Privacy Without the Right to Privacy*

Some commonplace claims:

"Smith violated Jones's privacy by peeping through her blinds."

"The doctor violated her patient's privacy by telling the patient's employer of her condition."

"What adults do with other consenting adults in their bedrooms is properly private."

Many in these parts would accept such judgments as clear and coherent. We also are likely to think that such judgments are important, as evidenced by the steps people take to protect their privacy against breaches, and by our tendency to feel harmed and diminished when they occur. Privacy is even thought important enough as a human good that we must have a right to it.

Philosophically, however, it is also commonplace to regard the concept of privacy as a mess, and to hold that significant work is needed to show its coherence as a concept, if it can be done at all. Some have also argued that there may not be a right to privacy, or that if there is, it must be much narrower than it has recently been construed.[1] These worries would appear to be related: the justification and content of a right to privacy would seem to depend upon the proper understanding of the concept itself. So theorists have labored to find a concept that might help justify, for instance, the U.S. Supreme Court's reasoning from its finding of a "right to privacy" in the Constitution to its rejection of certain state restrictions on access to contraception, abortion, pornography, or the practice of homosexual sex. Further inferences from the nature of privacy, it may be hoped, could help answer recent questions as to whether certain new forms of surveillance, investigation, or data accumulation violate a right to privacy, and whether decisions about reproductive technology, organ selling, or end-of-life matters are properly protected by such a right.

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This paper considers critically whether and when a proper understanding of the concept of privacy can support inferences to specifications of particular rights against the government, either limiting or requiring its intervention for the sake of protecting privacy. Leaving aside the familiar worries about the coherence of the concept of privacy, I will argue that there is an inherent tension within the thought of a "right to privacy" as something that a state may be called upon to define and enforce. Almost any conceivable law or state action that aims to protect a right to privacy will at the same time tend to work against other interests that may properly be understood as interests in privacy; thus, such means are quite generally liable to generate difficulties of coherence. If correct, this suggests that better answers to questions like "What do (or should) we mean by privacy?" may not make a right to privacy coherent. This essay explores the nature of these difficulties, with a view towards evaluating them and showing their significance. Properly understood, the concept of privacy has some normative value for guiding law, policy and judicial decision, but its value is more limited than is usually suspected, and is also too tightly connected to contingent historical circumstances to serve as the target of a broad, unwavering right. I will urge that debates (especially political debates, though not exclusively those) that apparently depend on thought about privacy will often be better conducted in terms that don't invoke privacy or the right to privacy. In working out the above, it should also become clearer why so many discussions of privacy seem to bog down in intractable difficulties, and how changing the terms of these debates may make them more productive.

This essay is in four sections. I will first survey some of the evidence for scepticism about the coherence of the content of any supposed right to privacy. I will also show how, despite these worries about content, we may still grasp the form of a privacy rights claim. In the following two sections I discuss the general sorts of ways privacy is protected and how individuals gain control over the "zone of privacy," and I demonstrate a tension within attempts to use the law to provide a right to privacy. In the final section, I suggest that a piecemeal approach to privacy will better secure what we value in privacy than would an attempt to expound a single, unified, state-backed right to privacy.

I. Is there a coherent concept of privacy?

Over the last 30–40 years, the concept of privacy has been the object of much philosophical labor, attempting to explain what is involved in pri-

vacy, such that we could define and defend it as something to which people in these parts, at least, should have a right. One reason such labor has been necessary is that it has proven difficult to work out what we mean by "privacy"—what content should be understood to inhere in that concept. Here is a shorthand list of some of the problems that seem to beset the ways we think (or have thought) about the concept of privacy.

1. Privacy as a normative concept has worked against the interests of women, children, and racial and ethnic minorities, among other groups.
2. The contours of privacy often seem to follow considerations of what is shameful or stigmatized, which are themselves often ethically dubious notions.
3. The value of privacy may be doubted because it permits individuals to engage in wrongful or less-than-admirable conduct.
4. The concept is historically young.
5. The concept is culturally specific, and variable across different times and places.
6. There is no clear answer to the question of how the apparently different aspects of privacy relate to each other, such that we should suppose that it is a single concept. These different aspects of privacy are thought to include:

   that which falls outside the proper purview of the state
   the right to be left alone
   the right to control access to oneself; solitude/seclusion
   a right to anonymity in some domains/aspects of one's activities
   the right to control certain kinds of information about oneself
   the right to autonomy in certain crucial decisions
   the preconditions of intimate relations

7. It is unclear whether (the right to) privacy is better understood as a negative liberty or positive liberty; if it involves positive liberty, it is unclear to what extent the state or society is obligated to furnish its material basis.

Some of these difficulties (especially 1–3) raise worries about the apparent value of privacy; others (especially 4–7) raise worries about the

coherence of the concept itself—whether there is a single, ontologically solid concept at stake in debates over privacy, or perhaps two or more distinct, unconnected ones. Difficulties of these latter, conceptual sorts are illustrated by the following table. Column A lists a number of the things that have been thought to be covered by a right to privacy; column B lists things that are not thought to be so covered; column C lists things which seem to be hard to place either as protected or unprotected by a right to privacy. A question for privacy theorists is whether one can give principled reasons for why the different elements of columns A and B belong in their respective columns, as well as principled reasons for moving the items from column C into one or the other of A and B. The lists are divided vertically into what are commonly discussed as different sorts of privacy: informational, accessional, and decisional.[2]

Type of privacy	**Column A: Things with greater degrees of protection by privacy**	**Column B: Things with lesser or no protection by privacy**	**Column C: Things where the protection by privacy is debatable/undecided**
Informational privacy	Sexual preferences regarding the sex of one's partner	Marital status	Racial background
	Details of sexual activities, including whether or not one is a virgin	The fact that one is not a virgin by virtue of one's being a biological parent	Commercial purchases of sex toys
	Email and internet use at home	Email and internet use at work; highway use	Email and internet use in the public library
	Medical history	Employment history	Driving records
	Love letters sent through the mail; cell-phone conversations	Love letters sent via radio frequency or by audible Morse code; contraband sent through the mail	Love letters sent by FedEx; Wireless computer communications
	The record of one's love affairs	The record of one's marriages	Divorce proceedings

