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Jed Rubenfeld
Yale Law School

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The Right of Privacy and the Right to Be Treated as an Object

JED RUBENFELD*

The problem of privacy today is no longer—if it ever was—a distinctly legal problem. On the contrary, the way we think about privacy as legal scholars and as advocates of legal reform is unlikely to help us to address the more intractable and important political problems that today surround the “right to be left alone.” To be sure, it is important to look at the ways in which Fourth Amendment law, employment law, and medical regulations, for example, increasingly authorize deep intrusions into our privacy. It is a great contribution of The Unwanted Gaze,1 Professor Rosen’s extremely interesting and provocative book, that it brings together so many legal domains and forces us to think about their convergence. But if we want to know what is really going on with privacy today, we have to step back from our legal analysis and ask what it is in our society, in our culture—including our legal culture—that is driving these developments. In short, some realism is in order.

We should start by admitting certain uncomfortable facts. For example, we might profitably begin by acknowledging the breathtaking disjunction in our society between public norms and private norms. Take pornography. Millions of people, apparently, buy or look at pornography on the Internet every month, but we consider it tremendously embarrassing to admit this sort of thing in public. If the fact that you have purchased pornography becomes known to the public, it becomes evidence of the sort that can be used to humiliate or to derail your judicial nomination. Or again, millions of people have affairs, but in public such conduct is piously and ostentatiously condemned. If a politician is revealed to be having an affair, it can jeopardize his political career or lead to a Title VII action. Now, in a society like this, we must expect invasions of privacy. The incentives to violate privacy are too large. The desire to see the fakery and hypocrisy exposed is too great. We want to see that other public figures are doing the things that we know everyone else is doing. So long as American society persists in its breathtaking contradiction on this point—its puritanism in public and its libertarianism in private—there will continue to be invasions of privacy, despite the best efforts of legal scholars and social reformists to protect privacy rights.

It is not that the law resists this contradiction—the law embraces it. A remarkably vivid example may be found in the Supreme Court decision Stanley v. Georgia.2 We have the right, according to that case, to possess obscenity in

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* Slaughter Professor of Law, Yale University.
our homes. But of course we can be thrown in jail for buying or downloading obscene materials, even if we are doing so for use within our homes. In other words, we can be prosecuted for *obtaining* what we have a right to *possess*. Someday, future generations of legal scholars will either laugh or fall silent in perplexity at the fact that our system could embrace these two propositions simultaneously. But for now, so long as we have a legal system that does embrace these two positions, we are ill-advised to cling to the expectation that our privacy will be sacrosanct, or even that invasions will be less than routine. On the contrary, within such a system, it has to be expected that people will exercise their supposed right to look at obscenity in their homes and that police will pry into their homes or their computers to see how they obtained it.

But there is another, related contradiction between the public and private in our law today. In public life, a new right is coming into being, and this new right is coming to occupy a core position in contemporary society. Call it the right to be treated as an object. In the workplace, for example, we demand the right to be treated without regard for our race, sex, ethnicity, religion, sexual orientation, ethnicity, and so on. We demand that employers be blind to these things. They cannot make any decision on the basis of these features of our personhood. They should not comment about them. They should act as if these features simply do not exist.

Consider that these features, which are not supposed to be noticed, are some of the most important things that make us the persons we are. By contrast, if our employers evaluate us exactly as they would evaluate a *machine*, looking at us solely as embodied net marginal product, they have discharged their legal duty. They have done us justice. That is what I mean by the right to be treated as an object.

This stripping away of our subjectivity extends far beyond employment law. In fact, this preference for objectification governs our public life. In public we are not supposed to comment upon—not supposed to notice, even—the race, gender, sex, religion, or wealth of an individual. Those aspects of a person—and the ideas that spring to our minds about those aspects—are not supposed to exist. Those aspects and our reactions to them do not disappear, of course. We are allowed to be who we really are in private. In fact, we have a right to be racist or sexist or religiously intolerant in our thoughts and in our private lives. But all of that is supposed to disappear in public. We are subjects in private, but objects in public.

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3. *See id.* at 559 ("[W]e agree that the mere private possession of obscene matter cannot constitutionally be made a crime."); *see also id.* at 564 ("Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.").

4. *See, e.g., United States v. Reidel, 402 U.S. 351, 356 (1971)* ("The focus of this language [in *Stanley*] was on freedom of mind and thought and on the privacy of one's home. It does not require that we fashion or recognize a constitutional right in people . . . to distribute or sell obscene materials.").
There can be no question here of being against discrimination law in any straightforward sense. Instead, the question concerns how our legal and social worlds interact. We began a crusade against discrimination years ago with the idea that every individual has a right to be treated as a person, a subject. But this crusade has ended in a different place. It has ended with a right to be treated as an object. What is going on here?

What has happened is no accident. Consider the most influential book of political theory since the Second World War, John Rawls’s *A Theory of Justice*. Rawls teaches us that we can attain true morality and justice by placing ourselves in an original position where race, sex, religion, wealth—again, all attributes of ourselves that make us the persons we are—are stripped away.

Of course, the overarching idea behind all this is to treat each individual with respect, but somehow we have come to a point where people have become *objects* of respect. It is as if we can only conceptualize the idea of fundamental rights by engaging in the same kind of dehumanization that the whole concept of fundamental rights was intended to oppose.

If it is true that we have embarked on a campaign of self-objectification in our public lives, the implications of this development are profound, and the implications for privacy particularly so. The objectification that is required of us in public exerts too much pressure on our private lives. Our private lives cannot absorb all of our subjectivity, the whole of our personhood. Accordingly, this subjectivity is always bursting out of its closet, whether in the form of sexual liaisons at work, racially tinged comments among corporate directors, or even senseless killings in schools. And then the police, the courts, the media, can only respond by doing their job, which is to say, by intruding into people’s privacy. Legal, moral, and commercial imperatives will all conspire to produce this result. The police and the media will have a duty to violate our privacy. In the name of the law, of morality, and of consumer demand, journalists and prosecutors will do whatever it takes to find out whether people are illegally seeking sex at work, talking about race where they were not supposed to have racially tinged conversations, looking at the wrong pictures on their home computers, or saying things that they should not say in their e-mail.

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