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THINKING CLEARLY ABOUT PRIVACY

Thomas Huff*

And Noah began to be an husbandman, and he planted a vineyard:
And he drank of the wine, and was drunken; and he was uncovered within his tent.
And Ham, the father of Canaan, saw the nakedness of his father, and told his two brethren without.
And Shem and Japheth took a garment, and laid it upon both their shoulders, and went backward, and covered the nakedness of their father; and their faces were backward, and they saw not their father's nakedness.
And Noah awoke from his wine, and knew what his younger son had done unto him.
And he said, Cursed be Canaan; a servant of servants shall he be unto his brethren.
And he said, Blessed be the LORD God of Shem; and Canaan shall be his servant.
God shall enlarge Japheth, and he shall dwell in the tents of Shem; and Canaan shall be his servant.¹

The punishment which Noah metes out to Ham and the blessings he bestows on Shem and Japheth demonstrate, at the least, a keen sense of the character and importance of privacy. Indeed, what makes this little story instructive is that it both captures the distinctive features of typical privacy invasions and expresses accurately and dramatically the sort of moral outrage felt by a person whose privacy has not been respected.

In a series of cases stretching back to 1965, the Supreme Court has had great difficulty keeping the distinctive features of privacy clearly in focus.² Under the aegis of a right of privacy, discovered in Griswold v. Connecticut³ and elaborated in such cases as Stanley v. Georgia,⁴ Eisen-

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¹ Genesis 9:20-27.
³ 381 U.S. 479 (1965).
The values protected by the norm of privacy are important. We can expect their protection by a right of privacy only if we think clearly about just what is at stake when privacy is gained or lost. Similarly, many of the values of personal liberty, like those raised in the abortion cases, deserve careful consideration. They, too, cannot be protected unless we think sensitively both about the limits of the right of privacy's protections and about the meaning of personal liberty and autonomy.

The purpose of this article is to offer a fresh assessment of the right of privacy. It begins with discussion of the privacy norm, drawing on our ordinary judgments and experiences to clarify and elaborate the interest persons have in privacy. It then reviews some of the Supreme Court's reasoning on privacy, explains the Court's confusions, and proposes a way that we and the Court might think more clearly about these difficult matters.9

### I. THE PRIVACY NORM

#### A. Unauthorized Intrusions

Ham, in the Noah story, invades his father's privacy in two obvious ways—by intruding upon his nakedness and by disclosing to his brothers

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9. As will become evident in the text, there is no attempt in this article to provide an exhaustive review of the Supreme Court's treatment of the right of privacy. The purpose here is to identify, explain, and clarify recurrent ambiguities in the Court's reasoning with respect to the right.
what the intrusion reveals. But what makes his intrusion and his disclosure an invasion of privacy and not a mere nuisance or what we might call a defamation? Consider intrusion first. Intrusions which are invasions of privacy are distinctive, first of all, because they subject persons directly to the conscious consideration of other persons. Ham’s intrusion would have been a mere nuisance had he only disturbed his father’s sleep. The interest he takes in what he sees, however, makes his actions like those of a Peeping Tom or an eavesdropping relative. His father is literally exposed, and Ham makes himself directly and deliberately conscious of that fact.

There are obviously many kinds of intrusions which are not privacy invasions because they lack this feature of conscious scrutiny. The noise of a neighbor’s radio or motorcycle, the disturbance caused by a construction project in the street, or the insipid music in the dentist’s office all intrude, but they intrude as nuisances or annoyances, not as privacy invasions. Even the intruding person may be merely a nuisance if this essential feature of conscious scrutiny is missing. The boor who joins our conversations or enters our room uninvited fails to recognize that when we are with others we are normally expected to acknowledge their very being in our actions and words and to admit them to our thoughts and conversations. Such a person thus fails to recognize how his or her intrusion makes claims upon us and thus fails to respect us. But this failure of respect is similar to the intrusion of the neighbor’s radio—we cannot do what we were doing before because of the nuisance created by the sheer presence of this person. We even call such persons “nuisances.” Intrusions by persons become privacy invasions when the intruder takes an interest in what we are doing, in how we are conducting our lives, or in what we are saying. When a child intrudes with questions there is only a nuisance—the questions must be answered! The adult, however, who takes an unwarranted—we sometimes say unhealthy—interest in our lives breaches the privacy norm by placing himself or herself in the position of knowing things about us which he or she should not know.

