



**BEYOND REDUCTIONISM:  
RECONSIDERING THE RIGHT TO  
PRIVACY**

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#### INTRODUCTION

In the last few years the American public has been concerned about numerous disclosures of personal information – both inadvertent and government-ordered – by cellular phone companies, web sites and Internet service providers. Some Americans are worried that a new X-ray scanning machine – which can produce detailed images of the naked body of the clothed passenger who stands before it – may be used for routine screenings of airline passengers.<sup>1</sup> Such controversies are just the latest evidence that many Americans are not satisfied with the legal protection afforded their privacy. While some scholars might see such cases as opportunities to enact still more privacy legislation, perhaps it is time to reconsider the right to privacy as such. The notion of privacy as a right is, after all, of recent vintage. First proposed by Samuel Warren and Louis Brandeis in an 1890 law review article,<sup>2</sup> it did not enjoy legal recognition until 1905.<sup>3</sup> And since then, the protection it offered has been limited in scope: its implementation involves a balancing test in which the judge balances the individual’s interest in privacy against whatever “public interest” is said to oppose it.<sup>4</sup> A thoughtful person contemplating this test might wonder whether Americans enjoy privacy not by right, but by permission; and he might then wonder whether there is any viable alternative.

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<sup>1</sup> Paul Giblin & Eric Lipton, *Free Flow: X-ray vision comes to 3 American airports*, INTERNATIONAL HERALD TRIBUNE, Feb. 28, 2007, <http://www.iht.com/articles/2007/02/28/business/transcol01.php> (last visited Feb. 20, 2008).

<sup>2</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>3</sup> See *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

<sup>4</sup> *United States v. Katz*, 389 U.S. 347, 360-61 (1967) (Harlan, J. concurring).

Since the time of the original debate about privacy there have been “reductionists” who argue that there should not be a distinct legal right to privacy, i.e., that the right to privacy derives from other rights – the rights to property, to liberty, or over one’s person – and is therefore superfluous. During the original debate itself, reductionist legal practitioners and scholars held, with respect to the cases then at issue, either that the existing law of property and contract could provide legal recourse or that no legal right of the plaintiffs had been violated.<sup>5</sup> The arguments were not always sophisticated and were sometimes marked by prejudices commonly held during that era.<sup>6</sup> So, while they may have been effective in countering the poorly argued Warren and Brandeis article, they were unable to overcome the appeal of Justice Cobb’s *Pavesich* opinion.<sup>7</sup> Cobb appealed to fundamental ideas of political philosophy in order to ground a legal right by which Paolo Pavesich was entitled to recovery.<sup>8</sup> *Pavesich*’s lesson for contemporary reductionists, then, is twofold. First, any tenable reductionist view must appeal to fundamental rights. (In fact a contemporary reductionist would probably have to do better than Cobb, as one can no longer assume, as America’s Founding Fathers did, that man’s inalienable individual rights are “self-evident.”) Second, the *Pavesich* opinion itself offers resources to which reductionists might appeal, and could even be interpreted as consistent with their view.

Cognizant of *Pavesich*’s lesson, one could examine the reductionist arguments appearing in the legal and philosophical literature of recent decades and try to identify the fundamental ideas

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<sup>5</sup> See Amy Peikoff, *No Corn on this Cobb: Why Reductionists Should be All Ears for Pavesich*, 42 BRANDEIS L.J. 751, 774-83 (2004).

<sup>6</sup> *Id.* at 776-77 (examining Chief Judge Parker’s statement that no woman should be offended if “a good portrait of her” was widely disseminated (quoting *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902))). Later, in response to a critique of the opinion, Judge O’Brien wrote that the suggestion that a woman might have a property right in her appearance was “too coarse and material a suggestion to apply to one of the noblest and most attractive gifts that Providence has bestowed upon the human race.” Denis O’Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437, 439 (1902)

<sup>7</sup> *Pavesich*, 50 S.E. at 68.

<sup>8</sup> See Peikoff, *supra* note 5, at 785-89.

behind these arguments. Upon doing so he would find that two contemporary reductionists, William Prosser and Judith Jarvis Thomson, essentially took such ideas for granted, either in the name of "Consensus Thought"<sup>9</sup> or in the name of accepted standards for articles in analytic philosophy,<sup>10</sup> respectively. However, even if readers share these reductionists' basic premises, these premises should be defended philosophically. This is particularly crucial when it is necessary to defend reductionism against some of its critics - those who appeal to core ideas inherent in our country's founding<sup>11</sup> or to the tremendous value of privacy for human life.<sup>12</sup> To answer such critics, a reductionist will have to do better than, e.g., asserting that the existing privacy case law can be neatly categorized in a way that is palatable to the more traditionally minded members of the legal profession,<sup>13</sup> or, e.g., that most people are inclined to explain the wrongness of privacy cases in a certain way.<sup>14</sup> A reductionist will need to explain why property and liberty are fundamental, and why privacy is not.

One contemporary reductionist, Richard A. Posner,<sup>15</sup> rests his view of privacy on a utilitarian foundation. His critics - even those who may agree with his conclusions about privacy - question this foundation. As one critic points out, Posner's theory contradicts the theory of inalienable individual rights that forms the essential basis of our country's founding documents.<sup>16</sup> Thus, a philosophical justification of individual rights would per se call into question Posner's economic theory of privacy. Such a justification would also

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<sup>9</sup> William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

<sup>10</sup> Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295 (1975).

<sup>11</sup> See Edward Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964).

<sup>12</sup> See James Rachels, *Why Privacy is Important*, 4 PHIL. & PUB. AFF. 323 (1975); Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26 (1976).

<sup>13</sup> Prosser, *supra* note 9.

<sup>14</sup> Thomson, *supra* note 10.

<sup>15</sup> Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978).

<sup>16</sup> Richard A. Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455 (1978).

challenge one of Thomson's critics, Thomas Scanlon,<sup>17</sup> for whom rights are not inalienable moral principles, but rather human conventions that may be set aside if doing so would better serve the public interest.

The purpose of this article is to show how just such a theory of individual rights, Ayn Rand's Objectivist political theory, applies to the issue of privacy. I believe that, had Rand considered the issue, she would have gone beyond reductionism, and would have rejected the idea of a legal right to privacy altogether. I will argue that Rand's theory implies not only that we should recognize that legal protection for privacy is grounded on the rights to liberty, property and contract, but also that we should reject the idea of privacy as a legal concept – even a “derivative” legal concept. Rand's perspective shows us that, ironically, abolishing the right to privacy will afford Americans better protection for privacy than they currently enjoy.

The first part of this article briefly sketches Rand's theory of individual rights. I will then explain why her view entails the fundamentality of rights to liberty and property, particularly in contrast to a proposed right to privacy. Finally, I will show why a legal system that implements Rand's political theory would necessarily reject the idea of privacy as a distinct legal concept, even though privacy is, in various contexts, a great and legitimate value.

### I. A SKETCH OF RAND'S VALIDATION OF INDIVIDUAL RIGHTS

Rand presented her theory of individual rights in her essay, “Man's Rights.”<sup>18</sup> Other writers have presented arguments for her view, at various levels of detail.<sup>19</sup> It is important to note that Rand argues for individual rights in the context of a total philosophic sys-

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<sup>17</sup> Thomas Scanlon, *Thomson on Privacy*, 4 PHIL. & PUB. AFF. 315 (1975).

<sup>18</sup> Ayn Rand, *Man's Rights*, in AYN RAND, *THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM*, 108 (1964).

<sup>19</sup> For a presentation of Rand's complete philosophy, organized according to its logical hierarchy, see LEONARD PEIKOFF, *OBJECTIVISM: THE PHILOSOPHY OF AYN RAND* (1991). A presentation focusing on Rand's validation for her theory of individual rights can be found in TARA SMITH, *MORAL RIGHTS AND POLITICAL FREEDOM* (1995).

tem, and here I will be able only to indicate some of the fundamental points on which she relies. A full defense of her view would require a much longer presentation. However, the interested reader may pursue the sources referenced herein.

Rand's general approach to the issue of rights is much like that presented by the Founding Fathers. She holds that man's fundamental right is his right to his own life and that its corollary rights are liberty, property, and the pursuit of happiness. An important difference between Rand and the Founding Fathers is that she is writing almost two hundred years later, at a time in which individual rights have come under attack by intellectuals and politicians across the ideological spectrum. Thus, while it would never be correct to declare that rights are "self-evident," the need for a full philosophical defense of rights is more apparent in Rand's time. Rand holds that to defend the abstract concept of rights, one must show the step-by-step reasoning by which one can reach the concept, starting with premises that are truly self-evident – i.e., premises graspable via direct perception.<sup>20</sup>

Rand's starting point here, as it is in ethics, is to ask why, or under what conditions, the concept at issue (here, the concept of rights) is necessary. The concept of rights, she says, is necessary only when man chooses to live in organized society; it would not be necessary, for example, in the case of one or a few individuals who coexist without government on a desert island. Rights are, however, essential principles of a proper government because they protect each man's ability to live morally, according to his nature, in society with others. Rand writes:

'Rights' are a moral concept – the concept that provides a logical transition from the principles guiding an individual's actions to the principles guiding his relationship with

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<sup>20</sup> Whether one can construct such an argument is a subject of much controversy. For Rand's argument that one can, see AYN RAND, INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY (2d ed. 1990); Rand's view on this issue is also presented in chapters 1-3 of Leonard Peikoff's book on her philosophy, PEIKOFF, *supra* note 19, 1-186.

others – the concept that preserves and protects individual morality in a social context – the link between the moral code of a man and the legal code of a society, between ethics and politics. Individual rights are the means of subordinating society to moral law.<sup>21</sup>

This passage indicates why the concept of rights is logically dependent on a total philosophic system. If the purpose of rights is to allow men to live morally in society, then rights' content will follow from the conditions necessary for an individual to lead a moral life, which in turn will depend on a particular view of ethics. But the logical dependence of rights on fundamental philosophy does not stop there. Rand's ethics depends on her view of the nature of man, including her view that human reason is a valid means of knowledge – in fact she thinks it is man's only means of knowledge. This view of man in turn entails a whole theory of the nature of reason (and concepts), i.e., of epistemology. Moreover, Rand's ideas in epistemology ultimately depend on her view of metaphysics: She holds that there exists only one reality – i.e., there is no supernatural dimension – and that everything that exists is something in particular (Law of Identity) and can act only according to its nature (Law of Causality). Thus, while my discussion here will largely focus on key ideas in Rand's ethics, the reader should be aware that Rand's validation of rights depends also on her epistemology and metaphysics.

