



A THEORY OF THE NATURE AND VALUE OF PRIVACY

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What is privacy? Why is it so important? These twin questions tend to focus much of the philosophical literature on privacy.¹ They are crucial to the resolution of the substantive moral, social, political and jurisprudential debates regarding privacy. This paper briefly summarizes an answer to the first question that I have discussed elsewhere.² Much work remains to be done, however, on the second question.

The range of attitudes regarding privacy in the constitutional context is nicely illustrated in the thoughts of two great twentieth century justices. Justice Black, writing in dissent in *Griswold v. Connecticut*, is almost dismissive.

I like my privacy as much as the next one, but I am nevertheless compelled to admit that government has the right to invade it unless prohibited by some specific constitutional provision.

To be fair, we must concede that much more is at issue here than simply the value of personal privacy. Justice Black is concerned with deep issues in constitutional and interpretive methodology -- one continual embarrassment to defenders of the constitutional right to privacy is the fact that the concept is never mentioned in the

document. Still, the contrast in attitude toward privacy is striking when compared to the thoughts of Justice Brandeis, also writing in dissent, less than forty years earlier in *Olmstead v. United States*.

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against government, the right to be let alone-- the most comprehensive of rights and the right most valued by civilized men.

Justice Brandeis surely engages in hyperbole. Lots of explicit constitutional rights -- voting, free expression, equal protection -- are more valued than personal privacy, even by "civilized" men and women. Many scholars and jurists would be in complete agreement, however, with the general sentiment. Personal privacy seems to fit in with the other social ideals enumerated in our nation's founding documents. Privacy is, indeed, a fundamental political value, or so I will argue. At the same time, it is undervalued in current popular and judicial attitudes. Part of the explanation for this apparent paradox is that it is not immediately clear why privacy is so valuable, at least when compared to political ideals like liberty, equality and justice. Equally responsible for the lack of consensus about the value of privacy is the fact that scholars are far from agreement as to the nature of privacy.

I. What Privacy Is

The following might be claimed as violations of your personal and/or constitutional privacy. Your roommate goes through your desk, or opens your mail, or listens in on your phone conversation without your permission. A voyeur peeks in your bedroom window. Your busybody neighbor lectures you on why you should attend church on Sunday morning rather than play golf. Your employer forces you to submit to a polygraph examination or a random urinalysis. Rude teenagers disturb your picnic in the park by playing rock music at an excessive volume. A credit agency gains computer access to your credit card accounts. The police search your home without a warrant. Your blood is tested for HIV when you are admitted to the hospital. The state makes it a crime to secure abortions in hospitals that sit on state owned land. You are arrested for engaging in oral sex with another consenting adult. The state refuses to honor your previously expressed desire not to be sustained in a vegetative state.

It is unrealistic to suppose that all of these issues can be captured by brief, elegant, necessary and sufficient condition definitions of privacy. Given this fact, many theorists have opted for semantic legislation. They have stipulated definitions that handle some of these cases, and relegated the others to different concepts or rights. This stipulative method is both unfair and unrealistic. It is unfair because opposing sides in substantive debates gain favor, or lose ground, by the supposed neutral conceptual housekeeping. Semantic legislation is unrealistic because philosophers and academic lawyers are not going to change the way people talk, or the terms in which they think. All that happens if the proposed semantic reform is taken seriously is that new technical jargon is introduced, and everyone not familiar with the specialists' literature uses the words just like before.

One case study in the use of this spurious methodology focuses on the concept of liberty. Many commentators have complained that several of the so-called privacy cases would be better understood as involving the concept of personal liberty. This seems reasonable until we pause to consider what is at issue in the constitutional tradition. Since every law infringes on absolute personal freedom in some way, it is commonly accepted that a liberty interest can be overridden by a simple expression of majority will, given merely that the proposed law is rational. A fundamental constitutional right, such as many insist privacy is, however, has much stronger standing -- the state must show much more than simple rationality for laws that would conflict with such a right. What appears to be offered as conceptual clarification ends up begging the question in a substantial constitutional controversy.

Because semantic legislation must be rejected, I am forced to live with the common description of loud music as an invasion of privacy, though I feel this is a very misleading way of talking. Also of concern is the fact that sexual modesty raises privacy related issues, though few of the analyses -- including my own -- do a very good job of explaining why we use the concept this way. I will confine my discussion to the predominant theory of privacy. Granting that this approach to the concept captures many of the central cases, I will, nevertheless, articulate a different model that I believe both more accurately characterizes the nature of privacy, and allows us to better see why it is of such normative significance.

For both ordinary speakers and conceptual analysts epistemological concepts like knowledge, secrecy and information dominate semantic intuitions about privacy.

