

## Privacy as a Matter of Taste and Right

Alexander Rosenberg

Privacy is something we all want. We seek privacy to prevent others securing information about us which is only immediately embarrassing to us (and so causes us pain but not material loss) or of strategic value in their interactions with us (and so imposes on us material as well as perhaps also psychic costs). I use the expression “securing information” so that it covers everything from the immediate sensory data that a voyeur acquires to the financial data a rival may acquire about our businesses. In the degenerate case of the Peeping Tom’s invasion of our privacy, suffering is caused just by the voyeur’s acquiring the information, even if nothing is ever done with it beyond the voyeur’s recalling it from time to time. In all other cases, privacy prevents others from imposing costs or harms on us in ways that require they secure information about us.

Since we all want privacy, it’s natural to assume its something we have a right to. And if it’s something we all have a right to, then surely it must have moral value. This is the beginning of both the interest in and a certain amount of confusion about the political philosophy of privacy. For now the philosopher is obliged to define privacy, identify its moral value, and show why privacy is ours as a matter of right. But the more one thinks about privacy, the less confident one can be that privacy is a distinctively moral desideratum, as opposed to a largely prudential one when it is anything more than a matter of widely shared taste. I shall argue that our interest in privacy is mainly a matter of taste and prudence. I say mainly, because in the end there appears to be a normative component in our thinking about privacy that seems resistant to this account of privacy as a matter of taste and prudence.

### 1. The moral social psychology of privacy

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Instead of beginning with the obvious point that we seek privacy to prevent others securing information about us which is embarrassing to us or of strategic value in their interactions with us, moral philosophers have sought some positive moral value which privacy plays. They have done so owing to a suspicion that if privacy is just a matter of hiding the truth from others, it cannot be a good thing from the moral point of view. But the weakness of the arguments for the moral value of privacy suggest that privacy's importance rests on other, largely prudential considerations.

Most of those who have worked in this area have attempted to develop or presuppose a moral psychology or more exactly a moral social psychology for privacy. Moral psychology is the study and theorizing about those psychological factors that either make normative principles binding or allow us to exercise moral judgment. By analogy, a moral social psychology treats of the social relations that may do either of these things. Thus, these moral social psychologists have widely agreed that some sort of privacy is a requisite for the full range of normal or healthy social relations, without however being able to agree beforehand on what privacy is or exactly what human personal needs privacy fulfills. For example, Robert Gerstein argues that "intimate relationships could not exist if we did not continue to insist on privacy for them."<sup>1</sup> Part of his argument is that the presence of (unwanted spectators) turns the participant in an intimate experience into a spectator, owing to self-consciousness, and so distracts the participant from the experience, or makes it otherwise impossible to consummate. Gerstein illustrates the point by describing how the presence of observers to a sexual relationship can destroy many of its most important qualities, when it can proceed at all.

In the same vein, Charles Fried argues that privacy is important to a range of human

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relationships:

It is my thesis that privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable. They require a context of privacy or the possibility of privacy for their existence.<sup>2</sup>

Similarly James Rachels argues that privacy is a necessary condition for other socially valuable ends. Unlike Fried, and Gerson, Rachels recognizes explicitly the connection between privacy and information:

I want to give an account of the value of privacy based in the idea that there is a close connection between our ability to control who has access to us and to information about us, and our ability to create and maintain different sorts of social relationships with different people. According to this account, privacy is necessary if we are to maintain the variety of social relationships with other people that we want to have, and that is why it is important to us. By a “social relationship” I do not mean anything especially unusual or technical. I mean the sort of thing which we usually have in mind when we say of two people that they are friends or that they are husband and wife or that one is the other’s employer.<sup>3</sup>

According to Rachels, each of these (and other) social relations are characterized by “an idea of... what information it is appropriate for them [the parties to the relationship] to have”<sup>4</sup> If we could not maintain these relationships, we would have good reason to object. But maintaining them requires that we

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differentially control access to information about ourselves, owing apparently to the fact that differential access is a large part of what these different relations consist in. In a similar vein Ferdinand Shoeman notes the wrong done to others by imposing unsought intimate information on them. “It is... very awkward to be going about one’s business and be confronted with a plea or expectation for personal involvement which by hypothesis is unoccasioned by the relationship. Although occasionally welcome, generally such pleas are disturbing for they seem to give us less control over where we will expend our emotional resources.”<sup>5</sup>

All of these authors express noble sentiments about friendship, love, intimacy, and the importance of privacy to their maintenance. But one may ask if privacy is really necessary to the establishment and maintenance of social relationships characterized by intimacy, friendship and love. “Really necessary” here can mean “logically or conceptually necessary” or “necessary as a matter of fact about Homo sapiens in groups” or “necessary as a matter of fact about us in contemporary society”. On the first interpretation the claim that privacy is necessary would require a great deal of further argument and a good deal of consensus about the meaning of fundamental concepts in moral philosophy. On the second interpretation, the claim requires a great deal of empirical as opposed to arm chair social science to establish. On the third interpretation it may have little universal normative significance.

To move from these claims of moral social psychology, even if true, to the conclusion that privacy is therefore a moral value, requires that intimate relations, friendship, have more fundamental moral value from which the value of privacy as a means can be derived. Endowing these things with

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intrinsic moral value seems far fetched. Intimacy, friendship, even love are not of intrinsic moral value; after all, each of them can prove a means to moral ills or by themselves contribute to the badness of a state of affairs they characterize. When these three features characterize the relationship between persons engaged in heinous crimes against humanity, they certainly do not detract in any way from the badness or wrongness of the actions; when their presence is causally necessary for such acts, some might hold that the presence of intimacy, friendship, and love among the perpetrators of , say war crimes, increases the badness or wrongness of their acts.

