

Chapter 1

PRIVACY: A PHILOSOPHICAL OVERVIEW

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In the introductory section of this chapter a brief summary is presented of some recent historical developments which have focused public and scholarly interest on the topic of privacy. The concept of privacy is analysed in the second section, and several of the prominent definitions which have been formulated by jurists and philosophers are critically evaluated. In the final section discussion centres on the value of privacy and its significance for society and the individual.

A. Recent Historical Developments

Given the historically important role which their article, "The Right to Privacy," has played, it seems fitting to begin with a passage from Warren and Brandeis:

The intensity and complexity of life. . . have rendered necessary some retreat from the world, and man, under the refining influence of culture has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual;

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but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.¹

The dangers pointed to by Warren and Brandeis have been lessened, to some degree, by several long-term historical trends. The rapidly increasing concentration of populations in large metropolitan centres seems to offer more scope for individual privacy than was formerly available to people living in closely-knit, small, homogeneous rural communities. The nuclear family, organized in individual households, frequently moving from one neighbourhood, or even from one city or one country, to another, also provides increased psychological and physical distance from others. The weakening of community bonds and moral norms, and the increased cultural emphasis on individual aspiration and achievement, have further enhanced social "atomization" and individual "privatization." The cumulative effect of these social developments has been to provide increased scope for anonymity, personal non-conformity, and, in general, an enhancement of the ethos of individual privacy.

In this context it is not surprising to find that there has also been, during the course of this century, a long-term trend toward decriminalization of a variety of acts claimed to be "private" and self-regarding. Society now tolerates a range of conduct which would formerly have been subjected to severe sanction.

There have, however, been a number of countervailing historical trends, rather more powerful in their social impact than those above-mentioned. Environmental factors have been important; for example, the high population density in many crowded urban neighbourhoods. Business factors have played a part; for example, the widespread use of credit, with its concomitant need for credit ratings. Other business-sponsored intrusions on individual privacy have resulted from such practices as door-to-door and telephone solicitation. Potentially more important are the dramatic technological breakthroughs in computerization and monitoring, which permit extensive government and business surveillance of private affairs and communication. Advanced technology has made extensive surveillance relatively easy and inexpensive. At the same time, the increasingly bureaucratic organization of social institutions (a feature shared by governments and multi-national corporations) has made extensive surveillance and monitoring of individuals seem inevitable and desirable, at least to those whose power and other interests are enhanced by the result.

To this list of recent developments contributing to an environment hostile to individual privacy should be added such further developments as the increasing

commercialization and sensationalism of the mass media, which are not above capitalizing even on personal grief to sell their product.

There has been, then, a merging of several social and economic trends with a series of breakthroughs in techniques of physical and psychological surveillance. As A. F. Westin puts it, recent technological advances:

... now make it possible for government agencies and private persons to penetrate the privacy of homes, offices, and vehicles; to survey individuals moving about in public places; and to monitor the basic channels of communication by telephone, telegraph, radio and television.²

There is good reason to believe that the parabolic microphone, the telescopic lens, and infra-red photography are only examples of the first fruits of what is likely to be an increasingly abundant harvest.

Along with this increased capacity for physical surveillance have come new prospects for psychological surveillance. The penetration of privacy by drug analysis and brain-wave monitoring is still in its early days, but polygraphy and the personality test have been with us for thirty years, and have recently been used more widely and, some would say, in more objectionable ways.³

The massive amounts of personal data which these new techniques have generated can now be stored, organized and disseminated in computer-usable form. One result of this has been that otherwise harmless (because scattered) data becomes threateningly transformed into comprehensive dossiers.⁴

It would be difficult to exaggerate the potential importance of computerized information systems for individual privacy. The ordinary citizen who, in earlier times, would have been known only in his or her own community, now leaves a "trail of data" behind with almost every project undertaken: the tax form completed; the social welfare claimed; the application for credit, insurance, or a driver's license; or the purchase of consumer goods. One's fears are not assuaged by the 1972 Report of the Department of Communications/Department of Justice, *Privacy and Computers*, which concluded that "more personal information is being collected than most

² *Privacy and Freedom*, 1967, p. 365.

³ As a condition of employment or continued employment, many job applicants or employees are now "invited" to take tests which require them to provide information about such matters as their sex lives or political attitudes. In one, not untypical, personality test, intrusive questions put to prospective employees include the following: "I feel there is only one true religion"; "My sex life is satisfactory"; "During one period when I was a youngster I engaged in petty thievery"; "There is something wrong with my sex organs"; Westin, n. 2 above, p. 260.

⁴ Westin n. 2 above, p. 309 reports that one American credit data corporation promises to supply subscribing companies with information on individuals within 90 seconds of a request for data. In this way, subscribers can obtain information about any defaults, accounts, income, debts, and even about personal habits and relationships.

¹ (1890), 4 *Harvard Law Review* 196. Following publication of this article, the American courts developed a tort of privacy by relying extensively on the early English authorities cited by Warren and Brandeis. See Professor Osborne's discussion of this development: Chapter IV in this text.

Canadians probably suspect, and is made available to a larger number of users than is probably supposed.”⁵

Once large quantities of information about individuals become centrally and inexpensively available, the citizen becomes vulnerable, and comes to feel vulnerable. Even if this information is not actually used/misused to harass or injure, the loss of “informational privacy” can have a profoundly inhibiting effect on people. This need not always be an unwelcome outcome. For example, by collecting and publicizing data about malfunctioning automobiles, we may be able to inhibit car manufacturers from producing and selling defective cars. People who currently make a practice of writing unsupported cheques should be inhibited therefrom by information available to their potential victims. In section C of this chapter an assessment is made of the problem of balancing costs and benefits associated with privacy loss.

