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Privacy, Morality, and the Law

I. The Definition of Privacy

Defining privacy requires a familiarity with its ordinary usage, of course, but this is not enough since our common ways of talking and using language are riddled with inconsistencies, ambiguities, and paradoxes. What we need is a definition which is by and large consistent with ordinary language, so that capable speakers of English will not be genuinely surprised that the term "privacy" should be defined in this way, but which also enables us to talk consistently, clearly, and precisely about the family of concepts to which privacy belongs. Moreover the definition must not usurp or encroach upon the basic meanings and functions of the other concepts within this family. Drawing useful and legitimate distinctions between different values is the best antidote to exploitation and evisceration of the concept of privacy.

Let me first state and then elaborate on my definition. Privacy is the condition of not having undocumented personal knowledge about one possessed by others. A person's privacy is diminished exactly to the degree that others possess this kind of knowledge about him. I want to stress that what I am defining is the condition of privacy, not the right to privacy. I will talk about the latter shortly. My definition is new, and I believe it to be superior to all of the other conceptions that have been proffered when measured against the desiderata of conceptual analysis above.

A full explication of the personal knowledge definition requires that we clarify the concept of personal information. My suggestion is that it be understood to consist of *facts* about a person[1] which most individuals

1. The spreading of falsehoods or purely subjective opinions about a person does not constitute an invasion of his privacy. It is condemnable in the language of libel or slander.

in a given society at a given time do not want widely known about themselves. They may not be concerned that a few close friends, relatives, or professional associates know these facts, but they would be very much concerned if the information passed beyond this limited circle. In contemporary America facts about a person's sexual preferences, drinking or drug habits, income, the state of his or her marriage and health belong to the class of personal information. Ten years from now some of these facts may be a part of everyday conversation; if so their disclosure would not diminish individual privacy.

This account of personal information, which makes it a function of existing cultural norms and social practices, needs to be broadened a bit to accommodate a particular and unusual class of cases of the following sort. Most of us don't care if our height, say, is widely known. But there are a few persons who are extremely sensitive about their height (or weight or voice pitch).[2] They might take extreme measures to ensure that other people not find it out. For such individuals height is a very personal matter. Were someone to find it out by ingenious snooping we should not hesitate to talk about an invasion of privacy.

Let us, then, say that personal information consists of facts which most persons in a given society choose not to reveal about themselves (except to close friends, family, . . .) or of facts about which a particular individual is acutely sensitive and which he therefore does not choose to reveal about himself, even though most people don't care if these same facts are widely known about themselves.

Here we can question the status of information belonging to the public record, that is, information to be found in newspapers, court proceedings, and other official documents open to public inspection. (We might discover, for example, that Jones and Smith were arrested many years ago for engaging in homosexual activities.) Should such information be excluded from the category of personal information? The answer is that it should not. There is, after all, nothing extraordinary about public documents containing some very personal information. I will hereafter refer to personal facts belonging to the public record as documented.

My definition of privacy excludes knowledge of documented personal information. I do this for a simple reason. Suppose that A is browsing

2. I know a recently divorced man who doesn't want anyone to know the fact. He and his former wife still live together, so it is possible for him to conceal their marital status from most everyone.

through some old newspapers and happens to see B's name in a story about child prodigies who unaccountably failed to succeed as adults. B had become an obsessive gambler and an alcoholic. Should we accuse A of invading B's privacy? No. An affirmative answer blurs the distinction between the public and the private. What belongs to the public domain cannot without glaring paradox be called private; consequently it should not be incorporated within our concept of privacy.

But, someone might object, A might decide to turn the information about B's gambling and drinking problems over to a reporter who then publishes it in a popular news magazine. Isn't B's privacy diminished by this occurrence?[3] No. I would certainly say that his reputation might well suffer from it. And I would also say that the publication is a form of gratuitous exploitation. But to challenge it as an invasion of privacy is not at all reasonable since the information revealed was publicly available and could have been found out by anyone, without resort to snooping or prying. In this crucial respect, the story about B no more diminished his privacy than would have disclosures about his property interests, say, or about any other facts concerning him that belonged to the public domain.

