THE ONTOLOGY OF PRIVACY

by

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The dissertation is an examination of the philosophical concept of privacy. It begins with an exposition of the evolution of the concept of privacy from ancient Greece to the present. It includes an evaluation of the extant scholarship on privacy in philosophy which I criticize as inadequate to explain privacy's value to us. I suggest an alternative model of privacy which completes and unites relevant prior theories. Focus is then shifted from philosophy to law. For background, I include a summary exposition of the concept of privacy as a right in both jurisprudential literature and in case law. I argue that a principle of privacy law needs to be articulated in order to attain coherence and consistent adjudication of claims to privacy in courts of law. To this end, I test my theory of privacy by applying it to a 1986 Supreme Court case, Bowers v. Hardwick, in order to show the superiority of my model.

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DEDICATION

I dedicate this work to my father, William S. Roberts and my late mother, Mildred Sweet Roberts, neither of whom ever limited my dreams, and to my sons, Jeffery Adam Roberts and Jacob William Dinneen, in the hopes that I have done the same for them.

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CHAPTER I

INTRODUCTION

This dissertation is, in a way, an autobiography of my struggle with a particular question: what is privacy and why is it important to us? The organization of this work generally follows the development of my efforts to satisfy my inquiry.

My interest in the questions surrounding privacy arose directly from studying Supreme Court Justice William O. Douglas' majority opinion in Griswold v. Connecticut[1] for a Philosophy of Law class. Griswold is a landmark case because, in deciding it, the Supreme Court of the United States acknowledged a constitutional right to privacy for the first time. Although there is ongoing dispute in jurisprudence as to the legitimacy of Justice Douglas' reasoning in this decision, privacy rights established therein have since been appealed to for protection of contraceptive use by married and single heterosexuals, a woman's right to choose to terminate her pregnancy, and the possession of pornography, among other claims.

Justice Douglas argued that a right to privacy is a

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[1] Griswold v. Connecticut, 381 U.S. 479 (1965).

penumbra right, which is to say that it is implied by or emanates from the Constitution, rather than being explicitly affirmed therein. He relied on existing protections for freedom of conscience, freedom from illegal search and seizure, freedom from self-incrimination as well as the Ninth Amendment which states that the rights of American citizens are not limited to those explicitly enumerated in the Constitution. It was Douglas' argument, philosophical in nature rather than strictly legal, which drew my attention to the questions I am pursuing in this work.

Because Justice Douglas did not attempt to say what privacy is or establish parameters for this newly acknowledged right, I began to wonder what a right to privacy was a right to. I also wondered what aspects of a person's life would be private and with what privacy was contrasted. It seemed to me that a person's intimate relationships would surely be protected by a right to privacy. However, in 1986, Michael Hardwick's claim of a right to privacy for his intimate associations was denied by the Supreme Court. In Bowers v. Hardwick, the Court, in a five to four decision, denied Hardwick a right to privacy for homosexual sex acts in his own bedroom.[2] This turn in the developing case law of privacy has dismayed those who value personal liberty in intimate affairs and suggests that the right to privacy affirmed in Griswold is far more

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[2] Bowers v. Hardwick, 478 U.S. 186 (1986).

tenuous than one might have otherwise thought.[3] The Bowers decision indicated to me that either there is confusion in the jurisprudence of privacy or the concept of privacy operative in law is something other than my intuitive and, as yet, unexamined notion. As it has turned out, both of these possibilities seem to be the case.

There is confusion about the public-private distinction in philosophy and law. This does not mean that each one of us individually and in specific cases could not say whether something should be private or public. It is to say, rather, that we have no useful guidelines for clearly distinguishing privacy from other human social arrangements. The notion of privacy is intriguing and complex in that it entails multiple entwined strands. One of these is the distinction between privacy as a political notion and as a social notion. In liberal political theory, the private realm is the area of human life in which the state may not legitimately intervene. For example, in Griswold, the Court decided that the State of Connecticut could not impose its normative position on the use of contraception by married couples. By contrast, in Bowers, the Court found that the State of Georgia appropriately exercised its state power in criminalizing sodomy for homosexuals, even in the confines

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[3] Given the methodology employed by the current Renquist court in determining what constitutes a fundamental constitutional right, one may reasonably fear that the right to privacy as articulated by Justice Douglas could be overturned if challenged directly. See Chapter VI.

of a person's own bedroom. Although not at issue in Bowers, the State of Georgia also criminalizes oral sex by heterosexual couples in their own bedrooms as well.

Privacy issues, however, also arise in circumstances where the possibility of governmental interference is not contemplated. In social theory, privacy is an informal organizational aspect of interpersonal relationships. For example, family members request privacy from their spouses and siblings. We may wish for and expect privacy in many ordinary circumstances of every day life when a possibility of state intrusion does not even arise.

I argue that social privacy is distinct from and provides the basis for political privacy. This basic distinction has not been made explicit in the literature about privacy, yet it is important because it accounts for some of the confusion in privacy scholarship today. The distinction between the political notion of a private realm and social privacy separates questions about the right to privacy from reflections about privacy itself. The former falls within political theory, rights being guaranteed by constitutions and courts. The conceptually prior inquiry, however, is toward an understanding of what this right is a right to. The social notion that privacy is valuable provides one of the bases for the political limitation of appropriate governmental involvement in people's lives. Thus, an examination of the social understanding of privacy

is essential to privacy scholarship.

I am interested in privacy as it operates in interpersonal relationships and individual lives, what I call social privacy. By developing an understanding of privacy in this sense, I hope to clarify the interests at stake in the political right to privacy, that is, in law.

I argue that social privacy is an existential condition, a way of being, necessary to the possibility of wholeness or the irreplaceable totality of who one is.[4] Wholeness of being, in turn, is required for individuality and intimacy, both of which are characteristic of full human expression. The way of being whole offered by privacy is in contrast with being a part or fragment of who one is which is a condition of society or the public realm. Privacy is valuable because it contributes in a positive and necessary manner to personhood.

Martin Buber and Hannah Arendt, two seemingly disparate philosophers, have been very useful to me in articulating my model of privacy. I have relied on Buber's language in I-Thou to illustrate the relational aspect of privacy in terms of intimacy.[5] Privacy's value in the creation,

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[4] In am grateful to Shulasmith Firestone for the term "irreplaceable totality" which captures what I mean by the wholeness of a person including the uniqueness of each person. Shulasmith Firestone, "The Culture of Romance," Women and Values, ed. Marilyn Pearsall (New York: Wadsworth, 1986) 86-91.

[5] Martin Buber, I-Thou, Trans. Ronald Gregor Smith (New York: Scribner's, 1958).

enrichment and sustenance of persons is revealed in I-Thou relation, which I claim is true intimacy. Buber says only in I-Thou relation can a human being become a person. Although, for Buber, relation is primary, even a priori, intimacy requires that the individuals involved have a particular orientation toward others. Privacy in terms of solitude is necessary for the development and maintenance of this attitude which is required for intimacy. Thus, Buber helps me to articulate the value of privacy both in the first person singular sense (I), as well as the first person plural sense (we).

Hannah Arendt's primary contribution to my thinking concerns the normative aspects of privacy as they relate to the conditions necessary to full exercise of the highest human capacities.[6] Although her concern is the political distinction between the Public and Private realms rather than the existential condition of (social) privacy, she gives a description of the conditions required for full expression of human beingness in ancient Greek society that I have found very useful in explicating my sense of privacy's value in modern times.

Arendt describes two opposing sets of characteristics that conditioned the quality of life in the Public and Private and the impact these conditions had on the exercise

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[6] Hannah Arendt, The Human Condition (Chicago: The U of Chicago P, 1958) Chapter II.

of human capacities. The highest expression of human capacities in ancient Greek society was possible only in the polis. It was reserved for individuality as the only place men could show really and inexchangeably who they were.[7] Members of the polis were persons, "whos." Those people relegated to the Private realm, primarily the household, were "whats," fungible things.

Ironically, where Arendt found the necessary conditions for fully actualized human beings in the Public realm of the ancient Greece polis, I find that these requisite conditions for personhood exist today in social privacy. In effect, this turns Arendt's ancient Greek paradigm on its head. In considering various conceptions of public and private, Arendt and I share, as do most others who have written about the normative aspects of privacy, an abiding concern for the conditions necessary for the possibility of personhood and the full exercise of human potential. Her reorientation of the requisite conditions from a particular location to a way of being is crucially important to my analysis. The specific characteristics Arendt ascribes to the Public and Private of antiquity play a key role in my claims about the value of privacy today. I will return to this emphasis in some detail.

Arendt's secondary contribution to my work comes from her history of ideas approach to privacy. She describes the

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[7] Arendt 41.

public/private dichotomy as originating in Greek antiquity and traces the changes internal to this distinction through history to the modern age. There is a dramatic dissimilarity between our understanding of privacy in the modern age as compared to its original sense. Arendt's work results in a firm denial that privacy is an abstract, atemporal concept although it is treated as such by most scholars.

Furthermore, Arendt's work suggests that public and private must be analyzed in terms of each other. Failure to consider privacy in relation to the shared common world produces practical and conceptual problems. Privacy is not a condition arising in a vacuum. If it were not for the shared common world, we would have no idea that parts of our lives could be or must be our personal own. The reverse is also true. Attending to our private lives, making this distinction at all, relies on there being other parts of our lives which can be, indeed should be, located in the common world.

In both the social and political senses, it is clear that the concept of privacy in our understanding and usage has changed over time. Ignoring the evolution of "privacy" over time encourages us to omit dimensions of the notion which expand our understanding and locate it in the contexts of persons, times and places. If we treat privacy as an unchanging notion, as if it were a Platonic form, we can,

perhaps, gain some knowledge about the form but little, if any, of its substance, its material expression in our lives. Given the evidence offered by Arendt, the normative notions of social and political privacy are context dependent, that is, concrete.[8] This aspect of privacy analysis is important to the adjudication of privacy rights, i.e., in law.

In what follows, I concern myself with the normative aspects of social privacy and clarify the interests at stake in a right to privacy, that is, as it is understood in political discussion. My focus coincides with what is generally classified as ethical and legal analysis. This is not the only approach represented in privacy scholarship. The relevant literature includes varying combinations of ethical, conceptual, economic and legal analyses.[9] Ethical approaches emphasize the value of privacy in relation to

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[8] I am indebted to Suzanna Sherry, "Civic Virtue and the Feminine Voice in Constitutional Adjudication," Virginia L Rev 72: 574-588, for introducing me to the term "concrete universal" and for an argument for its superiority over the abstract universal. See Carol Gould, "The Woman Question: Philosophy of Liberation and the Liberation of Philosophy," Women and Philosophy: Toward a Theory of Liberation, eds. Gould & Wartofsky (New York: Putnam's, 1976), 5, 26-27. Sherry also cites Philipa Foot in Virtues and Vices and Other Essays in Moral Philosophy (1971) and Iris Murdoch in The Sovereignty of Good (1971) as examples of philosophers who argue for the necessity of including context in the understanding of ethical terms.

[9] For an extensive discussion of privacy literature with a bibliographic essay, see Anita Allen, "Privacy and American Law" in Philosophy and Law Newsletter published by the American Philosophical Association, University of Delaware, May 1988.

personhood, dignity, intimacy, family and community. Conceptual analyses are often driven by a desire for a clear definition of what is meant by "privacy." Economic approaches are concerned with privacy law as maximizing certain desired ends such as protection of business information. Legal analyses examine "privacy" in positive law and often rely on some or all of the aforementioned approaches.

Regarding conceptual analysis, in the beginning of this project, I thought I could offer a definition of "privacy." However, there is substantial agreement among scholars that "privacy," as a bare concept, may not permit a clean, clear definition.[10] I suspect this is because it is a fundamental concept and, a la Wittgenstein, all explanations must start/stop somewhere. Whatever the reason, "...no definition of 'privacy' has gained universal acceptance. Nor is there consensus about what would constitute an adequate definition."[11] Instead, I attempt to get at privacy's meaning by focusing on its role in the creation and maintenance of certain aspects of our lives.

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[10] Privacy is often considered to be a matter of limiting observation of oneself by others. Anita Allen defines privacy as "a condition of inaccessibility of the person, his or her mental states, or information about the person to the senses or surveillance devices of others." Anita Allen, Uneasy Access: Privacy for Women in a Free Society (Totowa, NJ: Rowman & Littlefield, 1988) 15.

[11] Allen, Newsletter 6.

In order to lend some form and direction to my initially amorphous thinking about privacy, I first examined most of the existing literature on the subject in both philosophy and law. In a sense, the notion of privacy is a very modern one, having entered jurisprudential discussion at the end of the 19th century and philosophical journals not until the 1960's.

Discussion of privacy's value is found first, chronologically, in legal scholarship. Broadly, privacy is most often defined as "being let alone," popularized by Warren and Brandeis in an 1890 law review article which is generally acknowledged to be the beginning of jurisprudential discussion of the issue.[12] This article, "The Right to Privacy (The Implicit Made Explicit)," is the most often quoted journal article in privacy research. By comparison, the issues surrounding privacy have only recently come to the attention of philosophers. Since the 1960's, there have been less than 100 articles in journals or books of philosophical interest and few, if any, prior to 1960.

Philosophical analyses that seek to explain why privacy is important to us were most relevant to my enquiry. Arguments have been offered for many claims including privacy's relationship to intimate relationships of love,

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[12] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy (The Implicit Made Explicit)," Harvard L Rev 4 (1890) 193-220.

friendship and trust, to individuality, to the development of persons from pre-social human beings and because of its internal relationship with autonomy, dignity and self-development. Privacy, it is argued, promotes the moral principle of respect for persons. In sum, relevant scholarship concludes that privacy is valuable and necessary in the creation, enhancement and maintenance of full human expression which includes intimate relationships, individuality, autonomy and dignity.

I discovered, however, that the relevant literature regarding the foregoing claims left underlying questions unanswered. For example, why is privacy, rather than a social setting, necessary for intimacy? Privacy may be important because connected with autonomy, but why would an autonomous person choose privacy? What is it about privacy, rather than a social setting, that promotes or maintains individuality?

Prompted by the scholarship and the lingering problems it provokes, I develop a thesis that resolves these problems and shows that there is a common principle uniting what are generally thought to be separate strands of privacy scholarship. I argue that the various accounts of privacy's importance in regards to personhood are based on a single idea rather than being competing, although complementary, theories.

One of the primary motivations for my thinking about

privacy is to look for an understanding of its value that can serve as a principle of privacy law. If there were a clear appreciation of the importance of privacy to each person's life, the political demarcations imposed by the courts and legislatures should then have a coherent construction. In order to succeed in a democracy, law must be grounded on underlying principles shared by most of the community, whether or not the principles are ever articulated explicitly. If such a principle is lacking in a particular area of jurisprudence, the relevant case law will exhibit an incoherence and have about it an air of tenuousness or instability. This is, in fact, the situation today in regards to the jurisprudence of privacy. For example, Justice Kennedy, a current member of the Supreme Court, testifying during his Senate confirmation hearings in 1987, agreed that there is a marital right to privacy but admitted that no one understands the principle upon which such a right to privacy is founded. This situation renders the philosophical examination of privacy at once especially interesting and vitally important.

My thesis illuminates privacy case law. I apply my model as the grounds of a political right to privacy, arguing that people require a sphere of life free from interference by the state and/or other people for their well being as persons. Coherent development of relevant case law was abruptly halted in Bowers and this shows that the

adjudication of privacy claims lacks a clear and coherent basis.

Although I will not respond to criticisms of privacy scholarship in general, it is important to take note of them before proceeding. The general project of articulating privacy's value is attacked by those who deny that it is a distinct and coherent concept or that it is valuable at all, as well as by many feminists who claim privacy serves only the patriarchal domination of women, and by those who claim that privacy is merely an ethnocentric concern.

Sceptics in law and philosophy argue that the interests protected by claims of privacy are not unique and are actually interests of property, including ownership of one's body.[13] In general, I reject all claims that reduce everything of importance to human beings to materiality. The literature also includes those who argue that privacy is a disvalue, an aspect of liberal ideology which separates and isolates human beings one from another.[14]

In spite of these kinds of critiques, the literature commonly acknowledges that privacy is a social good and valuing privacy does not mean one has rejected a common life and community responsibility. Community is not the opposite

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[13] See Judith Jarvis Thomson, "The Right to Privacy," Philosophy and Public Affairs, 4:295 (1975).

[14] E.g., Richard A Wasserstrom, "Privacy: Some Arguments and Assumptions," Philosophical Dimensions of Privacy, ed. Ferdinand Schoeman, (Cambridge: Cambridge UP, 1984) 315-332.

of privacy, nor is privacy indicative of isolation or alienation.

Feminists more frequently than not criticize the presumption that privacy is valuable and argue, instead, that the private realm of the home has sheltered, and thus perpetuated, the abuse and oppression of women and children by physically superior and economically more powerful male heads of household.[15] It is intriguing to note that feminists who aim to explode the public-private distinction seem to consider the private realm to be basically unchanged from the original Greek paradigm Arendt describes. These critics also appear to focus exclusively on the political notion of the private realm rather than distinguishing between it and what I claim is the conceptually prior idea of social privacy.

Questions also arise as to whether privacy is culturally relative, that is, whether it is a value simply because of its central role in liberal ideology. There is, however, sufficient support in cultural anthropology to argue that privacy is a value in all human cultures, primitive to sophisticated. It is reasonable to maintain that a desire for privacy is a panhuman trait.[16] Thus,

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[15] E.g., Catharine MacKinnon, Towards a Feminist Theory of the State, (Cambridge, Mass.: Harvard UP, 1989) 35. Also see, Gould 34-37.

[16] Barrington Moore, Jr., Privacy: Studies in Social and Cultural History (New York: Sharpe, 1984) 276.

although culturally variable in its manifestations, it is not an ethnocentric value. My discussion, however, draws from and pertains primarily to Western European based cultures, specifically my own.

I proceed, then, in the following manner. Roughly the first half of this work is devoted to a philosophical examination of privacy as an evolving concept. In Chapter II, I begin with Arendt's history of the idea which concludes that the purely Public and Private realms of Greek antiquity no longer exist in our modern age. Arendt argues that we are left with a merging of the two formerly distinct realms into what she calls the Social. The challenge we are left with is to articulate the meaning and value of privacy in the Social. Other than a few cryptic remarks, Arendt makes no attempt to respond to this challenge.

I undertook the challenge left by Arendt, that is, to explain the value of privacy today. Chapter III is an examination of the relatively small body of extant literature in both philosophy and law. Persistent questions prompted by the available scholarship revealed the inadequacy of current theories of privacy's value. In Chapter IV, I answer these questions and unite the heretofore competing conceptions by arguing that privacy is an existential condition, a context that offers the possibility of an experience of wholeness or the irreplaceable totality of one's being. Arendt calls this

being a "who," and Buber calls it being "Thou" as opposed to experience of oneself as a fragment or part, which Arendt calls a "what," and Buber calls "It." Wholeness of being is, itself, personhood and it is internally related to intimacy and individuality, both of which are important aspects of fully realized human potential.

Once I have offered my thesis of privacy's value, I turn to the political realm to which we must look for protection of this essential existential condition, and roughly the second part of this work is devoted to examination of the political notion of privacy and its basis in social privacy. Chapter V is a review of the most salient of the jurisprudential privacy scholarship and includes an overview of relevant case law development.

In Chapter VI, I test my thesis by applying it to Bowers v. Hardwick, a case in which the coherent development of privacy law was, seemingly, abruptly disrupted. If the Court had employed a principle based on my thesis, they would have decided the case in favor of Michael Hardwick's privacy rather than in opposition to it.

Finally, Chapter VII closes with two forward looking suggestions as to how privacy interests of individual citizens may be understood in relationship to the state, the community and to other persons. The conception of privacy such as I suggest here is in harmony with both the social and political theory of Roberto Unger and with the

jurisprudential argument of Judge Cravens. Problems remain, however, because the incorporation of nonmaterial conception of privacy, i.e., as other than a location, is difficult because the body of positive law is essentially property based. The common law basis and requirements of precedential reasoning characteristic of legal reasoning make introduction of nonmaterial values difficult or suspect. Judge Cravens' suggested solution to this problem warrants serious consideration. Unger incorporates privacy into his communitarian theory by understanding the private person as the particular expression of the community as universal and, thus, overcomes the usual treatment of the public and private as dichotomous. As I read Unger, he suggests that public and private are two expressions of the same thing rather than opposites separated by unbridgeable difference.

