

PRIVACY'S PAST: THE ANCIENT CONCEPT AND ITS IMPLICATIONS FOR THE CURRENT LAW OF PRIVACY

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ABSTRACT

Privacy is a mysterious concept. The more apparent its significance in the real world becomes, the more obscure the core and the limitations of the concept become. In the digital age, it is urgent that the legal framework to protect privacy should be enhanced more than ever before. At the same time, the right-based model of privacy which has long been dominant in theory and practice is now challenged by many privacy law experts who propose a shift from the right-based model to the trust-based model, a transition from the consent-based regime to the expectation-based regime, or from the user's right to control to the fiduciary duties of professionals. This Article addresses the current debate and contributes to the ongoing search for a new concept of privacy by looking back at privacy's past. As a legal formula, privacy was introduced at the end of the nineteenth century. However, we can trace its cultural origin to ancient Greek thought and the idea of a distinction between the public and the private realms that was inherent in the design and political structure of the polis. Relying on Hannah Arendt's works, this Article draws some critical implications from the ancient idea and its modern turn, focusing on both the privative traits and the non-privative traits of privacy. The argument is that the ancient Greek concept of privacy originally suggests a state of being deprived of relationships with others, and the implication is that privacy has been a relational concept since the beginnings of western political thought. This Article maintains that privacy law should seek its foundations in the nature of privacy as a component of the human condition, the existential fact that we all live with ambivalence between whether to disclose or conceal some aspect of our selves to others. This Article proposes that we shift away from thinking of privacy in relation to the demand to be "left alone" and think rather about the framing of regulative ideals for relation-building.

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TABLE OF CONTENTS

INTRODUCTION.....	1338
I. THE ANCIENT CONCEPT OF PRIVACY AND ITS MODERN TURN.....	1341
A. <i>The Privative Trait of Privacy</i>	1341
B. <i>The Non-Privative Trait of Privacy</i>	1343
1. <i>The Rise of Modern Society</i>	1343
2. <i>Discovery of Intimacy</i>	1345
3. <i>The Non-Privative Traits of Privacy: Intimacy, Urgency, and Depth</i>	1346
II. AMBIVALENCE OF DISCLOSURE AND CONCEALMENT.....	1349
A. <i>From Binary Concept to Ambivalent Concept</i>	1349
1. <i>The ‘Disclosure-for-Greatness/Concealment-for-Sanctity’ Solution is Not the Answer</i>	1349
2. <i>Empirical and Existential Basis of the Ambivalence of Disclosure and Concealment</i>	1350
B. <i>A Philosophical Explanation on the Ambivalence of Privacy</i>	1351
1. <i>Another Privative Trait of Privacy: Privation of Others</i>	1351
2. <i>Another Non-Privative Trait of Privacy: The Conception of Good</i>	1353
III. IMPLICATIONS FOR THE CURRENT LAW OF PRIVACY.....	1356
A. <i>Space and Architecture: Privacy as the Four Walls</i>	1356
B. <i>Sanctity of Life and Death</i>	1357
C. <i>Relationship with Others</i>	1358
D. <i>For the Current Development of Privacy-as-Trust Scholarship</i> ..	1360
CONCLUSION.....	1364

INTRODUCTION

It has long been the common understanding that the legal concept of privacy developed as a contemporary innovation. It is common knowledge that Warren & Brandeis’s famous 1890 article¹ impressively introduced the notion of a right to privacy to the legal world and that this concept became one of the most utilized measures in tort law.

This is true. As a constitutional law scholar, however, I would like to consider the fact that the concept equivalent to privacy has roots in the modern tradition of liberal thought.² A basic premise of modern political

1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2. Jeff Weintraub once stated that “the public/private distinction stands out as one of the ‘grand dichotomies’ of Western thought.” Jeff Weintraub, *The Theory and Politics of the Public / Private Distinction*, in PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE 1 (Jeff Weintraub & Krishan Kumar eds., 1997) (citing NOBERTO BOBBIO, *The Grand Dichotomy: Public / Private*, in DEMOCRACY AND

thought and liberal constitutionalism is that the political community needed to be divided into two spheres, the public and the private. Roughly speaking, the liberal tradition holds that political powers should be in charge of the public sphere, while individual freedom and autonomy are to be preserved in the private domain.³ The legal tool that draws boundaries between the public and the private is articulated in the form of fundamental rights, and among these rights is the concept of privacy. In theory, this concept plays a major role in negotiating the lines between public duties and private freedoms. In a sense, an ideal of privacy was already incorporated into modern constitutional projects from their inception.

But we can trace the history of a concept of privacy back much further. The idea of public/private distinction and a concept like privacy already existed in Greek thought and actually functioned in the life of the Polis in ancient Greece. The Greek concept of privacy has often been seen as socially detrimental and criticized as a form of retreat from society.⁴ Daniel L. Solove articulated the Greek understanding of privacy as follows: “[t]he public sphere was the truly important realm of existence; the private sphere was valuable solely to the extent that it nourished people for public participation.”⁵ Elsewhere in the same work, Solove also suggests that the protection of a realm of solitude in the private sphere is “built into society’s structure for a social purpose.”⁶ To verify this view, Solove cites the famous political philosopher Hanna Arendt’s work on Greek thought, asserting that “the private sphere was essential to shaping the dimensions and quality of life in the public sphere.”⁷ The passage he cites from Arendt’s work reads:

A life spent entirely in public, in the presence of others, becomes, as we would say, *shallow*. While it retains its visibility, it loses the quality of rising into sight from some darker ground which must remain hidden if it is not to lose *its depth* in a very real, non-subjective sense.⁸

By mapping the metaphor of the shallow/deep dichotomy onto that of the public/private, Arendt suggests that a life in the private sphere originally held its own intrinsic value besides its social role of encouraging vigorous participation in public life. What then, according to Arendt, is the nature of

DICTATORSHIP (1989)); *see also* Raymond Guess, PUBLIC GOODS, PRIVATE GOODS (2001).

3. Distinction of the public and the private is often seen to be equivalent to establishing the boundary for the political. However, “the picture is actually more complicated.” Weintraub, *supra* note 2, at 2, 2 n.4.

4. DANIEL L. SOLOVE, UNDERSTANDING PRIVACY 80 (2008).

5. *Id.*

6. *Id.* at 164.

7. *Id.*

8. HANNAH ARENDT, THE HUMAN CONDITION 71 (2d ed. 1998) (first published by the University of Chicago Press in 1958) (emphasis added).

the value of the private sphere?

In what follows, I pursue this question by revisiting Arendt's presentation of the public/private dichotomy in Greek thought as laid out in her representative work, *The Human Condition*. My purpose is to expand the horizons of legal discourse about the public/private distinction by reconsidering the relevance of Arendt's understanding of the private as a source of intrinsic value in Greek social life. Part I introduces the contrast between the privative trait of privacy and the non-privative trait of privacy and describes the different versions of these traits which were rediscovered in the modern age. Part II clarifies the differences and similarities between the Greek trait of privacy and the rediscovered traits in the modern age. I then move beyond historical inquiry by considering the universal implications of concealment and disclosure for human life as baseline factors that underlie both ancient and modern concepts of privacy.

Finally, I suggest some preliminary implications that arise when applying Arendt's reading of the Greek concepts of privacy to privacy law scholarship, in particular to the current proposals of "the privacy-as-trust school." In my interpretation, since its inception as a fundamental category in political thought, the concept of privacy has been a relational one, not a mere justification for the solitude of the individual. I believe that the relational aspect of privacy is central to any form of the concept in both contemporary states and even in ancient Greek city states, and it also applies equally in the digital age and pre-digital age. It is our fate to lead our lives in complicated webs of human relationships, and legal forms like contract and consensus-based models cannot help but narrow the scope of these private relationships. Legal measures cannot regulate or formalize every context of daily human relationships. It is necessary to consider this underlying reality to uncover the original meaning and value that privacy has in our daily life and practice. From this standpoint, the significance of the boundary of the public and the private may become clear. By returning to Arendt's insightful reading of the ancient Greek concept of privacy, we may be able to discover that the value of privacy is connected to that of trust—a basic requirement for maintaining stable intimate relationships. This observation suggests the connection between ancient concepts of privacy and modern traditions of legal thinking. I conclude by returning to Arendt's work in order to propose a further step to protect privacy in the future.

