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### Privacy as a Human Right

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## X—PRIVACY AS A HUMAN RIGHT

BEATE ROESSLER

The right to privacy seems to occupy an entirely natural place within the structure of human rights; for many years now there has been an established jurisprudence on the right to privacy coming from the European Court of Human Rights in Strasbourg. At the same time, there have been fundamental conceptual (Thomson, Geuss) and normative (McKinnon) criticisms of the right to privacy. Against these critics, I argue, first, that it is possible to articulate a systematic normative conception of privacy, which explains and supports a general *right to privacy*; and second, that the right to privacy lies at the very heart of a human right to freedom and autonomy. Without reference to a right to privacy, many other rights to freedom are not realizable. I first develop a normative conception of privacy and its different dimensions, and in a second step take a closer look at the jurisprudence of the ECHR by considering some examples, in order to understand what role the right to privacy plays in the Court's decisions. The right to privacy, far from being reducible to other rights or detrimental to the rights and needs of women, occupies a central place on the list of human rights.

These days, the right to privacy seems to occupy an entirely natural place, not only within the structure of human rights, but also, especially in Europe, within national constitutions and in legislation more generally. This is especially true of the right to what is known as 'informational privacy', which has been a particular object of legal attention over the past several years, and for many years now there has been an established jurisprudence on the right to privacy coming from the European Court of Human Rights in Strasbourg.

At the same time, there have been both conceptual and normative criticisms of the right to privacy, which hold it to be either internally inconsistent or normatively superfluous. We can distinguish between two basic strands of criticism. On the one side, there are those who argue that there is no unified concept to be found here, since all aspects of an alleged right to privacy can be reduced to other rights,

and since the concept is far too heterogeneous to denote a single right. Judith Jarvis Thomson and Raymond Geuss are both well known for this type of criticism of the concept of privacy.

On the other side, we find a feminist critique that casts suspicion, not only on the general idea of human rights, taking it to be expressive of a male bias, but more specifically and centrally on the right to privacy, in so far as such a right is thought to sanction the patriarchal and repressive distinction between a public and a private space, consigning women to the private domain in which men have traditionally been free to act as they please.

I think that both criticisms of the idea of privacy should be taken very seriously; but I also think that neither of them is devastating to the idea of a right to privacy. In what follows, I want to argue for two claims: first, that it is possible to articulate a systematic normative conception of privacy, which explains and supports a general *right to privacy*; and second, that the right to privacy lies at the very heart of a human right to freedom and autonomy. Without reference to a right to privacy, many other rights to freedom are not realizable. Thus what I will argue is that the right to privacy, far from being reducible to other rights or detrimental to the rights and needs of women, occupies a central place on the list of human rights.

In arguing for these conclusions, I want to show that the different normative dimensions of privacy are important to human rights discourse, because they play an essential role in identifying certain human rights violations and therefore in protecting human rights. The philosophical debate over the ethics of privacy can thus be instructive for the debate about human rights. To bring out this connection, I will both develop a normative conception of privacy and its different dimensions, and take a closer look at the jurisprudence of the European Court of Human Rights by considering some examples. The goal here is to understand what role the right to privacy plays in the Court's decisions, and to ask how the ECtHR's interpretation of this right fits with the normative structure of the concept of privacy.

I will begin by briefly discussing the criticism of the concept of privacy, or rather, of the possibility of developing a unified and normatively cogent conception of privacy. To do so, I will provide brief sketches of Thomson's and Geuss's critical approaches, and respond to those criticisms by showing how it is possible to develop a conception of privacy that is not vulnerable to them.

In a second move, I turn to privacy as a human right. Here I will start by engaging with the feminist critique of the idea of a human right

to privacy; I will then go on to present the various existing formulations of a human right to privacy, and consider the salient differences between them. In the third part of the paper, I will attend in some more detail to at least a few instances of the jurisprudence of the European Court of Human Rights, interpreting them with the aim of finding out in which contexts the right to privacy plays, or should play, a role, and what this means for the idea of privacy. Building on the work of legal scholars, my aim is to discuss and criticize the various normative principles underlying the Court's decisions; and to show that it is precisely in order to overcome the traditional liberal idea of having clearly separable private and public spheres that we need the human right to privacy.