Type of privacy	**Column A: Things with greater degrees of protection by privacy**	**Column B: Things with lesser or no protection by privacy**	**Column C: Things where the protection by privacy is debatable/undecided**
Informational privacy	Employment income in private employment	Lottery winnings; employment income from state or federal employers	Winnings in private gambling
	Social security number; likenesses	Name; sex	Residential address; facial characteristics; age
	A confession to a crime to a priest, a lawyer, or a spouse	A confession to a crime to a policeman or a lover	A confession to a crime to a psychological counselor
	A vote for a candidate	Party affiliation for purposes of voting in a primary election; financial contributions to candidates or political parties	Contributions to political or viewpoint advocacy groups not engaged in electioneering
	Students' grades	Students' achievements, statistics in athletic competitions	Student home addresses (e.g., for military recruiters)
Accessional privacy	The contents of a home, apartment, or hotel room	The contents of an automobile on a roadway; things put outside in the trash	The contents of a travel trailer or recreational vehicle
	DNA	Fingerprints	Urine
	A worker's locker at work	A student's locker in a primary or secondary school	A worker's office at work
	Things in one's home that produce externally-detectable infra-red radiation	Things in one's home plainly visible through one's windows; things in one's yard visible from the street	Things in one's home that use unusually large quantitites of electricity
Decisional privacy	Abortions that are not harmful to the health of the pregnant woman	Abortions harmful to the health of the pregnant woman; infanticide	Sex-selective abortion; abortion to select for other phenotypic characteristics; maternal behavior potentially harmful to the fetus

Type of privacy	**Column A: Things with greater degrees of protection by privacy**	**Column B: Things with lesser or no protection by privacy**	**Column C: Things where the protection by privacy is debatable/undecided**
Decisional privacy	Heterosexual, monogamous marriage	Polygamous marriage	Homosexual marriage
	Access to, and use of, contraceptives	Access to, and use of, recreational narcotics; (non-)use of seatbelts or motorcycle helmets	Access to, and use of, sex toys; access to, and use of, hard-core adult pornography
	Decisions about child bearing *via* sexual reproduction	Decisions about child adoption	Decisions about reproduction *via* cloning or surrogacy
	Voluntary heterosexual sex among adults for most reasons	Voluntary heterosexual sex among adults for money	Voluntary heterosexual sex among adults for career advancement
	Decisions to refuse some or all forms of medical treatment	Decisions to use non-standard, non-approved medical treatments; decisions to use growth hormones for non-medical reasons	Decisions to use experimental or narcotic drugs for medical treatment

I think that these lists, fairly considered, generate at least *prima facie* worries about the coherence of privacy, considered as a single concept, at least among us in these parts. While one can make out some grounds for distinguishing between items in each row of the table, it's apparent that one will be hard pressed to define a concept of privacy, with a univocal sense, that explains what all column A (or column B) items have in common, or that provides a single sorting procedure for column C.

Whatever the apparent difficulties in detailing the contents of "the private," we nonetheless seem to have a rough idea of what we mean when we talk about privacy, and have little trouble attaching a sense to claims that one's privacy has been violated by one or another sort of intrusion. This suggests that there is a way of using the concept that we are comfortable with, despite difficulties about its content. Such an inarticulate sense is sometimes papered over by talking about the "personal" or "intimate space," the "private realm" or "domain," or a "zone of autonomy" or "privacy," employing a spatial metaphor to grapple with the uncer-

tainties canvassed above. Even if we can't easily specify how to set the boundaries of such a space, it seems we can give a sort of abstract, formal characterization of it. Let us say that the zone of privacy for an agent *A* encompasses (or is defined by):

a) some set of objects *O* (tangible and intangible)

b) having values V_1–V_n to *A*[3]

c) which are secured or available to *A* by some particular (set of) means of protection *M* (e.g., distance, hiding, encoding, legal sanction)

d) at *A*'s discretion[4] (I'll call this factor *A*'s "element of control")

e) from some form(s) of involvement *I* with persons or agencies P_1–P_n (collectively, *P*).[5]

This formula leaves a number of dimensions to be specified in a full account of "the private," but it captures the rough structure, if not the content, of a claim that some item, choice, etc., belongs to *A*'s "zone of privacy."[6]

On the surface it appears that the main obstacle for describing and justifying a right to privacy is to determine how to specify the boundaries of such a right—how to fill in, that is, the variables in (a), (b), and (e) in the formula above. Nonetheless, in what follows, I will draw our attention to the other elements of this formula: (c), the notion of "securing" the objects that are properly private through means such as the provision of a "right to privacy" by one's state; and (d), the agent's "discretion" or "element of control" over whether such-and-so object shall remain private. I will argue that the state's use of coercive means to protect a zone of privacy for individuals raises a set of important though little remarked difficulties, and that understanding these helps to explain some of the difficulties in marking out a coherent concept of privacy that could be the content of a "right to privacy."

II. Non-legal protections for privacy

Although privacy is not equivalent to individual control or autonomy with respect to one's environment and those with whom one comes into contact, some sort of control seems to be a crucial aspect of what people

seek in seeking privacy. (Consider: privacy is not merely the privation of contact with/influence by others. The sort of absence of interaction that shut-ins, extremely lonely people, and those in solitary confinement experience is not what "privacy" means here.[7]) If so, then it is of importance to consider how individuals attain relevant sorts of control. Control in the relevant sense is linked to the existence of "protections" for privacy (*M* in the formula above), which may take different forms and come from different sources. There are three broad categories into which we might classify the means of protection *M* useful for securing or making available the objects of privacy: physical/natural; social norms; and, within the range of social norms, a special place must be given to legal and institutional means wielded by the state. I'll consider the first two briefly on the way to an extended discussion of the third.

Perhaps the clearest model for thinking about privacy as a protected zone is to consider how one can obtain privacy by managing the physical circumstances mediating the relationship between oneself and others—for instance, by putting distance between oneself and others. If you drive to an unpopulated, unpopular wilderness area, leave your car behind, wander a few hundred yards or more into a wooded patch, chances are you will then have some sort of privacy.[8] The concept of privacy captured here involves notions of solitude, isolation, absence of observation, and freedom from impediments to action imposed by others or by society more generally. This sort of privacy need not involve perfect solitude: two people can do this, or several or a small group. In cases where there are multiple people seeking privacy together, "privacy" here refers to relations between these people and those not part of the group seeking privacy. This sort of privacy also helps one to achieve a certain degree of autonomy. When you are by yourself, or with a group of like-minded others, and you are unobserved and unimpeded by the rest of society, the laws and direct interference of outsiders will provide no obstacle to doing what one likes; and while one might be held accountable later for one's acts in seclusion, the ability of outsiders to call one to account can be severely diminished by the absence of (forthcoming) witnesses to one's acts. Thus, such seclusion and distance can provide an individual with substantial autonomy to act free from external interference, either at the time or after the fact.