For all their desirability, could a just society could get along without intimacy, friendship, and love? We can perfectly well image desert island societies and scenarios of impeccable justice and moral probity in which there is no interest in the sort of social relations these moral psychologists extol. Like the emotionally controlled society of Vulcan in Star Trek, it might not be a society creatures like us would want to live in; but it might well be devoid of injustice. Such a society would have no need for the sort of privacy these moral social psychologists seek to justify. Alternatively we can imagine societies replete with friendship, intimacy, etc., and without privacy, although the agents in these societies would be differently situated from us. What is more, anthropologists have reported the existence of such societies, for example various Eskimo and Inhuit peoples, living in environments that make privacy impossible, but friendship, intimacy, and love necessary for survival and emotional health.

No one doubts we all want to have a full range of normal social relations, but it is not clear what is so morally special about this range of social relations that might underwrite the positive moral value of privacy. Bear in mind that doubts about the moral value of something are compatible with the

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recognition that any one like the readers of this paper would find it in fact psychologically indispensable for normal human life as presently arranged. But assertions of intrinsic moral value are incompatible with ethical relativism. They should transcend present social arrangements and have cross-cultural force.

Fried goes on to connect privacy to distinctive qualities much more well accepted as genuinely and distinctively morally significant than intimacy, friendship, or the specialization of labor: our integrity as persons.

To make clear the necessity of privacy as a context for respect, love, friendship and trust is to bring out also why a threat to privacy seems to threaten our very integrity as persons. To respect, love, trust, feel affection for others and to regard ourselves as the objects of love, trust and affection for others is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion.<sup>6</sup>

Similarly, Schoeman argues that

...the respect for privacy marks out something morally significant about what it is to be a person and about what it is to have close relationships with another....respect for privacy reflects a realization that not all dimensions of self and relationships gain their moral worth through their promotion of independently worthy ends.<sup>7</sup>

If some dimensions of self and some relationships have moral worth independent of the worthy ends they may promote, then they must have intrinsic moral worth. The conception we have of our selves as autonomous rational agents does seem a stronger candidate for a conception of something having

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intrinsic value than certain social relationships. But here the problem is one of showing that privacy is in fact indispensable to personal integrity. The claim that privacy is in fact “the necessary atmosphere” for personal integrity seems empirically false. It is clear that actual and possible scenarios obtain in which respect, love, friendship, trust and the greatest personal integrity obtain though there is no scope for privacy.

Consider for example, the unprivate prison career and personal relationships of Nelson Mandela and his fellow prisoners, or the personal integrity of the political prisoners that Solzhenitsyn described as obtaining in the Gulag. Even if love, trust and affection are crucial to regarding ourselves as persons, the fact that they may exist and even flourish in the absence of privacy makes moot the more controversial claim that personhood is impossible in the absence of love, trust and friendship or privacy. Again, no one should question the claim that in this day and age, we may have great difficulty as a matter of fact actualizing our potential to be moral agents without the support of these social relationships. But from this it no more follows that they are themselves of intrinsic moral value that oxygen is of moral value because it is necessary for actualizing our potential to be moral agents.

The moral social psychology of privacy reflects the power of pious assertion to disguise a lack of argument. Even if they are correct about the relationship between privacy and relationship with others important to us, these considerations will not underwrite the claim that privacy is either morally valuable in itself or an indispensable means to ends that are morally valuable in themselves. Privacy does not after all have any positive moral value. It is just a matter of withholding information from others.

## 2. Evolution of a taste for privacy

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Though they do not suffice to ground a right to privacy, all these accounts do touch on something significant about it. Behind these forays into moral social psychology, there lies an obvious and very plausible explanation for the origin of a universal taste of privacy, a felt need for privacy which however has different content in different environments. To the extent that the division of social roles and specialization in a society is like the division of labor, adaptive for the individuals within it, the argument for privacy as morally valuable reflects in fact an essential component of an evolutionary explanation of how a sense of privacy might have arisen among interacting humans and indeed infrahumans. Given hunter-gatherer organisms like us, geared to maximize reproductive fitness, the advantage to be secured by friendship and love is evident. There is much evidence that both cooperation and the division of labor are highly adaptive strategies among hunter-gatherer peoples competing against mega-fauna in the savannah. Cooperation and trade of the sort required under the circumstances for survival and flourishing will require social institutions and these in turn may well be fostered by privacy. If some sort of privacy is essential for friendship and love, its adaptive value is manifest.

This argument for the necessity of privacy is more compelling as an evolutionary explanation than a piece of philosophical analysis. And it is compossible with the recognition that there are or can be societies in which environmental circumstances either discourage or obviate cooperation and with it social relations that require privacy; or there may have been and still are societies in which these relationships obtain with little or no privacy of the sort we recognize. A range of privacy-securing institutions, roles and rules which differ from one another depending on a society's environment-- from the Kalahari to the Arctic, from the stone age to the post-modern age--is just what we would expect if

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the acceptance of privacy is a disposition selected for and shaped by evolutionary adaptation in different environments. After all, though privacy may foster social relationships that are adaptive, it is likely to be the case that in its absence other social arrangements would have emerged that are equally adaptive. Nature always has more than one way of skinning its cats.

The anthropological literature suggests that almost all societies honor some sort of personal sphere for each individual. But it also shows that such spheres differ substantially from culture to culture, even in regards to human behavior paradigmatically marked out as private in our culture. What one society--say ours--counts as paradigmatically indecent action--intrusion on people engaged in basic biological functions, disrobed, or in sexual relations, other societies treat as acts of no moral importance. Among the Dobe Ju of East Africa there are no latrines, and sexual relations are conducted in the presence of children. Apparently neither the Tiri or the Mardu of Australia wore clothing of any kind when they first met with Europeans, and remove them in their absence.<sup>8</sup> Even among contemporary industrialized societies of the same general culture, there is a wide diversity of standards of privacy. Americans traveling to Europe in the fifties and sixties were shocked at the lack of privacy in public rest rooms; today acceptable styles of bathing costume on the two sides of the Atlantic reflect significant differences about where the private sphere ends. Indeed, even in American society while most of us will assert a right to privacy to prevent others from “indecently” observing portions of our anatomy, some assert an equal and opposite right to impose information about portions of their anatomy on others. Whence nudist camps and topless protests. The most commonly private acts--sexual relations--are not universally private in all cultures, or even in this one.

