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Rethinking Privacy: Privacy as an Equality Right

by

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A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the

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FOR MY CHILDREN TO REMIND THEM THAT GOALS CAN BE ACHIEVED REGARDLESS OF AGE AND TO LAURA WHO REMINDED ME OF THIS VERY IMPORTANT FACT

ABSTRACT

It seems trite to say privacy is valuable. The Supreme Court of Canada has emphasized that privacy is worthy of constitutional protection. Scholars tend to agree that privacy is a fundamental moral and political concept. The consensus appears to end, however, when privacy in theory approaches privacy in practice. As a broad and evanescent concept, opinions differ as to what interests or values the protection of privacy is designed to achieve.

At first glance, this unhappy state of affairs appears to arrive from a lack of understanding, or at least consensus, of what core liberty or liberties privacy strives to protect. If we want to protect privacy, the argument goes, then we have to ground it in something other than an inchoate, inarticulate right. The problems with the current conceptions of privacy go beyond simply delineating what kinds of things ought to be private. What is missing, and needed, is a coherent concept of privacy *as a right* - not whether privacy is valuable, but rather, what is it about privacy that is, or should be, protected. Is privacy a free standing right or is it simply derivative from other more recognizable causes of action. Upon what is privacy grounded? Is this really a liberty issue?

The thesis in this essay is that privacy is better conceived of as an equality issue, not a liberty issue. At its core, privacy is necessary to ensure individual equality, not individual liberty. The focus should shift away from conceptualizing privacy as a prerequisite for preventing invasions of various liberty interests to one of *maintaining conditions* that will make the exercise of those liberty interests possible.

The thesis relies upon four separate and distinct arguments: first, that the standing conceptions of privacy depend upon and serve the concept of privacy as liberty; second, that the concept of privacy as liberty, and those conceptions based upon that concept, are prey to substantial criticisms from which they cannot recover; third, as noted above, that privacy is much better suited if conceived as an equality issue; and four, that so conceived, a juridical conception of privacy becomes available against which it is possible to ferret out true privacy claims from faint imitations at best.

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> *Privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all.*[1]

I. Introduction

It seems trite to say privacy is valuable. The Supreme Court of Canada has emphasized, on numerous occasions, that "the protection of privacy is a fundamental value in modern, democratic states,"[2] worthy of constitutional protection for that reason alone, but having "profound significance for the public order as well."[3] Privacy has emerged as a fundamental value, not only for Canadian society but for human society as well, having found protection as the right against arbitrary interference with privacy in article 12 of the *Universal Declaration of Human Rights*, and article 17 of the *International Covenant on Civil and Political Rights*.[4]

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1. Robert C. Post, "Three Concepts of Privacy" (2001) 89 Geo. L.J. 2087.
2. *Dagg v. Canada (Minister of Finance)* (1997), 46 Admin. L.R. (2d) 155 at para. 65.
3. *R. v. Dyment*, [1988] 2 S.C.R. 417 at para. 17.
4. Craig, "Invasion of Privacy and Charter Values: The Common Law Tort Awakens" (1997) 42 McGill L.J. 355.

The consensus appears to end, however, when privacy in theory approaches privacy in practice. As a "broad and somewhat evanescent concept,"[5] opinions differ as to what interests or values the protection of privacy is designed to achieve. Numerous examples abound. Two of Canada's privacy "experts", saddled with the responsibility of ensuring informational privacy—the Alberta privacy commissioner and the federal privacy commissioner—reach opposite conclusions in similar scenarios concerning whether prescriber information disclosed by pharmacists to a data collection company violates the prescribing physician's right to privacy.[6] Two decisions by the Supreme Court of Canada appear to be inconsistent on whether disclosures of information pursuant to access to information requests violate individual privacy in particular cases.[7] In the context of employee surveillance, two arbitrators reach different conclusions in cases involving the admissibility of surreptitious surveillance, both citing an

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5. *Dagg , supra* note 2 at para. 67 in relation to defining the privacy interests protected by the *Privacy Act, S.C.* 1980-81-82-83, c. 111.

6. Alberta: Order H 2002-003 between *IMS Health Canada and Alberta Pharmacists and Pharmacies*. An application for judicial review has been commenced in the Alberta Court of Queen's Bench as *IMS Health Canada Ltd. v. Information and Privacy Commissioner* (Action No. 0303 06949); Federal: *PIPED Act Case Summary #15* located at www.privcom.gc.ca. Likewise, an application for judicial review is ongoing in the Federal Court, Trial Division as *Maheu v. IMS Health Canada Ltd.* (Action No. T-1967-01).

7. Disclosure of personal employment information of RCMP members to aid in litigation was ordered in *Canada (Information Commissioner) v. Canada (Commissioner of the RCMP)*, 2003 SCC 8; disclosure of the expenses of a particular member of Quebec's National Assembly was refused without the consent of the member in *Macdonell v. Quebec (Commission d'acces a l'information)* (2002), 44 Admin. L.R. (3d) 165.

employee's reasonable expectation of privacy, or lack thereof, in similar scenarios, as the basis for their decisions.[8] In the context of the criminal law, there are numerous examples spanning different jurisdictions and court levels where the judiciary rules a search and seizure violates section 8 of the *Charter* in one scenario but does not in conceptually similar circumstances. For example, the Supreme Court holds, in one case, that an accused does not have a reasonable expectation of privacy in his personal electric consumption records in his home,[9] but, in another, rules that the accused does have a reasonable expectation of privacy in his financial information at his bank.[10] The Supreme Court of the United States, by contrast, comes to the opposite conclusion as regards financial records in an earlier case in that country.[11]

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8. Surveillance evidence excluded in *Doman Forest Products Ltd. v. I.W.A. Local 1-357* (1990), 13 L.A.C. (4th) 275 (Vickers); surveillance evidence admitted in *Toronto Transit Commission and Amalgamated Transit Union, Local 113 (Fallon grievance)* (1999), 79 L.A.C. (4th) 85 (Solomatenko).

9. *R. v. Plant*, [1993] 3 S.C.R. 281 where Sopinka J. at paragraph 20 held that section 8 of the *Charter* only protects "a biographical core of personal information" and that "[t]he computer records investigated in the case at bar while revealing the pattern of electricity consumption in the residence cannot reasonably be said to reveal intimate details of the appellant's life since electricity consumption reveals very little about the personal lifestyle or private decisions of the occupant of the residence".

10. *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841 where although the Court split on the applicability of the *Charter* for different reasons (ie. the request for information was in a foreign financial institution (ie. Swiss)), all agreed that financial information does fall with the "biological core of personal information" that ought to be protected.

11. *United States v. Miller*, 425 U.S. 435 (1976).

It is not only privacy jurisprudence, as reflected in different results in these decisions, that appears to be inconsistent. Scholarly literature on privacy is rife with inconsistency on this score as well and must be held to have contributed to the piecemeal, patchwork approach to privacy by the judiciary. When speaking of privacy, scholars at one end of the spectrum contend that privacy promotes or protects relationships,[12] one's personhood and the creation of self,[13]one's dignity,[14] and even democracy[15] and the rejection of totalitarianism.[16] At the other end of the spectrum, scholars dismiss privacy as simply protecting property interests,[17] as promulgating subordination of, and violence to, women by men,[18] or as promoting,

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12. Rachels, "Why Privacy is Important" (1975) 12 Philosophy and Public Affairs 269.

13. Reiman, "Privacy, Intimacy, and Personhood" (1976) 6 Philosophy and Public Affairs 26.

14. Parker, "A Definition of Privacy" (1974) 27 Rutgers Law Review 275 at 292.

15. Reiman, "Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future" (1995) 11 Santa Clara Computer & High Technology Law Journal 27.

16. Jed Rubenfeld, "The Right to Privacy" (1989) 102 Harv. L. Rev. 737.

17. Murphy, "Property Rights in Personal Information: An Economic Defense of Privacy" (1996) 84 Georgetown Law Journal 2381.

18. Schneider, "The Violence of Privacy" (1991) 23 Connecticut Law Review 973. See also Reva B. Siegel, "The Rule of Love: Wife Beating as Prerogative and Privacy" (1996) 105 Yale L.J. 2117 where she states at 2152 that a husband's right to punish his wife—known as chastisement—was permitted so that courts would not have to interfere with 'marital privacy'.

or at least rewarding, fraud and deceit.[19] In Canada, some of the debate is still stubbornly focused on whether we have, indeed, a right to privacy at all in situations not involving the criminal law.[20] As a result, some commentators have concluded that if privacy is not dead, it "is probably best described as alive, but on life support."[21]

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19. Posner, "The Right to Privacy" (1978) 12 Georgia Law Review 393. And see Murphy, *supra* note 17 at 238. And see Parent, "Privacy, Morality and the Law" (1983) 12 Philosophy and Public Affairs 269 at 277 where he states that, in Posner's view, the motivation of individual privacy was simply to "hide discreditable facts about themselves from future employers who are entitled to this information."

20. Craig, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997) 42 McGill L.J. 355. This is a point that I consider moot for several reasons. First, most jurisdictions in Canada have, in some fashion, legislated a privacy right. In such cases, the question is whether the facts establish that the statutory tort is engaged. See for example s. 60 of the *Personal Information Protection Act*, S.A. 2003, c. P-6.5. Second, our courts are reluctant to strike out novel claims. For example, in *Cooper v. Hobart*, 2001 SCC 79 and its companion case of *Edwards v. Law Society of Upper Canada* (2001), 34 Admin. L.R. (3d) 38 the Supreme Court of Canada reviewed the proximity or neighbourhood principle established in *Donoghue v. Stevenson* and in *Anns v. Merton London Borough Council* and emphasized at paras. 23 and 25 that "although there are various categories in which proximity has historically been recognized, those categories are not closed", thus evidencing judicial reluctance to strike out novel claims, which presumably will include privacy claims. Third, privacy considerations are sprinkled throughout our *Charter* jurisprudence. As the common law is to be informed by our *Charter* values (see *Dickason v University of Alberta*, [1992] 6 W.W.R. 385 and *Vriend v. Alberta*, [1998] 1 S.C.R. 493), it is reasonable to conclude that our notions of privacy—as articulated in our *Charter* jurisprudence—will find a voice in the common law where needed.

21. Murphy *supra* note 17 at 2392. And see Kramer, *infra* note 70 at 722 where, citing Zimmerman, "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort" (1983) 68 Cornell L.Rev. 291, at 723, observes that cases have overwhelmingly favoured the press and claims of privilege and qualified privilege as to "virtually swallow the tort". "After examining what she believes are insurmountable constitutional problems, Professor Zimmerman could not reconcile Warren and Brandeis' views with existing first amendment rights and urged courts to abandon the tort of invasion of privacy: '[A]fter nearly a century of experience, ... it is probably time to admit defeat, give up the efforts at resuscitation, and lay the noble experiment in the instant creation of common law to a well-deserved rest.'"

So we all share, judges and academic lawyers alike, responsibility for the state that privacy law finds itself in. At first glance, this unhappy state of affairs appears to arrive from a lack of understanding, or at least consensus, concerning the core liberty or liberties privacy strives to protect.[22] This approach stagnates privacy discourse into a debate about what liberty interests are deserving of protection—that is, this privacy discourse seems content to limit itself to debating what "action verbs"[23] are, or should be, at the core of privacy. I need privacy, so the argument goes, to allow me to have an abortion, or possess pornography, or read unpopular material, or any other liberty one might imagine. Under the current conceptions of privacy, it is not surprising that there is no consensus on what privacy should be and no consensus, therefore, on the core value—if there is one—that privacy seeks to protect. One can easily see where my right to define myself and the community in which I live by attempting to prohibit you from possessing unpopular material will conflict with your right to define yourself by exposure to many divergent viewpoints. Since under the current conceptions of privacy, we both defend our "right" on the basis of some form of privacy, what and whose right does privacy really protect? If only one is protected, then it is an error to suggest that privacy is

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22. A point similarly noted in Negley, "Philosophical Views on the Value of Privacy" (1966) 31 Law and Contemporary Problems 319.

23. A phrase coined by Lois L. Shepherd, "Looking Forward With The Right to Privacy" (2000) 47 Kansas L.R. at 22.

engaged in the other. If both are protected, then whose "right" takes priority? Whose privacy is more valuable?

If we want to protect privacy, the argument continues, then we have to ground it in something other than an inchoate, inarticulate right. We have to discover the fundamental kinds of activities which people would invariably point to as requiring privacy. Under this view, it is not surprising that current conceptions of privacy vary greatly.[24]

The problems with the current conceptions of privacy go beyond simply delineating what kinds of things ought to be private. What is missing, and needed, is a coherent concept of privacy *as a right*—not whether privacy is valuable, but rather, what is it about privacy that is, or should be, protected. Is privacy a free

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24. See Parker, *supra* note 14 at 275-276: "For some, privacy is a psychological state, a condition of "being-apart-from others" closely related to alienation. For others, privacy is a form of power, the "control we have over information about ourselves", or "the condition under which there is control over acquaintance with one's personal affairs by the one enjoying it", or "the individual's ability to control the circulation of information relating to him". Another noted author on privacy defines it as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." For still others, an important aspect of privacy is the freedom not to participate in the activities of others, a freedom which is lost when we are forced to hear the roar of automobile traffic or breathe polluted air. Given such a diversity of definitions, indicating uncertainty whether privacy is a psychological state, a form of power, a right or claim, or a freedom not to participate, to say that what the fourth amendment protects are constitutionally justifiable expectations of privacy is to be unclear about the purpose of the fourth amendment."

standing right or is it simply derivative from other more recognizable causes of action. Upon what is privacy grounded? Is this really a liberty issue?

The task appears, at first blush, to be daunting. As noted by Solove, how "can we erect a robust and effective law of privacy" when technological advancements constantly shift the ground upon which it is based?[25] The task is only daunting, in my view, if we stubbornly hold onto the current conceptions of privacy which are based at their core on an erroneous concept of privacy. I argue that the various, standing conceptions of privacy are all based on an underlying concept of privacy which is itself flawed. The organizing concept of privacy, around which the prevailing conceptions of privacy are based, is a concept of privacy designed to promote and protect liberty as a form of license. So conceptualized, individuals are, or should be, free to do according to their own lights. Privacy is simply the means to achieve those ends. Liberty as license will naturally conflict with other liberties similarly conceived. If privacy is conceived simply as protecting liberty as a form of license, then whose privacy is protected when individual liberties clash? A fundamental criticism of the standing conceptions of privacy is that, collectively, they fail to answer this question in a convincing manner.

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25. Solove, "Conceptualizing Privacy" (2002) 90 California Law Review 1087 at 1090.

A better conceptualization of privacy, one that would make privacy more logical and coherent as a concept, will require a shift in the present paradigm against which privacy is evaluated. The thesis of this essay is that privacy is better conceived of as an equality issue, not a liberty issue. At its core, privacy is necessary to ensure individual equality, not individual liberty. The focus should shift away from conceptualizing privacy as a prerequisite for preventing invasions of various liberty interests to one of *maintaining conditions* that will make the exercise of those liberty interests possible.[26] That is, privacy is a prerequisite for meaningful equality. The numerous examples of which liberty interests have been protected so far—the "action verbs"—are not at the core of privacy. Rather, in my view, they should be seen simply as extensions of an individual's right to equality. That is, liberties are merely spokes on the privacy wheel, with equality at its hub.[27]

To be sure, this thesis challenges the existing paradigm that privacy is a liberty issue. One risks, therefore, appearing to be making an extraordinary kind of mistake.[28] A consequence of this thesis will indeed be to restrict the kinds of cases considered to be "true" privacy cases. Many cases that we now characterize as

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26. Negley, *supra* note 22 at 320 (to borrow Negley's language with respect to rights generally).

27. To borrow the metaphor from Daniel J. Solove, "Conceptualizing Privacy" (2002) 90 Cal. L. Rev 1987 at 1097-1099.

28. Ronald Dworkin, *Laws Empire* (Cambridge Ma: Harvard University Press, 1986) at 72.

involving privacy may not be so viewed if one approaches the concept of privacy as a specific requirement of equality. The hope is, however, that by restricting its ambit, privacy will become more coherent as a concept and thus strengthened in the process.

My thesis relies upon four separate and distinct arguments: first, that the standing conceptions of privacy depend upon and serve the concept of privacy as liberty; second, that the concept of privacy as liberty, and those conceptions based upon that concept, are prey to substantial criticisms from which they cannot recover; third, as noted above, that privacy is much better secured in theory and in practice if conceived as an equality issue; and four, that so conceived, a juridical conception of privacy becomes available against which it is possible to ferret out true privacy claims from faint imitations at best.

I shall articulate my thesis in six distinct parts. In Part II, I preface the thesis by considering why we need a normative theory of privacy at all. Is anything to be served by revisiting how privacy should be conceptualized? Dworkin notes that these sorts of exercises are of fundamental importance:[29]

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29. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) at 14-15.

> These are not puzzles for the cupboard, to be taken down on rainy days for fun. They are sources of continuing embarrassment, and they nag at our attention. Suppose a novel right of privacy case comes to court, and there is no statute or precedent claimed by the plaintiff. What role in the court's decision should be played by the fact that most people in the community think that private individuals are 'morally' entitled to that particular privacy? ... Conceptual puzzles about 'the law' and 'legal obligation' become acute when a court is confronted with a problem like this.

Accordingly, I advance three reasons which support advocating a new normative conception of privacy. First, individuals are currently bombarded with legislation designed to address privacy issues. We are thus affected by privacy legislation at every turn but we presently lack any consensus on what privacy really is. How should this legislation be interpreted? Against what standard should our judiciary decide privacy issues? Should the judiciary be free to adjudicate privacy issues on a case-by-case basis or are there some fundamental privacy principles that should guide them? Moreover, if privacy is so fundamental a right that it warrants constitutional protection, why should individuals sit idly by waiting for the judiciary to decipher privacy's rules? Self-help is much more appealing particularly since privacy, once lost, can never be satisfactorily restored. If privacy exists, then it exists apart from legislative or judicial decree.

Second, it does not necessarily follow that just because there is not presently a consensus on a core value of privacy that one does not exist. If the current concept

of privacy, and the conceptions thereof, are not coherent with the result that privacy finds itself struggling as a right, that does not require us to abandon privacy as a concept. The concept may have to be refined to be sure. It is, however, precisely because most would agree that privacy as a concept has inherent value that we should endeavour to refine the concept and articulate a conception of privacy that is coherent. Such attempts should not be abandoned as being fruitless but rather vigorously continued in an ongoing pursuit to tame the unwieldy beast that has become privacy. It is here that I shall first introduce the concept of privacy as equality. Although equality is an ideal capable of different conceptions, most would agree that individuals are entitled to equal concern and respect as individuals in society. Discrimination in the sense of stereotyping, historical disadvantage, and vulnerability to political and social prejudice would invariably violate an individual's right to equal concern and respect under any reasonable conception of equality. This is why we need privacy—not to protect any particular activity or liberty, but to safeguard our equality. Without equality, meaningful liberty is illusory.

Third, a new normative approach is appealing from a remedial point of view. Privacy, once lost, can never be satisfactorily restored. Remedies which serve to maintain conditions that will make the exercise of individual rights possible and

not simply to compensate for past loss have tremendous appeal for privacy advocates.

In Part III, I summarize both the prevailing conceptions of privacy and the criticisms that have been levelled against each. The current conceptions—six of which have generally been advocated—all have some intuitive appeal. Each can be used to rationalize some, but not all, of the myriad of ways that privacy comes under scrutiny in modern life. One must review and critique the conceptions before one can legitimately offer something else in their stead.

In Part IV, in addition to the criticisms levelled against each conception by proponents of other conceptions, I advance two additional criticisms, applicable to all, which I contend ultimately explain their inadequacy. First, the conceptions all suffer from intuitionism as regards what makes things private. They approach the question by asking us all to imagine horrible or nightmarish invasions of privacy. If we do not all share what is intuitively horrible or nightmarish, then the conception must falter. Secondly, the current conceptions are invariably based on a misconception of liberty as a form of license where individuals are free to do as they please according to their own lights. As such, privacy finds itself in constant tension with other liberties. This is a conflict which, as will be developed below, historically privacy usually loses.

In Part V, accepting as I do the argument that the current conceptions of privacy do not adequately explain privacy in daily life, I explore three alternatives for privacy. First, one could remain within the existing paradigm but evaluate privacy cases against the conceptions working together, not in isolation. Some scholars have done precisely this and, indeed, such an approach appears to be evident in the judiciary. This approach leaves, unfortunately, the original question of whether there is a core value of privacy unanswered.

Alternatively, one could abandon the search for a core value and instead approach privacy on a case-by-case basis. That is, one could accept that privacy has no inherent value, nor principles per se, and simply leave privacy to the whim of legislative and judicial decree. Such an approach, however, seems inconsistent with most jurisprudence which recognizes privacy as a fundamental right worthy of constitutional protection.

The last alternative, and the one to which I subscribe, is to change the existing paradigm. By accepting a rights-based philosophy of law,[30] I agree that all fundamental liberty rights evolve from equality as equal concern and respect for individuals. Without equality, there is no liberty. There is, in my view, no merit in continuing to debate what liberties—"action verbs"—privacy should protect

30. As articulated by Ronald Dworkin in *Taking Rights Seriously*, *supra* note 29.

unless we can first be satisfied that individuals have meaningful equality. Keeping things private does not, then, facilitate our liberty but rather it ensures our equality.

In Part VI, I consider some scholarly and jurisprudential writings which, though couched in liberty vernacular, I contend support a shift in paradigm.

Finally, in Part VII, I articulate a particular conception of privacy as equality against which privacy cases may be evaluated. Drawing upon *Charter* equality jurisprudence, I offer discrimination as the test for determining whether equality is at issue and, therefore, privacy is engaged. If equality is not at issue, then privacy is not engaged. Although discrimination could be applied to a virtually inexhaustible number of cases where privacy has been alleged—particularly in the United States since privacy is still somewhat novel in Canada—I limit the consideration to some of the more contentious privacy cases.

II. The Need for a Normative Conception of Privacy

Given the lack of consensus about what is, or ought to be, the core liberty deserving of privacy protection, some scholars have abandoned, at least for now, the search for a normative conception of privacy in favour of a pragmatic approach which "focuses on the palpable consequences" of "specific types of disruption and

the specific practices disrupted."[31] I will comment on this suggestion below but shall, for the moment, advance several reasons in support for advocating a normative conception of privacy.