I hasten to add that a person does lose a measure of privacy at the time when personal information about him first becomes a part of the public record, since the information was until that time undocumented. It is also important not to confuse documented facts as I define them here with facts about individuals which are kept on file for special purposes but which are not available for public consumption, for example, health records. Publication of the latter does imperil privacy; for this reason special precautions are usually taken to ensure that the information does not become public property.

I believe the personal knowledge definition isolates the conceptual one of privacy, its distinctive and unique meaning. It does not appropriate ideas which properly belong to other concepts. Unfortunately the three most popular definitions do just this, confusing privacy with quite different values.

1. *Privacy consists of being let alone.* Warren and Brandeis were the first to advocate this broad definition.[4] Brandeis movingly appealed to

3. I owe this example, as well as other useful comments and suggestions, to an Editor of *Philosophy & Public Affairs.*

4. Samuel Warren and Louis Brandeis, "The Right to Privacy," *The Harvard Law Review,* 4 (1980): 205–07.

it again in his celebrated dissent to the U.S. Supreme Court's majority ruling in *Olmstead v. U.S.*[5] Objecting to the Court's view that telephone wiretapping does not constitute a search and seizure, Brandeis delivered an impassioned defense of every citizens' right to be let alone, which he called our most cherished entitlement. Several other former U.S. Supreme Court Justices have endorsed this conception of privacy, among them Douglas, Fortas, and Steward.[6] And a number of distinguished law professors have done likewise.[7]

What proponents of the Brandeis definition fail to see is that there are innumerable ways of failing to let a person alone which have nothing to do with his privacy. Suppose, for instance, that A clubs B on the head or repeatedly insults him. We should describe and evaluate such actions by appeal to concepts like force, violence, and harassment. Nothing in the way of analytical clarity and justificatory power is lost if the concept of privacy is limited, as I have suggested that it be, to cases involving the acquisition of undocumented personal knowledge. Inflationary conceptions of privacy invite muddled reasoning.

2. *Privacy consists of a form of autonomy or control over significant personal matters.* "If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government invasion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[8] With these words, from the Supreme Court case of *Eisenstadt v. Baird*, Mr. Justice Brennan expresses a second influential theory of privacy.

Indeed, definitions of privacy in terms of control dominate the literature. Perhaps the most favored among them equates privacy with the

5. Olmstead v. U.S., 277 U.S. 438 (1928): 475–76.

6. See William Douglas, *The Rights of the People* (Westport, CT: Greenwood Press, 1958). See Fortas's decision in Time v. Hill, 385 U.S. 374 (1967): 412; and in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974): 412–13. See Stewart's decision in Katz v. U.S., 389 U.S. 347 (1967): 350; and in Whalen v. Roe, 429 U.S. 589 (1977): 608.

7. For example, Edward Bloustein, in "Group Privacy: The Right to Huddle," from his *Individual and Group Privacy* (New Brunswick, NJ: Transaction Books, 1978), pp. 123–86; Paul Freund, in "Privacy: One Concept or Many?" ed. J. Pennock and J. Chapman, *Nomos XIII: Privacy* (New York: Atherton Press, 1971), pp. 182–98; Henry Paul Monagham, "Of 'Liberty' and 'Property'," *Cornell Law Review* 62 (1977): pp. 405–14; and Richard Posner, *The Economics of Justice* (Cambridge, MA: Harvard University Press, 1981), p. 123.

8. Eisenstadt v. Baird, 405 U.S. 438 (1972): 453.

control over personal information about oneself. Fried, Wasserstrom, Gross, and Beardsley all adopt it or a close variation of it.[9] Other lawyers and philosophers, including Van Den Haag, Altman, and Parker,[10] identify privacy with control over access to oneself, or in Parker's words, "control over when and by whom the various parts of us can be sensed by others."

