PRIVACY AND THE CHARTER: PROTECTION OF PEOPLE OR PLACES?

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A right to privacy is firmly established in section 8 of the Charter. By contrast, though the Supreme Court has suggested on numerous occasions that section 7 touches privacy issues, it has never clearly accepted a right to privacy in section 7. The result is the anomalous situation of a constitutional right to privacy whose stated purpose is the broad promise of protecting "people, not places," but which in practice applies mainly to the spatial aspects of searches and seizures and barely implicates personhood concerns at all. This article examines the history of privacy in both section 8 and section 7, and argues that expanding privacy into section 7 will allow the right to privacy to deal seriously with persons and not just places.

Un droit à la vie privée est bien consacré à l'article 8 de la Charte canadienne des droits et libertés. En revanche, et bien que la Cour suprême ait en de nombreuses occasions laissé entendre que l'article 7 touche aux questions de vie privée, elle n'a jamais clairement admis qu'un droit à la vie privée existait en vertu de l'article 7. Il en résulte une anomalie, soit un droit constitutionnel dont le but déclaré est la vaste promesse qu'il protège « les personnes, et non les lieux » mais qui, en pratique, s'applique principalement aux aspects spatiaux des fouilles et saisies et ne touche qu'à peine aux questions qui ont trait à la personne. Le texte qui suit examine l'historique de la vie privée autant dans l'article 8 que l'article 7, et fait valoir qu'un élargissement de la protection de la vie privée jusque dans l'article 7 donnera au droit à la vie privée la possibilité de traiter sérieusement de la protection de personnes et non pas seulement de lieux.

1. Introduction

The *Canadian Charter of Rights and Freedoms*[1] contains no explicit protection of privacy. Though early drafts of the *Charter* included a

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*

Electronic copy available at: http://ssrn.com/abstract=2465146

right to privacy under the heading "Legal Rights," this was deleted in the face of provincial opposition, and later attempts to reinsert privacy protection were voted down in committee.[2] This rejection of privacy is perhaps unsurprising, given the thorny intergovernmental negotiations surrounding the *Charter*, and the reasons for the omission continue to resonate today: jurisdictional concerns over potential interference with provincial legislative powers; and uneasiness with leaving the definition and scope of such a right to the courts.[3] Still, the omission is interesting, considering that Quebec had recognized a right to privacy in 1975 in its quasi-constitutional *Charter of Human Rights and Freedoms*,[4] and that privacy has long been recognized internationally as a fundamental human right, notably in the *Universal Declaration of Human Rights* of 1948.[5] While moving from these models to the constitutional entrenchment of privacy in the *Charter* is a big step, these expressions of a right to privacy do indicate a degree of national and international consensus that the protection of privacy is a worthy aspiration.

Despite this choice to leave privacy out of the *Charter*, indeed despite many of the concerns expressed during the patriation

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(U.K.), 1982, c. 11 [*Charter*].

2 Privacy protection (expressed as "the right to protection against arbitrary or unlawful interference with privacy") was included in drafts as early as January 1979; see Anne F. Bayefsky, *Canada's Constitution Act 1982 and Amendments*: *A Documentary History* (Toronto: McGraw-Hill Ryerson, 1989) vol. 2 at 538. Privacy was finally deleted in the September 1980 draft; see *ibid*. at 709. For the later attempted amendments, see *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32d Parliament, Issue No. 43 at 43:55-62 (22 January 1981) (proposing adding a subsection (*e*) to section 2); *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32d Parliament, Issue No. 46 at 46:62-70 (27 January 1981) [*Minutes* (section 7 privacy)] (proposing adding a second paragraph to section 7).

3 Bayefsky, *ibid*. at 661-62; see also generally Roy Romanow, John Whyte and Howard Leeson, *Canada… Notwithstanding*: *The Making of the Constitution 1976-1982* (Toronto: Thomson Carswell, 2007) at 216-59. The debate over privacy covered some of the same ground as the more vigorous controversy over whether to include property rights in the *Charter*; see Alexander Alvaro, "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24 Can. J. Poli. Sci. 309.

4 R.S.Q. c. C-12, s. 5.

5 GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, art. 12. See also *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, art. 8; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 17 (entered into force 1976).

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negotiations, the Supreme Court of Canada has read a right to privacy into the *Charter*, much as the United States (US) Supreme Court has done in interpreting the Fourth and Fourteenth Amendments to the US Constitution.[6] The Supreme Court of Canada has held that section 8 (protection against unreasonable search or seizure) contains a right to privacy, and at times the Court has appeared sympathetic to the idea that in certain specific situations section 7 (right to life, liberty, and security of the person) might also protect privacy.[7]

The result has been that constitutional protection of privacy remains controversial and is, inevitably, a somewhat makeshift affair; certain situations fall within the right as articulated, others remain outside *Charter* protection, and it is difficult to draw a line between the two. A key problem, and my focus in this article, is the continuing ambiguity that surrounds the central idea that privacy protects "people, not places," a principle that guides the interpretation of privacy in the constitutional context. Since this dictum first appeared in Canada, as an American import adopted by Dickson J. in the first *Charter* privacy case, *Hunter v. Southam Inc.*,[8] it has become something of a mantra in privacy cases, and has even been proposed as a general principle underlying the entire *Charter*.[9] Despite this key role in the articulation of constitutional privacy rights, the meaning and application of this principle remain vague, and privacy analysis continues to betray its roots in spatially-oriented concepts of trespass and invasion while leaving the personhood implications of "people, not places" largely unexplored. A related issue is the Supreme Court of Canada's reluctance to move privacy protection beyond the limited scope of section 8 and link it decisively to the broader potential of section 7.

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6 See e.g. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Katz v. United States*, 389 U.S. 347 (1967) [*Katz*]. See generally John W. Johnson, *Griswold v. Connecticut*: *Birth Control and the Constitutional Right of Privacy* (Lawrence: University Press of Kansas, 2005), especially at 198-222.

7 In addition to these sections, some cases and commentators suggest that various privacy interests are protected under sections 2 (fundamental freedoms), 6 (mobility rights), 10 (right to counsel on arrest), 11(*c*) (right of a witness to keep silent), and 13 (right to protection against self-incrimination). These minor heads of privacy protection in the *Charter* will not be analyzed in this article. See generally Alain-Robert Nadeau, *Vie privée et droits fondamentaux*: *étude de la protection de la vie privée en droit constitutionnel canadien et américain et en droit international* (Scarborough, Ont.: Carswell, 2000) at 106, and the cases cited there.

8 [1984] 2 S.C.R. 145 at 159 [*Hunter*]. The phrase derives originally from Stewart J.'s curial opinion in *Katz*, *supra* note 6 at 351.

9 *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 at 202, *per* L'Heureux-Dubé J.: "The First Amendment as well as the *Canadian Charter of Rights and Freedoms* were designed to protect people, not places."

Privacy is a slippery concept that engages many different issues; the invasions and disclosures against which section 8 protects are only part of the story.[10] So far, section 7's personhood-based rights to life, liberty, and security of the person remain at the edges of constitutional privacy protection, despite their potential for enriching the protection of the "people" in "people, not places."

In this article, I will examine the history of the Supreme Court's[11] conceptualization of privacy in sections 8 and 7 of the *Charter* and offer some suggestions for developing privacy protection under section 7. The Court is clear that the *Charter* includes an implicit right to privacy whose purpose is to protect "people, not places." My point in what follows is to explore how the Court might be held to this purpose, how personhood concerns might be better articulated and protected in *Charter* analysis. Part 2 of this article surveys the development of constitutional privacy in its initial – and still most accepted – home in section 8 of the *Charter*. Though the "people, not places" principle applies here, the meaning of "people" remains unclear, since privacy analysis is dominated by territorial and informational conceptions of privacy that are strongly place-centred. Part 3 traces the still unsettled question of the connection between privacy and the liberty and security interests in section 7. I argue that bringing privacy protection more firmly into section 7 would allow it to develop beyond the limitations of the spatial concerns of section 8 and permit clearer analysis of some of the personhood issues that grow out of a stated focus on the protection of "people, not places."

