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Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law Notes

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INTRODUCTION

I give the fight up: let there be an end,
A privacy, an obscure nook for me.
I want to be forgotten even by God.

—Robert Browning[1]

Although most people do not wish to be forgotten "even by God," individuals do expect their community to refrain from intrusive regulation of the intimate aspects of their lives. Thus, the community must strike a balance between legitimate community concerns and the individual's interest in personal autonomy. In free societies, the community ostensibly speaks through a popularly constituted government. Thus, government protection of privacy rights is a measure of a society's commitment to liberty and, in a broader sense, autonomy. Privacy law reflects the tolerance of a nation. Although privacy is only one example of autonomy, privacy rights are a substantial subset of personal autonomy.[2] Thus, examining privacy rights is one way to evaluate the general measure of liberty a society confers on its members.

But, even if one recognizes the need for privacy, the right of privacy cannot be absolute. The existence of political community requires the relinquishment of certain rights, prerogatives, and freedoms.[3] As John Locke described, individuals must cede some rights and prerogatives that

1. *Paracelsus,* in 1 THE POEMS 118, 127 (J. Pettigrew ed. 1981).

2. The autonomy/privacy relation is a difficult matter. Privacy relates to personal autonomy, but they are not coextensive. For example, autonomy would reach public acts such as one's public dress or a speech given at a public gathering, acts that are not encompassed in any notion of privacy. Yet, autonomy is vindicated through the protection of privacy in substantial ways. R. WACKS, THE PROTECTION OF PRIVACY 12-13 (1980). For present purposes, one may take privacy to be a manifestation of personal autonomy (which in many societies is given either cultural or legal solicitude). Although most "rights" can be couched in terms of privacy interests, *see* Gross, *Privacy and Autonomy,* in PRIVACY 180-81 (J. Pennock ed. 1971), whether freedom of speech and other public expressions of autonomy could be collapsed into the aegis of "privacy" is a matter best left aside for present purposes.

3. Thomas Hobbes and John Locke make this point. *See* T. HOBBES, LEVIATHAN ch. 17-18, 129-41 (1962); J. LOCKE, TWO TREATISES ON GOVERNMENT § 87-99, at 366-77 (P. Laslett rev. ed. 1963).

they otherwise could claim in a lawless state of nature: "Whosoever therefore out of a state of Nature unite into a *Community,* must be understood to give up all the power, necessary to the ends for which they unite into Society, to the *majority* of the Community . . . ."[4] Nevertheless, democratic societies strive to maximize freedom while simultaneously ensuring the survival of the institutions that secure the liberties of the people. Thus, individuals in democratic states expect community deference to some choices.[5] The right of privacy is one way to articulate this expectation of autonomy.

The United States and Great Britain have a long tradition of rule of law.[6] Although the United States and Great Britain share a common legal background and hold many of the same assumptions regarding the proper role of government, the two countries have parted ways on their approaches to privacy law. This Note examines privacy law in Britain and compares it to privacy law in the United States. Specifically, the Note focuses on the institutional factors that have led Britain to reject "privacy" as a useful legal construct for the vindication of certain liberty interests.[7]

A critique of the effectiveness of British governmental institutions in protecting privacy highlights the underlying problem of community and autonomy—the difficulty of squaring majoritarianism with individual rights. Although Parliament occasionally has valued autonomy over legal commands, the British institutional regime places too much faith in the ability of a majoritarian body to vindicate the rights of unpopular minorities. As a result, the British system does not provide an effective domestic process for individuals to redefine and broaden privacy rights in favor of greater autonomy.

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4. J. LOCKE, *supra* note 3, § 99, at 377. The Advocate General of the Court of Justice of the European Communities has also noted this dilemma:

> The requirements of life in a community and the fulfillment of the tasks incumbent on the State may call for adjustments in the definition of that degree of freedom which the subjective right of the individual represents. To constitute violation of the right—it is not enough that there should be any limitation whatever; the substance of the right must be affected.

State v. Watson, 1976 E. Comm. Ct. J. Rep. 1185, 1209, [1976] 2 Common Mkt. L.R. 552, 566.

5. From Locke's perspective, the vindication of these claims must, in some respects, be left to institutional or majoritarian judgment. J. LOCKE, *supra* note 3, § 94, at 372-74.

6. From the time of Magna Carta, the British have prided themselves on being a people governed under law. Since its inception, the United States has claimed to vindicate the liberty interests of its citizens by the rule of law.

7. *See* Malone v. Metropolitan Police Comm'r, [1979] 1 Ch. 334, 372-73 (Ch.) (court refuses to create a right of privacy because of limited role British courts play in developing policy); R. WACKS, *supra* note 2, at 21-23, 25, 176-180 (1980) (suggesting that "privacy" is a poor unifying concept for discrete, independent, and identifiable interests).

The United States also fails to vindicate important privacy interests. Privacy law in the United States has suffered from serious definitional problems. Although the Supreme Court has recognized autonomy interests under the Constitution,[8] it has failed to provide a clear and reliable standard for identifying protected privacy rights. Thus, individuals in the United States exercise privacy rights at their own risk. Recently, the Supreme Court has superimposed narrow majoritarian preferences on the exercise of autonomy rights[9]—a trend that undercuts privacy rights. Those who value privacy—and hence autonomy—must demand that government retain a province for individual choice.

Part I of this Note considers the nature of privacy and the problems one encounters when trying to define the concept. Part II discusses domestic privacy law in Britain and details the efforts made to enact a general right of privacy for non-public action. Part II also considers the extent to which article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR)[10] affords protection of privacy rights and examines the interplay between article 8 and the British rejection of the right of privacy. Although domestic British law emphatically rejects privacy as a useful legal construct for the delineation of autonomy rights, article 8 guarantees a "right of privacy" to the citizens of the United Kingdom. Part III briefly examines privacy law in the United States to set a standard of comparison in order to better evaluate the British approach. Part IV compares United States and British privacy law and suggests explanations for the differences in the means chosen, if not the ends reached, by each country. Finally, with this comparison in mind, reforms for each system are suggested.

The analysis of British privacy law suggests that many privacy interests can be protected without formally vesting "privacy" rights in individuals. Nevertheless, the failure to provide individual citizens with a forum to raise their autonomy claims can lead to the rejection of minority rights. The British could more effectively protect their citizens' privacy rights by incorporating the guarantees of the ECHR into their domestic law.[11]

An examination of the British approach to privacy also suggests that the United States could more effectively protect legitimate privacy claims. For instance, the Supreme Court needs to formulate a clear,

8. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 483-84 (1965) (describing the penumbral "zones of privacy" implied by the specific rights guaranteed by the Bill of Rights).

9. *See infra* notes 206-25 and accompanying text.

10. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (1955) [hereinafter ECHR].

11. *See infra* notes 101-07 & 171-73 and accompanying text.

identifiable standard of review for privacy claims and apply it consistently.[12] The mere existence of a forum that hears claims against the government is of little value if individuals do not know what standards the courts will use to evaluate such claims.

Ultimately, a just legal system should provide both certainty about the scope of rights and a forum in which a citizen may raise a claim to protect his rights. Both the United States and Britain are committed to securing the privacy rights of their citizens; this Note attempts to show how each country could better fulfill this goal.

I. WHAT IS "PRIVACY?"

An initial problem with the study of privacy law is the concept of privacy itself. Difficulties arise because privacy cannot be defined with precision.[13] According to J. B. Young, "[P]rivacy, like an elephant, is perhaps more readily recognized than described."[14] The word "privacy" contains emotive, subjective connotations that represent a variety of values and concerns embodied in a given culture. Further, because privacy concerns are, in large part, defined in relation to a particular society at a particular point in time, the concept itself is likely to evolve.[15]

Despite the definitional difficulties, numerous courts and commentators have attempted to delineate the concept of privacy. They have defined privacy as "the right to be let alone,"[16] a right to act or not to act,[17] the right of control over disclosure of oneself,[18] or some amalgam of all three. Privacy has also been equated with autonomy over certain aspects

12. *See infra* notes 226-35 and accompanying text.

13. R. WACKS, *supra* note 2, at 10-13.

14. Young, *Introduction,* in PRIVACY 2 (J. Young ed. 1978) [hereinafter PRIVACY]. Young's introduction to his collection of essays on privacy is illuminating with respect to the philosophic and linguistic difficulties one faces when discussing "privacy" interests.

15. *See* Report of the Committee On Privacy, 1972, CMND. No. 5012, at 23 [hereinafter YOUNGER REPORT] (suggesting that the commuter on the rush-hour train experiences privacy as anonymity, whereas his ancestors traveling on the open road experienced privacy as solitude). The Committee Report also noted that notions of privacy varied from person to person. *Id.* at 5.

16. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Brandeis' formulation has been used as both an indictment and a justification for legally cognizable privacy interests. *See* R. WACKS, *supra* note 2, at 12 ("a sweeping phrase which is as comprehensive as it is vague"). *But cf.* PRIVACY, *supra* note 14, at 2 ("an excellent short definition").

17. *See* Roe v. Wade, 410 U.S. 179, 209-15 (1973) (Douglas, J., concurring) (right to privacy is given three formulations, all of which emphasize the individual privilege to act or to refrain from acting).

18. *See* R. HIXSON, PRIVACY IN A PUBLIC SOCIETY 53 (1987); Wasserstrom, *Privacy: Some Arguments and Assumptions,* in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 317 (F. Schoeman ed. 1984); *see also* R. WACKS, *supra* note 2, at 10-12 (discussing various formulations of privacy). Gross, in defining privacy as two classes of personal matters, including "things which tell us who a person is and what he's like," and matters pertaining to a person's life, offers the best general definition of privacy. *See* Gross, *supra* note 2, at 172.

of one's life.[19] As these examples suggest, no single theory of privacy can capture all the nuances of the concept.

Formulating a comprehensive and exhaustive definition of privacy is beyond the scope of this Note. However, a common definition of privacy provides a necessary starting point—a datum—for any comparison of two different legal systems. For the purposes of this Note, "privacy" signifies a realm of individual autonomy in recognized and accepted social contexts. One need only assume that the people of both the United States and Great Britain share enough of a common background to recognize that government regulation of individual choice often adversely affects individual autonomy. Privacy rights in both countries derive not only from case law and relevant statutes, but also from the culture's institutional and philosophic foundations. Legal culture shapes each nations' determination of how much autonomy to grant the individual and the best means suited to that end.[20] Even if we assume that each system of government reflects the sensibilities of the people it governs, the effectiveness with which systems vindicate individual liberty remains open to question.

II. THE RIGHT OF PRIVACY IN GREAT BRITAIN

The right of privacy does not receive explicit recognition in English law.[21] To the extent that privacy rights exist implicitly in Britain, they are formulated quite differently than in the United States. Indeed, a popular treatise on privacy in Britain does not discuss freedom of choice in the areas of sexuality, reproduction, or familial/parental relations.[22] Although British law does address these issues, they do not fall within the rubric of privacy. As a result, privacy rights in Britain are a "patchwork affair."

Early judicial decisions and legislation lacked any notion of privacy.[23] This reflects, in part, a reservation of authority to make laws regulating any aspect of community life. Additionally, British Govern-

19. *See* sources cited *supra* note 2.

20. *See* P. ATIYAH & R. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 33-35 (1987) (attention to the context in which a legal system operates is a necessary prerequisite to understanding the system).

21. *See* Dworkin, *Privacy and the Law,* in PRIVACY, *supra* note 14, at 115.

22. *See* R. WACKS, *supra* note 2, at 1-85. This work is interesting because of what it does not address, i.e., sexuality and parenthood, as well as for what is addressed—nondisclosure of personal information to the government or others. An older work presents a "survey of the present content of civil liberties in England," but again, there is no mention of a "right of privacy" as such. H. STREET, FREEDOM, THE INDIVIDUAL AND THE LAW 9 (1963).

23. *See* W. PRATT, PRIVACY IN BRITAIN 60 (1979).

ments resist any legal restrictions on the exercise of their powers.[24] Britain has also declined to adopt domestically the right of privacy guaranteed by the European Convention on Human Rights. Although article 8 guarantees British citizens a right of privacy, Britain remains the only signatory to the European Convention on Human Rights, without a law of privacy.[25] Thus, under domestic law, the individual citizen has no guaranteed right to seek redress against intrusive government activity.

British citizens have seized upon the concept of privacy as a potential means to obtain judicial relief from unduly burdensome majoritarian commands. Citizens have lobbied Parliament for the creation of a statutory right of privacy,[26] argued before the domestic British courts for the enunciation of a common law right of privacy,[27] asked the British judiciary to apply article 8 of the European Convention on Human Rights and Fundamental Freedoms domestically,[28] and ultimately, traveled to Strasbourg, France to obtain a hearing before an international human rights court.[29] Unfortunately, these efforts to carve out an effective institutional process to guarantee privacy interests have largely been unsuccessful. Some external body may have to force parliamentary action. For instance, the Court of Justice of the European Community effectively could compel the British government to recognize a right of privacy. But, in the absence of external pressure, the prospects for reform are bleak.

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24. The "Government" is composed of the ministers selected from the House of Commons and the House of Lords. All of its members have seats in Parliament. Higgins, *United Kingdom*, in THE EFFECT OF TREATIES IN DOMESTIC LAW 123-25 (F. Jacobs & S. Roberts eds. 1987). Critics have noted that such a system does not promote democracy. *See* Mellors, *Governments and the Individual—Their Secrecy and His Privacy*, in PRIVACY, *supra* note 14, at 93. Mellors writes: "The truth is that Britain has the weakest democratic constitution of any comparable country. It is not designed to encourage a plurality of power bases within its executive. Its legislature is all but impotent. It is the anchor of an over-powerful unitary state." *See* Rogaly, *Why Britain Should Copy Germany*, Financial Times, July 13, 1990, § 1, at 16, col. 2; *see also* Atlas, *Thatcher Puts A Lid on Censorship in Britain*, N.Y. Times, Mar. 5, 1989, § 6 (magazine) at 36, col. 1 (describing the political and social forces contributing to the debate over Charter 88, a manifesto decrying censorship in Britain under Margaret Thatcher).

25. Scholars of the ECHR have lamented this state of affairs:

> "[I]t is only in the UK, without the benefit of such incorporation by statute of the E.C.H.R. or comparable provisions in a similar constitutional Bill of Rights, that an individual who relies exclusively on such a defined right guaranteed to him by his government under the E.C.H.R. must have recourse to the Commission to vindicate it. Hence, it is not surprising to observe that the UK has the unenviable record of having had more petitions registered against it and more cases against it referred to the Court than any other member state in the Council of Europe.

Dowrick, *Council of Europe: Juristic Activity 1974-86, Part II*, 36 INT'L & COMP. L. Q. 878, 888 (1987). *See* J. FAWCETT, APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 20 (1987); Mellors, *supra* note 24, at 93.

26. *See infra* notes 30-49 and accompanying text.

27. *See infra* notes 74-92 and accompanying text.

28. *See infra* notes 121-50 and accompanying text.

29. *See infra* notes 151-67 and accompanying text.

A. *Statutory Privacy Rights in Britain*

The primary source of legal rights in Britain is statutory law. "Generalized rights" are not the norm in English law,[30] and the courts tend to hew narrowly to established doctrines and to statutes adopted by Parliament. Respect for the supremacy of Parliament,[31] fear that rapid change in the law will create uncertainty,[32] and a tendency to maintain a positivist jurisprudential outlook[33] preclude British judges from developing social policy.[34] These same factors also discourage judges from using broad, nebulous legal constructs—such as privacy—to decide cases and implement rights.

1. *Unsuccessful Attempts to Create a Statutory Right of Privacy.* Perhaps the most disturbing characteristic of the British approach to privacy is the historical lack of parliamentary and judicial interest in the protection of privacy rights. Although Parliament historically has approached privacy as a matter of relations between private persons and between private persons and the press,[35] in recent years, back bench

30. *See* P. ATIYAH & R. SUMMERS, *supra* note 20, at 266; YOUNGER REPORT, *supra* note 15, at 28. By "generalized rights" I mean rights that lack specific definition (privacy, freedom of speech, due process of law, etc.) and rights that are not limited by a specific text.

31. *See* P. ATIYAH & R. SUMMERS, *supra* note 20, at 42-53. Atiyah and Summer's book provides a theoretical and practical discussion of the systemic differences between the U.S. and British legal systems.

32. *See id.* at 142-43.

33. *Id.* at 421.

34. Street writes that:

> [T]he British judge has trained himself as an umpire, avoiding clashes with the Government of the day, cutting himself off from politics whenever possible, and divesting his judgments of social, economic, and political references to the utmost. This outlook has made him unable to provide the kind of interpretation necessary for the written constitutions of other parts of the Commonwealth . . . .

H. STREET, *supra* note 22, at 286; *see also* YOUNGER REPORT, *supra* note 15, at 211.

35. *See* W. PRATT, *supra* note 23, at 128. Although individuals in Britain have viewed privacy as encompassing more than protection from private parties, most of the early legislative reform efforts focused only on this aspect. In the tort context, Parliament made three unsuccessful attempts in the 1960s to legislate an action for invasion of privacy against non-governmental actors. Lord Mancroft introduced a Privacy Bill on February 14, 1961 that provided for a right of action against the press for stories published about individuals without their consent. R. WACKS, *supra* note 2, at 5-9. The Act was intended to discourage the public disclosure of private facts. *See* 229 PARL. DEB., H.L. (5th ser.) 607-617 (1961).

Parliament has expressed concern for protecting freedom of the press over the individual's privacy interest. However, the extent of this concern is limited. The Official Secrets Act has been invoked regularly against the British press in favor of the government's privacy interest. *See* R. WACKS, *supra* note 2, at 16-17. Ironically, a free press trumps an individual's privacy interest, but not the government's privacy interest. For a British recognition of the general problem, see YOUNGER REPORT, *supra* note 15, at 195-200.

In 1967 and 1969, bills that created a general privacy right against other private interests as well as against the press were introduced. In 1967, the Lyon's Bill sought to define privacy as the right to be let alone, stating that privacy was "the right of any person to preserve the seclusion of himself, his

members of Parliament have introduced several bills that would recognize a more generalized notion of privacy.[36]

In response to parliamentary support for a privacy act in the late 1960s, Parliament created the Committee on Privacy, chaired by Kenneth Younger.[37] The Younger Committee's mandate extended only to private and quasi-private interference with individual privacy; specifically, it did not extend to governmental intrusions.[38] Nevertheless, the committee's survey on the public's perception of privacy concluded that:

> In identifying privacy with the state of being let alone to do as one wished, most respondents appear[ed] to have been thinking primarily of the dangers of interference with their liberty by a possible totalitarian government, an aspect [of privacy] which lies outside our terms of reference, and only secondarily of preserving their privacy as a valued element in the quality of life from interference by non-governmental bodies and their fellow citizens.[39]

The Younger Committee reviewed the subject for three years before concluding that Britain needed neither a general right of privacy nor a specific tort action for the invasion of privacy.[40] The Committee found that a general right of privacy against governmental and private interests was incompatible with the concept of society.[41] The "right to be let alone" was viewed as unreasonable in a community dedicated to common goals and purposes.[42] The Younger Committee's conclusions dovetail with the ambivalence of some British commentators to an American-style right of privacy—both groups found that the benefits conferred by a privacy construct are dubious at best.[43]

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family, or his property, from any person." W. PRATT, *supra* note 23, at 161. Lyon's bill did not focus on the press, nor did it target governmental invasions of privacy. Instead, Lyon wanted to extend the individual's privacy interest to reach material gathered by other private individuals or groups via new technologies. *Id.* at 162. No action was taken on Lyon's bill. In 1968 and 1969, a movement to establish an English Bill of Rights with a privacy clause was defeated. Concerns over the creation of an ill-defined cause of action and over the possible limitations on freedom of the press prevented passage. *Id.* at 169. A third bill, the Walden Bill of 1969, would have created a privacy tort through the use of a general definition of privacy that enumerated infringements, defenses, and examples. *See* W. PRATT, *supra* note 23, at 180. Although the Walden Bill did not draw tremendous support, it did induce the Government to create a committee on privacy.