## I

*The Critique of Privacy and a Normative Defence.* Let me begin by considering the fundamental critique of a unified and basic conception of privacy. It is well known that the earliest and most radical version of this critique was offered by Judith Jarvis Thomson: the right to privacy is not in fact one single right, but a 'bundle of rights', consisting of two non-reducible 'grand rights' (the right to property and the right over one's own person) and a number of reducible 'un-grand rights' which make up the grand rights (the right not to be subject to eavesdropping, the right to keep my belongings out of view, and so on). The concept of privacy is far too heterogeneous for there to be a single consistent and meaningful right to it (Thomson 1975).

Raymond Geuss seconds Thomson's line of criticism, but adds to it a more fundamental consideration. The very distinction between private and public, he argues, already relies on the assumption that there is a unified liberal distinction that is politically set in stone and uncontested. But this assumption, he continues, displays not only a mistaken conception of the distinction between public and private, but also a mistaken conception of politics. In 'real politics', all distinctions and all values are contested, and the liberal distinction is therefore illusory and ideological. According to Geuss, this becomes apparent only once one recognizes the deep heterogeneity of privacy and the plurality of very different values attached to its various meanings (Geuss 2001a).

Now Geuss and Thomson are surely right to assert that the distinction between a private sphere and a public sphere is multifaceted.

But in the first round of rejoinders to Thomson, Thomas Scanlon made it clear that it is nevertheless possible to identify a unifying idea, a common foundation for the different usages and meanings of privacy. This foundation, according to Scanlon, is the interest we have in being able to be free from certain kinds of intrusion (Scanlon 1975, p. 315). Since then, various conceptions have been developed that all indeed rely on the idea of freedom or autonomy as their foundational and unifying concept. The thought is that we each want to be free from *different* kinds of intrusion, because each of us aims to live an autonomous life and there are several *different respects* in which the protection of privacy is needed for the realization of freedom or autonomy. Thomas Scanlon, Anita Allen, Jean Cohen (and even James Griffin, with his concept of normative agency) all defend a similar account: on one side, there is a basic normative principle, such as freedom or autonomy; on the other side, there are the multiple aspects or dimensions of privacy, in regard to which freedom can be curtailed or threatened by intrusions.

To be able to reject Thomson's and Geuss's critiques of a unified conception of privacy, we need to show that this basic idea is compatible with the heterogeneous meanings and different cultural interpretations of privacy. And what I would like to show is that it is precisely a conception of privacy which is linked to the ideas of autonomy or freedom that is indeed best suited to take these heterogeneous meanings and cultural differences into account.

There is a further reason why we need to recognize a unified normative idea underlying the different meanings of privacy: when a practice develops and its norms—conventional, moral, legal norms—change or have to change, we need to analyse what constitutes the *normative foundation of privacy*, what exactly is protected by the right to privacy, how its contexts are subject to change, and why we value privacy in the first place. Any normative conception of privacy needs to be able to accommodate new developments and contexts regarding social norms of privacy. And conversely, these new developments may of course give rise to new interpretations of what privacy means.

So what does it mean to be free from intrusion in various different respects? It means that a person is capable of controlling, and authorized to control, others' access to herself—for example, to her data, her residence, her decisions, and her ways of acting (Westin 1967, p. 7; Roessler 2004; Warren and Brandeis 1890). This 'access' may

be understood in a metaphorical or symbolic sense, for instance, when what is at issue is another person's ability to object to certain decisions; but the term may also apply quite literally, regarding access to a set of data or to an apartment. In this way, the meaning of privacy is linked to the freedom from intrusion in the very general sense of having control over others' access to one's own person. It is because of this connection that we take privacy to be valuable and worthy of protection (Schoeman 1984; Allen 1988; Cohen 1992; Roessler 2004).