The conception of philosophical scholarship that informs and directs this work is one that seeks participation in a conversation with others who are interested in the same sort of enquiry. The goal is to contribute to the continuing dialogue which is more important than being right such that others must be wrong. It is my hope that this work exhibits a spirit of cooperation rather than an adversarial stance.

CHAPTER II

PRIVATE AS COMPARED TO WHAT?

In this chapter, I will summarize the ancient Greek Public and Private realms as described by Hannah Arendt.[1] I include the characteristics of each realm as they conditioned the quality of life for their human inhabitants. The attributes Arendt assigns to the polis offer a useful way of describing the optimal conditions for a way of being which allows achievement of the highest human expression. She maintains these conditions were to be found in the Public of ancient Greece. I argue that this same set of attributes generally characterizes privacy today.

Arendt's analysis combines historical and contextual descriptions of the public/private distinction beginning in ancient Greece and evolving over time. Although her primary interest is the ancient Greek Public, lamenting the passing of this purely political realm, her language and emphases have been very helpful, first, in my efforts to articulate the value of privacy in our society today and, second, by underscoring the fact that normative and historical analyses

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[1] Chapter II of The Human Condition 22-78.

of privacy are inextricably entwined. Privacy is an aspect of the overall organization of human life. Its role and meaning have evolved from one of deprivation in antiquity to a condition of relative enrichment today. This dramatic alteration of its conceptual content is inseparable from the materiality of human life of which it is only one facet. Given that the human condition continues to evolve, I am convinced that the place of privacy in our lives will also continue to change.

I include a description of what Arendt calls the rise of the Social primarily to illustrate its "leveling influence." Arendt says modern privacy is a response to this phenomenon and it primarily serves to protect intimacy. She says little more about the role of privacy in our times.

In subsequent chapters, I take on the challenge of articulating the meaning and value of privacy in our world today. I will rely in large part on the characteristics Arendt uses for delineating the Public and Private of ancient Greece and will show that the antiquated model is essentially turned on its head in today's society.

The Public and Private of Ancient Greece

Human life in ancient Greece was either Public or Private, but not both at the same time, nor were there any other relevant divisions of human society. The distinction

was clear and rigid. The two realms were separated by a gulf and admission to the Public rested on a man's ability to transcend the Private realm of the household.[2] Courage was necessary to cross the gulf, to move from circumstances common to all to the possibility of individuality and uniqueness. The polis of ancient Greece was the realm of freedom, persuasion, speech and action as opposed to the bondage of necessity, coercion, violence and labor of the household.[3] The only relation between the two realms was that the latter was necessary to the former.

The division between Public and Private was grounded in the distinction between that which was necessary for perpetuation of the life process and that which was freely chosen in a most fundamental sense, that is, as having nothing whatsoever to do with biological survival of the individual or species. The Private realm corresponded primarily to the home because this is where the requirements for the physical survival of the individual and the species were provided.[4] It was in the home that procreation,

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[2] "Man" is precisely male and not a generic term for all human beings.

[3] The polis was not a physical location; it was a way of relating to others that involved speech and action, no matter where it was. It does not always exist today and most people, including job holders or businessman, do not live in it. Furthermore, no man can live in it all the time. Arendt 198.

[4] This may explain the traditionally private nature of the bodily part of human existence.

feeding, clothing, sheltering and death of people occurred.[5] The labor required to provide for survival was done necessarily; it was not chosen because it was required to maintain the human life process itself.

All people, to a certain degree, were inhabitants of the Private realm. Women, children and slaves were members of the household exclusively. Their lives were spent in necessary labor. The rulers of the home were also occupied there in so far as they provided for the nourishment and sheltering of the individuals in their care. The head of household tasks also included the necessity of ruling over the home and its occupants.

The distinctive trait of the Private was that people were driven to live together in order to provide for their wants and needs. The driving force was life itself, according to Arendt. Survival of the individual and the species required the company of others in birth-giving and the provision of nourishment and care. Thus, the natural community of the household was born of necessity, and "necessity ruled over all activities performed in it."[6]

Economic affairs were also non-public and included in the Private realm by definition, regardless of where they occurred, because they too had to do with ongoing provision

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[5] I specify procreation here rather than sexual activity in general because of the non-procreative function of homosexual sex as described by Plato in the Symposium.

[6] Arendt 30.

for the life process. We can conclude from this that the marketplace and its activities were also part of the Private realm. On this basis alone, it is clear that the Private then was constituted entirely differently from how we think of privacy today.

Because necessity was the organizing principle of economics and the household, force and violence were justified in their regard because it was the only way to master necessity, ruling over slaves being a clear example.[7] It is also accurate to characterize the activities occurring within the household as predominantly coerced. Hunger, elements of the physical environment, the fundamental drive to assure future generations, in short, life itself, all acted to coerce human beings to particular kinds of activities. Because coerced, the housekeeping labors could not be freely chosen; they were necessary.

By contrast, the _polis_ was the realm of freedom in two interrelated senses. To be free meant to overcome the urge of all living beings for their own survival, that is, mastery over the necessities of life. It also meant freedom from the inherent inequality of rulership. By definition, the _polis_ was free in the first sense. The head of

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[7] A fuller understanding of the role of violence in the Private realm must include Arendt's usage in the Marxian sense as the alteration of things given in nature to some end. For example, to tan a cowhide in order to make sandals involves violence to the hide, let alone the more obvious violence done in slaughtering the cow in the first place.

household was free only because he could leave the house for the polis, a gathering together chosen by those males who were no longer subject to the animal necessity of biological survival. In fact, no activity serving only the maintenance of the life process either of the individual or of the species, was permitted to enter the political realm.[8] Because all members of the polis were free because no longer bound to the life process, they were also equal.[9]

Freedom in terms of equality meant that the hierarchical structure of the household was absent in the polis. In the home, the head of the household necessarily had to rule over others but in the polis, he was free from ruling as well as being ruled. However, the freedom and equality of the political realm depended on the inequality in the home, the correlative rule of the household head and his resulting ability to transcend the labor necessary for biological survival. Thus, freedom and equality logically presupposed necessity and hierarchy. Where people are with others and neither for nor against them, there is freedom and equality. In any gathering of unequals, hierarchy conditions the relationships and there is an absence of free and equal others.

Because free and equal, the mode of relating in the

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[8] Arendt 37.

[9] Arendt says that "equality ... was the very essence of freedom ..." 33.

polis was through speech and action. This stands in contrast to coercion and violence which set the tone in the household. Arendt maintains that speech and action are the highest of distinctly human capacities and the importance of the Public realm to this cannot be overstated. Without freedom and equality, neither could exist.

Through speech and action, a member of the polis was able to reveal himself to others.[10] This self-revelation was in the Public, that is, among free equals, so confirmation of who he was, was given by others who saw and heard him.[11] In the process of self-disclosure, a man distinguished himself (who) from other men and not merely something (what) about him.

Word and deed are the means by which human beings are known to one another as distinct and differentiated persons not merely as physical objects or as indistinct species members. Through speech and action, then, each person becomes a unique being, an individual. In this way, the person reveals "who" he is rather than "what" he is. As

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[10] What there was to talk about is an interesting question. It seems that problem solving in terms of the necessities of daily life would be eliminated as possible topics of discussion. Perhaps talk was of issues such as Plato's forms, the "good," the value of eros, and the like.

[11] Arendt 199. Whatever is not seen and heard by others remains, for Arendt, mere appearance. She quotes from Aristotle's Nichomachean Ethics (1171b36 ff.): "for what appears to all, this we call Being, and whatever lacks this appearance comes and passes away like a dream, intimately and exclusively our own but without reality."

Arendt notes, the moment we try to say who somebody is, our language "leads us astray into saying what he is" and, in so doing, we lose the unique individuality of that person.[12] Thus, the unique personality of the individual can only be shown. The polis offered the only possibility for individuality.

Speech, in the polis, stood in contradistinction to violence and coercion in the home. Political action was transacted in words. Fundamentally, it was a matter of finding the right words at the right moment, apart from any information or communication that might be conveyed. This quality, Arendt argues, explains the characterization of politics as an art by Aristotle. To be political meant to decide everything through words and persuasion rather than through force and violence. Because humans have the capacity for speech, we have the possibility of transcending violence in our relationships by the use of persuasion. To force by violence, to coerce rather than persuade, are pre-political ways of dealing with people and this was characteristic of household. In the home, the head ruled with uncontested despotic power, with violence and force.

"Action" is a technical term for Arendt.[13] It is

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[12] Arendt 181. The distinction between "who" and "what," between revealing the complete person as opposed to the things that each of us is, is the single most valuable contribution Arendt has made to my work as a whole.

[13] See Arendt, Chapter V, 175-247, for a thorough explication of "action."

distinguished from the coerced labor of the household as well as the work of craftsmen. Unlike work, action has no product, no end. It produces nothing but itself and has no other end besides itself. Action is not limited to the acting; it is that which begins a new process, a birth of something which never could have occurred without humans. It can occur only in a realm of freedom and its essence is spontaneous creativity arising out of the human response to what happens and what is done. Action creates something from nothing and is not only spontaneous, it is also unpredictable and irreversible. By acting, we set something in motion whose direction we can neither foresee nor control.

Arendt's "action" is exemplified by the debates integral to the formation of the Constitution of the United States in the 18th century. The founders were male property owners with slaves and women in their homes whose labor enabled their participation in the months long discussions.[14] Furthermore, a conception of governance arose from the debates whose future was surely unpredictable and irreversible. This action was not limited to the acting, that is to the creation of the Constitution itself, but continues to this day as an ongoing process. It has a

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[14] Not only does the way of life of the framers of the Constitution seem to echo that of the ancient Greeks, the discussions were influenced, at least in part, by Plato's Republic.

life of its own.

By contrast with the speech and action of the dynamic Public, the static Private realm knew only repetitive labor with the perpetuation of the life process as its goad. One slave could be replaced by another, one woman could bear the offspring as well as any other woman. The laborers were interchangeable, the tasks remained the same. Unlike the craftsmen's work, housekeeping labor produced no product, only consumables. Laborers, not individual persons, were needed to get the job done. The monotonous maintenance of life afforded no opportunity for distinction, for individuality.[15] The labor required for biological survival of the human species does not require distinctive individual members any more than does survival of any other animal species. Arendt calls this way of life that of animal laborans.

The Private realm, the household, deprived its inhabitants of the highest and most human of our capacities: the opportunity for individual distinction. This is the reason for, what Arendt terms, the "tremendous contempt" for privacy in antiquity.[16] Because of the lack of freedom and equality, and of speech and action, the private human could neither be seen nor heard by others; there were no means of

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[15] Simone deBeauvoir has made this same assessment of housework in The Second Sex, Trans. H.M. Parshley (New York: Knopf, 1952) 505 and elsewhere.

[16] Arendt 46.

revealing "who" one was. It was as if the private person did not exist, although the human inhabitants of the household labored on, as whats. Since the household lacked freedom, equality, speech and action, Arendt characterizes it as a place of privation, indicated by the word "private" itself.[17]

Before moving on, it will be helpful here to summarize the defining characteristics of the ancient Public and Private. The contrast they represent will be important to keep in mind in order to understand my claim, in Chapter IV, that conditions for revealing oneself as distinct and unique are to be found today in privacy.

The polis, the ancient Greek Public, was a dynamic way of being which enabled a man to reveal who he was, the highest of strictly human expressions. It was a realm of freedom predicated on transcending the necessities required for biological survival and because every man in the polis was free in this sense, each was equal to all others. There was no hierarchy of rulers and those ruled and, without hierarchy, there was no place for coercion, violence and force. This allowed speech and action to emerge as the mode of relating and, by these capacities, each member revealed who he was as a unique individual.

By contrast, the static Private, essentially the household and, presumably, the agora, was determined by the

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[17] Arendt 38.

requirements for biological survival. This life was not chosen and, thus, was unfree. Those things required for survival were monotonous, repetitive and done by fungible laborers. Relations were unequal, hierarchical, and conducted by force and violence. As a result, the conditions necessary for self-revelation were lacking and the inhabitants of the Private realm were relegated to being "whats."

The two realms were distinguished by the relative conditions of richness and opportunity in the Public contrasted with the deprivation of the Private. It would, however, be inaccurate to leave the impression that this is all there was to the Greek Private. It was instrumentally valuable. The very fact of the polis, its freedom and related possibilities depended wholly on the existence of the household as the means for transcending biological necessity. Without a home, a man could not be free to participate in Public affairs. If he happened to lose his Private location, he almost automatically lost his citizenship in the Public as well.

There were also what Arendt calls the non-privative aspects of the household which are older than and independent of the modern discovery of intimacy. It is here we find some overlapping similarity between the Private of antiquity and privacy today.

The sanctity of the hearth was never entirely lost.[18] The only sacredness the Private held for the ancient Greeks derived from the mystery of the beginning and end of life. Birth and death were hidden from the Public "because man does not know where he comes from when he is born and where he goes when he dies."[19] Although they are common to everyone, birth and death are impenetrable to human knowledge. Because unknowable, they are unspeakable and, thus, could not have been part of the polis.

A further non-privative aspect of the Private stemmed from the fact that the four walls of the household offered the only reliable seclusion from the mere publicity of the common world, that is, from being seen and heard by others. The value of seclusion from the Public lies in the fact that a life spent entirely in Public, in the presence of others, becomes shallow. According to Arendt, a public life must arise from the hidden realm of the household in order to have depth. The only way to guarantee this quality of "arising" is by way of a private place from which to rise. It was through the coexistence of the Public and Private realms that human lives had depth.

The ancient Greek Public and Private realms, distinguished from one another largely by the relevant characteristics of each, no longer exist today. As a result

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[18] Arendt 29.

[19] Arendt 63.

of a centuries-long process Arendt calls "the rise of the Social," the rigid dichotomy of ancient times is, today, a confused intermingling of the two.[20]

The Rise of the Dominant Social

The essential distinction between the Public and Private of antiquity was the radical difference between two modes of existence. As long as the conditions and activities of each remained absolutely separate from the other, the ancient dichotomy persisted.

Over the centuries, however, changes in human organization brought about an intermingling of the formerly distinct realms and produced what Arendt calls the Social, or mass society of today. In the process, the purely Public and Private were essentially destroyed, ultimately resulting in confusion as to what can and should be one's personal own as opposed to that which belongs to the common world.

At the center of this evolution is an alteration in the way people conceived of the organization of humanity. According to Arendt, the rise of the Social was essentially a matter of household and economic concerns becoming public matters. She cites Solon's legislation requiring children to take care of their parents as the beginning of the

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[20] Arendt 33. In the Social, Public and Private "constantly flow into each other like waves in the never-resting stream of the life process itself."

merging of the two realms. With this, the polis had become concerned with an aspect of the biological life process, the kind of consideration previously excluded from the Public. Another early example of a formerly Private concern taking on Public significance was the regulation of the marketplace, including the introduction of coin of the realm.

This transition was underway by the time of Plato's Republic which included plans for abolition of private property along with dismantling of private life altogether.[21] Although the character of the polis remained identifiable, the boundary between Public and Private had already blurred. Slowly but certainly, the polis took on issues and concerns which before had been relegated solely to the household. Private affairs continued to remain private only if they involved the welfare of individual family members.[22]

During the Middle Ages, the secular realm became entirely what the Private realm had been in pre-Socratic Greek civilization. Formerly private concerns became a matter of collective interest and human relationships began to be modeled on the example of the household. With the

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[21] Arendt cites Book V of the Republic, 223.

[22] Legislation regarding the "exposure" of unwanted infants immediately after their birth remained legal until 374 A.D. Arendt 29.

rule of feudalism and the Christian church, all human activities were organized along the lines of independent large families in both the religious and secular realms. The Church strongly encouraged its members to concern themselves only with what was their own, as individuals and as family members. God and Catholic priests were and are referred to as Father, indicating the familial organization of the Christian religion.[23] Humankind as a whole gradually began to see itself in a familial relationship.

The organization of humanity into one gigantic quasi-family is the hallmark of Arendt's Social, today's mass society. "Society is the form of life in which the fact of mutual dependence for the sake of life and nothing else assumes public significance and where the activities connected with sheer survival are permitted to appear in public."[24] The phenomena of formerly private affairs continuing to emerge into the Social realm is visible all around us.[25]

Families eat their meals in restaurants with increasing frequency, often sacrificing quality by "dining" on "fast

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[23] The church, however, also offered men an opportunity for citizenship like that available in the polis. The transcendence of the secular for the religious was, for them, similar to the rise from Private to Public in antiquity.

[24] Arendt 46.

[25] Think of the total publicity suffered by homeless people.

food." Although a generation ago most children were cared for in their homes by parents, today there is a profusion of day care centers to take care of the children of workers. The same is true of the aged. The elderly today are more often placed in "homes" outside the home rather than cared for within the family setting. As care of young and old has moved outside the private home, society has become significantly involved in regulating day care centers and nursing homes. We are also becoming increasingly more concerned with the care children receive within the family setting, in terms of neglect and abuse of various kinds. The recently heightened social willingness to intervene in spousal abuse situations also reveals the ongoing transformation of formerly private matters into collective concerns. Shelters for abused women and children exist in most areas today, supported by community concern.

The Social realm, created by the publicizing of formerly private household matters, is dominated by the narrow concern for biological survival. It is a way of life characterized by expectations that its members will behave as though they belong to one family with one interest and one opinion.[26]

In antiquity, the male household head acted on behalf of all and prevented disunity among family members. Today,

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[26] Hence, whatever "common good" there is pertains to the fact that individuals have private concerns in common.

in his place, the dominant Social imposes rules aimed at fostering unity by normalizing behavior and excluding spontaneous action.[27] Those who do not follow the rules are deemed asocial or abnormal. Although the sheer number of human beings in any given society tends to suppress originality and uniqueness in human behavior, Arendt's characterization of this often discussed phenomenon centers on her claim that social conformity is a result of society's familial nature, the oneness of mankind as an animal species.[28] Recall that it is through self-revelation in speech and action that man differentiated himself as other than simply a member of the species. Although this possibility had existed, it disappeared along with the polis. The Social provides little opportunity for speech and action as Arendt understands them.[29]

The conformism inherent in society is revealed by the fact that the social sciences, including economics, are possible only because people become "behavors," that is, conform to statistically predictable patterns of behavior. Creative action which enables self-revelation as unique

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[27] Recall Arendt's "action" as spontaneously creating something new and unique. See 28-29 supra.

[28] Arendt 46.

[29] It has occurred to me that the oral defense of a doctoral dissertation may be one contemporary example of speech and action in public. However, it is rare today that Arendt's "action" is exhibited in politics. M.L. King, Jr. may have been a practitioner of this art.

cannot fit the model and appears as statistical deviation. Using Arendt's language, behavors are measurable, fit predictable patterns and are "whats," or things. By contrast, those who act spontaneously, exhibiting their individuality, are outside the ability of social sciences to measure and are "whos," or persons.

Arendt maintains it is these developments, the publicizing of formerly private household matters and the conformity demanded by society, that have transformed privacy into the value it is today. Once, a life spent in Private was deprived of expression of our most human capacities. Today, we no longer think of privacy in terms of deprivation, largely due to the enrichment of the private sphere in relation to the Social. Thus, privacy today is opposed not to the political but to the "leveling demands of the social ... what we would call the conformism inherent in every society."[30]

Arendt claims that it is a "decisive historical fact" that "modern privacy in its most relevant function is to shelter the intimate..."[31] Recognition of positive aspects of privacy arose during the Romantic period as a reaction against the conformity of society. Rousseau's discovery of intimacy, another development of the same period, was a product of his rebellion "against society's unbearable

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[30] Arendt 39.

[31] Arendt 38.

perversion of the human heart, its intrusion upon the innermost region in man which until then had needed no special protection."[32]

Arendt describes the intimacy she assigns to Rousseau as a subjective mode of existence founded on escape from the common outer world to the inner subjectivity of the individual. The major forces of intimacy, "the passions of the heart, thoughts of the mind, and delights of the senses," are private because one's personal own. Although Arendt says little more about her conception of intimacy, we can safely infer that it is predominantly related to individuality, that is, revealing oneself as a unique being.

With the rise of the Social and the disappearance of the polis, distinction and difference have become a private concern of the individual because speech and action were banished to the intimate and private.[33] In the process, they lost much of their former quality; expression of one's intimate life is often so subjective that it cannot be fully communicated. Speech and action are most readily exhibited today by storytelling and "artistic transposition of individual experiences." For example, the recent film, "Out of Africa," included several scenes of Karen Blitzen telling spontaneously created stories to her lover, Denys Finch-Hatton, revealing herself in the process. In fact,

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[32] Arendt 39.