The ability to isolate oneself from others by choice, or later to rejoin society, is the element of control exhibited in this form of privacy. An

analogous form of control can be realized through both mundane physical means as well as some quite sophisticated technological ones. For privacy in communication, you and I might whisper to each other in low voices, adopt a code which others can't break, or find hiding places for our notes that others can't find. I might also do similar things to protect information for just myself. If performed carefully and successfully, these techniques will indeed keep information or communication private—in the sense of being protected from the reach or inspection of those for whom it is not intended. To achieve privacy from the observation or access of others, we may also use certain constructed devices, such as homes with opaque walls, cars with tinted windows, bathrooms with doors on the stalls, and so forth. Such physical barriers create a simulacrum of distance between us and others. More advanced technology can also be used to encrypt messages, mask communication, secure premises, and so forth, thus creating artificial barriers between persons, and thereby allowing one to control access to and information about one another.

Several things are important to note about the sort of privacy one can obtain through distance, barriers, codes, and technology. First, its enjoyment does not depend on one's having any right to it; these means operate, if they operate at all, to impede the ability of others to observe or gain access to oneself, independently of any right to such protection. Moreover, no one would suppose that there is or should be a right to a broad, unfettered use of these means, since any unqualified guarantee to the use of these means would create conflicts with other important rights. There is no entitlement to the kind of isolation and freedom from observation that characterize the wilderness and are defeated by one's return to Main Street. A second, related point, then, is that this sort of privacy does not depend on the common possession of a concept of "privacy," since this sort of privacy can be obtained without special social protections for privacy, *per se*. Hence it is likely that this sort of privacy—the privacy of the hermit or of the homeowner barred behind the door of his house—is one that could be described and achieved in virtually any culture or time-period of human history. (Its value, however, may be viewed differently at different times and places.)

From these considerations, a third important point follows, namely, that this sort of privacy is fragile, and often only temporary. If someone finds you in the wilderness, intrudes on your whispered conversation, or

walks into your home unbidden, such privacy evaporates. Virtually any physical or natural basis for such privacy can be overcome by others if they have sufficient will and tools to do so. One thing that will help protect such privacy, then, is a robust, stable, and well-enforced set of rights that individuals can rely upon to check and predict the conduct of others.[9] Such rights would include, at a minimum, rights to security in one's possessions and person, to freedom of contract and association, to due process of law, and to some freedom of movement.[10] By *stable*, I mean that the person can depend on his rights being in place and not withdrawn throughout the course of his life. Whether or not such a set of rights is present, we can say that to create some guarantee of privacy in the wilderness, or the basis for a similar privacy within the confines of the social world, one will need the cooperation of others in society in some way.

Such cooperation is not entirely lacking, however. We commonly enjoy control over the objects involved in privacy in part because we possess social means to protect them. Buttressing the literal "zone of privacy" created by distance, walls, and so forth, certain social norms add to our understanding of a "zone" within which individuals are entitled to control with whom they interact, and how. Examples here include norms such as that one should:

> refrain from reading over the shoulder of strangers;
>
> refrain from eavesdropping on others' conversations;
>
> refrain from spreading embarrassing or unflattering gossip;
>
> refrain from asking strangers or casual acquaintances certain kinds of questions;
>
> refrain from sitting too close to others in an uncrowded public area if other choices exist;
>
> knock and obtain permission before entering a dwelling or a room;
>
> inform others if they are inadvertently revealing more of themselves than they likely intend to.

The norms represented in these directives and others are undoubtedly local, and variable in their importance within any given society; none of them amount to human rights or constitutional protections. They do, however, create expectations that one will enjoy freedom within and control over certain aspects of one's life under most circumstances. These norms offer individuals control over their personal zone by giving others reasons not to invade it. When members of a society violate such norms, doing so counts as bad manners or unsavory conduct, and can generate social scorn for the violators. Nonetheless, these norms are far from iron-clad protections for privacy, since violations of them are common, if not routine.

I've suggested that privacy can be obtained in varying degrees without strong protections. But if privacy is something we value, and if it plays a functional role in crucial areas of human life (as some have suggested[11]), and if, as I suggested, the powers of strangers to gain knowledge of and to influence our behavior is ever increasing, then it seems reasonable to seek to provide stronger social protection for privacy in the form of laws and state institutions. It is to this effort I turn now.

III. The protection of privacy by legal right

Sanguine writers have valiantly attempted to provide characterizations of privacy that show it to be a coherent, unified, and defensible concept; I will not contest their efforts here. However, when we start thinking in terms of a *right* to privacy, there is a further difficulty in expounding a right that the state is to enforce. This difficulty derives from the two very different ways that "privacy" might govern state decision-making: the state may be the guarantor of the privacy of individuals, protecting objects in the zone of privacy from external infringement; the state may also aim to respect the proper boundary between public and private. While it seems possible that both sorts of state aims could be governed by a single understanding of privacy, there is reason to think that they in fact must respond to different considerations. This is in part because privacy, in the first sense, requires the state to protect individuals against infringement by both the state and by other "private"—that is, non-governmental—agents. When one private individual or group acts, or is liable to act, in such a way that it intrudes upon the zone of privacy of another, the state may well

be able to act to safeguard the latter individual's zone of privacy against such infringement. Such enforcement activity, however, requires the state to be actively involved in policing these boundaries, which necessitates for it a role in the private zone it is supposed to create, and makes it an active participant in the lives of at least some private individuals. If, however, the state scrupulously commits itself to stay out of the private zone on grounds that this zone is on the other side of the public/private boundary, it will likely fail to provide individuals full protection from intrusion by other, private, parties. I will argue for the aptness of this picture first, and then discuss its significance.

A few specific cases will help illustrate my point more clearly. Consider first the sort of protection that the U.S. currently gives to the "decisional privacy" of individuals with respect to contraception, pornography, abortion, and homosexual activity. Some have argued that decisions such as *Griswold, Stanley, Eisenstadt, Roe,* and *Lawrence* reflect a sense that there is a particular zone of intimacy that is protected by the right of privacy. Let us suppose that there is some way to mark out the bounds of the intimate sphere of decisions that is justifiable and consistent with current precedents.[12] The upshot of these constitutional cases has been that the state should refrain from interfering with certain behaviors, in particular those that are thought to constitute the intimate sphere concerning sexual communication, sex acts, reproduction, and choice of sex partner.