I. THE ANCIENT CONCEPT OF PRIVACY AND ITS MODERN TURN

A. *The Privative Trait of Privacy*

In the ancient Greek thought, political community (*polis*) is not just different from but stands in direct opposition to the natural community whose center is the home and the family (*oikos*).⁹ According to Arendt's analysis, "[t]he distinction between a private and a public sphere of life corresponds to the household and the political realms, which have existed as distinct, separate entities at least since the rise of the ancient city-state."¹⁰ The ancient concept of public/private distinction was based upon this sharp contrast between "the household and the political realms."¹¹ As Arendt says, the public and the private existed as "distinct, separate entities,"¹² the distinction was so decisive and thorough that there seemed to be no interactive space in this formula. At least theoretically, however, this decisive arrangement was thought to be an essential prerequisite for the establishment of the *polis*.

As for the household as the center in the private realm, its driving force was life itself, namely, individual maintenance and survival of the species. In ancient *oikos*, "[t]hat individual maintenance should be the task of the man and species survival the task of the woman was obvious[.]"¹³ So the household was the place to fulfill "the necessity of life" and the necessity ruled over all members and activities in the family.¹⁴ To the contrary, the realm of *polis* was the sphere of freedom. Mastering the necessities of life would liberate oneself from the household for the realm of *polis*.¹⁵ In that realm, people are free and equal. Arendt states "[t]he [*polis*] was distinguished from the household in that it knew only 'equals,' whereas the household was the center of the strictest inequality."¹⁶ Yes, it was very unequal. Only men were eligible to go out of the household and to be free, while duties and burdens to satisfy the necessity of life were loaded on women and slaves. Only men could fully disclose and even expose their true selves by "action (*praxis*) and speech (*lexis*),"¹⁷ and then they would gain

9. ARENDT, *supra* note 8, at 24.

10. *Id.* at 28.

11. *Id.*

12. *Id.*

13. *Id.* at 30.

14. *Id.* at 31, 32.

15. *Id.* at 31.

16. *Id.* at 32.

17. *Id.* at 25, 175–81. Arendt describes action and speech: "while certainly only the foundation of the city-state enabled men to spend their whole lives in the political realm, in action and speech, the conviction that these two human capacities belonged together and are the highest of all seems to have preceded the *polis* and was already present in pre-Socratic thought." *Id.* at 25. By the way, Arendt deliberately distinguishes between "labor," "work," and "action." For the details, see *id.* at 7–8. As for

the capability to show excellence.¹⁸ The public sphere was the place for a great self-realization where men could gain freedom (from rule of the necessity of life) and disclose their excellence through action and speech. The private sphere was not.

Based on this contrast, Arendt describes a concept of privacy or the private which is totally different from the oft-used liberal formula of privacy today. Arendt writes:

In ancient feeling the privative trait of privacy, indicated in the word itself, was all-important; it meant literally *a state of being deprived of something*, and even of the highest and most human of man's capacities. A man who lived only a private life, who like the slave was not permitted to enter the public realm, or like the barbarian had chosen not to establish such a realm, was not fully human.¹⁹

Arendt clearly understands the ancient concept of privacy as “a state of being deprived of something,”²⁰ and people (particularly women and slaves) relegated to the shadows of the private realm—that is, to the household—were deprived of the possibilities for the greatness, excellence, and freedom that could be enjoyed by men in the public realm. She calls this attribute of privacy “the privative trait of privacy” in the passage cited above.²¹ So, while the household casts a binding spell of the necessity of life on members of the family and deprives them of freedom and excellence, people (men) in the public sphere could be free through action and speech, free from the household, and free to disclose their true selves. In sum, the ancient concept of freedom indicates that freedom means a state of having no privacy. People can be free when they do not have to hide and are able to disclose themselves to others outside the home. This is sharply different from the current concept of privacy, in which privacy is thought to protect the sphere of freedom.

“action,” Arendt explains, “[a]ction, the only activity that goes on directly between men without the intermediary of things or matter, corresponds to the human condition of plurality, to the fact that men, not Man, live on the earth and inhabit the world.” *Id.* at 7. Different from other activities, labor and work, people have to leave the home and the family and stand in the public realm when they would undertake action in Arendt's sense of the word. Arendt also explains “since action is the political activity par excellence, natality, and not mortality, may be the central category of political, as distinguished from metaphysical, thought.” *Id.* at 9. Action alone is a sort of prerogative of man. “[N]either a beast nor a god is capable of it.” *Id.* at 22 (footnote omitted).

18. In Arendt's view, “[e]xcellence itself, *arete* as the Greeks, *virtus* as the Romans would have called it, has always been assigned to the public realm where one could excel, could distinguish oneself from all others” and “[e]very activity performed in public can attain an excellence never matched in privacy.” *Id.* at 48–49.

19. *Id.* at 38 (emphasis added).

20. *Id.*

21. *Id.*

B. *The Non-Privative Trait of Privacy*

1. *The Rise of Modern Society*

With the advent of the modern age begun, the social realm emerged as a new form of sphere. The rise of the social realm developed, inaugurating a different understanding of the public/private distinction and transforming both the private and the public realms.

The emergence of society—the rise of housekeeping, its activities, problems, and organizational devices—from the shadowy interior of the household into the light of the public sphere has not only blurred the old borderline between private and political, it has also changed almost beyond recognition the meaning of the two terms and their significance for the life of the individual and the citizen.²²

Arendt suggests that modern society derived from the household.²³ This interpretation of modernization implies that modern society was the expansion of the family and housekeeping and it developed as government took responsibility for a greater share of the core economic tasks of the family unit. So, Arendt says “the collective of families economically organized into the facsimile of one super-human family is what we call ‘society,’ and its political form of organization is called ‘nation.’”²⁴ In this arrangement, the “nation state” is a territorial manifestation of modern society. After all, the process of building society was at the same time the process of producing the national community as a kind of extended family or “national household.”²⁵

What made this phenomenon possible was the fact that modern society subsumed labor and property from the private sphere through the industrialization of the household and the advancement of machine technologies. The nation state as a national household also incorporated labor and property from the private sphere by taxation. To be sure, modern society generally organized labor (through the so-called division of labor) such that most people were liberated from the necessity of devoting most of their time to the kinds of labor necessary for the maintenance of life.²⁶ Taking this seriously, however, Arendt points out that “[t]he striking coincidence of the rise of society with the decline of the family indicates clearly that what actually took place was the absorption of the family unit into corresponding social groups.”²⁷ Thus, the household, which was once

22. *Id.*

23. *Id.*

24. *Id.* at 29 (footnote omitted).

25. *Id.* at 44.

26. *Id.* at 47.

27. *Id.* at 40.

a self-contained realm of production and reproduction declined in significance as society expanded to incorporate the economic functions that had once been located in the private domain.²⁸ Likewise, the classical concept of the public domain also suffered deterioration due to the rise of the social realm. As discussed in Part I.A, the public realm in the ancient age was originally the place for men to expose their greatness and excellence through their actions and speeches, and Arendt maintains that this realm of action was independent from concerns about the necessity of life (which were relegated to the private sphere). There was a sharp distinction between the public and the private realms and the political solely existed in the public realm. But modern society made those clear boundaries between the private and the public, and thus the private and the political, much less distinct. According to Arendt's interpretation, the idea "[t]hat politics is nothing but a function of society, that action, speech, and thought are primarily *superstructures* upon social interest, is not a discovery of Karl Marx but on the contrary is among the axiomatic assumptions Marx accepted uncritically from the political economists of the modern age."²⁹ As an arena based on actions, speeches, and thoughts, the political realm (the public realm) itself became a comprehensive superstructure upon interests and concerns of the social realm, which emerged as an expansion of the household in the private realm. So, according to Arendt's interpretation, the rise of modern society entailed a renegotiation of the boundaries between the public and private such that the society became increasingly concerned with affairs that had traditionally belonged to the private realm of the family and household in classical times. Arendt says

[This] is not a matter of a theory or an ideology, since with the rise of society, that is, the rise of the 'household' (*oikia*) or of economic activities to the public realm, housekeeping and all matters pertaining formerly to the private sphere of the family have become a 'collective' concern.³⁰

Modern society organized and managed the households and the processes to satisfy the necessity of life which were hidden in the private realm before,³¹ and it became *the substructure* to just reflect the necessity of life upon the political (the public) realm as the superstructure. And labor³²

28. As for contemporary life, think about working at the company, living in the residential complex or the company house, or being on a solo transfer, etc.