The above-mentioned developments — social, economic, and technological — have generated well-grounded fears as to the ability of individuals and groups to protect themselves effectively against unwarranted intrusions into their private affairs. The need to be constantly on the alert, or to undertake onerous and expensive precautions, in order to preserve one’s privacy, is deemed by many to be objectionable and itself a violation of their rights.

B. Conceptual Analysis and Definition

It is surprisingly difficult to give a straightforward definition of the concept of privacy. Despite innumerable attempts by contemporary philosophers and jurists to formulate a definition, the concept has remained elusive. One can discover no consensus in either the legal or the philosophical literature.

Before examining critically some of the more prominent definitions of privacy which have been offered, it will be useful to adumbrate a few criteria of adequacy for a successful definition.

The most important criterion of adequacy for any definition is that the definition should “fit” the data. The data in this case would consist of our shared intuitions of when privacy is or is not gained or lost, respected or violated. A proposed definition could fail this test of adequacy either by being too narrow, that is, by excluding cases which we would agree should be included; or by being too broad, that is, by including cases which we would agree should be excluded. As we shall see, however, people’s intuitions about the relevant data are themselves far from clear, and frequently conflict. Fortunately, there is a core of cases about which there would be universal, or near universal, agreement, as well as a periphery of disputed and disputable cases.

A second criterion by which to test the adequacy of any proposed definition

⁵ P. 3.

of privacy is that it should not arbitrarily close issues of substance. By formulating an overly-powerful definition one can foreclose, linguistically, the legitimate discussion of significant and controversial issues. To illustrate: it would be a desideratum for any proposed definition of “privacy” that it left open the issue of whether privacy is a good thing either in general or in any particular situation. A definition which prejudged whether privacy is desirable, or how desirable it is in relation to other competing interests would, on this count, be less than satisfactory. Suppose that someone were to claim that privacy is not always desirable, or that it is much overvalued in our society, and we agree that this claim makes sense (whether or not it is correct). If our definition of privacy ascribed a positive value to it, anyone who denied that privacy is desirable would have contradicted himself.

It may well be, of course, that the concept is ambiguous, and has both a descriptive (or value-neutral) and one or more normative (or value-loaded) senses. The term “private” is certainly used to invoke rights, as when one says “this is a private conversation,” meaning thereby “you have no right to stay here listening to what we are saying.” It is interesting to note in this connection that there are cultures, Hutterite colonies, for example, in which to describe an action as having been done “in private” could involve an accusation of impropriety rather than a claim to immunity from interference. In other words, when the term is invoked normatively, the norm can be negative as well as positive, depending upon the circumstances and the culture.⁶

Finally, in formulating a definition of privacy one ought to seek the simplest possible set of necessary and sufficient conditions. There has been great confusion, both within and without the law, concerning the nature of the interest which the right to privacy is designed to protect. It may turn out that no simple set of defining characteristics can be discovered, in which case we would have to settle for overlapping and criss-crossing similarities, or for a mere list of the different interests involved. Dean Prosser has produced one such list.⁷ It appears, however, that the law has suffered much confusion — akin to “a haystack in a hurricane” — from the lack of any agreed-upon set of characteristics common to all privacy claims.

Warren and Brandeis claimed to perceive a single principle of explanation underlying the welter of over three hundred cases they examined. Despite the influence of their work, however, a number of contemporary legal scholars and philosophers have come to doubt that there truly is a common thread of

⁶ Stanley Benn points out that the concept of privacy functions in a variety of different ways. When a person appeals to privacy in a norm-invoking fashion, the norm will sometimes, as in the Hutterite example, be prohibitive rather than immunity-conferring. Moreover, privacy can function mandatorily as well. For example, it is considered improper in our culture for strangers to attempt to observe one’s “private parts,” but equally improper for one to expose those parts (deliberately or negligently) to them. See: S.I. Benn, “Privacy, Freedom, and Respect for Persons,” in *Privacy*, Nomos, Vol. 13 (1971), pp. 1-3.

⁷ William L. Prosser, “Privacy” (1960), 48 *California Law Review* 383, at 389.

principle running through these cases. Dean Prosser, for example, concludes that wrongful invasion of privacy consists of several irreducibly distinct wrongs, and that of the different interests protected by the right to privacy — freedom from mental distress, the interest in reputation, and a proprietary interest in name and likeness — none of these suggest a distinctive interest in privacy.⁸ Professor Thomson reaches a similar conclusion, though via a different route. She agrees that “the right to privacy” is a unitary label disguising a cluster of independent rights, none of which has anything in common:

... the right to privacy is “derivative” in this sense: it is possible to explain in the case of each right in the cluster how come we have it without ever once mentioning the right to privacy. Indeed, the wrongness of every violation of the right to privacy can be explained without ever once mentioning it.⁹

Frederick Davis reaches a similar conclusion:

If truly fundamental interests are accorded the protection they deserve, no need to champion a right to privacy arises. Invasion of privacy is, in reality, a complex or more fundamental wrong. Similarly, the individual’s interest in privacy itself, however real, is derivative and a state better vouchsafed by protecting more immediate rights.¹⁰

Perhaps in the final resort we shall be compelled to accept the conclusion of Prosser, Thomson, Davis and others, that the cluster of rights we call “rights to privacy” lacks any common foundation. The range of privacy claims is, it must be admitted, remarkably wide and diverse. Nevertheless, it seems premature to conclude that we are faced with an irreducibly diverse cluster of rights. Even if it should be found that previous attempts to formulate a unified account of the notion of privacy are unsatisfactory, one ought not to rule out the possibility of future success.