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The fact that territoriality and other claims of personal space obtain among a wide variety of infrahumans reinforces the attractiveness of an evolutionary explanation of our culturally variable desires for privacy.<sup>9</sup> The universality of our acceptance of and provision for personal space, coupled with the high variability of what acts, parts of the body, or physical space, count as personal space strongly suggests that there is an adaptational process operating to create differing spheres of privacy in differing environments. This adaptational response to differing environments operates to select for a generic taste for privacy in all human environments or in the primeval one. Of course it is possible that human concerns with bodily privacy may be “holdovers” from a territoriality-seeking disposition adaptative in our evolutionary ancestors. More likely, it is like the incest taboo, the conscious expression of a behavioral constraint selected for up and down the phylogenetic tree. Overcrowding and lack of privacy in animals is known to reduce populations, and both the symptoms which result from it and the mechanisms by which it is reduced are common among humans and non-humans.

If privacy is adaptive for creatures like us over the long term it will be selected for becoming something that gives us psychological satisfaction or become closely tied to what gives us such satisfaction. Thus we will be selected for wanting it and taking steps to insure we have it. If the most efficient way for each to insure one’s own privacy is to adopt an injunction enjoining privacy violations by all, then such a group norm may emerge as a “focal point” or as an revolutionarily adaptive strategy. Skyrms has shown that private property may evolve to fixation as a territory-dividing evolutionary stable strategy in iterated hawk/dove prisoner’s dilemma settings.<sup>10</sup> To the extent privacy is a matter of restricting rights of others to (informational) resources, it could emerge along with other privatized

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resources (property). Even where property institutions do not emerge, privacy may evolve as a device for apportioning space or territory in ways that are mutually advantageous and so require little or no enforcement.

The trouble with this hypothesis, as with all such evolutionary theorizing is its resistance to testing.<sup>11</sup> We can certainly imagine scenarios in which there is no taste for privacy and plenty of friendship, love and other prosocial adaptive institutions. But the cross species prevalence of territoriality and privacy makes evolutionary adaptation or sheer coincidence the best available explanation for the emergence of universal generic privacy so widely differing in its specific content in differing environments. The crucial thing to see is that if privacy is necessary for certain social relationships, this is only in virtue of other contingent facts about the society and the environment in which its necessity is claimed. Someone might reply that since we are engaged in developing a moral philosophy for our actual society and not for a toy-society or a Robinson Crusoe island, the environmental contingency of privacy's importance makes no difference. But this misses the point: if the content of our desire for privacy and the desire to accord it to others is contingent on features of our society, and will be quite different for other actual and possible social arrangements, then any claim that it has special moral standing is seriously reduced.

For one thing, relativity about privacy becomes obvious. On the anthropological evidence and from the evolutionary perspective, it is clear why the extent and categories of the private sphere tend to differ so broadly across cultures. If what constitutes the private differs from culture to culture depending on other contingencies about these cultures and their environments, there may be little if anything the

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concept of privacy covers which is common and peculiar across them all. If privacy is a concept with no common core it will be difficult to find a single ground for more than a putative generic right to privacy across changeable social arrangements. This will make privacy and any right to it quite different a notion from say the classical civil rights such as life or liberty, which many of us hold to obtain specifically and cross-culturally. If, even within our culture the functions which privacy serves are contingent, variable among individuals and changeable over time, then its nature and the putative right to it will not be provided by some very neat and simple theory. For example, a default right to privacy would be of great value in the face of an intrusive and coercive government, and an annoyance when it prevents the dissemination of information about your Internet purchasing preferences to providers of goods and services wishing to make their availability known to you. If privacy is in the end a matter of individual taste, then seeking a moral foundation for it--beyond its role in making social institutions we happen to prize possible, will be no more fruitful than seeking a moral foundation for the taste for truffles.

Finally, if the taste for some degree of privacy and for according some degree of it to others are traits selected for and so widespread, then the former taste probably needs less protection than other things we value. Only the odd mutants will seek to invade our privacy or wish us to invade theirs. A right to certain privacies which no one in his right mind would transgress is hardly a right that we need trouble ourselves much about, even if we grace it with the title of a right.

Privacy will begin to be something protected with rights only when its relative costs of invading it decline and the relative benefits of doing so increase. As such it will not be a moral right at all, but rather a prudential one.

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### 3. Judith Jarvis Thomson on Privacy

I began this paper with an implicit definition of privacy: prevention of others securing information about us which is immediately embarrassing to us (and so causes us pain) or of strategic value to others in their interactions with us (and so imposes on us other material costs). But this definition is controversial.

Indeed, it is controverted by perhaps the most well-known philosophical treatment of privacy: Judith Jarvis Thomson's influential paper, "The right to privacy".<sup>12</sup>

Thomson begins by acknowledging that "perhaps the most striking thing about the right to privacy is that nobody seems to have a very clear idea about what it is."<sup>13</sup> Presumably this admission reflects ignorance about the concept of 'privacy', not the concept of 'right'. In her inimitable way, Thomson then proceeds to sketch some imaginary cases in which her clear intuitions enable her to draw conclusions about the right to privacy. The conclusion to which she comes is that there really is no distinct right to privacy, as opposed to other, presumably more fundamental rights:

The question arises, then, whether or not there are any rights in the right to privacy cluster which aren't also in some other right cluster. I suspect there aren't any, and that the right to privacy is everywhere overlapped by other rights....The right to privacy is derivative in this sense: it is possible to explain in the case of each right in the cluster [of privacy rights] how come we have it without ever once mentioning the right to privacy.<sup>14</sup>

What Thomson means is the right to privacy is "overlapped" by other rights in the sense that each privacy right violation is in fact the violation of some other right; and the wrongness of the privacy-right violation is exhausted by the wrongness of the other right violation. Thus "the right to privacy" will be at

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most a sort of convenient expression for packaging together all these other rights. This will explain why it seems difficult to carve out a distinct right to privacy, for example by identifying what moral desideratum privacy is extrinsically good for. If this is Thomson's claim then we need to ask why it is convenient to employ the notion of a right to privacy, if the motley of other rights which it protects, have nothing in common among them. The answer will vindicate the implicit definition of privacy in terms of information, a claim which Thomson denies, as we shall see.

