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## The Human Right to Privacy

James Griffin

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# The Human Right to Privacy

JAMES GRIFFIN\*

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### I. AN ABBREVIATED ACCOUNT OF HUMAN RIGHTS IN GENERAL<sup>1</sup>

To say much of interest about a particular human right, we have to know its content. So we have to know how to decide its content. That is where I shall start.

We agree that human rights are rights that we have simply in virtue of being human. That does not get us very far, though, because we lack agreement on the relevant sense of “human.” Thus, our notion of a “human right” suffers from no small indeterminateness of sense. During the seventeenth and eighteenth centuries, when thinkers increasingly

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\* White’s Professor of Moral Philosophy, Corpus Christi College, Oxford University.

1. This Article is adapted from my new book, JAMES GRIFFIN, ON HUMAN RIGHTS (2008).

accepted that human rights were available to reason alone apart from belief in God, the theological content of the notion was gradually abandoned, and nothing was put in its place. The term was left with so few criteria for determining when it is used correctly and when incorrectly that we often have only a tenuous, and sometimes plainly inadequate, grasp on what is at issue. One of our pressing jobs now is to remedy the indeterminateness.

A term with our modern sense of “a right” emerged in the late Middle Ages, probably first in Bologna, in the work of the canonists who glossed, commented on, and to some extent brought system to the many, not always consistent, norms of canon and Roman Law.<sup>2</sup> In the course of the twelfth and thirteenth centuries, the use of the Latin word *ius* expanded from meaning a law stating what is fair to include our modern sense of “a right,” that is, an entitlement a person possesses to control or claim something. For instance, in this period one finds the transition from the assertion that it is a natural law (*ius*) that all things are held in common and thus a person in mortal need who takes from a person in surplus does not steal, to the new form of expression, that a person in need has a right (*ius*) to take from a person in surplus and so does not steal.<sup>3</sup> The prevailing view of the canonists was that this new sort of *ius*, a right that an individual has, derives from the natural law that all human beings are, in a very particular sense, equal: namely, that we are all made in God’s image, that we are free to act for reasons, especially for reasons of good and evil. We are rational agents; we are, more particularly, normative agents.

This link between freedom and dignity became a central theme in the political thought of all subsequent centuries. Pico della Mirandola, an early Renaissance philosopher who studied canon law in Bologna in 1477, gave an influential account of the link. God fixed the nature of all other things, he said, but left man alone to determine his own nature.<sup>4</sup> It is given to man “to have that which he chooses and be that which he wills.”<sup>5</sup> This freedom constitutes, as it is called in the title of Pico’s book, “the dignity of man.”<sup>6</sup>

This same link between freedom and dignity was at the centre of the early sixteenth-century debates about the Spanish colonization of Latin

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2. I present here what I take to be the present state of scholarship. See JAMES A. BRUNDAGE, *MEDIEVAL CANON LAW* 81 (1995); see also BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS* 35 (1997).

3. TIERNEY, *supra* note 2, at 69–77.

4. See GIOVANNI PICO DELLA MIRANDOLA, *ON THE DIGNITY OF MAN* 4–5 (Charles Glenn Wallis trans., Hackett Publ’g Co. 1998) (1965).

5. *Id.* at 5.

6. See *supra* note 4.

America. Many canonists argued emphatically that the American natives were undeniably agents and, therefore, should not be deprived of their autonomy and liberty, which the Spanish army was everywhere doing. The same notion of dignity was also central to political thought in the seventeenth and eighteenth centuries, when it received its most powerful philosophical development at the hands of Rousseau and Kant. And this notion of dignity, or at any rate the word *dignity*, appears in the most authoritative claims to human rights in the twentieth century. The United Nations says little in its declarations, covenants, conventions, and protocols about the grounds of human rights; it says simply that human rights derive from “the inherent dignity of the human person,”<sup>7</sup> but the most plausible interpretation of their use of *dignity* is that it is the use of the philosophers of the Enlightenment.

Now, the human rights tradition, which I have condensed into very few words, does not lead inescapably to a particular substantive account of human rights. There can be reasons to take a tradition in a new direction or to break with it altogether. Nonetheless, the best substantive account of the existence conditions for human rights is, I should say, very much in the spirit of the tradition and goes like this.

Human life is different from the life of other animals. We human beings reflect; we form pictures of what a good life would be and try to realize these pictures. That is what we mean by a characteristically *human* existence. It does not matter if some animals have more of our nature than we used to think, nor that there might be intelligent creatures elsewhere in the universe also capable of deliberation and action. So long as we do not ignore these possibilities, there is no harm in continuing to speak of a characteristically *human* existence. And we value our status as human beings especially highly, often more highly even than our happiness. Human rights can then be seen as protections of our normative agency—what I shall call our “personhood.”

But personhood cannot be the only ground for human rights. It leaves many rights too indeterminate. For example, we have a right to security of person. But what does that exclude? Would it exclude forcefully taking a few drops of blood from my finger to save the lives of many others? Perhaps not. To up the stakes, would it also not exclude forcefully taking

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7. International Covenant on Civil and Political Rights pmbl., Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights pmbl., Dec. 16, 1966, 993 U.N.T.S. 3.

one of my kidneys? After all, the two weeks it would take me to recover from a kidney extraction would not deprive me of my personhood. Where is the line to be drawn? The personhood consideration on its own will not make the line determinate enough for practice. And if a proposed right cannot become a practicable claim that one person can make upon another, then it will not be a right. That degree of determinateness is one of the existence conditions for rights. To fix a sufficiently determinate line we should have to introduce considerations such as these: Given human nature, have we left a big enough safety margin? Is the right too complicated to do the job we want it to? Is the right too demanding?, and so on. We must consider how human beings and societies actually work. So, to make the right to security of person determinate enough, we need another ground—call it “practicalities.” I propose, therefore, two grounds for human rights: personhood and practicalities. The existence conditions for a human right would, then, be these: One establishes the existence of such a right by showing, first, that it protects an essential feature of personhood, and, second, that its determinate content results from the sorts of practical considerations that I have roughly sketched.

My statement here of the personhood account is too abbreviated to persuade doubters, but I have discussed it more fully elsewhere.<sup>8</sup> One cannot get far in clarifying the human right to privacy without some remedy for the indeterminateness. Those who reject the personhood account will have to put their own remedy in its place.

## II. PERSONHOOD AND THE CONTENT OF A HUMAN RIGHT TO PRIVACY

With the resources of the personhood account to hand, we can make the following case for a human right to privacy.<sup>9</sup> Without privacy, autonomy is threatened. Most of us fear disapproval, ridicule, ostracism, and attack. We are social animals; we seek acceptance by the group; we are severe self-censors, often unconsciously. It takes rare strength to swim against strong social currents. If our deliberation and decisions about how to live were open to public scrutiny, our imperative for self-censorship and self-defence would come feverishly into action. Of course, there are so far no mind-reading machines outside science fiction, but there are alternatives: seizing one’s diaries or papers, strapping one to a

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8. See GRIFFIN, *supra* note 1.

