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### Coercing Privacy

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## COERCING PRIVACY

ANITA L. ALLEN\*

### INTRODUCTION

This Essay advances two propositions about a pair of complex ideas that I will call “the liberal conception of privacy” and “the liberal conception of private choice.”<sup>1</sup> Both ideas will be familiar to anyone who has followed the personal privacy debates in the United States during the past three decades.

The liberal conception of privacy is the idea that government ought to respect and protect interests in physical, informational, and proprietary privacy.<sup>2</sup> By physical privacy, I mean spatial seclusion and solitude. By informational privacy, I mean confidentiality, secrecy, data protection, and control over personal information. By proprietary privacy, I mean control over names, like-

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\* Professor, University of Pennsylvania School of Law. J.D., Harvard Law School; Ph.D., University of Michigan. I would like to thank the organizers of the conference “Reconstructing Liberalism,” sponsored by the Institute of Bill of Rights Law and the Department of Philosophy at the College of William and Mary, for inviting me to present this paper, and to my former colleagues at the Georgetown University Law Center for help with post-symposium revisions.

1. I put this economical terminology of “privacy” and “private choice” to similar use in Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461 (1987).

2. See *id.* at 464-66.

nesses, and repositories of personal identity.<sup>3</sup> The liberal conception of privacy informs popular understandings of, for example, the four invasion of privacy torts, the Fourth and Fifth Amendments of the U.S. Constitution, state confidentiality statutes, federal wiretapping legislation, and proposed genetic privacy codes.<sup>4</sup> The liberal conception of privacy overlaps considerably with the liberal conception of private property. We associate privacy with certain places and things we believe we own, such as our homes, diaries, letters, names, reputations, and body parts. At the core of the liberal conception of privacy is the notion of inaccessibility. Privacy obtains where persons and personal information are, to a degree, inaccessible to others.<sup>5</sup>

The liberal conception of private choice is the idea that government ought to promote interests in decisional privacy, chiefly by allowing individuals, families, and other nongovernmental entities to make many, though not all, of the most important decisions concerning friendship, sex, marriage, reproduction, religion, and political association.<sup>6</sup> The liberal conception of private choice informs normative understandings of the First Amendment and the substantive due process requirements of the Fourteenth Amendment.

The concept of private choice seems to presuppose that social life is divided into distinguishable public and private spheres, the private sphere being a realm of individual decisionmaking about sex, reproduction, marriage, and family. So conceived, "decisional" privacy has origins in classical antiquity. The Greeks distinguished the "public" sphere of the *polis*, or city-state, from the "private" sphere of the *oikos*, or household.<sup>7</sup> The Romans

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3. Recently, I have begun to count "proprietary" privacy as a distinct conception of privacy, along with physical, informational, and decisional privacy. See Anita L. Allen, *Genetic Privacy: Emerging Concepts and Values*, in GENETIC SECRETS: PROTECTING PRIVACY AND CONFIDENTIALITY IN THE GENETIC ERA 31 (Mark A. Rothstein ed., 1997).

4. See Allen, *supra* note 1, at 464-65.

5. Cf. William C. Hefferman, *Privacy Rights*, 29 SUFFOLK U. L. REV. 737, 740 (1995) ("[P]rivacy rights presuppose a seclusion privilege. . . . Seclusion allows for a flourishing of difference beyond that which society tolerates in public places because it cuts people off from direct contact with the outside world.").

6. See Allen, *supra* note 1, at 465-66.

7. See HANNAH ARENDT, *THE HUMAN CONDITION* 22-78 (1958) (describing Greek

similarly distinguished *res publicae*, concerns of the community, from *res privatae*, concerns of individuals and families.<sup>8</sup> The public realm was the sector in which free males with property whose economic status conveyed citizenship participated in collective governance.<sup>9</sup> By contrast, the private realm was the mundane sector of economic and biologic survival.<sup>10</sup> Wives, children, slaves, and servants populated the private sphere, living as subordinate ancillaries to male caretakers.<sup>11</sup> The classical premise that social life ought to be organized into public and private spheres survives in the post-Enlightenment Western liberal tradition, as does the premise that the private sphere consists chiefly of the home, the family, and apolitical intimate association.

Privacy, on the one hand, and private choice, on the other, restrain and obligate government. Government must leave us alone as a matter of government restraint. Government also must protect us from interference and invasion as a matter of government obligation. There is a special point to this restraint and obligation: where restrained and obligated to advance interests in privacy and private choice, government is decent and tolerant in a way liberals believe moral justice demands.

Relative to the moral justice liberals demand, privacy and private choice are indispensable, foundational goods. Neither privacy nor private choice, however, is an absolute, unqualified good. There can be too much privacy, and it can be maldistributed. Some liberal feminists take an appropriately skeptical view of traditional uses of privacy and private choice to subordinate

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and Roman conceptions of public and private).

8. Cf. JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* 3-4 (Thomas Burger trans., 1989) (describing Greek and Roman conceptions of public and private).

9. See ARENDT, *supra* note 7, at 27-78.

10. See *id.*

11. See Anita L. Allen, *Autonomy's Magic Wand: Abortion and Constitutional Interpretation*, 72 B.U. L. REV. 683, 688 (1992); Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 419, 443 (1995) [hereinafter Allen, *Proposed Equal Protection Fix*].

women.<sup>12</sup> Likewise, some liberal exponents of law and economics take an appropriately skeptical view of traditional uses of privacy to conceal adverse information unreasonably.<sup>13</sup> Characteristically, though, liberals of all stripes proclaim that a degree of privacy and private choice is beneficial to individuals and a society marked by aspirations for free, democratic, and reasonably efficient forms of life.<sup>14</sup>

It is no secret that liberals disagree among themselves about the rights of privacy and private choice that justice requires. Conservative-leaning liberals disagree with liberal-leaning liberals about whether government is obligated to permit abortion, gay marriage, drug use, and certain other forms of conduct.<sup>15</sup> Conservative liberals stress traditional notions of decency and propriety along with home and family-centered intimate lives.<sup>16</sup>

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12. See ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 54-56 (1988); Catharine A. MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 93, 101-02 (1987) [hereinafter *FEMINISM UNMODIFIED*]; Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 328-55 (David Kairys ed., 3d ed. 1990); see also Laura W. Stein, *Living With the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality*, 77 *MINN. L. REV.* 1153, 1160-70 (1993) (examining feminist critiques of privacy and equality); Cass R. Sunstein, *Feminism and Legal Theory*, 101 *HARV. L. REV.* 826, 827 (1988) (reviewing *FEMINISM UNMODIFIED*, *supra*, and noting that "the domestic sphere has been devalued and used as a major arena for the subordination of women").

13. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 55 (2d ed. 1977).

14. Cf. MICHAEL SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 94-100 (1996) (arguing that constitutional privacy is rightly valued by liberals, though for the wrong reasons); James Fleming & Linda McClain, *The Right of Privacy in Sandel's Procedural Republic*, in *DEBATING DEMOCRACY'S DISCONTENT* 248-59 (Anita L. Allen & Milton C. Regan, Jr. eds., 1998) (criticizing Sandel's attack on traditional liberal accounts of the value of privacy).

15. See, e.g., Leon E. Trakman & Sean Gatier, *Abortion Rights: Taking Responsibilities More Seriously than Dworkin*, 48 *SMU L. REV.* 585, 592 (1995); Mark V. Tushnet, *Sex, Drugs, and Rock 'n' Roll: Some Conservative Reflections on Liberal Jurisprudence*, 82 *COLUM. L. REV.* 1531, 1536-39, 1542-43 (1982) (book review); Robin West, *Universalism, Liberal Theory, and the Problem of Gay Marriage*, 25 *FLA. ST. U. L. REV.* 705, 711, 726-30 (1998).

16. See, e.g., Will Kymlicka, *Liberal Egalitarianism and Civic Republicanism: Friends or Enemies*, in *DEBATING DEMOCRACY'S DISCONTENT*, *supra* note 14, at 131, 132-48 (distinguishing conservative or "right-wing" liberals from liberal or "left-wing"

Liberal liberals stress the importance of tolerating nonconformity and responsible departures from traditional modes of private life.<sup>17</sup> All liberals agree, though, with a general principle of substantial government restraint with respect to broad dimensions of personal life.<sup>18</sup> Subscription to this rough principle of public and private is one of the ties that bind competing versions of liberalism.