[33] Arendt 41.

who Isak Dinesen was is very visible in her story on which the film itself was based.

Although perhaps unintended, Arendt implies that privacy and the opportunity for self-revelation are also critical in interpersonal relations. First, she notes, in agreement with Marx, that as a result of "the dehumanization and self-alienation of commercial society ... in striking reversal of the ancient relationship between private and public men show themselves only in the privacy of their families or the intimacy of their friends."[34] Public life today is generally found in the marketplace and the people involved there are not persons (who), but producers of products (what). Arendt notes that it is "an indispensable element of human pride ... that who somebody is transcends in greatness and importance anything he can do or produce."[35] In other words, each person's uniqueness is more than the sum total of his qualities, and this can only be shown privately in our contemporary world.

Elsewhere, she describes love as inherently worldless and, unlike friendship, it is "extinguished" when exposed to the glare of publicity. Thus, love must be kept hidden in

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[34] Arendt 210.

[35] Arendt 211. Emphasis added.

order to exist.[36] It also requires disclosure of who someone is but it is unconcerned with what the loved one is, his qualities, achievements, failings or transgressions. In fact, love possesses "an unequaled power of self-revelation."[37]

Privacy today, in protecting intimacy, provides the opportunity for revelation of self as a unique individual and the possibility of love in interpersonal relationships. Although Arendt develops neither of these two lines of thought, by explanation and use she does point to both, if no more than implicitly. Clearly, her emphasis is on lamenting the displacement of individuality from the polis of antiquity to modern privacy with its consequent loss of quality. But she also indicates that modern privacy has a role to play in love, family and friendship. Critical to both of these is the possibility of revealing "who" one is, once found in the Public, today in privacy.

Upending the Greek Paradigm

Antiquity gave us clear and distinct separation of the

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[36] Arendt 51-52. "Because of its inherent worldlessness, love can only become false and perverted when it is used for political purposes such as the change or salvation of the world."

[37] Arendt 242. Emphasis in the original.

Public and Private realms which were differentiated on the bases of freedom and necessity, persuasion and coercion, spontaneity and repetition, uniqueness and fungibility, equality and hierarchy, fulfillment of human potential and mere existence as a species member. These ways of being were clearly divided between the polis and the household. Whatever had to do with the necessities of life was located in the latter while the former realm was limited to those men who were able, through the labor of others, to transcend simple biological survival. An aspect of human life was clearly either public or private and not both. Today, the situation is far less clear and, in some sense, the ancient paradigm has turned on its head.

As activities and problems of biological survival became collective concerns, the Private realm was deprived of its exclusive subject matter. At the same time, the Public realm became increasingly focussed on issues of necessity. These changes produced the rise of the Social and blurred the formerly clear distinction between Public and Private. Their meanings and the significance they have for the lives of individuals has dramatically changed.

In contrast with the ancient Private as deprivation, the modern struggle against the conformity of society has revealed that privacy can be rich and multifaceted under conditions of intimacy. Having been driven from the Public realm of antiquity, the most valued expression of humankind,

showing "who" one is, has found its home in privacy. Today, privacy stands fundamentally in relation to society. Private matters continue to become collective concerns. The reverse is also the case, however less frequently.[38]

As a result of the ebb and flow between the two, the distinction between society and privacy is amorphous, porous and changing. Nevertheless, there are two general sets of conditions, very similar to those used by Arendt, which serve to broadly separate the two. I have listed them in opposed columns for clarity and brevity. Although not an exact fit, there is sufficient evidence to support my claim that Arendt's ancient Greek model has been upended.

Ancient Public Privacy	Ancient Private The Social
Who	What
Freedom	Necessity
Non-market	Economics, marketplace
Individuality	Fragments, fungibility
Intimacy	Roles, functions
Equality	Hierarchy and dominance
Persuasion	Coercion
Creation	Work
Being, reality	Appearance

Without question, there are exceptions to these characterizations today as there must have been in antiquity but the fact that some people's work, for example, allows

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[38] A doctoral dissertation in progress by Stan Taylor, Political Science, University of Oregon, also based on Arendt's The Human Condition, argues that there is a conscious and concerted effort on the part of the state to privatize aspects of human existence to such a degree that citizens are being disenfranchised from the collective social body.

for self-revelation through creativity or that some economic transactions are wholly private, does not alter the fact that these general conditions significantly shape our lives.

It is important to understand that the conditions I have ascribed to privacy are the ideal. I am not claiming they are actual in every case, even in part. We do, however, wish for our "intimate" relationships, including familial ones, to be governed by equality and persuasion rather than hierarchy, dominance and coercion. We also wish to grant the uniqueness of individuality to each other in general. But, given the conditions of the common world today, what Arendt calls a society of jobholders, these aspirations are to be fulfilled in privacy, if at all.

Arendt claims that the elementary distinction between the terms "public" and "private" is that "there are things that need to be hidden and others that need to be displayed publicly if they are to exist at all."[39] She says there are things which cannot "withstand the implacable, bright light of the constant presence of others on the public scene."[40] What is it that must be private in order to exist?

In Chapter IV, I will argue that the possibility for self-revelation as a unique being is most readily enabled by conditions of privacy rather than society. In addition, I

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[39] Arendt 73.

[40] Arendt 51.

claim that being a "who" is absolutely necessary to individuality and intimacy, both of which are hallmarks of the highest possible human expression. They are required for personhood in the fullest sense.

Before proceeding, we will benefit by first examining the relevant philosophical literature which also supports the claim that privacy is essential to personhood. Much good work has been done in this area and my thinking has benefited greatly from it. However, the questions raised there are instructive and they are as important as the ones answered for a full understanding of privacy's value in our world today.

CHAPTER III

PHILOSOPHICAL LITERATURE

This chapter will serve several purposes. First, I want to examine the progress made by philosophy toward elucidating privacy's value. Second, while noting areas of agreement, I want to use points of disagreement, lack and persistent questions prompted by the literature to indicate what is needed to improve on the existing scholarship. Finally, by filling out the seemingly separate and competing theories, I want to show that there is an underlying principal that unifies privacy's value in terms of individuals and intimate relationships.

The work of philosophers on privacy is generally directed toward attaining an understanding of its intrinsic value, or the value(s) it protects instrumentally.[1] Broadly, there is agreement that privacy is important, perhaps essential, to individual persons and to their

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[1] There is a very broad range of issues involving privacy but to my own end, I have omitted arguments addressing privacy's connection to fraud, deception, business secrets, unauthorized use of data bank information and the like.

relationships.[2] Beginning in the late 1960's and intensifying in the 1970's, philosophers began to examine the relationship between privacy and the notion of respect for persons in terms of self-concept and interpersonal relationships.

Privacy is said to be involved in the development and maintenance of self-concept in terms of autonomy, individuation and personal growth. Respect for people's privacy in this regard is respect for persons gua persons rather than as objects or specimens and necessarily includes, I will argue, individuality. Exploration of relational privacy, on the other hand, involves its connection to the possibility of intimacy in varying degrees, from friendships to love affairs, and the importance of intimacy to personhood. There is inherent overlap of the concepts involved in privacy's value and this fact adds a great burden to an already confusing and complex set of problems. Although not separable in reality, I consider the literature in general terms of self-concept, respect for persons and intimacy. There remain, however, unavoidable interminglings.

In this chapter, I have chosen to review literature that shares my interest in social privacy, that is, as an organizing principle in everyday, ordinary individual lives

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[2] See, e.g., Gross, Benn, Schoeman and Gerstein in this chapter.

and interpersonal relationships. For this focus, I am indebted to James Rachels who insists that we need an account of privacy's value in the many common and unremarkable cases of everyday life. Although mundane in one sense, at bottom, privacy is valued in normal situations, where there is nothing embarrassing, shameful or unpopular in what we do and nothing ominous or threatening about its disclosure.[3]

Dramatic and out of the ordinary cases of invasions of privacy find their way into the legal system by way of civil law suits that ask the state to shore up privacy claims.[4] I will discuss these kinds of issues as part of the jurisprudence of privacy in Chapter V. Here, the focus is on scholarship which is aimed at understanding privacy's value in the most ordinary sense.

It is helpful to sort the claims about privacy's personal value by whether they address first person singular or first person plural interests. I refer to this distinction as individual privacy in the former case, and as relational privacy in the latter. Interestingly enough,

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[3] James Rachels, "Why Privacy is Important," Philosophy & Public Affairs 4 (1975): 323-33. See the relevant and important distinction between privacy and secrecy in Sissela Bok, Secrets: On the Ethics of Concealment and Revelation (New York: Random House, 1984) 10-14.

[4] This kind of privacy claim is neither strictly social nor political but a hybrid of the two I call quasi-political. It is derivative of social privacy but relies on legal protection.

although scholarship has been directed toward both of these aspects of personal privacy, they are nearly always treated separately and their connection has not been articulated. In fact, the connection between individual and relational privacy has been ignored in scholarship to date. In Chapter IV, I will explain this connection and will provide a model of privacy that unifies the following competing explanations of privacy's value.

Individual Privacy

Autonomy, Personal Growth & Self-Concept

There is a variety of arguments connecting the value of privacy to the development and maintenance of self-concept. They include privacy's contribution to a concept of self as autonomous (self-determining and responsible) and trustworthy. It is also claimed that privacy is valuable because it enables individuation, that this life is my life, and confers to an individual the moral title to her own existence. Privacy is also valuable because it contributes to personal growth by enabling self-criticism and self-discovery. Finally, privacy is claimed to be essential to the possibility of any self-concept whatsoever, which is accomplished by limiting the degree of "contaminative exposure." There is something right about each of these

claims but each singly and all together fail to get at why privacy is fundamentally valuable to us.

Philosophers have argued that privacy is related to autonomy in two ways. It is argued that privacy is necessary to a person's self-concept as autonomous. In this sense, liberty is argued to require a conception of self as autonomous. For example, it is claimed that a person who did not realize she was free from the intrusions of others would not be autonomous. Others argue that without privacy, autonomy would cease to exist. Now, it may be true that the exercise of autonomy is aided by a concept of self as autonomous but, arguably, such a self-concept is not necessary to the existence of liberty itself. These two general treatments of the relationship between privacy and autonomy are confused and confusing.

An early work by Hyman Gross initially connected privacy to autonomy in so general a way that the relationship seemed to be internal.[5] He argued that privacy is necessary to autonomy generally in that if we are to be free to choose the kind of lives we want to a certain degree, we must be able to control the access others may have to the personal aspects of our lives, that is, maintain a degree of privacy. Privacy, then, permits us the freedom

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[5] Hyman Gross, "Privacy and Autonomy," in Privacy: Nomos XIII, ed. J. Roland Pennock and John W. Chapman (New York: Atherton, 1971) 169-181. This anthology will be hereafter cited as Nomos XIII.

to more or less design our own lives as well as maintain them in a way that suits us. Gross concludes, then, that privacy is necessary to autonomy. On the other hand, the reverse is also true. Autonomy is necessary to privacy in that if we were not free to do so, we could not choose privacy. This last point is more important than it might first appear and I will return to it near the end of this section.

General arguments such as these are problematic for a couple of reasons. First, they contribute to the mistaken tendency to conflate privacy and autonomy. The close and confused relationship between the two is illustrated in debates about the grounding of Supreme Court decisions in Griswold v. Connecticut and Roe v. Wade, both of which were decided on the basis of a right to privacy. Subsequent to these decisions, numerous scholars have argued that the right to use contraception and to choose to terminate a pregnancy respectively are, in fact, issues of individual liberty or autonomy and should have been decided on the basis of the Fourteenth Amendment.[6]

Although there is a strong inclination to equate privacy and autonomy, it is clear they are different. First, it is possible to deny personal liberty without violating the person's privacy, for example in confining a

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[6] David M. O'Brien, Privacy, Law, and Public Policy (New York: Holt, 1979) 189. Also see Gross 180-81.

teenager to the house for disciplinary reasons or, similarly, placing someone under house arrest. His autonomy is minimized but his privacy may remain wholly intact. Another distinction between the two can be clearly seen in cases of voyeurism, where a person's privacy is violated but, arguably, her personal liberty remains intact, at least on the level of subjective experience. The problem of surreptitious surveillance will be addressed later in this chapter.

General arguments claiming that privacy is essential to autonomy also fail because they presume the value of privacy and do not show why one would ever choose it, given the option. Privacy's value cannot rest on the fact that it is one thing we might choose. If this is all that is required, an argument could be made that anything, even suicide for example, is valuable because by choosing it, we establish a concept of self as autonomous.[7] There must be more to it.

In order to argue for privacy's value in terms of autonomy, it must be shown why one would ever desire or choose it. Various explanations have been offered in this regard. Charles Fried argues that privacy protects our autonomy in two ways.[8] He maintains that our actions derive their meaning partly from their social context - from

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[7] This is, in fact, Sartre's ultimate support for his claim that we are radically free.

[8] Charles Fried, "Privacy: A Moral Analysis," Yale Law Journal 77 (1968): 475-93.

how many people know what about them. If a person cannot be sure that another is not listening (or observing in some other way), if privacy is not secure, he is denied the freedom to do what he wishes, to have his acts have the meaning he wishes them to have.

In addition to controlling the social context of our acts, privacy protects our liberty is another way. We may wish to do or say things, neither immoral nor illegal, but unpopular or unconventional nevertheless. If our every word and deed were public, fear of disapproval might keep us from doing or saying things which we would do or say in private. Privacy thus expands the range of possible self-expression by freeing us from this fear.

The question remains as to what it is about privacy that enables or encourages spontaneous expressions of ourselves that we are likely to suppress in public. Why is it that if other people are observing us, we become reluctant to do or say things they may possibly disapprove of? Is it a fear of potential negative judgement that causes us to control spontaneous expression? If not this, what? By answering this question, we will gain insight into how privacy promotes the possibility of spontaneous expressions of self.

Gross argues that privacy protects "personal matters," those involving issues of personality and those of our affairs. The former relates to who we are, our talents,

desires, integrity, habits, interests. The latter involves, for example, what we do, what we have done, intend to do or are doing, what we have or what we need.[9] In order for these personal matters to be private, we must be free to control the access that others may have to us in this regard.

Unfortunately, Gross grounds this claim on the desirability of maintaining a constructed public image while keeping one's unedited (true) face private. He calls this "making editorial efforts." Gross also argues that we need to keep certain of our personal activities private because if they were known, it would handicap or remove possibilities of self-determination. We would be in a vulnerable position because we could be acted upon by others on the basis of information surreptitiously gathered about us.[10]

These two arguments are unfortunate because they leave open the criticism of privacy as a disvalue. Gross seems to believe that if we show who we really are, unedited, it would produce unfavorable, or at least undesirable, responses from others in a social setting. The presumption seems to be that privacy enables us to be free to show only

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[9] Gross 172.

[10] This part of Gross' discussion is similar to the argument put forth by Richard Posner in "An Economic Theory of Privacy," Regulation (1978): 19-26, in which he argues that privacy gives us a market advantage over others and this is its value.

the person we would like others to see. This model of privacy involves secrecy and hiding. Gross' notion of the value of privacy seems to rest on its being a means by which we are able to manipulate others. Oddly enough and in seeming contradiction to his claims, Gross concludes that although insistence on privacy is often taken as an implicit admission that there is a reason for shame, claims to privacy do not imply such admissions.

Furthermore, claims like Gross', which base privacy's value on protection of "personal matters," fail because circular. In general, whatever is personal is private and vice versa and unless and until the two can be distinguished, the terms contribute nothing to the understanding of either or their relationship.

Joseph Kupfer offers a more positive thesis for the value of privacy based on its connection with self-concept and autonomy.[11] He argues that privacy, as control over information about us as well as when and by whom we can be experienced, is essential to the development and maintenance of an autonomous self which necessarily includes a concept of oneself as a purposeful, self-determining, responsible agent. Planning and deciding what to do requires a concept of self as empowered to determine one's own life according to one's own purposes and interests. Kupfer maintains that

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[11] Joseph Kupfer, "Privacy, Autonomy and Self-Concept," American Philosophical Quarterly 24 (1987): 81-90.

it is not sufficient simply to be free of others' interference but that autonomy requires the awareness that one can control one's relationships with others. A person who was free of interference by others but did not realize it would not be autonomous. Development of a self-concept as autonomous also requires that others grant the individual the requisite control or privacy. Kupfer claims that we think of ourselves as autonomous because we experience others as permitting us this control. Thus, autonomy is a social product, resulting from a variety of social practices which encourage self-determination, including those forming the institution of privacy.[12]

Kupfer argues that autonomy involves being free to restrict access by others, that is, to choose privacy. Like Gross, however, he also fails to tell us why one would choose privacy rather than a wholly public existence, if this were possible. It seems to me that one could affirm and reconfirm an autonomous self-concept by being free to choose between two or more public existences. I do not deny that the ability to choose privacy is valuable, simply that privacy is not involved in development of an autonomous self-concept to the degree Kupfer and Gross argue. If they are simply saying that part of being autonomous and conceiving of oneself this way is the possibility of choosing privacy, they are correct yet the point is trivial.

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[12] Kupfer 82-83.

To repeat, the value of privacy cannot rest on the fact that it is one of the ways of being we might choose.

To support his claim that privacy is necessary to a concept of self as autonomous, Kupfer also points out that we gain a sense of trustworthiness when granted privacy. In private, out of sight or earshot, a person can conceive of herself as absent-to-others and, understanding that this is permitted, she can learn to trust herself. We can try out new thoughts, some of which we may immediately reject, without fear of failure or accusations of wrong doing. Although this particular claim makes sense as far as it goes, it does not support a thesis that privacy is necessary for autonomy. It may be that in order to consider or choose some particular options, one must be in private. However, enlarging the range of possible choices does not so much establish autonomy as it broadens the scope of its exercise. Trustworthiness would seem to be a by-product of exercise of choice in general, and not limited to its exercise in private in particular.

Finally, I want to return to Gross' earlier point that autonomy is necessary to privacy. This is, in fact, true because freely choosing privacy is precisely what distinguishes it from banning, shunning, and other forms of isolation, such a being lost in the wilderness or shipwrecked on a desert island. In this sense, autonomy is necessary to privacy rather than the other way around.

Privacy is chosen as an alternative to some other condition, for example social interchange or public display. Kupfer also notes this important distinction. He defines isolation as deprivation of social contact over which the individual has no control. When banned or shunned, the individual cannot choose interaction with others. When someone enjoys privacy, there is freedom to choose and control social interchange. Kupfer concludes succinctly that we elect solitude (or privacy) and suffer isolation.[13]

In summary, autonomy is necessary to privacy in order to distinguish it from isolation. The issue of whether privacy is necessary to autonomy is far less clear. As we have seen, the fact that privacy is one thing an autonomous person can choose does not establish its value. General arguments claiming that privacy is valuable because essential to autonomy fail, specifically because they presume the value of privacy and do not show why one would choose it, given free choice. This leaves the fundamental question: why do people, who are free to do so, choose privacy as a way of being?

One reason we might choose privacy, according to Kupfer, is because it enables self-knowledge, self-criticism and self-evaluation. If every moment we are subjected to

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[13] Kupfer 85. I am aware of only one author who disputes that privacy must be chosen. O'Brien denies the association of freedom and privacy and claims that it is something that can <u>happen</u> to people, thus obliterating the distinctions discussed here. O'Brien 23-25.

observation or other kinds of input, it would be difficult to ever come up with something uncontaminatedly one's own for self-understanding or evaluative purposes.[14] In private, one is able to choose to accept or mark for alteration aspects of oneself. One can ask whether he or she is the kind of person one ought to be, or wants to be. Privacy, then, is valuable because it "is needed to morally inform one's self-concept in certain ways."[15]

Robert S. Gerstein also notes privacy's valuable contribution to moral change in his examination of the underpinnings of the Fifth Amendment. He argues that the possibility of moral change in private self-confrontation is one major reason for protection against self-incrimination. If one is forced to publicly confess to wrong doing, the moral change that may result from one's privately confronting the wrong done is short-circuited and, thus, may be precluded.[16]

Gross, too, argues that privacy promotes personal growth through self-discovery and self-criticism but for reasons other than moral change. Privacy allows us a way to

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[14] Privacy's value as an "uncontaminated" way of being is a recurrent theme. See the discussion of Erving Goffman's work later in this chapter. Also see Chapter IV for Buber's claim that solitude (individual privacy) is necessary as a place of "purification," presumably from this kind of contamination.

[15] Kupfer 84.