9. One finds personhood offered as the ground for a right to privacy from time to time in the literature. See, e.g., DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 243–44, 252–53 (1986); PHILIPPA STRUM, *PRIVACY: THE DEBATE IN THE UNITED STATES SINCE 1945*, at 202–03 (1998); Lloyd Weinreb, *The Right to Privacy*, in *THE RIGHT TO PRIVACY* 25, 25 (Ellen Frankel Paul et al. eds. 2000).

polygraph, administering truth drugs, or magnetic resonance imaging of the brain that, it is claimed, can distinguish truth-telling from lying with ninety-nine percent accuracy.<sup>10</sup>

All of these threats are possible in the case of one person's solitary thoughts. But a lot of our most fruitful deliberation takes place in communication with others. Frank communication extends our vision, corrects or confirms our ideas, gives us confidence to go on thinking boldly. Frank communication, too, needs the shield of privacy; it needs the restraint of peeping Toms and eavesdroppers, of phone taps and bugging devices in one's house, of tampering with one's mail or seizure of one's correspondence. This is only a start, but we must also guard against padding the list. Too often the form of argument for a human right, or a right of any kind, is to identify a value—say, a valuable form of privacy—and then conclude that there is a right that protects it. But that is a blatant non sequitur. Not all values support human rights, or indeed rights of other kinds. For example, relaxation is valuable to us; without a certain kind of privacy one cannot fully relax. But that hardly shows that there is a human right to relaxation. Without relaxation, one might be a rather stressed agent, but if the stress is not great, one would be an agent all the same.

So much for autonomy. Think now of liberty. Autonomy is a feature of deliberation and decision; it has to do with deciding for oneself. Liberty is a feature of action; it concerns pursuing one's aims without interference. Only with frank, private communication can I discover that you and I have certain of the same unpopular beliefs and so be confident enough to act singly or discover the opportunity to act jointly. One would be inhibited from sexual experimentation, especially the kind that invites shock and disapproval, unless there was no fear of peeping Toms or hidden cameras. The richness of personal relations depends upon our emerging from our shells, but few of us would risk emerging without privacy. What is more, we need not only the fact but also the assurance of privacy, and for assurance we need well-established principles of behaviour, deep dispositions, strong social conventions, and laws effectively enforced.<sup>11</sup>

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10. On the last, see Mark Henderson, *Lie Test '99% Accurate'*, TIMES (London), Sept. 22, 2005, at 30.

11. See T.M. SCANLON, WHAT WE OWE TO EACH OTHER 203 (1998).

The issue about a human right to privacy is whether certain forms of privacy are necessary conditions of normative agency. What sort of necessity of condition is at issue? Is this case not conceptual necessity?<sup>12</sup> One can conceive of a person's functioning as a normative agent despite a plague of peeping Toms, listening devices, and magazines devoted to photographs of intimate moments. The strongest form of necessity that could be meant here is empirical necessity: that a member of the species *homo sapiens* will not in fact function as a normative agent in the absence of these forms of privacy. But that is implausible too. There are a few people courageous enough or self-confident enough, or just exhibitionist enough, to thrive in full public gaze. It is just that the rest of us cannot. But as long as these familiar weaknesses are characteristic of humanity widely, they are enough to provide a ground for a human right. Normative agency constitutes what we call "human dignity." Human rights are meant to protect the dignity of perfectly ordinary human beings. It would distort the existence conditions for human rights to limit them to what is necessary for the normative agency of supermen or exhibitionists. It would equally distort them, in the opposite direction, to include what is necessary for the normative agency of even the very most pusillanimous among us; it would be likely to result in too great a loss in other values, such as vigorous expression of opinion.

That, then, is the narrow, agency-focused right to privacy derivable from the personhood account. How much would it protect? It is what several recent writers have labeled "informational privacy": certain of my acts and thoughts and utterances should not be accessed by others

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12. No doubt, Charles Fried's use of *inconceivable* is hyperbolic. See Charles Fried, *Privacy*, 77 *YALE L.J.* 475, 477 (1968).

It is my thesis that privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply *inconceivable*. They require a context of privacy or the possibility of privacy for their existence.

*Id.* (emphasis added). Despite his talk of inconceivability, it looks, especially from the final sentence, that Fried really has in mind empirical necessity. At other points, though, Fried seems to return to conceptual necessity:

To make clear the necessity of privacy as a context for respect, love, friendship and trust is to bring out also why a threat to privacy seems to threaten our very integrity as persons. To respect, love, trust, feel affection for others and to regard ourselves as the objects of love, trust and affection is at the heart of our notion of ourselves . . . .

*Id.* at 477–78. Without privacy, says Fried, there is no love, respect, friendship, or trust; without those we are, he seems to say, not persons. But a misanthrope who does not love or respect others and is not loved or respected by them does not cease to be a person. But again, Fried shifts from a conceptual to an empirical point; the passage concludes: "[P]rivacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion." *Id.* at 478.

and, if known to them, should not be further spread. Which ones? Ones that, if public, would typically threaten normative agency. “Informational privacy” is not the ideal name; it suggests data—financial, medical, educational records, and the like—while it must be understood also to include certain correspondence, conversations, actions, even works of art if they are self-revealing and deliberately kept under wraps. A peeping Tom’s mere observation must count, for our purposes, as a violation of informational privacy. So long as we realize just how much the name “informational privacy” is meant to cover, it will do.

A question for us is whether this right to informational privacy is too narrow to constitute *the* human right to privacy. Over the last fifty years lawyers in several jurisdictions have appealed to a right to privacy in order to protect all of the following as well: the sale and use of contraceptives; abortion; sodomy; miscegenation; single-sex marriage; access to pornography; use of drugs in one’s own home; refusal to incriminate oneself; euthanasia; freedom from loud noises and foul smells that penetrate the home; not to have one’s reputation attacked; a father’s participation in the birth of his child; and much more. No doubt, current appeals to the right to privacy are too broad. But would we be willing to see them shrunk solely to informational privacy?