Rand holds that man has rights because it is proper and obligatory for him to live according to his own rational self-interest. To justify this view, she starts by noting the fact that man is a living entity, that he faces the basic alternative of life and death. On this basis she argues that a man's own life should be his ultimate purpose because it is the only thing that is, for him, an end in itself. The choice to live is, she notes, the precondition of all values.<sup>22</sup> Further, if a man chooses to live, he must choose to live qua man. This

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<sup>21</sup> Rand, *supra* note 18, at 108.

<sup>22</sup> Ayn Rand, *The Objectivist Ethics*, in RAND, *supra* note 18, at 16-18.

means not only that he must engage in self-sustaining, self-generated action, as all living things must, but also that he must engage in certain special types of such action. Rand believes that men are unique among living beings in that they survive primarily by reason, by using their minds to alter their environments in life-sustaining ways (e.g., cultivating land, building shelters, devising methods of transportation). Thus, she thinks, men may choose to try to live like animals (via sense perception vs. abstract thought) or like plants (by remaining rooted to one spot), but they will not survive long by such methods.<sup>23</sup> Rather, they will survive only to the extent that *someone* uses his mind to engage in productive activity. Thus, if an individual wants to ensure his own long-range existence, he should engage in such life-sustaining activities; otherwise he will be reduced to depending on others to do this for him. Rand does not regard this course as either moral or practical.<sup>24</sup>

The primary virtue, then, according to Rand, is the virtue of rationality, which says that one should achieve his self-interest by means of a full exercise of his rational faculty – as his only guide to knowledge and values. He must perceive reality and act in accordance with reality – i.e., rationally – in order to achieve the values necessary to sustain his life. Ethics is therefore just as necessary for a man living on a desert island as it is for a man living in the middle of Manhattan: both belong to a certain species of living entities who face the fundamental alternative of life and death and must, if they choose to live, act accordingly. The man living in Manhattan has the potential to be much better off, because rather than creating all the values he needs himself, he can specialize in creating one type of human value, and then trade to acquire the rest of what he needs and wants.<sup>25</sup> However, this potential exists only if others leave him free to use his mind, engage in productive activity, and keep the

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<sup>23</sup> *Id.* at 19-21.

<sup>24</sup> *Id.* at 25.

<sup>25</sup> Thinkers as far back as Plato thought it important to try and preserve the benefits of this advantage. See PLATO, THE REPUBLIC 45-47 (Allan Bloom trans., 1968).



products of his labor, so that he may trade them in a way that benefits him.

The basic social principle of the Objectivist ethics is that just as life is an end in itself, so every living human being is an end in himself, not the means to the ends or the welfare of others – and, therefore, that man must live for his own sake, neither sacrificing himself to others nor sacrificing others to himself.<sup>26</sup>

This is where the concept of rights comes in. In order for men to live in a society in which no one is made to sacrifice for another, in which men are free to achieve and use the fruits of their productive labor so as to further their own lives, the concept of rights must be the society's organizing principle.

Now that we have discussed that which, according to Rand, gives rise to the need for individual rights, we are ready for her crucial passage defining and explicating this principle:

A 'right' is a moral principle defining and sanctioning a man's freedom of action in a social context. There is only one fundamental right (all the others are its consequences or corollaries): a man's right to his own life. Life is a process of self-sustaining and self-generated action; the right to life means the right to engage in self-sustaining and self-generated action – which means: the freedom to take all the actions required by the nature of a rational being for the support, the furtherance, the fulfillment and the enjoyment of his own life. (Such is the meaning of the right to life, liberty and the pursuit of happiness.)<sup>27</sup>

Note that Rand says the only fundamental right is the right to life. Only if a right can be shown to be a corollary of the right to life –

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<sup>26</sup> Ayn Rand, *The Objectivist Ethics*, in RAND, *supra* note 18, at 13, 30.

<sup>27</sup> Rand, *supra* note 18, at 110.

where “corollary” means, “a self-evident implication of already established knowledge”<sup>28</sup> – can it be deemed fundamental. In her presentation of rights, Rand discusses two such corollaries.

The first corollary follows from Rand’s view that all rights are rights to action, to one’s own action and its results, not to the actions or products of others. Accordingly, the right to life is not the right to be kept alive, but rather the right to engage in self-sustaining actions. This entails the ability of each person to act on his own rational judgment, free from any obligation to follow the dictates of others. In other words, it entails the right to liberty. Thus the right to liberty is the first corollary of the right to life.

The second corollary is the right to property. In accordance with her view of all rights as rights to action, Rand does not mean the right to be given some property, but rather the right to act in ways that will result either in the production of a valuable material object, or in wealth that will enable the producer to acquire such an object by means of voluntary trade. In addition, and perhaps most importantly, the right to property includes the right to keep those things that one has produced or acquired in these ways. For living beings with bodies, who exist by altering their environments and producing material values, the right to property is not, as some might see it, a “base,” “materialistic” concept to be scorned or, perhaps, begrudgingly tolerated in the name of the common good. Rather, it is, like the right to liberty, a corollary of the right to life. Rand writes:

The right to life is the source of all rights – and the right to property is their only implementation. Without property rights, no other rights are possible. Since man has to sustain his life by his own effort, the man who has no right to the product of his own effort has no means to sustain his life. The man who produces while others dispose of his product, is a slave.<sup>29</sup>

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<sup>28</sup> PEIKOFF, *supra* note 19, at 15.

<sup>29</sup> Rand, *supra* note 18, at 110.

For Rand, the rights to liberty and property are corollaries of the right to life because they are self-evident, once one considers the right to life in the context of the knowledge we have about the nature of man and the types of actions required for his survival on earth.

The key points in Rand's validation of rights fall out nicely from the above discussion. The first is the observation that rights protect the conditions required for man to engage in his distinctive form of self-sustaining activity. The second key point is the evaluation that it is proper and morally necessary for man, as a rational living being, to engage in such activity.

Rights are conditions of existence required by man's nature for his proper survival. If man is to live on earth, it is right for him to use his mind, it is right to act on his own free judgment, it is right to work for his values and to keep the product of his work. If life on earth is his purpose, he has a right to live as a rational being: nature forbids him the irrational.<sup>30</sup>

It is in this passage that Rand makes the transition from the phrase "is right," i.e., is good, is acting properly, etc., to "has a right." Rand would say someone "has a right" to act in ways that are necessary if one is to do right actions. Similarly, one can "have a right" to do X only if it would be right to leave him free to do X.

Note that I did not say "only if it would be right for him to do X," because Rand's view is not paternalistic: She thinks people have a right to do things that it may not be right for them to do. Nonetheless the purpose of rights, says Rand, is to allow people to act morally and thereby to sustain their lives. For Rand, all ethical actions are performed at the direction of one's rational faculty, which means: by choice. Thus, for Rand, in order to have the right

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<sup>30</sup> *Id.* at 111.

to do right, one must be left the option to do wrong, so long as doing wrong does not interfere with others' rights.

How does one interfere with others' rights? Rand writes:

The rights of man . . . can be violated by one means only: by the initiation of physical force (including its indirect forms, such as fraud).<sup>31</sup> One cannot expropriate a man's values, or prevent him from pursuing values, or enslave him in any manner at all, except by the use of physical force. Whoever refrains from such initiation – whatever his virtues or vices, knowledge or errors – necessarily leaves the rights of others unbreached.<sup>32</sup>

Rand's identification is arguably implicit in the conception of rights passed down from the Founding Fathers and held by many Americans today. It is this identification that, I believe, is lurking behind Thomson's distinction between actions that violate rights and actions that are merely "not nice."<sup>33</sup> What distinguishes Rand is her defense of reason as man's only means of knowledge, her explanation of that faculty's crucial role in sustaining human life, and her observation that this process is stopped by the initiation of physical force.

On the basis of the above, Rand holds that the only proper purpose of government is to perform those functions necessary to protect individual rights. This means: All actions of government and all laws enacted must address only those wrongs that constitute an initiation of physical force. Moreover, says Rand, government cannot properly initiate force; it can only retaliate against those who initiate its use.<sup>34</sup> This point is crucial because it makes possible a theory of objective law.

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<sup>31</sup> Fraud is a species of indirect force in that it compels one to act against his will, albeit not by physical means.

<sup>32</sup> PEIKOFF, *supra* note 19, at 359.

<sup>33</sup> Thomson, *supra* note 10, at 314.

<sup>34</sup> See Ayn Rand, *The Nature of Government*, in RAND *supra* note 18, 125.

Ayn Rand's discovery that rights can be violated only by the use of physical force . . . is essential to the proper completion of the theory of rights, giving men, for the first time, the means to implement the theory objectively. The violator of rights, in her view, is not to be detected by "intuition," feeling, or vote; his action [the use of physical force] is a tangible fact, available in principle to sense perception.<sup>35</sup>

Therefore, on Rand's view, no law is proper whose application is a matter of personal preference, or majority opinion, or governmental decree; objective laws are those whose application depends on whether or not certain perceivable events have occurred. So, for example, Rand's view is consistent with laws prohibiting robbery, because the events constituting the forceful taking of another's property are available to direct perception.<sup>36</sup> By contrast, the application of a law banning obscenity is not an objective matter, because what is or is not obscene turns on someone's (or some group's) evaluation.<sup>37</sup>

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<sup>35</sup> PEIKOFF, *supra* note 19, at 359.