Thomson's cases are all ones in which it may look initially tempting to say that a right to privacy has been violated, but which she argues, in the end, are violations of property rights, or rights over our persons/bodies. Summarizing these cases does her discussion a certain amount of injustice. But Thomson's argument proceeds by appealing to our intuitions about the nature of the wrongness of certain privacy-right violations: If I circumvent the steps a person takes to keep his face from view or his voice from hearing, I have violated that person's rights over their person. "These rights--the right not to be looked at and the right not to be listened to--are analogous to rights we have over our property."<sup>15</sup> If I circumvent the steps a person has taken to keep her pornographic picture's existence and nature from others, then I violate that person's property right: "specifically the negative right that others shall not look at the picture."<sup>16</sup> Although Thomson does not go on to make the claim, we may argue not for analogy, but for assimilation of rights over the person to a species of property rights--all person being the owners of their bodies. This would reduce the cases in question to violations of property rights exclusively. If all privacy right violations were property-and-body rights violations, then the right to privacy would just be an aspect of the right to property in a broad enough sense of the term to include

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ownership of the body. If privacy rights are a species or subset of property rights or rights over certain kinds of property, they will require and submit of the sorts of arguments available for justifying private property.

Thomson addresses the claim that privacy is about information. But having entertained the thought, she emphatically rejects it:

I should say straight away that it seems to me none of us has a right over any fact to the effect that fact shall not be known by others. You may violate a man's rights to privacy by looking at him or listening to him; there is no such thing as violating a man's right to privacy by simply knowing something about him.<sup>17</sup>

Again, according to Thomson, examining cases of putative privacy violation shows that there is a right that people not take certain steps to acquire information about us--by looking at us or our property or listening to us when we don't want them to, or torturing us or extorting information. But there is no distinct right to keep information secret from all. Or again there is a right that people not use acquired information to our disadvantage. According to Thomson, this right is based on a right not to be caused distress. And so forth for other cases, in which privacy violations are wrong because they violate the right to be free from annoyance in the home, or annoyance in a public place, or the right that if famous the public not press you too closely, or the right that our liberties not be infringed in the absence of compelling need to do so.<sup>18</sup>

But if Thomson is right about these cases, then there is an outstanding question which she neglects or even rejects: the question of why we invoke a privacy right if "the wrongness of every

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violation of the right to privacy can be explained without ever once mentioning [privacy]”.<sup>19</sup> One attractive answer is that the right to privacy is an instrument, a convenience, a right we introduce and invoke because it is the best or most efficient or most convenient way to assure the protection of other rights of ours, including the motley of mainly property rights in the privacy-right cluster.

Consider, in order to violate each of these property or bodily rights we need to acquire information about the agent which the agent wishes we do not acquire. Even the degenerate case of merely peeping is the acquisition of information. The case is degenerate in the obvious sense and also in the sense that pain is causes to the victim even if acquiring the data have no further causal upshot. The violations Thomson envisions of these particular property rights and rights over the person and rights not to be annoyed, and rights not to be pressed too close, require the acquisition of information the subjects wish we do not acquire. There are other rights violation of which requires information, but these are violations that require information we otherwise would not sequester (wrongfully killing me requires information about where I am; normally, this information is not private). Invoking a privacy right in these mainly property cases is effective and efficient because it requires the least interference with the actions of others that might infringe the mainly property rights in question. Suppose that information about us is available to others and could be exploited by them to arrogate our property or cause us non-material harms like shame or embarrassment. Then protecting property rights against violations would require constraints on other’s exploitation of information about us. This would involve more interference with others than merely preventing them from securing information in the first place. Whence the greater efficiency and effectiveness of an enforceable right to privacy.

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So, privacy-rights violations are ones which are most effectively and efficiently prevented by restricting information (including mere sensory data). Yet Thomson writes, there is no such thing as violating a man's right to privacy by simply knowing something about him",<sup>20</sup> And this will be so even though simply knowing something about a person may harm that person. For as Thomson makes manifest in another justly famous paper, causing someone harm may violate no right of that person.<sup>21</sup> Yes, but...it is the nature of the information and the inevitability that people will make use of the information that comes to them that makes it convenient or expedient to invoke a right to privacy.

Consider two alternatives: in one case everyone knows many thing embarrassing or discreditable about everyone else, though no one realizes that anyone else does so. And suppose further that this knowledge has no effect whatsoever in their actions and behavior. In the second case privacy rights are completely respected. Never mind that in the nature of the case, no actual human beings could realize the first possibility: we are all of us too sensitive to the information we pick up about others (especially discreditable information) to be completely poker faced about it. The question is whether there is a morally significant difference between the two cases: complete non-exploitation of widely disseminated discreditable information about others or strict privacy. Note that in the first case, the invasion of everyone's privacy causes no one pain or loss because the invasion is undetected and unexploited. I suggest that there is not a morally significant difference here. And from this equivalence I infer that privacy is an instrumental good which we invoke because people as we know them are not immune to the effects of changes in the information they come to have about others. Even in the degenerate case of the Peeping Tom what troubles us is that the data remains accessible and accessed

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in the mind of the voyeur. Even this “use” causes us pain.

