OXFORD

ON HUMAN RIGHTS

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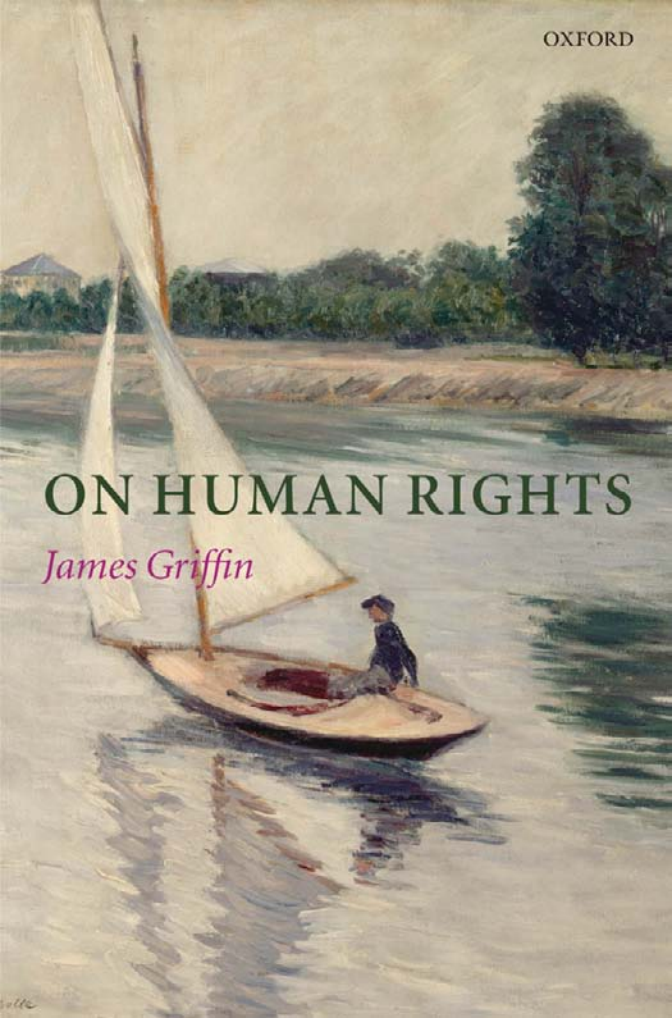

human rights will supply, that will carry our use of the term 'human right' from indeterminateness to sufficient determinateness of sense. It may be that what carries members of the Western European Enlightenment tradition to sufficiently determinate sense may be non-trivially different from what carries members of the Hindu or Bushman traditions. It may be that, despite our different routes, we all arrive at more or less the same destination. But there has to be something that carries each of us to it. That is why we need a substantive account of human rights.

Once we have such an account, should we keep it dark? This brings us back to the thought that a substantive account should be self-effacing. If there really is a non-trivial difference in substantive accounts between members of different countries, we should hardly insist that our own particular account should be preferred by incorporation in international documents. Those documents at least can remain silent on the subject. But in deliberating about what is and what is not a human right, one cannot do anything but appeal to one's own understanding of human dignity. And we need more, not less, such deliberation. In present conditions, there is likely to be conflict when the drafters of an international document listing a new category of human rights come to decide what belongs on the list. That would be no bad thing. The conflict would provide a good test of the adequacy of the competing substantive accounts. With time, we might find greater convergence between them.

12

A Right to Life, a Right to Death

12.1 THE SCOPE OF THE RIGHT TO LIFE

On the face of it, the right to life is the least problematic of rights. Of Locke's trinity—life, liberty, and property—it was the least discussed. In the debates at the end of the eighteenth century about the ratification of the US Constitution the right to life was often cited, but without comment, as if it were too obvious to need it.[1] But when the parties to the debate turned to liberty and property, they had much to say. Their relative silence about the right to life was probably connected to another belief of theirs; they seemed to conceive of it largely negatively—as a right not to be deprived of life without due process. A prohibition of murder hardly needed comment.[2]

Still, once one reflects on the grounds for a right to life, even the grounds accepted in the seventeenth and eighteenth centuries, the scope of the right seems irresistibly to expand. The grounds tend to a generality that justifies more than just a prohibition of murder. If living at liberty is of great value (to take an indisputable human right), then *living*, as well as living in that *way*, is valuable, and that seems to justify a claim to some broader preservation of life. It would seem to justify a wider negative right than just the prohibition of murder—say, a prohibition of gratuitously endangering other people's lives or of destroying their rationality. What is more, it would seem to justify some positive rights.[3] If you are drowning, and all that I have to do to save you is to toss you the life-belt next to me, and I wantonly disregard your plight, do I not violate your right to life? Does the right not include a positive right to rescue, at least if the cost to the rescuer is not great? And if it includes a right to be tossed a life-belt if one were drowning, would it not include a right to food if one were starving, or to medicine if one were dangerously ill? And if it includes those, does it also include a right to conditions, such as clean water and female literacy, the absence of which drastically shortens a child's

life? This ballooning of the content of the right to life is not just a theoretical possibility; it is just what has happened. The putative right has grown from a right against the arbitrary termination of the normal life of someone already living (murder), to a right against other forms of termination of life (abortion, suicide, euthanasia), to a right against the prevention of the formation of life (contraception, sterilization), to a right to basic welfare provision, to a right to a fully flourishing life. That last extension, no doubt, goes too far. The right to life cannot even be a right to have life preserved in *any* circumstances. That would be impossibly demanding. So, what is, and what is not, demanded by the right to life?

This line of thought leaves the right without a clear boundary. What starts off as the least problematic of rights becomes, on reflection, distinctly problematic.

12.2 LOCKE ON THE SCOPE OF THE RIGHT

What *is* the scope of the right to life? We might start by asking what the natural or human rights tradition makes of its scope. And when it comes to the trinity—life, liberty, and property—Locke is the towering figure in the tradition. Many think that on Locke's view, and on the classical natural rights view generally, natural rights are all negative.[4] But Locke's view is more complicated and better than that.