2. Privacy and Section 8

A) Reasonable Expectations and Zones of Privacy

A right to privacy was first read into the *Charter* through section 8's guarantee of "the right to be secure against unreasonable search or seizure." This was perhaps the most obvious place to begin developing the constitutional protection of privacy, since a major concern of privacy advocates had long been technological developments such as wiretaps that allowed state agents to monitor citizens,[12] and since

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[10] An excellent overview is Daniel J. Solove, *Understanding Privacy* (Cambridge, Mass.: Harvard University Press, 2008) [Solove, *Understanding Privacy*].

[11] Though my focus is the Supreme Court, I will make occasional reference to the *Charter* privacy jurisprudence of the provincial courts.

[12] See e.g. Brandeis J.'s famous dissent in the wiretap case *Olmstead v. United States*, 277 U.S. 438 (1928). Surveillance and data collection were major concerns in Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1967) at 67-168, a work

historically the protection of privacy in Canada – and elsewhere – owes much to common-law conceptions of property, trespass, and control over private space.[13]

The Supreme Court set out the general contours of the right in two decisions of the 1980s, *Hunter*[14] and *R. v. Dyment*.[15] Both were heavily indebted to the conceptualization of privacy in American constitutional jurisprudence, especially the US Supreme Court's 1967 wiretap decision in *Katz v. United States*.[16] Indeed, from *Katz* came what would become the two key concepts in section 8 privacy, "reasonable expectation of privacy" and "people, not places," while *Dyment* added the idea of zones of privacy.

In *Hunter*, Dickson J. avoided the morass of defining privacy by simply adopting from *Katz* Justice Stewart's vague but intuitive notion that privacy represents the "right to be let alone by other people."[17] He focused instead on turning an abstract concept into a workable standard by isolating two key elements of the right to privacy to give courts a test for determining its extent and intensity. First, the right to privacy is limited by the idea that an individual's expectation of privacy must be reasonable.[18] Second, the constitutional right to privacy extends beyond its roots in the common law tort of trespass, in that it must be seen as protecting "people, not places" (nor property).[19] The result is a two-step analysis, set out most succinctly by Cory J. in *R. v. Edwards*:

> There are two distinct questions which must be answered in any s. 8 challenge. The first is whether the accused had a reasonable expectation of privacy. The second is whether the search was an unreasonable intrusion on that right to privacy.[20]

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that continues to influence the Supreme Court of Canada's section 8 privacy jurisprudence.

13 See generally David J. Seipp, "English Judicial Recognition of a Right to Privacy" (1983) 3 Oxford J. Legal Stud. 325 at 335-37.

14 *Supra* note 8.

15 [1988] 2 S.C.R. 417, particularly the majority opinion of La Forest J. [*Dyment*].

16 *Katz*, *supra* note 6.

17 *Hunter*, *supra* note 8 at 159. "The right to be let alone" itself has a long history; Stewart J.'s source is Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy" (1890) 4 Harv. L. Rev. 193 at 193, who in turn seem to have borrowed the idea from Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract*, 2d ed. (Chicago: Callaghan, 1888) at 29.

18 *Hunter*, *ibid*. at 159-60.

19 *Ibid*. at 158-59.

20 [1996] 1 S.C.R. 128 at 140 [*Edwards*].

As is evident, *Hunter*'s legacy has been to focus privacy analysis on objective criteria, while leaving to the side the subjective considerations that are implicit in "people, not places."

Building on the ruling in *Hunter*, La Forest J.'s majority opinion in *Dyment* filled out the right to privacy in section 8 and the idea that it protects "people, not places." First, the right is delineated objectively by the concept of a reasonable expectation of privacy, and not purely subjectively.[21] Second, privacy issues engage three different "zones" – the territorial, the informational, and the personal – which signal the need for particular privacy vigilance and which each bring up particular concerns.[22] Third, privacy protection must be prospective and not retrospective, since once privacy has been violated it is too late to offer recompense.[23] Finally, and most important for our purposes, privacy is essential to individual well-being, since it is an integral part of "man's physical and moral autonomy" and thus of human dignity.[24]

Subsequent decisions have refined the framework developed in *Hunter* and *Dyment*, but its essentials remain the basis of section 8 privacy analysis today.[25] The two threads of reasonable expectation and "people, not places" create a tension, however, that affects the scope of privacy protection and that the idea of zones of privacy does not adequately resolve. On the one hand, the reasonable expectation of privacy works as a normative standard to restrict privacy protection by putting the emphasis on social constraints and by emphasizing situations and places in which privacy will or will not be protected. It thus serves as a threshold to divide the non-protected, subjective feelings of an individual from the protected, objective social construct called privacy. On the other hand, centring privacy on people has the potential to broaden protection considerably by bringing subjective aspects of privacy back into the analysis and by moving constitutional privacy protection into highly value-oriented areas like human dignity, autonomy, and identity. In practice, and following the lead of Dickson J. in *Hunter*, the Court has focused on the problems of analyzing reasonable expectations while leaving the meaning and implications of "people, not places" largely unexplored. I will develop this point

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21 *Dyment*, *supra* note 15 at 426.

22 *Ibid*. at 428.

23 *Ibid*. at 430.

24 *Ibid*. at 427.

25 Most recently, see *e.g*. *R*. *v*. *Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432 esp. at 443-45 [*Tessling*]; and *R*. *v*. *Patrick*, 2009 SCC 17, (2009), 304 D.L.R. (4th) 260 (S.C.C.) [*Patrick*].

further in the next section; here, I want to assess briefly what this choice of focus has meant for section 8 privacy jurisprudence.[26]

In elaborating the right to privacy in section 8, the Court has not surprisingly opted for a largely reactive approach, dealing with cases as they arise rather than prospectively setting out rules for determining whether or not an expectation of privacy in a given situation will be deemed reasonable. This means that the informational, territorial, and personal "zones" of privacy serve more as a general guide to the interests being engaged than as a grid within which to assess particular situations.[27] Over the years, however, the Court has dealt with a wide variety of situations, and a hierarchy has emerged – fluid and evolving, but within which the reasonability of the expectation of privacy is ranked according to the facts of each individual case.

The body – the main concern of the "personal" zone of privacy – has generally attracted the greatest protection, since "the sanctity of the body [ ] is essential to the maintenance of human dignity."[28] The degree of invasiveness is often decisive; internal searches are highly suspect, strip searches or those involving physical force almost as much, while simple frisk searches are less so.[29] Seizures of bodily substances likewise depend on the circumstances of the taking itself,

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[26] The survey that follows can be fleshed out by the more extensive discussions of the niceties of section 8 privacy jurisprudence in Barbara McIsaac, Rick Shields and Kris Klein, *The Law of Privacy in Canada*, 2007 student ed. (Toronto: Thomson Carswell, 2007) at 2-13 to 2-58.30; Stanley A. Cohen, "The Paradoxical Nature of Privacy in the Context of Criminal Law and the Canadian Charter of Rights and Freedoms" (2002) 7 Can. Crim. L. Rev. 125; Nadeau, *supra* note 7; James A. Fontana, *The Law of Search and Seizure in Canada*, 7th ed. (Markham, Ont.: LexisNexis Butterworths, 2007).

[27] This contrasts for example with the treatment of personality (including privacy) in German law, where a more rigid hierarchy of protection is set out between the so-called public, personal, and intimate "spheres." See generally Edward J. Eberle, "Human Dignity, Privacy, and Personality in German and American Constitutional Law" [1997] Utah L. Rev. 963.

[28] *R. v. Stillman*, [1997] 1 S.C.R. 607 at 664 [*Stillman*].

