

The Ethical Basis of the Right to Privacy

by James L. Muyskens

Rights talk is power talk. To lay claim to a right is to call others to attention. It is putting them on notice.

Affirmations of fundamental human rights have been at the core of struggles to promote and advance human dignity and of demands for respect for persons as individuals. The concept of natural, God-given rights has shaped how we as Americans see ourselves and how we view the role of government and its legitimacy. Today, despite serious challenges to the notion of natural, God-given rights, most of us would probably affirm that it is "self-evident" that we as individuals possess "certain inalienable rights," and among them are "life, liberty, and the pursuit of happiness."

Many of us may be prepared to add to that list of fundamental rights. We are likely to include the right to privacy, a right that has been at the center of recent controversies over sexual freedom, abortion, and the termination of treatment for dying patients. Others, reacting to the deluge of loose talk about rights and the proliferation of rights claims, may dismiss the right to privacy as a recent invention that is without foundation. In this essay I will argue that the right to privacy is not a recent invention and that appeals to a right to privacy can be made in a compelling and coherent way. Even if not always identified as such, the need for privacy and right to privacy lie at the heart of Western moral traditions.

James L. Muyskens, Ph.D., is Professor of Philosophy and Dean of the College of Liberal Arts and Sciences, at the University of Kansas.

It must be conceded, however, that articulation of the right has suffered from the excessive use of the language of rights that has occurred since the 1960's.

The proliferation of appeals to rights has come about as groups, struggling to be recognized, discover the power and

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effectiveness of appeals to rights. To say, "We would like the opportunity for a decent education" or even "We demand the opportunity for a decent education" does not carry the clout of "We have a **right** to the opportunity for a decent education." Unfortunately, as creative appeals to rights proliferate, the coinage is devalued.

The canonical rights to life, liberty, and property (or the pursuit of happiness) have had to make room for a plethora of rights: the right to die, the right to refuse medical treatment, the right to health care, the right to adequate housing, the right to publicly-funded child care, the right to a reasonably full life, the right to clean air, the right to sunshine, to name but a few. With so many claims to special privilege and so many confused advocates for them, it is becoming increasingly difficult to take rights seriously.

Despite the prevalence of rights-talk, when we try to determine exactly what we mean by our claims we find ourselves in surprisingly rough terrain. What seems at first pass to make sense frequently turns out to be confused, tautological, or paradoxical.

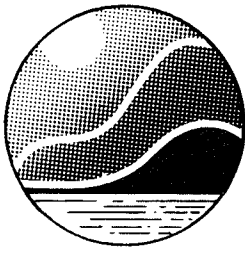
When faced with such conceptual riddles, it is well to accept William James' advice: begin by making distinctions. Clarity through distinction-making will not carry us the whole distance, but it is a necessary means of transport to move us toward our destination. We turn then to the concept of a right to privacy and begin by making some distinctions. The first is a distinction concerning the notion of a right.

Rights are usefully divided into two classes: negative and positive. A positive right is a claim to assistance or action or aid by another; for example, if my child has the right to publicly-funded child

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Associate Editor:

Myra Christopher

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care or if my family has the right to adequate housing, then someone else (the state in these cases) has the duty to provide it. A negative right is one that forbids interference; for example, if I affirm my right to die, then others must refrain from those actions that would thwart my desire to forgo heroic rescue efforts. With a few notable exceptions, the legal right to free speech is construed as a negative right. My having this right does not require that you or anyone else help me to speak (for example, buy me a loudspeaker, give me diction lessons, write my speeches, or carry them on television). As long as no one interferes, we are left to our own devices in attempting to exercise the right. With some commonly accepted rights, it is not always clear whether proponents of the right see it as negative or positive. For example, there has been considerable controversy of late as to whether the legal right to an abortion entails that someone else has a duty to provide the service (Medicaid funding for abortions) or merely that no one else may interfere with a woman's exercising her right.

Claiming a right to privacy would most naturally be construed as laying claim to noninterference, a negative right. It would be saying that a particular region of one's life (yet to be specified) is off-bounds to others. Asserting this right is to put up a shield against unwanted intrusion by others. It is to post no trespassing signs.

Two rather different restricted regions could be specified: (1) One region that we might have in mind is the part of our lives that we share only with intimate friends and family members, the areas that we consider our private as opposed to our public lives. Examples would include an individual's sexual preferences, his foibles or her personal correspondence. (2) Another overlapping but distinct region is a range of fundamental choices — decisions about whom to marry, whether to have children, whether to follow a certain profession or take up a hobby or undergo a physician's recommended course of treatment.

If the region not to be trespassed is the first one, the emphasis will be upon restricting others' knowledge of what is happening in the closed off area. One will be insisting that information gleaned from access to the restricted zone should be withheld from the public domain. If the region not to be trespassed is the second one, the emphasis will be upon nonintervention with choice, whether or not knowledge of these choices is in the public domain. This second region is the region specified by

the landmark U.S. Supreme Court decision, *Griswold v. Connecticut* (1965). It defines the right to privacy as the right to make fundamentally important choices free from unwarranted governmental intrusion.