29. ARENDT, *supra* note 8, at 33 (emphasis added).

30. *Id.*

31. For example, labor-intensive manufacture, factory works, organization of labor union, public health, and birth control, etc.

32. What Arendt means by the term, "*labor*", is as follows: "Labor is the activity which corresponds to the biological process of the human body, whose spontaneous growth, metabolism, and

becomes a major driving force in modern society instead of the ancient excellence such as action, speech, and thought. In this way, *society as the household* came to demand that “its members act as though they were members of one enormous family which has only one opinion and one interest.”³³ So, it is quite natural for both the private and the public from their original meanings to be antagonistic to the social.³⁴

2. *Discovery of Intimacy*

As the social realm expanded and the private realm declined, the nature of privacy and the household came to be reconsidered. Modern society produced a new understanding of privacy distinct from the ancient concept that saw the private realm as characterized by the deprivation of the possibility of achieving greatness or excellence. Arendt characterizes this shift in the concept of the private as a turn towards the discovery of intimacy:

We no longer think primarily of deprivation when we use the word “privacy,” and this is partly due to the enormous enrichment of the private sphere through modern individualism. However, it seems even more important that modern privacy is at least as sharply opposed to the social realm—unknown to the ancients who considered its content a private matter—as it is to the political, properly speaking. The decisive historical fact is that modern privacy in its most relevant function, to shelter *the intimate*, was discovered as the opposite not of the political sphere but of the social, to which it is therefore more closely and authentically related.³⁵

Arendt points out three things in the paragraph above. First, modern privacy is understood not in relation to privation,³⁶ the cardinal trait that prevailed in the ancient understanding, but rather in relation to “enormous

eventual decay are bound to the vital necessities produced and fed into the life process by labor. The human condition of labor is life itself.” ARENDT, *supra* note 8, at 7.

33. *Id.* at 39. If society subsumes the private and the public and constitutes one enormous family, it would be natural course for people to get hot and mad at sexual scandals of public figures and celebrities and to urge journalists to disclose their privacies in a body (in one family?) because sexual scandals destroy the basic order of the family.

34. One of the representative theorists criticizing modern society was John Stuart Mill. See JOHN STUART MILL, *ON LIBERTY* (1884). As Arendt critically analyzes modern society itself, Mill also focuses his theory of liberty on a critical analysis of society: “Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly held in dread, chiefly as operating through the acts of the public authorities. But reflecting persons perceived that when society is itself the tyrant—society collectively, over the separate individuals who compose it—its means of tyrannizing are not restricted to the acts which it may do by the hands of its political functionaries.” *Id.* at 12–13.

35. ARENDT, *supra* note 8, at 38 (emphasis added).

36. In this Article, “privation” means a state of being deprived of something important for existence or lack of what is needed for life and existence.

enrichment.”³⁷ Second, the newly recognized trait of privacy is intimacy. Third, the modern concept of the value of privacy as a shelter for intimacy was “discovered” by conceiving of the private realm not in opposition to the public or political realm, but rather by opposing the private to the newly emerging social realm. It is worth noting Arendt’s interpretation does not suggest that the advent of modern individualism brought the “enormous enrichment” to the private realm. Rather, the perspective of individualism which emerged in the modern age made it possible for people to articulate the idea that intimacy is a source of enrichment already existing in the ancient private realm. More importantly, Arendt maintains that as soon as the intimate trait of privacy was discovered in modern society, it was immediately impoverished precisely due to the encroachment of the social into the private. Once people went out of the private *oikos* and started leading their social lives, they found that the social interfered with the private and recognized that the private was the place of intimacy. Thus, Arendt writes that “the modern discovery of intimacy seems a flight from the whole outer world into the inner subjectivity of the individual, which formerly had been sheltered and protected by the private realm.”³⁸

The oft-repeated observation that modern society invented the intimate is arguably incorrect. Intimacy was discovered when modern society came to be an enemy of the private. Arendt summarizes this line of thought as follows:

The distinction between the private and public realms, seen from the viewpoint of privacy rather than of the body politic, equals the distinction between things that should be shown and things that should be hidden. Only the modern age, in its rebellion against society, has discovered how rich and manifold the realm of the hidden can be under the conditions of intimacy.³⁹

3. *The Non-Privative Traits of Privacy: Intimacy, Urgency, and Depth*

It is in describing the rise of modern society and the decline of the private realm that Arendt enumerates the non-privative traits of privacy. She writes: “[I]t is only natural that the non-privative traits of privacy should appear most clearly when men are threatened with deprivation of it.”⁴⁰ Intimacy is arguably the non-privative trait in question.⁴¹ In order to understand this

37. ARENDT, *supra* note 8, at 38.

38. *Id.* at 69.

39. *Id.* at 72.

40. *Id.* at 71.

41. Arendt does not explicitly say that intimacy is one of the non-privative traits of privacy. But it would be arguably safe to say that she implicitly suggests that it is because she thinks intimacy is

non-privative trait more properly and the danger to human existence when this trait is lost, Arendt argues that it may be best to consider two non-privative traits of privacy which are older than, and independent of, the discovery of intimacy.

First, Arendt argues that the classical concept of the private realm is characterized by the urgency of meeting the necessities required to sustain life.⁴² From the standpoint of the public realm, the necessity of life can be understood as a negative trait of the private realm in that the necessities of life place limitations upon freedom to the extent that one must labor (in private) to meet the biological necessities of survival. Arendt insists, however, that the necessity of life “possesses a driving force whose urgency is unmatched by the so-called higher desires and aspirations of man,” and “it will also prevent the apathy and disappearance of initiative” that may arise in a community which is very wealthy and has no fear of poverty.⁴³

Second, Arendt refers to the quality of depth that can be enjoyed only in private life, within “the four walls of one’s private property.”⁴⁴ Arendt states that “the four walls” offer “the only reliable hiding place from the common public world” and thereby protect the “second outstanding non-privative characteristic of privacy.”⁴⁵ On the other hand, in the paragraph I cited in the INTRODUCTION of this Article, Arendt maintains that a life spent entirely in the public will be *shallow* and it must be hidden in the private in order to retain its *depth*.⁴⁶ Putting these arguments together, the second non-privative trait of privacy is the quality of depth which can only be possible in a space hidden or protected from public view within the household. Excessive exposure to the public gaze risks eviscerating the depth of life. Outside the hidden place, the depth of life gets shallow.

A closer look at these non-privative traits, urgency and depth, will be helpful for drawing out implications for further inquiry. With respect to the former, we have to ask why the urgency of satisfying the necessities required for life is greater than the urgency of satisfying the need for personal greatness that can only be satisfied through public exhibition. To this question, Arendt offers no explicit answer. She suggests, however, that the hidden has long been thought to maintain linkage with human life and body when she says that “from the beginning of history to our own time it has always been the bodily part of human existence that needed to be hidden in privacy, all things connected with the necessity of the life process

based on other two traits of privacy—*urgency of satisfying the necessities of life* and *depth of life (sacredness of birth and death)*—which Arendt explicitly sees as non-private ones.

42. ARENDT, *supra* note 8, at 70–71.

43. *Id.*

44. *Id.* at 71.