### III. LEGAL APPROACHES TO THE RIGHT TO PRIVACY

Several national constitutions promise protection of “privacy.”<sup>13</sup> The United States Bill of Rights never uses the word, but proclaims “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .”<sup>14</sup> Article 12 of the Universal Declaration of Human Rights says: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his honour and reputation.”<sup>15</sup> This is repeated almost verbatim in Article 17 of the International Covenant on

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13. See, e.g., CONST. ARG. art. 19; CONSTITUCION DE LA REPUBLICA DE CUBA art. 32; CONSTITUTION, art. 23 (1963) (Nigeria); CONSTITUTION OF NORWAY art. 102; CONSTITUTION OF POLAND art. 74; CONSTITUTION OF PORTUGAL art. 8; Konstitutsiia SSSR (1965) [Konst. SSSR] [USSR Constitution] art. 8; CONSTITUTION OF YUGOSLAVIA art. 53; see also AMOS J. PEASLEE, CONSTITUTIONS OF NATIONS (rev. 3rd ed. 1968).

14. U.S. CONST. amend. IV.

15. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 12, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948).

Civil and Political Rights.<sup>16</sup> The European Convention on Human Rights, Article 8, says: “Everyone has the right to respect for his private and family life, his home and his correspondence.”<sup>17</sup>

What one finds many times repeated in national and international documents are requirements of respect for or, more strongly, assertions of the sanctity of one’s person (security of person), private life, family life, home, and correspondence, with not infrequent mentions as well of protection against attacks on one’s honour and reputation. On the face of it, this is a heterogeneous list. One can see how married and family life, home, and correspondence might all be collected under the rubric “privacy.” But what about attacks on one’s honour and reputation? They seem a matter either of justified interest or of libel and slander, and their links with privacy are unclear.

Our immediate interest in looking at the law is in what it suggests to us about the content of the human right to privacy, particularly what more it suggests than simply informational privacy. The extreme brevity of what national constitutions and international declarations say about privacy, at which we have just had a glance, is not much help here. It is more helpful to consult case law. I want to look at the particularly rich case law on privacy grown up in recent decades around the United States Supreme Court. Of course, the ultimate aims of deliberation of a judge, a legislator, and a moral philosopher need not be identical. The constraints on a judge to interpret a constitution or a law and to build, where possible, on precedent, and the constraints on a legislator to find solutions to actual social problems and to stay within the bounds of what can feasibly be treated by law, are not as strong for a philosopher seeking to formulate a human right. But I shall not be trying to interpret either United States law or Supreme Court decisions, but rather, to use them simply as prompts to thought.

The first explicit, though unsuccessful, claim to a constitutional right to privacy appeared in Justice Louis Brandeis’s dissent in *Olmstead v. United States*.<sup>18</sup> The case concerned wiretapping. But Brandeis’s worry about such intrusions went back a long while—to an article that he and Samuel D. Warren published in the *Harvard Law Review* in 1890.<sup>19</sup> As Brandeis wrote in his dissent in *Olmstead*, echoing the article:

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16. International Covenant on Civil and Political Rights art. 17, Dec. 19, 1966, 999 U.N.T.S. 171.

17. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

18. 277 U.S. 438, 471 (1928) (Brandeis J., dissenting).

19. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The article had great influence on legal thinking in the United States. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 510 n.1 (1965) (Black, J., dissenting)

The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without moving papers from secret drawers, can reproduce them in court . . . Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.<sup>20</sup>

The privacy that exercises Brandeis here is informational privacy. But he claims further that the constitutional right to privacy, deriving, he thinks, from the Fourth and Fifth Amendments,<sup>21</sup> provides protection against “invasion of ‘the sanctities of a man’s home and the privacies of life.’”<sup>22</sup> This looks like the right to the protection of some sort of private space and private side of life, with the value attaching to these forms of privacy serving as the ground of the right. Call this “the privacy of space and life.” The right to informational privacy protects us against people’s access to certain knowledge about us. The right to the privacy of space and life protects us against intrusions into that space and into that part of

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(“Largely as a result of this article, some States have passed statutes creating . . . a cause of action [for persons whose private affairs were exploited by others], and in others state courts have done the same thing by exercising their powers as courts of common law.”).

It was Mrs. Warren who was the spur; she became alarmed at how advancing technology was eroding what hitherto had been quite naturally private. Early cameras required the subject to sit still for a good while, so a photograph typically had the consent of its subject, but high speed cameras allowed the taking and publishing of photographs of private life without consent. Whispers at the village water pump did not spread far, but then widely circulated newspapers appeared devoted largely to gossip. The result of this alarm was Warren and Brandeis’s article, *The Right to Privacy*.

20. *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting).

21. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The Fifth Amendment states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V. All of the following amendments have been cited in the Supreme Court at one time or another as giving support to a right to privacy: the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments.

22. *Olmstead*, 277 U.S. at 473 (Brandeis, J., dissenting) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

our life—say, into our married or family life. These two rights overlap in their protections, but, on the face of it, are different.

Brandeis next takes a step that increases the range of the proposed right to privacy still further:

The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.<sup>23</sup>

This seems to be something else again: a general right to liberty. Brandeis, though, overstates it. There is only, as doubtless he knew, a right to be let alone *unless* there is an overriding public interest. Several well-known principles of liberty take this form: *freedom of action unless an overriding public interest*. For instance, it is the form of John Stuart Mill's principle of liberty: *freedom of action unless harm to others*.<sup>24</sup> It is also the form of the principle of liberty much employed by the Supreme Court itself in the second half of the twentieth century: *freedom of action unless certain forms of immorality*, which may well include harm to others. In *Bowers v. Hardwick*,<sup>25</sup> the Court announced that people are generally to be let alone, but that the government is justified in forbidding acts as repellent to American sensibilities as oral and anal sex.<sup>26</sup>

Why did Brandeis move so easily and so without remark from informational privacy to the relatively narrow privacy of space and life and, finally, to the broad privacy of liberty? He moved so easily because he took these principles to be the same. So did many subsequent writers, including many of his fellow Supreme Court Justices.<sup>27</sup> Brandeis's inferences suffer from his using different senses of the word *private*. Any principle of liberty defines an area into which authorities may not intrude, that is, an area not of legitimate public interest, that is, a private area. Call this, as I did a moment ago, "the privacy of liberty." An enormous number of actions exhibiting the privacy of liberty are what we would ordinarily call "public." It would fall within our private sphere of

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23. *Id.* at 478.

24. JOHN STUART MILL, ON LIBERTY 10–11 (David Spitz ed., W.W. Norton & Co. 1975) (1859).

25. 478 U.S. 186 (1986).

26. The defence of these prohibitions in *Bowers v. Hardwick*, *id.* at 190–91, 196, was overturned by *Lawrence v. Texas*, 539 U.S. 558 (2003), explicitly on the grounds of liberty.