But what is it about this “knowing things about our lives” that is objectionable? Many persons, after all, have knowledge of us, even intimate knowledge, without invading our privacy. What is also distinctive about a privacy intrusion is that the knowledge which is gathered by the intruder is knowledge which could make us subject to presumptuous evaluation or 10 On at least one line of argument the search for an interest protected by the right of privacy is fruitless or misguided. See Thomson, The Right to Privacy, 4 PHILOSOPHY AND PUB. AFF. 295 (1975); Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong? 31 LAW AND CONTEMP. PROB. 326 (1966). Kalven suggests, for example, that some “rights” of privacy are merely attempts to enlarge defamation and would better be left to the technical complexity of our present law of defamation which deals well with insignificant dignitary harms. Id. at 341.
which could place us in a position where we might have to be concerned about the possibility of such evaluation. Consider how our social relationships, especially the relationship of friendship, and our sense of the nature of private places suggest that the ultimate concern we have with privacy is this concern with the possibility of unauthorized evaluation.

When we are with a friend, as opposed to a stranger, there is usually little concern about privacy. This is so because we are secure exposing the more intimate aspects of our lives to a friend—secure when faced with the friend’s use of what is learned from that exposure. We feel comfortable, for example, turning to a friend for advice because we trust the friend to continue to care for us, to continue to respect us, despite what may be known as a consequence of our request for help. We would never, in other words, expect a friend to make us the mere object of his or her judgment. An important and characteristic difference, then, between that part of our lives conducted with family and friends and that part conducted with strangers is the absence in the former, but not in the latter, of a conscious awareness of ourselves as objects of evaluation. We speak of this part of our lives as conducted “in private” and as involving “private relations” because this is where we are safe from scrutiny and thus secure against evaluation. Moreover, we call the places where this part of our lives is conducted “private places.” Indeed, it is when we are in such places that we are most comfortable “letting our hair down,” exposing

11. Benn, Privacy, Freedom, and Respect for Persons, NOMOS XII: PRIVACY I (J. Pennock & J. Chapman eds. 1971), states a different, more general principle: “... [A]ny man who desires that he himself should not be an object of scrutiny has a reasonable prima facie claim to immunity.” Id. at 12. This principle of “presumptive immunity” Benn makes specific in three areas: First, he insists privacy is important as an excluding condition—making possible intimate social relations, id. at 16-21; second and third, he stresses privacy’s role protecting respectively “the free man in a minimally regulated society,” id. at 21, and the autonomous man against the pressures of conformity, id. at 24.

12. See Rachels, Why Privacy is Important, 4 PHILOSOPHY AND PUB. AFF. 323 (1979). Rachels finds the primary interest persons have in privacy in a different connection between privacy and social relationships. He argues that our ability to control what is known about us is an essential ingredient in our being able to develop and maintain social relationships, and that privacy’s role is to provide this control. Id. at 326–31. But exactly what role does privacy play? Different social relationships are often characterized by the extent of intimacy. Just because these relationships typically exhibit a certain willingness to reveal intimate information, however, does not mean they are necessarily caused by these revelations. The cause-effect relation works both ways. There usually is friendship before intimate revelation, though sometimes such intimacy (witness trustful and evoking revelations by the friend) deepens the friendship, causing it to grow and endure. Primarily though it is because we have friends that we are willing to reveal things about ourselves. This is so because we are secure in revealing intimate things about ourselves to a friend—secure when faced with the friend’s judgment of us. What a correct analysis of the relationship of “friendship” to “intimacy” and “privacy” should disclose is that differing social relationships determine when evaluations of our character and conduct are appropriate, expected, or invited, and that the privacy norm operates to control the conditions under which such evaluations are possible.
our bodies and minds, and engaging in those intimate activities most easily disrupted by the presence of evaluational attitudes.

Because we recognize private relations and private places as safe in these ways from evaluation, we can also better appreciate Noah’s outrage. At the core of what is objectionable about Ham’s intrusion is his presumption of permission to gain that knowledge which could make his father the mere object of his evaluation—a presumption implicit in his conscious scrutiny of the circumstances revealed in the tent. Intimate friends and lovers do not ordinarily invade our privacy because they have our permission to share, and thus know about, our lives. We would neither expect nor consider threatening their evaluations. Children have a hard time invading privacy, because their ability to make judgments based on the knowledge they gain by their intrusion is limited. Even Ham’s intrusion becomes more palpably a privacy invasion when we know he actually takes a judgmental interest in what he sees, an interest which was unjustified especially given his relationship to his father. Moreover, because it is this potential for evaluation that is of concern in privacy intrusions, the effect of an accidental intrusion can be mitigated either by “putting out of mind” what we have seen or heard—by not thinking about what we should not know, or, as Shem and Japheth do when they back into their father’s tent, by trying to make sure that no adverse judgment can result.