A. Extensive Legislative Framework

Individuals are increasingly bombarded by layer upon layer of legislative attempts to address privacy interests in one form or another.[32] Consider an average Albertan who may have concerns about his or her health information. Depending on what body holds the information (Alberta Health Care, Health Canada or Dr. Smith), the type of health information it is (was this arising from a workers' compensation claim or from a private injury?), the purposes for which the information was collected (marketing as opposed to treatment), and where the information goes (intra or interjurisdictional), he or she will be faced with some combination of the *Health Information Act*,[33] the *Personal Information Protection*

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31. Solove, *supra* note 25 at 1091,1093.

32. At last count there are 28 Federal or Provincial statutes that address, in some fashion, privacy issues.

33. R.S.A. 2000, c. H-5.

Act,[34] the *Freedom of Information and Protection of Privacy Act*,[35] the *Privacy Act*,[36] and the *Personal Information Protection and Electronic Documents Act*.[37] Each of these statutes purports, in one fashion or another, to give individuals certain rights over information about themselves in an effort to safeguard their privacy.

Thus, we are inundated with privacy legislation at every turn but we do not yet appear to have a coherent working conception of privacy.

One practical reason to support a normative approach to privacy is that our current approach to statutory interpretation requires us to consider the purpose(s) of the statute when interpreting its provisions.[38] Although there are three primary

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34. S.A. 2003, c. P-6.5.

35. R.S.A. 2000, c. F-25.

36. R.S.C. 1985, c. P-1, as amended.

37. S.C. 2000, c. 5, as amended.

38. The modern rule of statutory interpretation has been described as follows: "Courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just." See R. Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 131.

considerations in modern statutory interpretation—plausibility, efficacy, and acceptability—the requirement that interpretation be efficacious is the most important consideration in statutory interpretation and is taken into account in every case and at every stage of interpretation. Simply stated, it means that the adopted interpretation should promote the purpose of the legislation: "An interpretation that promotes the purpose is to be preferred over one that does not, while interpretations that would tend to defeat the purpose are to be avoided."[39]

How can we interpret privacy legislation and discern its purpose—protection of privacy—without a consensus about what privacy is, or ought to be?

Closely related to statutory interpretation is the function of judicial review in matters involving privacy. The vast majority of privacy decisions will be made, at least initially, by statutory decision-makers (Information and Privacy Commissioners). This has two consequences which, in my view, require the adoption of a normative approach to privacy. First, most legislation does not require these decision-makers to be legally trained (although practically that is the case). Therefore, any intuitive approach that these offices bring to privacy must be

39. R. Sullivan, *Statutory Interpretation* (Irwin Law, 1997), c. 9 at 135.

discouraged and replaced, as far as possible, with a coherent conception of privacy.[40]

Second, these decisions will be subject to judicial review. Our Supreme Court jurisprudence on the standard of review to be applied in judicial review proceedings—correctness, reasonableness *simpliciter*, or patent unreasonableness —requires the reviewing court to conduct a pragmatic and functional analysis, which requires in turn the court to consider, *inter alia*, the purpose(s) of the statute as well as the relative expertise of the statutory decision-maker.[41]

The pragmatic and functional analysis applies to discretionary decisions,[42] which will include decisions involving privacy made, in the first instance, by statutory decision-makers such as Information and Privacy Commissioners. Unless we agree on a normative approach to privacy, we will be left to conclude that privacy will be decided on the basis of individual intuition about what privacy is, or the concept will be ignored altogether in favour of mechanical—and sterile—attempts

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40. See for the example the different intuitive approaches taken by the federal and provincial information and privacy commissioners with regards to prescriber information referred to in note 6 above.

41. See, for example, *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* (1999), 11 Admin. L.R. (3d) 1. More recently, see *Dr. Q. v. College of Physicians and Surgeons of British Columbia* (2003), 8 Admin. L.R. (3d) 1.

42. *Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 14 Admin. L.R. (3d) 173 at 204.

to interpret the "rules". Neither approach is satisfactory. The former is unsatisfactory because "intuitive commonality" is not possible, and hence, privacy law will be dependent upon the length of the Privacy Commissioner's foot (to paraphrase an old common law complaint of equity). The latter approach is similarly unappealing, for it provides neither coherence nor conformity in how privacy matters are interpreted. Unfortunately, both approaches seem, at least to me, to be distressingly common in our jurisprudence.[43]

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43. None of our "informational privacy" cases that have, to date, been considered on judicial review have approached the issue first by conceptualizing what privacy is generally before considering the statutory language used. Further, the prevailing trend is for the courts to not defer to the decisions of the Information and Privacy Commissioners—all of whom have superior expertise to that of the courts in matters involving privacy, which is one factor that bespeaks of a deferential standard of review. This raises the potential of adding another layer of intuitive analysis on the issue. I include the following cases as examples of this: in *Canada (Information Commissioner) v. Canada (Commissioner of the RCMP)*, 2003 SCC 8; *Macdonell v. Quebec (Commission d'acces a l'information)* (2002), 44 Admin. L.R. (3d) 165; *Dagg. v. Canada (Minister of Finance)* (1997), 46 Admin. L.R. 155; *The University of Alberta v. Pylypiuk* (2002), 2 Alta. L.R.(4th) 332; *Alberta (Attorney General) v. Krushell* (2003), 14 Alta. L.R.(4th) 356; *John Doe v. Ontario (Information & Privacy Commissioner)* (1993), 19 Admin. L.R. (2d) 251; *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 12 Admin. L.R. (2d) 300; *Ontario (Attorney General) v. Fineberg* (1994), 25 Admin. L.R. (2d) 123; *Ontario (Workers' Compensation Board) v. Ontario (Information and Privacy Assistant Commissioner)* (1998), 164 D.L.R. (4th) 129; *Ontario (Minister of Finance) v. Ontario (Assistant Information and Privacy Commissioner)* (1997), 46 Admin. L.R. (2d) 115; *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R.(3d) 611; *Fletcher Challenge Canada Ltd. v. British Columbia (Information and Privacy Commissioner)* (1996), 38 Admin. L.R. (2d) 230; *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)* (1998), 8 Admin. L.R. (3d) 236.

A normative conception of privacy will provide a sort of compass or legal barometer of where we were, are, and should be going. Solove puts the matter thus:[44]

> Without a normative component, a conception of privacy can only provide a status report on existing privacy norms rather than guide us toward shaping privacy law and policy in the future. If we focus simply on people's current expectations of privacy, our conception of privacy would continually shrink given the increasing surveillance in the modern world. Similarly, the government could gradually condition people to accept wiretapping or other privacy incursions, thus altering society's expectations of privacy. On the other hand, if we merely seek to preserve those activities and matters that have historically been considered private, then we fail to adapt to changing realities of the modern world.

This is particularly important given the extensive—but piecemeal—legislative measures that have been enacted to address privacy.

B. Failure of a Conception *is not* a Failure of a Concept

It does not necessarily follow that because consensus on a core value of privacy has not, to date, been reached, that one does not exist. The failure of the current approach is a failure of conceptions of privacy, not a failure of privacy as a concept. The distinction is important to emphasize.

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44. Solove, "Conceptualizing Privacy", *supra* note 25 at 1142.

There are many concepts known to the law—'reasonableness' for example—that are incapable of precise definition and yet they are still workable within the law.[45] 'Equality' or 'cruel and unusual punishment' are other examples but in a constitutional context. Privacy is yet another. Concepts, though often mistakenly called vague, are more accurately thought of as general and abstract propositions. Though abstract, concepts are not devoid of content. People agree on concepts at least in a general fashion. Where they disagree is about the "more concrete refinements or subinterpretations" of the concepts.[46] "The contrast between concept and conception is here a contrast between levels of abstraction at which the interpretation of the practice can be studied. At the first level agreement collects around discrete ideas that are uncontroversially employed in all interpretations; at the second the controversy latent in this abstraction is identified and taken up."[47]

Dworkin utilizes the concept of "fairness" to demonstrate the distinction. To quote him at length:[48]

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45. See also Ronald Dworkin, *Taking Rights Seriously*, *supra* note 29 at 2 where he includes other concepts such as 'fault', 'possession', 'ownership', 'negligence', and 'law'.

46. Ronald Dworkin, *Laws Empire*, *supra* note 28 at 70.

47. Ronald Dworkin, *Laws Empire*, *supra* note 28 at 71.

48. *Ibid.* at 134.

> Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my 'meaning' was limited to these examples, for two reasons. First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, in that case I should want to say that my instructions covered the case he cited, not that I had changed my instruction. I might say that I meant the family to be guided by the concept of fairness, not by any specific conception of fairness I might have had in mind.
>
> ...
>
> *When I appeal to the concept of fairness I appeal to what fairness means, and I give my views on that issue no special standing. When I lay down a conception of fairness, I lay down what I mean by fairness, and my view is therefore the heart of the matter. When I appeal to fairness I pose a moral issue; when I lay down my conception of fairness I try to answer it.* (emphasis added)

There does not appear to be any disagreement that privacy—in some form or another—is an important moral and political concept. There is, in its crudest form, certain information about ourselves that is not open for public consumption. Privacy over such matters has, simply stated, intrinsic value "whose sacrifice or compromise should in itself be a matter for regret."[49] If one disagrees with this

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49. Ronald Dworkin, "What is Equality? Part 3: The Place of Liberty" (1987) 73 Iowa L. Rev. 1 at 6: "A concept implies consensus about a distinct and compelling political ideal as something whose sacrifice or compromise should in itself be a matter for regret."

assumption, then he or she has a challenging argument.[50] If one agrees, however, then we do not have to abandon privacy as a concept simply because there is disagreement about a particular conception of privacy.[51] The question simply becomes which of the different versions or conceptions of privacy best captures how privacy is experienced in practice.[52]

In doing so, however, we may have to refine the concept of privacy somewhat. A concept sets a standard which the conceptions must try—and may fail—to meet.[53]

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50. Posner attempts, I believe to make just this argument. See Part III.C.–Concealment of Discreditable Information as a conception of privacy. Dworkin would likely argue, however, that such an argument is, in reality, based on a disagreement over conceptions, not concepts. While considering different conceptions of equality, he states: "most of the people who seem to reject equality, in cases like our examples, do not actually reject it. They think equality very important indeed, but they do not think that the form in which equality is at stake in these cases is the important or genuine form of that virtue." Dworkin, "What is Equality? Part 3: The Place of Liberty" (1987) 73 Iowa L.Rev. 1 at 5.

51. Ronald Dworkin, "What is Equality? Part 1: Equality of Welfare" (1981) 10 Phil & Pub. Affairs 185 at 195.

52. *Ibid.* at 194 where Dworkin talks of justice as a concept.

53. Which is why, in Dworkin's view, strict constructionists of the American *Constitution* are doomed to fail:

> Those who ignore the distinction between concepts and conceptions, but who believe that the Court ought to make a fresh determination of whether the death penalty is cruel, are forced to argue in a vulnerable way. They say that ideas of cruelty change over time, and that the Court must be free to reject out-of-date conceptions; this suggests that the Court must change what the *Constitution* enacted. But in fact the Court can enforce what the *Constitution* says only by making up its own mind about what is cruel, just as my children, in my example, can do what I said only by making up their own minds about what is fair. If those who enacted the broad clauses had meant to lay down particular conceptions, they would have found the sort of language conventionally used to do this, that is, they would have offered particular

(continued...)

As I will develop below, the inadequacy of the prevailing conceptions of privacy is that they are all based on an underlying refinement of the concept of privacy which is itself flawed. While the more general concept of privacy—there is certain information about ourselves that is not open for public consumption—remains incontestable, the standing conceptions of privacy suggest that there are certain *activities* in which we engage that are not open for public consumption. So conceptualized, individuals are, or should be, free to do according to their own lights. As conceived, then, privacy is liberty. The prevailing conceptions of this concept of privacy are simply theories on what activities ought to be private—abortions, possession of pornography or unpopular material, associations unpopular groups: the list could go on *ad infinitum*. The prevailing conceptions are thus based on a conception of liberty as a form of license which, as I will develop below, is flawed.

I contend that privacy as a concept is better conceived as an equality right. Although equality is itself an ideal which is capable of different conceptions, most

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53. (...continued)
theories of the concepts in question.

> Indeed, the very practice of calling these clauses 'vague', in which I have joined, can now be seen to involve a mistake. The clauses are vague only if we take them to be botched or incomplete or schematic attempts to lay down particular conceptions. If we take them as appeals to moral concepts they could not be made more precise by being more detailed.

Ronald Dworkin, *Laws Empire*, *supra* note 28 at 136.

would agree that individuals are entitled to equal concern and respect as individuals in society. Some people are not more worthy of concern and respect than others. Discrimination in the sense of stereotyping, historical disadvantage, and vulnerability to political and social prejudice would invariably violate an individual's right to equal concern and respect under any reasonable conception of equality. This, in my view, is why we need privacy—not to protect any particular activity or liberty as license, but to safeguard our equality. Without equality, meaningful liberty is illusory.

C. Remedial Effectiveness

A normative approach is appealing from a remedial point of view. The lack of a clear consensus concerning what privacy is, or upon what it is grounded, often results in a "creative and strained effort to find a remedy."[54] Practically, this means individuals must resort to litigation to enforce their privacy. This, in itself, has several drawbacks.

First, litigation is prohibitively expensive and necessarily uncertain. In the context of privacy, the prevailing lack of consensus about what is protected privacy, and

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54. Joel R. Reidenberg, "Privacy Wrongs in Search for Remedies" (2003) 54 Hastings L.J. 877 at 885.

what is not, makes the uncertainty that much greater. Further, the uncertainty has not abated with the current legislative trend to enact informational privacy legislation.[55] Much of the debate with these statutes is the extent of their application—does the statute apply in the present context,[56] or does the information requested fall within one of the exemptions allowing disclosure?[57] The statutory mechanisms are costly, reactive in nature, mired in procedure and delay common with current litigation,[58] and do not protect privacy in any

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55. To name only a few examples in Canada: Federal: the *Privacy Act*, R.S.C. 1985, c. P-21; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("*PIPEDA*"); In Alberta: *Freedom of Information and Privacy Act*, R.S.A. 2000, c. F-25; *Personal Information Protection Act*, S.A. 2003, c. P-6.5 ("*PIPA*"); *Health Information Act*, R.S.A. 2000, c. H-5.

56. Under the Alberta's *PIPA*, for example, section 4(1) of the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 states that the Act "applies to every organization and in respect of all personal information". "Organization" does not, however, include individuals acting in a personal or domestic capacity (but does for individuals acting in a commercial capacity), nor does it apply (s. 4(2)) to personal information that is in the custody of or under the control of a public body (in which case the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 will apply). Further, section 4(3) severely restricts the applicability of the Act.

    Subsection 3 lists ((a) through (o)) a number of further exceptions to the act to exclude information used: for domestic or personal uses (a), artistic or literary purposes (b), journalistic purposes (c), health information as defined in the *HIA* (in which case the *HIA* will apply) (f), and personal information contained in a court file (k), to state a few examples.

57. *Dagg v. Canada (Minister of Finance)* (1997), 46 Admin. L.R. (2d) 155 at para. 65, *Canada (Information Commissioner) v. Canada (Commissioner of the RCMP)*, 2003 SCC 8; and *Macdonell v. Quebec (Commission d'acces a l'information)* (2002), 44 Admin. L.R. (3d) 165 are examples where the issue was whether the exemptions or exceptions to disclosure applied, not what was it about the situation that attracted a privacy claim.

58. In *Ruby v. Canada (Solicitor General)* (2003), 49 Admin. L.R. (3d) 1, Arbour J describes the procedure under the Federal Privacy Act as follows:

    ¶ 6 The Act provides for two levels of independent review when a

(continued...)

meaningful way. Moreover, whatever remedies are available under those types of statutes—the remedial mechanism is essentially the same in all[59]—it can safely be argued that the remedy is grossly ineffective for "true" invasions of privacy.

Second, the decision to litigate rests with the person whose privacy interest has been invaded. That is, litigation is reactive in nature. As such, it forces

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58. (...continued)

> government institution refuses a request for access to personal information: the Privacy Commissioner and the Federal Court of Canada. The Privacy Commissioner has broad powers to carry out investigations. Upon completing an investigation, if the Privacy Commissioner finds that the complaint is well-founded, the Commissioner may recommend that the information be disclosed. The Commissioner does not, however, have the power to compel disclosure. Where the Privacy Commissioner has completed an investigation and a government institution continues to refuse to disclose the personal information, the individual who has been refused access may apply to the Federal Court for judicial review of the refusal. Pursuant to s. 46(1), the reviewing judge must take every reasonable precaution to avoid the disclosure of information that, in the end, may be found to be appropriately withheld. Accordingly, s. 46(1) gives the reviewing judge the discretion to receive representations ex parte and to conduct hearings in camera.

Will a two step remedial mechanism seem likely to instill confidence in people whose privacy is invaded? I would think not.

59. In all cases, either the federal or provincial privacy Commissioner has jurisdictions over informational privacy. The Commissioner(s) has (have) broad investigatory powers where there is an alleged collection, use, or disclosure in contravention of the statute. The Commissioner must interpret numerous, and complicated, exemptions to what information is protected and, if the Commissioner agrees that the Act has been contravened, certain remedies follow. Federally, the Commissioner may only make recommendations. Enforcement, however, falls to a further application to the Federal Court, Trial Division (section 41 of the *Privacy Act*). In Alberta, the remedy is slightly more effective as the Commissioner's order can be filed with the Court of Queen's bench and enforced as such. (Section 72(6) of *FOIP*) Judicial review lies, however, in both cases further delaying an effective remedy to an aggrieved. Even in those situations where a statutory cause of action exists, as is the case pursuant to section 60(1) of Alberta's *Personal Information Protection Act*, S.A. 2003, c. P-6.5, there are still several prerequisites before the cause of action crystallizes, least of which is that the Act applies at all to the particular situation.

individuals into the unenviable position of having, generally, to reveal more personal or private information about themselves in order to validate the invasion of their privacy.[60] Privacy, once lost, can never be satisfactorily restored. Gavison states:[61]

> For [the person whose privacy has been invaded], a legal action will further publicize the very information he once sought to keep private, and will diminish the point of seeking vindication for the original loss. Moreover, for the genuine victim of a loss of privacy, damages and even injunctions are remedies of despair. A broken relationship, exposure of a long-forgotten breach of standards, acute feelings of shame and degradation, cannot be undone through money damages. The only benefit [of a lawsuit] may be a sense of vindication, and not all victims of invasions of privacy may feel sufficiently strongly to seek such redress.

A normative consensus of privacy, particularly one that views privacy as an equality issue, creates, in my view, certain positive rights which allow individuals preemptively to protect their privacy without suffering the ignominy of having to respond after their right to privacy has been invaded. If one accepts privacy as fundamentally an equality issue, then the focus can shift away from *preventing* an invasion of rights to one of *maintaining conditions* that will make the exercise of

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60. Post, *supra* note 1 at 2091.

61. Ruth Gavison, "Privacy and the Limits of Law" (1980) 89 Yale L.J. 421 at 458.

rights possible.[62] It shifts the burden away from the individual whom one can presume wishes to retain his privacy, and onto the countervailing interest seeking to invade privacy, an interest presumably based on some argument of liberty as a form of license (freedom of speech for example). Viewing privacy as an equality, and not a liberty, issue may also help ensure that individuals who preemptively refuse to reveal information about themselves are not consequently denied services or benefits from either the government[63] or the private sector.[64]

As La Forest J. in *Dyment* observed "[o]ne further general point must be made, and that is that if the privacy of the individual is to be protected, we cannot afford to

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62. *Supra* note 22 at 320 to borrow Negley's language with respect to rights generally (emphasis mine).

63. As a violation of Section 15 of the *Charter* for example. See also *Vriend v. Alberta* , [1998] 1 S.C.R. 493 where the Supreme Court of Canada held that under inclusiveness of equality protection provincial human rights legislation may constitute a breach of the *Charter.*

64. For example, in Alberta, the *Human Rights, Citizenship and Multiculturalism Act*, RSA 2000, c. H-14. Section 4 reads: "No person shall
(a) deny to any person or class of persons any goods, services, accommodation or facilities that are customarily available to the public, or
(b) discriminate against any person or class of persons with respect to any goods, services, accommodation or facilities that are customarily available to the public, because of the race, religious beliefs, colour, gender, physical disability, mental disability, ancestry, place of origin, marital status, source of income or family status of that person or class of persons or of any other person or class of persons."

wait to vindicate it only after it has been violated".[65] Although this observation was made in the context of a criminal case, it still resonates with privacy generally.

D. Summary on the Need for a Normative Conception of Privacy

Establishing a coherent normative concept of privacy will then have many advantages. It will aid in statutory interpretation for both initial decision-makers (Information and Privacy Commissioners) and for any judicial review of those decisions. A coherent concept of privacy will eliminate—or at least reduce—the probability that individual intuition or taste will form the basis of the decision. This is particularly important given the extensive number of statutes which purport to protect "privacy" in some fashion or another.

Second, simply because current conceptions do not appear to be working does not mean either that privacy as a concept must be abandoned or that a workable conception of privacy cannot be found. There is, in my view, consensus on privacy as a concept. Privacy has intrinsic value as a moral and political ideal. The present state that privacy finds itself in is as a result of a concept of privacy—and the conceptions derived therefrom—on a flawed conception of liberty as

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65. *R. v. Dyment*, [1988] 2 S.C.R. 417 at para. 23. In a similar vein see also L'Heureux-Dubé in *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para.119 dealing with production of a complainant's counselling records in an accused's sexual assault trial.

license where privacy protects activities. I suggest that the concept of privacy is better served if conceived of as equality.

A normative concept of privacy also aids from a remedial point of view. The present remedial mechanism is both ineffective to remedy true invasions of privacy (for privacy can never be restored)[66] and prohibitively costly (both time and money). There is undeniable intuitive appeal for remedies that have as their purpose the maintenance of conditions that will make the exercise of rights possible and not simply the prevention of an invasion of rights in the first place.

If we accept that a search for a normative concept of privacy has merit, then we must undertake a review of the current conceptions of privacy before we can honestly critique them and offer something else in their stead.[67] It is to that task that I now turn.

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66. But perhaps it can be remedied if monetary compensation is seen as adequate.

67. Demarcating privacy's bounds is an "occupational hazard of a thesis of privacy rights"—Shepherd, *supra* note 23 at 18. For a more extensive review of the current conceptions of privacy, see Solove, "Conceptualizing Privacy" *supra* note 25.

III. Current Conceptions of Privacy

It is generally acknowledged that there are six conceptions of privacy that are currently championed. Privacy is seen as:[68] (1) the right to be let alone; (2) the limited access to the self (autonomy); (3) secrecy and the concealment of discreditable information; (4) control over personal information; (5) creation of self/personhood and preservation of one's dignity; and (6) promoting intimacy and relationships. Many of the conceptions overlap with each other and, as will be developed below, some scholars have abandoned a search for a single conception in favour of a combination of several which, in their view, explains privacy. Each will be considered in turn along with some criticisms specific to each conception. General criticisms—those that apply to them all—will be considered in the next section.

