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An Essay about Privacy

By Ronald C. Griffin*

Jessye Norman was an American opera singer. She died on October 1, 2019. On October 2, 2019, my wife got a grim diagnosis that put me in a stupor and reminded me, now more than ever, that my generation (that did so much good in the world) stands in line waiting for the Grim Reaper's call. In a seventy-years (that have gone by too fast) I have watched my peers run from the realms of privacy, spaces where people implemented life plans uninterrupted by neighbours that were discernible, palpable, and real to everybody, to a realm where there is none. Why? This paper takes a stab at answering that question and, in so doing, reclaiming bits of what we have lost with workable ideas, a Michigan statute, the Restatement of Torts, stories, and case law. The undertaking collects things with catch phrases and, with a trove in hand, assembles and weaves together a narrative that will help us. There are guides for the reader to follow to help him through the essay: new beginning, ploughing the ground, tree stumps and stone obstacles, furrowed fields, and so on. It ends with a deep conviction that "we've relinquished too much of ourselves to claim anything as private." Everybody knows something about everybody. Who you are and what you are and where you have been are in the hands of others.

Keywords: *Privacy, Surveillance, and Constitutional Law*

Introduction

Privacy is a realm bustling with activity.¹ It is a noun in the English language that accommodates cities where people think and feel anonymous. It is in bustling small towns and villages where everybody knows something about everybody. It is in digital spaces where people do embarrassing things to themselves. It is in self-propelled, highly motivated, individuals excavating their minds and bodies for talents out of the gaze of other people.

Invasions of privacy are disruptive events. They come down to unwelcomed visitations by others. Some victims accede to visitations because there is nothing they can do about them. Some welcome visitations because it is the only way to get credit to do business. Some resist visitations, with all their might because what they are doing to themselves is nobody's business but their own.²

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¹I am eighty years old and I have watched change tear down everything I know. Freedom (the option to go hither and yon in my country unmolested by others) and privacy (with all its facets) are legacies American civilisation gave to everybody. See Marcuse (1968). Sadly, people have given them away for electronic conveniences, and see Etsebeth (2011).

²*Griswold v. Connecticut.*

There is a metaphorical-lyrical account for this. Think about it this way! We are bit players in the town circus. Everybody has a performance under the big top. What players do after their performance is a mystery. First off, it is nobody's business. Second, it is private time for the performer away from everybody, and everything, and what's gnawing on them. Third, it is a domain or domains within a larger realm where performers retreat. It accommodates a craving for peace, quiet, solitude, self-isolation, and the right to be left alone.

Folks are terrified by myths about the outside world: that it is cruel; that reason is impotent; that reality (what's serendipity in our lives) comes out of chaos. The truth is that some things associated with the myths are true. We live in physical and virtual realities. Everybody is everybody's friendly enemy. People are nosy and pushy. Competition and anxiety fuel what people do. Violence is a part of everyday life and, lastly, a ruling class tells us what to do.³

Story, Questions, and Answer

Let me flesh out these claims with a story. I am in Kansas City. Jesse Norman (a Metropolitan Opera singer and a celebrity of note) died yesterday. The next day, October 2, 2019, my wife got a grim diagnosis that put me in a stupor and reminded me of the fact that my generation, that did so much good in the world, stands in line waiting for the Grim Reaper's call.

In seventy plus years, that have gone by too fast, I have watched my peers run from the realm of privacy - a space where people made and implemented life plans uninterrupted by neighbours - to a realm where there is no privacy. Why is this so? Is privacy a relic from the past? Is it being alone with one's thoughts and personal decisions that we have lost? Is it being anonymous in the marketplace that we have lost? Is it the deals we cut with somebody to conceal matters from others? Is it freedom from government surveillance that we fight to keep? This paper takes stabs at answering these questions and, in so doing, reclaiming bits of what we have lost with workable ideas, statutes, and case law. The undertaking collects new ideas with catchy phrases, and with a trove of material in hand, knits principles and legal narratives together that will help us.

Chimera

There is a preliminary problem to solve before embarking upon a longer journey about privacy. A reader of this paper told me the paper was like a cubist painting. He could see the privacy images being painted by me. But when the painting's pieces were parsed and viewed in isolation, the parts, he said, were too blurry and too illusive to grasp. He intimated that it was like wrestling with a

³Patricians, who provided historic memory and generational leadership, have given way to a small cadre of corporate elites who crave money, power, and control of everything. See Baltzell (1987) at 7-8, 144-145. See Ramirez (2012) at 48, 133; Galbrath (1973) at 81-82. See also Bouton (2007) at 69-70.

chimera on paper. You could wrestle with him, but you could not put him down on the mat for the count. Let us solve this problem, now, with a shorter and blunter narrative about privacy.⁴

Privacy is a familiar and enigmatic idea. First off, it is a noun in the English language. Second it is a craving. Third, it takes different forms in different contexts in different places in different people, in different people's lives. In some cases, it is a domain within a realm (the public square) where people bury what they have done to themselves. It is a personal diary in one's home, in a lock box, that one needs a key to open. It is a craving for physical and mental space to be alone and safe in one's person that crops up from abusive master-and-slave, master-and-servant, principle-and-agent, parent-and-child, employer-and-employee, government employer-and- government employee relationships.

Thematically speaking, privacy is the same craving in everybody everywhere. Britaney Spears' Los Angeles conservatorship case is an example.⁵ In a parent-and-child relationship, she wanted her father to leave her alone; to stay out of her mind; to let her manage her own money; to give her physical space; to give her an emotional break; and last, but not least, time and space to work-out what was important in her life without outside interference. Ms. Spears is a modern-day American woman, living in a 246-year-old country, trying to figure out what is important to her as an individual. She wanted and eventually reclaimed a domain within the realm of privacy.

Primitive Notion

Let us begin with a primitive notion about privacy. It is apocryphal to say this, but it should be said anyway. America is a country of foreigners. Nobody belongs here. We are a raucous, unruly, acquisitive, heterogeneous, mongrelised people. We are colonisers living in man-made fortresses that are camped on somebody else's land.⁶ Everybody's erected walls around themselves to get privacy. Government uses what passes for bad speech (what the ruling class finds

⁴Like a piece of metal on a blacksmith's anvil out west, I have pounded out privacy, over and over again, to push out the concept in all its forms so we can apply them to facts.

⁵Day, Stark, & Coscarelli (2021) at A1. See also Coscarelli & Jacobs (2021) at A1.

⁶Men and women with guns built the United States on the dead bodies of Native Americans and the purloined labour of West Africans. See, e.g., "Act to provide for the armed occupation and settlement of the unsettled parts of the peninsula of east Florida," in Stat. at Large at 502, 4 Aug., 1842. See Williams (1994) at 9; Zinn (2015) at 129; Frymer (2014) at 124-25.

unpalatable in public discourse),⁷ reasonable suspicion,⁸ national security,⁹ and probable cause¹⁰ to breach the walls.

Individuals furnish the public with ways to peer over the walls: Being weird, odd, and cantankerous in public; allowing church folks to misuse organized religion and religious precepts to spy on a congregation in their homes; snitching to clerics about what folks do. Bursting on the scene (taking center stage) in different science, art, or entertainment cloaks (Carl Sagan and David Chappelle); a person assuming folk, entertainment, and celebrity status¹¹ like Michael Jackson did in America culture, and, in so doing, making what one does public.¹² Using the internet to buy goods that allows others to mine data about us. Shoppers using Amazon,¹³ Google,¹⁴ Microsoft Edge, and Yahoo to look up stuff merchants use to make avatars of us; and last, but not least, private sector employers monitoring an employee's use of company computers to get company work done and their work done too.¹⁵

Today, we blithely go about our days unaware of what we have given up: (1) the exquisite feeling of being alone (the option to use time, space, and presence of mine to be introspective);¹⁶ (2) the loss of and the erosion of historic memory (important family encounters in our lives; our experiences with relatives that matter to us; the option to rummage through parents' and grandparents' things to find personas to present to the world), and (3) sanctuaries we erect from the rough and tumble and hustle and bustle of daily life.¹⁷

In our haste to reclaim things that are worthwhile, in our lives, we have reclaimed nothing. We are like fish in a fishbowl. Everybody sees us.¹⁸ There is little or no self-reflection. There is too little introspection. It is all about Meta, Instagram, Twitter, FOX sports spectacles, like SEC football games on weekend TV, and celebrities from Division I football teams selling college athletic images

⁷*Ashcroft v. American Civil Liberties Union* (Breyer, J. dissenting); *Pope v. Illinois*; *Miller v. California*. See Hudson (2009).

⁸*Terry v. Ohio*.

⁹When one uses an electronic medium to converse with somebody about everything, the user's right to privacy evaporates. See *Smith v. Maryland*; *In re FBI*. Cf. *Klayman v. Obama*. Trolling the nation's electronic communications (metadata) without a warrant to find folks likely to commit domestic acts of terror for a foreign entity is a troubling. See Atkins (2014) at 51, 56-57.

¹⁰Probable cause is a conviction that is one step up from suspicion that a crime has been or is being committed. *State v. Wilson*. See *Brinegar v. United States*, at 175-176. See also *Telzer v. Borough of Englewood Cliffs*.

¹¹Carl Edward Sagan was a celebrity, an American astronomer, planetary scientist, cosmologist, astrophysicist, famous author, and scientific communicator. Kragh (2022). See Achenbach (2014).

¹²A celebrity's image is camped on turf beyond the scope of privacy. Policing its use by the press for profit, be it for the target's good or ill, is problematic. *Comedy III Production, Inc. v. Gary Sunderup, Inc.*, at 134-135 (2001). See Dreyman (2017) at 677-678.

¹³Grynberg (2019) at 226 fn.131.

¹⁴Carr (2011) at 156.

¹⁵Levinson (2009) at 933-934.

¹⁶Carr (2011) at 167.

¹⁷Carr (2011) at 64-65.

¹⁸April Falcon Doss, *Cyber Privacy: Who has your data and why should you care*, Loc. 151,160, and 169 (2020). (Kindle E-book).