Let us turn now to a consideration of various proposed definitions of privacy. Of the many attempts to define privacy, perhaps the most succinct and familiar is that of Judge Cooley, who defines it as “the right to be let alone”.¹¹ This definition was adopted in a somewhat expanded form by the 1967 Nordic Conference on the Right to Privacy. The right to privacy, according to the Nordic Conference, is “the right to be let alone to live one’s life with the minimum degree of interference.”¹²

Despite the incurable vagueness of this formulation, there is something very seductive about attempts to equate privacy with non-interference, or being let

alone; what philosophers call “negative liberty.” The standard cases which the phrase “invasion of privacy” brings to mind do commonly take the form of coercive interferences with or intrusions upon the individual. Prying neighbours intrude upon one’s home life; government officials interfere with one’s correspondence; business secrets are stolen by one’s competitors; over-zealous press reporters or photographers hound one mercilessly; one’s professional advisors disclose confidential information damaging to one’s reputation; advertisers make unauthorized use of one’s name, identity or likeness. In each of these cases, and many others besides, a person who claims that his or her right to privacy has been violated might be thought to be claiming a right to be let alone, not to be interfered with.

Nevertheless, although there does not appear to be a close relationship in the above-cited examples between the concepts of negative liberty and privacy, they are not identical. To equate them is mistaken and potentially confusing.

Consider, for example, a government regulation which severely interferes with freedom of expression. Public advocacy of communism is, let us suppose, forbidden. In such a case, one’s “negative liberty” is clearly undermined. But one’s privacy is unaffected. The proposed definition is, thus, too broad. It includes too much.

The definition is also too narrow. Consider, for example, how easy it is to violate a person’s privacy without any coercion or interference with freedom of action. When my telephone is tapped, my mail read, my private conversations recorded via a remote control microphone, my sunbathing observed through high-powered binoculars, without my knowledge or consent, I suffer a loss of privacy. I suffer a loss of privacy in each of these cases, notwithstanding the fact that I am uncoerced, and my freedom of action, thought, and expression remain undiminished.

It might be objected that the discovery that one’s privacy has been invaded will produce embarrassment and mental distress or some other untoward consequences, and will thereby constitute an interference with one’s life. Future activities may be inhibited as a result. But none of this need happen. One may never discover the violation. Or one may discover the violation of privacy and yet be indifferent to it. But the absence of “hurt” does not cancel or diminish the violation of privacy. The objective “harm” of losing one’s privacy need not be accompanied by any subjective hurt or mental distress. Similarly, it may be noted in passing that this point counts as an equally decisive objection to those definitions of “privacy” which pick out some psychological state as the key element. Laws and customs which protect privacy do protect individuals against suffering embarrassment or other mental distress. But a definition which equates privacy with freedom from psychological injury will be too narrow, since it will exclude situations in which privacy is infringed without any psychological change in the victim.

H. J. McCloskey adds a further argument against the too-facile equation of

⁸ N. 7 above, p. 406.

⁹ Judith Jarvis Thomson, “The Right to Privacy” (Summer 1975), *Philosophy and Public Affairs* no. 4, p. 313.

¹⁰ “What Do We Mean by ‘Right to Privacy?’” (1959), 4 *South Dakota Law Review* 1.

¹¹ Cooley, *Torts*, 2nd ed. (1888).

¹² In *Privacy and the Law*, Report of “Justice,” British Section of the International Commission of Jurists, 1970, p. 45.

the right to privacy with the right to non-interference.¹³ McCloskey observes that, far from being identical, the two rights will sometimes conflict. It may be necessary, for example, in order to protect an individual's right to privacy, to interfere with the liberty of others to spy upon that person, or to publish information about him or her. Such interferences diminish negative liberty, but they enhance privacy.

McCloskey's argument depends, in part, on the assumption that privacy is invaded by the mere fact that information about private matters becomes available to others. Against this assumption, Lubor Velecky asserts that "mere availability of information about what is covered by the right to privacy does not in itself result in the invasion of privacy."¹⁴ Velecky claims that privacy is invaded only when information about private matters is used unjustifiably or for bad motives, rather than when such information is acquired or disseminated. Presumably, then, if the motives of a Peeping Tom were pure, and if he made no malicious use of the private information he acquired, there would be no loss of privacy. This consequence of Velecky's argument seems utterly implausible. Surely one's privacy is diminished or violated by the Peeping Tom whatever his motives, and regardless of what use, if any, he makes of the information he acquires.

To return to Judge Cooley's definition of privacy as "being let alone," one must conclude that the definition fails by being at once too broad and too narrow.

Perhaps the most widely-canvassed alternative approach to defining privacy is one which takes "information control" rather than non-interference as its essential characteristic. Alan Westin, for example, defines privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."¹⁵ Charles Fried defines privacy as "the control we have over information about ourselves,"¹⁶ while A. Miller opts for "the individual's ability to control the circulation of information relating to him."¹⁷ Velecky suggests that privacy should be defined as "the state of a person who, in the pursuit of the good, justifiably can choose the nature and duration of contact with others."¹⁸ Richard Parker, on the other hand, prefers "control over when and by whom the (physical) parts of us (as identifiable persons) can be seen or heard (in person or by use of photographs, recordings, T.V., etc.), touched, smelled, or tasted by

others."¹⁹ Thus, the Westin-Fried-Miller formulae focus on information control, while Velecky and Parker adopt definitions focusing on sensory access.