36. *See infra* notes 44-49 and accompanying text.

37. *See* W. PRATT, *supra* note 23, at 183-84.

38. YOUNGER REPORT, *supra* note 15, at 2-3.

39. *Id.*

40. *Id.* at 200-05.

41. *See* Mellors, *supra* note 24, at 90.

42. YOUNGER REPORT, *supra* note 15, at 10.

43. R. WACKS, *supra* note 2, at 21-23. The British view American privacy law with much skepticism. Consider the Younger Committee's appraisal of the then new decisions in the *Griswold* line:

> The decisions, backed by some statements in the Constitution, justify the conclusion that privacy itself is widely recognized as a legally defensible right in the United States, but not

The Younger Committee hearings and report stimulated much debate, but no legislative action.[44] Despite this setback, the privacy debate continued in Britain. In the 1988-89 session of Parliament, M.P.s John Browne and Tony Worthington introduced bills to guarantee a right of privacy and a right of reply, both to run only against the press.[45] In response, the Government constituted a second committee on privacy.[46] The Committee on Privacy and Related Matters (the Calcutt Committee) issued its final report in June 1990. But once again the privacy committee's terms of reference limited its investigations to non-governmental intrusions of privacy.[47]

The Calcutt Committee concluded that tort law did not need a right of privacy cause of action.[48] The difficulty in defining privacy did not lead to the rejection of the tort. Rather, the uncertainty with regard to the effect of such a tort on the ability of the press to function produced the committee's rejection.[49]

The current Government does not appear ready to address the fundamental problem with British law: the lack of a right of privacy that can be asserted against the state. The Calcutt Committee Report merely

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that it is established as a coherent principle of law or that is has significantly contributed to respect for privacy in every-day life, especially by the mass publicity media.

YOUNGER REPORT, *supra* note 15, at 30. Coherence in a principle of law is certainly desirable; nevertheless some interests may not fit neatly with other interests or lend themselves to easy application in specific cases. *See* Rogaly, *supra* note 24.

44. W. PRATT, *supra* note 23, at 203.

45. *See* REPORT OF THE COMMITTEE ON PRIVACY AND RELATED MATTERS, CMND. No. 1102, at 1 (1990) (Chairman: David Calcutt, Q.C.) [hereinafter Calcutt Committee Report].

The Committee also was organized in response to perceived abuses by the popular press—specifically, an incident in which reporters from the *Sunday Sport* barged into a popular actor's hospital room in order to report on his condition. *See* Snoddy, *The Press on A Slippery Slope,* Financial Times, June 23, 1990, § 1 at col. 1. The case of Gordon Kaye, the actor, prompted the committee to recommend a new criminal law. *Id.*

46. Calcutt Committee Report, *supra* note 45, at 1.

47. The Calcutt Committee Report noted:

> A number of those who submitted evidence to us argued that our terms of reference were too narrowly drawn; some urged us to extend our inquiries to include official secrets, data protection, computer hacking, and telephone tapping. While we recognize that all these issues may be relevant to individual privacy, they do not generally concern intrusion by the press.

Id. at 4.

48. *Id.* at 46.

49. The supreme irony of the Calcutt Committee Report occurred when the Committee referenced articles of the ECHR and suggested that the individual's interest in privacy should be balanced against the community's interest in a free press. *Id.* at 7-8, 13. The irony is that the ECHR applies first and foremost against *government* action. Thus, the Calcutt Committee used a prohibition on government interference to attempt to justify restrictions on a *private* actor—the press. *See infra* note 99 and accompanying text. Although private activity may trigger provisions of the ECHR, the primary focus of the ECHR's restrictions is on government infringements of basic civil liberties. *See* P. VAN DIJK & G. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 13-18, 310 (1984).

provides additional evidence and an interesting example of this shortcoming.

2. *Explicit Recognition and Rejection of Privacy Rights by Parliament.* Despite the lack of a written constitution and the failure of Parliament to enact privacy legislation, British citizens are not entirely without remedies for invasions of privacy. In many respects, a different approach rather than any difference in substance separates Britain and the United States with regard to privacy rights. Although Parliament has never enacted a Privacy Act, it indirectly has created distinct privacy rights in a number of areas. In some cases, these parliamentary laws grant broader coverage for individual freedom of action than the American "right of privacy."

Britain's approach demonstrates that a majoritarian body sometimes can adequately resolve the tension between individual liberty and community.[50] In contexts in which a majoritarian consensus exists, Parliament has granted autonomous decisionmaking to the individual. Sodomy, prostitution, abortion, and data protection provide several examples.[51]

a. Statutory recognition of autonomy interests. Parliament has recognized several autonomy interests by statute. First, in contrast to many states in the United States, the British Sexual Offences Act allows homosexual sodomy in the home provided that the act is not engaged in for monetary gain.[52] The British approach to the problem of prostitution

50. Britain's approach is in keeping with the contentions of some current U.S. Supreme Court Justices' that the tension between individual liberty and community moral values is best resolved by majoritarian legislative bodies. *See* Michael H. v. Gerald D., 491 U.S. 110, 127-30 (1989). Justice Scalia takes the position that tradition, usually enunciated best by the legislatures, should guide the delimitation of privacy interests. But although legislatures are accountable to some extent, they often are unwilling to tackle issues because of a fear of adverse reaction by a vocal plurality of the voters.

51. *See infra* notes 52, 55-61 and accompanying text; *see also* P. ATIYAH & R. SUMMERS, *supra* note 20, at 299-306. The party system in Great Britain makes it possible for a Member of Parliament (MP) to vote for a bill that is repugnant to his constituency and remain in office. *Id.* at 302-03. If the party decides to take an unpopular stand, then the party itself eventually will be held accountable, but individual members will not immediately feel the wrath of the public. *Id.* at 303.

Public sanction of individual parliamentary acts is, at least in some cases, only indirect, if it exists at all. Thus, even though the election of Parliament is an expression of majoritarian desires, the acts of the body do not necessarily always coincide with public opinion. Conversation with P.S. Atiyah, in Durham, North Carolina (March 22, 1989).

52. Sexual Offences Act, 1967, ch. 60 § 1. Conversely, the Supreme Court of the United States refused to grant the act of sodomy constitutional protection. Bowers v. Hardwick, 478 U.S. 186 (1986). Although Britain legalized consensual homosexual conduct, the British approach is not terribly deferential to the individual interests when determining whether or not to occupy a given field legislatively. *See infra* notes 265-73.

provides a second illustration. Rather than criminalize payment for sexual favors, the British regulate only public solicitation and pimping.[53] Prostitution itself is not illegal; Britain has recognized that it is unrealistic, and perhaps unsafe, to maintain a prudish attitude in light of society's long practice. Abortion, however, provides the best example of an area in which Parliament has acted to secure an autonomy interest commonly associated with the right of privacy.

Theoretically, the right to abortion enjoys less protection in Britain than in the United States. Whereas in the United States a "right of privacy" protects a woman's "fundamental liberty" to decide whether or not to abort her fetus,[54] the British Abortion Act generally criminalizes abortion in Britain. In practice, however, the Act's exception clause swallows the whole by allowing legal abortions for the physical and *mental* well-being of the mother or of existing children and for deformed fetuses.[55] By liberally construing this provision, the courts, with Parliament's tacit approval, effectively have created abortion on demand.[56]

Pro-life advocates in Britain have challenged this interpretation of the Act. In *Royal College of Nursing of the United Kingdom v. Department of Health and Social Security,*[57] the House of Lords rejected a petition by pro-life nurses arguing that a literal reading of the statute's requirement for "termina[tion] by a registered medical practitioner"[58] required doctors to personally administer a drug resulting in miscarriage in eighteen to twenty hours.[59] *Royal College* is just one example of unsuccessful efforts to restrict *de facto* abortion on demand. The *de facto* statutory right to an abortion also has been protected against challenges based on the Infant Life Protection Act, and against challenges by fathers and other outsiders.[60] The message to be gleaned from these cases is that only the state has standing to enjoin an abortion operation.[61]

53. Street Offenses Act 1959, 7 & 8 Eliz., ch. 57, §§ 1-4. One of the ironies of this policy is that men cannot be punished for paying for sex, while women can still go to jail for solicitation.

54. Roe v. Wade, 410 U.S. 113 (1973); *see infra* notes 194-205 and accompanying text.

55. Abortion Act, 1967, ch. 87, § 1.

56. *See* Ryan, *Rights That Go Awry,* London Times, Aug. 23, 1990, at 8, col. 2 (David Steel's Abortion Act "was a classic piece of compromise legislation. It declared abortion criminal except in some situations." The result allows abortions in the same circumstances which the U.S. Supreme Court granted women a constitutional right to an abortion in Roe v. Wade, 410 U.S. 113 (1973).

57. 1981 App. Cas. 800 (H.L.).

58. Abortion Act, 1967, ch. 87, § 1; *see* 1981 App. Cas. 800, 828 (H.L.) (discussing the statutory language).

59. Lord Denning on the Court of Appeal had rigidly applied the provision as the nurses requested, commenting that he doubted Parliament would amend the law so as to allow de minimis supervision. *Id.* at 806-07 (C.A.).

60. Grubb & Pearl, *Protecting the Life of the Unborn Child,* 103 L.Q. REV. 340, 340 (1987).

61. *Id.* at 342.

The British government's position seems to be that abortion does not implicate a sufficient governmental concern to justify a government proscription against it. However, Parliament's deference to a woman's decision whether to have an abortion has not led to general discussions of rights of privacy. Rather, British citizens appear to rely on a principle of governmental self-restraint coupled with a notion of liberty vesting in the citizenry—that which Parliament does not prohibit is permitted.[62] Thus, privacy is "protected" via indifference or deliberate inaction. However, no procedure exists to prevent Parliament from legislating in areas that impinge on privacy: Individual autonomy is subject to summary abrogation by parliamentary fiat.

A final example of the protection of limited privacy interests by statute is the Data Protection Act of 1984, which regulates the collection and dissemination of computer data.[63] The Act guarantees an individual the right to access a computer database that contains information about him.[64] Parliament accomplished this goal by requiring firms collecting personal information on computer databases to comply with registration and reporting requirements. The Act, although comprehensive within its area of application, contains an exception for the government when "national security" is implicated.[65] Similar to acts passed by the United States Congress in the late 1960s and early 1970s,[66] the Data Protection Act protects personal information—furthering privacy—but it does not directly relate to individual autonomy. The Data Protection Act, the Abortion Act, and the Sexual Offences Act are examples of Parliament's willingness to protect privacy in certain cases.

b. Parliament sometimes fails to protect some privacy interests where the powers of government are directly in question. When the government wishes to restrict an individual's freedom, or to shield itself from public scrutiny, British law grants individual citizens little recourse. Although Parliament has been quite permissive on privacy issues relating to abortion, homosexuality, and prostitution, it has been somewhat neanderthal in the areas of official government secrets and search and seizure law. The following examples illustrate this problem.

With regard to search and seizure, the Police and Criminal Evidence Act grants broad power to arresting officers to search houses without a

62. H. STREET, *supra* note 22, at 10, 284.

63. Data Protection Act, 1984, ch. 35, §§ 1-3.

64. *Id.* § 21(1).

65. *Id.* § 27(1).

66. *See infra* notes 177-78 and accompanying text.

warrant.[67] Although section four of this Act limits searches to the subject matter of the entry, this is of little consolation to one whose bedroom is ransacked.[68] Thus, privacy in the home is tenuous under the present state of the law—and is always subject to complete revocation by Parliament.[69]

Even when Parliament acts to protect privacy, parliamentary reforms are often minimal. In 1985, responding to *Malone v. Metropolitan Police Commissioner,*[70] Parliament adopted the Interception of Communications Act,[71] which protected some privacy interests through procedural reforms. Prior to the 1985 Act, judicial review of government

67. Police and Criminal Evidence Act, 1984, ch. 60, § 17. In contrast, in the United States a general search may not be conducted absent a warrant describing the items to be taken. Even in the United States there are exceptions—such as the "plain sight" rule—to the prohibition against general searches. *See* Coolidge v. New Hampshire, 403 U.S. 443, 465-67 (1971) (items in plain view may justify taking relevant evidence not listed in a warrant, but doctrine may not be used to justify a general "exploratory" search with or without a warrant); M. ABERNATHY, CIVIL LIBERTIES UNDER THE CONSTITUTION 83-109 (5th ed. 1989); MCCORMICK ON EVIDENCE § 169, at 479-81 (E. Cleary 3d. ed. 1984).

68. However, local police are not immune from tort law, unless Parliament specifically vitiates such liability. *See* Morris v. Beardmore, 1981 App. Cas. 446 (H.L.) (constable who entered home during unlawful search in drunk driving investigation civilly liable for trespass); H. STREET, *supra* note 22, at 12-32. Similarly, in the United States, local police officers are held accountable for their actions under 42 U.S.C. § 1983 (1988) and federal officers through the *Bivens* doctrine. For a discussion of section 1983, see Monroe v. Pape, 365 U.S. 167, 184 (1961). For the extension of constitutional torts to searches by federal agents, see Bivens v. Six Federal Unknown Agents, 403 U.S. 388 (1971). The principle difference between the United States and Britain on imposing liabilities on law enforcement personnel is that Parliament may vitiate liability at will, whereas the Congress would presumably be limited by the federal Constitution—Congress *could not* authorize unconstitutional conduct by state or federal agents.

69. *See infra* notes 80-83 and accompanying text.

70. [1979] 1 Ch. 344 (Ch.). *Malone* itself concerned the police practice of wiretapping and "metering" without any independent judicial or administrative supervision. *Id.* at 368. "Metering" is the recording of incoming and outgoing phone numbers, and not an actual recording of the conversations. Under the then-existing legislation, the local constables were free to monitor or meter phones with a minister's approval. *Id.* The legislation did not provide for any judicial oversight. *Id.* at 368-69. *See* 1 V. BERGER, CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS: 1960-1987 at 255-60 (1989) (procedural history of the *Malone* case). Great Britain did not reform its domestic surveillance laws until called to task by the ECHR (sometimes referred to as the Strasbourg court). V. BERGER, *supra,* at 257, 260. The European Commission of Human Rights declared Malone's application to the European Court of Human Rights (hereinafter European Court) admissible in 1981, Malone v. United Kingdom, [1982] 4 Eur. Hum. Rts. Rep. 330, 349 (1981), and the European Court of Human Rights heard and decided the case. Malone v. United Kingdom, [1985] 7 Eur. Hum. Rghts. Rep. 14 (1984); V. BERGER, *supra,* at 258-60. The European Court found that Britain's failure to regulate government interception of private communications violated article 8. *Malone,* 7 Eur. Hum. Rts. Rep. at 41-47. Ultimately, a friendly settlement was reached between the parties; Britain passed the Interception of Communications Act, 1985, ch. 56 and paid £ 18,000 for his legal costs and damages. V. BERGER, *supra,* at 260. The *Malone* case is an example of the good that can result when individuals pursue their claims in the European Court of Human Rights. *See infra* notes 151-67 and accompanying text.

71. Interception of Communications Act of 1985, ch. 56.

wiretaps was not required before the government could monitor private conversations. The 1985 Act, however, did not create or recognize a right of privacy in the citizenry. Rather, the Act redrew the rules relating to the interception of private communications by government officials. The Act required judicial supervision of wiretaps and delimited the circumstances in which such a warrant could be issued.[72]

The Interception of Communications Act vindicates the individual's privacy interest only in the most limited contexts. The Act shows that Parliament can protect privacy in limited contexts against arbitrary government action when required to do so.[73] It also illustrates that privacy, as a general matter, will remain largely unprotected.

B. *The Role of the British Judiciary in Securing Privacy Rights*

In contrast to United States courts, the British courts consistently refuse to recognize or create a right of privacy in any context. British judges believe it is "no function of the courts to legislate in a new field."[74]

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72. Government agents are immune from liability, provided that they were acting in a matter authorized pursuant to section two of the Act, which provides that:

> (2) The Secretary of State shall not issue a warrant under this section unless he considers that the warrant is necessary—
>
> (a) in the interests of national security;
>
> (b) for the purpose of preventing or detecting serious crime; or
>
> (c) for the purpose of safeguarding the economic well-being of the United Kingdom.

Additionally, a Commissioner provides governmental oversight and has the duty to inform the Prime Minister of any suspect interceptions by the government. Finally, the courts are charged with ensuring compliance with the Act. Interception of Communications Act, 1985, ch. 56, § 8. The provisions of the Act protecting citizens from government surveillance of their correspondence are entirely consistent with Klass v. Federal Republic of Germany, [1979-80] 2 Eur. Hum Rts. Rep. 214 (1978), in which the European Court allowed West Germany to intercept communications under a stringent administrative scheme, even thought the scheme did not involve direct judicial review.

73. Parliament did not pass the Act spontaneously. Rather, an external body precipitated reform of government surveillance of the citizenry. In *Malone,* the European Court of Human Rights (European Court) found that the government of Great Britain violated the right of privacy guaranteed by article 8 of the European Convention on Human Rights. Thus, the Interception of Communications Act, unsurprisingly, tracks the permissible exceptions to the right of privacy provided in article 8(2). ECHR, *supra* note 10, art. 8(2), at 230. The allowable exceptions relate to "national security, public safety or the economic well-being 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." The general notes to section 2 of the Interception of Communications Act note that the wording of the section "also reflect the wording of Article eight of the European Convention for the Protection of Human Rights and Fundamental Freedoms." Explanatory notes, Interception of Communications Act, 1985, ch. 56, in 45 HALSBURY'S STATUTES OF ENGLAND AND WALES 419 (4th ed. 1988).

74. *Malone,* [1979] 1 Ch. at 372. However, there is popular sentiment for the creation of such a right by the domestic British courts. *See, e.g.,* Justinian, *Establishing the Right to Be Left Alone,* FINANCIAL TIMES, Mar. 26, 1990, § 1, at 40, col. 2 ("[T]here is a strong argument for letting the law grow out of a series of rulings in individual cases. The judges' riposte to the suggestion that they should construct a law of privacy is that it is too late in the day for the courts to create new remedies.").