On this basis we can proceed to connect the various aspects of privacy to different respects in which privacy should be protected. Let me distinguish between three such respects or dimensions, which are expressive of distinct aspects of privacy and its connection with autonomy. These are respects in which privacy must be protected in order for autonomy to be possible. First, when the object of protection is in fact the privacy of a residence or a room—or more generally, the privacy of a physical space—it makes sense to speak of *local* or *domestic* privacy. What is at issue here is the protection of a 'backstage' area that is needed so that persons—all persons—can retreat there and rest from performing their various social roles. This local or domestic privacy is what people usually mention first when they speak of privacy or of private life, and it is often held to possess intrinsic value, so that individual autonomy is not invoked at all. It is then quite natural to assume that privacy simply consists in this dimension. But that assumption is mistaken. Local privacy is just one among different dimensions.

We can call this second dimension of privacy *decisional privacy*. It concerns private decisions and actions: who to live with, what career to pursue, which church to join, or what clothes to wear. It is clear that this dimension of privacy extends into the public realm. It is therefore a serious misconception to conceive of privacy exclusively in spatial terms. Especially in the feminist literature of the past two decades, it has often been pointed out that it is possible (and necessary) that the notion of privacy be given a feminist reinterpretation so as to overcome the metaphor of space and to reveal the different dimensions of privacy (Allen 1988; DeCew 2015).

Third, the protection of *informational privacy* aims at limiting the amount of information about a person that others—be they persons or institutions—have or are able to obtain. We can live autonomous lives only if we can be certain that it is more or less up to us who has

what kind of knowledge about us; only if, in the words of Germany's Federal Constitutional Court, we are protected in our informational self-determination (BVerfGE 65, 1 [43]). Informational privacy pertains to all sorts of data and information, including information possessed by friends, acquaintances and strangers, as well as by institutions. This dimension of privacy too is clearly not restricted to any particular space, but must be safeguarded across the various public contexts which we inhabit.

To be sure, these distinctions among different dimensions of privacy are not clear-cut, but admit of overlaps. Moreover, these three dimensions of individual privacy protect not only individuals and are valuable not only to individuals: they protect individuals *within relationships*, and these relationships themselves, as social practices, would not be possible without such protection (Roessler and Mokrosinska 2015). This defence of a systematic normative conception of privacy does not suffice to defeat the critique developed by Thomson and Geuss, but it shows in what direction we need to look. It is at least intelligible and possible to develop a unified conception of privacy based on the value of freedom or autonomy, which will allow us to account for the diverse aspects and contexts of privacy. Let me now take a closer look at the human right to privacy, at the feminist critique, and at the ECtHR's jurisprudence.

## II

*Human Rights and the Feminist Critique.* It is well known that human rights were contested from the very beginning: with regard to the possibility and mode of their justification, and thus their validity; with regard to their scope; and with regard to their meaning or interpretation. Also, the questions whether human rights are moral rights, natural rights, or subjective rights, and whether they are a criterion for the legitimacy of any political order, are all highly contested. But I will here set aside all fundamental issues and proceed on the assumption that they have been settled (see Steiner and Alston 2000; Ignatieff 2001; Alexy 2004; Geuss 2001b; Beitz 2009; Griffin 2008). At the same time, we can observe that there is now an almost worldwide consensus regarding the *existence* of human rights. This does not mean that human rights have been realized around the globe, but it means that states are forced to embrace human rights at least as a matter of protocol.