45. *Id.*

46. *Id.*

itself.”⁴⁷ And Arendt clarifies that the hidden assumes a sort of sanctity:

The sacredness of this privacy was like the sacredness of the hidden, namely, of birth and death, the beginning and end of the mortals who, like all living creatures, grow out of and return to the darkness of an underworld. *The non-privative trait of the household realm originally lay in its being the realm of birth and death* which must be hidden from the public realm because it harbors the things hidden from human eyes and impenetrable to human knowledge. It is hidden because man does not know where he comes from when he is born and where he goes when he dies.⁴⁸

In this analysis, the urgency associated with the necessities of life in the private realm is based upon the sacredness of the realm of birth and death. Therefore it would be much more appropriate to say that the non-privative trait of privacy lies in the *sanctity* of the realm of birth and death rather than the *urgency* of the realm of necessity of life. Sanctity must be hidden in the household while greatness or excellence must be exposed in the public realm. In the modern age, many activities associated with birth and death take place in social spaces such as hospitals, clinics, nursing homes, rehabilitation facilities, hospices, hotels, psychiatrist’s offices, and so on. These places are associated with the hidden or the private in some parts of them because even now they still maintain some spaces for the sanctity of birth and death like the household, in other words, they are the places of privacy.

The second non-privative trait, depth, is perhaps more relevant for this Article. What is the nature of this quality of the private realm—a trait is deep when hidden and shallow when disclosed? Is it the sanctity of life and death? On the other hand, political greatness and excellence go the opposite way. These traits can only flourish in the public realm and under the collective gaze, but such greatness is not possible for those hidden in the private realm. Regarding these points, Arendt gives no clear answer. As seen above, she only suggests that the distinction between the private and public realms equals the distinction between things that should be disclosed and things that should be hidden and also that a life must be hidden in the private in order to retain its depth. In line with this arrangement, it appears that greatness and excellence require actions to be exposed to a public audience while the sanctity of life and death must remain hidden to be protected. In Arendt’s interpretation of the classical structure of the public/private divide, it appears that the territory between public and private

47. *Id.* at 72.

48. *Id.* at 62–63 (emphasis added) (footnote omitted).

can be indexed to the binaries of disclosure/concealment and excellence/sanctity. The system of associations appears clear and simple. However, the picture so far is inadequate for grasping the messy realities and complexities of human life because it pays little attention to the fact that we all live in ambivalence between disclosure and concealment.

II. AMBIVALENCE OF DISCLOSURE AND CONCEALMENT

A. *From Binary Concept to Ambivalent Concept*

1. *The 'Disclosure-for-Greatness/Concealment-for-Sanctity' Solution is Not the Answer*

"Disclosure-for-greatness/concealment-for-sanctity" solution is so lucid and simple that it almost looks like a binary scale. Needless to say, human life is not easily mapped onto binaries. Even if a binary solution is useful for formulating a theoretical framework, the application to real life may not prove easy or helpful. I think there are two main reasons why "disclosure for greatness/concealment for sanctity" solution is not promising.

First, where has intimacy gone in this binary framework? As I referred to earlier, Arendt pointed out that intimacy was "discovered" in the modern age and implied intimacy was one of the non-privative traits of privacy. Arendt also states, however, that in order to understand how dangerous the loss of the private realm may be, we need to go beyond intimacy and take a closer look at other non-privative traits: it is here that the concepts of urgency, the sanctity of life and death, and the depth of private life enter the picture.⁴⁹ Intimacy in a narrow sense is decomposed into these non-privative values. Arendt contrasts these non-privative values attributed to the private realm with the perfectionistic values of greatness and excellence attributed to the public realm. Perfectionistic values (like greatness and excellence) and sacred values (like the sanctity of life and death) are placed at either end of a gradation or sliding scale of human values.⁵⁰ Both the values are extremes or climax states. To be sure, Arendt tends to illustrate her philosophical picture by deliberately using sharp contrasts, clear-cut

49. See *supra* Part I.B.3.

50. Intimacy is one of the values which lie in this gradation of human value. Intimacy plays a main role when we talk about privacy. But it is said that the concept of intimacy can be too broad if it does not adequately define its scope and the concept can be "too narrow because they exclude many matters that do not involve the characteristics of intimate relationships." SOLVE, *supra* note 4, at 37. About the latter point, I think it is important for us to distinguish *privacy* and *personal information*. Personal information is the main part of "many matters that do not involve the characteristics of intimate relationships." *Id.* Privacy is thought to be deeply and historically connected with intimacy. Personal information can be often protected by privacy-as-intimacy but personal information needs to be protected by reasons other than intimacy, such as security, freedom, or crime prevention.

frameworks, and these climax states. For the topic of this Article, however, the entire spectrum of human values, not merely the poles at both ends of the gradation, are more relevant. That means we need a comprehensive and general theory of the disclosure/concealment issue as we face it in our daily lives, not just on special occasions like glorious times, such as life, and death.

Second, the social realm has caused the binary distinction to lose its validity or usefulness. Arendt observed that when the social realm emerged in the modern age both the public realm and the private were absorbed into modern society.⁵¹ In this picture, the “disclosure for greatness/concealment for sanctity” construction of the respective values in play in the public/private distinction breaks down because the social realm where we live no longer needs clear boundaries between the public and the private.

The world we live in is not neatly divided in a binary way just between two spaces, the public and the private. The values we hold are not simple enough to be accounted for by these opposing poles. The distinction of disclosure and concealment cannot be rendered as a binary. Rather, we live in the ambivalent spaces between disclosure and concealment every day. We are urged constantly to make decisions about what should be disclosed to the public and what should be hidden in the private in every aspect of our lives.

2. *Empirical and Existential Basis of the Ambivalence of Disclosure and Concealment*

How does the ambivalence of disclosure and concealment work in our lives? This may appear as something self-evident. For example, Patricia Meyer Spacks writes: “Each of us establishes individual boundaries of privacy; each of us may *willingly, even happily* abandon privacy in different specific contexts. In practice, then, privacy carries in modern Western culture no fixed assignment of value. Sometimes we want the state it designates, sometimes we don’t.”⁵²

We usually entrench ourselves in a wall of privacy. But we sometimes willingly, happily, deliberately, or strategically disclose privacy to specific persons, on specific occasions, or in specific contexts. Spacks’s statement above suggests that there are two kinds of empirical truth or existential basis of the ambivalence of disclosure and concealment. First: everyone has her/his secrets. Second: people sometimes deliberately disclose their secrets, even desiring to do so on some occasions.

Alan F. Westin implies this empirical or existential basis of the

51. ARENDT, *supra* note 8, at 69.

52. PATRICIA MEYER SPACKS, *PRIVACY: CONCEALING THE EIGHTEENTH-CENTURY SELF* 3 (2003).

ambivalence from a different angle when he referred to “desire for privacy” as follows: “The individual’s *desire for privacy* is never absolute, since participation in society is an equally powerful desire. Thus, each individual is continually engaged in a personal adjustment process in which he balances the desire for privacy with *the desire for disclosure* and communication of himself to others.”⁵³

If Westin’s observation is correct, and I believe it is so, then we are required daily to balance two desires: the desire to keep something hidden and the desire to share or disclose ourselves. This is precisely what the ambivalence of disclosure and concealment means and requires us to do every day. However, there are further questions to be asked: Why do we desire to participate in society by going so far as to abandon privacy? Why is “the desire for disclosure” so powerful? How does “a personal adjustment process” work? Why do we “willingly, even happily” abandon our privacy? In order to solve those issues, it is not sufficient to appeal to empirical evidence or existential conditions—a philosophical inquiry will be needed.

B. A Philosophical Explanation on the Ambivalence of Privacy

1. Another Privative Trait of Privacy: Privation of Others

Here again, Arendt’s works will help us to find a philosophical basis of the ambivalence of disclosure and concealment. She firstly pointed out the privative trait of privacy as a state of being deprived of greatness or excellence in the household.⁵⁴ On the other hand, Arendt refers to another privative trait of privacy when she states as follows:

To live an entirely private life means above all to be deprived of things essential to a truly human life: to be deprived of the reality that comes from being seen and heard by others, to be deprived of an “objective” relationship with them that comes from being related to and separated from them through the intermediary of a common world of things, to be deprived of the possibility of achieving something more permanent than life itself. *The privation of privacy lies in the absence of others*; as far as they are concerned, private man does not appear, and therefore it is as though he did not exist.⁵⁵

Arendt says that the privative trait of privacy, different from the privation of greatness or excellence, lies in the state of being deprived of “others.”⁵⁶

53. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967) (emphasis added).