The impossible ideal of a private sphere free of government and other outside interference has currency despite the reality that, in the United States and other Western democracies, virtually every aspect of nominally private life is a focus of direct or indirect government regulation. Marriage is considered a private relationship, yet governments require licenses and medical tests,<sup>19</sup> impose age limits,<sup>20</sup> and prohibit polygamous,<sup>21</sup> incestuous,<sup>22</sup> and same-sex marriages.<sup>23</sup> Procreation and childrearing are considered private, but government child abuse and neglect laws<sup>24</sup> regulate how parents must exercise their responsibilities. The liberal ideal of a private sphere can be no more than an ideal of ordinary people, living under conditions of democratic self-government, empowered to make choices about their own lives that are relatively free of the most direct forms of governmental interference and constraint.

The first proposition that I will advance against the preceding background is this: although the liberal conception of private choice is flourishing, as evidenced by the growing acceptability of homosexual unions<sup>25</sup> and abortion rights,<sup>26</sup> the liberal concep-

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liberals, and identifying the respects in which both are liberal).

17. See *id.* at 132-34.

18. See *id.*; see also SANDEL, *supra* note 14, at 4-5 (defining liberalism).

19. See, e.g., CONN. GEN. STAT. ANN. § 46b-24 (West 1997); GA. CODE ANN. § 19-3-40 (Harrison 1991).

20. See, e.g., MICH. COMP. LAWS ANN. § 551.103 (West 1998).

21. See, e.g., CONN. GEN. STAT. ANN. § 53a-190.

22. See, e.g., *id.* § 53a-191.

23. See, e.g., LA. CIV. CODE ANN. art. 89 (West 1997).

24. See, e.g., TENN. CODE ANN. § 39-15-401 (1997).

25. See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 61 (Haw. 1993) (holding that a denial of marriage license to homosexual couples constitutes sex-based discrimination);

tion of privacy is not flourishing similarly. One detects signs of an erosion of the taste for and expectation of privacy. Neither individuals, institutions, nor government consistently demand or respect physical, informational, and proprietary privacy. Liberals may need to rethink the claims they have always made about the value of privacy. We are forced to be free. Liberal governments cannot permit us to sell ourselves into slavery. Are we forced to be private? Should we be? Should liberals urge government to force people to be modest, keep sexual and family matters confidential, get off of mailing lists, install caller-ID blockers, and sanitize their memoirs?

The second proposition that I will advance relates to the first: traditional liberal conceptions of privacy and private choice have survived appropriately strenuous feminist critique, re-emerging in beneficially reconstructed forms.<sup>27</sup> As a result of the feminist critique, we understand that the conditions of confinement, forced modesty, obedience, and unaccountability that once constituted the private sphere are not a model of privacy worthy of the name. Ironically, just when meaningful, unoppressive forms of privacy and private choice are becoming imaginable and available to women,<sup>28</sup> privacy is losing its cache.

What good are the ideals of physical, informational, and proprietary privacy that survive feminist critique if no one subscribes to them? Everyone should want privacy, for reasons liberal moralists have stated, and for other reasons relating to responsibility and participation that they have tended to overlook. What if, however, some people do not want privacy? "Coercing

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RICHARD A. POSNER, *SEX AND REASON* 202 n.38 (1992) (noting a 1989 Gallup poll in which 47% of respondents favored legalizing homosexual relations, up from 43% in 1977); Mireya Navarro, *2 Decades Later, Miami Passes Gay Rights*, N.Y. TIMES, Dec. 2, 1998, at A1; cf. *Rutgers Council of AAUP Chapters v. Rutgers*, 689 A.2d 828, 831 (N.J. Super. Ct. App. Div. 1997) (surveying public and private-sector trends in the acceptance of domestic partnerships).

26. See David J. Garrow, *No End is in Sight for Abortion Battle*, NEWSDAY (N.Y.), Jan. 20, 1998, at A31, available in 1998 WL 2655066 (noting "increased public support for early abortions").

27. See *supra* notes 12-14.

28. See Allen, *supra* note 1, at 470-77.

privacy”—imposing privacy norms to make sure everyone lives in accordance with a particular vision of privacy—would be problematic. That kind of intolerant moralism is part of the problem with the military’s “Don’t ask, Don’t tell” policy respecting gay service members; that kind of intolerant moralism was part of the problem with the cult of domesticity. Nonetheless, I suggest that imposing privacy norms to undergird the liberal vision of moral freedom and independence is generally consistent both with liberalism and with the egalitarian aspirations of feminism.

### I. TECHNOLOGY AND THE TABLOIDS

The final decades of the twentieth century could be remembered for the rapid erosion of expectations of personal privacy and of the taste for personal privacy in the United States. Recent polling data as well as high profile litigation and policy debates suggest impressively high levels of concern about physical and informational privacy.<sup>29</sup> Certain legal and policy trends; certain modes of market, consumer, and political behavior; and certain dimensions of popular culture, though, suggest low levels of concern.<sup>30</sup> I sense that people expect increasingly little physical,

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29. See Marc Rotenberg, *Electronic Privacy Information Center (EPIC): Privacy Surveys*, (visited Sept. 9, 1996) <<http://www.epic.org/privacy/survey>>. Professor Marc Rotenberg, Adjunct Professor of Law at the Georgetown University Law Center in Washington, D.C., heads EPIC and maintains its excellent website. Well-respected privacy surveys include Professor Alan F. Westin’s periodic surveys for *Privacy & American Business*, and the Equifax/Harris Consumer Privacy Surveys by Louis Harris and Associates, who also sometimes collaborate with Professor Alan Westin. See Louis Harris & Associates, *The 1996 Equifax-Harris Consumer Privacy Survey* (Oct. 8, 1996). According to Professor Rotenberg, the Georgia Tech Graphics, Visualization & Usability Center World Wide Web Survey (“GVU WWW Survey”) is the most comprehensive poll of web users. See, e.g., Graphics, Visualization & Usability Center, *GVU’s 8th WWW User Survey* (visited Oct. 30, 1998) <[http://www.gvu.gatech.edu/user\\_surveys/survey-1997-10](http://www.gvu.gatech.edu/user_surveys/survey-1997-10)>; see also Dr. Alan F. Westin and Danielle Maurici, *E-commerce and Privacy: What Net Users Want, Survey Report* (June 1998).

30. See Eric Fisher, *Stores Find Value in Tracking Buys; Privacy Group Questions Practice*, WASH. TIMES, June 15, 1998, at D14, available in 1998 WL 3450474 (noting grocery store’s practice of tracking consumer purchase patterns using a magnetized “loyalty program” membership card, and noting “strong consumer popularity for



informational, and proprietary privacy, and that people seem to prefer less of these types of privacy relative to other goods.

An erosion of privacy-related tastes and expectations could have numerous causes. These causes could include an avalanche of technologies that make it easy and advantageous for us to make ourselves available to others (e.g., cellular phones, fax machines, e-mail); easy and advantageous for our government to keep track of us (e.g., video surveillance of urban streets, data-banking, testing); and easy and advantageous for the corporate sector to collect and exchange personal information about us (e.g., phone surveys, data-banking, mailing lists). Technologists hope that someday soon we may be wearing computers capable of transmitting data around the world, as casually as we wear eyeglasses and wristwatches.<sup>31</sup>

Another cause of erosion in privacy-related tastes and expectations could be an avalanche of two related kinds of opportunities. First, opportunities to earn money and celebrity by giving up privacy voluntarily, and second, opportunities to consume other people's privacy and private lives on the cheap: \$1.50 for a magazine or tabloid; \$19.95 for access to the Internet. Opportunities to earn money and celebrity include opportunities to write books, to sell personal information to publishers, and to appear on sensational television programs designed to expose shocking intimacies. Only now, the intimacies that once were shocking when exposed are merely titillating. Opportunities to consume other people's privacy include the purchase of magazines and newspapers containing personality profiles, or spending time on

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loyalty programs" despite the resulting invasion of privacy); Sarah Ann Nelson, *Internet Traders Swap Beanies—and Trust*, USA TODAY, July 20, 1998, at 15A, available in 1998 WL 5730887 (noting the thriving Internet trade in the popular Beanie Babies with minimal concerns about privacy).