(there is a recent Supreme Court case on this)¹⁹ to make money. Surreptitiously, data miners go about the business of collecting info about us every day; storing their trove; and selling it to others. Nobody (the individual) knows anything about himself, indeed, anybody anymore. It is smoke and mirrors - day-in and day-out.

Commercial Zombies

What are we? Are we commercial Zombies? Maybe. Are we scavengers? The answer is yes. Are we avatars? Again, the answer is yes. Are we murderous scallywags? The answer is sometimes and yes. Everybody breaks moral codes for a reason to get something valuable and something done. Who are we really? Are we flawed human beings? The answer is yes. Are we commodities to be bought and sold by other beings? Again, the answer is yes. Everybody capitalises upon the works of others.

Let's get something straight. We live on the earth's crust like ants. We mine the planet for minerals, harvest surface plants for food, waste stuff we need, set up camps in mountains, valleys, meadows, semi-arid places, and open plains dotted with villages, towns, cities, computer stations, large computer storage facilities (in Utah),²⁰ and cyberspace networks to make a living.

Settlers draw circles around their neighbours' aspirations; doing their best to stay on their side of their neighbours' lines. Everybody is a friendly enemy. Competition animates what folks do. Everybody is preoccupied with their projects: assembling them; launching them; and seeing them through to fruition. So what! Is it a big deal? Is this a bad thing per se? The answer is no. Is there a dystopian side to us in this world?²¹ The answer to that question is yes.

We are fractious, flawed, and competitive beings. We embrace the doctrine of sameness to cope with unruliness in American life. We think everybody is equal. What we do by ourselves is destructive, selfish, theatrical and, when you look at the big pictures in life, irrelevant. We treat everybody the same (of course, we do not do that all the time); judge folks by their deeds; arresting impulses in

¹⁹NCAA v. Alston. See also Do & Weaver (2021).

²⁰Uta Data Center (2023).

²¹It is 2022. Devolution (a fancy word for States Rights) is in vogue. Dismantling the federal administrative state by somebody and rugged individualism "run-a-muck" enchants us. See Marcuse (1991) at 276 & 282. Modern day Americans behave like cowboys lived out West, 125 years ago, when life was short, crude, and uncertain; when death was a certainty and violence, and violent people were everywhere. See *District of Columbia v. Heller* (Therein the Supreme Court said Americans could store guns in their homes to protect the hearth); *New York State Rifle & Pistol Association v. Bruen* (Therein the Supreme Court said Americans could pack guns in public to ward off violence). Folks use guns to settle far too many disputes in the United States. Stoked fears and violence established peoples' boundaries. A person's reputation for acting violent, their neighbours' wariness, and his perceptions of him, determine the scope of privacy. Privacy comes down to private pacts between individuals (I will leave you alone Mr. X and Mrs. Y if you will leave me alone.) In its most granular form, it is a circle around an individual that is impermeable to a stranger's claims and prying eyes. It is the "non-disclosure of personal facts" and "non-interference with the right to decide what's good for oneself." See, Outing Arthur Ash in the Press, in Cohen (1992). This article was about a tennis player's personal battle with AID'S.

ourselves, where we can, to deal with others based on pigmentation, religion, language, sex, or dress. Principles of Law like Contracts, Property, Torts and Ethical Precepts (justice, equality, and fairness) capture, weigh, measure, and objectify what we do.

Dystopia

There is a dystopian side to us that is frightening.²² We are bound together by two bears. One giant is gentle, kind, and altruistic. The other is mean, selfish, and violent. In the end, the one we feed determines who we become. Like the great dinosaurs, from the Earth's past, we are spectacles on this planet. We are territorial beings with needy children. We perceive that we are under threat by our neighbours and, labouring under this delusion, we will do anything and everything to stave off death (pushing rivals to the margins of life, servitude, and extinction). Given all the foreigners who occupy physical space in the United States; that is, the countless non-native American invaders (by and large European coloniser) occupying Indian land: immediate gratification trumps long range planning and generational gratification. We dwell in our parents' reality - good and bad.

This is a quaint, oh so gothic, and old-worldish-picture of ourselves. It is 2023 now. The world is in turmoil and people are anxious and upset about everything. The only constant is time. It moves on no matter what we do to stop it or slow it down. Our surroundings (the earth's landscapes, seascapes, national boundaries) keep changing and, rightly or wrongly, America is changing too. The world wide web blankets the Earth. Generation X is at the nation's helm. Citizens are making accommodations with their new surroundings. Privacy as we know it is under siege. Older adults are bewildered by their surroundings. Access to countless website and a flood of data make things worse.

Like mother nature and what little we know about outer space, cyberspace is indifferent to the shenanigans, cheap claims, puny achievements, and the antics of man. But cyber technology - a man-made achievement in the wrong hands - is a fearsome, intrusive, corrosive, destructive, upsetting, and worrisome thing. Business computers prowl company turf to compile data about company employees. Government uses machines to spy on people to trap lawbreakers.

When you think about it, cyberspace is like the old growth forests that blanketed North America in the old days. Good guys (frontier path finders in a new world) and bad guys (cyber ruffians) and sheriffs (government marshals) dart in an out to plot things, solve problems, catch criminals, steal information, trap, and gather what they want, to trade with others.

Today, rummaging through personal computers is suspect.²³ Using a computer to steal information from another computer is wrongdoing.²⁴ Using a website to bully somebody is wrongdoing.²⁵ Using a computer to goad somebody into

²² Albright (2019) at 230-233 and 238.

²³ *Shamrock Food Co. v. Gast*.

²⁴ *Multiven v. Cisco Systems, Inc.*

²⁵ Chaffin (2008) at 773, 774, 817-818.

committing suicide is a crime.²⁶ Taking another person's on-line identity is wicked.²⁷ Using a computer to collect proprietary information is suspect. Selling the trove to private entities²⁸ and foreign governments is a crime.²⁹

Depravity

There is something craven about human beings these days. A significant number wallow in depravity because depravity is profitable. The wallowers use crowds, houses, family homes, and bungalows they own, or rent, to hide their identity, movement, and foul deeds. These folk are empty vessels---beautiful people to look at but monstrous down deep.

They look at the world with a jaundice eye. They treat civil society with contempt. They are users, grifters, predators, and profiteers: bored with their surroundings; incapable of love and desire; indifferent to ugliness and beauty; hiding, as best they can, their foul attitudes from everybody. They are things, sleek tool and menacing visages. A more apt description of them is hollowed out human beings and free lancers - property-for-hire, criminals, assassins, prostitutes, props, pimps, and actors - capable of doing awful things.

In today's world, the pressures of everyday life beat people down. They want to be left alone. Does privacy crop up when individuals use crowds to hide their identity and what they have done to other people? Does it crop up when they use houses and warehouses to hide their identity and what they are doing? Does it crop up when they use crowds, houses, and warehouses to hide their movements?

When a person is not detained, restrained, or arrested by authorities: is his privacy (the emotional barricade that bars officials from rummaging through a person's life) intact? Is his body a fortress against officialdom?³⁰ When one gives into an entreaty to converse with a policeman: does the individual's right to privacy evaporate? Can government rummage through a person's cell phone history without invading his privacy?³¹ What about GPS monitoring of a person's movements for 28 days?³² Is that an invasion of privacy?

When a congenial and convivial man, walking his dog in a gated community and, notably, unconnected with any wrongdoing, gets stopped and frisked by a policeman: is that an invasion of privacy? Can a policeman use an arrest to harvest

²⁶*United States v. Drew*.

²⁷*Sloan v. Equifax Info. Services Inc.* at 498.

²⁸*United States v. Aleynikov* at 187-188.

²⁹*Idem* at 176-179.

³⁰Alderman & Kennedy (1997) at 71-80. Messing with people's bodies, poking around to look for stuff is a matter of propriety (what is proper under the circumstances), common sense, and degree of intrusion. A beat-cop is like an ordinary pedestrian when he exchanges pleasantries with folks in a mall and on the street. Privacy does not come into play under those circumstances. Now, when something vile and upsetting happens to somebody somewhere; that is, when officialdom stoops to using breath, urine, and blood tests, cavity searches, figure scrapings, and surgery to collect information about somebody, the Fourth Amendment constrains what officialdom can do. *Idem* at 80. Somebody must do something wrong to generate that kind of official activity.

³¹*Carpenter v. United States* at 2216-2217.

³²*United States v. Jones*.

data in his cell phone? If the cell phone is seized by a policeman after a person's arrest; if the data stored in the cell phone cannot be used as a weapon to hurt the officer or effectuate the arrestee's escape: is harvesting the data from the phone an invasion of privacy? Are these unwelcomed intrusions? The answer is a resounding yes.

A Man's Castle

In America, a man's home is his castle. People crave peace, quiet, and solitude at home. Are door-to-door salesmen, telemarketers, text messaging sales schemes, and robot-calls disruptive? Assume a person's workday has come to an end. If the worker is ensconced in her home and spending quality time with her spouse and children: Is a telemarketing call an invasion of privacy?

If the call is made after 9 p.m.: is the call an invasion of privacy?³³ If a telemarketer makes calls after he has been told not to call a person's home: is that an invasion of privacy?³⁴ If a telemarketer uses a mailing to a person's home to get him or her to make a 1-800 call about something: does privacy evaporate when the person makes the call?

Are robot calls alright? If the telemarketer is using equipment that has a gizmo in it that produces random or sequential phone data: is the use of that equipment an invasion of privacy? Are children prey to invaders in their home? Do they have a right to privacy? Can merchants use computers, computer game promotionals, and apps for computers, to harvest personal information?

A Brewing Storm

There is a political and social storm brewing in the United States.³⁵ Clerics, congressmen, senators, and judges, giving into forbidden desires, have stooped to using laws and technology to hurt people because of their sympathies, associations, and beliefs. Over time, and after ceaseless pounding, the victims (beaten up inside) forget what they believe and what they were born to do.