<sup>36</sup> It is true that, at the time of the robbery, the victim's ownership of the property may not be perceivable. What I am referring to is the physical taking of the property from the victim. Of course the actions leading to the ownership of the property were also, at one time, perceivable.

<sup>37</sup> The Supreme Court stated the test for obscenity in *Miller v. California*, 413 U.S. 15 (1973):

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.* at 24 (citations omitted).

Note that a law banning obscenity would contradict Ayn Rand's theory for another reason: obscenity and its creation often involves no initiation of physical force.

In the next two sections, I will show how the above points from Rand's theory can help one evaluate the proposed right to privacy.

## II. THE RIGHT TO PROPERTY AS FUNDAMENTAL

Rand did not have a view on the right to privacy,<sup>38</sup> so in this section and the next, I explain what I believe are the implica-

<sup>38</sup> The only writing of hers that is directly on point is a brief letter she sent to an attorney named Alan F. Westin in 1964. At the time Westin was a member of the Special Committee on Science and Law for the New York City Bar Association, and he had apparently written to Rand asking about the issue of legal recourse for invasions of privacy. Here is her response:

Dear Mr. Westin:

An issue such as "the invasion of privacy" cannot be discussed without a clear definition of the right to privacy, and this cannot be discussed outside the context of clearly defined and upheld individual rights.

Since individual rights are being evaded, denied, negated and violated by the dominant philosophical theories and political practices of our time, I do not quite know how scientific gadgets can be singled out as the particular offender in the case.

Scientific gadgets or weapons do not put themselves into action; it is men who use them, and men's actions are determined by their philosophical ideas. Therefore, the issue is not what sort of tools science has produced to violate individual rights, but: what sort of philosophy permits men to use these tools.

To answer your specific questions: . . .

2. I do not regard "the pressures of mass society, the mass media, the large organization, and conformity pressures beyond the cold war" as the causes of today's invasion of privacy and destruction of individual rights.

If you are interested in my views on the causes of that destruction, the "specific source" I can recommend for your investigation is my novel, *Atlas Shrugged*.

Letter from Ayn Rand to Alan F. Westin (March 28, 1964), in *LETTERS OF AYN RAND*, 622 (Michael S. Berliner ed., 1997). So Rand does not offer a view as to whether the right to privacy is fundamental or derivative, and seemed not to have considered whether it is proper even to speak in such terms as a "right of privacy." However, she clearly rejects one of the arguments offered in favor of such a right: the idea that new technology is responsible for an increase in the number of invasions of privacy.

tions of her theory of individual rights for a proposed right to privacy. The result will be a theory that one might be tempted to call reductionist because, as we will see, I will argue that privacy – in contrast to property – cannot be a fundamental right and conclude that, for this reason and others, there should be no legal right to privacy.

The first point to make is that, if Rand's theory of rights is true, a reductionist argument is enough to establish the fundamentality of the right to property with respect to a right to privacy. The type of reductionist argument I have in mind is the kind I have made in an earlier article.<sup>39</sup> There I was playing the role of reductionist-devil's-advocate with respect to Warren and Brandeis's examples of cases in which the legal doctrines of property, contract, etc., seem not to offer adequate legal recourse for victims of egregious invasions of privacy. I argued that one could use his property in a variety of ways so as to protect his privacy. For example, when one writes an entry in a diary, he presumably owns the diary in which he writes, and therefore can use the fact that he has the exclusive right to use and dispose of the diary to make sure that no one else reads the entry. He can, if he so chooses, place the diary in a drawer of his desk (which is also his property), which in turn sits in a room of his home (also his property, or property to which he has purchased exclusive access using his money). Another option is for him to lock the diary in a safe-deposit box at his bank, to which he has purchased a right of exclusive access. And so on.

In addition, one may use his property rights to keep others from witnessing intimate happenings in one's life. Take Thomson's example of a domestic dispute between husband and wife. If the two of them wish to keep this event private, they should use their property, e.g., their home, as a means of doing so. They should close the doors and windows, and perhaps shut the blinds. They should keep their voices at a volume low enough so that one would have to enter (or cause some device to enter) their property, and

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<sup>39</sup> Peikoff, *supra* note 5, pp. 760-73.

thereby become a trespasser, in order to hear or see the dispute in progress.

Looking at examples such as these from Rand's perspective one can see that, in her ideal society, the way one would obtain privacy is by means of control over material objects or access to locations – in other words, by means of one's right to property. Recall that, on Rand's view, one may not control or proscribe the actions of others, so long as those actions do not amount to the initiation of physical force. Thus, any law telling others what they might look at or listen to, either while they are on their own property, or on property allowing public access, would, according to Rand, be an improper law. One has the right to earn, through one's own productive effort, the resources necessary to create states of privacy. However, he does not have the right to demand that others "leave him alone" – i.e., refrain from observing him in any way – without his earning a right of exclusive access to some physical location.

If I am right, I have "reduced" the proposed right to privacy and shown it to be an exercise of one's right to property. In Rand's terms, I have shown that, in those cases in which privacy should be protected by law, such protection is a consequence of the right to property. What I have done is illustrate, with respect to the issue of privacy, Rand's point that the right to property is the "only implementation" of rights, that "[w]ithout property rights, no other rights are possible."<sup>40</sup> By this, Rand means that whenever anyone exercises any right of his, he is using property of some kind. Take, for example, the various ways in which one might exercise his freedom of speech. One might need access to paper, a printing press, and ink. Or maybe he needs a microphone and some radio transmission equipment. Perhaps a computer and a contract with an Internet service provider would do the trick. Even if all he wants to do is speak to those within the range of his voice, he needs to have the right to be on a plot of land (from which others can hear him) while doing so. True, the speaker may not necessarily own the

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<sup>40</sup> Rand, *supra* note 18, at 110.



property he uses. But in a purely capitalist society, as envisioned by Rand, all property is privately owned, and thus any would-be speaker is dependent on either his ability to either own or lease property, or on the generosity of others. One's right of free speech is, like one's right to act so as to achieve privacy, a consequence of one's right to property, however much this has been denied by our nation's judges.<sup>41</sup>

In making the above argument, I have already gone one step beyond the type of argument that says, "property rights are more fundamental than the right to privacy because people are inclined to explain the wrongness of invasions of privacy in terms of property rights," which is the type of argument Thomson made in her article.<sup>42</sup> I have, in effect, explained *why* people are justified in explaining the wrongness of invasions of privacy in such terms. However, there is more that can be said on this point if we compare, on the one hand, the relationship between the right to property and the right to life and, on the other, a right to privacy and the right to life.

On Rand's view, recall, man is a being of both mind and body, and one must be able to retain the physical products of his efforts in order for his action to be self-sustaining. This is why she says that man needs a right to property if he is to have a right to life. One cannot say the same thing about a right to privacy, however. Even one who really likes his privacy would nonetheless be capable of performing life-sustaining actions without it. One can readily call to mind an image of a subsistence farmer engaged in the cultivation of his crops. If we decided that once the crops were ready for harvest, the farmer no longer had a legal right to the yield from those crops, he would be unable to sustain his own life. By contrast, that same farmer could make a nice living cultivating his crops even if, by some means, all of his thoughts and actions were known by oth-

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<sup>41</sup> See, e.g., *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Marsh v. Alabama*, 326 U.S. 501 (1946). But see *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

<sup>42</sup> Thomson, *supra* note 10, at 312.

ers, so long as others left him alone physically. In addition to hypothetical examples like this, studies of a number of well-established but primitive societies also support my point.<sup>43</sup> Privacy among people living in close proximity, it seems, is a relatively recent phenomenon, a luxury made possible only with the wealth produced in an industrial society.

It is true that one's quality of life is vastly improved with the availability of privacy, with the ability to retire temporarily from the world and pursue secret goals or merely "let one's hair down." James Rachels's and Jeffrey Reiman's arguments, which I have examined elsewhere, are quite convincing on this point.<sup>44</sup> It is also true that privacy enables the creation of certain values that otherwise would not exist – e.g., complex technological devices whose inventors either required absolute quiet and solitude in order to concentrate, or simply wanted the assurance that no one would observe their research and beat them to market (or the patent office). Nonetheless, a state of privacy does not have the same relation to a man's ability to sustain his life as does his ability to retain control over material objects.

Finally, recall that rights, according to Rand, apply only to those who choose to gain the potential benefits of living in an organized society with others,<sup>45</sup> and consider this point in conjunction with a commonly held definition of privacy: "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."<sup>46</sup> Like his critics,<sup>47</sup> I disagree with Posner's suggestion that we "assign" property rights to information to one per-

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<sup>43</sup> See, e.g., ALAN F. WESTIN, *PRIVACY AND FREEDOM* 11-12 (1966).

<sup>44</sup> Amy L. Peikoff, *The Right to Privacy: Contemporary Reductionists and Their Critics*, 13 VA. J. SOC. POL'Y & L. 474, 502-05 (2006).

<sup>45</sup> See Rand, *supra* note 18.

<sup>46</sup> WESTIN, *supra* note 43, at 7.