31. Approximately two hundred such technologists participated in the Second International Symposium on Wearable Computers, held October 19-20, 1998, in Pittsburgh, Pennsylvania, which profiled new and emerging wearable computing technology. The event was sponsored by The Institute of Electrical and Electronics Engineers Computer Society. See *Wearables: Out in the World* (visited Jan. 18, 1999) <<http://www.media.mit.edu/wearables/out-in-the-world>>.

the Internet during which one can view records containing personal financial information about others. One can even watch strangers on-line in real time as they groom themselves and interact with their intimates.

With regard to the latter, I am alluding to the young woman named Jenni who first garnered national attention last year for creating the *JenniCam* website, from which paying customers can watch her live out her life.<sup>32</sup> Jenni trains a video camera on a spot in her bedroom.<sup>33</sup> For a few dollars, one can watch her do many of the things adults ordinarily do in the privacy of their apartments.<sup>34</sup> The *SaraCam* project, launched and discontinued by station Bravo in 1998, offered live pictures—twenty-four hours a day—from the bedroom of another young woman, Sara.<sup>35</sup> In absolute terms, the number of us willing to sell privacy may be small, but the number of us who want to buy others' privacy is large enough to insure that entrepreneurs will make private facts available in the market in any number of attractive forms.

32. See *JenniCam* (visited Dec. 1, 1998) <<http://www.jennicam.org>>.

33. See *id.*; see also Rosa Prince, *Sara Draws Back the Curtains for All*, THE INDEPENDENT (London), Feb. 3, 1998, at 2 ("Fans of the Internet site JennCam [sic], featuring 24-hour live pictures from inside an American woman's bedroom, can now tune into a British version—SaraCam.").

34. As of December 1998, Jenni charged \$15 per year for "membership." See *JenniCam: Frequently Asked Questions* (visited Dec. 1, 1998) <<http://www.jennicam.org/faq/membership.html>>. Many features of the site, however, are accessible free of charge.

35. See *Bravo Girlcam* (visited Sept. 28, 1998) <<http://www.bravo.co.uk/html/girlcam.html>> (discontinued); see also Prince, *supra* note 33, at 2. Prince writes:

Viewers of the Internet station Bravo were invited to vote for a British Jenny [sic] from a short-list of three young women. . . . [A spokesman] for Bravo[] denied SaraCam's audience would be dominated by dirty old men. "It'll be more like a real soap opera," he said. "Sara has a great personality and she's bound to be throwing loads of parties. On the other hand there will probably be quite a lot of time when all you will be able to see is Sara's cat asleep on her bed or Sara brushing her hair." . . . The camera can be turned off or moved away if Sara wants a little privacy. And while the self-confessed show-off said . . . she is unshockable, it is understood no nudity will be involved.

*Id.* Visitors to Sara's site will now discover that she has, in her own words, "mutated into your friendly agony aunt, Staff Nurse Gertie," complete with a new web page.

The question these developments raise for me is whether someone ought to do something to stop the erosion of expectations and tastes.

The conjecture that the taste for privacy and the expectation of privacy are eroding is consistent with the observation I have made elsewhere that privacy norms play an expansive role in morals, politics, and law.<sup>36</sup> Privacy is not dead. In morals, though with significant cultural variations, expectations of, and mutual respect for, the privacy of certain places, communications, and behaviors constrain daily intercourse. In politics, particularly in Western-style democracies, privacy stands virtually on a par with liberty and equality as a core liberal value.<sup>37</sup> Privacy as a political value, however, is not limited to liberal thought or liberal regimes. People around the world consider protecting at least some privacy interests a core function of good government.<sup>38</sup> In law, virtually every country's written constitution or comparable basic law contains privacy principles limiting authorized government access to people and their possessions.<sup>39</sup> The civil law of individual Western European nations and the official directives of the European Community include broad privacy protection regulating the disclosure of personal and commercial information.<sup>40</sup>

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36. See Anita L. Allen, *Constitutional Law and Privacy*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 139-55 (Dennis Patterson ed., 1996) (expanding and supporting above assertions regarding the expansive role of privacy in law, morals, and politics); Anita L. Allen, *The Jurispolitics of Privacy*, in RECONSTRUCTING POLITICAL THEORY: FEMINIST PERSPECTIVES 68-84 (Mary Lyndon Shanley & Uma Marayan eds., 1997) [hereinafter Allen, *The Jurispolitics of Privacy*] (examining conventional understanding of privacy rights).

37. See Allen, *The Jurispolitics of Privacy*, *supra* note 36, at 68.

38. See, e.g., *Common Position (EC) Adopted by the Council on February 20, 1995 with a View to Adopting Directive 94*, 80 IOWA L. REV. 697 app. at 698-700, 704, 711 (1995) [hereinafter *Common Position*]; Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398, 433-34 (1996).

39. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 10-17 (1994); Michelle Lynn McClure, *An Analysis of the New Russian Constitution*, 4 J. INT'L L. & PRAC. 601, 609-11 (1995).

40. See, e.g., Council of Europe-Organisation for Economic Co-operation and Devel-

Privacy as a legal norm is especially pervasive in the United States. The First, Third, Fourth, Fifth, and Fourteenth Amendments of the U.S. Constitution implicitly guarantee rights of privacy.<sup>41</sup> Statutes and the common law create additional rights of privacy for American victims of unwanted intrusion, publicity, and breaches of confidentiality.<sup>42</sup> Americans now have an array of positive privacy rights to physical seclusion and limited publicity under the common law, the Constitution, and various statutes, and constitutional rights to a government that is supposed to leave people alone to make a range of decisions in peace and with relative autonomy.<sup>43</sup> I could be wrong about an erosion in privacy-related tastes and expectations. The popularity of anonymous and encrypted communication on the Internet could be evidence that technology has not worn away the taste for privacy. Let us suppose *arguendo*, however, that the conjectured erosion is real. Should we do something about it? Should government? Should industry? Should consumers? If we wanted to stop the erosion, how could we? One way to address the erosion would be to stop the avalanche of technology and commercial opportunity responsible for the erosion. We could stop the avalanche of technology, but we will not, if the past is any indication. In the United States, with a few exceptions like government-funded human cloning and fetal tissue research, the rule is that technology marches on.<sup>44</sup>

We could stop the avalanche of commercial opportunity by intervening in the market for privacy; that is, we could (some

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opment: Convention on Mutual Administrative Assistance in Tax Matters, *opened for signature* Jan. 25, 1988, 27 I.L.M. 1160, 1161; *Common Position*, *supra* note 38.

41. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

42. See, e.g., Lilliam R. BeVier, *Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J. 455 (1995); David W. Melville & Harvey S. Perlman, *Protection for Works of Authorship Through the Law of Unfair Competition: Right of Publicity and Common Law Copyright Reconsidered*, 42 ST. LOUIS U. L.J. 363 (1998).

43. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 852, 884 (1992) (noting "the right to make family decisions and the right to physical autonomy").

44. See Mark W. Davis, *Fetal Tissue Transplants: Restricting Recipient Designation*, 39 HASTINGS L.J. 1079, 1079-90 (1988).

way or another) increase the costs of consuming other people's privacy and lower the profits of voluntarily giving up one's own privacy. The problem with this suggested strategy is that, even without the details of implementation, it raises the specter of censorship, repression, paternalism, and bureaucracy. Privacy is something we think people are supposed to want; if it turns out that they do not, perhaps third parties should not force it on them, decreasing both their utility and that of those who enjoy disclosure, revelation, and exposure.

Of course, we force privacy on people all the time. Our elected officials criminalize public nudity, even to the point of discouraging breastfeeding.<sup>45</sup> Prison authorities throw felons into solitary confinement. Parents punish children by consigning them to "time outs" in isolated corners of their homes. It is one thing, the argument might go, to force privacy on someone by criminalizing nude sun-bathing and topless dancing. These activities have pernicious third-party effects and attract vice. It would be wrong, the argument might continue, to force privacy on someone, in the absence of harm to others, solely on the grounds that one ought not say too much about one's thoughts, feelings, and experiences; one ought not reveal in detail how one spends one's time at home; and one ought not live constantly on display. Paternalistic laws against extremes of factual and physical self-revelation seem utterly inconsistent with liberal self-expression, and yet such laws are suggested by the strong claims liberal theorists make about the value of privacy. Liberal theorists claim that we need privacy to be persons, independent thinkers, free political actors, and citizens of a tolerant democracy.<sup>46</sup>

Walling off the avalanche of technology and commercial opportunity via regulation and prohibition may be violative of liberal, libertarian, and market values. Halting the erosion without bureaucracy and coercion may be a more promising route. Here the

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45. See, e.g., Durmeriss Cruver-Smith, Note, *Protecting Public Breast-Feeding in Theory But Not in Practice*, 19 WOMEN'S RTS. L. REP. 167 (1998).