Owing to our evolved taste for privacy and for according privacy to others, we need invoke no right to it until the value of information rises and the costs of securing it fall. When the costs to others of acquiring information we wish to keep secret fall, and the value to them of this information rises, the incentives to invade privacy increase, and we begin to seek need means of protecting it. Whence the emergence of a right to privacy as the most convenient means to do so. 4. Privacy and the economics of information

The right to privacy turns out to be a natural right to the extent that the preferences which lead to wanting it and granting it were selected for as evolutionary adaptations. But it is at the same time a prudential right, the sort which will arise as a matter of institutional design among rational agents bargaining to a set of rules to govern themselves for mutual advantage. Rational bargainers will adopt prudential rights in information that are distinctive and separate from property and person rights, largely owing to the character of information as a commodity. To see this requires only a little pure theory of the economics of information.

Economists recognize that information is a commodity, but it is not like other goods we want. Information is abstract in a sense familiar to philosophers, as opposed to concrete. It can be expressed in a variety of physical representations, various kinds of writing--print, digital coding, and most important for present purposes, it can be represented in people’s brains under the label ‘beliefs’. But we need to distinguish a piece of information from any of its representations for the same reason we distinguish numbers from numerals. On the other hand, for information to be a commodity it must be

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physically represented at least somewhere--in a brain or elsewhere. Economical valuable information has come to be labeled “intellectual property”, but information is a commodity that is different in important ways from other kinds of property.

Perhaps most obviously, unlike physical goods, information is not appropriable, even though it must be represented physically (in our brains or elsewhere). It is inappropriable because it can be perfectly and almost costlessly duplicated. If I have information and I give it to another, or another takes it without permission, I still have the information. If I give it away or sell it, I have further information about who else now has it. In many cases, we need to keep information in other forms than memory; we need physically to represent it--on paper, electronically, etc. But then it can be copied. If it is taken by copying without my knowing that it has been taken, then unlike other property, I won't be able to tell that someone else has taken it simply by inspecting my store of intellectual property. Nothing will appear to be missing. In most cases, there is no mark on my representation, my copy of the information to show it has been copied. Only if I apprehend the other individual acquiring the information or if that person's use of the information comes to my attention will I acquire the information that it is no longer exclusively mine. And of course at that point it may be too late to stop the use or avoid its effect on me. Moreover, because information is abstract, it is sometimes impossible to establish that it was my (copy of the) information which was misappropriated.

Consider the fate of an invention in a regime of perfect competition and no rights of ownership of information. The inventor has in effect acquired some information about how to make something or make it better or cheaper, etc. The inventor cannot surrender the shear information by selling or giving

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others (copies of) the information. But economically valuable information like this which may have cost a great deal to acquire, can be sold (non-exclusively) and then resold very cheaply, or even given away.

The incentives to sell useful information you have bought will be very great just because selling the information often does not reduce its usefulness to you, and enables you to reduce your net costs of acquiring the information or even to profit from your original investment. Consider the black-market in soft-ware, which is easy to copy at very low cost. These features of information mean those who create it originally and indeed those who purchase it from the owners cannot secure anything close to the total market revenue which will be produced through its legal and illegal sale. More generally information cannot be fully appropriated by a purchaser because the seller still has the information, nor can any seller--the original owner or subsequent purchaser--secure the full revenue in the market price charged for selling a copy or representation of the information. Consequently, in a perfectly competitive market without rights over information, no one will have an incentive to invest in the creation of new information, and all will have an incentive to acquire it without payment from those irrational enough to invest in its creation. As a result, the investment in new discoveries will always be suboptimal, i.e. below the level which would be repaid by returns on improvements in production or utility gained through market.. On the other hand, if information once acquired through original discovery is effectively kept secret, i.e. not sold, the returns to scale for the owners might provide so great a competitive advantage, that inventors would duplicate one another's efforts and there would be over-investment in research and development. Thus, in a competitive economy investment in the original acquisition of information like inventions will always be suboptimal. Moreover, as the costs of copying information fall, the costs of new discovery

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rise, and the difficulty of enforcing secrecy rise, investment in new discoveries will decline further and further below the optimal. The non-privacy of information is a classical example of market failure. And in our day the photocopier, the reliance on unencrypted electronic information storage, the powers of reverse engineering, would make the degree of market failure catastrophic.

But this problem of market failure was long ago solved through the institutions of patent and copyright. These devices do not quite ensure an optimum level of investment in information, because they allow for economies of scale. But they enable markets more nearly to approach it. A patent in part solves both the potential underinvestment and overinvestment problems: On the one hand, it solves the underinvestment problem by giving the first owner of the information an enforceable right to charge for each “copy”, and on the other hand it solves the overinvestment problem by requiring the owner to make the information public, so that all who might be able to use to can learn of its existence and purchase “copies”. Thought patents and copyrights were hardly the result of an explicit social contract, rational agents faced with the general problem presented by the socially non-optimal provision of new information would endorse a system of rules that make information more like non-abstract property, over which privacy can be better retained.

Consider the economic problem of positional information; unpatentable information a firm may have about its own state and plans, which could be of great value to its competitors, for example company-secrets like financial position, merger and acquisition strategies, and other economically valuable information about a company. Given imperfect patent laws, or imperfect enforcement, an original owner of information may wish to retain it as a trade secret, forgoing the returns from sale in

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order to reap greater rewards from exclusive use, if exclusivity can be enforced. A trade secret could be positional information as well.

Suppose as rational agents contracting a legal environment for ourselves we are faced with the choice between establishing an environment in which such information can be kept enforceably secret and one in which all such positional information is fair game to commercial “espionage”. Roughly we are in the situation of card players contemplating whether to have a rule that players may surreptitiously look at one another’s cards or not. We can allow it, but then we will be playing a quite different game from cards. The game may be interesting and diverting, but it will no longer be a test of say our knowledge of probability theory, human psychology and facial gestures; it will be a test of all these and our powers of surreptitious observation as well. Since our objective is a game of skill at cards and not surreptitiousness, we choose to prohibit looking at one another’s cards. A game in which looking at other players’ cards is permitted is not a morally inferior game to one in which it is forbidden. Its just less fun.