54. *See supra* Part I.A.

55. ARENDT, *supra* note 8, at 58 (emphasis added).

56. *Id.*

The privation of others also means the privation of one's own "reality." Arendt also says:

The presence of others who see what we see and hear what we hear assures us of the reality of the world and ourselves, and while the intimacy of a fully developed private life, such as had never been known before the rise of the modern age and the concomitant decline of the public realm, will always greatly intensify and enrich the whole scale of subjective emotions and private feelings, this intensification will always come to pass at the expense of the assurance of the reality of the world and men.⁵⁷

Private life cannot be actualized until it is seen or heard by others. Our life can gain its reality only through being with others. Because being deprived of others means being deprived of the reality of life at the same time, a life relegated entirely to the private realm without the company of others will be tantamount to a fantasy life. In the passage cited above, Arendt states that the privation of others is a privation of "an objective relationship."⁵⁸ When we try to give a reality to our private life, we need to overcome the privation of others by forming objective relationships with others. In the ancient age, relationships were provided by the household. Women and slaves sacrificed participation in the public realm, but they may have been able to experience relationships albeit confined within the family as a self-contained unit. As I referred to, however, the modern age broke the spell of the necessity of life and released people from the household, so that people took a step forward to modern society to find others who give a life reality and form relationships with others.⁵⁹ People started wandering about the social realm beyond the unclear boundary of the private and public realms and searching for others and relationships with them.⁶⁰ In this sense, privation of others may provide a motivation for one to invite people to engage in the social realm, and through this process of relation building, people may move from solitude to fulfilling relationships. This means that precisely due to the deprivation of others, the realm of privacy somehow contains within itself the motivation for connecting with others and building relationships. Relationships are internalized within privacy itself.

57. *Id.* at 50.

58. *Id.* at 58.

59. *See supra* Part I.B.1.

60. Arendt states "[w]e first become aware of freedom or its opposite in our intercourse with others, not in the intercourse with ourselves." HANNAH ARENDT, BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT 148–49 (rev.ed. 1968). As for a functional role the private and the public play in modern society for us to form friendship, Allan Silver, "Two Different Sorts of Commerce"—Friendship and Strangership in Civil Society *in* PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE 1 (Jeff Weintraub & Krishan Kumar eds., 1997).

The privation of others differs from the privation of greatness or excellence. But, when the ancient Greek citizen sought to demonstrate his greatness or excellence, he had to engage in actions before an audience. He needed to be seen and heard by others. It would have been essential for the ancient to show his greatness before others in society in order to give reality to his perfectionistic fantasy. If it is the case, then the privation of others (relationships and the possibility for reality they create) appears to be the most fundamental or universal privative trait of privacy.

2. *Another Non-Privative Trait of Privacy: The Conception of Good*

Does it follow that privately held desires must be completely disclosed to the public when we decide to form relationships with others? My answer to this question is negative. As mentioned above, Arendt argues that the non-privative part of privacy maintains its depth when it is hidden but becomes shallow when it is disclosed. If so, it would be wrong to think that the desires harbored in the inner world must be disclosed and opened to public display as a prerequisite for forming relationships. It is only by their concealment from others that some private desires maintain the capacity to nourish the self. What does this mean? Arendt writes:

Yet there are a great many things which cannot withstand the implacable, bright light of the constant presence of others on the public scene; there, only what is considered to be relevant, worthy of being seen or heard, can be tolerated, so that the irrelevant becomes automatically a private matter. This, to be sure, does not mean that private concerns are generally irrelevant; on the contrary, we shall see that there are very relevant matters which can survive only in the realm of the private. For instance, love, in distinction from friendship, is killed, or rather extinguished, the moment it is displayed in public.⁶¹

What are the “relevant matters” which “cannot withstand the implacable, bright light” of the public realm? Arendt locates the source of the good in the private realm: “Only *goodness* must go into absolute hiding and flee all appearance if it is not to be destroyed.”⁶²

In Arendt’s interpretation, part of the necessity for protecting the private realm from “the implacable, bright light” of the public gaze arises because the private realm is the site of intimate personal relationships and as such a primary source of conceptions⁶³ of the good. In *The Human Condition*,

61. *Id.* at 51.

62. *Id.* at 75 (emphasis added).

63. In this Article, I distinguish *conception* from *concept* following the terminology of John

Arendt does not define the good but she uses the terms “good” or “goodness” in a limited way. For example, it appears that romantic love, religious beliefs, and good deeds constitute the generally Christian sense of the good that informs Arendt’s concept.⁶⁴ For my purposes, I will suggest that the list of goods that flourish in the private realm but recede in “the implacable, bright light” of the public realm includes more than just romantic love, religious beliefs, and so on. Can we not add to this list other goods such as personal desires, life goals, pleasure, affection, friendship, ambition, cherished possessions, or secret fantasies, which are similarly fragile and vulnerable when exposed in the public light? Moving forward, I would like to use the term good in a general way.⁶⁵ Thus, I maintain that a further non-privative trait of privacy (beyond intimacy), as Arendt stated that it becomes deeper when hidden but becomes shallow when disclosed, is precisely personal conceptions of the good.

It is sometimes said that the conception of good has nothing to do with selfishness or altruism. If we love somebody, the benefits or pleasures attained from that love are not just for the sake of the lover but also for the sake of the beloved one. The goods derived from love and friendship are shared by lovers and friends. This also suggests that whomever love and friendship are for the sake of, as Charles Fried once said, “these things are good in themselves.”⁶⁶ But this does not mean the conception of good life shall not be *personal or private* but be *public*. It is still personal because, again, in Fried’s words: “And still all of these goods—high and low, selfish and generous—are sought by us because of what we judge them to be. They are *our* goods.”⁶⁷

So an individual’s conception of the good is still personal and some component of this ideal should be hidden in the private realm in order to keep its non-privative trait of depth of life from the light of the public realm. Even so, however, the privation of others as the privative trait of privacy would be applied to an individual’s conceptions of the good too. As far as these conceptions are situated in the state of privation of others, they need to be nurtured by relationships with others to attain a kind of objective reality and to become more than a fantasy or imaginary wish fulfillment. Could a person be satisfied with life without trying to test and enact her or

Rawls and Ronald Dworkin. For a distinction of conception and concept, see, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 9 (revised ed. 1999); RONALD DWORKIN, *LAW’S EMPIRE* 70–72 (1986).

64. See ARENDT, *supra* note 8, at 73–78.

65. As for the concept of good, I follow its definition by John Rawls. He defines the good as that “A is a good X for K (where K is some person) if and only if A has the properties which it is rational for K to want in an X, given K’s circumstances, abilities, and plan of life (his system of aims) . . .” RAWLS, *supra* note 63, at 351.

66. CHARLES FRIED, *MODERN LIBERTY* 21 (2007).

67. *Id.*

his values outside the household or their inner world? A completely personal conception of the good without reality that comes from relationships with others amounts to a fantasy. Arendt describes the situation like this:

[Y]et only solitude can become an authentic way of life in the figure of the philosopher, whereas the much more general experience of loneliness is so contradictory to the human condition of plurality that it is simply unbearable for any length of time and needs the company of God, the only imaginable witness of good works, if it is not to annihilate human existence altogether.⁶⁸

A person in love with their own conceptions of the good may appear to share something of the devotion of the religious. Arendt maintains that some philosophers may be satisfied to dwell in solitude, apart from humanity, but even they rely on a sense of extra-human reality that provides the kind of sustenance that relationships with others can bring.⁶⁹ Aside from monastic or philosophical recluses ordinary persons cannot generally rely upon the sense of God's company to fulfill their needs for companionship, and most people need to form relationships with others in order to live lives of value in which they may try to put their conceptions of the good into practice through actions.

