history of the legal protection of private papers; it is a topic that merits more attention in privacy scholarship.

<sup>80</sup> See Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], art. 13 (protecting “the confidentiality of letters or *other papers or records*, whether *privately kept* or sent by post or by some other means . . .” (emphasis added)); see also U.S. CONST. amend. IV (“[t]he right of the people to be secure in their persons, houses, *papers*, and effects . . .”) (emphasis added). Cf. H. Brian Holland, *A Cognitive Theory of the Third-Party Doctrine and Digital Papers* (Texas A&M University Sch. of Law Legal Studies Research Paper No. 18-46, 2018), <https://ssrn.com/abstract=3257585>.

<sup>81</sup> Cf. SOFSKY, *supra* note 41, at 37 (seeing the skin as “a living borderline, marking the difference between the ego and the world”). See also MADANIPOUR, *supra* note 46, at 239–40 (observing that the “boundary between the private inner space of the self and the public space outside is the body itself”).

<sup>82</sup> SOFSKY, *supra* note 41, at 24. See also *id.* at 36 (observing that in the untouchability of the skin “lies the nerve center of everything private”).

objects) and looking inside the body through natural cavities (mouth, nose, ears, vagina, anus). Some of these will be considered more privacy-invasive than others, depending partly on whether or not the body is touched (forced shaving off of a moustache to facilitate a line-up is more invasive than collecting sweat from a handkerchief to guide sniffer dogs) and on the (socio-cultural) sensitivity of body parts<sup>83</sup> (rectal searches will be more invasive than mouth searches). Another complicating factor is that genetic information—which can be considered as relating to the core of the human person because it correlates, to a greater or lesser extent, to key identity features such as looks, personality, and propensity for diseases—can be derived not only by penetrating the boundary of the body but equally well from body material taken from the body's outside or from objects containing traces.

These examples show that, while the body bounded by the skin is unequivocally a privacy space, certain actions involving body material raise partly similar questions as physical intrusions into the body, but also somewhat different questions, and these questions will have to be discussed not only in terms of bodily integrity but also in terms of other privacy spaces (such as possessions, home, or public places) in which body material may be collected and analyzed.

## ii. *Personal Space*

The idea that people carry a certain private space around their body is widely recognized in the literature, albeit in sometimes different terms. Seminally, Sommer defines personal space as “an area with an invisible boundary surrounding the person's body into which intruders may not come. . . . It has been likened to a snail shell, a soap bubble, an aura, and ‘breathing room.’”<sup>84</sup> Ali Madanipour defines it as “the space that a person and the others observe around his/her body, as the extension of the body[.]”<sup>85</sup> It is “less private than mental space, but more private than the intimate space of the home.”<sup>86</sup>

---

<sup>83</sup> Cf. RUSSELL W. BELK, *Attachment to Possessions*, in PLACE ATTACHMENT 37, 39 (Irwin Altman & Setha M. Low eds., 1992) [hereinafter *Attachment to Possessions*] (referring to a study on “objects (including body parts) according to the degree to which they were seen as part of self” that found that “skin, genitals, fingers, hands, legs, heart, and eyes were all in the top quartile,” suggesting that these body parts are more strongly associated with people's sense of self than other body parts).

<sup>84</sup> ALTMAN, *supra* note 31, at 53 (quoting R. SOMMER, PERSONAL SPACE 26 (1969)). Sommer, *supra* note 16, at 656 emphasizes that personal space regards the “emotionally charged zone around the individual's body,” which is shaped “more like an hourglass than a circle, with longer distances in front and rear than at the sides.”

<sup>85</sup> MADANIPOUR, *supra* note 46, at 22.

<sup>86</sup> *Id.* at 25.

The notion of personal space was already envisioned in 1908 by Georg Simmel, who recognized “that an ideal sphere lies around every human being. Although differing in size in various directions and differing according to the person with whom one entertains relations, this sphere cannot be penetrated, unless the personality value of the individual is thereby destroyed.”<sup>87</sup> It is frequently mentioned, although not extensively discussed, in privacy literature,<sup>88</sup> and sometimes also recognized as such in law.<sup>89</sup> The main conceptualization of personal space can be found in Edward Hall’s discussion of “distances in man,” where he distinguished four types of distance, each in two variants, near and far.<sup>90</sup> *Intimate distance* is the small space immediately surrounding the body—“the distance of love-making and wrestling” (near variant) or where “hands can reach and grasp extremities” (far variant).<sup>91</sup> An uninvited intrusion into intimate personal space can be extremely disconcerting; as one of Hall’s American respondents expressed the experience of communicating with a foreigner with a different sense of personal distance: “They put their face so close it feels like they’re *inside you*.”<sup>92</sup> Roughly up to one meter surrounding a person,<sup>93</sup> *personal distance* refers to the “small protective sphere or bubble that an organism maintains between itself and others,”<sup>94</sup> that is, the space within which people generally feel comfortable in relation to others in non-intimate social interactions. When circumstances force people to stand closer, in elevators or crowded buses, for example, they will use mechanisms of discretion (such as averting one’s eyes and keeping one’s arms straight down) to show they do not intentionally invade others’ personal bubbles. *Social distance*, roughly from one to four meters outside the body, is usually for conducting impersonal business

---

<sup>87</sup> SIMMEL, *supra* note 52, at 321; *see also* text accompanying *supra* note 58.

<sup>88</sup> *See, e.g.*, COHEN, *supra* note 4, at 143 (“By analogy to what Altman described as the ‘invisible bubble’ that surrounds each embodied individual, we might envision a zone of personal space that permits (degrees of) unconstrained, unobserved physical and intellectual movement.”); ELI LEDERMAN, *INFOCRIME: PROTECTING INFORMATION THROUGH CRIMINAL LAW* 72 (2016) (“an abstract shape that surrounds a person to form a zone of physical privacy”); SOFSKY, *supra* note 41, at 39 (“The human shape is surrounded by its personal space, an invisible sphere whose scope changes with population density and the social and material situation.”).

<sup>89</sup> *See, e.g.*, Uteck, *supra* note 30, at 95 (mentioning recognition in Canadian law of “a personal zone of privacy” where “a person is deemed to be surrounded by a space, but, unlike physical property, this space is not necessarily bounded by tangible barriers”).

<sup>90</sup> HALL, *supra* note 16, at 113–29.

<sup>91</sup> *Id.* at 117.

<sup>92</sup> *Id.* at 118 (emphasis in original).

<sup>93</sup> The indication of distances is based on Hall’s observations of mainly Caucasian American middle-class professionals and therefore is purely indicative; the distances will vary for groups with different “proxemic patterns.” *See id.* at 116.

<sup>94</sup> *Id.* at 119.

and casual social gatherings,<sup>95</sup> while *public distance*, beyond four meters, is typically for important public figures (with people, for instance, not daring to come within 10 meters of the president unless so invited) or for public occasions, such as public speeches.<sup>96</sup>

Thus, personal space can be seen as a “series of invisible bubbles”<sup>97</sup> at different (context-dependent) distances. For privacy, the bubbles bounded by intimate and personal distance are especially important, as they constitute two personal space bubbles from which one will want to exclude uninvited others. Nevertheless, also social and public distance may be relevant, if someone comes too close for the purposes of the context at hand. Moreover, and more importantly, the distances are not simply geometrical in terms of physical proximity; rather, they are perceptual distances mediated by different human senses.<sup>98</sup> Being able to be yourselves within your intimate and personal bubbles is strongly related to (almost) all senses, including touch and smell; in contrast, social and public distances are bridged particularly by vision and sound. You may well experience a stare or shout across five meters as an invasion of your personal space, whereas someone standing close to you in the elevator with eyes averted and arms down (and not wearing a penetrating cologne) can be felt to be respecting your personal space.

Although I position personal space in the personal zone (because it directly relates to the human body), it should be noted that it functions as such in all zones of social interaction. Personal space is portable and accompanies the person wherever she goes.<sup>99</sup> It is, therefore, a key privacy space also in public.

### iii. *Personal Possessions: The Extended Self*

Simmel observed that “material property is, so to speak, an extension of the ego.”<sup>100</sup> Possessions “can give us a sense of who we are”<sup>101</sup> and thus are important in identity construction; they “enhance our feeling of being in control of our environment, strengthen our self-concept, increase our self-confidence, provide us with feelings of security, and allow us to communicate our identity to ourself [sic] and others.”<sup>102</sup> People are attached to favorite possessions primarily

---

<sup>95</sup> *Id.* at 121–22.

<sup>96</sup> *Id.* at 123–25.

<sup>97</sup> *Id.* at 129.

<sup>98</sup> *Id.* at 181 (“Man’s sense of space is a synthesis of many sensory inputs: visual, auditory, kinesthetic, olfactory, and thermal.”).

<sup>99</sup> MADANIPOUR, *supra* note 46, at 33; SOFSKY, *supra* note 41, at 40.

<sup>100</sup> SIMMEL, *supra* note 52, at 322.

<sup>101</sup> *Attachment to Possessions*, *supra* note 83, at 37.

<sup>102</sup> *Id.* at 45 (referring to M. Csikszentmihalyi, *The Symbolic Function of Possessions*, presented at APA meetings, Washington, D.C., August 1982).

because they serve “symbolic self-expression and memory ‘marking,’”<sup>103</sup> and the uncontrolled loss of property can be experienced as a “loss of self.”<sup>104</sup> Thus, they are part of the extended self, a notion advanced by Belk, as a “nested set of concentric selves resembling Russian mitrushka dolls.”<sup>105</sup> Individual possessions belong to Belk’s intermediate layer of extended self (the innermost self being unextended, and the outermost self consisting of collective possessions).<sup>106</sup>

The extended self includes personal belongings carried on or close to the body, or otherwise accessible only to the person (e.g., in a locker of which the person carries the key).<sup>107</sup> Personal effects such as “jackets, hats, gloves, cigarette packs, matches, handbags and what they contain, and parcels”<sup>108</sup> are important for their “value in relation to one’s identity” rather than their material value,<sup>109</sup> and possessions such as “casual clothes, vehicles, books, sporting goods, jewelry, heirlooms, wallet and purse contents” score high on “self” ratings.<sup>110</sup> Nowadays, smartphones will be a highly important part of the extended self in this sense; their loss can be experienced as losing a part of oneself, almost as serious as losing a body part.<sup>111</sup>

The extended self’s relevance for privacy is that possessions valuable for identity construction that are carried close to the body, or otherwise only accessible to the person, reside in personal space, falling within the distance bounded by the intimate or personal bubble,<sup>112</sup> or otherwise being experienced

---

<sup>103</sup> *Id.* at 42.

<sup>104</sup> *Id.* at 52 (observing that only “when there is control over disposition and the ability to employ disposition rituals . . . is the loss of highly cathected possessions likely to be non-traumatic . . . . When we lack control over this process of disacquisition, it [will] be perceived as a loss of self, but when we control the disacquisition, it can be a source of identity preservation”) (references omitted).

<sup>105</sup> *Id.* at 42.

<sup>106</sup> *Id.*

<sup>107</sup> Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 281 (1974) (defining privacy as “control over when and by whom the various parts of us can be sensed by others” and defining “parts of us” as “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”). *See also* Adam Moore, *Defining Privacy*, 39 J. OF SOC. PHIL. 411, 420.

<sup>108</sup> GOFFMAN, *supra* note 46, at 38.

<sup>109</sup> SOFSKY, *supra* note 41, at 41.

<sup>110</sup> *Attachment to Possessions*, *supra* note 83, at 41.

<sup>111</sup> *Cf.* Belk, *supra* note 5, at 492 (arguing that mobile phones are “for many today our most relevant identity-kit,” an identity-kit being what “people carry with them in order to feel secure in their self-identity and presentation of self”).