When we are left with a stormy place like this, and an anxiety wrack public space where people cannot find relief; that is, a space when fear of communism and its modern-day equivalents (Islam, Mexican and South American migrants, China, Russia and domestic terrorism) grip everybody; privacy crops up when folks stand mute to hide what they think about everything and everybody.

³³Telemarketing Sales Rules, 16 C.F.R. 310 (4) (c). See Telemarketing and Consumer Fraud and Abuse and Prevention Act, 15 U.S.C. 6102 (b)(c) (1994).

³⁴Telemarketing Sales Rules, 16 C.F.R. 310.4 (b) (iii) (A). See Greenfield, *Consumer Transactions* (5th ed. 2009).

³⁵Partisan politics (a blood sport these days) has displaced organised religion (what priests and preachers tell us) as the nation's recipe for resolving social disputes. It is a gamy enterprise. It is an emotionally charged, imperial brew of bad stuff, flavoured with violence and zealots, willing to use sticks, stones, spears, guns, intimidation and violence to get their way. Albright (2019) at loc. 3213, 3221, 3228, 3324, and 3332.

Speaking out on issues and acting out at demonstrations costs something - e.g., a person's social station in life, a sought-after job, and associational status. Calumny (touting a lie) eviscerates privacy (the craving to be left alone). If one is a teacher in a public school, a panhandler, a hobo, a vagrant,³⁶ or a member of a dreaded organisation, public officials can pry into what you are doing.

In the 1950's, Congress used unwelcomed-but-legal visitations, the cudgels of fear and publicity, to force people to prostrate themselves before authorities to keep their jobs. Victims wanted to: (1) rescue their social station in society, (2) keep their jobs, and (3) preserve their opportunities to work in the United States. In *Watkins v. United States*,³⁷ the Supreme Court stopped that practice. In 1957, the Alabama legislature passed a law sanctifying government surveillance and visitation of organisations to: (1) circumscribe a particular group's political activities and (2) an individual's choice to join them. The Supreme Court stopped that in *NAACP v. Alabama*.³⁸

It was a cruel and barbaric time in the United States.³⁹ The New Hampshire legislature went out of its way to erect a statute giving the New Hampshire Attorney General the power to delve into a university professor's past (a lecture he delivered to university students)⁴⁰ and, in so doing, make his private life public. Giving the Attorney General the power to determine whether a university professor was suitable to mingle with other New Hampshire residents was declared unconstitutional by the Supreme Court.⁴¹

Spiked by fear, surrounded by troubled adults, angry men, cackling women, unruly mobs, and disaffected intimidators (e.g., the FBI, national pundits, clerics, industrial manufacturers, Conservative activists, and advertisers), the national press caved to social pressure and decided to censor what their journalists published.⁴² Reporters wrote safe stories about world events that tracked with the prevailing narratives about American life,⁴³ America's foes, American foreign policy,⁴⁴ and American lifestyles---e.g., folks doing domestic and international travel, cabined tranquillity, consumerism, competitive individualism, the sanctity of the family, patriarchy, free enterprise, commercial liberalism, Christianity, and conditional equality.

Nothing is changed from yesteryear. Our foes remain the same - non-intellectuals bound by ridged principles and goons determined to enforce them. We (as a people) clung and, cling to, our tin-pan-like myths about America and American life. The Fourth Amendment (the words)⁴⁵ highlight what is private and

³⁶Wolf (2022). Morales (2022).

³⁷*Watkins v. United States* at 182, 185-187, 198-199.

³⁸*NAACP v. Alabama* at 462.

³⁹*Sweezy v. New Hampshire*.

⁴⁰*Idem* at 245.

⁴¹*Idem* at 244-245, 249-251.

⁴²Whitefield (1996) at 3025, 3033, 3042, 3049, 3057 & 3065.

⁴³*Idem* at Loc. 2933.

⁴⁴*Idem* at Loc 2917.

⁴⁵Amendment 4, United States Constitution. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things."

what is protected.⁴⁶ The Government's questionable activities brought into the squishy perimeter around the Fourth Amendment⁴⁷ while ordinary citizens, snared by a system that makes proof of innocence nearly impossible, succumb to government surveillance, searches, and seizures.

Absent a legitimate government search and seizure order a victim's protestations; his profession that "he knows about his rights to privacy"; his profession that he has a "general awareness of his rights"; a perception by government officials that what the government has done to a person is wrong, gets quashed by qualified immunity (a novel legal concept) that excuses what government does to somebody.⁴⁸ Government is at liberty to use probable cause "for computer-based crimes" to snare other computers and their owners caught up in a crime. If a search warrant is "cabined" by a statement limiting the search to a particular person and evidence for a particular criminal episode, that is enough for government to go after other people and their stuff. Victims of an abnormal searches and seizures cannot use the right to privacy or a lack of a warrant's specificity to thwart what the government wants to do.

Public Square

What about the non-criminal side of American life? That is, the public square where people are not branded criminals? Is privacy a thatched house built with brittle sticks? Is there a "close"? Is it a yard around the structure? Is it a haven for some? Can householders use the thatched dwelling to fend off unwelcomed intrusions? When there is wrongdoing by the householder, does the house get swept away? The answer to these questions is yes. Privacy is a thatched house built with brittle sticks. It has a "close" around it. It is a haven folks use to fend off unwelcomed visitors but, sadly, it can get swept away by need, emergencies, and other events at any time.

What about privacy in business settings? When employees use an employer's email system to converse with fellow employees: do the messages and the messages' contents land on turf beyond the realm of privacy? When a government agency (the employer) gives phone pagers to employees; when the employees misuse the pagers (mixing work related and non-work related messages); when the employer warns all its employees that they will be audited when there are too many "page characters" being used by an employee per month; when the employees know this; when the agency gets wind that something's wrong with a pager's use: does the agency have the right, indeed, an obligation to find out what the employee is doing? The short answer is yes.⁴⁹

⁴⁶See *Katz v. United States* at 361 (Harlan, J., concurring); *Kyllo v. United States*. When an individual manifests an expectation of privacy, by his conduct, that tracks with what society is willing to recognize as reasonable, there is privacy. Thermal imaging of a person's home compromises the homeowner's privacy.

⁴⁷*Rakas v. Illinois* at 148-149. (Mr. Justices White, Brennan, Marshall, and Stevens joined in dissent. Ibid at 156-160).

⁴⁸Schweikert (2020).

⁴⁹*City of Ontario v. Quon* at 764-765.

The Fourth Amendment (a U.S. Constitutional provision that highlights what is private) won't constrain what government employers are doing. If an undertaking is launched for an administrative reason and the audit itself is limited in scope, that is alright. Stumbling over embarrassing personal information about a government employee's doings while doing an audit changes nothing.

Suppose an employee of a private concern establishes a website; decides who is a suitable user; excludes all management; and posts a gatekeeper to vet visitors: can management use the username and the password of "suitable users" to peruse, monitor, and harvest website conversations?⁵⁰ Is that proscribed by the Stored Communications Act?⁵¹ Can management use the information to sow union discontent and steer collective bargaining negotiations their way to get a favourable collective bargaining result?⁵² Can it launch a lawsuit against the website developer? Is that proscribed by the Railway Labor Act?⁵³ Are these federal statutes the so-called "thatched houses" in which government employees can converse in secret? Are intrusions invasions of privacy?

What about privacy in a non-business setting? Is a person's brain a domain within the realm of privacy? Is it a healthy mental state (a condition we all crave) that we are trying to promote and defend? Is it a mental health status, writ large for everybody, that is a long sought-after mental condition free of noxious materials that we crave? Is it a claim against rueful people and gnarly things in society that hurt us? Is it marked by people's sharp outbursts hurled at others when they are threatened? Is it a person's outcry to "leave me alone"? Is it derived from a person's innate power to exclude others from his or her life (other men and women who want to tell someone where to live; what to do outside of work; where to travel; what activities are suitable; what one can and cannot do at home; who to marry; who to claim as one's friends and associates; what to say to strangers)? Is it a man's veto power over a person's decision to procreate; a man's veto power over a woman's decision to terminate a pregnancy, and would-be-charlatans and moralists, older men by-and-large and women long pass procreation possibilities, telling a woman what to do with her body?

Dobbs Decision

The battles fought over privacy are never-ending. Dobbs is the latest iteration of this fight.⁵⁴ Prior to the moment in time when a fetus is viable (on or before the 24th week of gestation), nobody can tell a woman what to do about her pregnancy.⁵⁵ But some folks in Mississippi want to replace "viability" with scientific evidence about "when a physician can detect a foetus's heartbeat" and "when a fetus can

⁵⁰*Konop v. Hawaiian Airlines.*

⁵¹Ibid at 880.

⁵²Ibid at 885.

⁵³Ibid at 883.

⁵⁴*Jackson Women's Health Organization v. Dobbs.*

⁵⁵Idem at 282, Ho, J. concurring.

feel pain”⁵⁶ (unique moments in time that are demonstrably less time than the 24th week) to curb what a woman can do on her own.

They (largely white men from the South and Southwest) want “fresh science” and legislatures to drive the law on this issue. They want to use the discovery rules at the trial level, as they were used by civil rights lawyers in *Brown v. Board of Education of Topeka*, to get evidence into the record to, in effect, develop a full record for the Supreme Court to rule on this claim and what is salvageable, or should be salvageable, under the banner of personal privacy.⁵⁷

The pro-lifers claim that there is nothing in the Constitution about abortion;⁵⁸ that the Supreme Court has made countless pronouncements about abortion; that Supreme Court pronouncements like other precedents are subject to being overturned by the Supreme Court for good reasons; and that there are good reasons for overturning this one.