It is an advantage of the information control type definition of privacy that it enables us to identify clearly the interest involved when people resist surveillance or monitoring of their affairs. The interest in privacy is claimed to be an interest in the self-regulation of one's communications with others (or, in Parker's case, of who can sense us). It reflects the desire of individuals and groups to disclose what they are doing only on their own terms and to whom they choose.

Of this set of "control" definitions of privacy, Velecky's is the least helpful. By normatively loading his definition, Velecky makes it impossible for us to distinguish (a) the empirical issue of whether a person has lost or gained control from (b) the evaluative question of whether the loss or gain is a good thing in the circumstances. In effect, Velecky's definition would resolve, by linguistic fiat, the issue of whether some particular loss of privacy violated a person's rights. The Westin-Fried-Miller definitions are very similar, and can be discussed collectively. With respect to the Westin version, however, privacy is not a "claim;" it is a state or condition about which claims can be made.

Information control definitions of privacy enjoy considerable popularity among jurists and philosophers. This popularity is at least partly deserved. Many, perhaps most, of the standard cases in which individuals or groups make legal or moral claims to privacy, are cases in which it is control of information about themselves²⁰ which is at issue.

The definition seems to "fit the data." As K. Greenwalt observes:

If we voluntarily reveal ourselves to family, friends, working associates, in matters that are commonly the subject of discourse among members of such groups, we do not speak of any loss of privacy. Yet if we wish to keep some matter private from members of these groups, and it is nevertheless revealed, privacy has been lost. Thus, for a broad range of disclosures, privacy does turn on control.²¹

Information control definitions also have an important advantage over negative liberty definitions; for the former, but not the latter, enable us to understand how the concept of privacy can encompass both "being let alone" and communicating with others.

But, as with the Cooley definition, a closer analysis reveals that information control definitions do not fit all the data: in particular, they exclude some of what they should include.

¹³ "The Political Ideal of Privacy" (October 1971), 21 *Philosophical Quarterly* no. 85, p. 305.

¹⁴ "The Concept of Privacy," Lubor C. Velecky, in John B. Young (ed.) *Privacy* (New York: John Wiley & Sons, 1978), p. 20.

¹⁵ Westin n. 2 above, p. 7.

¹⁶ *An Anatomy of Values: Problems of Personal and Social Choice* (Cambridge: Harvard U. Press, 1970), p. 140.

¹⁷ *The Assault on Privacy* (Ann Arbor: U. of Michigan Press, 1971), p. 25.

¹⁸ N. 14 above, p. 20.

¹⁹ Richard B. Parker, "A Definition of Privacy" (1974), 27 *Rutgers Law Review* 275, at 283-4.

²⁰ Or others? One can imagine a professional claiming that *his* privacy included the right not to divulge information of a confidential sort obtained from and about his client.

²¹ "Privacy and Its Legal Protections" (September 1974), *Hastings Centre Studies*, Vol. 2, no. 3, p. 46.

An example will help to illustrate some of the ways in which “information control” appears to be too narrow. A university teacher, let us suppose, is working in his study at home, attempting to complete a scholarly article. His neighbours engage in conduct which grossly disturbs his activity. They leave their windows open adjacent to his study, and through these windows they project raucous noises and offensive odours. No sooner does he regain his mental equilibrium and resume his work, than the doorbell and telephone ring, and he must interrupt his work again to fend off a commercial promotion for dancing lessons and solicitation for the latest set of encyclopedia. If it seems proper to describe our unhappy professor as having had his privacy disturbed or diminished by these intrusions, then we have illustrated an example of privacy loss which does not involve or relate to loss of control over information about ourselves.

Moreover, even in the case of intrusions which do involve some loss of control over information about ourselves — for example, when we are spied upon while naked in our bath, or our bedroom is “bugged” while we are having sexual relations with our spouse — the essential violation of one’s privacy will, often, consist not in the information over which we lose control, but in the embarrassment or indignity occasioned by this intrusive observation.

A person who is raped or brainwashed has suffered an extreme loss of privacy, and any information the intruder may have obtained is quite incidental to the major harm. An unwanted police search of one’s home is disturbing to familial privacy entirely apart from whatever information the police discover.²²

Parker offers an argument intended to show that information control definitions are too broad as well as being too narrow.²³ He suggests that not all cases in which a person loses control of information about himself are cases involving a loss of privacy. To illustrate this claim, Parker invites us to consider the case of a student whose poor examination results reveal to others the information that he has not studied much. Others gain this information quite legitimately, but without the student’s consent. Parker claims that the student’s privacy has not been violated, despite the loss of information control.

I find this argument unpersuasive. What seems to have happened is that Parker has mistakenly assumed that every loss of privacy must involve a violation of privacy, so that if there has been no violation there cannot have been any loss. It should be conceded to Parker that the student’s right to privacy has not been violated. No one has acted illegitimately. But the student’s privacy has, it seems to me, been diminished. An embarrassing fact about him which he would prefer to keep private has been revealed and publicized. What Parker’s example really shows is that one can sustain a loss of privacy without having one’s rights violated. A second example may help. If the door of the school’s

²² N. 21 above, p. 47.

²³ N. 19 above, p. 279.

changing room should be accidentally blown open before the student has finished dressing, others may discover that he wears Superman underwear. No one has violated his right to privacy. But he has lost control over personal information about himself and has, I suggest, suffered a loss of privacy.