<sup>112</sup> *See supra* Section III.A.2.ii.

as part of the self and hence as off-limits to others, unless they are invited to touch or observe the item.<sup>113</sup>

### 3. A Room of One's Own

A “room of one's own” is probably the most concrete physical place in the personal zone where someone can experience privacy.<sup>114</sup> It provides a refuge that

allows one to temporarily opt out of society and find a place of peace and tranquility where one can indulge one's inclinations, lose oneself in one's thoughts, work out secret projects, care for one's body, or do nothing at all, without being urged by anyone to act, speak, or work.<sup>115</sup>

In short, in your own room, you can truly be yourselves, in all senses of being let alone: backstage relaxation from playing social roles, having no fear of observation or judgement of others, and having utmost control over information flows. Being as straightforward a privacy space as the body bounded by the skin, it need not be elaborated here—except perhaps to note that for most of history, a room of one's own was a luxury that only the affluent could afford.<sup>116</sup>

---

<sup>113</sup> GOFFMAN, *supra* note 46, at 42 remarks that “personal effects, constituting a preserve in their own right, are frequently employed as markers [i.e., signifying a claim to a preserve]; moving them or even touching them is something like touching their owner's body, and such acts are avoided in many circumstances or performed with suitable circumspection.”

Note that some privacy spaces discussed below, such as cars and homes, *infra*, Section III.B, are also material possessions, functioning as containers of private life in a broader sense. Such spaces thus function as privacy spaces in two ways, both as special types of places in the intimate zone and as material possessions with a perimeter denoting the boundaries of private property. *Cf.* SOFSKY, *supra* note 41, at 86–87:

The power of disposal over things that belong only to oneself marks out one's place in the world. It creates a sphere to which no one else is allowed access, a safe realm of action in which the individual can experience the effectiveness of his acts and develop self-confidence. . . . Through mutual recognition of property, citizens guarantee their private spheres.

*Id.*

<sup>114</sup> A reference will be expected here to VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* (Vintage Books 2001) (1929), but the novella/essay is about property (“five hundred a year”, *passim*) rather than privacy. According to Virginia Woolf, it is primarily material and social independence that enables women to write and be themselves in writing. *Id.* Nevertheless, a room of one's own will also help women to foster peace of mind and autonomy: “a lock on the door means the power to think for oneself.” *Id.* at 92.

<sup>115</sup> SOFSKY, *supra* note 41, at 69.

<sup>116</sup> See GAY, *supra* 40, at 269–70 (noting that in the nineteenth century, the “most elementary requirement for domestic privacy was . . . a room of one's own, something that . . . the poor could



### B. Intimate Zone

The intimate zone of social life is characterized by persons in settings involving close relationships, typically between family and close friends.<sup>117</sup> Spaces in this zone involve settings, usually closed-off in some sense, where people typically develop and enact intimate life,<sup>118</sup> including sexual relations, bonding, and sharing deeply personal information.

#### 1. Home

Even more than the room of one's own, the home is perhaps the most typical and best-known privacy space. It is an eminent place for being yourself, both alone and with intimate others, because "we become attached to the home as a symbol of our bibliography, an expression of self, and a source of security."<sup>119</sup> How close the home is to the self can be seen by how people often feel after a burglary, even when little has been taken: "a feeling of invasion of self much akin to rape."<sup>120</sup> As with the room of one's own, however, it should be noted that the "harmonious ideal of the cozy, secure home"<sup>121</sup> is a relatively recent invention and that the home as we know it (with different rooms dedicated to specific purposes, corridors, and in-home toilets) became available and affordable to most people only in the course of the twentieth century.<sup>122</sup> Moreover, home cultures vary greatly, and the notion of the home as "my castle" and therefore as a pre-eminent privacy space may be stronger in, roughly, northern ("home") countries than in, roughly, southern ("house") countries.<sup>123</sup>

---

never afford" and that "the considerate allocation of private space, though widespread, was not a uniform practice"); SOFSKY, *supra* note 41, at 67 (noting that "[o]nly in the second half of the twentieth century did the majority of the population acquire more private space. Rooms became larger; intimacy was democratized").

<sup>117</sup> See Koops et al., *supra* note 38, at 548–50.

<sup>118</sup> Cf. JULIE C. INNESS, *PRIVACY, INTIMACY, AND ISOLATION* 10 (1992) (defining an intimate activity or action as one that "draws its meaning and value from the agent's love, care, or liking").

<sup>119</sup> *Attachment to Possessions*, *supra* note 83, at 39.

<sup>120</sup> *Id.* at 51 (with references).

<sup>121</sup> SOFSKY, *supra* note 41, at 65.

<sup>122</sup> *Id.* at 65–67; see also GAY, *supra* note 40, at 268–72; Shapiro, *supra* note 11, at 281.

<sup>123</sup> See JUDITH FLANDERS, *THE MAKING OF HOME* 3–4 (Atlantic Books 2014) (discerning a distinction between "home" countries, which have clearly distinct words (and thus concepts) for home and house, and "house" countries, which apply the same word for home and house; the latter are "societies where the community space, the town, village or hamlet, is the canvas on which life is painted, and where an individual house is only a more private area within that primary space," while the former are "societies where the house is the focal point, while the town, village or hamlet functions mainly as the route through which one passes in order to reach the essential privacies of the houses").

There are also cultural differences as to what constitutes being “in” or “outside” the home.<sup>124</sup>

As a privacy space, the home has a hybrid function. Sometimes, or for some, it functions as a secluded place in the personal zone, like the room of one’s own or personal space;<sup>125</sup> at other times, or for others, it functions as a place for intimate relations. Thus, “when the home is shared with other members of the household, the space becomes more stratified to create zones of comfort and privacy for household members. Here some areas at some times may become the extended personal space and the rest of the home negotiated, interpersonal space.”<sup>126</sup> Moreover, not only does the home include both personal and intimate interpersonal spaces, it also includes some semi-private or even public spaces—those accessible to, and often intended for, receiving visitors or for public display. Parlors and unscreened windows can also display “the éclat of that overt portion of [people’s] life that is carried on before the eyes of observers.”<sup>127</sup> Not all of the home is strictly private, therefore—but it always includes places to withdraw into when you feel the need to be with yourself, or to be intimate with chosen others.

While possessions can belong to personal space,<sup>128</sup> objects in the home also enhance the feeling of being “at home” and thus strengthen it as a space in which you can be yourselves. A special category that merits attention in this respect are souvenirs and mementos, with which people seek to “tangibly memorialize” those parts of their life that they cherish to remember, which are often key identity-building events and relationships.<sup>129</sup> Belk argues that “our attachment to souvenirs and mementos help to *construct*, rather than simply preserve, an identity.”<sup>130</sup> For the purposes of this Paper, it is important to note that these identity-building mementos have traditionally been primarily preserved within the safe space of the home, where they are closest to the person

---

<sup>124</sup> See HALL, *supra* note 16, at 133 (observing that “[t]alking through a screen door while standing outside a house is not considered by most Americans as being inside the house or room in any sense of the word. If one is standing on the threshold holding the door open and talking to someone inside, it is still . . . experienced as being *outside*. . . . None of these American spatial considerations is valid in northern Germany. In every instance where the American would consider himself *outside* he has already entered the German’s territory”) (emphasis in original).

<sup>125</sup> MADANIPOUR, *supra* note 46, at 25 (“When the home is the living place of a single person, the boundaries of personal space may be extended so that the two overlap, for the space of the home and personal space of the body become one and the same.”).

<sup>126</sup> *Id.*

<sup>127</sup> GAY, *supra* note 40, at 271–72 (quoting THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* 112–13 (1899)).

<sup>128</sup> *Supra* Section III.A.2.ii.

<sup>129</sup> *Attachment to Possessions*, *supra* note 83, at 40.

<sup>130</sup> *Id.* (emphasis in original).

---

and best protected against loss.<sup>131</sup> Now that souvenirs and mementos get increasingly digitized and mobilized, they are no longer sheltered by the home but stored in digital spaces—still close and (relatively) well-protected against loss, but triggering different legal regimes of protection.

## 2. Private Communications Space

Private communications space helps to develop identity by facilitating intimate relationships. It includes the spaces of private conversations, letters, and telecommunications.

### *i. Private Conversation Space*

Face-to-face conversation space can be conceptualized as a group equivalent of personal space, or the personal space of what Goffman calls a “with”, that is, “a party of more than one whose members are perceived to be ‘together.’”<sup>132</sup> It is constituted by the physical space bounded by a visible or invisible boundary surrounding a group of people engaged in private conversation into which intruders may not come. It usually takes place at social distance,<sup>133</sup> with voice level and eye movement being modulated depending on the closeness of by-standers or outsiders, to demonstrate the privateness of the conversation.

Private conversation space belongs to the intimate zone because it shelters the exchange of possibly intimate or sensitive information, and because it is a vital part of the establishment of close and intimate relationships, both of which are key parts of identity-building. However, conversations do not have to involve highly personal subject matter to be intimate.<sup>134</sup> And conversely, people sometimes talk about deeply personal matters with strangers, particularly in “certain places where the real world is seemingly held in suspension ‘outside’—such as trains, boats, and bars—[that] lend themselves to free conversation.”<sup>135</sup>

---

<sup>131</sup> The most important mementos—the photograph or hair lock of one’s beloved—are kept even more closely, carried on the person in wallet, purse, or locket; but for physical objects, there are natural limitations to what one can carry along. Hence, most mementos (photo albums, children’s drawings, travel souvenirs) will be left safely stored at home.

<sup>132</sup> RELATIONS IN PUBLIC, *supra* note 46, at 19.

<sup>133</sup> See *supra* note 95 and accompanying text.

<sup>134</sup> Cf. SIMMEL, *supra* note 52, at 126–27 (observing that intimate relations are characterized not by the content of the relationship but by the fact that participants share something that they share with no or only few others, which can be quite trivial).

<sup>135</sup> WESTIN, *supra* note 4, at 38 (observing that talking with strangers can provide “[c]onfessional relief . . . because what [the stranger] is told will not be repeated in the ‘home sphere’ of the person who has confided in him”). Note that according to SIMMEL, *supra* note 52, at 127, the sharing of “intimate” content with a stranger does not make the relation itself an intimate

Despite their variety, conversation spaces (at least to the extent that people make an effort to demonstrate a desire to keep the exchange private, e.g., through whispering or moving closer together when someone else approaches) trigger a high expectation of privacy. In German law, for example, private conversations belong to the “core area of private life” (*Kernbereich privater Lebensgestaltung*) that is most strongly protected, because—whether in a car, aloof in a restaurant, or in retreat during a stroll—they capture with some likelihood highly confidential situations.<sup>136</sup>

The boundary of a conversation bubble can be relatively visible, for instance, when people converse in a Goffmanian “stall,”<sup>137</sup> because stalls have “external, easily visible, defensible boundaries for a spatial claim.”<sup>138</sup> However, more often the boundaries will be invisible and rather fluid, and depend on cultural norms.<sup>139</sup> Then, others keeping their distance will serve “to isolate any such group and endow it with a protective wall of privacy.”<sup>140</sup>

Even when the physical boundaries of a conversation bubble are respected, however, content can still be overheard, particularly in relatively crowded places, such as a restaurant with tables placed closely together. This should trigger a form of civil inattention: “people will act as though they had not heard.”<sup>141</sup> The same seems to apply when people talk into their cellular phone in the presence of others: unless conversing so loudly as to give up any pretense at expecting privacy, the phoning person is nevertheless in a conversation bubble, even if the conversation partner is elsewhere, and others may be supposed to respect the privateness of the conversation even if they can actually overhear everything being said.<sup>142</sup>

---

one, because it does not lay the basis for an affective structure that characterizes an intimate relationship.

<sup>136</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 1 BvR 966/09 (Ger.) at §176.

<sup>137</sup> See *infra* Section III.C.1.ii.

<sup>138</sup> RELATIONS IN PUBLIC, *supra* note 46, at 34.

<sup>139</sup> Cf. HALL, *supra* note 16, at 137 (observing that his American students could not express “the distance at which a third party would intrude on two people who were talking,” although they would intuitively know when such intrusion would occur, while two German-based students answered without hesitation that the distance was seven feet).

<sup>140</sup> *Id.* at 132.