[16] Robert S. Gerstein, "Privacy and Self-Incrimination," Ethics 80 (1970): 87-101.

experiment that is cost-free in terms of public opinion. We can be unconcerned about appearances and, in this sense, privacy safeguards changes of moods, thoughts and self-expression without public consequences. Again, Gross is concerned with potential negative appearances: "We want to run the risk of making fools of ourselves and be free to call ourselves fools, yet not be fools in the settled opinion of the world, convicted out of our own mouths."[17]

A more recent journal article by Jeffery L. Johnson pursues this line of thought.[18] He maintains that all examples of privacy have the common feature that culturally recognized aspects of each person's life are "immune from the judgment of others."[19] Because human beings continually make evaluative judgments of others, for example about their behaviors, activities, etc., the function of privacy is to protect certain parts of an individual's life from these evaluations. By claiming privacy, Johnson says, "I do not seek to exclude all judgment, but simply to limit who may make those judgments."[20] Johnson is correct in characterizing privacy's value in this way but it, too, leaves us with the following question. Why is it that we

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[17] Gross 176. Emphasis added.

[18] Jeffery L. Johnson, "Privacy and the Judgment of Others," The Journal of Value Inquiry 23 (1989): 157-168.

[19] Johnson 157.

[20] Johnson 158.

resent the evaluative judgement of certain others? What harm is done that we seek to preclude by claims to privacy?

Gross and Johnson are concerned that, without privacy, a person may be evaluated on the basis of what they show of themselves in moments of experimentation. This is a telling concern because I think it begins to get to the heart of the matter. It is true that privacy allows us to try out things we may never wish to show non-intimate others. Some of us play around, making faces, acting goofy or sing in the shower when alone or with intimate others, doing things we would never want shown in public for fear the "clown" or "off key singer" would be fixed in the minds of others as what we are. Our good friends or family, for example, know there is much more to us, that this is only one of many possible expressions of who we are. In privacy (individual or relational) we have the freedom to express ourselves in certain ways without fear of being judged, frozen in place, so to speak. This is a theme I will continue to return to because it points to the crux of privacy's value, that is, as a condition enabling a person to be a whole being, an Arendt who, rather than a part, a what.

Jeffrey Reiman argues that privacy is valuable because it is a way we individuate ourselves from others.[21] He is specifically interested in the role privacy plays in the

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[21] Jeffrey H. Reiman, "Privacy, Intimacy and Personhood," Philosophy and Public Affairs, 6 (1976): 26.

realization that this life is my life and not your's or someone else's. He says that "(p)rivacy is a social ritual by means of which an individual's moral title to his own existence is conferred."[22] Bestowing of this title by a social group is not limited to recognizing my capacity to shape my own destiny by my choices, but by acknowledging my exclusive moral right to do so. Reiman argues that my social group affirms my life as my own by permitting me to have privacy. He extends this analysis to bodies as well. The social ritual that permits me to control what my body does or what is done to it confers the title of my body to me. An important part of this practice is that I am free to take my body (and, presumably, myself at the same time) out of sight of others and otherwise limit general social access to it. Reiman says that "(p)rivacy is a condition of the original and continuous creation of 'selves' or 'persons'."[23]

Of course, being free to choose privacy confirms my right to do with myself as I wish, but does privacy establish the moral title to my own existence? The social ritual that permits me to choose between a job or going to

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[22] Reiman 39. Emphasis omitted from the original. Theories of privacy have underlying corresponding theories of self. Reiman and others implicitly deny that self is some core kind of being that dons various masks suitable to the occasion. The role that concepts of self play in theories of privacy is an interesting topic in itself but I cannot go into it in this work.

[23] Reiman 40.

school, both of which are social activities, equally well serves to give me the idea that my existence, as well as my body, is my own and that I have the exclusive moral right, in ordinary circumstances, to decide what to do. What is it about privacy specifically, rather than publicity, that creates conditions for individuation? Arendt maintains that the "levelling" influence of the Social, the push for conformity in so-called public contexts, tends to make us interchangeable with others to whom we are similar. Privacy, by contrast, enables us to keep what is most central to us, our feelings, thoughts and sensations, as our own and we distinguish ourselves, in large part, on this basis.

Often cited in privacy literature is Erving Goffman's Asylums, an examination of total institutions, their characteristics and effects on inmates.[24] Kupfer, Reiman, and others, refer specifically to a chapter titled "On the Characteristics of Total Institutions," which is comprised of example after example of near total deprivation of privacy regarding the most basic activities of human life, including but not limited to toilet habits, eating and sleeping. Goffman's assessment is that institutional "contaminative exposure" leads to the subsequent loss of self-concept as the origin of one's own thoughts, purposes

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[24] Erving Goffman, Asylums (New York: Doubleday, 1961).

and actions or, graphically, "mortification of self."

> 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 the self are violated; the boundary that the individual places between his being and the environment is invaded and the embodiments of self profaned.[25]

Reiman notes that Goffman's phrase, "mortification of the self," means the death of the self, or the impossibility of any self-concept whatsoever. There is another form of mortification also of interest to Reiman. Contaminative exposure is specifically the result of being observed at all times.

> I have suggested that the inmate undergoes mortification of the self by contaminative exposure of a physical kind, but this must be amplified: when the agency of contamination is another human being, the inmate is in addition contaminated by forced interpersonal contact and, in consequence, a forced social relationship. (Similarly, when the inmate loses control over who observes him in his predicament or knows about his past, he is being contaminated by a forced relationship to these people - for it is through such perception and knowledge that relations are expressed.)[26]

According to Reiman, that these social practices are sufficient to literally kill off the inmate's self suggests,

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[25] Goffman 23. Note the overlap between Goffman's "objects of self-feeling" and the components of the intimate Arendt ascribes to Rousseau. See page 39 supra.

[26] Goffman 28.

though doesn't prove, that privacy is essential to the creation and maintenance of selves.[27]

Total institutions are at the extreme end of the social/private continuum and the situation of an inmate population is anything but ordinary or usual. The conditions do, however, present a picture of something otherwise unimaginable - a wholly social or public existence. What would human life be like without privacy as a countervailing condition to publicity? Goffman's work suggests that it is through privacy that boundaries are created between self and others, that is, that we have a concept of self at all. This resonates with Reiman's claim that privacy enables individuation of self.

In order to fully understand and appreciate the force of this argument, we must understand "self" to mean person, rather than specimen or thing. Let us turn now to privacy's role in personhood.

Privacy, Individuality and Respect for Persons

The normative dimension of privacy ultimately must be related to our being persons rather than inmates, clowns, off-key singers or any other "whats" that we may be. The arguments examined in this section focus on respect for persons as choosers and origins of value. Personhood, in

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[27] Reiman 41.

turn, grounds certain qualities of life which are given as reasons for protecting privacy. In what follows, S.I. Benn and Ferdinand Schoeman rely on the Kantian moral principle of personhood as the basis for their claims about privacy's value.

Benn, in one of the most influential articles on the value of privacy, "Privacy, Freedom, and Respect for Persons," argues that the right to claim immunity from observation (to have privacy) stems from basic features of our concept of persons and the respect due them.[28] He characterizes persons as subjects conscious of themselves as agents, having projects and their own points of view and respect for persons involves appreciating this about them. It also importantly includes understanding that what one does affects other persons as choosers.

Benn maintains that the presence of an unwanted other denies us freedom to do as we choose because it forces us to take into account the fact that our behavior is being observed and that we are being judged from another's point of view. This profoundly affects us as social beings. When observed, we must acknowledge perspectives on ourselves other than our own. The resentment we may feel at being observed, however, is not necessarily connected with fear of disclosure. Any act may be affected by an observer because the actor must see it from a perspective different from her

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[28] Stanley I. Benn, Nomos XIII, 1-26.

own. Goffman's "contaminative exposure" quite graphically captures what Benn is describing here.

When someone else is observing what we are doing, it is next to impossible to erase awareness of this very fact. Even if we are doing nothing we wish hidden, an observer still distinctly alters the conditions of our acting, sometimes to the degree that we can no longer go on. For example, I may set aside time in the morning to exercise and meditate alone on my living room floor before anyone else arises. If I were to become aware of someone watching me, say the early morning paper deliverer, the very fact of the observance would clearly alter the environment from one I had chosen to one not of my choosing. I may become so uneasy or self-conscious that I cannot continue as before.

Other resentment arises because to be observed is to be treated as a specimen or object rather than as a subject with sensibilities and this changes one's consciousness of self. A respectful person, recognizing my discomfort at being observed, would retreat and grant me the privacy I desire. The observer, however, who fails to respect me as a person, is looking at me as a specimen of woman exercising, much like a bird watcher looks at birds. I am aware of being an object for someone else's perusal. Benn maintains that it is not possible to treat someone both as a specimen and as a person at the same time because reciprocal

relationships are not possible between persons and objects.[29]

Benn's objection is not limited to simply being observed but to the manner of the observation. Women too often become specimens simply by being anywhere in public. Walking down the street, for example, females are often subjected to whistles, catcalls and appraising vertical glances, all indicating their status as objects or specimens. In addition to causing resentment because treated as a thing, the experience also alters the simple act of walking down the street to one of discomfort and degradation.[30]

There are instances, however, when we choose to be scrutinized as specimens, at least physiologically by a physician. Benn points out that resentment may still arise even here if the doctor sees us solely as specimens, without including in his examination the fact of our feelings, our values, our points of view and that we have an interest in the outcome of his scrutiny. A respectful physician has a person for his patient rather than a physical specimen.

For Benn, resentment at being observed as a specimen

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[29] This is Aristotle's distinction between affection and friendship. The Basic Works of Aristotle, ed. Richard McKeon, trans. W. D. Ross (New York: Random, 1941) 1155b 27-32, 1157b 28-33.

[30] Although this reduction is directed primarily to young attractive women, the possibility has surprising staying power and, itself, alters a woman's consciousness and experiences.

may be prima facie grounds for a claim to immunity from observation, for a claim to privacy. If a person wants to be free from such scrutiny and judgement, respecting that person involves a moral presumption to that preference. Unless we have a reason to observe a person against her will, we ought not do so.

This raises the question of surreptitious surveillance. Watching someone without his knowledge does not affect that person's consciousness of his own behavior but it nevertheless undermines his capacity to make choices and perform actions based on reasons of his own.[31] According to Benn, ignorance of the surrounding circumstances frustrates a person's efforts at making rational choices because the full conditions have been concealed from him.[32] For an example, recall the scene from Barth's novel, The End of the Road, where Joe was being observed covertly while masturbating.[33] It is reasonable to assume that had Joe

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[31] For a thorough discussion of voyeurism and its relationship to what the author argues is a fundamental right to privacy, see Daniel O. Nathan, "Just Looking: Voyeurism and the Grounds of Privacy," Public Affairs Quarterly, 4 (1990): 365-387. His argument is similar to Benn's however he disagrees that voyeurism's harm comes from its discovery by the victim. He also agrees with the Kantian analysis that unknown observers deny a person choice by deception concerning the conditions of the acting.

[32] Or, in Kantian terms, the person has been denied autonomy.

[33] "It is indeed the grossest of injustices to observe a person who believes himself to be alone." John Barth, The End of the Road (New York: Doubleday, 1969) 70-71.

known the full conditions of his environment, he would not have then chosen the act. Benn's point is that it is disrespectful of persons as persons to deliberately conceal the conditions for their choices and actions.

Benn concludes that any person who desires that she herself not be an object of scrutiny has a prima facie claim to immunity from observation, subject to certain qualifications. The principle of privacy is not absolute.[34] Claims to privacy can be and are overridden by claims of justice, legalities including freedom of speech, particularly regarding the role of the press. Rights of privacy can give way in some areas although they should, according to Benn, stand fast to irrelevant counterclaims. Just what interests can or should override claims to privacy is a fundamental problem in law and resolution awaits a clearly articulated idea of what privacy protects in our lives.

Benn suggests that we ground claims to immunity from observation on respect for private affairs. This claim, he says, will be stronger because a more specific reason will be needed to override a person's claim to privacy. "Private affairs," on Benn's view, are diverse and largely culturally determined. In the liberal tradition, however, they certainly include personal ideals, personal relationships,

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[34] Nearly all the philosophical and jurisprudential work on privacy acknowledge this.

political freedom and moral autonomy. Respect for persons, then, involves respecting claims to immunities in these areas because a person is a self-creative enterprise which can be disrupted or distorted by intrusions as small as being seen or heard by an unwelcome disinterested other.

As I noted earlier in response to Gross' similar argument, grounding privacy's value on protection of "private affairs" is circular unless the two are distinguished. Benn implies that certain of our affairs (the ones he calls private) play an essential part in a person's self-creative enterprise. We are left, still, with questions. How do "private affairs" contribute to personhood? What is it about "private" or "personal" matters that requires they be kept free from disinterested observation?

Benn's analysis of the effect of unwanted observation on our conception of selves as persons is a significant contribution to our understanding of privacy's value and has been pivotal in the development of my thinking. Privacy, in this sense, has to do with the quality of life as it involves others, either present or absent yet potentially present. The presence of unchosen and unwanted observation, causing consciousness of self as a specimen, reduces a person, a <u>who</u>, to a thing, a <u>what</u>. Why does this occur and how does privacy preclude or minimize this possibility? With assistance from more recent philosophical work which

follows, I will argue that privacy is valuable because it enables a person to be a unique whole, an irreplaceable totality, a person, and precludes the likelihood of being a specimen or object.

Ferdinand Schoeman, editor of and contributor to a recent comprehensive anthology about privacy, also connects its value to personhood by claiming that respect for privacy acknowledges something significant about what it is to be a person.[35] Respect for privacy acknowledges that not all dimensions of self and relationships gain their moral worth through promotion of independently worthy ends. Persons and their relationships have value other than as socially instrumental, that is, they have value as ends in themselves.[36] He argues two points. First, the quality of information we share about ourselves with others is more significant than the quantity. Second, he argues that individual persons are sources of value and, as such, what is important to a person about pursuing certain goals is that they are her goals. These are best kept private because the force exerted by public standards of value can threaten their very existence.

Schoeman maintains that the information people share

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[35] Ferdinand Schoeman, "Privacy and Intimate Information," Philosophical Dimensions of Privacy, F. Schoeman, ed. (New York: Cambridge UP, 1984) 403-418.

[36] This is Kant's practical imperative that persons may never be treated merely as a means to an end.

about themselves privately is important in terms of quality because what we share and know about one another is context dependent. In general, people reveal personal parts of their lives only to others in contexts in which any special meaning there may be will be appreciated.[37] Personal information revealed in social situations cannot carry its full meaning because the appreciation for its specialness will be missing, that is the context will be shallow.

Additionally, revealing something personal involves its value to the revealer. Consequently, the very act of revelation itself is a special act. When we share something personal, there is, according to Schoeman, an expectation that the information offered will be received sympathetically and in its fullest possible context.

Schoeman suggests that certain matters or affairs are private in large part because they are centrally important to our self-conception and our relationships with others. "Perhaps the most significant aspect of what the revealer of intimate information has to convey is that the information matters deeply to himself."[38] The telling of it involves a trust that the other will not regard the revelation as inconsequential, as it might be considered otherwise. Thus,

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[37] The exceptions are understandable; we sometimes need an objective or professional perspective, e.g., from counselors, attorneys, physicians. But, see Benn on this, page 69 supra.

[38] Schoeman 406. Emphasis in the original.

Schoeman argues, there is something special about sharing something personal that goes beyond the informational content. It is meaningful because it involves the trust that the hearer understands that the act of sharing is as important as the content. We trust that the persons with whom we share personal information will not ridicule what we have to say as being trivial, even if it would be to the world at large. According to Schoeman, the fact that I care deeply about what I share with you is a large part of what makes it private.

Schoeman's point can be expanded in another way. Since, as Benn claims, an uninterested other tends to reduce a person to a specimen, from totality to part, only an intimate other could understand the full force of my shared information because only she could place it in the context of my wholeness. A non-intimate other would have only a shallow background, part of who I am, for context to understand what I reveal. In other words, a substantial part of what I reveal about my intimate self is dependent on the context of the totality of my being.

Schoeman's second main point is that individual persons are origins of value. He maintains that our respect for privacy signifies our recognition that not all dimensions of persons or relationships need to serve some independently validated social purpose. Part of what is meant by respect for persons is the acknowledgement that what has meaning for

an individual person thereby gains presumptive moral value, independent of its promotion of socially valuable ends.

Schoeman argues that if individuals were not sources of value independently of their effects on others, there would be no point in helping others in the first place.[39] If the only morally recognized point of a person's activities consisted in the degree that her activities assisted other peoples' projects, it would be self-defeating and groundless because there would be no point whatsoever in striving for the betterment of society as a whole. The value or meaning to be found in any social organization is in its benefits to the people who comprise it. Even if my overriding concern is to devote my attention and energies to the betterment of society, sacrificing my individual interests, this itself is still my individual valuation. Schoeman claims that if a goal does not have personal value, persons would have only instrumental or incidental value insofar as they choose the "objectively" correct ends. This is the antithesis of respecting persons as ends in themselves.

Schoeman goes on to say that the personal basis for value is best kept private because it will otherwise atrophy and be subsumed by public standards of value. This echoes Arendt's concern with the levelling influence of the social

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[39] This is similar to yet different from Kant's argument that persons are sources of all value. Immanuel Kant, Foundations of the Metaphysics of Morals, trans. Lewis White Beck, (Indianapolis: Bobbs, 1981) 46-47.

realm and is connected with the general unwillingness of people to propose alternative values or ends that may be controversial or unpopular. It seems to be an aspect of human nature that we do not often risk being judged for views or goals that lie outside the mainstream of public opinion. Some of our institutions take this into account and protect the personal valuing of ends that are potentially antagonistic to the social well being, such as freedom of speech, freedom of conscience, and Schoeman includes, protection against self-incrimination. These protections are based on the presumption that persons are, at least in part, not to be exploited even for socially or politically worthy ends.

Schoeman argues for privacy's connection to respect for persons as ends in themselves rather than as instances of interchangeable means to socially valuable ends. A conception of persons as ends in themselves, as sources of value, must ultimately rely on each person's uniqueness, on the notion of persons as "whos" rather than "whats."

Those things that are means to ends, rather than ends in themselves, are characterized in part by the fact that they are interchangeable with like things. For example, hammers are the means to pound nails, fenders, or sometimes to throw. Even if a particular kind of hammer is required for a certain task, any hammer fitting that specific description will be interchangeable with any other of the

same kind. Instrumentality and fungibility are part of what is meant by something being a means to an end, a "what."

In certain cases, the same observation can be made of human beings although there are certainly more serious objections to be offered. Slaves, for example, are "whats" and, in any relevant sense, are interchangeable with one another, as long as the work gets done. This is not to say, of course, that female slaves as child bearers are interchangeable with the male slaves; they are not. However, if what a slave owner wants is more slave babies, any fertile female will do as the means. Less dramatic and more ordinary, one need only read the classified "help wanted" ads to clearly see human beings conceived of in terms of the task or function they are to serve. In this kind of case, human beings are also fungible and instrumentally valuable. Persons become specimens or things by violation of their privacy and become means to ends.

Respect for privacy provides the context for respect for the multidimensionality of persons. Privacy is also valuable because it insulates personal values or objectives from social scrutiny. Publicity tends to alters individual value because when in conflict with social utility, personal ends tend to be threatened or devalued. For Schoeman, this is sufficient defense of the importance of privacy.

Respect for persons as ends in themselves just is a respect for individuality. Valuing the uniqueness of persons

is an important step in precluding a view of persons as interchangeable "whats" and, at the same time, enhances respect for persons as ends in themselves, that is, as "whos." Privacy is essential to this possibility for human beings and we can begin to describe its value in these terms.

Relational Privacy

Intimacy

If there is anything resembling general agreement in philosophical literature on privacy, it is its connection to intimacy and personal relationships. Philosophers commonly seek to explain what it is about privacy that constitutes, creates, maintains or, in some other way, enables close personal relationships with others. The intuition to anchor privacy in this way seems to be a natural one.

The general approach involves understanding privacy as control over access to oneself and then goes on to say how this control permits or facilitates intimate relationships. There is variety in the lines of reasoning but there is general agreement that privacy importantly functions to protect our most important relationships. The project is to understand how privacy relates to intimacy, love, and friendship.

Charles Fried argues that privacy is a logically necessary context for intimate relations of love, friendship and trust, and that these relationships are central to our notion of ourselves as persons among persons.[40] Privacy is not just one possible means to attain love and friendship; without privacy these relationships are inconceivable. Relationships of love and friendship are fundamental to human life and therefore, threats to privacy endangers our very integrity as persons. How does privacy establish the possibility of intimacy, whether as lovers or friends?