46. Cf. Robin West, *Taking Freedom Seriously*, 104 HARV. L. REV. 43, 44-45 (1990) (arguing that "the traditional liberal faith in the individual is somewhat misplaced").

focus should be on strengthening individuals to stand up to the avalanche: empower fellow-citizens—through preaching and teaching—to hold on to their own privacy and to consume less of others'. This alternative approach—strengthening the moral foundation of the community—simply may be too difficult. The market for private facts not only feeds the taste for consuming the privacy of others; it simultaneously constructs such tastes. The teacher and the preacher must compete with market and marketing forces that also are teaching and preaching that Americans should tell all, sell all, and know all. Certain segments of the market may be at work in ways consistent with improving individual moral fiber. The market has brought us products such as caller-ID blockers and cryptography programs that make us more able to conceal from others who we are and what we think. My sense, though, is that technology-assisted accessibility is more alluring than old fashioned inaccessibility.

The picture I am painting of the demise of privacy expectations and preferences may sound gloomy, but it is only as gloomy as privacy is important in ways that matter. If privacy were not important, it would make no difference that people are more willing to give up privacy than they used to be. It would make no difference that people are even more attracted to gossip and intimate facts about others than they used to be. It would make no difference if technology has made willingness to give up privacy more profitable and the appetite for others' private lives more easily fed.

## II. PRIVACY AS INDISPENSABLE AND FOUNDATIONAL

Some people complain bitterly about privacy invasions in environments such as the workplace.<sup>47</sup> People are shocked to learn about the "cookies" they leave as they traverse the Internet.<sup>48</sup>

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47. See Larry O. Natt Gantt, II, *An Affront to Human Dignity: Electronic Mail Monitoring in the Private Sector Workplace*, 8 HARV. J.L. & TECH. 345, 345-50 (1995).

48. For a broad overview of the informational privacy issues raised by the use of the Internet, see TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE (Philip E. Agre &

Bioethicists focus on the privacy implications of genetics and HIV testing.<sup>49</sup> Legislatures enact privacy laws.<sup>50</sup> Privacy commissions and task forces convene regularly.<sup>51</sup> Some people really care about privacy; my point, however, is that many people do not.

The group that does not care much about privacy may consist of individuals who share some things in common. The regard one has for privacy or particular forms of privacy may be partly a function of one's generation, educational background, and wealth. An upper middle-class person can afford to care about the privacy of her body. She does not need to take a job as a stripper, whereas a poor, uneducated person might. Generational differences in the taste for privacy may be significant in the United States, as younger Americans appear to be learning to live reasonably well and happily without privacy. Young adults seem to take exposure for granted and many understand that they live in virtual glass houses. Anyone with sophistication about the Internet or the credit and insurance industries knows that it is easy and cheap to find out facts about friends, neighbors, and strangers.<sup>52</sup> I may not be able to walk into your bedroom, but I can find out how much you earn, where you work, your Social Security number, and how much you paid for your house. Young adults today understand that their medical records are not seen solely by their doctors, and that cameras posted in workplaces, at ATM machines, and on the public streets monitor their conduct. They know about the night detection devices and hyperbolic microphones that enable others to see and hear inside their homes.<sup>53</sup>

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Marc Rotenberg eds., 1997) [hereinafter TECHNOLOGY AND PRIVACY].

49. See Kristin M. Raffone, *The Human Genome Project: Genetic Screening & the Fundamental Right of Privacy*, 26 HOFSTRA L. REV. 503, 519-22, 544 (1997).

50. See, e.g., The Privacy Act of 1974, 5 U.S.C. § 552a (1994) (regulating disclosure of records); Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (1994) (regulating disclosure of educational records).

51. See generally Robert M. Gellman, *Can Privacy Be Regulated Effectively on a National Level? Thoughts on the Possible Need for International Privacy Rules*, 41 VILL. L. REV. 129, 134 (1996) (noting establishment of the Privacy Protection Study Commission in 1974).

52. See TECHNOLOGY AND PRIVACY, *supra* note 48, at 17.

53. Furthering the popularity of such technology, night detection devices are mar-

My one-time University of Michigan classmate, the entertainment mogul Madonna, symbolizes some of the generational differences to which I am referring. Early in her career, she responded cleverly to outmoded privacy conventions by flouting them. She deconstructed female modesty by wearing her underwear as outerwear and by turning her sexual fantasies into songs and coffee table books. She capitalized on eroded tastes and expectations of privacy by turning herself and everyone around her into mass media stars.<sup>54</sup> Her commercially successful full-length feature film *Truth or Dare* took us on an intimate tour of her personal and professional life.<sup>55</sup> The message was that happiness and success do not require privacy; indeed, they are antithetical to privacy.

For people under forty-five who understand that they do not, and cannot, expect to have many secrets, informational privacy may now seem less important. As a culture, we seem to be learning how to be happy and productive—even spiritual—knowing that we are like open books, our houses made of glass. Our parents may appear on the television shows of Oprah Winfrey or Jerry Springer to discuss incest, homosexuality, miscegenation, adultery, transvestitism, and cruelty in the family. Our adopted children may go on television to be reunited with their birth parents. Our law students may compete with their peers for a spot on the MTV program *The Real World*, and a chance to live with television cameras for months on end and be viewed by mass audiences. Our ten-year-olds may aspire to have their summer camp experiences—snits, fights, fun, and all—chronicled by camera crews and broadcast as entertainment for others on the Disney Channel.

Should we worry about any of this? What values are at stake? Scholars and other commentators associate privacy with several

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keted by popular firms, including the upscale chain Sharper Image. See *Tech Today: Help Seeing in the Dark*, STAR-TRIBUNE (Minneapolis-St. Paul), Dec. 18, 1997, at 13E, available in 1997 WL 7594235.

54. See generally Ingrid Sischy, *Madonna and Child*, VANITY FAIR, Mar. 1998, at 206 (noting Madonna's artistic career, business enterprises, and lifestyle).

55. See TRUTH OR DARE (Miramax 1991).



important clusters of value. Privacy has value relative to normative conceptions of spiritual personality, political freedom, health and welfare, human dignity, and autonomy. In 1890, E.L. Godkin published a magazine article defending privacy for its supposed "spiritual" value.<sup>56</sup> His quaint, elite-sounding tone and theme were echoed in the famous law review article published later the same year by Samuel Warren and Louis Brandeis.<sup>57</sup> For all three men, the photographic and printing technologies developed in their day threatened the privacy of home and family.<sup>58</sup> They believed that private homes and families were essential for the spiritual well-being of civilized men.<sup>59</sup> In 1905, the Georgia Supreme Court, in *Pavesich v. New England Life Insurance Co.*, became the first court expressly to affirm the existence of a legal right to privacy.<sup>60</sup> In *Pavesich*, the emphasis was not on spiritual man, but political man, as the court made the case for privacy in political terms. The court reasoned that the social contract surely must have a provision guaranteeing the protection of privacy.<sup>61</sup> If not, what citizen would agree to the social contract? The Georgia court's argument presupposed that it is rational and natural to desire control over one's personal likeness and identity.<sup>62</sup>

Psychologists have long emphasized the unhealthy effects of depriving individuals of opportunities for socially defined modes of privacy. In the 1970s and 1980s, social psychologists argued

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56. See E.L. Godkin, *The Rights of the Citizen, IV.—To His Own Reputation*, SCRIBNER'S, July 1890, at 58, 65-66. Godwin wrote:

Personal dignity is the fine flower of civilization, and the more of it there is in a community, the better off the community is. . . . But without privacy its cultivation or preservation is hardly possible. . . . [Newspaper journalism] has converted curiosity into what economists call an effectual demand, and gossip into a marketable commodity.