<sup>141</sup> *Id.* at 133; see also ERVING GOFFMAN, BEHAVIOR IN PUBLIC PLACES 156 (1963) (“Bystanders are obliged to refrain from exploiting the communication position in which they find themselves, and to give visible expression to the participants of the gathering that they are focusing their attention elsewhere—a courtesy of some complexity, since a too studied inattention to what one is in a position to overhear can easily spoil the show of inattention.”).

<sup>142</sup> Note that, at the same time, having a cell-phone conversation within hearing distance of bystanders (or by-sitters) may at the same time constitute a form of nuisance and thus mental-bubble invasion, *supra* note 60 and surrounding text, of the latter: “Those nearby, unable to shut out the

*ii. Letters*

Letters—also referred to as snail mail, as distinct from electronic correspondence—have been, in certain periods, a highly important privacy space, allowing people to extend the space, typified in the personal zone by diaries,<sup>143</sup> for expressing themselves on paper. By allowing one or a few selected others access to their thoughts, emotions, and private affairs, letters help people to shape their identity, both by putting their mind, memory, and life in some order and by creating intimate relations through the one-on-one sharing of information.<sup>144</sup>

The space of letters is physical and relatively clearly bounded: by the sealed envelope. The envelope shields against accidental viewing, the seal against purposeful acquisition of its contents. The sealed envelope thus performs an important function when the letter leaves the safety of the sender's home and before it reaches the safety of the recipient's home: it establishes, symbolically as much as physically, a secure channel for communications.<sup>145</sup> The space of letters is therefore primarily shielded off from those to whom the letter is entrusted: the postal service (which during most of history was a government institution). Opening of letters by the mail—of its own accord or so ordered by (another part of) government—was, and is, considered one of the most serious breaches of privacy. In Carlyle's formulation, it is "vital to us that sealed letters in an English post-office be . . . respected as things sacred," and that opening them was like pick-pocketing or "still viler and far fataler forms of scoundrelism."<sup>146</sup>

However, once the letter is delivered, its fate depends on the recipient's discretion; now, it is no longer bounded by the sealed envelope, but by the recipient's mind and the letter's storage place. As with conversations, the content of what is shared—and this is what typically makes letters intimate—is entrusted to the care of a particular other person. Trust therefore is crucial in ensuring that letters serve as a privacy space.<sup>147</sup> To be sure, this trust is frequently betrayed,

---

various cell phone conversations, feel as if their space has been invaded." See Sommer, *supra* note 16, at 654.

<sup>143</sup> *Supra* Section III.A.1.iii.

<sup>144</sup> As with diaries, see *supra* note 67, some letters are, of course, written with (potential) publication in mind, and in those cases, they are important spaces for self-expression and self-presentation in the semi-private or public zone rather than in the intimate zone.

<sup>145</sup> Cf. Shapiro, *supra* note 11, at 278–79 (discussing the "private space of sealed letters" as they move through public places).

<sup>146</sup> Letter from Thomas Carlyle to the Editor of *The Times* (June 19, 1844), in GAY, *supra* note 40, at 259.

<sup>147</sup> GAY, *supra* note 40, at 258 ("Trust, in short, became an essential ingredient in the conduct of correspondence."); SIMMEL, *supra* note 52, at 352 (observing that letters somehow carry an intensified subjective expectation of secrecy, although, or perhaps rather because, their very

but insofar as people *feel* they can trust the other's discretion, letters offer a space in which people feel they can be themselves, free from judgement of others and with sufficient control over the information flow. In this respect, it may also be significant that letters, in contrast to email and chat messages, are typically one-on-one communications; and as Simmel has argued, a dyadic relationship differs fundamentally from a triadic (or broader) relationship in that dyads are characterized by a "pure and immediate reciprocity," which fosters a substantially stronger and more intimate relationship.<sup>148</sup> It is not for nothing, then, that the secrecy of letters has been strongly protected in law since the nineteenth century, and still is—despite the gradual decline in the use and significance of snail mail in the twenty-first century.

iii. *Telecommunications*<sup>149</sup>

Telecommunications differ from face-to-face communications primarily in that they are mediated, that is, transported (usually by a service provider) over a communications channel. In this sense, they are like letters, and telecommunications space can therefore be seen as an extension of the space afforded by letters and the postal channel. Although perhaps less graspable, particularly with wireless communications, telecommunications constitute a physical space much like the postal channel: it consists in physical equipment and cables or air waves over which the communications are transported, all of which have a location and locale. The telecommunications channel, as the backdrop against which communication at a distance is played out, is therefore an important privacy space.

Over time, with the rise of new telecommunications means, paper-based correspondence has gradually (but not completely) given way to telecommunications-based communications.<sup>150</sup> Initially, with the telegraph and

---

nature—being intended to be read by another or others—is “opposed to all secrecy. . . . It is for this reason, perhaps, that we react to indiscretion concerning *letters* as to something particularly ignoble—so that, for subtler ways of feeling, it is the very defenselessness of the letter which protects its secrecy” (emphasis in original); *see also* VINCENT, *supra* note 27, at 21 (noting that the rise of “[e]pistolary intercourse diminished the dependence of intimacy on physical space. In return it enlarged the realm of the secret, with all its attraction and vulnerability”).

<sup>148</sup> SIMMEL, *supra* note 52, at 136.

<sup>149</sup> This Section discusses telecommunications as a closed-off space for private communications, a typical violation of which would be wiretapping. Another type of telecommunications-related privacy violation (more frequently discussed in older than in recent privacy literature) is the disturbance of unwantedly being called. This is a form of intrusion into other privacy spaces than discussed here, namely the mental bubble or the home. *Supra* Sections III.A.1.ii, III.B.2.i.

<sup>150</sup> Note how earlier human rights instruments used the term “correspondence” for mediated communications (*e.g.*, Eur. Conv. on H.R., art. 8; Universal Declaration of Human Rights, art. 12),

the switchboard-operated telephone, the contents of telecommunications were not shielded, as the letter was, from cognition by the transport company; telecommunications privacy therefore relied mainly on the discretion of the transporter's personnel (backed up by legal secrecy obligations). As the telephone system was automated, however, phone conversations constituted a privacy space more similar to letters, with information being entrusted over a relatively closed channel to reach the recipient. This allows one to see telephone conversations as "a constitutionally protected private zone,"<sup>151</sup> even when conducted from a publicly accessible telephone booth.<sup>152</sup> As with letters and face-to-face conversations, phone conversations help people to shape their identity, by allowing specially selected others access to their thoughts, emotions, and private affairs, creating intimate relations through the one-on-one sharing of information.

With newer communications media and applications, such as email, texting, and chatting, this is also the case when these are used for private communications; in many ways, these are simply new forms of letters and phone conversations. (The format affects, of course, what can be and is being communicated, but this does not diminish the importance of new media as an important space for identity-building through sharing of information.) A difference, however, is that these new media afford more easily sharing of information in a wider circle: messages can be sent to multiple recipients and forwarded to others.<sup>153</sup> Given the sociological difference between dyads and groups of three or more,<sup>154</sup> this implies that private communications through new media may be less a privacy space in the intimate zone, but rather more typically a space in the semi-private zone of social relations.

### 3. Car

Cars are underestimated in privacy literature as a special privacy space. Cars are something of a hybrid of personal space, the extended self, a mental bubble, a room of one's own, and private conversation space; this unique combination merits conceiving of a car as a privacy space in itself, which I think

---

while more recent instruments use the term "communications" (*e.g.*, Charter of Fundamental Rights of the Eur. Union, art. 7).

<sup>151</sup> NISSENBAUM, *supra* note 19, at 101.

<sup>152</sup> *Katz v. United States*, 389 U.S. 347 (1967). See Shapiro, *supra* note 11, at 280 (describing this ruling as effectively extending the home—along with other nominally private places—into electronic space).

<sup>153</sup> This is also possible with letters, of course, but it is far less practicable; the default with letters is one-to-one communications, whereas the default with email or chats may be coming closer to one-to-multiple communications.

<sup>154</sup> *Supra* text accompanying note 148.

should be placed in the intimate zone.<sup>155</sup> Sofsky eloquently expresses why it is a space in which you can be yourselves:

The automobile provides people with a vehicle that they can arrange as a private interior space. . . . [E]very individual can shape his own traveling room. A car is . . . a refuge for mobile intimacy. As a vehicle it is a public object; as a room it is a private object. Although it can be looked into from the outside, one can brush one's teeth undisturbed while waiting for the light to change, clean one's nose or ears, put on lipstick or comb one's hair. A conversation inside the car is not heard outside. Sometimes a car is also a substitute for one's bed at home, allowing one to take a nap or engage in erotic adventures.<sup>156</sup>

Being able to be yourselves means you can behave without bothering about others' judgements or observation; as a man with "something of a weakness for teenage dance music" and practicing Italian sentences stated, it must be amusing for other drivers to see him "talking behind the wheel and 'gesticulating as if I am completely insane, but who cares, it's my car, it's my space.'"<sup>157</sup>

One reason why cars, more than other means of transport, feel so private and comfortable is that they provide an eminent "space for 'acoustic cocooning,' that is: a domain in which people experience privacy and relaxation because the interior acoustics of cars are pleasant and controllable[.]"<sup>158</sup> Also, when (hands-free) communicating with someone outside, people still control "who and what is sonically able to enter the car. It is like being at home, but with more physical privacy than the home usually offers."<sup>159</sup> Similarly to users of portable music

---

<sup>155</sup> Cf. VINCENT, *supra* note 27, at 12 (observing that not the built environment itself, but rather moving through one's environment, epitomized by walking, might well be "the principal focus of the history of the privacy not just in the early part of this survey but through to the twentieth century when the motor car became the most available location for secluded reflection and discourse"). In the course of the twentieth century, "the car became a mobile castle, combining the comfort and the seclusion of the domestic interior with the freedom to escape its confines without . . . any engagement with another individual." *Id.* at 121.

<sup>156</sup> SOFSKY, *supra* note 41, at 70–71; see also SOUND AND SAFE, *supra* note 65, at 3 (referring to a car "as a mobile living room" and "an artifact that provides both mobility and a privatized, intimate space").

<sup>157</sup> SOUND AND SAFE, *supra* note 65, at 136; see also NISSENBAUM, *supra* note 19, at 198 (referring to "spheres of mobility" in which "individuals are generally permitted to act at their own discretion, to be answerable and accountable to no one") (citing Michael Zimmer, *The Quest for the Perfect Search Engine* (unpublished Ph.D. dissertation, New York University)).

<sup>158</sup> SOUND AND SAFE, *supra* note 65, at 6.

<sup>159</sup> *Id.* at 170.



players in their acoustic cocoon,<sup>160</sup> drivers also apparently experience “feeling oneself safe from other people’s views, at least on the highway, when dwelling in one’s private sonic bubble.”<sup>161</sup>

Perhaps because of their hybrid nature, cars are treated quite differently between and within legal systems. Depending on the context, uninvited entry into the space of a car might be qualified as, for instance, an intrusion of property, of something an arrestee has “at hand” (in the context of a search incident to arrest), or of a place with no particularly heightened privacy expectations; but at times, it is also considered an intrusion into an intimate and especially protection-worthy space, for example, when it shelters private conversations.<sup>162</sup>

### C. *Semi-private Zone*

The semi-private zone of social life is characterized by social interactions beyond the intimate sphere that retain a private character, because they take place in physically closed-off places or otherwise carry some social expectation of secrecy or discretion.<sup>163</sup> Within this zone, one can distinguish between spaces where users themselves can manage a substantial level of boundary control—making them effectively private places when the space is occupied and the boundary is marked—and spaces where boundary control is more difficult and where privacy protection relies more on others’ discretion than on boundary management—publicly accessible places.<sup>164</sup>

---

<sup>160</sup> *Id.* at 189.

