

## The Right to Privacy: A Sceptical View

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Privacy is at present a fashionable and popular commodity but a curiously elusive one. Even its pronunciation is uncertain.<sup>1</sup> Can we form a clear and comprehensive notion of it? The fact that it is one of the things guaranteed to us in the Universal Declaration of Human Rights might well give us grounds to suspect that we cannot. So might some of the definitions offered by those who have written about it. The author of a well known American study, Professor Alan Westin, says that it is in the first place "the state of solitude or small group intimacy".<sup>2</sup> Though small group intimacy sounds like something ripe for exposure in the *News of the World*, it is obviously, as Westin recognizes,<sup>3</sup> only a part of an acceptable definition.

This uncertainty gives rise to disagreements about policy. In July 1972, the British Younger Committee concluded that there was no satisfactory definition that could be used for the purpose of enacting a general law to protect privacy and that no such law was needed.<sup>4</sup> Two years earlier, however, a committee set up by the Justice Society said that there was an urgent need for legislation to create a new statutory tort of infringement of privacy<sup>5</sup> and several draft bills have been drawn up for the purpose.

There are, I think, a number of different reasons for this general state of muddle. One is the tendency in the past to produce incomplete or over-general definitions. The original begetter of the notion as a legal term of art, Thomas Cooley,<sup>6</sup> simply spoke of the right "to

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<sup>1</sup> The OED and Englishmen used to recognize only privacy (long i). But more probably now say privacy (short i) — possibly due to the quickening pace of modern life. Oddly, Americans whose pace quickened long ago used to say privacy (short i) but often now say privacy (long i). Nothing at all similar has happened to primacy or piracy.

<sup>2</sup> *Privacy and Freedom* (1967), 7.

<sup>3</sup> *Ibid.*, 7: he adds that privacy involves the right of individuals, groups and institutions to determine how and to what extent information about them is communicated to others.

<sup>4</sup> *Report of the Committee on Privacy*, Cmnd.5012 (1972).

<sup>5</sup> Justice (Society), *Privacy and the Law; a report* (1970).

<sup>6</sup> *The Elements of Torts* (1895), 9.

be let alone" and this was taken up by Messrs Brandeis and Warren in their article *The Right to Privacy* published in 1890.<sup>7</sup> A quite natural response to the assertion of a right to be let alone is the query "To do what?": to go on battering the baby, or cheating the Inland Revenue, or poisoning the customers?

An example of over-general definition is found in the last ditch attempt of the 1970 Justice committee<sup>8</sup> to salvage something from the conceptual flux. What they ended up with was "that area of a man's life which in any given circumstances a reasonable man with an understanding of the legitimate needs of the community would think it wrong to invade".<sup>9</sup> This produces an extra reason for confusion: namely, the running of the problem into that of the general issue of liberty and the limits of state action. Talk about community needs and reasonable men simply brings out the awareness that we are dealing with only one side of a relationship. There is no very clear area involved, since an area of life just means actions or activities and it is clear to most people that the right to keep our actions free from the intervention of others is subject to fairly continuous modification. We don't even hope to be let alone by the criminal law, the town planner, the gas meter inspector or the customs officer. Warren and Brandeis in fact equated the right to be let alone with "the right to life" which they said "has come to mean the right to enjoy life".<sup>10</sup> But protecting the right to enjoy life (by compulsory vaccination or Clean Air Legislation) will often mean not letting people alone.

There is a further ground of confusion caused by the fact that the contrast between what is private and what is or should be public (or non-private) occurs in a number of different fields, and the distinction in each field may be different. Differing public-private distinctions are found, for example, in discussions of the limits of criminal sanctions, civil liberties, and libel.

### Privacy and the Criminal Law

Let us take first arguments about the use of the criminal law, where assertions about privacy and private morality are common. "Private morality" is a misnomer for some such periphrasis as "the rules or morality that define the area of protected private behaviour".

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<sup>7</sup> (1890-91) 4 Harv.L.Rev. 193, 195.

<sup>8</sup> *Supra*, f.n.5.

<sup>9</sup> *Ibid.* Cf. *Report of the Committee on Privacy*, *supra*, f.n.4, particularly ch.4.

<sup>10</sup> *Supra*, f.n.7, 193.

But "private" here suffers from the ambiguity stemming from the supposition on the one hand that it describes some physically secluded area or activity and, on the other hand, that it labels or nominates some activity as deserving immunity from social or legal interference. It happens to be the case that some activities often held to be private or immune from interference in the second sense are frequently (as in the case of sexual activities) private in the descriptive physically secluded sense; in such cases, their immunity is often justified by the right to privacy.

