LAW, MORALITY, AND THE PRIVATE DOMAIN

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Introduction

MORAL QUESTIONS INVADE the law at every turn. To maintain a rigid separation between morality and the law — even in pursuit of analytical clarity — is, at best, an improbable enterprise. The legal positivist's quest for a value-free account of law is countered by the naturalist more plausible claim that this account neglects the very essence of law — its morality — that 'the act of positing law . . . can and should be guided by "moral" principles and rules; that those moral norms are a matter of objective reasonableness, not of whim, convention, or mere "decision"'.[1] Yet, to compound what has long been a perplexing question, positivists do not deny that moral considerations are without truth or practical consequence. As H L A Hart, legal positivism's most resolute modern advocate, declares:

> So long as human beings can gain sufficient co-operation from some to enable them to dominate others, they will use the forms of law as one of their instruments. Wicked men will enact wicked rules which others will enforce. What surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.[2]

This concession to a normative appraisal of legal rules cannot, however, extinguish the apprehension that a narrow positivism may engender, or at least support, unjust laws. Ideal fidelity to law, as Lon Fuller has shown, must mean more than allegiance to naked power.[3]

The contents of this book reflect some of my imprudent distractions over the last two decades. With hindsight it is not difficult to see how the essays might be amended or improved. But, save for the correction of errors or infelicities of style, I have, for three main reasons, resisted this temptation. First, because this comes close to cheating. The ideas expressed represent, it is true, what I embraced at the time the essays were written. But, though I may have changed my mind, who is to say I was not less wrong the first time?

Secondly, some of the essays generated responses from others which, were my original arguments to be retrospectively modified, could render them a shade incongruous. This would, in particular, distort the debate embodied in Chapter 2. South Africa has undergone a profound transformation, yet the moral dilemma of judges in wicked legal systems, described there and in Chapter 3, abides.

Thirdly, there is an important sense in which one's writing represents the peculiar time at which it is born. This is especially so in the case of the continuing debate surrounding the meaning and scope of the concept of 'privacy'. To tinker now with what I said then may, I hope it is not too presumptuous to suggest, degrade the fabric of the period and, hence, impair something of the process by which events shape ideas. Indeed, to choose to reflect upon the capricious concept of privacy and the volatile societies of South Africa and Hong Kong constitutes a reckless flight from predictability, and an invitation to obsolescence. I can only trust that what I have said in those chapters, while it springs in part from the moment, transcends its immediate source and contains a little that may still offer something of value.

I have attempted to remove the occasional repetition and overlap, though this has proved harder than expected. The flow of an essay is easily disrupted by eliminating passages that, though they may appear elsewhere in similar (or even identical form), ought to be allowed to survive in their original habitat. The alternative of cross-referring to other chapters is annoying and unwieldy. So these sections were reprieved from mutilation. They are, mercifully, few.

Moral dilemmas

Though they consider a number of problems, the essays in this collection contain, I hope, something approaching a coherent argument, or at least a related set of ideas. The focus in Part One is on certain moral and legal issues that beset the judicial process, the sources of legitimacy, and the protection of rights. I concentrate in Part Two on the thorny concept of privacy and its preservation. The moral foundations may here seem less discernible (and, in my approach, less conspicuous), but there can be little doubt that 'respect for privacy marks out something morally significant about what it is to be a person and about what it is to have a close relationship with another'.[4] I return to this point briefly below.

In attempting to comprehend the central role of those who occupy a key position in giving voice to the law — the judiciary — I have, in Part One, sought to show that the moral or ethical quandaries that beset this official duty (especially in societies where injustice and insecurity afflict the legal system) are neither avoidable nor intractable. Hong Kong and apartheid South Africa are examples of jurisdictions which, though plainly different, present unsettling challenges to judges who must interpret the law.

In Hong Kong, the exercise of this obligation is, I argue in Chapter 1, fundamental to the maintenance of the common law and its libertarian values. Early promise was signalled by Hong Kong's Court of Final Appeal's robustly libertarian decision in *Ng Ka Ling v Director of Immigration*[5] where the learned Chief Justice unequivocally rejected the decision of the Court of Appeal in *HKSAR v Ma Wai Kwan David*[6] and asserted that the exercise of the court's jurisdiction to declare laws inconsistent with the Basic Law of the Hong Kong Special Administrative Region (HKSAR) to be invalid, was a matter not of discretion, but of duty. It was, the court held, a constitutional check on the executive, legislature, and even the National People's Congress. In interpreting the Basic Law, the courts were to adopt a purposive approach that reflected the spirit of the principle of 'one country, two systems'. And, in respect of 'the constitutional guarantees for [sic] the freedoms that lie at the heart of Hong Kong's separate system':

> The courts should give a generous interpretation to the provisions of Chapter III [containing the fundamental rights and duties of residents] . . . in order to give to Hong Kong residents the full measure of fundamental rights and freedoms so constitutionally guaranteed.[7]

And this approach yielded the court's liberal construction of the right of abode as formulated in Article 24 of the Basic Law (BL 24), and the Government's subsequent referral of the question to the Standing Committee of the National People's Congress under Article 158 with its inevitable unfortunate result.

When the court was next seised of the matter, however, one discerns little evidence of its earlier fidelity to individual rights. The majority accepted the fact that the Standing Committee's power to make an Interpretation under BL158(1) was, in this case, unfettered.[8] Nevertheless, in his dissenting judgment, Bokhary PJ valiantly attempts to import into the evaluation of the Director's decision to remove the applicants from Hong Kong, 'underlying principles' of fairness that inhabit the common law.[9] It is these principles that provide the small, but essential, shaft of light that one would have expected our highest court to deploy. The surrender to constitutional reality might at least have followed a more vigorous struggle.