[29] *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1174: "The more invasive the search, the greater the assault on one's dignity." See e.g. *R. v. Greffe*, [1990] 1 S.C.R. 755 at 795 ("… it is the intrusive nature of the rectal search and considerations of human dignity and bodily integrity that demand the high standard of justification before such a search will be reasonable"); *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 659 (strip search judged reasonable); *R. v. Collins*, [1987] 1 S.C.R. 265 (throat hold to prevent suspect from swallowing drugs held in her hand judged unreasonable); *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 (frisk for weapons that revealed bag of drugs judged unreasonable).

with invasive procedures generally held to a higher standard than taking of materials already outside the body.[30]

Beyond the body itself, the approach to the "territorial" zone of privacy assesses the expectations that arise in different spatial settings. The home – like the body, frequently "sanctified"[31] – attracts the greatest protection,[32] while private cars attract a much lesser degree of the same protection.[33] Other situations align along a privacy hierarchy, depending on the degree of connection to the person in question, but more importantly depending on the circumstances of the situation. The Court has had to assess the quality of privacy expectations of, among others, a visitor to a friend's apartment;[34] inmates of prisons;[35] those on Crown land or trespassing on another's property;[36] students at school;[37] travellers passing through customs;[38] pay phone users;[39] guests in hotel rooms;[40] and users of lockers in schools and bus depots.[41]

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30 See especially *Stillman*, *supra* note 28 where the justices in the majority agreed that hair samples taken by force violated section 8, but differed on whether a used tissue discarded voluntarily by the defendant did so. See also *R. v. Pohoretsky*, [1987] 1 S.C.R. 945 at 949 (taking a blood sample "a violation of the sanctity of a person's body"); *Dyment*, *supra* note 15; *R. v. Dersch*, [1993] 3 S.C.R. 768; *R. v. Colarusso*, [1994] 1 S.C.R. 20; *R. v. Borden*, [1994] 3 S.C.R. 145. Compare *R. v. Monney*, [1999] 1 S.C.R. 652 [*Monney*] (no reasonable expectation of privacy in expelled fecal matter in which drugs hidden).

31 See e.g. *R. v. Godoy*, [1999] 1 S.C.R. 311 at 321 ("the sanctity of the home").

32 *R. v. Genest*, [1989] 1 S.C.R. 59; *R. v. Kokesch*, [1990] 3 S.C.R. 3; *R. v. Garofoli*, [1990] 2 S.C.R. 1421 (wiretap of home telephone); *Baron v. Canada*, [1993] 1 S.C.R. 416; *R. v. Plant*, [1993] 3 S.C.R. 281 [*Plant*] (search of home electrical consumption records); *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. Silveira*, [1995] 2 S.C.R. 297; *R. v. Evans*, [1996] 1 S.C.R. 8; *Tessling*, *supra* note 25. Distance from the home itself is a relevant criterion; see e.g. *Patrick*, *supra* note 25 at para. 62.

33 *R. v. Hufsky*, [1988] 1 S.C.R. 621; *R. v. Wise*, [1992] 1 S.C.R. 527; *R. v. Caslake*, [1998] 1 S.C.R. 51. Curiously, passengers have a lower expectation of privacy than the driver/owner, even while together in the same car; see *R. v. Belnavis*, [1997] 3 S.C.R. 341 [*Belnavis*], though compare the vigorous dissent of La Forest J.

34 *Edwards*, *supra* note 20, with a strong dissent by La Forest J.

35 *Weatherall v. Canada (A.G.)*, [1993] 2 S.C.R. 872.

36 *R. v. Boersma*, [1994] 2 S.C.R. 488 (Crown land); *R. v. Lauda*, [1998] 2 S.C.R. 683 (trespasser).

37 *R. v. M.(M.R.)*, [1998] 3 S.C.R. 393 [*M.(M.R.)*] (backpack search); *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R 569 [*A.M.*] (locker search).

38 *R. v. Simmons*, [1988] 2 S.C.R. 495.

39 *R. v. Thompson*, [1990] 2 S.C.R. 1111.

40 *R. v. Wong*, [1990] 3 S.C.R. 36.

41 *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631 (bus depot); *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456 (bus depot); *A.M.*, *supra* note 37 (school).

Finally, privacy protection in information – at least at the constitutional level – generally parallels the other situations. Information that touches a "biographical core of personal information"[42] (DNA, for example) is held to a stricter standard than information that relates more tangentially to the individual, such as tax returns or business documents.[43]

In theory, then, the jurisprudence reveals a hierarchy, based loosely on the three zones of privacy, and within them on nearness to the person or to the "biographical core of personal information." In practice, however, the location of the search or seizure and its circumstances usually determine the outcome, not whose privacy is at issue. What then does "people, not places" mean in the context of section 8? The answer to this question is crucial to understanding both the history and the future potential of section 7 privacy.

B) People or Places?

Hovering over the complexities of the reasonable expectation of privacy and the negotiation of the personal-territorial-informational framework is the principle that privacy protects "people, not places." The rough-hewn hierarchy that emerges from the section 8 privacy jurisprudence must fit into this stated overarching purpose of the whole exercise, but exactly how remains unclear. Though the Court frequently invokes "people, not places" – to the extent that La Forest J. could chide his colleagues for paying it "lip service" and repeating it "*ad nauseam*"[44] – these invocations tend to be without explanation, as if the meaning of the phrase were somehow self-evident.

The phrase originated in Justice Potter Stewart's attempt in *Katz* to move privacy analysis away from the idea of the "constitutionally protected area":

> But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of

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42 *Plant*, *supra* note 32 at 293.

43 *R. v. R.C.*, 2005 SCC 61, [2005] 3 S.C.R. 99 (DNA); *R. v. S.A.B.*, 2003 SCC 60, [2003] 2 S.C.R. 678 (DNA); *Plant*, *ibid.* (records of home electricity consumption); *Smith v. Canada (A.G.)*, 2001 SCC 88, [2001] 3 S.C.R. 902 (customs declaration); *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757 (taxpayer records); *Tessling*, *supra* note 25 (patterns of heat emanating from a home).

44 *Belnavis*, *supra* note 33 at 374.

> Fourth Amendment protection. … But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[45]

The phrase stuck, and it sounds intuitively right, but its meaning remains unclear. Justice Stewart's explanation suggests that it brings a subjective element to privacy analysis, though the result in *Katz* hinged not on the individual's own expectation of privacy, but on whether that expectation was reasonable. As we have seen, in Canada too the focus of analysis is an objective expectation, with the subjective aspects of privacy serving simply as the instigation of the *Charter* challenge.

Still, protection of "people, not places" remains the stated goal of section 8 privacy protection. Is it simply an empty mantra, a piece of window-dressing without real meaning or role in privacy analysis? More importantly, has it fulfilled its stated purpose in the context of the section 8 jurisprudence? Before addressing these questions, two brief remarks are in order.

First, "people, not places" is about "people," not "persons." This is not about legal personality and the niceties of defining the parameters of subjectivity in law,[46] but is about human beings. Though the Court has held that certain *Charter* rights apply to at least some non-human legal subjects (corporations), both the privacy aspects of section 8 and the whole of section 7 apply to human beings alone.[47] As such, "people, not places" would seem to articulate a connection between *Charter* rights and those abstract human qualities like dignity, autonomy, and identity that inform *Charter* analysis without being explicitly mentioned in the text itself.[48]

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45 *Katz*, *supra* note 6 at 351 [citations omitted].

46 See generally Ngaire Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects" (2003) 66 Mod. L. Rev. 346. Though this issue arises usually in the context of private law, the question of legal personhood in the context of the *Charter* is important and deserves further study. On administrative law, see Robert Leckey, *Contextual Subjects*: *Family*, *State*, *and Relational Theory* (Toronto: University of Toronto Press, 2008).

47 See generally Jean-Philippe Gervais, "Les personnes morales et la *Charte canadienne des droits et libertés*" (1993) 38 McGill L.J. 263. A corporate right to section 8 privacy was rejected in *R. v. Amway Corp*., [1989] 1 S.C.R. 21. On the exclusion of corporations from section 7, see *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 1002-03.