27. For instance, Morris L. Ernst and Alan U. Schwartz, in their book *Privacy: The Right to Be Let Alone*, equate them: "[W]e have chosen a subject uniquely personal in nature . . . the Right of Privacy, or, as we like to call it, the Right to Be Let Alone." MORRIS L. ERNST & ALAN U. SCHWARTZ, *PRIVACY: THE RIGHT TO BE LET ALONE* xii (1962).

liberty, for example, at least on Mill's account of it, for two homosexuals to kiss very publicly. The sense in which the intimacies of the locked diary and the marital bed are private is not the same as the technical sense, out of a general principle of liberty, in which a public kiss is private. And it does not seem that the right to private space and private life is just a specific form of a general right to liberty. The claim made by the Supreme Court, and by many others, seems to be that private space and private life are themselves valuable to us, indeed "sacred," and that the right to them is derived from those values. A general right to liberty, on the other hand, is derived from the value of our being able to pursue our conception of a worthwhile life; the values of private space and private life play no role in the derivation here. A general right to liberty is a right to *do* various things: to pursue the life one values, and perhaps also to use contraceptives, to have an abortion, and to commit suicide. Liberty says nothing explicit about whether, when I *do* use contraceptive devices in the marital bed, you may not spy on me. That is a further protection, needing a further rationale.

This puzzling shift from informational privacy to the privacy of space and life and then to the privacy of liberty recurs often in subsequent Supreme Court thinking. Four years before the famous *Griswold v. Connecticut* decision,<sup>28</sup> which concerned Connecticut's ban on the sale and use of contraceptive devices, the Court was invited to consider the very same ban in *Poe v. Ullman*,<sup>29</sup> but declined on the ground that there were no controversies raised requiring the adjudication of a constitutional issue, with Justice Harlan dissenting. Harlan insisted that, on the contrary, there were constitutional issues to be adjudicated, and to be adjudicated thus:

Precisely what is involved here is this: the State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation . . . . In sum, the statute allows the State [intolerably] to . . . punish married people for the private use of their marital intimacy.<sup>30</sup>

This looks like an invocation of the right to private space and life, but only a few lines later Harlan's identification of "precisely what is involved here" changes: "This enactment involves what, by common understanding throughout the English-speaking world, must be granted

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28. 381 U.S. 479 (1965).

29. 367 U.S. 497 (1961).

30. *Id.* at 548 (Harlan, J., dissenting).

to be a most fundamental aspect of ‘liberty.’”<sup>31</sup> Indeed, Harlan says, the liberty involved here is Brandeis’s liberty in *Olmstead*, the right to be let alone, which Harlan extols as “[p]erhaps the most comprehensive statement of the principle of liberty underlying these aspects of the Constitution.”<sup>32</sup> When Harlan observes that the State of Connecticut is enforcing its own moral judgements, he might be thought to suggest that this in itself is wrong. But he does not mean that. The liberty involved is not absolute, he says; states may enforce morality. So this is not Mill’s liberty—*freedom of action unless harm to others*. It is the formally similar but materially different liberty: *freedom of action unless certain forms of immorality*. Hence Harlan’s concentration on married couples. He leaves it open that, as far as the Constitution goes, fornicators, adulterers, homosexuals, and the incestuous may be denied contraceptives.

Only four years later in *Griswold v. Connecticut*, Harlan’s dissent became, in almost all major particulars, the Court’s view. For the first time the Court itself declared a right of privacy, “the right of marital privacy”:

The present case . . . concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. . . . Would we allow the police to search the sacred precincts of marital bedrooms . . . ? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.<sup>33</sup>

This seems clearly to be the right to private space (“the sacred precincts of marital bedrooms”) and to private relations (“the marriage relationship”), and it is the “sacredness” of the space and of the relationship that seems to be offered as the ground for the right. But then, once again, comes the now familiar shift. What Justice Goldberg, concurring,<sup>34</sup> cites as the ground of the right to privacy is Brandeis’s general liberty—and, once again, not the liberty of *freedom unless harm to others* but *freedom unless certain forms of immorality*. On Goldberg’s conception of liberty too, fornicators, adulterers, and homosexuals, no matter how private their acts, are not necessarily protected by the right.<sup>35</sup>

The Court’s opinion in *Roe v. Wade*,<sup>36</sup> which ruled unconstitutional a comprehensive ban on abortion, stretched the idea of “privacy” yet further. The majority opinion, written by Justice Blackmun,<sup>37</sup> starts with an idea of privacy we have met before:

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31. *Id.*

32. *Id.* at 550.

33. *Griswold*, 381 U.S. at 485–86.

34. *Id.* at 486–99 (Goldberg, J., concurring).

35. *Id.*

36. 410 U.S. 113 (1973).

37. For an account of the development of Blackmun’s thought in drafting the opinion, see LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 78–101 (2005).

[T]he Court has [hitherto] recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution . . . . [T]he right has some extension to activities relating to marriage, . . . procreation, . . . contraception, . . . family relationships, . . . and child rearing and education.<sup>38</sup>

This again looks like the right to private space (“areas or zones of privacy”) and private life (“marriage,” “procreation,” “family relationships”). But is an abortion private in either of these ways? It does not always take place within private space, such as the home or the marital bedroom, but often in clinics or hospitals with doctors and nurses in attendance. Nor is an abortion a matter of a personal relationship; it is in part a matter of a professional relationship. Soon the same shift from the privacy of space and life to the privacy of general liberty occurs in *Roe v. Wade*. Justice Stewart, in a concurring opinion, explains a person’s right to privacy as “his right to be let alone by other people”—that is, a general liberty.<sup>39</sup>

The principles of liberty that we have so far canvassed are of the form *freedom of action unless an overriding public interest*. Suppose liberty is, as Mill said, *freedom of action unless harm to others*. Abortion of—death to—a fetus can, I think, often be regarded, without intolerable conceptual strain, as a “harm” to the potential person denied life. But that is not enough to settle the moral question. If the phrase “harm to others” is best glossed as “harm to other persons,” then we have to decide whether a fetus, or a fetus at a late stage of gestation, is a “person” in the morally freighted sense intended. Suppose, on the other hand, that liberty is *freedom of action unless certain forms of immorality*. Then we have to decide the question of the morality of abortion. On either conception of liberty, we have to settle the major questions about the morality of abortion independently of the notion of privacy.

The reasoning in the Court’s opinion in *Roe v. Wade* is, to my mind—and hardly just to my mind—seriously flawed (though flawed reasoning, of course, does not imply wrong conclusion). Conceptions of privacy that seem, *prima facie*, to fit other cases do not seem, even *prima facie*, to apply to abortion. Liberty, however, does seem to apply, but various principles of liberty come with an “unless” clause that can hardly be ignored. The Court, though, ignores it—and understandably so. To confront it the Court would have had to take a stand on just the issues that then

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38. *Roe*, 410 U.S. at 152–53 (citations omitted).