It is apparent that there are a number of different claims that can be made in the name of privacy. A number of them--*and perhaps all*--of them involve the question and degree of control that a person ought to be able to exercise in respect of knowledge or the disclosure of information about himself or herself. This is not all there is to privacy, but it is surely one central theme.³

Not all privacy claims involve the control of personal information. To return to our earlier discussion, neither voyeurism nor loud rock music involve any kind of information at all. Busybody neighbors, and decisions to withhold abortions or death with dignity, depend on information only in some indirect way -- your neighbor or the state has to know something about what you're doing in order to become involved in this area of your life.

The most straightforward informational intrusions of your privacy might involve bugs on your phone, computer searches of your finances, or polygraph examinations of your soul. What happens when the searches fail to uncover anything? Your roommate violates your privacy by going through your desk drawer, even if she only discovers that you are obsessive about separating your paper-clips from your rubber bands. The private detective grossly violates your privacy, not just attempts to, by putting a tap on your phone, even if you're out of the country and he never hears anything.

The most striking thing about informational models of privacy is that they deflect us from what is really important. Why should I care that others know things about me? If its true that I have lousy credit, why hide the fact? The answer is obvious. It is not that people know things that bothers us, but that based on this knowledge, they do things or think things -- they judge us. I won't get my loan, or the state will throw me in jail. To return to an earlier theme, people may interfere with my liberty of action based on their knowledge of private facts about me. AIDS and drug testing can obviously produce information that will negatively affect a person's future decisions. But people do other things with personal information besides actively interfere with choices. My impotence is a private matter between my wife and I. I care that others

know this, not because choices or actions are denied me, but because people will judge me and the state of my marriage. Privacy has something to do with blocking. Some have seen this in a non-metaphorical sense -- denying physical access. Others have stressed informational blockage -- the creation of a sphere (note the spatial metaphor, again) of immunity over certain kinds of information. I have argued on a number of occasions that a better model would stress the blockage of illegitimate attitudes and judgments on the part of others. What we seek, on this conception of privacy, is immunity from the judgment of others. This is what ties together many of the paradigm cases of privacy invasion discussed above. It is offered as a unifying and simplifying hypothesis. It says nothing, of course, about the culturally determined lines within which we can expect immunity from the judgment of others -- surely it is legitimate to judge people in many contexts. The model is also silent about the specific areas in which we can expect immunity from the judgment of the state. Still, constitutional privacy should not be seen simply as a technical notion having no direct connection to our more idiomatic uses of privacy. It is precisely because our culture treats phone conversations as private, or decisions about sexuality or contraception as being immune from the judgment of other private citizens, that it makes sense to expect the Supreme Court to enforce a constitutional immunity from the judgment of the state within these narrowly circumscribed boundaries.

II. The Case Against Privacy

There is a pretend case against privacy that is sometimes mentioned in philosophical discussions. It goes something like the following. Privacy is actually a subversive interest. In the first place, those who care the most about privacy are precisely the people who have something, often illegal, to hide. Secondly, even for the honest ones, privacy is literally anti-social. It fosters an undesirable focus on the self and the narrow concerns of the individual rather than directing one's productive attention to the general welfare of the community. Thirdly, since information has a clear market value, too much concern with privacy misallocates resources in a highly inefficient manner.

This argument, of course, is bluster. Our culture clearly values personal privacy enough that no one would seriously suggest that privacy should be done away with, or even be so drastically reduced. Economic efficiency, concern with community welfare,

and a preoccupation with law and order will never completely override our commitment to some form of privacy.

There is, however, a much more serious argument, with not so distant ties to the above, that is much more disturbing and challenging. It appears in many social, political and legal contexts, but is perhaps clearest in its constitutional applications. In its most general form, it simply reminds us that allowing and protecting personal privacy often comes at a not insignificant price. There will be many contexts, so this argument goes, in which that price is simply too high to pay.

Consider Fourth Amendment contexts regarding reasonable searches, one of the most straightforward privacy issues in constitutional law. A young girl is searched by a school official acting in his official capacity without a warrant, and lacking probable cause. The Supreme Court concedes all of this yet argues that the search is constitutionally acceptable. The strategy is one of balancing the costs of protecting individual privacy rights.

Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and the school grounds.⁴

The Court's concerns above are the needs and interests of public school officials. The case dealt with drug dealing, and it is not surprising that the Court also considered the social costs to public order and law enforcement of overturning the conviction.