<sup>47</sup> See, e.g., Epstein, *supra* note 16; Charles Fried, *Privacy: Economic and Ethics A Comment on Posner*, 12 GA. L. REV. 423 (1978); Edward J. Bloustein, *Privacy is Dear at Any Price: A Response to Professor Posner's Economic Theory*, 12 GA. L. REV. 429, 433 (1978); C. Edwin Baker, *Posner's Privacy Mystery and the Failure of Economic Analysis of the Law*, 12 GA. L. REV. 475 (1978).

son or the other, depending on the economic (utilitarian) factors involved. At the same time, I think Posner is on the right track when he points out that some people might use a right to privacy in order to manipulate others: “[P]eople should not – on economic grounds, in any event – have a right to conceal material facts about themselves.”<sup>48</sup> Posner thinks it may indeed be impractical to impose a duty to disclose such things, but that does not change his view of what would ideally be proper.<sup>49</sup> Others who deal with you in social and business contexts have legitimate reasons to know this information in order to avoid being manipulated.<sup>50</sup>

In a capitalist society the guiding principle is voluntary trade towards mutual advantage. In such a society, then, it seems self-contradictory to declare that one has a *fundamental* right to control what information will be released about him. No, one need not agree with Posner, and always assign the right away from the information’s subject. But at the same time, one who wishes to enter or remain in society and improve his standard of living by trading with others should reasonably expect, in exchange, to give up some control over information about him. He should be prepared to deal with others honestly and forthrightly.

Incidentally, note that, due to the increased productivity made possible by specialization, a man who exchanges a solitary life on a self-sustaining farm for life in a capitalist society should expect, if he works equally hard, to increase the total amount of property he controls. At the same time, he should reasonably expect to lose at least some privacy – or else why should others be willing to trade with him at all? This observation is a further consideration in favor of the fundamentality of the right to property with respect to a proposed right to privacy.

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<sup>48</sup> Posner, *supra* note 15, at 399.

<sup>49</sup> *Id.* at 399-400.

<sup>50</sup> *Id.* at 400.

### III. SHOULD THERE BE A LEGAL RIGHT TO PRIVACY?

One might argue, particularly after reading my interpretation of the right to free speech in the last section, that a right to privacy, even if it is derivative from the right to property, should nonetheless be recognized in the law as a distinct and important right.<sup>51</sup> “After all,” my opponent might say, “you argue that the right to free speech is derived from the right to property, and yet the right to free speech is listed in the Bill of Rights. Perhaps a right to privacy should also be included. Perhaps the Framers’ omission of privacy was an oversight made because of their era’s relative lack of privacy-invading technology, overzealous journalists, and gossip-hungry citizenry.”

I would reply, however, that there are a number of reasons why having a distinct right to privacy is a bad idea. I will discuss them in this section.

#### A. ANY LAW PROTECTING A RIGHT TO PRIVACY WOULD BE NON-OBJECTIVE, AND THUS UNJUST.

Rand’s theory of rights again provides the basis for an argument that a right to privacy is not on a par with other derivative rights, in particular the right of free speech. While the argument does not provide conclusive proof of my point, it is helpful because it establishes the conceptual framework that I will use in making the argument that is the primary focus of this subsection.

For Rand, all rights are rights to action. Yes, one’s freedom to act implies a corollary duty on others to leave him alone in some sense – i.e., to allow him to act. “The right to bear arms,” for example, is not, in Rand’s view, the right to be provided with a weapon free of charge. It is the right to make or purchase a weapon, and then the right to carry and use that weapon for self-defense. Keep-

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<sup>51</sup> Reiman, e.g., might be likely to make this argument. See Reiman, *supra* note 12, at 28 (accusing Thomson for committing a “big non-sequitur” for arguing that, because privacy was derivative from property, there was therefore no point in determining that which is in common among privacy cases).

ing in mind this idea, let us compare and contrast the exercise of a right to free speech with the exercise of a right to privacy. In both cases, let us assume what is at stake is others' awareness of conceptual content. In the free speech case, suppose the agent wishes to communicate this conceptual content to others; in the privacy case, suppose he wishes to prevent others from learning it. In both cases, before the time of the agent's action, suppose the conceptual content exists only in his mind. He has not yet communicated it to anyone, nor has he recorded it anywhere in any form.

Given this situation, the simplest way one could exercise his right to free speech would be to open his mouth and say what is on his mind. Note that such an action would be affirmative in nature – it would be an action performed by the person whose right it is to speak. Of course, it is true that there would be a corollary duty on others (here, because we are speaking of a right in the Bill of Rights, those “others” are supposed to be government agents) to let the person speak without threat of physical force. It is also true that the agent would need to stand on a plot of land – property – somewhere. But, abstracting away from these factors, at the simplest level, an agent who exercises his right to free speech *acts*.

This is not so with respect to the proposed right to privacy. What would the exercise of such a right consist of, again at the most rudimentary level? Abstracting away from any use of property, as we did with the free speech example, our hypothetical agent would not be acting in an affirmative sense, but rather refraining from doing so. Let us concretize the example a bit. Suppose the agent has a thought in his mind – perhaps a plan for the execution of a practical joke he intends to play on a colleague later in the week. What does he do if he wants to exercise his “right” to privacy? He simply keeps it to himself; he does not tell anyone. In other words, at the simplest level, one exercises this proposed right, not by act, but by omission. Unlike the case with the right of free speech, there is no affirmative action one takes in achieving the simplest form of the value at stake. Given that, for Rand, all rights are rights to action, I believe this argument provides some reason to doubt the advisability of recognizing a distinct right to privacy.

Now we are ready to consider an argument that draws on the context of the preceding discussion. I just argued that, at the simplest level, an exercise of the proposed right to privacy consists not of any act, but rather of an omission. Looking now at more complex examples in which one is exercising the proposed right to privacy, let us see what is there, above and beyond an exercise of the right to property. Take the example I discussed earlier involving a man's diary entry, and suppose that someone has read the entry without the man's permission. It is plain how one would describe the rights violation in terms of the doctrine of property. The act of picking up and opening the diary would itself be a trespass to chattels (material objects). If the perpetrator had to open a drawer in order to take the diary, then that would be another trespass. And so on.

Assume now that we have, in addition to property law, a distinctive legal doctrine addressing invasions of privacy. What might such a doctrine add to the above description of the case at issue? It would likely add a description of the type of property subjected to trespass, or the type of information that was learned without permission of the subject. In accordance with what is often held to be the proper content of such a doctrine, the description would probably be formulated in terms of concepts such as "private" or "intimate."<sup>52</sup>

A legal doctrine formulated in such terms has the same problem as does a law banning "obscenity." Whereas the application of a legal doctrine concerning property rights violations is a matter of "tangible fact, available in principle to sense perception,"<sup>53</sup> this is not true of the proposed privacy doctrine. Whether or not something is "private" is an evaluative matter, a matter of personal preference and social mores that are often hotly contested. In

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<sup>52</sup> Julie C. Inness, for example, tries to give an account of privacy that integrates all the prevailing accounts - "information-based, access-based, and decision-based" - in terms of "intimacy," which seems no more objective than the term "privacy" with which she started. JULIE C. INNESS, *PRIVACY, INTIMACY, AND ISOLATION* 56 (1992).

<sup>53</sup> PEIKOFF, *supra* note 19, at 359.

the 1890's, Warren and Brandeis complained about such things as a gossip column's mentioning an innocent social gathering at a man's home. Today, by contrast, many people find it perfectly acceptable that reality television depicts and discusses the intimate sexual practices, deeply held emotions, personal bodily functions, and domestic disputes of those who appear on the shows. Others take a very different view: they believe that a family member's alcoholism, for example, no matter how destructive, is a private matter, to be discussed (if at all) only with members of the nuclear family.

The application of the concept "private" (or any concept of similar meaning, like "intimate") depends on considerations of personal preference – whether that preference belongs to an individual or some group. Because such a concept would be a necessary part of any distinct legal doctrine aimed at redressing invasions of privacy, any resulting doctrine would be, in Rand's terms, non-objective. Therefore, in her view, any such doctrine should be rejected as an improper exercise of government power. In other words, government's only proper function is to ask the question, "Has there been an initiation of force?" and, if the answer is yes, to retaliate. Whether or not someone has used physical force against another is, notes Rand, a matter of objective fact. By contrast, characterizations of the particular property involved, or of the information learned by the perpetrator, as either "private" or "intimate" are not based on an objective fact; rather they are a matter of personal evaluation and preference, of no concern to a proper government.<sup>54</sup>

To illustrate this more clearly, imagine a law prohibiting the appropriation, not of that which is private, but rather that which is "luxurious." Determining whether property has been appropriated can be done on the basis of mere perception, but deciding

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<sup>54</sup> While evaluation – the making of a value-judgment – properly plays a role in enacting laws, it should not play a role in applying them. In the context of the proposed privacy law, something is "private" if the reasonable person would want to keep it from being known by others. Because it would be neither possible nor desirable to name all the things that people might reasonably want to keep private, the value-judgment necessary to enforce a privacy law would have to be made on a case-by-case basis.

whether or not the property appropriated is “luxurious” requires more than this. One charged with making this determination will need to exercise his evaluative skills – he will need to measure the characteristics of the property against a standard, which necessarily will be written in abstract terms. Thus, if the application of the law in question turns on whether the particular item of property is luxurious, it turns on the individual judgment of the person assigned to make this determination. This is the type of law that Rand would rule out as non-objective and therefore unjust. I believe the same point applies to any law that turns on whether a particular piece of property, or particular subject matter, is “private,” or “intimate.”

This does not mean that one who suffers an invasion of privacy should have no legal recourse. As I argued above, as well as in an earlier article,<sup>55</sup> most invasions of privacy will give rise to legal actions for trespass, breach of contract, etc. My point is that, on Rand’s theory of rights, it would be inappropriate for a government to enact a law specifically directed at invasions of privacy. Suppose, then, that a legal system provides adequate legal protection against those who would initiate physical force against others and, at the same time, does not provide a remedy for a purported invasion of privacy. In such a case one should, as Thomson states, “ask whether or not the act is a violation of any other right, and if not whether the act really violates a right at all.”<sup>56</sup>

B. LAWS DIRECTED SPECIFICALLY AT INVASIONS OF PRIVACY TEND, IN THEIR APPLICATION AND PROLIFERATION, TO ERODE FUNDAMENTAL RIGHTS TO LIBERTY AND PROPERTY

The most important reason for rejecting the idea of a legal right to privacy is that the doctrine, in actual practice, has led to the erosion of fundamental rights. My argument here, which is a further application of the philosophic context of Rand’s theory, can

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<sup>55</sup> Peikoff, *supra* note 5, at 760-73.