48 Dignity, for example, is "an underlying value" that "has been viewed as finding expression in rights, such as equality, privacy or protection from state compulsion": *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 at 353 [*Blencoe*]. See the critical remarks in R. James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court

Second, the intent of "people, not places" was to move privacy protection away from its roots in trespass and the protection of property and, in effect, to bring it into the human rights era. In *Hunter*, Dickson J. took pains to dissociate the right from the traditional common law tort of trespass, which protects the space around the person from unauthorized intrusions.[49] As conceptualized in *Hunter*, the right to privacy is thus broader than trespass alone; "people, not places" seems to suggest that what is sacred and worthy of protection is not the location itself, but rather the individual in the location.

With this in mind, we see that whichever zones are engaged – personal, territorial, or informational – privacy in the context of section 8 is supposed to relate in some way to the individual human being, and not simply to the particular spaces in which the individual happens to be found, nor to his or her things. Privacy protection ensures that any state interference with one's person, one's spaces, or one's information respects his or her fundamental human dignity.

Understanding section 8 privacy as three overlapping zones is cumbersome, however, and creates conceptual limitations in the context of section 8 privacy; as we will see, it is also inadequate for the broader demands of privacy in the context of section 7. This tripartite taxonomy, which derives from a 1972 government report on privacy and computers, is the product of a particular time (the 1960s) and its particular concerns (wiretapping, data collection by increasingly powerful computers, and surveillance by the state).[50] Alan Westin's strongly information-based definition of privacy – "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others" – grows out of these same concerns. This definition had a strong influence on conceptualizations of privacy in the 1970s and was adopted almost word-for-word but unattributed by La

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of Canada"
(2007) 70 Sask. L. Rev. 1.

[49] The classic articulation is from the 1765 English case *Entick v. Carrington* (1765), 2 Wils. K.B. 275, 95 E.R. 807 at 817, quoted in *Hunter*, *supra* note 8: [O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.

[50] Canada, Task Force Established Jointly by Department of Communications and Department of Justice, *Privacy and Computers* (Ottawa: Information Canada, 1972; reprint 1974) [*Privacy and Computers*]. This is not to downplay the importance of these concerns, which have come to the fore again in today's climate of security worries occasioned by terrorist threats; see A. Wayne MacKay, "Human Rights in the

Forest J. in 1990 in *R. v. Duarte*.[51] "People, not places" sits awkwardly against this backdrop.

Although the Court has drawn explicit links between section 8 privacy and human dignity,[52] its continuing reliance on the three zones taxonomy and on the information-based definition of privacy set out in *Duarte* has kept section 8 privacy firmly attached to its roots in trespass and ideas of invasion or revelation. Moreover, in practice the privacy protection afforded by section 8 has tended to gravitate towards the territorial and the informational at the expense of the personal, underscoring still more clearly the difficulties in applying the "people, not places" principle.[53]

This tension between "people, not places" and the Court's focus on territorial and informational privacy is evident throughout the privacy decisions, as the justices seek to reconcile the principle of protecting people with the realities of assessing circumstances. Already in *Dyment*, La Forest J. noted that although privacy protects "people, not places," "[t]his is not to say that some places, because of the nature of the social interactions that occur there, should not prompt us to be especially alert to the need to protect individual privacy."[54] More recently, in *R. v. Tessling* Binnie J. wrote that "[s]uch a hierarchy of places does not contradict the underlying principle that s. 8 protects 'people, not places,' but uses the notion of place as an analytical tool to evaluate the *reasonableness* of a person's expectation of privacy."[55] More recently still, Binnie J. again addressed this tension in *R. v. A.M.*:

> Canadian courts have accepted as correct the proposition that s. 8 protects "people, not places." People do not shed their reasonable expectations of privacy in their person or in the concealed possessions they carry when they leave home, although those expectations may have to be modified depending on where they go, and what "place" they find themselves in.[56]

Global Village: The Challenges of Privacy and National Security" (2006) 20 N.J.C.L. 1.

51 Westin, *supra* note 12 at 7; *R. v. Duarte*, [1990] 1 S.C.R. 30 at 46 [*Duarte*].

52 Notably in *Plant*, *supra* note 32 at 292-93, which looks back to *Dyment*, *supra* note 15 at 429. It should be noted that dignity as a foundational value in privacy analysis comes out as well in *Privacy and Computers*, *supra* note 50 at 13.

53 *Tessling*, *supra* note 25, has been criticized for this orientation; see Alan Young, "Search and Seizure in 2004 – Dialogue or Dead-End?" (2005) 29 Supreme Ct. L. Rev. (2d) 351 at 371-74; MacKay, *supra* note 50 at 8.

54 *Dyment*, *supra* note 15 at 429.

55 *Supra* note 25 at 444 [emphasis in original].

56 *Supra* note 37 at 606.

Clearly, a certain measure of conceptual gymnastics is needed to reconcile protection of "people, not places" with a largely spatial analytic framework that emphasizes, at best, "people in places."

"People, not places" clearly cannot mean that privacy protection should be based purely on subjective expectations, which would be unworkable.[57] What it seems to have come to, however, is a highly spatialized inquiry, where the location of the search or seizure is assessed in order to discover whether or not the accused had a reasonable expectation of privacy. The problem is that as interpreted by the Court, "people" has come to serve more as an intensifier than as a meaningful category in its own right. What is important is not people *per se*, but people in particular places or situations. While La Forest J.'s remark in *Dyment* about "the nature of the social interactions" does suggest a person-centred analysis, by the time of *Tessling* this has given way to an assessment of place and the quality of information.[58] Even the human body effectively becomes just another place, a highly protected place to be sure, but a place nonetheless, like the home or a bus depot locker. How close to the person an invasion comes is still important, but this is more because of the nature of the space being invaded than because of any abstract notions of personhood, dignity, or autonomy that such searches engage. Body cavity searches are held to a strict standard not because they affect what it means to be an autonomous human being, but because they involve invasions of particularly personal spaces. This may seem like the same thing, and in practice the results will often be no different. The distinction is important, however, because by adopting a narrow, territorial and informational view of privacy in the context of section 8, the Court has left itself with a diminished privacy palette with which to approach other privacy issues that come up outside of section 8.

Despite the stated link between privacy and people, in practice section 8 privacy analysis has become an oddly depersonalized affair, and the "personal" privacy zone has largely become redundant. The inquiry begins by analyzing spaces (bodies, homes, cars, lockers) or information (DNA, tax records, customs declarations, heat emanations), and from there the reasonable expectation test considers human expectations, but the expectations of others, not the individual claiming privacy protection. The human being is part of the analysis as

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57 See e.g. *M.(M.R.)*, *supra* note 37 at 413; *A.M.*, *ibid.* at 593.

58 The Supreme Court decision in *Tessling*, *supra* note 25, contrasts markedly on this point with both Abella J.A.'s opinion at the Ontario Court of Appeal in the same case, (2003) 63 O.R. (3d) 1, as well as the factually similar decision of the United States Supreme Court in *Kyllo v. United States*, 533 U.S. 27 (2001).

the measure of the harm – the extent to which a "biographical core" of information is touched[59] – but remains off to the side, an interest to consider rather than the focus of the inquiry. The point is whether society would feel that the person's expectation of privacy was reasonable in the circumstances, not whether the dignity of the individual in question was violated. Briefly stated, the problem is that although the harm of a violation of privacy is individual and subjective, the analysis of this violation is universalized and objective.