Over time, the idea of human rights has steadily expanded,

beginning with negative rights to liberty and progressively coming to encompass rights to political participation, social claim rights, and finally, the substantive list of rights established by the United Nations in 1948. The right to privacy, or to a private life, represents one stage of this expansion. It was a completely novel entry in the catalogue contained in the Universal Declaration of Human Rights, and it is unusual in lacking any predecessors in state constitutions or basic laws. As Oliver Diggelmann and Nicole Cleis have pointed out, ‘the right’s potential was dramatically underestimated at the time of its creation’ (Diggelmann and Cleis 2014, p. 441). Having apparently originated in a somewhat accidental manner, the right to privacy has since become one of the most important human rights (Weil 1963; Michael 1994; Feldman 1997; Warbrick 1998; Volio 1981; Richardson 2017).

The idea of a right to a protected private life is thus encountered for the very first time in the 1948 Universal Declaration of Human Rights. Its Article 12 states:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks. (United Nations 1948)

In the International Covenant on Civil and Political Rights of 1966, we find a very similar formulation in Article 17; and Article 8 of the European Convention on Human Rights of 1950 reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. (Council of Europe 1950)

These formulations differ in interesting ways—for instance, in contrast with the Universal Declaration, the European Convention lacks any reference to ‘honour and reputation’, and whereas the Universal Declaration requires states to protect ‘privacy, family, and home’,

the European Convention speaks more generally of ‘private and family life’.

This general idea of a private life, stated in the European Convention, has been particularly influential in European jurisprudence. However, before I attend to the Court’s jurisprudence, let me take a closer look at the feminist critique. There is an important connection between the general feminist critique of human rights—or more cautiously speaking, its critique of human rights discourse—and the feminist critique of the demarcation between private and public spheres. For the basic human rights to freedom have traditionally been thought of as rights that citizens have against the state, as *negative* rights which prohibit state interference in certain areas of life. This seems to entail that the private sphere is exempt from criticism, and that it constitutes the space in which the liberties protected by those negative rights can be exercised. Yet grave violations of women’s human rights take place precisely within this protected private sphere. Domestic violence, an unjust division of labour along gender lines, and oppressive cultural practices all seem to be exempt from criticisms based on a human right to privacy, once we have accepted this interpretation of the distinction between public and private. In order to interpret human rights from a feminist perspective as rights that are also held by women, the entire distinction between the private sphere and the public sphere first needs to be dismantled (Kim 1993; Binion 1995; Marshall 2009; Holzleithner 2014).

This critique of the traditional liberal distinction is certainly well taken, and for many years now, feminist critics have rightly pointed to the ideological nature of this distinction. But as I tried to show above, endorsing this critique does not necessarily mean that the distinction has to be jettisoned altogether. Indeed, we can see that feminist theory since the 1980s has developed conceptions of privacy that conceive of the private sphere as protecting women and men in equal degrees.

Thus, the distinction between dimensions of privacy outlined above accommodates precisely this feminist critique, and builds on it: the family is no longer viewed as a pre-political institution located entirely within the private sphere, and questions of sexual identity or of religious dress code have to be understood as dimensions of the right to privacy lived in public space. Conceiving of privacy and the right to privacy in this way demonstrates that rights, and especially human rights, always have an emancipatory dimension. The feminist

critique need not be directed at their very nature as rights. On the contrary, the securing of equal rights has always played a fundamental part in the history of women's emancipation.

Interestingly, the history of the case law regarding Article 8 of the ECHR shows that its provision of a right to privacy has not in fact led to discrimination against women, at least not over the past several years. On the contrary, the relevant court rulings show how this right to a private life has contributed (or is at least capable of contributing) to emancipating women and securing their equal autonomy. Indeed, this right can be credited with serving as one of the starting points for the struggle for equal rights, even if the relevant jurisprudence is not always unambiguous and consistent.