All things considered, the implications of the privative/non-privative traits of privacy break down as follows: we are not so independent or monistic as to find satisfaction from merely contemplating the good in solitude without hope of somehow impacting the world of other persons. In such a completely isolated private life, the individual would be deprived of others and of the sense of his or her own reality. That would place our conceptions of the good in a state of privation too. People look for others in the social realm and form relationships with them in order to bring reality to their own conceptions of the good as a personal project. In sum, we need to give a chance to our conceptions of the good and test them to learn whether or not our values are truly good for us.

On the other hand, the arrangement above does not mean personal conceptions of the good can be completely exposed in the public realm. These conceptions still need to be protected as, for example, intimate matters not fully open to the public or the social. To balance between concealment and disclosure of the conceptions of good, it is necessary to test different values in the course of intimate relationships with others must be protected from "the implacable, bright light" of the outer world. Privacy as a legal measure has bearing on precisely this point.⁷⁰

68. ARENDT, *supra* note 8, at 76.

69. *Id.*

70. There is a different reason other than privacy to confine the conception of good in the private

III. IMPLICATIONS FOR THE CURRENT LAW OF PRIVACY

A. *Space and Architecture: Privacy as the Four Walls*

The first lesson we learned from the ancient concept of privacy is that privacy was deeply connected with the matters of space and architecture. As Arendt described, the house as “the four walls” offered “the only reliable hiding place from the common public world.”⁷¹ The spatial and architectural privacy is still important today. In *Boyd v. United States*, one of the earliest references to privacy in the United States, the Supreme Court held that the Fourth and Fifth Amendments ought to be protections against all governmental invasions “of the sanctity of a man’s home and the privacies of life” and that “[i]t is not the breaking of his doors . . . , that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property.”⁷²

In *Katz v. United States*, in which the Court considered the constitutionality of “evidence of the petitioner’s end of the conversation overheard by an FBI agent who attached an electronic . . . device to the outside of a telephone booth,”⁷³ Justice Stewart delivered the opinion of the Court:

[b]ecause of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a

realm. That is prevention of *tyranny of the good*. As for the “ruinous quality of doing good”, Arendt states that “[b]adness that comes out of hiding is impudent and directly destroys the common world; goodness that comes out of hiding and assumes a public role is no longer good, but corrupt in its own terms and will carry its own corruption wherever it goes.” ARENDT, *supra* note 8, at 77. For Arendt, who understands the society as an expansion of the household and sees the state as an organic entity like one family, it is very critical to prevent hypertrophy of common good in the public realm. She says:

The organic theories of nationalism, especially in its Central European version, all rest on an identification of the nation and the relationships between its members with the family and family relationships. Because society becomes the substitute for the family, “blood and soil” is supposed to rule the relationships between its members; homogeneity of population and its rootedness in the soil of a given territory become the requisites for the nation-state everywhere.

Id. at 256. Of course, when she talks about “blood and soil,” we must come up with a German nationalist slogan, *Blut und Boden*. Charles Fried also states that “[t]he greatest enemy of liberty has always been some vision of the good.” FRIED, *supra* note 66, at 17. He refers to Hitler’s thought of the good, which is clearly only for the glory of the German, because there is no thought of the oppressed. To reject Hitler’s tradition, Fried proposes “the good in the abstract,” not a particular person’s good, which means the good shall be an abstract from both the oppressor and the oppressed and applicable to all. *Id.* at 18.

71. ARENDT, *supra* note 8, at 71.

72. *Boyd v. United States*, 116 U.S. 616, 630 (1886). In this decision, Justice Bradley, relying upon Lord Camden’s opinion in *Entick v. Carrington & Three Other King’s Messengers*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765), stated that “[b]y the laws of England, every invasion of private property, be it ever so minute, is a trespass.” *Boyd*, 116 U.S. at 627 (emphasis added).

73. *Katz v. United States*, 389 U.S. 347, 348 (1967).

“constitutionally protected area.” The Government has maintained with equal vigor that it was not.⁷⁴

Justice Stewart then concluded: “[b]ut this effort to decide whether or not a given ‘area,’ viewed in the abstract, is ‘constitutionally protected’ deflects attention from the problem presented by this case. For the Fourth Amendment protects *people, not places*.”⁷⁵

This passage implies that the concept of privacy took its leave of the spatial concept. However, in his concurring opinion in *Katz*, Justice Harlan raised an objection to Justice Stewart: “As the Court’s opinion states, ‘the Fourth Amendment protects people, not places.’ The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires *reference to a ‘place*.”⁷⁶

Based upon this view, Harlan formulated the so-called Harlan test as a twofold standard for protection of privacy: “first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”⁷⁷ Applying the test to the case, Harlan concluded that “[t]he point is not that the booth is ‘accessible to the public’ at other times, . . . , but that it is *a temporarily private place* whose momentary occupants’ expectations of freedom from intrusion are recognized as reasonable.”⁷⁸ The spatial and architectural concept of privacy still works.

B. Sanctity of Life and Death

Again, Arendt said that in the ancient age the sacredness of privacy “was like the sacredness of the hidden, namely, of birth and death, the beginning and end of the mortals who, like all living creatures, grow out of and return to the darkness of an underworld.”⁷⁹ From this view, she understands sanctity as the non-privative trait of the private realm which “originally lay in its being the realm of birth and death which must be hidden from the public realm.”⁸⁰

This concept of privacy as sanctity of life and death is still vigorous in the Supreme Court’s opinions. For example, in *Griswold v. Connecticut*,

74. *Id.* at 351.

75. *Id.* (emphasis added).

76. *Id.* at 361 (Harlan, J., concurring) (emphasis added).

77. *Id.*

78. *Id.* (emphasis added). The Harlan test gained its status in the opinion of the Court in *Terry v. Ohio*, 392 U.S. 1 (1968); *Mancusi v. DeForte*, 392 U.S. 364 (1968); *Smith v. Maryland*, 442 U.S. 735 (1979); *California v. Ciraolo*, 476 U.S. 207 (1986); *Florida v. Riley*, 488 U.S. 445 (1989). *But see* *Kyllo v. United States*, 533 U.S. 27 (2001).

79. ARENDT, *supra* note 8, at 62–63

80. *Id.*

Justice Douglas asked: “[w]ould we allow the police to search *the sacred precincts* of marital bedrooms for telltale signs of the use of contraceptives?”⁸¹ He then responded negatively to this question by recognizing a constitutional guarantee of “the notion of privacy surrounding the marriage relationship.”⁸² Following *Griswold*, *Eisenstadt v. Baird* held that “[i]f, under *Griswold*, . . . the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible” and that “[i]t is true that, in *Griswold*, the right of privacy in question inhered in the marital relationship.”⁸³ And *Roe v. Wade* introduced the right to abortion as part of the right to privacy.⁸⁴ The fact that the Supreme Court has considered reproduction as a function of privacy is also quite suggestive of an implicit connection between privacy and sanctity of life.⁸⁵

C. Relationship with Others

Probably, for the current law of privacy, the most important implications from the ancient concept of privacy and its modern turn are ambivalence of the privative trait and the non-privative trait of privacy. Before referring to the implications, I would like to summarize the analyses and interpretations in the previous Parts:

—Privacy originally means a state of being deprived of something.

—In the ancient concept of privacy, what was deprived of in the private realm was the possibilities of achieving greatness or excellence. As both the public and the private realms came to be absorbed into the social realm in the modern age, intimacy or depth of life in the private realm were discovered as the trait of privacy instead of perfectionist ones of greatness or excellence. But what makes a life in the household intimate or deep? It would still be necessary to inquire into what the fundamental characters of life in the private realm are. Analysis in the previous Parts suggests that there are twofold characters in the private realm, privation of others as the privative trait of privacy and personal conceptions of the good in life as the non-privative trait of privacy.

—To live in a state of privation of *others* in the household also

81. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

82. *Id.* at 486 (emphasis added).

83. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

84. *Roe v. Wade*, 410 U.S. 113 (1973).

85. As for death, contrarily, the Supreme Court has denied constitutional guarantee of the right to die and the right to assisted suicide. See *Vacco v. Quill*, 521 U.S. 793 (1997); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990).

means to live in a state of being deprived of *the reality* that comes from being seen and heard by others, and being deprived of *an objective relationship* with others. If we would achieve something more than meeting the necessities of life and give reality to our lives, we have to go out of the household and enter society in order to compensate privation of others and build relationships with them.

—Each one of us has her or his own conceptions of the good or the good life. These conceptions are usually hidden and protected in the private realm because the good “cannot withstand the implacable, bright light” of the public realm. However, the supplementary principle of filling up privation of others shall also be applied to these personal conceptions of the good. Therefore, while we would give reality to our personal conceptions of the good by building relationship to share those conceptions with others, those relationships still need to be hidden and protected by privacy. Furthermore, personal conceptions of the good bear ambivalence of both the momentums to be concealed in the inner world and to be disclosed to others.

—The ancient meaning of privacy is a state of privation of others, and the privation has to be filled up with relationship with them. From this perspective, privacy internalizes the concept of relationship in its original trait. We enter the society with this relational concept of privacy and live the ambivalence between concealment and disclosure of personal conceptions of the good.

—Privacy is originally the relational concept, in other words, the social concept.

Several implications for the law of privacy could be delivered from the analyses and interpretations above.

First, as far as we understand privacy as the relational concept, the classical formula of privacy, *the right to be let alone*,⁸⁶ is misleading. Taken literally, this formula only justifies a state of solitude without others or living with just imaginary others including God in mind. These kinds of personal lives shall be protected not by privacy but rather by freedom of conscience or religious belief.

Second, as mentioned in Part III.A, privacy as the spatial concept is still important today; however, from the perspective of privacy as the relational concept, it has a certain limitation because we need to go out of the closed household protected by “the four walls” to form relationships with others

86. Warren & Brandeis, *supra* note 1, at 195.

outside. In this sense, Justice Stewart's statement in *Katz* that "the Fourth Amendment protects *people, not places*" is very suggestive.⁸⁷ On the other hand, in his concurring opinion, Justice Harlan, asking Stewart "what protection it affords to those people," states that "the answer to that question requires *reference to a 'place'*" is also suggestive.⁸⁸ We still need a solid protection provided by the spatial concept of privacy. But, what "the four walls" means has largely changed today. In some cases, the spatial concept of privacy and the relational concept of privacy are mutually complementary.

Third, even if privacy originally means privation of others, filling up the privation does not necessarily mean abandoning privacy. It is because people will not place their privacy entirely in the public realm when they disclose their privacy to the others. Privacy as the relational concept is exclusively disclosed only to specific others. In the society where the boundary of the public and the private is ambiguous and intertwined, we can only contextually decide what and how much to disclose or conceal and to whom. With regard to this point, it is worth noting that privacy plays important roles not just in protecting what is to be hidden but also in making it possible to disclose it. In order to give reality to personal conceptions of the good, people need to form relationships with others. When people attempt to establish a relationship with someone, they use privacy or secrecy like a token or currency to earn intimacy.⁸⁹ Probably partners would attempt to do the same thing by using their privacy in the same way. By sharing privacy with others, people can safely start testing their own conceptions of the good in the society. Consequentially, the web of various relationships of sharing privacy in society has to be protected from the light of the social and public realms by some measures. The law of privacy might as well reflect an existential truth that people sometimes hide their secrets but sometimes love to disclose them, and has to recognize the necessity of protecting ambivalence of concealment and disclosure, instead of the binary distinction of the private and the public.

D. For the Current Development of Privacy-as-Trust Scholarship

The relational or social concept of privacy may provide a strong foundation to the current movement in privacy law to reinforce the idea of

87. *Katz v. United States*, 389 U.S. 347, 351 (1967) (emphasis added).

88. *Id.* at 361 (Harlan, J., concurring).

89. In this sense, the degree of intimacy and the extent of intimate relationship can be decided by how much personal privacy is disclosed to others. Some scholars pointed this out by saying that the quality of intimate relationships are defined by the extent to which we trust each other with disclosure of personal information. See, e.g., Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431, 453–54 (2016); Irwin Altman, *Reciprocity of Interpersonal Exchange*, 3 J. THEORY SOC. BEHAV. 249 (1973).

privacy-as-trust.

Privacy law started its development from a legal measure in law of torts when Warren and Brandeis's classic formula of privacy was introduced⁹⁰. The main goal of this measure was to restrain the harms inflicted by the entrenchment of "the right to be let alone" as a classic concept of privacy which is formed on extension of protection against interference with *life and property*.⁹¹ With the advent of the age of information followed by the digital revolution, a new conceptualization of privacy became powerful: the concept of *information* privacy.⁹² Along this line, the legal measure for privacy has shifted focus from tort claims to *the right to control* one's personal information and its dissemination in society.⁹³ The idea of privacy as information control has been very powerful, not just in the United States but at the international level.⁹⁴ With the rise of digital society, however, this idea is becoming unhelpful in many of our transactions, and it bears the risk of making things worse.

As for the fate of this idea, Neil Richards and Woodrow Hartzog describe the expected purpose and role of the notion that the right to privacy entails the right to information control by saying that "[i]n this context, privacy means the rules governing the collection, use, and disclosure of information" and that "privacy rules should encourage and fortify *information relationships*."⁹⁵ So they insist that privacy rules should build trust in these relationships. However, "[r]ather than encouraging trust, modern American privacy law encourages companies to profit in short-sighted ways by extracting as much value as possible from personal data in the short term" and "they are essentially free to set up the terms of information relationships any way they wish."⁹⁶ Along this line, Richards and Hartzog strongly criticize the control-based model of privacy:

Companies have this power because of a second hallmark of modern

90. Warren & Brandeis, *supra* note 1, at 219.

91. *Id.* at 193–94, 197.

92. Alan Westin was a main advocate. He stated that "[p]rivacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." WESTIN, *supra* note 53, at 7.

93. A typical formula is well expressed by Charles Fried. He said that "[p]rivacy is not simply an absence of information about us in the minds of others; rather it is *the control* we have over information about ourselves." Charles Fried, *Privacy*, 77 YALE L. J. 475, 482 (1968).

94. In Japan, the concept of privacy as information control was enthusiastically introduced by Koji Sato, professor of emeritus of Kyoto University, and this idea arguably is still overwhelming. Professor Sato offered a new formula of privacy as the right to control over personal information relying upon Alan Westin's works in Koji Sato, *Puraibasi no kenri: sono koho teki sokumen no kenpogaku teki kosatsu—Hikakuho teki kento (1) (2) (The Right to Privacy: A Constitutional Inquiry into its Dimension of Public Law (1) (2)—A Comparative Study of Law)* (pts. 1 & 2), 85 HOGAKURONSO (KYOTO L. REV.), no. 5, 1970, at 1, 86 HOGAKURONSO no. 6, 1970 at 1.

95. Richards & Hartzog, *supra* note 89, at 434 (emphasis added).

96. *Id.*

American privacy law, its reliance on a *control-based regime of “notice and choice.”* Under this arrangement, terms are hidden in the fine print of legal notices virtually no one reads, and there is as little meaningful choice as in *old-fashioned consumer adhesion contracts*. Consumers are left exposed and bewildered, lamenting what they see as the “death of privacy.”⁹⁷

Rapid development of information technologies also seems to be accelerating this alleged “death of privacy.” Ordinary users have little knowledge about what happens with information that enters the Internet via ubiquitous electronic devices. But Internet business entities like Google, Amazon, Facebook, Apple, and IT engineers know very well what happens with this information. The gap in knowledge between users and IT professionals makes the contract-based model of privacy obsolete because the knowledge asymmetry deprives users of opportunities to have second thoughts about entering digital transactions, and this lack of knowledge undermines the well-informed consent on which such contractual transactions have heretofore been based. Furthermore, the knowledge asymmetry produces and even broadens the power asymmetry between users and IT companies. The asymmetry and imbalance of power and knowledge makes people vulnerable in their IT life, and many express discomfort (even feel creepy) about the excessively digitized environment.⁹⁸ Vulnerability and discomfort (creepiness) cannot be provided legal remedies through traditional means like tort claims and injunctions because they do not cause any direct and immediate infringement of rights.⁹⁹

In order to “mitigate the vulnerabilities and power imbalance in sharing information with others”¹⁰⁰ in the digital age, the trust-based model of privacy has been intensively introduced by many influential scholars.¹⁰¹ As seen above, both “the *Harm Principle* that derives from tort law and the *Control Principle* that comes from FIPs (the Fair Information Practices) are the legal bedrock of modern privacy law.”¹⁰² But both of them will not work well for users and come to be the bedrock of, in Richards and Hartzog’s

97. *Id.* (emphasis added).