Because the British courts see legal reform as the prerogative of Parliament, it would be anomalous for them to unilaterally create a right of privacy.

1. *The British Judiciary Will Not Recognize A Right of Privacy in the Common Law.* British citizens, in light of Parliament's inaction, have attempted to circumvent the legislature by petitioning the British courts to create a common law right of privacy. Without fail, the courts have refused to do so. One route sought to secure a common law right of privacy was through the extension of the torts of breach of confidence and trespass. For instance, in *Director of Public Prosecutions v. Withers,* Lord Simon[75] declined to recognize the tort of invasion of privacy.[76] Although he admitted that the tort arguably could be derived from the tort of breach of confidence, the Lord believed that court action would be inappropriate because Parliament was studying the issue. Ultimately, Parliament took no action, and in the late 1970s the issue of a common law right of privacy remained before the courts.

Article 8 of the ECHR presented a second route to a common law right of privacy through judicial action. However, the courts rejected article 8 as a source for establishing a common law right of privacy. The *Malone* case[77] effectively foreclosed the development of a common law right of privacy in domestic British law. *Malone* expressed the judiciary's determination to avoid the creation of a general right of privacy:

> No new right in the law, fully-fledged with all the appropriate safeguards, can spring from the head of a judge deciding a particular case: only Parliament can create such a right. . . . One of the factors that must be relevant in such a case is the degree of particularity in the right that is claimed. The wider and more indefinite the right claimed, the greater the undesirability of holding that such a right exists.[78]

Although much English case law, as well as provisions of the European Convention on Human Rights and the U.N. Declaration of Human Rights, was argued in support of a common law right of privacy, Sir Megarry concluded, "I can find nothing in the authorities or contentions

75. A "law lord" is a member of the House of Lords who is appointed for life (he or she is not a member of the peerage) and who sits in decision over the appeals taken from the lower British judiciary. The House of Lords, as a whole, does not sit and decide cases. Rather, the small cadre of law lords discharge this function. *See* P. ATIYAH & R. SUMMERS, *supra* note 20, at 269.

76. 1975 App. Cas. 842, 862-63 (H.L.). *See also* Berstein of Leigh (Baron) v. Skyviews & General Ltd., [1978] 1 Q.B. 479, 488 (Q.B.) (no remedy for breach of privacy unless plaintiff can establish the elements of an already recognized tort).

77. [1979] 1 Ch. 344. The Chancery Division upheld police attempts to gather evidence for a possible proseeution against Malone. Because British domestic law did not recognize any privacy right, Malone did not appeal the privacy issues to either the Court of Appeal or the House of Lords. Malone v. United Kingdom, [1982] 4 Eur. Hum. Rts. Rep. 330, 337-38 (1981).

78. *Malone,* [1979] 1 Ch. at 372-73.

that have been put before me to support the plaintiff's claim based on the right of privacy."[79]

One last example illustrates that the British courts will defer to Parliamentary commands, no matter how invasive to individual privacy. *Regina v. Inland Revenue Commission, ex parte Rossminster* provides an example of this phenomenon.[80] *Rossminster* involved government searches to enforce criminal tax fraud and answered the basic question of how far the government could go to collect its revenues.[81] According to the House of Lords, the government could go quite far indeed: The Lords found that the government may search homes and businesses with very general warrants.[82] The House of Lords simply gave effect to a broadly crafted law duly adopted by Parliament. Because the law did not require that a warrant issued under the act specify the authority under which it was issued or the items which could be seized, no such requirements would be implied by the House of Lords. Thus, as long as the government's activity is expressly authorized by Parliament, no claim of privacy under the common law (guaranteed primarily by the tort of trespass) may stand in the way of state action based on the authorization.[83]

2. *The Recognition of the Notion of Privacy by the British Courts Via Statutory Interpretation.* Although the judiciary refused to recognize a general right of privacy absent legislative authority, it will not

79. *Id.* at 375. With respect to article 8 in particular, the court observed that the domestic courts of England do not have jurisdiction to adjudicate the claims that arise under the ECHR and that the ECHR is not part of the domestic law of Britain. *See infra* notes 121-36 and accompanying text.

80. 1980 App. Cas. 952 (C.A.).

81. *Id.* at 969-71. Petitioners premises were searched by tax agents under a general warrant that did not specify any offense. *Id.* at 1015-16. On July 12, 1979, four warrants were issued under section 20C of the Taxes Management Act, 1970, ch. 9, as substituted by the Finance Act, 1976, ch. 40, sched. 6, for the search of two private homes and two businesses. *Id.* at 997, 1001. The warrant, consistent with section 20C, authorized the police to search the named premises and "seize and remove any things whatsoever found there which you have reasonable cause to believe may be required as evidence for the purposes of proceedings in respect of [a criminal revenue offence]." *Id.* at 1003. Lord Salmon would have upheld the result reached in the Court of Appeal, but on much narrower grounds than Lord Denning advocated. *Id.* at 1017-18.

82. The Act did not require the warrant to specifically state the iems to be taken—it authorized a general search. *Rossminster,* 1980 App. Cas. at 1003-04. Further, section 20C(3) authorized the general seizure of any evidence the executing officer believed might be helpful to the government's case. *Id.* at 1005.

83. Despite the contemporary British courts unsympathetic view toward the creation of a general privacy right, individual judges have been quite impressed with the arguments advanced in favor of such a right. In particular, Lord Denning, Master of the Rolls, was quite ready to recognize a privacy right in *Rossminster.* He wrote: "A good end does not justify a bad means. The means must not be such as to offend against the personal freedom, the privacy and the elemental rights of property." *Id.* at 976.

protect government officials from liability for illegal conduct in the absence of express parliamentary approval. The British judiciary applies a *notion* of privacy as a general principle of statutory construction.[84] Principles of statutory construction can provide some modicum of protection for privacy interests.

Morris v. Beardmore provides an example of British courts applying this notion of privacy.[85] In *Morris,* a gentleman involved in an accident left the scene of the incident and returned home. Over two hours later, local police arrived at his home and asked to speak with him. When Mr. Morris refused, the police broke into his house and demanded that he submit to a breathalyzer test (that he failed). The House of Lords decided the question as whether the police conduct was justified under a general statute for the enforcement of drunk driving laws.[86] The Lords decided in favor of Morris based on a principle of statutory construction: Parliament is required to expressly authorize official tortious conduct in order to preempt otherwise applicable common law liability for government officials.[87]

In this case, Lord Edmund-Davies nearly articulated a general notion, although not a "right," of privacy: "[T]o reject the appeal would entitle a constable who, in deliberate violation of the householder's rights, forcibly invades his privacy [to conduct a search]. . . . I cannot accept that Parliament contemplated anything of this sort."[88] Lord Edmund-Davies recognized that parliamentary inaction, by itself, does not justify undue interference with privacy interests that otherwise are protected (albeit indirectly) through tort law.

Other opinions in *Morris* were equally solicitous toward a notion of privacy. For instance, the speech of Lord Scarman in *Morris* is intriguing for its similarities to American judicial privacy law:[89]

84. Malone v. Metropolitan Police Comm'r, [1979] 1 Ch. 344, 380-81 (Ch.) (Sir Megarry, in *dicta,* says that he personally would welcome parliamentary reform, but that it is not the court's prerogative to create a new right). The Vice Chancellor's approach is consistent with the general deference given to Parliament by the Courts. *See* P. ATIYAH & R. SUMMERS, *supra* note 20, at 227-29.

85. 1981 App. Cas. 446 (H.L.).

86. *Id.* at 453-54.

87. *Id.* at 456. "The presumption is that in the absence of express provision to the contrary Parliament did not intend to authorize tortious conduct; and this presumption, in my view, owes nothing to the European Convention on Human Rights . . . ." *Id.* (Lord Diplock). The Lords did not want to rest their holding on the ECHR, because to do so would make the ECHR operational at the domestic level. *See infra* notes 121-50 and accompanying text.

88. *Id.* at 461-62 (Lord Edmund-Davies).

89. *See, e.g.,* Moore v. City of East Cleveland, 431 U.S. 502 (1976) (discussing the risks involved in protecting substantive liberties not specifically in the Bill of Rights).

> I have deliberately used an adjective with which has an unfamiliar ring to the ears of common law lawyers. I have described the right of privacy as "fundamental." I do so for two reasons. First, it is apt to describe the importance attached by the common law to the privacy of the home. . . . Secondly, the right enjoys the protection of the European Convention For the Protection of Human Rights and Fundamental Freedoms . . . which the United Kingdom ratified . . . .[90]

Yet Lord Scarman spoke only in the context of a case in which Parliament's intent was ambiguous. If Parliament had expressly authorized the objectionable police conduct, then the reliance on private tort law to protect Morris' privacy would be unavailing.[91] Such references to privacy as a "fundamental right" indicate a sympathy among the British judiciary for privacy concerns. Nevertheless, the judiciary remains unwilling to undertake unilateral action to protect privacy.[92] The ultimate result, to American eyes, is unsatisfactory. British courts lament that privacy concerns are legitimate, but only apply the notion of privacy at the margins (if at all).

The courts vindicate privacy interests only when Parliament has affirmatively endorsed the interest or has left some ambiguity in an authorization of intrusive conduct. If privacy concerns are legitimate, then the courts should have a greater role in securing them. The common law is not static; if the courts can create an action for trespass, they could also create a right to be let alone.

C. *The European Convention on Human Rights and Fundamental Freedoms As a Source of a Right of Privacy*

The failure of British domestic law to recognize a right of privacy does not foreclose its existence altogether. The European Convention on Human Rights guarantees a right of privacy to individual citizens against the governments of siguatory states, which include Britain.[93] Because Parliament has refused to give the ECHR domestic effect, British courts do not vindicate the individual autonomy rights recognized under the ECHR.[94]

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90. *Id.* at 464.

91. *See infra* notes 121-67 and accompanying text.

92. *See* P. ATIYAH & R. SUMMERS, *supra* note 20, at 228-29, 238, 269.

93. Article 25 of the ECHR limits the jurisdiction of the European Commission to the individual complaiuts of those seeking to vindicate rights guaranteed by the ECHR brought against states that recognize the authority of the Commission. P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 69-71. Article 46(1) requires the consent of states to the jurisdiction of the European Court. Presumably, signatories must accede to both in order to be subject to mandatory commands from the institutions of the ECHR. ECHR, *supra* note 10, at 246. However, article 24 allows for the Commission to hear complaints brought by other signatory states without an article 25 declaration. *Id.* at 236.

94. The British record before the European Court is abysmal. From 1983 to 1985, 392 complaints were filed with the Commission against the U.K. compared to France with 174, the Federal

1. *Practice and Procedure Under the European Convention on Human Rights and Fundamental Freedoms.* Following the end of World War II, the nations of Western Europe wanted to create an international framework to safeguard certain basic human freedoms against government infringement.[95] Acting under the auspices of the Council of Europe, a convention was drafted in 1950 and the European Convention On Human Rights and Fundamental Freedoms (ECHR) became effective on September 3, 1953.[96] Today, the Council of Europe consists of the twenty-one post World War II democracies of Western Europe.[97]

The ECHR creates two bodies independent of the regular agencies of the Council of Europe: the European Commission on Human Rights[98] and the European Court of Human Rights.[99] Together with the

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Republic of Germany with 312, and Italy with 91. Dowrick, *supra* note 25, at 888 n.48. Since 1959, when the European Court began hearing cases, 27 U.K. cases have been referred by the Commission. *Id.* at 888 n.49. The numbers for other signatories with Britain's population were France (1), Federal Republic of Germany (16), and Italy (12). Britain's record of adverse judgements is also particularly poor. *Id. See* Higgins, *United Kingdom,* in THE EFFECT OF TREATIES IN DOMESTIC LAW 123, 130 (F. Jacobs & S. Roberts eds. 1987).

Britain's ability to fulfill its international obligations as a signatory to the ECHR are seriously tested by the absence of a legally cognizable privacy right. *See infra* note 123; Ryan, *supra* note 56, at 8, col. 1 (British record before the European Court is poor). The Liberal Democratic Party recently has proposed incorporating the ECHR into British domestic law and establishing a United Kingdom Commission on Human Rights. *See* Hibbs, *First Written Constitution Proposed,* DAILY TELEGRAPH, July 6, 1990, § 1, at 12, col. 1.

95. P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 1-2.

96. *Id.*

97. The following states are members of the Council of Europe: Austria, Belgium, Cyprus, Denmark, the Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. *Id.* In 1990, Hungary became the first of the newly liberated East Bloc nations to join the Council of Europe. N.Y. Times, Nov. 6, 1990, § A, at 15, col. 1.

Distinct from the European Economic Community (EEC), which has only 12 members, the Council of Europe is not a supranational organization, but rather is an intergovernmental entity. The basic distinction is that the ECHR establishes an international organization, not a quasi-sovereign body. The EEC may directly displace domestic laws that conflict with policies of the EEC. *See e.g., Re* Detergents Directive: E. C. Commission v. Italy, 1980 E. Comm. Ct. J. Rep. 1099, 1104-06, [1981] 1 Common Mkt. L. R. 331, 342-43 (Ct. J.) (Italy violated article 169 of the Treaty of Rome by failing to bring its domestic law in line with Council Directive 73/404). The ECHR, on the other hand, does not vest the enforcement agencies with any power to act directly on the member states. *See* Bartsch, *The Implementation of Treaties Concluded with Council of Europe,* in THE EFFECT OF TREATIES IN DOMESTIC LAW 197, 199 (F. Jacobs & S. Roberts eds. 1987). Thus, the Council of Europe lacks plenary power to alter the domestic laws of the member states.

98. The European Commission of Human Rights examines complaints that are filed in a timely fashion. ECHR, *supra* note 10, art. 19, at 235; P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 18-23. The Commission receives complaints, determines their sufficiency, and attempts to negotiate a "friendly settlement." P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 91-92. For the requirements of a valid petition, see articles 26-28 of the ECHR *supra* note 10, at 238-40. *See also,* J. FAWCETT, *supra* note 25, at 355-75; P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 53-91; Boyle, *Practice and Procedure on Individual Applications under the European Convention on Human Rights,* in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 136-47 (H. Hannun ed. 1984).

Council of Ministers,[100] these bodies handle the day-to-day administration of the ECHR.

The ECHR, unlike many human rights conventions, effectively secures the rights guaranteed under its provisions.[101] Although the European Court cannot force member states to comply with its decisions, compliance with its judgments is the norm.[102]

Article 1 of the ECHR requires that signatories' domestic laws be consistent with the substantive guarantees of the ECHR.[103] Signatories can comply with article 1 either by incorporating the treaty directly into their domestic laws or by recognizing parallel rights under domestic law.[104] In fact, all but six signatories[105] give domestic effect to the treaty

99. Articles 48 and 49 of the ECHR set out the jurisdiction of the European Court. ECHR, *supra* note 10, at 246-48. Under article 47, the Court may take a case only after the Commission has failed to reach a friendly settlement. *Id.* at 246. A dispute may be referred to the Court by 1) the Commission, 2) a contracting state whose national is the alleged victim, 3) a contracting state who referred the case to the Commission initially, or 4) the contracting state against whom the complaint is lodged. *Id.* art. 48, at 246. *See* P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 111-29; Boyle, *supra* note 98, at 137. In practice, most complaints that are judged to be admissible by the Commission ultimately appear before the European Court. Boyle, *supra* note 98, at 148-49. Member states are required to bring their laws into conformity with the decisions handed down by the European Court of Human Rights. ECHR, *supra* note 10, art. 53, at 248; Bartsch, *supra* note 97, at 199. For a general discussion of the obligations of a member state to implement a decision of the European Court, see J. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 11-19 (1988). Signatory states are obligated to secure the rights of the ECHR under articles 1, 5(5), and 13. ECHR, *supra* note 10, at 224, 228, 232. They are bound by decisions of the Council bodies by articles 32(4) and 53. *Id.* at 242, 248. Signatories must report their compliance measures when so requested under article 57. *Id.* at 250.

100. The Committee of Ministers is a third branch of the ECHR, but has duties unrelated to the ECHR. P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 27-29.

101. *Id.* at 456.

102. Dowrick writes that: "Following an adverse judgement, defendant states have without exception eventually fulfilled their international obligations and complied with its terms, via executive measures which can be more rapidly effected, or by national legislation which may take years." Dowrick, *supra* note 25, at 889. *See also,* Waldock, *The Effectiveness of the System Set Up By the European Convention on Human Rights,* 1 HUM. RTS. L.J. 1 (1980) (success and effectiveness of Convention possible only through interpretations in domestic law consistent with intent of convention). Professor Rusen Ergec has suggested that the high visibility of the decisions of the court in the European media helped secure the compliance of member states. Conversation with R. Ergec, Professor at Frec University of Belgium, Copenhagen, Denmark (July 29, 1989); P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 455-60; Boyle, *supra* note 98, at 149-50.

103. ECHR, *supra* note 10, art. 1, at 224; P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 3, 377-78.

104. Under the ECHR a complainant must exhaust all effective domestic remedies before bringing his complaint before the European Commission. ECHR, *supra* note 10, arts. 26, 27(3), at 238. *See* F. CASTBERG, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 40, 43 (1974); J. FAWCETT, *supra* note 25, at 355-62, 368. However, remedies that are certain to be ineffective need not be pursued. *See* P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 74-75. On the requirement of exhaustion of local remedies before pursuing a claim at the international level, see Claim of Finnish Shipowners, (Finland v. Great Britain) 3 U.N. R. Int'l Arb. Awards 1479 (1934) (Finland could bring

itself.[106] Britain has not incorporated the ECHR itself, and has not created domestic law analogues to all the rights guaranteed by the ECHR. Britain's failure to give domestic effect to the ECHR or provide domestic law alternatives means that an individual may argue rights under the ECHR before the European Court of Human Rights in Strasbourg, but that Britain's domestic courts are not required to consider any arguments directly arising under the ECHR.[107]

2. *Privacy Rights Protected by the ECHR.* Article 8 of the ECHR secures a right of privacy in the home, family, and correspondence. Specifically, article 8 of the ECHR provides:

> (1) Everyone has a 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 well-being 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.[108]

The European Court of Human Rights has given article 8 a broad reading.[109] Article 8 has been used to vindicate privacy rights in the home,[110]

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claim in international legal forum for unauthorized use of Finnish ships by Great Britain during World War I since remedies in British War Compensation Court no longer available).

105. Cyprus, Iceland, Ireland, Malta, Sweden, and the United Kingdom. J. FAWCETT, *supra* note 25, at 5-21. *But cf.* A. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW 304-22 (1983) (Denmark, Iceland, Ireland, Liechtenstein, Malta, Norway, Sweden, and United Kingdom do not accord ECHR domestic status). Nevertheless, a signatory state may assert that the substance of its domestic law is in compliance with the ECHR, without actually enabling the specific guarantees of the convention. J. FAWCETT, *supra* note 25, at 20.