The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." . . . On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other the government's need for effective methods to deal with breaches of public order.⁵

A kind of balancing occurs in other privacy contexts having nothing to do with search and seizure, though it is seldom expressed in these terms. In Fourteenth Amendment Due Process cases the Court is forced to balance the rights of individuals to life, liberty and property against the collective wishes, needs, and in some cases rights,

of the majority within society. Thus, the question of homosexual rights balances the interests of an oppressed minority in having methods of sexual gratification being recognized as immune from the judgment of the state against the expressed legislative will of the majority to explicitly regulate this intimate area of personal life. The most notorious case of Fourteenth Amendment balancing pits women's right to reproductive freedom:

the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child⁶

against:

the state interests as to the protection of health, medical standards, and prenatal life.⁷

Perhaps the fundamental constitutional balancing goes back to the theoretical debates about judicial review. On the one side we have ideals of democracy which commit us to being governed by the perceived will of the majority. On the other side we have the need to protect individual rights from suppression at the hands of the majority. Conservative members of the Court have long worried that the recognition of substantive privacy rights illegitimately tips the balance away from "the people."

The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus on the one hand against a spectrum of possible impacts on the mother on the other hand.⁸

There is little doubt that the recognition of a robust right to privacy will result in a severe limitation on the will of the contemporary majority. The constitutional examples used above are a clear indication that, if social and legal policy is left to popular votes

and attitudes, then some states, at least, will be driven by a fear of crime, or drugs, or homosexuality, to ignore the privacy interests of individuals. Those of us who value personal privacy, therefore, must find a way to defend its importance to those who see it primarily as an invitation to anarchy, lawlessness and baby killing. A balancing methodology can only work, either in a constitutional context or that of practical moral reasoning, when the full value of privacy as an abstract social ideal has been carefully laid out. Only then are we in a position to see whether some specific recognition of privacy interests is too expensive or impractical. When such a case is adequately presented I am confident that the balance will often tip the other way. We will come to see that privacy is so important that its protection far outweighs the inconvenience borne by society in protecting it.

III. Functional Justifications

There have been a number of attempts to articulate the normative value of personal privacy in the philosophical literature. They all face the following difficulty. Some things we value for their instrumental value. Money is a favorite example -- it is good as a means to many worthwhile ends, but valued for its own sake, it is pathological. Other things, justice, for example, seem intrinsically valuable. Personal privacy seems to fit comfortably into neither camp. It seems extravagant to claim that privacy valued for its own sake, the way that social ideals like freedom, justice and equality are. At the same time, to treat privacy as an expedient means to other ends seems demeaning. A middle ground is clearly needed.

Social and biological scientists have long *explained*, and in the process *justified*, organs, behaviors and social practices in functional terms. This seems precisely the kind of philosophical compromise between the contingent and the intrinsic that is required. The circulation of the blood, and the obvious contribution to life that results, is much more than a merely contingent consequence of the heart muscle. Nevertheless, hearts are not intrinsically valuable. The function of the heart is the circulation of blood. This kind of functional explanation for what hearts are good for, and biologically, why they are there in the first place, manages to incorporate the means-ends relationship of hearts and blood circulation, while at the same time acknowledging that the relationship is much more intimate than relationship between

hearts and thumping sounds. Parallel stories could be told in anthropological terms between kinship structures and social stability.

Functional explanations, like the more general category of teleological explanations to which they belong, are puzzling and have a checkered past in both philosophy and the natural sciences. Much analytical effort has been devoted to logical models of teleological explanations since the 1950s. One high water mark in this literature is the work of Larry Wright.⁹ Wright's key insight is that teleological explanations offer consequence etiologies. In explanations of goal-directed behavior -- nest building or going to the store for beer -- we seek an etiology, a causal explanation for the behavior, and in every case the consequence, the nest or the beer, is an intimate part of an adequate account.

Functional explanations are offered for things, or practices, or conventions. Once again we see the general form of the consequence etiology. The organ, the heart, circulates the blood, and it is precisely because of this that it is there in the first place. Wright's formal model is as follows.

The function of X is Z iff:

- (i) Z is a consequence (result) of X's being there,
- (ii) X is there because it does (results in) Z¹⁰

Wright's analysis is particularly powerful because it allows us to handle conscious functions, the function of studs is better traction in icy conditions, where the causal relationship in (ii) is one of conscious intent -- that of the tire designer. At the same time we can handle natural functions like that of the heart, by non-conscious causal mechanisms like those of natural selection.

I will be reading the entire literature on the value of personal privacy as an attempt -- unconscious, to be sure -- to articulate a normative explanation of the social, political, and legal functions of privacy. I will incorporate Wright's consequence-etiological model of function statements and will, therefore, try to fit all of the ensuing analyses into the following general schema.

The function of privacy is Z iff:

- (i) Socially desirable situation Z is a result of the society's privacy conventions.
- (ii) The privacy conventions are there because they result in Z.