The courts, it is trite to observe, man the ramparts of our liberty. Judges have the power and the responsibility to safeguard individual rights. The Basic Law promises the survival of the common law, albeit in a potentially inhospitable setting. Yet judges must resist the constitutional vice that threatens to squeeze these values from the system. This is a difficult, but by no means an intractable challenge; the Court of Appeal in the flag case, and several other judges, have demonstrated its viability. But it requires a more comprehensive, coherent theory of judicial interpretation to safeguard the scheme of rights that our new dispensation vouchsafes.[10]

Is it not because we believe that our legal system is infused with the values of fairness, equality and justice that we seek to preserve it? The virtues of the common law should not be exaggerated, but few will dispute that its perpetuation is a sine qua non of our liberty. This is largely because a legal system is essentially a kind of moral system — a view, which will be familiar to readers of Ronald Dworkin, that rests on the proposition that the concept of law is not exhausted by rules; it contains also 'non-rule standards' such as principles and policies.[11] When faced with a hard case, a judge must draw on these moral and political standards in order to reach a decision. He is engaged in a process of 'constructive interpretation'[12] by which he seeks to provide the best possible interpretation of what the law is. This will include his own conception of the 'great network of political structures and decisions of his community'.[13] He must enquire 'whether it could form part of a coherent theory justifying the network as a whole'.[14]

There is, especially in the early years of the HKSAR, a critical need for the courts to formulate this kind of approach to our system of rights. A decision should not turn on the judge's own intuition or discretion, for this would render our rights fragile things to be sacrificed by courts on the altar of community interests or other conceptions of good. And there are already disturbing signs of this approach emerging in Hong Kong. If individual rights are to be accorded the protection they deserve, they must be regarded as part of the law itself. A judge must think of himself not as giving voice to his personal moral or political convictions (or even those that he thinks the legislature or the majority of the electorate would approve), but 'as an author in the chain of common law'.[15] This vision of what Dworkin calls 'law as integrity' that

> accepts law and legal rights wholeheartedly . . . It supposes that law's constraints benefit society not just by providing predictability or procedural fairness, or in some other instrumental way, but by securing a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does.[16]

It constitutes an amalgam of values that form the essentials of a liberal society and the rule of law. Its significance for the maintenance of the common law in Hong Kong is therefore plain. The judge must 'construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well'.[17] Where the legal materials allow for more than one consistent reconstruction, he will decide on the theory of law and justice which best coheres with the 'institutional history' of his community. Most importantly, his interpretation should be 'constructive' — one that depicts our system in the best possible light. He must choose the version of the law that best justifies the legal material: the 'soundest theory of the law'. This judgment will inevitably be one that justifies and explains our community, an essentially *moral* account of the law.

Although the institutional history of Hong Kong does not reveal a record of democracy, and individual rights have only recently been expressed in the emphatic form of written declarations, our courts have long cleaved to the common law's tradition of protecting rights.[18] In these uncertain times, however, judges need to construct a more resilient fortress to protect individual rights. A *moral* reading of the law, including the Basic Law, provides a cogent means by which to attain this goal.

Significantly greater obstacles impeded judges under apartheid. In 1983 my inaugural lecture as Professor of Public Law at the University of Natal, I argued that if a judge is 'to square his conscience with his calling', he had no choice but to resign. The lecture generated what Professor John Dugard, in his reply, calls 'a great stir in legal circles'. The so-called Wacks-Dugard debate, reproduced in Chapter 2, explores the nature of the judicial function, and turns on the competing conceptions of judicial morality and dissent in the face of monstrous wrongs.[19]

Nothing I said was intended to disparage individual members of the judiciary, some of whom manifested both courage and ingenuity in seeking to uphold justice and to respect rights while the executive was bent on their annihilation. Indeed, the proceedings of the Truth and Reconciliation Commission, established after the death of the apartheid order, revealed some of the strains to which this small minority was subjected.[20] At least one judge was driven to resignation, announcing in 1987 that his withdrawal was 'an exclusively personal matter of conscience'.[21] Even in the post-apartheid dispensation this quandary has not faded.[22] Nor is there any reason why it should. The act of judging creates inescapable moral burdens, especially, of course, in those societies whose law mocks the very justice judges are appointed to preserve and defend.

The question of the moral accountability of judges, which I pursue further in Chapter 3, frequently appears to slip through the cracks of legal and political theory, partly, I suspect, because it touches the raw nerve of judicial independence. Yet this need not be so. Moral obligation transcends political responsibility.[23] The separation of powers that is the cornerstone of judicial autonomy is not, I think, threatened by a recognition that judges, like other public officials, may be expected to answer for the exercise of their terrible power. Whether this implies or requires that they be called to account by truth commissions or similar bodies is always likely to be controversial. My efforts in this chapter are confined to what may be called the first-order question of moral, as opposed to institutional, responsibility.

In Chapter 4 I attempt to explain, or at least to understand, how Hong Kong's colonial, capitalist system at midnight on 30 June 1997 transmogrified into a Special Administrative Region of the world's largest socialist state. Investigating the legal source of the Basic Law's promise of continuity, I draw on the theories of H L A Hart and, more particularly, Hans Kelsen, whose idea of a *Grundnorm* has afforded a

useful tool by which to account for revolutionary changes to the legal order. The Sino-British Joint Declaration and the Basic Law purport to supply the continuity, duration, and identity through time that have proved so elusive in revolutionary situations. The unique features of this transition, however, place these theories under major strain. In fact, I conclude that the very positivist enterprise of arriving at neutral or formal justifications of authority is suspect, and I propose instead that answers be sought in social and normative explanations of legitimacy. By severing law from morals, Kelsen's influential account of legal validity impedes an understanding of social reality.[24]