<sup>161</sup> *Id.*

<sup>162</sup> *See, e.g.,* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 1 BvR 966/09 (Ger.) at §176; CLAUDIO MARINELLI, INTERCETTAZIONI PROCESSUALI E NUOVI MEZZI DI RICERCA DELLA PROVA 249 (2007) (finding that a “place of private abode”—which has the same constitutional protection as the home—comprises “all those places that, besides dwelling, accomplish the function of protecting private life and that are thus destined for repose, feeding, professional occupations and leisure activities, among which will be included the driver and passenger compartment of a car used as a rule for transfers from and to a place of work and leisure”) (quoting Cass., Sez. II [Supreme Court, criminal division, section II], 12 March 1998, *Riv. pen.* 1998, 1177) (translated).

<sup>163</sup> *See* Koops et al., *supra* note 38, at 550–52.

<sup>164</sup> The difference between publicly accessible places (in the semi-private zone) and public places (in the public zone, *infra* Section III.D, is that publicly accessible places (such as cafés) are open to an undefined group of people but, through natural limitations, not to a potentially extremely large number of people, and the place’s owner may set rules and expel visitors. In contrast, public places (such as a street) can host large numbers of people and usually have no specific owner-set rules. There are exceptions, of course, and the difference is gradual, not absolute.

## 1. Private Places

Private places in the semi-private zone are characterized by the fact that, although they are not as directly controlled as spaces in the personal or intimate zone (such as a room of one's own or a home), users can still exercise boundary control to a significant extent. This is the case in private clubs, temporarily occupied publicly accessible places, professional privacy spaces, and offices.

### *i. Private Clubs*

Private clubs are places usually involving dual access control: organizationally, one has to be member of the club (which may involve more or less formal procedures), and physically, one has to be allowed into the club building or room (by showing a membership card or being recognized by the gatekeeper). This makes them an important privacy space, because they create a strong feeling of belonging and comfort (symbolized by the club chair) that fosters members' feeling that they can really be themselves. These selves may reflect a generalized, relatively comprehensive identity (as with students' or old boys' networks' clubs linked with longer-term, friendship-like relationships), or a partial identity (for instance with a gay or lesbian club).

### *ii. Temporarily Occupied Publicly Accessible Places*

Whereas private clubs are generally spaces dedicated to club meetings, and thus not open to non-members, there are many places that are open to the public and owned by others, but that similarly become private territory when they are temporarily occupied. I see three types of these.

The first are closed-off spaces in which people can withdraw for certain, possibly intimate, activities, which one might call *black boxes*. Typical examples are toilets in publicly accessible places, changing cubicles in clothes stores, and hotel rooms. For the brief duration of occupation by a particular person, these become that person's private space—a temporary room of one's own. In contrast to personal places (such as one's bedroom at home), however, the duration is generally short and the place is far less personalized because it changes people with high frequency. Despite being impersonal, intrusion into these temporarily occupied places can be highly disturbing because of the intimate nature of the activities typically conducted there, involving nudity, body functions, and, not seldom, sex. Having privacy in such a black box involves not only freedom from physical intrusions and surveillance; it also requires discretion on the part of the professionals who get to see the box's inside, such as cleaning staff finding condoms, the latest cheap murder mystery, or three empty whisky bottles in the hotel room's wastebasket.

The second type of temporarily occupied places has a different character: less intimate, but still in some sense private. These are what Goffman calls a

---

*stall*, that is, a “well-bounded space to which individuals can lay temporary claim, possession being on an all-or-none basis.”<sup>165</sup> Examples are a chair, a table, a cot, a telephone booth, a desk in a university study room, a seat at a table in a library, or a bench in the park. When someone occupies such a stall, they are, of course, in their personal space (which may be more or less wide, depending on the stall’s size but also on the presence and availability of stalls nearby). But what makes stalls special as a privacy space for someone is that the place remains theirs even if they (and their personal space) briefly leave it, leaving some marker behind to indicate their intention to return. “So long as the person using them is nearby, no one else is allowed to move into them. Small signs indicate that the [stall] is occupied. People put down their bags, spread out their belongings . . . . Restricted [stalls] are relatively stable microspaces for the individual.”<sup>166</sup> An intrusion into this space therefore not only occurs when someone comes too close to you in your stall (sitting right next to you on the bench in the park, while the next bench is empty), but also when someone occupies “your” place when you are visiting the toilet, or picks up the newspaper or book you left to leaf through. A library may be publicly accessible, a newspaper can be the library’s property and will have public content, and yet, you may still experience a privacy intrusion when you return from the toilet and see someone standing at your seat reading your newspaper (marked as “yours” by the water bottle you left on the table). After all, it is none of their business what you are reading, and you would rather be let alone than have to ask to have “your” seat and newspaper back.

The third type consists in publicly accessible places that are not solely occupied or closed off by a particular person but nevertheless carry a heightened privacy expectation because of the intimate nature of the activity conducted there—what might be called publicly accessible *intimacy bubbles*. I am thinking of communal changing rooms and communal shower areas, for instance in public swimming pools or in sports clubs, as well as public toilets (public in the sense of shared, i.e., without visual barriers between toilets). In principle, anyone can enter these spaces; but they constitute an intimacy bubble because people are not supposed to share with others what they perceive inside. This is because such bubbles involve (partial) nudity, which is made visible not for affective but for functional reasons (one has to change clothes, shower, and urinate somewhere, after all, and not always is a black box at hand). A person using such an intimacy bubble cannot control who accesses the space; but she will expect freedom from surveillance cameras as well as discretion from those sharing the space that they

---

<sup>165</sup> RELATIONS IN PUBLIC, *supra* note 46, at 32.

<sup>166</sup> SOFSKY, *supra* note 41, at 40 (using “boxes” as a synonym for Goffman’s “stalls”; I have replaced the word “box” by “stall” in the quote, to avoid confusion with the first sub-type of “(black) boxes”).

will not stare at private parts (“when bodies are naked, glances are clothed”),<sup>167</sup> graphically describe those private parts or excremental noises to third persons, or make uninvited recordings of these.

iii. *Professional Privacy Spaces*

A third type of private space in the semi-private zone consists in places that are private because a special professional relationship is enacted there: professional privacy spaces. These are places to which people go and entrust themselves, relying on professional secrecy and discretion so that they can be themselves even when they reveal vulnerable parts of themselves.

One example is the hospital room. This space encloses personal space and private conversation space, but it is also a privacy space in itself because patients can be visually, aurally, and olfactorily perceived by others outside their personal space. In a shared hospital room, the hospital bed (sometimes closed-off by a curtain) will function much like a stall for other patients and their visitors, who are not supposed to come too close, to stare, or attentively listen unless so invited; jointly, the patients’ beds will also function as an intimacy bubble. Similarly, a hospital room of one’s own functions much as a black box into which uninvited others are not supposed to enter. However, the hospital room functions differently in relation to medical staff: they can enter without knocking whenever they like, and they can look, listen, and smell as much as they want to satisfy their (medical) curiosity. Nevertheless, this does not have to inhibit patients’ behavior and sense of belonging, because they can rely on the staff’s discretion and professional secrecy (strongly backed up by disciplinary and legal norms) to use what they perceive only and strictly within the medical context. This ensures that, also in hospital rooms, in vulnerable and possibly embarrassing circumstances, patients can be themselves (at least in their role as patients—some aspects of identity may have to be temporarily suppressed or hidden; after all, a hospital room, even a private one, is not a room of one’s own).

A similar example, in a different context, is the public library, where people can go to access information to read in private. The library is a place for “open inquiry without having the subject of one’s interest examined or scrutinized by others.”<sup>168</sup> But because the library is also a service space, library staff should assist users in their search for the (type of) material they want to access; to avoid a chilling effect on reading habits, library professionals have

---

<sup>167</sup> RELATIONS IN PUBLIC, *supra* note 46, at 46, 59 (observing that when “two men are urinating next to each other, their eyes will have a very narrow surface territory that will be safe”).

<sup>168</sup> RICHARDS, *supra* note 50, at 178 (quoting Candace Morgan et al., *Privacy and Confidentiality in Libraries*, in AM. LIBRARY ASS’N, INTELLECTUAL FREEDOM MANUAL 402, 402 (7th ed. 2006)).

---

---

professional standards for keeping user information confidential.<sup>169</sup> In the words of the American Library Association's policy on privacy, "patrons have the right to use a library without any inferences made between their reading habits and their behavior."<sup>170</sup> Thus, although the library is a publicly accessible place, it is also a particular professional privacy space.

Another type of professional privacy space are the places in which conversations are held that are covered by obligations of professional secrecy. These might be termed "professional black boxes," because they are a special type of black box into which a client and professional can withdraw for (professionally) intimate exchanges. These are typically the offices of doctors, lawyers, and notaries, and the confession booth. Such conversations can also be held, however, outside the professional's dedicated working place, for instance, in a car, on the street, or a bench in the park. These can equally serve as professional black boxes, although only in the absence of designated boundary-markers, both parties will have to take care that by-standers and passers-by are out of hearing distance.

The privacy space then functions partly as private conversation space (to which uninvited others should not come too close), but it is more than that: the trust that the conversation partner will not disclose the shared information to others (unless where relevant and necessary for professional reasons) is much stronger in a professional privacy space, making it more of a conversation black box than a conversation bubble. Professional secrecy offers a strong safeguard that people feel they can be themselves when talking with the professional. They may even show parts of themselves that they might otherwise hide even from themselves, when they bare themselves in front of their confessor or psychoanalyst.<sup>171</sup>

A derivative type of professional privacy space may be the meeting places for therapeutic group sessions, such as Alcoholics Anonymous or crime victims discussing their experiences, or for religious gatherings, particularly of vulnerable or underground sects. These have aspects of a private club, but similarly to professional black boxes, they carry a stronger expectation that confidences shared within this space will remain confidential (even in the absence of disciplinary or legal secrecy obligations for participants).

---

<sup>169</sup> *Id.* at 179 (citing *Privacy: An Interpretation of the Library Bill of Rights*, in AM. LIBRARY ASS'N, INTELLECTUAL FREEDOM MANUAL, 190, 192–93).

<sup>170</sup> *Id.*

<sup>171</sup> *Cf.* GAY, *supra* note 40, at 276 (calling psychoanalysis "the most private human recesses . . . —privacy for two").

*iv. Offices and Work Spaces*

Private life is broader than domestic life, and the workplace is a space where part of private life in this sense is lived.<sup>172</sup> Therefore, although work life and private life are in some sense distinct (at least in the eyes of most employers if not of some employees), work activities are private in the sense that they are not public activities.<sup>173</sup> Workplaces are generally also not publicly accessible: the owner can exercise the right to exclude others. Although workplaces will differ in the degree to which employees feel “at home” there, they are at least spaces in which employees should feel they can be themselves as employees, doing their job in the way that fits them. But offices are also important for social interactions beyond strictly work-related matters, and employees will often show more of themselves than their job identity, for instance at the coffee machine or in the canteen. Protecting privacy at work therefore serves to foster a space in which employees can be themselves, not only as employees but also as rounded human beings.

*2. Publicly Accessible Places: Cafés, Public Transport, Etc.*

Privacy is important in publicly accessible places, such as cafés, restaurants, concert halls, railway stations, and public transport vehicles. In the famous words of Justice Stewart in *Katz v. United States*, “the Fourth Amendment protects people, not places,”<sup>174</sup> which implies that “what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”<sup>175</sup> I am not sure, however, whether publicly accessible places also constitute a privacy space as such. Most privacy-relevant situations within publicly accessible places are covered by privacy spaces discussed above: personal spaces (sitting in the bus with your bag in the seat next to you), mental bubbles (listening, eyes closed, to a Royal Concertgebouw

---

<sup>172</sup> See, e.g., *Halford v. United Kingdom*, App. No. 20605/92, 24 Eur. H.R. Rep. 523 (1997). Offices are considered specially protected privacy spaces in some national legal systems, e.g., in Italian law, where “places of private abode” (which are legally protected against trespass in much the same way as dwellings) include non-public places that serve the carrying out of professional, cultural, and political life, which also covers (non-public) offices. See PAOLA FELICIONI, *LE ISPEZIONI E LE PERQUISIZIONI* 117 (2d ed. 2012) (observing that the Italian constitutional protection of the home covers not only dwellings, but also other “places of private abode”, a concept with a very broad scope that comprises “every place ‘other’ than dwellings, permanently or transiently destined to the unfolding of private life and of work activities”).

