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A SOCIOLOGICAL THEORY OF PRIVACY AS A COMMUNICATIVE RIGHT

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ABSTRACT: This paper redefines informational privacy through the lens of Niklas Luhmann's communication theory, shifting the focus from individual actions to a broader understanding of informational privacy within the theoretical framework of this thinker. While privacy studies have traditionally been influenced by action theory, this paper examines how societal expectations of informational privacy emerge and operate within communicative processes. Although Luhmann did not explicitly address privacy, his theory has been applied to this topic in a limited manner. Building on these applications, this paper provides a deeper perspective on informational privacy, framing it within Luhmann's theory and analysing its role in the formation of legal and social norms.

KEYWORDS: Privacy; communication; systems theory.

UMA TEORIA SOCIOLÓGICA DA PRIVACIDADE COMO UM DIREITO COMUNICATIVO

RESUMO: Este artigo redefine a privacidade informacional à luz da teoria da comunicação de Niklas Luhmann, deslocando o foco das ações individuais para uma compreensão mais abrangente da privacidade informacional dentro do arcabouço teórico do referido pensador. Enquanto os estudos sobre privacidade têm sido tradicionalmente influenciados pela teoria da ação, este trabalho examina como as expectativas sociais em relação à privacidade informacional surgem e operam nos processos comunicativos. Embora Luhmann não tenha abordado explicitamente a privacidade, sua teoria tem sido aplicada de forma limitada quanto a esse tema. Com base nessas aplicações, este artigo oferece uma perspectiva mais profunda sobre a privacidade informacional, enquadrando-a na teoria de Luhmann e analisando seu papel na formação de normas jurídicas e sociais.

PALAVRAS-CHAVE: Privacidade; comunicação; teoria dos sistemas.

1. Introduction

This paper introduces a novel concept of informational privacy, grounded in Niklas Luhmann's communication theory. Traditionally, privacy scholarship has been dominated by an action theory approach, which defines the right to privacy through the lens of individual behavior and emotions. This paper shifts the focus from individual actions and feelings to communication as the elemental unit of society. By doing so, it provides deeper insights into how societal expectations of informational privacy emerge and the functional relevance of these expectations to communication.

Although Luhmann did not directly address the right to privacy, his theory has been applied in a limited manner to privacy issues. These applications have primarily highlighted privacy as a safeguard against the totalitarian tendencies of functionally differentiated social systems and underscored its general functional relevance to communication. This paper extends these observations, offering a more comprehensive understanding of informational privacy within the framework of Luhmann's communication theory.

The next section outlines the dominance of action theory in existing privacy scholarship and highlights some of the problems of this approach for understanding the development of the right to privacy in law and society. The third section introduces Luhmann's communication theory in general, since it is less well-known than his systems theory, and outlines some of the most salient aspects of the theory in relation to privacy. The fourth section examines the right to privacy from this lens and makes a categorical distinction between physical and informational privacy from this perspective. Noting the functional implications of informational privacy to communication, the remainder of the paper focuses on this form of privacy.

The final section uses Luhmann's communication model to analyze how normative expectations of informational privacy arise in communication and provides a novel perspective on the subjective nature of the right. This joins up with insights from action theory approaches to privacy, but rather than relating this to the autonomy and integrity of the individual, the paper concludes by considering the implications of the subjective normative basis of the right to privacy for law as an objective social system.

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2. The dominance of action theory in privacy scholarship

The focus on the action and behavior of individuals in interaction settings is evident in the now classical concepts of privacy as freedom from 'public disclosure of private facts',[1] or, in the absence of interaction, as the 'right to be left alone' (Warre; Brandies, 1890) or as freedom from 'intrusion into seclusion'.[2] Even more abstract concepts of privacy as autonomy and dignity are based on reference to acts of intrusion and the palpable effects such acts have in undermining individuality (Bloustein, 1964).

What is remarkable, however, is that an action theory approach dominated privacy scholarship even after the linguistic turn in philosophy and the social sciences in the 1970s.[3] While many social theorists were turning their attention to communication as an important social structure, privacy scholarship went through a series of intense theoretical debates, between, reductionist and non-reductionist concepts of privacy, inherent and instrumental privacy, control and access, and between taxonomical and unified approaches.[4] The focus on action remained throughout these debates, as concepts of privacy were tried and tested by reference to action and ontology.[5]

One of the key distinctions that emerged in privacy scholarship during this period was the distinction between informational and physical privacy. The former relates to personal data, such as name, address, or financial information. The latter, to space and the corporeal, such as a person's body or home.

1 See Prosser, W. L. Privacy. *California Law Review*, Berkeley, v. 48, n. 3, p. 383-423. 1960. DOI: https://doi.org/10.15779/Z383J3C; American Law Institute. *Restatement of the law, second, torts: § 652*, 197 and Post, R C. The social foundations of privacy: community and self in the common law tort. *California Law Review*, Berkeley, v. 77, n. 5, p. 957-1010, Oct. 1989.

2 Prosser, op. cit. n. 10. Of Prosser's 'complex of four' types of privacy, it has been the first two, 'public disclosure of public facts' and 'intrusion into seclusion' that have proved most influential in theory and practice, Harts-Horne, J. The need for an intrusion upon seclusion privacy tort within English Law. *Common Law World Review*, v. 46, n. 4, p. 287-289, 2017. As argued below, this has caused much confusion in the law.

3 On such developments in philosophy, see Porty, R. *The linguistic turn: essays in philosophical method*. Chicago: University of Chicago Press, 1992. Luhmann's own linguistic turn came in the mid-1980s, with the shift to a societal autopoiesis.

4 As noted by Baghai, K. Privacy as a human right: a sociological theory. *Sociology*, [*s.l.*], v. 46, n. 5, p. 951-965, 2012. Available at: https://soc.sagepub.com. DOI: 10.1177/0038038512450804. Access on: 22 Jan. 2025. For overviews on the various debates, see, for example, Powers, M. A cognitive access definition of privacy. *Law and Philosophy*, [*s.l.*], v. 15, p. 369-386, 1996. DOI: https://doi.org/10.1007/BF00127211. Access on: 22 Jan. 2025.; Koops, B. *et al.* A typology of privacy. *University of Pennsylvania Journal of International Law*, [*s.l.*] v. 38, n. 2, p. 483-512, 2017.