That said, merely limiting the reach of the state is hardly a way to secure intimate decisions from outside interference. Even if the state refrains from interfering in the intimate choices of individuals, others, including neighbors, community members, and businesses, may well wish to intrude, and may well succeed without the help of the state to stop them. Mild forms of pressure might include refusing to associate or do business with those who make intimate choices one disapproves of; more aggressive forms might include using positive or negative financial incentives, refusing to license or reward, including refusing to conduct or acknowledge marriages, or using publicity and shaming. More potently, others normally considered part of the "intimate sphere" of a person's life may have a number of powerful levers with which to influence an agent's choices about intimate matters. Such parties might apply pressure by using publicity or shame, divorcing, disinheriting, or threatening to do such things, making emotional appeals, drawing children or friends into

the mix, or exploiting other vulnerabilities. A person considering abortion may be confronted with divorce or separation, disinheritance, ostracism, and/or public shaming. Conversely, some parties, such as employers and landlords, might use their powers to pressure a woman to have an abortion, by threatening to withdraw from their economic relations with her.

The state could, it seems, aim to protect a woman from having to confront such pressures by forbidding any of these pressures from being applied to her choice. To do so, however, would require it to take up an active intervention into what would normally be considered the private domain of decision. (It might, for instance, reject divorces when the grounds for divorce are related to a woman's abortion choice, or else to find "fault" in such cases with the non-pregnant partner.) Perhaps this is acceptable, on grounds that a proper understanding of what's private would give special protections to abortion choices above choices about divorce. However, if so, one may suppose that determining the bounds of the private zone would require considerable weighing and balancing of the goods at stake, and ultimately a good deal of subtlety. It is not likely that all grounds for wanting an abortion would be counted as equally defensible: e.g., abortions based on certain genetic characteristics (sex, race, height, allergies, hair color) might be deemed to be unacceptable on public-policy grounds (and even less defensible grounds can be imagined). Unless a woman's abortion choice were deemed so "private" that it is beyond any third-party scrutiny or pressure, the state will need to develop and implement criteria limiting the acceptability of abortion decisions, as well as attempts to prevent undue influence over them.

Whether or not we can easily imagine such grounds of state intervention arising, or that the state will go so far as to implement a regulatory regime in any of these areas, I think we can see a tension between the idea of privacy as a right to a protected zone of decision and privacy as a constraint on government intervention. If there is a right to protection from external interference in certain sorts of decisions, there is necessarily a call for a protector to take an interest in what happens in that protected zone. And if that right is less than absolute, then the protector will have to make judgments about when to intervene into that zone and when not to intervene. Besides putting significant decision-making authority about this zone in the hands of the state, making and enforcing such decisions will likely require it to inquire into people's motives, past activities, and

costs and benefits, thus becoming a much more active participant in those private decisions than might have been envisioned.

No doubt the cases associated with decisional privacy, arising out of the new jurisprudence of privacy, provide an especially contentious set of issues, and so may seem to leave more traditional notions of privacy untouched by my worries. But similar concerns apply to both informational and accessional conceptions of privacy. To demonstrate this in what is perhaps the narrowest conception of privacy—that is, privacy as control over certain kinds of information—I need first to note some of the difficulties that inhere in this area due to the nature of information, and also some of the steps states take already to secure individuals in their control over information. In contrast to certain ranges of decisions, it is nearly impossible to set a limit, in advance, on what sorts of information may be of legitimate interest to a state. Virtually any datum might, in some circumstances, be useful for state purposes such as setting policy, determining whether a suspect individual has committed a particular crime, furthering war aims, or preventing hostile attacks. So states in general do not seem to be obligated to avoid collecting any particular kind of information *tout court*. Rather, states, such as the U.S., restrict themselves from collecting certain kinds of information and then using it for certain purposes.[13] States also sometimes recognize the value of securing the personal information of individuals against other private parties, through restrictions on data collection and use of various sorts. For instance the U.S. recognizes torts related to the unwarranted obtaining and public dissemination of an individual's personal, embarrassing information for private gain. It also has created laws related to the collection and dissemination of information gained in business interactions. Third, there are laws against certain technological means of information gathering by private parties, such as wire-tapping, interception of electronic communication, surreptitious recording of conversations, and so forth. (Note that the second and third sorts of restrictions apply even when the nature of the information gained is not especially personal.)

If there is a right to privacy in law with respect to information, it would seem then to require a state to identify what sorts of information are to be protected to the control of the individual, along with a set of protocols for determining under what circumstances or for what purposes such information may be used or made public by parties outside an indi-

vidual's zone of privacy. It also requires the state to monitor compliance, investigate breaches, and undertake enforcement against those who violate these policies. Again, leaving aside the question of whether such a concept of the private (or protocol for determining its limits) can be determined, there seems to be a tension between the state's obligation to yield control over private information to individuals, and its obligation to prevent usurpation of that control by others. A few examples will illustrate the point.

Consider first some problems associated with establishing the boundaries needed to protect one individual's private information from disclosure by others. Because such information is frequently possessed by multiple people, setting boundaries here will require the state to weigh in on questions such as what facts of one's own life one can reveal, to whom, and under what circumstances. An illustration of these concerns can be found in recent discussions of whether "sexual orientation" is a private matter. We commonly hold that information about one's sexual activities is private, and this might lead us to think that such privacy covers not just activities but facts about one's sexual orientation as well. Recently, Richard Mohr has disputed this, denying there is a right to privacy for one's sexual orientation.[14] While Mohr does not advocate that people "out" homosexuals for the sake of outing them, or for just any cause, he argues that to grant homosexuals a right to privacy in their sexual orientation would impose an unfair and unreasonable burden—a "gag order"—on others, such as himself, to keep secret parts of their own lives which they would otherwise be free to discuss (if, say, they were heterosexual).

> The alleged duty is to keep the closet case's secret. On the part of the person with the alleged duty, such keeping entails a complex web of actions and omissions, including lies, deceptions, and morally coerced silences. . . . Third parties—parties with whom I have no contractual agreements—have no right to demand ... that I limit my independence—in the case of outing, my speaking and printing—for their sake even to the point of saving their lives.[15]

Mohr acknowledges that homosexuals have frequently accepted a conventional code of behavior according to which they are expected to keep such secrets for one another, and that severe consequences sometimes follow if such information is divulged. But Mohr contends that to embargo such information under a right to privacy would impose comparable but less justifiable burdens on those for whom their sexual orientation is no ground for shame. (Heterosexuals, by contrast, typically need not be cir-

cumspect about mentioning whom they talked to in a bar, or whom they have dated or seen dating other heterosexuals.)