Condition (ii) is clearly the most controversial feature of the model. It is responsible for the widely held view that functional explanations, like all teleological explanations, are illegitimate because they invert the normal causal-temporal order. How can some future state Z bring about our present conventions? Although a standard worry in the literature, it is beautifully addressed in the consequence etiological perspective. It is not the circulation of my blood that causally explains the presence of my heart, but the past value of blood circulation in previous generations that explains my genetic pre-disposition to develop a heart. Similarly, it is not the avoidance of today's icy conditions that explains the studs, but the designer's anticipation of such conditions at the time the tires were first on the drawing board.

Since the conscious design of cultural practices will only work if one is willing to adopt a very strong theistic framework, functional explanations in sociology and anthropology presuppose a transmission mechanism that is related to the evolutionary processes mentioned above. According to the thesis of cultural selection ideas, practices, and conventions can be socially fecund without ever entering our gene pool. If some convention works, and clearly works better than available alternatives, cultural selection says that it will tend to survive in the culture. Its past successes, its tendency to be functional, provides the consequence etiology that explains its present place in the culture. All of this, of course, is exceedingly controversial. Sociobiologists claim that all, or most, social transmission is ultimately genetic. Social scientists worry that without an identifiable transmission mechanism -- conscious ideas in someone's head or strands of DNA -- cultural selection must rely on mysterious entities like the collective memory or the oral tradition. Nevertheless, the ideas of social functionality and cultural selection, are widely endorsed.¹¹ I am willing to assume their existence, both because the ideas strike me as intrinsically plausible, and because the present task is not anthropological. We are seeking, after all, not a causal explanation of privacy, but a normative justification. It is quite compatible with the ultimate falsity of functional accounts of social practices, that our culture nevertheless assumes them in its normative deliberations.

Although almost all of the methodological controversy concerns Wright's second condition, most of the discussion to follow focuses on the first. If we grant some complicated mechanism by which successful social conventions are perpetuated, our

main concern will be with rival theories of what makes privacy conventions advantageous to the culture and/or the individuals within it.

IV. Freedom

At the level of pure lexicography I don't think there is any doubt that the term privacy means something very different than the term liberty. At the same time, it is commonly held that there exists some kind of connection between the concepts. Many would say that this connection is the straightforward one of a workable means to a desired end -- if you maintain your privacy, keep your business secret, then you will be able to get away with doing whatever you want. You will have freedom because no one will know anything about the choices you make. I have argued elsewhere that the connection between the concepts is logically stronger.¹² One could argue that one obvious limit on governmental control -- one area where citizens have a right to be let alone -- concerns those areas of people's lives protected by their right to privacy. Thus questions of liberty, "the nature and limits of the power which can be legitimately exercised by society over the individual",¹³ are partially answered in terms of one sufficient condition for drawing the limit, without any claim to semantic equivalence between the concepts.

I take it to be obvious that to the degree that "the Founders" considered the political value of privacy at all, they would have been most interested in its instrumental value as a safeguard of political liberty. Their distrust of government bordered on paranoia. Aspects of our privacy rights -- assembly, search and seizure, self-incrimination, and most of the "penumbral" emanations -- manifestly protect and further political dissent. This is certainly an important contemporary justification of the value of personal and constitutional privacy.

The problem is that as highly as we claim to value political freedom, our society is deeply suspicious of personal freedom. We basically distrust our fellow citizens. We don't really want a society where people will have enough privacy to engage in truly personal lifestyle choices. They might choose to use drugs, or become homosexual, or make a myriad of other "self-regarding" decisions. Worst of all, our society treats its members as stupid, undisciplined, and potentially violent. Government will oppose extensive personal privacy as long as it continues to be seen as a protective screen for illegal and disruptive behavior.

The problem is not really the connection between privacy and liberty, but a mistaken view of privacy itself. There is an exaggerated focus on personal information. Privacy becomes equated with secrecy. Even on an informational model, privacy is not a general immunity from the knowledge of others. Society stipulates the range of this immunity; criminal behavior is manifestly not immune. It is, of course, true that protecting the area of immunity will allow certain criminal acts to go undetected, but the importance of privacy is not to create anything-goes personal freedom to break the law or social conventions of our culture. We claim immunity from the judgment of others within special culturally circumscribed areas, and it is within these areas that we insist on genuine personal liberty.

V. Privacy as Moral Capital

Charles Fried was perhaps the first theorist to notice that normative justifications of privacy conventions were to be articulated in terms of functional explanations:

we do not feel comfortable about asserting that privacy is intrinsically valuable, an end in itself--privacy is always for or in relation to something or someone. On the other hand, to view it as simply instrumental, as one way of getting other goods, seems unsatisfactory too.¹⁴

Fried postulates a special kind of means/ends relationship between privacy and other fundamentally valued situations.