5 For example, references to X-ray devices looking at pornographic pictures locked in wall safes, or retired opera singers singing behind soundproofed walls. See Thomson, J. The Right to Privacy. *Philosophy & Public Affairs*, [*s.l.*], v. 4, n. 4, p. 295-314, 1975.

In response to the pernicious ambiguities of concepts of autonomy or dignity and the development of communications technology, some privacy scholars began to conceive of informational privacy as a distinct and important form of privacy (Gross, 1967, p. 34-35; Shils, 1966, 281-298; Posner, 1978, p. 4). Here again, the focus on action remained, and led to unsatisfactory concepts of privacy as the 'control of information' (Fried, 1970, p. 140), or the individual's ability to control the circulation of information relating to him (Miller, 1971, p. 25).

Critics of this so-called 'rubric of information' sought to develop more cohesive and unified theories of privacy (Parker, 1974). Parker, for example, argued that privacy was not about control over information, but rather 'control over who can *sense* us'(*id*).[6] Sensory perception was seen as core to both forms of privacy, *e.g.*, when the intruder *looks* at another through the window, or the intruder *looks* at private correspondence. Gavison, in presenting arguably one of the most influential concepts of the right to privacy, argued for a unified concept of privacy on the basis that each involves the issue of 'accessibility to the individual' (Gavison, 1980, 421).[7] Privacy, at its core, is seen as some *thing*–some state of being–that can be accessed, and that is violated by an act of gaining unpermitted access to another (Gavison, 1980, p. 428).

Yet, even among those who embrace a more unified notion of privacy grounded in individual autonomy, a distinction persists between informational and physical privacy. For Gavison, for example, the first type of privacy, information is '*acquired*' (Gavison, 1980, p. 430), such as when 'an estranged wife published her husband's love letters to her', or a data-leak of 'census information and government files' (Gavison, 1980, p. 433). Physical privacy is defined as 'physical access', and 'physical proximity that Y is close enough to touch or observe X through normal use of his senses', such as in the case of peeping Toms, or a 'stranger who chooses to sit on our bench even though the park is full of empty benches' (Gavison, 1980, p. 437).[8]

6 See also Gerety, T. Redefining privacy. *Harvard Civil Rights-Civil Liberties Law Review*, Cambridge, v. 12, p. 206, 1977.

7 Gavison's functional analysis of the right to privacy is that it promotes 'liberty of action', 'autonomy', and 'human relations', *id*., p. 438. See also, Decew, J. W. The scope of privacy in law and ethics. *Law and Philosophy*, v. 5, p. 145-159, 1986.

8 Gavison also conceived of a third form of privacy, which involves the 'attention paid to an individual', which although could be a way of 'acquiring information', is viewed differently in that it may cause a loss of privacy even if no new information 'becomes known'. (id, p. 452). Gavison gives the example that someone shouts out, 'Here is the president,' when the president attempts to anonymously walk the streets. According to the approach developed below, however, this will either involve physical privacy or informational privacy depending on whether the intrusion is by perception alone, or by the selection of information.

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This line of scholarship has been very influential in the development of privacy law and is often cited in support of the development of a so-called 'general tort of intrusion' seen as protecting *both* physical and informational privacy in the United States,[9] in Canada (Canada, 2012),[10] and in New Zealand (New Zealand, 2012).[11] In England and Wales, however, it has not been so influential on the development of law, and the courts have not considered it necessary to establish a general tort of intrusion, but have focused instead on protecting informational privacy. This, in turn, has been criticized by privacy scholars as crude (Hartshorne, 2017, p. 301), unsustainable (Wragg, 2019, p. 409), inadequate, and incomprehensive (Moreham, 2014, p. 367).

However, the underlying concepts of privacy in such arguments are not clear. It is not clear, for example, that it is physical privacy'that is protected by a 'general tort of intrusion'. The Ontario Court of Appeal developed a general tort of intrusion in *Jones* v *Tsige* (Canada, 2012),[12] but the case involved a bank teller who repeatedly accessed the bank's computer records to view the account information of her partner's ex-wife. Why should this be interpreted as protecting privacy interests, beyond informational privacy? It cannot be simply because the defendant 'did not publish, distribute or record the information in any way' (Canada, 2012, at [4]). The Ontario Court of Appeal itself described the interest at stake in *Jones* as 'informational privacy' (Canada, at [41]), and developed the new privacy tort on the basis that electronic databases 'make our most personal information available and vulnerable', and that 'technological change has motivated the need to protect the individual's right to privacy' (*id*., at [67]). Since then, moreover, the judicial development of the tort of intrusion in Ontario has primarily focused on cases involving private information, such as a defendant filming the plaintiff jogging on a public street and using the film in a promotional video for a real estate business, (Canada, 2017, at [16]) or a defendant's failure to protect plaintiffs' personal data from being hacked by third parties (Canada, 2025).[13]

9 Both Prosser and *The Restatement* give prominence to the physical in the concept of intrusion into seclusion and mark it as quite distinct from public disclosure of informational (Prosser, op. *cit*. p. 390; Restatement of the Law (Second) Torts 1977, § 652). But Prosser's intended distinction may have been between publicity and non-publicity, see Prosser, *id*., p. 390. The confusion was compounded by subsequent influential readings of the Prosser's distinction as between 'physical' and 'informational' privacy, see, *e.g*., Post, above, n. 1.

10 Examined forward.

11 Examined forward.

12 The case has been interpreted as protecting privacy interests beyond informational privacy, Moreham, N. Liability for listening: why phone hacking is an actionable breach of privacy. *Journal of Media Law*, London, v. 7, p. 155-163, 2015.