McCloskey provides a different sort of example from Parker in support of the view that information control definitions are too broad.²⁴ He asks us to consider the case of the criminal pickpocket, at the racetrack, whose illegal activities are inadvertently filmed during a shot of the crowd, and are then publicly broadcast on television. McCloskey rightly states that the pickpocket would not be justified in claiming an illegitimate intrusion on his privacy. But McCloskey goes further and declares that there has been no loss of privacy. Here I think that he is wrong. It seems more accurate to say that the pickpocket has lost some privacy in virtue of losing control over information about himself, though none of his rights has been violated.

The accusation that control definitions are too broad is made in still another fashion by Louis Lusky. In discussing Westin’s version of the information control definition, Lusky points out that “taken literally, it declares my privacy to be invaded, or at least affected somehow, if my one neighbour tells my second neighbour (without my consent) that I am a vegetarian or that I like oysters.”²⁵ Lusky presumably expects us to find this absurd. I do not. If the information circulated about me (without my consent and against my presumed wishes) concerns some highly intimate matter, for example the fact that my marriage is on the verge of collapse, then it is unquestionable that my privacy is seriously affected. If I live in a Moslem society and the gossip circulated is that I drink liquor, then it is unquestionable that my privacy is seriously affected. If the information circulated about me against my wishes concerns a less intimate or less serious fact about my personal life, for example that I am a vegetarian, then my privacy is affected in only a minor way. But it is nonetheless affected.

Parker’s definition, which substitutes “control over who can sense us” for “control over information about us” manages to handle some of these problem cases, though it does not encompass intrusive noises and odours, and would be less adequate than information control definitions in accounting for Lusky’s case.

Setting aside these putative counter-examples, there is another sort of case which seems to count equally against both the Parker and the Westin definitions of “privacy.” Imagine that a casual acquaintance approaches you at a party and that, to your great embarrassment, he forces upon you details of his financial and sexual problems. According to our control definitions, he does not suffer any diminution of his privacy since he has freely chosen to expose himself and the details of his personal life to public scrutiny.²⁶ But even if we allow that the

²⁴ N. 13 above, p. 309.

²⁵ “Invasion of Privacy: A Clarification of Concepts” (1972), 72 *Columbia Law Review* 693, at 695.

²⁶ Perhaps it would be better to acknowledge that information control definitions are

"exhibitionist" does not lose *his* privacy by this sort of voluntary self-exposure, some would wish to say that you, as an unwilling listener/spectator, have suffered a loss of your privacy. In other words, one may claim that one's right to privacy includes the freedom not to be exposed to matters one finds inappropriately personal or intimate. Intuitions are divided here, and not everyone would agree that it is one's privacy which is involved in this sort of case.

Moreover, Parker's definition seems to cope less well than information control definitions when confronted with the problem of national databanks. When a databank collates disparate pieces of information and thereby constructs a comprehensive personal dossier, facts about individuals are revealed that some would prefer not to have revealed. Does this not constitute a loss of privacy? There has been no loss of control over who can sense us, but one's intuition is that privacy has been lost.

Parker responds to this difficulty by distinguishing between a loss of privacy and a loss of the value of privacy. His claim is that databanks lessen the value of privacy but do not lessen privacy.²⁷ This counter-argument raises an interesting and important side-issue alluded to earlier, during the discussion of criteria of adequacy for proposed definitions. When some people assert that the collection and collation of information about themselves, such as occurs with databanks, constitutes an invasion of their privacy, and others deny that in such cases there is any privacy loss, how are we to settle the matter? The question is a serious one, because similar problems arise with respect to much of the data used to test the various proposed definitions of "privacy." Judith Thomson, for example, does not think that offensive odours or raucous noises diminish one's privacy.²⁸ If she is correct about this, then the fact that they are not covered by information control definitions will have to count as a strength of these definitions rather than as a weakness. The same point applies to Parker's definition and the problem of databanks.

The situation becomes more troubling still when one considers the range of controversial U.S. Supreme Court decisions which have determined, for the purposes of American law at least, that the right to privacy includes the right of a married couple to use contraceptives,²⁹ and the right of a woman to have an abortion prior to the seventh month of pregnancy, with the approval of a doctor.³⁰ In cases such as these, the concept of privacy is being extended (illegitimately?) to cover liberty of actions and autonomy from regulation of certain intimate aspects of one's life.

As was shown earlier, "non-interference" *simpliciter* is too broad to be

misleading here; for it does seem more natural to say that he has voluntarily surrendered his privacy than to insist that he retains his privacy because he is in control.

²⁷ Parker, n. 19 above, p. 284.

²⁸ Thomson, n. 9 above, p. 310.

²⁹ *Griswold v. Connecticut* (1965) 85 S. Ct. 1678.

³⁰ *Roe v. Wade* (1973) 410 U. S. 113 (U.S.S.C.).

satisfactory as a definition of privacy. But a definition of privacy which analyses it as claiming immunity from intrusion within a special "zone" of action, one's "private affairs," is more promising, though it carries with it a new set of difficulties. It is no easy matter to define this zone of non-interference, as J. S. Mill and innumerable other liberals have discovered. Intimate personal relations, such as love and friendship, and certain bodily functions, such as excretion, would doubtless fall within this zone, at least in our culture. Rules defining the zone of privacy depend on social convention (and sometimes on legal sanction as well). The circumstances in which observation of others or interference with their activities is permissible/precluded are specified by the conventions and legal norms prevailing in a given society. There exists significant variation within and between cultures on the question of which acts or relationships or facts about a person are to count as his or her "private affairs." The need for privacy norms may be universal, but the specific content of the norms found in various societies differs widely. And in any given society privacy norms can change over time. In our own society, for example, one's income used to be considered a purely private affair. There is a large proportion of the population who would not consider it so today.