106. Although the literal language of articles 5(5) and 13 suggest that domestic effect be accorded the ECHR, this has not been the practice under the ECHR. P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 4-5; *see also* F. CASTBERG, *supra* note 104, at 13-14.

107. *See* P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 10-13.

108. ECHR, *supra* note 10, art. 8, at 230. One should note that the protection of privacy in the home is somewhat limited, given the scope of article 8(2) exceptions. *See* P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 294-95. The exceptions clause has less effect on the protection of correspondence and family life. *Id.* Governmental concerns, such as the prevention of crime and national defense, may justify an invasion of one's privacy in the home do not arise as often in the context of correspondence or family relations. Finally, one should note that article 8 does not protect all aspects of privacy—nondisclosure of information and protection of likeness, for example, are protected under article 10. *Id.* at 283.

109. Article 8 was derived in part from the Universal Declaration of Human Rights, which recognizes a right of privacy. The relevant provision of the Universal Declaration provides that: "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." G.A. Res. 217A (III), 9 U.N. GAOR at 71 art. 12, U.N. Doc. A/810 (1948); *see also* J. FAWCETT, *supra* note 25, at 211. Although article 8 reaches governmental infringements of privacy, it is an open question as to whether it creates government liability for private invasions of privacy that are not compensated under existing domestic law. A

family rights (including a right of parental access),[111] abortion and other reproductive rights,[112] and certain freedoms from the disclosure of information.[113] Many of the cases arising under article 8 have been brought against Britain,[114] and all of these involved official government actions that were sanctioned by domestic statute or common law, but that arguably were inconsistent with Britain's article 8 obligations.

In applying the substantive provisions of article 8(1), the European Court allows the signatory state to justify facially inconsistent statutes or common law, if possible, under article 8(2).[115] The article 8(2) exceptions clause allows the state to interfere with privacy rights under three conditions: the interference must be prescribed by law;[116] the law must be sufficiently clear so that a citizen can observe its dictates;[117] and finally, the law must be "necessary in a democratic society."[118] The court

small extension of existing precedents on article 8 would allow a holding that the article reaches essentially private invasions of privacy. One need only assert that article 8 creates not only negative prescriptions on government action, but positive duties to secure privacy rights against unofficial incursion. *See* J. MERRILLS, *supra* note 99, at 95-96. Under the doctrine of *Drittwirkung*, a government may be liable for private actions violative of the ECHR, when such actions are tolerated under domestic law and thus at least tacitly consented to by the signatory government. *See* P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 284-85. The theory of *Drittwirkung* has not been expressly rejected in the context of article 8. For a general discussion of the theory underlying the doctrine of *Drittwirkung*, see *id.* at 13-18. However, the European Court views article 8 principally as a protection against government invasions of privacy. *Id.* at 284.

110. *See* J. FAWCETT, *supra* note 25, at 226-28.

111. *See id.* at 216-26.

112. *See* P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 287. *But cf.* J. FAWCETT, *supra* note 25, at 214 ("Article 8(1) cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother.").

113. *See* P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 283.

114. *See* L. PETTITI, THE EUROPEAN MACHINERY ON HUMAN RIGHTS 10-11 (1987). A rationale for this phenomena may be the lack of domestic consideration of privacy claims. *See* Boyle and Rice v. United Kingdom, 10 Eur. Hum. Rts. Rep. 425 (1988); R. v. United Kingdom, 10 Eur. Hum. Rts. Rep. 74 (1987); Silver v. United Kingdom, 5 Eur. Hum. Rts. Rep. 347 (1983); Dudgeon v. United Kingdom, [1982] 4 Eur. Hum. Rts. Rep. 149 (1981).

115. Some would argue that the article 8(2) exceptions clause takes away most of what article 8(1) conveys, at least with respect to the protection of privacy in the home. *See* J. FAWCETT, *supra* note 25, at 226-27. *See also* Klass v. Federal Republic of Germany, [1979-80] 2 Eur. Hum. Rts. Rep. 214, 231-37 (1978) (the European Court approved a German law allowing wiretaps; after examining the language of article 8, the purpose of the law, and the oversights provided by the law, the European Court concluded that Germany had a legitimate purpose consistent with article 8(2) and that the means used to effect that purpose were consistent with article 8).

116. *See* Malone v. United Kingdom, [1985] 7 Eur. Hum. Rts. Rep. 14, 39-42 (1984).

117. *See* Silver v. United Kingdom, 5 Eur. Hum. Rts. Rep. 347, 371-73, 376-77 (1983). Specifically, a law must be "accessible" and the potential sanctions for the law's breach must be "foreseeable." *See* Gillow v. United Kingdom, 11 Eur. Hum. Rts. Rep. 335, 350 (1989); Sunday Times v. United Kingdom, [1979-80] 2 Eur. Hum. Rts. Rep. 245, 271 (1979).

118. *Silver*, 5 Eur. Hum. Rts. Rep. at 376. The test is not whether a given law or practice is desirable or administratively convenient, but whether it is required in order to achieve legitimate state purposes. *See id.* at 376-77. *See also* J. MERRILLS, *supra* note 99, at 144-49 (discussion of the

tends to use the practices of the signatory states to determine whether a given practice meets this last criteria.[119] However, state practices cannot override the express provisions of the ECHR. The Court narrows the "margin of appreciation" granted to member states when regulated activity implicates core privacy rights.[120] Article 8 does not confer an absolute right of privacy. It does, however, provide substantial protection to individual autonomy.

3. *Article 8 in the Domestic Courts of Britain.* The United Kingdom does not give domestic effect to the ECHR.[121] British constitutional theory allows the use of international treaties only to interpret ambiguous parliamentary enactments and to clarify the common law. International treaties, including the ECHR, are not automatically incorporated into domestic British law. Lord Denning provided a succinct restatement of the status of the ECHR in English law:

European Court's interpretation of the "necessary in a democratic society" language in a number of contexts).

119. *See* Dudgeon v. United Kingdom, [1982] 4 Eur. Hum. Rts. Rep. 149, 167 (1981). The *Rees* Case is also illustrative of this practice. Rees v. United Kingdom, [1987] 9 Eur. Hum. Rts. Rep. 56, 65-68 (1986) (United Kingdom not obliged to follow examples of other signatory states relating to recognition of new sex for transsexuals in public records). *See also* Tyrer v. United Kingdom, [1979-80] 2 Eur. Hum. Rts. Rep. 1, 9-12 (1978) (the Court used the "commonly accepted standards" of the member states of the Council of Europe to determine whether the birching policy of the Isle of Man was a degrading punishment for purposes of article 3 of the ECHR).

120. J. MERRILLS, *supra* note 99, at 148. When regulated behavior is at the heart of a protected right, the European Court will require a showing of strict necessity to justify the burden on the individual's exercise of the right. As the interest becomes more tenuously connected with the essential functions of the right, the court is more tolerant of government interferences. This is done through the "margin of appreciation" given the defendant state. The margin of appreciation is at its greatest when questions of morals are implicated, because questions of morality are subjective and contextual. *Dudgeon,* [1982] 4 Eur. Hum. Rts. Rep. at 164 (1981); *see also Sunday Times,* [1979-80] 2 Eur. Hum. Rts. Rep. at 275-76 (1979) (morals are left to state, except when the result is inconsistent with the practices of other states or with the existence of the right in question); Handyside v. United Kingdom, [1979-80] 1 Eur. Hum. Rts. Rep. 737, 753-55 (1976) (discretion granted to states in matters of morality, but European Court has final say as to whether restriction is "reconcilable with [the] freedom[s]" secured to individuals under the ECHR). There is an exception to this general rule:

> However, not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case [on homosexual sodomy] concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of article 8.

Dudgeon, [1982] 4 Eur. Hum. Rts. Rep. at 165. The conclusion is that public authorities are given great discretion over questions of morality, except when the regulations impinge on an essential protected interest under the ECHR. In determining whether an interest is at the core of a given right, the nature of the right and the practice of the signatory states are considered. Tyrer v. United Kingdom, [1979-80] 2 Eur. Hum. Rts. Rep. 1, 10 (1978).

121. W. PRATT, *supra* note 23, at 87.

> The position, as I understand it, is that if there is any ambiguity in our statutes or uncertainty in our law, then these courts can look to the convention as an aid to clear up the ambiguity and uncertainty, seeking always to bring them into harmony with it. Furthermore, when Parliament is enacting a statute or the Secretary of State is framing rules, the courts will assume that they had regard to the provisions of the convention and intended to make the enactment accord with the convention, and will interpret them accordingly. But I would dispute altogether that the convention is part of our law.[122]

Thus, the supremacy of Parliament has led to problems concerning the incorporation of the ECHR in Britain—problems that arise because domestic law does not independently secure all ECHR rights.[123] At best, privacy serves as a canon of statutory construction;[124] this canon is insufficient to meet the requirements of article 8.

One argument for the domestic incorporation of article 8 of the ECHR is that the article represents a codification of customary international law. Customary international law,[125] through incorporation by the practice of sovereign nations, is a part of the domestic law of England. If a treaty represents the codification of pre-existing norms of international behavior, or if a treaty later comes to represent the current standard of customary international law, then rights under such a treaty would be justiciable in domestic British courts.[126] Thus, article 8 of the

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122. R. v. Chief Immigration Officer, Heathrow Airport, *ex parte* Bibi, [1976] 1 W.L.R. 979, 986 (C.A.).

The rights established under treaties are nonjusticiable in the courts of England, unless the treaty implicates the Crown's power of war and peace, or Parliament enables the language of the treaty. *See* Higgins, *supra* note 94, at 134-35, 137. The lack of domestic effect is related to the manner in which treaties are negotiated and ratified. *See id.* at 130. Traditionally, the Crown, and not Parliament, negotiated, concluded, and ratified treaties. *See id.* at 124. In modern times, the ratification of a treaty is principally an executive function, although treaties are "laid before" Parliament before being ratified. *Id.* Even today treaties are officially concluded on behalf of the "Crown" by the Secretary for Foreign and Commonwealth Affairs. *See id.* at 123. Since the Government exercises broad control over the legislative pronouncements of the House of Commons, it makes little sense to refuse to recognize the treaty domestically. The absence of any separation of powers in Britain makes formalism in the incorporation of treaties into domestic law redundant at best. *See generally* P. ATIYAH & R. SUMMERS, *supra* note 20, at 299-306 (describing Prime Minister's control over the House of Commons' legislative schedule).

123. Higgins, *supra* note 94, at 129; Ryan, *supra* note 56, at 8, col. 1.

124. *See supra* notes 84-92 and accompanying text.

125. A succinct definition of the sources of international law may be found in article 38 of the Statute of the International Court of Justice, opened for signing June 26, 1945, 59 Stat. 1055, T.S. 993, 3 Bevans 1179. However, no list of the sources of international law can be exhaustive. The content of customary international law is constantly evolving based on present state practice. *See* McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea,* 49 AM. J. INT'L L. 356, 357-58 (1955).

126. *See* Higgins, *supra* note 94, at 125; *see also* Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] 1 Q.B. 529 (C.A.).

ECHR, if a codification of customary international law, would be incorporated into English law.

There are two competing doctrines concerning the incorporation of international law into domestic British law: the incorporation theory and the transformation theory. The incorporation theory holds that as international law changes, British law changes with it, even if cases exist that apply the old rule.[127] This theory reflects a monist account of law—there is only one law that operates on all persons.[128]

The transformation theory holds that changes in international law must be incorporated either by parliamentary action or by the House of Lords. Under the transformation approach, Britain does not automatically adopt changes in customary international law. This theory reflects a dualist theory of law—municipal law and international law are totally separate systems. International law applies only to states, and thus cannot alter domestic law.[129] Under this theory, only if the domestic government ratifies article 8 of the ECHR will it apply internally relating to private persons.

In *Trendex Trading Corp. v. Central Bank of Nigeria,* the Court of Appeal adopted the incorporation theory.[130] Two judges opined that changes in international law were directly assimilated into British law, even if such changes conflicted with earlier cases decided by the Court of Appeal or House of Lords.[131] Lord Denning reasoned that because international law embodies no doctrine of case precedent, and because English law requires the domestic courts to apply international law, domestic law must reflect changes in international law, even if these changes are inconsistent with earlier domestic precedents.[132]

Given the incorporation theory of international law, it is theoretically possible that the ECHR (and article 8) could be incorporated into

127. *Trendtex,* [1977] 1 Q.B. at 553; *see also* Collier, *Is International Law Really Part of the Law of England?,* 38 INT'L & COMP. L.Q. 924, 931-34 (1989) (discussing adoption of incorporation theory in the 1970s); Duffy, *English Law & The European Convention on Human Rights,* 29 INT'L & COMP. L.Q. 585, 599-601 (1980) (discussing *Trendtex* and the incorporation approach).

128. For an excellent discussion on the currency of monist and dualist theories of law and the incorporation of international law in England, see Collier, *supra* note 127, at 924-26.

129. *See id.* at 925-26, 928-30.

130. [1977] 1 Q.B. 529 (C.A.). In adopting this theory, it largely ignored an earlier case, *R. v. Secretary of State for the Home Department, ex parte* Thakrar, [1974] 1 Q.B. 684, 701, which seemed to adopt the transformation theory: "As between these two schools of thought [incorporation and transformation], I now believe the doctrine of incorporation is correct." *Trendtex,* [1977] 1 Q.B. at 554.

131. *Trendtex,* [1977] 1 Q.B. at 554, 577 (Lord Denning and Shaw L.J. agreed that the incorporation theory was correct and that old cases interpreting international law could be overridden by subsequent developments in international law).

132. *Id.* at 554; Collier, *supra* note 127, at 932.

English law without parliamentary action by arguing that the ECHR reflects customary principles of international law. However, the requirements necessary for success in this endeavor are difficult to satisfy.[133] A plaintiff must show that respect for privacy has achieved strict observation in the practice of nation states.[134] Although some obligations—such as the prohibition on torture—create binding norms of behavior on states,[135] privacy has not yet reached this level of recognition and the domestic courts have not found the argument that the ECHR (either in whole or in part) embodies customary international law persuasive.[136]

A more successful argument for the recognition of article 8 by the British domestic courts is the principle of legitimate expectation.[137] The principle derives from an administrative law concept similar to the right to be heard under the due process clause of the United States Constitution and the private contract law notion of promissory estoppel.[138] Legitimate expectation covers rights not necessarily recognized at law, but rights that have a reasonable basis in the law.[139] Thus, there is no legal right to the vindication of the interest, but rather a willingness by courts to allow the vindication of reasonable expectations when those expectations are not inconsistent with statutory law.[140]

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133. On the difficulties in proving that the ECHR reflects customary international law, see Duffy, *supra* note 127, at 599-605 (discussing the incorporation of international law into British law and the requirements that must be satisfied before the ECHR is considered "customary international law").

134. The problem is that, "despite the international (and national) instruments, instances of human rights violations are all too frequent, thus weakening the argument based on state practice *stricto sensu*." *Id.* at 602.

135. *Id.* at 604-05.

136. *See infra* notes 144-50 and accompanying text.

137. *See* Schmidt v. Secretary of State for Home Affairs, [1969] 2 Ch. 149, 170 (C.A.); Attorney-General of Hong Kong v. Ng Yuen Shiu, [1983] 2 A.C. 629, 636 (P.C.). For a more recent discussion of these cases and of the principle of legitimate expectations, see Chundawadra v. Immigration Appeal Tribunal, 1988 Imm. A.R. 161, 169, 170.

138. For a discussion of "legitimate expectation" paralleling United States' notions of due process, see Salemi v. MacKellar (No. 2), [1977] 137 C.L.R. 396, 404-05, 422-23 (Austl.). Although, this is an Australian case, the British Court of Appeal cited the case in *Chundawadra*. *Chundawadra*, 1988 Imm. A.R. at 170. For the American formulation of the due process notion, see Board of Regents v. Roth, 408 U.S. 564, 577 (1972) ("He must have more than a unilateral expectation of it [the benefit]. He must, instead, have a legitimate claim of entitlement to it.") *See also* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). The analogy to promissory estoppel is helpful by way of loose analogy. Promissory estoppel operates primarily in the private sector rather than the public sector. At bottom, "legitimate expectation" is a doctrine of British administrative law meant to secure the reliance interests of those whose activities the government regulates in one way or another.

139. *See Chundawadra*, 1988 Imm. A.R. at 170 (quoting *Ng Yuen Shiu*, [1983] 2 App. Cas. at 636 (P.C.)).

140. *See id.* at 173. The doctrine is discretionary in its application. *See id.* at 170 (quoting *Ng Yuen Shiu*, [1983] 2 App. Cas. at 636 (P.C.)).

A legitimate expectation may arise from the actions or statements of a public authority.[141] In recent years, litigants have argued that based on current government policy, they have a "legitimate expectation"[142] of domestic protection of their article 8 rights. The results have been largely disappointing.

Chundawadra v. Immigration Appeal Tribunal[143] illustrates the argument that the principle of legitimate expectation sometimes requires the explicit incorporation of article 8 into domestic law. Chundawadra presented the novel argument that he had a "legitimate expectation" that the Home Secretary would take article 8 into account in assessing his immigration status.[144] The immigration statutes in question included a requirement that the person deciding the case consider the "public good,"[145] and Chundawadra argued that the "public good" included Britain's compliance with its international obligations.

After laboriously examining the present scope and history of legitimate expectation, the Court of Appeal unflinchingly rejected its application to rights arising under article 8 on the facts presented.[146] The court concluded that because Parliament had not incorporated article 8 into British domestic law, an individual could not maintain a legitimate expectation that public authorities considered article 8.

Not all the Lords were so quick to reject the legitimate expectation argument. Lord Slade's concurrence would have reserved the determination of the outcome if the Secretary of State had a clearly established policy of considering the ECHR in exercising his discretionary statutory authority.[147] He believed that it was possible for a legitimate expectation to arise when a governmental agency, exercising discretionary decision-

141. Id. at 171 (quoting Council of Civil Serv. Unions v. Minister for the Civil Serv., [1985] 1 App. Cas. 374, 401 (H.L.)).

142. *See infra* note 150 and accompanying text.

143. [1988] Imm. A.R. 161.

144. *Id.* at 169.

145. Immigration Act, 1971, ch. 77, § 3(5)(b).

146. The Court stated the following:

> Here there is an international treaty; the Government of the United Kingdom has acceded to it but it is not embodied in our domestic legislation, and indeed, whether it should be is the subject of a good deal of discussion. But it is not and because it is not it may not be looked at or prayed in aid in relation to matters in these courts save when a question of ambiguity in a statute or other legal text arises. That not being the case here, it may not be looked at all and no expectation that it should be followed can arise. . . . it is not appropriate to introduce the Convention into the law of England by the back door of legitimate expectation when the front door is firmly barred.

Chundawadra, [1988] Imm. A.R. at 174.

147. *Id.* at 175. *See, e.g.*, Somasundarum v. Entry Clearance Officer Colombo, [1990] Imm. A.R. 16, 20 ("[W]here criteria in immigration issues are clearly set out in English law, there is no power to refer to the Convention on Human Rights or any other Convention. However there may be consideration of Conventions in the exercise of an executive discretion.").

making power, had an established policy of considering article 8 in the decisionmaking process.