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68. Solove, "Conceptualizing Privacy" *supra* note 25. I do not take great exception with Solove's characterizations of the prevailing conceptions since they appear to be supported by the literature on this subject. I say that with a number of qualifications however. First, and most importantly, the characterizations do not affect my thesis one way or another. They are all based, in my view, on the commonly held—but erroneous—*concept* of privacy as a liberty (as opposed to equality) interest. This forms the basis of my contention that all of the conceptions have proven unworkable even though, when considered separately, they each possess some intuitive appeal. Secondly, the theories do not fit neatly into any one category and I doubt whether the authors would necessarily agree with Solove's assignment of them subscribing to one conception as opposed to another. For example, Charles Fried defines privacy as "control over knowledge about oneself" (Fried, "Privacy" (1968) 77 Yale L.J 475 at 482). By the same token, however, Fried contends at 484 that "privacy is the necessary context for relationships which we would hardly be human if we had to do without—the relationship of love, friendship and trust". Is this a conception of privacy as control over information or promoting intimacy and relationships? This is simply one example where scholars use language that seems to overlap with other conceptions.

A. The Right to be Let Alone

This conceptualization of privacy dates back to 1890, when two young lawyers penned a famous plea to have recognized a right to privacy at common law.[69] Although no one is quite sure what moved Warren and Brandeis to write,[70] one can be sure that part of their motivation was to ensure that privacy was seen as a free standing right worthy of protection in its own right and not derivative of some other more recognizable cause of action which required judges, then and in the future, to resort to legal fictions if predisposed to protect privacy.[71] Warren and Brandeis simply argued, as a rights-based theorist would,[72] that precedential cases, though not specifically referring to privacy, nevertheless contained "privacy

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69. Warren & Brandeis, "The Right to Privacy" (1890) 4 Harv. L.Rev. 193.

70. See for example Kramer, "The Birth of Privacy Law: A Century Since Warren and Brandeis" (1990) 39 Catholic Univ. L.R. 703 at 709 where legend, subsequently discredited, was that Warren, himself and his family being part of Boston's social elite, became infuriated with the press having a field day on his daughter's wedding and so penned the law review article.

71. Implied contract or breach of confidence where the "invasion" is between strangers for example.

72. Rights based in the sense that one accepts that rights are inherent to the individual and are not dependent upon some external force: "they are not the product of any legislation, or convention, or hypothetical contract", they are not "gifts from God, or an ancient ritual or a national sport". See Dworkin, *Taking Rights Seriously*, *supra* note 29 at 176 and 198.

principles"[73] that could be applied independent of any property or other recognizable cause of action.[74] The right to privacy envisioned by the article is prefaced on a distinct right to liberty—the right to be let alone.[75]

Warren and Brandeis argued that privacy is a right not dependent "on the interposition of the legislature",[76] and concluded that privacy is based on a notion of one's personality or of an "inviolate personality":

> These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. In each of these rights, as indeed in all other rights recognized by the

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73. Ronald Dworkin, *Taking Rights Seriously*, *supra* note 29 at 119: "Brandeis and Warren's famous argument about the right to privacy is a dramatic illustration [of the point that precedent can be used to have a new principle striking out on a different line]: they argued that this right was not unknown to the law but was, on the contrary, demonstrated by a wide variety of decisions, in spite of the fact that the judges who decided these cases mentioned no such right."

74. Warren & Brandeis, *supra* note 69 at 213: "The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise."

75. Note, however, that Warren and Brandeis did not take credit for this phrase, crediting instead, at note 4 at 195, Judge Cooley from T. Cooley, *A Treatise on the Law of Torts*, 2d ed., 1888 p. 29. Even more interesting is that Cooley himself used this term to encompass the individual's right to be free from physical attack, not any inchoate, inarticulate right like privacy—see Kramer, *supra* note 70 at 710.

76. Warren and Brandeis, *supra* note 69 at 195.

> law, there inheres the quality of being owned or possessed—and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.[77]

Although this view has attracted significant scholarly interest throughout the twentieth century,[78] it suffers from numerous difficulties. First, the underlying principle of privacy it promotes—that of "inviolate personality"—is not defined:

> The formulation of privacy as the right to be let alone merely describes an attribute of privacy. Understanding privacy as being let alone fails to provide much guidance about how privacy should be valued vis-a-vis other interests, such as free speech, effective law enforcement, and other important values. Being let alone does not inform us about the matters in which we should be let alone. Warren and Brandeis did speak of "inviolate personality", which could be

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77. *Ibid.* at 205.

78. Richard C. Turkington, "Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy" (1990) 10 N. Ill.U. L. Rev. 479 at 481 where he states:

> [T]he article has acquired legendary status in the realm of legal scholarship. It is likely that *The Right to Privacy* has had as much impact on the development of law as any single publication in legal periodicals. It is certainly one of the most commented upon and cited articles in the history of our legal system.

See also Irwin R. Kramer, "The Birth of Privacy Law: A Century Since Warren and Brandeis" (1990) 39 Cath. Univ. L.Rev. 703.

> viewed as describing the content of the private sphere, but this phrase is vague, and the authors failed to elaborate.[79]

Second, the conception of privacy as the "right to be let alone" has, generally, been applied in situations involving state interference. It forms the basis in both Canada and the United States for many search and seizure cases in the criminal law context. Unfortunately,[80] it has also been used to justify a women's right to an abortion[81] or an unmarried couple's right to contraceptives[82] in America.

This conception is clearly inadequate where state interference is not the action complained of.[83] It is much too narrow, since it ignores the role—more prevalent today than in the past—that private actors play in the realm of privacy. In many situations that we now find ourselves faced with—particularly as a result of

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79. Solove *supra* note 25 at 1101.

80. "Unfortunately" in the sense that, as will be developed below, these decisions could have been reached without resorting to any strained notion of privacy.

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

82. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (which held as unconstitutional a statute criminalizing contraceptives for married couples). In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Griswold* was extended to the use of contraceptives by unmarried couples.

83. Shepherd, *supra* note 23 at 13: "As early as *Griswold* it was apparent that privacy in the sense of a zone of behaviour not for public view did not completely describe the protections the Court wished to recognize for individuals against the state. While there was certainly appeal to such sense of privacy, by reference to the marital bedroom, and analogy to the fourth amendment's prohibition against unwarranted search and seizure, it would soon break down when we left the home, for example, to buy contraceptives."

technological advancements in the collection, use, and dissemination of personal information—it is becoming increasingly common for individuals to demand more, not less, state intervention on their behalf.[84]

It is simultaneously too broad, as any form of invasion by the state would be prohibited under this conception. At its core is a concern that the individual not be denied liberty.[85] Clearly, however, the state's obligations to ensure basic security and certain property rights for its citizens outweighs any unfettered right of individuals to do as they please. For these reasons, other conceptions of privacy have been advanced.

B. The Limited Access to the Self (Autonomy)

This conception of privacy requires "a zone of relative insulation from outside scrutiny and interference—a field of operation within which to engage in the

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84. Which likely explains the explosion in information privacy statutes across all jurisdictions. Posner would take a more skeptical, but similar, view of the right to be let alone: "It is no answer that such individuals have the "right to be let alone." Very few people want to be let alone. They want to manipulate the world around them by selective disclosure of facts about themselves. Why should others be asked to take their self-serving claims at face value and be prevented from obtaining the information necessary to verify or disprove these claims?" See Posner, *supra* note 19 at 399.

85. As will be developed below, however, how this conception has been applied is by viewing liberty as a form of license. This alone condemns this conception to fail as inevitably liberty as licenses will be in constant tension with each other.

conscious construction of self."[86] Under this conception, we desire privacy "out of a sincere conviction that there are certain facts about us which other people, particularly strangers and casual acquaintances, are not entitled to know ... but instead [we] are to be respected as autonomous, independent beings with unique aims to fulfill."[87] This conception emphasizes that privacy gives individuals "the opportunity to experiment with self-definition in private, and (if one desires) to keep distinct social, commercial, and political associations separate from one another."[88]

Gavison would be considered a leading proponent of this conception.[89] In her view, there are three elements present in every legitimate privacy claim: secrecy, "the extent to which an individual is known"; anonymity, "the extent to which an individual is the subject of attention"; and solitude, "the extent to which others

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86. Julie Cohen, "Examined Lives: Information Privacy and the Subject As Object" (2000) 52 Stan. L. Rev. 1373 at 1424.

87. Parent, "Privacy, Morality and the Law" (1983) 12 Philosophy and Public Affairs 269 (1983) at 276-277.

88. William Treanor and Paul Schwartz, "The New Privacy" (2003) 101 Mich. L. Rev. 2163 at 2179.

89. Ruth Gavison, "Privacy and the Limits of Law" (1980) 89 Yale L.J. 421 at 423: Privacy is "related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others's attention".

have physical access to an individual."[90] An intrusion must violate all three, simultaneously, to merit being labelled an invasion of privacy.[91]

This conception, like the right to be let alone, suffers from being overly broad. Surely not all information about ourselves, however innocuous and whatever its source, is truly "private". Access to us occurs, in some form, many times a day without our knowledge. We are frequently overheard or seen saying or doing things in our daily lives without ever feeling that our privacy has somehow been invaded. One would surmise that only access to specific dimensions of ourselves or to particular matters or information would be worthy enough to attract privacy.[92]

Further, this conception links, again, privacy to liberty. This is exemplified by Shepherd who, when adopting a similar conception of privacy as autonomy, states:

> [u]nder my analysis, at the heart of liberty is the opportunity to find meaning in our lives. This is why we value liberty. This thesis looks to what effect certain denials of liberty, such as the liberty to choose

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90. *Ibid.* at 423.

91. Accordingly, for example, the following could not properly invoke privacy, even though privacy is invariably asserted in all such claims: exposure to unpleasant noise, smells, and sights; prohibitions of such conduct such as abortions, use of contraceptives, and "unnatural" sexual intercourse; insulting, harassing, or persecuting behaviour; presenting individuals in a "false light"; unsolicited mail and unwanted phone calls; regulation of the way familial obligations should be discharged; and commercial exploitation. *Ibid.* at 436.

92. Solove, *supra* note 25 at 1104.

> one's spouse or romantic partner or the liberty to have or not to have children, have on the meaning people find in their lives.[93]

Here too does this conception suffer from being too broad. It is naive to assume that individuals share universal beliefs about which liberties are valuable, and therefore which matters are "private". The conception's coherence thus breaks down at this point. The conception carries the same albatross that other conceptions based on liberty as a form of license do. Individual liberties may, and often do, conflict. This conception offers no guidance for balancing competing liberty interests, and therefore, which privacy interests are more important than others.

In addition, the requirement of solitude is also too narrow. It is somewhat of an oxymoron to be concerned about privacy for someone marooned, for example, on a deserted island, who has absolute solitude. Something more must be involved.

C. Secrecy/Concealment of Discreditable Information

The leading proponent of this conception of privacy is an American judge, Richard Posner, who views privacy as an individual's "right to conceal discreditable facts

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93. Shepherd *supra* note 23 at 4.

about himself."[94] Posner views privacy as a form of self-interested economic behaviour, concealing true but harmful facts about oneself for one's own gain:

> Much of the demand for privacy, however, concerns discreditable information, often information concerning past or present criminal activity or moral conduct at variance with a person's professed moral standards. And often the motive for concealment is ... to mislead those with whom he transacts. Other private information that people wish to conceal, while not strictly discreditable, would if revealed correct misapprehensions that the individual is trying to exploit, as when a worker conceals a serious health problem from his employer or a prospective husband conceals his sterility from his fiancee. ...[95]

Under this economic conception of privacy, it is simply inefficient that law should allow privacy to allow anything less than full disclosure:

> An analogy to the world of commerce may help to explain why people should not—on economic grounds, in any event—have a right to conceal material facts about themselves. We think it wrong (and inefficient) that the law should permit a seller in hawking his wares to make false or incomplete representations as to their quality. But people "sell" themselves as well as their goods. They profess high standards of behaviour in order to induce others to engage in social or business dealings with them from which they derive an advantage but at the same time they conceal some of the facts that these acquaintances would find useful in forming an accurate picture of their character.[96]

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94. Posner *supra* note 19.

95. Posner *supra* note 19 at 399.

96. *Ibid.*

Quite clearly this is a very restrictive—and cynical—conception of privacy. Under this conception, individual privacy would be eliminated for the sake of societal efficiency. If one agrees with this conception, then one must also reject privacy as a concept, that it has any intrinsic value as an important moral and political idea. Similar arguments—all in the name of efficiency—could be made to eliminate affirmative action or other policies that seek to ameliorate the conditions which historically disadvantaged groups of people have suffered.[97] Yet whoever seeks to make such an argument faces an unpalatable argument and a hostile reception. Can one credibly make the argument that nothing is private? I would think not but, in any event, it is a proposition to which I cannot subscribe.

This conception is also too narrow by focusing only on discreditable facts, which by its nature, lends a sort of perjorative air to the process. Not all information about an individual is discreditable or misleading. The books we read, the products we buy, the people we associate with are not necessarily unsavoury but we nonetheless view them as private matters. Nor do all of the activities which we

97. A point similarly made by Dworkin when discussing different conceptions of equality in "What is Equality? Part 3: The Place of Liberty" (1987) 73 Iowa L.Rev. 1.

assume to be private occur in the privacy of our homes (with whom we associate for example).[98] So the conception is too narrow on this score as well.

Posner responds to this latter criticism by suggesting that it is not only discreditable facts that individuals use privacy to conceal. Individuals also use privacy selectively in order to mislead. They do so for two reasons.[99] First, true facts are selectively revealed in order to create different perceptions that people have about them. My children have a much different perception about me than does my boss even though I have tried to deceive neither. Secondly, people are never reticent about revealing facts that show themselves in a favourable light. Reticence "comes into play when one is speaking to people—friends, relatives, acquaintances, business associates—who might use information about him to gain an advantage in some business or social transaction with him. Reticence is generally a means rather than an end."[100]

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98. Solove *supra* note 25 at 1109. Similarly, at 1153-54 he states: "Although many disruptions of privacy practices involve the disclosure of secrets, much of the information collected about individuals in databases consists of day-to-day, often nonsecret information such as name, address, phone number, race, gender, birth date, and so on. Trying to fit the problem into the conception of privacy as secrecy will not illuminate the problem very well; in fact, important aspects of the problem will be ignored or marginalized."

99. Posner, *supra* note 19 at 410.

100. *Ibid.* Posner notes that "[a]nyone who has ever sat next to a stranger on an airplane or a ski lift knows the delight that people take in talking about themselves to complete strangers."

Posner's response fails to consider the importance that an individual's control over information plays in privacy. Some private information we willingly disclose, but we nonetheless expect to maintain some control over the information.[101] Many claims of privilege would also fall under this rubric.[102] Full disclosure of our information to our doctor or lawyer is necessary to ensure we get adequate medical treatment or legal advice, as the case may be. In such cases, is it reasonable to assume that we have, by our voluntary disclosure to our doctor or lawyer, abandoned our interest in preventing our trusted advisors from further disclosing our personal information? Perhaps, but perhaps that interest is not a 'privacy' interest except under the broadest conceptions of privacy.[103]

Further, it is not simply the *content* of disclosed information that portrays an individual in an unfavourable or favourable light. Often it is the *context* and the relationship between various bits of information that determine how one is perceived. Technology allows the collection, use and dissemination of personal

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101. Solove characterized this as "selective disclosure"—"criticizing a boss to a coworker does not mean that the employee desires that her boss know her comments." Solove, *supra* note 25 at 1108.

102. See below under privacy as "control over personal information".

103. Perhaps any 'reversionary' interest is not based on some strained notion of privacy but on some other currently recognized form of action such as breach of trust or contract for example. Alternatively, perhaps the *effect* of the disclosure determines whether privacy is engaged. I develop this alternative below when I contend that, at its essence, privacy is engaged where the disclosure will tend to have a discriminatory effect—objectively determined—on an individual.

information to occur effortlessly and, often, without the knowledge of the individual. Accordingly, if individuals cannot correct the information—either because they do not know that information about them has been disclosed or because they do not have the ability or means by which to do so—then Posner's economically efficient world of perfect disclosure is not feasible. Accordingly, some privacy advocates (most notably Fried) would shift the privacy battleground to one of controlling the extent to which personal information is used. It is to that conception that I now turn.

D. Control over Personal Information

Under this conception, privacy is "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[104] Fried, who is the leading proponent[105] of this conception, contends that the notion that privacy is related to secrecy—to limiting the knowledge of others about oneself—must be refined. Privacy is not simply an

104. Solove *supra* note 25 at 1109.

105. Charles Fried, "Privacy" (1968) 77 Yale L.J. 475. See also Jeffrey Rosen, "The Purposes of Privacy: A Response" (2001) 89 Geo. L.J. 2117.

absence of information about us in the minds of others; rather, it is "the control over knowledge about oneself".[106]

As noted above, control over personal information appears to be at the heart of claims of privilege. Fried states:

> An excellent, very different sort of example of a contingent, symbolic recognition of an area of privacy as an expression of respect for personal integrity is the privilege against self-incrimination and the associated doctrines denying officials the power to compel other kinds of information without some explicit warrant. By according the privilege as fully as it does, our society affirms the extreme value of the individual's control over information about himself. To be sure, prying into a man's personal affairs by asking questions of others or by observing him is not prevented by the privilege. Rather it is the point of the privilege that a man cannot be forced to make public information about himself. Thereby his sense of control over what others know of him is significantly enhanced, even if other sources of the same information exist. Without his cooperation, the other sources are necessarily incomplete, since he himself is the only ineluctable witness to his own present life, public or private, internal or manifest. And information about himself which others have to give out is in one sense information over which he has already relinquished control.[107]

One can readily see the similarities between this conception and others including limited access and secrecy. As such, it suffers from the same sorts of criticisms.

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106. Fried, *supra* note 105 at 483.

107. *Ibid.* at 488.

First, there are problems defining its terms. What 'information' is covered? Certainly, it cannot be all information whatever its source. If so, the conception would be too broad. Perhaps it is simply intimate information. But, in that event, it would be too narrow as other information that we would not normally characterize as "intimate", we would still want protected (financial information, salary, job description or title to name a few examples). Further, by focusing on information, the conception has been criticized for excluding those aspects of privacy that are not informational, "such as the right to make certain fundamental decisions about one's body, reproduction, or rearing of one's children"[108] or to disruptions of one's peace of mind such as noises or smells.[109]

Also, what is meant by "control"? If "control" means ownership of the information, then the conception may fit in some contexts, but not others. For example, who "owns" the health information in a patient's chart—the patient to

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108. Solove *supra* note 25 at 1110. But should these fundamental decisions invoke privacy? There are two distinct aspects of these types of decisions. There is, first, the *ability or liberty* to make the decision itself. Then comes the *consequences* that flow from the decision, including who might have knowledge of the decision taken. One would expect that "privacy" would be invoked for the second aspect, but it does not necessarily follow in my view that privacy should, or needs to be, invoked for the first aspect of the decision. The questions are entirely separate—can I do it? followed by, who knows that I did it?

109. *Ibid* at 1115: "Privacy can be invaded even if nobody else knows something new about a person, such as being forced to hear propaganda, by being manipulated by subliminal advertisements, or by being disrupted by a nuisance that thwarts one's ability to think or read."

whom the information relates or the health care provider who creates the chart?[110] Who owns the information that a person was seen walking into an abortion clinic—the observer or the participant? Or taken further, who owns the information between two partners who collectively decide to have an abortion—the mother (who undergoes the procedure) or the father (who may have participated in the decision)? What if the mother thinks this is private but the father does not?

These issues highlight the difficulty posed by information which is capable of being simultaneously possessed by a number of people—associations for example.[111] Who controls the information in these cases? These issues also highlight the difficulty with the commoditization of information. Solove states:[112]

> [T]here are problems with viewing personal information as equivalent to any other commodity. Personal information is often formed in relationships with others, with all parties to that relationship having some claim to that information. For example, individuals are not the lone creators of their web-browsing information, for most of that information is created from the interaction between the user and websites. Often, the market value

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110. *McInerney v. MacDonald*, [1992] 2 S.C.R. 138 suggests the latter, but a patient nevertheless retains a right of access to his or her chart.

111. Solove, *supra* note 25 at 1113: "Unlike physical objects, information can be possessed simultaneously within the minds of millions. This is why intellectual property law protects particular tangible expressions of ideas rather than the underlying ideas themselves."

112. *Ibid.*

> of information is not created exclusively by the labor of the individual to whom it relates but in part by the third party that compiles the information. For example, the value of personal information for advertisers and marketers emerges in part from their consolidation and categorization of that information.

Control over personal information, as a conception of privacy, does not adequately address these issues.

E. Creation of Self/Personhood and the Preservation of One's Dignity

Similar to privacy as autonomy, the personhood conception of privacy is defended on the grounds that it protects an individual's self-identity, that it respects "those attributes of an individual which are irreducible in his self-hood."[113] Others have described this conception variously as a protection against conduct that is "an affront to personal dignity" and an "assault on human personality" to protection of "the individual's interest in becoming, being, and remaining a person."[114] It is a conception of privacy that has, at its core, the individual's right to experiment and make choices in an effort to define himself. Without privacy, it is argued, individuals inevitably bend to the "pressures to conform, ridicule, punishment,

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113. Shepherd *supra* note 23 at 16.

114. Solove, *supra* note 25 at 1116.

unfavourable decisions, and other forms of hostile reaction."[115] In that case, we are less likely to experiment and make choices, even bad ones: in such an environment, "[the observed person] is fixed as *something*—with limited probabilities rather than infinite, indeterminate possibilities."[116]

Bloustein, the leading advocate of this conception, summarizes this matter as follows:[117]

> The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.

The argument continues that to become the sort of independent, creative people that society hopes for, individuals need—by trial and error—experience in

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115. Reiman, "Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future" (1995) 11 Santa Clara Computer & High Technology Law Journal 27 at 35.

116. Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, in *Nomos XIII: Privacy* 149 (J. Ronald Pennock & J.W. Chapman eds. 1971) at 7.

117. Edward Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 N.Y.U. L. Rev. 962 at 1003.

formulating their own judgments and in acting upon those judgments. Privacy provides the setting in which individuals can obtain that experience.[118] Without the chance to experiment in an effort to define ourselves, "we will become something different than we currently are, something less noble, less interesting, less worthy of respect."[119]

Most agree that this conception is either a more sophisticated version of "the right to be let alone" conception, or more likely, a combination of the "right to be let alone" and the "autonomy" conception. Regardless, it has certainly been applied more as the former and, accordingly, suffers from the same criticisms, such as: the conception's notion of 'dignity' is too broad;[120] it ignores the role that private actors play in modern day privacy invasions; and it does not rise to the challenge

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118. A contention disputed by Posner, "Right to Privacy" *supra* note 20 at 407: "However, history does not teach that privacy is a precondition to creativity or individuality. These qualities have flourished in societies, including ancient Greece, Renaissance Italy, and Elizabethan England, that had much less privacy than we in the United States have today."