Defining privacy in such a way that it becomes a culturally variable ideal will seem a disadvantage to some, an advantage to others. The disadvantage is that cross-cultural comparisons become difficult if not impossible if the measure of privacy is not something constant. The advantage is that it may facilitate the comprehension of otherwise inexplicable phenomena, such as the lack of embarrassment evoked or evinced by the members of some cultures in response to states of public undress which we would find acutely embarrassing.

A more serious problem if we choose to adopt a definition of privacy in terms of non-interference with "private affairs" is to define the concept of "private affairs" in such a way as to avoid the twin dangers of covertly importing a normative element or collapsing into circularity.

Is it accurate and/or useful to employ the term "privacy" so as to include non-interference with one's choices about intimate ("private") matters? Judge Cooley's definition, suitably qualified so that only the appropriate range of conduct is included, may have to be returned to service in order to account for some of the cases wrongly excluded by control definitions. On the other hand, control definitions would still be necessary to cope with those cases discussed earlier, which are wrongly excluded by negative liberty definitions.

Where does the foregoing discussion leave us? Can an acceptable lexical definition of "privacy" be formulated? I would tentatively propose several conclusions. First, the term "privacy" is both ambiguous (it has at least two distinct senses, one descriptive and one normative) and vague (the phenomena which it picks out cover a spectrum, with no obvious non-arbitrary cut-off point). It is the descriptive sense of the term which is of primary importance from our point of view, and the definition sought should therefore be normatively neutral. Since the term is used vaguely, any accurate lexical

definition must reflect this fact. Any very precise definition would misrepresent the fuzzy edges which the concept has in actual usage. My proposal is that the term "privacy" can be defined by combining our two conditions: (1) control over information about oneself and over who can sense us, and (2) non-interference in private affairs. They are jointly necessary and individually sufficient. A definition which combined these two conditions (as disjuncts) would certainly cover all, or virtually all, of the cases agreed to fall within the ambit of privacy. Unfortunately, it would also include a number of the more doubtful or controversial cases and would, therefore, be rejected as overly broad by those who prefer to operate with a thinner concept of privacy. Since this is unavoidable, it should not unduly upset us. It results from the vagueness of the term.

C. The Value of Privacy

The ideal of privacy is clearly one of the fundamental values of our culture. In general, Western societies place a high value upon the right to privacy. It is protected by both moral and legal norms. Serious violations are often punished with fines and imprisonment as well as with public disapprobation. It is not, however, regarded as an absolute value. Like other *prima facie* rights, the right to privacy can be overridden by other values. Nevertheless, the high value which we place (or claim to place) upon privacy is reflected by our general insistence that claims to privacy should be overridden only where there exists some very strong countervailing justification. The onus of proof, in other words, rests with those who would violate privacy rather than with those who would defend it.

In this section I consider various answers to the question of why privacy is so important to us.

The case for assigning a high value to privacy is in part (and some would insist in large part) a utilitarian one. People have a number of interests which may be seriously harmed by invasions of their privacy. When an individual's telephone is tapped, bedroom "bugged," or mail opened, the information acquired might be used to harm the person in various ways: to intimidate or blackmail, to facilitate the theft of property, to embarrass the person socially, or to ruin his or her career. Even if the individual's conduct has been entirely "normal" and legitimate, the observation of his or her private affairs by an intruder, or their unwanted disclosure to the public, can be a source of considerable mental distress. Privacy can have great utility for groups as well as individuals. The internal affairs of ideological protest movements, businesses, unions, and a variety of other groups and movements all require a kind of nutritive privacy to protect their organizational life. Unless individuals and groups have wide scope to formulate and test their ideas without intrusive surveillance by governments,

the police, or the general public, an essential precondition for effective democratic society will be destroyed.

J. S. Mill has provided us with many of the standard liberal arguments for the psychological, sociological, and political utility of individual privacy. As Mill points out, there is a close correlation between the availability of a protected zone of privacy and the individual's ability freely to develop his individuality and creativity. In a society which is frequently intolerant of or hostile to non-conformity, freedom from constant surveillance is an important pre-condition for the development of independent and critically-minded individuals. Diversity and non-conformity will, in turn, promote the vitality and progress of society and contribute thereby to long-run utility.³¹

The important psychological utility of privacy is a theme which has been developed extensively by Erving Goffman³² and Alan Westin.³³ Writing about such "total institutions" as prisons and mental institutions, Goffman contends that:

... (B)eginning with admission a kind of contaminative exposure occurs. On the outside, the individual can hold objects of self-feeling — such as his body, his immediate actions, his thoughts and some of his possessions — clear of contact with alien and contaminating things. But in total institutions these territories of self are violated; the boundary that the individual places between his being and the environment is invaded and the embodiments of self profaned.³⁴

It is Goffman's thesis that the individual's integrity and the development and preservation of personal identity require the protection of a zone of privacy within which the ultimate secrets of one's "core" self remain inviolable against unwanted intrusion or observation. Westin adds to this the claim that social life is frequently stressful and generates tensions which would be unmanageable unless the individual had opportunities for periods of privacy. During such periods, one's psychological health is preserved by the opportunity to release one's emotions, and to relax from the pressure of social role-playing.³⁵

Charles Fried's attempt to establish the instrumental value of privacy appeals to an alleged necessary connection between the existence of privacy and the creation of intimate personal relations. Taking an information control analysis as his starting point, Fried argues that privacy is valuable because it:

... provides the rational context for a number of our most significant ends, such as love, trust and friendship, respect and self-respect. Since it is a necessary element of those ends, it draws its significance from them. And yet since privacy is only an

³¹ *On Liberty*, 1859.