It's one thing if social norms establish that certain topics and facts about people are best reserved for discussion amongst intimates, or constricted networks of acquaintances, or perhaps even to be treated as matters for juicy gossip, but not for publication. It is a very different thing when a state sets boundaries that constrain each individual in what one can reveal about one's own life when it intersects with the lives of others, or restricts what one can inquire about the lives of others. Yet, since rights most naturally inhere in individuals, asserting a right to control over private information would involve establishing such boundaries to keep individuals' private information safe from being divulged by others. Two relevant models illustrate the problems here.

At one extreme, an enforced right to informational privacy might take the form of the U.S. military's "don't ask, don't tell" policy, writ large. In the other direction, the state might create a proprietary interest in certain bits of information, as it has in enacting the sorts of laws that currently protect financial and health information in the U.S. These laws establish that individuals have the right to control the dissemination of certain facts about themselves, which they may then disclose at their discretion, or release to other individuals and business entities in exchange for consideration. This model is exemplified by recent requirements on many businesses to secure permission from their trading partners with respect to how they use such facts in the conduct of their business. While this approach likely increases individual control over private information, it is unclear just how much difference this makes in practice. It would appear that most individuals end up ceding control over their information to the banks, insurance companies, and medical providers they deal with as a matter of course: it would be very difficult to lead an ordinary life in the U.S. these days without doing so.[16] Moreover, the terms of these agreements are almost always set by the more powerful trading partners who can take or leave the business of any particular individual.[17]

While the "don't ask, don't tell" approach to informational privacy is almost certainly less palatable than the latter, proprietary model, note that both require the state to take up an active role in policing and adjudicating the boundaries of the private sphere. In the former model, the idea that the state would intervene between individuals to enforce silences is prob-

lematic for reasons like those Mohr discusses: ensuring one party's control over private information involves taking away such control from another party. While we might imagine that things run more smoothly in the proprietary model, giving the state a role in enforcing the boundaries of privacy again requires it to abridge some individuals' control over their information to protect that of others. If there turns out to be a dispute over whether one party has breached the rights of another, the state would need to investigate such incidents, and if found to be warranted, pursue rectificatory justice to punish the breaching party and to compensate and/or return control to the injured party. Such a process can result in further and wider revelations of sensitive information for those whose rights have been breached. Moreover, many may not learn that their privacy has been breached unless the state is somewhat vigilant in looking for such breaches, and bringing them to light when they occur. Of course a few successful prosecutions of those who have breached the rights of some can help to secure the rights of many more by creating disincentives to violate their rights. But in principle, at least, each individual's privacy is secured first and foremost by the decisions of others to refrain from violating it; unlike some rights (say, to peaceful possession of one's property, or to freedom of speech), the state's enforcement of a right to informational privacy is not likely to repair the damage to the rightholder's privacy after a breach occurs.[18]

Lastly in this section, I'll note that a similar set of issues is raised by the feminists' critique of privacy, in their assertion that the public/private dichotomy has helped men to retain control over women by regulating access to them in the private sphere. Because women have historically been confined to the "private sphere," the very "privacy" of that sphere has aided in their subordination, by excluding their conditions there from the scope of state scrutiny.[19] In response, feminists have advocated that the state take a greater interest in protecting women's rights against their husbands and lovers, and those who would exploit them in the "private sector." Yet giving the state a greater role in protecting women's physical and bodily privacy does not unambiguously advance this interest. While it is surely best for women to be able to obtain state protection from violence, assault, rape, and harassment, such protections tend also to cost women control over their access. For instance, in some jurisdictions the police who investigate domestic violence complaints are required to arrest the alleged abuser, regardless of the wishes of the complaining party.

Protections for women against rape have also tended to put the victims under scrutiny with respect to their past sexual histories, in order to judge whether their complaint is likely to have merit.[20] When women who are mothers of juveniles have public authorities come into their private spheres, especially when the women are already marginalized or under stress, they also tend to risk being found unfit as a parent, and thus losing access to their children. More generally, women who find themselves in serious need of protection from state or public agencies tend to lose significant degrees of control over their lives when they have to deal with bureaucracies designed to weigh and protect their interests. States are simply not well suited to provide nuanced and flexible assistance to most of the people they govern, nor are empowered bureaucrats and functionaries particularly likely to respect the privacy of those they are supposed to assist.

IV. Protecting privacy: The piecemeal approach

The analysis to this point does not yet a complaint make. I have suggested that efforts to specify the content of a right to privacy may be even trickier than has been thought, due to the state's problematic dual roles as privacy-right enforcer and potential transgressor of said rights. I have not argued that such content could not be specified, nor that if it were, that the state could not in its dual roles equally respect and enforce a right to privacy. What I will argue, by way of conclusion, is that even in a best-case scenario, where the state functions as well as we could reasonably expect, there are reasons to be wary of asking it to define "privacy" and then to enforce a general "right to privacy." These reasons stem from the ways we actually value privacy, and how we come to understand what privacy is in ordinary life. Even if the state has a legitimate end in protecting privacy, it would do better to define and protect specific rights—sometimes broad, sometimes quite narrow—on their own merits, rather than to attempt to deduce from the concept of privacy a specification of the particular claims and duties it will enforce.

I suspect that the difficulties manifested by the cases in Section III are at least partly explained by the following, more general complaint. The long-suffering notion of the public/private divide, as the idea that there are specific boundaries on proper state action, is meant at least to do this much: namely, to mark off the proper limits to the state's use of its coercive powers. Insofar as individuals have particular rights against one

another that the state is required to enforce, the bounds of the public sphere extend so far as to allow for use of coercive power to protect those rights. If, however, the "right to privacy" means not just a right against state intervention beyond the public/private boundary, but rather a generic right of individuals against individuals, and if this right licenses and requires coercive state intervention for its protection, then individual privacy itself becomes enmeshed with the apparatus of the state which is assigned to enforce such a right. This will tend to ensnarl notions of privacy, as a protected domain of individual control, with the vagaries of what it is possible to achieve with the coercive institution of the state.