### III

*Normative Principles Underlying the Decisions of the ECtHR?* Against the background of the feminist critique and the normative conception of privacy outlined above, let me therefore turn to a discussion of some cases decided by the European Court of Human Rights which invoke Article 8 of the Convention. Different legal scholars have made different proposals regarding the identity of the principles underlying this jurisprudence. Thus Kirsty Hughes writes, 'In its judgments the Court sets out a number of "general principles" elaborating on the nature of the right. In doing so, it touches upon many of the arguments that have been advanced in privacy scholarship; for example, the Court's references to "physical and psychological integrity" and the "right to identity and personal development"' (Hughes 2015, p. 232). And in a wide-ranging treatment of the jurisprudential role of Article 8, Nicole Moreham suggests classifying the cases and judgments according to a schema containing three 'freedoms from', namely, 'the right to be free from interference with physical and psychological integrity, from unwanted access to and collection of information, and from serious environmental pollution', as well as certain 'freedoms to: the right to be free to develop one's personality and identity and to live one's life in the manner of one's choosing' (Moreham 2008, p. 44).

This leaves us with a whole cluster of normative principles. While I want to build on these attempts at classification, I will do so with a critical intent. For what interests me specifically is whether or not it

is useful to interpret the Court's decisions as applications of the normative conception of privacy and its different dimensions outlined above. This jurisprudence has often been criticized; and I would like to find out whether these criticisms derive from a misleading or incomplete conception of privacy, and whether we might advance by basing our critical assessment of the Court's decisions on the normative conception of privacy and its different dimensions.

This would mean attributing to the Court not four or five different principles, but only one: individual autonomy or freedom, which is protected and enabled by the right to privacy in its different dimensions. This would also do justice to the feminist critique, since insisting on the *local* dimension of privacy is precisely *not* the same as endorsing the conception of privacy associated with the traditional spatial metaphor. The private sphere, on my conception, serves men and women equally.

A further advantage of this greater simplicity regarding underlying principles lies in the fact that it would serve the interest of legal predictability, by making it easier to interpret new cases whose resolution depends on the norms of privacy. We would then also have principled criteria for cases where the norms of privacy change because of changes in social reality.

So what I want to do in the following is to discuss some paradigmatic cases along with the ensuing debates among legal scholars, and assess the extent to which the proposed systematic conception of privacy may be able to help in giving efficacy to the human right to privacy. Let us have a look at the most frequently discussed and fiercely contested cases in this area: they include those concerned with questions of sexual identity, which also pertain to the right to develop one's own personality and identity, and those concerned with informational privacy, wiretapping, and surveillance. Beyond these types of cases, I will also discuss domestic violence as a special problem for the Court's jurisprudence concerning Article 8. I will have to be rather brief, but I hope that the basic points will be evident enough. What I am interested in is the plausibility of linking these three groups of cases to the three normative dimensions of privacy.

Let me begin with cases where the privacy of a person's sexual identity is at issue. A number of prominent cases brought before the Court concerned domestic legislation by which homosexual conduct was prohibited or otherwise suppressed. One of the best known and most discussed cases is *Dudgeon v United Kingdom*, which resulted in a ruling

that has occupied many legal scholars. The question to be settled by the Court was ‘whether the existence of criminal offences relating to homosexual conduct in private between consenting males over the age of 21, or some lesser age, constituted an interference with a person’s right to respect for his private life in contravention of Article 8 of the European Convention on Human Rights’ (*Dudgeon v United Kingdom* [1981] summary). The Court ruled that such legislation did indeed constitute an interference in the private life of homosexuals. But the reasoning given for this ruling—that is, the normative principle on which it relied—came in for criticism. To quote the Court:

There can be no denial that some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of the criminal law can be justified as ‘necessary in a democratic society’. The overall function served by the criminal law in this field is . . . ‘to preserve public order and decency [and] to protect the citizen from what is offensive or injurious’. Furthermore, this necessity for some degree of control may even extend to *consensual acts committed in private*, notably where there is call . . . to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence. (*Dudgeon v United Kingdom* 45 [1981] at 49)