<sup>56</sup> Thomson, *supra* note 10, at 314.



also be seen as an extension of the argument made by Ruth Gavison in her anti-reductionist article, "Privacy and the Limits of Law."<sup>57</sup> In that article, Gavison argues for a limitation on the application of the legal concept of privacy on the grounds that, in certain cases, resort to privacy by lawyers and judges obscures the real issues at stake.

[I]dentifying privacy as noninterference with private action, often in order to avoid an explicit return to "substantive due process," may obscure the nature of the legal decision and draw attention away from important considerations. The limit of state interference with individual action is an important question that has been with us for centuries. The usual terminology for dealing with this question is that of "liberty of action." It may well be that some cases pose a stronger claim for noninterference than others, and that the intimate nature of certain decisions affects these limits. This does not justify naming this set of concerns "privacy," however. A better way to deal with these issues may be to treat them as involving questions of liberty, in which enforcement may raise difficult privacy issues.<sup>58</sup>

The types of cases Gavison has in mind are those commonly referred to as "decisional privacy" cases - those upholding, e.g., a woman's right to an abortion, on the grounds that such decisions are too personal to be dictated by government. The issues that are obscured in such holdings are issues such as: Is a fetus a person with individual rights or merely a potential human being or parasite whose existence depends on the host? Should a woman have an absolute right to decide how her body is to be treated, including having a doctor remove a fetus from her womb or using drugs to remove it herself? What is the role of government (if any) in regulating conduct affecting the health of its citizens (or potential citizens)?

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<sup>57</sup> Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980).

<sup>58</sup> *Id.* at 438-39.

These are all issues that the Supreme Court in *Roe v. Wade*<sup>59</sup> was able to avoid because of the availability of the legal doctrine of privacy.<sup>60</sup> If the Court had chosen to tackle these issues, it might have reached its holding on the grounds of liberty, which would have (1) preserved the right to liberty, instead of abandoning it in favor of another doctrine and (2) provided a more secure foundation for abortion rights. After looking at *Roe* and its progeny, we will see that a similar trend has occurred in cases where the right to privacy has been used instead of the right to property, i.e., the so-called “informational” privacy cases.

1. “Decisional” Privacy – *Roe v. Wade* and its progeny

In *Roe*, the Court invalidated<sup>61</sup> Texas statutes making it a crime “to ‘procure an abortion,’ . . . or to attempt one, except with respect to ‘an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.’”<sup>62</sup> While the decision is based on a Constitutional right to privacy, appellants gave the Court ample opportunity to place a woman’s right to choose on more solid ground. They argued “that the woman’s right [to choose an abortion] is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses.”<sup>63</sup> In Rand’s terms, we might say that a woman’s right to liberty, and perhaps a right of property in her own body, dictate that she be the sole authority in decisions regarding the abortion of a fetus she is carrying. In support of their view, appellants noted the adverse mental and physical effects of bringing an unwanted child into the world. These effects, they argued, would be felt by the entire family, but especially by the mother.<sup>64</sup>

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<sup>59</sup> 410 U.S. 113 (1973).

<sup>60</sup> See also, sources cited in Gavison, *supra* note 57, at 439 n.56.

<sup>61</sup> *Roe*, 410 U.S. at 154 (concluding “that the right of personal privacy includes the abortion decision”); *id.* at 164 (holding that, measured against its three-trimester framework, the Texas statutes are too broad and, therefore, unconstitutional).

<sup>62</sup> *Id.* at 117-18.

<sup>63</sup> *Id.* at 153.

<sup>64</sup> *Id.*

The Court found that these concerns did not support a right that is absolute. In its answer to appellants, the Court noted that “important interests in safeguarding health, in maintaining medical standards, and in protecting potential life” justified state intervention.<sup>65</sup> “At some point in pregnancy,” the Court wrote, “these respective interests become sufficiently compelling to sustain regulation of factors that govern the abortion decision.”<sup>66</sup> Inferring that appellants were arguing for “an unlimited right to do with one’s body as one pleases,” the Court noted that it “ha[d] refused to recognize an unlimited right of this kind in the past.”<sup>67</sup>

In support of this conclusion, the Court cited its opinions in *Jacobson v. Massachusetts*<sup>68</sup> and *Buck v. Bell*.<sup>69</sup> However, the holding in *Jacobson* is arguably incorrect, and the *Buck* holding is subject to an alternative interpretation, one that would have supported a principled distinction between *Buck* and *Roe*. In *Jacobson*, the Court was asked to evaluate a Massachusetts statute requiring all inhabitants of the city of Cambridge to be vaccinated for smallpox, which was then “prevalent . . . and continu[ing] to increase” in the city.<sup>70</sup> It held that the statute did not “invade[] any right secured by the Federal Constitution.”<sup>71</sup> The *Roe* Court concluded on the basis of this holding that an individual does not have an unlimited right of control over his own body, and therefore one’s bodily integrity can be violated whenever the violation is sufficiently important to the public interest.

The *Jacobson* opinion does contain language supporting this conclusion. The opinion holds: “There are manifold restraints to which every person is necessarily subject for the common good.”<sup>72</sup> Moreover, it also states “persons and property are subjected to all

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<sup>65</sup> *Id.* at 154.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> 197 U.S. 11 (1905).

<sup>69</sup> 274 U.S. 200 (1927).

<sup>70</sup> 197 U.S. at 12.

<sup>71</sup> *Id.* at 38.

<sup>72</sup> *Id.* at 26.

kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state.”<sup>73</sup> However, other language indicates the Court ascribed little real meaning to these almost bromidic statements. It said, for example, “[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.”<sup>74</sup> Similarly, it said “liberty . . . is not unrestricted license to act according to one’s own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others.”<sup>75</sup>

These last two statements are arguably consistent with Rand’s view that government interference is justified only in cases of initiation of physical force; however, it is doubtful that refusal to be vaccinated can be construed as an infringement of others’ rights – or even as posing an imminent danger of doing so. If one had a contagious disease, against which no vaccination was available, a government might properly require the infected individuals to be quarantined. However, in refusing to be vaccinated, one endangers only himself; others are still free to be vaccinated and protect themselves from the disease in question. And, of course, if the one who refuses the vaccine does become infected, he can, at that time, be quarantined. Thus I believe the Court’s holding in *Jacobson* was wrong and should not have been relied upon as evidence that one’s right to liberty is less than absolute.<sup>76</sup>

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<sup>73</sup> *Id.* (quoting *Hannibal & St. J. R. Co. v. Husen*, 95 U.S. 465, 471 (1877)).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 26-27 (quoting *Crowley v. Christensen*, 137 U.S. 86, 89 (1890)).

<sup>76</sup> See AYN RAND, *AYN RAND ANSWERS*, 13 (Robert Mayhew ed., Penguin Books 2005):

Requiring inoculation against disease is definitely not a job for the government. If it is medically proven that a certain inoculation is desirable, those who want it will take it. If some disagree and don’t want it, they alone are endangered, since the others will be inoculated. Nobody has the right to force a person to do anything for his own good and against his own judgment.

The issue in *Buck* was whether involuntary sterilization of a mentally incompetent woman violated her rights.<sup>77</sup> The Court concluded that it did not violate the woman's rights, on the ground that a state may "call upon those who already sap [its] strength . . . for these lesser sacrifices."<sup>78</sup> There are a number of factors present in *Buck* that reduce the value of its holding as precedent, including: (1) the plaintiff was incapable of supporting herself, much less a child, and only the state was willing to support her or her offspring,<sup>79</sup> and (2) the plaintiff was incompetent, and therefore perhaps unable to make any meaningful choice to procreate. In any event, this holding comes tied to a very particular set of facts and, like the holding in *Jacobson*, is compatible with deciding that a mentally competent, self-supporting human being has a right to do with her body as she wishes, so long as she infringes no one else's rights.

On the basis of the above, it seems the *Roe* court could have overturned *Jacobson* and distinguished *Buck*. It then could have been free to hold, accordingly, that a state may interfere with a woman's right to an abortion only if her action can be shown to violate someone else's rights. While some anti-abortionists argue that a woman who has an abortion violates a right of the man who impregnated her, the more common position – and the one urged in *Roe* – is that she violates the rights of the fetus.<sup>80</sup> Thus, if the *Roe* Court had adopted my suggestions above, then in order to uphold state prohibitions of abortion, it would have had to hold that a fetus is a person with Constitutional rights.

But the Court did not want to do this. What it wanted to do instead was to permit early term abortions, while allowing the State

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Note also that a property owner could refuse to let an unvaccinated person come onto his property, or make him pay a high price for doing so. And, in a purely capitalist society, where all property is privately owned, peer pressure would help to ensure that people received those vaccines which were safe, and effective against dangerous, contagious disease.

<sup>77</sup> *Buck v. Bell*, 274 U.S. 200, 205 (1927).

<sup>78</sup> *Id.* at 207.

<sup>79</sup> *Id.* at 205 (noting that *Buck's* mother and daughter were also incompetent, living in the same state-supported institution).

<sup>80</sup> Dalton Conley, *A Man's Right to Choose*, N.Y. TIMES, Dec. 1, 2005.

some power to regulate abortions, particularly as the fetus was closer to coming to term. In order to do this, it would have to find that the State has legitimate interests in protecting the health of both the pregnant woman and the fetus. A state interest in protecting the fetus was necessary to tip the scales in favor of allowing regulation, because the abortion procedure was relatively safe and, when performed correctly, did not pose a significant health risk to the woman having an abortion. Thus the crucial question was whether the State could have a legitimate interest in protecting a fetus. By noting that a state might legitimately have an interest in "potential" life, it was able to avoid answering the question, "When does life begin?"<sup>81</sup>

Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.<sup>82</sup>

All the Court needed then, was a doctrine that would support a woman's right to choose an abortion while, at the same time, allowing the infamous three-trimester compromise that it crafted, under which the amount of regulation a state is permitted under the Constitution is minimal in the first trimester, increases somewhat in the second, and then increases again in the third trimester, allowing states to prohibit late-term abortions.