[P]rivacy is not just one possible means among others to insure some other value, but . . . it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable. . . . [P]rivacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion.¹⁵

The simile with oxygen and combustion is important for understanding Fried's thesis. Although he uses the language of necessity and inconceivability, I think its clear that he is not really making a modal claim at all. Imagining, or even discovering, some eccentric society where love and friendship existed in the absence of privacy would not

count as a counter-example. The thesis is that in our culture love, friendship and trust stand in some law-like relationship to privacy. "Privacy creates the moral capital which we spend in friendship and love."¹⁶ It is irrelevant whether the connection between privacy and love and friendship is conceptual, semantic, or empirical.

Incorporating Wright's model of functional explanation, we have the following schema:

- (i) Love, friendship and trust are a (partial) consequence of privacy conventions.
- (ii) Privacy conventions exist because they further love, friendship and trust.

Following Wright, we will take the notion of "being a consequence" in (i) and "because" in (ii) both to indicate causal relationships. Thus the functional account is committed to privacy conventions being a partial cause of love and trust, and to the social, and ultimately evolutionary, value of love and trust being causally responsible for the survival of privacy conventions. Both of these causal hypotheses are open to question.

Reiman presents an example that shows that the sharing of private information alone cannot produce intimacy.

One ordinarily reveals information to one's psycho-analyst that one might hesitate to reveal to a friend or lover. That hardly means one has an intimate relationship with the analyst. . . . What is missing is that particular kind of caring that makes a relationship not just personal but intimate.¹⁷

The sharing of private information, or as I prefer to express it, the inviting of the potential judgment of another where one normally expects immunity from judgment, does not produce intimacy, friendship or love. Indeed, it is more plausible to argue that the love and friendship produce an inclination to invite judgment and to share information.

James Rachels, who produced a strikingly similar analysis of the moral value of privacy, explicitly acknowledges the independent need for intimacy and affection in meaningful interpersonal relationships. Nevertheless, he insists that the sharing of private information is definitional of relationships like friendship.

[D]ifferent patterns of behavior are (partly) what define the different relationships; they are an important part of what they are. The relationship of friendship, for example, involves bonds of affection and special obligations, such as the duty of loyalty, which friends owe to one another; but it is also an important part of what it means to have a friend that we welcome his company, that we confide in him, that we tell him things about ourselves, and that we show him sides of our personalities which we would not tell or show just anyone.¹⁸

I am quite happy to concede that inviting the judgment of another in contexts where one could claim immunity from such judgment is one contingent element in identifying relationships like friendship and love. I doubt very much, however, that this has much to do with the cultural fecundity of privacy conventions within our society, and thus, I would claim that the furtherance of such relationships is not the function of privacy.

Fried explicitly, and Rachels implicitly, endorse informational analyses of privacy. Fried treats the conventionally defined realm of the private as equivalent to what is secret. The immunity from the judgment of others model, however, makes the connection between secrecy and meaningful relationships far from straightforward. Surely if I confess my criminal career to my lover, this does seem to presuppose a relationship of trust. When I share my sexual fantasies with my lover, however, I still expect a certain immunity from her judgment. I, of course, realize that others do cast judgments on sexual preferences, that's why I generally protect my immunity from the judgment of others by keeping quite. There is risk involved, therefore, in sharing this information with her, and creating a context where she may judge me. This is surely different, however, than the information about my criminal background. I may trust

her to keep quite; I may hope that she'll still love me; but, I can hardly feel betrayed if she judges me disreputable.

Fried and Rachels, seem to confuse the preconditions for love and trust, with the contingent manifestation of these attitudes within a culture that independently recognizes personal privacy. Within our culture there is a connection, perhaps even a law-like connection, between privacy and intimacy. It is far from clear, however, that within cultures with less stringent privacy conventions, and perhaps even no privacy conventions at all, that relationships like love and friendship would be impossible. Something would no doubt have to be shared in these relations, but there is no empirical nor conceptual reason to believe that it would have to be information or an invitation to potential judgment.

VI. Privacy and Respect for Persons

Stanley Benn has articulated one of the most complete and intellectually satisfying defenses of the value of privacy that is to be found in the literature. The Kantian notion of respect for persons provides the foundation.

[A] general principle of privacy might be grounded on the more general principle of respect for persons. By a *person* I understand a subject with consciousness of himself as an agent, one who is capable of having projects, and assessing his achievements in relation to them. To *conceive* someone as a person is to see him as actually or potentially a chooser.¹⁹

Included in these few lines are a number of presuppositions about the nature of privacy, as well as what it is to be a person, why personhood is so important, and why failure to respect a person's privacy amounts to such a serious form of disrespect.