Locke's ground for natural rights is a natural law that asserts some form of equality of human beings. But it is not a sort of political equality that he has in mind (e.g., equality of distribution of goods or equality of opportunity in their acquisition, or the difference principle), but that morally fundamental notion of equal respect; what he has in mind is equal standing as moral agents. In the *Second Treatise* Locke quotes this passage from the philosopher he refers to as 'the judicious Hooker':

> … those things which are equal, must needs all have one measure; if I cannot but wish to receive good, even as much at every man's hands, as any man can wish unto his own soul, how should I look to have any part of my desire herein satisfied, unless my self be careful to satisfy the like desire, which is undoubtedly in other men, being of one and the same nature?[5]

So, Locke says, no one ought to harm another 'in his life, health, liberty, or possession'.[6] We find in the state of nature none of the subordination between persons, as we do between persons and animals, that would authorize

one person to destroy another.[7] But notice how Locke generalizes as he concludes:

> … so by the like reason when his own preservation comes not in competition, ought he, as much as he can, *to preserve the rest of mankind*, and may not unless it be to do justice on the offender, take away or impair the life, or what tends to the preservation of the life, liberty, health, limb, or goods of another.[8]

When Locke says that one must, to the extent that one can, *preserve the rest of mankind*, he seems to include the positive as well as the negative. If one is to preserve mankind, one must rescue and bring aid—provided, as Locke puts it, that one's own survival is not in competition. It is true, however, that Locke then goes on to list a number of specific duties, all of which, being duties not to harm, seem negative.

It never becomes fully clear what Locke's view of the right to life is. The distinction between positive and negative rights was, I expect, not in his mind. And the same unclarity, the same alternation between positive-sounding and negative-sounding proposals, runs through other passages in the *Second Treatise*.[9] Still, it is also not clear for that reason, contrary to a common view, that Locke saw the right to life as purely negative. And Hooker's, and Locke's, ground for the right has echoes of 'Do unto others as you would be done by'. All of us would want to be rescued or aided if we were ourselves in great danger. And, as we saw earlier,[10] Locke is not one of those writers who thought that all genuine natural rights are negative; he recognized a natural right to 'meat and drink' when in need.

In any case, I do not think that Locke's ground for human rights—the principle of equal respect—is really what we should see, in the end, as grounding them. According to Locke, Hooker has shown how equality serves as a foundation of duties of justice and charity.[11] And that seems entirely right: the principle of equal respect is the foundation of far more than just human rights. Being the moral point of view itself, it is, in that sense, the foundation of all morality. But then Locke has not provided us with the ground for human rights in particular. If we were to accept that whatever the moral point of view itself generates are rights, then rights would spread to fill the whole moral domain. Then our account of human rights would fail a reasonable redundancy test: we already have a perfectly satisfactory way of speaking about moral demands in general. It would be a waste of the special language of human rights to let it become so inflated.

12.3 PERSONHOOD AS THE GROUND OF THE RIGHT

If personhood were, as I propose, indeed the ground of the right to life, the intuitive case for it would go like this. We attach a high value to our autonomously choosing and freely pursuing our conception of a worthwhile life. Then it is not surprising that we should include among human rights, as the tradition always did, not only a right to liberty but also a right to life. Can we value living in a characteristically human way without valuing the *living* as well as the autonomy and liberty that make it characteristically human? If human rights are protections of that form of life, they should protect life as well as that form. This intuitive case, which we have met earlier,[12] leads to a right to life with positive as well as negative elements.

If we accept that the right to life implies positive duties, then we face several problems. How great will the demands be? One limit on them is that the right is not to a fully flourishing life, but only to that more austere state, the life of a normative agent. And there are limits, which I also mentioned earlier,[13] deriving from the principle that *ought* implies *can*. There are limits to human powers of calculation. There are limits to human motivation, especially to the motivation of the sorts of persons we should want there to be. There is a domain of permitted partiality, which limits the extent to which ethics may demand that we sacrifice ourselves, or those especially close to us, for the benefit of strangers.

Still, the protection even of that relatively austere state, the life of a normative agent, can be highly demanding. Here the right to life, with its positive elements, substantially overlaps a right to health. The right to health is not, strictly speaking, a right to health itself. Health is only partly within human control. I have no right not to be struck down by an incurable disease. Nor is it a right merely to health care. Much more is relevant to our health than health care, narrowly conceived: for instance, safe roads, female literacy, good sewage, clean water, and so on. Our right is to health care, broadly conceived. But then it is a right only to *basic* health care, also broadly conceived, where what is 'basic' is decided by what is necessary for life as a normative agent, and no more. There are many forms of ill health that have no bearing on normative agency. For example, there are the mild neurotic hang-ups that afflict us all. They are pathological, but they usually do not stop us from being normative agents. We have no human right, therefore, to their treatment. It is easy to imagine very many physical ailments of the same

sort. We should not be disturbed by this consequence. There are perfectly good reasons, even moral reasons, to treat minor illnesses besides a human right's requiring it.

The combined effect of these limits makes the demands on us arising from the positive side of the right to life much more manageable than they may seem at first sight.

12.4 FROM A RIGHT TO LIFE TO A RIGHT TO DEATH

There are groups that invoke the right to life to justify banning abortion, suicide, and euthanasia. The right to life, so interpreted, not only protects our freedom to live, but can also oblige, even condemn, us to go on living.

It may seem an odd interpretation of a human right that would have these consequences—a welcome entitlement that turns into an unwelcome prohibition—but there are several other rights much like this. No doubt in most of what are called 'entrapped cases' (e.g. a person with advanced motor neurone disease with a perfectly good mind in a non-functioning body), the patient would wish to waive the sort of right to life that these groups have in mind. But not all rights are waivable. I cannot waive my autonomy or liberty. If I freely ask you to take all my central decisions in life for me, you may not do it, except in rare circumstances. If I voluntarily offer to be your slave, you may not accept. In general, I may not waive my dignity as a human person. I am often obliged, even condemned, to maintain it. Nor is there any conceptual error in linking a human right of mine, which is often a freedom, with an obligation upon me, which is a kind of restriction on my freedom. One has, for instance, both a human right to education and an obligation to exercise it. Similarly, one has, as well as a right, an obligation to be autonomous and at liberty.

How are we to distinguish human rights that are waivable from those that are not? On the personhood account, one looks at whether normative agency would thereby be seriously diminished; if so, the right in question is unwaivable. That is why, though one cannot waive one's rights to autonomy and liberty, one probably can, in certain circumstances, waive one's human right to privacy. Most of us need certain forms of privacy to function at all effectively as agents, but especially self-confident persons, or shameless exhibitionists, may not. And for most of us the loss of certain minor privacies would not seriously compromise our normative agency.