When I wrote this essay in 1993 the issue of continuity, though important, was largely of academic interest. But it was not long before the courts were asked to rule on it. In *HKSAR v Ma Wai Kwan, David*[25] the Court of Appeal rejected the respondents' argument that the Standing Committee of the National People's Congress lacked the authority to establish a provisional legislature for Hong Kong. HKSAR judges, the court held, had no jurisdiction to question acts of the NPC or its subordinate organs. In the same way as the colonial courts allegedly could not question acts of the sovereign, the courts of the HKSAR were unable to query those of the Chinese authorities. The metamorphosis from colony to SAR is accounted for, not by any theory of sovereignty or its transfer, but largely by the terms of the Joint Declaration and the Basic Law.[26]

In Chapter 5 I consider the question of moral duties to the most abused members of our society. Virtue would be a hollow thing if kindness were to extend only to our own species, for, as J L Mackie puts it:

> A humane disposition is a vital part of the core of morality . . . Such a disposition, if it exists, naturally manifests itself in hostility to and disgust at cruelty and in sympathy with pain and suffering wherever they occur. If we are a people of the sort that we need to be, and . . . we want to be, we cannot be callous and indifferent, let alone actively cruel, either towards permanently defective human beings or towards non-human animals.[27]

There is little evidence that, though the practice of using live animals for scientific research has generated greater attention and concern, the moral status of animals has improved. From some jurisdictions, however, there springs the occasional scintilla of hope. The recently enacted Animal Welfare Act in New Zealand Act contains some major initiatives that have, until now, not received statutory recognition, such as the use of

codes of welfare and the philosophy of the 'five freedoms': proper and sufficient food and water, adequate shelter, the opportunity to display normal patterns of behaviour, physical handling in a manner that minimizes the likelihood of unreasonable or unnecessary pain or distress, and protection from, and rapid diagnosis of, any significant injury and disease. The legislation contains also a significantly widened definition of an 'animal' to include most creatures capable of feeling pain, whether domesticated or wild. Provisions relating to the use of animals in research, testing and teaching are more comprehensive and detailed than in the previous legislation, along with greater accountability when undertaking animal experiments.

In respect of the general issue of cruelty, the law in most countries, even when protective of animals, is rarely enforced. And when it is, penalties imposed are invariably trifling. As a species, we still seem to be a long way from recognizing and preventing the cruelty and suffering we inflict on those we eat, exploit and abuse.

In Chapter 6 my task is to demonstrate how the concept of human rights is sufficiently hardy to resist some of the assaults that are launched against it. I consider nine such attacks, including the utilitarian, socialist, feminist, communitarian, and relativist challenges, and attempt to show that, though bruised and battered, the idea of human rights still breathes. The prevalence of ethical and cultural relativism, I argue, flies in the face of internationally accepted minimal standards of behaviour. These norms are an integral feature of international law and custom. A naturalist logic should operate to undermine both the 'statist' logic and the associated relativism that impair the effective protection of this so-called International Bill of Rights.

The private domain

Part Two concentrates on the right of privacy, though paradoxically — and, I suppose, controversially — I conclude, in Chapter 12, that there is a need for a reappraisal of the rights argument in the complex debate about privacy. This is not only a consequence of the inherent vagueness of the concept of privacy itself, but also because the 'right of privacy' has failed to provide adequate support to the private realm when it is intruded upon by competing rights and interests, especially freedom of expression. I do not deny the normative character of privacy. Far from it. I contend, however, that, in our burgeoning information age, the vulnerability of

privacy is intensified. Unless this central democratic value is translated into simple language it becomes less susceptible to effective regulation.

Moral, cultural, and economic assumptions lie at the heart of any conception of what is private. They are rarely uncontentious. The scope of the private domain is plainly contingent on social and historical circumstances.[28] The construction of privacy norms rests also on our political institutions and social environment. And privacy may serve a variety of ends, not all of them virtuous.[29] But while an understanding of these background needs and values enhances our perception of this kaleidoscopic notion, its effective protection requires more precise delineation. My approach may well be misguided, but among several of my numerous critics there is a tendency to accuse me of having discounted or disregarded the social aspects of privacy. To this charge of reductionism I plead not guilty. But before certain judges, it is too late; I already stand convicted.

At the heart of the concern to protect privacy lies a conception of the individual and his or her relationship with society. Indeed, the idea of private and public domains assumes a community in which not only does such a division make sense, but the institutional and structural arrangements that facilitate an organic representation of this kind are present.[30] This was not so for the Greeks who regarded a life spent in the privacy of 'one's own' *(idion)*, outside the world of the common, as, by definition, 'idiotic'. Hannah Arendt captures this representation of a private domain:

> In ancient feeling the privative trait of privacy, indicated in the word itself, was all-important; it meant literally a state or being deprived of something, and even of the highest and most human of man's capacities. A man who lived only a private life, who like the slave was not permitted to enter the public realm, or like the barbarian had chosen not to establish such a realm, was not fully human.[31]

The Romans conceived of privacy as merely a temporary refuge from the activities of the *res publica*. It is only in the late Roman period that it is possible to detect the first recognition of privacy as a zone or sphere of intimacy.[32]

Contemporary distinctions between public and private domains grew out of a twin movement in modern political and legal thought. As I suggest in Chapter 8, the emergence of the nation-state and theories of sovereignty in the sixteenth and seventeenth centuries produced the idea of a distinctly public realm. On the other hand, a delineation of a

private sphere free from the encroachment of the state emerged as a response to the claims of monarchs and, subsequently, parliaments, to an unrestrained power to make law. Hence the development of the modern state, the regulation of social and economic behaviour, the perception of a private zone, and so on, are natural prerequisites to this form of demarcation. And the division between a public and private sphere is a central tenet of liberalism.