What are the points being made by the pro-life litigants in the Supreme Court? That we should establish a full record about abortion piled high with scientific evidence to overturn *Roe v. Wade*? That human life begins at conception; that life is something that must be rescued and cultivated above all else? That a child in the womb is as valuable as a child outside of the womb? That “feeling a fetus’s heartbeat” in a woman and “a foetus’s ability to feel pain” are suitable substitutes for “viability” in abortion cases? That women, in the final analysis, have no right to privacy when it comes to new life in the United States?⁵⁹

What does world history tell us about peoples’ social attitudes about privacy, new life, life in the womb, and abortion? What did the German state do to women who underwent abortions and the abortionist doctors in the 1930’s and 1940’s?⁶⁰ What position did Ireland and the Irish Catholic Church take on abortion in the 1940’s, 1950’s, and later?⁶¹ Was abortion a crime then?

Do we want state legislators using unruly crowds, vigilantes, and mobs on ideological jags about what it means to be a human, and, lastly, ill-considered state

⁵⁶Idem at 280-82.

⁵⁷Idem at 282.

⁵⁸Idem at 277.

⁵⁹The Supreme Court put aside all the judges’ deliberations, deliberation time, and fretting about a woman’s privacy, freedom, liberty, and abortion rights. On July 24, 2022, it wiped out all these things, saying, it was a part of our past. Six Justices burned down everything. From the moment of fertilisation, the state can constrain what women do with their bodies. *Dobbs v. Jackson Women’s Health Organization*, at *8. See Cf. *Hodes & Nauser v. Smidt*. Nobody, including the state, can fiddle with another person’s human dignity---recognition of oneself, recognition of one’s worth, and self-determination. Idem 497-98. Under Section 1 of the Kansas Constitution Bill of Rights, men and women are endowed with the same right to make decisions about their bodies, their health, their family formation, and their family life. Idem at 484, 491-492.

⁶⁰Hereditarily healthy German women of Aryan descent were denied the right to abortion. Women deemed inferior based on race or health were allowed or forced to terminate their pregnancies. See German Historical Institute (1993).

⁶¹Cole (1993) at 115-33. Ireland outlawed abortion. In 2018, a referendum measure amending the Irish Constitution legalised abortion up to 12 weeks after a woman’s fertilisation. Ely (2022). See *Open Door and Dublin Well Woman v. Ireland; Society for the Protection of Unborn Children (S.P.U.C.) (Ireland) Ltd v. Grogan; Att’y Gen. v. X and Others, rev’d (Ir. S. C. 1992)* reprinted in attorney general v. x and others: judgement of the high court and supreme court with submissions made by counsel to the supreme court (Suniva McDonagh ed., 1992).

laws telling all women what to do with their bodies? Do we want to restrict the time, or worst, eliminate the time women need to make good decisions for themselves? Is the state an unwelcomed visage, an interloper, a disrupter, in a realm where women make decisions for themselves? Do we want religion, religious figures, and would-be moralists telling women what to do?

A Summing Up

Individual liberty of which privacy is a part, and the demands of organised society clash all the time.⁶² When there is a clash; when the fate of liberty, privacy, autonomy, and gender equality (fundamental rights) hang in the balance: should fundamental rights carry the day? Yes.⁶³

Context fixes the meaning for privacy. So far, privacy comes down to cities and towns where people feel anonymous, thatched houses (federal statutes) where people move about and converse in secret; virtual file cabinets in cyberspace surrounded by guards and gatekeepers to keep unwelcomed visitors out;⁶⁴ people's brains; the human body, a woman's reproductive parts; and last, but not least, claims against society (that is, the raw powers given to individuals to exclude others from their lives).

Is personal privacy in commerce a myth in society, a commodity, or a different kind of thing altogether? Is it about the creation and the maintenance of a good reputation in the marketplace to get credit? Is it something an individual creates with his personal power? Is it about others doing whatever to maintain and protect it? Is it about holding others accountable for doing too little to prevent others from tarnishing it?

Commerce Writ Large

In commerce, creditors and credit bureaus are conservators, guardians, and gatekeepers of personal privacy? When a person shares personal information with others, his privacy evaporates. Recipients of divulged information (vendors of various sorts, creditors, and credit bureaus) must identify themselves; highlight how they will use personal information; promise to keep the information confidential, safe, secure, and accurate; list others who will use the information; and, last, provide the person sharing his personal information with remedies for a user's wrongdoing.

⁶²MacCormick (2005) at 112-114.

⁶³Ibid. It is using social values like folks using bright line-colored pencils in some other contexts, to draw bold lines beyond which society should not go. Abortion cases are about human life (the fetus) and human lives (the women). In *Dobbs*, women lost the right to privacy when it came to new life. *Roe's* calculation about life were quite different. If men and women are human beings and human beings are equal: Women, like men, should be afforded the time, indeed, equal time and emotional space to make good decisions about their future and fate?

⁶⁴*Koch Industries, Inc. v. John Does*, at *8.

There are industry codes, statutes, and cases memorializing all these obligations. The Fair Credit Reporting Act is one of them.⁶⁵ It polices creditors, credit bureaus, and faulty consumer reports that may or could damage peoples' reputations. If a consumer report contains a half-truth that creates inferences that cannot be corroborated with n facts; if corrections are cheap and doable for a credit bureau; if the credit bureau does nothing; that is wrongdoing.⁶⁶ If a person files an application for credit with a brick-and-mortar-store; if the credit bureau issues a report about a person not seeking credit from that store; if the report is negative in tone; if it is about the credit applicant's spouse; that is wrongdoing.⁶⁷

What about a report that contains false statements? That is wrongdoing. If it contains a statement that is a literal truth, that might be alright. What about a report containing a clerk's mischaracterisation of a public record? Is dissemination of that report a wrongdoing? What about a report containing a bureau investigator's mischaracterisation of a public record? Is dissemination of that report wrongdoing? If a person, seeking a correction of his record, asks a credit bureau to correct its record; if the correct information about the person is in a public record (e.g., a judicial declaration about him); if the information is in bold print; if it costs nothing to correct the record; if nothing is done to fix this: is the ongoing dissemination of that report a wrongdoing?⁶⁸

What is a credit bureau report? What is in a public record? Here are the short answers. Both are official narratives about peoples' doings in commerce. The former is larger and contains the latter. It (1) highlights identifying information about somebody (an individual's full name, social security number, home address, telephone number, a spouse's name); (2) financial status and employment information (a person's income, a spouse's income, the person's workplace, his position, and tenure of employment); (3) credit history (the types of credit previously obtained, names of previous credit guarantors, extent of previous credit, and complete payment histories); (4) information about existing lines of credit (payment habits and outstanding obligations); (5) public record information (pertinent newspaper accounts about a person, arrests and conviction records, bankruptcies, tax liens, and lawsuits); and (6) a list of bureau subscribers that have asked for credit reports on an individual.⁶⁹

Let us put the credit report in context. If a person gets wind of a mischaracterisation of himself in a bureau's credit report; if he asks the bureau to correct the mischaracterisation; if the bureau asks the source of the mischaracterisation (the individual creditor-vendor) to investigate the questioned characterisation for its truth or falsity; if the creditor's obliged to do a detailed and systematic

⁶⁵ 15 U.S.C. 1681-1681x (1970). See Commentary on the Fair Credit Reporting Act, 16 C.F.R. Part 600 Appendix.

⁶⁶ *Austin v. Bank of America Service Corp.* Cf. *McPhee v. Chilton Corporation*.

⁶⁷ *Koropoulos v Credit Bureau Inc.*

⁶⁷ *Koropoulos v Credit Bureau Inc.*

⁶⁸ *Dennis v BEH-1* [hereinafter *Dennis*].

⁶⁹ Greenfield (2009) at 228-230 citing Privacy Protection Study Commission, *Personal Privacy in an Information Society* 47-51 (1977).

investigation of the characterisation to find the truth; if the creditor does a cursory investigation: that is wrongdoing.⁷⁰

Here is the skinny on all of this. In commerce, privacy presupposes the creation, control, and use of one's reputation to get credit. When an individual divulges personal information to another person, personal privacy evaporates. The holders of divulged information are both conservators and, figuratively speaking, Pretorian guards of privacy. What they disclose to others is confidential. What they do is policed by private codes, public policy, and statutes. Sadly, these policies, codes, and statutes are too vacuous, open ended, ambiguous, toothless, mind bending, and costly, in terms of time and effort and money spent on them, to get anything done.

Children and Privacy

What about children? Do they have a domain called privacy? Their inside world---the family bubble shielding them from the whims and vicissitudes of mercenary adults--- remains the same. But their outside world has undergone change in the 21st Century. Do they have a mental space, a species of privacy, unto themselves? Do they have a right to privacy? Is it palpable, tangible, viewable, emotional, and, lastly, a thing unto itself for them? Is privacy for children a legal conundrum in our world? Is it negotiable? Is its outer boundary determined by a parent's admonition (telling his or her child and children) not to rifle thru a sibling's diaries? Is it a domain in a larger realm established by government that is manned by sophisticated bureaucrats (government guardians and private gatekeepers) screening out unwelcomed adults? Does it crop up from deals in commerce---what children seek from their parents at a particular time, place; or a subject, an object, or activity that pops up in their house, where they are left alone?

Congress has drawn a line beyond which predators, amoral, and greedy merchants cannot go. The Children's Online Privacy Protection Act (COPPA) is such a line.⁷¹ Merchants cannot use the media to fish for impressionable youngsters. When they use media to send messages to children; when their motive is to collect personal information about the children's parents; when they use a youngster's appetite for different on-line amusements, to collect for the merchants what they need for themselves;⁷² when the entire undertaking is without parental consent, that is wrongdoing.⁷³

When they collect, use, and disclose personal information with computer programs, the programs' collectors should tell the parents what they are doing. Merchants should post a privacy policy on their websites, and online services, highlighting what they are collecting; put parents on notice that they are doing this; procure parental consent; give parents veto power over what is collected; and last, but not least, establish a scheme that does the following: (1) stamps out corruption

⁷⁰*Dennis v BEH-1.*

⁷¹15 U.S. Code Sec.6501-6506 (1998).

⁷²In The Matter of GeoCities, Docket No. C-3850, 127 F.T.C. 94 1999 WL 339112980.