39. *Id.* at 168 n.2 (Stewart, J., concurring).

deeply divided, and still divide, the country and the Court itself: for example, whether the fetus is a person, whether death harms the fetus, and whether, more generally, there is serious immorality in abortion. So it is not surprising that the Court, in its majority opinion, while appealing also to liberty, chose not to stress it, but took refuge in ideas of private space and private relationships. Once we endow private space or private relationships with “sanctity” we are off the hook: what then takes place in that space or in those relationships, whether moral or not, may not be regulated. The disturbing trouble, though, is that the ideas of private space and private relationship do not fit abortion.

What deserves our attention in *Bowers v. Hardwick*, in which the Court declared Georgia’s criminalization of sodomy to be constitutional,<sup>40</sup> is Justice Blackmun’s dissent.<sup>41</sup> The crux, he says, is the right to be left alone, and that right protects the practice of sodomy.<sup>42</sup> By now we are familiar with how interpretations of Brandeis’s principle of liberty shift around. But Blackmun goes on in his dissent to give a rationale for the right to general liberty different from any we have met before in Supreme Court deliberation, and a rationale, I should say, of great power:

We protect those rights [associated with the family] . . . because they form so central a part of an individual’s life. . . . We protect the decision whether to have a child because parenthood alters so dramatically an individual’s self-definition . . . . The Court recognized in *Roberts* . . . that the “ability independently to define one’s identity that is central to any concept of liberty” cannot truly be exercised in a vacuum; we all depend on the “emotional enrichment from close ties with others.”<sup>43</sup>

This important passage does two things worth our attention. It offers a defence of informational privacy. And it introduces a new conception of liberty. It does both of these by putting great weight on the idea of personhood. Our capacity as normative agents constitutes what the tradition has called “human dignity.” As Blackmun put it, we are capable of self-definition. As the Court in the earlier *Roberts* decision put it, one has the “ability independently to define one’s identity,” and that, it added, “is central to any concept of liberty.”<sup>44</sup> Normative agency cannot successfully be exercised in a vacuum. We need to read and talk and assemble without pressures on us to conform, and that requires, among other things, the absence of various kinds of monitoring—that is, it requires informational privacy. Blackmun’s appeal to a personhood conception of liberty was

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40. 478 U.S. 186, 189 (1986).

41. *Id.* at 199 (Blackmun, J., dissenting).

42. *Id.*

43. *Id.* at 204–05 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984)), *overruled by Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

44. *Roberts*, 468 U.S. at 619.

not unique. A few years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>45</sup> Justices O'Connor, Kennedy, and Souter also rejected the view of the earlier Courts and averred that "at the heart of liberty" is personhood.<sup>46</sup>

This new personhood conception of liberty can be explained like this. As I pointed out earlier, there are narrow and wide conceptions of

45. 505 U.S. 833 (1992).

46. *Id.* at 851. *Planned Parenthood of Southeastern Pennsylvania v. Casey* concerns the constitutionality of imposing certain restrictions on abortion—not a total ban but restrictions on how it may take place: for example, that a woman seeking an abortion must be provided with certain information twenty-four hours before the operation, and that a minor must have the informed consent of one parent. The Court ruled that some of the Pennsylvania restrictions at issue were constitutional and some were not. Though the Court's decision paid occasional lip service to the idea of "privacy," the crux, according to the majority of Justices, was liberty—the personal liberty conferred by the Due Process Clause of the Fourteenth Amendment. Justices O'Connor, Kennedy, and Souter emphatically rejected what had hitherto been the Court's predominant conception of liberty:

The controlling word in the cases before us is "liberty." . . . It is a promise of the Constitution that there is a realm of personal liberty which the Government may not enter. . . . Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.

*Id.* at 846–50. And here are what seem to me the explicitly personhood terms in which they then go on to characterize liberty:

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

*Id.* at 851. I point out their adoption of the personhood conception of liberty to show that Blackmun's appeal to it in *Bowers v. Hardwick* was not unique. Justices O'Connor, Kennedy, and Souter justify their repudiation of the Court's earlier principle of *freedom of action unless certain forms of immorality* by appeal to epistemic modesty:

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy . . . . The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter . . . .

*Id.* at 850. This epistemic turn is, I think, unfortunate. When it comes to the limits of liberty, the law cannot abjure all nondefinitive moral judgements. Our moral views about a mother or a doctor killing a deformed newborn baby are also not definitive, but we believe that a state may, nonetheless, prohibit such acts. In any case, one does not need to adopt epistemic modesty in order to reject the principle *freedom of action unless certain forms of immorality*. The idea of liberty itself gives us strong reason not to interfere with agents open to rational persuasion. One can reason with such agents, try to convince them, but often one may not, even if one knows definitively that they are wrong, decide for them. Respect for liberty alone would be enough to hold one back.

liberty.<sup>47</sup> On the wide conception, any restriction on what one wishes to do is a restriction on one's liberty, probably often justified. This is what I have been calling here "freedom unless"—that is, blanket freedom unless there is a justification for a restriction. On this conception, the one-way restriction on the road that I should love to nip down when I am late for work infringes my liberty, but no doubt justifiably. The personhood account, however, yields a narrow conception of liberty. What liberty protects, it says, is our pursuit of our conception of a worthwhile life. And my nipping the wrong way down a one-way street is certainly no part of my conception of a worthwhile life; it is too trivial for that. On the narrow conception, the traffic restriction does not violate my liberty, even a very minor liberty. It is a narrow conception because there are material constraints on it. On the wide conception, the domain of liberty is everything left after the "unless" clause has made its exclusions; it is the large residue. On the narrow conception, however, the domain of liberty is limited to what is major enough to count as part of the pursuit of a worthwhile life. There is also, on the narrow conception, a formal constraint on the content of liberty: one is at liberty to do only what is compatible with equal liberty for all. We shall come back to these two conceptions shortly.

So much for my selective survey of Supreme Court decisions. I do not pretend that it is a contribution to United States constitutional jurisprudence. I am not expert enough. Rather, I want to use it to advance my project. What will it tell us about the content of the human right to privacy?

#### IV. HOW BROAD IS THE RIGHT?: (I) PRIVACY OF INFORMATION, (II) PRIVACY OF SPACE AND LIFE, AND (III) PRIVACY OF LIBERTY

We come away from the survey with three forms of privacy for our consideration: informational privacy, the privacy of space and life, and the privacy of liberty. We have thereby identified various understandings of the right to privacy, one for each of these three forms of privacy and four for their possible combinations, so seven altogether. And we have encountered two different understandings of liberty: a broad or residual liberty and a relatively narrow liberty derived from personhood. We have also encountered two different examples of residual liberty: *freedom unless harm to others* and *freedom unless certain forms of immorality*, though in principle there are more.

What solid ground is there in all of this? There are, it seems to me, two pieces of solid ground. One is the right to informational privacy.

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47. GRIFFIN, *supra* note 1, ch. VII § 2.