Though "personal" privacy is the most difficult of the three zones to conceptualize, and it has never been defined in any clarity beyond its connection with the physical body itself,[60] it is crucial for bringing legal privacy protection closer to the subjective feelings that privacy violations engender. A clearer articulation of just what personal privacy might include would go a long way towards giving "people, not places" some meaning, and would open up privacy protection to include a wider range of interests than section 8 as currently interpreted protects. "People, not places" suggests that privacy is more than just protection of the individual against invasions of protected private places, but is rather an aspect of the individual's personality.[61] We might take this still further and see "people, not places" as creating a positive rather than a negative right; the right to privacy in the constitutional context involves not simply a tort-like protection against invasion, but also protecting the capacity to do the things that makes one a person.[62]

This is not to say that section 8 privacy is inadequate as currently understood; within the limitations of "search and seizure" set by the provision itself, it is perhaps inevitable that the focus would be on ideas of invasion and information. My point is that to give the Court's stated

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59 This comes out especially clearly in *Plant*, *supra* note 32 at 293.

60 See *Tessling*, *supra* note 25 at 443: personal privacy "protects bodily integrity, and in particular the right not to have our bodies touched or explored to disclose objects or matters we wish to conceal."

61 This is an idea with a long history in the privacy literature, going back at least to Warren and Brandeis and the idea of privacy as "inviolate personality"; see Warren and Brandeis, *supra* note 17 at 205.

62 Various commentators have linked privacy and personhood, primarily in the private-law context; see particularly Edward J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 N.Y.U.L. Rev. 962; Charles Fried, "Privacy" (1968) 77 Yale L.J. 475; Jeffrey H. Reiman, "Privacy, Intimacy, and Personhood" (1976) 6 Phil. & Public Affairs 26; Robert C. Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort" (1989) 77 Cal. L. Rev. 957. For critiques of this view, see Jed Rubenfeld, "The Right of Privacy" (1989) 102 Harv. L. Rev. 737; James Q. Whitman, "The Two Western Cultures of Privacy: Dignity Versus Liberty" (2004) 113 Yale L.J. 1151.

goal of protecting "people, not places" real meaning, we need to move beyond treating people as just one zone among others to be protected from invasion and instead to confront human complexity and specificity. This requires moving *Charter* privacy protection away from an exclusive focus on the territorial and informational views of the right, limited as they are by their roots in trespass and invasion, and exploring some of the other ways that the state interferes with the privacy, broadly conceived, of human beings. This means bringing "people, not places" out from under the shelter of section 8 and into the analysis of section 7.

3. Privacy and Section 7

Though its application and contours are continually developing, the existence of a right to privacy in section 8 is hardly controversial. Privacy has many aspects, however, and not all violations of privacy involve searches or seizures. While most state violations of territorial and informational privacy fit within section 8, what of the still hazy personal privacy? Personhood concerns extend far beyond the searches and seizures rubric; to limit privacy of the person to freedom from invasive body searches would be to conceptualize the human being as just another place, which would narrow "people, not places" excessively. As we have seen, despite bringing into section 8 analysis concerns about human dignity and the protection of a "biographical core" of information, the Court's development of section 8 privacy has focused more on the places than on the people. If privacy is to be a fundamental constitutional right, protected in all its variety – and the Court's jurisprudence suggests that this is indeed the goal – the searches and seizures model of section 8 is too limiting. What is needed is a clearer association of the right to privacy with the more person-centred rights to life, liberty, and security found in section 7 of the *Charter*.[63]

Unlike section 8, whose meaning was hammered out early in *Charter* adjudication, section 7 has been and remains a battleground of conflicting textual, jurisprudential, and political interpretations. Recently termed "the Charter's problem child,"[64] section 7 has been the site of some of the most difficult issues in *Charter* interpretation, from procedural versus substantive due process in the early days to the

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[63] Section 7 reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[64] Jamie Cameron, "From the *MVR* to *Chaoulli v. Quebec*: The Road Not Taken and the Future of Section 7" (2006) 34 Sup. Ct. L. Rev. (2d) 105 at 105.

controversy over positive economic and social rights more recently.[65] There have been, however, some tentative suggestions from the Court that section 7 protects privacy, and indeed privacy of a very different kind than that protected by section 8.

A) Fits and Starts Towards Section 7 Privacy

Though the inclusion of an explicit right to privacy in section 7 was rejected in committee hearings on the draft *Charter*,[66] the Supreme Court has on numerous occasions flirted with the idea that section 7 contains a substantive right to privacy, associated with either the liberty or the security interest or both.[67] Tantalizing though they are, these suggestions – invariably in *obiter dicta*, minority opinions, or dissents – are not definitive, and the Court has never clearly agreed on the existence of such a right, let alone its scope and application.

This reluctance is due at least in part to the difficulties and political dangers in going where the legislature has strongly suggested the Court should not go, though as we have seen, this did not prevent the Court from creating a strong right to privacy in section 8. A more fundamental, though not insurmountable, obstacle stems from the problems in defining privacy, an exercise that despite a flood of definitions has achieved no consensus whatsoever.[68] Unlike section 8, where searches and seizures naturally call to mind popular ideas of privacy as solitude against unwanted intrusions, in its ordinary meaning section 7 by no means clearly implies a right to privacy. Depending on how one defines privacy and the rights to life, liberty, and security, however, section 7 might have either everything or nothing to do with

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65 Cameron, *ibid*., provides a good overview. On due process see Luc Tremblay, "Section 7 of the Charter: Substantive Due Process?" (1984) 18 U.B.C. L. Rev. 201. On economic and social rights see Martha Jackman, "What's Wrong With Social and Economic Rights?" (1999-2000) 11 N.J.C.L. 235; Jane Matthews Glenn, "Enforceability of Economic and Social Rights in the Wake of *Gosselin*: Room for Cautious Optimism" (2004) 83 Can. Bar Rev. 929.

66 The New Democratic Party proposed adding a second paragraph to section 7, which would have read, "Everyone has the right to protection against arbitrary or unreasonable interference with privacy;" see *Minutes* (section 7 privacy), *supra* note 2 at 46:62.

67 This is besides the suggestion that the right to privacy might itself be a principle of fundamental justice; see *R. v. Mills*, [1999] 3 S.C.R. 668 at 714, *per* McLachlin and Iacobucci JJ. for the majority [*Mills*].

68 On the definitional difficulties, see especially Solove, *Understanding Privacy*, *supra* note 10 at 12-38; Daniel J. Solove, "A Taxonomy of Privacy" (2006) 154 U. Pa. L. Rev. 477 [Solove, "Taxonomy"]; Ken Gormley, "One Hundred Years of Privacy" [1992] Wisc. L. Rev. 1335.

privacy. If one starts from the position that there exists a primordial right to privacy that should have been in the *Charter* but was left out (or was left implicit), then section 7 would seem to be its most likely home, even more so than section 8. Certainly, if we view the constitutional right to privacy as closely linked to the protection of fundamental human dignity, an idea that has been asserted on numerous occasions,[69] then section 7 seems the most direct and complete way to protect this central aspect of individual autonomy.[70] If, on the other hand, we start from the position that no such overarching right exists, and that privacy interests are engaged in certain kinds of situations for which the law provides specific and distinct remedies, then section 7 would seem to be entirely unconnected to privacy, unless privacy were to be defined so loosely as to be almost meaningless.[71]

As I argued above, the principle of "people, not places" seems to look towards an expansive view of privacy linked to values of dignity, autonomy, and identity. Section 8 has provided little scope for the development of these personhood aspects of the right to privacy, however, since the focus on reasonable expectations tends to push the analysis away from subjective concerns and towards territorial and informational analysis. It is worth tracing the history of the Court's flirtation with section 7 privacy before exploring further how an expanded understanding of the constitutional right to privacy might clarify what "people, not places" means in the *Charter*.

Privacy was first brought explicitly into the orbit of section 7 in early 1988 in Wilson J.'s concurring opinion in *R. v. Morgentaler*.[72] Drawing explicit analogies between Canadian abortion law and the landmark privacy decisions of the US Supreme Court in *Griswold v. Connecticut* and *Roe v. Wade*,[73] she began by asserting a central place for human dignity in the *Charter*, and then used this value to inform a

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69 See e.g. *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326 at 1362, *per* Wilson J. concurring [*Edmonton Journal*]; *Stillman*, *supra* note 28 at 643, *per* Cory J. for the majority. Indeed, the Court has held human dignity to underlie all *Charter* rights, an idea first expressed in Wilson J.'s concurring opinion in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 166 [*Morgentaler*], and then developed more fully by all of the justices (despite differences as to the result) in *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519 [*Rodriguez*].