⁷³15 U.S. Code Sec. 6502(b)(1)(A)-(D) (1998).

of the information, (2) preserves confidentiality, and (3) keeps unwelcomed users out.⁷⁴

If youngsters are urged to download computer programs and, in the downloading process, they divulge personal information (name, street address, email address, age, and personal interests), without parental inputs, that is wrongdoing under COPPA. If a child is urged to enter an online contest, without a scheme to verify parental ratification of the child's participation, that is wrongdoing. If a merchant uses an educational program to spy on school age children, that is suspect. If it is done without parental consent, that is wrongdoing.

New Mexico officials caught Google doing that in 2020. The firm without parental input used teachers in different school-settings; school children doing their homework; and children shouldering other school related educational undertakings, because adults asked them to do something to: first, hook youngsters to Google's other services and, second, track them. The New Mexico Attorney General brought an action in United States District Court to stop this.

There are other cases about these shenanigans. Their likely outcomes are settlements. The point being made here is this. To date government actions under COPPA are laudable. But, under COPPA, not providing a youngster's parents with a private remedy is a major shortcoming. Thomas Hobbs, and all his oracles and acolytes, that is, those folks who have a dark view about human beings,⁷⁵ have seeped into American commerce on this score. Children are the victims (the vulnerable little fish at sea, swimming in schools near home, feeding on the fringes of commercial society). Merchants trawl for them. The trawlers (commercial competitors) and their captives (the little fish) have no friends. They are friendly enemies. Competition and profit are everything in this world. It is the parents the trawlers want more than anybody else. It is "dog-eat-dog fight" among competitors, when they are trawling for children and, in their fishing expeditions, it is survival of the fittest.

Adults and Praxis

Turning back to intemperate adults in a much larger world: It is an animal kingdom out there. There is human wreckage everywhere. When people are not fusing, fuming, quarrelling, pestering, postering, and fighting with each other, about everything, many seek and eventually workout timeouts among themselves. They want to be inaccessible to others; to minimise unwelcomed attention, visitations, and noxious disruptions of their lives.

What about the mentally ill? What about mental illness itself? In the privacy realm: can mentally ill patients minimise the unwelcomed attention of strangers? Do they have a right to privacy? If a person has violent propensities; if his or her

⁷⁴F.T.C. v. Toysmart.com

⁷⁵Larry McMurtry (an American novelist) said it best. Life is what we do with it. Humans are puny beings occupying small spaces on the Earth's surface. Individuals, he wrote, must be as wild as wild beasts in the wild to survive. McMurtry (1995) at 400-401. See Finn (2008). <https://iep.utm.edu/hobmeth/>

physician knows this: does she have a duty to warn others? Should she blab to the public about all she knows? If a person is a paedophile; if her craving for children is acute; if her physician knows this: does she have a duty to warn?⁷⁶ If a patient is violent; if she has a target for her ire; if her physician knows this: does she have a duty to warn him? To whom should she disclose patient information? Should she tell the patient's would-be victims, hospital custodians, employers, and police? If the societal benefit coming out of disclosure of this information dwarfs a patient's discomfort, is disclosure alright?

Nothing is intrinsically private these days. For many people privacy is a situational thing. It comes down to an individual's control over the amount and type of disclosure offered to others. The right word for this disclosure is *confidentiality*. If a person is a paranoid schizophrenic, if he is an alcoholic, if he is a war veteran (having participated in vicious combat in Southeast Asia at some point in his life), if heavy drinking nowadays triggers violent outbursts in public, if his physicians know all this: should they warn those who host him in their homes?⁷⁷

What do we know now about privacy at this moment? In the real world, there is something called privacy praxis. Personal information about somebody is precious cargo in the commercial world and everybody wants it. If one's "frame of reference" about himself, that is, what he thinks of himself as a person and what he thinks of his place in the world, is something he wants to protect; if that information is in sync with his neighbour's frame of reference about him, there is a bit of privacy. Colleagues, acquaintances, neighbours, physicians, and strangers, in the know, should not disclose a person's physical condition, mental state, and financial situation; or blab to everybody about what they know; or put it on parade for all to see. Physicians, for example, should warn folks who are the object of a dangerous patient's fantasies. In all other cases, they should shut up. They should leave people alone.

Let us sum up what we have gleaned, so far, from this essay about privacy? It is domains in a realm that accommodates peace and quiet, solitude and self-isolation and so on. It is thatched houses (federal statutes) where people converse in secret. It is what comes out of privacy praxis. It is a woman's procreative parts, the human body writ large, cyber cabinets harbouring personal information with guards and gate keepers posted around them to keep unwelcomed visitors out. It is places where one is inaccessible to others. It is houses and bungalows with "closes" where homeowners and renters keep unwelcomed people out.

Privacy has its own iconography, relics, and artifacts (the brain, the human body, human body parts, people's images of other people, long running marriages and their secrets, procreation decisions, contraception decisions, made by young people at home, family relationships, childrearing practices, childrearing, and education in general). Privacy crops up from norms (social routines about a private life acceded to by the ruling class and followed by everybody else). It comes from

⁷⁶*Tarasoff v. Regents of University of California*, at 342-344.

⁷⁷*Leonard v. Latrobe Area Hosp.* at 1231-1232. In Pennsylvania, a physician needs to know a specific person whose life or health is threatened by a patient before notice of his illness is disclosed to others.

customs, traditions, Supreme Court cases, private pacts, codes, statutes, and regulations.

Confidentiality is one step removed from privacy. It highlights a person's obligation to keep another's personal information secret. The right to privacy is a constitutional right embedded in the First and Fourth Amendments. It is a right recognised in torts.⁷⁸ Confidentiality comes from private pacts. It is both a sword and a shield that offended people use against offending folks to preserve and restore their reputations.

The Media

Let us look at the media. The news producers are big corporations. The news they produce for us is a commodity. It captures facts and events that are spectacular, unsettling to many, emotionally disturbing, and negative. American media traffics in this stuff to make money and, in the process, turns ordinary folk into celebrities that are gawked at by the public, e.g., West Virginia Senator Joe Manchin gutting President Biden's Build Back Better Act in Congress, and Kyrie Erving (a National Basketball Association New York Nets basketball player) telling the media that he would not take the Covid-19 vaccine and, by implication, would not play professional basketball for the New York Nets this season.

Intrusion - the invasion of a domain where a celebrity wants to keep something secret - is an issue. The American press is a busy body in our lives. It is an intruder and an irritant. It publishes accounts about our environment, e.g., awful oil spills off the Monterey, California and Alaskan coasts, sports figures and their peccadillos, poverty and destitution, slums and peoples' foibles, gun violence and other events. It camps around us like the Covid-19 virus, in America, waiting for opportunities to make us their host. The press is driven by (1) a need to survive as an industry, (2) what is prurient in our lives, (3) a smattering of malice, and (4) profiteering.

When private facts are put on parade for all to see (e.g., a victim of a child abandonment who doesn't want her personal story and family history perused by anybody); when the account's newsworthiness (the newspaper publisher's decision to bring dark traits in human beings to light) is overshadowed by the thrill and excitement the newspaper's readers feel after reading the account; when the newspaper's editor runs the account over-and-over again; when the motives are (a) moneymaking only and (b) getting people to gawk at somebody, or (c) something or somebody passing by us in the community, or an event that turns a person into a spectacle; that's wrong. We should turn the newspaper's act into a tort.⁷⁹

⁷⁸*Rumbaуска v. Cantor* at 856-858; *Villanova v. Innovative Investigations, Inc.*; 21 A.3d 650, 654 (N.J. 2011); *ACS Systems, Inc. v. St. Paul Fire & Marine Ins. Co.* at 793-795.

⁷⁹*Hall v. Post* at 825-827. The North Carolina judiciary revisited this question a year later. When a person is a noteworthy figure; when the press publishes a true story about her; when the story draws a large reading audience, that is alright. *Hall v. Post* at 714. The public's right to know negates the family pain kindled by the story. See Alderman & Kennedy (1997) at 406-408

If there are two narratives about a newspaper's account of something it has done to a victim; if one is the intentional infliction of emotional distress; if the other is invasion of privacy, in North Carolina, at least, the first narrative governs everything.⁸⁰ If a sliver of wisdom fuelling what's been done, that is, not giving in to the temptation to repeat a reported disasters, from the past, for the sake of reporting them; if important human insights about something are the real issue; if it comes down to a jury second guessing what the newspapers' editors have done; the newspapers always win.

If a newspaper takes a picture of a fourteen-year-old girl; if she is a murder victim and, without her parents' consent, the newspaper publishes her image; if the newspaper reproduces the image from a negative photo, displays, and sells it to others; if the paper sells the image to keep the story going: that is wrongdoing.⁸¹ If what the newspaper purveys is the truth; if it is plucked from public records, and adds authenticity to a newspaper's story about somebody, or something odd; or a tragic event in human affairs; if, in the final analysis, the newspaper's output makes the story real, that's alright.⁸²

Should an intrusion (that is, somebody bogarting their way) into another's private domain and rifling stuff be confined the photographed victim? If the victim is dead should the invasion of privacy tort die with her? Should tort law pardon TV and print media, that is, give reporters a pass for the emotional damage a publication of an article with pictures,⁸³ or the TV broadcast of horrific images of a person, does to the victim's families?⁸⁴ What about the ritualistic lynching of young Negroes in the form of newspaper pictures, in the South, in the early 1900's and the 1930's? What about the 1950's image of Emmett Till, in his casket, after his brutal murder in Mississippi?

When a reporter takes a person's picture and puts it in a national magazine to make a parody; when he writes a narrative accompanying the photo that is false: is that an invasion of privacy? When a woman is doing wholesome work in her community; when her photograph is put in a pornographic magazine; when it is done by the reporter without her consent; when it creates a false impression of her with a segment of the reading public; when the false impression causes her mental distress: is that an invasion of privacy?⁸⁵ In California, and elsewhere, media cannot go into a person's home, willy nilly, and film who lives there without the

⁸⁰*Hall v. Post* at 716.