But the first sense is perhaps an irrelevant distraction since it is never conclusive in itself. An adult consenting Englishman's home is only his castle up to a point and not if he uses it to grow cannabis, slaughter animals or hire out women, however privily these activities are confined between four privately owned walls. Nobody since (and including) John Stuart Mill has been able to describe any particular area or type of activity to which the term "self regarding" or "immune" activity could be attached.

Most attempts to establish a libertarian circle around the individual are concerned with the consequences or impact of his actions either on others or on himself. A recent American author<sup>11</sup> writing in the Mill tradition on what he calls "the criminal threshold" describes activities that ought to be left free from legal interference and mentions several categories ripe for privacy or immunity. One is "activities where there are no visible external consequences that can rationally be shown harmful to the community or to individuals in it".<sup>12</sup> (The emphasis on "visibility" seems to suggest that discreetly slaying one's enemies might be allowable if done by hypnotism, laser beams or one of those rare fictional poisons that leave no trace.) The other categories include activities whose prohibition is generally unenforceable (I suppose on the assumption of some standard degree of undermanning in the police force), and activities that are no longer generally considered criminal (perhaps by a majority of 51 percent, or by persons specially trained to recognize non-criminal forms of crime). Whatever we think of these categories, however, they do not name any particular area or type of activity.

In general privacy has not much to do with the limits of the criminal law. It is not, for example, the reason why some people think the law should be kept out of labour relations or the enforcement of betting and gambling debts. But sometimes privacy arguments do seem to play a part. A plausible example perhaps is the

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<sup>11</sup> Paul R. Wilson, *The Sexual Dilemma* (1971).

<sup>12</sup> *Ibid.*

American decision in 1965 in which the Supreme Court held (in *Griswold v. Connecticut*)<sup>13</sup> that married persons in Connecticut could not be prohibited from using contraceptives. Here the court made specific reference to the Fourteenth Amendment's protection of the rights of "privacy and repose". It was said that it would be repugnant to the notions of privacy surrounding the marital relationship to allow the police "to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives".<sup>14</sup> But in what sense is privacy as distinct from some more general notion of liberty the deciding factor here? There were independent reasons for holding that the prohibitory statute violated the Fourteenth Amendment. It was over-broad and ineffective as a means of achieving the legislature's professed end of controlling promiscuity. It certainly involved a matter of individual conduct where the choices involved could not be said to be primarily aimed at or to affect other people. So does the talk of the sacred precincts of the marital bedroom make any difference? Would it be all right if the pills were lying about in the dining room? Suppose that we substitute heroin or gelignite for contraceptives. Would the bedroom door no longer be a barrier? Or could the State properly authorize its agents to rummage even under the mattress? If persons can for proper reasons be searched, why not premises: is the bedroom more sacred than the trouser pocket?

My point is that though some rights such as those to be free from unreasonable searches or from tapping of one's telephones or interferences in sexual behaviour can plausibly be described as interferences with privacy when done in circumstances in which we know the interference to be wrong, privacy as such rarely seems to aid in determining what those circumstances are. Another example may illustrate this. The Supreme Court has ruled<sup>15</sup> that state laws cannot forbid a woman to have a medically approved abortion in the first three months of pregnancy, mentioning once more the right to privacy. However, it is difficult to see how the interference with privacy is any less if the abortion is in the seventh or eighth month, or if it is sought for non-medically approved reasons. If we call decisions about our own bodies "private", what is it that makes some decisions about what we put into or take out of them rightly immune from interference and others not? Decisions about abortion where a developed foetus is involved of course bring in arguments about the impact of actions on other persons (assuming that we can

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<sup>13</sup> 381 U.S. 479 (1965).

<sup>14</sup> *Ibid.*, 485-6.

<sup>15</sup> *Roe v. Wade* 93 S.Ct. 705, 410 U.S. 113 (1973).

decide when a foetus is a person). But neither that decision nor any consequent reasoning about the propriety of abortion is much helped by the privacy notion. Liberated women who believe that abortions should be available on demand do not, I think, base their arguments on any special claim about privacy.