The fledgling Constitutional right to privacy was the perfect candidate for the job. First, it had already been used by the Court to protect freedoms in the controversial area of reproductive rights.<sup>83</sup> Second, the Constitutional doctrine, like the tort doctrine

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<sup>81</sup> *Roe v. Wade*, 410 U.S. 113, 159 (1973).

<sup>82</sup> *Id.* at 150 (emphasis omitted).

<sup>83</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

from which it originated, was flexible enough to allow for State regulation of the conduct it supported. Even Warren and Brandeis, in their original article proposing the right to privacy, recognize that an absolute right to privacy was not feasible or desirable. They devote a number of pages to sketching proposed limitations of the right to privacy. Such limitations, they assume, are necessary because “the dignity and convenience of the individual must [at some point] yield to the demands of the public welfare or private justice.”<sup>84</sup>

The balancing factors used in the Constitutional context are different than those used in the tort context, but the pliable nature of the right to privacy remains the same.

[T]he right to privacy, however based, is broad enough to cover the abortion decision; . . . the right, nonetheless, is not absolute and is subject to some limitations; and . . . at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant.<sup>85</sup>

The legal concept of privacy gives courts a way to permit the conduct they want to permit, when they want to permit it, without requiring them to reach verdicts on contentious issues. However, it does so at the price of abandoning the right to liberty, and thereby weakening it. Still, some argue that this may not be a bad thing, given the current cultural context. Discussing the use of privacy law to conceal those characteristics and behaviors others in society may find objectionable, Gavison writes:

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<sup>84</sup> Warren & Brandeis, *supra* note 2, at 214-19. In fact, one might argue that the authors’ anticipation of difficulty in determining the “limitations” of their proposed right to privacy, along with the vague terms they use to characterize the interests that must be balanced against individual privacy, are further considerations against the objectivity of privacy law: “To determine in advance of experience the exact line at which the dignity and convenience of the individual must yield to the demands of the public welfare or of private justice would be a difficult task. . . .” *Id.* at 214.

<sup>85</sup> *Roe*, 410 U.S. at 155.

[Sometimes] the use of privacy is justified. First, there are important limits on our capacity to change positive morality, and thus to affect social pressures to conform. This may even cause an inability to change institutional norms. When this is the case, the absence of privacy may mean total destruction of the lives of individuals condemned by norms with only questionable benefit to society. If the chance to achieve change in a particular case is small, it seems heartless and naïve to argue against the use of privacy.<sup>86</sup>

I understand the temptation to apply this argument to plaintiffs like Roe. However, the tradeoff for the use of the privacy doctrine is that protection for the conduct at issue (1) rests on unprincipled decisions susceptible to the criticism that they are poorly reasoned,<sup>87</sup> and (2) is not absolute, so that each time a new case comes up, raising new factors for the Court to “balance,” freedom to engage in the conduct is at risk. This is exactly what we have seen in the years following *Roe*, particularly in the Court’s decisions in *Webster v. Reproductive Health Services*<sup>88</sup> and *Planned Parenthood v. Casey*.<sup>89</sup> As of its decision in *Casey*, the Court had abandoned both Roe’s trimester framework and strict scrutiny standard in favor of a new test under which a State may assert its “legitimate interests” in potential life throughout a woman’s pregnancy, even in the first trimester, so long as the conditions placed on obtaining an abortion do not constitute an “undue burden.” In *Casey*, the Court held that an informed consent requirement does not place an undue burden on a pregnant woman seeking an abortion.<sup>90</sup> A State regulation places an

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<sup>86</sup> Gavison, *supra* note 57, at 453.

<sup>87</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 172 (1973) (Rehnquist, J., dissenting) (“A transaction resulting in an operation such as [an abortion] is not ‘private’ in the ordinary usage of that word.”) Rehnquist also argued that the application of the concept of privacy in *Roe* did not correspond to the Court’s previous applications of the term.

<sup>88</sup> 492 U.S. 490 (1989).

<sup>89</sup> 505 U.S. 833 (1992).

<sup>90</sup> *Id.* at 887.

Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that



undue burden on such a woman only “if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”<sup>91</sup> While the Court saw itself as affirming the “essential holding” of *Roe*, those in favor of a woman’s right to choose an abortion have reason to worry. This is especially so in light of the current Administration’s extending Medicaid benefits, previously given only to children after birth, to fetuses.<sup>92</sup> Because *Roe*’s elaborate balancing test included an examination of federal legislation for purposes of determining whether a fetus is a “person,” the passing of federal health insurance and federal criminal legislation which treats fetuses as persons, for purposes of awarding health benefits or imposing criminal sanctions is, for those who support a woman’s right to choose to have an abortion, ominous indeed. In addition, a Federal ban on so-called “partial birth” abortions was enacted in 2003 and, while it was initially struck down in Federal Court, it was recently upheld by the Supreme Court.<sup>93</sup> Anti-abortionists see establishing a ban on partial-birth abortion as an important step towards prohibiting all abortions.<sup>94</sup>

Had the right to privacy not been available to the *Roe* Court, there is no guarantee that appellants, in 1973, would have won a principled verdict based on a woman’s right to liberty. However,

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the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the state may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance....

*Id.* at 872.

<sup>91</sup> *Id.* at 878.

<sup>92</sup> PLANNED PARENTHOOD, THE WAR ON WOMEN: A PERNICIOUS WEB, [http://www.plannedparenthood.org/files/PPFA/report\\_waronwomen-chronology.pdf](http://www.plannedparenthood.org/files/PPFA/report_waronwomen-chronology.pdf) (last visited Jan. 22, 2008).

<sup>93</sup> Partial-Birth Abortion Act, 18 U.S.C. § 1531 (2000); *Carhart v. Ashcroft*, 413 F.3d. 791 (2005); *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007).

<sup>94</sup> See HADLEY ARKES, NATURAL RIGHTS AND THE RIGHT TO CHOOSE (2002).

because of the tremendous support for a woman's right to choose an abortion, it is likely that this right would have been upheld in due course.<sup>95</sup> As Gavison writes, "legal and social changes are unlikely until individuals are willing to put themselves on the line,"<sup>96</sup> i.e., until they are willing to demand that courts directly confront the issue, even if that means losing their cases. Perhaps the unavailability of the privacy doctrine would have forced the Supreme Court to reconsider its holdings in *Jacobson* and *Buck*. One thing is clear, however: grounding a woman's right to an abortion on the right to privacy – a non-objective doctrine whose application is largely unpredictable – has placed what many consider a basic freedom of one person, at the mercy of others. In addition, it has arguably weakened legal protection for the right to liberty in general, as it has set a precedent for abandoning the doctrine in favor of privacy law.

## 2. "Informational" Privacy Cases: Eroding the Right to Property

The same type of development can be seen in other areas where privacy law has been applied. For instance, the right to privacy has in some cases been used in place of the right to property, resulting in further erosion of legal protection for property rights. The result of this development is particularly ironic: Because, as I have argued above, one uses property to achieve states of privacy, the legal right to privacy has arguably decreased our ability to maintain states of privacy.

To see why, first let us look at a series of cases involving Fourth Amendment proscriptions of unreasonable searches and seizures by government agents. In early cases, the question of whether a search or seizure occurred turned on the same events that constitute a trespass to property, whether of one's home or land, or

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<sup>95</sup> The Pew Forum on Religion & Public Life, *Abortion Seen as Most Important Issue for Supreme Court*, <http://pewforum.org/docs/?DocID=127> (last visited Jan. 22, 2008).

<sup>96</sup> Gavison, *supra* note 57, at 453.

of one's "chattels" (physical objects).<sup>97</sup> The first noteworthy case in which the adequacy of the physical trespass doctrine was questioned was *Olmstead v. United States*.<sup>98</sup> In *Olmstead*, the government performed a wiretap of a telephone line and used it to listen to Olmstead's telephone conversations. In the majority opinion the Court, relying on the doctrine of trespass to property, concluded that the Fourth Amendment was not implicated because there had been neither search nor seizure.

The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.<sup>99</sup>

I think this holding was incorrect, not because the Court used the physical trespass doctrine in determining whether a search occurred, but because the Court incorrectly applied that doctrine. There was a physical trespass, not to "the houses or offices of the defendants," but rather to the phone company's telephone lines, to which the defendants had purchased exclusive access during the times of their telephone calls.

The result of this misguided holding by the Court was similar to the result of the *Roe* court's misinterpretation of its bodily integrity cases. Justice Brandeis used the opportunity created by the majority's holding in *Olmstead* to write a dissent encouraging the abandonment of the physical trespass doctrine. In its place, Brandeis suggested the constitutional equivalent of the tort right to privacy he had proposed decades earlier.

Before doing so, Brandeis did offer a brief argument indicating the proper application of the trespass doctrine to the case

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<sup>97</sup> See, e.g., *Ex parte Jackson*, 96 U.S. 727 (1877); *Boyd v. United States*, 116 U.S. 616 (1886).

<sup>98</sup> 277 U.S. 438 (1928).

<sup>99</sup> *Id.* at 464.

before him. Invoking the Court's earlier holding in *Ex parte Jackson*, he noted that in that case:

it was held that a sealed letter entrusted to the mail is protected by the Amendments. The mail is a public service furnished by the Government. The telephone is a public service furnished by its authority. There is, in essence, no difference between the sealed letter and the private telephone message.<sup>100</sup>

However, Brandeis's characteristic flourish was reserved for his arguments relating to the invasion of privacy experienced by the defendants. Most notable was Brandeis's impassioned call to ignore the means by which an invasion of privacy is effected.