<sup>173</sup> Except, of course, in the case of public officials. Their work activities may be the public’s business, although—depending on their rank and the political-legal culture—some of their work activities will remain outside of the public sphere.

<sup>174</sup> *Katz v. United States*, 389 U.S. 347, 351 (1967).

<sup>175</sup> *Id.*

Orchestra concert), private conversation spaces (talking with your partner over a pizza, or phoning a friend from the train), and stalls (sitting on a bench in the station's waiting room, or playing on the pub's pinball machine). Overall, I think that publicly accessible spaces are not privacy spaces as such, but larger spaces in which various particular privacy spaces co-exist.

Nevertheless, one might consider some types of publicly accessible places to have special characteristics, making them some sort of privacy space in themselves. The library is one such example, given that it is an environment that as a whole fosters the privacy of pursuing one's very personal interests. Not only librarians but also fellow users have "a responsibility to maintain an environment respectful and protective of the privacy of all users."<sup>176</sup> Public transport may be another example, because its character of transit gives a feeling of being "in-between" without particular obligations to do anything, which stimulates both mental bubbles (withdrawing into yourself) and relaxed conversations (sharing intimacies with others<sup>177</sup>).

Possibly, we should also consider publicly accessible places that are typically used for social gatherings and conversations as a privacy space of their own, which in a Habermasian spirit we might term *coffee house space*.<sup>178</sup> A reason to do so is that in cafés, bars, and pubs, people often come to talk with friends (creating private conversation spaces) but also to socialize more generally. Such places function as a "third place," that is, "a place that is neither the first place of home nor the second place of work, but at which people hang out, enjoy themselves, and feel accepted."<sup>179</sup> In third places, the personal spaces, mental bubbles, and private conversation spaces seem more fluid and more easily penetrable in cafés, bars, and pubs than elsewhere. Gazing at others is more accepted, or at least more customary, and conversations are more easily started or joined by others. In that sense, it is no coincidence that coffee houses played an important role in the rise of a bourgeois public sphere.<sup>180</sup> The fact that social interaction in coffee houses contributes to the public sphere<sup>181</sup> does not imply

---

<sup>176</sup> RICHARDS, *supra* note 50 at 179 (quoting *Privacy: An Interpretation of the Library Bill of Rights*, *supra* note 169, at 193).

<sup>177</sup> See *supra* text accompanying note 135.

<sup>178</sup> See JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* 32–33 (Thomas Burger trans., Polity Press 1989) (1962) (discussing the emergence of English coffee houses in the seventeenth and eighteenth centuries).

<sup>179</sup> Belk, *supra* note 5, at 486 (referring to the work of RAY OLDENBURG, *THE GREAT GOOD PLACE: CAFÉS, COFFEE SHOPS, BOOKSTORES, BARS, HAIR SALONS AND OTHER HANGOUTS AT THE HEART OF A COMMUNITY* (1999)).

<sup>180</sup> HABERMAS, *supra* note 178, at 36 (observing that English coffee houses, French *salons*, and German *Tischgesellschaften* "organized discussion among private people that tended to be ongoing").

<sup>181</sup> Or to a public sphere. See Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, 25/26 *SOC. TEXT* 56, 60–61 (1990) (observing that

that they are not also privacy spaces at the same time. The public in the pub, after all, may as well be discussing today's drizzle as the challenges of climate change. It is precisely because people can be themselves when socializing in coffee houses—and thus enjoying the privacy of coffee house space—that they can (but do not have to) contribute to public debate, just as many other privacy spaces, including mental bubbles, personal writings, and private conversation space contribute to the public sphere in this sense. This is one of the demonstrations of the social value of privacy.<sup>182</sup>

#### D. Public Zone

The public zone of social life is characterized by social interactions in public places, where they are, in principle, observable to an unrestricted group of others.<sup>183</sup> Although this might seem *prima facie* at odds with privacy, there is (or used to be) quite some privacy in public because of the fact that *de facto*, people often are (or used to be) inconspicuous. One can seek solitude and intimacy also in public places, and find anonymity in crowds.

##### 1. Public Places

Although public places such as unfamiliar metropolitan spaces can be alienating, they can be spaces too in which people feel at home. A metropolitan environment also forms “an external dimension of [the] minds and hearts” of its inhabitants,<sup>184</sup> and for many, the local environment, such as one's neighborhood, is a factor that contributes to their sense of self.<sup>185</sup> Given the importance of the environments in which people move for the construction of their identity, “adequate self-realization requires adequate privacy in public,” as Sloan and

---

there are also “other, nonliberal, non-bourgeois, competing public spheres” besides Habermas's public sphere).

<sup>182</sup> See PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY 213 (1995) (arguing that privacy “is also a *public value* in that it has value not just to the individual as an individual or to all individuals in common but also to the democratic political system”) (emphasis in original).

<sup>183</sup> See Koops et al., *supra* note 38, at 552–54. See also MADANIPOUR, *supra* note 46, at 111 (observing that public places and spaces “are public because anyone is entitled to be physically present in them”).

<sup>184</sup> *Attachment to Possessions*, *supra* note 83, at 43 (quoting EUGENE ROCHBERG-HALTON, MEANING AND MODERNITY: SOCIAL THEORY IN THE PRAGMATIC ATTITUDE 191 (1986)).

<sup>185</sup> See David M. Hummon, *Community Attachment: Local Sentiment and Sense of Place*, in PLACE ATTACHMENT 258, 259 (Irwin Altman & Setha M. Low eds., 1992) (discussing “the ways locales are imbued with personal and social meanings, and how such symbolic locales can serve in turn as an important sign or locus of the self” and “the role of the built environment as a nonverbal medium for the communication of moral reputation, social rank, and other significant qualities of self”) (references omitted).



Wagner have argued, and this requires people to “voluntarily limit their knowledge of each other as they interact.”<sup>186</sup> This happens because, like publicly accessible places, public places are also larger spaces in which various particular privacy spaces, such as personal space, the extended self, and private conversation space, co-exist. Although these privacy spaces—because they are in public—often have invisible and easily penetrable boundaries, they are often respected by other people exercising discretion. *De facto* anonymity also plays an important role in contributing to people’s feeling that they can be themselves in their transparent privacy spaces: someone walking the streets “is among people and knows that he is being observed; but unless he is a well-known celebrity, he does not expect to be personally identified and held to the full rules of behavior and role that would operate if he were known to those observing him. In this state the individual is able to merge into the ‘situational landscape.’”<sup>187</sup>

Moreover, particularly if alternative, closed-off spaces are unavailable, privacy in public places can cover quite intimate activities, such as being immersed in subversive or embarrassing reading, love-making in the park or on the beach, or pouring out one’s heart to someone. “Thus, people in crowded living quarters find privacy outdoors . . . in a host of ‘public’ places where the necessary solitude, intimacy, anonymity, and reserve can be found.”<sup>188</sup>

This is not to deny that people generally have lower reasonable expectations of privacy in public; they are, after all, visible. Thus, Prosser could find in 1960 that someone “has no right to be alone” on the public street and that “it is no invasion of his privacy to do no more than follow him about.”<sup>189</sup> But this is a difference of degree and a matter of proportionality rather than a matter of principle. Persistent, protracted, and obtrusive following of someone in public will often be considered a substantial privacy intrusion and qualified as stalking. And as Nissenbaum has observed, moving around in public, we are “[s]een by hundreds, noticed by none. Or, if we are noticed, it is by disparate observers,

---

<sup>186</sup> Robert H. Sloan & Richard Warner, *The Harm in Merely Knowing: Privacy, Complicity, Surveillance, and the Self*, 19 J. INTERNET L. 3, 3 (2015).

<sup>187</sup> WESTIN, *supra* note 4, at 31; *see also* VINCENT, *supra* note 27, at 32 (the notion of anonymity and solitude in urban public space already existed in 1711, when Joseph Addison wrote that, in view of his “Love of Solitude,” he preferred leaving the countryside to retire into town “and get into the Crowd again as fast as I can, in order to be alone”) (quoting JOSEPH ADDISON, SPECTATOR 131 (July 31, 1711)).

<sup>188</sup> WESTIN, *supra* note 4, at 41; *cf.* Fadhila Mazanderani & Ian Brown, *Privacy as a Practice: Exploring the Relational and Spatial Dynamics of HIV-Related Information Seeking*, in COMPUTERS, PRIVACY AND DATA PROTECTION: AN ELEMENT OF CHOICE 262 (Serge Gutwirth et al. eds., 2011) (observing an “apparent inverting of the private and the public” in London-based HIV-positive African women’s search for online HIV information, who preferred to go to Internet cafés even if they had Internet access at home, because “often the home was considered the *least* private place with regards to HIV”).

<sup>189</sup> William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 391 (1960).

each taking in only discrete bits of information.”<sup>190</sup> It is only when these discrete bits of information are accumulated and aggregated that we lose the privacy in public that we *de facto* have—or have had, because it is precisely such aggregation that we are nowadays experiencing with ever more prevalent surveillance of public places. The knowledge of being on camera and traceable throughout your movements lessens the experience of public places as a place in which you can be yourselves.

## 2. Political Privacy Places

All places are political, in the sense that no place exists that is intrinsically exempt from the public interest.<sup>191</sup> In fact, all privacy spaces are also political spaces, in that they foster citizens’ self-development, reflection, and debate, which contributes to playing the role of citizen and therefore to a well-functioning democracy. But this social value of privacy is inherent to privacy spaces as such; it does not make a particular space a political privacy space. What I mean with political privacy places as a privacy space is more particular, namely a place that requires some form of privacy protection for people to be able to engage in a political act. In other words, a political privacy place is a place where, through some form of privacy protection, someone can be herself as a political actor.

This includes places where politicians should be able to be themselves in their role as politician, for instance, a chamber of parliament or a meeting room of a local government administration. Generally, such places have few privacy protections, given the importance of transparency in government,<sup>192</sup> but there are situations in which *political deliberation places* are closed to ensure confidentiality of communications. One might also see security measures that restrict access to these places as privacy-protecting measures because they safeguard the political actors’ privacy of body and mind—another instance of the

---

<sup>190</sup> NISSENBAUM, *supra* note 19, at 117.

<sup>191</sup> Cf. the feminist critique of domestic privacy, most emphatically, Catherine MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 45, 51 (Jay L. Garfield & Patricia Hennessey eds., 1984) (arguing that “[the private] is . . . defined by everything that feminism reveals women have never been allowed to be or have”), and more nuancedly, ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 54 (1988) (observing that “many a woman’s home life [is] a privacy bane rather than a boon” and that “women face the problem of overcoming inequitable social and economic patterns that substitute confinement to the private sphere for meaningful privacy”).

<sup>192</sup> Illustrative is the remark of Dutch MP Franssen in 1970, discussing the Bill to protect privacy through criminalizing covert visual observation, and lamenting the entrance of television in Parliament: “We have gradually grown used to it in this Chamber: nose-picking parliamentarians will continue to be displayed to the public. That is also something we will have to live with.” See *Handelingen II* [Parliamentary Discussions, Second Chamber] 22 October 1970, 477 (Neth.) (translated).

social value of privacy (and of the non-negligible synergy between security and privacy).

Something of a mirror to these official political places are the places of public citizen protest, such as the public square where citizens demonstrate for political purposes. Public places are a space for the exercise of “personal rights that are both politically and spatially grounded, including the right to . . . assembly and freedom of action in urban open spaces.”<sup>193</sup> What makes these *protest places* a privacy space is that masking and other forms of anonymity preservation can be important to ensure that protesting citizens can be themselves as political agents; freedom to protest as political actor requires freedom from others’ judgement that would implicate other parts of identity.<sup>194</sup> The worker and student should not have to fear being dismissed or expelled because they have engaged in political protest (as long as they remained within certain limits of law, of course).