⁸¹In *Waters v. Fleetwood*, the newspaper got away with it. Gruesome pictures of a murder victim were milked for money. A judge took a whack at media spectacles in *Toffoloni v. FSP Publishing Group, LLC*. A person's likeness belongs to himself. Appropriation for profit is an invasion of privacy. The privacy right, that is, the right to publicity survives an owner's death. It is inheritable and divisible (*idem* at 1205-1206). A short newspaper type narrative pinned to a nude photograph of a dead celebrity is an invasion of privacy. The celebrity's demise changes nothing (*idem* at 1210-1211).

⁸²*Waters v. Fleetwood*.

⁸³*Idem* at 348. If images of a person's death attract newspaper audiences; if they hold their attention; if the images are part of a murder investigation, that is alright. Family grief kindled by a newspaper's display of death of a person in photographs, and sale of the gruesome pictures, changes nothing.

⁸⁴*Armstrong v. H&C Communications* at 282-283.

⁸⁵*Braun v. Flynt* at 250-258.

owner's consent. If they are overly aggressive while they are doing their newspaper job, that is an invasion of privacy.

Media Redux

Alas. This world may not be fit for chivalrous men in 2023. Don Quixote is dead. Strangers camp around us waiting for chances to make us their hosts. Surveillance is a minor annoyance. Intrusion is a major headache. The media has turned our backstage peccadilloes (the things we want to keep secret) into stage performances. The social etiquettes of the past (the non-publication of the private life of General Dwight David Eisenhower, in the UK, during the Second World War, and President John F. Kennedy) have given way to "telling it like it is" (newspaper reporters writing articles about Colorado Senator Gary Hart's extra marital activities) when he ran for President of the United States.⁸⁶

Put bluntly: we live in a media hungry, media crazed, and media adjusted society. Our human cravings, debts, deeds, peccadilloes, needs, habits, appetites, and vices command more value than us. People are comfortable with facades and avatars of us. They (the media) is all about the images of our corpus. People can make money off of them.

These days, there is no privacy in the media and cyberspace. Everybody knows about everybody else's business. What should we do about this? As a society, folks should use: (1) autonomy (doing what we can for ourselves to protect what's precious to us), (2) liberty (fighting for and preserving the option to roam about society without government surveillance and government interference), (3) bargains with folks to fence out others; (4) all state and federal legislation establishing havens for privacy; (5) personal vigilance to keep interlopers out of our lives; (6) circumspection in public places and last, but not least, (7) man made solitude to protect ourselves. Is that enough? It is something to do but, sadly, it is not enough.

The media has adjusted us. Its enablers (news conglomerates, news corporation executives, and their news reporting policies to make money), their toadies (the beat reporters, their scandal sheets (New York Post), popular cable pundits, respected journalist, computers, and sundry machines) have spread information broadly; levelled what the recipients get; democratised ideas (allowing truth to emerge from falsehoods and conflict). Disparate, desperate, emotionally needy, ethically challenged, hustling cub reporters and, last, but not least, would-be journalists, high and the low, have altered the way we process information about the outside world. Our words, in the English language, have given way to pictures and, lamentably, long accounts of peoples' deeds have given way to chopped up ones.

Media tools (newspapers, national magazines, digital replicas) have shaped our culture; they have changed discussions around the office water cooler and break rooms; they have changed discussions around the family dinner table about everything; and altered peoples' consciousness. Having said all that: what about

⁸⁶Waxman (2018).

the everyday beat reporters who produce local news? Can they shroud (encrypt) their sources and their raw information under the law? Can government pry it out of them? Are reporters accorded some privacy?⁸⁷

At times, reporters are pimps, scavengers, pickpockets, bottom feeders, and thieves. They use feelings, hunches, rumours, personal reconnaissance, stealth, peoples' tips, hushed up sessions with interviewees (their sources) away from prying eyes, phony gestures of friendship with interviewees, social contrivances to foster trust, paper-and-pens, yellow pads, audio and video tapes, I-pads, and cellphones to steal a subject's pearls of wisdom.

They jumble up what they collect from folks, mix and re-mix, and reconfigure their trove of stuff, to produce narratives that differs from the interviewees and the subjects upon which they report (making unflattering likenesses of them, distortions of some events, distortions of the reported subject's location in a narrative, and, lastly, misrepresentations of a person's view).

What about the scrivener's emotional state of mind while she is writing, editing, and typing up her news reports? What about her attitude, her mental state of mind, and the material discarded before she publishes her article? Can the reporter shroud all that material? If a reporter promises to write a life story about somebody; if she promises the interviewee that the story will comport with what she is told by the interviewee; if the story clashes with what she is told by the interviewee: can the victim of her narrative parade the reporter's black hearted work, her dark inner workings, and discarded materials? Is the reporter's conduct a tort? Can the interviewee recover damages for defamation?

In *MacDonald v. McGuinness*,⁸⁸ a celebrity brought an action against a reporter and he paid a price in damages.⁸⁹ The plaintiff used a civil suit with legal depositions, interrogatories, documentary evidence, and the testimony of the defendant-reporter, under oath, to establish his malice, fraud, defamation of the plaintiff, moral failing, and breach of contract.

Janet Malcolm wrote about this in her famous book.⁹⁰ She quoted Joseph Campbell. Campbell wrote the following about reporters:

'The look that one directs at things, both outward and inward, as a [reporter], is not the same as that with which one would regard the same as a man.... [It's] at once colder and more passionate. As a man, you might be well-disposed, patient, loving, positive, and have a wholly uncritical inclination to look upon everything as all right, but as a [reporter], your demon constrains you to observe, to take notes, lighting fast upon, and with hurtful malice, [capture] every detail that in the literary sense would be characteristic, distinctive, significant, opening insight, typifying the race, the social, or the psychological mode..[:] recording all, as

⁸⁷Taylor (2021).

⁸⁸Malcolm (1990) at 36-44.

⁸⁹Malcolm (1990) at 100-101. Jeffery MacDonald sued Joseph McGuinness on a false friend claim. He sought 15 million dollars. The parties settled the case for three hundred and twenty-five thousand dollars. See *Fatal Vision Lawsuit Settled*, N.Y. TIMES, November 24, 1987, at A21.

⁹⁰Malcolm (1990) at 60. An Interviewee's encounters with seasoned reporters has a regressive affect. Wariness of the breed gives way to childish trust and impetuosity, at Malcolm (1990) at 82.

mercilessly, as though you had no human relationship to the observed object whatsoever'.⁹¹

That, Mr. Campbell said, is a newspaper reporter. He is an observant narrator that reports the facts; that is, makes written statements that are empirically verifiable and accurate. He is someone who is separate, apart from, and independent of the person, organisation, or event that is reported upon.

As regards their inner workings (what she collects as a reporter for her newspaper and all her discarded materials): can she shroud the stuff from authorities in a criminal case? Can he say to legal authorities that "it's my stuff, that is, what I collected that inspired the news account" and "I alone can use it" and "it's my property" and "leave me alone"? Can a reporter claim some form of privacy? If the existence of an item (a reporter's background materials) enhances the accuracy of a statement in a criminal case; if it is exacting; if it is unobtainable in some other way: must the reporter cough it up for authorities? The answer is yes.

African American's Plight

Let's ponder what we've put on paper thus far and think anew about privacy. What about the plight of Africans in America? If we rummage thru their tortured history in the new world (the old cotton, sugar, rice, and tobacco plantation lifestyles and black slavery in the South):⁹² can we get a bead on their privacy? From their first step as a people on the continent, to this today, African Americans have fought for rights that white American from Europe take for granted. They pine for freedom (the option to go hither and yon unmolested by neighbours), liberty (the option to go hither and yon unmolested by government), and privacy (the right to be left alone). These foundational principles were then, much like now, bound together by the notion of sovereignty over oneself.

This was, in the beginning of African American history, like now, the profound and, sadly, pined for, masked and unresolved issue in *Dred Scott v. Sandford*. If a slave resided in a non-slave state or territory for a notable amount of time, the question was: whether he or she could use "emancipation" to secure his or her freedom and privacy? In *Rachel v. Walker*, the Missouri Supreme Court said yes.⁹³ Slaves got emancipated when they were taken to and resided in a non-slave territory or state by their masters for a notable period of time.⁹⁴ If a master was military officer; if he was required by military orders to go to a non-slave state or territory to complete a tour of duty, i.e., in Missouri, for example, the petitioning slave had to be set free.⁹⁵

⁹¹Malcolm (1990) at 61.

⁹²See Baptiste (2016) at Loc. 5310, 5318 & 5322.

⁹³*Rachel v. Walker (Text)*, Washington University of St. Louis digital library, <http://repository.wustl.edu/concern/texts/t722h9873>. See Ashcroft (2023).

⁹⁴*Ibid.*

⁹⁵*Ibid.*

In 1850, the Scotts secured freedom in Missouri. They could go about their business unmolested by white people. Justice Tawney rendered a different opinion, when *Dred Scott v. Sandford* reached the United States Supreme Court.⁹⁶ Tawney preached white supremacy. If people coming from Europe were a part of American society (the folks baked into the national pie), if people from other continents on Earth were excluded from American society, people coming from excluded continental locations on Earth, like Africa, had no rights that Americans (white Europeans) had to respect.

President Lincoln's Emancipation Proclamation (a military measure that lost its force and effect after the Civil War), the 13th Amendment to the US Constitution, and complementary federal legislative and Constitutional law pronouncements, overthrowing *Dred Scott v. Sandford*, kindled white anger and rage in the South, white anxieties acute among former plantation owners, Black Codes,⁹⁷ the Klu Klux Klan organisation, white terrorism, vagrancy and vigilante laws, legal segregation, and restrictive covenants in contracts,⁹⁸ that chipped away an African American's sovereignty over himself.