Although Lord Slade's observation appears promising, it does not significantly alter the status of the ECHR in British domestic courts: absent parliamentary reference to article 8, the article and privacy are only considered by the courts when they construe ambiguous statutes.[148] The courts have held that a government minister is not required to consider the treaty obligations of the United Kingdom when exercising discretionary authority.[149] Yet a decisionmaker could adopt a unilateral policy requiring the consideration of article 8—or any other provision of the ECHR. Under these circumstances, the doctrine of legitimate expectation would allow the consideration of article 8 by the domestic courts.[150] Legitimate expectation demonstrates one way to incorporate article 8. However, the incorporation of article 8 in this manner not only will be piecemeal, but also will be subject to parliamentary reversal by statute.

4. *The Interaction of the European Court and the British Domestic Courts: Attempts to Vindicate Article 8 Rights.* Because of the difficulties encountered in vindicating article 8 rights in the domestic courts of Britain, some British citizens have sought relief in the European Court of Human Rights by arguing a breach of the right of privacy protected by article 8. As a consequence, the European Court, domestic British courts, and Parliament have worked together to bring British law into compliance with article 8. Custody and correspondence matters present two types of cases that demonstrate not only that Britain is not fulfilling its obligations under article 8, but also that the European Court can be a

148. *See infra* notes 157-62 and accompanying text.

149. R. v. Chief Immigration Officer, Heathrow *ex parte* Bibi, [1976] 1 W.L.R. 976, 984 (C.A.).

150. A 1987 case authored by Judge Taylor lends support to the limited usefulness of the doctrine of legitimate expectation in the context of privacy. R. v. Secretary of State for the Home Dep't *ex parte* Ruddock, [1987] 1 W.L.R. 1482 (Q.B.) held that when a warrant for a telephone wiretap was issued, those subject to it could claim a legitimate expectation that the declared policies of the Home Secretary would be followed, unless a public change of such policies was announced. A member of a nuclear disarmament campaign who had her phone tapped claimed that the procedures followed to authorize the tap violated the Home Department's publicly adopted guidelines. *Id.* at 1484-88, 1493. While invoking article 8 and *Malone v. United Kingdom,* [1985] 7 Eur. Hum. Rts. Rep. 14 (1984) as background considerations, Ruddock's barrister founded his argument on the doctrine of legitimate expectation. *Id.* at 1493-97.

It was argued that the privacy interest under article 8 showed an injury sufficient to predicate the invocation of the legitimate expectation doctrine. *Id.* at 1493-94. *Ruddock* accepts in large part the approach suggested by Lord Slade in *Chundawadra. See Chundawadra,* 1988 Imm. A.R. at 175-76. The trend is to allow the indirect vindication of privacy interests through legitimate expectation when the facts will evidence the breach of an affirmative promise or policy by a government agency or officer. *Id.* at 1497.

necessary alternate forum for British citizens to pursue their autonomy claims.

Although British citizens may pursue their claims in the European Court, from a national perspective, this is hardly an ideal forum. The process allows a foreign tribunal to scrutinize the act of the British Parliament for violations of basic human rights.[151] British cultural values may be unduly discounted by allowing a foreign tribunal to judge the correct line between individual right and community prerogative in Britain. However, if the British government will not police itself, the European Court is authorized to assume this responsibility.

In response to European Court decisions, Parliament has reacted positively in some instances by bringing British law into compliance with article 8. Although courts are willing to enforce privacy claims when authorized by Parliament, the courts will not independently apply article 8. The social costs engendered by this system are high.

a. An example of the British legal system and the European Court interacting: custody cases and article 8. In cases involving parental rights, the ECHR and article 8 have been used to defend against government actions. These cases arise under the protection of privacy in the family life contained in article 8(1). Problems occur because of the inherent conflict between parental rights and the state's interest in protecting children from unfit or abusive parents.

In *R. v. United Kingdom,*[152] the European Court found that the discretion given to British local authorities to decide custody matters, coupled with the lack of effective judicial review, constituted a violation of article 8.[153] Because the hearings in question set in motion a process that could result in the total severance of all parental rights, the European Court found that article 8 required meaningful participation by custodial parents informed of the possible consequences of the local authority's action. The court also held that the local authority's decisions must be subject to timely judicial review.[154] Although article 8(2) authorized in-

151. P. ATIYAH & R. SUMMERS, *supra* note 20, at 269-71, 298-99.

152. [1988] 10 Eur. Hum. Rts. Rep. 74 (1987).

153. *Id.* at 46, 48-50 (the facts and legal analysis for *R. v. United Kingdom* are in part reported in W. v. United Kingdom, [1988] 10 Eur. Hum. Rts. Rep. 29 (1987); an explanatory note appears at 10 Eur. Hum. Rts. Rep. 76.).

154. *Id.* at 49-51, 80. A related, but different, interest was at issue in *Gaskin v. United Kingdom,* [1990] 12 Eur. Hum. Rts. Rep. 36, 38-43 (1989). *Gaskin* involved a request for documents related to Gaskin's childhood. Mr. Gaskin, as a child, had been in the custody of various social services departments following the death of his mother. *Id.* at 38. The Liverpool City Council refused to provide Mr. Gaskin with access to his files, which included statements provided on a confidential basis. *Id.* at 39. The European Court of Human Rights held that the City Council violated article 8 by refusing to provide Mr. Gaskin with his personal records. The Court concluded that personal

terference with parental rights of access, the court held that the right to be heard and participate in such hearings was essential to meeting the "necessity" prong of the article 8(2) exceptions clause.[155] Thus, the case was as much about procedural fairness as it was about parental rights.

In the wake of *R. v. United Kingdom,* Parliament reformed its custody laws to bring British law into compliance with article 8.[156] However, the courts remained unwilling to consider independently article 8. Despite the existence of clear precedents from the European Court, the British judiciary continues to apply unambiguous parliamentary enactments without regard to privacy interests; however, if Parliament itself takes article 8 into consideration when passing a statute, the courts will directly address the privacy claims.

A recent case, *In re K.D.*,[157] illustrates the judiciary's willinguess to address privacy claims when authorized to do so by Parliament. The case presented the issue of whether a clearly unfit mother could continue to exercise parental rights. The court denied the teenage mother access to her children until she severed contact between her boyfriend and the children.[158] In approaching this problem, the Law Lords often referred to the principles embodied in article 8 in an attempt to resolve the conflict between English law and the requirements of the ECHR.[159]

The reason the Lords considered article 8 was, in part, due to *R. v. United Kingdom*—the custody case in which Britain was found to have violated article 8.[160] The mother's barristers presented legislative history to the House of Lords that indicated parliamentary concerns similar to, if

files regarding "family life" that are maintained by the government could not be arbitrarily kept confidential. *Id.* at 50. *Gaskin* is one more example of the British government's failure to properly implement article 8, illustrating again the need for the domestic incorporation of article 8.

155. *Id.* at 50-53. *See supra* text accompanying note 108 for the text of the article 8(2) exceptions clause. *R. v. United Kingdom* was one of several cases contemporaneously decided by the European Court of Human Rights reviewing Britain's custody laws. [1988] 10 Eur. Hum. Rts. Rep. 1-122 (1987).

156. M. v. H., [1990] 1 App. Cas. 686, 722 (H.L.).

157. [1988] 1 App. Cas. 806 (H.L.).

158. *Id.* at 813-15 (speech of Lord Oliver, setting out facts of case).

159. "In my opinion there is no inconsistency of principle or application between the English rule and the Convention rule. The best person to bring up a child is the natural parent." *Id.* at 812. Lord Oliver seems to apply English law, but also considers the requirements imposed under article 8. For example, Lord Oliver stated that:

> Although this [the *R. v. United Kingdom* case from the European Court] is not binding upon your Lordships, the United Kingdom is, of course, a party to the Convention for the Protection of Human Rights and Fundamental Freedoms and it is urged that it is at least desirable that the domestic law of the United Kingdom should accord with the decisions of the European Court of Human Rights under the Convention.

Id. at 823. Lord Oliver then proceeds to square domestic law with Britain's article 8 obligations. *Id.* at 823-25.

160. In response to *R. v. United Kingdom,* Parliament modified British law to refleet the European Court's decision. *See infra* note 163; [1988] 10 Eur. Hum. Rts. Rep. 74 (1987).

not coextensive with, rights guaranteed under article 8. Although the Lords found that the procedures used in the custody hearing complied with both English law and the duties imposed by article 8,[161] reference to article 8 is, in itself, surprising. The House of Lords felt it necessary to address article 8 directly, even though it could not bind the Lords.

The congruence of article 8 and domestic law on the delineation of parental rights legitimated judicial reference to the article. Because British statutory and common law characterized parental access as a fundamental interest, the Law Lords were not preempting parliamentary decisionmaking by independently giving effect to a legal provision of the ECHR.[162] Thus, the ECHR may be relevant in modifying or applying domestic law—especially if the article 8 right in question is squarely addressed under statutory law.

Although some privacy rights are vindicated by the domestic British courts, *R. v. United Kingdom* is emblematic of the social cost created by the British system.[163] The system forced the parent to go through time consuming (and largely useless) appeals in the domestic courts before permitting recourse to the European Court. The British judiciary views this as a necessary evil. Judicial deference preserves the necessity of par-

161. *Id.* at 828-30.

162. In Re K.D., [1988] 1 App. Cas. at 811-13, 823-25.

163. *Id.* M. v. H. demonstrates the Lords' limited use of article 8 as a tool in statutory interpretation. In *M. v. H.*, a biological father demanded rights of parental access to a child born outside of wedlock. British custody law did not recognize a right of access for unmarried biological parents, whereas case law from the European Court suggested that article 8 required some legal process before such a denial of parental access could be permitted. *Id.* at 713-18. Under the terms of the custody statute, the British domestic courts could not review the merits of local custody officials' decisions. *Id.* at 718-21. Counsel for the father suggested that the previous British cases were wrongly decided, especially in light of recent decisions of the European Court interpreting article 8. *Id.* at 717-18.

The House of Lords, per Lord Brandon, squarely rejected the application of article 8. They held that article 8 cannot be applied if the result would be inconsistent with domestic statutory and case law. *Id.* at 721. The bench recognized that their decision was inconsistent with Britain's international obligations under the ECHR. Nevertheless, the Lords refused to modify domestic law to accommodate the reqnirements imposed under article 8: "Parliament has not, in the statutes relating to children in the care of local authorities . . . given full effect to certain provisions of the Convention, and has in that respect failed fully to comply with the international obligations of the United Kingdom as a party to it." *Id.* at 721-22. Lord Brandon's speech concluded by observing that Parliament amended British domestic law in anticipation of the *R. v. United Kingdom* decision by the European Court and that Parliament may do so again to avoid the possibility of being sanctioned in the event that the father took his case to the European Court. *Id.* at 722.

The gravamen of *In Re* K.D., [1988] 1 App. Cas. 806 (H.L.), is thus limited: Where domestic law is not clearly consistent with the ECHR, the Honse of Lords defers to Parliament to make whatever changes they deem necessary. While the efficiency of Parliament in addressing such problems when they arise makes this a workable system, one cannot help but question the fairness of this approaeh to individual litigants. *See generally* P. ATIYAH & R. SUMMERS, *supra* note 20, at 299-306 (describing the efficiency of parliamentary law reform).

liamentary reforms and creates an impetus for parliamentary action.[164] If legislative reform is more thorough and more effective than piecemeal judicial reform, then there is nothing problematic with this approach.[165] However, this argument presupposes that Parliament will vindicate minority autonomy interests. This premise is open to question: Why should a democratic, majoritarian body respond to the autonomy demands of distinct insular minorities? The question of Parliamentary sensitivity to unrepresented groups remains unanswered.

In Re K.D. and *R. v. United Kingdom* do not incorporate the ECHR as a whole. Only if a right already exists under domestic law may provisions of the ECHR and the case law interpreting it be considered by a British court applying domestic law. This mode of interpretation gives some provisions of the ECHR the status of a principle of construction—as tools of statutory interpretation. The Law Lords will harmonize domestic law and obligations under the ECHR, but they will not allow the ECHR to preempt conflicting domestic legal norms.

b. An example of article 8 precipitating unilateral reform: the correspondence cases. Like parental rights, the ability of individuals to communicate with each other without government surveillance is an important aspect of privacy that is necessary for a free society. British domestic courts also have refused to vindicate article 8 rights to privacy for personal correspondence absent express or implicit parliamentary authorization. However, the interaction between the European Court and the British legal system that occurred (and is still ongoing) in the custody cases is absent in the correspondence cases.

In *Boyle and Rice v. United Kingdom,*[166] the European Court held that the United Kingdom's practice of opening prisoners' mail addressed to their legal representatives constituted a breach of article 8.[167] The British government reformed its policies before the decision was handed down, more or less admitting that its prior practice was not in compliance with article 8. Thus, the European Court and article 8 can precipitate the complete reform of a given area of the law.

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164. *See infra* notes 257-67 and accompanying text.

165. Some say this is especially true in the United Kingdom, where for 400 years the system's reliance on parliamentary reform has arguably worked quite well. Interview with P.S. Atiyah in Durham, N.C. (March 22, 1989). *But cf.* Rule, *Group Says Press Freedom is Declining in Britain,* N.Y. Times, Oct. 19, 1990, § A, at 7, col. 1 ("The U.K. with no written constitution and no formal protection of freedom of expression has depended on a tradition of self-restraint by the law-making and law-enforcement authorities. The worrying trend toward tighter governmental control shows that these traditional safeguards are no longer working and, therefore, no longer adequate [quoting Dr. Frances D'Souza, director of Article 19, a London-based human rights group].").

166. 10 Eur. Hum. Rts. Rep. 425 (1988).

167. *Id.* at 441-42.

c. Parliamentary reaction to cases from the European Court is a poor means of securing compliance with article 8. The cases presented in this subsection illustrate the effect that the ECHR can have on British domestic law. Without pressure from the European Court, modification of the custody laws and prison rules might never have occurred. Although the domestic courts can cite inconsistencies with domestic law and the ECHR, they will not ascribe any legal consequences to this conflict absent a parliamentary command. Parliamentary action inevitably follows decisions from the European Court: But why should reform wait on a decision from the Strasbourg court? A review of the article 8 claims on the merits by the British domestic courts prior to review by the European Court makes sense. The British domestic courts are in the best position to interpret their own laws, provided the laws are consistent with article 8. Additionally, the financial expense and embarrassment of defending a suit before the European Court could be avoided if most claims were decided on the merits in the domestic courts. The present system works, insofar as it brings about reform, but it fails to the extent that it discourages the aggressive litigation of human and political rights.

D. *The Future of a Right of Privacy in Britain*

1. *The European Economic Community Adoption of Article 8 in the Commercial Context.* Article 8's future as a source of domestic privacy rights is not yet completely determined. Just as the Treaty of Rome (which established the EEC) assumed greater significance with the passage of time, so too could the ECHR. Consider Lord Denning's prophetic observation about the role of the Treaty of Rome in the early 1970s: "[W]hen we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back . . . ."[168] Very few people could have foreseen the complete commercial integration of Europe, which is almost a reality. Likewise, although the ECHR, a charter of basic human rights, does not yet have the ubiquitous presence of the Treaty of Rome, the day when the ECHR directly displaces domestic laws may one day arrive. Although it is far from a certainty, the ECHR and the institutions implementing it may also become a source of British domestic law in the same way as the Treaty of Rome.

A more limited implementation of the principles of the ECHR may already have arrived. The European Economic Community's Court of Justice uses the principles reflected in the ECHR, and article 8 in partic-

168. H.P. Bulmer Ltd. v. J. Bollinger, S.A., [1974] 1 Ch. 401, 418 (C.A.). The supranational character of the EEC has certainly accelerated this process. *See supra* note 97 and accompanying text.

ular, as a source of guidelines for permissible community action.[169] Fundamental rights form an integral part of the general principles of law that the Court of Justice protects.[170]

Thus, privacy interests are "fundamental rights" recognized and protected in commercial affairs by the EEC. The indirect importation of article 8 in the commercial context by the EEC presents a plausible stimulus to further parliamentary action. As the commercial integration of Europe continues, the ECHR may take on greater significance in the United Kingdom through EEC law (but only in the commercial context). Eventually, a dichotomy in the domestic rights of individuals may develop between their commercial lives—as governed by EEC law—and their private lives, as governed by British domestic law. Individuals conceivably could enjoy greater protection in the board room than in the bedroom. At that point, Parliament would have to consider the wisdom of continuing to refuse to incorporate the ECHR into domestic law.

2. *A Final Comment on Privacy in Great Britain.* Great Britain's international obligation under the ECHR to vindicate certain privacy interests cannot be dismissed or ignored. Some legally cognizable privacy right—particularly as against the government—is necessary for Great Britain to fulfill its obligations under the ECHR and the Universal Dec-

169. *See* National Panasonic Ltd. v. Commission of the European Communities, 1980 E. Comm. Ct. J. Rep. 2033, 2056-58, [1980] 3 Common Mkt. L.R. 169, 186-87. The formal adoption of the ECHR standards by the EEC would go far toward securing to British citizens in domestic courts. *See also* P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 479-486 (discussing the interplay between the EEC and the ECHR, and the potential for greater application of the principles of the ECHR by the EEC).

170. P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 13. It is relatively well established that the ECHR is a source of fundamental principles which are part of Community law: "Similarly, international treaties for the protection of human rights, on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law." Nold, Kohlen, and Baustoffgrosshandlung v. Commission of the European Communities, 1974 E. Comm. Ct. J. Rep. 491, 507, [1974] 2 Common Mkt. L.R. 338, 354.

Where a nexus exists between an area ceded to the Community's institutions under the Treaty of Rome and a protected "fundamental right" guaranteed by the ECHR, the Community will adjudicate the individual's claim using standards derived from the guarantees of the ECHR. In practical terms, this would suggest that the preemption of domestic law by the EEC would then lead to the *de facto* domestic application of the rights protected under ECHR as part of Community law, even in the United Kingdom. Community law supersedes inconsistent domestic law, and therefore could create a domestic claim to a privacy right similar to article 8. For an example of EEC law superseding domestic law (in Scotland), see Kaur v. Lord Advocate, 1980 Sess. Cas. 319, 336. For a discussion of the implications of the ECHR as a norm of EEC law, see P. VAN DIJK & G. VAN HOOF, *supra* note 49, at 479-86.

With regard to article 8 in particular, see the statement of the Advocate-General of the Court of Justice in State v. Watson, 1976 E. Comm. Ct. J. Rep. 1185, 1205, [1976] 2 Common Mkt. L.R. 552, 564. Article 8 was relevant in deciding whether an Italian immigration policy violated article 48 of the Treaty of Rome on the free movement of persons. *Id.* at 1192-93, 571-72.

laration of Human Rights.[171] Parliament's refusal to allow the domestic courts to entertain arguments premised on article 8 ensures the breach of this obligation. Apparently, securing the rights guaranteed under the ECHR is a lower priority for Parliament than maintaining its traditional prerogative of plenary legislative authority.