*Id.*

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

58. See *id.* at 195.

59. See *id.* at 193-94.

60. See *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 69-70 (Ga. 1905).

61. See *id.* at 69.

62. See *id.*

that opportunities for physical and informational privacy were important to mental well-being and social exchange.<sup>63</sup> Physical and informational privacy practices serve to limit observation and disclosure that are inimical to the well-being. Philosophers and legal theorists began urging in the 1970s that the great growth of privacy rights in tort law, the constitutional right to privacy, and state and federal privacy statutes serve the interests of human dignity and autonomy.<sup>64</sup>

Liberals explain the value of privacy and private choice in relation to their consequences for individuals and society, as well as in relation to dignitarian and deontic ends. Liberal moral philosophers maintain that respecting the many forms of privacy is paramount to respect for human dignity, personhood, moral autonomy, workable community life, and tolerant democratic political and legal institutions.<sup>65</sup> In a memorable essay, philosopher Jeffrey Reiman once closely linked privacy to the formation of individual personhood: “[p]rivacy is a social ritual by means of which an individual’s moral title to his existence is conferred.”<sup>66</sup> Some theorists wrongly condemn privacy when privacy is construed in Reiman’s terms.<sup>67</sup> So construed, privacy can seem to serve the interests of selfishness or an exaggerated individualism. The formation of self-concept and intimate relationships on which workable family and community life depend, however, requires opportunities for privacy and private choice. Privacy is down time. Privacy allows me to rest, retool, and as a result, better prepare myself for my social responsibilities, whether they be familial, local, or global. Privacy has value as the con-

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63. See, e.g., CARL D. SCHNEIDER, *SHAME, EXPOSURE AND PRIVACY* (1977).

64. See, e.g., *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* (Ferdinand David Schoeman ed., 1984); Joel Feinberg, *Autonomy, Sovereignty and Privacy: Moral Ideals in the Constitution?*, 58 *NOTRE DAME L. REV.* 445 (1983).

65. See, e.g., Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 *PHIL. & PUB. AFF.* 26 (1976).

66. *Id.* at 39.

67. See, e.g., William A. Parent, *Privacy: A Brief Survey of the Conceptual Landscape*, 11 *SANTA CLARA COMPUTER & HIGH TECH. L.J.* 21, 22 (1995) (rejecting Reiman’s definition of privacy).

text in which individuals work to make themselves better equipped for their familial, professional, and political roles. With privacy, I can try to become competent to perform and achieve up to my capacities, as well as to try out new ideas and practice developing skills.

To speak of “coercing” privacy is to call attention to privacy as a foundation, a precondition of a liberal egalitarian society. Privacy is not an optional good, like a second home or an investment account. The argument of this Essay is structurally identical to an argument philosopher Samuel Freeman makes about drug policy.<sup>68</sup> It would be illiberal to criminalize addictive recreational drugs in the absence of good evidence of substantial negative externalities, were clear-headed cognitive capacity not a requirement of responsible participation in a liberal democratic government.<sup>69</sup> Similarly, it would be illiberal to coerce privacy were something approaching the ideal of morally autonomous selves not a requirement of participation in a liberal democratic society.

A hard task seems to lay before us—namely, deciding which forms of privacy are so critical that they should become matters of coercion. The task is especially hard because we cannot fairly rely solely and uncritically on traditional notions of modesty and civility. Responding to the erosion of privacy tastes and expectations is not just a matter of outlawing nudity on the Internet or demanding standards for broadcasters and publishers that limit the number of confessional television shows and publications. No one is rendered unfit for life in a liberal democracy because he or she posed nude or appeared once on *Jerry Springer* or *Oprah*. Yet numerous little consensual and nonconsensual privacy losses, too trivial to protest individually, aggregate into a large privacy loss that is a detriment to the liberal way of life. It is this aggregation problem of cumulative accessibility and accountability to others that policymakers should begin to try to address.

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68. See Samuel Freeman, *Liberalism, Inalienability, and Rights of Drug Use*, in *DRUGS AND THE LIMITS OF LIBERALISM* 118 (Pablo De Greiff ed., 1999).

69. See *id.* at 124-25.

This policymaking task should be guided by a consideration of the cumulative effect of living without "down time" in a seclusion-deficient, access-compulsive world. We live in busy households, with partners, children, and parents who have complete access to us; we walk down busy streets where we are observed and approached by others, and where video cameras may track our moves to deter crime; law enforcers observe and monitor our automobile driving; employers ask for blood and urine samples, and request psychological testing; our supervisors and co-workers may read our mail and e-mail, and listen in on our telephone calls; we make purchases from retailers who bank information about us, sell it to others, and are subject to subpoenas; we travel with cellular phones, beepers, and laptops, and our portable phone conversations can be intercepted by third parties. Approaches to coercing privacy should take all of this experiential reality into account while avoiding the easy assumption, attacked by feminist theory, that social elites know exactly what kinds of privacy and private lives are appropriate for everyone.<sup>70</sup>

### III. FEMINIST RECONSTRUCTION

Thirty years ago, the prevailing liberal visions of privacy and private choice were in desperate need of re-thinking. The then-prevailing visions have now been re-thought: Scholars and activists have undertaken "deconstruction," "revisioning," and "reconstruction" of old notions of privacy and private choice with much success. Scholars now think differently about private life and private lives. Historians, social scientists, and jurisprudes have joined forces to discredit the myth that the home is a haven.<sup>71</sup>

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70. See generally Linda C. McClain, *Inviability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 208-09 (1995) (asserting that critical examination of privacy protection and public/private distinctions "have been a significant component of feminist jurisprudence. [Such critiques] target not only the legal treatment of privacy, but also an array of beliefs and social practices about privacy and the private sphere, and the ways in which they construct and constrain women's lives.").

71. See *id.* at 209 (citing CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 193 (1989)).

As a result, we have at our disposal the intellectual tools to look realistically and critically at the quality of life in households and families. We understand now that the nominally private sphere may not provide meaningful opportunities for privacy and private choice to certain people and groups.

Liberal philosophers (other than liberal feminists) have tended to overlook the risks of harm that privacy poses. These risks, however, must be factored into any complete ethical analysis of privacy. Feminists have demonstrated that the private sphere of home and family is a site of peril and subordination.<sup>72</sup> Feminists claim that privacy facilitates subordination and shields violence against spouses, children, and the elderly.<sup>73</sup> If what feminists say is true, it might seem to follow that one ought not lament the apparent demise of privacy-related tastes and expectations. I believe a different conclusion is warranted.

The concept of privacy has been central to the feminist critiques of Western liberal societies. Feminist scholars have been in the forefront of liberal, progressive, and communitarian efforts to debunk and rebuild liberal understandings of privacy and private choice.<sup>74</sup> Many feminists explicate privacy—construed primarily as the private sphere of home and family life—as the problematic context of traditional female subordination and isolation in subservient, dependent socio-economic roles.<sup>75</sup> They argue on good evidence that violence and neglect can befall vulnerable individuals in any area of domestic or commercial life when a community or its government abrogates responsibility to citizens and enterprises tagged “private.”<sup>76</sup>

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72. See Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991) (stating that “the law’s privacy is a sphere of sanctified isolation, impunity, and unaccountability”); McClain, *supra* note 70, at 209 (arguing that the private sphere of home and family can be a place of “rape, battery, and other exploitation”).

73. See MacKinnon, *supra* note 72, at 1311; McClain, *supra* note 70, at 209.

74. See, e.g., Ruth Gavison, *Privacy and the Limits of the Law*, 89 YALE L.J. 421 (1980); MacKinnon, *supra* note 72.

75. See, e.g., McClain, *supra* note 70, at 209-12 (exploring the feminist argument that the private sphere is a sphere of subordination, abuse, and oppression).

76. See *id.*; see also MacKinnon, *supra* note 72, at 1311 (arguing that “the doc-

Feminist critics equate traditional ideas of privacy and private choice with (1) barriers to escaping confinement in traditional roles;<sup>77</sup> and (2) ideals of isolation, independence, or individualism that conflict with the reality of the encumbered self<sup>78</sup> and with ideals of ethical care, compassion, and community.<sup>79</sup> Not all feminists, however, believe in the possibility of reconstructing privacy and private choice consistent with gender equality. When all is said and done, some feminists retain a decidedly negative stance toward privacy, professing the need to relegate privacy and private choice to the trash bin of outdated ideology.<sup>80</sup> By contrast, I accept the basic feminist critique of privacy and private choice, but I also believe worthwhile, egalitarian conceptions of privacy and private choice survive the critique.<sup>81</sup>

#### A. *Overcoming Under-Participation*

Feminists exploded the assumption that the proper role of women is to live under the authority of men as daughters, wives, and mothers. The lives of American women once consisted chiefly of domestic tasks, such as cooking, shopping, gardening, cleaning, and childrearing. "Conventions of female chastity and modesty have shielded women in a mantle of privacy at a high cost to sexual choice and self-expression."<sup>82</sup> Seclusion and subor-

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trine of privacy has become the triumph of the state's abdication of women in the name of freedom and self-determination").