To whom could I owe these sometimes unwelcome obligations? In a secular ethics, my obligation to maintain my status as a normative agent is one that I owe, it seems, in the first instance, to myself. On the face of it, my obligation to be educated is more complex; I owe it not only to myself but also, if I have political power in a society, to my fellow citizens. The relative clarity of the case of education might then lead us to accept that, in the same social circumstances, I owe it also to my fellow citizens to maintain my normative agency generally. These conclusions depend upon there being obligations to oneself. I shall here simply suppose that there are.

Do I, by parity of reason, then have an obligation as well as a right to go on living?[14] If I have an obligation to maintain my normative agency, do I not therefore have an obligation, to myself, to maintain myself in being so long as I remain a normative agent? I think that, by parity of reason, I do. The crucial question, of course, is: how strong a one? There need be no element here of an obligation to others. If I have certain powers of decision in society, then my correlative obligation to others is that I exercise them responsibly, but that obligation has no clear implications about my committing suicide. One's obligation to maintain oneself in being would often be an obligation only to oneself, grounded in the dignity of living as a normative agent. Respect for personhood would require respect for its very existence. But respect for personhood would require respect also for its exercise—for example, in reaching a judgement that suicide in certain conditions is rational. There is no reason why the first form of respect should always outweigh the second. It would, most of us would think, be outweighed by one's life's holding nothing but intolerable pain, as judged by oneself, as a normative agent, for oneself. It would be outweighed, many of us would say, even by a person's deciding to commit suicide on certain semi-aesthetic grounds: say, on the ground that one had no obligations to others, that one had reached a certain perfection in life, and that what lay ahead was only pitiful decline. It could be outweighed, however, if I were a quite exceptional person upon whom depended the avoidance of some great social disaster, or if I were a perfectly ordinary person who had dependants who would suffer greatly without me. Then I might have to soldier on. The obligation to soldier on could fall on one quite apart from responsibilities to others, if, though my pain were great, it was not so great as to outweigh the often underestimated value of living as a normative agent. There is truth in the criticism that suicide can be 'the easy way out'. Some suicide is cowardly or shows a bad sense of values. A person who kills himself because he is about to be charged with fraud may act from

narcissism, or a wish to hurt others, or ignorance of the forms of dignity still left him.

We have now identified three kinds of value of human life. Hitherto I have concentrated on what is good for the person whose life it is and how that life can be good or bad for others. But just now I have added the value of the life itself—not value *for* anyone, the person concerned or others, but an intrinsic value. And this intrinsic value, many say, is generally overlooked by secular accounts of the value of life. I think that is so. And I have just tried to describe this third sort of value and how it manifests itself. But many would also think I am still underestimating it, that I recognize the category but not its true weight. It manifests itself, they will say, in a right to life that prohibits, or at least more severely restricts than I understand, suicide and euthanasia. Still, I would respond that the way I have described the intrinsic value of life at least makes it comprehensible and plausible. The accounts that make it still weightier—weighty enough for it to manifest itself in these much more restrictive ways—are extraordinarily hard to make intelligible. Is there an account of this weightier value that is both comprehensible and plausible?

Many think that there is. Many, like Locke, derive it from God's will:

> Men being all the workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order and about his business, they are his property, whose workmanship they are, made to last during his, not one another's pleasure … Every one … is *bound to preserve himself*, and not quit his station wilfully …[15]

It is sometimes said that Locke saw human life as a gift from God, but the word 'gift' does not begin to capture Locke's thought. If my life were a gift, I should now own it and could do with it as I please. But Locke's idea is that God retains ownership and gives me only a loan of it, and so restricted use.[16] This makes an especially weighty, highly restrictive intrinsic value of life entirely comprehensible; whether it is also plausible, we can leave aside, because we are looking for a secular account. Indeed, even theists may reject Locke's view if, for instance, they think, as many do, that the loan conception of human life is theologically and scripturally under-motivated.[17]

In *Cruzan* v. *Missouri* (1990), Chief Justice Rehnquist, for the majority, asserted that the state has an interest in protecting human life itself, even when it is contrary to the interests of the person concerned (the person concerned in this case being Nancy Cruzan, who had by then spent more

than seven years in a persistent vegetative state, and whose parents had petitioned for her to be allowed to die). A possible state interest in restricting suicide and euthanasia could arise from a more permissive policy's creating an atmosphere in which suicide and euthanasia become too psychologically easy, to the detriment of the many who then killed themselves without sufficient justification. That, I think, cannot be gainsaid; nor, I think, can the claim that human life has intrinsic value. The crucial question, however, is how weighty its intrinsic value is, measured in the strength of the restrictions it implies.

The most powerful secular case for strong restrictions is, to my mind, Kant's. Mere things, he says, have *price*: they have equivalents, so substitutes. But persons have *dignity*; they have no equivalents or substitutes. The dignity that one has as a person is a value one has *in* oneself, not *for* oneself nor *for* others. Persons require respect; they must be treated as ends in themselves and never merely as means. To kill oneself because one's life is no longer worth living, or even worse, is to treat one's rational nature, one's personhood, as a means of controlling what is good *for* one and not as an end in itself. And the same would be true for the same reason of an act of euthanasia.[18]

This is too brief to stand as an account of Kant's views, but my concern here is not the ethics of suicide and euthanasia in general, but the content of the right to life. Well, one might think, what could be more appropriate as a role (not necessarily the only one) for the human right to life than to protect the intrinsic value of life? Once one admits that there is such an intrinsic value, does one not have to accept that there is a right to its protection? All that I want to claim here is that the human right to life does not protect the intrinsic value of life on Kant's strong interpretation of it. I have argued this earlier.[19] Kant derives what he calls 'natural rights' from his idea of respect for persons, and that results in a far broader set of rights than we have from the Enlightenment tradition or in present international law. Kant's 'natural rights' rest on the a priori 'Universal Principle of Right', which says, 'Any action is *right* if it can co-exist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can co-exist with everyone's freedom in accordance with a universal law.'[20] As I explained earlier, his term 'natural right' therefore covers much of morality, far more of it than our term 'human rights' now covers.[21] Why not then go over to Kant's way of speaking? There are three good reasons not to. First, we should no longer be explaining what we set out to explain: human rights with roughly

their current extension. Second, we should be shifting from a limited basis for human rights that is likely to be widely accepted to a basis in a comprehensive moral view that is widely disputed. And, finally, the distinction between the value of life *for* the person living it and the value of the life *in itself*, as Kant uses the second notion, is far too sharp: the dignity of having a rational nature includes exercising it in making rational judgements, and one cannot respect a rational nature and therefore its exercise without respecting those judgements, which may well concern what is good *for* persons.