Perhaps Britain should continue to abjure individual justice in favor of the greater good of reliable Parliamentary reform.[172] But from an American perspective, this solution seems harsh—if not unjustifiable.[173] If a society truly believes in liberty, then it must support liberty for all. The institutional framework of government must provide distinct subgroups with the opportunity to be heard. Further, if the majority elects to vest rights (as Britain has in acceding to the ECHR), it should ensure that claims to those rights are vindicated regardless of the status of the person who makes the claim.

III. PRIVACY IN THE UNITED STATES—THE PRECARIOUS BALANCE OF INDIVIDUAL LIBERTY AND COMMUNITY PREFERENCES

The transformation of privacy and autonomy concerns into constitutionally cognizable rights is a relatively new occurrence in the United States. Over the last several decades, the courts have wrought a revolution in autonomy rights. The tension between individual claims to deference with regard to personal choices and community claims to regulate behavior for the good of all provides the central theme in the historical development of these rights. The competing traditions of liberty maximization and majoritarian democratic principle have shaped this dialectic.

Unlike Britain, the United States has adopted "privacy" as a useful legal construct. The right of privacy provides United States citizens both a substantive right and a procedural mechanism with which to challenge intrusive government regulations. However, the experience of the United States demonstrates that mere recognition of the right of privacy is insufficient to vindicate important autonomy interests. Procedural regularity and clarity in defining the privacy right are integral to its effective vindication by courts. The British system's approach to privacy, although seriously flawed, possesses both virtues: Privacy rights are clearly defined and the legal process of enforcing those rights is strictly circumscribed. However, certainty and procedural regularity should not outweigh the

171. *See* YOUNGER REPORT, *supra* note 15, at 212. The United Kingdom wins as often as it loses when brought before the European Court; however, its overall record is at best spotty. *See supra* note 123 and accompanying text.

172. *See infra* notes 266-67 and accompanying text.

173. P. ATIYAH & R. SUMMERS, *supra* note 20, at 229-39; *id.* at 420-26.

ultimate goal of vindicating liberty. Britain's reticence to adopt a right of privacy is based on the faulty assumption that a "right of privacy" cannot be predictably and uniformly applied by Courts.[174] The history of privacy law in the United States demonstrates that tradition could provide a solution to the problem of inclusive rights at the cost of certainty. Tradition could effectively delimit the scope of privacy rights without unduly limiting them.[175] An examination of the American experience with privacy law will amply demonstrate that the British concern for legal certainty need not be sacrificed in order to more effectively protect the liberties of the people.

The broad language of the Constitution ostensibly protects individual liberty from governmental encroachment. Concurrently, the Constitution contains a strong infusion of a democratic principle that implies majoritarian choicemaking. Forced to disentangle these contradictory constitutional norms, the Court has referred to community tradition as a means of validating claims of autonomy.[176] The use of tradition, however, risks a pernicious contamination of liberty by allowing majoritarian impulses to regulate unpopular behavior. Even though United States' privacy law utilizes a different institutional paradigm, it suffers from the same malady of the British regime—too much concern for majoritarian preferences, and not enough concern for the competing (majoritarian) value of individual liberty.

In the United States, privacy rights primarily are vindicated by the federal judiciary, rather than the Congress. Although the role of Congress in the development of privacy rights has been far less important than Parliament's role in Britain, Congress has enacted some laws that implicate "privacy" interests. In the 1960s and 1970s, technological advances in information collection and transmission greatly increased the potential for government invasion of individual privacy rights. In response, Congress enacted laws that created rights and duties with respect to the gathering, maintenance, and dissemination of information about

174. *See* Malone v. Metropolitan Police Commissioner, [1979] 1 Ch. 344, 372-73 (Ch.) (broadly worded rights, such as the right of privacy, cannot be predictably applied by courts and therefore should be avoided whenever possible).

175. Both the European Court, *see supra* notes 115-20 and accompanying text, and the EEC, *see supra* notes 168-70 and accompanying text, use tradition to delimit broadly worded rights. Thus, Britain's rejection of article 8 reflects, in part, a rejection of tradition as a meaningful delimiting principle to cabin judicial decisions. *See generally* P. ATIYAH & R. SUMMERS, supra note 20, at 423 (European Court, interpreting a text without standards, issues "mere opinions"). I suggest that tradition can provide meaningful guidance to courts, thus meeting the British passion for legal predictability and conformity.

176. *See* Michael H. v. Gerald D., 491 U.S. 110, 122 n.2 (1989) (Justice Scalia says that the existence of laws prohibiting an act excludes that act from protection under the due process clause; clause protects only "important traditional values").

individuals;[177] however, these laws did not focus on individual autonomy.[178] The task of vindicating autonomy claims remained with the federal judiciary.

In the 1920s, the Supreme Court began to develop a distinct privacy doctrine.[179] The Court considered deference to individual choicemaking a legitimate object for judicial protection. In the 1960s and 1970s, early precedents from the 1920s were used to expand the right of privacy into a shibboleth capable of overpowering state and federal laws. However, in the 1980s, the Court reexamined its use of the right of privacy and its earlier precedents.

Today privacy law in the United States is at a crossroads. The Court ultimately must choose between older cases that emphasize individual rights (placing the burden on the state to justify regulation of individual behavior) and new decisions that emphasize the community's interest in self-regulation through democratic institutions (placing the burden of proof on the individual to affirmatively establish why the government cannot act as it has). Although the existence of the right of privacy is not in immediate danger, the contemporary Court could severely restrict the scope of the right. The recent developments in United States privacy law demonstrate that the recognition of a right of privacy did not resolve all problems. How a "right" is implemented may be as important as whether the right is recognized in the first place.

A. *The Development of the Right of Privacy in the United States*

State legislatures or the federal Congress could have assumed primary responsibility for the development of U.S. privacy law. Instead, the federal judiciary, insulated from the rigors of partisan politics, has as-

177. These include: The Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966), amended by Pub. L. No. 93-502, 88 Stat. 1561 (1974), (codified at 5 U.S.C. § 552 (1988)) (requires government disclosure of information gathered and collected in certain matters); the Right to Financial Privacy Act, Pub. L. No. 95-630, 92 Stat. 3697 (1978) (codified at 12 U.S.C. §§ 3401-3422 (1988)) (limits access to an individual's financial records kept by financial institutions); the Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1128 (1974) (codified at 15 U.S.C. §§ 1681-1681t (1988)) (requires that consumer reporting agencies adopt procedures to ensure fairness and confidentiality); the Family Education and Privilege Act, Pub. L. 93-380, 88 Stat. 571 (1974) (codified at 20 U.S.C. § 1232g (1988)) (describing conditions for inspection of educational records); and the Privacy Act, Pub. L. No. 96-440, 94 Stat. 1883 (1980) (codified at 42 U.S.C. §§ 2000aa-2000aa12) (1988)) (defining scope of government's access to certain private materials in conducting a criminal investigation).

178. R. HIXSON, *supra* note 18, at 219. These interests, while important, do not go to the heart of what the author perceives as the right of privacy. Although they are cognizable under the aegis of "privacy," they do not guarantee individual autonomy and choice in matters of fundamental importance.

179. Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

sumed the task of protecting privacy rights from the directly elected majoritarian governmental branches. Invoking the tradition of liberty reflected in the Bill of Rights and fourteenth amendment, the Supreme Court required that government justify its actions when challenged by those adversely affected by state laws.

1. *The Use of the Tradition of Liberty in Early Privacy Case Law.* In the 1920s, the Supreme Court used the liberty clause of the fourteenth amendment to vindicate privacy interests as a legitimate expectation of the citizenry. *Meyer v. Nebraska*[180] and *Pierce v. Society of Sisters*[181] established that parents have a privacy interest in raising their children. Noting that the people of the United States believed that the education and upbringing of children was largely the responsibility of parents, the Court recognized and validated a community tradition of deference to parents in the rearing of their children.[182] Thus, the Court looked to the *tradition* of community deference to parents raising their children[183] rather than examining the traditional way in which children were

180. 262 U.S. 390, 399 (1923). *Meyer* involved a challenge to a state statute which prohibited the teaching of foreign languages in private or parochial schools. *Id.* at 396-99. In finding the statute in violation of the fourteenth amendment's protection of "liberty" interests, the Court recognized that due process included the right to make certain decisions of a personal nature. *Id.* The Court expressed this interest as a distinct claim of the citizenry against their state governments: "That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected." *Id.* at 401.

181. 268 U.S. 510, 534-35 (1925). *Pierce* struck down a state statute requiring all children to attend public schools, as opposed to private or parochial schools. *Id.* at 530-32. Oregon's interest in ensuring the education of its children could not preclude the ability of parents, or families, to exercise choice with respect to the upbringing of children:

> [W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 535-36. *Pierce*, like *Meyer*, arises as a "liberty" interest case under the fourteenth amendment. *Id.* at 533. The Court recognizes that "liberty" encompasses autonomy with respect to a given matter not specifically enunciated in the text of the Constitution. *Id.* at 535. This analytic framework paved the way for Griswold v. Connecticut, 381 U.S. 479 (1965), which held that implied rights exist within the broad language of the Constitution. *See id.* at 484. *Pierce* and *Meyer* help illustrate one of the quirks of U.S. privacy jurisprudence at the constitutional level: There is no express guarantee of privacy in the document.

182. *See Pierce*, 286 U.S. at 534. The use of tradition and community values in delimiting privacy/liberty interests has been rediscovered by the modern Court. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 191 (1986) ("[P]roscriptions against such conduct [homosexual sodomy] have ancient roots."); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (The sanctity of family is protected by the Constitution "precisely because the institution of the family is deeply rooted in this Nation's history and tradition.").

183. *See Meyer*, 262 U.S. at 399-400; *Pierce*, 268 U.S. at 535.

raised.[184] Drawing upon traditions of liberty enshrined in American society through the Constitution, the Supreme Court determined that an individual family's claim to be left alone trumped the state legislature's determination that the parents were raising their children improperly.[185] *Meyer* and *Pierce* accurately drew a line between the vindication of individual autonomy and the regulation of behavior by the community for the good of all.

2. Griswold: *Privacy as a General Constitutional Right.* *Meyer* and *Pierce* established a principle that exploded into new prominence in the 1960s. Building upon the intellectual foundation established by *Meyer* and *Pierce,* the Court greatly expanded the scope of the right of privacy. Toward this end, the Court characterized privacy as a penumbra created by express textual provisions of the Bill of Rights and the fourteenth amendment. Alternatively, some members of the Court cast the notion of privacy as a particular kind of liberty interest, implicitly, if not explicitly, protected under the ninth or fourteenth amendment.[186]

Griswold v. Connecticut, the landmark case of 1965, represented a major expansion of the constitutional protection of privacy. The case raised the question of whether a state could regulate the intimate details of the marital relationship.[187]

Griswold involved a challenge to a ban by Connecticut on the use of contraceptive devices and the dissemination of information or instruction on the use of such devices.[188] Even though the statute had not been strictly enforced,[189] it still stood as an impediment to effective family planning counseling and practice. Griswold, the Executive Director of the Planned Parenthood League of Connecticut, and a physician, provided counseling and instruction to married couples on various means of contraception.[190] The Court struck down the Connecticut statute, finding that it unduly interfered with the marital relationship. In deciding *Griswold,* the Court looked beyond the literal language of the Constitu-

184. *See Meyer,* 262 U.S. at 402; *Pierce,* 268 U.S. at 534.

185. *Meyer,* 262 U.S. at 402; *Pierce,* 268 U.S. at 535. Indeed, we know that insofar as the legislatures of Nebraska and Oregon had prohibited the parents' course of action, the relevant communities *did not* approve of how the parents were going about their parental duties.

186. Justice Douglas clearly accepted privacy as a free standing interest under the Constitution. *See* Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965) and his concurrence in Doe v. Bolton, 410 U.S. 179, 209-15 (1973) (Douglas, J., concurring). In contrast, some have argued that the *Roe v. Wade* Court could not, and did not, rely on privacy as a general constitutional right. *See* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 YALE L.J. 920, 931-33 (1973).

187. Griswold, 381 U.S. at 480-82.

188. Id. at 480.

189. Id. at 506 (White, J., concurring).

190. Id. at 480.

tion's text to ensure that states did not arbitrarily infringe upon basic autonomy interests.[191]

Regardless of the precise source of the right of privacy,[192] *Griswold* established that individuals could make claims of privilege against some state regulations. In *Griswold,* the promise of *Meyer* and *Pierce* came to fruition with a full-fledged constitutional privacy doctrine. Although the right of privacy clearly does not always override state regulations, courts began to listen to arguments based on claims of autonomy.[193]

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191. By utilizing the ninth amendment to predicate a principle of deference toward individual autonomy, *id.* at 486-99, Justice Goldberg's concurring opinion resurrected the amendment in modern Constitutional law: "[T]he Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." *Id.* at 492. He noted that "the concept of liberty protects those persoual rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. *Id.*

192. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); H. POLLACK & A. SMITH, CIVIL LIBERTIES AND CIVIL RIGHTS IN THE UNITED STATES 21-25 (1978); C. PRITCHETT, CONSTITUTIONAL CIVIL LIBERTIES 1-15 (1984).

The *Slaughter House Cases* held that the "privileges and immunities" language of the fourteenth amendment did not constitute a new limitation on the state governments' freedom of action. The Slaughter House Cases, 83 U.S. at 78. The opinion, reviewed in light of the intervening 116 years, is more than a little ironic. The liberty clause of the fourteenth amendment was found to do what the textually more congenial "privileges and immunities" clause could not—incorporate the rights and liberties of the Bill of Rights. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (only those rights enumerated in the Bill of Rights which "have been found to be implicit in the concept of ordered liberty, and thns, through the Fourteenth Amendment, become valid as against the states."); Twining v. New Jersey, 211 U.S. 78, 99-101 (1908) (Court considers possibility that due process clause might incorporate some of the Bill of Rights as against the states).

193. The Supreme Court continued to build upon the foundation enunciated in *Griswold*. *Katz v. United States,* a fourth amendment case, protected the expectation of privacy in electronic communications. 389 U.S. 347, 361 (1967). The case involved the tapping of public telephones by the government in an interstate gambling investigation which led to criminal proseeutions. *Katz* was seemingly a clean victory for advocates of a right of privacy under the fourth amendment. However, Justice Stewart's majority opinion expressly deelined to adopt a general right of privacy. "[T]he Fourth amendment cannot be translated into a general constitutional 'right to privacy.' " *Id.* at 350. This is not to say that the fourth amendment does not protect privacy interests. Rather, Justice Stewart believed that the fourth amendment is not limited to privacy interests, nor is it a proxy for a general right to privacy.

However, some members of the Court perceived *Katz* as going too far in the direction of establishing a fourth amendment right of privacy. In the words of Jnstice Black, "the Court began referring incessantly to the Fourth Amendment not so much as a law against *unreasonable* searches and seizures as one to protect an individual's privacy." *Id.* at 373. Given the tenor of Justice Stewart's majority opinion, Justice Black's concern seems overstated. In *Katz,* Jnstice Black reacted against the increasing willingness displayed by the Court to recognize a general privacy right under the Constitution, related to, but distinct from, the strict textual provisions of the document. *See id.* at 374.

Katz was just one of several cases expanding and clarifying the privacy interests protected by individual amendments. *Stanley v. Georgia,* 394 U.S. 557 (1969), used the first amendment to create a near-absolute right to privacy in the home where free speech was implicated. In the wake of *Stanley,* one has the right of privacy under the first amendment to peruse obscene materials in the home, but the state may prescribe the means of obtaining such material commercially. *Id.* at 567.

B. *Autonomy Rights Are Correctly Vindicated Through the Modern Right of Privacy*

The development of the right of privacy in constitutional adjudication reflects the Court's frank recognition that the Constitution guarantees individuals protection from undue governmental regulation of private life, despite the community's concern for its own security and well-being. Yet the Court realized that some liberty interests are too destructive to the community's existence to be countenanced. Thus, in the privacy cases,[194] the Court utilized the tradition of liberty in the United States in order to limit the right of privacy and affirm the community's right to regulate for the good of all its members.

In the abortion cases,[195] the Court applied the test of community deference to individual liberty suggested by *Meyer* and *Pierce.* These cases reflect a balancing of interests: the individual's right to make reproductive choices verses the community's interest in the protection of potential life. However, the Court may be shifting away from *Meyer, Pierce,* and *Griswold.* The most recent privacy cases reflect a disturbing trend toward the vindication of majoritarian moral choices, rather than the tradition of liberty set forth in *Meyer* and *Pierce.* In cases involving sodomy and parental rights, the Court has utilized a new and potentially dangerous test—the tradition of community approval of a particular lifestyle.[196] This new test reflects an infusion of majoritarian choicemaking into what should be an analysis of the scope of individual autonomy.

1. *The Abortion Decision's Test: Community Traditions of Autonomy in Moral Decisionmaking. Roe v. Wade,* the controversial decision that granted women a constitutional right to abortion, reaffirmed the constitutional right of privacy established in *Griswold.*[197] *Roe* also set forth a balancing test to resolve conflicts between individual privacy and legitimate state interests.[198] The Court held that only a "compelling

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The right of privacy enunciated in *Stanley* applies only in the home itself. In United States v. Reidel, 402 U.S. 351 (1971), the Court held that *Stanley* did not extend to the right to use the mails to obtain obscene materials. *Id.* at 355-56 ("To extrapolate from Stanley's right to have and peruse obscene material in the privacy of his own home a First Amendment right in Reidel to sell it to him [*Stanley*] would effectively scuttle *Roth* [v. United States, 354 U.S. 476 (1957)], . . . and we decline to do so now.").

194. *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973).

195. Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Roe v. Wade, 410 U.S. 113 (1973).

196. *See infra* notes 206-21 and accompanying text.

197. 410 U.S. 113, 152-54 (1973).

198. *See id.* at 154. The balancing test enunciated in *Roe,* and used in later abortion cases, shows that even where fundamental rights are implicated, the state may prevail in delimiting behav-

state interest" could justify an invasion of the "right of privacy."[199] Although the Court referred to other constitutional amendments to support its holding,[200] the majority secured the privacy interest from state intervention primarily through the fourteenth amendment's liberty provision in connection with the ninth amendment privacy interest.[201]

Thus, a majority of the Court finally accepted a specific formulation of a general right of privacy. *Roe* completed the process that began in the 1920s with *Meyer* and *Pierce*. The federal Constitution created limits upon both the federal and state governments; governmental power was cabined by the vesting of residual power in the individual citizens. According to the Court, invasive state regulations could not unduly burden legitimate autonomy interests.