We have seen the solid enough ground for considering at least *that* to be a human right. The second piece of solid ground is the right to liberty. The question of whether the broad or narrow interpretation of liberty is to be adopted is still with us, but nobody doubts that there is a general right to liberty, on one or the other of the understandings.

We must now try to make some of the rest of the ground firmer. Let me start with the relation of privacy and liberty. Should we, in the cases that have concerned us, forget about the right to privacy and appeal solely to the right to liberty? Does liberty do all the work? No, I should say. What Justice Stevens meant by “liberty” in his opinion in *Bowers v. Hardwick* is what I mean by “liberty” as distinct from “autonomy.” The various principles of liberty we have identified all concern “liberty” in my distinct sense. But informational privacy, which certainly constitutes at least part of a right to privacy, rests not only on liberty but also on autonomy. As I said earlier, we need certain forms of privacy to develop the confidence and capacity to overcome the enormous barriers to autonomous decision.

I explained earlier still, in discussing practicalities,<sup>48</sup> why, though the value of normative agency constitutes much of the value attaching to human rights, the rights cannot be fully reduced to it. There is also a looser pragmatic sense of reducibility in which human rights are irreducible. We could not discard specific rights and appeal only to the overarching right to normative agency without practical loss. It is hardly enough to give police the instruction: “Do not violate normative agency.” There is a lot of work and judgement, usually not at all obvious, involved in a strict derivation of a specific right, such as privacy, from the overarching interest—normative agency. A society would not successfully protect human rights if it appealed only to the one overarching value. We need to spell out far more specific rules such as respect for a person’s privacy of information, that is, a person’s correspondence, diaries, beliefs, associations, and so on.<sup>49</sup>

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48. *Id.* ch. II § 5.

49. I therefore agree with Ruth Gavison that the right to privacy can always be reduced to some other interest and right, but that it can be reduced hardly shows that it can also be jettisoned. See Ruth Gavison, *Privacy and the Limits of Law*, 89 *YALE L.J.* 421, 459–71 (1980). I disagree with Judith Jarvis Thomson’s claim that the rights to various forms of privacy are all justified by more basic property rights and rights over one’s body. But the human right to privacy—a right to informational privacy—is best seen as justified by autonomy and liberty, not by property rights or Thomson’s highly

Let me now turn to the key question: Is there more to privacy than informational privacy? I want to suggest that we say “No.” The Supreme Court, of course, has repeatedly said “Yes.”

I have two reasons for doubting the existence of a right to privacy of space and of life as the Supreme Court has conceived it. First, not only is it not needed to settle the Court’s questions about contraception, abortion, and many others, it is also not what actually does settle them. Justice Stevens is right: the issue they raise is liberty. The government may not interfere with my using contraceptives, or with my partner’s having an abortion, or with my watching pornographic films, and much else besides, unless there is a substantial enough public interest to outweigh my liberty, and in all of these cases there is none. That, anyway, is what I should be willing to argue, and it is, at any rate, the real issue.

My second reason for scepticism is the difficulty of finding any plausible explanation of why private space and private life should have the sort of considerable value that supports a human right. It is easy to explain it in the case of informational privacy; that sort of privacy is a necessary condition of normative agency and so is instrumentally valuable. But why should we care about, say, a private space? There is an ancient saying that still exerts an influence on our modern thought about private space: an Englishman’s home is his castle. For a long while, a man (the gender is essential) was accepted as an absolute sovereign in his own house. This sentiment originated in an age when a man had his goods and chattels, with his animals included among his chattels and his wife and children often not a big step above them. But now we think that society has urgent and still insufficiently recognized duties to regulate what goes on inside the private space, even in the marital bed. Society now rightly exerts control over marital rape, violence against the spouse, a parent’s physical or sexual abuse of a child, the parents’ neglect of their child’s health or education, and a family’s cruelty to its animals. Justice Blackmun avers that what is particularly protected against state regulation is “intimate behavior that occurs in intimate places,”<sup>50</sup> but that is doubtful. The ancient idea of an Englishman’s home, with a privacy that was a near absolute bar to outsiders, has given way to a much more permeable modern privacy. These remarks bring out the force of the feminist attack on privacy, but feminists have an objection not to the true human right to privacy, but merely to a patriarchal distortion of it.<sup>51</sup>

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dubious version of rights over one’s body. See Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295 (1975).

50. *Bowers v. Hardwick*, 478 U.S. 186, 213 (1986) (Blackmun, J., dissenting), *overruled by Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

51. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 187–94 (1989).

Our question is not whether private space is of *some* value. Of course, it is. One needs private space the better to relax, and the better to be creative—Virginia Woolf’s “room of one’s own.”<sup>52</sup> But though Virginia Woolf’s point might be good reason for my family’s aspiration to, say, each have a room of our own, it is most implausible that it gives us a human right to one. There are levels of health and education, as well as kinds of privacy, that are highly desirable but beyond what is required by human rights. But what of other cases? We are often concerned for the privacy of nonagents—for example, patients in a nursing home with advanced dementia. Their privacy is not only morally important, but it is also, we say, a matter of the dignity to be accorded to the human person. Why does not this non-agency value therefore, contrary to what the personhood account says, support a human right? But one cannot conclude merely from the fact that we speak here of “human dignity” that a human right is involved; the expression *human dignity* is far too widely used for that inference to be valid. Is not the more plausible explanation instead this: that those sunk in dementia still deserve deep respect for the full persons they once were, traces of whom may still survive, and anyone who lacks that respect has grossly defective feelings? The same is true, though to a somewhat lesser degree, of someone who lacks deep feelings of respect for the dead body of a beloved parent. But in neither case does the respect seem to be best explained in terms of possession of a human right. Appropriate behaviour does not always have to be determined by rights.

Does an undetected peeping Tom with a blissfully ignorant victim, then, not violate his victim’s right to privacy? After all, he does not actually inhibit his victim’s agency. But a human right is a right that one has simply in virtue of being human; one does not actually have to be a victim. What grounds the right to privacy is that certain forms of publicity typically inhibit human agency. The right is borne universally by human beings simply because of this typical vulnerability. So the right would be violated even by an undetected peeping Tom. Besides, the second ground of human rights, practicalities, which is also universal in scope, will lead to an easily grasped and widely drawn private domain: one that will foster the levels of assurance that agency needs, as well as perhaps

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52. VIRGINIA WOOLF, *A ROOM OF ONE’S OWN* 2 (Barnes & Noble 2007) (1929) (“All I could do was to offer you an opinion upon one minor point—a woman must have money and a room of her own if she is to write fiction . . .”).

supply a reassuring buffer zone. There are the demands of the human right to privacy in any society, but the exact levels concerned may vary in time and place. To employ an earlier distinction,<sup>53</sup> basic human rights are universal in the class of persons. But derived human rights, ones that arise from applying a basic human right to a particular time and place, may vary in content from society to society. In our present society it might require, at least for a while longer, protection of our nakedness and certain other culturally determined forms of modesty, which we know not all other human societies, or groups within our own society, need.<sup>54</sup>

What we have been looking for is a value attaching to private space besides, on the one hand, one that though undoubtedly a value is insufficient to support a human right and, on the other, a value that supports a human right but only because of its instrumental connection to informational privacy. At a certain point one must just either produce such a value or confess that one cannot find any. I confess that I cannot find any.