Privacy also enters on occasion into arguments about free speech and the right to silence. Privacy, for example, is often connected via the freedom of private conscience with the freedom of speech and belief and the right to keep one's beliefs to oneself. Thus the privilege of non-self-incrimination or the right to remain silent on a criminal charge is frequently said to be the corollary of the right to speak, and is thought to be justified by the notion of privacy. This argument should, I think, be viewed with suspicion. It raises a number of questions. For example:

- 1) Does the right to speak out in most or all circumstances entail the right to keep silent in all or most circumstances? I don't think that it does, or that they would necessarily be the same circumstances.
- 2) Is it the case that the right not to incriminate oneself is justified by the right to privacy? The history of this right and of the related principles in the law of evidence does not suggest that it is.
- 3) How close is the connection between privacy and the freedom of expression? If we connect one too closely with the other, some curious conclusions may follow, in view of the recent tendency to extend the notion of free speech into the area of what is sometimes called "symbolic speech", or expressive actions that in some way or other manifest beliefs. Thus privacy entails the right to keep silent, which derives from the right to speak out, which may properly be exercised in the form of symbolic speech and expression in political and artistic matters, which suggests that public commercial displays of copulation should be constitutionally immune from prosecution by reason of the right to privacy. Something like this argument has been used in California.<sup>16</sup>

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<sup>16</sup> In *In Re Gianni* 446 P.2d 535 (1968), 540, the California Supreme Court extended the protection of the First Amendment to a nightclub dancer charged with indecent exposure. Her specialty was described as "30 seconds of wriggling around on her hands and knees with her breasts exposed". The Court held that "The First Amendment cannot be constricted into a straight-jacket of protection for political expression alone. It extends to all forms of communication".

### Privacy and Discrimination

Let us turn now from the criminal law to, in a broad sense, constitutional and public welfare issues. Arguments about privacy have been thought to play a part here in demarcating a different kind of dividing line between an area of public obligation and an area of individual choice. In Britain and America, legislative or constitutional provisions aim to secure equality and impartiality of treatment for citizens. Nevertheless, it is clear that this policy collides at some point with the principle of promoting free choices in the use of property and other resources and with desires to be let alone or to be exempt from the requirement of acting in an impartial way towards others.

One conceivable principle for defining the scope of the obligation to observe impartiality (which was once written into the American constitution, but has since been written out of it again by the Supreme Court) is that the duty is not one to be imposed by law on private persons at all but is only one that falls on state or public agencies.<sup>17</sup> The application of this principle brings out the many-sidedness of the public-private distinction. Here "private" simply means "non-governmental" and "private activity" means unofficial or non-state activity. The borderline is a fuzzy one. To delimit the right to equal treatment against state or public agencies as being one that lies against official or governmental bodies is unclear to the extent that the criteria for being a governmental body are unclear. Are central government institutions in question or are local ones included? Do we count regulatory bodies or corporations appointed by politicians but engaged in commercial operations? Do we include bodies of whatever kind operating with public money or subsidized from taxation, such as universities or charities? (In a sense, this corrals almost everybody since almost all taxpayers are in part subsidized or supported by allowances or welfare payments derived from taxation.)<sup>18</sup>

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<sup>17</sup> The trend of decision during the past forty years on, for example, white primaries, property and fair housing, and civil rights legislation, has been towards the obliteration of any clear distinction between discrimination by state or public bodies and by unofficial or private bodies. Samples are *Shelley v. Kraemer* 334 U.S. 1 (1948); *Katzenbach v. McClung* 379 U.S. 294 (1964); and *Reitman v. Mulkey* 387 U.S. 369 (1967).

<sup>18</sup> Since in the United States state libel laws cannot penalize citizens for non-malicious defamatory utterances directed against the conduct of public officials, the public-private borderline is important for free speech purposes, too.

This principle, good or bad, has however been eroded in the United States by two arguments, neither of which carries complete conviction. One is that the state or government acts in a discriminatory way whenever it permits others to use its laws to discriminate or when it has no laws to prevent others from discriminating. The other argument steals tacitly back and forth between two senses of the term "public". It runs as follows: Some persons offer goods or services or accommodation to the public (*i.e.*, people in general). Thus they cannot be entirely private. Thus they must be public. But public (*i.e.*, state or governmental) activities are caught by the constitutional guarantee of equality under the law. Therefore the activities are properly subject to rules against discrimination.<sup>19</sup>

The temptation to use this and similar arguments derives from a feeling, which may be perfectly justified, that private individuals ought not to be free from legal obligations to treat other persons impartially at least up to a point. The point, however, is not very well defined. One attempt to locate it occurs in Professor David Raphael's *Problems of Political Philosophy*.<sup>20</sup> He suggests that the duty of impartiality only arises for private individuals where they are exercising a role of authority or guardianship, such as judges, policemen or civil servants. If what is in question is a moral duty, it would not of course follow that it ought on that account to be made a legal duty. But it may well be intended that the guardianship or authority role principle should provide a criterion for potential enforcement legislation aimed at discriminatory activity.