70 See the literature cited *supra* note 62.

71 On this more restricted view of privacy, which characterizes the common law tort of invasion of privacy, see William L. Prosser, "Privacy" (1960) 48 Cal. L. Rev. 383; Harry Kalven, Jr., "Privacy in Tort Law – Were Warren and Brandeis Wrong?" (1966) 31 Law & Contemp. Probs. 326; Solove, "Taxonomy," *supra* note 68.

72 *Supra* note 69.

73 *Griswold*, *supra* note 6; *Roe v. Wade*, 410 U.S. 113 (1973).

broad reading of section 7's liberty interest as including "the right to make fundamental personal decisions without interference from the state."[74] She concluded that "the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives."[75] Though none of her colleagues subscribed to this view, preferring instead to base the decision on security of the person, Wilson J.'s linkage of dignity and autonomy in the context of section 7 liberty and her suggestion that this amalgam is a species of privacy protecting the right to make fundamental personal decisions without interference would be important in later attempts to articulate a right to privacy in section 7.

Wilson J.'s opinion in *Morgentaler* looked back to her own discussion of liberty in the context of section 7 in her dissenting opinion in *R. v. Jones* of 1986. In that case, which dealt with a parent charged with truancy under schools legislation for home schooling his own and other children, the majority of the Court found it unnecessary to comment on the scope of the section 7 liberty interest since the accused had not been deprived of his rights in violation of the principles of fundamental justice. Wilson J., however, set out an expansive definition of liberty that would be a foundation for subsequent discussions on the interpretation of section 7:

> I believe that the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric – to be, in to-day's parlance, "his own person" and accountable as such. John Stuart Mill described it as "pursuing our own good in our own way."[76]

After *Morgentaler*, La Forest J. picked up on the idea of section 7 privacy in 1988, writing for a unanimous Court in *R. v. Beare*, a case involving fingerprinting. In an off-hand remark (which opens to question the degree of concurrence by the other justices), he asserted:

> Assuming section 7 includes a right to privacy such as that inhering in the guarantee against unreasonable searches and seizures in s. 8 of the Charter, a proposition for which I have considerable sympathy, it must be remembered that the present Chief

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74 *Morgentaler*, *supra* note 69 at 166.

75 *Ibid*. at 171.

76 [1986] 2 S.C.R. 284 at 318 [*Jones*].

> Justice in Southam was careful to underline that what the Constitution guaranteed was a "reasonable expectation" of privacy.[77]

Following *Morgentaler* and *Beare*, a number of cases dealing with a variety of factual situations have brought privacy and section 7 together, though the language used shows that it has always only been certain justices – and never a clear majority of the Court – treading carefully around the idea of section 7 privacy. In *Edmonton Journal v. Alberta (A.G.)* of 1989, which dealt with a statutory partial publication ban on court proceedings involving family matters, La Forest J., dissenting in part, stated in a remarkably conditional way that various "considerations may well indicate that, in some contexts at least, privacy interests may well be invoked as an aspect of the liberty and security of the person guaranteed by s. 7 of the *Charter*."[78] In 1993, Lamer C.J.C., writing for the Court in *R. v. Macooh*, a case of hot pursuit into the accused's home, stated that "even assuming that [section 7] implies a protection of a right to privacy, something which we do not have to decide here," this argument was "devoid of merit" on the facts of the case.[79] In *B.(R.) v. Children's Aid Society of Metropolitan Toronto* of 1995, which concerned the rights of Jehovah's Witness parents to refuse blood transfusions for their daughter, La Forest J., writing for the majority, reminded us that in *Beare* he had been "sympathetic to the view that s. 7 of the *Charter* included a right to privacy."[80] Similarly, in the context of the production of medical records in sexual assault cases, L'Heureux-Dubé J. noted in *R. v. O'Connor* of 1995 that "[t]his Court … has expressed sympathy for the proposition that s. 7 of the *Charter* includes a right to privacy,"[81] a degree of support that became "great sympathy" two years later in her dissent in *M.(A.) v. Ryan*.[82] More recent cases have shown various justices still speculating about the existence of section 7 privacy, notably McLachlin C.J.C., writing for the majority in *R. v. Sharpe*, where privacy is a "value" rather than a right:

> Privacy, while not expressly protected by the Charter, is an important value underlying the s. 8 guarantees against unreasonable search and seizure and the s. 7 liberty guarantee …[83]

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77 *R. v. Beare*; *R. v. Higgins*, [1988] 2 S.C.R. 387 [*Beare*] at 412 [emphasis added].

78 *Supra* note 69 at 1377.

79 [1993] 2 S.C.R. 802 at 822 and 821, respectively. The *Charter* arguments were dismissed.

80 [1995] 1 S.C.R. 315 at 369 [*B.(R.)*].

81 [1995] 4 S.C.R. 411 at 482.

82 [1997] 1 S.C.R. 157 at 199.

83 2001 SCC 2, [2001] 1 S.C.R. 45 at 72. See also *Godbout v. Longueuil (City*

Though speculating why the Court has been more reluctant to embrace section 7 privacy than section 8 privacy is hazardous, two possible reasons deserve brief mention. First, a degree of overlap exists between some situations implicating fundamental personal decisions and the economic and social rights to which a majority of the Court remains deeply opposed. If a private decision for which protection is claimed smacks at all of using the liberty or security interests to protect the right to earn a livelihood, both the Supreme Court and provincial appellate courts have been quick either to reject it outright, as in *Siemens v. Manitoba*,[84] or to decide it on other grounds that avoid this issue, as in the mandatory retirement cases.[85] A good illustration of this is the Saskatchewan case *Shaw v. Stein*, in which amendments to the provincial *Family Property Act* that imposed spousal rights and obligations on unmarried partners were challenged under section 7 of the *Charter*. Though the challenge clearly invoked a liberty-based view of privacy – the argument was that the amendments interfered with autonomy by denying the choice of whether or not to consider oneself married – the Court of Queen's Bench allowed the Attorney General's motion to strike the constitutional question by interpreting the legislation as dealing with the economics of matrimonial property law rather than with privacy, thus rendering section 7 inapplicable.[86]

A second problem is the reluctance of the courts to embrace wide-ranging rights that do not admit of easy definition or limitation. Lamer J.'s remark in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* might apply equally well to privacy:

> If liberty or security of the person under s. 7 of the Charter were defined in terms of attributes such as dignity, self-worth and emotional well-being, it seems that liberty under s. 7 would be all inclusive. In such a state of affairs there would be serious reason to question the independent existence in the Charter of other rights and freedoms such as freedom of religion and conscience or freedom of expression.[87]

In theory, *Charter* rights and freedoms as diverse as expression, conscience and belief, mobility, association, and equality all implicate

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of), [1997] 3 S.C.R. 844 at 893 [*Godbout*]; *Mills*, *supra* note 67 at 721; *Blencoe*, *supra* note 48 at 340, 357; *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48, [2000] 2 S.C.R. 519 at 573.

84 2003 SCC 3, [2003] 1 S.C.R. 6. *Cf.* also *R. v. Banks*, 2007 ONCA 19, 84 O.R. (3d) 1, permission to appeal to S.C.C. refused.

85 See e.g. *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 and *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, both decided on equality grounds.

86 2004 SKQB 194, (2004), 248 Sask. R. 23. The decision was not appealed.