Benn's views about the nature of privacy are more diverse than those of most theorists. He happily admits that expressions like "in private," "private affairs," and "private room" may use the adjective in different, though related, senses. He is also sensitive to the crucial differences between the private/non-private distinction and the public/private distinction. Underlying Benn's entire analytic approach to privacy is a tacit endorsement of informational models of privacy. The basic model, however, can be employed in widely divergent, and culturally dependent, ways.

The norms invoked by the concept of privacy are diverse, therefore, not only in substance but also in logical form; some grant immunities, some are prohibitive, some are mandatory. There may be cultures, indeed, with no norm-invoking concept of privacy at all, where *nothing* is thought properly immune from observation and anything may generally be displayed.²⁰

His strategy is to downplay the importance of a single analysis of privacy, and seek to discover "some minimal right to immunity from uninvited observation and reporting [which] is required by certain basic features of our conception of a person."²¹

The key concept is clearly personhood. Benn identifies two important aspects of mature autonomous people. A person is not only conscious, but self-conscious; aware of himself or herself "as agent, one who is capable of having projects, and assessing his achievements in relation to them."²² A major concern with violations of personal privacy involves the way a person's consciousness of herself is affected by the intrusion. Humming to yourself, sadly out of tune, while listening to Beethoven's Fourth on your earphones is a lovely way of unwinding. When you open your eyes, however, and discover that your roommate has been amusing himself watching and listening to your feeble attempts at musicality, this alters everything. You are embarrassed, you literally become self-conscious, because you are forced to see your activity through his eyes. This, of course, ruins any possible enjoyment.

Much more is at issue than the pain of embarrassment. Your roommate has failed to respect you as a person because:

A's [the roommate] uninvited intrusion is an impertinence because he treats it of no consequence that he may have effected the alteration in C's [your] perception of himself and the nature of his performance. Of course, no *damage* may have been done; C may actually enjoy performing before an enlarged audience. But C's wishes must surely be a relevant consideration.²³

A prime virtue of the respect for persons model is its ability to deal with violations of personal privacy where no harm is done to the victim because none of the judgments

made, or knowledge gained, have adverse effects, and where no embarrassment or personal psychological pain is experienced because the victim never becomes aware of the intrusion.

By respect for persons we sustain an objection even to secret watching, which may do no actual harm at all. Covert observation--spying--is objectionable because it deliberately deceives a person about his world, thwarting, for reasons that *cannot* be his reasons, his attempts to make a rational choice. One cannot be said to respect a man engaged in an enterprise worthy of consideration if one knowingly and deliberately alters his conditions of action, concealing the fact from him. . . . [T]he significance to him of his enterprise, assumed unobserved, is deliberately falsified by A. He may be in a fool's paradise or a fool's hell; either way, A is making a fool of him.²⁴

As important to Benn's approach to personhood as the concept of self-awareness is, it becomes clear that an even more central concept is that of autonomous choice. Persons, for Benn are "choosers," and the primary offense in violations of privacy is the interference with free choice and action. He identifies three liberal ideals -- personal relationships, political freedom, and personal autonomy -- all of which are compromised by a failure to respect personal privacy. In each case the breakdown is not simply the embarrassment or offense, but rather a diminished capacity to choose and act.

Benn's analysis constitutes a significant theoretical advance because the connection between privacy, and self-awareness and freedom, is drawn at a conceptual level rather than one of contingent cause and effect. Violations of privacy do not merely have bad consequences -- embarrassment, outrage, diminished freedom -- they are failures of respect for personhood. In Wright's format, the function of privacy is genuine personhood.

- (i) Genuine personhood -- self-awareness and autonomy -- are consequences of privacy conventions.
- (ii) Privacy conventions exist because they result in of genuine personhood.

Benn's article is intrinsically plausible, at least within our culture's normative and descriptive conception of personhood. The examples of altered self-awareness and loss of freedom are poignant, and the normative contrasts suggested by the notions of respect and disrespect are beautifully descriptive. The only problem is specifying more clearly the connection between privacy and personhood. The discussions of altered self-awareness and loss of personal choice do seem connected in some intimate way with our culture's concept of a mature autonomous person. What is needed, however, is some more explicit and detailed analysis of how these social-psychological, political, and normative concepts tie together within our cultural framework.

VII. A Neo-Symbolic Interactionist Justification

The cultural anthropologist, Robert F. Murphy, begins his ethnographic report on the Tuareg practice of veiling with some theoretical speculation on the social function of privacy.²⁵ He traces his analysis in terms of the functional value of "social distance" to Simmel's work on self-revelation and self-restraint. He expands on this idea with reference to the work of Mead.