13 There have been some claims under the tort of intrusion for unlawful strip searches. However, it is significant that the defendants in such cases are always public authorities, and even then the courts tend to focus on interests in

In New Zealand, the courts developed a general tort of intrusion in the case of *C v Holland* (New Zealand, 2012). As the case involved a surreptitious video recording of the plaintiff showering, the interest at stake obviously has something of a physical nature. However, it is not clear why the development of the law should be seen as protecting physical privacy, or something beyond informational privacy (Moreham, 2014, p. 373). It could be argued that the interests at stake, and which the law stepped in to protect were as much about informational privacy. The defendant after all installed a digital camera in the ceiling directly above the shower area and set it up to record the plaintiff when she used the shower. He further downloaded footage of the plaintiff showering from the camera, saved it to his external hard drive, and 'titled' the files with the plaintiff's nickname. Even though the defendant tried to keep the information secret, when the defendant's housemate later borrowed the defendant's computer, stumbled upon the file in question, and clicked on it, he understood it as a violation of the plaintiff's privacy.[14]

Since its judicial invention, the tort of intrusion into seclusion in New Zealand has been limited in its application to cases involving private information, for example, in relation to a surveillance camera that the defendant had trained on an area just outside the plaintiff's home (New Zealand, 2014),[15] or when a defendant accessed files on the plaintiff's computer and shared them with third persons (New Zealand, 2015).[16] Meanwhile, claims that are limited to physical space or sensory perception, without the recording or storing of information, tend to fail under the intrusion tort.[17]

Privacy scholarship has struggled to clearly identify the form of privacy involved in such cases or to explain why they might involve a unified concept of privacy. The distinction between physical and informational privacy in an action-focused approach remains ambiguous. Defining physical privacy as sensory does not provide much clarity, as informational privacy also involves sensory perception, such as when X sees Y and immediately takes a photograph of her. Similarly, defining physical

informational privacy. See, Canada. *Superior Court of Justice. Farrell v. Attorney General of Canada*, 2023 ONSC 1474 (CanLII), decided on Mar. 3, 2023. Available at: https://canlii.ca/t/jvxl2. Access on: Jan. 23, 2025.

14 The court in C v Holland, moreover, noted that '[p]rivacy concerns are undoubtedly increasing with technological advances, including prying technology through, for example, the home computer.' New Zealand. High Court. *C v. Holland*, [2012] NZHC 2155, Judge: Whata J, decided on Aug. 24, 2012. at [86].

15 Although the claim was rejected because the plaintiff did not meet the objective criteria, see below, VII.

16 Although again the claimed failed on New Zealand's high offensiveness test.

17 Such as in Grant v Everett [2022] NZHC 3109, where it was held that the defendant rummaging through the plaintiff's personal belongings did not amount to 'intrusion' under the tort. See: New Zealand. High Court. *Grant v. Everett*, CIV-2021-442-000015, [2022] NZHC 3109, Judge: Grice J, decided on Nov. 25, 2022.

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privacy as relating to anything of a physical nature includes anything recorded on video or photograph, offering little further guidance. The numerous action-based commonalities between both forms of privacy lead to a conceptual equivalence in the theory, complicating the distinction further.

Moreover, what exactly is meant by the unity of the distinction based on 'access' to individuals, or on the dignity or autonomy of the individual? The dominance of action theory among privacy scholars has led to some resistance against this line of analysis. However, these concepts alone tell us little about the nature of the right to privacy, how it arises in communication, and the functional relevance of such normative expectations to society. For further clarity, it is necessary to move away from an action perspective and instead turn to Luhmann's communication theory.

3. Luhmann's communication theory

From the mid-1980s onwards, with the development of his social systems theory, Luhmann criticized the dominance of action theory in social theory and its portrayal as a comprehensive explanation of societal operations. He argued that action theory's prevalence was primarily due to its simplicity as a unit of societal self-description (Luhmann, 1995, p. 166.) but that it failed to adequately capture the complex relationship between action and society (Luhmann, 1995, p. 137). Action theory, according to Luhmann, focused erroneously on debating the validity of various accounts of action, while neglecting deeper sociological questions about societal progress and the extent to which human action can ever exercise control over the future.

This does not imply that Luhmann completely dismissed action theory. He acknowledged that both action and communication, and their constant cooperation, are essential for society (Luhmann, 1995, p. 169). Moreover, both must be recognized as complementary aspects of social theorizing (Stichweh, 2000, p. 6). However, in his critique of action theory as an all-encompassing method, Luhmann proposed an alternative emphasis on communication as the elementary unit of society. This, of course, is relatively well-known in so far as it relates to Luhmann's theory of societal autopoiesis (*i.e.*, that the recursive connection of units of communication constitutes society). However, what is less known, and what is important to privacy, is Luhmann's theory about the mechanics of each unit of communication. Drawing upon the insights of

earlier communication theories, and particularly that of Shannon and Weaver's mathematical model of communication (Shannon; Weaver, 1949, p. 9),[18] and Bateson and Ruesch's cybernetic concept of information (Ruesch; Bateson, 1951; Bateson, 1971, p. 465)[19] Luhmann viewed a single communication as a combination of three selections: 'the selection of information, the selection of the utterance of this information, and selective understanding or misunderstanding of this utterance and its information (Luhmann, 2002, p. 157)[20].

While these selections should not be viewed as action, some reference to action is necessary to explain this.[21] Every communication starts with selecting information, though this does not always happen in a specific order. Information is always chosen from a range of possibilities. For example, you might notice the weather, the price of groceries, or the color of the President's football shirt, but it only becomes information when you pick it out from these possibilities. Information can therefore be thought of as a digitalization of perception.

After selecting information, the next step is to choose how to express it. The person who has the information must decide on a way to share it. For example, if someone wants to share the news, 'The President has just announced his resignation,' they need to choose how to express it. They might send a text message, print it in a newspaper, shout it out loud, or whisper it to someone.

It is important to understand that expression here means 'to show or make known' in some way, not publishing or disclosing it (Oxford English Dictionary, 2010). For communication to happen, both the selection of information and the way it is expressed must be clear. This leads to the third part of communication: understanding.

Understanding information and how it's expressed is the most counter-intuitive parts of communication. If someone says, 'The President has just announced his resignation,' we might think everyone who hears it will understand it right away. However,

18 'The fundamental problem of communication is that of reproducing at one point either exactly or approximately a message selected at another point'. Shannon, C. E.; Weaver, W. *A Mathematical Theory of Communication*. Champaign: University of Illinois Press, 1949. p. 31.

19 On the influence of both Shannan and Weaver's and Bateson and Reusch's communication theory for Luhmann, see: Stitchweh, R. Systems theory as an alternative to action theory? The rise of 'communication' as a theoretical option. *Acta Sociologica*, [*s. l.*], v. 43, p. 5-13, 2000. p. 8.

20 Luhmann, N. *What is communication*?, Theories of Distinction, Stanford: Stanford University Press, 2002, p. 157; see also, Luhmann, N. *Social Systems*. Stanford: Stanford University Press, 1995. p. 140.