Why was this decision so controversial (and remained so)? On the one hand, the Court’s argument is quite unambiguous, since it clearly held that the concept of private life is ‘a concept which covers the physical and moral integrity of the person, including his or her sexual life’. Thus, on the one hand, the court decided that homosexual acts among consenting adults in private should be free from interference, and also that the freedom to do so constituted a matter of human rights (see [Johnson 2010](#); [Heinze 1995](#)). Yet on the other hand, it is clear that in defending a right to homosexual conduct, the Court was relying on a traditional spatial distinction between private and public, and was relegating homosexual life to the secrecy of private space. By endorsing the need for this spatial division in the interest of controlling social practices, the Court also seemed to remain committed to the notion that public homosexuality is incompatible with public morality, and that it can be coercively kept from public view. It is clear that the relevant discourse here is one which

views gay men as corrupting public morality due to their deviant behaviour, which should therefore be confined to private spaces.

These assumptions were rightly criticized by Paul Johnson: ‘Homosexuality as a “private manifestation of human personality” has been decisive in socializing a European consensus on the protection of private sexual expression, and it can also be seen to have encouraged a continued separation of “sexual rights” from “citizenship rights”’. To ensure the existence and preservation of full citizenship rights for non-heterosexuals, homosexuality needs to be comprehended outside of the narrow confines of “private life” associated with Article 8’ (Johnson 2010, p. 97). I think that one should agree with Johnson and others who criticize the Court’s explanation of its ruling. On the other hand, it is apparent that Johnson himself is still relying on an overly narrow conception of privacy. The object of his criticism is not the conception of privacy applied by the Court, but rather the fact that the Court is referring *only* to the right to privacy. If Johnson were to recognize that a dimensional conception of privacy has the resources to regard homosexuality as both a private matter and one that people are entitled to bring into public space, he would be in a position to criticize the Court’s reasoning in a different and more plausible way. The right to privacy protects individual autonomy within relationships, independently of whether those relationships are being lived in the private sphere (that is, in the local dimension of privacy) or in public. Since choices concerning one’s sexual identity should be seen as private choices, it is normatively most adequate to conceptualize homosexuality as being protected by *decisional privacy*.

I next want to take a brief look at a different but equally famous case, which should also be seen as a case of decisional privacy, or so I argue: this is the case of the face veil. In *S.A.S. v France*, the Court held that France was entitled to prohibit the wearing of the burqa in public (Marshall 2008, 2015; Brems 2016). This ruling caused a great deal of discussion because it was and remains deeply contested whether, as France maintained, the banning of the burqa and the niqab is indeed necessary for the functioning of a democratic society. This is no doubt a difficult issue. But what is evident throughout the critical commentaries on this case is that it is religious freedom (Article 9) which is here being weighed against the moral texture of life in common. Yet, what should be at issue here is not just religious freedom but also the *right to privacy*, properly understood

(Marshall 2015). Again, if we conceive of privacy not only and not primarily as a *space*, it becomes much clearer and also much more plausible that, and why, this case should be understood as one involving *decisional privacy*. Of course, there remains the difficult problem of weighing different rights against one another, since none of the rights involved is absolute. What is at stake, however, is not simply the protection of religious identity, but the empowerment of an individual wanting to live her life autonomously, and able to do so in public only if her decisional privacy with respect to her religious beliefs and religious dress is respected and protected.

Needless to say, if one believes that the niqab is ‘an obvious symbol of oppression’ (Alibhai-Brown 2016, p. 117), then neither freedom of religion nor the right to privacy will be able to deliver an argument against prohibition of the face veil. But I do not think that one should agree with this view. One should at least concede that there can be some degree of autonomy in a woman’s decision to wear a niqab or in her recognizing, accepting, or acknowledging that this is how she wants to live her life.

In another ruling, the Court made it clear that it considers individual autonomy as an important principle, if not the central one: ‘The Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees’ (*Pretty v United Kingdom* [2001] at 61). Regarding religious dress, an issue of decisional privacy would allow us to recognize that Article 8 is at least as relevant here as Article 9, the freedom of religion. This is just what a normative conception of privacy can serve to show and to justify.