87 [1990] 1 S.C.R. 1123 at 1170.

the scope of an individual's power to make fundamental life decisions, as cases like *Godbout v. Longeuil (City of)*[88] or the mandatory retirement cases or even *R. v. Sharpe*[89] indicate. However, values like dignity, self-worth, autonomy, and emotional well-being, though not equivalent to life, liberty, and security of the person, do inform these rights and need to be given some meaning. Characterization of these rights is crucial. In *Morgentaler*, for example, the same result might have been achieved via various different "rights." In the final decision, none of the justices supported a right to abortion. Wilson J. was alone in recognizing a liberty-based right to make fundamental life choices; the majority accepted a right to security of the person. More recently, in *R. v. Malmo-Levine; R. v. Caine*, the majority characterized the appellants as demanding a "free-standing constitutional right to smoke 'pot' for recreational purposes," a rather fanciful characterization much harder to sustain than a personhood-based right to privacy or liberty or security.[90] By providing a way to characterize different sets of circumstances touching liberty and security, but not coterminous with either, privacy can bridge the gap between the overarching values informing *Charter* analysis and the enumerated rights of life, liberty and security.

Whatever its reasons, the Court's reluctance to commit itself to section 7 privacy has resulted in a series of far from compelling precedents, couched in hypothetical and speculative language. Still, these tentative steps do indicate that while lately a right to privacy in section 7 may be dormant and potential, it is certainly not non-existent.

It is worth revitalizing this line of analysis, since the contexts in which section 7 privacy has arisen – abortion, choice of where to live, parental rights, and so on – show that it often engages issues distinctly different from the invasions and disclosures typical of section 8 privacy. The common thread in these section 7 cases is a concern with the human being not as a space, as in bodily searches under section 8 "personal privacy," but as an individual whose autonomy must to be protected against the unjustified – the qualifier is crucial – meddling or obstructionism of the administrative state.[91] Outside the criminal context, the personal-territorial-informational taxonomy on which

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88 *Supra* note 83.

89 2001 SCC 2, [2001] 1 S.C.R. 45.

90 2003 SCC 74, [2003] 3 S.C.R. 571 at 624 [*Malmo-Levine*].

91 An excellent example is *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] S.C.J. No. 30 (QL) [*A.C.*], in which the Court split 6-1 over whether a statutory provision effectively creating an irrebuttable presumption of the incapacity of children under the age of 16 to make decisions regarding their medical care (in this case a potentially life-saving blood transfusion) represented an arbitrary

section 8 privacy is based is inadequate, since its concerns tend to be external to the individual: physical interference with the body, with space, or with information. Section 7 privacy, by contrast, offers a way to move privacy protection towards internal aspects of the human being, which in turn can give privacy a positive dimension as something more than simply security from different types of invasion. As such, it offers an opening for bringing into constitutional privacy analysis a fuller understanding of human dignity, based not only on the corporeal, but on the non-corporeal, psychological, and even spiritual values that go to make us human. In this way, section 7 privacy can help fill out the principle of "people, not places" by articulating more clearly how the *Charter* protects "people."

B) Privacy and Personhood

Privacy is a notoriously slippery concept. "Protean" to some, indefinable to others, the difficulty is in part due to privacy's basis in highly subjective impressions that something of our own has somehow been violated, invaded, taken away, or otherwise interfered with. Moreover, the violations need not be physical to elicit these impressions; interference with our thoughts, our relationships, or our choices likewise brings up feelings that privacy has been violated, as outsiders – state agents in the *Charter* context – meddle in or even control for us what we feel should be private and personal.

Under the *Charter*, section 8 privacy covers physical invasions, but this is only part of the story of potential privacy violations. Like section 8, section 7 privacy can also be interpreted as involving a form of intrusion,[92] though the broader scope of section 7 allows the provision to embrace both physical and more figurative kinds of interference with privacy. As we move away from the criminal and regulatory context with which section 8 is primarily concerned, we see that certain interferences, such as those involving choosing the circumstances of one's death,[93] or family decision-making,[94] or choice

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infringement of the section 7 liberty and security rights of a Jehovah's Witness just shy of 15 years of age.

[92] Solove classifies decisional privacy as a form of invasion, and moreover emphasizes its links to control over information; see *Understanding Privacy*, *supra* note 10 at 165-70. In my view, this unnecessarily limits the conceptual scope of this area of privacy protection.

[93] *Rodriguez*, *supra* note 69. This has been an important site of privacy discussion in the United States as well; see, with differing outcomes as to the existence of a right to privacy, *Re Quinlan*, 355 A.2d 647 (1976, N.J. Sup. Ct.) and *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

[94] *Jones*, *supra* note 76; *B.(R.)*, *supra* note 80; *M.(V.) v. British Columbia*

of residence,[95] or even expressions of culture[96] bring forward the personal aspect of privacy protection and leave aside its territorial and informational sides. Indeed, if section 7 is an umbrella provision,[97] then it can accommodate both kinds of privacy – external and internal, corporeal and non-corporeal, or however we choose to label them. The security interest links to the more corporeal privacy of section 8, while the liberty interest points to a broader, more abstract privacy as protection against outside interference with fundamental decisions.[98]

What section 7 brings to privacy analysis is a move away from an exclusive focus on a negative view of privacy – protection against invasion – and towards a focus on its positive side – the right to make fundamental decisions without interference, subject only to reasonable and justifiable limits. This positive aspect of privacy moves the analysis away from the protection of places (or people in places) and towards the protection of people full stop, since it works to protect the active expression of individual autonomy.

Put another way, the difference between privacy in section 8 and section 7 reflects differences in the activities that give rise to *Charter* challenges. Section 8 sets up limits on the police powers of the state, determining when investigation of criminal activity constitutes an invasion that crosses the threshold of reasonability. Growing marijuana in one's basement, hiding stolen property in bags in a car, driving while intoxicated – the starting point is that these are suspicious acts, and the question is whether the state is playing fair in its investigation.[99] Section 7 privacy turns on different issues, which generally involve state restrictions or prohibitions at the boundaries of usually licit

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(Director of Child, Family and Community Service), 2008 BCSC 449, 85 B.C.L.R. (4th) 142.

95 *Godbout*, *supra* note 83.

96 *A.C.*, *supra* note 91; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256. Though the latter two cases were decided on the basis of freedom of religion and do not explicitly involve privacy, they bring up similar issues of dignity and autonomy in the context of fundamental choices about how to live one's life.

97 *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 502-03 [*Motor Vehicle Reference*].

98 Constitutional privacy has taken this direction in Germany; see Eberle, *supra* note 27.

99 This is not to say that suspects subjected to a search or seizure were necessarily engaged in illegal activities, nor to deny that over-zealous surveillance or investigation can violate the privacy of innocent people. The point is that the events leading to a section 8 privacy challenge are generally motivated by a suspicion of illegal activity. This point is usefully underscored in Abella J.'s concurring opinion in

activities, such as raising one's children, deciding where to live, asserting control over one's body, earning a living, and so on. As such, section 7 privacy protects against state limits on the sorts of activities that all people, as autonomous individuals in a free and democratic society, expect to engage in without interference.

This view of privacy as a positive right builds on Wilson J.'s opinion in *Morgentaler*, and has been voiced periodically since, most strongly by Bastarache J. in *Blencoe v. British Columbia (Human Rights Commission)*.[100] Moreover, discussing questions like these as privacy matters rather than simply as liberty or security issues adds something useful to the analysis. Clearly various cases that bring up decisional privacy concerns have been decided under the liberty or security interests; one thinks of *B.(R.)* and *Rodriguez v. British Columbia (A.G.)*, respectively.[101] Characterizing the protection of fundamental life choices and individual autonomy as a privacy right, however, usefully brings forward the personhood aspects of section 7 by linking the analysis to various strands of privacy theory outside the constitutional context. Most notably, this brings in the view from the civilian tradition of privacy as an aspect of personality, a perspective that contrasts markedly with the more spatially-oriented common law view of privacy as an aspect of trespass.[102] The problem with "people, not places" has in part been due to inadequate theorization in the largely common-law-based constitutional law of Canada of exactly what protecting "people" might mean in law.