119. Solove *supra* note 25 at pp.36-42.

120. "To equate privacy with dignity is to ground privacy in social forms of respect that we owe each other as members of a common community. So understood, privacy presupposes persons who are socially embedded, whose identity and self-worth depend upon the performance of social norms, the violation of which constitutes 'intrinsic' injury. In these respects, the conception of privacy as a form of dignity is in theoretical and practical tension with Rosen's observation that "[t]he ideal of privacy ... insists that individuals should be allowed to define themselves." See Post, *supra* note 1 at 2092.

when presented with competing liberties.[121] With regards to the latter criticism, Shepherd notes that this conception creates obvious tension between a person's right to define himself and society's right to define itself. Shepherd uses the following example:[122]

> We can see this played out in the consideration of the right of individuals to engage in homosexual activity. The personhood thesis would presumably support the right of homosexuals to engage in homosexual activity because of the importance to their self-identity of such conduct. Under the personhood thesis, communities could not legislate against such behaviour and therefore could not maintain legal intolerance of homosexuals. The republican critique insists that the identity of individuals may be formed by and supported by inclusion in communities. If the principles underlying the personhood thesis are given full appreciation, then for would-be members of a community intolerant of homosexuals, self-identity is impermissibly infringed. The value-neutrality of the personhood thesis, which is its core—that individuals have a right to define themselves, even against the norms of society—is lost when it prevents the existence of communities intolerant of some identities.

Leaving aside any comment that anti-discrimination advocates may make, this conception has, at least for me, the most appeal. Its concern about maintaining

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121. Posner contends that Bloustein's view simply interchanges "privacy" for "personal liberty", which is a hallmark of the right to be let alone: Richard A. Posner, "Privacy, Secrecy and Reputation" (1979) 28 Buff. L. Rev. 1 at 7. Similarly, Solove states that "theories of privacy as personhood tell us why we value privacy (to protect individuality, dignity, and autonomy), but their usual focus on limiting state intervention in our decisions often gives too little attention to the private sector. ... Therefore, beyond an account of where the state ought to leave individuals alone, personhood theories frequently fail to explain how personhood is to be protected." Solove, *supra* note 25 at 1118.

122. Shepherd, *supra* note 23 at 18-19.

dignity hints at understanding of the real problem that privacy addresses—equality. It perpetuates, however, the existing paradigm of privacy as a concept: that privacy is a liberty issue. Accordingly, it may suffice for the moment simply to repeat my view that all conceptions which have at their core a conception of privacy as a form of license will suffer from the same sorts of tension illustrative in Shepherd's example. As will be developed below, I contend that all such conceptions cannot adequately resolve the tension and, therefore, do not provide a satisfactory conception of privacy.

F. Promotion of Intimacy and Relationships

This conception of privacy "recognizes that privacy is not just essential to individual self-creation, but also to human relationships. ... By focussing on the relationship-oriented value of privacy, the conception of privacy as intimacy attempts to define what aspects of life we should be able to restrict access to, or what information we should be able to control or keep secret."[123] Post is the leading proponent of this conception:

> Post comments that privacy represents not "a value asserted by individuals against the demands of a curious and intrusive society", but a necessary aspect of relations with others. Rather than

123. Solove *supra* note 25 at 1121.

> upholding the "interests of individuals against the demands of community", information privacy creates rules that in some significant measure "constitute both individuals and community". The fashion by which privacy standards carry out this constitutive task is by confining personal information within boundaries that the standards normatively define. In Post's words, privacy's function is to develop "information territories". The establishment of these "information preserves" is a critical means for defining social and individual life. ... The critical inquiry ... is whether the "reasonable person" would find certain invasions of privacy "highly offensive".[124]

This conception too is generally seen as too broad: everything that is intimate may not be private and vice versa.[125] For example, Solove states: "[t]he conception of privacy as intimacy fails to capture the problem in this context because for the most part, databases do not invade or disrupt our intimate lives. Our names, addresses, types of cars we own, and so on are not intimate facts about our existence, certainly not equivalent to our deeply held secrets or carefully guarded diary entries. In cyberspace, most of our relationships are more like business transactions than intimate interpersonal relationships."[126]

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124. Treanor and Schwartz, *supra* note 88 at 2177 quoting Robert C. Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort" (1989) 77 Cal. L. Rev. 957.

125. Solove *supra* note 25 at 1123: "Individuals not intimately related may nevertheless assert that their relation or activity is a private one in the sense that it is not the proper concern of the community or some institution, such as the state, a church, or a business firm."

126. *Ibid.* at 1153-54.

IV. A Critique of the Current Conceptions

A. Summary of Standing Criticisms

A general overview of the criticisms is in order. The criticisms contend that the conceptions are either too narrow or too broad in their application. Indeed, they are often both simultaneously.

They are too narrow by emphasizing state action in private activities and ignoring the impact that private actors have on privacy in a modern society (right to be let alone or dignity). They are also too narrow because they are confined to particular situations (autonomy), or particular types of information (discreditable facts or intimate information for example) that ignore a broader interest that a person may have in subsequently controlling information that has voluntarily been disclosed.

They are also too broad. Many of the conceptions are overly expansive. Some situations require the state to intervene on its citizens' behalf, so it is difficult unequivocally to defend conceptions of privacy which require non-interference by the state (right to be let alone, dignity). For other conceptions, the type of information protected is overly broad by protecting all sorts of innocuous information or activities that we would not normally consider private. One would

assume that only certain types of activities or information would attract privacy (autonomy, control over information). Finally, some conceptions (control over information, promoting relationships) fail to consider the difficulty posed by information that is capable of being simultaneously possessed by a number of people—who owns or controls the information in those cases?

B. Analysis of Standing Criticisms

The criticisms have, at their core, two components. First, the conceptions suffer from intuitionism. They offer an intuitive approach of what makes things 'private'. They assume, incorrrectly in my view, that we approach privacy with a common understanding of the concept, or concepts, that the term 'privacy' expresses. 'Individual autonomy', 'dignity', and 'creation of self' are themselves concepts capable of different conceptions. Without consensus about the underlying concepts associated with each conception, none of the conceptions can provide a coherent theory of privacy.

Secondly, underlying the various conceptions of privacy is a concept of liberty which is itself flawed. 'Liberty' is seen as a form of license, protecting—in its most crude form—an individual's right to do as he pleases. Privacy protects, under such a view, simply 'action verbs'—to possess pornography, to associate

with unsavoury causes, or to make unpopular decisions. The deficiencies with such a view come into focus when competing liberty interests are at stake. Whose liberty interest prevails where you have a conception of a moral society, but I choose to live a lifestyle that you consider immoral? Privacy has been invoked to justify, or deny, these sorts of decisions.

Each of these will be considered in turn.

1. Intuitionism

One significant difficulty with the prevailing conceptions of privacy is that they are all premised, in varying degrees, on an "intuitionist analysis". 'Individual autonomy', 'dignity', and 'creation of self', to take a few examples, are themselves concepts capable of different conceptions. Intuitionist arguments presume universal conception of these vague concepts. If consensus does not exist, the conceptions will be exposed as incoherent failures. Whitman puts the matter thus:[127]

> Overwhelmingly, privacy advocates rely on what moral philosophers call "intuitionist" arguments. In their crude form, these sorts of

127. James Q. Whitman, "The Two Western Cultures of Privacy: Dignity versus Liberty" (2004) 113 Yale L.J. 94 at 96 (emphasis his).

> arguments suppose that human beings have a direct, intuitive grasp of right and wrong, an intuitive grasp that can guide us in our ordinary ethical decision-making. Privacy advocates evidently suppose the same thing. Thus the typical privacy article rests its case precisely on an appeal to its reader's intuitions and anxieties about the evils of privacy violations. *Imagine invasions of your privacy*, the argument runs. *Do they not seem like violations of your very personhood?* Since violations of privacy seem intuitively horrible to everybody, the argument continues, safeguarding privacy must be a legal imperative, just as safeguarding property or contract is a legal imperative. Indeed, privacy matters so much to us that law protecting it must be a basis requirement of human rights.

One does not need to strain to find evidence of intuitive analysis lying at the heart of various conceptions. Shepherd, for example when describing elements of the personhood conception of privacy, states: "[w]hile it is true that the specific relationships or endeavours or pursuits that will be meaningful to each individual are unique to that individual, we probably have some *general, rough consensus of the sorts of things that supply individuals with meaning*, or at least the sorts of freedoms they need to search for those."[128] Comments like these evidencing an intuitionist analysis are not unique to academic lawyers. Examples of intuitive analysis also exist in the judiciary.[129]

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128. Shepherd, *supra* note 23 at 55 (emphasis mine).

129. See cases cited at note 43.

It is simply inconceivable that intuitive consensus is possible, nor is such an approach desirable.[130] Whitman observes that[131] "no matter how anxiety-inducing it may be to read these authors [who assume an intuitionist approach], their arguments only carry real weight if it is true that the intuitions they evoke are shared by all human beings." Since "intuitive commonality" is not possible, Whitman rejects all arguments based on intuitionism:[132]

> Indeed, it is a basic error to try to explain or justify any aspect of the law by appealing to our unmediated intuitions about what seems evil or horrible. ... Crude intuitionism is pretty much dead among moral philosophers, and it ought to be dead in the law, too. ... In liberal western societies, law is regarded as a weapon of last resort, to be drawn only when authentically fundamental values of society are at stake. This has a consequence that deserves to be stated over and over again. It is the very nature of being a member of a liberal society that one must live with many things that seem horrible. If the sort of arguments mounted by privacy advocates were valid, many things indeed would be forbidden. ... [For privacy] [w]e cannot simply start by asking ourselves whether 'privacy violations' are intuitively 'horrible' or 'nightmarish'. The job is harder than that. We have to identify the fundamental values that are at stake in the 'privacy' question as it is understood in a given society. The task is not to realize the true universal values of 'privacy' in every society. The law puts more limits on us than that: The law will not work as law, unless it seems to people to embody the basic commitments of their society.

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130. For the reasons stated earlier under "The Need for a Normative Conception of Privacy".

131. Whitman, *supra* note 127 at 2.

132. *Ibid.* at 9.

While I generally agree with Whitman's rejection of intuitionist analysis, he ignores the underlying problem with the approach. Intuitionist arguments presume abstract concepts back into the argument before consensus on these concepts is evident. As stated above, a conception can only approach coherence if, and when, reasonable people agree on the underlying concepts. Why quibble about what fairness dictates in any given situation, if we are unable to agree that fairness is a desirable objective in the first place? In the context of privacy, one would expect to see the conceptions falter if the underlying concept—privacy as liberty—is demonstrated to be deficient. This leads to my next criticism, addressed below.

2. Liberty as a Form of License

A related criticism is that the current conceptions of privacy are invariably based on an underlying concept of privacy as a liberty interest which is itself flawed. They have, as their rallying point, a conception of liberty as a form of license which finds 'liberty', as a commodity,[133] at odds with state interests. Numerous examples demonstrate that privacy, in America, is primarily invoked to protect

133. To use Dworkin's language in *Taking Rights Seriously*, *supra* note 29 at 270.

various liberty interests—'action' verbs—from intrusions by the state.[134] Privacy has been asserted to allow abortions,[135] contraceptives for married[136] and unmarried couples,[137] interracial marriages,[138] 'unnatural' sexual activity,[139] and the private possession of 'obscene' material.[140]

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134. Indeed, even scholarly discourse seems to concede that it is a conception of privacy that is liberty based, although they may not concede that the conception of liberty is in turn a form of license. For example, Fried states: "[m]ost obviously, privacy in its dimension of control over information is an aspect of personal liberty". In a similar vein, Whitman states: "[a]t its conceptual core, the American right to privacy still takes much the form that it took in the eighteenth century: It is the right to freedom from intrusions by the state, especially in one's own home. The prime danger, from the American point of view, is that 'the sanctity of [our] homes,' in the words of a leading nineteenth-century Supreme Court opinion [*Boyd v. United States*, 116 U.S. 616, 630 (1886)], will be breached by government actors. American anxieties thus turn little on the media. Instead they tend to be anxieties about maintaining a kind of private sovereignty within our own walls." See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty* (2004), 113 Yale L.J. at 94. Finally, while commenting on the right to be let alone, autonomy, and promoting human relationships conceptions of privacy, Gavison notes that they are all based on liberty arguments: "Each of these arguments based on privacy's promotion of liberty shares a common ground: privacy permits individuals to do what they would not do without it for fear of an unpleasant or hostile reaction from others. This reaction may be anything from legal punishment or compulsory commitment to threats to dissolve an important relationship. The question arises, then, whether it is appropriate for privacy to permit individuals to escape responsibility for their actions, wishes, and opinions." Gavision, supra note 61 at 451.

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

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

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

138. *Loving v. Virginia*, 388 U.S. 1(1967).

139. *Lawrence v. Texas*, 539 U.S. 235 (2003) which dealt with sodomy.

140. *Loving v. Virginia*, 388 U.S. 1(1967).

Two consequences follow when liberty is conceived as a form of license. Insofar as liberty is in competition with state interests, privacy is simply a negative form of liberty. Dworkin characterizes negative liberty as the absence of constraints placed upon an individual by the state:

> I have in mind the traditional definition of liberty as the absence of constraints placed by a government upon what a man might do if he wants to. Isaiah Berlin, in the most famous modern essay on liberty, put the matter this way: 'The sense of freedom, in which I use this term, entails not simply the absence of frustration but the absence of obstacles to possible choices and activities—absence of obstructions on roads on which a man can decide to walk.' This conception of liberty as license is neutral amongst the various activities a man might pursue, the various roads he might wish to walk.[141]

Liberty as a form of license ignores the fact that privacy has both negative and positive aspects to it. As noted above, many of the conceptions are particularly vulnerable to criticism simply because they consider only the role that state interference plays, and ignore the broader impact that private actors play in modern invasions of privacy. A coherent conception of privacy would seem to embrace state intervention in some cases, and state silence in others.[142] As

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141. Ronald Dworkin, *Taking Rights Seriously*, *supra* note 30 at 267.

142. Solove, "Conceptualizing Privacy", *supra* note 25 at 1120 notes the importance of positive liberty for privacy: "Without protection against rape, assault, trespass, collection of personal information, and so on, we would have little privacy and scant space or security to engage in self-definition. To preserve people's ability to engage in self-definition, the state must actively intervene to curtail the power of customs and norms that constrain (continued...)

mentioned previously, such a conception is not likely where liberty is viewed as a form of license.

Second, if a form of license, then liberty is not simply at odds with the state but often finds itself in competition with other liberty interests.[143] As such, some individual (or societal) liberty interest must take preference—and therefore importance—over a competing liberty interest. Dworkin, for example, describes the problem as follows:[144]

> Liberty as license is an indiscriminate concept because it does not distinguish among forms of behaviour. Every prescriptive law diminishes a citizen's liberty as license: good laws, like laws prohibiting murder, diminish this liberty in the same way, and possibly to a greater degree, as bad laws, like laws prohibiting political speech. The question raised by any such law is not whether it attacks liberty, which it does, but whether the attack is justified by some competing value, like equality or safety or public amenity. If a social philosopher places a very high value on liberty as license, he may be understood as arguing for a lower relative value for these competing values. If he defends freedom of speech, for example, by

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142. (...continued)
freedom."

143. Just as academic lawyers concede that their conceptions are liberty based, they also seem to acknowledge the challenge presented by competing liberties: "[as] is true for property or bodily security, the control over privacy must be limited by the rights of others. And as in the cases of property and bodily security, so too with privacy the more one ventures into the outside, the more one pursues one's other interests with the aid of, in competition with, or even in the presence of others, the more one must risk invasions of privacy". Fried, *supra* note 105 at 483-486.

144. Ronald Dworkin, *Taking Rights Seriously, supra* note 29 at 267.

> some general argument in favour of license, then his argument also supports, at least pro tanto, freedom to form monopolies or smash store front windows.

In the context of privacy, this is tantamount to an acknowledgment that one privacy interest is more important than another privacy interest. This amounts to a zero sum gain. Further, when privacy competes with other liberty values, privacy claims do not generally succeed, at least in America. This is particularly true where rights enumerated in the American Constitution such as right to freedom of the press or freedom of speech compete with non-enumerated rights such as privacy.[145] Whitman concludes:[146]

> Privacy is not the only cherished American value. We also cherish information, and candour, and freedom of speech. We expect to be free to discover and discuss the secrets of our neighbours, celebrities, and public officials. We expect government to conduct its business publicly, even if that infringes the privacy of those caught up in the matter. Most of all, we expect the media to uncover the truth and report it—not merely the truth about government and public affairs, but the truth about people. The law protects these expectations

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145. Mudd, "Right to Privacy v. Freedom of Speech: A Review and Analysis of Bartnicki v. Vopper" (2002) 41 Brandeis Law Journal 179. See Murphy, *supra* note 17 at 2392 where he concludes: "The disclosure tort is not a complete dead letter: it is technically a viable cause of action in about thirty-five states, and occasionally plaintiffs win. But overall, it has fared poorly. One reason it has failed is that it is not conceived as a dispute about property rights in information, but rather as a battle between First Amendment values and an inchoate, elastic privacy 'right'. It is easy to see why the First Amendment generally wins this battle."

146. Whitman, *supra* note 127 at 62.

> too—and when they collide with expectations of privacy, privacy almost always loses.

Is it possible to conceptualize privacy in such a fashion that "true" privacy claims do not compete? I contend that it is indeed possible, but not if we continue to conceive of privacy as liberty and to hold on to the conceptions thereof which view liberty as a form of license.[147] If this proposition is persuasive, then what options does the modern privacy advocate have? It is to these that I now turn.

V. Alternatives for Privacy

The current conceptions of privacy are, quite simply, deficient. As the examples at the start of this essay suggest, this bold statement should not come as a surprise. Indeed, scholars, while championing their own conceptions, ably articulate why other conceptions are inadequate to explain the myriad of ways that privacy is affected in our daily lives. I am by no means the only—or first—writer to note this. Gerety observed that privacy has "a protean capacity to be all things to all

147. As will be developed below, if the true privacy claims are "equality" claims, then it is unlikely that two true equality cases will conflict.

lawyers."[148] Others have commented that the only thing that the various conceptions of privacy have in common is simply the privacy label.[149]

If the current conceptions do not work, then we are left with the several alternatives. First, we can, as some scholars have done, abandon the conceptions individually, in favour of a consortium of conceptions working together. If no one conception is persuasive, perhaps a cluster of conceptions taken in concert will be more successful.

Alternatively, we can abandon the search for a core value of privacy in favour of a different conceptual framework. Solove does precisely this by abandoning the search for the essence of privacy in favour of a "pragmatic" approach to privacy which "focuses on the palpable consequences of ideas rather than on their correspondence to an ultimate reality."[150] In Solove's view, "there is no one answer to privacy, but a variety of answers depending on a variety of factors."[151]

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148. Tom Gerety, "Redefining Privacy" (1977) 12 Harv. C.R.-C.L. L. Rev. 233 at 234.

149. Solove, *supra* note 25 at note 8.

150. Solove *supra* note 25 at 1098-99. This approach, Solove contends, "urges philosophers to become more ensconced in the problems of everyday life; adapts theory to respond to flux and change rather than seeking to isolate fixed and immutable general principles; and emphasizes the importance of the concrete, historical, and factual circumstances of life."

151. *Ibid.* at 1091.

Finally, we can change our entire approach to privacy. We can approach the search for what makes things private from a different paradigm. As indicated previously, I shall contend that privacy is an equality issue, not a liberty issue.

I will consider these alternatives in turn.

A. Combine current conceptions

One can readily find evidence suggesting that several of the conceptions overlap. Indeed, often proponents of one conception of privacy seem to use terminology associated with another. In some cases, the overlapping appears to be innocent, almost if by accident. For example, autonomy is often used in the same context as the creation of self or dignity, or alternatively, the right to be let alone is commonly cited in contexts where personhood or autonomy is the conception of privacy being advanced. One is often left, in such cases, wondering which conception of privacy is actually being championed.

One example of this latter approach is the "anti-totalitarian" conception of privacy advocated by Rubenfeld.[152] Under this view, the right of privacy prevents the state from occupying the totality of our lives:

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152. Jeb Rubenfeld, "The Right to Privacy" (1989) 102 Harv. L. Rev. 737.

> The point is not to save for the individual an abstract and chimerical right of defining himself; the point is to prevent the state from taking over, or taking undue advantage of, those processes by which individuals are defined in order to produce overly standardized, functional citizens. ... Democracy by definition rejects totalitarian intrusions into people's lives because totalitarianism destroys the independent thinking nature of the population needed to sustain democracy.[153]

Without privacy rights or some other protection against totalitarianism, we will have, under this view, "a monolithic society created by government-imposed norms."[154] That is, we will have state-created automatons. Rubenfeld seems to connect the right-to-be-let-alone conception with the personhood or autonomy conceptions of privacy. Which one is not clear. He complicates the conception further by drawing an additional distinction between an individual's right to define himself and society's right to define itself. However it is viewed, the right to be let alone appears to be fundamental to Rubenfeld's conception. As with other similar conceptions, this conception does not contemplate the role that non-state actors play in the privacy arena.

Alternatively, sometimes the overlap appears to be by design. Given the recognition that no one conception of privacy seems satisfactorily to address all

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153. Shepherd *supra* note 23 at 22.

154. *Ibid.*

privacy claims, some scholars have abandoned any single conception in favour of a combined conception. An attempt to conceptualize privacy by connecting three distinct concepts—control over information, dignity/personhood and autonomy—is one such attempt.[155] Consider the following argument for privacy made by Rosen:[156]

> When private information is taken out [of] context, the only way to try to put the information in a broader context is to reveal more private information, which only increases the risk of misinterpretation, because certain kinds of private information can only be understood in a context of intimacy. Certain kinds of private information should only be exposed under conditions of trust, which means that even if the revelation of more private information led to more understanding, it would nevertheless compound the injury of the initial exposure. This injury, I want to argue, is an offense against autonomy as well as dignity, against the self-defined "I" as well as the socially defined "me". The autonomy that the backstage area protects is not merely freedom from totalizing forms of state scrutiny but also from overly intrusive forms of social scrutiny. And respecting the privacy of the backstage spares us from the burden of justifying differences that no one in a pluralistic society should be forced to subject to communal inspection and debate.