If this is so, we need, I think, some clear idea of what roles of authority and guardianship are. Is the role of employer, for example, such a role? Or does it depend on the size of the work force or the degree of paternalism exerted over it? At least some activities, such as those of shopkeepers or householders, seem plainly not to be roles of authority. Professor Raphael concedes this where he says that if a shopkeeper chooses to give credit to his friends, that is his own affair.<sup>21</sup> Having enunciated the principle, however, Professor Raphael seems to treat it rather lightly since he says that it may be right to impose a duty of non-discrimination even where no such roles arise

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<sup>19</sup> In *Bell v. Maryland* 378 U.S. 226 (1964), a "sit-in" case, it was said that "private property is involved but it is property that is serving the public" (Douglas J., 252). Mr Justice Black, dissenting, thought that the Constitution in itself did not prohibit storekeepers or property owners from choosing their customers or business associates (at 343).

<sup>20</sup> D.D. Raphael, *Problems of Political Philosophy* (1970).

<sup>21</sup> *Ibid.*, 130. I am not sure whether the same would be true of publicans and brothel keepers.

(and where according to the principle no moral duty to act impartially exists) on employers, hotel owners and property sellers. The suggested reason for imposing the obligation is that their freedom to discriminate has the effect of depriving a group of people of benefits generally acknowledged to be common rights.<sup>22</sup>

This smells of circularity because what are held to be rights must depend upon what rules and what legitimate exceptions are agreed upon. This is what is in issue and there is not a very obvious consensus about it, partly because many people believe in an inarticulate way in some version of the maltreated public-private principle despite legislation that clearly cuts across it, particularly in the fields of advertising, employment, housing and sexual equality. We have not yet got a full-blooded prohibition on private discrimination against women, but no doubt we soon shall have. In the United States, there are pressure groups devoted to putting down not only racism and sexism, but "heightism" and "uglyism": the denial of equal status to those innocently handicapped by smallness of stature and lack of physical attraction.

### **Privacy, Intrusion and Exposure**

To what extent is privacy a candidate for further specific protection by the extension of existing civil and criminal liabilities? An argument against establishing a general right to privacy might be seen in the fact that it is so pre-eminently a notion that takes its colour and meaning from the many different things that we may contrast it with. In different contexts it may be a synonym for seclusion, secrecy, individuality or unofficial status, just as its correlative adjective "public" may mean non-secluded, non-confidential, general or governmental. Public rights in several senses are relevant when considering a possible right to privacy.

There isn't a right of privacy in the sense that there may be a right to an old age pension. Privacy is more like (and indeed is) a special case of liberty. There are some rights to some of it in some circumstances, and they may be better protected piecemeal than by a Right to Liberty bill which would be more trouble than it was

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<sup>22</sup> Two other ideas are also introduced, namely, "essential needs" and "the lack of tolerable alternatives". An example given is that exclusion from a golf club causes annoyance and resentment, but not a deprivation of essential needs. On the other hand, excluding someone from a job or a hotel room frustrates an essential need and leaves no tolerable alternative. How much unfairness is tolerable in the interests of free choice is of course just what has to be decided. Nevertheless, something might be made of this principle.

worth. In England, at least four draft bills to protect privacy have been promoted, however.<sup>23</sup> They tend to range over a number of different kinds of invasion of the right to be let alone, and then to provide, as they have to, broad and sometimes puzzling exceptions and defences to allow for legitimate inroads into the various privacies or liberties.

The two general elements that seem to separate out are intrusion and disclosure.<sup>24</sup> Intrusion in its strictest sense covers the invasion or observation of premises or property by physical, optical or electronic means. Disclosure ranges over the storing and publication by writing or other media of facts against the will of those to whom they relate. It is a pertinent question whether the invasion of esteem, reputation or comfort by writing or publication ought to be run together with the first type of intrusion as part of a new elastic-sided statutory tort.

The collision between wrongful disclosure and the right of speech and expression produces the need for defences to protect publication designated as being in the public interest. In this context, as in others, the phrase "public interest" can bear various senses. It might mean "deservedly published because beneficial to the general interests of the community" or "published because it interests the generality of people". Many things that are published in underground newspapers or that might be published about the domestic lives of politicians might be published because of public interest in the second sense without promoting it much in the first. The first test imposes a restraint that would, if taken seriously, penalize a great deal that is now published and televised; but the second test hardly imposes a restraint at all.