This is not say that anything that conceivably could be cast as an autonomy or identity issue necessarily should be, nor that all decisional privacy claims are equal. The difficulty lies in determining when a life choice becomes of such fundamental personal importance as to attract *Charter* protection. The decision to install video lottery terminals in a shop, for example, is clearly less closely associated with personhood than the decision to end one's life or to refuse a blood transfusion, but

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Patrick, *supra* note 25 at para. 77.

100 *Supra* note 48 at 340:

The liberty interest protected by s. 7 of the *Charter* is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices.

101 *B.(R.)*, *supra* note 80; *Rodriguez*, *supra* note 69.

102 See especially the discussion of privacy as an extrapatrimonial personality right in *Aubry v. Éditions Vice-Versa*, [1998] 1 S.C.R. 591. On the distinctions between privacy in the civil law and common law traditions, see Whitman, *supra* note 62; and Basil S. Markesinis, *et al*., "Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)" (2004) 52 Am. J.

drawing a bright line is impossible. The potential harm in restricting such choices, however, argues for a high justificatory burden on the state; these matters, after all, often reach deeply into core aspects of the personality. Given this intimate connection with individual identity and autonomy, stronger justification for limiting or barring these choices is needed than simple assertions by the courts that an individual's subjective belief is unreasonable when measured against the yardstick of others' values.[103]

Compare two cases. In *R. v. Monney*, the Court unanimously rejected a rather ludicrous attempt to bring a personhood claim into a section 8 analysis:

> Heroin pellets contained in expelled faecal matter cannot be considered as an "outward manifestation" of the respondent's identity. An individual's privacy interest in the protection of bodily fluids does not extend to contraband which is intermingled with bodily waste and which is expelled from the body in the process of allowing nature to take its course.[104]

In *R. v. Clay*, the Court reasoned similarly that as a simple lifestyle choice, "[r]ecreational [marijuana] smoking is not on a par with other activities that have been held to go to the heart of an individual's private existence."[105] The *Charter* claims failed in both cases, but both illustrate how privacy violations – whether physical interference with the body, things, or information, or more abstract denial of autonomy – implicate personhood concerns. What is missing in both cases, however, is any real consideration of exactly how personhood has been affected beyond a simple assertion that the claimant has failed to clear the hurdle. Protecting "people, not places" demands more.

What autonomy-based personhood claims and the "people, not places" formulation more generally raise is the difficult issue of the place of subjectivity in *Charter* analysis. I believe that clearer engagement with the unavoidable subjectivity of section 7 privacy issues, limited of course by considerations of legality and social harm, is essential to achieving just results. An exclusive focus on objective standards, whether in terms of reasonable expectations of privacy, or in considering the principles of fundamental justice, or in applying section

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Comp. L. 133.

[103] This was a key point of disagreement between the majority and Binnie J. in dissent in *A.C.*, *supra* note 91.

[104] *Supra* note 30 at 680.

[105] 2003 SCC 75, [2003] 3 S.C.R. 735 at 751. The reasoning in the companion cases *Malmo-Levine*, *supra* note 90 is similar.

1, pushes aside the "people" in "people, not places," substituting potential effects of privacy violations on hypothetical others for actual effects on real people. Wilson J. recognized the problems with this in *Morgentaler* when she argued that the gender aspects of the abortion question necessitate addressing the subjective issues raised, though her male colleagues declined to follow her lead.[106] Most recently, Binnie J., dissenting in *A.C. v. Manitoba (Director of Child and Family Services)*, suggested a similar point:

> The Court has thus long preached the values of individual autonomy. In this case, we are called on to live up to the s. 7 promise in circumstances where we instinctively recoil from the choice made by A.C. because of our belief (religious or otherwise) in the sanctity of life. But it is obvious that anyone who refuses a potentially lifesaving blood transfusion on religious grounds does so out of a deeply personal and fundamental belief about how they wish to live, or cease to live, in obedience to what they interpret to be God's commandment.[107]

In the case of searches and seizures within criminal investigations, an objective standard fits more naturally, especially since reasonability is textually mandated, and because section 1 has been irrelevant in section 8 analysis.[108] Outside the criminal context,[109] however, where the courts are adjudicating limits on highly personal decisions, defining section 7 privacy according to reasonable expectations is an ill fit that effectively imports a kind of section 1 analysis into the definition of the right, where it does not belong.[110] Though the idea that section 7 includes free-standing substantive rights to life, liberty, and security of the person has received little support,[111] separating these substantive

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106 *Morgentaler*, *supra* note 69 at 171:

> It is probably impossible for a man to respond, even imaginatively, to such a dilemma [whether or not to seek an abortion] not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.

107 *Supra* note 91 at para. 219.

108 As is only proper, given Wilson J.'s logical observation in *Thomson Newspapers v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at 501 that it would be odd if an "unreasonable search or seizure" could be saved as a "reasonable limit" under section 1.

109 Philip Bryden, "Section 7 of the *Charter* Outside the Criminal Context" (2005) 38 U.B.C. L. Rev. 507.

110 This concern has been voiced regarding recent equality cases; see Sheila McIntyre, "The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review" (2006) 31 Queen's L.J. 731.

111 Arbour J. floated this idea (which in my view is textually compelling) in

rights from the fundamental justice clause would open them up to the kind of positive reading outlined above, something that would be much more difficult if these rights continued to be inextricably linked to the negatively-oriented "deprived thereof" clause. A positive understanding of life, liberty, and security would then push reasonability analysis out of the substantive definition of these rights and open the door for a fuller airing of the subjective considerations central to these claims.[112]

Section 7 is a provision in flux, caught between being stifled by the constraints of the *Motor Vehicle Reference* and becoming unworkably diffuse and abstract.[113] Where it goes in the future will affect the direction of *Charter* rights more generally, as LeBel J. suggested in *Blencoe*:

> We must remember though that s. 7 expresses some of the basic values of the Charter. It is certainly true that we must avoid collapsing the contents of the Charter and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the Charter. At the same time, the Court should remind litigants that not every case can be reduced to a Charter case.[114]

The history of section 7 privacy at the Supreme Court bears out LeBel J.'s warnings. Flexibility is important so that privacy in the *Charter* does not become fossilized in the informational and territorial view that has become the focus of section 8 privacy.

4. Conclusion

The "people, not places" formula, underlying as it does *Charter* privacy protection and perhaps even the entire *Charter*, deserves more than lip service. While the Court frequently evokes broad personhood values

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dissent in *Gosselin v. Quebec (A.G.)*, 2002 SCC 84, [2002] 4 S.C.R. 429 at 614-15. L'Heureux-Dubé J. concurred with Arbour J.'s section 7 analysis, but the other justices would have none of it.

[112] This could in turn allow for bringing section 1 analysis into section 7, something currently virtually excluded by the *Motor Vehicle Reference*, *supra* note 97 at 518. See Cameron, *supra* note 64; Christopher D. Bredt and Adam M. Dodek, "The Increasing Irrelevance of Section 1 of the Charter" (2001) 14 Supreme Ct. L. Rev. (2d) 175.

[113] Cameron, *ibid.*

[114] *Supra*, note 48 at 406.

such as dignity or autonomy, it has tended to pull back from giving these more than symbolic effect due to conceptual difficulties in limiting their scope or in the face of the spectre of economic and social rights. Bringing privacy protection clearly within section 7 would expand *Charter* privacy beyond the conceptual limitations of the search and seizure model from the criminal law, and recast privacy as a positive right to personal realization and autonomy rather than simply a negative right protecting against invasion. If the *Charter* is to protect human dignity, the courts cannot ignore the personhood issues that privacy violations raise. Revitalizing privacy within section 7 would help begin to cast off the spatial residue inevitable in section 8 privacy. Until this happens, "people, not places" will be an increasingly empty mantra, invoked automatically in every privacy case, but devoid of meaning.