Similarly, rational agents could contract to an economy in which there are no restraints on the acquisition and use of positional information, but the result will be suboptimal for most of us most of the time. Without enforceable privacy of positional information the price signals can be employed to deceive others about one’s knowledge of their private affairs and one’s willingness to trade. If most players know this then market-pricing as a device for efficiently exchanging commodities will be threatened. For a graphic example consider what happens in an auction when the buyers learns the seller’s real reserve price (as opposed to the one sometimes quoted in the catalog) or the sellers know the buyers’ maximal

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price or both. If both parties know this is likely, the auction may collapse. Indeed, a non-perfectly competitive market (i.e. any real market) may grind to a halt altogether leaving everyone worse off, including those who seek and secure positional information.

As with card-games, the alternatives between privacy and no privacy are not been one dispensation which is morally superior and one which is morally inferior, but between alternatives under which we are more likely to be better or worse off. As with patents and copyrights, the abstract problems described were long ago solved in principle in the legal theory of contracts. As technology makes information acquisition, duplication, and transmission more and more inexpensive, ways are sought to adapt these principles of contract to preserve rights to retain information or to recover the gains from trade in information.

The important point about patents, copyrights, and positional information, is that regulations that govern information reflect the nature of information as an unusual commodity, as well as the costs and benefits that accrue among agents in a market from various regimes for the control of it. Moral or normative considerations do not seem to enter in to the matter.

Now compare information about me whose value is not measured in dollars but rather in units of utility because if someone acquires it I will suffer pain owing to the sheer embarrassment the other's knowledge produces in me or because the other will use the information to my disadvantage otherwise. Suppose there is little or no information about me that is embarrassing or useful against me or that the cost of effectively protecting this information is low and the cost of securing it is high. Then no one will need a very strong privacy right. This situation characterizes most pre-western societies of the past and

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present. Social groups in which there is extreme equality both of resources and power, and high homogeneity of tastes, preferences, mores, will not trouble themselves to establish rights to privacy (though they will honor privacy mores shaped by evolutionary adaptation). For information about members will not have any value in extracting advantage from them. But as inequalities and differences among people arise, opportunities for exploiting such information for material and non-material reward rise. Because of its unusual character so different from other commodities, information about people, especially information they do not want others to have, is “versatile” and effective enough a tool to enable its user to extract almost anything from the information’s subject while retaining a high degree of anonymity (no finger prints, no DNA traces on copies). Thus, information can be effectively employed to acquire almost anything protected by property- and self-ownership rights. If at the same time technological change makes the cost of securing it fall and the cost of protecting it rise, the search for ways of controlling the use of such information intensifies. But the best and most effective way to control use of information, without interfering with the conduct of others, is to prevent it ever coming into their hands. Whence the establishment of a right to privacy, and its strengthening and entrenchment as the cost of information falls and its value rises.

In a sense Brandeis recognized this instrumental role of the right to privacy. Although he is widely credited with the view that the right to privacy is the right to be let alone, in fact, his argument for the latter right rests on its instrumental role in securing the former. Writing of “the makers of our constitution” Brandeis held, “They conferred, as against the government, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every

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unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the fourth amendment.<sup>22</sup>

The upshot of this discussion is that whether rational agents seek to establish privacy rights will depend on cost/benefit calculations that change over time. It will be no surprise if privacy rights are highly variable between cultures and levels of technology as these effect the value, storage, costs and control of information..

#### 5. Credit and Genetic Testing, Efficiency v Equality

Yet all these economic considerations seem to come up against a major piece of irrationality about privacy, so large a bit of irrationality as to undermine this whole approach, or at least suggest it misses something important about privacy.

In the system of health insurance in force in the United States, individuals secure coverage through their employers or through insurance companies. In most cases, health insurance rates are determined by the cost of providing care to large groups brought together for reasons which haven't nothing to do with their actual health. When the group is large enough this practice of "experience rating" ensures that aggregate health care costs are predictable to the insurer and on average affordable to the participant. Experience rating of such groups provides no incentive to insurance companies to secure information about individuals.

Until the advent of the computer, information about people's medical conditions was lodged in files to which it was difficult to gain access. Once this information was put on networks, in order to for example facilitate the detection of dangerous prescription drug interactions, it became literally a matter

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of a bit of clever computer hacking to gain access to almost anyone's medical records. Additionally, an important change in the nature of medical information has arisen with genetic testing. Such testing enables individuals to learn relatively early in life the likelihood of late on-set genetically based diseases. Since the late '80's literally a score or more of such diagnostic tests have become available. Within a decade the number will have expanded many fold. Because most people in the United States who are likely to take advantage of such testing are provided with health insurance by their employers, or by insurance companies, it is widely recognized these corporations have a strong incentive to acquire aggregate information about the long-term health risks of these persons in order to minimize their business risks. More important, the availability of more predictively useful information about each individual newly seeking participation in an "experience rated" group, together with the annual order of magnitude declines in the costs of storing, and using it, is expected by many observers to give health insurance providers overwhelming incentives to move to a system now in force in life insurance, for example, that provides insurance only on the basis of individual actuarial risk, as opposed to group risk. As individuals begin to seek long-term disability insurance, such individualized risk-assessment strategies become not just attractive, but business necessities for commercial insurance companies.<sup>23</sup>

The result has been a growing concern that such information about the results of genetic testing will come into the hands of the insurance companies, and effect shifts in their insurance practices away from group to individual risk-rating . Thus there has emerged a demand on the part of insurance clients that their privacy be protected against disclosure of the findings of genetic tests. It should be borne in mind that this relatively recent increase in demands for privacy and its more stringent enforcement is the

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result of changes in degree of certain conditions which have long obtained. Insurance companies have always sought confidential health information about prospective life insurees, medical records have sometimes been accessible to unauthorized inspection, and people have been able to some extent to predict their own health risks. Hitherto, the availability of reliable information about long term health risk was low, the cost to insurance companies to avoid adverse selection by acquiring information was high, and feasible treatments were non-existent or inexpensive and so of low cost to insuring companies. In recent years the cost to insurance companies of securing this information about people has gone down, the cost to insurees of the undesired dissemination of this information have gone up, and the risk to insurance companies of failing to secure this information has increased. All these trends will accelerate over the next few decades. The result is that the companies will increasingly want the information, while the potential insurees will want to hide the information. Let us consider the consequences of wide dissemination and of strict privacy for each party, and how rationally they should respond to these alternatives.