There are different ways of understanding Kant's views on the value of human life. There are also Kantian accounts of the value of life that do not aim to be interpretations of Kant's own. And there are entirely non-Kantian accounts—say, a non-theistic teleological account. Each of them might come up with a weighty intrinsic value of life that justifies strong restrictions on suicide and euthanasia, but I shall stop with this subject here. I know of no account that yields a weighty value that is both comprehensible and plausible. I know some that are comprehensible but not plausible, and some that may be plausible but are scarcely comprehensible, and some whose restrictive consequences are announced, but the value that is supposed to support them is left unspecified. Of course, someone may come up with an account that is both comprehensible and plausible. We should then have to revisit these matters.

Let me return to the current ballooning of the content of the right to life. There is, I conclude, an intrinsic value of a human life as well as a value for the person living it. Does the human right to life severely restrict suicide and euthanasia? No; the right protects the intrinsic value of human life in protecting our personhood generally, but there is nothing in the intrinsic value that makes it incommensurable with the other two values, the values for oneself and for others, nor anything that makes it resistant to frequently being outweighed by the value of the life for the person who lives it. Does the right to life include a right to a flourishing life? No, as I have already argued;[22] it is a right only to that more austere state, the life of a normative agent. Does it imply a prohibition of abortion? No; as I have already argued,[23] embryos and foetuses do not have human rights, though there may be moral considerations other than human rights that serve to prohibit abortions. Does a human right imply a prohibition of contraception? No; the pre-conception forms of life that can produce a human person do not have human rights, though again it is an open question whether there are other moral reasons for a prohibition.

12.5 IS THERE A RIGHT TO DEATH?

Most of us think that the right to life does not severely restrict suicide and euthanasia. Indeed, is there not, as well as a right to life, a closely related right to death?

There is an answer to that question that is tempting in its simplicity: a right to death is the obverse of the right to life.[24] But that is too simple. Rights to autonomy and liberty are needed to justify the right to death. A free, informed, and competent person will choose a valuable life, but may not choose a valueless life or, all the more, a life in which the bad irreversibly overwhelms the good. Both of those choices, for life and for death, are manifestations of the same highly valued thing, one's status as a person. If the first choice is protected by rights—the right autonomously to choose what one judges to be a worthwhile life and freedom to pursue it—so must the second be—the right not to live a valueless or a thoroughly bad life. The second right is just a special case of the autonomy and liberty that are the ground of the first. Whether dignity-destroying pain or deterioration is to be endured is one of the most momentous decisions that one can take about what one sees as a life worth living.[25] If one is denied that momentous decision, or the possibility of implementing it, then one's right to autonomy and liberty are hollow shams. If one has a right to anything, one has a right to death.[26] The right to life enters this argument only in the obvious way that it enters any appeal to autonomy or to liberty: the rights are to *living* autonomously and *living* at liberty.

Like all human rights, the right to death is borne only by normative agents. In the case of the right to death, however, there is the special problem that suicide is often the act of a disturbed mind. Then, others may intervene to stop a person bent on suicide at least long enough to ensure that the suicide is indeed the act of a normative agent—free, informed, and competent. Freedom is perhaps the hardest of the three conditions to establish. The old and ill often feel themselves to be an unwelcome burden on their children, and if suicide becomes more widely accepted, if children see their infirm parent as resisting the sensible way out, the pressure on the parent to commit suicide could become hard to resist. And if one's doctor encourages suicide, as it has been said some Dutch doctors have done to free scarce hospital or hospice resources,[27] then the pressure could become

overwhelming. Sometimes suicide is rational, given the state of one's society, or given one's position in it. If one is poor, and adequate medical treatment is beyond one's means, it may be rational to kill oneself. But, in those circumstances, what most urgently ought to be done is not to make suicide easier but to improve the inadequate medical care that can drive people to it. We have a secondary obligation to protect vulnerable agents from such coercion.

Still, a human right can be outweighed. The right to suicide seems especially vulnerable to being overridden. Take the simplest case available: that of rational, unassisted suicide. Perhaps a policy of blanket prohibition would have better consequences overall, even for the would-be suicides themselves, than the rather vague, permissive policy that we might eventually be able to formulate. These are not idle speculations. About 25 per cent of terminally ill patients die in pain.[28] Despite this, the class of doctors most opposed to euthanasia are experts in pain management.[29] They believe that few need die in pain, and that many who do are the victims of ignorance, usually their own general practitioner's ignorance. Would a society not therefore be better off prohibiting suicide while, at the same time, ensuring that as few as possible die in pain?

But few societies have the resources to provide the best medical treatment, or even adequate pain management, for all its members. And in those circumstances, a society can hardly prohibit suicide on the ground that it would be better for it to provide effective pain management instead, if it is not actually going to do so. Even if it is going to do so, it is reckoned that 15 per cent of the dying suffer extreme pain beyond the reach of present pain-killers.[30] Anyway, not all conditions that make suicide rational involve physical pain. Some are untreatable and intolerable mental illnesses. Yet others are forms of gross physical and mental deterioration. It is true that one could deeply sedate all such patients. But this would merely consign them to a form of living death.

In any case, how heavily could the fact that a policy of blanket prohibition of suicide had better consequences overall than a more permissive policy, if indeed it were a fact, weigh against a right to suicide? A right to suicide is an instance of the general anti-paternalist rights to autonomy and liberty. In general, to respect a person's autonomy and liberty is to let the person decide and then carry out the decision. One may try to dissuade the person, but one may not intervene. It is true that these rights can be outweighed, but only in extreme circumstances. There are many cases of suicide in which

the agent is, in fact, free, informed, and competent. And if there is any substantial doubt about it, our rights to autonomy and liberty demand, at the minimum, that an agent be given the benefit of the doubt. And there is very substantial doubt about the claim that blanket prohibition of suicide would have better consequences overall than more permissive policies. We simply do not know with much reliability, and probably not with sufficient reliability for action, how the calculations of the long-term, large-scale consequences of these competing policies come out. It would be thoroughly perverse to deny a very large number of people a highly important right on the basis of a thoroughly shaky guess about cases in which the exercise of the right might turn out to be a mistake.[31]

12.6 IS IT A POSITIVE OR A NEGATIVE RIGHT?

What is a right to death a right to? The right clearly entails a duty on others, in certain circumstances, not to stop one from killing oneself. But does it also entail a duty on some others to help one?