According to Fried, privacy creates the moral capital we have to spend in friendship and love in the following way. Intimacy is the sharing of information about one's actions, beliefs or emotions which one does not have to share with anyone. By restricting information about ourselves, we have something to share with specific others. If we shared everything about ourselves indiscriminately with the world, we would have nothing left to "spend" on love and friendship. Thus, if we did not restrict access to ourselves, intimate relationships could not exist because there would be no way to distinguish them from any other social interaction.

This is similar to having a savings account with information about myself being what is saved. If I spend it

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[40] Charles Fried, "Privacy: A Moral Analysis," Yale Law Journal 77 (1968): 475.

indiscriminately, I empty the account. However, if I save some for a special occasion, I will have the "moral capital," using Fried's term, to spend. Then, if something comes along which looks to me like a potential intimate relationship, I will have this capital to invest in it. Without the "moral capital" to invest, there is nothing to convert the potential intimate relationship into an actual one. Therefore, Fried concludes that reserving certain information about oneself is absolutely necessary to intimate relationships and, moreover, this way of relating is inconceivable without it.

James Rachels essentially agrees with this view however he does not argue explicitly in terms of intimate relationships. Instead, Rachels argues that privacy enables us to maintain a variety of social relationships, the emphasis here being on variety.[41] Like Fried, Rachels closely connects control over access to us with our ability to create and maintain different sorts of social relationships with different people. Different kinds of social relationships involve different patterns of behavior. Responding to objections that acting differently with different people is somehow deceitful, Rachels argues that there need be nothing hypocritical or dishonest about behaving appropriately in varying circumstances or relationships. No part of a person's personality is the

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[41] Rachels 327.

"real" person. In fact, on Rachels' view, varying patterns of behavior are partly what define the different relationships. For example, friendships involve affection, loyalty, trust and special obligations. Because of these qualities, we confide in friends, telling them things about ourselves we would not tell others.

Each kind of social relationship carries with it a conception of how it is appropriate to behave with each other and an idea of the kind of information it is appropriate to have and share. For example, we may show an aspect of our personalities to close friends or family that others may never see, and this is appropriate. Rachels asks us to notice what occurs when two close friends are joined by a third acquaintance. The subjects appropriate for discussion change. Suppose, he suggests, that two close friends could never be together without intrusions. It is likely the relationship would wither away, changing into one of acquaintance, from the prior friendship. Similarly, I recall the changes in behavior and relating that occurred at my childhood dinner table when one of we children would bring a friend home. It seemed to me then, as it does now, that some kind of natural rhythm was interrupted and everyone seemed more self-conscious.

This suggests to Rachels that we need to be able to separate our associations, at least to some extent, in order to maintain variety. If we cannot control access to

ourselves, sometimes including and sometimes excluding different people, we cannot control the behavior we need to exhibit and the kinds of relations we will have with others. Since it is the ability to control access to us that enables us to have a variety of social relationships, we have reason to object to anything that makes it difficult for us to maintain them in the way we wish. Therefore, Rachels concludes that privacy is necessary if we are to have the possibility of a variety of relationships.

Although Rachels does not repeat Fried's spending of "moral capital" description, it is implied in his discussion. It is fair to assume that Rachels recognizes that we value variety of relationships not simply for the variety but also because there is a hierarchical valuation placed on the kinds. Rachels argues for variety but he implies the same general conclusion as Fried.

There is enough similarity in Fried and Rachels' approaches to the value of privacy that Reiman considers them together, criticizing what he calls the Rachels-Fried view. He summarizes their view as one in which intimacy is both signalled and constituted by sharing information and observation not shared with the rest of the world. If there were nothing about myself the rest of the world did not have access to, I would have nothing to give in order to create an intimate relationship; the moral capital would have been squandered.

Reiman finds this analysis "both compelling and hauntingly distasteful."[42] It is compelling because it makes jealousy understandable but it is distasteful because it suggests a market concept of intimacy. Jealousy is explained by the fact that if the value and reality of my intimate relationship involves your sharing with me something you do not share with others, then if you do share it with someone else, what I have is literally decreased in value and adulterated in substance.

The thesis is distasteful to Reiman, however, because the market-oriented analysis suggests that the value and substance of intimacy does not lie in what we have together but in what others do not have. "The reality of my intimacy with you is constituted not simply by the quality and intensity of what we have, but by its unavailability to others - in other words, by its scarcity."[43] Reiman concedes that our relationships may, in fact, be valuable to us because of their exclusivity rather than their depth, breadth and beauty, but that this is not a necessary condition. On the Rachels-Fried view, the exclusivity of intimate relations is logically necessary but Reiman suggests we look at this with suspicion because it injects aspects of our present possessive, market-oriented world into the realm of logical necessity.

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[42] Reiman 32.

[43] Reiman 32.

His alternative suggestion is that intimacy is constituted not merely by the sharing of otherwise withheld information but by the context of caring which makes the shared information significant. In other words, intimacy is not limited to what is revealed; at least as important is who cares about it. Reiman's intimacy is characterized by a "reciprocal desire to share present and future intense and important experiences together, not merely to swap information."[44] He asks us to contrast this with the information we give to physicians, counselors and the like. We tell these professionals things we may not share even in our most intimate relationships but it serves an entirely different function, informational rather than from a desire to share ourselves with another. On Reiman's view, information shared in intimate relationships deepens, fills out and nurtures the intimacy. Revelation of personal information is significant in that the more each person knows about the other, the more they are able to deeply share experiences rather than merely having intense experiences side by side.

Reiman's second criticism is that on the Rachels-Fried view, individual privacy seems to be derivative of social relationships. If one argues that privacy is valuable, first and foremost, because we can choose when and with whom to share ourselves, investing in intimacy as it were, then

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[44] Reiman 34.

an individual's desire for privacy is a function of potential intimate relationships he or she may enter. Reiman argues, for example, that the Rachels-Fried view implies that his right to be nude in his own home derives from the possibility of meaningfully revealing his body in intimacy. This implication would permit denial of privacy to those persons who have no chance of entering into a variety of social relationships such as catatonics and those in solitary confinement. This view must be false, Reiman notes, because individual persons must not be denied privacy whether they are likely to have friends and lovers or not.

Reiman has not read Fried and Rachels sympathetically. It is more accurate to understand the two philosophers as addressing relational privacy specifically, leaving aside the importance of privacy in terms of solitude and contemplation. This criticism, however, is revealing of the tension between analyses of individual and relational privacy. In Chapter IV, I argue that these two aspects of personal privacy are internally related and mutually interdependent. Before tackling this issue, however, we need to complete the examination of extant scholarship regarding relational privacy.

Fried, Rachels and Reiman all argue that the relationship of intimacy to privacy is one of necessity. Schoeman takes a somewhat different approach by asking if there are domains of life that are inherently private. He

replies that intimate matters are inherently private if anything is. Some things should be essentially private because they are central to us, because they define who we are emotionally, physically, cognitively and relationally.[45] Arendt has described intimacy similarly, to include thoughts, feelings and sensations which are clearly central to each person's being.

Benn also agrees that personal, i.e., intimate, relationships must be recognized as specifically private. As we have seen, he is interested in the ways in which intrusions affect people, specifically in terms of the presence of a nonparticipating and unwelcome observer. A disinterested other who intrudes on an intimate relationship makes most of us self-conscious and inhibited. We find ourselves unable to express our feelings spontaneously and are, thus, unable to contribute to a mutually sensitive and creative relationship. Although Benn does not say so, intrusions in relational privacy, as in individual privacy, have the effect of converting persons into specimens or objects under someone else's gaze.

The question provoked by this description of intrusion is similar to the unanswered question prevalent in nearly all philosophical literature on privacy. Why does the presence of an unwelcome uninvolved other produce inhibitions in us? Why are intimate relations crippled or

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[45] Schoeman 412.

destroyed unless private? We need to understand this in order to anchor the value of privacy.

Robert Gerstein comes close to filling out the deficit in philosophical analyses of privacy's value.[46] His approach is distinctive because subjective, from the experience of privacy, while other philosophical approaches to privacy discussed in this chapter can, by contrast, be described as being objective, that is, from the observers' points of view. They each say why it is wrong to violate someone else's privacy. But, the value of privacy is a personal matter by definition, thus, an experiential approach is worth pursuing.

Gerstein's focus is also the relationship between privacy and intimacy and he wonders why they seem to go together. He rejects explanations for privacy such as hiding potentially embarrassing or discrediting actions and Fried's exclusive expenditure of "moral capital." The relationship between privacy and intimacy runs deeper than this. In fact, Gerstein argues that intimate relationships could not exist without privacy.

He describes intimacy in a phenomenological manner, relying in great part on first person descriptions of religious ecstacy which he takes to be similar to aspects of intimate relations. Both are cases in which we are "deeply

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[46] Robert S. Gerstein, "Intimacy and Privacy," Ethics 89 (1978): 76-81.

engrossed" in experiences to the degree that they "wholly shape our consciousness and actions." Within the experience, "(w)e do not understand ourselves to be choosing to do this or that, or to be looking here or there as we choose. Rather, whatever we do, whatever we see, is a product of the experience in which we are taking part." The participant "loses himself in the experience."[47]

The distinction between the experience of participating in an engrossing experience and observing one is important in Gerstein's explanation. Observation involves a turning of our attention toward things, examining their various aspects in order to find out what we want to know. It also entails perceiving things while maintaining our independence from them. Observing does not necessarily involve a cold-hearted objective stance, however. Gerstein makes clear that we can observe sympathetically and understandingly, but even here, observing does require some separation between the observer and what is observed.

By contrast, to lose oneself in an experience requires loss of the observer role. As a participant in an intimate experience, "we see what the internal dynamic of the experience directs us to see, and we see it in the context of meaning established by the experience."[48] Gerstein wants

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[47] Gerstein (1978) 77. In Chapter IV, I will compare this description to Martin Buber's I-Thou relation.

[48] Gerstein (1978) 77.

us to recognize that in an intense intimate experience, there is a dynamic interdependence between the experiencer and the experience.

If, while engrossed in an experience, we begin to observe ourselves or other things, "(t)he fragile unity of an experience is broken."[49] If one observes oneself during the experience, one is not lost in the experience. While immersed in an experience, a person's appearance and actions are not objects to be interpreted or judged. An intimate experience does not function as an appearance for anyone, including the participants. The participants, their appearances and actions are spontaneous manifestations or expressions of an intimate communion.

For Gerstein's argument, it is equally important to understand the distinction between experiencing our own actions when we intend them to be observed by others as contrasted with being immersed in intimacy. In the first instance, we tend to observe ourselves as we think others do or would, and we are consciously aware of the appearance we present. This is true, as Gerstein points out, even when we are rehearsing in front of a mirror or reading aloud to practice intonation and emphasis when the point is to try and see ourselves as others might. In intimacy, we have no intention whatsoever of being observed, even by ourselves.

The implication for this distinction between

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[49] Gerstein (1978) 77.

observation and intimate communion, according to Gerstein, is that one must choose to keep observers away in order to have an intimate experience at all. Like Benn, he argues that the intrusion of an unexpected observer brings me to an awareness of my own actions as objects of observation. As a result, I am tempted to evaluate the appearances and change them to fit what I wish to show to the observer. The effect, Gerstein says, "would obviously be to kill the spontaneity which is essential to intimacy." This dramatic change in perspective would remove the possibility of experiencing the relationship from within because I would have become an observer of it. Consciousness of myself has been forced upon me by the intrusion.[50]

Gerstein argues that, in addition to the alteration intrusion makes in the awareness of the participants, there is another sense in which an observer is destructive of intimacy. An intimate relationship is one characterized not merely by its intensity but also by the meaning it has for those involved. Intimacy is not a means to accomplish other things we want to do. It is valued for its own sake and what we do within the intimacy is a spontaneous expression of it. But, an observer always makes use of the outward appearance of intimacy in one way or another. The uses range from exploitation through voyeurism to a detached curiosity, perhaps with a hope of understanding intimate

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[50] Gerstein (1978) 79.

communion. Whether the observer is intruding as a means to sensual satisfaction or as a means to learn about the experience, the intimacy is being used nonetheless. To turn intimacy into a tool useful towards some end is to demean it. In fact, one should ask whether what is being "used" in this case is intimacy at all.

Finally, although privacy is necessary to intimacy, it is not all that is required. All too often, would be participants take an observer's role in their own intimate relationships. This also precludes the engrossing experience described by Gerstein. Self-consciousness, even that which is self-caused, must be avoided if we are to lose ourselves in intimacy. Being conscious of oneself as either the observer or the observed precludes intimacy in its fullest sense.

Privacy is valuable, then, because it is essential to the possibility of intimacy. It prevents the presence of uninvolved others who bring us to consciousness of self, converting our experience from one of engrossment to that of observation. By intrusion, I become either a specimen of my own observation, to use Benn's language, or the relation becomes an appearance, a thing, for my consideration. In either case, intimacy is impossible.

The effect here is very similar to Benn's description of intrusion in individual privacy, when a person becomes an object both for the intruder's perusal and for herself. The

same question remains. Why does an unwelcome other reduce persons and their intimate relationships into things?

Synthesis

Considered individually, philosophical examinations of privacy's value remain incomplete. Several, most notably Benn and Gerstein, have pointed to, without explicitly articulating, the core value of privacy. Taken together, along with the questions they raise but do not answer, the scholarship indicates and demands a theory of privacy that explains and unifies the differing and competing claims discussed in this chapter.

I will argue that an understanding of privacy as valuable because it is the condition necessary to a way of being whole, an irreplaceable totality, accomplishes this goal. In contexts of publicity, in the presence of non-intimate others, we are nearly always fragmented, considered as part of who we are and the part comes to stand for the whole and through this, we become things. This characteristic of our human condition is not lamentable in itself but it is fatal to certain key values central to personhood, many of which are eloquently described in the literature, especially by Benn and Gerstein.

Spontaneous self-expressions, personal growth in terms of experimentation and moral change, individuality, private

or personal matters and the possibility of intimacy are second order values of privacy. By this, I mean that they all are predicated on wholeness of being, alone or with certain others. I argue that this is privacy's first order, or core, value because it grounds and unifies the others. Chapter IV is dedicated to argument for the superiority of this conception of privacy. Ideas briefly sketched below are fully explicated in the next chapter.

Conceiving of privacy in this way, we can answer the questions provoked by others and, at the same time, provide a unifying principle for the extant scholarship. A person free to do so (autonomous) would choose privacy in order to experience herself as a totality, unreduced to any of the many, many things she is. It is this wholeness that constitutes individuality. As any of the parts or "whats" that we are, we are interchangeable with others. Our uniqueness lies in our totality, not in any of the things we are or do. As a whole being, I am an irreplaceable totality, unlike anyone who has ever been or will be. I am me, not you or anyone else.

Privacy protects personal or private affairs because if they become known to disinterested others, they are co-opted in the sense that they become things or facts rather than expressions of our selves with their full meaning possible only in the context of our whole lives.

Moral change also requires the context of our being

whole. When fragmented, when experienced as aspects of who we are, we are "whats" and things have neither moral awareness nor moral obligation. It is as whole persons, as the irreplaceable totality each of us is, that we are moral beings and are able to assess the normative dimension of our lives, evaluate our actions in terms of moral ideals, recognize our shortcomings and seek moral change. Things or "whats" have no such normative dimension. Privacy, because it provides the possibility of being a whole being, protects the possibility of moral change and other forms of personal growth through experimentation, self-evaluation and self-criticism.

Finally, an intimate relationship, whether friendship or between lovers, is the mutually created experience of two persons in the fullest extent of their being, unreduced to any aspect of who they are. Thus, privacy, as the condition enabling wholeness of being, is necessary for the possibility of intimacy.

An uninvited, uninvolved intruder, in either individual or relational privacy, brings us to consciousness of ourselves as things. The interloper can only consider <u>what</u> we are, can only observe specimens, because the totality of each of us is unavailable to a non-intimate other. Furthermore, awareness that we are being considered as specimens leads us to consider our selves as objects also. Thus, privacy allows us to experience ourselves as whole and

complete and to share this totality with intimate others.

CHAPTER IV

A WAY OF BEING

> If I am for myself only, what am I?
> If I am not for myself, who will be
> for me? Hillel

In this chapter, I endeavor to explain what it is about individual and relational privacy that engenders, nurtures and sustains individuality and intimate relationships, both of which are necessary for personhood. Whatever it is that privacy contributes to these possibilities must be difficult or impossible to attain in public or social contexts, otherwise privacy would have no unique value of its own.

The inadequacy of prior accounts of privacy's value seems to be, at least in part, a function of the perspective from which philosophers have approached the question. Each view, excepting Gerstein, is characterized by a detachment, a distancing from the issues involved. Generally, philosophers (and jurisprudents) ask why someone else values privacy and why intrusions into someone else's privacy are objectionable. By framing these questions in third person grammar, that is, in terms of he, she, or they, scholars, perhaps unwittingly, have excluded the possibility of discovering just what it is they pursue.

Privacy, by its very nature, is personal, and attempts to give a complete explanation of its value from an impersonal, third person perspective are bound to yield incomplete possibilities. The following may illustrate my point. If one tries to understand what grief is, yet asks the question of someone else's experience, omitting one's own, the explanation will necessarily be impoverished. We will have only an external description of something which, by definition, exhibits its full meaning and value internally, within someone's life. Grieving, like privacy, is personal in its very nature. Privacy is a first person concern, that is, it is important to me and we. Respect for her privacy or theirs derives from the fact that privacy has importance in my life or ours. Thus, to frame questions about privacy solely in impersonal or external terms is to assure that the account will be incomplete and, therefore, inadequate to explain why privacy is important to any person or persons and, thus, to everyone.

I argue that it is productive of a fuller understanding of privacy to include from the outset a subjective point of view. This is in harmony with Thomas Nagel's recent discussion of the relationship and interplay between internal (subjective) and external (objective) standpoints in philosophical problems, including value and ethics.[1] He

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[1] Thomas Nagel, The View From Nowhere (New York: Oxford UP, 1986).

argues that "...not all reality is better understood the more objectively it is viewed."[2] Inclusion of a subjective viewpoint may provide material essential to an objective theory, especially in human morality.[3] From an internal point of view one may ask, "what is this like?" Omission of an internal view may result in a false objectification, that is, one in which greater objectivity impairs our understanding. It should not surprise us, Nagel says, "if objectivity is essentially incomplete."[4]

Some might object that to inquire about the value of privacy from an internal standpoint hinders discovery of philosophical truth. But Nagel points out that subjective values and reasons can also be objective "if they can be understood and affirmed from outside the viewpoint of the individual who has them."[5] My examination of privacy's value in first person language not only includes the possibility of its generalization, it also completes earlier credible philosophical conceptions which are impoverished because approached from the external point of view alone. Inclusion of the internal point of view provides a richer, more complete and more real basis for investigation.

However, having a more fertile perspective (internal

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[2] Nagel 4.

[3] Nagel 186.

[4] Nagel 18.

[5] Nagel 153.

added to the external standpoint) from which to approach questions of privacy's value is, by itself, not sufficient to ensure an adequate account. There are other criteria an explanation of privacy's value must meet in order to provide a full understanding. Most important of these is Rachels' "ordinary situation" criterion discussed in the previous chapter. He argues that "(w)e need an account of the value which privacy has for us, not only in the few special cases but in the many common and unremarkable cases as well."[6] It is necessary to consider everyday life in addition to the exceptional cases, those situations where there is something to be embarrassed about or ashamed of.

Finally, a full and adequate account of the value of privacy would retain its relationship to the deep and central human concerns of love, friendship, intimacy and individuality. This would seem unnecessary to say except for the existence of accounts of privacy which reduce its value to one of ownership of one's body and one's home.[7] Reductionist accounts fail to explain why we require privacy for intimacy and self-communion, concerns that transcend, or ought to, those of private property.

Thus, a full understanding of privacy's value will include an experiential component because privacy is, above

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[6] Rachels 325.

[7] See, e.g., J.J. Thomson, "The Right to Privacy," Philosophy & Public Affairs 4 (1975): 295-314.

all else, a personal value; will explain its role in everyday, ordinary situations; and, will maintain its connection to central human concerns of love, friendship, intimacy and individuality.

In this chapter, I present a theory of privacy that meets these criteria, grounds those values I have called second order values of privacy and connects individual and relational privacy. The theory of privacy I develop here lends a coherence to privacy scholarship that has been lacking until now.