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. 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 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>101</sup>

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<sup>100</sup> *Id.* at 475 (Brandeis, J., dissenting) (citing *Jackson*, 96 U.S. at 733 (1877)).

<sup>101</sup> *Id.* at 478 (emphasis added). Note the similarity of the language here to that in the original Brandeis article

The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for

The Fourth-Amendment-privacy baton was next passed to Justice Douglas, who wrote a concurrence in *Berger v. New York*.<sup>102</sup> In that case, the Court struck down a New York statute that permitted eavesdropping in circumstances where doing so would violate the Fourth Amendment. The majority opinion did refer to "the privacy of every home in America,"<sup>103</sup> as something the Amendment was meant to protect. However, Douglas's concurring opinion contains more explicit support for adopting a privacy-based standard for determining whether a government action has violated the Amendment.

If a statute were to authorize placing a policeman in every home or office where it was shown that there was probable cause to believe that evidence of a crime would be obtained, there is little doubt that it would be struck down as a bald invasion of privacy, far worse than the general warrants prohibited by the Fourth Amendment. I can see no difference between such a statute and one authorizing electronic surveillance, which, in effect, places an invisible policeman in the home. If anything, the latter is more offensive because the homeowner is completely unaware of the invasion of privacy.<sup>104</sup>

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growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone."

Warren and Brandeis, *supra* note 2, at 194-195.

<sup>102</sup> 388 U.S. 41, 64-68 (1967) (Douglas, concurring).

<sup>103</sup> *Id.* at 63.

<sup>104</sup> *Id.* at 65 (Douglas, J., concurring).

Thus the *Berger* opinion represents a further departure from the physical trespass doctrine in Fourth Amendment cases.

The Court finally rejected the trespass doctrine in *Katz v. United States*.<sup>105</sup> At issue in *Katz* was the government's listening to and recording of the defendant's phone conversations, which were made from a telephone booth; the device used had been attached to the outside of the booth. The majority opinion refused to "adopt [a] formulation of [search and seizure] issues" using language implementing the physical trespass doctrine - e.g., "physical penetration," or "constitutionally protected area." At the same time, however, the Court declined to "translate" the Fourth Amendment "into a general constitutional 'right to privacy,'" stressing that protection of that general right is "left largely to the law of the individual states." Thus, the majority opinion represented a compromise of sorts. Whether a physical trespass occurred is no longer controlling; whether there was an invasion of privacy is relevant, but also not controlling. Justice Stewart, author of the majority opinion, wrote:

The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.<sup>106</sup>

*Katz* is better known for the test as it is articulated in Justice Harlan's concurring opinion, where he translated the majority's idea of justifiable reliance on a state of privacy into the two-part test that became the key for determining whether the governmental action at issue constitutes a search for purposes of the Fourth Amendment. First, did the person exhibit an actual expectation of

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<sup>105</sup> 389 U.S. 347 (1967).

<sup>106</sup> *Id.* at 353.

privacy? Second, if he did, is that expectation one that society is prepared to recognize as “reasonable”?<sup>107</sup>

Thus, as of *Katz*, whether one enjoys privacy depends not on the property he owns or on the contracts into which he has entered. Rather, it depends on whether a judge or jury believes that he has an expectation of privacy and, whether that expectation is “reasonable” to them. The *Katz* test is a paradigm case of non-objective law. Who is to decide what sort of expectation is reasonable? Members of the jury and the judiciary. By what standard? You know, reasonableness. Not surprisingly, as we will now see, the results have been disastrous for anyone who values either property or privacy.

Ten years later, in *United States v. White*, the Court held that one has no constitutionally protected expectation of privacy when he discloses information in a conversation with someone who later agrees to share that information with the government.<sup>108</sup> This holding was extended to apply to bank records in *United States v. Miller*.<sup>109</sup> In *Smith v. Maryland*, the Court held that it was “doubtful” whether anyone actually expected the phone numbers that he dialed to remain private and, furthermore, that even if one did have such an expectation, that it was not “reasonable.”<sup>110</sup> One scholar, in an attempt to explain why the government conducts a search when it listens to someone’s phone conversation but not when it merely uses a pen register to record the phone numbers he dials, coined the phrase “communication attributes” to denote all the incidental characteristics of a conversation – i.e., characteristics of the conversation other than its content.<sup>111</sup> “Communication attributes” can be the phone number dialed, the time of a dialing, the location of the two parties to the phone conversation, the length of the phone call, etc. *Smith* and *Miller* set a precedent for federal legislators who re-

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<sup>107</sup> *Id.* at 360, 361 (Harlan, J., concurring).

<sup>108</sup> 401 U.S. 745 (1971).

<sup>109</sup> 425 U.S. 435 (1976).

<sup>110</sup> 442 U.S. 735, 743 (1979).

<sup>111</sup> Susan Freiwald, *Uncertain Privacy: Communication Attributes After the Digital Telephony Act*, 69 S. CAL. L. REV. 949, 951 (1996).

cently have enacted legislation awarding lower levels of protection for “communications attributes” and other analogous “transactional data” that one discloses to others in the normal course of conducting his life.<sup>112</sup>

If the controlling standard in these cases had been one’s right to property, along with one’s right to use his property to enter into contracts, then a man’s privacy would not be dependent on others’ opinions about what he actually expects and whether his expectations are reasonable. Rather, it would depend solely on his ability to produce values and to trade those values for the means to protect the privacy he seeks. Of course, the government could still issue warrants to compel third parties to disclose information that has been entrusted to them. But at least then the disclosure of information would depend on factors such as particularized suspicion and limited scope of search, as articulated in the Fourth Amendment warrant requirement.

The situation has deteriorated further still. In recent years courts have held that the government can, in effect, reduce one’s “reasonable expectation of privacy” simply by passing government regulations.<sup>113</sup> If one works in a heavily regulated industry, one should expect to be closely monitored; hence, the argument goes, one should expect to have less privacy than those working in less regulated industries. A particularly egregious example is *Stogner v. Kentucky*, in which a federal district court held: “Since barbering is closely regulated, supervised, and inspected by the state, it is not unreasonable for the Board to conduct warrantless inspections to protect the health and safety of the public.”<sup>114</sup> Thus the Commonwealth of Kentucky did not violate the Fourth Amendment’s gen-

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<sup>112</sup> *Id.* at 963-66 (discussing the latitude given Congress in *Smith*); *id.* at 969-90 (explaining provisions of two pieces of federal legislation, enacted after *Smith*, providing weak protection for communication attributes).

<sup>113</sup> See generally Ann K. Wooster, Annotation, *Validity of Warrantless Administrative Inspection of Business That is Allegedly Closely or Pervasively Regulated; Cases Decided Since Colonnade Catering Corp. v. U.S.*, 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970), 182 A.L.R. FED. 467 (2002).

<sup>114</sup> 638 F. Supp. 1, 3 (1985) (emphasis added).



eral prohibition against unreasonable searches and seizures when its agents, without a warrant, viewed not only the general areas on the inside of plaintiffs' barber shop, but also the interiors of private booths that plaintiffs offer as a special service to their customers – while the customers were inside the booth receiving services. Plaintiffs argued that such warrantless searches should at least stop short of the shop's private booths when they are occupied by customers; to conduct warrantless searches of these would violate these customers' reasonable expectation of privacy. They pointed out that patrons of both sexes sought out this shop, in part because of these booths, and "they would be embarrassed to be seen in hair-curlers or without their toupees."<sup>115</sup> The Court rejected this argument.

The rationale for permitting a warrantless inspection is the close regulation of barbering by the Commonwealth. Many of the applicable rules and regulations concern the practice of barbering itself as well as the condition of the barber-shop. The inspector would have no way to determine whether the barbers inside the booths were following the regulations if he could not inspect them while they were occupied. Thus, the court finds that it is not unreasonable for defendants to require inspection without a warrant of plaintiffs' booths when they are occupied.<sup>116</sup>

As for the customers' expectation of privacy while in the booths: "One receiving services in a barbershop is fully clothed and in an uncompromising position."<sup>117</sup> Tell that to the self-conscious man who wears a toupee! Other cases held to fall within the "pervasively regulated industry exception" to the Fourth Amendment's warrant requirement are *Colonnade Catering Corp. v. United States* (liquor sales),<sup>118</sup> *United States v. Biswell* (firearms),<sup>119</sup> and *Donovan v.*

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<sup>115</sup> *Id.* at 4.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> 397 U.S. 72 (1970).

*Dewey* (ore mines).<sup>120</sup> This exception has recently been extended further, so as to essentially obliterate the traditional doctrine of “curtilage,” which, up until recently at least, accorded special protection from search and seizure to the area immediately surrounding one’s home.<sup>121</sup> The curtilage doctrine itself already represents an erosion of property rights, made possible by the abandonment of the trespass doctrine. However, in *Widgren v. Maple Grove Township*, a federal appellate court upheld a warrantless search of plaintiff’s curtilage, on the grounds that the search was essentially administrative.<sup>122</sup> This new holding is apparently in danger of being extended to non-administrative searches as well.<sup>123</sup>

So now we have governments issuing regulations that, on the view of rights that I have presented, lack justification entirely, as they do not depend on whether there has been or imminently will be an initiation of force or threat of harm. (Remember that no one is being forced to patronize establishments in these pervasively regulated industries.) Then, in addition, that same government says that, because of those unjustified regulations, one who works in or patronizes businesses in the regulated fields has a decreased expectation of privacy. Because of this decreased expectation of privacy, the government is entitled to do even more than it did before, without its actions constituting either a “search” for purposes of the Fourth Amendment, or a violation of someone’s right to privacy more generally; and this is true whether that someone is a customer or proprietor. In my opinion both our property and our privacy would be more secure from government intrusions today if the Court in

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<sup>119</sup> 406 U.S. 311 (1972).