Roe's approach to privacy survives today. Although *Webster v. Reproductive Health Services* directly challenged the *Roe* decision, it did not repudiate the privacy interest recognized in *Roe*.[202] *Webster* involved a Missouri law seemingly inconsistent with the Supreme Court's opinion in *Roe*.[203] Although the Supreme Court sustained several key portions of the law,[204] the Court expressly declined to overrule *Roe*.[205] Therefore, *Webster* leaves intact the fundamental interest/compelling state interest balancing test for analyzing privacy claims, but recognizes a greater state interest in the fetus than the Court accorded in *Roe*.

Abortion provides an example of the dilemma introduced by "undesirable" conduct that arguably falls within the domain of individual liberty. Abortion generally is not seen as a desirable experience, but rather as an unfortunate event to be avoided. When a court inquires as to whether the state should regulate abortion the outcome often hinges on the manner in which the court poses the question. If the court asks, "Does the community advocate abortion as a valuable activity?," it will arrive at negative response. In contrast, if the Court asks whether the

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ior if its "compelling interest" is sufficiently weighty. *See* Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3054-57 (1989). Privacy is not the enunciation of an absolute interest, but rather of a cognizable interest which must be considered before the state intrudes into individual autonomy. Bowers v. Hardwick, 478 U.S. 186 (1986), makes plain that some interests potentially protected under the right of privacy fall prey to state intrusion.

199. *Roe*, 410 U.S. at 155.

200. *See id.* at 152 (referring to the first, fourth and fifth amendments and the "penumbras of the Bills of Rights").

201. *Id.* at 153.

202. 109 S. Ct. 3040, 3058 (1989) (court says existence of the abortion right not at issue and that *Roe* is "undisturbed").

203. *Webster*, 109 S. Ct. at 3047-48.

204. *Id.* at 3052-53. The Court upheld Missouri's decision not to commit any public funding to abortion—whether through direct subsidy or indirectly through the use of state subsidized facilities or services—by recognizing that the district court should not have passed on an issue that was moot.

205. *Id.* at 3058.

community approves of the state encroaching upon individual privacy by limiting access to abortion, a different answer is both possible and likely. If one acknowledges that the United States people—and their Constitution—adhere to a basic tradition of individual liberty, then the court must choose the second formulation of the question. Of course, asking the second question *does not* mean that an individual's privacy claim will prevail—it merely requires the state to justify its intrusion into the individual's private life.

2. *The Competing Test: Requiring Community Sanction for a Given Activity.* Contrary to the early trend to protect individual choice in sexual and reproductive matters,[206] the court in *Bowers v. Hardwick* held that the right of privacy under the liberty clause of the fourteenth amendment did not protect individuals who wished to engage in private homosexual sodomy.[207] The Court seemed to require that the activity in question have community sanction before it would be accorded protection as a privacy interest. The Court noted that because "24 states and the District of Columbia" had laws prohibiting sodomy, such conduct could not meet the test of being "deeply rooted in this Nation's history and tradition."[208] This test suggests that an individual must legitimate a claim of privacy by demonstrating the community's acceptance of a particular behavior, rather than demonstrating the community's tolerance of individual choice in the area.[209] When courts vindicate liberty interests, neither the community nor the court necessarily sanctions a particular behavior. Rather, decisions recognizing an individual's right of privacy merely demonstrate the community's willingness to allow individuals to make their own moral decisions.

A more recent case, *Michael H. v. Gerald D.*,[210] further illustrates this trend. In *Michael H.*, a natural father established a relationship with his adulterously conceived child. The biological mother and her husband subsequently sought exclusive parental rights to the child[211]—an outcome permitted by California law which conclusively presumed that children born to a married couple were the offspring of the couple.[212] The plurality opinion of the Court, written by Justice Scalia, found that

206. Specifically, *Meyer, Pierce, Griswold, Roe,* and *Webster*. *See supra* notes 180-86 and accompanying text.

207. 478 U.S. 186, 190-91 (1986).

208. *Id.* at 193-94.

209. Interestingly, Justice Powell, in concurring with the opinion, noted that the Georgia law had not been enforced "for several decades." *Id.* at 198 n.2. If this was so, one might ask whether the community tradition was accurately reflected in the statute.

210. 491 U.S. 110 (1989).

211. *Id.* at 113-17.

212. *Id.* at 117-19.

Michael H. had no constitutionally protected privacy interest in his relationship with the child.[213] Justice Scalia admonished that "[o]ur cases reflect 'continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society.' "[214] He later noted that "our traditions have protected the marital family."[215] The Court, finding no accepted liberty interest, did not even engage in the fundamental interest/compelling state interest balancing. Justice Scalia explained: "In an attempt to limit and guide interpretation of the [due process] Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' . . . but also that it be an interest traditionally protected by our society"[216] Justice Scalia argued that tradition always has favored the nuclear marital family and that "adulterous fathers" have never had protected parental rights.

In footnote 6 of his plurality opinion, Justice Scalia opined that "[w]e refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[217] This formulation of the question ensures that the community's moral preferences, rather than a tradition of deference to individual decisionmaking, will control the adjudication of privacy claims.[218] From the standpoint of the protection of privacy, a better way to use tradition in *Michael H.* would have been to ask whether the community has recognized the interest of both the natural parent and the child in maintaining a mutual relationship—regardless of whether the parental relationship is coextensive with a marital relationship. This approach emphasizes liberty, but not at the expense of community values.[219] The difference between asking the individual liberty question and the Court's approach in *Michael H.* appears in the zone of protected autonomy that emerges from the answer. In *Michael H.*, the Court extended toleration only as far as contemporary morals sanction a particular behavior. Such liberty is no

213. *Id.* at 130.

214. *Id.* at 122-23.

215. *Id.* at 124 (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965)).

216. *Id.* at 122.

217. *Id.* at 127-28 n.6.

218. A tradition of liberty can always be broken down into discrete acts, any number of which the community may disapprove. The question then becomes whether broader traditions should always be ignored in favor of narrower traditions related to a discrete type of behavior.

219. I do not mean to suggest that the result in *Michael H.* would be different under the alternative analysis I suggest. *Michael H.* is a difficult case, even if one broadly applies community traditions of liberty.

liberty—it is merely the freedom to conform.[220] Freedom entails the right to make bad choices as well as good choices.[221]

As the Supreme Court's most recent pronouncement on privacy, *Michael H.* appears to represent a reshaping of the right. In particular, footnote 6 of the plurality opinion seems to depart from earlier privacy decisions.[222] Justice Scalia's requirement that the most specific level of a relevant tradition control the privacy analysis does not square with the holdings of *Meyer* and *Pierce.* The most specific level at which a tradition could be identified in *Meyer* and *Pierce* would have been the particular type of instruction at issue. History is replete with examples of state regulation of school curricula and mandatory attendance at accredited institutions.[223] In *Meyer* and *Pierce,* the Court looked to a broader tradition—to the tradition of deference to parents in raising their children. Thus *Michael H.* (and particularly footnote 6) represents a marked departure from the Court's earlier approach to privacy rights.[224] Indeed, *Michael H.* attempts to complete the shift away from *Meyer, Pierce,* and *Griswold* that began with *Bowers.*[225]

3. *The Correct Use of Tradition Is Essential to Vindicating Legitimate Autonomy Interests.* *Bowers* and *Michael H.* demonstrate the importance of asking the relevant question if the Court wishes to use

220. *See Michael H.,* 491 U.S. at 141 (Brennan, J., dissenting) (fourteenth amendment and the nature of our society require toleration of "someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncracies").

221. The autonomy/individual choice approach to tradition in validating privacy claims would not be a meaningless test. Some activities are seen as so destructive, and so damaging to the community's sense of well being as to not allow any room for individual autonomy—consensual human sacrifice or the use of illicit drugs provide good examples.

222. *Michael H.,* 491 U.S. at 127-28 n.6 (1989).

223. More specifically, Nebraska, the setting for *Meyer,* had a community tradition of discouraging the teaching of German, while Oregon, where *Pierce* arose, had a tradition of requiring all minor children to attend secular public schools.

224. *Michael H.,* 491 U.S. at 132 (O'Connor, J., concurring) (refused to adopt the single mode of historical analysis outlined in footnote 6, and noted its inconsistency with some Supreme Court precedents protecting rights at levels of generality above the "most specific level" available).

225. *See supra* notes 208-19 and accompanying text. In Bowers v. Hardwick, 478 U.S. 186 (1986), the majority phrased the question as follows:

> The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.

Id. at 190. Justice Blackmun would have none of it. Dissenting, he pointed out that:

> This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by Civilized men," namely, "the right to be let alone." (citations omitted).

Id. at 199 (Blackmun, J., dissenting).

community values as a touchstone for protecting liberty interests. *Bowers* asked whether the community historically approved of behavior "X." A different question is whether the community traditionally has classed "X" as a decision left to the individual. The Court in *Meyer* and *Pierce* used this second question to develop a balancing test.

In the case of homosexual sodomy, Americans generally do not advocate either the act or the lifestyle of those who engage in it.[226] But the answer to the question of whether most Americans would want the state to regulate sexual behavior in the bedrooms of America is far more ambiguous.[227] The historic lack of enforcement of the sodomy statutes suggests that the states have higher priorities than eliminating sodomy.[228] Yet the existence of laws criminalizing sodomy must in some way reflect community sentiments. The community may believe that without an officially stated disapprobation of an undesirable behavior, the behavior may become commonplace.[229] Hence, the statement of disapproval operates to create a tendency toward the community's idea of virtue. The prohibition is not intended to coerce virtue: Some laws are meant to be positive commands binding upon all, whereas some are mere precatory statements of a community's moral norms.

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226. The hesitance to repeal state sodomy laws, and the negative stereotypes of homosexuals in the United States, suggest that the community does not approve of, much less advocate, sodomy. *See Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity,* 40 U. MIAMI L. REV. 521, 523-28 (1986); R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 249-50 (1990).

227. For example, the New York Court of Appeals struck down New York's criminal sodomy statute in People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S. 947 (1980). The court noted the privacy interest manifested as individual decision making:

> At the outset it should be noted that the right addressed in the present context is not, as a literal reading of the phrase might suggest, the right to maintain secrecy with respect to one's affairs or personal behavior; rather, it is a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint—what we referred to . . . "as freedom of conduct."

Id. at 485, 415 N.E.2d at 939, 434 N.Y.S. at 949. Interestingly, the Court made liberal reference to Brandeis' dissent in *Olmstead*. *Id.* at 485-88, 415 N.E.2d at 939-40, 434 N.Y.S. at 949-51. The decision could be read as resting on tradition, to the extent that personal autonomy and liberty are part of the American tradition. *Id.* at 485-91, 415 N.E.2d at 939-42, 434 N.Y.S.2d 949-53. The Court also concludes that behavior that does not injure anyone else should be unregulated. *Id.* at 490, 415 N.E.2d at 941-42, 434 N.Y.S.2d at 952.

228. In *Poe v. Ullman,* the Supreme Court refused to reach the merits on a challenge to Connecticut's ban on the distribution, sale, or provision of birth control because the law had fallen into desuetude. 367 U.S. 497, 507 (1961) ("During the more than three-quarters of a century since its enactment, a prosecution for its violation seems never to have been initiated."). *Poe* illustrates how the existence of a criminal statute does not establish that a community is resolved to prohibit a particular act.

229. The maxim that "hypocrisy is the tribute life owes to virtue" is apropos.

A law may or may not reflect community tradition regarding a particular matter.[230] Some legal thinkers suggest that legislative inaction reflects the continuing approbation of the community in regulating private behavior.[231] Yet, for a variety of reasons, such as a desire to avoid the taint of any association with a controversial question, a legislature may fail to repeal precatory laws even though this failure to act causes a result that does not represent general community thought on a given matter.[232] Courts can and should look to the existence of laws prohibiting conduct in their attempt to divine tradition. However, even if a law prohibiting a certain course of action exists, the courts must also look to whether the history of the enforcement of the law confirms its use as the dispositive source of the community's traditions.

Tradition can legitimize privacy claims—essentially claims of autonomy—against the community, even if the community disapproves of the protected behavior. Because the right of privacy lacks a clear constitutional mandate,[233] the use of a tradition of individual liberty as a legitimating touchstone is a desirable, persuasive, and perhaps, necessary approach. There is a danger, however, that the Court will ask the wrong question when it seeks to delineate the contours of the American community's "tradition" on a given matter.[234] Thus, how the Court asks the question prefigures the ultimate resolution.

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230. For instance, many states prohibit all forms of gambling on sports events. Nevertheless, small wagers on collegiate and professional athletics have been, and remain, a strongly enshrined American tradition. USA Today does not publish odds on such events soley for the edification of game theorists.

231. R. BORK, *supra* note 226, at 248-50, 352-53.

232. American legislatures are highly sensitive as to how their actions are perceived. Historically, they are not eager to take positions opposed by vocal minorities, even when the general population holds an opinion that is contrary to that of the minority group. *See generally* P. ATIYAH AND R. SUMMERS, *supra* note 20, at 314 ("The passage of bills in a state legislature often says very little about the 'will' of the legislature, and still less about the will of the electorate.").

233. Nowhere in the Constitution is "privacy" expressly mentioned. Professor John Hart Ely clearly believed that *Roe* could not be justified on legal principles, since it lacked a firm constitutional touchstone: "At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking." Ely, *supra* note 186, at 936-37. Ely is not unsympathetic to the result in *Roe,* but believes that the Court lacked the competence to interfere with the states' legislative pronouncements on this matter without providing a sounder foundation. *Id.* at 926-27, 931-33.

234. Another important consideration is what the relevant "community" should be for constitutional privacy analysis. The tenth amendment possibly suggests a state-by-state analysis of tradition to determine whether the relevant state had a history of deference to choice on a given matter. However, this would result in 51 different privacy precedents, each to be protected by the federal judiciary, a clearly untenable position. *But cf.* Miller v. California, 413 U.S. 15, 24 (1973) (Court allows "contemporary community standards" to control obscenity trials; the Court apparently views localities and/or states as permissible governmental units from which to define obscenity). *Miller* involved the exclusion of materials from first amendment protection. However, in Reynolds v.

A separate but related problem arises because of the changing nature of tradition. By definition, tradition is determined by reference to the prior practices of the relevant community group. Conceivably, the use of the tradition of liberty as an exclusive test might result in shifting privacy rights that would undermine the persuasiveness of precedent and that would erode the legal force of court decisions. This problem is easily surmounted: Privacy rights should move in only one direction—toward greater levels of protection. Thus, over time, the court should "ratchet up" the number of liberty interests recognized, but should not "ratchet down" the sphere of protected personal autonomy, even if the contemporary community's values are shifting. The application of the ratchet approach requires a reviewing court to resolve two issues: is the interest claimed one of the class already recognized, and if not, should it be recognized as a legitimate autonomy claim. If the Court determines that conduct falls within a tradition of community deference to individual liberty, then it will strike down attempts at reregulation, thus precluding a future change in tradition, absent constitutional amendment. Alternatively, the Court should examine traditions of community deference as a primary test for validating yet unrecognized claims of privacy. If such a tradition is not present—as is the case with illicit drugs—the Court would then consider whether the behavior was so fundamentally aimexed to notions of "liberty" that it commands constitutional protection under the language of the fourteenth amendment.[235] In applying the second step, the court should look to whether the states have traditionally regulated the conduct and also to whether such regulations have been consistently enforced. The use of this two step process would resolve the problems inherent in the use of tradition as a constitutional test.

The court's renewed use of tradition as a means of determining privacy claims could be a welcome development. Since the first privacy cases, American privacy law has lacked both procedural regularity and substantive consistency. Tradition offers a rational means of cabining the scope of the right; procedural regularity (predictable application of clearly articulated tests) is a matter of self-discipline on the part of the

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United States, 98 U.S. 145 (1879), the Court refused to respect a local tradition in the Utah territory—bigamy. If *Meyer* and *Pierce* were correctly decided, the Court must look to a national—not local—tradition in setting the minimal parameters of "liberty." The relevant "community" must be national in scope, at least insofar as is needed to secure the minimal protection of liberty interests. The notion of "liberty" in the fourteenth amendment logically cannot be a state-specific concept.

235. Essentially, this is the how the test works under current precedents. A citizen may attempt to raise a privacy claim by showing that the interest has the imprimatur of "tradition," *or* by showing that the interest is "implicit in the concept of ordered liberty." The former test is the approach used in Moore v. City of East Cleveland, 431 U.S. 494, 503-06 (1977), and the latter one of Palko v. Connecticut, 302 U.S. 319, 325 (1937).

courts. The measure of liberty afforded United States citizens by the right of privacy is and remains a function of both substance and process.

IV. PRIVACY: INDIVIDUAL AUTONOMY V. COMMUNITY SELF-REGULATION

The British judiciary refuses to recognize a general right of privacy, either under domestic law or under article 8 of the ECHR.[236] Conversely, American courts view privacy rights as fundamental and justiciable interests. Both nations have histories that emphasize individual right and liberty. The apparent difference in means (if not ends) can be explained by realizing that the British and American courts have developed into functionally different institutions.[237] Neither of these institutions, however, adequately and predictably vindicate the autonomy interests of their citizens. In Britain, minority groups are denied a domestic forum in which to challenge laws that unduly interfere with their private lives. In the United States, citizens who claim the right of privacy have little certainty with regard to the scope of the right or the standards a court will use to evaluate their claim.

A. *A Right of Privacy Is Necessary in the United States' Legal System*

The use of tradition as a constitutional touchstone transforms the individual claim of a right of privacy into a liberty interest bestowed on the individual by the community. Viewed in this way, the right of privacy is not a "right to be ungoverned," but rather a right to be partially "self-governing" in matters related to the core of who we are and what we aspire to be and do.

Some British commentators view American privacy law as an anarchistic passion to be ungoverned somehow not yet bred out of the nation.[238] This British view may be partially correct. A privacy right rests upon an individualistic concept of society, sometimes manifested in the unfortunate extreme "each man for himself, and the devil take the hindmost."[239] The United States tradition emphasizes the benefits of self-government—the right and the responsibility of the individual to think for himself in order to determine the best life course. Our society recognizes that belief in a *summum bonum,* a best life, does not mean that any one person or group of persons has been blessed with perfect knowledge of it. The free exercise of reason, coupled with the trial and error process

236. *See supra* notes 21-34, 172-73 and accompanying text.
237. *See* P. ATIYAH & R. SUMMERS, *supra* note 20, at 35-41.
238. YOUNGER REPORT, *supra* note 15, at 19.
239. R. HIXSON, *supra* note 18, at xv.

of experience, may be the only way for the individual and the community to work toward happiness.[240] Privacy rights play a key role in this process because they protect the process of self-definition. Self-definition through the exercise of personal autonomy is a gradual process. In making moral choices and in living with the consequences, reason and experience move the individual toward greater self-knowledge and understanding.[241]

Recognizing the utility of privacy as an end does not provide a means for securing personal autonomy. For privacy rights to be effective, their scope and application must allow individuals to recognize the activities that are within the aegis of the right. Predictability is lost when the parameters of a right are ill-defined.