As a Way of Being

Privacy acquires its value as a context enabling a particular existential condition, a way of being. To have privacy is to have the possibility of certain kinds of experiences, experiences which are most fully described in terms of I and we, in first person grammar. In private, I can <u>be</u> in a particular way that is generally impossible in public or social contexts. Alone or with intimate others, I can be the totality that is me, the unique whole that constitutes me as a person. In social contexts, I am often fragmented in the sense that others regard me as part of who I am, on the basis of the things that I am, and these parts come to stand for all of who I am. In other words, I am

reduced to something (some thing) about me.[8]

This line of thought was sparked by Hannah Arendt's claim that a certain way of being is necessary for a person's unique and individual personality to be revealed for others. I also use her distinction between a human being regarded as a "who" (a person) and as a "what" (a thing). Martin Buber's I-Thou/I-It is similar and also valuable to further describe the way of being I argue is available with privacy and otherwise difficult or impossible to attain, especially in regard to intimacy.

Arendt and Buber's models are similar to Kant's distinction between persons and things. However, unlike Kant, Arendt's "who" and Buber's "Thou" are socially dependent whereas Kant's "person" can be and often is conceived of as an isolated being. This is important because privacy is not an alienating way of being; it is not isolation. It is the condition enabling self-integration in the sense of continual incorporation of experiences, ideas

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[8] I use the language of "reduction from" and "fragmentation of" a whole person throughout this work. However, it is equally if not more efficacious to talk of persons being crystallized or made static conceived of on the basis of something they are or do. Rather than reducing the whole person, it would be illustrative to say that a dynamic being has been made static. A person, in this language, is a dynamic becoming which is made static by the conception that what she is stands for the irreplaceable totality, who she is. The distinction here between static and dynamic is in harmony with what I have to say. Please see Robert M. Pirsig, Lila (New York: Bantam, 1991), a work devoted to the important distinction between static and dynamic reality.

and relationships into one's being. Privacy, in this sense, plays an essential role in the ongoing creation and sustenance of the person I am and the relationships in which I participate. Arendt and Buber's language is more suited to my model of privacy which has little to do with rationality or autonomy.

When I ask myself what I gain from privacy, either alone or with intimate others, I find the following. In private I am least available to others as a thing, as a specimen. In private, I am most able to experience my whole self because my consciousness is self-reflexive rather than other-reflexive. Most all other times in my life, there is the ever present probability that I am some thing or another for others. Like anyone else, I am identified and known socially as a variety of "whats," in my case, woman, mother, philosopher, teacher, red-headed, thorough, reliable, passionate, irreverent, and so on. In social or public settings, almost always a few of these "whats" dominate and become all of who I am. At the university, for example, the characteristics connected with my studies or teaching are most often the source of recognition and identification. At home, my son is more interested in the fact that I cook, do laundry, etc. On the street, I have often been reduced to my gender alone. Nearly everywhere that I am in the course of living my life, what I think of as aspects of myself end up constituting the whole of who I am for others. A

consequence of this false objectification is the fragmentation of my self. This occurs whenever I experience or "see" myself in an other-reflexive manner, that is through the eyes of most other people, true intimacy excluded.

On the other hand, alone or with intimate others, "who" I am can be revealed and experienced. Even though it is true that I am each of the "whats" that I am (woman, teacher, redhead, etc.), no listing of these things, however exhaustive, will ever capture who I am for this cannot be said. According to Arendt, when we try to say who someone is, the words we use only describe what she is.

> The moment we want to say who somebody is, our very vocabulary leads us astray into saying what he is; we get entangled in a description of qualities he necessarily shares with others like him; we begin to describe a type or a "character" in the old meaning of the word, with the result that his specific uniqueness escapes us.[9]

Some may argue that we can, in fact, speak to whom someone is. For example, one could maintain that by describing me as a woman with passion and integrity, with a strong sense of responsibility, etc. that he has captured who I am. What actually happens in cases like this is that the qualities chosen to be listed are those that the other person finds most important to him. Other lists are as descriptive, if not more so, to other people in my life.

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[9] Arendt 181. Emphasis in the original.

For example, my integrity and passion are not consciously important, if they are at all, to my children. Qualities such as I generally keep snack food in the house, that I keep the laundry done and share my car and disposable income are more telling to my son or his friends. My softball teammates think of my hitting or lack thereof, my defensive play and whether I am a good sport or not. When someone claims that she can say "who" I am as opposed to simply listing the "whats" that describe me, she is in fact listing the qualities most important to her in characterizing and evaluating me in a given context.

Part of the value of privacy lies in the fact that it provides the context for discovery, experience and nurturing of individuality understood as the unique complex singularity of each and every person. In private, by virtue of not being aware of myself through others' eyes, as reduced to certain aspects of myself, I am able to experience myself as more than the compilation of all the "whats," the things that I am socially.[10] This amounts to nothing less than experiencing myself as a "who," a person. The uniqueness of the specific configuration of all the

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[10] I rely here on what may be referred to as the social interactionist model of self where I am a product of my gender, my class, my race, the time in which I live, etc. There is, however, nothing about the concept of a core self, a la Descartes, with various masks or roles that would contradict my conception of the value of privacy. If one prefers the latter notion, she need only view privacy as the context for shedding all the roles assigned to or acquired by her, thus experiencing her core, or true, self.

"whats" into the irreplaceable totality that I am is available to me and intimate others.

It is by virtue of this wholesome and integrated way of being that I can make assessments about my entire life. My reactions and responses to daily experiences, my plans, dreams and fears can be assessed for harmony or dissonance, comfort or ease, satisfaction or anxiety. Normative choices can be evaluated according to the "who" rather than the specific and sometimes disconnected "whats." As a result, internal contradictions are available should I wish to address them rather than being invisible to me because of fragmentation of myself into merely the things that I am.

When in social or public situations, perhaps unavoidably, one is frequently reduced to aspects of his or her being. This is not, however, necessarily a matter of blame. We often relate to one another in bits and pieces. Sometimes this is clearly immoral as in cases where women are reduced to their gender and become sex objects, when someone's race or ethnic characteristics become all that is seen, when sexual orientation becomes the (false) totality of a person for others. Other times, it seems hardly regrettable. For example, my students relate to me as their teacher and this is often my entire identity for them. There are circumstances when what I refer to as "reduction to an aspect of a person" is called for. If I call a police officer because I hear a burglar, <u>who</u> either of them is has

little immediate relevance or import.

It may very well be the case that the finitude of human energy, attention and interest make it impossible to know enough about more than a few other persons to see them as whole beings rather than the particular aspects that are relevant to the moment. Most social interactions do not require that the whole person, the "who" of the bank teller, grocery checker or gas station attendant, for example, be known. In fact, the efficiency of many business-like interchanges is enhanced by a certain degree of relating on the basis of function or role in the exchange. However, any such reduction of a person to her work can and should be made consciously and include the awareness that she is an extremely complex configuration of many aspects, whether or not we are cognizant of the specifics. Ultimately, not one person <u>qua</u> person is reducible to a single attribute or group of attributes.

Even though it may not be pragmatically possible to fully know the person we interact with in most cases, it does not follow from this that we are then permitted to deny her personhood. Relating to the bank teller as a person, a who, for example, may require accommodation for her less than joyous disposition: perhaps her child was ill all night, perhaps she cannot provide for child care and all the other necessities on her wages, perhaps she is a student with a term paper due. That she is a bank teller is only

part of who she is. It is a matter of attitude. We can acknowledge her unique complexity, her personhood, even though we do not or cannot know her irreplaceable totality.

The distinction between knowing (many or all of the characteristics and aspects of someone) and acknowledging (that each person is a unique and infinitely complex being) is similar to but different from one made by Stanley Cavell.[11] Acknowledging, for Cavell, is a matter of admission or confession and goes "beyond knowledge" in that knowledge is logically prior. In acknowledgement, something is done or revealed on the basis of particular knowledge. For example, acknowledging someone's pain presupposes knowing he is in pain.[12] Acknowledgement, as I am using it here, is less like an admission or confession and far more like recognition or respect.[13] If I acknowledge someone as a person, that is, as a unique and infinitely complex human being, I show by my attitude, my words and actions that I

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[11] Stanley Cavell, Must We Mean What We Say? (New York: Scribner's, 1969) Chapter IX, "Knowing and Acknowledging," 238-266.

[12] Cavell 257. Cavell's discussion specifically addresses whether we can know (with certainty) that someone else is in pain if we do not have their pain. He argues that if one acknowledges another's pain, this is sufficient to show knowledge. His discussion is relevant to another kind of philosophical problem with privacy, one entirely different from the one I am addressing in this work. I would call the former a problem of epistemological privacy, also called the problem of other minds.

[13] This is recognition in the Hegelian sense as illustrated in the struggle of the slave in the master-slave dialectic to be "recognized" as a person.

recognize and respect the status of the other as a person. This is an entirely reasonable attitude to take towards someone else even though we rarely know more than a few of the particulars of another's complexity. To know the specifics of a myriad of details is different from acknowledging that the complexity exists. Acknowledging that another is a complex and unique being is to recognize that he or she is not reducible to any trait, role or function. Just what specific behaviors exhibit the acknowledgement of another as a person is another question. However, each of us can tell when we are being acknowledged as a person and, painfully, when we are not.

As a condition for a particular way of being, privacy is not a locative, that is, being private is not necessarily being some <u>place</u>. In other words, privacy need not depend upon bounded space, either physically or conceptually. For example, a friend who was recently informed that she has breast cancer is undergoing chemotherapy and faces the unfortunate likelihood of loss of her beautiful hair. This concerns her, not because of the hair loss itself, but ultimately because strangers and mere acquaintances will see her as a "woman with cancer," a <u>what</u> rather than <u>who</u> she is. In order to avoid becoming a specimen or object of pity, she is buying a wig in advance of the hair loss. In this sense, the wig will protect her privacy and will preclude this particular reduction from wholeness to a characteristic.

The wig will provide her the possibility of being whole in the eyes of others.

Much as the polis in ancient Greece was a way of being rather than a location, privacy is a way of being in modern society. However, the operative model of privacy in law and society today is primarily one of property, and of spheres and realms. Specifically, privacy is thought by most to be intrinsically tied to a particular place, most usually the home and, in some cases, the office. An ontological explanation of privacy does not deny that, in most instances, four walls most readily provide the possibility of a private context. It does seem natural to connect privacy with the home as the location of our most intimate relationships as well as with being let alone. However, to limit privacy to a property model denies the actuality of private and intimate conversations on street corners and in restaurants, for example. Privacy is, of course, far more vulnerable and tentative in social settings just because the possibility of being considered and treated as a "what," as an aspect of one's self, is ever present.

Benn also notes that crowded conditions do not preclude privacy. Although tact and goodwill are required, it is possible to develop what are referred to as "avoidance techniques." Not noticing others accompanied by a corresponding confidence in not being noticed is a workable

substitute for physical seclusion.[14] At one point, I may have been more willing to challenge the efficacy of psychological avoidance techniques had I not lived for a number of years in family student housing where the walls are "thin" and there is no insulation between the floors. Consequently, one can hear most of the neighbors' activities, including the most "private" ones. However, one learns not to notice and to have confidence that one is not being noticed. The preference or perceived requirement for seclusional privacy may be a product of affluent western culture but it does not exhaust the possible forms privacy may take.

Instead of presuming that privacy is necessarily related to a conceptual or physical location, I argue that privacy is best understood as a way of being. This way of being is essential to both individuality and intimacy. In the following two sections, I will examine individuality and intimacy as they relate to privacy. I take individuality and intimacy to be the paradigm values of individual and relational privacy respectively. As promised, in fully developing these values, I will show how individual and relational privacy are mutually interdependent in their contribution to personhood. In so doing, I will illustrate and illuminate my idea that privacy is valuable because it provides the conditions most conducive to the creating and

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[14] Benn 20.

nurturing of persons. I begin with individuality because it is essential to the possibility of intimacy as I conceive it.

Individuality

It is one of the mysteries and joys of life that no two people are identical; each person is unique, unlike anyone who ever has been, is or will be. This uniqueness is individuality. It is the totality of each person's characteristics that sets off or distinguishes us one from another.[15] Contemporary therapist John Bradshaw agrees: "Unified wholeness is...what makes each child special, unique, and wonderful. No one else is exactly like him."[16]

Individuality is threatened in at least two ways that are relevant to the issue of privacy. First, since individuality is defined as an irreplaceable totality, any reduction from or fragmentation of the whole places individuality in jeopardy. The second and more esoteric

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[15] Individuality is sometimes confused with individualism which, in the abstract sense, forms part of the foundation of liberal ideology. Abstract individualism is a reduction of persons to repositories of political rights and duties without regard for the particularities of each individual. This is not the kind of individuation I am concerned with here. Individualism implies a degree of separation and isolation, individuality does not.

[16] John Bradshaw, Homecoming: Reclaiming and Championing Your Inner Child (New York: Bantam, 1990) 38.

threat comes from what has been called the contamination or blighting of a person's being, her thoughts and feelings. This threat arises from a deprivation of the context that gives substance and richness to a person's thoughts, emotions and sensations. The earliest and most often cited journal article on privacy notes these two dangers. When Warren and Brandeis argued in 1890 that privacy is necessary to protect the "inviolate personality,"[17] they were referring to individuality.[18] They also claimed that publicity trivializes and "destroys the robustness of thought and delicacy of feeling." Publicity, according to this view, is a "blighting influence."[19]

Individuality does not arise from single traits or combinations of characteristics but from the totality of a person's whole being. Using myself as an example, there are other heterosexual women, mothers of two sons, former waitresses, philosophy teachers, softball players, redheads, etc. It is possible there are others who share this particular combination of characteristics with me. It is also probable that the longer the list, the fewer people there would be with whom I would share the particular

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[17] Warren and Brandeis 200.

[18] This interpretation is shared by others. Edward Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," New York University L Rev 39 (1964): 969.

[19] Warren and Brandeis 194-95.

combination of traits. It would be rather easy to make a list of characteristics specific enough to rule out the possibility that any other human being could be identical to me, for example that I was born to my mother and father at the specific place and time I came to be.

However, no matter how exhaustive the list of characteristics, it could never capture who I am. Individuality importantly involves the idea that each person is more than the sum of her discreet attributes. To use Arendt's language, "who" someone is transcends all the "whats" that she is. Buber notes that a person is not a "loose bundle of named qualities...just as the melody is not made up of notes nor the verse of words nor the statue of lines."[20] No matter how we compile the traits someone has, we can never capture the totality that is the person. My being as a person is more than the composite of all my characteristics or traits, it is the irreplaceable totality that I am.

Who I am also includes the interconnectedness of my various characteristics, my feelings, impressions and assessments of, reactions and responses to the complex whole they comprise. It is the ongoing incorporation of self-contemplative thought and the resultant permutations of self that give individuality its infinitely complex nature.

The uniqueness of each person adds force to and helps

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[20] Buber 8.

explain Kant's practical imperative to treat each person as an end in him or herself. Although Kant argues that being an end in oneself is grounded in each person being rational and a source of value, there must be more to it. If rationality and origin of value were the only bases, each one of us would be interchangeable with any other who has these two specific qualities. So, to respect a person as an end in herself must also include her uniqueness. Treating someone as an end in herself is based, at least in large part, on the fact that she is irreplaceable and not interchangeable with another.

Reduction of a person to certain aspects of her being carries with it the possible danger of being used as a means to an end. For example, when you have your gas tank filled at a service station, the attendant serves a function, is a means to an end and, for this purpose, it matters not <u>who</u> the attendant is. Any gas station attendant could accomplish the same end; a sufficiently sophisticated robot could perform the task. The same is true of grocery store checkers, bank tellers and most all other roles filled in employment. However, <u>as a person</u>, the attendant working in the gas station is unique and irreplaceable even though fungible on the basis of his employment.

To treat someone as a means rather than as an end logically entails a reduction of the unique individuality to certain attributes, that is, to the "whats" he or she is or

does. It is only as a "who," as a complex, whole person, that I have uniqueness, individuality. As a woman, teacher, or waitress, I am interchangeable with others. Arendt's "whats" are Kant's things and means; her "who" is his person and an end. A person acknowledged to be unique must be an end because being unique, she cannot be interchangeable and used as a means. She becomes a means only when fragmented, that is reduced to one or some of the things she is. Again, this is not necessarily bad or wrong or harmful in all cases. Kant implies that persons may be used as means, but never treated merely as a means.[21]

Reduction of human beings seems to be an inherent part of the social way of being and the explanations for this tendency are not mutually exclusive. As I explained earlier, I think this phenomenon results from the fact that we humans have a finite amount of time, energy and attention to give to others. However, Arendt, as we have seen, claims that the threat to individuality comes from the "leveling demands of the social" which she equates with "the conformism inherent in every society."[22] The pressure to conform, according to Arendt, is a result of the social realm being conceived of as one large family, the family of man. She says that "society always demands that its members

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[21] Kant 47. "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only." Emphasis added.

[22] Arendt 39.

act as though they were members of one enormous family which has only one opinion and one interest."[23] Thus, being a family member supersedes and overrides individuality. Once, the public realm "was reserved for individuality; it was the only place where men could show who they really and inexchangeably were." Today, "distinction and difference have become private matters of the individual."[24]

Edward Bloustein, in the following excerpt from a 1964 law review article, also argues that privacy is necessary to individuality just because the pressure to conform is inherent in society.

> The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.[25]

Bloustein agrees that the social realm generally precludes individuality but he does not explain why public opinions tend to be less different than private ones, why public aspirations are conventional ones or why feelings lose their unique depth when publicly known.

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[23] Arendt 39.

[24] Arendt 41. Emphasis added.

[25] Bloustein 994.

I understand this to be a result of the fact that a person's opinions, aspirations and feelings have full meaning for her only within the context of her whole being, the integrated rather than fragmented self. In a social context, personal expressions cannot carry their full significance because the deep background of a person's uniqueness is missing. In mass society, the context for self expression is the understandings we hold in common, our shared background rather than each individual person's unique story, concerns, hopes and fears. This characteristic of the social inherently deprives personal self expressions of their richness and fullness. Our thoughts and feelings are "levelled" because to be understood at all, it must be in terms of the common denominators we share culturally. As a result, we tend not voice certain sentiments in public because there is little, if any, chance that what we say will be understood as we understand it ourselves. We fear and resent being judged on the basis of this superficial commonality because this, in itself, is again a reduction. In a sense, when judged by those who do not know us, we are crystallized, made static because the dynamic background of our lives is unavailable to non-intimate others.

Privacy offers respite from the trivialization of sentiments and emotions by mass society. My thoughts and feelings are available to me in the full context of the

dynamics of my life rather than the commonality of everyone's life which comprises the social realm. In my self-contemplative private experience, I need not be any of the things I am socially - not my gender, not my appearance, not my occupation. Privacy provides the possibility that I be relatively unconstrained by social categories, preferences and expectations. There is freedom from the inclination to be so identified by others or to identify myself on the basis of the things I am or do.

Thus, privacy protects individuality by providing the condition necessary to integration of aspects of oneself into the unique complexity that each person is. Away from the gaze of others, we are no longer reduced, fragmented or "levelled" as a matter of course, as when part of the social realm. Although people are reduced for social efficiency or, negatively, because of racism, sexism, ethnocentrism, etc., persons qua persons are not reducible.

The distinction between treating others as whole persons as contrasted with reducing others to things or "whats" is also central to Buber's I and Thou.[26] Although

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[26] Buber uses different terms than mine. I have translated his "individual man" into "human being" which is understood to be a conglomeration of separate qualities. I have made this change because of the gendered nature of "man." I also use his "person" to mean an irreplaceable totality but I don't think this is a change at all. For Buber, "individual man" is an It and "person" is a Thou. Buber also uses "individuality" to mean "individualism" but this difference is inconsequential to my efforts.

relation is primary for Buber, in fact, a priori,[27] the beginning point is a human being whose conception of self and others is such that relation is possible. Every real relation in the world rests on individuation. This is its joy for only in this way is mutual knowledge of different beings possible.[28]

Relations are possible only between persons or Thous. Buber says, "If I face a human being as my Thou ... he is not a thing among things, and does not consist of things." A human being is not a "loose bundle of named qualities," but this does not mean that we cannot "take out" from a person some of the named qualities. According to Buber, we must continually do this, however each time we do, the human being "ceases to be Thou."[29] He does not say that we should not relate to others as "Its," just that this ought not be all there is. In fact, Buber says that "(w)ithout It man cannot live. But he who lives with It alone is not a man."[30]

In echoing the Kantian person-thing and Arendt who-what distinction, Buber also contributes to our understanding of

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[27] Buber 27.

[28] Buber 99. Buber adds, in the same passage, that beginning with individuation is also the limitation of relations because "perfect knowledge and being known are foregone."

[29] Buber 8.