Another, less contested and more typical, political privacy place is the *voting booth*, where, at least in most democracies, privacy of the ballot is strictly safeguarded. “To vote, alone and unobserved: nothing could be a stronger exemplar of privacy in action.”<sup>195</sup>

#### *E. Overview of Traditional Privacy Spaces*

As this section has shown, the array of traditional privacy spaces is broad indeed. Given the wide variety, both in types of spaces and in possible manifestations of these types, it is difficult to graphically represent this array in a concise way. Nevertheless, I have attempted to put all the discussed spaces in a graphic overview (Figure 1), using the spectrum of zones of social interactions (used as a structuring principle above<sup>196</sup>) on the horizontal axis. For the vertical axis, the spectrum of access control versus discretion is a useful heuristic, because this is a major distinction in the way privacy is or can be protected in different environmental settings.<sup>197</sup> The placing of spaces along this vertical axis is tentative, based on a rough estimation of the relative importance of access control and discretion to protect privacy in these spaces; no special importance should be attached to the precise placement along this vertical axis, except perhaps that it can generally serve to illustrate the relative importance of discretion for privacy protection in a large number of privacy spaces.

---

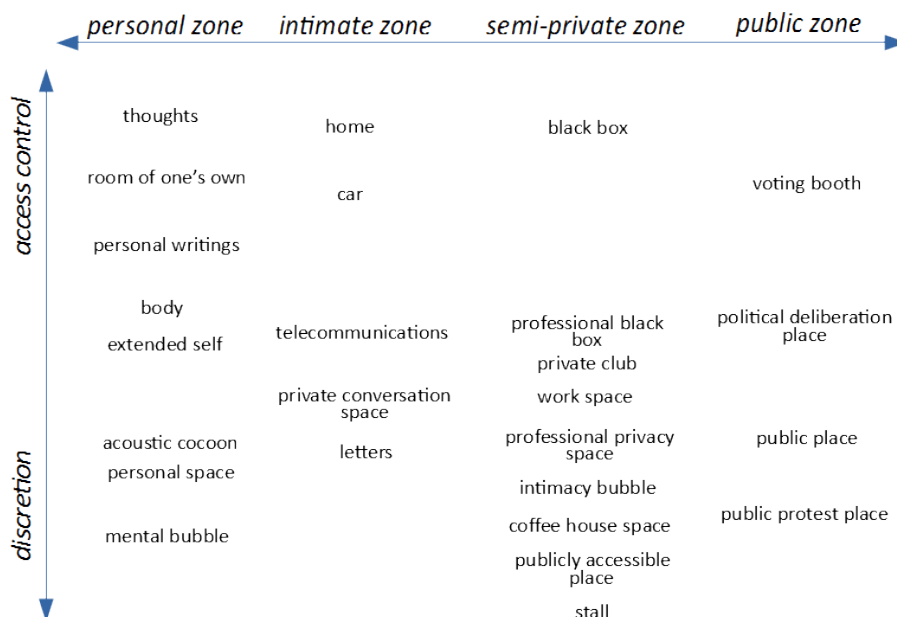
<sup>193</sup> Koops & Galič, *supra* note 21, at 31.

<sup>194</sup> Cf. Michael Nagenborg, *Hidden in Plain Sight*, in *PRIVACY IN PUBLIC SPACE: CONCEPTUAL AND REGULATORY CHALLENGES* 47 (Tjerk Timan et al. eds. 2017) (discussing the role of masks in practices of resistance to surveillance).

<sup>195</sup> GAY, *supra* note 40, at 276.

<sup>196</sup> See *supra* text accompanying note 47.

<sup>197</sup> See *infra* text accompanying note 230.



As the overview shows, privacy matters in a wide range of human interactions in different spatial settings. Although the array of privacy spaces might be conceived of as concentric circles,<sup>198</sup> with mind and body at the center and moving out through intimate spaces such as the home and car to places in the semi-private and public zones, this is an oversimplification. The extended self of the body (including personal possessions carried along) is not necessarily a more “core” privacy space than a café’s toilet or a confession booth. Moreover, privacy spaces are often nested and partly overlapping; coffee house space, for instance, is a privacy space in itself but also incorporates multiple personal spaces, private conversation spaces, stalls, and black boxes, all at the same time. Also, only few spaces are truly backstage, where people can drop role-playing altogether; most spaces involve the playing of one or more roles in life, and while some spaces are specifically associated with special roles (such as the analyst’s couch or the voting booth), most spaces involve different partial identities, which may be triggered at different times, or simultaneously, depending on a host of factors. All this helps explain why privacy is regularly called context-dependent and also messy: privacy is often relevant for different aspects of persons and interactions at the same time. Yet this does not diminish the role of privacy in all these different spatial settings: regardless of the complexity of the privacy spaces

<sup>198</sup> *Supra* text accompanying notes 45–46.

---

---

and the types of interaction involved, privacy still comes down to being able to play one's relevant role(s) in a certain spatial setting.

When social interactions, over time, shift and adapt to new or changed environmental settings, this will impact the ways in which privacy can be experienced by people. In the next Part, I will discuss the implications of the rise of digital and online spaces of social interaction for people's capacity to have spaces in which they can feel free to play their relevant role(s).

#### IV. THE PROBLEM OF DIGITAL PRIVACY SPACES

An adequate discussion of the challenges of digital privacy requires a book series, which cannot be magically condensed in a few pages. What I can offer here are some arguments that explain *why* digital privacy presents a puzzle, both in descriptive terms of capturing what is happening in digital spaces and in normative terms of regulating them. These arguments build on the insight that digital spaces are not radically new, *sui generis* spaces involving *sui generis* practices and norms; they are combinations, adaptations, and extensions of existing spaces.<sup>199</sup> The physical and the digital are not separate realms, but jointly part and parcel of the human condition. We live in an *onlife* world: most of our life nowadays has an *online* component, and online activities constitute *life* experiences.<sup>200</sup> This is the main reason for the long discussion of traditional, physical privacy spaces in Part III above: to understand and regulate privacy in digital spaces, we need to place them in the context of the traditional spaces that they build on, adapt, and combine, forming an altogether *onlife* world. This historical context is vital for understanding digital spaces, given

the Kantian insight that time and space are *both* necessary or *a priori* mental categories . . . the two are inextricably intertwined. In other words, we need to remind ourselves to keep historicizing as much as we spatialize. More than that, we cannot even begin to engage with spatial questions sensibly unless we constantly historicize space.<sup>201</sup>

What follows is a first reflection on the relevance of recognizing digital spaces as a complex rehashing of traditional physical spaces of social interaction,

---

<sup>199</sup> See *supra* text accompanying notes 18–19.

<sup>200</sup> See generally THE ONLIFE MANIFESTO: BEING HUMAN IN A HYPERCONNECTED ERA (Luciano Floridi ed. 2014). The term “onlife” is not defined in this manifesto, but is used to characterize a world in which the distinctions between reality and virtuality, and between human, machine, and nature are blurred; where information scarcity has given way to information abundance; and where the primacy of entities has shifted to the primacy of interactions. See also The Onlife Initiative, *The Onlife Manifesto*, in THE ONLIFE MANIFESTO 7, 7 (Luciano Floridi ed. 2014).

<sup>201</sup> Eeckhout, *supra* note 39, at 33 (emphasis in original).

and the importance of studying digital privacy challenges using this insight, which can function as an invitation for follow-up research.

A. *The Complex Relationships Between Digital and Physical Spaces*

A first cluster of arguments relates to the complex relationships between digital and physical spaces. First, digital spaces collapse traditional privacy spaces.<sup>202</sup> Social networking sites are a key example:<sup>203</sup> they combine new manifestations of many traditional privacy spaces, such as writings and other expressions of the mind, private communications space, private clubs, group therapy space, office space, coffee house space, personal and material possessions (such as digital photos), public places, and political privacy places—all depending, of course, on the affordances of particular social-networking platforms and how people use these in actual social interactions. Smartphones are another example: they combine new manifestations of spaces that traditionally used to function as mental bubbles, personal writings, a room of one's own, the home, private communications spaces, professional and office space, public places, material possessions, and political privacy space.

Second, digital spaces sometimes seem, at first sight, an extension of a certain traditional space while they are actually (also or rather) extensions of other spaces. For instance, the cloud seems an extension of communications space (and in law, it is often qualified as such) because it relies on communications networks. People use the cloud for various purposes, but the information flow always passes through the telecommunications infrastructure. Yet some cloud applications have nothing to do with communications: cloud storage space—the space in the cloud reserved for an individual user—is a space for storing documents, which serves as an extension of the hard disk of people's personal computer or smartphone. And the hard disk and smartphone, as storage space of documents (think of photographs, books, music, diaries, and personal notes), is an extension of the home (and for some documents, such as agendas and address books, of the extended self), not of private communications space. This means that safeguarding privacy in the cloud implies distinguishing between cloud-based communications and cloud-based document storage, and that for the latter, analogies should be sought with privacy of documents and possessions that used to be stored in the home, not with secrecy of communications. Another example is the environment of massively multiplayer online games, which would seem a (much elaborated) extension of the living

---

<sup>202</sup> Shapiro, *supra* note 11, at 276 (observing that partly due to technological innovation, “we are increasingly confronted by spaces spanning multiple places . . . and, conversely, single places intersecting with multiple spaces,” which makes the exercise of mapping privacy onto spaces “more complex and fuzzy”).

<sup>203</sup> See *supra* note 19.

room and the public park where games are played, or perhaps of clubs for amateur theatre; these games function, however, also as a “third place”—a contemporary equivalent of coffee house space,<sup>204</sup> involving “a rich sense of imagined community” where people can be themselves.<sup>205</sup> Consequently, the social value of privacy fostered by these spaces’ potential contribution to the public sphere should not be neglected when analyzing the privacy implications of multiplayer online games. These are but two examples that underline the need to be careful in framing digital privacy challenges: the frame must do justice to historical evolutions of physical into digital spaces, looking for functional equivalents rather than for evolutions in information carriers or the labels attached to online spaces.

Third, along with a shift in emphasis from entities to interactions<sup>206</sup> and a shift from the traditional “space of places” to a “space of flows,”<sup>207</sup> digital spaces are far more interconnected and interoperable than traditional spaces. This is afforded by both digitization and networking. As a result, there are fewer boundaries clearly delimiting digital privacy spaces than can be found in the traditional “space of places.”<sup>208</sup> This is not to deny that boundaries exist online: both territorial boundaries of nation-states<sup>209</sup> and virtual boundaries guarded by access-restricting passwords demarcate the limits of certain digital spaces. Yet digital spaces tend to be more interconnected, multi-functional, multi-purpose, and multi-user environments than physical spaces (except, perhaps, the public square) have ever been.

---

<sup>204</sup> *Supra* Section III.C.2.

<sup>205</sup> *Extended Self*, *supra* note 5, at 486 (referring to findings of Constance A. Steinkuehler and Dmitri Williams, *Where Everybody Knows Your (Screen) Name: Online Games as “Third Places”*, 11 J. COMPUTER-MEDIATED COMM. 885 (2006)).

<sup>206</sup> The Onlife Initiative, *Background Document: Rethinking Public Spaces in the Digital Transition*, in THE ONLIFE MANIFESTO 41, 46 (Luciano Floridi ed. 2014) (discussing “reversal from entity’s primacy over interactions to interactions’ primacy over entities”).

<sup>207</sup> MANUEL CASTELLS, 1 THE RISE OF THE NETWORK SOCIETY 408–09 (2d ed. 2010). *See also* MITCHELL, *supra* note 18, at 5 (discussing “the shift from a world structured by boundaries and enclosures to a world increasingly dominated, at every scale, by connections, networks, and flows”).