B. Unauthorized Disclosures

The second major sort of privacy invasion we noted earlier involves the disclosure of information. Ham not only intrudes upon his father, he exhibits his judgmental interest in what his intrusion reveals and compounds his invasion of his father’s privacy by “telling his brethren without.” We have become particularly sensitive to privacy invasions by disclosure in recent years because of the advent of information technologies. There are

13. Such evaluations would not only be inappropriate, they would be likely to destroy the relationship itself. Consider, for example, the lover who insensitively demands high standards of sexual performance from his or her beloved. Even parents can invade their children’s privacy by constantly placing themselves in a position to know the intimate details of their child’s life, especially when that information is used to judge the child’s motives or behavior.

14. Notice, though, that a privacy intrusion need not actually involve such a judgmental interest. All that is essential is that the intruder be sufficiently aware of the significance of events observed to be able to evaluate them. The voyeur may peek into my window with the intention of revitalizing a fantasy rather than to make a judgment, but the peeking is into a place where security against the possibility of evaluation is assumed and where, therefore, the voyeur can still become aware of events or activities which might elicit an evaluation. By contrast, the child intruding into the marital bedroom of the young couple, may, quite innocently, avoid a privacy invasion by being unable to recognize the significance of events there.
obvious and important similarities between privacy intrusions and releases of private information. Both involve knowledge of us which provides a condition under which we might be evaluated.\textsuperscript{15} In the intrusion case it is direct observation of our lives which makes us subject to possible evaluation. In the information release case it is secondhand observation which occurs.

Our privacy is invaded by disclosures of information when the sort of information which could make us subject to evaluation is transmitted to persons who lack the authority to evaluate us. Again, intimate relations with lovers and friends are instances in which this aspect of privacy is often waived as a natural part of the relationships involved. But unlike the intrusion case, there is no question of confusion with nuisances. Rather, the interesting issues are when and what information about us ought to be available to others.

In the information release case our privacy is obviously waived in those circumstances in which evaluation is appropriate or approved. We release our school or job records to prospective employers or graduate schools. We submit our work to the evaluation of superiors. We expect our efforts will be evaluated when we run races, play games, seek prizes, or run for public office. In all these instances our privacy is not invaded by the disclosure of information because we choose to place ourselves in a position where evaluations are expected. However, when information is released without our permission, or is sought in contexts in which we have not sought evaluation, as it is for example by the gossip, our privacy is invaded.\textsuperscript{16} It is invaded because we are treated as the potential objects of others' gratuitous evaluations rather than as persons.\textsuperscript{17}

\textsuperscript{15} Because in most instances it is impossible directly to prevent persons from attempting to evaluate us, the right of privacy protects, in part, by giving us control over that knowledge which would ordinarily tend to license critical evaluations or lend them credibility.

\textsuperscript{16} There are instances in which we may become subject to evaluation less by choice than by accident—situations where rights of free expression and press are also at issue. The ex-Marine who saved President Ford's life by deflecting Sara Jane Moore's shot was discovered by the newspapers to be a member of the San Francisco gay community. He has sued several California newspapers for an invasion of his privacy. Abrams, The Press, Privacy, and the Constitution, N.Y. Times, Aug. 21, 1977, § 6 (Magazine) at 11.

\textsuperscript{17} Reiman, Privacy, Intimacy, and Personhood, 6 PHILOSOPHY AND PUB. AFF. 26 (1976), makes the claim that protecting privacy shows respect for persons by serving as "an essential part of [a] complex social practice," id. at 39, which has a powerful impact on our conception of ourselves. Privacy, he says, "protects the individual's interest in becoming, being, and remaining a person." Id. at 44. It does this by requiring "that the individual be treated as entitled to determine when and by whom his concrete reality . . . [and] . . . the thoughts in [his] head will be experienced by someone other than [himself] . . . ." Id. at 42 and 43 respectively. But Reiman never tells us exactly which observations of our "concrete reality" or "thoughts" will be privacy invasions, \textit{i.e.}, when the individual ought to be in control. He says, for example, "It is sufficient that I can control whether and by whom my body is experienced in some significant places and that I have the real possibility of repairing to those places." Id. at 44.
C. Dignitary Harms—Avoiding Overextensions of the Privacy Norm