[30] Buber 34.

individual privacy. He is concerned with the importance of solitude, what I call individual privacy, in attainment and experience of the purity of one's being. Buber argues that solitude is valuable in two ways: it enables a freedom from the experience and use of things in the world and, related to this, it is a turning to a place of purification, necessary even to those within a relation. Buber's purification is an antidote to Goffman's "contaminative exposure" used to describe the effect of complete absence of privacy.[31]

There are two kinds of solitude, one is according to that from which one turns away and another according to that toward which one turns. Both have positive and negative manifestations. The positive role of solitude as turning away is a freedom from the experiencing and using of things, the world of It. This solitude is "always necessary, in order that the act of relation ... may be reached." The negative of this solitude is isolation, an active rejection of relation and the world.

The second type of solitude, as turning towards, also relates to individual privacy. We are, according to Buber, naturally disposed to solitude as the place of purification which is necessary even to the person who is in a relationship. The negative manifestation of solitude as turning towards exists when a person considers aloneness to

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[31] Goffman 28.

be isolation, where he conducts conversation with himself, not to test and master himself, but as a denial of the value and reality of relationships.[32]

Buber's attention to solitude derives from its importance to the possibility of relations which he calls the source of true humanity. (I will discuss Buber's notion of relation in the next section, "Intimacy.") Relation begins with a person as starting-point and, as such, the becoming one of the soul is a preliminary goal.[33] I have understood the "becoming one of the soul" to refer to the integrated wholeness of a person, no longer fragmented or reduced in the world of It. Buber describes this as a unity without duality that occurs when the concentrated power of the individual is united within the person. This is the "decisive moment for a man because without it, he is unfit for the work of the spirit (relations). This concentration of the person should aim towards the whole, unimpaired man. "It aims at, and <u>is</u> reality."[34]

I understand and incorporate Buber's notion of solitude(s) into my theory in the following ways. I seek individual privacy for two positive reasons. When I turn from the "experience and use of things," I attain a wholeness for myself that is otherwise unavailable. To

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[32] Buber 103-04.

[33] Buber 92-93.

[34] Buber 89. Emphasis in the original.

appreciate Buber's theory, it is crucial to understand that when one is entangled in the world of things, Its, one necessarily is also an It. The "I" can never stand separately from It or Thou.

Buber maintains that I-Thou and I-It are primary and single words even though they are word pairs. By this, he means that the "I" is inseparable from the mode of being it signals. If I say "Thou" (by my attitude) to someone, I also become a Thou. If I say "It" to another, I too am an It. There is no way, according to Buber, for me to have the attitude that says "It" to another, yet at the same time claim Thou for myself. In short, to become a person, I must regard another as a person. This means my glance toward another must be inclusive of their whole being. Any attitude I take towards another which regards her partially makes me an It also. In the latter case, I live in the world of objects and boundaries rather than in the world of spirit, of relation. Solitude frees me from the world of It.

Related to this, I also seek individual privacy as a place of purification, as a way of eliminating all but my immediate self-reflexive experience. In social or public contexts, our perceptions of ourselves are necessarily other-reflexive because our self-consciousness is contaminated in the sense that it includes, and can be dominated by, the fact that we are being seen by others

which entails awareness of our reduction from a unique complexity to some aspects of our being.

As Benn and Gerstein have both pointed out, the presence of non-intimate others forces itself on our consciousness and alters the essential nature of experience. By way of the gaze of others in social contexts, we are fragmented and become an Arendt "what," a Benn "specimen or object." And, as I have argued, by definition these things cannot be persons, irreplaceable totalities. Solitude, by eliminating the reductive gaze, provides for the possibility of integration, of being an irreducible unique complexity, a person.

I also seek solitude in order to contemplate my own thoughts and feelings which can become contaminated in another sense. On occasion, my own considerations and evaluations can be overwhelmed by the sometimes relentless barrage of information, sensations and interactions which comprise the social way of life. Solitude offers purification by eliminating the constant input of others. In a sense, my conscious awareness is clarified and I can feel how I feel and think what I think. In this sense, solitude offers respite from the hustle and bustle of everyday life and its demands. Although any estimation I might make of the effects of total lack of privacy must be pure conjecture, I am willing to rely on Goffman's claim that constant observation and input by others causes

"mortification" of the self. Based on this, solitude is necessary for any self contemplation whatsoever.

In summary, then, privacy is necessary to individuality, the irreplaceable totality each person is. Since, as I claim, a person qua person is a unique whole being, an Arendt "who," individuality is necessary to personhood. In social or public contexts, persons are regarded on the basis of part of who they are and the part comes to stand for the whole. I have called this phenomenon "reduction of persons to things" or "fragmentation of persons." Furthermore, once reduced or fragmented, it is highly probable that the individuals affected will no longer be conceived of as persons, as irreplaceable totalities. Instead, the likelihood exists that they will be regarded as things accompanied by the danger of being used as means to ends. Although this is often immoral, as in racism, sexism, heterosexism, ageism, etc., in another form, it can be a relatively harmless inherent characteristic of mass society that lends efficiency to social interaction. Even in this case, however, we require the countervailing experience of privacy to be persons. In private, alone or with intimate others, we are able to experience ourselves in our completeness because of the integration of all the socially nameable attributes into a unified whole. It is by virtue of this wholeness that we are persons, that we can experience ourselves as such and share this magnificence

with others.

Privacy, in the individual sense, is valuable because necessary to personhood. But this is only part, albeit a crucial part, of the whole story. We also require intimate relationships in order to achieve the fullest expression of our capacities as persons. Privacy, in the relational sense, is necessary for the possibility of intimate relationships, and contributes to personhood in this way.

Intimacy

> It is only in relations of the deepest intimacy that we can allow to another person the same complexity of nature which we know to be our own. That is, with such individuals, we can stop making presuppositions and merely accept, as we do with our own selves, that there is no need to define them, no need to seek for patterns or shapes, no need to say that she or he is such and such a type. A.N. Wilson[35]

As we saw in Chapter II, Arendt argues that "modern privacy in its most relevant function" is to "shelter the intimate." She characterizes the intimate as a subjective mode of being, the major forces of which are the emotions, thoughts and sensations of each person, those things most central to human experience. She says little more to characterize intimacy other than to note it came to importance as a reaction against society's unbearable

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[35] From Incline our Hearts, (New York: Viking Press, 1989). Quoted in Time Magazine, January 23, 1989, 66.

pressure to conform. As such, Arendt's conception of "intimate" is broader than is implied by the ordinary use of the word. "Intimacy" is usually used to refer to a certain quality of relationship between two or more people. Although it is correct to refer to one's relationship with one's self as intimate, the term is not commonly used in this way. Given the ambiguity, we should first be clear about what I intend by intimacy and intimate relationships before connecting it to relational privacy.

I argue that intimacy correctly names any relationship between two or more whole beings, irreplaceable totalities, and it covers a broad continuum from friends to lovers to long-mated couples. Its language is in the first person plural, we. Intimacy is characterized by the willingness of the participants to reveal <u>who</u> they are to one another. This requires courage and trust. I will return to these characteristics later.

Although many forms of association are called "intimacy," most are mere pretenders. For example, we call sexual intercourse an intimate relationship but it is intimate only in its finest expression. Clearly, prostitution is not intimacy, nor are one night stands, nor, often, sexual expression even in marriage. Intimacy, as I am using it, is possible only when both individual whole beings are present to the other in conditions of equality and freedom. Any relationship created by two persons

(irreplaceable totalities) is inherently free and equal, as was characteristic of the Greek polis. As I argued in Chapter II, inequality arises from hierarchy which, in turn, results from evaluation of differences. I also argued that, as persons, we are inherently equal to one another. Since each person is unique and irreplaceable in the wholeness of being, there can be no basis for relative evaluations and hierarchy cannot exist. It is only in reduction of whos to whats that hierarchy and inequality come to be. In order to feel better than or superior to someone else, I must regard him as what he is - his race, gender, class, sexual orientation, age, occupation, etc. I argue that no such way of regarding another can possibly yield intimacy.

Even when a relationship appears to be intimate, if there a hint of coercion or force, I deny that this relationship is actually an intimate one. The presence of coercion in a relationship seems to me to be prima facie evidence that the relation is not between equals. This means that many marriages, usually thought to be the paradigm of intimate relationships, are not intimate at all. Whenever a marriage entails a fundamental power differential, whatever its source - economics, physical intimidation, emotional blackmail, sexist oppression, etc., intimacy is precluded. Parent-child relationships are also often called intimate. This too is an incorrect use of the term. If there is inequality, e.g., disparity in power or

control, which there is in nearly all parent-child relationships by necessity, there can be no intimacy in the sense I intend it here. There is, minimally, an understanding that "you are the child, I am the parent," or vice versa. The power differential precludes intimacy. Many parents and children never really come to understand or know one another as persons in their own right. If they do, it is because they have transcended the parent-child roles.

In our culture, we assume there is intimacy in the family, but this assumption of intimacy is just that, an assumption and a mistaken one in many cases. In the face of incontrovertible evidence of spousal abuse, child abuse, sexual assault in the family, and the many more subtle expressions of dominance and oppression in the home too numerable to list, to assume intimacy in the family is an error.

I have found Buber to be especially helpful in understanding intimacy in its truest sense. He says that there are basically two different conceptions combined in the idea of the social life of human beings. First, there is "the community that is built up out of relation, and second, the collection of human units that do not know relation."[36] Notice that Buber reserves "relation" for the former "mode of being," constituted by I-Thou. Relation is purely spiritual for Buber. In that I-Thou relations

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[36] Buber 107.

require whole beings, persons, Bradshaw echoes Buber. "Wholeness and spirituality are synonymous. When we are spiritual, we are in contact with our uniqueness and specialness."[37]

The latter kind of human social life, I-It, results any time the participants regard one another on the basis of some aspect or part of who they are and this precludes the possibility of intimacy, either in the form of friendship or romance. Certain kinds of friendships, most notably Aristotle's "friendships" of utility and pleasure, are based on reduction of persons to certain of their qualities or aspects. As Aristotle points out, these kinds of friendships are temporary, instrumental and easily dissolved. But, this is not what I mean here by friendship. Aristotle's "perfect friendship" is the only one that is intimate.[38]

For example, the protagonist in The Arrangement laments the lack of quality relationships in his life. One striking fact has occurred to him - he has had few friendships. Instead there have been numerous associations which were either professional or functional, including bosses, editors, mistresses, wife, secretaries and repairmen for

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[37] Bradshaw 38.

[38] This same point has recently and coincidentally made by Robert A. Strikwerda and Larry May, "Male Friendship and Intimacy," Hypatia 7 (3) (1992): 119.

various appliances, salespeople, tailors, etc.

> "But you couldn't call these friendships," he says. "I hadn't talked or related to any of these people, except for some use or function. I hadn't touched any of them humanly. They were things to me."[39]

According to Buber, relation is primary because it is only through the I-Thou way of being that human beings become persons and a priori because it is from the original relation of infant and mother that the recognition of self as a distinct being arises.[40] If confined to I-It associations, a human being remains a thing. The I-It mode of being produces boundaries and this destroys relation.

It is true, of course, that even in truly intimate relations, there are exchanges based on certain aspects or whats of those involved. This is natural, helpful and, as Buber points out, necessary to life. We do "take out" certain named qualities from our friend or lover. For example, within an intimate relationship, one partner will often have skills the other lacks. If I ask my lover, who is a good mechanic, to adjust my carburetor, it might be argued that I have reduced him to one of his skills. However, in a friendship or love affair, making such a request will include consideration of the entire context of

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[39] Elia Kazan, The Arrangement (New York: Stein and Day, 1967) 392.

[40] This view is common to Freudians and others. See, e.g., Dorothy Dinnerstein, The Mermaid and the Minotaur, (New York: Harper, 1977).

the person's life and a readiness to accommodate this in my request. On the other hand, thoughtlessly expecting him to fix the car because of his skill is tantamount to making demands upon him as an It, reducing him to an aspect of who he is. The same sort of reduction occurs when women are unconsciously expected to do the cooking or laundry or house cleaning. However, if the partners have thoughtfully agreed to such a division of labor, it need not detrimentally affect the intimacy of the relationship.

When I maintain that treating another as a "what" or an It precludes the possibility of intimacy, I am speaking of the general attitude or tone of the association rather than the specific incidents within it. Given our human imperfections and the pragmatic functions we all serve for one another, to insist on a generalized purity as the indicator of intimacy would be to ignore the actuality of the friendships and love affairs we experience in our daily lives.

I-Thou relations have a certain form, that is, they involve the consideration of self and others as persons, as irreplaceable totalities. Within this form is a variety of relationships, ranging from simple friendship to the intimacy of lovers. The continuum of intimate relationships is a function of the degree of reciprocal sharing involved; the greater the sharing, the greater the intimacy. The deepest intimacy involves the greatest degree of shared

complexity by the persons involved. It is through these kinds of relationships that individuals become persons in the fullest sense.

Buber says that true relations involve sharing which includes participation in something that can neither belong to someone nor be entirely separated from the participants. A true relation is one in which I share without being able to appropriate it for myself.[41] In other words, a relation is not an object that can be possessed. It exists only as a creation by participation and thus cannot exist separately from the sharing. Intimacy is not a thing; it is a way of being with another person.

Involvement in an I-Thou relationship, one between whole persons, entails a degree of immersion of the individuated self in the relation. It may be argued that the immersion must be complete, to the degree that the individuation of those involved is lost in the relationship. Although this may describe relationships of ultimate intimacy, I am unwilling to list loss of the self as one of the criteria for intimate relations in general. Although "intimacy" is often addressed as though it were a single over-arching conceptual entity, substantial I-Thou relationships extend over a continuum from casual friendships to close friendships to romantic love to the relationships of long-mated couples. It is more accurate to

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[41] Buber 63.

characterize intimate relationships in terms of varying degrees of interpenetration of the participants in the "we" they create.

Friends share more of the substance of their lives than do acquaintances. Close friends share their lives with one another to a greater degree than do friends. Lovers share additional dimensions of themselves unshared with their close friends. Thus, it seems to me that intimacy is not marked by complete loss of the individual persons involved but by differing amounts of investment by persons in the created relationship.

Nor does the total giving over of one person to the other create intimacy. Buber also argues against the efficacy of one person absorbing another in relation. As he points out, with absorption into one, relation between two is no longer possible. Any criterion of loss of self for the existence of intimacy cannot be correct for, as Buber notes, the joy of discovery in relation depends upon mutual knowledge of different beings.[42] "To wish to understand pure relation as dependence is to wish to empty one of the bearers of the relation, and hence the relation itself, of reality."[43] There can be no relation without individuated persons.

As I read Buber, the grounds of an I-Thou relation is

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[42] Buber 99.

[43] Buber 38.

not the loss of the individual self as much as it is a shift in awareness and attention from one's individuated self to that which is created in the relationship. In moments of intimacy, one's awareness is neither of self nor other, but of the conjointly created relation. As Gerstein notes, what is required for intimacy is relinquishing the observer role so that the self may be lost "in the experience," engrossed in relation rather than separate from it.[44]

Buber calls that which is created in relation the dynamic "lived reality." It occurs in the "unfathomable nature of the relational act" and is a union that is no union, but "the enrapturing dynamic of relation." Although it may seem as though unity arises here, instead, the created relation "puts itself before its bearers as they steadily confront one another." At this point, "the relational act goes beyond itself; the relation itself in its vital unity is felt so forcibly that its parts seem to fade before it, and in the force of its life, the I and Thou, between which it is established, are forgotten."[45]

Intimate relations are valued and sought by most persons but it is not enough simply to desire intimacy.[46]

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[44] Gerstein 77.

[45] Buber 86-87. Emphasis in the original.

[46] In fact, Buber says intimacy cannot be sought but must come through grace. Buber 11. This calls to my mind the adage that a good marriage is not a matter of finding the right person, but of being the right person.

Willingness to involve oneself in an intimate relationship must be accompanied by courage and trust for several reasons. To the degree that the continual journey of self-creation that is life leads each of us individually we know not where, the mutual creation of intimacy is equally if not more unpredictable. That which is created in intimacy is mysterious and it takes a willingness bolstered by courage to seek the unknown which Buber characterizes as "the unreliable, perilous world of relation."[47] Remember that the only value the Private retained for the ancient Greeks derived from the mystery of the beginning and end of life. Birth and death are sacred because impenetrable to human knowledge and being unknowable, they are unspeakable and thus cannot be part of the Public. The same consequence results from the mystery of intimacy. Not only does intimacy require courage for one to confront its mystery, its sacredness comes from its "unfathomable nature." The awareness achieved in intimacy cannot be known in a way that allows it to be described. Once conceived of in a way that yields description, it is no longer intimacy. Intimacy is a dynamic becoming which is made static by the constraints of language and, hence, destroyed.

Courage is also necessary for the experience of intimacy because one must give up control over self, the other and yield to that which is created.

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[47] Buber 78.

> It (intimacy) is an experience so intense that it wholly shapes our consciousness and action. We do not understand ourselves to be choosing to do this or that, or to be looking here or there as we choose. Rather, whatever we do, whatever we see, is a product of the experience in which we are taking part.
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> It is not that the person is suddenly blinded or struck deaf ... Nor is it simply that he suddenly finds himself looking at or hearing something, rather than consciously directing his attention to it. He does not find himself at all, but loses himself in the experience.[48]

Finally, courage is required for intimacy because there is risk inherent in I-Thou relation. According to Buber, "the primary word (Thou) can only be spoken with the whole being. He who gives himself to it may withhold nothing of himself."[49] Intimacy involves the willingness to reveal oneself fully. Self-revelation in the entirety of one's being involves the ever-present demon of risk and fear of rejection. Showing who one is fully means inclusion of the aspects of one's self that prompt self-loathing, justified or not.

The obligation to be open to the irreplaceable totality is a mutual one. The intimate others to whom we risk revealing ourselves must also be receptive and sensitive to the wholeness of being that is revealed. To the extent that aspects of <u>who</u> we are remain concealed or denied, intimacy is limited or precluded. As Hesse points out, describing

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[48] Gerstein 76-77.

[49] Buber 10.

the difficulty Harry, the Steppenwolf, faces in entering into relations, those who would know him had to be open to both the man and his wolf-like alter ego.

> And they had to because Harry wished, as every sentient being does, to be loved as a whole and therefore it was just with those whose love he most valued that he could least of all conceal and belie the wolf.[50]

Patricia J. Williams describes a similar experience subjectively. The barrier to receptivity of her wholeness is that she is Black, which she calls a partializing social construction. She is describing the danger inherent in looking at someone fully, and the price paid for not doing so.

> To look is also to make myself vulnerable; yet not to look is to neutralize the part of myself that is vulnerable. I look in order to see, and so I must look. Without that directness of vision, I am afraid I shall will my own blindness, disinherit my own creativity, and sterilize my own perspective of its embattled, passionate insight.[51]

The risk and fear are great, so great that these factors alone often preclude the fullest possible intimacy.

Revealing oneself to another also requires trust. I am willing to reveal myself to you because I trust you will not judge me on the basis of an aspect of my being alone but will understand whatever I do or say within the context of the totality of my being; I trust that you will regard me as

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[50] Hermann Hesse, Steppenwolf, trans. Basil Creighton (New York: Holt, 1969) 49.

[51] Patricia J. Williams, The Alchemy of Race and Rights (Cambridge, MA: Harvard UP, 1991) 223.

a whole person, a Thou, rather than as part, a thing, an It. The "dynamic lived reality" of intimacy requires this complete reception because any crystallization of me by you on the basis of some single thing I do or say makes our association static, even if only temporarily but this still destroys the possibility of intimacy.

Now one could point out, and it would be correct to do so, that Buber does not discuss privacy as important or necessary to I-Thou relations or intimacy. However, since intimate relations require Thous (whole persons or whos) and individual privacy (solitude) is necessary for the possibility of being a whole person (the concentrated power of the individual united in one person), then it is reasonable to conclude that privacy is necessary for Buber's I-Thou relation (intimacy), at least by derivation. Buber notes that solitude is one of the gateways to relation.[52] However, intimate relationships are more than the aggregate of the distinct individualities involved so there is more to the value of privacy for intimacy than its derivation from individuality.

It is arguable that relational privacy is essential to intimacy for the same reasons solitude is valuable for one person, viz., the ability to turn away from the experience and use of things and as a place of purification. Since an I-Thou relation cannot be attained by an association of Its

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[52] Buber 103.

and since I-It entails the reduction of a person through the "taking out" of named qualities from the whole that transcends the parts, intimacy cannot be achieved in a context of the experience and use of things, the world of It. Thus, I-Thou, intimacy, requires a turning away from the experience and use of things.