Whether information published even comes within the ambit of the latter provision will depend in part on whether it relates to facts or behaviour that are in the public or the private domain and it is not clear whether the tests for this are a matter of the conduct being observable, potentially observable, discoverable by people in general or already recorded in some public record. How is the issue moreover affected by the public position or status of the persons

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<sup>23</sup> Bills were introduced in the House of Common (U.K.) on a number of occasions unsuccessfully, *e.g.*, by Lord Mancroft in 1961, by Mr Lyon in 1967 and by Mr Walden in 1969. See G.D.S. Taylor, *Privacy and the Public* (1971) 34 M.L.R. 288.

<sup>24</sup> Peeping Toms may intrude without disclosing and newspapers may disclose without intruding.

concerned?<sup>25</sup> Is there less legitimate public interest, for example, in the private sunbathing of Mrs Jacqueline Onassis than in the private swimming of Senator Edward Kennedy? Oddly enough, the American courts, operating with the law of defamation and the First and Fourteenth Amendments, seem to be extending remedies for privacy while widening the category of "public" and non-private persons who are denied the benefits of it.<sup>26</sup>

How does privacy in this context fit into the more general picture in which privacy claims are made and distinctions drawn between private and non-private activities in the criminal law and civil law fields? We have seen that the major areas of dispute about privacy in its various senses can be set out as follows:

- P(1) the argument about the limits of the criminal law (freedom from restraint on "private" self-regarding acts);
- P(2) the argument about the right to discriminate (freedom for "private" dissociation and discrimination); and
- P(3) the argument about safeguards against intrusion (freedom from intrusion on and unwelcome publicity about "private" affairs).

An illustration of a claim which might involve all three would be an objection by the members of an exclusive private club for white homosexuals to a newspaper report disclosing the proceedings at their annual general meeting.

All three of the above arguments are claims to liberty, but the claim to exercise "private" or individual liberty under P(1) and P(2) generally does not involve privacy in the P(3) sense.<sup>27</sup> A case

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<sup>25</sup> Greater public interest in those who aspire to public office or who thrust themselves into public events is sometimes regarded as something that enlarges the potential defence of implied consent to publication. Both categories may perhaps feel themselves to be more thrust upon than thrusting. Does the argument not still leave room for distinction between the public and domestic conduct of a public figure? Or is it supposed to imply that those holding certain public offices at least are on notice to observe higher standards in their personal lives on pain of disclosure?

<sup>26</sup> *Time Inc. v. Hill* 385 U.S. 374 (1967); *Curtis Publishing Co. v. Butts and Associated Press v. Walker* 388 U.S. 130 (1967); cf. Harry Kalven Jr, "Anonymity, Privacy and Freedom of Association" in *The Negro and the First Amendment* (1966), 65.

<sup>27</sup> Some claims to exercise a right to discriminate under P(2) may be on privacy grounds, but many will not be. The right to discriminate in the letting of shared living accommodation or in admission to a club might be claimed on privacy grounds, but the right to discriminate in the sale of goods and services, in employment or in insurance would usually be a "liberty" claim.

like *Griswold v. Connecticut*, though about contraceptives and bedrooms and explained in terms of privacy, was not really a privacy claim in this last sense at all, but just a claim to be free from criminal penalties. There was no worry or complaint about observation or spying on the activities or disclosure of their taking place. Similarly, the conflict in the discrimination issue between private choice and public obligations is, in most cases, a conflict between the promotion of equality and individual liberty to use property or dispose of goods or jobs freely. It does not involve privacy in the P(3) sense except in special cases about the rights of clubs to discriminate, or those involving householders not wanting to share domestic services or premises. In such instances, an element of P(3) and P(2) is mingled.

P(3) privacy separates into two elements: (i) physical intrusion on the one hand, and (ii) disclosure, exposure and damaging revelation on the other. The first element is less controversial and a privacy bill confined to it would not raise as many theoretical difficulties as one covering both. About physical intrusion and observation there is a fair amount of moral agreement, apart from some unsettled questions about the circumstances in which governments should be allowed to make use of certain methods. With the communication and disclosure side, very difficult balancing questions arise.