When the interest in what others know about us is connected with privacy in the particular way suggested here, we should be able to specify how the privacy norm’s protections should be limited to avoid petty claims to dignitary harms. Socrates warns at the beginning of the Crito that our concern should not be with the opinions men have of us but rather with the truth of those opinions. Socrates would no doubt qualify such a claim by repeating his insistence that the community provide an opportunity for open discussions of men’s views and their views of us. It is not our image which is at stake, but the truth of that image and some opportunity to respond to its erroneous disparagement. In the presence of modern information technology, however, we may have lost the conditions under which response to the views of others would be possible, and this fact may make control of some aspects of our biography especially important. Properly understood and applied, the privacy norm can provide that control. But there is an aspect of the legal protection of control over information about persons in our day which is much less fortunate. This is an inflated concern with “image.” Such a concern reflects in part a lack of trust in the judgment of fellow citizens—in their ability to distinguish well-founded opinions and mere appearances. It also reflects a general lack of venturesomeness—an unwillingness to take risks in a world which has come considerably under our control. Certainly, the weaker our image of ourselves, both as vulnerable to gossip and as morally weak, the more distorted becomes our fear of being found out and the more strongly we desire to control our image. A person who is self-respecting, self-possessed, and venturesome is doubtless less afraid of what might be found out about him or her. With the advent of modern information systems, then, the privacy norm plays an important and essential role in helping us control our lives by restricting how and when we might be subject to evaluation. What is troublesome is that it can also be misused to try to protect “images,” which is dishonest and destructive of the very social relations privacy helps protect.

D. The Cultural Factor

The analysis of the privacy norm’s restrictions on intrusion and disclo-
sure of information also helps us to see that what makes some circum-
stances private and others not private will inevitably be bound up with our
culture and mores. We will not count as invasions of the privacy right
scrutiny of those of our activities where evaluations would be inconse-
quential or unproblematical. Someone may stare at a haircut across the
room or watch as a jogger passes in the park. In neither instance is there a
privacy invasion because we do not count such scrutiny to be of particular
significance. What we count as important spheres of evaluation will also
be what we count as important possible areas for privacy invasions. Shem
and Japheth took great pains not to see their father’s nakedness—no doubt
more care than we might take. Their sense of how they might evaluate
their father’s state determines which specific behavior shows respect, in
their culture, for privacy.

E. Tort Law Protections of Privacy

If the analysis of the privacy norm proposed here is correct, then it
ought to be confirmable in the experience of the development of the pri-
vacy tort, and in particular it ought to be able to show us how to draw
together the various elements of that tort. Prosser’s authoritative sum-
mary of the development of the idea of a right of privacy classifies four
distinguishable torts:20 intrusion into seclusion or private affairs; public
disclosure of potentially embarrassing facts; public release of information
which places a person in a false light; and appropriation of name or like-
ness for commercial or similar use.21 It is not immediately clear how all
four of these torts can be connected with the privacy norm. Certainly the
first two—the intrusion and public disclosure torts—do fit as obvious
cases of the gathering of knowledge without warrant that might make per-
sons subject to evaluation. But why should the “false light” and “appro-
priation of name or likeness” torts come to be associated with privacy
and not with defamation and theft of a property interest, respectively?22

The analysis of the privacy norm proposed above suggests that one rea-
son the “false light” tort came to be associated with privacy is that the
snoop or gossip typically wants to make “the best” of private knowl-
edge—make others look as bad as possible—by twisting what has been
learned into a form which makes evaluations of certain kinds most obvi-

takes into account recent Supreme Court cases, see Bostwick, Comment—A Taxonomy of Privacy:
Repose, Sanctuary and Intimate Decision, 64 CALIF. L. REV. 1447 (1976).
22. Compare Wade, Defamation and the Right of Privacy, 15 VAND. L. REV. 1093 (1962)(the
false light tort should replace defamation) with Kalven, supra note 10, at 331 (the appropriation tort
is actually unjust enrichment by the theft of good will).
ous and most titillating. Indeed Prosser might have named this the “gossip’s tort” because privacy is here invaded only when private information is actually placed in a false judgmental light. The “false light” tort probably also came to be associated with privacy because the partial information gathered by invasions of privacy often is not seen in the intimate context of a whole life and is thus likely, when revealed, to suggest or encourage misleading or mistaken evaluations.

The reason the “appropriation of name or likeness” tort came to be associated with privacy, and not considered a kind of theft of property, the analysis here suggests, is that at the end of the last century the use of someone’s name or likeness in commercial enterprises might have subjected that person to strong social censure. In 1900 a young woman’s chances for marriage, and thus her life chances, could, for example, have been spoiled by her becoming a “public” person. This was so because, in that day, women were so extraordinarily vulnerable to criticism that they needed to be especially private persons. Attaching a name or likeness to a commercial product might be seen as equivalent to the loss of a woman’s virtue or at least an invitation to the loss of that virtue.