This is, of course, a subject of hot dispute. As I mentioned earlier, there are many who think that human rights should be kept purely negative. I doubt that there is a sharp enough divide between positive and negative elements in most human rights for that strategy to be feasible, and, anyway, it is a myth that the classical human rights of the seventeenth and eighteenth centuries were purely negative.

What, then, might be the positive element in a right to death? Perhaps the most common circumstance in which one would want to commit suicide is when one is terminally ill and the value of life is low. One would want to determine the time and manner of one's death. But one would also not want to die before one needs to. So the chances are not negligible that, when the need arises, one's own physical capacities will have diminished. One may be bedridden and weak. One may be in hospital and subject to its rules. If one's right to suicide were merely a right not to be stopped, then the right would often, in the circumstances most relevant to rational suicide, amount to little. One cannot slit one's wrists if one has not got a knife, or take an overdose of drugs if doctors and nurses have no duty to supply them, or even a duty not to do so. Here the moral significance of the line between non-prevention and assistance becomes difficult to defend. In these circumstances, there is no question of stopping one from committing suicide; one cannot even get

started. One has become much like an entrapped case. The right to liberty does not impose a duty on others actually to supply one a valuable life, but merely not to stop one from pursuing it. But what if, as in this case, one does not even have the capacity for the pursuit? Is what we value in liberty merely non-denial of the pursuit or, somewhat more fully, ability to pursue? For the same reasons as apply to other apparently negative rights that turn out partly positive, I think that the more plausible account of what we value in liberty is the more generous one. We value not merely the capacities of agency, but their exercise. The right to vote, for instance, includes its exercise, and its exercise can require special ballots for the illiterate, absentee ballots for the infirm, and, for everyone, widespread publication of the issues, police to prevent intimidation, and other expensive forms of assistance. More generally, the right to liberty requires supplying prosthetic aids to the crippled and guide dogs to the blind. The right is not satisfied just by non-interference in one's attending a political meeting; it requires one's being able to attend it. So it requires some sort of restoration, if they are lost, of the capacities necessary for agency. Entrapped cases present special problems here, but still come under all the same principles. Prosthetic aids are of no help to them. At present, the only equivalent help is for someone else to act as the patient's arms and legs, even if the patient's intention in moving the limbs would be to commit suicide.

There remains the question of whether it is possible to draft a law permitting euthanasia and assisted suicide that does more good than ill. Who may assist? What are the standards for a patient's being free, informed, and competent? Who is to decide whether a patient meets the standards? No answer to those questions is without its troubles. The practical problems in formulating an acceptable principle may be so intractable that we must give up the project.

That conclusion seems to me too despairing,[32] but at this point the question comes down largely to matters of fact about which I am not competent to judge. In any case, my questions here have been of a more theoretical sort: Is there a right to life? Is there a right to death? What are their grounds? What is their content?

13

Privacy

13.1 PERSONHOOD AND THE CONTENT OF A HUMAN RIGHT TO PRIVACY

With the resources of the personhood account to hand, we can make the following case for a human right to privacy.[1] Without privacy, autonomy is threatened. Most of us fear disapproval, ridicule, ostracizing, and attack. We are social animals; we seek acceptance by the group; we are severe self-censors, often unconsciously. It takes rare strength to swim against strong social currents. If our deliberation and decisions about how to live were open to public scrutiny, our imperative for self-censorship and self-defence would come feverishly into action. Of course, there are, so far, no mind-reading machines outside science fiction, but there are alternatives: seizing one's diaries or papers, strapping one to a polygraph, administering truth drugs, or magnetic resonance imaging of the brain that, it is claimed, can distinguish truth-telling from lying with 99 per cent accuracy.[2]

All of these threats are possible in the case of one person's solitary thoughts. But a lot of our most fruitful deliberation takes place in communication with others. Frank communication extends our vision, corrects or confirms our ideas, gives us confidence to go on thinking boldly. Frank communication, too, needs the shield of privacy; it needs the restraint of peeping Toms and eavesdroppers, of phone taps and bugging devices in one's house, of tampering with one's mail or seizure of one's correspondence. This is only a start, but we must also guard against padding the list. Too often the form of argument for a human right, or a right of any kind, is to identify a value (say, a valuable form of privacy) and then conclude that there is a right that protects it. But that is a blatant non sequitur. Not all values support human rights, or indeed rights of other kinds. For example, relaxation is valuable to us; without a certain kind of privacy, one cannot fully relax. But this hardly shows that there is a human right to relaxation. Without relaxation, one

might be a rather stressed agent, but if the stress is not great, one would be an agent all the same.

So much for autonomy. Think now of liberty. Autonomy is a feature of deliberation and decision; it has to do with deciding for oneself. Liberty is a feature of action; it concerns pursuing one's aims without interference. Only with frank, private communication, can I discover that you and I have certain of the same unpopular beliefs and so be confident enough to act singly or discover the opportunity to act jointly. One would be inhibited from sexual experimentation, especially the kind that invites shock and disapproval, unless there were no fear of peeping Toms or hidden cameras. The richness of personal relations depends upon our emerging from our shells, but few of us would risk emerging without privacy. What is more, we need not only the fact but also the assurance of privacy, and for assurance we need well-established principles of behaviour, deep dispositions, strong social conventions, and laws effectively enforced.[3]

The issue about a human right to privacy is whether certain forms of privacy are necessary conditions of normative agency. What sort of necessity of condition is at issue? In this case, not conceptual necessity;[4] one can conceive of a person's functioning as a normative agent despite a plague of peeping Toms, listening devices, and magazines devoted to photographs of intimate moments. The strongest form of necessity that could be meant here is empirical necessity: that *Homo sapiens* will not in fact function as a normative agent in the absence of these forms of privacy. But that is implausible too. There are a few people courageous enough or self-confident enough, or just exhibitionist enough, to thrive in full public gaze. It is just that the rest of us cannot. But as long as these familiar weaknesses are characteristic of humanity widely, they are enough to provide a ground for a human right. Normative agency constitutes what we call 'human dignity'. Human rights are meant to protect the dignity of perfectly ordinary human beings. It would distort the existence conditions for human rights to limit them to what is necessary for the normative agency of supermen or exhibitionists. It would equally distort them, in the opposite direction, to include what is necessary for the normative agency of even the most pusillanimous among us; it would be likely to result in too great a loss in other values, such as vigorous expression of opinion.