21 Necessary, because 'communication cannot be observed directly, only inferred' (*id.*, p. 164). Luhmann does not completely reject the use of action as a unit of society's self-description.

understanding always depends on who is receiving the information and the context in which it is shared. For example, the news about the President's resignation would be understood differently if it appeared on the front page of a national newspaper, in a WhatsApp group chat among friends, or if it were whispered to the Vice-President during a meeting with foreign dignitaries. Understanding (and misunderstanding) information involves recognizing the difference between the content of the message and the reasons for sharing it (Luhmann, 1995, p. 140).

According to Luhmann, the unity of these three selections (information, expression, and understanding) constitutes communication (Luhmann, 1995, p. 160). While it is easy to think of these parts as separate actions between individuals, for Luhmann the selections are determined as much by the structure of communication itself (Stichweh, 2000, p. 10).

These parts should not be seen as independent building blocks that can exist on their own. Instead, they only exist within communication (Luhmann, 1995, p. 160). The field of selection can only be constituted through communication itself. 'There is no information outside of communication; there is no utterance outside of communication; there is no understanding outside of communication' (Luhmann, 1995, p. 160).

There's also a fourth part of communication to consider: whether the communication is accepted or rejected. But before we dive into that, let's review some key points of Luhmann's communication theory that are important for understanding privacy.

First, it is crucial to distinguish communication from action. Communication is not the same as action, and the process of communication should not be seen as a series of actions (Luhmann, 1995, p. 164.).[22] Thus, one person making a certain action, for example covering their face, is not by itself communication. Nor is it communication if one action is met with another, for example, one person covers their face, and another turns their head to look.

Secondly, it is important to distinguish communication from perception. Perception is a psychological event that is separate from communication. It is a 'psychological event without communicative existence,' and it is not 'connectable' in the way that communication is (Luhmann, 1995 p. 164). One cannot confirm, refute, question, or

22 Moreover, in contrast to action, communication is asymmetrical and 'bidirectional' Stichweh, R. Systems theory as an alternative to action theory? The rise of 'communication' as a theoretical option. *Acta Sociologica*, [*s.l.*], v. 43, p. 5-13, 2000.

respond to what someone else perceives. It remains locked up within consciousness and does not automatically register in the communication system (Luhmann, 1995, p. 164).[23]

Finally, communication does not involve transmission in the sense of something being passed from sender to receiver. In Shannon and Weaver's communication model 'the function of the transmitter is to encode, and that of the receiver to decode, the message' (Shannon; Weaver, 1949, p. 34). Understanding information involves reconstructing the signal from the noise.[24] Unlike, traditional ideas of communication, which focused too much on signals or the act of speaking, from this perspective, information is never the same for both the sender and receiver (Shannon; Weaver, 1949, p. 34).

Luhmann's communication theory identifies communication as a complex process involving the selection of information, its expression, and its understanding. These insights are helpful for understanding privacy, as they can break down how expectations of privacy arise within the intricate dynamics of communication, the clear distinction between physical and informational privacy, and how the acceptance or rejection of communication plays a key role in claims to the right of informational privacy.

4. A communication theory of privacy

In applying this approach to the concept of privacy, the distinction between physical and informational privacy takes on a new importance. Informational privacy always involves *each* of the three selections that constitute communication from Luhmann's sociological perspective. In other words, informational privacy always involves the selection of information, the selection of behaviour that gives expression to that information, and the selective understanding of the information and its expression as a violation of privacy.

23 Moreover, communication must also be distinguished from intentionality. One can mean what one says, but it is not necessarily so. This contingency is key to communication, as the 'understander must presuppose self-reference in the communicator in order to use this self-reference to separate information from utterance.' (Luhmann, 1995, 151). Moreover, communication is possible without any intention of utterance, such as when someone blurts something out, laughs when they should not etc. However, the utterance must at least be interpretable as a selection in the sense of a 'self-limitation within a situation of perceived double-contingency.' This requires something more than observed behaviour.

24 This is examined in terms of 'the entropy of the message relative to the signal' (Shannon; Weaver, 1949, p. 20).

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Physical privacy can be distinguished on the basis that it does not involve these selections. In cases of physical privacy, at least one–and most likely all–of the selections involved in communication will be missing. What is objected to in cases of physical privacy is intrusion by perception, seeing, hearing, touching, etc. What is objected to in cases of informational privacy is not simply the intrusion by perception, but rather *intrusion by communication*. Furthermore, the two forms of privacy are not unified by concepts of control or access, for example, as they are unsuitable to the complexity of communication.

Thus, to take the classic example of the bald head (Gavison, 1980, p. 430), we can say that if Y looks into a room and sees, amongst other things, X's bald head, it may be an intrusion upon X's *physical* privacy. Of course, for a normative claim to privacy to arise in this situation, X must begin to communicate, claim that his or her privacy has been violated etc., but the intrusion itself does not constitute communication. It does not involve unity of the selections. There is no clear selection of information, or mode of expression to understand. However, if Y not only perceives X's bald head, but then decides to write about it, talk about it, photograph it etc., it engages *informational* privacy.

One of the most important elements of communication in this distinction is *understanding*. The full extent of this will be explored further below, but at the most basic level, it can be said that there must be understanding in order for there to be an intrusion upon informational privacy. If Y writes about X's bald head in a code that only Y can understand, then there is no communication, and there obviously is no engagement of the right of informational privacy. This is not to base a right of informational privacy on concepts of publication or disclosure. These traditional action-based concepts are not accurate markers of informational privacy. There is communication, for example, if someone stumbles upon a video file that Y has surreptitiously made of X.

While Luhmann's communication theory approach therefore categorically distinguishes informational privacy, it nonetheless recognizes it as a broad and inclusive form of privacy. It may not include pure physical privacy interests, such as when Y comes into X's physical proximity and sees or feels X, but it would include, for example, where Y both sees and photographs X's physical appearance. Communication technology always makes the selection of private information more obvious in this way–it digitizes and records the intruder's selection of information and expands it in spatial and temporal dimensions. And as so much of our lives are now digitalized and recorded as information by communication technology, intrusions into physical privacy

increasingly register also as intrusions into informational privacy.[25] The development of communication technology automatically increases normative expectations of informational privacy, and as it does, it accelerates the scope and importance of informational privacy in society.[26]

Furthermore, from this perspective, information is not something that one acquires (Bloustein, 1964, p. 184; Gavison, 1980, p. 430),[27] or gains access to (Gavison, 1980, p. 430). Nor can informational privacy be identified as the extent to which we are known to others (Gavison, 1980, p. 423), or as the condition of having control over information about oneself (Fried, 1970, p. 141; Beardsley, 1971, p. 65). From this perspective, there may be an intrusion upon informational privacy, for example, where a reporter asks a public figure if rumors are true that they are having an extramarital affair, even if the public figure refuses to answer. Here, even refusing to answer is communication.