At the same time, the *traditional* idea of privacy as a *protected space* continues to play a role in the debates on the concept of privacy, as well as in the jurisprudence of the court. My next examples are cases that proceed from this traditional idea of a private sphere, in so far as they are concerned with the dimension of *local* or *domestic privacy*. The question here is whether the Court ruled in ways that take seriously the feminist critique of the private sphere as a refuge solely for men, and thereby in ways that remove the sting of that critique.

How important it is to construe and develop this private protected space as one inhabited by women and men alike is attested to by the fact that marital rape was made a criminal offence only in very recent times—in Germany, in 1997. The feminist critique applies

perfectly here: instances of domestic violence, such as marital rape, went legally unrecognized because they were taken to belong within the protected sphere of privacy. The legal reform in Germany did come about without any appeal to the European Court of Human Rights, but it is clear that this form of violence contravenes not only Article 2 ('Everyone's right to life shall be protected by law') but also the protection of private life in Article 8. The jurisprudence concerning Article 8 can serve as a corrective to the feminist critique by demonstrating that it is *possible* to appeal to Article 8 to demand the protection of one's private sphere, including its protection against domestic—and primarily male—violence. In line with the Court's rulings, domestic violence can be construed as a very specific type of violence. This is why appealing to Article 2 alone would not be apt in these cases. Only the protection of private life can do justice to the special kinds of vulnerability that characterize intimate relationships and domestic settings. As an example, let me point to the case of *Kalucza v Hungary*, which was decided by the ECtHR in 2012: 'The applicant unwillingly shared her apartment with her violent common-law husband pending numerous civil disputes concerning the ownership of the flat. She alleged in particular that the Hungarian authorities had failed to protect her from constant physical and psychological abuse in her home. ... The Court concluded that the Hungarian authorities had failed to fulfil their positive obligations, in violation of Article 8 ... of the Convention. It found in particular that, even though the applicant had lodged criminal complaints against her partner for assault ... the authorities had not taken sufficient measures for her effective protection' ([European Court of Human Rights 2017](#), p. 9).

What we encounter here is precisely the idea that private space must be a protected space not only for men but equally for women. This also means that the family and family life do not constitute some extra-legal, pre-institutional space, but are subject to the same basic rights that apply in all other areas of society. In this regard, there is no difference between the private and public spheres (see [Rawls 2001](#), p. 166).

I will leave it at these brief remarks to finally turn to cases having to do with *informational privacy*, that is, with the dimension of privacy that concerns information or data about a person. This dimension of privacy has become more urgent over the past years as new forms of data processing have created novel threats to the freedom

of individuals and to the life of democratic societies. It is therefore especially important to clarify the underlying normative principles in this area, so as to allow us to develop transparent criteria for new cases of privacy violation.

How central an issue this is for European human rights is revealed by the fact that the Charter of Fundamental Rights of the European Union, passed in 2000, distinguishes the protection of data (informational privacy in the narrow sense) from the protection of privacy. In addition to Article 7, concerning the protection of private life, it introduces a separate provision for the protection of personal data (Article 8), departing from all earlier European and other international declarations. Paragraph 1 of that article states that ‘Everyone has the right to the protection of personal data concerning him or her’.

Introducing this separate article is of course very helpful: I have already mentioned above that we need to be able to control what information about us is available to others—or at least to have well-founded, reasonable expectations concerning this information—in the interest of retaining control over our self-presentation and over the various different social roles we occupy. Absent such control, persons are unable to effectively oversee what Goffman (1956) called their ‘presentation of self’, which in turn amounts to a curtailment of their autonomy. Due to the advances in wiretapping technology, but also because of increased CCTV surveillance, there are by now a whole number of cases having to do with informational privacy. The best known among them are *Klass v Germany* and *Malone v United Kingdom*, both of which concern the secret wiretapping of a person’s telephone calls by state agencies (Bygrave 1998; Griffin 2008, pp. 225–30; Hughes 2015).