Rosen's choice of terminology certainly seems to suggest he is advancing several conceptions of privacy at once.

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155. See Post, *supra* note 1, where he reviews this recent conceptualization.

156. Jeffrey Rosen, "The Purposes of Privacy: A Response" (2001) 89 Geo. L. J. 2117 at 2120.

This alternative does have some appeal. Although suffering from criticisms of being too broad, or too narrow, or both, the current conceptions considered in isolation seem to provide—at least superficially—the best explanation of privacy in some contexts. Certainly more "privacy" cases will be caught if the conceptions are considered cumulatively, rather than in isolation. The disadvantage with this approach is that it does not answer our original question: is there a common value inherent in all privacy cases? Unless a common denominator is articulated, combining conceptions simply perpetuates the piecemeal, haphazard approach to privacy that has marked the privacy landscape so far. Nor will it provide a satisfactory answer for the hard privacy cases as they occur.[157]

1. Conceptions of Privacy and the Canadian Judiciary

One does not need to strain to find evidence that the current conceptions of privacy have found a voice within the judiciary. I have previously highlighted some American cases which have espoused various conceptions of privacy in support of

157. To borrow from Dworkin who applies his rights theory to a series of "hard" cases.

their decisions.[158] The current conceptions of privacy are also evident in Canadian jurisprudence. A small sampling of cases will suffice to make this point.[159]

It is perhaps not surprising that the "right to be let alone" conception of privacy is predominantly found in the context of the criminal law. Prohibitions against unreasonable search and seizure[160] attempt to balance important, but competing, individual interests (such as privacy and de facto liberty) against state interests in crime detection and prevention. *Hunter v. Southam Inc.* is, of course, the seminal

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158. Scholars do not, however, invariably agree on which conception of privacy governs in any given case. Many scholars suggest that the "right to be let alone" is the prevailing conception for cases involving abortion (*Roe v. Wade*, 410 U.S. 113 (1973)), interracial marriages and the availability of contraceptives (*Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972)). Solove, by contrast, characterizes these decisions as based on the personhood conception of privacy. Solove *supra* note 26 at 1106.

159. An exhaustive summary of Canadian cases is not required to make the point that the current conceptions of privacy do indeed form the basis for many of the judiciary's decisions involving privacy. I am simply arguing that the conception of privacy must evolve into privacy as an equality right. For an exhaustive review of Canadian jurisprudence, see McIsaac, Shields, and Klein, eds., *The Law of Privacy in Canada* (Toronto: Carswell 2000).

160. Section 8 of the *Canadian Charter of Rights and Freedoms* states:

> Everyone has the right to be secure against unreasonable search or seizure.

The Fourth Amendment of the *United States Constitution* provides:

> 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.

case illustrative of this conception.[161] Paraphrasing Warren and Brandeis, Dickson C.J.C. (as he then was) characterizes privacy as simply the "public's interest in being left alone by government."[162] In doing so, however, Dickson C.J.C. emphasizes that section 8 of the *Charter* protects "people, not places or things"—an attempt, no doubt, to jumpstart Canadian privacy law and to distance the Canadian Court from the pitfalls experienced over decades in American jurisprudence that is preoccupied with the "sanctity of one's home".[163]

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161. *Hunter v. Southam*, [1984] 2 S.C.R. 145. The facts of Hunter are well known but bear repeating: Involved the constitutionality of s.10(1) and 10(3) of the *Combines Investigation Act* and specifically whether the broad search and seizure provisions were inconsistent with the right to be secure against unreasonable search and seizure. Pursuant to s. 10(1) of the *Combines Investigation Act*, the Director of Investigation and Research of the Combines Investigation Branch authorized several Combines Investigation officers to enter and examine documents and other things at a respondent's business premises in Edmonton "and elsewhere in Canada". The authorization was certified by a member of the Restrictive Trade Practices Commission pursuant to s. 10(3) of the Act. The authorization was not, however, a judicial warrant.

162. Dickson C.J.C. states:

> The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

163. A point echoed by La Forest J. in *R. v. Dyment*, [1988] 2 S.C.R. 417 at para. 16 where he notes that, while having its historical roots in the right against unreasonable search and seizure, the right to be let alone simply in one's home is not sufficiently broad enough to address modern privacy concerns in the criminal law:

> The lives of people in earlier times centred around the home and the significant obstacles built by the law against governmental intrusions on property were clearly seen by Coke to be for its occupant's "defence" and "repose"; see *Semayne's Case* (1604), 5 Co. Rep. 91a, 77 E.R. 194, at p. 91b

(continued...)

The 'right to be let alone' conception is not the only conception of privacy that the Supreme Court of Canada has embraced, nor are the conceptions limited to consideration in criminal cases.

In *Hill v. Church of Scientology of Toronto*,[164] which dealt with a *Charter* challenge to the common law tort of defamation, Cory J. reiterates the constitutional significance of the right to privacy emphasizing the 'autonomy' conception of privacy.[165]

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163. (...continued)

> and p. 195 respectively. Though rationalized in terms of property in the great case of *Entick v. Carrington* (1765), 19 St. Tr. 1029, 2 Wils. K.B. 275, 95 E.R. 807, the effect of the common law right against unreasonable searches and seizures was the protection of individual privacy. Viewed in this light, it should not be cause for surprise that a constitutionally enshrined right against unreasonable search and seizure should be construed in terms of that underlying purpose unrestrained now by the technical tools originally devised for securing that purpose. However that may be, this Court in *Hunter v. Southam Inc.* clearly held, in Dickson J.'s words, that the purpose of s. 8 "is ... to protect individuals from unjustified state intrusions upon their privacy" (supra, p. 160) and that it should be interpreted broadly to achieve that end, uninhibited by the historical accoutrements that gave it birth.

164. [1995] 2 S.C.R. 1130.

165. *Ibid.* at para. 121. Although to be fair, Cory J. also mentions in passing that defamatory comments are an "affront to that person's dignity".

In *R v. Plant*[166] and *McInerney v. MacDonald*,[167] 'control over information' is the primary conception of privacy being considered. In *Plant*,[168] Sopinka J. emphasizes that although a person may feel compelled to disclose information about himself, he may nevertheless have a reasonable expectation that the information shall remain confidential to the persons to whom, and restricted to the purposes for which, it is divulged. Such expectations must be constitutionally protected.[169]

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166. [1993] 3 S.C.R. 281.

167. [1992] 2 S.C.R. 138.

168. *Plant* dealt with a search and seizure of the electric consumption records of a suspected drug dealer stored in the computer database of the utility company. The majority of the Supreme Court of Canada held that such records were not personal and confidential and, therefore, did not attract constitutional protection.

169. Interestingly, however, Sopinka J. concludes that the electric records do not attract constitutional protection. Compare his reasoning with that of McLachlin J.(as she then was) who, though ultimately agreeing with Sopinka J.'s result, nevertheless concludes that the records are indeed private, requiring the state to justifying a warrantless search. She states at paras. 41-42:

> The question in each case is whether the evidence discloses a reasonable expectation that the information will be kept in confidence and restricted to the purposes for which it is given. Although I find the case of electricity consumption records close to the line, I have concluded that the evidence here discloses a sufficient expectation of privacy to require the police to obtain a warrant before eliciting the information. I conclude that the information was not public, since there is no evidence suggesting that this information was available to the public and the police obtained access only by reason of a special arrangement. The records are capable of telling much about one's personal lifestyle, such as how many people lived in the house and what sort of activities were probably taking place there. The records tell a story about what is happening inside a private dwelling, the most private of places. I think that a reasonable person looking at these facts would conclude that the records should be used only for the purpose for which they were made - the delivery and billing of electricity - and not divulged to strangers without proper legal authorization.

(continued...)

McInerney is a civil suit involving privacy of medical records. While technically an access issue and not an invasion issue per se, *McInerney* demonstrates the judiciary's concern about an individual retaining some form of control over his or her personal information. Here a patient sought access to her medical records. Some but not all records were provided to her.[170] In ordering the entire file—including the disputed reports—be provided to the patient, La Forest J. for the Court emphasized that an individual retains a "basic and continuing interest in what happens to [personal] information, and in controlling access to it."[171] This interest continues even where the individual lacks any proprietary rights in the form of record.

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169. (...continued)

> I disagree with my colleague's assertion that "[t]he computer records investigated in the case at bar while revealing the pattern of electricity consumption in the residence cannot reasonably be said to reveal intimate details of the appellant's life since electricity consumption reveals very little about the personal lifestyle or private decisions of the occupant of the residence" (p. 293). The very reason the police wanted these records was to learn about the appellant's personal lifestyle, i.e. the fact that he was growing marihuana. More generally, electricity consumption records may, as already noted, reveal how many people live in a house and much about what they do. While not as [page303] revealing as many types of records, they can disclose important personal information.

170. The doctor provided copies of all notes, memoranda and reports that she had prepared but refused to produce copies of reports prepared by other physicians.

171. La Forest in *McInerney*, *supra* note 192 at paras 18-19.

Several cases have emphasized the personhood/dignity conception of privacy. Both *R. v. O'Connor*[172] and *A.M. v. Ryan*[173] involve production of medical and counselling records, but in entirely different contexts.[174] In both cases, however, the Supreme Court of Canada emphasizes the impact that the production of private medical records would have on the dignity of the complainants and plaintiff as the case may be. For example, L'Heureux-Dubé J. states in *Ryan*:[175]

> Writing for the Court on this issue, I concluded that the rights to individual liberty and security of the person as enshrined in s. 7 of the *Charter* encompassed a right to privacy. This finding was based on a number of developments in the jurisprudence of this Court. In its s. 7 jurisprudence, it has expressed great sympathy with the notion that liberty and security of the person involve privacy interests. That privacy is essential to human dignity, a basic value underlying the *Charter*, has also been recognized. Our right to security of the person under s. 7 has been found to include protection from psychological trauma which can be occasioned by an invasion of our privacy. Certainly, the breach of the privacy of a sexual assault plaintiff constitutes a severe assault on her psychological well-being. Section 8 also reveals that the *Charter* is clearly premised on a respect for the interests of individuals in their privacy.

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172. [1995] 4 S.C.R. 411.

173. [1997] 1 S.C.R. 157.

174. In *O'Connor*, an accused in a sexual assault case wanted access to counselling records of the complainants held by third parties. *Ryan* involved a similar request for disclosure by the defendant in a civil suit for sexual assault brought by his victim. Both cases are considered important from a constitutional point of view as some consider *O'Connor* and *Ryan* as establishing section 7 of the *Charter* as the constitutional source for a right to privacy. Indeed, Madam Justice L'Heureux-Dubé said as much in *Ryan*.

175. *Ryan*, *supra* note 173 at para 80.

In *Schreiber v. Canada (Attorney General)*,[176] although disagreeing on whether a reasonable expectation of privacy existed, the justices reiterated this conception. For example, Lamer C.J.C. (as he then was) states:[177]

> This Court has said a great deal about how expectations of privacy, and their reasonableness, can be ascertained. In my view, the single most important idea that emerges from the jurisprudence is that expectations of privacy must necessarily vary with the context. This is inherent in the idea that privacy is not a right tied to property, but rather a crucial element of individual freedom which requires the state to respect the dignity, autonomy and integrity of the individual. The degree of privacy which the law protects is closely linked to the effect that a breach of that privacy would have on the freedom and dignity of the individual.

Finally, *R. v. Dyment*[178] is significant. In *Dyment*, the Court combines several of the conceptions to address privacy.[179] In identifying those situations where society

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176. [1998] 1 S.C.R. 841.

177. *Ibid.* at para. 19.

178. [1988] 2 S.C.R. 417.

179. To be fair, several cases have used terminology associated with different conceptions. They do so only in passing and generally only after emphasizing another conception. In *McInerney*, for example, La Forest J. comments on an individual's autonomy at para 18: "When a patient approaches a physician for health care, he or she discloses sensitive information concerning personal aspects of his or her life. The patient may also bring into the relationship information relating to work done by other medical professionals. The policy statement of the Canadian Medical Association cited earlier indicates that a physician cannot obtain access to this information without the patient's consent or a court order. Thus, at least in part, medical records contain information about the patient revealed by the patient, and information that is acquired and recorded on behalf of the patient. Of primary significance is the fact that the records consist of information that is highly private and personal to the individual. It is information that goes to the personal (continued...)

should be most alert to privacy considerations, La Forest J. adopts different zones of privacy: those involving territorial or spatial aspects, those related to the person, and those that arise in the information context.[180] In doing so, several conceptions are involved. La Forest J. states:[181]

> As noted previously, territorial claims were originally legally and conceptually tied to property, which meant that legal claims to privacy in this sense were largely confined to the home. But as *Westin*, *supra*, at p. 363, has observed, "[t]o protect privacy only in the home ... is to shelter what has become, in modern society, only a small part of the individual's daily environmental need for privacy". *Hunter v. Southam Inc.* ruptured the shackles that confined these claims to property. Dickson J., at p. 159, rightly adopted the view [page 429] originally put forward by Stewart J. in *Katz v. United States*, 389 U.S. 347 (1967), at p. 351, that what is protected is people, not places. This is not to say that some places, because of the nature of the social interactions that occur there, should not prompt us to be especially alert to the need to protect individual privacy.
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> ...
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> Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about

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179. (...continued)
integrity and autonomy of the patient". Similarly, in *Plant* Sopinka J. noted in passing, the underlying values of dignity, integrity and autonomy protected by section 8 of the *Charter*.

180. *Dyment, supra* note 178 at para 19.

181. *Ibid.* at paras. 20-22.

> oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.

As demonstrated previously, one of the main criticisms of the current conceptions of privacy is that they depend upon and serve the concept of privacy as a liberty issue which, in turn, is conceived of as a form of license. As such, privacy—in so far as it protects individual liberties—will continually be in tension with other conflicting liberty interests. As the history in America has demonstrated, where privacy competes with other liberties, privacy often loses. The result is incoherent conceptions of privacy which only partly explain the myriad of ways that privacy presents itself in a modern world. If the current conceptions, or any combination of them, are unsatisfying, is there a different approach to conceptualizing privacy that does not put liberty interests in constant tension with each other? It is this question that I now address.

B. A Pragmatic Approach to Conceptualizing Privacy

Not surprisingly, Solove accepts that the current conceptions of privacy do not work. "The current top-down approach to conceptualizing privacy, which begins with an overarching conception of privacy designed to apply in all contexts often

results in a conception that does not fit well when applied to the multitude of situations and problems involving privacy."[182]

Solove contends that privacy problems involve disruptions to certain practices, not isolated events, and should be seen as a dimension of these practices rather than as a separate abstract concept.[183] He advocates, therefore, a pragmatic approach to privacy which "turns away from universals and focuses on specific situations" in that we "should act as cartographers, mapping out the terrain of privacy by examining specific problematic situations rather than trying to fit each situation into a rigid predefined category."[184] Solove summarizes his position as follows:[185]

> A pragmatic approach to the task of conceptualizing privacy should not therefore, begin by seeking to illuminate an abstract conception of privacy, but should focus instead on understanding privacy in specific contextual situations. ... Thus, the pragmatist has a unique attitude toward conceptions. Conceptions are "working hypotheses",

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182. Solove *supra* note 25 at 1098-99. Similarly, he states at 1096: "Although the terminologies theorists employ differ, most theorists strive toward the central goals of the traditional method of conceptualizing privacy: to locate the "essence" of privacy, the core common denominator that makes things private. The traditional method endeavors to conceptualize privacy by constructing a category that is separate from other conceptual categories (such as autonomy, freedom, and so on) and that has fixed clear boundaries so we can know when things fall within the category or outside of it."

183. *Ibid.* at 1130: "We should conceptualize privacy by focusing on the specific types of distruption and the specific practices disrupted rather than looking for the common denominator that links all of them."

184. *Ibid.* at 1126.

185. *Ibid.* at 1128-29.

> not fixed entities, and must be created from within concrete situations and constantly tested and shaped through an interaction with concrete situations. ... My approach is from the bottom up rather than the top down because it conceptualizes privacy within particular contexts rather than in the abstract.

To Solove the question is not so much whether privacy exists as it is whether privacy should be respected. If privacy impacts certain contexts or practices in a negative way, then for Solove the issue is not the existence of a privacy interest, but whether less privacy is desirable in that context. If, on the other hand, privacy furthers a desirable practice ("or is so constitutive of the practice that the practice would be impossible without it"), then privacy should be recommended.[186] It is an approach, therefore, that is less a normative theory of privacy than it is a sort of litmus test for whether privacy is or is not engaged. There are two questions which must be asked in every privacy case. First, is there a privacy interest at stake? Secondly, is there a fundamentally important competing right that justifies overriding the privacy interest in the case? One of the difficulties with Solove's approach is that it tries to answer both questions simultaneously.

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186. *Ibid.* at 1145.

1. Solove's Pragmatic Approach applied

Solove concludes by considering a few cases using his pragmatic approach.

In *McNamara v. Freedom Newspapers, Inc.*,[187] a newspaper published a photo of a high school soccer player's genitalia that he inadvertently exposed while running on the soccer field. The student sued under the American tort of public disclosure of private facts. The Court held that the student's case should be dismissed because the "picture accurately depicted a public event and was published as part of a newspaper article describing the game. At the time the photograph was taken, [the student] was voluntarily participating in a spectator sport at a public place".

The Court based its decision on a conception of privacy as concealing private facts.[188] For Solove, the Court ought to have approached the issue by looking at what social practices ought to be either protected or prohibited by the privacy claim:

> The answer, I believe, is that social practices have developed to conceal aspects of life that we find animal-like or disgusting as well

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187. 802 S.W.2d. 901 (Tex.Ct.App. 1991).

188. Solove *supra* note 25 at 1147-49: "Since the photograph was taken outside and in public, the student could not claim that an image of his exposed genitals was a private matter."

> as activities in which we feel particularly vulnerable and weak. We scrub, dress, and groom ourselves in order to present ourselves to the public in a dignified manner. We seek to cover up smells, discharge, and excretion because we are socialized into viewing them with disgust. We cloak the nude body in public based on norms of decorum. These social practices, which relegate these aspects of life to the private sphere, are deeply connected to human dignity. ... [O]ne form of torture is to dehumanize and degrade people by making them dirty, stripping them, forcing them to eliminate waste in public, and so on. When social practices relating to dignity are disrupted, the result can be a severe and sometimes debilitating humiliation and loss of self-esteem. Therefore, the fact that the student's genitalia was exposed to the public may have eliminated its secrecy, but the injury was not one of lost secrecy. The fact that the exposure occurred in a public place should have been treated as relatively unimportant.[189]

Although substantive criticisms of Solove's approach will be offered below, his reasoning in this case is suspect on two alternative grounds. On the one hand, Solove's argument defending the runner's privacy appears to be based on the same current conceptions of privacy that he rejected earlier. His terminology—dignity and self-esteem—invokes the same conceptions of privacy which Solove conceded are incoherent. If this is so, then Solove's defence of privacy must fail for the same criticisms mentioned earlier.

Alternatively, if privacy is simply a matter of context, is privacy really engaged here? The exposure may be embarrassing, and the runner would presumably hope

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189. Solove *supra* note 25 at 1148.

that the newspaper would not print such a picture simply for its titillating detail, but is it private? What practice would be disrupted if the picture is printed? Would the picture prevent the runner from pursuing a path he hopes would define him? Would the runner recoil into his own world, shunning the possibility of athletic glory in favour of a seat in the stands? Would he shun all forms of exercise or sport, or only those done in public? I doubt it, but this assumption belies a fundamental difficulty with Solove's approach. It re-introduces a form of "intuitive analysis" back into the argument which, as mentioned previously, is unhelpful.

In *Nader v. General Motors Corp.*,[190] Ralph Nader, an outspoken critic for consumer safety, had for many years criticized the safety of GM automobiles. General Motors interviewed Nader's friends and acquaintances to learn the private details of his life, made threatening and harassing phone calls, wiretapped his telephone and eavesdropped into his conversations, hired prostitutes to entrap him into an illicit relationship, and kept him under pervasive surveillance while outside in public places.[191] The Court considered each of the complaints separately as a privacy complaint. With the exception of the wiretapping, the Court concluded that no privacy rights were infringed. With regards to the surveillance, however,

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190. 255 N.E.2d 765 (1970).

191. To quote Solove's summary of the issue. Solove, *supra* note 25 at 1148.

the Court concluded that surveillance could be so 'overzealous' as to render it actionable.[192]

Solove objects to the Court considering the acts in isolation, suggesting that the Court "lost sight of the forest for the trees": "By slicing off parts of the case and compartmentalizing them into categories, the Court impeded a jury's ability to consider the full situation. ... The purpose of General Motors' plan was to employ its considerable power in a campaign to disrupt Nader's personal affairs. The Court should have focused on the way in which the company's actions aimed to disrupt Nader's life, and the paramount social importance of avoiding such exercises of power designed to deter, harass, and discredit individuals, especially ones who are attempting to raise important social and political issues."[193]

By considering the context of this case, as opposed to the alleged invasions of privacy in isolation, Solove concludes that the social practices disrupted by the facts of this case—social and political speech—established a general violation of Nader's privacy. Nothing more should be required to assert privacy.

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192. Posner summarizes surveillance cases as follows: "The common thread running through the cases in which the courts have held that ostentatious surveillance was tortious is that the surveillance exceeded what was reasonably necessary to uncover private information and became a method of intimidation, embarrassment, or distraction." See Posner, "Right to Privacy", *supra* note 20 at 420. Thus do these other recognized causes of actions adequately respond to these situations—why is privacy involved?

193. Solove, *supra* note 25 at 1151.

With respect, why? With the exception of the wiretapping (which is also illegal), what privacy interest is engaged? Nader's choices, like those of General Motors, have consequences: to whom should he divulge intimate details of his life, what acts or activities should he engage in public?[194] Depending on what use GM could make of any discreditable conduct that Nader engaged in, there are a number of actionable remedies available to Nader, without having to resort to privacy. Defamation, extortion, trespass, and nuisance readily come to mind. There are legitimate causes of action which exist independent of privacy. Do we have to torture privacy to get relief, when other recognizable causes of action exist? By attempting to have privacy be all things to all people, Solove's approach risks trivializing privacy for everybody.

2. A Criticism of Solove's pragmatic approach

The critics of the prevailing conceptions of privacy are correct: they argue, persuasively in my view, that the other conceptions all attempt to define the fundamental characteristic, or common denominator, in privacy claims to be the protection of a liberty as a license interest. The goal has been, obviously, to

194. As Fried stated, "[o]ne does not trust machines or animals; one takes the fullest economically feasible precautions against their going wrong. Often, however, we choose to trust people where it would be safer to take precautions—to watch them or require a bond from them." If only it were that simple. Fried, *supra* note 105 at 486.

attempt to define privacy with sufficient precision yet retain flexibility to deal with the rapid pace of technology and the implications for privacy that arise as a result. The consequence, unfortunately, has been conceptions of privacy that are too broad, too narrow, or both.