Morality is closely related to privacy (in its broadest sense) in several respects. And my narrower conception of 'informational' privacy rests firmly on the ethically permissible lines to be drawn between the public and private domains of our individual and social lives.[33] The right to privacy, though it is a great deal more, is inescapably a moral issue:

> Because private life is the sphere in which individuals relate as individuals, and because maintaining relationships between individuals as individuals is more demanding than maintaining relationships between individuals as generic role players or officeholders, we grant greater discretion in private than in public domains. We feel less competent to judge right and wrong in private domains, and we set higher thresholds before scrutiny and intervention are deemed legitimate. Even when the threshold for scrutiny and intervention is transgressed, because a personal relationship is at issue, we still recognize the domain as private, despite letting outsiders intervene. The privacy norms are engaged, and we have a proclivity to aim at restoring the personal relationship on a more fitting basis through our intervention, if that is possible.[34]

This essentially civic republican view of privacy is to be contrasted with the rights-based liberal tradition that regards privacy as powerfully associated with autonomy.[35] The orthodox legal analysis has, not surprisingly, tended to adopt the latter position, and it is its negative consequences that I have found so troubling. The germ of my discontent is evident in Chapter 7. In this essay, published in the *Law Quarterly Review* in 1980, and developed in my monograph, *The Protection of Privacy* published in the same year, I propose a less expansive alternative that identifies, as the core privacy interest, the protection of 'personal information'.

The last twenty years have, of course, generated an enormous literature on every conceivable dimension of 'privacy'. In postulating an approach that is founded upon the protection of 'personal information', I could not have imagined that, with the spectacular spread of the computer and the advent of the Internet, 'informational privacy' would come to

dominate the debate about the limits of the private domain. The fragility of personal data is not only the stuff of political and moral contention, it has inevitably become a major preoccupation of privacy advocates, legislators and, since the very future of e-commerce turns on the security and integrity of online transactions, of the corporate world too.

The law trundles on, toiling to maintain the frenetic pace at which the technology moves. Chapters 8 and 9 provide sketches of how conventional common law and constitutional doctrine, especially in the United States, have wrestled with the protean concept of privacy. I contend that this analysis fails to specify with clarity or consistency the circumstances under which invasions of privacy are actionable. Judgments in both England and the United States afford only limited guidance as to the legitimate expectations of individuals concerning the protection of intimate or sensitive information. The conceptual disorder that obtains in this branch of the law is, in large part, a consequence of the failure to identify, except in the most general terms, the type of information that warrants protection. But I am repeating myself.

Chapter 10 identifies the interests that are frequently under threat online: privacy and freedom of speech. The question of how these, occasionally colliding, rights might be safeguarded has since become commonplace. The law is an especially blunt instrument in cyberspace. In this essay I query whether a combination of 'fair information practice' and privacy enhancing technology (PET) could provide a solution. This approach is pressed even further in Chapter 12.

Conceiving there to be an inescapable conflict between privacy and freedom of the press, I argue in Chapter 11, is perhaps to neglect the fact that the two rights are, in important respects, mutually supportive.[36] This claim requires me to examine both rights and to conclude that this controversial and difficult subject is best addressed by carefully drafted legislation,[37] though in Chapter 12, as mentioned above, I try to demonstrate that, in the absence of a statute (that is normally too hot for most lawmakers to handle) the data protection paradigm provides a workmanlike alternative.[38]

I need to elaborate upon this central point.[39] The relationship between data protection legislation and the right of privacy has long inhabited an obscure corner of the privacy jungle. The two plainly overlap; indeed the latter is normally invoked as the interest that animates the former. But, even in our burgeoning information society, 'privacy' is not necessarily violated by what we once called 'data banks'.

To some extent, of course, data protection (fashioned to regulate

some of the problems generated by the collection, use, storage and transfer of personal data) can and does protect individuals' 'privacy'. When this claim is made it normally means, I think, not that data protection laws can or should resolve the wider questions that, especially in the United States, are accommodated under the ever expanding umbrella of 'privacy' (abortion, contraception, homosexuality, etc.), but whether personal information obtained by intrusive conduct or gratuitously disclosed by the media lie outside the scope of such legislation.

This is not a matter of mere speculative interest; the application of data protection norms to matters that are considered by many to lie beyond its orbit is now a reality. The collection and use of personal data by the media is the most conspicuous example of this development, though the European Directive on Data Protection explicitly exempts the press from its purview.[40]

The extent to which 'fair information practice' might be applied to the collection of data by the media has recently been considered by the Hong Kong Court of Appeal. It follows the first judicial review of the Privacy Commissioner for Personal Data[41] under the Personal Data (Privacy) Ordinance.[42] The Commissioner survived the challenge. But that decision was reversed by the Court of Appeal.[43] The defendant, a popular Chinese magazine, published a photograph of a young woman to illustrate an article on fashion. Her image, taken with a long-range lens as she stood at a busy intersection, was used as an example of poor dress sense. She consented neither to the photograph nor to its subsequent uncharitable publication. Her successful complaint to the Privacy Commissioner was based on a breach of the first data protection principle (DPP1) in Schedule 1 of the Personal Data (Privacy) Ordinance requiring, inter alia, that personal data be collected by means that are 'fair in the circumstances of the case'.