This, then, is the narrow, agency-focused right to privacy derivable from the personhood account. How much would it protect? It is what several recent writers have labelled 'informational privacy': certain of my acts and thoughts and utterances should not be accessed by others and, if known

to them, should not be further spread. Which ones? Ones that, if public, would typically threaten normative agency. 'Informational privacy' is not the ideal name; it suggests data—financial, medical, educational records, and the like—while it must be understood also to include certain correspondence, conversations, actions, even works of art if they are self-revealing and deliberately kept under wraps. A peeping Tom's mere observation must count, for our purposes, as a violation of informational privacy. So long as we realize just how much the name 'informational privacy' is meant to cover, it will do.

A question for us is whether this right to informational privacy is too narrow to constitute *the* human right to privacy. Over the last fifty years, lawyers in several jurisdictions have appealed to a right to privacy in order to protect all of the following as well: the sale and use of contraceptives, abortion, sodomy, miscegenation, same-sex marriage, access to pornography, use of drugs in one's own home, refusal to incriminate oneself, euthanasia, freedom from loud noises and foul smells that penetrate the home, not to have one's reputation attacked, a father's participation in the birth of his child, and much more. No doubt, current appeals to the right to privacy are too broad. But would we be willing to see them shrunk solely to informational privacy?

13.2 LEGAL APPROACHES TO THE RIGHT TO PRIVACY

Several national constitutions promise protection of 'privacy'.[5] The United States Bill of Rights never uses the word, but proclaims:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures …

The Universal Declaration of Human Rights (1948), Article 12, says:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his honour and reputation.

This is repeated almost verbatim in the International Covenant on Civil and Political Rights (1966), Article 17. The European Convention on Human Rights (1950), Article 8, says:

> Everyone has the right to respect for private and family life, his home and his correspondence.

What one finds many times repeated in national and international documents are requirements of respect for or, more strongly, assertions of the sanctity of one's person (security of person), private life, family life, home, and correspondence, with not infrequent mentions as well of protection against attacks on one's honour and reputation. On the face of it, this is a heterogeneous list. One can see how married and family life, home, and correspondence might all be collected under the rubric 'privacy'. But what about attacks on one's honour and reputation? They seem a matter either of justified interest or of libel and slander, and their links with privacy are unclear.

Our immediate interest in looking at the law is in what it suggests to us about the content of the human right to privacy, particularly what more it suggests than simply informational privacy. The extreme brevity of what national constitutions and international declarations say about privacy, at which we have just had a glance, is not much help here. It is more helpful to consult case law. I want to look at the particularly rich case law on privacy that has grown up in recent decades around the United States Supreme Court. Of course, the ultimate aims of deliberation of a judge, a legislator, and a moral philosopher need not be identical. The constraints on a judge to interpret a constitution or a law and to build, where possible, on precedent, and the constraints on a legislator to find solutions to actual social problems and to stay within the bounds of what can feasibly be treated by law, are not as strong for a philosopher seeking to formulate a human right. But I shall not be trying to interpret either United States law or Supreme Court decisions, but rather, to use them simply as prompts to thought.

The first explicit, though unsuccessful, claim to a constitutional right to privacy appeared in Justice Louis Brandeis's dissent in *Olmstead* v. *United States* (1928). The case concerned wire-tapping. But Brandeis's worry about such intrusions went back a long while—to an article that he and Samuel D. Warren published in the *Harvard Law Review* in 1890.[6] As Brandeis wrote in his dissent in *Olmstead*, echoing the article:

> The progress in science in furnishing the government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the government, without moving papers from secret drawers, can reproduce them in court .... Advances in the psychic and related sciences may bring means of exploring unexpressed belief, thoughts and emotions.

The privacy that exercises Brandeis here is informational privacy. But he claims further that the constitutional right to privacy, deriving, he thinks, from the

Fourth and Fifth Amendments,[7] provides protection against 'invasion of "the sanctities of a man's home and the privacies of life" '. This looks like the right to the protection of some sort of private space and private side of life, with the value attaching to these forms of privacy serving as the ground of the right. Call this the privacy of space and life. The right to informational privacy protects us against people's access to certain knowledge about us. The right to the privacy of space and life protects us against intrusions into that space and into that part of our life—say, into our married or family life. These two rights overlap in their protections, but, on the face of it, are different.

Brandeis next takes a step that increases the range of the proposed right to privacy still further:

> The protection guaranteed by the amendments [viz. the Fourth and Fifth] is much broader in scope. The makers of our Constitution undertook to secure conditions favourable to the pursuit of happiness … .They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

This seems to be something else again: a general right to liberty. Brandeis, though, overstates it. There is only, as doubtless he knew, a right to be let alone *unless* there is an overriding public interest. Several well-known principles of liberty take this form: *freedom of action unless an overriding public interest*. For instance, it is the form of J. S. Mill's principle of liberty: *freedom of action unless harm to others*.[8] It is also the form of the principle of liberty much employed by the Supreme Court itself in the second half of the twentieth century: *freedom of action unless certain forms of immorality*, which may well include harm to others. In *Bowers* v. *Hardwick* (1986) the Court announces that people are generally to be let alone, but that the government is justified in forbidding acts as repellent to American sensibilities as oral and anal sex.[9]