Thus, it is apparent that both the “false light” and “appropriation” torts do have an evaluational element, and that it is this element which is essential to understanding the privacy interest the tort invades. It is also apparent that all four of Prosser’s torts can be connected to the privacy norm when that norm is understood to protect the interest in being free of the potential for certain unwarranted evaluations.

II. THE CONSTITUTIONAL RIGHT OF PRIVACY

A. Griswold v. Connecticut

In 1964 the Supreme Court faced a challenge to Connecticut’s statute proscribing the use of contraceptives. There seemed to be general agreement on the Court that the Connecticut statute was, in Justice Stewart’s words, “an uncommonly silly law.” The question, of course, was whether it infringed basic constitutional protections, especially the fourteenth amendment’s due process clause.

Justice Douglas, writing for the Court, made roughly the following argument: The doctrine of substantive due process has been discredited. The Supreme Court should not substitute its judgment for that of the state legislatures regarding precisely what liberties persons shall and shall not have. “We do not sit as a super-legislature to determine the wisdom,
need and propriety of laws that touch economic problems, business affairs, or social conditions," he asserted. However, the Court does feel responsible to secure persons against state actions which would abridge their fundamental rights. The meaning of "liberty" in the due process clause is thus to be defined, not as the Court should unilaterally decide, but according to the Court's understanding of the meaning of "fundamental rights." Following this principle, Douglas discovered a "fundamental" right of privacy in the "penumbras" of several of the rights of the Bill of Rights and by means of this right and the due process clause struck down the Connecticut statute. In reasoning from the right of privacy to Connecticut's contraceptives statute Douglas' argument seemed to take two alternative courses. The first involved a serious conceptual error, and the second reached the statute only indirectly.

By reading the right of privacy discovered in the penumbras to protect "private life," where the latter meant those parts of a citizen's life which should be kept free from state interference to provide for certain autonomous choices, the Connecticut statute could be reached easily and directly. The Court needed only to decide that included in "private life" is the use of contraceptives. But this employment of privacy involves a pun on "private," an equivocation in meaning. The Court attempted to restrict the reach of the concept of liberty in the due process clause by limiting its meaning to "fundamental rights," but then discovered a right—the right of privacy—which it used in a way its limitation was ostensibly designed to avoid. The Court could find the contraceptives statute unconstitutional, on this line of reasoning, only by deciding unilaterally what our personal autonomy shall be. This argument not only failed to avoid some of the evils of substantive due process, it also had nothing to do with the privacy norm, discussed above.

The second argument which Douglas seemed to use was less direct in its application but did use the right of privacy in a manner consistent with the privacy norm. The argument was that a statute like Connecticut's can

25. Id. at 482.
26. Id. at 485.
27. There has, of course, been considerable disagreement on the Court since 1937 as to just which rights are fundamental rights. Do they include all or only some of the rights of the Bill of Rights? Do they include any rights not specified in the Bill of Rights? For discussion of these issues, see L. Tribe, supra note 2, at 567–69.
28. I owe this important point to Gross, Privacy and Autonomy, NOMOS XIII: PRIVACY 169, 180–81 (J. Pennock & J. Chapman eds. 1971). Indeed, as Gross has noticed, there is a double temptation to conceptual error here, first by puns on "private" and, second, by equating the whole range of "right to be let alone" with the "right to privacy."
29. As the discussion in D infra indicates, the Court is not clear at this point, or in subsequent cases, about whether it is all autonomous choices or only those relating to particularly intimate or personal matters that are protected under the "private life" argument.
be found unconstitutional for infringing on a right of privacy if the conduct it restricts is nearly always carried on in private, and if enforcement procedures would involve such extensive privacy invasions as to outweigh the benefits achieved by making the conduct a crime. On this argument it was not the substance of the statute but the costs of its enforcement which was attacked directly.  

The difficulty in *Griswold* is that Douglas’ opinion for the Court did not make clear just which of these two arguments was being used. Douglas quoted approvingly from *Boyd v. United States*:  

"It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence [against the right of privacy]; but it is the invasion of [the] indefeasible right of personal security, personal liberty and private property, ..."  

This suggests that Douglas was using the argument in which the right of privacy is taken to protect personal autonomy. Just over one paragraph further on, however, Douglas asked rhetorically: "Would we allow the police to search the sacred precincts of marital bedrooms for the telltale signs of the use of contraceptives?" This, of course, suggests he was using the second, indirect argument—the argument in which enforcement of the statute would breach the privacy norm.  