There may even be an intrusion upon informational privacy where, as in Scanlon's example, someone asks prying questions of another at a party, even if no information is revealed (Scanlon, 1975, p. 317). This could never be adequately explained by an action theory account of informational privacy, as nothing has been given up, or transmitted, by the private individual in this situation. But, from a communication theory approach it makes perfect sense. Intrusion into informational privacy involves the *selection* of information, and its actualization as a theme in the communication system, not the physical reality of the content it relates to. As a right, informational privacy relates to the medium, not matter;[28] it is a right of communication about oneself, and more than any other human right, a 'communicative right'.

There are, admittedly, potential criticisms of this communication theory of privacy and its categorical distinction between physical and informational privacy. Such a concept of informational privacy would not include invasions of personal privacy which do not involve the obvious selection of information, where intrusion is made

25 See, *e.g.*, Citron, D. K. Sexual Privacy. *Yale Law Journal*, New Haven, v. 128, n. 7, p. 1870-1960, 2019. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3232632. Access on: Jan. 22, 2025.

26 See Baghai, K. Privacy as a human right: a sociological theory. *Sociology*, v. 46, n. 5, p. 951-965, 2012. The theory is generally well recognized. It is as old as Westin's analysis of privacy (Westin, A. F. *Privacy and freedom*. New York: Atheneum, 1967), long before the internet. For a more recent account, see Nissenbaum, H. *Privacy in context*: technology, policy, and the integrity of social life. Stanford: Stanford University Press, 2009.

27 Bloustein, above, n. 4, p. 184; Gavison, *id.*, p. 430.

28 McLuhan coined the phrase 'the medium is the message' from a similar communication theory perspective. McLuhan, M. *Understanding media: the extensions of man*. New York: McGraw-Hill, 1964. p. 7.

only, for example, by physical proximity, by seeing or by touching. It does not, for example, include as informational privacy the classic Peeping Tom scenario–that is, without the use of technology recording the selection of the private information. While it may be argued that information is selected in the Peeping Tom scenario when the peeper covertly sets up to spy on another, they generally hide to do so, and thereby seek to exclude themselves from communication. Most importantly, even if they are caught and it does trigger further communication, it is communication about the peeping itself, and not the private information–not a video, for example, of the victim undressing. The perception of the Peeping Tom is not evident in the way that information is,[29] and thus cannot be communicated. That is the very basis of the distinction proposed here.

However, even if this approach distinguishes between informational and physical privacy, and rejects any conceptual equivalence between them, it nonetheless recognises that there can be an intrusion into both physical privacy and informational privacy at the same time. Y sees and photographs X bald head at the same time, for example. It recognises that with developments in communication technology, this may be increasingly the case.

Moreover, this approach does not claim that informational privacy is the only form of privacy worth talking about, or that it operates as a concept that 'isolates the distinctive meaning of privacy'.[30] Obviously, there are still intrusions into privacy that do not occur in communication (one person's touching of another without consent, for example), but such violations are less common today than they have ever been–not simply because of the deterrence of criminal laws governing such behavior, but because society is increasingly recorded by communication technology. What has changed in recent years is the greater need for informational privacy, and it is this form of privacy that has seen the most dramatic development in society.

Ultimately, what Luhmann's communication theory offers privacy scholarship, to use Gavison's words, is a distinct and coherent concept of privacy, which can 'help us in thinking about problems' (Gavison, 1980, p. 422). It is distinct because we can say with certainty that informational privacy involves not just perception, but also

29 As Scanlon says, 'vision is not selective'. Scanlon, T. Thomson on privacy. Philosophy and public affairs. *Blackwell Publishing*, v. 4, n. 4, p. 315-322, 1975.

30 As Parent, for example, claimed for his concept of privacy as undocumented personal information. Parent, W. A. Recent work on the concept of privacy. *American Philosophical Quarterly*, [*s.l.*]. v. 20, p. 341, 1983.

communication. It is coherent in that communication is always evident in the facts, such as in making a digital recording, a photograph, or downloading or saving digital files, and the factual understanding of such expressions of information.

5. Subjective expectations of informational privacy and the function of law

Everything that has been discussed so far leads to the conclusion that, while informational privacy does not mean that it allows individuals to control communication, it does allow individuals to decide what information about themselves is shared, with whom, and under what circumstances. It is essentially an individual right *of* communication.

This aligns with the functional analysis of the right to privacy. According to the broader functional analysis of human rights, as individuals become vulnerable with the totalizing tendencies of differentiated social systems, human rights develop to allow individuals some variability in how they present themselves from one social system to another (Verschraegen, 2002, p. 269), and to encourage individuals to participate freely in different function systems (Verschraegen, 2002, p. 270).

While this approach has seen limited direct application to the right to privacy, where it has been so applied, the development of privacy rights is seen as essential to safeguard against 'totalitarian tendencies' of the differentiated functional systems (Baghai, 2012, p. 957). From this perspective, privacy conflicts arise when an event in one social system becomes relevant, without justification, to communication in another system, leading to disputes over the 'functional relevance of communication' (Baghai, 2012, p. 962).

Certainly, one can see this in practice. The celebrity may advocate against drug use in the media, for example, but have a right to privacy about her treatment in the health system for drug addiction.[31] The Formula One boss may engage in sex games with groups of prostitutes, but expect that he should not have to present that side of

31 See, for example, the English privacy case of *Campbell v MGN Ltd* [2004] 2 AC 457. United Kingdom. House of Lords. *Campbell (Appellant) v. MGN Limited (Respondents)*, [2005] UKHL 61, decided on Oct. 20, 2005.

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himself in business or in the media.[32] This kind of privacy clearly strengthens the functionally differentiated structure of society. At the most basic level, it encourages individuals to talk about themselves, and therefore can be said to ensure the autopoiesis of society itself (Luhmann, 1995, p. 270).

However, while this functional analysis of the right to privacy is useful, it remains a somewhat blunt instrument on its own, missing crucial details about the normative foundations of privacy rights. To fully appreciate the significance of subjective expectations of privacy and the challenges they pose to the legal system, it is essential to continue analysis through the lens of Luhmann's communication theory.