My primary interest here is twofold. First, the Court argues that informational privacy constitutes a central aspect of privacy, and that the secret surveillance of citizens without their consent is therefore in itself a violation of informational privacy. But what seems even more important to me is that, second, the Court is arguing quite explicitly that privacy must be lived in public. This, I believe, amounts to an application of the normative dimensional conception of privacy. The critique of the traditional liberal distinction, which claims that the liberal conception cannot do justice to the fact that one’s private life may be partly led in public, is not apt here, as the Court argues precisely that private life sometimes must take place in

public. One of the best known cases in this context, *Von Hannover v Germany*, is so well known partly because the Court here made this consideration very explicit: ‘There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of “private life”’ (*Von Hannover v Germany* [2004] at 50; see Hughes 2015, pp. 227 ff.). Informational privacy and local privacy (as a protection against domestic violence) are not in conflict here: both are aspects or dimensions of privacy which are needed to enable individuals to be autonomous in very different respects. This becomes clear once we adopt the dimensional conception of privacy.

There is, however, a third aspect of informational privacy that is also important here. Lastly, therefore, I want to briefly consider the significance of informational privacy for democracy. Without the protection of privacy, citizens cannot make use of their democratic liberties—the German Federal Constitutional Court already recognized in its ruling on the 1983 Census Act that the right to individual self-determination is an ‘elementary prerequisite for the functioning of a free democratic society predicated on the freedom of action and participation of its members’ (BVerfGE 65, 1).

Many theorists have pointed out that there is a connection between the protection of privacy, understood as the protection of individual autonomy, and the protection of democracy. For instance, Kirsty Hughes speaks of a ‘bulwark against totalitarianism’ (Hughes 2015, p. 228), and Spiros Simitis characterizes the right to privacy as ‘a constitutive element of a democratic society’ (Simitis 1987, p. 732). Again we can cite an important ruling here, one of the most discussed cases in this context: in *Klass v Germany*, the Court argued that the Contracting States do not ‘enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate’ (*Klass v Germany* [1978] at 49).

The unobserved spaces that we need in order to be able to act autonomously and authentically within the public sphere could not exist if we were constantly subject to (even just potential) observation and social control. Indeed they would already cease to exist if we

could no longer be certain who may gain access to our data and what data are being collected about us in the first place. When one cannot be sure that one is not being observed and controlled, one can no longer engage in open and autonomous critical debate with others (see [Stahl 2016](#)).

#### IV

*Conclusion: Normative Dimensions for Article 8.* Let me come to a close. I have tried to combine two different perspectives: on the one hand, a normative perspective that seeks to explain and articulate in a consistent, systematic and plausible way what the meaning and value of privacy are, for individuals as well as for democratic society, given the different meanings and social contexts of privacy that we find in our social life; and on the other hand, a perspective provided by the jurisprudence of a court which, in making decisions about actual cases, is required to interpret the written law regarding the human right to privacy. I hope that it has become clear that a unified conception of privacy can help us in understanding, interpreting and criticizing the Court's rulings, and thus to protect the various distinct dimensions of (both male and female) individuals' right to privacy against threats and violations.

I have argued that it is useful to point out that underlying the different dimensions of the right to privacy is a single principle: the principle of freedom or autonomy. The answer to the question of what homosexuality or the burqa have to do with privacy is then plain: certain aspects of our lives as free and autonomous persons are not possible without the protection of privacy. Such an underlying principle seems to be highly important for the practice of adjudication. When aspects of our lived reality change, so do the social norms regulating them. In assessing these changing norms, a principle of this sort can play a guiding role. When norms of privacy change, the criterion for evaluating this change is whether and how the autonomy of persons continues to enjoy the kind of protection that is a precondition of its existence.

At the outset I said that the right to privacy occupies a natural place, not only within the system of human rights, but also within the constitutions of the European states, as well as in their legislation. We are now in a position to understand why this is just as it

should be. This right is indispensable, since without it certain essential dimensions of our freedom or autonomy could not be realized.<sup>1</sup>

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