The court rejected the magazine's argument that, since it wanted to capture the complainant's picture in a 'natural pose', its non-consensual long-range photograph was justified. And he gave short shrift to its claim that, since the Commissioner had accepted that it would have been impractical to obtain the complainant's prior consent to a candid photograph, such a picture could be taken without her *knowledge*. This, the judge held, was an erroneous construction of the Commissioner's decision, for he had not found the taking of the photograph to have been unfair solely on this ground: 'What rendered the taking of the photograph unfair was the fact that it was taken without the complainant's knowledge or consent *"at a time when (a) the photographer did not have*

reasonable grounds for thinking that he would be able to obtain her consent to its publication, and (b) the magazine did not have a policy of publishing someone's photograph (obtained without the person's knowledge or consent) in such a way that the person cannot be identified."'[44]

The Court of Appeal (by a majority) held that the facts fell outside of the ambit of the legislation. Neither DPP1 nor any of the data protection principles were 'engaged'. The Privacy Commissioner had therefore been wrong to rule against the magazine. The judgment rests on four main grounds. First, that the act of photographing the plaintiff did not constitute an act of data collection. This was because

> [T]he essence of the required act of personal data collection [is] that the data user must thereby be compiling information about *an identified person* or about a person whom the data user intends or seeks to identify. The data collected must be an item of personal information attaching to the identified subject ... This is missing in the present case. What is crucial here is the complainant's anonymity and the irrelevance of her identity so far as the photographer, the reporter and Eastweek were concerned. Indeed, they remained completely indifferent to and ignorant of her identity right up to and after publication of the offending issue of the magazine. She would have remained anonymous to Eastweek if she had not lodged a complaint and made her identity known. In my view, to take her photograph in such circumstances did not constitute an act of personal data collection relating to the complainant.[45]

Secondly, to apply DPP1 to the facts of the case would unduly inhibit press freedom since a newspaper may wish to publish photographs of unidentified persons to illustrate some social phenomenon such as teenagers smoking.

Thirdly, other provisions of the ordinance (such as access rights and the use limitation requirement in DPP3) point to the necessity for a data subject whose identity is known or sought to be known by the data user as an important item of information. In other words, the right of access, for example, makes sense only if the data user holds the data collected in relation to each *identified* data subject. This was of course not the case here.

Fourthly, the ordinance protects only personal data; it is not intended to create a general right of privacy against all forms of intrusion into the private domain. The court stressed that it was not deciding that that taking someone's photograph could never be an act of personal data collection. It depended on the circumstances:

> Thus, if someone's photograph is taken with a view to its inclusion as part of a dossier being compiled about him as an identified subject, the act of photography would clearly be an act of personal data collection. For example, the portfolio of photographs of particular actors, entertainers or fashion models maintained by a theatrical impresario or fashion modelling agency would clearly constitute personal data collected in relation to the individuals in question. Similarly, law enforcement agencies are likely to have databases including photographs of wanted persons whose identities may or may not be known. If unknown, their identities would be considered important and sought-after items of information. Such photographs clearly would constitute part of the personal data collected in relation to such wanted persons.[46]

Moreover, none of the three judges doubted either that a photograph could constitute 'personal data' (an issue upon which the trial judge had expressed uncertainty) or that the press or other media organizations fell beyond the scope of the ordinance. 'On the contrary, it is clear that they are caught by its provisions if and to the extent that they engage in the collection of personal data.'[47]

What was the complainant's grievance? She was in a public place when her photograph was taken without her knowledge or consent. It is doubtful that the 'privacy' laws of any jurisdiction would regard her as having, on these facts, a reasonable expectation of privacy. Even the American common law tort of 'intrusion' would be of little help — unless perhaps she exhibited by her conduct a desire to preserve her privacy and that this is reasonable in the circumstances.[48]

Ironically, therefore, DPP1 (which requires the collection of personal data to be 'fair') may, in appropriate circumstances, provide greater protection to 'privacy' than the American tort that exists for this very purpose. But the matter is not so simple. First, as already mentioned, the court rejected the view that this was collection of personal data at all.[49] Secondly, the relationship between what may be called (even in the present context) 'intrusion' and 'disclosure' is problematic.

The second issue has long bedevilled the literature of 'privacy'; its analysis is, however, neglected in the data protection setting. In short, there is normally little point in taking my photograph unless it is to be used for some purpose. My objection to being photographed, whether in a public or private place, usually resides in the frustration of my legitimate expectation that my image should not be *used* without my consent.[50] There is therefore a symbiotic relationship between use and disclosure or, to use the language of data protection, collection and use.

The Court of Appeal proceeds on the (common) assumption that the two are, in effect inseparable. But caution is required.

A similar presumption is to be found in common law 'privacy' cases and literature where there is a tendency to conflate the *intrusion* practised by the prying journalist or photographer with the *publication* of the information thereby acquired. The two activities should, as far as possible, be addressed separately.[51]

Does this approach have any purchase in respect of the data protection principles regulating collection and use of personal data? Each is, of course, targeted at a rather different mischief than the privacy considerations deployed in the cases mentioned in the note above. Thus 'use' for example, includes not merely 'disclosure' of information, but *any* use of it. Moreover, and perhaps more significantly, it embodies the principle that data collected for one purpose should be used for another purpose only with the prescribed consent of the data subject. I have argued that this is a core 'privacy' right, but this view may not be widely shared. In any event, the reference in DPP3 to 'the purpose for which the data were to be used at the time of the collection of the data' demonstrates a similar interconnectedness between this principle and DPP1. Nevertheless, the argument in support of treating the wrongfulness of each form of conduct discretely remains. This means that the act of data collection should be evaluated independently of the use to which the data are put. In addition, though the complainant's objection was to the use rather than the collection of the data,[52] where a data protection regime is applied to the media, it may be necessary to treat the notion of collection in a less restrictive manner.[53]

It is hard to dispute the reasoning of Ribeiro JA that led him to conclude that if no complaint had been made to the Commissioner and, a year later, *Eastweek* had been requested to provide any information that it had relating to the complainant, the magazine would have responded that it had no records relating to such an individual, even if the offending photograph and article remained available in its electronic and print archives. The information 'would not have been collected in or intended to be retrievable from such archives as personal data relating to the complainant'.[54]

But there may well be circumstances in which a data subject may seek access to data that identify him only by his image. Suppose, for example, that my activities in public are, as increasingly is the case, monitored by means of a closed circuit television camera. I fear that the video recording may have captured me in an embarrassing situation and

I wish to obtain a copy of this piece of personal data. Leaving aside the nice question of how access might operate in practice, the mere fact that I am identified on the tape is not conclusive of the question whether the law does protect that right though presumably it could be argued that the collector of these data may intend to establish the identity of those surreptitiously recorded.