Accordingly, it is easy to see why Solove's pragmatic approach has appeal. Perhaps no single conception of privacy is indeed coherent and, therefore, we ought to abandon the search for the core value of privacy in favour of a pragmatic approach where privacy cases are considered on a case by case basis to be determined in their respective context. That is, maybe positivism is the answer, at least for privacy,[195] because no conception of privacy that assumes an inherent core value is possible:

> Ronald Dworkin, one of the principal proponents of intrinsic value, argues that certain things "are valuable in themselves and not just for their utility or for the pleasure of satisfaction they bring us. ... However, along with other scholars, I contend that privacy has an instrumental value—namely, that it is valued as a means for achieving certain other ends that are valuable. ... In contrast to many

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195. Solove, *supra* note 25. Evidence that Solove's approach rests upon a positivistic view of the law include: (at 1126) "pragmatism turns away from universals and focuses on specific situations"; (at 1127): rejects the notion, at least for privacy, "that there are objective and universal truths that exist prior to, and independently of, experience"; (at 1144): "If privacy impacts the practice in a negative way, then less privacy would be desirable. If privacy furthers a desirable practice (or is so constitutive of the practice that the practice would be impossible without it), then privacy should be recommended." *Quaere*: isn't this a return to the length of the Chancellor's foot?

> conceptions of privacy, which describe the value of privacy in the abstract, I contend that there is no overarching value of privacy.[196]

I do not share this view. My view is that the conceptions have thus far simply failed to identify the common denominator—the hub of the privacy wheel to use Solove's metaphor. If liberty—or some manifestation thereof—is not the core value of privacy, does that mean that some other intrinsic value at its core does not exist?

Second, although positivism has some intuitive appeal,[197] I cannot agree that there is no conceptual connection between law and morality—that law is simply "morally neutral" and "descriptive" as positivism attempts to do. If law requires social consensus[198] and depends only on its source or pedigree for its validity—and

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196. *Ibid.* at 1145.

197. See Brian Bix, "Legal Positivism", Martin P. Golding and William A. Edmundson, eds., *Blackwell Guide to the Philosophy of Law and Legal Theory*, 2004 at 9: "(1) it carries the power of a simple model of law (if, like other simple models of human behaviour, it sometimes suffers a stiff cost in distortion); (2) its focus on sanctions, which seems, to some, to properly emphasize the importance of power and coercion to law; and (3) because it does not purport to reflect the perspective of a sympathetic participant in the legal system, it does not risk sliding towards a moral endorsement of the law."

198. *Ibid.* at 15: "As discussed above, Hart had argued that all (modern or mature) legal systems have secondary rules—rules about rules, rules that allow for the identification, modification, and application of "primary rules. ... Most significantly within Hart's analysis, legal systems have a "rule of recognition", which comprises the basic criteria of legal validity within the legal system in question: the rule of recognition 'will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts. The basic role or nature of the rule of recognition is established by the legal (continued...)

as a consequence there are no inherent or natural rights which exist apart from some external source—then positivism suffers, in my view, from majoritarianism and intuitionism. Both are unsatisfying from the aspect of privacy. With regards to the former, one must prevail upon the will of the majority. As Dworkin has suggested, majoritarianism is not the proper basis for protecting unpopular or minority interests in a free and democratic society:

> Constitutionalism—the theory that the majority must be restrained to protect individual rights—may be a good or bad political theory, but the United States has adopted that theory, and to make the majority judge in its own cause seems inconsistent and unjust. So principles of fairness seem to speak against, not for, the argument from democracy.[199]

Further, having to rely upon judicial activism is also unacceptable. The objections are threefold. First, pleas for judicial activism similarly rely on the judge's view of societal values, or of the will of the government if deferring to legislation, which is simply majoritarianism from a judicial perspective. Second, it would seem likely

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198. (...continued)
system's being a normative system: a structured system of "ought" statements. ... Under Hart's approach, one looks at the behaviour of legal officials (especially judges) to determine what the ultimate criteria of validity are. (The Sovereign plays a similar role in Austin's command theory. All the valid legal norms in the legal systems, according to this approach, can be traced back to a direct or indirect command by the Sovereign (indirect commands include the Sovereign's authorization that judges can make new law in the Sovereign's name).)"

199. Ronald Dworkin, *Taking Rights Seriously*, *supra* note 29 at 142.

that an intuitionist analysis as contemplated by Whitman would creep into judicial activism. Third, if rights do not exist until recognized by the courts or the legislature, yet judges have discretion where the "law" is vague, how can people know with certainty what their rights and obligations are before finding that they have none or, worse, have violated some heretofore unrecognized duty. Making law, and therefore rights and duties, and applying it retrospectively, is unacceptable.[200]

It must be acknowledged, on the other hand, that a rights-based view of the law—with law and morality conceptually connected—is troublesome for many lawyers and judges:

> A great many lawyers are wary of talking about moral rights, even though they find it easy to talk about what is right or wrong for government to do, because they suppose that rights, if they exist at all, are spooky sorts of things that men and women have in much the same way as they have non-spooky things like tonsils. But the sense of rights I propose to use does not make ontological assumptions of that sort: it simply shows a claim of right to be a special, in the sense of a restricted, sort of judgment about what is right or wrong for governments to do.[201]

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200. *Ibid.* generally at chapter 3.

201. *Ibid.* at 139.

Spooky though they may be, for rights to have substance, they must be inherent or natural and not dependent upon some external source: "it must be a theory that is based on the concepts of rights that are natural, in the sense that they are not the product of any legislation, or convention, or hypothetical contract";[202] they are not "gifts from God, or an ancient ritual, or a national sport."[203]

If privacy is not inherent to individuals, and there are no privacy principles per se, then any developments in privacy require legislative decree. Our quest becomes simply to champion legislative reform to address particular contexts where privacy interests are at issue. We become beholden to political will and judicial discretion.[204] Solove subscribes to this position with his contention that privacy has no inherent value on its own, only an instrumental value, namely, "that it is valued as a means for achieving certain other ends that are valuable."[205] For those who subscribe to Dworkin's view that rights are inherent, Solove's pragmatic approach is unsatisfying. Further, that privacy is not a "right" seems contradictory

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202. *Ibid.* at 176.

203. *Ibid.* at 198.

204. An approach rejected by Dworkin when discussing constitutional debate in "Unenumerated Rights: Whether and How Roe Should be Overruled" (1992) 59 U. Chi. L. Rev. 381 at 393: "Nor should we waste any more time on the silly indulgence of American legal academic life: the philosophically juvenile claim that, since no such formula exists [for explaining "bad" constitutional decisions], no one conception of constitutional equality and liberty is any better than another, and adjudication is only power and visceral response."

205. Solove *supra* note 25 at 1145.

to most jurisprudence which recognizes privacy—in some form or another—as a fundamental right worthy of constitutional protection.

To summarize to this point, then. I have argued that the current conceptions do not adequately explain the myriad of ways that privacy is affected in our daily lives. They all depend upon and serve the concept of privacy as a liberty issue which, in turn, is conceived of as a form of license. As such, privacy—conceived as it is of protecting individual liberties—will continue to find itself in constant tension where individual liberties clash. Combing several conceptions to "explain" privacy cases does have some intuitive appeal. Certainly more "privacy" cases will be caught if the conceptions are considered cumulatively, rather than in isolation. The disadvantage with this approach is that it does not answer our original question: is there a common value inherent in all privacy cases? Unless a common denominator is articulated, combining conceptions simply perpetuates the piecemeal approach to privacy that has marked the privacy landscape to date.

Similarly, I have argued that Solove's "pragmatic approach" to conceptualizing privacy is unsatisfactory. Simply because a core value of privacy has not been articulated, or has proven to be unsatisfactory in the case of privacy as a liberty interest, does not mean that one does not exist. If one agrees with approaching privacy cases on a case-by-case basis, then one must accept that privacy has no

inherent value nor principles per se, leaving individual privacy to the whim of judicial activism and majoritarianism. I do not agree with such an approach.

Concluding, then, that the alternatives explored so far are unsatisfying, is there a different approach to conceptualizing privacy that does not find itself in constant tension with competing liberties ? It is this question that I now address.

C. Shifting Paradigms -- Privacy as Equality, Not Liberty

Privacy as a fundamental liberty interest certainly has intuitive appeal. By challenging that widely held view, one risks appearing to make an "extraordinary kind of mistake."[206] Yet, the current conceptions of privacy remain unsatisfying for even those critics who, while offering various criticisms of other conceptions,

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206. Ronald Dworkin, *Laws Empire*, *supra* note 28 at 72-73:

> The connection between the institution and the paradigms of the day will be so intimate, in virtue of this special role, as to provide another kind of conceptual flavor. Someone who rejects a paradigm will seem to be making an extraordinary kind of mistake. But once again there is an important difference between these paradigms of interpretative truth and cases in which, as philosophers say, a concept holds "by definition", as bachelorhood holds for unmarried men. Paradigms anchor interpretations, but no paradigm is secure from challenge by a new interpretation that accounts for other paradigms better and leaves that one isolated as a mistake. In our imaginary community, the paradigm of gender might have survived other transformations for a long time, just because it seemed so firmly fixed, until it became an unrecognized anachronism. Then one day women would object to men standing for them; they call this the deepest possible discourtesy. Yesterday's paradigm would become today's chauvinism.

continue to approach privacy as a form of liberty. They demonstrate, persuasively in my view, where one conception of privacy or another fails to include or account for a particular privacy situation.[207] Privacy, even for those who subscribe to the prevailing conceptions, cannot then be simply a liberty interest, at least as liberty has thus far been "conceived by its champions."[208]

Dworkin has, notably, rejected liberty as a form of license. Only if liberty is seen as protecting an individual's independence—which at its core is an individual's right to equality—will the tension between competing liberties subside. Dworkin describes the difference as follows:

> Liberty as license is an indiscriminate concept because it does not distinguish among forms of behaviour. Every prescriptive law diminishes a citizen's liberty as license: good laws, like laws prohibiting murder, diminish this liberty in the same way, and possibly to a greater degree, as bad laws, like laws prohibiting

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207. *Ibid.* at 72. To paraphrase Dworkin who used paradigms of courtesy as an example:

> At each historical stage of the development of the institution, certain concrete requirements of courtesy will strike almost everyone as paradigms, that is, as requirements of courtesy if anything is. The rule that men must rise when a woman enters the room, for example, might be taken as a paradigm for a certain season. The role these paradigms play in reasoning and argument will be even more crucial than any abstract agreement over a concept. For the paradigms will be treated as concrete examples any plausible interpretation must fit, and argument against an interpretation will take the form, whenever this is possible, of showing that it fails to include or account for a paradigm case.

208. Ronald Dworkin, *Taking Rights Seriously*, *supra* note 29 at 267 where he considers liberty as "conceived by its champions".

> political speech. The question raised by any such law is not whether it attacks liberty, which it does, but whether the attack is justified by some competing value, like equality or safety or public amenity. If a social philosopher places a very high value on liberty as license, he may be understood as arguing for a lower relative value for these competing values. If he defends freedom of speech, for example, by some general argument in favour of license, then his argument also supports, at least pro tanto, freedom to form monopolies or smash store front windows.
>
> But liberty as independence is not an indiscriminate concept in that way. It may well be, for example, that laws against murder or monopoly do not threaten, but are necessary to protect, the political independence of citizens generally. If a social philosopher places a high value on liberty as independence he is not necessarily denigrating values like safety or amenity, even in a relative way. If he argues for freedom of speech, for example, on some general argument in favour of independence and equality, he does not automatically argue in favour of greater license when these other values are not at stake.[209]

Dworkin rejects liberty as a form of license since, under that view, liberty and equality will inevitably be in competition with each other:

> But that seems to me absurd; indeed it seems to me absurd to suppose that men and women have any general right to liberty at all, at least as liberty has traditionally been conceived by its champions.
>
> I have in mind the traditional definition of liberty as the absence of constraints placed by a government upon what a man might do if he wants to. Isaiah Berlin, in the most famous modern essay on liberty, put the matter this way: 'The sense of freedom, in which I use this term, entails not simply the absence of frustration but the absence of obstacles to possible choices and activities—absence of obstructions

209. *Ibid.*

> on roads on which a man can decide to walk.' This conception of liberty as license is neutral amongst the various activities a man might pursue, the various roads he might wish to walk. ... In this neutral, all embracing sense of liberty as license, liberty and equality are plainly in competition. Laws are needed to protect equality, and laws are inevitably compromises of liberty.[210]

If liberty "as conceived by its champions" is indeed in conflict with equality, then, as Dworkin forcefully asserts in a subsequent essay, "any genuine contest between liberty and equality is a contest liberty must lose":

> I make that bold claim because I believe that we are now united in accepting the abstract egalitarian principle: government must act to make the lives of those it governs better lives, and it must show equal concern for the life of each. Anyone who accepts that abstract principle accepts equality as a political ideal, and though equality, as I said, admits of different conceptions, these different conceptions are competing interpretations of that principle. So anyone who thinks that liberty and equality really do conflict on some occasion must think that protecting liberty means acting in some way that does not show equal concern for all citizens.[211]

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210. *Ibid.* at 267.

211. Ronald Dworkin, "What is Equality? Part 3: The Place of Liberty" (1987-88) 73 Iowa L. Rev. 1 at 7-8. Dworkin continues, at 9, that under any political idea, it is inconceivable and repugnant for the state to favor one set of liberties over another: "[w]e cannot accept both that government must have equal concern for all lives and that it may sometimes show more concern for some than others. That would not be pluralism but incoherence."

    This article by Dworkin completed a trilogy on equality: see also Ronald Dworkin, "What is Equality? Part 1: Equality of Welfare", (1981) 10 Phil & Pub. Affairs 185 [where Dworkin reviews and rejects versions of equality which are based on the conception of equality of welfare] and Ronald Dworkin, "What is Equality? Part 2: Equality of Resource" (1981) 10 Phil & Pub. Affairs 283 [where Dworkin offers a conception of equality according to which ideal equality consists in circumstances in which people are

(continued...)

Dworkin views liberty—as independence—as devolving from equality. He contends that current arguments about competing liberty interests are based on a misconception of liberty:[212]

> [Criticisms of Mill's essay do] not distinguish between the idea of liberty as license, that is, the degree to which a person is free from social or legal constraint to do what he might wish to do, and liberty as independence, that is, the status of a person as independent and equal rather than subservient. ... Mill saw independence as a further dimension of equality; he argued that an individual's independence is threatened, not simply by a political process that denies him equal voice, but by political decisions that deny him equal respect. Laws that recognize and protect common interests, like laws against violence and monopoly, offer no insult to any class or individual; but laws that constrain one man, on the sole ground that he is incompetent to decide what is right for himself, are profoundly insulting to him. They make him intellectually and morally subservient to the conformists who form the majority, and deny him the independence to which he is entitled. Mill insisted on the political importance of these moral concepts of dignity, personality, and insult. It was these complex ideas, not the simpler idea of license, that he tried to make available for political theory, and to use as the basic vocabulary of liberalism.[213]

Equality and liberty are not, in fact, in conflict with each other. Rather liberty follows from equality:

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211. (...continued)
equal not in their welfare but in the resources at their command].

212. He bases the argument on what he views as a common, but wrong, understanding of John Stuart Mill's famous essay *On Liberty* (1961) (Hackett Publishing Company, 1978; originally published in 1859); see Chapter 11 of *Taking Rights Seriously*.

213. Ronald Dworkin, *Taking Rights Seriously*, *supra* note 29 at 262-263.

> The central concept of my argument will be the concept not of liberty but of equality. I presume that we all accept the following postulates of political morality. Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conception of the good life is nobler or superior to another's. These postulates, taken together, state what might be called the liberal conception of equality; but it is a conception of equality, not of liberty as license, that they state. ... I propose that the right to treatment as an equal must be taken to be fundamental under the liberal conception of equality, and that the more restrictive right to equal treatment holds only in those special circumstances in which, for some special reason, it follows from the more fundamental right. ... I also propose that individual rights to distinct liberties must be recognized only when the fundamental right to treatment as an equal can be shown to require these rights. If this is correct, then the right to distinct liberties does not conflict with any supposed competing right to equality, but on the contrary follows from a conception of equality conceded to be more fundamental.[214]

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214. *Ibid.* at 272-274. See also Ronald Dworkin, "What is Equality? Part 3: The Place of Liberty" (1987-88) 73 Iowa L.Rev. 1 where he states: (at 2) "Can it really be more important that the liberty of some people be protected, to improve the lives those people lead, than that other people, who are already worse off, have the various resources and other opportunities that they need to lead decent lives?"; (at 3) "So liberty is necessary to equality, according to this conception of equality, not on the doubtful and fragile hypothesis that people really value the important liberties more than other resources, but because liberty, whether or not people do value it above all else, is essential to any process in which equality is defined and secured"; (at 8) "...it [liberty over equality] is no longer arguable, at least in public, that officials should be more concerned about the lives of some citizens than others."

The penultimate sentence in the above passage is particularly significant and bears repeating: "... individual rights to distinct liberties must be recognized *only when* the fundamental right to treatment as an equal can be shown to require these rights" (emphasis mine). In these passages, Dworkin persuasively argues that if equality is at issue, then liberty is engaged. So conceived, liberty does not compete with equality but rather evolves from equality.

The implications of the Dworkian view for privacy appear obvious.[215] If one accepts a rights-based philosophy of law, and is persuaded that all liberties evolve from a more fundamental right to equality as equal concern and respect for individuals, then it follows that the concept of privacy cannot be liberty but must rather be equality. Discrimination by stereotyping, historical disadvantage, and vulnerability to political and social prejudice would invariably violate an individual's right to equal concern and respect under any reasonable conception of equality. Without privacy over those things likely to cause discrimination, meaningful equality is not possible and liberty merely illusory.

Part of the difficulty with the current conceptions of privacy is that by trying to pigeonhole all things 'private' into a comprehensive privacy right, they endeavour

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215. Although Dworkin's views appear in the context of state interference, his comments are, in my view, nevertheless highly persuasive in a much broader context.

to please everyone and end up pleasing no one. Liberty as license is understandably expansive and unmanageable as the current conceptions of privacy have demonstrated. Privacy as an equality issue is undoubtedly a much more restrictive approach. By restricting privacy to equality issues, however, we may nevertheless strengthen privacy as a right. This is a noble sentiment indeed, but is there any support for such a shift?

VI. Scholarly and Jurisprudential Evidence Supporting a Paradigm Shift

One would have to have a myopic view of the jurisprudence and scholarly literature to suggest that anything other than the prevailing conceptions of privacy have formed the basis for decision and argument.[216] Notwithstanding judicial and scholarly statements to the contrary, I remain encouraged that the judiciary and the legal academy nevertheless have shown a willingness—or at least a readiness—to embrace a paradigm shift to approach privacy as an equality, and not a liberty, issue. Although it often uses 'liberty' vernacular, I contend that, at its core, some of the discourse is aimed at whether individual equality rights are harmed by an invasion of privacy.

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216. See earlier where I examine a small sampling of cases in which the current conceptions have found a voice in the judiciary.

A. Scholarly Literature

Surprisingly, proponents of two current conceptions of privacy provide compelling arguments that connect privacy and equality. The first comes courtesy of Jeb Rubenfeld, a proponent of the "anti-totalitarian" conception of privacy. To quote him at length:

> In public life, a new right is coming into being, and this new right is coming to occupy a core position in contemporary society. Call it the right to be treated *as an object.* In the workplace, for example, we demand the right to be treated without regard for our race, sex, ethnicity, religion, sexual orientation, ethnicity, and so on. We demand that employers be blind to these things. They cannot make any decision on the basis of these features of our personhood. They should not comment about them. They should act as if these features simply do not exist.
>
> Consider that these features, which are not supposed to be noticed, are some of the most important things that make us the persons we are. By contrast, if our employers evaluate us exactly as they would evaluate a machine, looking at us solely as embodied net marginal product, they have discharged their legal duty. They have done us justice. That is what I mean by the right to be treated as an object.
>
> This stripping away of our subjectivity extends far beyond employment law. In fact, this preference for objectification governs our public life. In public we are not supposed to comment upon—not supposed to notice, even—the race, gender, sex, religion, or wealth of an individual. Those aspects of a person—and the ideas that spring to our minds about those aspects—are not supposed to exist. Those aspects and our reaction to them do not disappear, of course. We are allowed to be who we really are in private. In fact, we have a right to be racist or sexist or religiously intolerant in our thoughts and in our private lives. But all of that is supposed to

> disappear in public. We are subjects in private, but objects in public.[217]

The implications of this passage, I think, are profound. In private, we should be free to be anything or anybody we choose.[218] In short, we desire liberty. In public, however, we can demand that we are treated with equal respect and concern. Privacy is simply the connecting point between who we are in private and what we expect in public. There is quite simply some information about us—our preferences, choices, associates, indeed our errors in judgment—that would, if revealed, given human frailty, invariably cause us to be thought of as less worthy or deserving of equal concern and respect as a member of society. Privacy of such matters is necessary to ensure our expectation of equality.

If equality is not engaged, then privacy should not be either. Why should we expect our privacy to be protected if our right to equality will not be diminished by the revelation of private information about ourselves?[219] Like all remedies, privacy cannot be all things to all people. We strengthen privacy by restricting it to ensure individual equality. Privacy works up to that point. Beyond that point,

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217. Jeb Rubenfeld, "The Right to be Treated as an Object" (2001) 89 Geo. L.J. 2099 at 2100.

218. Up to the point, of course, that we cause harm to others.

219. There may, of course, be access to other remedies when private information about ourselves is revealed—defamation or copyright come to mind—but why should privacy be similarly engaged?

however, privacy returns to the liberty as license debate and once again becomes ensnared in the criticisms canvassed previously.

Unfortunately, Rubenfeld does not pursue the connection further. Instead, having simply raised the connection, he seems to remain mired in the American preoccupation with liberty as a form of license. He appears content to accept that, since liberty interests (as they are currently conceived by their champions, to borrow from Dworkin) are in constant tension with each other, our idiosyncrasies in private will naturally lead to invasions of our privacy in public.[220] Alternatively, perhaps, Rubenfeld does not see the connection.[221]

If one views privacy as I have suggested, then perhaps Warren and Brandeis were simply misunderstood. Not advocating a liberty interest per se, perhaps they were, in fact, advocating an equality interest, though couched awkwardly in liberty terminology:

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220. Jeb Rubenfeld, *supra* note 217 at 2099: "Now, in a society like this, we must expect invasions of privacy. The incentives to violate privacy are too large. The desire to see the fakery and hypocrisy exposed is too great. We want to see that other public figures are doing the things that we know everyone else is doing. So long as American society persists in its breathtaking contradiction on this point—its puritanism in public and its libertarianism in private—there will continue to be invasions of privacy, despite the best efforts of legal scholars and social reformists to protect privacy rights."