The former delineation of the region of privacy, one which involves keeping information about one's person out of the public eye, is much closer to the meaning of "privacy" in common parlance. The latter delineation corresponds to that usually intended in legal discussions of the right to privacy. On either interpretation, the right is introduced to act as a shield from unwanted intrusion.

One might expect that "failure to respect another's privacy" would be synonymous with "violating one's right

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to privacy." Yet such an expectation would be erroneous. That these two expressions have quite different meanings and that they refer to rather different offenses can be seen by the following illustration. If I were told by an acquaintance that she jealously guards her privacy or that she is an intensely private person, I would understand her to be saying that she wishes to strictly limit access to such things as her inner thoughts or her behavior when out of the public eye. If subsequent to this conversation she invites me to a private party at her home, I would understand that I have been put on notice that she does not want those of us taken into her confidence to share the personal knowledge gained with others.

Suppose, however, that I slip and share with others (not within the circle of confidence) the personal knowledge of her acquired in this way. We would say that I breached a confidence or that I failed to respect her privacy. We would not say that I violated her right to privacy.

When we speak of violating the right to privacy, what we have in mind is not unwarranted divulging of information of a personal nature but rather wresting

control of significant personal matters from another. Thus, violating another's right to privacy is failure to recognize the other's autonomy, the other's standing as a self-directed individual. The right to privacy is closely akin to, if not identical with, the right to liberty.

These linguistic twists and turns explain why the concerns of one individual decrying a loss of privacy and another individual affirming a right to privacy would be so divergent. The first individual's complaint has to do with unwarranted access to or dissemination of information of a personal nature. The second individual's concern is not with access or dissemination of personal information but with unwarranted interference with personal choice. What both individuals have in common is the posting of "no trespassing" signs.

In the post-*Roe v. Wade* abortion debates, the appeal to the right to privacy has little to do with the fact that most women would prefer that their having an abortion not be public knowledge. Were a physician to talk to a reporter about her patient's abortion without the consent of the patient (suppose, for example, that the patient is a candidate for public office), the physician would be breaching confidentiality but would not be violating the patient's right to privacy. On the other hand, if the physician and others were to prevent the patient from entering a clinic to keep her appointment for an abortion, they would be violating her (court affirmed) right to privacy—her right to make this funda-

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mental choice without interference.

Especially now that *Roe v. Wade* is under intense attack, it is important that we have a clear understanding of it. What is well-known is that the 1973 decision legalized abortion nationwide. The Supreme Court ruled that during the first

three months of a pregnancy a decision to have an abortion must be left to the woman and her doctor. During the pregnancy's second trimester, the Court ruled, states may interfere in that decision only to protect the woman's health. In the third trimester the state may intervene and take steps to protect fetal life.

What is not as well-known or as clearly understood is that the Supreme Court based its judgment on the legal notion of privacy we have outlined, privacy as autonomy, as noninterference with fundamental choice. If the state is going to overrule the strong but qualified right to privacy, it must have a "compelling state interest" in so doing. The Court maintained that the state had "important and legitimate interests" in (a) preserving and protecting the health of the pregnant woman and (b) protecting the potentiality of human life. The state's legitimate interest in preserving and protecting the health of the pregnant woman becomes "compelling" only after the first trimester. Before that, the dangers are not great enough to warrant state interference. After the first trimester, because the risks of abortion increase, states are permitted to set requirements (such as that a hospital is the only place an abortion may be performed) for safety's sake. The state's legitimate interest in protecting the potentiality of human life becomes "compelling" only after the second trimester or (which the Court designates as the same time) the point of viability—the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."

Many issues are raised in this summary that would take us far beyond the topic of this paper. What is relevant is to observe how the Court attempted to carve out a space for the individual that would be out of bounds for others (in this case the state). The right to privacy fences off the restricted zone. It marks off regions in which individual liberty or self-determination rule. What this entails is that a burden of proof is placed upon anyone who wishes to substitute her or his judgment (on matters falling within the restricted zone), for that of the individual.

Clarification of what is meant by affirming that one has a right to privacy is a very different task from evaluating whether the claim to possess such a right is defensible. When we evaluate whether one's claim to the right is legitimate, we ask whether, contrary to what the claimant says, intrusion could be justified. Such justification would take different forms. Intrusion could be justified in

several ways: by appeal to an overriding duty to protect another's rights or interests (e.g., our duties to a child who is being abused by her parents may permit if not require us to intrude upon the parental zone of privacy); by arguing that it is required to protect an individual from himself or herself (e.g., our general duty of beneficence may permit intru-

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sion when that is the only way to prevent another from doing grave harm to himself or herself). Both of these appeals were made in the *Roe v. Wade* decision. An overriding duty to another was introduced as a justification for intrusion in the third trimester; the state's paternalistic interests were introduced as justification for regulation in the second trimester.