While this role for the state may appear to be no different than any of its other tasks of enforcing rights, it is different, for at least two reasons.[21] First, insofar as privacy is about securing to individuals control over some important aspects of their lives, state coercive apparatuses are generally not adept at leaving such control in the hands of individuals. Even in what seems like the most promising scenarios, where the state merely enforces private agreements (such as contracts), the state must play an active role in deciding which agreements merit enforcement, monitoring compliance, investigating non-compliance, and then choosing and enforcing remedies. In more contested situations, where the state is called upon to set boundaries between individuals and settle disputes, individuals are liable to confront cumbersome bureaucratic or policing functionaries in the service of protecting their privacy. The tendency of state apparatuses to under- or overreach is unmistakable.

Again, this may seem no different from concerns one might raise about the state's enforcement of any right: virtually all abstract rights require balancing against competing claims, as well as translation into more specific principles, as part of realizing them in policy. Nonetheless, while these sorts of difficulties certainly plague very abstract rights, such as rights to liberty, equality, or due process of law, they would appear to be less salient for rights with more substantive content, such as a right to bear arms, to freedom of expression, to compensation for the expropriation of property, or the non-establishment of religion. Such rights specify a particular end or domain over which the individual is to be secured freedom, and are largely "negative rights," taking the form of guarantees against intervention by the government. In these cases overreach is not so clearly a worry.[22] Those "positive rights" which require government pro-

vision—such as rights to, say, compensation for expropriation of property, basic education or non-discrimination—do not generally seek to promote individuals' control over those domains, but rather to provide some good or to eliminate some harms, independently of whether the individuals involved wish such benefits or not. Hence a right to privacy appears special at least in this: that the end of the right—the provision and protection of an individual's control over certain important aspects of her life—is in some tension with the institutionalized, coercive means that are used to implement it.

The second difference is that because concepts of privacy tend to develop and change in response to the conditions in which people live, stability and predictability in those conditions is crucial for protecting what people regard as their privacy. This is in part reflected in the fact that the occasions when privacy becomes an issue for individuals are typically those when there is a struggle for control over their lives. The state's weighing in on behalf of one party or another—whomever it regards as possessor of the privacy right—may serve to tip the struggle in favor of the interests of the rightful party. But insofar as the state is itself a site of such struggle, the protections granted by the coercive intervention of the state may be temporary and reversible. Or, to the extent that coercive intervention merely alters but fails to end such struggles, those who are disadvantaged by government intervention may take alternative routes to exercise power over others.[23] This does not imply that states must not intervene in such struggles; rather, it implies that such intervention has to be judged fairly holistically before one can judge that it increases individuals' control over their private spheres. This again seems to be different from most other sorts of rights one might ask the government to enforce.

This last bit of analysis deserves further development. As suggested earlier, we can understand how people come to possess and value a concept of privacy even if there is no specific right to enjoy such privacy. Our understanding of the contours of "the private" can be at least partly explained in terms of the histories of technology, social organization and cultural norms. It is also shaped and aided by the fact that citizens in modern Western states enjoy sets of stable, robust rights. Were our set of rights much less robust or stable than it has been, it is hard to see how we would come to think of some currently private things as private: if, for instance, we could not keep interlopers out of our homes, we might come to have very different understandings of the possibility, need or value of keeping

such things as family disputes, medical conditions or pornography usage "private." Differences among the concepts of privacy at different places and times may be traceable, in part, to facts about what other rights are possessed by the various groups. So our sense of what is and isn't private is no doubt influenced by the rights and other circumstances to which we are accustomed.

The ideas of privacy that we get from its haphazard history may be hard to piece together neatly, but they also don't need to bear much weight. Social conventions, technology, rights of other sorts, and our own accommodations will tend to provide some protections for privacy, and/or inure us to its absence. From time to time, we may have reason to alter or expand the range of rights we enjoy, and doing so may require the state to intervene into aspects of life it previously left unregulated, or withdraw from parts it has previously regulated. But decisions of this sort can be made based on the merits or demerits of the particular proposal, where its effects on privacy-as-we-know-it are just some of the many possible pros and cons. We need to reason about what rights we should have in this area by starting from considerations of things such as the local social norms of privacy, existing and expected technology, natural and physical protections for privacy, and the set of currently defended and independently grounded rights we enjoy. Taking all such considerations into account constitutes what I will call the "piecemeal" approach to privacy.

The piecemeal approach to privacy can be contrasted to one that posits a full-on legal right to it, or perhaps several such distinct rights. This appears to be the approach that is now ensconced in U.S. constitutional law, and is also in evidence in the earlier, narrower common-law privacy findings, and is the aim of much recent philosophical theorizing. Independently of the problems of defining privacy, I still think that there are justified worries about the need for such an approach, its flexibility for adapting to the nuances of particular cases, and its political stability in the face of disputes between competing conceptions of what is properly "private."

Both approaches to privacy are, and must be, able to accept and advocate changes to the laws for good cause, including to right injustices, to protect against new or unforeseen harms, and to promote the ability of individuals to flourish. To see the importance of such dynamism, it is helpful to consider more carefully even just the last century or so of the history of our concepts of privacy and the right to privacy, including the recent crescendo in concern over privacy. Virtually all of the significant

developments in the modern theory of privacy in the U.S. have in their very near vicinity a technological or social-organizational development to which they respond. The original torts that have been recognized as constituting the right to privacy can be traced to worries related to the development of mass media in the last century or two. Warren and Brandeis, in their famous 1890 article on "The Right to Privacy," were clearly provoked by the way new technologies made it possible for strangers to transgress the bounds of what was then regarded as the properly private. William Prosser's analysis of the right to privacy in 1960 found that it consisted of four torts, three of which are closely linked to the possibility of using mass media to cast an unflattering, unwarranted public light on a private person.[24]

Similar reflections go with other considerations of privacy, such as an interest in restricting access to one's financial or medical information, or in making decisions about birth control and abortion. New technology frequently offers opportunities for individuals to act in ways that further their interests, but it also frequently puts their decisions into novel networks of influence. Through technology, a person's medical and biological data becomes much more useful, detailed, and portable, but it also is of use to those who may be called upon to pay for one's treatments (insurers, employers), who also come to take an interest in it. Collected financial and consumer information presents individuals with the ability to prove their credit worthiness, but it also allows businesses to target their marketing, price-segment the marketplace, and deny credit to some. Various geo-locational devices (such as tollbooth transponders and GPS receivers on phones) facilitate a number of conveniences, but they also make one's movements more easily tracked by governments and marketers. Technological advancements like abortion and contraception shifted the balance of control over women's sexual choices. Attempts by states to restrict access to these technologies may be seen as a way that male-dominated segments of society have tried to counter the threat such technology poses to their control over sexual decision-making. The assertion of a right to privacy in this area, then, can be seen as a way that courts have sought to increase some individuals' control of a part of human life when such control was in dispute between different social groups.