Moreover, it is not even clear from his presentation of the "penumbra" arguments which right Douglas discovered. Indeed, the very ambiguity present in his use of privacy to strike down the Connecticut statute is also present in his penumbra precedents. For example, that part of the right of privacy found in the penumbras of the first amendment’s right of association was said to be evident both in *NAACP v. Alabama* where Douglas found "‘privacy in one’s associations’ [protected against] [d]isclosure of membership lists" —a clear instance of protection of the privacy norm, and also in *Pierce v. Society of Sisters* and *Meyer v. Nebraska* where the issue was the right of parents to choose the schools, and the language
used in schools, for their children—an equally clear instance of protecting autonomous parental choices against state interference.

In four cases which followed *Griswold* this systematic ambiguity in the Court’s use of the right of privacy becomes increasingly evident and troublesome.

B. Griswold’s Progeny

In *Stanley v. Georgia*, which struck down Georgia’s obscenity statute as it pertained to possession of obscene materials in the home, Justice Marshall wrote for the majority: “Moreover, in the context of this case . . . [the right to receive information and ideas] takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.” Marshall’s argument here makes it sound like he was dealing with the privacy norm, but immediately he quoted Brandeis’ famous dissent in *Olmstead v. United States*:

> 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 man.*

This language seems to refer to a right of personal autonomy. To add to the ambiguity, Marshall then cited *Griswold* and *NAACP v. Alabama* in support of the claim he is making here.

Similar difficulties appear in the Court’s reasoning in *Eisenstadt v. Baird*. There the issue was, again, a contraceptives statute, Baird having been convicted of giving contraceptive foam to an unmarried woman contrary to a Massachusetts statute. Justice Brennan, speaking for the Court, argued:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. . . . If the right of privacy means anything, it is the

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40. *Id.* at 564.
41. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
42. 394 U.S. at 564 (emphasis added).
43. 394 U.S. at 564 (emphasis added).
44. 405 U.S. 438 (1972).
right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.45

Brennan’s very choice of words exposes the confusion. Government does not intrude into a decision, it intrudes into privacy; it interferes with a decision. The availability of contraceptives for use by unmarried persons is a matter of the right of personal autonomy, not a matter of the privacy norm right of privacy. To add to the confusion, Brennan cited Stanley and quoted Marshall at the point at which Marshall appears to have used both senses of privacy.46

By 1973, in Roe v. Wade,47 Justice Blackmun’s opinion for the Court ignored the privacy norm completely, using only the autonomy argument. Blackmun cited Stanley, Boyd, Olmstead (Brandeis’ dissent), Griswold, Eisenstadt, Meyer and Pierce, among others, and then said of the right of privacy:

... whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, [it] is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.48

The right of privacy, in the sense of personal autonomy, is broad enough to guarantee a woman’s right to make decisions whether to have an abortion, provided, of course, one reads the abortion laws as involving unjustified state paternalism as Blackmun apparently did. Blackmun could not, however, connect the abortion issue to the privacy norm, because there is not any concern in Roe v. Wade, analogous to the concern in Griswold, over police searches of private places.49 Without privacy norm issues raised in some way, it was very difficult for the Court to conceal, as it was able to conceal in the earlier cases, the independence of the autonomy right from the privacy norm right. Additionally, the way was open for the Court to ignore the interests protected by the privacy norm right when they arose in the future.

45. Id. at 453 (emphasis in original).
46. Id. at 453 n.10.
47. 410 U.S. 113 (1973).
48. Id. at 153.
49. This is not to say, however, that abortion could never invoke privacy norm considerations. If, for example, some benighted state legislature passed a law requiring the publication of the names of women who have undergone abortions, the privacy norm would be violated. For an analogous situation, see the discussion of Whalen v. Roe, 429 U.S. 589 (1977) in notes 56–61 and accompanying text infra.
In *Paul v. Davis* a photograph of respondent Davis was included in a "flyer" of "active shoplifters" distributed by Police Chief Paul, even though Davis had only been arrested and not convicted at the time of distribution. Davis sued, alleging among other things that the flyer deprived him of his constitutional right of privacy. Justice Rehnquist, in the majority opinion, acknowledged that the Court has recognized "zones of privacy," which recognition has resulted in suppression of evidence seized in unreasonable searches and protection of activities "relating to marriage, procreation, contraception, family relationships, and child rearing and education." Rehnquist failed, however, to identify the privacy norm interests which underlie protections against unreasonable searches and failed to distinguish clearly these interests from the autonomy interests related to marriage, procreation, etc. He noted that Davis was not seeking "to suppress evidence seized in the course of an unreasonable search, . . ." and then, without considering ways other than unreasonable searches in which the privacy norm right might be breached, gave his primary attention to the claim that there were autonomy interests at stake in the case, despite the fact that autonomy is the wrong category for Davis' case. He spoke of the autonomy line of right of privacy cases as "defying categorical description" but as "deal[ing] generally with substantive aspects of the Fourteenth Amendment" and limiting "the States' power to substantively regulate conduct." He then said:

Respondent's claim is far afield from this line of decisions. He claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private,' but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

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51. Davis also alleged that he was deprived of liberty without due process by being branded a criminal without benefit of trial. *Id.* at 697–712. This issue is not discussed here.


53. 424 U.S. at 713. Rehnquist apparently failed to notice, as Douglas noticed in *Griswold*, that rights against unreasonable searches protect the privacy norm by focusing on the threats to privacy inherent in criminal enforcement processes. See notes 22–33 and accompanying text *supra*. Suppression of evidence is, of course, a means of protecting privacy which might be invaded during such processes. At stake in *Davis* was the privacy norm issue interest against extensive and misleading disclosure of information by state officials.

54. *Id.*
Privacy

Davis's concern over disclosure of his arrest by the state surely raised only privacy norm issues. Indeed, Davis's was a classic privacy norm situation because the publication and distribution of the flyer encouraged unwarranted, unauthorized, and false evaluations of his character. But because Rehnquist did not identify clearly or correctly the privacy norm sense of the right of privacy (it was not merely a matter of suppression of evidence), he was satisfied to dismiss Davis's claim for not presenting issues akin to those in the personal autonomy cases. Paul v. Davis thus dramatically demonstrates the danger of fuzzy definitions of privacy, and shows that insistence on the proper identification of the interest protected by a right is more than a matter of semantics. It is ultimately an appeal to the proper resolution of cases.55

C. Whalen v. Roe56—An Additional Confusion

By 1977 there had been sufficient comment in the literature,57 especially on Roe v. Wade, that the Court could finally acknowledge explicitly, in the words of Justice Stevens in Whalen v. Roe, that: "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."58 For lack of a clear understanding of these two interests, however, Stevens' attempt to apply the two rights of privacy to the issues in Whalen is confused, and confused in a new and complicating way.

In Whalen the question was the constitutionality of a New York statute which classified potentially harmful drugs and required that reports be filed with the State Health Department when such drugs were dispensed.

55. Properly analyzed, Davis's claim should have been upheld, and the state action struck down through the due process clause as a violation of the privacy norm right. Justice Brennan, in dissent on the privacy issue, argued the case well:

Essentially, the core concept would be that a State cannot broadcast such factual events as the occurrence of an arrest that does not culminate in a conviction when there are no legitimate law enforcement justifications for doing so, since the State is chargeable with the knowledge that many employers will treat an arrest the same as a conviction and deny the individual employment or other opportunities on the basis of a fact that has no probative value with respect to actual criminal culpability.

424 U.S. 713, 735, n.18.
58. 429 U.S. at 598–600 (footnotes omitted).
Suit was brought by patients regularly receiving such drugs and their prescribing doctors. The basis of their constitutional claim was that the New York statute invades a "protected zone of privacy." After presenting the argument which recognized the two interests in privacy, Stevens reasoned as follows:

Appellees argue that both of these interests are impaired by this statute. The mere existence in readily available form of the information about patients' use of Schedule II drugs creates a genuine concern that the information will become publicly known and that it will adversely affect their reputations. This concern makes some patients reluctant to use, and some doctors reluctant to prescribe, such drugs even when their use is medically indicated. It follows, they argue, that the making of decisions about matters vital to the care of their health is inevitably affected by the statute. Thus, the statute threatens to impair both their interest in the nondisclosure of private information and also their interest in making important decisions independently.\(^5\)

Stevens then addressed each of these interests, accepting them as prima facie legitimate and distinct. Unfortunately, a correct analysis of the facts in *Whalen* would have revealed but one privacy-related issue.