There cannot be a single answer to the question, "Is there a right to publish true but unwelcome or damaging information about other people?". Anybody asked to answer this question in a particular case would want to know and weigh four considerations (assuming the information to be true):

- (a) Was the information acquired properly or innocently, or by wrongful means?
- (b) Was there any consent to disclosure or could any be implied?
- (c) Was the activity described or exposed itself innocent or disreputable?<sup>28</sup>
- (d) Was there any actual damage caused, or just annoyance?

Disagreements about the answer in a particular case will arise because of variations in the answers to these particular questions. If the activity is criminal, for example, disclosure without consent would obviously be thought legitimate. If acquisition of the information is wrongful and the activity exposed innocent, then its publication would not be legitimate even if the actual damage element is

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<sup>28</sup> Or, although innocent, generally treated as disreputable.

not large. There can obviously be a great many permutations of these factors. The trickiest cases will be combinations of innocence under (a) and non-innocence under (c). There will in all four categories be disputes over the criteria for counting something as "innocent" or as "consent" or as "damaging". That is why there might be some disagreement about the answer to the question, "Ought I to be able to disclose to somebody else my knowledge, innocently acquired, that my next door neighbour has an immoral liaison?". Still, one can see that our feelings about the various privacy cases reported vary because they represent a different balance of these four factors.

Compare the innocent family in *Time Inc. v. Hill*<sup>29</sup> exposed to unwelcome publicity after being the protagonists in a crime of violence, with the policeman mentioned in the Younger report whose ex-mistress exposes his old love affair,<sup>30</sup> or the cases in which the revelation, though certainly without consent, seems to be of matters which an objective bystander would not regard as being as detrimental as does the party affected. Under (a) questions of motive also might well enter into a moral assessment: Is the exposé working off a grudge or is he a newspaper reporter doing his job?

If we count (+) and (—) as affirmative or negative answers to the four questions about the presence of innocent acquisition, existence of express or implied consent, innocence of the conduct exposed and presence of real damage, then the strongest combination for non-publication would be a—b—c+d+. On the other hand, a combination of a+ with d—, especially if conjoined with c— or b?+ (where b?+ = implicit consent), would strongly suggest that the right to privacy should not in that instance prevail.

There seem two points worth making about this computation in the light of the argument about the need for privacy legislation. Quite apart from the intrinsic difficulty in assessing multiple considerations, consistency in the balancing process requires some agreement as to the onus of proof regarding publication *vs.* confidentiality. Someone starting with the presumption of the freedom to speak or communicate the truth unless an overwhelming case could be made for suppression of this right, might well reach a different result from someone who begins with the assumption of a

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<sup>29</sup> *Supra*, f.n. 26.

<sup>30</sup> *Supra*, f.n.4. The answer to the question, "Was the information published *innocently* acquired?" may be complicated by the fact that the exposé and exposee are in some sense joint malefactors. The information might nevertheless be rightfully acquired as distinct from stolen or obtained by trick or deception.

proprietary right to keep information about oneself confidential unless an overriding case can be made out that the public interest requires publication. It is partly because there is no real consensus about the competing rights of free speech and privacy that legislation in this area (P3(ii)) is controversial.

A second point is that there is some difference between deciding which way the balance should come down in a case resulting in moral condemnation as opposed to one in which the consequence is a legal penalty. One might, for example, feel in the case of the policeman's spiteful ex-mistress who publicizes a former liaison, that on balance she was not morally entitled to disclose the information, yet not think there should be a legal remedy against her. In considering the case for a general legally enforceable right to privacy, it appears that a further balancing process must take place. The existence of some cases in which the damage element excites sympathy will have to be weighed against the increased opportunity that such legislation would provide for legal suppression of information by individuals, organizations and officials whose dislike of publicity is less well founded.

### Conclusion

The terms "private" and "privacy" have no succinct or precise legal definition that is universally accepted. The ambiguity which surrounds the notion of "privacy" confuses any discussion concerning the "right of privacy". Legislation purporting to protect an individual's right of privacy would be subject to widely varying interpretation. To be meaningful and effective, reference to a general right of privacy must be avoided: specific rights of privacy must be enumerated and defined.<sup>31</sup>

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<sup>31</sup> The creation of a specific tort of breach of confidence has now been recommended in a report by the Law Commissioners. It is suggested that actions would lie where disclosure of information would cause direct financial damage; would deprive a person to whom the duty of confidence existed from benefitting financially by the use of the information; or would cause distress. Defences of publication on lawful authority, privilege and public interest are proposed (*Law Commission Working Paper 58. Breach of Confidence (1974)*).