Although privacy adjudication presently lacks needed predictability, there are several avenues by which the scope of the privacy right can be delineated. Justice Scalia's approach seeks to define privacy by arbitrarily limiting the scope of the privacy right.[242] Conversely, the British protect some privacy interests, but only on an ad hoc basis. Both of these approaches have their failings. A piecemeal approach to the vindication of privacy interests is insufficient because many issues will remain unresolved.[243] Arbitrarily limiting the objects of a broadly crafted privacy right seriously undervalues the benefits of personal autonomy, ceding residual power not with the people, but with the government. There is an alternative to choosing between either a narrow but specific right of privacy or a vague but inclusive privacy right. A return to the American tradition of liberty, evidenced in *Meyer*,[244] *Pierce*,[245] and *Moore v. City of*

240. For an example of this kind of natural law reasoning, the writings of Thomas Jefferson are illustrative:

> Man was destined for society. His morality therefore was to be formed to this object. He was endowed with a sense of right and wrong merely relative to this. . . . [The moral sense] may be strengthened by exercise, as may any limb of the body. . . . Fix reason firmly in her seat, and call to her tribunal every fact, every opinion.

Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), *reprinted in* THE PORTABLE THOMAS JEFFERSON 423, 424-25 (M. Peterson ed. 1985).

241. "The unexamined life is no life for a human being." PLATO, *Apology*, in 1 DIALOGUES OF PLATO *38a (B. Jowett Trans. 1953). An Enlightenment notion of pre-social rights seems to survive in the United States. *See* R. HIXSON, *supra* note 18, at 97-102. Americans believe that they have a right to retain interests as against both the government and *the community*. The attitude of Americans toward their legislatures exemplifies this belief. Americans do not want the government to become a sort of collective *parens patriae*. *See* P. ATIYAH & R. SUMMERS, *supra* note 20, at 270-71; *see also* 311-15.

242. This is precisely what Justice Scalia attempts to do in his opinion in Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989).

243. Ironically, although not specifically mentioning the United States, the British point out this defect in the YOUNGER REPORT, *supra* note 15, at 197-98.

244. 262 U.S. 390 (1923).

245. 268 U.S. 510 (1925).

East Cleveland,[246] but not in *Bowers*[247] or *Michael H.,*[248] could provide the necessary framework through which to vindicate privacy rights consistently and predictably.[249] The relevant tradition derives from the Enlightenment tradition that imbued the founding of the Republic—a tradition of intellectual independence and personal autonomy, rather than one of direct government supervision of the minutiae of one's private life.

Because notions of privacy are related to notions of autonomy, a legally cognizable privacy interest against the government is unexceptional. Americans' predisposition to rely on rights against the government may also be explained, in part, by the pluralistic nature of the populace. A nation of immigrants, the United States welcomed settlers from different nations, races, and religions. As a result, legislatures can be mistrusted, particularly by minorities who feel either unrepresented or underrepresented by a particular body.[250] Minority interests rely on the courts to vindicate the majoritarian promises of liberty, endangered by majoritarian legislation. A small minority probably cannot convince a legislature to protect its interests. Thus minorities view the countermajoritarian courts, which at the federal level do not specifically answer to any interest group, as the best potential means of securing relief.

I advocate a privacy law that focuses on tradition, but also on substantial reliance on strict observation of process.[251] The right of privacy represents a coruucopia of distinct interests, organized under the rubric of "privacy."[252] Whether a particular interest is or is not accorded protected status is not as important as the existence of the privacy right itself. Ultimately the point is not that "X" is or is not a privacy right, but rather that the American courts are prepared to examine the question on its merits.[253] From this perspective *Roe's* process approach best

246. 431 U.S. 494 (1977).

247. 478 U.S. 186 (1986).

248. 491 U.S. 110 (1989).

249. I am not suggesting that tradition be used as a means of imposing a narrow set of values. Rather, if tradition is used to define areas where the community has in practice deferred to individual choice, it may provide a useful limiting principle. To the extent that "tradition" is used to impose a "motherhood and apple pie" morality directly upon the population through the evisceration of "liberty" interests, the effect is unwarranted and pernicious.

250. P. ATIYAH & R. SUMMERS, *supra* note 20, at 312-15.

251. *See supra* notes 224-34 and accompanying text.

252. *See, e.g.,* Roe v. Wade, 410 U.S. 113, 152 (1973) (a survey of various rights of privacy found by the Supreme Court under various constitutional amendments). This is also exemplified in Griswold v. Connecticut, 381 U.S. 479 (1965) where the court attempts (without success) to spell out the contours of a defined and limited interest. *See also* A. WESTIN, PRIVACY AND FREEDOM 350, 359-60, 365-69 (1967).

253. *Webster* is a good example. The Court entertained the privacy claim, but after applying the balancing test enunciated in *Roe* came down on the side of the state interest, at least with respect to

vindicates legitimate privacy claims while *Michael H.* ignores the citizen's right to force government to justify its acts.

The problem of predictability remains. The *Griswold* line of cases failed to specify with any cogency how or when the compelling state interest balancing test is to be applied. Although the concept of "liberty" certainly suggests some sphere of autonomy, courts struggle to identify "fundamental interests" and to balance them against the "compelling state interests."[254] Thus the United States has failed to draw clear lines so that citizens may live their daily lives secure in the knowledge that their acts are legal.

The renewed use of tradition by the Supreme Court to validate privacy interests could potentially help delimit the right of privacy.[255] If the federal courts would consistently apply the two step approach advocated by this Note,[256] then the problem of predictability would be substantially resolved. The fundamental problem lies in the determination of the relationship between individual autonomy and self-definition on the one hand, and the community's perceived need to control individuals to protect itself and its sense of well-being on the other. Nevertheless, the federal courts can and should surmount this difficulty.

B. *Britain Also Needs a Right of Privacy*

Britain should adopt a right of privacy in its domestic law. If Parliament will not act, then the courts should assert themselves more forcefully through the common law.[257] There are two reasons for this conclusion. First, large areas of personal autonomy are hostage to parlia-

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the particular Missouri statutes in question. Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3056-58 (1989). One must bear two things in mind in the wake of *Webster:* First, the privacy balancing test has survived the Reagan Court, and is an accepted doctrine of American jurisprudence, and second, that whether a particular action or forbearance is cognizable as a privacy right is not always an easy question for the present court. *See supra* notes 208-34 and accompanying text.

254. *See* People v. Onofre, 51 N.Y.2d 476, 485, 415 N.E.2d 936, 939, 434 N.Y.S.2d 947, 949 (1976) (privacy is "a right to independence in making certain kinds of important decisions").

255. R. WACKS, *supra* note 2, at 10-23; YOUNGER REPORT, *supra* note 15, at 19. *See supra* notes 206-32 and accompanying text for a discussion of the potential dangers in using tradition as the source of privacy rights.

256. *See supra* notes 230-35 and accompanying text.

257. The easiest way for the courts to accomplish this task would be to create a common law right that parallels article 8. The British judiciary could not unilaterally incorporate article 8 *per se* consistently with the present state of British constitutional law. *See supra* note 122; Dworkin, *Privacy and the Law,* in PRIVACY, *supra* note 14, at 133. For example, Lord Denning has said, "It [article 8] is so wide as to be incapable of practical application." R. v. Chief Immigration Officer, Heathrow Airport, *ex parte* Bibi, [1976] 1 W.L.R. 979, 984; *see also* R. WACKS, *supra* note 2, at 178 (only benefit of article 8 is its "catalytic effect on our legislators in the event of an adverse ruling by the European court").

Another consideration is the general contempt which the domestic courts of Great Britain have for the European Court, which gives "mere opinions" rather than holdings predicated on law. *See*

mentary fiat under the present state of the law. Second, Britain has an international obligation under the ECHR to vindicate a right of privacy pursuant to article 8.[258] Yet, for many reasons, it is unlikely that Britain will adopt a right of privacy in the immediate future.

Rights exist only if the relevant decisionmakers affirmatively decide to confer a power of decision back to the community. For a right of autonomy to exist, the community must adopt it through Parliament. One of the principal problems is the British legal system's emphasis on predictability, stability, and the maintenance of the distinction between the law as it is from the law as it ought to be.[259] If Parliament is fairly elected and entirely representative, then individual claims to be privileged from governance are selfish, if not absurd.

However, the British Parliament may decide questions of policy free from constitutional constraints.[260] Positivism—the idea that the law must be applied as it is—leads courts to apply the law before them without questioning the purposes that the law is meant to serve. For better or worse, positivism is one of the theoretical bulwarks for the supremacy of Parliament.[261] Positivists attempt to separate law and morality at the time laws are applied. Thus, Parliament may consider ethical matters when passing a law, but this is the only time when morality should enter into the consideration of legal consequences. Legal positivists generally are unreceptive to the idea that an act of Parliament, passed properly and clear in all of its provisions, should be unenforced by the courts because it offends some individual's right of privacy—a right unexpressed at law, and self-evident in nature.[262]

Although divorcing law from morality at the time courts actually apply laws is one way to approach privacy questions, this approach ultimately may be more problematic than the American substantive approach to privacy law.[263] It requires something of a leap of faith, if one

P. ATIYAH & R. SUMMERS, *supra* note 20, at 423. As such, they are theoretically not entitled to any more deference from the courts than are anyone else's opinion.

258. "It is worth emphasising [sic] that the E.C.H.R. envisages recourse to its Commission and Court as a last resort for aggrieved individuals." Dowrick, *supra* note 25, at 887-88. Of course, the ECHR machinery is the *first* resort for British citizens arguing article 8 or any other substantive right not having an analogue in domestic British law.

259. P. ATIYAH & R. SUMMERS, *supra* note 20, at 148-50; *see also* H. KELSEN, GENERAL THEORY OF LAW AND STATE 120 (1945) (discussing generally the tension between the "ought" and the "is" in legal order).

260. P. ATIYAH & R. SUMMERS, *supra* note 20, at 227, 257-63, 266 (developing the historical relationship between the British constitutional framework, including Parliamentary supremacy, and legal positivism).

261. *Id.* at 3.

262. *Id.* at 224; R. HIXSON, *supra* note 18, at 93-104.

263. Comment, *Abortion and Statutory Interpretation,* LAW & JUSTICE, Spring 1982, at 2, 3.

lives in a pluralistic society (which Britain is rapidly becoming), to presume Parliament correctly resolves all issues when legislating.

A right of privacy in Britain will come, if at all, from one of the international conventions.[264] Britain could adopt a right of privacy either through a Parliamentary Act that domestically recognizes the ECHR or through the aggressive use of the principles enunciated in ECHR by the EEC. A narrowly defined parliamentary adoption of a right of privacy, particularly as against the government, would not cause irreparable harm to the British constitutional framework and would benefit substantially the growing minorities within Britain.

Parliament has, of course, specifically recognized some privacy interests through limited statutory enactments. In repealing the "sin-laws," Parliament has applied a kind of "compelling state interest" test, without expressly recognizing an individual privacy right. For example, in the Wolfenden Report on Homosexuality, the Committee approached the question of government regulation not in terms of privacy or individual right, but rather in terms of whether consensual sexual behavior was any concern of the state.[265] However, this built-in legislative restraint does not always succeed in protecting arguable privacy rights—especially when state security or law enforcement is at stake.[266]

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264. As a result of positivist legal philosophy, "[s]tatutes in the United Kingdom require greater specificity to compensate for the limited judicial role." W. PRATT, *supra* note 23, at 207. A statute that purported to create a general right of privacy would be an anomaly in the British system of government. Traditional institutional roles also work against the creation of a right of privacy. The present judiciary has neither the disposition nor the administrative resources to police a broad right of privacy. *See* P. ATIYAH & R. SUMMERS, *supra* note 20, at 279-83; W. PRATT, *supra* note 23, at 206-07. In the United States, judges generally have a battery of clerks and secretaries, in addition to libraries and docket clerks. Further, the increasing use of magistrates and staff attorneys suggests that chambers in the United States are becoming mini-bureaucracies. P. ATIYAH & R. SUMMERS, *supra* note 20, at 281-82. In contrast, judges in Great Britain lack the clerks, secretaries, and libraries needed to assume a quasi-legislative function. *Id.* at 279-81.

265. W. PRATT, *supra* note 23, at 126 n.105, 131; REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION, 1957, CMND. No. 247 [hereinafter Wolfenden Committee].

266. Professor Street criticized the lack of entrenched rights in Britain:

> The legal concept of liberty is that there are residual areas . . . where man is free to act as he likes without being regulated by law. . . . More than that, in a system like the American, the Constitution is a special law, one that cannot be changed except by a special procedure different from that for ordinary laws. Was it a good thing that all the restraints on freedom contained in the Official Secrets Act of 1911 were rushed through the House of Commons in one day in time of peace as if they were matters of no moment, the citizen no doubt unaware of that curtailment of his liberty which was thereby being effected? Parliamentary sovereignty in Britain ensures that Parliament can change any law, however fundamental, by the same process as, say, a law which increases the amount which a local authority may charge for dustbins.

H. STREET, *supra* note 22, at 284-85. *See supra* notes 67-73, 80-83 and accompanying text. *See* Atlas, *supra* note 24, at 36, col. 1 ("To an American, accustomed to the defense of individual rights afforded by the Constitution and the Bill of Rights, the power concentrated in the hands of the British Government is extraordinary.").

A communitarian ideal may work well in a unitary and homogeneous society, but as Britain becomes more pluralistic, it will be forced to rethink its approach to entrenching individual rights against parliamentary abrogation. Historically, British jurisprudence has not been receptive to the idea of rights existing free and clear of parliamentary sanction. Professor Raymond Wacks has noted the problem with this approach: "Our law is manifestly inadequate to protect the individual against various attacks made, often in the name of progress, order or liberty, upon his personality."[267]

The benefit secured by the British approach is the certainty with which individuals know the parameters of legal sanctions and individual right.[268] However, the use of tradition could provide meaningful guidance in limiting a British right of privacy.[269] Furthermore, we must question whether we want to value certainty above liberty.[270] The British systems' reliance on parliamentary reform keeps the system neat and tidy, but it also results in individual cases of injustice. Even though the American approach lacks order, rules, and definition, its flexibility allows for immediate response to individual injustice. Both systems could benefit from an increased reliance on each society's traditions of liberty to cabin the right of privacy.

It may be that privacy is not a pressing social concern because the traditions and habits of British society do not require the legal vindication of such interests. For generations, tradition and social mores operated to guarantee some modicum of personal autonomy. According to Professor Alan Westin, "The English accomplish with reserve what the Germans require doors, walls, and trespass rules to enforce."[271] Although legal guarantees are not always the only way to achieve a desirable social end, they sometimes are the surest means. English society historically has been a small, homogeneous population, with strong family structure, a class system, public support of the government, and an

267. R. WACKS, *supra* note 2, at 21.

268. P. ATIYAH & R. SUMMERS, *supra* note 20, at 133-41.

269. The jurisprudence of the European Court and the EEC already incorporates the traditions of the western European nations. *See supra* notes 115-20 (European Court) and 168-70 (EEC) and accompanying text; *see generally supra* notes 227-35 (describing how tradition could provide meaningful guidance to United States courts).

270. Professor Street observed:

> [I]t will be no bad thing for [the reader] to consider whether [Britain is] better off without a constitution, relying on the ordinary Courts to minimize as much as is reasonable any specific encroachments on our freedom. Does the practical, piecemeal improvisation suit us better than the formal high-sounding manifesto? Or do we pay too high a price in more uncertainty about the precise limits of our freedom?

H. STREET, *supra* note 22, at 11. Street strongly implies that Britain needs to rethink its reliance on parliamentary restraint. *Id.* at 283-89.

271. A. WESTIN, *supra* note 252, at 29.

elite system of education.[272] Consequently, the force of tradition remains strong in Britain. Granting the validity of these observations, the question of the rights of individual minorities is still open. English society is changing, and the social strictures that once were sufficient may no longer suffice to protect liberty.[273] Minority members of British society must be provided with a procedural means of asserting their autonomy claims against the community of which they are a part. This is the essence of a *truly* free society.

C. *Conclusion*

Autonomy interests are vindicated against government encroachment, in part, through the legal constraint of privacy rights. If the British are formalistic and miserly in conferring privacy rights on individuals, then Americans are imprecise to the point of absurdity in defining an individual's privacy rights. Taken to its logical extreme, a "right to be let alone" ultimately is the right to be ungoverned.[274] No orderly society could survive the recognition of such an absolute right of privacy. The extent to which a community will tolerate deviant behavior must ultimately be related to the maintenance of a sense of well being in the community. If the use of illicit drugs, or abuse of women or children, were claimed as privacy rights, then the accompanying disquietude visited upon the community would rend the social fabric asunder. The existence of a social compact cannot be squared with absolute individual autonomy. Conversely, however, the demands of the community cannot unduly impinge on the individual's ability to be self-defining—at least in some respects. Thus the proper measuring stick for the effectiveness of any governmental regime is the extent to which personal liberty is maximized in a given nation. Both the United States and Great Britain have had relative successes and relative failures in their approaches to the protection of privacy.

The problem that any government faces is one of drawing lines between competing interests—those of the community in regulating and defining itself through custom and law, and that of the individual in maintaining vital elements of personality and self. Although this prob-

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272. *See id.* at 26.

273. As one contemporary British writer noted:

> The old British complacency [regarding the lack of a written constitution] may never have been justified. Today, it is clearly quite unjustified. . . . What is needed, if only somebody can find the recipe, is a charter of rights that entrenches our liberties without suggesting that everything worth having must somehow be among them.

Ryan, *supra* note 56, at 8, cols. 1-2.

274. Schneider, *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues,* LAW & CONTEMP. PROBS., Winter 1988, at 79, 86-87.

lem does not lend itself to a simple and precise answer, community traditions of individual liberty are a safe starting point. The closing paragraph from one of the minority reports filed by the Younger Committee summarizes the interests motivating the discussion of the legal and social necessity of privacy rights, and provides a fitting conclusion:

> Somehow I find all the excuses [by the majority for rejecting a general right of privacy] inadequate. I prefer a society where a zeal for truth is matched by compassion and where even the weakest of our fellow citizens knows that he can call upon the law in his unequal fight with those powerful interests, including the government, who abuse his freedom.[275]

The protection a society affords individual autonomy reflects whether it is truly free; citizens should remain ever vigilant, lest they find their government omnipresent.

Ronald J. Krotoszynski, Jr.

275. YOUNGER REPORT, *supra* note 15, at 212 (minority report of A. W. Lyon). It is my hope that this Note helps provide a technical understanding of the role of privacy law in Britain, and also, through a comparison with U.S. privacy law, some insight into the systemic differences that exist between the two nations. More fundamentally, however, I hope that the tension which exists between governance and autonomy is made clear, for it is the *agon* between self and community which drives privacy law. Where and how to draw lines respecting legitimate claims of autonomy is beyond my abilities. Let it suffice to say that communities, politicians, and most importantly judges, must draw this line on a daily basis. However, I do believe that courts should consider a community's traditions of deference to individual decision-making when citizens challenge government regulations of their daily lives. In balancing the autonomy of the individual against the needs of the community, the tenor of the polis is struck; thus, the act is a delicate one whose repercussions will have real affects on both the community and the individual.