Assume that the privacy of medical records can be and is strictly enforced. The result will be ever increasing “adverse selection”—people who know they are at risk will insure more heavily, people who know they are not at risk will reduce their insurance coverage. In the long run, as diagnostic tools increase in number and become more accurate, large sections of the hitherto insured population can acquire information about their genetic disposition to health risks, and seek to tailor their insurance expenditure to these risks. As a result the insurance companies will eventually be forced to curtail and eventually withdraw health insurance protections because the costs of treatment will grow rapidly, the

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base of customers may decline, and the size of the premium required to make an acceptable return may rise beyond the ability of enough people to pay. The result will be withdrawal of private insurance companies from health care insurance and a much stronger and more univocal demand for public health insurance. Problems of adverse selection will decline--everyone will have health insurance, while problems of moral hazard--irresponsible behavior incentivized by the safety-net of insurance--will increase. But notice that substitution of universal public health care for private health insurance may reduce the quality of everyone's health care--witness the quality of medicine in the United Kingdom. Finally, those persons who are more risk-averse than others, or otherwise are prepared to pay for a higher than minimal provision of health care by purchasing supplementary insurance, will be unable to do so, because there will be no supply of such insurance products under the privacy-conditions assumed. In this scenario strictly and effectively enforced privacy rights will make most people worse off--insurers and their employees, persons of average means and average health, all those who now provide themselves with private health insurance, and those with above average aversion to health risks. Those who will be advantaged in this scenario will include persons susceptible to late onset genetic disorders that can be detected, and those not now insured by private insurance who will secure public health care.

Let us compare the likely outcome without strict privacy injunctions. If insurance companies have the right to secure information about late-onset early diagnoses, they will craft health insurance prices to reflect risks, and individuals will have strong incentives to minimize risks, by taking precautions and avoiding conditions that will further increase risks, as well as to undertake preventative treatments. Insurance companies will be in a position to offer people incentives by special pricing--on the model of

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“good driver” car insurance rates--to minimize risk. But if testing for a wide variety of late on-set genetic disorders becomes widely available many persons may turn out to be privately uninsurable through no fault of their own. The companies will withdraw their health insurance products and the result will be greatly increased demands for public health insurance. However in an environment of widely available information about all or most individuals susceptibility to late onset genetic disorders both the provision and enforcement of steps to minimize health risk will be easier to effect. In exchange for free health insurance the government could require insures to take steps to minimize risk, and avoid environmental factors which together with gene defects produce these late on-set disorders. For example, those with genetic susceptibility to lung cancer might be required to avoid cigarette smoking in exchange of public health insurance. The result of this enforcement regime would be to the advantage of the recipients and those who pay for such a system of free health insurance--i.e. everyone. As a side-benefit, general disclosure of information about genetic traits in the population and their correlation with various disease syndromes will provide a powerful data base for medical research that could produce a wide variety of improvements in treatment and enhanced longevity.

If agents are rational problems of adverse selection will disappear and problems of moral hazard will be minimized. There may even emerge a market for private supplementary health insurance for those especially risk-averse or wishing to devote larger portions of their resources to health care.

If anything like these alternative scenarios are accurate then the privacy of medical records does not seem to be a right worth having. Agents in possession of these facts bargaining to a social contract may well forego privacy rights of the sort in question. At a minimum this would suggest that privacy at

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least of medical records is not an intrinsic moral value, indeed in a society like ours it may come to be a harmful irrationality.

And yet the trend in demands for privacy of genetic testing information does not appear to be moving in this direction. Rather, demands for such protections are growing. This may be owing to widespread irrationality, or the failure thus far to foresee the near-term future, or it may be that my analysis has failed to take into account some important additional factor. Or it may be that privacy is not to be understood exclusively on the model of a prudential property right.

Compare another area in which the demand for privacy is quite different: credit reporting. Credit reporting agencies solicit, collect, store and disseminate credit records on consumers, and sell these records to any authorized business entity prepared to pay their price: most obviously potential lenders, employers, dwelling providers, and insurance companies. As with medical records, the cost of maintaining such records and transmitting them has decreased, while the range of reports, the rate of updating, and the level of accuracy has increased over time. By and large the only regulatory demands which credit reporting companies have had to honor are ones which ensure accuracy and give subjects the opportunity to correct, and comment on, but not keep private or otherwise control credit records. They do not need our permission to solicit, record, and store financial, other personal and sometimes even medical information about us. And the only way we can prevent release of this information is by declining to deal with the agencies that seek it before offering us loans, employment, insurance, housing, etc. It is clear that the advantage that each of us gains from giving credit reporting companies the right to solicit, record, store and sell such records is cheaper access to and more available credit for every one,

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and the cost is the availability of our records to an employer, insurer, lender, or landlord willing to pay for the information about our credit records, credit worthiness, insurability and purchasing patterns.

Why is privacy less of an issue here? Why do consumers not prohibit creditors, banks, and others from reporting on their credit histories to these credit reporting agencies, when presumably they would prohibit the central collection of their medical histories? Why is information about our credit permissibly transmitted to current and potential employers, landlords, and insurance companies, for example, when information about our medical history is not permissibly so transmitted to the same agencies. The answer is obvious: were the same strictures that surround medical records to be enforced about credit-worthiness, the cost of loans, and the risks facing employers, landlords, insurers and others would greatly increase. In the extreme, the market for loans would rapidly disappear; interest rates required to compensate lenders for risk resulting from their ignorance of credit-worthiness would become too high for borrowers to bear. The result would be the abolition of credit to the disadvantage of all. And yet it is doubtful that most persons accept the non-privacy of credit reporting on this basis.