From this brief excursion thru American history, it is clear to me, now, that privacy means different things to different folks at different times in history. For African Americans it means "don't sully my life with your foolishness" or "trash my domain." It means "leave me alone" and "let me plot my own way of life." It means do not constrain what I do behind closed doors with my spouse. It means do not "single me out for disparate treatment." As a person, let me bounce around the country, as I wish, using public transportation, public roadways, public accommodations, public amusement parks, state universities to get an education for myself and my children and, lastly, public hospitals to get well like everybody else. It means do not let others turn my life inside out; make my life a side show; make unwelcomed intrusions into my life a norm; putting what I do in private on public display for others to ridicule and last, but not least, denigrate my sovereignty over myself.

Second Summation

Senator Joseph McCarthy and Roy Cohen did that very thing to Annie Lee Moss.⁹⁹ The woman migrated from South Carolina to North Carolina to Washington, D.C. to build a better life for herself. She was a government employee, a union member, and a community activist doing her best to make life better for herself and the people around her. She bumped into and had casual contacts with Communists and people who sympathised with communism.¹⁰⁰

⁹⁶*Scott v. Sandford*..

⁹⁷Dubois (1997) at 149-152.

⁹⁸*Corrigan v. Buckley* at 330. Pacts between individuals constraining what Negroes do with real property was alright. That notion got overturned in *Shelley v. Kraemer*.

⁹⁹Wills (2021).

¹⁰⁰*Ibid*.

Government spies in her community got wind of her encounters; put her on a watch list; and gave documents to the government about her.

She was hauled before a federal loyalty board in D.C. and Senator Joseph McCarthy's Senate Subcommittee investigating communist infiltrations in government. The Chairman wanted to establish two things. First, Ms. Moss was a security risk. Second, black folks embraced the status quo erected by white men that temporised and rationalised what was "right thinking" in a segregated society ruled by white men and white women.

Let us sum up some things in the essay about privacy. It is a domain where people get peace, quiet, solitude, self-isolation and the right to be left alone. If you own yourself (all Europeans self-evidently owned themselves); if you own other folk suffused with your personality or birth stain (mulatto men, women, and children one hundred and eighty years ago; some emancipated-but-subservient Negroes; house keepers and tenant farmers): messing with them was a deprivation of personal property, a messy trespass, and an invasion of the owner's privacy.

Oscar Wilde's Take

Oscar Wilde (a noted 19th Century Irish playwright) is an inspiration for what comes next. In the *Picture of Dorian Gray*, he intimated that man was a two-faced creature. One face (accommodating man's foibles, vices, ugliness, sins, and antics) was everchanging. The other (e.g., the facial makeups, each day's get-ups, masks, daily dramas, theatre, and spectacles) was unchanging. Most of us live on and, sadly, too many spend large amount of time acting out on what is unchanging.

In this unchanging world, everything is bought and sold. Everybody owns somebody. Everybody steals, uses, and wastes somebody else's mind, body, and talents. Everybody is attractive, beautiful, pretty, and petty. Television pitch men and women, social celebrities holding different ranks in society, FOX and MSNBC cable broadcasters, network T.V. program characters, T.V. programmers and producers, television ads and ads makers, pop culture heroes, pop culture characters, known actors and actresses, comic book figures in film, and last, but not least, the internet companies themselves, e.g., Comcast and Spectrum Inc., facilitate the sale and trade of everything.

In this world, where people use the internet, the user forfeits privacy. With the virtual world changing from one moment to the next; with the physical world giving way to the virtual world at every turn in a person's life; common laws must change to (1) reflect societal changes in our daily lives; (2) normalise what is taken place around us; (3) get people into the changes; and (4) promote, through updated laws, legal order, certainty, continuity, and predictability in our lives.

With some exceptions, people should do what they can to control information about themselves. Publicity about oneself should be limited to legitimate matters of public concern. It comes down to sovereignty over oneself, sovereignty over one's personal information, and the relinquishment of some sovereignty to others, and free will.

New Questions

Does surrender of sovereignty come from bargains? Does the giver consent to a traffic in personal information for everything? Does it come down to a tussle between folk about a legal subpoena? Is the information traffic about a person authorised by statute? When does one's claim to privacy (that wooden stake a person drives into society's mud, with big red flags, bearing the words "no further") weigh-up to a basket of wooden sticks with red flags that amount to privacy? Does the basket help people to flourish as a group?

Here is our tally for privacy thus far. Privacy is a realm. It is a "place name" for domains given to everybody.¹⁰¹ Its virtual cabinets surrounded by guards, gatekeepers, and written pronouncements to keep unwelcomed visitors out. It is thatched houses (statutes) where people can converse in secret. It is a reporter's work product (a domain unto itself shrouded (encrypted) from another's gaze). It is people's medical records veiled from others. It is a bunch of sticks with red flags bearing the words "no further".

Deeds that compromise a person's autonomy and stunt his or her personal growth; deeds that sully a person's reputation and degrade his or her domains; deeds that cause personal and family heartache; spies and gossips who besmirch a person's reputation; eavesdroppers eavesdropping on people at unguarded moments,¹⁰² and laws constraining what people do behind closed doors *are* invasions of privacy. The question is: how do we cope with all these invasions? Property law, case law, constitutional law, and statutes provide some answers.

A Thought

Let me digress for a moment, take deep breaths, as I occasionally do, pause and think anew about this topic, to get at an answer for the privacy question. There is a slave narrative and his or her progenies' perspective after slavery about privacy. Here is their up-to-date narrative about his or her day-to-day surroundings in the new world. When one crawls into an African American's skin; when one rummages through his or her family's history; when he or she (the rummaging child) recounts his or her parents' stories and narratives about their social life when they were young, and the social life of his or her ancestors in Virginia, when they were slaves; when he or she knows that history down deep in their bones because of his or her schooling and university training:¹⁰³ he and she can see things in history. She can see her family's troubled rubble strewn pathways down thru history towards freedom basic schooling up to the seventh grade for one's grandmother, the good teachers and the bad teachers, the public scolding children got from broken adults, the social snubs and social protests, the campaigns

¹⁰¹It is a space that is impregnable to strangers' claims; a space that accommodates peace, quiet, solitude, self-isolation, and the right to be left alone; and a larger space where an individual shares personal information with somebody who is bound to keep the trove from strangers.

¹⁰²See Madigan & Somalya (2016).

¹⁰³National Advisory Commission on Civil Disorders (2016) AT 211-238.

launched by educated black folks for a better way of life, the social unrest, the costs (loss of jobs and damaged reputations) and the triumphs to establish sovereignty over oneself.

In the United States, a coloniser's property claims to bewildered, confused, and imprisoned east coast Indians, imported West Africans, and indentured servants, brought to America to work; the unlucky groups' labour value (what have you done for me lately claims), along with farm animals, was then, like now, a reality. Privacy was and is, to this day, intertwined with property claims. If one owned a slave suffused with an owner's personality, branded, and biologically stained, the object was property. If one made an object that was coveted by others (a new life to be nurtured by somebody for example), the object was property. If one used a contract to purchase somebody, the object (a Black man from West Africa) was property. If somebody owned another's body and, literally, controlled that person's life, heart, mind, and spirit: all of that was property.

If the body's subtle movements, brain power, and prized skills were constrained by somebody else: the body's movements, brain power, and skills were property. If one coveted a slave's athletic physique and his prowess in a sport like boxing, horse-racing, sprinting, football, and long-distance running; if somebody with money bought those things: the athlete's body in sport amounted to property.

Holders of this property then, like now, were endowed with autonomy (the option to make decisions that sated their appetite), and freedom (the power to implement personal decisions about their property's use, sale, and fate, unimpeded by others), and privacy (the option to sweepout, include, or exclude others in their lives vis-a-vie the property).

If a white man from Europe used his mind, body, and spirit to break new ground somewhere in the newly minted United States; if he established, cultivated and collected slaves and other people who coveted what the trailblazer owned and developed, that was property. If he built banks, cultivated bank owners, neighbours, business acquaintances, business partners, associates, colleagues, peers, investors, friends, and formed other economic relationships that were valuable to him: he could call all these things his property and, by implication, brand what he had said about all of them as private.

If, by chance, one was a reporter for a news outlet somewhere; if the reporter used his skill, brain power, and physical body to establish a rapport with a stranger to write a story about him that edified the public (like Andrew Jackson and the cruelty of slavery and mistreatment of Native Americans attributable to him); or the skinny on the Bill Cosby's professional career in entertainment, his sex capades, and sexual harassment case in Pennsylvania): the source and his source materials were the reporter's property, and, lastly, what the sources told the reporter was private too.

Old Man's Reflections

Let me pause one more time and refit my pen with ink and start anew. I am running out of time. This is my last rodeo as an academic and I want to write something that takes a long time for people to erase. I have wrestled with privacy as if it were a wild animal (a mustang bronc out West) and gone at the animal with spurs, hammers, and tong. It is January 12, 2022, in Orlando, Florida. It was a hard day for me to write about personal privacy. Before I got underway a physician told me, in his office, that "I was sick" and "I'd succumb to a disease." His pronouncements made me numb inside; threw me off my essay writing schedule; and put my time on Earth (thankfully, I have a lot left), my friendships, family, loved ones, kindnesses, and debates with others about privacy in sharper relief.

Going forward with this privacy project, today, I am stirring this essay (my privacy soup) with a frenzy to get things just right; mobilizing bits of the English language that I find colourful enough to add flavour to the brew; sprinkling *nostalgia* into what I have before me to give the broth a kick, to dispatch the stuff into battle as a refreshment for new gladiators to nourish them for a noble cause (getting the public to see that I'm fighting for the individual's sovereignty over himself to the end.)

Years ago, Hubert Pair was my mentor. He was the Deputy Corporation Counsel for the District of Columbia; a member of the Board of Bar Examiners for the District of Columbia; and, later, a Court of Appeals Judge for the District of Columbia Court of Appeals.