To recap, communication consists of three selections: information, expression, and understanding. However, Luhmann also introduces a fourth selection: the 'acceptance or rejection of the specific meaning that was communicated' (Luhmann, 1995, 147). This fourth selection is crucial in any claim to the right of informational privacy. When normative expectations of informational privacy are at play, the communication in question is rejected as a breach of privacy. For instance, if someone discovers a camera pointed at their shower area, investigates, and complains, they are rejecting that communication as an invasion of privacy. And by rejecting the communication as 'private', and refusing to accept the intrusion, the individual not only asserts their own privacy rights, but their own communication.

This, in turn, highlights the importance of *understanding* in privacy communication. As privacy scholar Eric Barendt has noted, in 'many cases a claimant will have had no actual expectations at the time his privacy was infringed' (Barendt, 2016). However, what the claimant will have had, at some point before an expectation of privacy arises, is an *understanding* of privacy. From the perspective of Luhmann's communication theory, this understanding involves the ability to distinguish between the selection of information and its mode of expression. It is from this aspect of the communication process that a normative expectation of privacy must emerge. The expectation of privacy only comes to fruition, one might say, in the *understanding* part of communication.

In practice, this understanding will usually be the understanding of the individual subject in question. For example, the subject discovers the surreptitious videos

32 See, for example, the English privacy case of *Mosley v Newsgroup Newspapers Ltd.* [2008] EWHC 1777. United Kingdom. High Court of Justice, Queen's Bench Division. *Mosley v. News Group Newspapers Ltd*, [2008] EWHC 1777 (QB), decided on July 24, 2008.

of her showering, and understands it to be a breach of privacy; the retired opera singer discovers she has been recorded singing at home and understands it as a breach of privacy. Of course, it is not always the subject–it could be anyone who understands the selection of information and its expression as a breach privacy. For example, the police surreptitiously monitor the individual and the public understands it as a breach of privacy and protests against the practice (Parker, 1974, p. 281).[33]

However, what is remarkable about the right of informational privacy is that the subject's understanding can be so pivotal, and moreover that the subject can choose to understand the information as private even if the information is *true*.[34] For example, the celebrity *is* receiving treatment for drug addiction; the businessman *does* engage in sex with prostitutes in his spare time etc. Yet, the subject may understand such communication as private and, in many parts of world society, be confident in rejecting it on that basis, and may appeal to the legal system for enforcement of the expectation.[35]

This importance of the subjective expectation of privacy has already been noted by privacy scholars adopting an action-focused approach (Hughes, 2012). In focusing on action and ontology, however, they invariably trace this to abstract values of autonomy and dignity of the individual. From the perspective of both Luhmann's functional analysis *and* communication theory, what is important instead are the insights it reveals into the role of the right to informational privacy in functional differentiation and communication in general. Moreover, what is particularly interesting from this perspective, and which has received no attention at all so far from scholars, are the implications for the legal system, the questions this raises about how law as an objective social structure can stabilize such subjective expectations of privacy, and the paradox that this involves for the legal system.

In Luhmann's functional analysis of law, the legal system stabilizes expectations by generalizing them on temporal, social, and material grounds (Luhmann, 1985, p. 77). All are vital for the function of law in society, but when it comes to the right of informational privacy, the most important is the generalization of expectations in the social dimension, *i.e.*, when third party adjudicators also expect a right of

33 Gives the example of the public understands ground control's monitoring of the astronaut's body in the space capsule as a breach of privacy.

34 In distinction, for example, to the right of reputation that is protected by defamation.

35 Different cultures of course have different ideas of privacy, see, Van Der Geest, S. Privacy from an anthropological perspective. *In*: Van Der Sloot, B.; De Groot, A. (eds.). *The handbook of privacy studies*. Amsterdam: Amsterdam University Press, 2018. p. 413-443.

informational privacy in those circumstances. Although normative expectations of informational privacy are highly subjective, not all such expectations can find stabilization in law. Law must be selective in its recognition of normative expectations of privacy.[36] In order to find any stabilization in law, subjective expectations of privacy must meet an objective standard.

This balance between objective and subjective expectations is well reflected in privacy law. One the one hand, for example, it is well-recognised in the law, as a matter of principle, that 'an individual's personal autonomy makes him–should make him–master of all those facts about his own identity',[37] that informational privacy is something that an individual is 'entitled to decide for herself' (United Kingdom, 2005, at [53]),[38] that it involves a 'subjective expectation of privacy' (Canada, 2012, at [59]) 'an irreducible sphere of personal autonomy wherein individuals may make inherently private choices' (Canada, 1997, at [66]), that it is a 'right of the individual to determine for himself when, how and to what extent he will release personal information about himself' (Canada, 1990, at [27]), that aspects of a claimant's life should be able to remain private if they so wish (New Zealand, 2004, at [239]). To achieve this, the courts often examine subjective factors such as 'the attributes of the claimant' (United Kingdom, 2008a, at [36]),[39] 'the absence of consent',[40] or the 'effect on the claimant' (United Kingdom, 2008a; Canada, 2012, at [81]).

36 It could not differentiate itself as a system if it did not, Luhmann, N. *A sociological theory of law*. London: Routledge, 1985, p. 48; Stichweh, R. 'Niklas Luhmann. *In:* Ritzer, G.; Stepinsky, J. (eds.). *The Wiley-Blackwell Companion to Major Social Theorists*: Classical Social Theorists, Volume I. Oxford: Wiley-Blackwell, 2011. p. 20.

37 As in English law, United Kingdom. High Court of Justice. R (Wood) v. Commissioner of Police of the Metropolis, [2010] 1 WLR, at [21].

38 In the same case, Lady Hale stated the focus of the tort is on 'the protection of the individual's informational autonomy' *Ibid*, at [134]. In another English case, *Terry* v *Persons Unknown*, Tudgendhat J put it thus: '[r]espect for the dignity and autonomy of the individuals concerned requires that, if practicable, they should speak for themselves.' United Kingdom. High Court of Justice, Queen's Bench Division. *Terry v. Persons Unknown*, [2010] EWHC 119, decided on Jan. 30, 2010, at [66].