The first theory of the appellees was, indeed, a privacy norm theory. It expressed understandable concern regarding the potential for release of private medical information which could make both patients and doctors subject to social scrutiny.\(^6\) This part of their appeal appears correctly focused on exactly that point. An independent interest in personal choice was not, however, presented by the second theory as appellees proposed. Instead, it was the privacy norm interest repeated in different terms. One of the reasons a privacy right is important, as indicated in Part I, is that it assures circumstances in which persons need not fear the scrutiny and thus the judgment of others. The specific liberty provided by the right of privacy, when it is promoting the privacy norm, is the liberty to talk, to act, and to engage in certain activities free of the potential for judgment by others. Without privacy we might not act because we would be fearful of the consequences of revelations. Appellees' second theory in *Whalen* only raised, again, privacy in the privacy norm sense, though it did raise it in the terms of the specific personal liberty protected by the privacy norm right. The majority's endorsement of this second claim as the application of the autonomy sense of the right of privacy misconceived the relationship between the autonomy right and the privacy norm right.

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59. *Id.* at 600 (emphasis added).

60. Stevens ultimately held that New York had provided sufficient safeguards for the release of this data to make the risk of disclosure too small to represent a genuine threat to appellees. 429 U.S. 600–02.
Privacy

Clarification of this new confusion regarding the Court’s use of the right of privacy will conclude this article.

D. Liberty and the Two Privacies

The right of privacy in the autonomy sense is potentially a very broad right. Prior to *Whalen* the Court seemed to have limited its protections to autonomous choices relating to “marriage, procreation, contraception, family relationships, and child rearing and education.” But this right can, with a little stretching, be taken to protect all autonomous choice, i.e., all political liberty. This can be done with ease if the elasticity in the meaning of “autonomy” is fully exploited. “Personal autonomy” usually refers to a fairly narrow set of liberties from unwarranted state paternalism, especially as that paternalism interferes with particularly intimate or personal choices, but it can also refer to all protected liberties—all autonomy, thus liberty equivalent to the broad ideal of personal liberty. But when personal autonomy is taken to be equivalent to personal liberty, understood in this generic sense, the right to personal autonomy ceases to protect a specific liberty of its own, because the personal liberty ideal merely serves as a shorthand way of referring to that collection of specific liberties which, when taken together, are supposed to be the whole liberty of individuals in a liberal state. This means that any specific right, like the privacy norm right, necessarily becomes an instance of the generic right to personal autonomy, because the liberty protected by the specific right, in this case the liberty to act free of certain observations or disclosures, is, by definition, an instance of the generic ideal of personal liberty.

So Stevens was correct in *Whalen* to recognize the privacy norm issues in the threat of disclosure of prescription information. He was also correct to recognize that the specific liberty at stake in this case is the liberty to conduct parts of one’s life, to make certain personal choices, without disclosure. What he failed to recognize was that this liberty is merely the liberty protected by the privacy norm right. It can be viewed as being protected by the personal autonomy right only if “personal autonomy” is first stretched to mean what the generic ideal of personal liberty means and then the specific liberty protected by the privacy norm right is cited as one of its instances. This not only invites a new set of confusions, just at the moment when the Court seemed on the verge of separating its two rights of privacy, it also opens the way for full revitalization of that type of substantive due process reasoning so often disparaged. Prior to *Whalen*, the narrowly defined autonomy right of privacy had at least been limited to protecting a specific set of liberties relating to home and family life. The more expansive personal autonomy right has no such limita-
tions, however, and consequently cannot preclude that sort of freewheeling Court determination of specific personal liberties typically associated with the least attractive forms of substantive due process.61

III. CONCLUSION

When Justice Douglas discovered the right of privacy in the penumbras of the Bill of Rights in Griswold he opened a conceptual Pandora’s box. To think clearly about this right, potential ambiguities in the use of concepts like “privacy,” “personal autonomy,” and “personal liberty” needed to be avoided. Unfortunately, the Court, in trying to protect a number of important interests, has not thought at all clearly about these concepts. Consequently, it has resolved at least one case incorrectly,62 and continues to reason in ways that will invite errors in the future.

When Noah condemned Ham to a life of servitude he expressed dramatically both the high value of privacy and the presumptuousness of the privacy invader. We do have an interest in being free of the evaluations of others, and persons who invade privacy need to recognize that the privacy norm protects this important, specific interest. If the Supreme Court is going to treat these issues with the care and sensitivity they deserve, then it needs to recognize, and articulate clearly, the privacy norm interest protected by one of the rights of privacy it has discovered. It also needs to distinguish correctly this interest from the interest in making certain particularly intimate and personal choices, which is protected by a different, quite specific and distinct autonomy right of privacy. Then it can avoid accusations that it is arrogating to itself the sweeping powers of the more infamous forms of substantive due process jurisprudence, even if it cannot avoid the charge that it created the autonomy right out of a play on words.63

61. See notes 28–29 and accompanying text supra.
62. See note 55 and accompanying text supra.
63. See note 28 and accompanying text supra.