77. See McClain, *supra* note 70, at 209-10.

78. See MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 20-21 (2d ed. 1998).

79. Cf. ROBIN WEST, *CARING FOR JUSTICE* 9 (1997) (discussing an "ethic of care" and the "act of caring" as traditionally private and separate from the public legal realm).

80. See, e.g., MacKinnon, *supra* note 12, at 93-102 (arguing that the liberal notion of privacy is outmoded and inconsistent with feminism); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1016-28 (1984) (arguing that "[t]he rhetoric of privacy . . . reinforces a public/private dichotomy that is at the heart of the structures that perpetuate the powerlessness of women").

81. For a detailed discussion of egalitarian conceptions of privacy and private choice, see Anita Allen, *Privacy*, in *A COMPANION TO FEMINIST PHILOSOPHY* 456-65 (Alison M. Jaggar & Iris Marion Young eds., 1998).

82. Allen, *supra* note 1, at 471. The good news is that expectations of emotional

dination meant that women generally were unable to utilize their full capacities to participate in society. Maternal and social roles kept women—who might otherwise have distinguished themselves in the public sphere as businesswomen, scholars, government leaders, and artists—in the private sphere.<sup>83</sup> To increase women's participation in society, feminist activists have advocated for the right of women to hold property, to vote, and to work outside the home in jobs of varied description for which they would be compensated on an equal basis with men.<sup>84</sup>

Women have under-participated in societal affairs. Although the under-participation critique is sweeping and true, the critique does not suggest that women should not seek privacy, or eschew opportunities for personal privacy and private choice. Women today, especially educated and middle-class women, have lifestyle options that they can exercise with privacy-related interests in mind. Some of their options (e.g., celibacy, childlessness) have a cost. Encouraging women to recognize their options, and to exercise their options in ways that acknowledge that women's privacy and private choice are worth something, would be an appropriate feminist emphasis. Educating oneself, delaying marriage, controlling the timing of childbearing, working part-time—all of these are techniques women can use, and are using, to create lives in which they can enjoy forms and degrees of privacy unknown to American women fifty years ago. A felicitous balance between privacy and disclosure can come about if lessons about exploiting privacy and lessons about exploiting the new openness in public life are offered in tandem. Some feminists seem to assume that privacy and disclosure are differing

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intimacy have fostered beneficial personal ties for women, and the domestic arts have reached high levels of excellence.

83. See, e.g., Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1672-73 (1997).

84. See Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589, 624 (1986) (demonstrating that feminist activists have worked to enhance women's access to political and economic opportunity by challenging laws that denied women the right to vote, to own property, and to work outside the home).

models of how one might live.<sup>85</sup> Privacy and disclosure are better understood, however, as important and necessary dimensions of a range of good lives one can elect to live.

### B. *Overcoming Violence*

Liberal society thrives on open government and closed personal relations. Feminists have stressed that closed personal relations make it more likely that serious harm will go undetected.<sup>86</sup> A parent-child relationship may involve sexual abuse or neglect; a marital relationship may involve beatings or rape. Government cannot protect vulnerable citizens from domestic violence if unbreachable boundaries of legally sanctioned privacy surround the family. The worthiness of the privacy ideal has been called into question in the United States, where problems of domestic violence suggest a need for more, rather than less, involvement in the traditionally "private" spheres of home and family life.<sup>87</sup> It is no longer acceptable that men and women batter one another—or that parents batter their children—in the name of anger or discipline.

Domestic violence is a serious problem that additional economic opportunities and civil rights for women appear not to have abated.<sup>88</sup> Both substantive law and law enforcement practices need to reflect an understanding that households, no less than street corners, can be places of peril. Our households *are*

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85. See, e.g., MacKinnon, *supra* note 72, at 1311; Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441, 455-56, 458-61 (1992).

86. See *supra* notes 73-77 and accompanying text.

87. See generally Carolyne R. Hathaway, Case Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints*, 75 GEO. L.J. 667, 671 & n.20 (1986) (demonstrating that victims of domestic violence are almost always women and that the social, physical, and economic impact of such violence is severe); *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1501, 1501 (1993) [hereinafter *Legal Responses to Domestic Violence*] ("By any standard, domestic violence must now be recognized as the most pressing social and legal problem in the United States.").

88. See *Legal Responses to Domestic Violence*, *supra* note 87, at 1502-03 (noting the persistence of "stereotypes and misconceptions about domestic violence" that hinder the development of effective legal responses to domestic violence).



places of peril, but it does not follow that we perpetually ought to station agents of government in our living rooms, observing us and second-guessing every decision we make about our personal lives in the name of saving us from injury at home. We do better with solutions to the problems of domestic violence that preserve conditions that afford opportunities for safe and meaningful seclusion, intimacy, and decisionmaking. Battered women's shelters protect women by providing health services, safe companionship, and privacy. It would be unfortunate indeed if the price women had to pay for escape from domestic abuse was a life without opportunities for privacy.

The U.S. Attorney's Office for the District of Columbia established the Domestic Violence Unit of the District of Columbia local court system to provide expert response and adjudication of domestic violence charges and to help women cope with the social and economic consequences of abuse.<sup>89</sup> This program and others like it compel women to relinquish seclusion and private information for the sake of prosecuting their assailants, but the program does not assume that daily lives lived in wholly exposed settings are the ideal remedy for violence. The solution to domestic violence and the *DeShaney* problem of public neglect of private violence<sup>90</sup> is not to end families and seclusion, but to make better use of evidence of chronic violence and imminent peril. The act of making better or different use of evidence regarding what occurs among family members and cohabitators is a way of reconstructing privacy—redrawing lines of public and private. The line between public and private already has been redrawn substantially in the criminal law of rape where, in many jurisdictions, “marital privacy” no longer immunizes married men from prosecution for unconsensual sex with their wives.<sup>91</sup>

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89. See Bill Miller, *Team Created to Fight Domestic Violence*, WASH. POST, Apr. 2, 1996, at C3.

90. See generally *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989) (holding that the Fourteenth Amendment places no affirmative duty upon state government to protect its citizens).

91. See, e.g., Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2163 n.163 (1996).

### C. *Righting the Conservative Tilt*

Some feminists view the concept of privacy as having an inherently conservative tilt in the Western liberal societies where it has had the greatest currency.<sup>92</sup> The privacy banner waves away beneficial public intervention calculated to reinvent customary standards of behavior that lead to female under-participation and male aggression or harassment. Legal feminists commonly argue that the liberal ideology of "privacy" is inherently conservative and has slowed the growth of egalitarian laws beneficial to vulnerable classes of women.<sup>93</sup> Another argument posits that a conservative ideology of privacy supports the notion that gays and lesbians belong, if at all, silent and repressed in the "closet."<sup>94</sup>

Conservatives generally have opposed government welfare programs, especially any that are amenable to characterization as inessential.<sup>95</sup> It is perhaps not surprising, then, that they generally have opposed government funding for poor women's "elective" abortions.<sup>96</sup> Many conservatives and liberals interpret the right to privacy, in the context of contraception and abortion, as a negative right *against* government decisionmaking respecting procreation, not as a positive right *to* governmental pro-

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92. See generally Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 150-72 (1992) (examining feminist critiques of privacy).

93. Cf. Cass Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)*, 92 COLUM. L. REV. 1, 31 (1992) (noting that "an abortion decision does not involve conventional privacy at all").

94. See, e.g., Cathy A. Harris, Note, *Outing Privacy Litigations: Toward a Contextual Strategy for Lesbian and Gay Rights*, 65 GEO. WASH. L. REV. 248, 268-69 (1997) ("The claim of privacy becomes a trap for gays and lesbians . . . which in turn perpetuates the[ir] oppression.").

95. See, e.g., Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 365 (1995) (noting the desire of conservatives to "contract" the scope of government aid to the disabled); Kathleen A. Kost & Frank W. Munger, *Fooling All of the People Some of the Time: 1990's Welfare Reform and the Exploitation of American Values*, 4 VA. J. SOC. POL'Y & L. 3, 31 (1996) ("Welfare reform is obviously a rollback of social programs that have been described by conservatives for a decade as favoring 'special interests.'").