221. Which I do not think is likely since he notes, at 2101, that "the implications of this development are profound, and the implications for privacy particularly so".

> Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is a potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbours, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.[222]

Viewed this way, perhaps Warren and Brandeis were simply advocating privacy protection at the point where their private activities deprived individuals of their inherent right to equal respect and concern in public.

Gavison, who advocates a conception of privacy based on individual autonomy or limited access to one's self, similarly senses the connection between privacy and equality. She states:[223]

> It is here that we return to contextual arguments and to the specter of a total lack of privacy. To have different individuals we must have a

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222. Warren & Brandeis, *supra* note 69 at 196.

223. Gavison, *supra* note 61 at 454.

> commitment to some liberty—the liberty to be different. But differences are known to be threatening, to cause hate and fear and prejudice. These aspects of social life should not be overlooked, and oversimplified claims of manipulation should not be allowed to obscure them.

Privacy, she contends, should serve to "let one's ignorance mitigate one's prejudice."[224] Unfortunately, like Rubenfeld, Gavison fails to pursue the connection further. Like Rubenfeld, Gavison continues in her approach to privacy as protecting individual liberty, and not as promoting individual equality.[225]

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224. Gavison, *supra* note 61 at 453-4:

> Ultimately, our willingness to allow privacy to operate in this way must be the outcome of our judgment as to the proper scope of liberty individuals should have, and our assessment of the need to help ourselves and others against the limited altruism and rationality of individuals. Assume that an individual has a feature he knows others may find objectionable—that he is a homosexual, for instance, or a communist, or committed a long-past criminal offense—but that feature is irrelevant in the context of a particular situation. Should we support his wish to conceal these facts? Richard Posner and Richard Epstein argue that we should not. This is an understandable argument, but an extremely harsh one. Ideally, it would be preferable if we could all disregard prejudices and irrelevancies. It is clear, however, that we cannot. Given this fact, it may be best to let one's ignorance mitigate one's prejudice. There is even more to it than this. Posner and Epstein imply that what is behind the wish to have privacy in such situations is the wish to manipulate and cheat, and to deprive another of the opportunity to make an informed decision. But we always give only partial descriptions of ourselves, and no one expects anything else. The question is not whether we should edit, but how and by whom the editing should be done. Here, I assert, there should be a presumption in favor of the individual concerned.

225. *Ibid* at 451-2: "Privacy is derived from liberty in the sense that we tend to allow privacy to the extent that its promotion of liberty is considered desirable. ..."

Gavison seems to regard privacy as necessary precisely because discrimination exists, and not as a means of preventing inequality.[226]

B. Jurisprudential Connection of Privacy and Equality

The connection between equality and privacy is most clear in the context of section 15 of the *Charter*.[227] Although equality is admittedly an ideal capable of different conceptions,[228] discrimination would invariably violate an individual's right to equal concern and respect under any reasonable conception of equality.[229]

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226. *Ibid.*: "The liberty promoted by privacy is not problematic in contexts in which we believe we should have few or no norms; privacy will be needed in such cases because some individuals will not share this belief, will lack the strength of their convictions, or be emotionally unable to accept what they would like to do. Good examples of such cases are ones involving freedom of expression, racial intolerance, and the functioning of close and intimate relations. The existence of official rules granting immunity from regulation, or even imposing duties of nondiscrimination, does not guarantee the absence of social forces calling for conformity or prejudice. A spouse may understand and even support a partner's need to fantasize or to have other close relations, but may still find knowing about them difficult to accept. In such situations, respect for privacy is a way to force ourselves to be as tolerant as we know we should be. We accept the need for privacy as an indication of the limits of human nature."

227. Section 15(1) of the *Charter* states:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

228. As noted by McIntyre J. in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at para. 34. Dworkin also makes this observation in the *What is Equality?* trilogy of articles.

229. As Wilson J. characterized the "central indicia" of discrimination in *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1326.

This conception of equality—where one's dignity is demeaned by discrimination —is prevalent throughout the *Charter* jurisprudence on equality.

For example, in *Law v. Canada (Minister of Employment and Immigration)*, Iacobucci J. states:[230]

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society.

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230. [1999] 1 S.C.R. 497 at para. 51, a case involving the constitutionality of the Canada Pension Plan provisions which denied the 30-year-old able-bodied appellant survivor's benefits which were otherwise payable to 35-year-old people or to those under 35 but who were disabled. See generally at paras. 47-53.

It is in this discussion of the purpose of section 15(1) of the *Charter* that Iacobucci J. emphasizes the "promotion of human dignity" and the prevention of "the infringement of essential human dignity" as the basis for the conception of equality:[231]

> What is human dignity? There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the *Charter*, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

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231. *Ibid.* at para 53. The importance of human dignity and equality has also been reemphasized in *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 and more recently in *Nova Scotia (Attorney General) v. Walsh*, [2002] S.C.J. No. 84.

Numerous other cases similarly reflect the Court's conception of equality which emphasizes discrimination which demeans or offends human dignity.[232]

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232. Two more examples should suffice. In *Egan v. Canada*, [1995] 2 S.C.R. 513, a case which involved whether homosexuals were entitled to receive, as "spouses", guaranteed income supplements under the *Old Age Security Act*, L'Heureux-Dubé J. states at para. 37:

> "Equality, as that concept is enshrined as a fundamental human right within s. 15 of the *Charter*, means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity."

In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, which involved a constitutional challenge to Alberta's then *Individual Rights Protection Act*, R.S.A. 1980, c. I-2 because it did not include sexual orientation as a prohibited ground of discrimination, Justices Cory and Iacobucci state at paragraphs 68-69:

> ¶ 68 The concept and principle of equality is almost intuitively understood and cherished by all. It is easy to praise these concepts as providing the foundation for a just society which permits every individual to live in dignity and in harmony with all. The difficulty lies in giving real effect to equality. Difficult as the goal of equality may be it is worth the arduous struggle to attain. It is only when equality is a reality that fraternity and harmony will be achieved. It is then that all individuals will truly live in dignity.
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> ¶ 69 It is easy to say that everyone who is just like "us" is entitled to equality. Everyone finds it more difficult to say that those who are "different" from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any enumerated or analogous group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of Canadian society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy. Yet, if any enumerated or analogous group is denied the equality provided by s. 15 then the equality of every other minority group is threatened. That equality is guaranteed by our constitution. If equality rights for minorities had been recognized, the all too frequent tragedies of history might have been avoided. It can never be forgotten that discrimination is the antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.

In the context of privacy, discrimination or disadvantage as a result of disclosure of personal information was also a simmering concern in *O'Connor* and *A.M. v. Ryan*. In *O'Connor*, for example, Madam Justice L'Heureux-Dubé states:[233]

> As I noted in *Osolin*, uninhibited disclosure of complainants' private lives indulges the discriminatory suspicion that women and children's reports of sexual victimization are uniquely likely to be fabricated. Put another way, if there were an explicit requirement in the Code requiring corroboration before women or children could bring sexual assault charges, such a provision would raise serious concerns under s. 15 of the *Charter*. In my view, a legal system which devalues the evidence of complainants to sexual assault by de facto presuming their uncreditworthiness would raise similar concerns. It would not reflect, far less promote, "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration." (Citations omitted.)

L'Heureux-Dubé J. subsequently completes the connection between privacy and equality:[234]

> All of these factors, in my mind, justify concluding not only that a privacy analysis creates a presumption against ordering production of private records, but also that ample and meaningful consideration must be given to complainants' equality rights under the *Charter* when formulating an appropriate approach to the production of complainants' records. Consequently, I have great sympathy for the

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233. *O'Connor*, *supra* note 172 at para. 123.

234. *Ibid.* at para. 128.

observation of Hill J. in *R. v. Barbosa* (1994), 92 C.C.C. (3d) 131 (Ont. Ct. (Gen. Div.)), to this effect (at p. 141):

> In addressing the disclosure of records, relating to past treatment, analysis, assessment or care of a complainant, it is necessary to remember that the pursuit of full answer and defence on behalf of an accused person should be achieved without indiscriminately or arbitrarily eradicating the privacy of the complainant. Systemic revictimization of a complainant fosters disrepute for the criminal justice system.

Similarly, McLachlin J. (as she then was) emphasizes in *A.M. v. Ryan* the disadvantage or discrimination that a victim of sexual assault may suffer as a result of an unreasonable disclosure of personal information:[235]

> As noted, the common law must develop in a way that reflects emerging *Charter* values. It follows that the factors balanced under the fourth part of the test for privilege should be updated to reflect relevant *Charter* values. One such value is the interest affirmed by s. 8 of the *Charter* of each person in privacy. Another is the right of every person embodied in s. 15 of the *Charter* to equal treatment and benefit of the law. A rule of privilege which fails to protect confidential doctor/patient communications in the context of an action arising out of sexual assault perpetuates the disadvantage felt by victims of sexual assault, often women. The intimate nature of sexual assault heightens the privacy concerns of the victim and may increase, if automatic disclosure is the rule, the difficulty of obtaining redress for the wrong. The victim of a sexual assault is thus placed in a disadvantaged position as compared with the victim of a different wrong. The result may be that the victim of sexual assault does not obtain the equal benefit of the law to which s. 15 of

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235. *A.M. v. Ryan*, *supra* note 173 at para. 30.

> the *Charter* entitles her. She is doubly victimized, initially by the sexual assault and later by the price she must pay to claim redress—redress which in some cases may be part of her program of therapy. These are factors which may properly be considered in determining the interests served by an order for protection from disclosure of confidential patient-psychiatrist communications in sexual assault cases.

A concept of equality where an individual's entitlement to equal respect and concern is harmed by prejudice or discrimination has tremendous appeal for a concept of privacy. Privacy need not protect all forms of activities. Privacy could be restricted to those class of cases where an individual's right to equality is at stake. Whether privacy protects my dignity or mitigates your prejudice amounts to the same issue. To be sure, your right to discriminate—which is simply a liberty as a form of license—is in conflict with my right to be treated as an equal. But the more fundamental right—our equality—is not in conflict. Indeed, it is something of a non sequitur to suggest competing equality interests. How can two individuals be afforded equal concern and respect if one's equality must take preference over another's?[236]

If one accepts this argument, then a whole series of questions emerge. When is equality at issue? What test should one adopt to determine when equality is at

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236. Which is not to suggest that privacy rights, like other rights, cannot be overridden to further important societal interests.

issue and, therefore, privacy engaged? How does one determine when an individual's right to equal concern and respect has been violated? How does this concept of privacy fit within existing privacy cases? It is to these issues that I now turn.

VII. Evaluating the Thesis: Discrimination as a Conception of Privacy

If equality is at the core of privacy, how should that thesis be tested? Since equality is admittedly an ideal capable of different conceptions, articulating a standard against which equality or inequality is judged is of fundamental importance.[237] Having said this, however, one does not need to reinvent the wheel.

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237. Iacobucci J. notes the difficulty associated with grappling with the concept of equality in *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497:

> ¶ 2 Section 15 of the *Charter* guarantees to every individual the right to equal treatment by the state without discrimination. It is perhaps the *Charter's* most conceptually difficult provision. In this Court's first s. 15 case, *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R 143, at p. 164, McIntyre J. noted that, as embodied in s. 15(1) of the *Charter*, the concept of equality is "an elusive concept", and that "more than any of the other rights and freedoms guaranteed in the *Charter*, it lacks precise definition". Part of the difficulty in defining the concept of equality stems from its exalted status. The quest for equality expresses some of humanity's highest ideals and aspirations, which are by their nature abstract and subject to differing articulations. The challenge for the judiciary in interpreting and applying s. 15(1) of the *Charter* is to transform these ideals and aspirations into practice in a manner which is meaningful to Canadians and which accords with the purpose of the provision.

Equality and human rights jurisprudence, some of which has been already referred to, have already done much of the intellectual heavy lifting.

A. A Caveat

One could ignore our *Charter* jurisprudence altogether and approach equality as it has been applied in the context of various human rights legislation.[238] Such an approach has the advantage that human rights statutes are, by their nature, designed to apply to private activities. Utilizing discrimination jurisprudence in the private sector addresses one of the fundamental criticisms of the current conceptions of privacy, namely, that they ignore the role that private actors play in matters involving privacy, particularly in the collection, use and dissemination of personal information. Further, the prohibited grounds of discrimination

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238. For example, in Alberta, the *Human Rights, Citizenship and Multiculturalism Act*, RSA 2000, c. H-14. Section 4 reads:

> No person shall
>
> > (a) deny to any person or class of persons any goods, services, accommodation or facilities that are customarily available to the public, or
> >
> > (b) discriminate against any person or class of persons with respect to any goods, services, accommodation or facilities that are customarily available to the public,
>
> because of the race, religious beliefs, colour, gender, physical disability, mental disability, ancestry, place of origin, marital status, source of income or family status of that person or class of persons or of any other person or class of persons.

enumerated in human rights legislation—race, religious beliefs, colour, gender, physical disability, mental disability, ancestry, place of origin, marital status, source of income or family status to cite Alberta's statute—reflect the "most common and probably the most socially destructive and historically practised bases of discrimination."[239] Accordingly, most privacy cases where discrimination in one form or another is alleged would be captured.

Relying on human rights jurisprudence alone, however, has its drawbacks. First, all human rights legislation specifically designates a certain limited number of grounds upon which discrimination is forbidden. The grounds are exclusive and fixed.[240] There is no comparable "analogous" grounds argument that could be made to advance new claims of discrimination, and therefore to novel claims of privacy.[241]

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239. McIntyre J. in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at para 38.

240. *Ibid.*

241. Having said that, however, human rights legislation could itself be challenged under section 15 of the *Charter* on the basis that the legislation itself discriminated against a claimant by not including another ground as a prohibited ground of discrimination. This is precisely what occurred in *Vriend v. Alberta*, [1998] 1 S.C.R. 493 where the non-inclusion of "sexual orientation" as a prohibited ground of discrimination was successfully challenged under section 15 of the *Charter*.

Second, and more importantly, even human rights jurisprudence applies *Charter* values. Although the applicability of the *Charter* to private litigants is still generating debate,[242] the trend appears to be to consider those values reflected in the *Charter* to inform the common law.[243] *Charter* values have been applied in

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242. Scholars have noted there are two competing streams of thought; some saying the common law should apply the law of the land, of which the *Charter* is part, while others steadfastly maintain that the *Charter* applies only to governmental actors and not to private litigants citing the clear language of s. 32.

243. Casey, *Remedies in Labour, Employment and Human Rights Law*, (Carswell 1999) at 2-53:

> The jurisdiction of arbitrators to apply the *Charter* is an issue that has gained and continues to gain considerable attention and comment. While it cannot be said that the case law reflects unanimity amongst arbitrators, what the case law does reflect is an overall evolutionary trend in favour of greater arbitral jurisdiction relative to the *Charter* and *Charter* remedies. This trend has been directed, in the main, by a series of Supreme Court of Canada decisions beginning with *St. Anne Nackawic* ((1986) 28 DLR (4th) 1 SCC) and *McLeod v. Egan* ([1975] 1 SCR 517). By those two decisions, the Supreme Court confirmed the exclusive jurisdiction of arbitrators in matters arising out of a collective agreement and that it is within the power and the duty of arbitrators to apply the "law of the land" to the disputes before them. That the Charter was part of the "law of the land" was confirmed in *RWDSU Local 580 v. Dolphin Delivery Ltd.* (1986) 33 DLR (4th) 174) ... where the Supreme Court of Canada determined that the *Canadian Charter of Rights and Freedoms* applies only to governmental actors yet also recognized the relevance of *Charter* values to private litigants whose disputes fall to be decided at common law:
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> > Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the *Charter* is far from irrelevant to private litigants whose disputes fall to be decided at common law.

several different contexts.[244] In a privacy context, McLachlin J. (as she then was) considered *Charter* values when considering whether to compel disclosure of the plaintiff's counselling records in *A.M. v. Ryan*.[245] In the context of human rights

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244. In a labour context, for example see *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 where McLachlin J. states at para 61: "This brings us to the question of whether a labour arbitrator in this case has the power to grant *Charter* remedies. The remedies claimed are damages and a declaration. The power and duty of arbitrators to apply the law extends to the *Charter*, an essential part of the law of Canada: *Douglas/Kwantlen Faculty Assn. v. Douglas College, supra*; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Re Ontario Council of Regents for Colleges of Applied Arts & Technology and Ontario Public Service Employees Union* (1986), 24 L.A.C. (3d) 144. In applying the law of the land to the disputes before them, be it the common law, statute law or the *Charter*, arbitrators may grant such remedies as the Legislature or Parliament has empowered them to grant in the circumstances."

245. *Supra* note 173 at paragraphs 22-23 where McLachlin J states:

> ¶ 22 I should pause here to note that in looking to the *Charter*, it is important to bear in mind the distinction drawn by this Court between actually applying the *Charter* to the common law, on the one hand, and ensuring that the common law reflects *Charter* values, on the other. As Cory J. stated in Hill, *supra*, at paras. 93 and 95:
>
> > When determining how the Charter applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved. It is important not to import into private litigation the analysis which applies in cases involving government action.
>
> The most that the private litigant can do is argue that the common law is inconsistent with *Charter* values. It is very important to draw this distinction between *Charter* rights and *Charter* values. Care must be taken not to expand the application of the *Charter* beyond that established by s. 32(1), either by creating new causes of action, or by subjecting all court orders to *Charter* scrutiny. Therefore, in the context of civil litigation involving only private parties, the *Charter* will "apply" to the common law only to the extent that the common law is found to be inconsistent with *Charter* values.
>
> ¶ 23 While the facts of Hill involved an attempt to mount a *Charter* challenge to the common law rules of defamation, I am of the view that Cory J.'s comments are equally applicable to the common law of privilege at issue in this case. In view of the purely private nature of the litigation at bar, the

(continued...)

legislation, the Supreme Court of Canada has also reaffirmed that *Charter* values can be used to inform human rights issues which involve, in essence, issues between private litigants. In *Dickason v. University of Alberta*,[246] although differing in result, all three judgments agreed that *Charter* principles could be used to aid interpreting and applying the provincial legislation which regulated rights between private litigants.[247]

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245. (...continued)

> *Charter* does not "apply" per se. Nevertheless, ensuring that the common law of privilege develops in accordance with "*Charter* values" requires that the existing rules be scrutinized to ensure that they reflect the values the *Charter* enshrines.

246. [1992] 6 W.W.R. 385.

247. The approval came, in Justice Cory's opinion, with "some words of caution and restraint": at para. 18: "Yet it must be remembered there is a crucial difference between human rights legislation and constitutional rights. Human rights legislation is aimed at regulating the actions of private individuals. The Charter's goal is to regulate and, on occasion, to constrain the actions of the state. This essential difference must be borne in mind...."

In *Gwinner v. Alberta (Human Resources and Employment)*, 2002 A.J. No. 1045, Greckol J. recently had the opportunity to again consider the applicability of *Charter* principles to private litigant cases in respect of the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14. This case is also of interest because it dealt with the human dignity component of discrimination and involved a similar issue to that considered in *Law*. In that regard, Greckol J. states at para. 103:

> As the *Law* case was a synthesis and clarification of the s. 15(1) discrimination analysis, with an elaboration of the third step to closely scrutinize the impugned law's effect on the human dignity interest, and since there is a strong legal history of interchange between *Charter* and human rights discrimination analyses, it will be appropriate in some human rights cases to apply the entire *Law* analysis, bearing in mind that flexibility should be maintained. The *Law* analysis proposed by Iacobucci J. was developed in the context of a *Charter* s. 15(1) equality challenge to legislation which set up a government program of financial support that was alleged to discriminate in purpose or effect. There, the government raised a serious question as to whether the claimant's dignity interest was engaged. The *Law* analysis is particularly applicable in this case, where there is a human rights equality

(continued...)

Utilizing *Charter* jurisprudence on equality must also be approached with caution. The *Charter* attempts to balance competing societal and individual interests. Thus, in the context of equality rights, built into the section 15 test for equality is a remedial component designed to remedy such ills as prejudice, stereotyping, and historical disadvantage. Not every disadvantage suffered will necessarily attract redress however. For example, Iacobucci J. states in *Law*:[248]

> Another possibly important factor will be the ameliorative purpose or effects of impugned legislation or other state action upon a more disadvantaged person or group in society. As stated by Sopinka J. in *Eaton*, *supra*, at para. 66: "the purpose of s. 15(1) of the *Charter* is

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247. (...continued)
challenge to legislation which sets up a government program of financial support that is alleged to be discriminatory. Here, as in *Law*, the government raises a serious question as to whether the dignity interest of the Claimants is engaged.

248. *Law v. Canada (Minister of Employment & Immigration)*, [1999]1 S.C.R. 497 at para. 72. *Law* concerns the constitutionality of ss. 44(1)(d) and 58 of the *Canada Pension Plan*, R.S.C., 1985, c. C-8, which draw distinctions on the basis of age with regard to entitlement to survivor's pensions, prohibiting those persons under the age of 45 from receiving spousal benefits unless that person was disabled or had dependent children. The appellant, who was 30 years old at the time of her husband's death, applied to receive survivor's benefits under the CPP. Her husband had made sufficient contributions under the CPP such that she would qualify for survivor benefits if she came within the class of persons entitled to receive them. However, her application was refused because she was under 35 years of age at the time of her husband's death, she was not disabled, and she did not have dependent children. The Supreme Court of Canada dismissed the appeal, concluding that she had not established that she had been discriminated against within the meaning of the *Charter*. Iacobucci, J. for the Court concludes at paragraph 95 that although 'age' is an enumerated ground under section 15 of the *Charter*, "[r]elatively speaking, adults under the age of 45 have not been consistently and routinely subjected to the sorts of discrimination faced by some of Canada's discrete and insular minorities. For this reason, it will be more difficult as a practical matter for this Court to reason, from facts of which the Court may appropriately take judicial notice, that the legislative distinction at issue violates the human dignity of the appellant."

> not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society". An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. I emphasize that this factor will likely only be relevant where the person or group that is excluded from the scope of ameliorative legislation or other state action is more advantaged in a relative sense.