New technology and social upheavals often have the effect of altering the balance of power amongst different segments of society, some-

times leveling it, sometimes tilting it. Law can play a valuable part in helping individuals to retain control over those parts of their lives they regard as private when they are threatened by new forms of surveillance, access, or social regulation. But choices about when and how the law should intervene need to reflect a range of considerations, including efficiency, equity/justice, equality, autonomy, security, risk and reward for future members of society, in addition to the effect on the perceptions and expectations of privacy of those concerned. A piecemeal approach to privacy more clearly gives a place to the many competing considerations that can conflict with any particular conception of an individual's privacy. But it would also give significant weight to the understanding of privacy predominant at a given time and place, since individuals are likely to have shaped their lives and their own ideas about what is private (and what not) according the norms of their society. Maintaining stability in these understandings is one of the crucial preconditions for the possibility of any concept of privacy. Hence there is a non-trivial presumption in favor of maintaining stability in the rights and laws governing a place, but which also favors state intervention when technology or social change make possible new, undesirable intrusions into the lives and decisions of individuals.[25]

Of course privacy theorists don't generally claim that privacy is an overriding value for government policy. But whether the idea of a right to privacy is deemed overriding or merely *prima facie*, it is hard to imagine that state implementation of such a right could avoid being subject to the sorts of power dynamics that have been in evidence over the abortion controversy in the U.S. in the wake of *Roe*, or the gay-marriage controversy in the wake of *Lawrence*. Consequently, it would not be surprising to find the actual implementation of any generically stated right to privacy would be unpredictably variable. As some of the arguments in the previous section suggest, many of the individuals affected by these adjustments would perceive them as violations of their privacy, as they currently regard it, and *they would be right about this*. When the state intervenes in a dispute between parties in order to protect one against encroachment or aggression by the other, more often than not the state will be regarded as itself encroaching or aggressing by the party who is the target of the state's action. For most purposes this is conceptually unproblematic, because the point of the state's action can be described in terms of a substantial, legitimate purpose that the state aims to bring about—for instance, the protec-

tion of property, life, the right to speak or assemble. But unless the understanding of the privacy interests at stake is already broadly shared and such privacy is valued, the state's claim to be defending privacy is likely to be seen by the targets of the state's action as merely reversing the outcome of a competition or struggle among private parties, rather than putting it to rest. Hence, if there is a shift in the control of state power, there can easily be a further reversal in the outcomes of such disputes. Such reversals are inimical to the ability to enjoy privacy, since they first foster expectations of privacy and then undermine them, leaving individuals more vulnerable than they might have been if left to their own devices under more stable circumstances.

Thus, privacy may end up being best supported by a piecemeal approach, in which the state establishes and consistently enforces rights that are broadly accepted, clearly demarcated, and protective of the resources needed to lead autonomous lives. Growth, change, and even decay in an individual's allotment of rights may be compatible with privacy, so long as there is great stability in them overall, and the set of rights is sufficiently robust to allow individuals freedom from fear, stigma, and subordination. If so, this might help explain and support an otherwise puzzling or troubling remark by Judith Shklar, in her rather minimalist defense of liberalism:

> The important point for liberalism is not so much where the line [between the personal and public spheres] is drawn, as that it be drawn, and that it must under no circumstances be ignored or forgotten. The limits of coercion begin, though they do not end, with a prohibition upon invading the private realm, which originally was a matter of religious faith, but which has changed and will go on changing as objects of belief and the sense of privacy alter in response to the technological and military character of governments and the productive relationships that prevail. It is a shifting line, but not an erasable one, and it leaves liberals free to espouse a very large range of philosophical and religious beliefs.[26]

If Shklar is correct, one lesson from her injunction is that there is a keen need to avoid conflating the public/private distinction, understood as the boundary of proper state action, with the boundary of the zone of privacy, understood as the individual's proper sphere of protection from interference. The latter distinction is likely to be more transient, fuzzy, and contradictory. Positing a state-enforced "right to privacy" tends to erode the

difference in these two boundaries, and replaces the public/private boundary with something much less solid.

Scott A. Anderson

University of British Columbia

NOTES

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1. Judith Jarvis Thomson famously denied that we know what we are talking about when we talk about a right to privacy, but also denied that this was a problem, arguing that the concept of privacy is a "derivative" from other rights that we understand better. See "The Right to Privacy," *Philosophy and Public Affairs* **4** (1975), 295–322. This essay has had numerous respondents, arguing in favor of what she denies. See in particular Thomas Scanlon, "Thomson on Privacy," *Philosophy and Public Affairs* **4** (1975), 315–22; James Rachels, "Why Privacy is Important," *Philosophy and Public Affairs* **4** (1975), 323–33; Jeffrey Reiman, "Privacy, Intimacy and Personhood," *Philosophy and Public Affairs* **6** (1976), 26–44; Ruth Gavison, "Privacy and the Limits of Law," *Yale Law Journal* **89** (1980), 421–71; Anita Allen, *Uneasy Access* (Totowa, NJ: Rowman and Littlefield, 1988). For an essay that anticipates Scanlon, Rachels, and Reiman, and contradicts Thomson, see Charles Fried, "Privacy," *The Yale Law Journal* **77** (1968), 475–93. These essays *contra* Thomson defend what might be described as a moderate position on privacy, construing it as control over intimate information or space, or access to a person. See n. 2 (below) for discussion of broader and narrower conceptions of privacy.