Similarly, if I know that my photograph has been taken, even if my name is not revealed in the accompanying article (as occurred in this case) the offending newspaper, though it has no interest in my identity, ought to be able to retrieve the picture when I inform them when and where it was shot. Anonymity of the data subject need not be the death knell of fair collection. Those who manage web sites increasingly collect the e-mail addresses of those who visit their sites. The identity of visitors is of almost no relevance to the data user.

I believe that the data protection principles provide a sound basis for the protection of individual privacy. Placing control of personal information at the heart of our deliberations about privacy achieves what the orthodox analysis has conspicuously failed to do: it postulates a presumptive entitlement accorded to all individuals that their personal data may be collected only lawfully or fairly and that once obtained, may not be used, in the absence of the individual's consent, for a purpose other than that for which it was originally given. This approach is not of course a panacea. The challenge of striking a balance between privacy and competing interests remains, but we need to rethink the conceptual foundations of privacy if we are to check its inexorable demise.

Some of the material mentioned in Chapter 12 was almost out of date as the words were being processed. The speed at which our digital world changes has led me to delete the notes I added in a (futile) attempt to refer readers to the unfolding events. But 'latest developments' in this field are a ceaseless occurrence. Anything I say now will be overtaken by incidents tomorrow. The best I can do is to recommend regular monitoring of some of the Web sites mentioned in the note attached to this sentence.[55]

While we cannot avoid encountering moral questions daily, the existence, or even the recognition, of ethical values by which to live, is far from uncontroversial. Being or doing good is not always synonymous with obeying the law. But there can be little doubt that the law, its concepts and its institutions, are frequently animated by moral norms. It would be odd if it were otherwise. Some of them are touched on the pages that follow.

Notes

1. J M Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), p 290. For a powerful defence of the 'separability thesis' see Matthew Kramer, 'Also Among the Prophets: Some Rejoinders to Ronald Dworkin's Attacks on Legal Positivism' (1999) 12 Canadian Journal of Law and Jurisprudence 53.
2. H L A Hart, *The Concept of Law*, 2nd ed by P A Bulloch and J Raz (Oxford: Clarendon Press, 1994), p 210.
3. Lon L Fuller, 'Positvism and Fidelity to Law — A Reply to Professor Hart' (1958) 71 Harvard Law Review 630, 634.
4. Ferdinand Schoeman, 'Privacy and Intimate Information' in Ferdinand D Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (Cambridge: Cambridge University Press, 1984), p 404.
5. [1999] 1 HKC 291. I draw here on Raymond Wacks, 'Our Flagging Rights' (2000) 30 HKLJ 1.
6. [1997] 2 HKC 315, [1997] 1 HKLRD 761.
7. At 135.
8. *Lau Kong Yung v Director of Immigration* [1999] 4 HKC 731 at 754–55.
9. At 775–77.
10. See Raymond Wacks, 'The Judicial Function' in Raymond Wacks (ed), *The Future of the Law in Hong Kong* (Hong Kong: Oxford University Press, 1989), Chapter 1 of this volume. For a detailed analysis of the nature and scope of the Basic Law, see Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Sovereignty and the Basic Law* (Hong Kong: University of Hong Kong Press, 2nd ed, 1999). Some of the exacting problems of interpreting the Basic Law are traced in Johannes M M Chan, H L Fu and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict Over Interpretation* (Hong Kong: Hong Kong University Press, 2000). See too the essays in Part 1 of Raymond Wacks (ed), *The New Legal Order in Hong Kong* (Hong Kong: Hong Kong University Press, 1999).
11. See in particular, Ronald Dworkin, *Taking Rights Seriously*, new impression with a reply to critics (London: Duckworth, 1978); *Law's Empire* (Cambridge, Mass; London: Belknap Press, 1986); *Freedom's Law: The Moral Reading of the Constitution* (Oxford: Oxford University Press, 1996).
12. Dworkin, *Law's Empire*, p 52, see note 11 above.
13. In the unfortunate contest between non-sexist pronouns and non-cumbersome expression, the latter has prevailed in this book. Hercules J is, in any event, not female! Dworkin, p 245, see note 12 above.
14. Ibid.
15. Dworkin, p 239, see note 12 above.
16. Dworkin, pp 95–96, see note 12 above.
17. Dworkin, pp 116–17, see note 12 above.
18. See Peter Wesley-Smith, 'Protecting Human Rights in Hong Kong' in Raymond Wacks (ed), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992).