<sup>208</sup> *Cf.* Mc Mahon & Aiken, *supra* note 39, at 17, 24–25 (explaining the difficulty of demarcating boundaries online by highlighting an intrinsic tension between the competing drives of territoriality—which necessitates creating some controllable boundaries—and identity—which involves a representation of the self that we want others to see; the result is that, in social networks, “the most exclusive shows are cordoned off by nothing more than a velvet rope”; “Marking out a unique and personal territory in an environment fundamentally devoted to connection and association seems like an impossibility”).

<sup>209</sup> *See* Bert-Jaap Koops & Morag Goodwin, *Cyberspace, the Cloud, and Cross-border Criminal Investigation: The Limits and Possibilities of International Law*, 5 TILBURG L. SCH. LEGAL STUD. RES. PAPER SERIES 1 (2014).

Fourth, there are significant differences between traditional, physical settings and online settings in terms of presentation of the self. Goffman emphasizes that self-presentation involves not only managing the expressions of the self that one *gives*, but also those one *gives off*, through one's general appearance, non-verbal behavior, involuntary facial expressions etcetera.<sup>210</sup> Although "given off" expressions are harder to manage than intentional, "given" expressions, because they include unintentional signs, people are generally aware of when, how, and to what extent they might give off impressions in traditional social settings, and of the consequences that may generally attach to these, on the basis not only of their own life experience, but also of an evolutionarily developed sense of how others perceive them with their eyes and ears. For instance, people may subconsciously perceive subtle signs such as a raised eyebrow of a conversation partner, a slightly turned head or a stare from across the street to realize that they do not give off their standard impression, and adjust their appearance accordingly (such as quickly zipping up that fly you accidentally left open). Thus, people know about the impressions they may give off in general, if not in every concrete instance, in physical settings, and they have generally developed some ways to deal with the expressions they give off there. Now, in digital spaces, you also give off expressions besides the expressions you intentionally give: these are the metadata that are generated along with communications and browsing, as well as the data that can be inferred through online behavioral monitoring. In contrast to physical given-off expressions, however, people are far less aware of the fact that they give off expressions online, in the form of data that are inevitably leaked through their online activities; and even if they are aware of these, there is often little they can do to adjust their appearance, because they will often have no clue as to how these given-off expressions may affect their future social relations, nor how they might adjust their online behavior in order to avoid inferences of information that counters the self they want to present. Therefore, in studying the implications of digital spaces for impression management, it is important not only to look at how people actively present themselves online,<sup>211</sup> but also to take into account how metadata and inferred data constitute a digital equivalent of "given-off"

---

<sup>210</sup> PRESENTATION OF SELF, *supra* note 3, at 2 (distinguishing between expressions someone *gives* and those he *gives off*, as "radically different kinds of sign activity"). *Id.* at 4 (indicating his analysis is primarily concerned with the latter, "the non-verbal, presumably unintentional kind, whether this communication be purposely engineered or not").

<sup>211</sup> Which is what the majority of literature on online identity focuses on. *See, e.g., Extended Self, supra* note 5, at 490 (offering an excellent summary of changes in the digital self as opposed to the embodied self ("[a]ll in all, the self is much more actively managed, jointly constructed, interactive, openly disinhibited, confessional, multiply manifest, and influenced by what we and our avatars do online"), but not discussing the implications of given-off expressions of the online self through the generation of metadata and inferable data).



expressions, with an associated challenge for self-presentation constituted by a lack of awareness, experience, and capacity to manage these.

Finally, there is another reason why being able to be yourselves in digital spaces is not the same as being able to be yourselves in traditional physical environments. This is the collapsing and combining of traditional spaces that occurs in digital spaces. Many traditional places are more or less closely associated with one or more partial identities, and they can be—as I have tried to show in Part III—relatively straightforwardly associated with the personal, intimate, semi-private, and public zones of social life. In contrast, digital spaces often trigger different partial identities at the same time, or at different times on the same platform, and audience segregation—a key element in the presentation of self in everyday life—is considerably more difficult to achieve online than offline.<sup>212</sup> Moreover, because of the abundance of information, the ease of information flows, and the relative persistence of digitized data over time,<sup>213</sup> parts of the self disclosed in certain online contexts can reappear in unexpected ways in social interactions in traditional spatial settings (for instance, when a prospective employer googles you prior to a job interview), and vice versa, information derived from observed behavior in meatspace can be used—and re-used, aggregated, and profiled—in unexpected ways online. Such unexpected encounters can even happen in real time, given the overlapping of physical and digital spaces. This implies that being able to be yourselves in an onlife world almost requires people to be aware of all their selves all of the time—something that, even if it were possible, surely has a chilling effect on people’s feeling they can safely be “themselves” in any given situation.

### B. *The Role of Social Norms*

A second cluster of arguments relates to the social norms applying in and to digital spaces. As can be seen in the discussion of traditional privacy spaces,<sup>214</sup> many of these thrive on social norms that have developed over time—

---

<sup>212</sup> *Id.* at 483 (“[T]he challenge of segregating multiple personas is more difficult in a digital age”). *Id.* at 490 (“our lessened ability to segregate audiences for our self presentations also means that we cannot easily present conflicting selves”); Bibi Van den Berg & Ronald Leenes, *Audience Segregation in Social Network Sites*, in PROCEEDINGS FOR SOCIALCOM2010/PASSAT2010 1111 (IEEE 2010). See also Mc Mahon & Aiken, *supra* note 39, at 16–17 (observing that the “online self” consists of a set of different constellations of the self).

<sup>213</sup> Although the meme that “the Internet never forgets” is not true, forgetfulness is much harder to achieve when perception-based memories are stored externally on digital information carriers than internally in people’s brains. Cf. Paulan Korenhof, *Forgetting Bits and Pieces*, in PRIVACY AND IDENTITY MANAGEMENT FOR EMERGING SERVICES AND TECHNOLOGIES 127 (Marit Hansen et al. eds., 2014).

<sup>214</sup> *Supra* Part II.

usually decades if not centuries or millennia<sup>215</sup>—and are relatively strongly rooted in social practices. Digital spaces, particularly those that have evolved only in the past decade or so (it bears reminding that (The) Facebook was launched in 2004 and opened up to the public only in 2006<sup>216</sup>), have had considerably less time to foster the development of social norms and the embedding of these in online and onlife practices. To be sure, social norms do exist and develop in digital spaces; but it is often unclear whether and to what extent these norms reflect the norms and practices of the traditional privacy spaces of which the digital spaces are extensions and combinations. Digital platforms, for instance, stimulate sharing of information in ways that go far beyond information-sharing practices in traditional social environments, leading to sharing being the norm and shielding being frowned upon.<sup>217</sup> The discontinuity effected by the transition to an onlife world results “in a schism, many schisms, between experience and expectation.”<sup>218</sup>

Moreover, some digital spaces are relatively straightforward extensions of traditional privacy spaces but involve very different information flows, which are not (or at least not yet) regulated by an equivalent extension of the applicable social norms. A clear example is private reading, which is traditionally done in a mental bubble in the personal zone (which may be nested in a room of one’s own, home, office, coffee house space, or public place). The privacy intrusion into this space traditionally consists in distraction—snapping the mental bubble—but not in covertly monitoring the reading nor in systematically profiling someone on the basis of what one reads, simply because that has practically been hard to do. With the rise of e-readers, however, private reading may (depending on the privacy settings and how carefully you read the terms and conditions and check the appropriate boxes) involve that the e-book provider continuously looks over your shoulder, monitors your reading progress, notes how you mark favorite text passages (and distributes or sells these to others), and profiles who you are on the basis of your reading patterns. No social norm has evolved yet of being let alone while e-reading, and the privacy of reading is left to the mercy of the provider’s (one-sided and non-negotiable) terms of conditions.<sup>219</sup>

---

<sup>215</sup> Some mechanisms relating to privacy spaces have evolutionary roots; personal space, *supra* Section III.A.2.ii, is the product of “a lengthy process of gene-culture coevolution through natural selection,” according to Sommer, *supra* note 16, at 649.

<sup>216</sup> Facebook, WIKIPEDIA, <https://en.wikipedia.org/wiki/Facebook> (last visited Sept. 24, 2018).

<sup>217</sup> See generally DAVE EGGERS, THE CIRCLE (Alfred A. Knopf 2013) (centering on the slogan ‘SHARING IS CARING’). See also Ari Ezra Waldman, *Safe Social Spaces* 8, (N.Y.L. Sch. Legal Studies Research Paper No. 3119735, 2018), <https://ssrn.com/abstract=3119735> (observing that ‘in a modern social world in which sharing is, if not mandatory, expected, law and design have a role to play in making digital spaces safe for everyone’).

<sup>218</sup> NISSENBAUM, *supra* note 19, at 231.

<sup>219</sup> See RICHARDS, *supra* note 50, at 129 (discussing the “e-reader paradox” that “e-readers create an illusion of physical reader privacy” (no-one on the tube notices you are reading *Fifty*

A similar example, albeit more complex because it also involves changes in behavior patterns, is music consumption. Traditionally, the consumption of music (such as listening to one's records or CDs) is a relatively solitary act, largely played out in one's home, room, and acoustic cocoon, and music preferences are shared with only a small circle of family and friends. In contrast, the digitization of music, and particularly the consumption and sharing through online platforms, affords the sharing of playlists online, which "can say a great deal more about us than opening the windows and cranking up our stereo."<sup>220</sup> This is not as trivial as it may seem, because playlists reach far broader audiences, and these "can judge others' personalities quite well based on the music that they listen to."<sup>221</sup> Other examples, such as the search engine that is some sort of onlife extension of the library but has no equivalent professional standard that no inferences should be made between reading habits and behavior,<sup>222</sup> are yet more complex, because the analogies are more intricate and the context may require more reflection on what can be considered appropriate information flows to preserve a space in which you can be yourselves.

The underlying problem might not even be so much that social norms are slow to evolve, but rather that the involved parties are different. In traditional privacy spaces, particularly those where people cannot well prevent disclosure through access control, discretion exercised by communications partners and by-standers plays a primary role.<sup>223</sup> Such discretion might be asked of online communications partners and online "by-standers" (although standards of discretion may differ, as the prevalence of revenge porn suggests); but discretion can hardly be expected from service providers, particularly not from those whose business models rely on selling customer data rather than, or besides, selling products or services. And the problem with most digital spaces is that they are co-inhabited by service providers, who through terms and conditions to which customers click their consent in blissful ignorance, often ensure the capability of accessing information generated in or through the service. Customers do not only show themselves to digital service providers in their role of customer; they often reveal information relating to many other partial identities, which may be used, re-used, aggregated, and profiled in the same as well as in other contexts. The co-habitation of service providers in digital spaces stands in stark contrast to traditional physical spaces, where the "space provider" does not usually, and certainly not systematically, monitor what people do in their space. Hotel owners

---

*Shades of Grey*) "while they threaten the very existence of any kind of digital reader privacy" (because Amazon knows all too well not only *that* but also *how* you are reading *Fifty Shades of Grey*)).

<sup>220</sup> *Extended Self*, *supra* note 5, at 479.

<sup>221</sup> *Id.*

<sup>222</sup> *Cf. supra* note 170 and accompanying text.

<sup>223</sup> *Supra* Section II.E.

---

---

may use CCTV in corridors, but not (we hope) in hotel rooms; municipalities cannot listen in on private conversations you have on a bench in their park; your employer may monitor your ICT usage, but not the talks at the coffee machine. This default absence of space providers in most traditional privacy spaces is reversed in digital spaces; there, the default is rather that the service provider is inside, having the capacity to take knowledge of what you do and say. Whether they use this capacity depends on their business model, terms and conditions and so-called “consent,” and, who knows, even on their discretion—but in any case, not on clearly developed and rooted social norms of acceptable behavior.

### C. *Compounding Technological Developments*

A third cluster of arguments relates to other technological developments besides digitization and online interactions. First, robots are or will soon be entering many of our traditional spaces, and we will have to negotiate privacy practices with them (and, of course, with their developers and providers). Companion and care robots may be cute and cooperative, but they come with sensors that significantly expand information flows. Moreover, “[t]echnologies that introduce the equivalent of people into our homes, cars, computers and mobile devices—places historically experienced as private—threaten our dwindling opportunities for solitude and self-development.”<sup>224</sup> At the same time, they may also enhance opportunities for people to be themselves, as people can feel free from the judgement of robots (although not necessarily from the judgement of people behind the robot). Robotization will add another layer to the enmeshing of physical and digital spaces, making an already complex puzzle even more puzzling.