<sup>120</sup> 452 U.S. 594 (1981).

<sup>121</sup> See *United States v. Dunn*, 480 U.S. 294 (1987); *Oliver v. United States*, 466 U.S. 170 (1984).

<sup>122</sup> 429 F.3d 575 (6th Cir. 2005).

<sup>123</sup> See *Taylor v. Humphries*, 402 F. Supp. 2d 840 (W.D. Mich., 2005) (upholding arguably warrantless search by police officer within suspect’s curtilage).

*Olmstead* had reached the right decision, on the basis of the trespass doctrine.<sup>124</sup>

Cases in both of the areas of law that I have discussed so far have involved some sort of government action, usually a government agent's invading some right of a citizen. With respect to these I have argued that the legal doctrine of privacy has resulted in (1) the weakening of the legal rights that should have been held to be at issue in the case, as well as (2) a decrease in one's ability to choose the circumstances in which he will have privacy. (Or, since getting an abortion arguably does not involve privacy at all, my argument focused on the increased risk of losing the freedom originally upheld on privacy grounds.) The laws governing and cases involving the interactions of citizens with respect to privacy – i.e., the legislative and common law components of “tort” privacy law – are arguably even more illustrative of my point about the legal doctrine of privacy causing an erosion of fundamental rights. The reason is that the cases arising under this law involve an alleged “clash” between two rights – the right to privacy and the right to property.

I argued in the second part of this article that, properly understood, Rand's view of rights implies that the right to property is fundamental and that the proposed right to privacy – if it is a viable doctrine – is derivative. Others have argued the reverse, starting with Warren and Brandeis themselves who wrote that the common law right to intellectual and artistic property was “merely an instance of the . . . more general right of the individual to be let alone.”<sup>125</sup> This idea that the right to privacy is fundamental with

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<sup>124</sup> A different holding in *Roe* may have made a difference as well. One scholar hypothesizes that the *Roe* Court's resorting to privacy doctrine was an attempt to avoid using the then-discredited “substantive due process” doctrine. See Gavison, *supra* note 57, at 439 (citing John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 937-43 (1973)). Recall that its being discredited was due to its use to support a strong conception of property rights in the “infamous” case, *Lochner v. New York*, 198 U.S. 45 (1905). Some of us who, like Rand, support strong property rights alongside strong rights to individual liberty find it sadly amusing that the Court found itself in this difficult position after invalidating *Lochner*.

<sup>125</sup> Warren & Brandeis, *supra* note 2, at 198. Others who have argued for this view are Scanlon, *supra* note 17, and Craig S. Coleman. The latter, in his dissertation in the

respect to property rights has led to legislation and case law sacrificing the latter to the former.

For example, federal legislation and case law limit an employer's ability to listen in on telephone conversations made by his employees during work hours.<sup>126</sup> This constitutes, in effect, an involuntary redistribution of an employer's property to his employees, for the sake of providing the employees with states of privacy. As of yet, this legal trend has not been carried over to e-mail, or even voice mail, but there apparently are already some union contracts that require employers to provide employees with a certain amount of "workplace privacy," and special interest groups are urging legislation forcing similar provisions on all employers.<sup>127</sup> In a similar vein, some state supreme courts, in so-called "wrongful termination" cases, have held that an employee's interest in privacy is to be protected over an employer's interest in determining how his business is to be run (i.e., how he may use his property): these courts have limited a private employer's right to require drug testing as a condition of employment.<sup>128</sup>

Privacy and property have appeared to conflict in other areas as well. For example, in 2001 a Connecticut man sued a car

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area of Political Science, argues that one should reject an "economic" justification of the right to private property (one like Rand's, for example) in favor of a justification based on the grounds that it is necessary to achieve privacy. Craig Stuart Coleman, *Privacy and Property: A Reexamination of the Right to Private Property* (2000) (unpublished Ph.D. dissertation, The University of Wisconsin - Madison) (on file with author).

<sup>126</sup> See, e.g., *Deal v. Spears*, 980 F.2d. 1153 (8th Cir. 1992); *United States v. Harpel*, 493 F.2d. 346 (10th Cir. 1974).

<sup>127</sup> See University of San Diego, *Employer Monitoring: Is There Privacy at the Workplace?*, <http://www.privacyrights.org/fs/fs7-work.htm> (last visited August 19, 2007). A group of federal judges argued that their e-mail correspondence should, on privacy grounds, be free from monitoring, and won. See Philip L. Gordon, *Federal Judge's Victory Just the First Shot in the Battle Over Workplace Monitoring*, [http://www.privacyfoundation.org/workplace/law/law\\_show.asp?id=75&action=0](http://www.privacyfoundation.org/workplace/law/law_show.asp?id=75&action=0). However this case is arguably distinguishable from other workplace privacy cases as the employees are government-employed judges.

<sup>128</sup> See, e.g., *Twigg v. Hercules Corp.*, 406 S.E. 2d. 52 (W. Va. 1990); *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 23 (N.J. 1992).

rental company on the grounds that the company invaded his privacy when it monitored the speeds at which he drove their rental car.<sup>129</sup> Here again we see a call to sacrifice a property owner's right to determine how its property will be used; this time to a customer's "right" to privacy. Privacy-oriented special interest groups have indicated that they might advocate legislation in this area.<sup>130</sup> Another example can be found by visiting any medical doctor's office. Regulations now require doctors to create, print, and distribute lengthy documents describing their "privacy" practices, to collect signatures from patients showing the patients have received such documents, and to appoint a specific employee who is in charge of privacy or information-disclosure matters.<sup>131</sup> Not only does this infringe a doctor's right to allocate his monetary and human resources as he sees fit, it also invites government to intrude further into a relationship in which, in a capitalist society, it would have no place: that between doctor and patient. Finally, within the last few years federal legislation designed to protect "genetic privacy" has been proposed; a version of such a bill has even passed in the Senate.<sup>132</sup> Such legislation would prohibit employers and insurers from discriminating against individuals on the basis of their genetic makeup. In other words, the legislation would force some people to assume financial liabilities, in the form of health care expenses and insurance payouts that they might otherwise avoid, in order to protect another individual's "privacy."<sup>133</sup>

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<sup>129</sup> See *Turner v. American Car Rental, Inc.*, 884 A.2d 7 (Conn. App. Ct. 2005).

<sup>130</sup> See, e.g., Robert Lemos, *Rental Car Firm Exceeding the Privacy Limit?*, <http://news.com/2100-1040-268747.html?legacy=cnet> (last visited Jan. 22, 2008).

<sup>131</sup> U.S. Department of Health & Human Services, *About The Privacy Rule*, <http://www.hhs.gov/hipaafaq/about/189.html> (last visited Jan. 22, 2008).

<sup>132</sup> Sheryl Gay Stolberg, *Senate Sends to House a Bill on Safeguarding Genetic Privacy*, N.Y. TIMES, Oct. 15, 2003, at A12. One Senator said, in favor of the legislation, that people would not utilize the latest advances in genetic testing "if they are subjected and held hostage to the fears of discrimination by their employers and by insurers." *Id.* She meant that people should be able to discover the likelihood of their needing significant medical attention in order to stay alive, and then they should be able to hide that information from the people who will have to pay for such medical care.

<sup>133</sup> This last example is no more about privacy than is *Roe v. Wade*.

The trend emerging in the area of informational or tort privacy is particularly troublesome because, as I demonstrated earlier, the use of property is required to achieve privacy. Thus one who essentially has no right to property has no real right to privacy, either. Sadly, what we are left with once we have abandoned the right to property in favor of the “right” to privacy is only the permission to use or enjoy either – a permission that judges or legislators might revoke at any time.

#### IV. RECOMMENDATION

In my view we should phase out the legal right to privacy and return to a jurisprudence based on liberty and property rights. Gavison argues that the right to privacy should be retained with respect to the “decisional privacy” cases where, she thinks, it protects our freedom to do things that many in society would consider immoral. Her concerns seem especially relevant today, when much of the country, including the current Administration, is turning to religion for moral and political guidance. Gavison would not, however, advocate retaining a right to privacy in the “informational privacy” cases – i.e., those cases in which the real right at stake is one of property or contract. Those cases, she thinks, do not raise particularly contentious moral issues.

I disagree. While the legal right to privacy has arguably served to protect additional freedoms in the “decisional” cases, such gains have been only temporary, and have been achieved at the price of eroding the legal principle – liberty – that protects such freedoms. Similarly, while “informational privacy” has seemed to fill the vacuum left by our legal system’s abandonment of property and contract rights, in practice the doctrine has done little but contribute to the size of that vacuum. Neither privacy, nor property nor contract is treated as a right in any meaningful sense any longer; all are permissions granted by society when it deems our interests in them to be “reasonable.”

Thus I support making changes in the law that would move us towards a jurisprudence of liberty, property and contract, so long as these changes provide a net increase in the protection of

individual rights. A pro-capitalist public-interest law firm, such as the Institute for Justice,<sup>134</sup> or a pro-choice organization like Planned Parenthood,<sup>135</sup> might make significant inroads by litigating carefully selected cases<sup>136</sup> or by advocating properly crafted legislation.

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<sup>134</sup> Institute for Justice Home Page, <http://www.ij.org>.

<sup>135</sup> Planned Parenthood Home Page, <http://www.plannedparenthood.org>.

<sup>136</sup> For a blueprint for such litigation, see *Suburban Trust Company Co. v. Waller*, 408 A.2d 758 (Md. Ct. Spec. App. 1979), in which a court held that a bank has a fiduciary duty to its customers and that, "absent compulsion by law, a bank may not make any disclosures concerning a depositor's account without express or implied consent of the depositor" *Id.* at 764. The court did not rely on a right to privacy in reaching its decision.

It is heartening to see that cell phone companies who were recently defrauded into divulging their customers' calling records have filed cases under existing fraud statutes, rather than calling for more privacy legislation.