All of these definitions should be jettisoned. To see why, consider the example of a person who voluntarily divulges all sorts of intimate, personal, and undocumented information about himself to a friend. She is doubtless exercising control, in a paradigm sense of the term, over personal information about herself as well as over (cognitive) access to herself. But we would not and should not say that in doing so she is preserving or protecting her privacy. On the contrary, she is voluntarily relinquishing much of her privacy. People can and do choose to give up privacy for many reasons. An adequate conception of privacy must allow for this fact. Control definitions do not.[11]

I believe the voluntary disclosure counterexample is symptomatic of a deep confusion underlying the thesis that privacy is a form of control. It is a conceptual confusion, the mistaking of privacy for a part of liberty. The defining idea of liberty is the absence of external restraints or coercion. A person who is behind bars or locked in a room or physically pinned to the ground is unfree[12] to do many things. Similarly a person who is prohibited by law from making certain choices should be described as having been denied the liberty or freedom to make them. The loss of liberty in these cases takes the form of a deprivation of autonomy. Hence

9. Charles Fried, *An Anatomy of Values* (Cambridge, MA: Harvard University Press, 1970), chap. 9, p. 141; Richard Wasserstom, "Privacy: Some Assumptions and Arguments," in *Philosophical Law*, ed. Richard Bronaugh (Westport, CT: Greenwood Press, 1979), pp. 148–67; Hyman Gross, "Privacy and Autonomy," *Nomos XIII*, p. 170; Elizabeth Beardsley, "Privacy, Autonomy, and Selective Disclosure," *Nomos XIII*, p. 65.

10. Ernest Van Den Haag, "On Privacy," *Nomos XIII*, p. 147ff.; Irwin Altman, "Privacy—A Conceptual Analysis," *Environment and Behavior* 8 (1976): 8; and "Privacy Regulation: Culturally Universal or Culturally Specific?" *The Journal of Social Issues* 33 (1977): 67; Richard Parker, "A Definition of Privacy," *Rutgers Law Review* 27 (1974): 280.

11. Proponents of a control definition might respond by saying that they are really interested in identifying *the right to privacy* with the right to control personal information about or access to ourselves. But then they should have said so explicitly instead of formulating their contention in terms of privacy alone. And even if they had done so their position would still be confused, since the right to choose is an integral aspect of the right to liberty, not the right to privacy.

12. Here I use "unfree" to mean "lacking liberty." My concern is not with the metaphysical notion of free will.

we can meaningfully say that the right to liberty embraces in part the right of persons to make fundamentally important choices about their lives and therewith to exercise significant control over different aspects of their behavior. It is clearly distinguishable from the right to privacy, which condemns the unwarranted acquisition of undocumented personal knowledge.[13]

3. *Privacy is the limitation on access to the self.* This definition, defended by Garrett and Gavison[14] among others, has the virtue of separating privacy from liberty. But it still is unsatisfactory. If we understand "access" to mean something like "physical proximity," then the difficulty becomes that there are other viable concepts which much more precisely describe what is at stake by limiting such access. Among these concepts I would include personal property, solitude, and peace. If, on the other hand, "access" is interpreted as referring to the acquisition of personal knowledge, we're still faced with a seemingly intractable counterexample. A taps B's phone and overhears many of her conversations, including some of a very intimate nature. Official restraints have been imposed on A's snooping, though. He must obtain permission from a judge before listening in on B. This case shows that limitation of cognitive access does not imply privacy.

A response sympathetic with the Garrett-Gavison conception to the above criticism might suggest that they really meant to identify privacy with certain kinds of limitations on access to the self. But why then didn't they say this, and why didn't they tell us what relevant limitations they had in mind?

Let us suppose that privacy is thought to consist of certain normal limitations on cognitive access to the self. Should we accept this conception? I think not, since it confuses privacy with the existential conditions that are necessary for its realization. To achieve happiness I must have some good luck, but this doesn't mean that happiness is good luck.

13. I do not mean to ascribe to proponents of control definitions the view that every interference with liberty is by that very fact an infringement to privacy. I do mean to criticize them for failing to recognize that interferences with personal choice or control, taken by themselves and with no consideration given to undocumented personal knowledge that might be acquired from them, are not appropriately described or persuasively condemned in the language of privacy.

14. Roland Garrett, "The Nature of Privacy," *Philosophy Today* 18 (1974): 264; and Ruth Gavison, "Privacy and the Limits of the Law," *Yale Law Journal* 89 (1980): 428.

Similarly, if I am to enjoy privacy there have to be limitations on cognitive access to me, but these limitations are not themselves privacy. Rather privacy is what they safeguard.