39 Children are particularly relevant expectants of informational privacy. Communication is complex, and understanding it requires both some faculty and experience. A child may not fully understand what it means to have their picture in a national newspaper, for example. However, where it can be supposed that the subject has the capacity to understand the communication, *i.e.*, to make the distinction between its selection as information and mode of expression, their understanding will be relevant to whether there is a 'reasonable expectation' of privacy. In *Murray*, the England and Wales Court of Appeal accepted as a principle that a child should be treated differently from that an adult claimant, on the basis that a child 'has no obvious sensitivity to any invasion of privacy which does not involve some direct physical intrusion into his personal space.' (op. cit., at [38]). For this reason, the courts are willing to 'step in' to protect children who are too young to appreciate informational privacy, or will allow parents or guardians to bring privacy cases on behalf of children, see also. UNITED KINGDOM. Court of Appeal. *Weller and others v. Associated Newspapers Ltd*, [2015] EWCA Civ 1176, decided on Nov. 20, 2015.

40 See *e.g.*, the English case of: United Kingdom. Court of Appeal. *Murray v. Express Newspapers plc and another*, [2008] EWCA Civ 446, at [36], decided on May 7, 2008.; United Kingdom. High Court of Justice, *Chancery Division. Richard v. BBC*, [2018] EWHC 1837 (Ch), at [231], decided on Jul. 18, 2018.; United Kingdom. High Court of Justice. *HRH*

On the other hand, this must be counterbalanced with an objective test. In the American Restatement of Torts, for example, the intrusion must be 'highly offensive to a reasonable person' (American Law Institute, 1965).[41] Similarly, in Ontario and New Zealand, a claim to informational privacy is only actionable if 'a reasonable person would regard the invasion as highly offensive' (Canada, 2012, at [59]).[42] In England and Wales, the 'touchstone of private life is whether in respect of the disclosed facts the person in question had a *reasonable expectation of privacy*'.[43]

Courts test this through objective factors, such as the place at which the intrusion took place, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, or the circumstances in which the 'information came into the hands of the publisher' (Canada, 2012, at [59]). Crucially for a functional analysis of privacy, courts across multiple jurisdictions operate under a presumption that the claimant meets the objective standard when the privacy expectation relates to a person's health, finances, political opinions, religious commitment, and personal communications.[44] In other words, there is an objective presumption of privacy regarding communications within these key societal domains.

It should be noted, however, that the law does not usually promote an objective standard on such a principled basis in relation to other individual rights. It does not figure as a stand-alone principle, for example, in adjudication of the right to reputation in defamation claims, or the right to physical privacy in trespass – even though it will surely be an essential question in every adjudication of such whether the claimant's expectation of the right was 'reasonable' under the circumstances. Moreover, the

Sussex v. Associated Newspapers, at [90], decided on May 1, 2020.; or the Canadian case of Canada. Supreme Court. *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 SCR 591, at [23], decided on Apr. 9, 1998.

41 See also United States. Supreme Court. Katz v. United States, 389 U.S. 347, decided on December 18, 1967.

42 In Ontario, the publicity tort depends on 'that a reasonable person would regard the invasion as highly offensive causing distress, humiliation, or anguish.' (Canada, 2017, at [15]), while intrusion into seclusion depends on 'offensive or objectionable to a reasonable person' (Canada, 2012, at [20]). In New Zealand, the publicity tort requires 'highly offensive to an objective reasonable person' (New Zealand, 2004, at [117]); the intrusion tort requires, 'highly offensive to the reasonable person'. (New Zealand, 2012, at [94]).

43 As per Lord Nicholls (United Kingdom, 2005, at [21]) emphasis added. See also, *ibid*, at [99] (the critical question for courts is 'what a reasonable person of ordinary sensibilities' would feel if she was placed in the same position as the claimant'). Similarly, under statute in British Columbia, Newfoundland and Saskatchewan, the 'nature and degree' of privacy to which a person is entitled is that which is 'reasonable in the circumstances, Privacy Act [RSBC 1996] s. 1(2); Personal Information Protection Act [SBC 2003] CHAPTER 63, s. 14.; Privacy Act [RSNL 1990], s. 3(2); The Privacy Act (RSS 1978) s. 4(1).

44 See, Canada. Ontario Court of Appeal. Jones v. Tsige, 2012 ONCA 32, decided on Jan. 18, 2012. at [72]; See also, United Kingdom. Supreme Court. Bloomberg LP (Appellant) v ZXC (Respondent), [2022] UKSC 5, decided on 2022, at [52]. See also, the High Court of Australia decision in Australia. High Court of Australia. *Australian Broadcasting Corp. v Lenah Game Meats Pty Ltd*, 208 CLR 199 (HCA), 2001.

formula itself provides little guidance and only begs the question of what is the privacy which may be the subject of a reasonable expectation of privacy.[45] However, what the reasonable person test achieves in privacy law is a second-order objective bulwark against the highly subjective normative basis of the right of informational privacy. It provides an objective standard to counterbalance subjective expectations of informational privacy.

Nonetheless, the striking the balance is becoming increasingly difficult for the courts to maintain. For example, in the case of *JR38* (United Kingdom, 2015b),[46] the UK Supreme Court was divided on this issue. The claim arose from CCTV images of the 15-year-old claimant engaging in riots on a public street, which were published in a local newspaper. The court was split on how to balance the subjective and objective expectations of privacy. Lord Kerr questioned why the reasonable expectation of privacy should be given such 'unique and overweening' status in determining whether the right to privacy had been engaged and argued that this emphasis on the objective test interfered with the substance of the right (United Kingdom, 2015b, at [56]-[61]). However, the majority disagreed, holding that the subjective expectation of privacy could not override the question of whether the expectation was reasonable. They considered the nature of the claimant's activity, ultimately concluding that the criminal nature of his actions was not an aspect of his private life that he was entitled to keep private (United Kingdom, 2013, at [21]).

In New Zealand, the additional requirement of an objective highly offensive test has been contentious. Some argue that it tips the scales too much in favor of the objective standard. In a separate opinion in *Hosking v Runting*, Tipping J questioned the necessity of the highly offensive test for the privacy tort, suggesting that both tests effectively perform the same function (New Zealand, 2004, at [255-6]).[47]

45 See, United Kingdom. Supreme Court. *R (on the application of Catt) v Commissioner of Police of the Metropolis*, Judgment given on 4 March 2015 at [4]. On the inherent confusion arising from the judgment, and the problems of such a prominent objective standard, in general, see Barendt, E. A reasonable expectation of privacy? A coherent or redundant concept? *In*: Kenyon, A. (ed.). *Privacy*: A conceptual analysis. Cambridge: Cambridge University Press, 2016.