2. The vertical divisions in this table roughly reflect disagreements about how broadly or narrowly the right to privacy should be construed. Hyman Gross, Louis Henkin, Richard Posner, W. A. Parent, and Raymond Wacks have decried the expansion of the right to privacy to include protection for personal autonomy or a "freedom to be left alone," and argue that it should protect principally control over certain sorts of information. See Hyman Gross, "Privacy and Autonomy," in J. Roland Pennock and John W. Chapman (eds.), *Privacy: Nomos XIII* (New York: Atherton Press, 1971), pp. 169–181; Henkin, "Privacy and Autonomy," *Columbia Law Review* **74** (1974), 1410–33; Raymond Wacks, "The Poverty of Privacy," *The Law Quarterly Review* **96** (1980), 73–89; Richard Posner, *The Economics of Justice* (Cambridge, MA: Harvard University Press, 1981), pp. 274–75; and W. A. Parent, "Privacy, Morality, and the Law," *Philosophy and Public Affairs* **12** (1983), 269–88. Arguing in favor of a broader conception of privacy, as in a "right to be left alone," are Samuel Warren and Louis Brandeis, "The Right To Privacy," *Harvard Law Review* **4** (1890), 193–220. More recently, in the same vein, see Edward J. Bloustein, "Privacy as an Aspect of Human Dignity," *New York University Law Review* **39** (1964),

962–1007; Ferdinand Schoeman, *Privacy and Social Freedom* (New York: Cambridge University Press, 1992); Julie Inness, *Privacy, Intimacy, and Isolation* (New York: Oxford University Press, 1992); Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Ithaca, NY: Cornell University Press, 1997); Jean Cohen, *Regulating Intimacy: A New Legal Paradigm* (Princeton, NJ: Princeton University Press, 2002); and J. Angelo Corlett, "The Nature and Value of the Moral Right to Privacy," *Public Affairs Quarterly* **16** (2002), 329–50.

3. This condition aims to distinguish actual losses in privacy from, say, random fluctuations in what others learn about oneself that they did not previously know.

4. That is, *A* can at least reject elements of *O*, and perhaps also obtain them, at *A*'s choosing.

5. These are actually two distinct conditions, which could be separated.

6. This formula is intended to encompass equally different "kinds" of privacy, such as informational, restricted-access, and decisional privacy.

7. I owe this thought to Bruce Jennings.

8. I am also assuming facts such as that no one has placed remote-sensing devices in this location.

9. Note: the rights I'm thinking of here need not include any specially conceived "right to privacy."

10. Having such rights is not, however, the same thing as having a right to privacy, or therefore a concept of privacy. At least it's not obviously the same. One reason to think this: rights of the sort mentioned antedate by centuries the contemporary concept of privacy under discussion here.

11. In particular, theorists have argued that privacy is crucial for the possibility of intimate relationships. See Fried, Rachels, and Reiman (cited in n. 1, above) and Inness, DeCew, and Cohen (cited in n. 2, above).

12. Or, if not "the intimate sphere," then whatever other regulative concept properly captures the point of privacy protections.

13. Examples of this might include facts about the juvenile criminal behavior (or behavior that has been legally expunged) of individuals arrested as adults; the past sexual history of women making rape accusations; the race or ethnic backgrounds of applicants for admission to higher education; or the age or sex of candidates for jobs.

14. See especially Richard Mohr, *Gay Ideas: Outing and Other Controversies* (Boston, MA: Beacon Press, 1992), ch. 1.

15. *Ibid.*, p. 20.

16. To consider another possible case, suppose that employees possess a right to privacy against their (prospective) employers with respect to their personal medical information. Say that this implies that they need not reveal such information to their employers, that the employers have no right to ask for it, and that employers cannot make use of such information if they come to possess it innocently. Nonetheless, if such information is of value to employers (as it may be), and employees know this, then savvy, healthy employees may divulge such information to employers in order to assure them that their health would not be a concern to their employers. If such a practice became widespread, it could disadvantage those who refuse to make such declarations. While the state might still require employers to refrain from taking such information into account, enforcing this regulation would require considerable collection and use of such information by the state, and would require employees who find themselves disadvantaged by their employers likewise to reveal considerable information about themselves in order to show that they had

grounds for a claim of unfair discrimination. Moreover, it would require the state to prohibit certain forms of contract between employees and employers where healthy employees seek to benefit financially from their good health. For a skeptical look at using privacy law to prohibit such contractual arrangements, see Richard Epstein, "Deconstructing Privacy: And Putting it Back Together Again," *Social Philosophy and Policy* **17** (2000), 1–24.

17. It may of course be the case that such institutions feel constrained by competitive pressures to offer fair, respectful terms to their customers with respect to their privacy. There are, however, reasons to doubt that competition is a significant factor here. Consider this: How often do you carefully read the privacy policies of the businesses you deal with? Have you ever taken business elsewhere because of one?

18. A useful window on the enforcement problem is provided by the dilemma posed by the "Racial Privacy Initiative," a recently rejected ballot measure in California. This measure would have prohibited the state and its local governments from, among other things, using race, ethnicity, color, or national origin to separate, sort, or organize the personal data of students, contractors or employees. The putative rationale for the initiative was to help promote a color-blind government, and to prevent some state agencies (such as the higher education system) from adopting race-based targets for admissions, in defiance of an earlier proposition banning the use of such information. Assuming that the state has a legitimate interest in promoting race-blind decision-making on the part of its subordinate units and in-state employers, one might treat the collection of such information by those units or employers as an unwarranted intrusion into the zone of privacy. But enforcement of this prohibition would be more or less impossible without the enforcement arm of the state itself taking an interest in exactly that data which its subordinate entities are supposed to ignore, and thereby apparently harming the same protected interest. (Opponents suspected that creating this impossibility was the main purpose of the law.)

19. For one instructive, historical take on these matters, see Reva Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy," *The Yale Law Journal* **105** (1996), 2117–2207.

20. Note that one of the first steps a rape victim is encouraged to take immediately after her assault is to submit to an examination in which DNA evidence can be collected. See, e.g., Jantje Wilken and Jan Welch, "Management of People Who Have Been Raped," *BMJ* **326** (2003), 458–59.

21. Thanks are owed to two anonymous reviewers for this journal for pressing me here.

22. And while underprotection against the government is certainly possible, that amounts to the failure of the government to do what it has promised to do, which is a different sort of problem.

23. See n. 16, above, for an example of how such a dynamic might play out.

24. These are public disclosures of embarrassing information; publicity placing one in a false light; and misappropriation of someone's likeness. See William Prosser, "Privacy," *California Law Review* **48** (1960), 383–423.

25. One might rightly read into this conclusion a ground for rejecting, e.g., the arguments by which the U.S. Supreme Court derived rights to contraception, abortion, and homosexual sex from a more general right to privacy. One should not, however, conclude that such rights could not be justified on other grounds, but only that it would be hard to find unambiguous support for these rights in any ordinary understanding of "privacy."

26. Judith Shklar, "The Liberalism of Fear," in Nancy L. Rosenblum (ed.), *Liberalism and the Moral Life* (Cambridge, MA: Harvard University Press, 1989), pp. 24–25.