One of the great human dilemmas, following George Herbert Mead, derives from the premise that the concept of the self is bestowed upon us by society and through social interaction. But these very processes are at one and the same time testing this identity and working to change it; senescence and altered circumstance, then, conspire in an erosion of, and sometimes assault upon, the ego. Interaction is threatening by definition, and reserve, here seen as an aspect of distance, serves to provide partial and temporary protection to the self.²⁶

I find this suggestion very exciting. It amounts to an outline of an extremely plausible functional theory of personal privacy.

Jeffrey Reiman is the one theorist who has come closest to articulating this functional theory of privacy.

[T]he social ritual of privacy seems to be an essential ingredient in the process by

which "persons" are created out of prepersonal infants. . . . [T]he social ritual of privacy confirms, and demonstrates respect for, the personhood of already developed persons. . . . And of course, to the extent that we believe that the creation of "selves" or "persons" is an ongoing social process . . . the two dimensions become one: privacy is a condition of the original and continuing creation of "selves" or "persons."²⁷

Returning to Wright's schematic representation of functional explanations, this functional theory of privacy can be represented as follows:

(i) The original and continuing creation of the self is a (partial) consequence of privacy conventions.

(ii)

Privacy conventions exist because they further the creation and maintenance of selves.

Such a functional explanation comes the closest, in my judgment, to an adequate basis for a normative justification of the importance this society places on personal privacy.

Both Murphy and Reiman explicitly refer to the symbolic interactionist tradition. I have little interest, and even less qualification, to undertake an exegesis of Mead. I want only to explore the above functional explanation as far as it provides insight into our moral, social and political attitudes toward privacy.

Cultural processes -- symbolic interaction -- are at work on newborns from the beginning. A first step is the production of basically egocentric entities. Almost immediately, however, they become aware of others. They learn to interpret the behavior of others. Eventually they enter a "conversation of gestures" in which mutual interpretation of behavior transpires. Meaning appears when this conversation of

gestures becomes self-conscious. To engage in this self-conscious conversation of gestures, the child needs to be particularly aware of the judgment of others -- mother's pleasure, auntie's displeasure. The judgment of others is a prime incentive or disincentive for future behavior. As the child becomes a self-conscious participant in the conversation of gestures, he or she learns that these judgments can be abstracted to the person of a "generalized other."

At this point we can easily see the need for an area of sanctuary from the incessant judgment of the generalized other. How could any individual or autonomous personality develop when every action or choice is open to censure? This, I believe, is the great insight in Reiman's analysis. He has most clearly seen how threatening to selfhood, at least as this normative ideal is conceived in our culture, the disregard of personal privacy is.

The analysis so far has portrayed privacy as an area of sanctuary from the judgment of others -- concrete others, casual observers, busybodies and undercover agents of the state, and the abstract generalized other. Mead's perspective suggests another source of potential judgment from which the autonomous self seems to require protection. Consider the common suggestion that Mead's notion of the generalized other is simply a recycling of Adam Smith's "impartial spectator." T. V. Smith, one of Mead's students, addressed this exegetical point in a particularly helpful passage.

[W]hatever he may have borrowed from Smith, his "generalized other" is much richer than what he borrowed. Smith's "man within the breast" is an altruistic guest housed in an egoistic household for the purposes of respectability; Mead's "generalized other" is no guest. He is the householder himself.²⁸

Mead introduced the imperfect distinction between the "I" and the "me" in order to make something like the following point. One aspect of myself, the I, is aware of others, but also aware of another aspect of myself, the me. In learning about what we

might call the "conversation of judgments" I learn that I judge others and that others judge me. The robust awareness of myself requires that I adopt the same judgmental attitude to myself that others adopt toward me. Thus, I learn to judge myself. Basically this is a good thing. It is a plausible view of personal conscience, self-regulation, and ultimately social order. There is a down side to all of this, however. Without privacy -- without some areas of immunity from judgment -- I face not only constant judgment by concrete others, not only constant judgment by the abstract "generalized other," but ultimately constant self-judgment.

The problem of self-judgment allows me to reinforce a persistent sub-theme in this essay. Theories of privacy that emphasize knowledge and information have little to say about self-judgment. Obviously personal privacy does not protect oneself from self-knowledge, and this shows, I would argue, the profundity of the mistake in equating privacy and secrecy. A personal information theorist could take refuge in self-deception, though this seems less than promising. More likely the gambit will be to deny the importance of immunity from self-judgment, at least as an aspect of privacy. Here I must simply demure. Our culture recognizes certain areas of immunity both from the judgment of others and ourselves. These areas of immunity, of course, are nascent, vague, and in some cases, controversial. When people insist on privacy they are not erecting some kind of screen, literal or metaphorical, to hide behind and get away with things, they are rather insisting that no one, including their own consciences, has the right to judge them.