I believe, nonetheless, that we should retain a form of the right to privacy of space—only much more restricted than, and differently based from, the one that the Supreme Court employed. There is this instrumental argument. It is doubtful that society would be successful in keeping my correspondence and beliefs and sexual practices private if its officials were free to walk into my house whenever they liked. Also, laws, even moral laws, need to work with fairly clear, easily understood boundaries, and the walls of one's house form a far clearer boundary than the line between one's beliefs and practices that are relevant to informational privacy and those that are not. And around what is especially valuable to us we like, for good practical reasons, to have an ample buffer zone. So perhaps for reasons such as these the right to privacy will include a private space. But, even if so, the value of a private space would, on this explanation, depend on the value of informational privacy. So this gives us no reason to treat privacy of space as an independent addition to informational privacy.

What holds of private space holds too of private life. "Private life" covers, among other things, certain personal relationships. They are a major component of a good life and, indeed, central enough in most people's conception of a good life to help support a human right, usually liberty. Liberty is being free to pursue one's conception of a worthwhile life, and society can improperly interfere with its pursuit both by erecting a

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53. GRIFFIN, *supra* note 1, ch. II § 8.

54. This might explain why the following is not just a violation of a legal right to privacy, but a violation of our human right to privacy: "The owner of a country guest house rigged up a secret camera to film guests naked in a bathroom, a court was told yesterday." Simon de Bruxelles, *Hotelier Filmed His Guests in the Bath*, *TIMES* (London), July 12, 2003, at 13.

barrier between one and one's ends, say by legal prohibition, and by undermining the necessary conditions of the end itself, say by destroying the privacy that personal relations need. But the privacy that they need is informational privacy, as a necessary condition for autonomy and liberty. The privacy of space and of relationships is playing no further, independent role.

#### V. A PROPOSAL ABOUT THE RIGHT TO PRIVACY

My proposal is that we reduce the human rights that we appeal to in settling the cases we have had before us to two: the fairly circumscribed right to informational privacy and the long established right to liberty.

Early on I listed some of the heterogeneous issues claimed to be settled by the right to privacy. If my proposal is accepted, the list will have to be considerably trimmed. On my proposal, the following issues are to be settled, not by appeal to privacy, but by appeal to liberty: contraception, abortion, homosexual acts, pornography, interracial marriage, single-sex marriage, and euthanasia.

The following issues, however, *are* to be settled by appeal to privacy: wiretapping, planting listening devices in a person's house, unauthorized photographs of or other forms of information about one's sexual life or intimate personal relations, publishing membership lists of political organizations, disseminating information about one's sexual life or personal relations unless there is an overriding public interest, and, if practicalities do indeed counsel extending the exclusion zone to the walls of the house, then a derived right to the privacy of that space.

Then there are what are claimed to be issues of privacy that are in fact issues neither of privacy nor of liberty: nuisance noises and smells that penetrate the house (Is this an issue of human rights at all? Is it not a matter for some other part of tort law that has no bearing on human rights?), attacks on one's honour and reputation (Again, is this an issue of human rights? Should it not also be left to another part of tort law?), and two closely related matters—rights to security of person and to bodily integrity. Each of these two rights is derivable from normative agency. One would have no security of agency without certain kinds of security of person or of body. So these rights do not seem to be a matter of either liberty or privacy. There is also the supposed right to determine what happens in and to one's body. One interpretation of this further right is that it asserts that one's body is a private space, within which one is sovereign or near sovereign. It has prominently been cited to defend a

woman's right to abortion.<sup>55</sup> In this use, it echoes the ancient claim of male domination: an Englishman's home is his castle. It becomes the modern claim of female domination: a woman's body is her castle. And it is equally suspect. Would it protect a woman's taking drugs likely to seriously deform her fetus, or having as many children as she wants? Would it protect a woman's, or a man's, refusal to be safely inoculated against a disease that seriously endangers public health, or to supply a breath or blood or urine or DNA sample? Would it make mandatory drug tests for airline pilots an infringement of their rights? Would it give us a human right to sell our body parts? I suspect that there is nothing to this supposed right except what is already included in the right to liberty or in the right to security of person. In any case, it seems not a matter of privacy.<sup>56</sup>

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55. See Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUBL. AFF. 47, 52-61 (1971).

56. For completeness sake, one should explain why various rights in the United States Bill of Rights thought to imply a right to private space or private life do not really do so. In Supreme Court jurisprudence, the right against self-incrimination has been taken to rest on a right to the privacy of one's thoughts. For example, Justice Douglas wrote for the majority in *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965): "Various guarantees create zones of privacy. . . . The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment." Does the right against self-incrimination assume the privacy of thought? Does it not rest, instead, on the avoidance of injustice? A confession is not, for many reasons, ideal evidence. Putting great weight on confession easily degenerates into the judicial practices of the Inquisition and the Star Chamber. It leads readily to torture, and though torture is obviously wrong for the agony it involves, it is also wrong, and a matter of a human right, because it is typically used to undermine a person's agency; it is meant to take away a person's ability to decide what to do and then to stick to the decision. Is not the right against self-incrimination based on procedural justice and the protection of normative agency? "Our forefathers wisely inserted the Fifth Amendment in our Constitution in an attempt to prevent inquisitions of the types so common in Europe at that time and to protect accused citizens against being compelled to incriminate themselves under torture." Louis C. Wyman, *A Common Sense View of the Fifth Amendment*, 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 155, 157 (1960). McNaughton remarks that "the policy underpinning the privilege [against self-incrimination] is anything but clear." John T. McNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Affectation, Raison d'Être and Miscellaneous Implications*, 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 138, 150 (1960). But his own conclusion is that it had two purposes: First, "to remove the right to an answer in the hard cores of instances where compulsion might lead to inhumanity, the principal inhumanity being abusive tactics by a zealous questioner," and second, "to comply with the prevailing ethic that the individual is sovereign and . . . that the individual not be bothered for less than good reason . . ." *Id.* at 151.