If I were writing for him in chambers, today, I would say the following about privacy. We are in the midst of a rebuild of privacy and the boundaries we should ascribe to peoples' private lives. Privacy is a reclamation project in the United States. It is an aspirational thing for many people. It is a good idea (there is no doubt about that) and lots of folks want it. Sadly, people have glommed demands and complexities onto it to make an undertaking about the "new privacy" (turning people's aspirations into rewarding realities) more difficult. We need to clarify the realm's boundaries and the personal domains accommodated in the realm.

Privacy is a visage. It is a social value. It is a hazy and colourful picture of something grand in our lives. We should hold fast to this picture (with the all haze and the fog and all that) because: (1) it makes life better; (2) it is a way to ration *our common's* wealth (claims against organised society given to everybody about freedoms, liberty, equality, property, and bits of alone time); (3) it is a way to give everybody their share of the above to make them comfortable with their fate, their allotments, and their surroundings; and (4), when bits of the above stuff are left over, and unused by folks, its way for hungry people, craving something, to compete and bargain for to stabilise the privacy project.

Privacy should not be a glossy state trophy won in an all-out-contest with others over a right, hammered out in state legislatures, or made the subject of half-baked once-and-for all bargains about a person's refuge against the cold and the cruel world. Michigan's adopted a modest privacy statute to cope with invasions

of privacy. The statute may help us see our way thru on this project. The statute is paraphrased below for your review.¹⁰⁴

(1)The Michigan statute covers people who can do and suffer (Individuals) and organisations (partnerships, cooperatives, associations, public and private corporations, personal representatives, receivers, trustees, assignees, and other legal entities with sufficient contacts with the state of Michigan to satisfy the Due Process Clause of the United States Constitution), transactions (occurrences cropping up in commerce), and third parties (individuals and organisations not directly involve with a transaction between an Individual and an organisation), and personally identifiable information (data that specifically identifies an individual or could reasonably be believed to identify a specific individual).

(2)It is unlawful, in Michigan, for an organization to get personally identifiable information beyond that which is necessary to complete a transaction. It is unlawful for an organisation to disclose personally identifiable information to third parties without the express or implied consent of the individual that submitted the personally identifiable information to the organisation as part of a transaction. The absence of individual consent (either expressed or implied) makes the organisations actions unlawful.

(3)If an organisation violates the statute, individuals can bring an action for a temporary or permanent injunction or a civil action to recover actual damages or damages in an amount of \$5000 per violation. The Attorney General is invested with the power to pursue a temporary or permanent injunction; accept an assurance of a discontinuance in a manner provided by the statute; he is given subpoena power and the option to bring class actions to produce a result.

(4)Information needed to promote the health, safety, and welfare of the public; information to help law enforcement; information that promotes and enhances the welfare of an individual; information needed to enforce contract rights are beyond the scope of the statute. Lastly, information by journalists, artists, literate, and historians are stacked up on ground outside of the statute's boundaries.

Let me close with a few psychological remarks about privacy. Human beings have big egos. There is something going on in our brain every moment of the day. The brain's boundaries are determined by pleasure and pain. The Id and the Super-Ego are its tenants. The former grabs everything that is pleasurable. The latter constrains what the Id wants to grab. Memories about our appetite clutter the brain like trash. They are the vile, the brutish, the uplifting, and the clownish encounters with the outside world. It is all the good, all the bad, all the pleasure, and all the pain showering us, inflicted upon us, and chewing up all human beings.

The spaces in the brain and what people try to pry open and un-package about others (our informational cargo) are the crudest objects of privacy. This is a nativist way to proclaim things about us. It is the unvarnished animal impulses, in us all, to grab everything outside of ourselves for pleasure. It presupposes the use of autonomy, freedom, liberty, and our secret desire to pry open another person's life versus a person's sovereignty over himself.

¹⁰⁴Keck (2002) at 118-121.

American slaves never got these powers or got them by trick, compacts, hard work, sleight of hand, and chance during slavery. European emigres (the early ones), the pathfinders, the white pioneers, and settlers had them when they landed in America. We, as a people, have spent over 100 years gridding down and refining this trove of legal and psychological stuff to make use of a felt need, a craving in all of us, to insulate ourselves from others in our lives. In 1896, we gave the work-product a façade. In a law review article, we called it privacy.¹⁰⁵

Old Man's Reflection

It is the 21st century now and my time on earth to do good and useful things as an elder is short, treacherous, hazardous to one's health, emotionally draining at times, climate altering, and cruel. Some people want *us* (the people who think about people as individuals and their privacy) to die off so they can get on with their lives and the business of making money. As commercial individualists, mercenaries of a sort (capitalists), they stand apart from their dying neighbours; doing their best to stay aloof from reality's social distractions, people's foibles, pain, and civilisation's shortcomings, to minimise the pain inflicted upon them as individuals and a group. They seek objects to love (cars and trucks) and objects that love them (cats and dogs) to cope with reality. Some take intoxicants to dull reality. Others accept death and give into its will to find ultimate privacy. All are obsessed with money.

Let me put a finer point on these observations. Privacy is a realm established in our public square. It is a refuge from the coarseness of the outside world. It is a structure. It has physical wing and psychological wing in our lives. Invasions of privacy, by contrast, are unwelcomed intrusions into a person's life that upset a person's plans, planned activities, and equilibrium. It is spying on a woman's doings and ratting her out to authorities. It is holding her up for ridicule. It is making a person's private affairs grub for public consumption. It is defamations of a person's character. It is putting people in a false light. It is opting to cause another's mental anguish; it is making a conscious decision to do something awful that causes mental anguish and bodily harm. It is making caricatures out of people to cause disquiet in them. It is unearthing awful things people bury about themselves that is grub, or becomes grub, for other's consumption. It is using inaccurate, false, misleading, and deceptive consumer reports to sully a person's reputation. It is turning university lectures by a professor into grub for consumption by government officials.

Now, while one is alive and kicking, like me, there are tools we can use to help ourselves. They are: (1) use frames of reference about our body and body parts to keep un-welcomed visitors out; (2) use negligence per se under privacy statutes to punish those who publish what one wants to keep secret; (3) use the defamation tort to defend the walls of privacy; (4) use virtual cabinets with guards and gatekeepers to keep un-welcomed visitors out; (5) use the First, Fourth, Fourteenth Amendment, and Supreme Court cases to minimise the harm

¹⁰⁵Warren & Brandies (1890) at 195.

government can do with official power; and (7), where possible, use state legislatures to get rid of vagrancy and vigilante statutes that circumscribe and criminalise what people do in public.

Let me close with these remarks. I wanted to write an essay about privacy and technologies that breach the walls of privacy. What I believed when I started this project a year ago and what I believe now are different. Between human beings there are secrets (knowledge about what will become of one's body in the near term; the love or contempt one has for one's spouse; the pain that comes from the discovery that you're not an attractive object to your spouse; that a spouse prefers companionship with others and not you; that your marriage to someone is based upon a lie; that a spouse's grudges and deceit fracture a marriage; that a spouse's anxieties, insecurities, and cravings for money determine a lot in one's life).

When technology takes over folks' lives; when people use technology daily as a substitute for a person-to-person conversations about everything; confidentiality replaces privacy. When all is said and done, given the social trash piled high around us that most of us have not or cannot swept away or bury beneath us (the stuff paraded in the previous paragraphs), death becomes the ultimate form of privacy.

The Mouth of Babes

Let me end the essay with an uplifting story. It is the Thanksgiving Holidays in Florida. I went to the movies with my grandson. We saw the *Eternals* on 29 November 2021, and, after the movie, we had a discussion in my car on the way home. Out of the mouths of babes (It was Griffin Roy Simons who spoke to me) came wisdom. Here is the synthesis of our twenty-minute conversation. There is a wheel that turns all the other wheels. That is life. How it starts is a mystery. Life on earth is a given, obvious, plain, raw, and unadorned. Animals eat animals to live. Man is an animal. He has the option to eat animals to live. That is free will.

Earth men are curious beings. They have a public face (it is adorned with stuff), a private face, and zones of privacy. The public face is used in play, social, and business discourse. The private face harbours desires, concerns, drives, fears, secrets, ambition, anxieties, and loathing. The space between the two is the zone of privacy. It is a chamber or lots of chambers where one hides what's humbling, dark, embarrassing, and humiliating about oneself.

Modern man lives in a man-made fortress (21st Century privacy domains) on plots of land that belonged to somebody else. The fortresses have guards and a gatekeeper (bureaucrats with statutes) to keep unwelcomed visitors out. There are fences around the fortress to accommodate the fortress holders' peace and quiet, freedoms and liberties. Vandal camp around the fences waiting for a chance to poach what is valuable to them. Is this a good image of privacy? Maybe, I told Griffin. Is poaching an invasion of privacy? Maybe. Stay tune. We will see.

To Griffin I said: we must get out of our old and the dusty books about our checker past in history, to see what is going on around us. American devolutionists (the states' rights politicians) [...] I used different words with Griffin [...] are in

control. Deregulation,¹⁰⁶ individualism run-a-muck,¹⁰⁷ and mob violence (a recurrent feature in American life) have carried the day. People behave like cowboys and Indians lived a century or so ago. Today, privacy is a glossy veneer people use to hide what they have done in the past. One's reputation, and his or her neighbour's perception of him or her,¹⁰⁸ their wives' and loved ones' perceptions, determine the scope of privacy. *We are reflections of the people who made us. We want to be left alone, in the worst way, to preserve our best selves; we want to deny folks an opportunity to appropriate our names, likeness, and image for money; and, lastly, take away another person's chance to put us in a false light.*

Conclusion

Chew on this. We are a memory and a hope. We live in a haze. Too many of us have relinquished too much of ourselves to claim anything as private. Everybody knows something about everybody. "Who you are" and "What you are" and "Where you've been" are in the hands of others. We have to claw back things for ourselves and make somebody pay for the misuse of our information.

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¹⁰⁶*West Virginia v. EPA*. See Wallach (2022).

¹⁰⁷*New York State Rifle & Pistol Association v. Bruen* (Packing guns in public is alright under the Second Amendment); *District of Columbia v. Heller* (The Second Amendment to the United States Constitution accommodates the storage guns at home).

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