Caution demands that the above be softened to some degree. It is unrealistic to suppose that without protection of privacy individuals will face constant judgment, either by themselves or by others. Many things we do are simply too trivial or ordinary to warrant judgment. It is also an exaggeration to suggest as an empirically testable anthropological hypothesis that the development of selves is impossible without significant areas of immunity from judgment. Functioning members of our species, and the culture they come from, may well flourish in the absence of privacy conventions. The important thing to notice, however, is that these persons will be different from us. This is true in a trivial sense -- they will be the products of a very different culture, one that does not recognize personal privacy. In the more important sense, it seems

reasonable to suppose (as a testable consequence of this view of privacy) that they will be different because they will be less autonomous.

The mature, well-adjusted, autonomous individual is an independent normative ideal in our culture. A functional explanation of privacy in terms of the development and maintenance of such individuals will serve, therefore, as more than a provocative sociological hypothesis, but as normative justification as well.²⁹

¹ A remarkably complete survey of the literature is contained in Ferdinand D. Schoeman, editor, *Philosophical Dimensions of Privacy*, Cambridge: Cambridge University Press, 1984. The classic collection of papers is J. R. Pennock and W. Chapman, editors, *Nomos XIII: Privacy*, New York: Atherton Press, 1971.

² Jeffery L. Johnson, "Privacy and the Judgment of Others," 23 *The Journal of Value Inquiry* (1989b) 157-68, and "Privacy, Liberty and Integrity," 3 *Public Affairs Quarterly* (1989b) 15-34. See, also, Jeffery L. Johnson and Donald W. Crowley, "T.L.O. and the Student's Right to Privacy," 36 *Educational Theory* (1986) 211-24, and Donald W. Crowley and Jeffery L. Johnson, "Balancing and the Expectation of Privacy," 7 *Public Law Review* (1988) 337-68.

³ Richard Wasserstrom, "Privacy: Some Arguments and Assumptions," in Richard Bronaugh, editor, *Philosophical Law*, Westport: Greenwood Press, 1978. Reprinted in Schoeman, *op. cit.*, p. 317, my emphasis.

⁴ *New Jersey v. T.L.O.*, 83 L. Ed. 2d, 733 (1985).

⁵ *Id.* at 731-2.

⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965)

⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

⁸ *Id.*, Justice Rehnquist, dissenting.

⁹ See, Larry Wright, "Mechanisms and Purposive Behavior III," 41 *Philosophy of Science* (1974) 345-60, "Functions," *Philosophical Review* 82 (1973) 139-68, and *Teleological Explanations*, Berkeley: University of California Press (1976).

¹⁰ Wright (1976), *op. cit.*, p. 81.

¹¹ See, for example, Richard Dawkins, *The Selfish Gene*, Oxford: Oxford University Press, 1976, and Marvin Harris, *Our Kind*, New York: Harper Perennial, 1990.

¹² Johnson (1989b), *op. cit.*

¹³ John Stuart Mill, *On Liberty*, Indianapolis: Hackett, 1978, p. 1.

¹⁴ Charles Fried, *An Anatomy of Values*, Cambridge, MA: Harvard University Press, 1970, Chapter IX reprinted in Richard Wasserstrom, editor, *Today's Moral Problems*, New York: Macmillan, 1975, p. 21.

¹⁵ Charles Fried, "Privacy [A Moral Analysis]," 77 *Yale Law Journal* (1968). Reprinted in Schoeman, *op. cit.*, p. 205.

¹⁶ Fried (1970), *op. cit.*, p. 25.

¹⁷ Jeffrey Reiman, "Privacy, Intimacy, and Personhood," 6 *Philosophy & Public Affairs* (1976). Reprinted in Schoeman, *op. cit.*, p. 305.

¹⁸ James Rachels, "Why Privacy is Important," 4 *Philosophy & Public Affairs* (1975). Reprinted in Schoeman, *op. cit.*, p. 294.

¹⁹ Stanley I. Benn, "Privacy, Freedom and Respect for Persons," in Pennock and Chapman, *op. cit.*, pp. 228-9.

²⁰ *Ibid.*, p. 228.

²¹ *Ibid.*

²² *Ibid.*, pp. 228-9.

²³ *Ibid.*, 230.

²⁴ *Ibid.*

²⁵ Robert F. Murphy, "Social Distance and the Veil," 66 *American Anthropologist* (1964). Reprinted in Schoeman, *op. cit.*

²⁶ *Ibid.*, p. 36.

²⁷ Rieman, *op. cit.*, p. 310.

²⁸ T. V. Smith, "The Social Philosophy of George Herbert Mead," 37 *American Journal of Sociology* (1931). Quoted in Lewis A. Coser, *Masters of Sociological Thought*, San Diego: Harcourt, Brace, Jovanovich (1977), p. 351.

²⁹ Thanks, as always, to Professor Burke Thomason.