And what of the now antique Third Amendment right not to have troops forcibly quartered in one's house? Does that imply, as in Supreme Court jurisprudence it has been taken to imply, a right to private space? Again see Justice Douglas's opinion in *Griswold*, 381 U.S. at 484: "Various guarantees create zones of privacy. . . . The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy." The American colonists had greatly resented the British Army's forcibly quartering its troops in their family houses.

VI. PRIVACY VERSUS FREEDOM OF EXPRESSION AND  
THE RIGHT TO INFORMATION

There is a worry. Will one person's right to privacy not constantly be in conflict with other persons' freedom of expression? And if the right is specifically to *informational* privacy, will it not often be in conflict with other people's right to information?<sup>57</sup> I think not.

To decide whether two rights really conflict it is not enough to know their names. One must know their content. Freedom of expression is freedom to state, discuss, and debate anything relevant to our functioning as normative agents: religion, ethics, learning, art, and whatever goes on in society or government that bears on our thinking and deciding autonomously and being free to pursue our conception of a worthwhile life. If I stop a friend from mischievously shouting "Fire" in a crowded theatre, or simply from boring us with stories about his holiday, I do not infringe his freedom of expression, even in a small way. Similarly, the right to information is a right to the information needed to function as a normative agent: access to the relevant thoughts of others, to the arts, to exchange of ideas, and, in a democracy, to information about the issues before the public, certain of the government's acts and intentions, and so on. If the government of my country does not reveal certain of its acts and intentions, my right to information may be infringed. If the newspapers in London fail to publish the results of my favourite baseball team in Cape Cod, I may be maddeningly frustrated but my right to information will not be infringed.

With an adequate understanding of the public-private distinction in place, society could then demand much finer-grained arguments for the existence of a public interest than anything we are offered now.<sup>58</sup> The

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The Third Amendment does not guarantee that it will not happen in the future, only that it will not happen in peacetime, and happen in wartime only "in a manner to be prescribed by law." U.S. CONST. amend. III. So does the Third Amendment define a human right (the word *right* is never used), or merely promise to reduce and, to some extent, regulate a much resented, though still possibly necessary, practice? If the Third Amendment has any link to privacy, it would be because the forced quartering of troops would threaten our informational privacy, just as having the police coming and going in our houses at their will would do. But the comparison with frequent police intrusion is farfetched; forced quartering of troops was fairly rare.

57. For an example, see Adam Sherwin, *Privacy Law Ruled Incompatible with Free Press*, TIMES (London), June 17, 2003, at 4.

58. It is not that the harmony between the rights to privacy, free expression, and information will be complete. Even after we have located this new line between the public and the private, the two domains can overlap. The sort of truly private discussion between a group of people about the injustices of society and their possible remedies

argument that adopting a public life forfeits a private life is ridiculous. So too is the argument that, it is reported, many journalists use to establish a public interest: “*Anything* may be relevant to assessment of a person’s character.”<sup>59</sup> True, anything may be relevant to a person’s character, but not everything relevant to a person’s character is of public interest. The odious practice of outing homosexuals, for instance, has also been defended on the ground of public interest. In 1994 Peter Tatchell, the head of the British organization OutRage!, urged ten unnamed Anglican bishops to admit their homosexuality, with the threat of outing hanging over their heads.<sup>60</sup> Outing, he said, was justified “when public figures abuse their power to harm other gay people.”<sup>61</sup> “Queer homophobes,” he went on, “are hypocrites, and their hypocrisy deserves to be exposed.”<sup>62</sup> There is an apparent public interest here: a society is the healthier for combating certain forms of hypocrisy; it is certainly better for combating injustice. But a homosexual bishop who believes, even if misguidedly, that priests should not be active homosexuals is not necessarily abusing his power. Not all persons whose appearance differs from their reality are thereby hypocrites. A homophobe, whether homosexual or not, who acts hostilely towards homosexuals solely because they are homosexual is unjust. The injustice deserves exposure. *That* is the public interest. But if the homophobe is himself also homosexual, to publicize that further fact is protected neither by the outer’s freedom of expression nor the public’s right to information. On the contrary, it is an outrageous infringement of the homophobe’s right to privacy.<sup>63</sup> It is not that a person’s sex life is never of public interest<sup>64</sup> but that usually it is not.<sup>65</sup>

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might include decisions and plans to mount terrorist attacks that a journalist who learns of them would rightly regard as being of public interest.

59. As reported by Laurence Marks, *The Right to Be Left Alone: An Argument for and Against a Privacy Law*, OBSERVER (London), Jan. 17, 1993, at 19 (emphasis added).

60. Peter Tatchell & John Lyttle, *I’m Out with the In Crowd; No Different from the Terror Tactics of the Tabloids—or a Just Cause? Peter Tatchell and John Lyttle Clash Over the Ethics of ‘Outing’ Homosexuals*, INDEPENDENT (London), Apr. 30, 1998, at 4.

61. *Id.*

62. *Id.*

63. There are less easy cases. Could publishing a revelatory biography violate its subject’s privacy? Here the potential public interest might be precisely the subject’s private life. We often benefit from a biography by having the whole of human life illuminated for us—for example, how a person’s sexuality affected his or her art. I think that the right to privacy would enter consideration only if the subject were alive, because it concerns the inhibition of one’s normative agency (though there is something arbitrary in this: one’s normative agency can even be inhibited by fear of what will come out after one’s death).

64. There was a more plausible case for a public interest (a security risk) when, in the early 1960s John Profumo was Secretary of State for War in the British Cabinet and enjoying the services of a prostitute also being enjoyed by the military attaché at the Soviet embassy. But even here, had there been a law prohibiting publication of a person’s sex life unless there was a public interest *and* no other way of meeting that

We are easily confused on these matters because, with human rights, we have been content merely to know their name. But we also have to know their content. And to know their content we have to know their existence conditions.

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interest, the newspapers would have been forced to take their information to the police or the intelligence services, which would have been both more efficient and more humane. There are, of course, considerations on the other side to be weighed: for example, would newspapers engage in this sort of sometimes useful investigative journalism if there were no prospect of publication?

65. There are any number of illustrations of how desperately societies need clearer and higher standards for establishing a public interest. In London, *The Independent* revealed in 1992 that Virginia Bottomley, then Secretary of State for Health, gave birth to her first child three months before her marriage, twenty-five years earlier, to the child's father and still her husband. Editorial, *Leading Article: In the Public Interest*, INDEPENDENT (London), July 14, 1992, at 16. An invasion of privacy, her husband charged to the Press Complaints Commission. *Id.* "A legitimate public interest," *The Independent* replied, arguing in a leader that the story "added to our understanding to discover that an able and widely respected Secretary of State for Health, drawing attention to the problems surrounding young unmarried mothers, should have gone through the difficult though in no way discreditable experience herself." *Id.* What a sorry state of society in which *The Independent* would have the effrontery to publish such a feeble argument.