³² *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (New York: Doubleday, 1968).

³³ N. 2 above, p. 32.

³⁴ N. 32 above, p. 23.

³⁵ N. 32 above, p. 32ff.

element of those ends, not the whole, we have not felt inclined to attribute to privacy ultimate significance.³⁶

Fried's claim is that privacy provides an essential context for the emergence and development of such sensitive and valuable feelings as love, trust, and friendship. James Rachels offers a similar analysis of the value of privacy. Privacy is important to us, Rachels contends, even in quite normal or ordinary situations in which we have "nothing to hide." It is important because "if we cannot control who has access to us, sometimes including and sometimes excluding people, then we cannot control the patterns of behaviour we need to adopt . . . or the kinds of relations with other people that we will have."³⁷ Thus, privacy is valuable because it is necessary if we are to create and maintain different sorts of social relationships.

The Fried-Rachels hypothesis is that love, friendship, trust, and respect are impossible without privacy. Privacy enables us to establish and maintain degrees of intimacy by granting us control over information about ourselves.

Intimacy is the sharing of information about one's actions, beliefs, and emotions which one does not share with all, and which one has the right not to share with anyone. By conferring this right, privacy creates the moral capital which we spend in friendship and love.³⁸

Since our involvement in such relationships is vital to our integrity as persons, the right to privacy is of great value indeed.

There is something true and important in the Fried-Rachels hypothesis. Close personal relationships do, typically, involve the mutual sharing of personal information, and the conferring of access to intimate observation of oneself, which are denied to mere acquaintances or to the public at large. But is the connection between intimacy and privacy as close as Fried and Rachels make it out to be? Intimate relations seem to be able to flourish even in crowded slums, where one's every word and action is overheard or overseen by others. Thus, to assert that friendship and love cannot survive without privacy does not seem to fit the facts. People who care for each other manage usually to adjust to such adverse conditions, and to create and sustain intimate relationships in the absence of privacy. Moreover, the fact that many people share highly personal details about their lives with virtual strangers (bartenders, hairdressers, psychiatrists), details which they sometimes withhold from friends and lovers, suggests that the alleged connection is not sufficient to establish intimacy, any more than it is necessary. The Fried-Rachels emphasis on exclusivity may be a culture-specific reflection of our possessive market-oriented society, rather than a universally necessary feature of social life.

³⁶ N. 16 above, p. 138.

³⁷ "Why Privacy is Important" (Summer 1975), *Philosophy and Public Affairs*, Vol. 4, no. 4, p. 331.

³⁸ Fried, n. 16 above, p. 142.

From this brief summary of the various individual and social needs fulfilled or promoted by the value of privacy, one can see why its protection ought to be assigned a high priority by society. Some philosophers, nevertheless, have felt that this assembly of utilitarian defences of privacy is less than fully adequate. Does privacy have only "instrumental" value? Or can it be shown that privacy is also intrinsically worthwhile, valuable in itself, quite apart from its utilitarian value in preventing bad and promoting good consequences?

Stanley Benn has been prominent among those offering non-utilitarian defences of privacy.³⁹ After reviewing some of the ways in which wiretapping, bugging, and so on, can be misused by tyrannical governments or unscrupulous persons, Benn argues that there are reasonable grounds for objecting to privacy invasions even when the information acquired is not misused. Even when no extrinsic harm comes to a person as a result of losing his or her privacy, that person has a *prima facie* ground for claiming the right not to be spied upon or watched without knowledge or consent. Humans are self-conscious beings. To monitor their conduct without authorization is to show a less-than-proper respect for their dignity.

To *respect* someone as a person is to concede that one ought to take account of the way in which his enterprise might be affected by one's own decisions. By the principle of respect for persons . . . I mean the principle that every human being . . . is entitled to this minimal degree of consideration.⁴⁰

When we spy upon others *we ipso facto* deceive them about their situation in the world, and thereby thwart their attempts to make rational choices. We have harmed them by undermining their dignity, even if they never discover our intrusion and we make no use of it to victimize them by publicizing what we discover. Overt observation also violates the principle of respect for persons as choosers by altering the conditions in which they act and choose.

There are both strengths and weaknesses to Benn's analysis. One advantage of the analysis is that it helps us to understand the reaction of persons who do not withdraw their objection to computerized databanks even when they are satisfied that adequate safeguards against abuse have been implemented. The source of their resentment is the belief that no one is entitled to have access to such information without the knowledge or consent of the subject. One disadvantage of Benn's analysis, however, is that it appears to extend the boundaries of our right to privacy in an inappropriately wide fashion. It simply does not seem plausible to suggest that my privacy is violated every time I am casually observed without my knowledge or against my wishes. Benn attempts to deal with this problem by adopting a modified version of the principle: unknown or unwanted observation violates the principle of respect for persons only when things closely bound up with their identity are concerned.

³⁹ N. 6 above.

⁴⁰ N. 6 above, p. 9.

Even with this qualification, however, the principle seems overly-strong. A person who inadvertently acquires information about some matter deeply affecting my personal identity (by, say, overhearing a conversation of mine in a crowded restaurant) does not thereby show disrespect for my dignity as a person. Thus, even as amended, Benn's principle seems less than fully satisfactory. But if it were qualified in some more appropriate manner, it would usefully reinforce utilitarian arguments on behalf of privacy. There is clearly some connection between our duty to respect the dignity of persons and our duty not to violate an individual's right to privacy.