96. See Kelley P. Swift, Comment, *Hope v. Penales: Abortion Rights Under the New York State Constitution*, 61 BROOK. L. REV. 1473, 1479 n.42 (1995).

grams designed to make contraception and abortion services available to those who cannot afford to pay.<sup>97</sup> For some, it is self-evident as a matter of logic that a privacy right is not something for which the public should have to pay.

In the United States, women won the right to obtain legal contraception and abortion in the 1960s and 1970s under the banner of "the right to privacy."<sup>98</sup> Many feminists blame the emphasis on privacy in abortion law for the failure of legal efforts to secure government funding for poor women's abortions.<sup>99</sup> Perhaps it is no accident that equal protection, rather than privacy, is now apparently the more promising jurisprudential basis for advocating gay rights since the privacy debacle of *Bowers v. Hardwick*.<sup>100</sup>

In an attempt to reconceive public and private, a number of feminists have argued that certain privacy rights for the poor entail public support.<sup>101</sup> These efforts strike me as exactly right. There is no need to concede the battle to liberalism's most conservative exponents. The liberal theorists who see the privacy case for abortion funding as doomed to fail because of the supposed inherent conservative tilt of privacy rights talk lack the will to impose a new construction of privacy over the old conception of negative freedom. The idea that privacy is simply a negative liberty—a freedom from, as opposed to a claim to—can be challenged, and has been challenged, on its own terms.<sup>102</sup>

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97. See, e.g., Allen, *Proposed Equal Protection Fix*, *supra* note 11, at 444.

98. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the right to privacy secured by the Constitution includes the right to abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (using the right to privacy to hold that married individuals have the right to obtain legal contraception).

99. See Allen, *Proposed Equal Protection Fix*, *supra* note 11 at 451-54.

100. 478 U.S. 186 (1986). *But see Powell v. State*, No. S98A0755, 1998 WL 804568, at \*7 (Ga. Nov. 23, 1998) (declaring Georgia sodomy statute upheld in *Bowers* invalid under the Georgia Constitution).

101. See, e.g., Rachel N. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407, 421 & nn.53-54 (1992).

102. See, e.g., *id.*; Dorothy E. Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 640-41 (1993).

*D. Rescuing the Public and the Private*

Critics of liberalism are apt to insist that the public/private distinction is altogether an ideological tool of subordination in societies in which white men with property dominate other groups. Feminists charge that privacy justifies exclusive monopolies over social resources as well as societal indifference to the violence and poverty that characterize the "private" lives of many women and children.<sup>103</sup> The private sphere is permeated by government. The public sphere is ubiquitous. Law, and therefore the arms of "public" government, defines and mediates the complex entity-to-entity relations that constitute "private" life. For example, a person is permitted to drive a car, adopt a child, practice a religion, marry outside of her race, expect confidentiality from physicians, belong to exclusive private clubs, and use birth control pills, all because of legislative and constitutional provisions created and enforced by government.<sup>104</sup> Moreover, government serves essential policing and adjudicative functions without which personal privacy would be impossible for most people. If someone is being harassed in certain ways that violate privacy, he or she can call the police. If someone harms another's privacy interests, the harmed individual may be able to bring a lawsuit to have losses compensated.

To the extent that government is infused with patriarchal, heterosexual ideals, men's and women's privacy rights are likely to reflect patriarchal, heterosexual ideals of a private sphere. As a woman, "my" legal privacy is limited by "his" and "their" conceptions of the good life. Thus, a lesbian's desire to live in peace with her female lover and to adopt her lover's children may be thwarted by others' conceptions of the morally good family.

Some liberals continue to speak of "the public" and "the private" as if they were determinate, fixed categories constraining good government. One can argue, though still within the frame-

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103. See, e.g., MACKINNON, *supra* note 71, at 193.

104. See, e.g., CAL. CONST. art. I, § 4 (guaranteeing religious liberty); CONN. GEN. STAT. ANN. § 45a-724 (West 1998) (regulating adoption); MASS. GEN. LAWS ANN. ch. 90, § 8 (West 1998) (regulating driver's licenses).

work of liberalism, that public and private are contingent, transformable conceptions of how power ought best to be allocated among individuals, social groups, and government. It is not necessary to defend privacy and private choice on grounds that presuppose the existence of fixed, determinate, uncontestable Platonic realms. It is therefore not a devastating feminist challenge to observe that the public/private distinction is something of a myth.

Feminist critiques of privacy leave the liberal conceptions of privacy and private choice very much alive. The longing for personal time and personal decisionmaking can linger long after the grip of patriarchy over women's bodies and lives is loosened. Feminists need not reject the language of public and private or the broad principles of inaccessibility, control, and decisional autonomy that undergird privacy rights. They do need to stress that the lines between public and private should be renegotiated and redrawn as necessary to further dignity, safety, and equality. Feminists have good reason to be critical of what the privacy of the private sphere has signified for women in the past and what the rhetoric and jurisprudence of privacy rights can signal for the future. At the same time, there is little doubt that women seeking greater control over their lives already have begun to benefit from heightened social respect for appropriate forms of physical, informational, proprietary, and decisional privacy.

*E. Feminism, Liberalism, and a New Generation*

Liberal theory survives feminists' theoretical assessments of privacy, but I am less certain that liberal society or feminism can survive the demise of privacy as a preferred object of desire. Liberalism has taught that without privacy we are degraded, unfree, unhappy, untolerated,<sup>105</sup> yet Jenni—the young woman who sells continual *JenniCam* access to her apartment over the

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105. See generally Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985) (exploring liberalism as an ideology that defines privacy and autonomy as the good).

Internet—seems fine. Is Jenni fine? The answer depends in part on whether we are willing to judge Jenni on her own terms. No one is forcing her to appear on the Internet. She is collecting money by exploiting viewers who watch hoping to be titillated. She is not being exploited; she is not watched at all times and everywhere she goes. As a result, while her apartment is not strictly private, one must assume she gets some privacy somewhere, sometime. Madonna, we know, gets quite a bit of privacy.<sup>106</sup>

It is of particular interest to feminism that some women (like Jenni) have little taste for privacy. Thirty years ago, in the early days of the women's movement, women declared the personal to be political.<sup>107</sup> By 1990, women had begun implicitly to declare that the personal is commercial.<sup>108</sup> Put differently, women first reconstructed privacy by rejecting outmoded conceptions of domesticity, modesty, reserve, and subordination to men; now they reconstruct privacy by exploiting it for income, celebrity, or both. Feminists are bound to split over the issues of self-exposure or objectification raised by Jenni and Madonna, the same way they split over issues of self-exposure or objectification raised by prostitution, pornography, and surrogate motherhood.<sup>109</sup>

If privacy is as important to the formation of personhood and political freedom as some liberal moral theorists have argued,<sup>110</sup>

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106. See Sischy, *supra* note 54, at 206.

107. See, e.g., MACKINNON, *supra* note 71, at 191.

108. See generally Rosemary J. Coombe, *Authorizing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365 (1992) (examining the ways that commercialization and celebrity have altered privacy and produced engendered and endangered identities); Cheryl B. Preston, *Consuming Sexism: Pornography Suppression in the Larger Context of Commercial Images*, 31 GA. L. REV. 771, 840-52 (1997) (arguing that feminist attacks on privacy and advocacy for the suppression of pornography are now giving way to advocacy for commercial solutions).

109. See generally Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343 (1995) (analyzing the effect of different legal frameworks on women and surrogate motherhood); Peter Halewood, *Law's Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 IOWA L. REV. 1331 (1996) (examining the commodification and objectification of women in liberal thought and contemporary society).

110. See, e.g., J. Braxton Craven, Jr., *Personhood: The Right to Be Let Alone*, 1976

we should be worried—feminists and nonfeminists alike—by the optional and challenged character taken on by personal privacy. Some valued forms of privacy are and should be optional. Sometimes giving up optional informational privacy is a good thing, as when a guilty criminal freely decides to plead guilty rather than accept the protection of the Fifth Amendment to the U.S. Constitution. Adopting—or acceding to—a whole lifestyle premised on disclosure, however, ought not be an option. For that reason, maybe we should be prepared to force people to have private lives and to live their private lives in private. Not, as in the past, so they can be kept in their place, but so that they can reap the full dignitarian and political consequences of privacy. Moralism? Snobbery? Classism? Civic republicanism? I think not.