Second, and similarly, the Internet of Things (IoT) will also complicate the picture because IoT devices will further perforate the boundaries of existing privacy spaces with ever more channels for information flows—from and into the home, the car, personal space, private places, and public places. Similarly to robots, but with other dynamics, IoT devices will compound the ways in which physical and digital spaces connect and how people, and their hyperextended selves, will interact.

Third, and implying another turn of the screw, machine learning and algorithmic decision-making will affect privacy spaces in ways that are as yet hard to foresee. We can at least expect that the spatial setting in which humans move will become more flexible, not to say protean, when algorithms decide what the environment should look like; this may range from simple A/B testing

---

<sup>224</sup> M. Ryan Calo, *People Can Be So Fake: A New Dimension to Privacy and Technology Scholarship*, 114 PENN ST. L. REV. 809, 815 (2010).

in websites you consult<sup>225</sup> through changing your room's lighting scheme according to your (automatically inferred) mood to radically altering the experience of space through augmented reality applications. Such real-time adaptations in spatial settings based on behavioral and preferential inferences are likely to substantially affect whether and to what extent you feel you can be yourselves in a setting. Adaptable environments might sometimes be alienating but will probably often also be comforting, enhancing your feeling of being "at home" or "in place" even in unfamiliar places. But they will also implicate privacy at a deeper level. It is questionable whether the self you feel you can be in real-time adaptive environments is really the self or selves that *you* want to present in that setting; often, it may rather be the "self" that *your proactive environment* thinks you want to be at that time and place. Thus, machine learning will compound the challenges of online and onlife privacy, as it risks lulling people into an imposed sense of self to the detriment of a self-determined sense of self.<sup>226</sup>

More arguments and developments could be mentioned that showcase the challenges of digital privacy, but space is running out here. I hope that this brief discussion suffices to demonstrate the usefulness of looking at digital privacy challenges through the lens of traditional privacy spaces and the associated norms and practices. Traditional privacy spaces form a theme on which digital spaces offer boundless variations. The as yet enigmatic variations in digital privacy spaces can be better appreciated when we keep in mind the initial theme that they vary on: the traditional spaces in which you can be yourselves.

## V. CONCLUSION

In this paper, I have introduced the concept of "privacy spaces" as spaces in which people can be themselves, that is, where they are able to play the roles and perform the impression management in social settings that they want to play at a particular place and time. I have mapped a wide range of traditional types of privacy spaces,<sup>227</sup> from which four conclusions can be drawn. First, the overview demonstrates that being able to be yourselves at certain times and places is relevant in all zones of social life, not only in the personal and intimate zones,

---

<sup>225</sup> A/B testing is a business-intelligence method that randomly presents two variants (A and B) to users to test how different designs affect user behavior. See *A/B Testing*, WIKIPEDIA, [https://en.wikipedia.org/wiki/A/B\\_testing](https://en.wikipedia.org/wiki/A/B_testing) (last visited Sept. 24, 2018).

<sup>226</sup> Cf. Roger Clarke, *The Digital Persona and its Application to Data Surveillance*, 10 INFO. SOC'Y 77 (1994) (distinguishing between a projected personae (the digital persona over which someone has some level of control, as she discloses the data that create it) and an imposed persona (the digital persona that are created by others on the basis of data available about the person)).

<sup>227</sup> *Supra* Part II.

but also in the semi-private and public zones of social interaction.<sup>228</sup> Having a privacy space is relevant both when being alone and when interacting with others; it is relevant both in intimate relationships and in interactions with acquaintances, colleagues, professionals, and strangers; and it is relevant both for sharing or showing a very private part of yourself and for showing or sharing trivia. This underlines the character of privacy as an infrastructural condition: what matters is having the capability of being yourself at certain times and places, not whether or how you use it.

A second conclusion is that not only do privacy spaces have great variety; also, the boundaries of privacy are quite diverse in character. Boundaries of privacy spaces can be visible or invisible, more or less fluid, more or less penetrable, and have different penetrability in relation to different senses. Obviously, moats and meter-thick walls constitute strong boundaries to fence off one's castle; yet invisible, fluid, and permeable boundaries can also be quite effective to preserve privacy in practice. People will seldom invade your personal space marked by a bag in the seat next to you, and when a train gets so crowded that your personal space shrinks to your own seat, most people will indicate with a question or glance whether you are okay with their sitting next to you, and they will generally respect the armrest in between as new boundary-marker between your and their personal space.

Third, this also shows that privacy relies on two complementary mechanisms: access restriction (creating boundary-markers that fence off a privacy space) and discretion (the respect that others show for another's privacy space). These are communicating vessels: the clearer the boundary-marker and the more practically impenetrable the boundary, the less one has to rely on others' discretion not to invade your privacy space. And vice versa: for spaces delimited by invisible, fluid, or easily permeable boundaries, privacy relies largely on others' discretion. This duality of mechanisms somewhat resonates the oft-made distinction in privacy literature between access and control<sup>229</sup> but has a different emphasis. While on one end of the spectrum, the mechanism of access restriction is the same, the mechanism at the other end of the spectrum is an effort by others to respect your privacy (discretion) rather than an effort by you to control how others deal with what they get to hear or observe (control).<sup>230</sup>

---

<sup>228</sup> Cf. VINCENT, *supra* note 27, at 12 (observing that "from the medieval period onwards, those seeking to protect their thoughts and intimacies viewed their physical environment as a continuum of more or less transient opportunities").

<sup>229</sup> NISSENBAUM, *supra* note 19, at 70–71 formulates this distinction as a difference in approaches to privacy as consisting in, on the one hand, a constraint on access (i.e., preventing access by others to information, persons, or places) and, on the other, a form of control (in particular, having control over information flows).

<sup>230</sup> Cf. SIMMEL, *supra* note 52, at 320–21 (observing that "discretion consists by no means only in the respect for the secret of the other, for his specific will to conceal this or that from us, but in staying away from the knowledge of all that the other does not expressly reveal to us. It does not

---

After all, in situations involving invisible, fluid, or easily permeable boundaries, but also in situations involving voluntary disclosure within a privacy space, you only have limited control over others' behavior and subsequent information processing.<sup>231</sup> I therefore suggest that the prevalent distinction between access and control should be discarded in favor of the distinction between access and discretion, as this distinction captures more accurately how privacy protection works.

And this relates to a fourth conclusion: the protection of privacy is highly dependent on social norms. Many of the privacy spaces I have discussed involve behavioral norms developed over time to respect people's privacy. The fact that, usually, mental bubbles are not snapped, diaries not read, bodies not touched, doors of rooms of one's own not opened without knocking, private conversations not published when accidentally overheard, private parts in communal showers not stared at; the fact that the bench in the park is kept for you while you buy an ice-cream, and that colleagues do not tell your spouse what you told them at the coffee table—all this speaks to the fact that many privacy spaces are respected because of relatively strongly rooted social patterns. (Of course, these privacy spaces are also frequently invaded, to people's annoyance or harm—social norms are standards of behavior, not laws of nature.) Where privacy intrusions (can) have serious effects, the social norms tend to be backed up and reinforced, and sometimes steered or adapted, by legal norms; indeed, several privacy spaces, such as the body, home, and letters can claim strong legal protection. But if we oversee the landscape of privacy spaces, privacy protection turns out to be first and foremost a process of *social* regulation rather than legal regulation. And for many privacy spaces, the associated social norms of behavior have developed over relatively long periods of time, and are more or less strongly embedded in local social practices. Social norms evolve along with changes in the socio-technical environment of social interactions because they depend not only on people but also on the affordances of spatial settings and, particularly, on the co-production of humans and their environment. But if such changes are fast and disruptive, social norms have a hard time catching up. This is one, and perhaps the most underestimated, aspect of the problem of digital privacy spaces.

---

refer to anything particular which we are not permitted to know, but to a quite general reserve in regard to the total personality”).

<sup>231</sup> Cf. NISSENBAUM, *supra* note 19, at 70 (finding that while “most of what is written about privacy assumes it to be a form of control, accounts in terms of access have tended to be more precise and conceptually better developed”). The finding that privacy protection often relies on others' discretion helps explain the limitations inherent to conceptualizing privacy in terms of control. See *Extended Self*, *supra* note 5, at 486 (observing that “processes of self management are not fully under our control. Even if we restrict certain content to a designated circle of online friends, there is no guarantee that the information will not be reposted, retweeted, or quoted. . . . While we may exercise self-control, it is far harder to control all our digital self representations when others may reshare with unintended audiences”).

---

---

As I have argued, the challenges of digital and online privacy can be better understood when the historical roots of social interaction patterns are taken into account, and when the digital, or rather onlife, spaces in which social interactions take place, are analyzed as combinations, adaptations, and extensions of traditional spaces.<sup>232</sup> Digital spaces collapse traditional privacy spaces, and, while at first sight sometimes appearing as an extension of a certain traditional space (such as the private communications space of telecommunications), they are actually (also or rather) extensions of other spaces (such as personal writings, personal possessions, the home, and various professional privacy spaces). Because digital spaces are far more interconnected and interoperable than traditional spaces (which will be compounded by technological developments such as robotics, the Internet of Things, and machine learning), fewer boundaries avail to clearly delimit digital privacy spaces. Impression management is more complicated, both because of unfamiliarity with the types of expressions one gives off online (metadata and inferred data), and because digital spaces often trigger different partial identities at the same time, or at different times on the same platform, more so than in traditional spaces. Moreover, not only are social norms slow to evolve, information flows are often different, and often involve, besides communications partners and by-standers, a service provider looking over your shoulder. The co-habitation of service providers in digital spaces stands in stark contrast to traditional physical spaces, where the “space provider” does not usually, and certainly not systematically, monitor what people do in their space. As a result of all these factors, digital, or onlife, impression management therefore virtually requires people to be aware of all their selves all of the time, which surely severely hampers their feeling they can safely be “themselves” in any given situation, and which leads to a demise of backstage spaces where people can relax and forget about role-playing for a while. This disappearance of backstage spaces will have devastating effects, because, as Westin observes, “[t]here have to be moments ‘off-stage’ when the individual can be ‘himself’ . . . . To be always ‘on’ would destroy the human organism.”<sup>233</sup>

The analysis in this paper opens up a broad spectrum for future research. On one side of the spectrum, the map of traditional privacy spaces can be tested, refined, expanded, or adapted, through analysis of, for instance, other bodies of literature, non-Western societies, or concrete practices in particular types of spaces. Also, normative work is required to match the conceptual map of privacy spaces with the reality of privacy affordances in these spaces, both in terms of how and to what extent privacy rights apply to particular spaces, and in terms of how and to what extent particular privacy spaces work for vulnerable or minority groups, and to what extent privacy is available to people for whom important

---

<sup>232</sup> *Supra* Part III.

<sup>233</sup> WESTIN, *supra* note 4, at 35.



privacy spaces are illusory. On the other side of the spectrum, the challenges of digital, online, and onlife privacy can be studied through the conceptual lens of privacy spaces. The vast research on digital privacy and data protection can be enriched by looking closely into how social interactions take place in particular digital and onlife environments, bearing in mind the historical and spatial roots of these interactions in traditional privacy spaces. Analyzing how traditional spaces where social interactions take place are scrambled and rehashed into digital and onlife spaces; whether and to what extent the social norms associated with the former also co-evolve along with the latter; and how the interconnection of digital spaces and the presence of digital “space providers” affect people’s capability of impression management and room for backstage relaxation—all this can enhance our understanding of digital privacy challenges, in general and in particular cases. And better understanding of these challenges, grounded in awareness of spatio-temporal developments, is vital for informing effective responses to these challenges, in law, policy, and design.