Why did Brandeis move so easily and so without remark from informational privacy to the relatively narrow privacy of space and life and, finally, to the broad privacy of liberty? He moved so easily because he took these principles to be the same. So did many subsequent writers, including many of his brother Supreme Court Justices.[10] Brandeis's inferences suffer from his using different senses of the word 'private'. Any principle of liberty defines an area into which authorities may not intrude: that is, an area not of legitimate public interest, that is, a private area. Call this, as I did a moment ago, the privacy of liberty. An enormous number of actions exhibiting the privacy of

liberty are what we would ordinarily call 'public'. It would fall within our private sphere of liberty, for example, at least on Mill's account of it, for two homosexuals to kiss very publicly. The sense in which the intimacies of the locked diary and the marital bed are private is not the same as the technical sense, derived from a general principle of liberty, in which a public kiss is private. And it does not seem that the right to private space and private life is just a specific form of a general right to liberty. The claim made by the Supreme Court, and by many others, seems to be that private space and private life are themselves valuable to us, indeed 'sacred', and that the right to them is derived from those values. A general right to liberty, on the other hand, is derived from the value of our being able to pursue our conception of a worthwhile life; the values of private space and private life play no role in the derivation here. A general right to liberty is a right to *do* various things: to pursue the life one values, and perhaps also to use contraceptives, to have an abortion, and to commit suicide. Liberty says nothing explicit about whether, when I *do* use contraceptive devices in the marital bed, you may not spy on me. That is a further protection, needing a further rationale.

This puzzling shift from informational privacy to the privacy of space and life and then to the privacy of liberty recurs often in subsequent Supreme Court thinking. Four years before the famous *Griswold* v. *Connecticut* decision, which concerned Connecticut's ban on the sale and use of contraceptive devices, the Court was invited to consider the very same ban in *Poe* v. *Ullman* (1961), but declined on the ground that there were no controversies raised requiring the adjudication of a constitutional issue, with Justice Harlan dissenting. Harlan insisted that, on the contrary, there were constitutional issues to be adjudicated, and to be adjudicated thus:

> Precisely what is involved here is this: the State is asserting the right to enforce its moral judgement by intruding upon the most intimate details of the married relation. … In sum, the statute allows the State [intolerably] to … punish married people for the private use of their marital intimacy.

This looks like an invocation of the right to private space and life, but only a few lines later Harlan's identification of 'precisely what is involved here' changes:

> This enactment involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of 'liberty' …

Indeed, Harlan says, the liberty involved here is Brandeis's liberty in *Olmstead*, the right to be let alone, which Harlan extols as 'perhaps the most

comprehensive statement of the principle of liberty underlying these aspects of the Constitution'. When Harlan observes that the State of Connecticut is enforcing its own moral judgements, he might be thought to suggest that this in itself is wrong. But he does not mean that. The liberty involved is not absolute, he says; states may enforce morality. So this is not Mill's liberty, *freedom of action unless harm to others*. It is the formally similar but materially different liberty: *freedom of action unless certain forms of immorality*. Hence Harlan's concentration on married couples. He leaves it open that, as far as the Constitution goes, fornicators, adulterers, homosexuals, and the incestuous may be denied contraceptives.

Only four years later, in *Griswold* v. *Connecticut* (1965), Harlan's dissent became, in almost all major particulars, the Court's view. For the first time the Court itself declared a right of privacy, 'the right of marital privacy':

> The present case … concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. Would we allow the police to search the sacred precincts of marital bedrooms …? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

This seems clearly to be the right to private space ('the sacred precincts of marital bedrooms') and to private relations ('the marriage relationship'), and it is the 'sacredness' of the space and of the relationship that seems to be offered as the ground for the right. But then, once again, comes the now familiar shift. What Justice Goldberg, concurring, cites as the ground of the right to privacy is Brandeis's general liberty—and, once again, not the liberty of *freedom unless harm to others* but *freedom unless certain forms of immorality*. On Goldberg's conception of liberty too, fornicators, adulterers, and homosexuals, no matter how private their acts, are not necessarily protected by the right.

The Court's opinion in *Roe* v. *Wade* (1973), which ruled unconstitutional a comprehensive ban on abortion, stretched the idea of 'privacy' yet further. The majority opinion, written by Justice Blackmun,[11] starts with an idea of privacy we have met before:

> … the Court has [hitherto] recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. … the right has some extension to activities relating to marriage … procreation … contraception … family relationships … and child rearing and education.

This again looks like the right to private space ('areas or zones of privacy') and private life ('marriage', 'procreation', 'family relationships'). But is an abortion

private in either of these ways? It does not always take place within private space (the home, the marital bedroom) but often in clinics or hospitals with doctors and nurses in attendance. Nor is an abortion a matter of a personal relationship; it is in part a matter of a professional relationship. Soon the same shift from the privacy of space and life to the privacy of general liberty occurs in *Roe* v. *Wade*. Justice Stewart, in concurring, explains a person's right to privacy as 'his right to be let alone by other people'—that is, a general liberty. The principles of liberty that we have so far canvassed are of the form *freedom of action unless an overriding public interest*. Suppose liberty is, as Mill said, *freedom of action unless harm to others*. Abortion of—death to—a foetus can, I think, often be regarded, without intolerable conceptual strain, as a 'harm' to the potential person denied life. But that is not enough to settle the moral question. If the phrase 'harm to others' is best glossed as 'harm to other persons', then we have to decide whether a foetus, or a foetus at a late stage of gestation, is a 'person' in the morally freighted sense intended. Suppose, on the other hand, that liberty is *freedom of action unless certain forms of immorality*. Then we have to decide the question of the morality of abortion. On either conception of liberty, we have to settle the major questions about the morality of abortion independently of the notion of privacy.

The reasoning in the Court's opinion in *Roe* v. *Wade* is, to my mind (and hardly just to my mind), seriously flawed (though flawed reasoning, of course, does not imply wrong conclusion). Conceptions of privacy that seem, prima facie, to fit other cases do not seem, even prima facie, to apply to abortion. Liberty, however, does seem to apply, but various principles of liberty come with an unless-clause that can hardly be ignored. The Court, though, ignores it—and understandably so. To confront it, the Court would have had to take a stand on just the issues that then deeply divided, and still divide, the country and the Court itself: for example, whether the foetus is a person, whether death harms the foetus, and whether, more generally, there is serious immorality in abortion. So it is not surprising that the Court, in its majority opinion, while appealing also to liberty, chose not to stress it but took refuge in ideas of private space and private relationships. Once we endow private space or private relationships with 'sanctity', we are off the hook: what then takes place in that space or in those relationships, whether moral or not, may not be regulated. The disturbing trouble, though, is that the ideas of private space and private relationship do not fit abortion.