98. *See, e.g.,* Richards & Hartzog, *supra* note 89, at 437–40; Caitlin Dewey, *9 Answers About Facebook’s Creepy Emotional-Manipulation Experiment*, WASH. POST (July 1, 2014), <http://www.washingtonpost.com/news/theintersect/wp/2014/07/01/9-answers-about-facebooks-creepy-emotional-manipulation-experiment> [<http://perma.cc/FZT9-BJ45>]. *See also, infra* note 98.

99. For more details about the historical development of various ideas of legal remedies for privacy, *see, e.g.,* Daniel L. Solove & Neil M. Richards, *Privacy’s Other Path: Recovering the Law of Confidentiality*, 96 GEO. L. J. 123 (2007).

100. ARI EZRA WALDMAN, *PRIVACY AS TRUST: INFORMATION PRIVACY FOR AN INFORMATION AGE* 47 (2018).

101. *See e.g.,* Richards & Hartzog, *supra* note 89, at 448–51.

102. *Id.* at 436.

term, *Privacy Pessimism*.¹⁰³ Consequently, *the Harm Fixation*¹⁰⁴ and *the Control Illusion*¹⁰⁵ has to be transformed to a new arrangement, the trust-based model of privacy. The transformations shall occur in many ways: from the right-based model to the trust-based model, from the consent-based regime to the expectation-based regime, from the user's right to control and to make choices to the fiduciary duties of professionals.¹⁰⁶

With these in the background, the privacy-as-trust model may become the most promising alternative to the rights-based model of privacy. I think it is clear that considerations and interpretations in this Article would contribute to the privacy-as-trust scholarship by offering philosophical answers to the fundamental question about why trust is important in the field of privacy law.

First, thinking of privacy as a relational concept or as a social concept in the manner proposed here offers theoretical foundations for the idea of privacy-as-trust. To explain this, it may suffice to cite Waldman's statement below:

We need to change our perspective on privacy.

It may sound strange, but privacy is an inherently social concept. The very idea of privacy presumes that we exist in both formal and informal relationships with others: *privacy only matters after we share within those relationships*. When making sharing decisions, we rely on and develop expectations about what should happen to our information based on the contexts in which we share, thus integrating privacy into our lives relative to other people.¹⁰⁷

Here is another important statement. In a short passage, Woodrow Hartzog says: “[t]rust is an essential component of healthy relationship and healthy societies.”¹⁰⁸

These passages are standing for a social function of privacy. Privacy needs objective relationships with others because we are inclined to give reality to personal conceptions of the good by filling up privation of others in the private realm. So Waldman is right and correct when he says “privacy

103. *Id.* at 436–47.

104. *Id.* at 441–44.

105. *Id.* at 444–47.

106. I will not refer to more details about privacy-as-trust scholarship. For more details, see WALDMAN, *supra* note 100; Richards & Hartzog, *supra* note 89; Solove & Richards, *supra* note 99. As for the fiduciary duties, see DANIAL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* (2006.); Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016).

107. WALDMAN, *supra* note 100, at 3 (emphasis added).

108. WOODROW HARTZOG, *PRIVACY'S BLUEPRINT: THE BATTLE TO CONTROL THE DESIGN OF NEW TECHNOLOGIES* 98 (2018).

only matters after we share within those relationships.”¹⁰⁹ Privacy shall protect people’s freedom not from, but for others and for society at large.

Second, consideration of the ambivalence between the needs for disclosure and concealment will encourage deeper reflection on the nature of trust-based relationships. When Hartzog proposes three privacy-related values (trust, obscurity, and autonomy), he refers to how the first two values, trust and obscurity, relate to each other:

Obscurity and trust let us explore and create identity and be intimate with each other because they create zones of safety. They can be combined to give us holistic protection. Trust protects us when dealing with other people. Obscurity protects us when there are no people we can trust. Most important, they are both related to the large moral value of autonomy.¹¹⁰

The value of obscurity is ambivalent because it is of course not perfect exposure but not complete disappearance either. Even if you have someone you trust and both of you are entering the trust-based relationship, unless obscurity protects those relationships, trust may become fragile. These ambivalent and complicated characteristics of trust and obscurity come from the inherent traits of privacy: ambivalence of disclosure and concealment.

CONCLUSION

The next step shall be to reflect the idea of privacy-as-trust upon legislation and policy making. The implications of this Article may provide theoretical support for this movement. Even so, the classical and modern concepts of privacy, including the spatial concept of privacy and the right to control over personal information, must still play important roles in protecting human life. All modes of legal measures such as “the four walls,” the right to control, the fiduciary duties, and reasonable/subjective expectations,¹¹¹ should work differently in response to every context of matters of privacy. Or, if a rapid and considerable development of technology like data portability empowers IT users and solves technological asymmetry between users and IT platforms, the right to control over information might gain the technological tools to actualize the control. If so, while we see the trust-based model of privacy prevalent in the transactions of daily life, we might also see that data portability revives the right-based or control-based model of privacy again in the near future.

109. WALDMAN, *supra* note 100, at 3.

110. HARTZOG, *supra* note 108, at 116.

111. Richards & Hartzog, *supra* note 89, at 438.

In closing, I propose a possible further step for the development of political and legal theory surrounding the role of privacy in contemporary society. For this purpose, I will return to Arendt. As seen in Part I.B, for Arendt, the social realm was antagonistic to both the public and the private realms. I think Arendt's view of modern society seems somewhat negative, illiberal, and even pessimistic in some contexts.¹¹² She actually describes modern society as a machine of exploitation that squeezes labor and property from the household and destroys the virtues of both the private and public (political) realm. In *Crises of the Republic*, her criticism of society seems to be made more severe in that it takes the form of a criticism of industrial society, capitalism, and socialism. She says:

In that case one must say that capitalism has destroyed the estates, the corporations, the guilds, the whole structure of the feudal society. It has done away with all the collective groups which were a protection for the individual and for his property, which guaranteed him a certain security though not, of course, complete safety. In their place it has put the "classes," essentially just two: *the exploiters and the exploited*.¹¹³

Combining her interpretations of the society in *The Human Condition* and *Crises of the Republic*, almost all societies have long been exploiting something from the private realm. In the modern age, they exploited "labor" and "property" from the private realm. Today, however, societies exploit not just labor and property but also "information" from all of us. Limitless exploitation of information keeps building a gigantic accumulation of personal data and privacy. We might live in a society divided between the exploiters (IT platforms) and the exploited (users). So, if we want to take privacy seriously, the further step for privacy law must be critical inquiry into the nature of society itself.

112. There are various views of the society other than Arendt's 'negative' one. As is well known, Jürgen Habermas proposes a different type of the civil society where through free communication the private realm and the political realm are connected. As for a comparative study of the views of Arendt and Habermas, see SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS* 89–120 (1992). For a rigorous critical analysis on Arendt's distinction between the public and the private realms, see JUDITH BUTLER, *NOTES TOWARD A PERFORMATIVE THEORY OF ASSEMBLY* 44–45, 203–208 (2015).

113. HANNAH ARENDT, *CRISES OF THE REPUBLIC* 214 (1972) (emphasis added).