19. See David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon Press, 1991); Edwin Cameron, 'Nude Monarchy: The Case of South Africa's Judges' (1987) 3 South African Journal on Human Rights 338; Richard I Abel, *Politics By Other Means: Law in the Struggle Against Apartheid, 1980–1994* (New York: Routledge, 1995); Adrienne van Blerk, *Judge and be Judged* (Cape Town: Juta & Co, 1988); Stephen Ellman, *In A Time of Trouble: Law and Liberty in South Africa's State of Emergency* (Oxford: Clarendon Press, 1992); Christopher Forsyth, *In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950* (Cape Town: Juta & Co, 1985).
20. The judiciary declined the invitation to appear before the Commission, the Chief Justice, Michael Corbett, declaring that it would undermine judicial independence. A number of judges nevertheless made written submissions. See David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998).
21. Dyzenhaus, p 79, see note 20 above. Mr Justice L W H Ackermann (now a member of the Constitutional Court) resigned to take up a chair in human rights law. He stated that his departure was prompted by his 'general ethical and jurisprudential objections to apartheid' and his belief that 'the whole structure was irreconcilably at odds with my religious conviction that all humans are created equal in the image of God and indefeasibly equal in their fundamental dignity'. Ibid. Dyzenhaus comments that this judge 'understood his personal sense of moral duty to be in conflict with his duty as a judge, and therefore took the option which Wacks had advocated . . .' (at 80).
22. Mr Justice Rex van Schalkwyk resigned in September 1996. He complained of affirmative action on the Bench and the early release of prisoners.
23. This is different, I think, from saying that personal morality is necessarily distinct from political morality. I agree with Joseph Raz that we should not seek to apply a relatively independent body of moral principles to the government, and that the morality of political freedom should, to a great extent, be based on considerations of personal morality. But such arguments are rarely directed at judicial officers. See Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p 4.
24. See J W Harris, 'The Basic Norm and the Basic Law' (1994) 24 Hong Kong Law Journal 207.
25. [1997] 2 HKC 315.
26. See Albert H Y Chen, 'The Provisional Legislative Council of the SAR' (1997) 27 Hong Kong Law Journal 1. For an analysis of aspects of the transition from an international law perspective, see Roda Mushkat, *One Country, Two International Legal Personalities: The Case of Hong Kong* (Hong Kong: Hong Kong University Press, 1997); Roda Mushkat, 'Hong Kong's Quest for Autonomy: A Theoretical Reinforcement' in Raymond Wacks (ed), *Hong Kong, China and 1997: Essays in Legal Theory* (Hong Kong: Hong Kong University Press, 1993).

27. J L Mackie, *Ethics: Inventing Right and Wrong* (Harmondsworth: Penguin, 1977), p 194.
28. It would be an impoverished conception of 'privacy' that confined it to the negative control over interference in one's private life. See Ferdinand Schoeman, *Privacy and Social Freedom* (Cambridge: Cambridge University Press, 1992). See too David Feldman, 'Privacy-related Rights and their Social Value' in Peter Birks (ed), *Privacy and Loyalty* (Oxford: Clarendon Press, 1997).
29. Thus Richard Posner has argued: 'To the extent that people conceal personal information in order to mislead, the economic case for according legal protection to such information is no better than for permitting fraud in the sale of goods.' Richard Posner, 'The Right of Privacy' (1978) 12 Georgia Law Review 393, 401. See too his essay 'An Economic Theory of Privacy' in Ferdinand Schoeman (ed), note 4 above. But even if one were to accept the economic argument, it does not follow that one need accept the assessment of the economic value of withholding personal information; some individuals may be willing to trade off their interest in restricting the circulation of such information against their social interest in its free circulation. See Raymond Wacks, *Personal Information: Privacy and the Law* (Oxford: Clarendon Press, 1989 and 1993), pp 28–30.
30. I draw here on Raymond Wacks, see note 29 above.
31. Wacks, see note 29 above. Cf A H Saxonhouse, 'Classical Greek Conceptions of Public and Private', in S I Benn and G F Gaus (eds), *Public and Private in Social Life* (London: Croom Helm and St Martin's Press, 1983), p 380.
32. Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), p 38.
33. The capacious concept of privacy that accommodates abortion, contraception, sexual preference and other matters of personal autonomy might be resisted on grounds other than analytical clarity. Radical feminists' discomfort about privacy is well expressed by Catherine MacKinnon: 'When the law of privacy restricts intrusions into intimacy, it bars change in control over that intimacy. The existing distribution of power and resources within the private sphere will be precisely what the law of privacy exists to protect. It is probably not coincidence that the very things feminism regards as central to the subjection of women — the very place, the body; the very relations, heterosexual; the very activities, intercourse and reproduction; and the very feelings, intimate — form the core of what is covered by privacy doctrine. From this perspective, the legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labor; has preserved the central institutions whereby women are *deprived* of identity, autonomy, control and self-definition; and has protected the primary activity through which male supremacy is expressed and enforced.' Catherine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard: Harvard University Press, 1987), p 101.
34. F Schoeman, see note 28 above, p 176. See too Perri 6, *The Future of Privacy, Volume 1: Private Life and Public Policy* (London: Demos, 1998).

35. See the admirable analysis by Perri 6, note 29 above, pp 46–65. He identifies two other traditions: the egalitarian strain (that includes the radical feminist rejection of privacy as a shield that protects men against being exposed for their abuse of women), and what he calls the fatalist tradition (expressed most forcefully in the writings of Michel Foucalt).
36. Robert George puts the matter in the following way: '[F]ree speech and privacy are two aspects of the same reality, namely, the good of persons-in-communion. Although these two instrumental goods may come into conflict, it is mistaken to suppose them to be fundamentally antagonistic. This error typically results from treating free speech and privacy as if they were independent basic goods which, as such, have some value irrespective of the uses to which they are put . . . When free speech and privacy are understood in light of their normative purposes . . . they are (despite occasional conflicts) essentially complementary: both are necessary for people to be fulfilled as persons *in communion* and as communities of *persons*.' Robert P George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Clarendon Press, 1995), p 216.
37. The Law Reform Commission of Hong Kong concludes that, though the Privacy Commissioner ought to issue a code of practice on the collection and use of personal data for journalistic purposes, DPP3 was 'not effective in protecting individuals from unwanted publicity', The Law Reform Commission of Hong Kong, *Consultation Paper on the Regulation of Media Intrusion*, August 1999, para 5.24. I should declare that I am a member of both the Law Reform Commission's sub-committee on privacy (and since 1 September 1999, its chairman) and, from the same date, a member of the Law Reform Commission. See too the Law Reform Commission of Hong Kong, *Consultation Paper on Civil Liability for Invasion of Privacy*, August 1999.
38. Various aspects of this argument may be found in Raymond Wacks, 'Towards a New Legal and Conceptual Framework for the Protection of Internet Privacy' (1999) 3 Irish Intellectual Property Review 1; Raymond Wacks, 'Privacy and Press Freedom: Oil on Troubled Waters' (1999) 4 Media and Arts Law Review 259; Raymond Wacks, 'Privacy and Media Intrusion: A New Twist' (1999) 6 Privacy Law and Policy Reporter 48; Raymond Wacks, 'Media Intrusion: An Expanded Role for the Privacy Commissioner?' (1999) 29 Hong Kong Law Journal 341; Raymond Wacks, 'Pursuing Paparazzi: Privacy and Intrusive Photography' (1998) 1 HKLJ 1; Raymond Wacks, 'What has Data Protection to do with Privacy?' (2000) 6 Privacy Law and Policy Reporter 143.
39. I draw here on Wacks (2000), see note 38 above.
40. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal of the European Communities, 23 November 1995, No. L. 281, p 31. The Directive provides that in the case of 'the processing of sound and image