At the outset of this section it was observed that privacy is a fundamental value of our liberal culture. The positive side of this value has been discussed and evaluated, but nothing has yet been said about its negative side. Before concluding, we should note that some other cultures have assigned to the ideal of privacy an altogether lower value than we do. Even within contemporary Western liberal culture, some critics have ascribed to privacy a partially negative value.

Hannah Arendt, for example, claims that in classical Greece, freedom and personal self-fulfillment were associated with participation in public life, with involvement in "politics" in its broadest sense of community affairs. Man's existence in his own household was regarded, by contrast, as a necessary evil, a concession to biological necessity, an area of deprivation held in general disesteem.⁴¹

A number of Western social scientists have argued that privacy has become an unhealthy obsession of contemporary liberal society. Philip Slater claims, for example, that North Americans "seek more and more privacy, and feel more and more alienated when we get it."⁴² Edmund Leach asserts that "(f)ar from being the basis of the good society, the family, with its narrow privacy and tawdry secrets, is the source of all our discontents."⁴³ And Paul Halmos believes that the excessive stress placed on privacy by liberal ideology has produced a corresponding social pathology, which he labels "desocialization." Liberal ideology postulates (and a market culture of possessive individualism creates) man as an egoistic isolated atom, unwilling and unable to participate in co-operative community projects because of his ruthless competitiveness:

In our Western society, the basic pattern of living is rightly home centred; the daily and nightly retirement into solitude or the family circle shows up the only things which have remained concrete and tangible to modern man: his freedom in privacy and his belonging to the family circle. One lives one's life in the family and one has social contacts, makes social excursions, instead of the other way round, that is,

⁴¹ *The Human Condition* (Chicago: U. of Chicago Press, 1958), pp. 26-27.

⁴² *The Pursuit of Loneliness* (Boston: Beacon Press, 1970), p. 7.

⁴³ *A Runaway World*, The 1967 Reith Lectures, 1968, p. 44, cited by Benn, n. 6 above, p. 14.

instead of living in society and withdrawing from it occasionally according to one's needs.⁴⁴

In sum, what these social scientists are claiming is that an excessive emphasis on the value of privacy produces social pathology rather than social health. The deleterious effects of too much privacy, or privacy of the wrong sort, include personal isolation, alienation, loneliness, antisocial behaviour, and the progressive withering of public-spiritedness.

If one juxtaposes the positive and negative critiques of privacy, one recognizes the paradox that privacy has the potentiality either to facilitate the development of social relationships or to diminish human interaction, depending upon how it is incorporated alongside other social values and embedded in social institutions.

We are not simply isolated individual atoms bouncing around in the void. By living together with others as part of a community we share common experiences, gain innumerable benefits, and must accept certain common burdens. Part of the price we pay for community membership is the sacrifice of some degree of privacy, when this is required either to fulfil ourselves as social beings or to further the public interest. The problem, then, becomes one of balancing the individual's claim to privacy against the community's claim to regulate conduct for the general good, against the claim of other individuals to exercise their legitimate rights, and against the individual's own need for participation in wider communities. As Justice Rehnquist has observed, "no careful student of the subject would suggest that the claim of privacy ought to prevail over every other societal claim whatever the fact situation."⁴⁵ Not every threat to privacy is sufficiently serious to warrant sanctions, either legal or social. Some invasions of privacy, such as casual scrutiny by one's neighbours or enumeration by a census taker, are inevitable features of life in a crowded industrial society. It follows that:

A very sophisticated and necessarily discretionary balancing of interests, private and public, is required before a plaintiff's claim to privacy can be satisfactorily reconciled with the competing claims of fellow citizens to their legitimate rights.⁴⁶

In order to adjudicate a claim involving privacy, one must weigh the value of privacy generally, and the seriousness of its violation in the particular case, and balance these against the competing values involved. Continuous adjustments will have to be made, and the balance between privacy and

⁴⁴ *Solitude and Privacy: A Study of Social Isolation, Its Causes and Therapy* (Westport, Conn.: Greenwood, 1952), p. 119.

⁴⁵ "Is an Expanded Right to Privacy Consistent With Fair and Effective Law Enforcement?" (1974), 23 *Kansas Law Review* 1, at p. 2.

⁴⁶ Dale Gibson, "The Right to be Left Alone," in R. St. J. Macdonald (ed.), *The Practice of Freedom* (Toronto: Butterworths, 1979).

disclosure/intrusion/publicity/participation/involvement will change as the circumstances and cultural norms of society change.

Because there must inevitably be a large discretionary element in the adjudication of competing value claims, it is important that rational criteria be established for assessing the relative weight of the values involved. A careful assessment will have to be made both of the utility of protecting privacy in the particular case in question, and of the utility of the competing values. The range of values which may be invoked to justify surveillance and intrusion is extensive, and includes, for example, the values of crime prevention, protection of public safety and order economic and administrative efficiency, and freedom of expression. These are not insignificant values. The free dissemination of news and information is of particular importance to society, and when it clashes with the individual's right to privacy, privacy claims will frequently have to be overridden. Nevertheless, a balance must be struck in each case. It is to be hoped that careful decision-making procedures will ensure that the true value of privacy is not lost sight of or diminished in the process.

Chapter 2

PRIVACY AND THE COMMON LAW: A TANGLED SKEIN UNRAVELLING?¹

Peter Burns*

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A. Introduction

The common law of privacy,² so far as the Commonwealth is concerned, is

¹ This is a revised version of part of a previously published paper, "The Law and Privacy: The Canadian Experience" (1976), 54 *Can. Bar Rev.* 1.

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² Winfield, "Privacy" (1931), 47 *L.Q. Rev.* 23; Dworkin, "The Common Law