Unless there is only one right or unless a hierarchy of rights is established in which one right supersedes all others or unless the world can be ordered in such a way that rights do not come into conflict with one another (all implausible alternatives), no particular rights-claim or type of rights-claim will be above challenge. The work of ethical theory is to bring some order out of chaos and to devise strategies, principles, or procedures for adjudicating clashes between or among rights-claims, for generating challenges and for answering them.

With the aid of the above efforts to clarify the concepts of a "right" and a "right to privacy," we turn to the question of the ethical foundation of the right to privacy. What ethical grounds support this right, a right that restricts access and control by others?

At least within the Hebrew-Christian moral tradition and the modern liberal traditions of Western democracies, it is agreed that a fundamental (if not the fundamental) ethical duty is a duty of respect for other persons as persons. We respect others as persons when we respond to them as rational creatures as we are. Immanuel Kant's discussion of this principle ranks among the most impressive and influential. To paraphrase

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him, the principle affirms that one must always act in ways that respect each human being (including oneself) as a creature with thoughts, plans, goals, aspirations, and hopes of one's own; that is, as a rational creature. Stating the principle in its negative form: it is impermissible to fail to treat all human beings as rational creatures.

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If we accept this Kantian formulation of what it is to be a moral person, we see that being moral and having the institutions and practice of morality depend upon the possibility of people developing as individuals who know how to make choices, determine their own life-plans, follow their dreams. If we did not have these capacities for independent choice and autonomous action and if the conditions that make their development possible were not present, it would make little sense to say that we ought to act in ways that allow these capacities to flourish in ourselves and in others.

Indeed, when we come across people who are unable to act autonomously, we do not hold them morally responsible. We recognize that to praise or blame them would be inappropriate. Such judgments would not be applicable. Another's ability to act autonomously is a necessary condition for the proper ascription of moral predicates to him or her.

This being the case, we must ask how it happens that people develop these capacities for autonomous choice. A complete answer would take us into child development and developmental psychology. For our purposes, it is sufficient to note that autonomy (a necessary condition for morality) will not flower in a setting in which privacy is unattainable. The challenge for parents as their children move from infancy through childhood, to adolescence and young adulthood, is determining the right mix of maternal and paternal control and willingness to step back and give the child space (privacy). Only those who have had the space, the freedom, to

begin to shape their own destiny, to follow through on their choices, to experience the consequences of their actions will develop a concept of themselves as autonomous, as purposeful, as responsible. If people who have developed such concepts of themselves are, through a cruel twist of fate, placed in an environment of total control (e.g., an intensive care unit of a hospital, certain nursing homes, prisons, captivity as a hostage), their self-concept is likely to change from self-motivated to other-motivated, from autonomous to automaton, from free to slave [See Joseph Kupfer, "Privacy, Autonomy, and Self-Concept"].

What these examples and others bear out is that privacy—the establishment of a region that is off-limits to others—is a necessary condition for the development and maintenance of autonomous selves. It is a necessary condition for people to see themselves as able to make choices and to accept moral responsibility.

The moral maxim to treat others as we wish to be treated is premised on the notion that we are autonomous selves and wish to be treated as such. When we can understand for our own case what it is to be autonomous, we are in a position to treat others similarly. Hence, as we see for ourselves the need and the desirability of privacy or freedom, we see how the moral maxim to treat others as we wish to be treated requires that we respect the privacy or freedom of others.

The right to privacy is affirmed as a means of protecting the fragile flower of personal freedom in an imperfect world. It posts "no trespassing" signs to remind those who may have forgotten and to inform those who do not know that indi-

Privacy is a necessary condition for people to see themselves as able to make choices and to accept moral responsibility.

viduals have an exclusive moral prerogative to make fundamentally important choices free from unwarranted intrusion by others. In so doing they determine their own destiny, their own identity.

This brings us full circle. Privacy is a

precondition for the development of the autonomous self that is the subject of moral discourse. To violate the right to privacy, that is, deliberately and without justification to frustrate or contravene an individual's desire for privacy, is to fail to respect that individual as a person. Such action displays contempt. It fails to treat the other as one who has purposes, dreams, hopes, and aspirations. We can conclude that the right to privacy lies at the heart of our Western democratic moral tradition.

What remains to be clarified, however, is exactly what territory is fenced off by this right. Our discussion has been vague and general on this point, leaving open the question of the scope and limits of the right to privacy. For example, the extent of the right to privacy when applied to the range of abortion cases is not resolved by this discussion. It simply sets the stage for that discussion. It should also be evident that an appeal to a right to privacy is not the whole of morality. While it protects the individual from moral bullies, it does not, for example, provide an individual with the incentive or the rationale for overcoming selfishness, for acting charitably, for developing empathy, or for moral heroism.

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