data carried out for purposes of journalism or the purposes of literary or artistic expression . . . the principles of the Directive are to apply in a restricted manner according to the provisions laid down in Article 9'. Article 9 requires member states to provide for exemptions or derogations for the processing of personal data 'carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.'

41. *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data* [2000] HKC 692.
42. See generally Mark Berthold and Raymond Wacks, *Data Privacy Law in Hong Kong* (Hong Kong: Sweet & Maxwell, reprinted 2000).
43. *Eastweek Publisher Ltd v the Privacy Commissioner for Personal Data* [2000] HKC 692.
44. At 10–11. Emphasis in original, per Keith J.
45. At 10–11. Emphasis in original, per Ribeiro JA.
46. At 17, per Ribeiro JA.
47. At 18, per Ribeiro JA.
48. Is her real complaint one of libel? The judgment refers to her being embarrassed and teased by her friends and that the article sought to provide 'a degree of malicious amusement' to readers of the magazine at the complainant's expense. This, it is submitted, is unlikely to form the basis of a cause of action in defamation. But see Wong JA's dissenting judgment (at 26–27).
49. The Court of Appeal acknowledged that the complainant was 'entirely justified in regarding the article and the photograph as an unfair and impertinent intrusion into her sphere of personal privacy. However, unfortunately for her, the Ordinance does not purport to protect "personal privacy" as opposed to "information privacy"'. (At 20, per Ribeiro JA.) This is a common assertion, but it fails to recognize the potential of data protection regulatory regimes to reach the parts other laws cannot, perhaps more effectively.
50. See Wacks, note 29 above; Raymond Wacks, *Privacy and Press Freedom* (London: Blackstone Press), ch 5.
51. I draw here on Raymond Wacks, *Privacy and Press Freedom*, see note 50 above. There is much, I think, in the approach adopted by A Hill, 'Defamation and Privacy under the First Amendment' (1976) 76 Columbia Law Review 1205; Note, 'The Right of the Press to Gather Information' (1971) 71 Columbia Law Review 838. In *Dietemann v Time, Inc*, 449 F 2d 244 (9th Cir 197) two reporters of *Life* magazine tricked the plaintiff into allowing them access to his home and there set up hidden surveillance devices to monitor the plaintiff, a virtually uneducated plumber, who purported to diagnose and treat physical ailments. The resulting article informed the public about a newsworthy topic — the unlicensed practice of medicine — but the court had to consider whether this would grant immunity to the reporters in respect of their surreptitious news gathering techniques. On appeal, the judgment in the plaintiff's favour for invasion of privacy was upheld. In

answer to the defendant's claim that the First Amendment's shield extended not only to publication but to investigation, the court remarked that the amendment 'has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering'. (At 249.) It added that 'there is no First Amendment interest in protecting news media from calculated misdeeds [thus] damages for intrusion [may] be enhanced by the fact of later publication'. (At 250.)

52. Though DPP3 does, as stated in the text, somersault back to DPP1. Moreover, if, as the court held, there was no act of data collection, DPP3 could not come into play.
53. While a relevant factor, the motives of the photographer should not determine whether the photograph is an act of data collection. This seems to be the consequence of Ribeiro JA's dictum: 'It should be stressed that the fact that the photograph, when published, is capable of conveying the identity of its subject to a reader who happens to be acquainted with that person, just as the complainant's teasing colleagues were able to identify her from the picture in the magazine, does not make the act of taking the photograph an act of data collection if the photographer and his principals were acting without knowing or being at all interested in ascertaining the identity of the person being photographed.' (At 14.) Godfrey JA acknowledged that the ordinance does not expressly require the identification or intention to identify the data subject by the collector of the data, but held that the legislation was not intended to apply in the absence of them. But, as Robin McLeish has pointed out to me, since the statute defines 'personal data' *objectively*, to consider the knowledge or intention of the collecting party may render the definition a *subjective* one.
54. At 11–12.
55. The following sites should satisfy most readers who have the stamina to keep abreast with the mercurial world of privacy:
<http://beta.austlii.edu.au/links/World/Subject_Index/Privacy>
<http://privacy.topclick.com/mainMenu.html>
<http://www.cix.co.uk/~net-services/privacy.htm>
<http://www.orlandomaildrop.com/privacy.html>
<http://special.northernlight.com/privacy/index.html>
<http://epic.org>
<http://www.hotwired.com>
<http://www.privacy.org>
<http://www.www.eff.org>
<http://www.cyber-rights.org/eu-watch>
<http://www.anu.edu.au/people/Roger.Clarke/DV/Internet.html>

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