People do not think about these issues the way economists do, or the way economists assume people do. Rather, one reason they may accept non-privacy here because people accept that except for misfortunes we have earned credit history and credit worthiness by our own choices, decisions, actions, etc. We deserve the credit rating we have secured (assuming it is accurate).

By contrast, we have not earned our “genetic load”, the burden of deleterious hereditary dispositions with which we were born. In addition to not earning our genetic load, we did not earn and do not deserve the standards of decorum and taste or the public/private distinctions of the societies into

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which we were born and socialized. We cannot help it if we are embarrassed by some things which members of other cultures do not find embarrassing. This suggests that among those attributes knowledge of which can be employed by others to our disadvantage, those which are unearned and undeserved are the ones we are more likely to crave privacy for, or at any rate to find suitable to protect from others by invoking a right to privacy.

It is here that moral values may finally enter the story. Along with a desire for privacy and for according privacy to others, there is good reason think Homo sapiens evolved with a predisposition to fairness in division of resources, a predisposition that translates into equality of opportunity to pursue our interests.<sup>24</sup> And whatever equality of opportunity comes to, it requires at least that individuals not be disadvantaged by unearned burdens imposed upon them. Some traits are uncontroversially burdens for which society should equalize; others are more controversial. Thus much greater debate rages about affirmative action policies than about the Americans with Disabilities Act. Those traits of ours and facts about us that we seek privacy for are like disabilities which the polity tries to compensate for in order to insure some level of equality of opportunity; they are unearned obstacles to equality of opportunity: unearned because we have no choice in our nature or our nurture--our genes or our socialization; obstacles to equality of opportunity because they provide others with information useful to control access to opportunities. The cheapest way to avoid the threat to unfairness information about unearned differences poses is by privatizing the information.

So, though privacy is a matter of taste or prudence, it becomes an institution of indirect, instrumental normative force because, given human behavior as it is (and not as it ought to be) ensuring

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privacy of information is the most efficient means to attaining outcomes prized for their intrinsic moral value—“being let alone” in Justice Brandeis’ words, or equality of opportunity as spelled out in the fourteenth amendment perhaps. On this understanding at least privacy might even provide some basis--albeit indirect--for some of the uses to which it has been put in American constitutional law. For example, in Roe v. Wade, the U.S. Supreme Court’s majority opinion cast about for a constitutionally entrenched “right of personal privacy or zones of privacy”:

In varying contexts the Court or individual justices have indeed found the root of that right in the First Amendment,... in the Fourth and Fifth Amendments, ...in the penumbras of the Bill of Rights, ...in the Ninth Amendment, ... or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment...

This right of privacy, whether it be found in the Fourteenth Amendment’s concept of personal liberty and restrictions on state actions, ... or ... in the Ninth Amendment’s reservations of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.<sup>25</sup>

Much of the legal controversy surrounding Roe v. Wade reflects the tortuous character of the Court’s alleged discovery of a right to privacy as implicit in a body of law in which the word ‘privacy’ does not figure. But if the right to privacy about information has the prudential character which this paper accords it, in virtue of the nature of information and the special potential for information’s misuse (by contrast to other commodities) in the violation of rights that can be found in the U.S. constitution, then there may be a firmer and less controversial foundation for it: securing rights that are not merely prudential.<sup>26</sup>

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Notes

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  2. C. Fried, "Privacy" in Schoeman, op cit., p. 205.
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  4. Ibid., p. 295.
  5. F. Shoeman, "Privacy and Intimate Information", in Schoeman, op. Cit., p. 404.
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  10. Brian Skyrms, Evolution of The Social Contract (Cambridge, Cambridge University Press, 1996), chapter four, especially pp. 76-79.
  11. See A. Rosenberg, "The Biological Basis of Ethics: A Best Case Scenario", Social Policy and  
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12.J.J.Thomson, “The Right to Privacy”, Philosophy and Public Affairs, 4 (1975); 295-314, reprinted in Shoeman, op. cit., pp. 272-289. Page references are to the reprinting.

13. Ibid., p. 272.

14. Ibid., pp. 286-287.

15. Ibid., p. 280.

16. Ibid., p. 278.

17. Ibid., p. 282.

18. Ibid., p. 285-286.

19. Ibid, p. 287.

20. Ibid., p. 282.

21. J.J.Thomson, “A Defense of Abortion” Philosophy and Public Affairs, 1 (1971), pp. 47-66.

22.. Louis B. Brandeis, dissent in Olmstead v. U.S., U.S. 438, 478 (1928). Thus, the criticism advanced by W.A. Parent, for instance, that Brandeis unwarrantably assimilated privacy to the more general right to be let alone seems mistaken. Brandeis rightly saw that a privacy protection was the most effective way of ensuring “the most comprehensive of rights.” See W.A. Parent, “Privacy, Morality, and the Law”, Philosophy and Public Affairs, 12 (1983), p. 271.

23. See for example, Larry Gostin, “Genetic Discrimination: The Use of Genetically Based Diagnostic and Prognostic Tests by Employers and Insurers”, American Journal of Law and Medicine, 109

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24. See Skyrms, Evolution of the Social Contract, op. cit., note 10, chapter 1.

25. Roe v. Wade, 410 U.S. 113 (1973), reprinted in Contemporary Issues in Bioethics, Fourth Edition, eds., T. Beauchamp, L. Walters (Belmont, Ca., Wadsworth, 1994), p. 313.

26. For extensive comments and criticism of previous drafts I owe thanks to Clark Wolfe, Roberta Berry, Cristin Shrader-Frechette, Judith Jarvis Thomson and Ellen Frankel Paul.