What deserves our attention in *Bowers* v. *Hardwick* (1986), in which the Court declared Georgia's criminalization of sodomy to be constitutional, is

Justice Blackmun's dissent. The crux, he says, is the right to be let alone, and that right protects the practice of sodomy. By now we are familiar with how interpretations of Brandeis's principle of liberty shift around. But Blackmun goes on in his dissent to give a rationale for the right to general liberty different from any we have met before in Supreme Court deliberation, and a rationale, I should say, of great power:

> We protect those rights [he refers here to certain rights associated with the family] … because they form so central a part of an individual's life … We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition … The Court recognized in *Roberts*, 468 U.S. at 619, that the 'ability independently to define one's identity that is central to any concept of liberty' cannot truly be expressed in a vacuum; we all depend on the 'emotional enrichment from close ties with others'.

This important passage does two things worth our attention. It offers a defence of informational privacy. And it introduces a new conception of liberty. It does both of these by putting great weight on the idea of personhood. Our capacity as normative agents constitutes what the tradition has called 'human dignity'. As Blackmun puts it, we are capable of self-definition. As the Court in the earlier *Roberts* decision put it, one has the 'ability independently to define one's identity', and that, it adds, 'is central to any concept of liberty'. Normative agency cannot successfully be exercised in a vacuum. We need to read and talk and assemble without pressures on us to conform, and that requires, among other things, the absence of various kinds of monitoring—that is, it requires informational privacy. Blackmun's appeal to a personhood conception of liberty was not unique. A few years later, in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992), Justices O'Connor, Kennedy, and Souter also rejected the view of the earlier Courts and averred that 'at the heart of liberty' is personhood.[12]

This new personhood conception of liberty can be explained like this. As I pointed out earlier, there are narrow and wide conceptions of liberty.[13] On the wide conception, any restriction on what one wishes to do is a restriction on one's liberty, probably often justified. This is what I have been calling here 'freedom unless': that is, blanket freedom unless there is a justification for a restriction. On this conception, the one-way restriction on the road that I should love to nip down when I am late for work infringes my liberty, but no doubt justifiably. The personhood account, however, yields a narrow conception of liberty. What liberty protects, it says, is our pursuit of our conception of a worthwhile life. And my nipping the wrong way down a

one-way street is certainly no part of my conception of a worthwhile life; it is too trivial for that. On the narrow conception, the traffic restriction does not violate my liberty, even a very minor liberty. It is a narrow conception because there are material constraints on it. On the wide conception, the domain of liberty is everything left after the unless-clause has made its exclusions; it is the large residue. On the narrow conception, however, the domain of liberty is limited to what is major enough to count as part of the pursuit of a worthwhile life. There is also, on the narrow conception, a formal constraint on the content of liberty: one is at liberty to do only what is compatible with equal liberty for all. We shall come back to these two conceptions shortly.

So much for my selective survey of Supreme Court decisions. I do not pretend that it is a contribution to United States constitutional jurisprudence. I am not expert enough. Rather, I want to use it to advance my project. What does it tell us about the content of the human right to privacy?

13.3 HOW BROAD IS THE RIGHT? : (I) PRIVACY OF INFORMATION, (II) PRIVACY OF SPACE AND LIFE, AND (III) THE PRIVACY OF LIBERTY

We come away from the survey with three forms of privacy for our consideration: informational privacy, the privacy of space and life, and the privacy of liberty. We have thereby identified various understandings of the right to privacy, one for each of these three forms of privacy and four for their possible combinations, so seven altogether. And we have encountered two different understandings of liberty: a broad or residual liberty and a relatively narrow liberty derived from personhood. And we have encountered two different examples of residual liberty: *freedom unless harm to others* and *freedom unless certain forms of immorality*, though in principle there are more.

What solid ground is there in all of this? There are, it seems to me, two pieces of solid ground. One is the right to informational privacy. We have seen the solid enough ground for considering at least *that* to be a human right. The second piece of solid ground is the right to liberty. The question of whether the broad or narrow interpretation of liberty is to be adopted is still with us, but nobody doubts that there is a general right to liberty, on one or other of the understandings.

We must now try to make some of the rest of the ground firmer. Let me start with the relation of privacy and liberty. Should we, in the cases that

have concerned us, forget about the right to privacy and appeal solely to the right to liberty? Does liberty do all the work? No, I should say. What Justice Stevens meant by 'liberty' in his opinion in *Bowers* v. *Hardwick* is what I mean by 'liberty' as distinct from 'autonomy'. The various principles of liberty we have identified all concern 'liberty' in my distinct sense. But informational privacy, which constitutes certainly at least part of a right to privacy, rests not only on liberty but also on autonomy. As I said earlier, we need certain forms of privacy to develop the confidence and capacity to overcome the enormous barriers to autonomous decision.

I explained earlier still, in discussing practicalities,[14] why, though the value of normative agency constitutes much of the value attaching to human rights, the rights cannot be fully reduced to it. There is also a looser pragmatic sense of reducibility in which human rights are irreducible. We could not discard specific rights and appeal only to the overarching right to normative agency without *practical* loss. It is hardly enough to give police the instruction: 'Do not violate normative agency.' There is a lot of work and judgement, usually not at all obvious, involved in a strict derivation of a specific right, such as privacy, from the overarching interest, normative agency. A society would not successfully protect human rights if it appealed only to the one overarching value. We need to spell out far more specific rules such as respect for a person's privacy of information: that is, a person's correspondence, diaries, beliefs, associations, and so on.[15]

Let me now turn to the key question: Is there more to privacy than informational privacy? I want to suggest that we say, No. The Supreme Court, of course, has repeatedly said, Yes.

I have two reasons for doubting the existence of a right to privacy of space and of life as the Supreme Court has conceived it. First, not only is it not needed to settle the Court's questions about contraception, abortion, and many others; it is also not what actually does settle them. Justice Stevens is right: the issue they raise is liberty. The government may not interfere with my using contraceptives, or with my partner's having an abortion, or with my watching pornographic films, and much else besides, unless there is a substantial enough public interest to outweigh my liberty, and in all of these cases there is none. That, anyway, is what I am willing to argue, and it is, at any rate, the real issue.

My second reason for scepticism is the difficulty of finding any plausible explanation of why private space and private life should have the sort of considerable value that supports a human right. It is easy to explain it in the