46 This was a claim against the state under Article 8 of the Human Rights Act 1998, but it provided a clear insight into how the courts also judge private claims for informational privacy.

47 The point has been subsequently echoed by the House of Lords. In Campbell (United Kingdom, 2005), the House of Lords held that once a court has considered whether there is 'reasonable expectation of privacy' under the circumstances, 'there is no need to go on and ask whether it would be highly offensive' (at [96]). It has also been echoed by privacy law scholars, Hunt, C. New Zealand's new privacy tort in comparative perspective. *Oxford University Commonwealth Law Journal*, v. 13, n. 1, p. 157-163, set. 2013. Hunt, C. Breach of privacy as a tort. *New Zealand Law Journal*, n. 1, p. 286, 2014.; Moreham, N. Beyond Information: Physical Privacy in English Law. *Cambridge Law Journal*, Cambridge, v. 73, p. 350-367, 2014.

In *Hyndman v Walker* (New Zealand, 2021), the New Zealand Court of Appeal reconsidered these criticisms and found merit in them (New Zealand, 2021, at [73]). However, the court did not see the case as suitable for abandoning the extra objective test, expressing unease about relying solely on the reasonable expectation of privacy test to strike the appropriate balance (New Zealand, 2021, at [74]).

In Canada, particularly Ontario, the tension between subjective and objective elements has been prominent in large class action suits for intrusion or public disclosure of private facts. In such cases, it is impractical for courts to examine the effect of an intrusion on each plaintiff or to analyze the subjective expectations of privacy for each individual. Consequently, the objective test tends to dominate in class action suits. For instance, in *Demme* (Canada, 2022), [48] the Ontario Superior Court of Justice noted that the significance of the intrusion should be assessed individually, not collectively (Canada, 2022, at [24]). However, given the impracticality of doing so for thousands of plaintiffs, the court held that the fleeting nature of the intrusions and the fact that the intruder was not after the information itself meant there was no discernible effect on the patients (Canada, 2022, at [27]).[49]

In summary, the courts must carefully navigate interplay between subjective and objective expectations of privacy to ensure that the protection of privacy not only gives individuals the confidence to communicate in society but also that individual expectations of privacy are aligned with societal norms and that the law selects certain expectations in this regard.

The tension between the two represents something of a paradox for the law to unfold. As Luhmann and others have pointed out, paradoxes are inherent to the legal system and the creative use of paradoxes allows the law to adapt and evolve (Luhmann, 2004, p. 182).[50]

48 *Stewart v Demme*, 2022 ONSC 1790, which involved an action for the *Jones v Tsige* (Canada, 2012) tort of intrusion into seclusion.

49 Similarly, in Canada. Ontario Court of Appeal. *Rina Del Giudice and Daniel Wood v. Paige Thompson, et al.*, case no. 41202, dismissed on 19 September 2024., the defendants were subject to a class action suit for intrusion into seclusion because they had failed to safeguard the plaintiffs' data from a third party hacked the data, and then aggregated and developed it into algorithms for marketing purpose. The Ontario Court of Appeal held there was 'nothing into which' the defendant could be said to have intruded, and that it 'is not highly offensive and could not be considered humiliating by a reasonable person.' [35]. A better way to deal with such claims may be to separate from any question of 'reasonableness' and decide them on whether there is any 'misuse' of information to speak of, as the English courts do, see, for example, United Kingdom. High Court of Justice. *Smith and others v TalkTalk Telecom Group Plc*, [2022] EWHC 1311, decided on 2022.

50 See also, Luhmann, N. The third question: The creative use of paradoxes in law and legal history. *Journal of Law and Society*, v. 15, p. 157, 1988.; Nobles, R.; Schiff, D. *A Sociology of Jurisprudence*. Oxford: Hart, 2006; King, M.; Thornhill, C. *Niklas Luhmann's theory of politics and law*. [*s.l.*]: Palgrave MacMillan, 2003.

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However, the balance between subjective and objective expectations of privacy represents a very special example of the paradox of maintaining the internal consistency of law while adapting to external changes and societal stimuli. The unity of the distinction between subjective and objective expectations of privacy represents the blind spot of privacy law. But it is along this axis that privacy law will continue to develop; the development of the privacy torts in these jurisdictions will be driven forward by the judicial balancing act between the subjective and the objective. Thus, privacy law scholars must be willing to reflect on the unity of the distinction. If there is validity to the functional analysis of the right to informational privacy as a communicative right – and the above analysis certainly lends support to that functional analysis from another perspective – the courts in each jurisdiction must get this balance right in developing the law. The communication theory of privacy outlined above suggests that subjective expectations of privacy are of fundamental importance in encouraging individuals to talk about themselves, and this, in turn, requires the law to select subjective expectations, to stabilize them in the social dimension. Only, therefore can individuals be encouraged to talk about themselves.

6. Conclusion

One might argue that the development of the law to stabilize such highly subjective expectations somewhat undermines Luhmann's theory about the exteriority of individuals from communication and their 'exclusion' in a functionally differentiated society (Luhmann, 2004, p. 487). However, the implications of law's stabilization of these subjective expectations align more closely with his social systems theory than they contradict it. The evolution of the right to privacy, and the law's role in stabilizing these expectations, seems to go further than any other human right in encouraging individuals to discuss themselves and participate in functionally differentiated social systems. If anything, this analysis underscores the tensions in managing the paradox between the individual and society, and between the inclusion and exclusion of the individual in a functionally differentiated society.

This article does not aim to critique Luhmann's social systems theory. Instead, it seeks to develop the analysis of the right to privacy by employing Luhmann's theory of communication. While still theoretical, this approach is grounded in relatively trivial observations that are well established in communication theory and are difficult to

deny on any logical basis. Communication, by necessity, comprises the selections that Luhmann identifies. Perception of physical reality does not. There is no denying this, yet the implications for the concept of the right to privacy and the distinction between physical and informational privacy have thus far been overlooked.

Using Luhmann's communication theory as a method for analyzing the right to privacy provides a new perspective on the distinction and relative complexity of normative expectations of informational privacy in communication, and the reflection of these expectations in the judicial development of private law across common law jurisdictions. This analysis has revealed, in detail and from a novel perspective, the highly subjective nature of expectations, the courts' achievements in developing the law to stabilize such subjective expectations of privacy, the mechanisms they use to do so, and the challenges they will face in continuing to manage the tension between subjective expectations of informational privacy and the objective socialization of such expectations.

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