Liberals should continue to urge that, to the extent possible, people must be free to exercise their judgment and live in accord with their own visions of the good life. We want government to be neutral, in the plausible way Dworkin suggested a number of years ago,<sup>111</sup> between competing conceptions of the good. A conception of the good that permits privacy to be waived, however, is like a vision of the good that permits freedom to be waived. As liberals, we should not want people to sell *all* their freedom, and, as liberals, we should not want people to sell *all* their privacy and capacities for private choices. This is, in part, because the liberal conceptions of private choice as freedom from governmental and other outside interference with decisionmaking closely link privacy and freedom. The liberal conception of privacy as freedom from unwanted disclosures, publicity, and loss of control of personality also closely links privacy to freedom. I am not suggesting that Jenni should turn off her camera and sweep floors for her boyfriend, but I am suggesting that she

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DUKE L.J. 699 (arguing that the liberal concept of the right to be let alone can be secured with a recognition of a right to personhood); John Lawrence Hill, *Mill, Freud, and Skinner: The Concept of the Self and the Moral Psychology of Liberty*, 26 SETON HALL L. REV. 92, 167-70 (1995) (showing that the rise of liberalism and its requirement of personal freedom altered the formation of personhood and political liberty).

111. See RONALD DWORIN, A MATTER OF PRINCIPLE 191 (1985).

should turn off her camera so that, free from the gaze of others, she can live a more genuinely expressive and independent life. I am also suggesting that regulatory measures aimed at curbing the culture of exposure for the sake of “forcing” people to love privacy and live privately would be consistent with liberal values.

#### IV. LIBERALISM AND THE POLITICS OF THE GOOD

In *Democracy's Discontent*, Michael Sandel distinguishes between the “old” and the “new” privacy.<sup>112</sup> The old privacy, which he endorses, centers on home and family as reflections of an individual's identity.<sup>113</sup> Our privacy requires that government and fellow citizens let us alone to fulfill roles and responsibilities central to our identities and not necessarily of our own choosing. Custom, religion, and family obligate us in ways others ought to respect. The new privacy, which Sandel rejects, centers on autonomous choices.<sup>114</sup> Under this vision, our privacy requires that government and fellow citizens let us alone to make important decisions and live in accordance with those decisions.<sup>115</sup> Sandel argues that the old privacy is historically and logically connected to the civic republican strand in American thought, while the new privacy is historically and logically connected to the liberal strand.<sup>116</sup> For Sandel, a core requirement of government is that it recognize that selves are thickly constituted by religion, culture, and family ties.<sup>117</sup> Individuals are obligated by identities and attachments to lifestyles of which others in society may disapprove.<sup>118</sup>

The version of liberalism to which I subscribe understands persons as shaped partly and substantially by social forces not of

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112. See SANDEL, *supra* note 14, at 94-100.

113. See *id.* at 94-97.

114. See *id.* at 97-100.

115. See *id.*

116. See *id.* at 94-100.

117. See *id.* at 92.

118. See *id.*



their own choosing, but also and importantly by their own choices—their own decisions, commitments, and compromises. Education is vital to the formation of persons who understand human capacities for choice and the limits of those capacities. Persons are educated by families, schools, and religious institutions, and increasingly by exposure to television, radio, print media, films, and the Internet. The direct and indirect education they receive from these sources varies in content and intensity. Not all of what they learn contributes constructively and beneficially to liberalism's "formative project."<sup>119</sup>

My conception of privacy (and private choice) is distinctly liberal in its assumption that individuals are and should be well-informed, morally autonomous choosers. My conception is also egalitarian and feminist in its assumption that a background of educational, economic, and sexual equality is a requirement of meaningful choice. In a just and liberal democracy, one's ability to choose how one shall live will be constrained through taxation and regulation so that others can achieve a comparable palette of choices. The "old" civic republican conception of privacy rights as public recognition of obligations generated by encumbrances of identity<sup>120</sup> may well have been what Warren and Brandeis had in mind. So much the worse for them.<sup>121</sup> Surely my privacy means more than that others should let me alone to be the best darn African-American, Methodist, suburban wife and mother I can be. Privacy is also a matter of freedom to escape, reject, and modify such identities. I should be free to make and remake myself.

Privacy is a matter of escaping as well as embracing encumbrances of identity. Without adequate privacy, there can be no

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119. See William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. & MARY L. REV. 867 (1999); see also Michael J. Sandel, *The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues*, 66 FORDHAM L. REV. 1, 3 (1997) (defining the "formative project").

120. See SANDEL, *supra* note 78, at 94-97.

121. See Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. L. REV. 441 (1990) (examining feminist assessments of approaches to understanding the value of privacy taken by the Warren and Brandeis article).

meaningful identities to embrace or escape, and no opportunities to engage in meaningful reflection, conversation, and debate about the grounds for embracing, escaping, and modifying particular identities. Undergirding the liberal democratic way of life will require public policies mindful of the cumulative threat to privacy.

Government will have to intervene in private lives for the sake of privacy and values associated with it. Protecting privacy, however, rarely will require government to proscribe specific categories of conduct. The men who sunbathe in the nude on warm Sundays in Berlin's Tiergarten are as morally autonomous as their friends and neighbors who do not.<sup>122</sup> The threat to liberalism is not that individuals sometimes expose their naked bodies in public places, display affection with same-sex partners in public, or broadcast personal information on national television. The threat to liberalism is that in an increasing variety of ways our lives are being emptied of privacy on a daily basis, especially physical and informational privacy.

Government already, and with minimal controversy, interferes with individual privacy in the interest of protecting third parties or children from serious harm. In the near future, liberal government may have to proscribe and regulate disclosures and publications precisely in the interest of preventing cumulatively harmful diminutions of the taste for or the expectation of privacy. So empowered, there is a risk that government will make mistakes and engage in discrimination. Proscribing breast-feeding, while permitting men to go about bare-chested, is one example of error and discrimination with which we are all familiar. Government could use its power to single out particular groups for repression, and one legitimately worries that public policies will penalize certain behaviors unfairly. Consider prohibitions against public displays of affection by same-sex partners and "Don't ask, Don't tell" policies. Coercing privacy in the strong sense of dictating what people must always keep to themselves

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122. See, e.g., James Woodall, *48 Hours in . . . Berlin Worldwide*, THE INDEPENDENT (London), Aug. 15, 1993, at 52, available in 1993 WL 16745587.

and what they may disclose to others would threaten the liberal egalitarian ideal of tolerance. A plurality of notions and opportunities for privacy must be permitted to flourish.

When it comes to government, coercing privacy may be as much a matter of self-restraint as restraint of others. Government's greater and greater ability to demand, access, and manipulate information about us contributes to the increasingly lowered expectations of privacy. It may also be a matter of regulating the corporate sector more aggressively, requiring fair information practices that give employees and consumers greater control over what information is collected and how it is used.

Fear of a government misstep is sometimes a reason for recommending government inaction. There is both empirical evidence and normative philosophical argument supporting the proposition that paradigmatic forms of privacy (e.g., seclusion, solitude, confidentiality, secrecy, anonymity) are vital to well-being.<sup>123</sup> It is not simply that people need opportunities for privacy; the point is that their well-being, and the well-being of the liberal way of life, requires that they in fact experience privacy.

Coming up with public policies that are responsive to the aggregation problem—the problem of many small privacy losses cumulating into a large overall loss—will require special creativity on the part of those responsible for making policy. It may require a mode of thinking environmental policy analysts engage in all the time, namely, broad, long-term multi-factored assessments of costs, benefits and non-quantitative values. We ultimately may need a national privacy “czar” to promote the ideal of policies and practices that encourage and protect essential forms of privacy without intolerance or undue paternalism.

Suppose there is no efficient way to make public policy that is responsive to the aggregation problem because, for example, it would require mutual knowledge and coordination within a large and varied group of institutional actors. My observations about the importance of privacy to liberalism would hold, as a

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123. See *supra* note 110 and accompanying text.

matter of principle, even if the transaction costs of regulatory approaches to “coercing privacy” are prohibitive in practice. Moreover, if we can do no better than to leave things precisely as they are, then the seriously liberal way of life is in jeopardy. I am hopeful that we can do at least a little better than leaving things as they are. My proposal is that public policymakers begin to take account of the cumulative effects of eroding privacy tastes and expectations, and weigh the risks of either doing something or doing nothing. I do not pretend that this Essay has answered all of the questions it raises. We are very much at the beginning, not the end, of a fresh line of thinking about privacy, culture, and regulative norms.