Thus, section 15 contains a limiting mechanism[249] which does not suit one of the main purposes of this thesis, which is to advance a concept of privacy that fetters out true privacy claims. There are two questions that need to be answered in every

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249. This limiting mechanism is evident in the test for equality claims ultimately articulated by Iacobucci J. in *Law* at paragraph 39:

> **39** In my view, the proper approach to analyzing a claim of discrimination under s. 15(1) of the *Charter* involves a synthesis of these various articulations. Following upon the analysis in *Andrews*, *supra*, and the two-step framework set out in *Egan*, *supra*, and *Miron*, *supra*, among other cases, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries. First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

privacy question. The first asks whether there is a privacy interest at stake (which I contend depends upon whether an equality issue is at stake). Only after this question is answered in the affirmative is it neessary to consider the next question: is there some overriding societal interest that justifies infringing the privacy (or equality) interest? *Charter* jurisprudence considers both of these questions simultaneously under section 15,[250] whereas only the first question needs to be considered for the purposes of this thesis.

To be sure, any coherent theory of law must also recognize competing interests and provide a mechanism to balance competing rights. Overriding rights is a serious matter: "It means treating a man as less than a man, or as less worthy of concern than other men. The institution of rights rests on the conviction that this is a grave injustice, and that it is necessary to prevent it."[251] Establishing a privacy

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250. And again under section 1 of the *Charter*.

251. Ronald Dworkin, *Taking Rights Seriously*, *supra* note 29 at 199. One must distinguish between actual harm to an individual right and a speculative or marginal risk of harm to a competing right before we limit a fundamental right. That is why, for example, we reject abandoning certain procedural and evidentiary safeguards for an accused under the principle that it is better for a hundred guilty men to go free than have one innocent man be convicted, notwithstanding acquitting guilty men "marginally increases the risk that any particular member of the community will be murdered, raped, or robbed" (*Ibid.* at 200).

Fundamental rights should be limited only when there is a "clear and substantial" risk that harm to a competing individual right will occur. Dworkin contends, at 203, that there are only three situations which justify consistently overriding rights:

> I can think of only three sorts of grounds that can consistently be used to limit the definition of a particular right. First, the Government might show that the

(continued...)

right is separate from deciding whether a societal interest should nevertheless override that right. A concept of privacy as an equality right is directed to the first question, not the second.

With this one caveat in mind, I will draw on certain aspects of the equality provisions contained in section 15 of the *Charter* and the test for equality articulated by the Supreme Court of Canada in *Law v. Canada (Minister of Employment & Immigration)*,[252] and *Andrews v. Law Society of British Columbia*.[253]

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251. (...continued)

> values protected by the original right are not really at stake in the marginal case, or are at stake only in some attenuated form. Second, it might show that if the right is defined to include the marginal case, then some competing right, in the strong sense I described earlier, would be abridged. Third, it might show that if the right were so defined, then the cost to society would not be simply incremental, but would be of a degree far beyond the cost paid to grant the original right, a degree far beyond the cost paid to grant the original right, a degree great enough to justify whatever assault on dignity or equality might be involved.

252. [1999] 1 S.C.R. 497. The test articulated by Iacobucci J. in *Law* has subsequently been reaffirmed on numerous occasions. See for example *Granovsky v. Canada (Minister of Employment & Immigration)*, [2000] 1 S.C.R. 703 at para. 41 and *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325 at para. 31.

253. [1989] 1 S.C.R. 143. Andrews dealt with the constitutionality of the citizenship requirement for entry into the legal profession contained in s. 42 of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26. The respondent, Andrews, though resident in Canada, remained a British subject. Despite having taken law degrees at Oxford and fulfilling all the requirements for admission to the practice of law in British Columbia, his application for call to the Bar was denied on the basis that he was not a Canadian citizen. The majority of the Supreme Court struck down the provision under section 1 of the *Charter*. Although split on the section 1 analysis to the particular case, all the justices agreed with McIntyre's reasoning in dissent concerning the equality provisions of section 15 of the *Charter* (McIntyre and Lamer JJ. dissented on the application of section 1 to the case, (continued...)

B. A Conception of Privacy: Discrimination

Dworkin's concept of equality—that every individual is equally deserving of concern and respect—has been echoed in Canadian equality jurisprudence. In *Andrews*, McIntyre J. envisions "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[254] Similarly in *Law*, Iacobucci J. reiterates that the ideal of equality is "to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration."[255]

At its core, equality as an ideal seeks to eliminate the discrimination associated with stereotyping, historical disadvantage and vulnerability to political and social

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253. (...continued)
holding that the citizenship requirement was reasonable and sustainable in the circumstances).

254. *Ibid.* at p. 171.

255. *Law*, *supra* note 251 at para. 51.

prejudice.[256] McIntyre J. provides a concise statement of discrimination in *Andrews*: [257]

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

Discrimination, not simply differences or differential treatment, is important for establishing a breach of the equality provisions under section 15 of the *Charter*.[258] Although perceived by the individual, and therefore somewhat subjective,

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256. Wilson J. in *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1327.

257. *Andrews*, *supra* note 252 at para. 37.

258. Following up with the approach adopted by McIntyre J. in *Andrews*, Iacobucci J. in *Law* articulates a tripartite test at paragraph 88: "(1) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? (2) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds? And (3) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?"

actionable discrimination must have an objective component to it. Not all "discrimination" subjectively felt will necessarily be remedied.[259] Having said that, however, one must be careful not to let the objective "reasonable person"

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259. Indeed, the Supreme Court of Canada has refused on several occasions to objectively validate subjective claims of discrimination.

In *Law*, Iacobucci J. concludes at para. 108 that "I am at a loss to locate any violation of human dignity. ... The impugned distinctions do not stigmatize young persons, nor can they be said to perpetuate the view that surviving spouses under age 45 are less deserving of concern, respect or consideration than any others."

In *Granovsky v. Canada (Minister of Employment & Immigration)*, [2000] 1 S.C.R. 703 the Court considered a constitutional challenge to the *Canada Pension Plan*, R.S.C., 1985, c. C-8 ("CPP") which requires permanent disability claimants to have made CPP contributions over a 10 year period prior to making the claim. The appellant did not make the contributions because, he claimed, his disability prevented him from doing so. In dismissing his appeal, Binnie J. concludes at para. 81 that the contribution scheme did not discriminate against him, nor did it demean him: "I do not believe that a reasonably objective person, standing in his shoes and taking into account the context of the CPP and its method of financing through contributions, would consider that the greater allowance made for persons with greater disabilities in terms of CPP contributions "marginalized" or "stigmatized" him or demeaned his sense of worth and dignity as a human being."

Finally, *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325 involved a *Charter* challenge to the Nova Scotia *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 ("*MPA*"), which limits "spouse" to a man and a woman who are married to each other and therefore excludes unmarried cohabiting opposite sex couples from its ambit. Walsh and Bona lived together in a cohabiting relationship for a period of 10 years, having two children together during this time. Assets were acquired during this time separately and jointly. When the relationship ended, the respondent Walsh claimed support for herself and the two children. She further sought a declaration that the Nova Scotia *MPA* was unconstitutional in failing to furnish her with the presumption, applicable to married spouses, of an equal division of matrimonial property. The Supreme Court of Canada (L'Heureux-Dubé dissenting) concludes, at para. 62 that the Act did not discriminate against unmarried couples: "In this context, the dignity of common law spouses cannot be said to be affected adversely. There is no deprivation of a benefit based on stereotype or presumed characteristics perpetuating the idea that unmarried couples are less worthy of respect or valued as members of Canadian society."

standard serve—through misapplication—as "a vehicle for the imposition of community prejudices."[260]

Adapting the above specifically to privacy might yield a test as follows: Would the disclosure of personal information promote or perpetuate the view that the person whose information has been revealed is less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration?[261]

An affirmative response to this question would, in my view, negatively impact individual equality and, therefore, privacy would be engaged. In such a case, the particular personal information is *prima facie* not compellable to be disclosed. Undoubtedly a balancing mechanism is needed: the party seeking disclosure would bear some sort of evidentiary onus establishing disclosure outweighs any

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260. Iacobucci J. states in *Law*, *supra* note 248 at para. 61: "I should like to emphasize that I in no way endorse or contemplate an application of the above perspective which would have the effect of subverting the purpose of s. 15(1). I am aware of the controversy that exists regarding the biases implicit in some applications of the 'reasonable person' standard. It is essential to stress that the appropriate perspective is not solely that of a 'reasonable person'—a perspective which could, through misapplication, serve as a vehicle for the imposition of community prejudices. The appropriate perspective is subjective-objective. Equality analysis under the Charter is concerned with the perspective of a person in circumstances similar to those of the claimant, who is informed of and rationally takes into account the various contextual factors which determine whether an impugned law infringes human dignity, as that concept is understood for the purpose of s. 15(1)."

261. To paraphrase Binnie J.'s summary of discrimination in *Granovsky*, *supra* note 261 at para. 58. See also Iacobucci J. in *Law* at para. 64.

privacy concern. Privacy cannot be absolute. The importance for the purposes of this thesis is that a conception of privacy as preventing discrimination is proactive, not reactive in nature: the burden is to establish disclosure and not to establish non-disclosure.

Under this view, one would anticipate that privacy is engaged when the information sought to be disclosed reveals the individual to fall within those most common and socially destructive historically practised bases of discrimination such as religious beliefs, physical disability, mental disability. If the disclosure does not cause discrimination, then I contend that privacy is not engaged.[262] To be sure, this thesis will have the effect of reducing or restricting the number and types of claims that can legitimately be said to involve privacy. In so doing, however, privacy as a right may achieve the coherence that it now lacks under its current conceptions.

C. Some Cases Revisited

Some cases can easily be defended as true privacy cases under any conception of privacy. The information is just so inherently "private" that one cannot reasonably

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262. Although the disclosure may still be actionable under other causes of action such as defamation, nuisance, or trespass.

suggest that privacy is not engaged. One's medical information, for example, is one such class of cases. Physical and mental disability have, as noted above, been traditionally two of the most common and socially destructive historical bases of discrimination. Disclosure of one's medical information could undoubtedly promote or perpetuate the view that the person whose information has been revealed is less capable, or less worthy of recognition or value as human beings equally deserving of concern, respect, and consideration. It is not surprising, therefore, that cases such as *O'Connor*, *A.M. v. Ryan*, and *McInerney v. MacDonald* have all identified strong privacy interests at stake in those instances.

What about more difficult, less obvious cases? In American jurisprudence, why is privacy asserted in *Griswold v. Connecticut* or *Eisenstadt v. Baird* which held as unconstitutional statutes criminalizing contraceptives for married couples and unmarried individuals? These choices are undoubtedly personal, but why are they defended on the grounds of privacy? Certainly individual license is involved, which would explain why privacy as a right to be let alone and autonomy advocates lead the charge against these sorts of statutes. Is there similarly an equality interest at stake? Could a reasonable person seriously suggest that the revelation that a married couple or a single bachelorette purchased contraceptives promote or perpetuate the view that they are less capable, or less worthy of recognition or value as human beings? For most of us today, the most likely

answer would be no. Unless one can articulate an equality interest at stake, then my contention is that privacy is not engaged. These statutes could undoubtedly be struck down as violating other liberties,[263] but in my view, not on the basis of privacy as an equality right.[264]

What about a woman's choice to an abortion first recognized in *Roe v. Wade*? Although the decision can be defended on other grounds,[265] can it also be defended on a right to privacy? One can readily see how the decision is justified on some current conceptions of privacy—individual autonomy or creation of self for example. Abortion as a form of license provides a stark example of the difficulty presented when one must decide between two conflicting licenses. The vitriol and tension between pro-life and pro-choice is still evident today, some thirty years after *Roe v. Wade*. Debate and legislative attempts to overrule the effect of this decision continue today. What if the issue is recast as an equality issue? Would

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263. For violating security of the person, for example, by contending that contraceptives are necessary to prevent the transmission of disease.

264. But what if one was an observant of the Roman Catholic faith? Religious beliefs have also historically been a basis for discrimination. So perhaps these cases can indeed be defended as privacy under my conception.

265. See Ronald Dworkin, "Unenumerated Rights: Whether and How Roe Should be Overruled" (1992) 59 U. Chi. L. Rev. 381. Dworkin persuasively argues that an unborn foetus is not a constitutional person worthy of constitutional protection. On this level alone, the decision can be defended. Similarly, Dworkin argues that arbitrary term limits which restrict whether and when a woman can have an abortion can also be defended on the basis of societal's interests. Interestingly, Dworkin does not have to resort to privacy to defend *Roe*.

the disclosure that a woman had an abortion promote or perpetuate the view that she is less capable, or less worthy of recognition or value as human beings equally deserving of concern, respect, and consideration? For most I think the answer would be probably be a resounding yes. One may not agree with a decision to abort, but how can one reasonably argue that an individual is not entitled to equal concern and respect?

What about cases in between? Should government employee records not be disclosed under federal access to information legislation on the basis that they attract privacy. The Supreme Court of Canada ruled in favour of disclosure in *Dagg v. Canada (Minister of Finance)*,[266] and in *Canada (Information Commissioner) v. Canada (Commissioner of the RCMP)*.[267] Unfortunately, both decisions turned on detailed statutory interpretation arguments, and not on any consideration of privacy. This raises the interesting question: can these decisions be defended on the basis of privacy, or lack thereof? I contend that they can.

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266. (1997) 46 Admin. L.R. (2d) 155.

267. [2003] SCC 8.

At issue in *Dagg* was whether employee sign-in logs were subject to disclosure under the *Access to Information Act*.[268] The Department disclosed the relevant logs but deleted the employees' names, identification numbers and signatures on the ground that this information was private.[269] Taking a strict statutory interpretation approach, the majority concludes that the information ought to be disclosed. Unfortunately, only La Forest J. in dissent considers privacy generally in the statutory context at issue concluding that employees "would have a reasonable expectation of privacy that the information in the sign-in logs would not be revealed to the general public."[270] With respect, one must ask why? Why would an employee's comings and goings over a weekend be private? Using equality as the test, would the disclosure of the employee's overtime records promote or perpetuate the view that the employee is less capable, or less worthy of recognition or value as a human being, equally deserving of concern, respect, and

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268. R.S.C. 1985, c. A-1. The appellant—a professional access to information consultant—filed a request with the Department of Finance for copies of logs with the names, identification numbers and signatures of employees entering and leaving the workplace on weekends. These logs were kept by security personnel for safety and security reasons but not for the purpose of verifying overtime claims. The purpose for which the appellant sought the information was admittedly for marketing: he assumed that union members were working overtime on weekends without claiming compensation. If correct, he intended to present this information to the union anticipating that the union would find it helpful in the collective bargaining process and that the union would as a consequence be disposed to retain his services.

269. Specifically, that it constituted personal information as defined by section 3(j) of the *Privacy Act*, R.S.C. 1985, c. P-21 and was thus exempted from disclosure pursuant to section 19(1) of the *Access to Information Act*.

270. At paragraph 71.

consideration? Objectively viewed, I would think not. Although I agree with the result reached by the majority, my view is that the information quite simply does not attract privacy because the disclosure of those particular employment logs does not, in my view, promote or perpetuate discrimination.

Similarly, in *Canada (Information Commissioner) v. Canada (Commissioner of the RCMP)*, the Court ordered disclosure of employment records of four police officers which were sought in connection with litigation against the officers.[271] As it did in *Dagg*, the Court takes a strict statutory interpretation approach to order disclosure without ever considering privacy generally.[272] Again, I contend that privacy is not engaged here as the officers' equality rights were not at issue. The information requested was trivial and the refusal to disclose was based, one can

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271. The information requested included the list of historical postings for each of the officers, the list of ranks and the dates the officers received those ranks, their years of service and their anniversary date of service. The RCMP refused to disclose the information on the grounds that the information contained "personal information", as defined by s. 3 of the *Privacy Act*, and therefore was exempt from disclosure pursuant to s. 19(1) of the *Access to Information Act*.

272. The Court approaches the issue simply as one of statutory interpretation—do the records fall within the *Access to Information Act* and/or *Privacy Act*?. At a minimum, one would think that privacy generally would be contemplated under one of the contextual factors engaged in the pragmatic and functional analysis required for determining the standard of review. Instead, aside from Gonthier J.'s general observation at paragraph 23 that "[a]s its name indicates, the *Privacy Act* protects the privacy of individuals with respect to personal information about themselves held by government institutions", nowhere does Gonthier J. consider generally the nature of privacy. The analysis is unsatisfying, at least for privacy advocates.

infer, on a desire to frustrate the ongoing litigation involving the officers. That is not a proper role for privacy under any conception of privacy.

Recall the two decisions on prescriber information decided by the Alberta privacy commissioner and the Federal privacy commissioner prefaced in the opening.[273] The Commissioners reach opposite conclusions concerning whether prescriber information disclosed by pharmacists to a data collection company violates the prescribing physician's right to privacy. The Alberta privacy commissioner decides the information is private and excluded from disclosure. The Federal privacy commissioner decides the opposite. Neither decision considers privacy generally. The current conceptions of privacy are strikingly unsatisfying to explain these decisions. Specifically, one would be hard pressed to identify how a physician's dignity or desire to define himself would be violated if it was revealed that he prescribed a certain drug. Similarly, the information at issue raises the difficulties where the information can be simultaneously possessed by a number of people. Who owns or controls the records in these cases? I suggest that one has to torture the conceptions of privacy to justify the Alberta commissioner's decision. If the issue is recast as a privacy issue, what equality right is violated if the prescribing physician's name, address, phone number and type of drug prescribed

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273. *IMS Health Canada Ltd. v. Information and Privacy Commissioner* (Action No. 0303 06949), *Maheu v. IMS Health Canada Ltd.* (Action No. T-1967-01); (which can be located as *PIPED Act Case Summary #15* located at www.privcom.gc.ca).

is disclosed by a pharmacist to a data collection company? Would the disclosure that a doctor had prescribed a certain drug on a certain occasion promote or perpetuate the view that the doctor is less capable, or less worthy of recognition or value as a human being equally deserving of concern, respect, and consideration? The physician cannot dispute that the drug was prescribed, nor that he or she was paid for the medical services provided. The patient cannot object because the patient's name is never associated with the prescription. A physician who objects likely does so for a variety of reasons, not least of which is that he or she does not want to be hassled on a daily basis by pharmaceutical representatives selling their wares. There are undoubtedly other remedies available to the physician.[274] Why does the disclosure, or prohibition thereof, engage privacy? Under the view being advanced here, privacy would not be engaged and the information would be disclosed. And in so doing, one would avoid torturing any reasonable conception of privacy to protect the information. The federal Privacy commissioner's decision reached the correct result for an unsatisfying reason.[275]

The examples could continue *ad infinitum*. Those canvassed hopefully demonstrate how a conception of privacy as an equality right might fetter out true privacy claims from those who share only the label. Privacy understood as an

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274. Trespass or nuisance to name two.

275. Strict statutory construction analysis without any consideration of privacy generally.

equality issue may diffuse tension and conflict whereas privacy as license perpetuates it.

VIII. Conclusion

Privacy law finds itself in a most distressing state. Inconsistency and conflict are evident in both the jurisprudence and the literature on privacy. At first glance, this unhappy state of affairs appears to arrive from a lack of consensus on the core liberty or liberties that privacy strives to protect. If we want to protect privacy, so the argument goes, then we have to ground it in something other than an inchoate, inarticulate right. We have to discover, the argument continues, the fundamental kinds of activities which people would invariably point to as requiring privacy. This approach forces privacy discourse into a debate about which liberty interests—or action verbs—are deserving of protection. The current conceptions of privacy do just that. In doing so, however, the conceptions are invariably too broad or too narrow and fail to explain the place of privacy in the modern world. They offer an intuitive approach of what makes things 'private' and falter when intuitive commonality does not exist. More importantly, however, is that underlying the various conceptions of privacy is a concept of privacy which is itself flawed. The current conceptions of privacy all share a concept of privacy as serving liberty as a form of license. 'Liberty' as a form of license protects—in its

crudest form—an individual's right to do as they please according to their own lights. Privacy, so conceived, finds itself continually at odds with both state and other individual interests. This is a conflict that privacy usually loses and leaves one with the impression that privacy is not that valuable as a right.

The problems with the current conceptions of privacy go beyond simply delineating what kinds of things ought to be private. What is missing, and needed, is a coherent concept of privacy *as a right*: not whether privacy is valuable, but rather, what is it about privacy that is, or should be, protected. Some scholars have abandoned the search for the core value of privacy by advocating a pragmatic approach to privacy where cases are decided, on a case-by-case basis, in the particular context in which privacy finds itself. Accepting that privacy is not an inherent right, and that there are no privacy principles per se, seems contradictory to most jurisprudence which recognizes privacy—in some form or another—as a fundamental right worthy of constitutional protection. Such a view also leaves us in the unenviable position of being beholden to political will and judicial discretion for positive developments in privacy law.

We do seem to agree that the current state of privacy is unsatisfactory. We are collectively bombarded by privacy legislation at every turn, but we do not yet have a handle on what privacy should protect. Just because the core value of privacy

has yet to be articulated does not mean that a core value does not exist. Accepting that the current conceptions of privacy fall prey to fatal criticisms, the thesis of this essay has been that privacy is better served if conceived of as an equality issue, not a liberty issue. At its core, privacy protects and ensures equality in the sense that we are entitled to equal concern and respect as individuals. The focus should shift away from viewing privacy as a prerequisite for preventing invasions of various liberty interests to one of maintaining conditions that will make the exercise of those liberty interests possible. As such, privacy is undoubtedly a prerequisite for equality. If equality is not engaged, then nor should privacy be. So conceptualized, equality is at the hub and the various liberty interests protected by privacy are simply spokes on the privacy wheel.

Drawing on equality jurisprudence, I have articulated a particular conception of privacy to serve as a test for determining whether equality—and therefore privacy—is engaged: Would the disclosure of personal information promote or perpetuate the view that the person whose information has been revealed is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration? An affirmative answer—objectively determined—negatively impacts individual equality and, therefore, privacy is engaged. Although privacy may be overridden in favour of an important, but competing, societal interest, privacy as equality is a

more coherent mechanism for establishing in the first instance whether a privacy interest is engaged at all.

A likely consequence of this thesis will be to restrict privacy. One might anticipate affirmative responses when the information disclosed reveals that the individual falls within those most common and socially destructive historically practised bases of discrimination. But there may be other situations where an individual can objectively establish discrimination and trigger a privacy response. If not, an individual may still be able to remedy certain "invasions", but not on any notion of privacy. Privacy cannot be all things to all lawyers.

As stated over a hundred years ago by the "founders" of the privacy right in America:

> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.[276]

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276. Warren & Brandeis, "The Right to Privacy" (1890) 4 Harv. L.Rev. 193.

Perhaps, given the difficulties exposed in privacy law today, it is time again to consider anew how privacy is conceived. By limiting the ambit of privacy, we may indeed strengthen it.

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