Furthermore, the presence of an unchosen other forces awareness of being a specimen or object on one's consciousness. This is equally a problem for two people seeking intimacy as for an individual seeking solitude. If, in relation, either one or both people become specimens or Its (either for themselves or others), an I-Thou relation, or intimacy, is impossible. Relational privacy, then, is necessary to "purify" the conscious awareness of those who seek intimacy. For these reasons, I conclude that Buber's concerns about solitude for an individual logically extends to those seeking relation.

My claim is that privacy is necessary for the possibility of intimacy because it provides the condition for wholeness of being, for both of the participants as well as for the relation, the "we" itself. In the presence of disinterested others, intimacy is jeopardized because the participants are brought to view themselves, jointly and/or separately, as things, as whats. As Gerstein points out, the physical manifestation of the "we" can also be appropriated and used as a means to some end by uninvolved

others.[53] Benn's claim that we become specimens in the presence of an observer is clearly applicable to intrusions on intimacy. Once one comes to awareness of herself as an object of someone's observation, she is reduced from the person she is. If I am unable to be the whole unique complexity that is me, I am not a person and thus cannot participate in creating an intimate relation. If intimacy requires involvement of whole persons, then intimacy requires privacy for much the same reason as individuality.

I have been discussing my notions of intimacy, privacy and their connection. I have also claimed that intimacy importantly contributes to personhood as wholeness of being and I want to turn to this now. Intimacy, as we have seen, involves revealing oneself to another. Self-revelation is crucially important in coming to self-awareness and understanding. In relation, one is involved in conditions and experiences which do not and cannot exist in solitude. In the process of participating in "we," in responding and experiencing a relationship, we learn a great deal about <u>who</u> we are that is impossible to know otherwise. The same is true when another person reveals herself to us. Intimate others experience things about us to which we may be otherwise blind or unaware. Much as we look in a mirror to see ourselves, an intimate other is able to reflect <u>who</u> we are and this reflection offers the possibility for self-

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[53] Page 90 <u>supra</u>.

awareness and realization unavailable otherwise.

Intimacy also provides solid, sustained nurturing of the person I am. I can relax into myself and be the totality that is me. All the various responsibilities and categories I experience as fragmenting - my gender, occupation, age, et al - are integrated in the presence of an intimate other. The mistress of a high ranking British government official explains the value she and her apartment held for her lover.

> She had believed, still believed, that only with her had he been wholly at peace. He had lived his over-busy life neatly compartmentalized: the Campden Hill Square house, the House of Commons, his ministerial suite at the Department, his constituency headquarters. Only in this high, ordinary, suburban flat did the disparate elements fuse together and could he be a whole person, uniquely himself. When he had come in and sat opposite her, had dropped his briefcase at his feet and smiled at her, she had watched with joy, time and time again, the taut face soften and relax, become smooth as if they had just made love.[54]

In my intimate relations, I also share my worries and concerns I am reluctant to share with others who may not understand certain manifestations of me in the entire context of my being. In so doing, I may discover that, although unique, I really am not that much different from other people. The grounds I have held for perceiving and judging myself as odd or inferior (or superior) dissipate and, taken in the overall context of humanity, become

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[54] P.D. James, A Taste for Death (New York: Warner, 1986) 331.

minimally significant if they retain any importance at all.

Intimacy contributes to personhood by expanding what constitutes the wholeness of being through the mutual creation of "we." Relation not only reveals heretofore concealed dimensions of self, a person is irrevocably changed by participation in the "mutual act of creation." Through willingness accompanied by courage and trust, who we are is actualized and realized simultaneously in a way impossible under any other conditions.

In the relational sense, privacy is valuable because intimacy is impossible without it. Intimate relations are created by persons understood to be irreplaceable totalities, and privacy is the condition that provides the possibility of the requisite wholeness of being. In Chapter III, I claimed that this conception of privacy is its first order value. I also claimed that this notion unifies prior scholarship. As such, we should now be able to fill out and connect the earlier relevant claims.

First, Fried, Rachels and others argue that it is control over information and the sharing of it with particular others that constitutes intimacy. Psychoanalysis, for example, entails the sharing of information of a most personal nature, perceptions and beliefs we may not share even with the most intimate others in our lives. On the theory that shared personal information constitutes intimacy, it would seem that the

relationship of psychoanalyst and client would be among the most intimate possible. However, Buber argues and I agree, that a mutual I-Thou relationship is precluded by the very nature of psychoanalysis.

The full mutuality of an I-Thou relationship is "forbidden" in Buber's terms, when the relation "is specified as a purposive working of one part upon the other..." If the psychotherapist, for example, in analyzing his patient, brings to light unknown factors of the person's life, he may succeed in doing some repair work. "At best he may help a soul which is diffused and poor in structure to collect and order itself to some extent." However, the real goal, "regeneration of an atrophied personal center" can only be achieved in the "person-to-person attitude of a partner, not by the consideration and examination of an object."[55]

It is not the rare quality of shared information that is the constituting requirement, but rather the attitude one brings to another person that determines the quality of the association and allows intimacy as a possibility. Reiman, as you may recall, objects to what he characterizes as the market analysis of Fried and Rachels. Instead, he argues that it is the caring context of intimacy that makes shared information significant. Intimate others seek to share themselves with one another, not merely swap information,

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[55] Buber 132-34.

and the information shared fills out and nurtures the intimacy. The more intimate others know about one another, the more they are able to deeply share experiences. We can understand now that the caring context of which Reiman speaks is the receptivity and acceptance of the wholeness of the participants. In an intimate relationship, my expressions will take place in a context that involves the deep background of who I am and, consequently, they will have the same or closely approximate meaning for the other that they have for me.

Benn and Gerstein both argued that intimacy requires privacy because the disinterested other who intrudes on an intimate relationship makes most of us self-conscious and inhibited. As a result, we become unable to express our feelings spontaneously and are, thus, unable to contribute to a mutually sensitive and creative relationship. This description provoked the lingering question prevalent in most scholarship on privacy. Why does the presence of an unwelcome other produce inhibitions in us? Why are intimate relations crippled or destroyed unless private? We can now answer this question.

Privacy, as the condition enabling wholeness of being, protects us from being regarded as specimens. Benn and Gerstein are correct: unwelcome intruders cause us to become either specimens for observation and/or the relation itself becomes an appearance for consideration. Since

intimacy requires whole beings, any intrusion inhibits its possibility, both on an individual and relational basis. In private, uninhibited by fear of intrusion and unreduced, intimate relationships offer the persons involved a degree and range of self expression unavailable in social settings.

In summary, privacy is valuable because it enables and sustains individuality and intimacy. It does this by providing the context in which persons can be unique whole beings. In public or social settings, persons are always at risk for, and often subjected to, reduction to aspects of their being, and, in turn, are considered as though the aspects constitute the totality of who they are. This is fundamentally objectionable because it denies one's status as a person, relegating one to the status of an It, a thing. Since fragmenting persons into the things they are or do is a likely social consequence, we value the countervailing condition of privacy because it provides the possibility of a way of being whole.

Implications

There are many pragmatic implications carried with the understanding of the value of privacy I advocate here. I want to discuss some of them in order to show the breadth of the practical consequences.

To begin, let us recall the example of the

psychoanalyst and client discussed in the previous section and relate this back to the public-private distinction of antiquity per Arendt. In ancient Greece all matters of commerce were, by definition, part of the purely Private, rather than Public realm. Commercial relationships such as those between psychotherapist and patient and between prostitute and client, are matters of the hybrid public-social realm today. Unless we understand intimacy in a perverted or constricted sense, for example, as constituted by sexuality or personal information, these kinds of associations are aligned with market exchanges rather than with the inclusive mutuality of I-Thou relationships. This fact does not affect the regulation of the information involved in psychoanalysis or the market exchange in prostitution, it simply places these kinds of associations outside the purview of privacy. The privacy of the individuals involved is something other than the connections constituted by the monetary exchange.

On the whole, I would argue that associations established on the grounds of exchange of money or its substitutes ought not be a matter of privacy but should belong to the social-public realm, and thus fall under rule of law. Persons are whole beings, ends in themselves, and it is only when reduced to some thing or things that commercial exchange becomes a possibility. Things (whats) are bought and sold, not persons (whos). For example, a

person sells her time as a worker; she does not sell herself. Another person who sells his blood is not, at the same time, selling his hopes and fears. In slavery, when it looks as though persons are being bought and sold, it is only because the human beings on the market block are reduced from persons - they are really regarded as animals of a sort. In the eyes of the buyers and sellers, slavery in any form involves particular kinds of things to be exchanged for money. If I am correct that privacy's value relates to the irreducible unique being that each person is, nothing connected with the buying and selling of human beings or aspects of them (skills, bodies, etc.) can be a matter of privacy.

In the Greek society of antiquity described by Arendt, the Public realm was the context for a way of being that involved free expression of individuality, the revelation of the "who" someone was. Equality was inherent in the polis because comprised of unique persons and, consequently, entailed the use of persuasion rather than violence and coercion. The men involved were said to have been fully human and to have lived a spontaneous, dynamic life in the polis because of these conditions. By contrast, the ancient realm of deprivation, the Private, was constituted by human beings as animal laborans, interchangeable and subject to tasks of static maintenance required for biological survival. Rule by the master of the house involved coercion

and oppression because of the hierarchy based on the fact that the women, slaves and children of the household were not persons but fungible laborers.

Although today we assume that familial relationships are constituted by freedom and equality, a second implication of the model of privacy I have developed here is that this presumption of privacy for the home would be called into question. This is already occurring as is apparent by the increasing willingness of the state to intervene in cases of spousal and child abuse in increasingly broader terms. If privacy is the condition for wholeness of being and relationships of equality rather than of hierarchy and dominance with the attendant coercion and force, no longer can the home be presumptively private. As I have argued, any case of substantial abuse should be prima facie evidence of a non-intimate relationship and would, then, not be protected by claims to privacy.

As I have pointed out, privacy has undergone a significant transformation from a state of deprivation to one of great value. As a result of this evolution, I argue that the qualities formerly identified with the Public realm have found their modern home in social privacy. To a certain extent, the negatives that described the Private of antiquity have come to be identified with the social realm of today. The qualities of the two realms have substantially switched places.

For conciseness and to support this claim, I have listed below the attributes that differentiated the ancient Greek Public and Private, and substantially distinguish social privacy from mass society today.[56]

Ancient Public (Privacy)	Ancient Private (Social)
Who	What
Freedom	Necessity
Non-market	Economics, marketplace
Individuality	Fragments, fungibility
Intimacy (I-Thou)	Roles, functions (I-It)
Equality	Hierarchy and dominance
Persuasion	Coercion
Creation	Work
Being, reality	Appearance

Arendt's ancient Greek paradigm is here, in large part, turned on its head. If the conditions of the polis produced the possibility of fullest human expression, then it is privacy (in the social sense) that provides this very possibility in today's modern age. Another similarity between my model of social privacy and Arendt's Public realm is that I claim privacy is a way of being and not a place which is consistent with Arendt's description of the polis as a way of being rather than a place.

In our modern world, few persons are free to choose to work or not; people ordinarily work from necessity, in order to provide for biological survival. Furthermore, rare is the individual job holder who is not replaceable; one who does a particular job is interchangeable with other similar workers. Our social organization is also dominated by

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[56] This list was originally presented on page 43 supra.

multitudinous hierarchies; there is competition and conflict on the bases of gender, economic class, race, sexual orientation, religion, age and so on. Finally, because of the density of populations and the complexity of modern life, today's social interchanges are most often governed by reduction of persons to things that they are or do, rather than the distinctiveness of who they are; what we see is the mere appearance of persons.

Taken on the whole, I am suggesting that the qualities for which Arendt eulogized the Public realm of ancient Greece (individuality, creativity, freedom, persuasion, spontaneous and dynamic relations, expression of one's fully human self) are offered today by privacy. The negative qualities of the ancient Private (coercion, necessity, violence, interchangeable human laborers, inequality, static maintenance) are visible features of mass society today.

One difference between Arendt's model and mine is that the ancient Public and Private realms were clearly delineated spheres. Today, however, the boundary between privacy and the common social world is amorphous, porous, and constantly changing and this condition produces profound problems in legal adjudication of privacy rights.

We value privacy and seek to protect it because, as I have argued, it is necessary to the central human concerns of individuality and the creation and nurturing of intimate relationships. When we seek protection for privacy through

our political institutions, attention shifts to the right to privacy. I argued in Chapter I that conceptually prior to political privacy is an understanding of what this right is a right to and I have accomplished this much. What remains is the pragmatic application of my theory to the realm of law.

Although privacy jurisprudence seems to be evolving, albeit ambiguously, in the direction I have been suggesting, problems remain on two fronts. First, as I argued in Chapter I, it is essential to the coherent applicability of privacy law that we understand what the right to privacy is a right to. The solution to this problem has been no more yet no less clear in jurisprudence than in philosophy. The conception of privacy I have developed in this chapter provides the necessary clarity and coherence the law requires. Understanding privacy as a condition enabling wholeness of being explains the unity of case law prior to Bowers v. Hardwick and shows why this 1986 decision was profoundly objectionable. Believing as I do that a major criterion for the success of a theory is its applicability in practice, I want to test this claim and the efficacy of my model of privacy by applying it to the existing legal framework of privacy law.

The second and perhaps more daunting problem arises from the fact that law is predominantly oriented toward material concerns, that is, those concerns to which a

monetary value can be assigned. Because law evolved from common law and develops on the basis of logical development from case to case to case, incorporation of a spiritual value into the body of law is always difficult and usually impossible. These two issues are illustrated in what follows.

Chapter V is a review of the most representative jurisprudential literature on privacy and its importance in the adjudication of privacy rights. Because the arguments for privacy's value in this area echo those I have critiqued from the philosophical literature, I do not repeat the criticisms. Instead, I examine the jurisprudence of privacy to gain insight into the contemporary grounds for a right to privacy. Chapter V also examines the evolution of privacy case law up to and including Bowers, at which time the logic and coherence of privacy jurisprudence was abruptly and rudely halted.

CHAPTER V

JURISPRUDENTIAL LITERATURE & CASE LAW

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men.[1]
>
> The state of law is still that of a haystack in a hurricane ...[2]

The concept of privacy, as we have seen, presents an intriguing and complex philosophical problem in itself. We value privacy for many reasons, basic among them is its connection to personhood. Privacy is inextricably entwined with personhood because it protects the possibility of individuality and intimacy, both of which are necessary to

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[1] Justice Brandeis, Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion).

[2] Chief Justice Biggs, referring specifically to privacy law subsequent to Warren and Brandeis' 1890 law review article, in Ettore v. Philco Television Broadcasting Co., 229 F.2d 481, 485 (1956).

the fullest expression of human capacities. It does so by providing a condition for wholeness of being generally unavailable in social or public contexts. Because privacy is fundamentally valuable to us, we seek to protect it from violations and intrusions, whether by the state or other individuals. Hence, in addition to its purely philosophical importance, privacy is also of intense practical concern. The pragmatic conception, value and protection of privacy is the business of the legal and political realm. This chapter, then, serves as a transition from philosophy to law and from social to political privacy which entails a noticeable shift in emphasis and focus.

Jurisprudential scholarship seeks to understand the basis for and the values involved in claims to a right to privacy. As such, both philosophical considerations and legal constraints are relevant. Case law involves the pragmatic adjudication of claims to privacy rights. In a broad sense, jurisprudence renders the theory while case law reveals the practice.

I have argued that social privacy, which involves no legal component, is conceptually prior to any claim to a right to privacy; it is what this right is a right to. Political privacy, by contrast, is privacy that citizens claim as a right against the state or against other individuals and which is enforced by the state. A claim to a right to privacy is a claim to privacy as protected by

law. Thus, privacy as a legal concept entails the value it has for citizens as well as the practical protection of this value claimed as a right.

First, before proceeding, we should understand an important and fundamental distinction between philosophical and legal reasoning. The latter is constrained by the requirement that it be responsive and true to precedent, that is, legal thought is embedded in a historical and evolutionary context. Legal thinking, whether in jurisprudence or case law, is dependent on what has gone before and is precluded from creating from whole cloth either law or principle de novo.[3] As such, the existence and condition of political privacy can be considered only as it has developed over time, both theoretically and practically. This chapter provides a summary of the evolution of privacy in jurisprudence and case law. Any claim a citizen may make to a right to privacy must be considered in this context.

Significant problems arise when a dispute before a court involves a "hard case" which, by definition, is one for which no existing law or precedent is specifically applicable to the fact pattern at hand. For better or worse, judges must and do decide questions for which there is no applicable black letter law on some basis or another. Critical legal theorists, and others, argue that judges

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[3] Legislators create law.

apply their own personal, cultural or class values to fill the gaps, a situation argued to be antithetical to blind justice and equal protection.

Others who have examined how the judiciary decides "hard cases," most prominently Ronald Dworkin, have come to the conclusion that, for various families of black letter law, there are underlying principles actually referenced in decision making.[4] Although these principles may be neither articulated nor conscious, he argues that they provide the integrity for a concatenation of cases.

Dworkin's theory is, briefly and simplistically stated, that the black letter law should serve the principles of the community for which the law is law. A community based on shared principles believes that its rights and duties are "not exhausted by the particular decisions their political institutions have reached, but depend, more generally, on the scheme of principles those decisions presuppose and endorse." As a consequence of this, the members of such a community acknowledge that others have rights and duties in harmony with the scheme of principles even though they have not been formally adopted or identified.[5]

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[4] R. M. Dworkin, ed., The Philosophy of Law (Oxford: Oxford University Press, 1977) 6 and elsewhere. Also see, Law's Empire (Cambridge, Mass.: Harvard UP, 1986) throughout.

[5] Dworkin (1986) 211.

Without arguing for this position, I intend to continue as if it were true, and I believe it is. The dispute surrounding the actual bases of deciding "hard cases" is a topic of ongoing contention and concern in jurisprudence and I cannot enter it here without abandoning my own project.[6] Thus, I am adopting the theory that laws are articulated and codified instances of underlying community principles.

From this perspective, it stands to reason that some, if not most, of the problems in privacy law are a consequence of the lack of a coherent and articulated principle of privacy, whether this results from failure to understand its value or an absence of an acceptable definition. Without a clear and agreed upon principle of privacy, it follows that there is likely to be confusion and incoherence in the adjudication of claims to a right to privacy.

In this chapter, we will see that Warren and Brandeis struggled to make explicit a principle underlying privacy issues implied by tort law. Prosser's subsequent reduction of privacy law to four separable kinds of torts impliedly denies the existence of an underlying principle. Bloustein disputes this claim and articulates a principle of privacy law based on Prosser's own work. Justice Douglas' highly

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[6] It is interesting, however, to view this jurisprudential debate through the binocular of the fact-value problem, black letter law being akin to facts and principles representing values.

controversial majority opinion in Griswold v. Connecticut established a principle of privacy implied in explicit Constitutional protections.

Many members of the legal community were appalled and outraged by Douglas' opinion because it relied upon emanations from the Constitution rather than on precedent, on implication rather than explicit protections. These critics claim that the Griswold opinion lacks the integrity of strict legal reasoning based on existing laws and prior judicial decisions. Even many of those who support the resulting Constitutional right to privacy fear and reject the represented methodology because of the potential for misuse. They argue that the latitude taken by Douglas has the potential of undermining Constitutional protections if practiced by judges of the "wrong" ideological bent, diminishing rather than expanding civil rights.[7] This objection to judicial activism should not be minimized particularly in light of the cyclic opportunity of American presidents to stack the Supreme Court with judges of their own ideological persuasion.

There is a solution to the still raging debate over Justice Douglas' judicial activism in Griswold. Congress and the American people could enact a Constitutional amendment guaranteeing a right to privacy. The Warren Court's harshest critics would be hard pressed to object to

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[7] See Chapter VI for an example of this in Bowers.

the enactment of such an amendment, believing as they do in the fundamental legitimacy of law enacted by legislatures. However, given the present chaotic state of privacy law in general, the task seems daunting, to say the least. Until thinking about privacy issues is clarified and articulated in a coherent and generally acceptable manner, the necessarily precise wording of such an amendment seems out of reach.

Jurisprudential Literature

Although there is general agreement between jurisprudential analyses of privacy and those of philosophy, the former is constrained by the requirements of legal reasoning. This is no small matter because legitimate legal reasoning requires logical development from either black letter law or precedent. As a result, inclusion of privacy, understood as an intangible value, into the law has been hindered by the overwhelmingly material basis of the common law foundation of our legal system and cases devolving therefrom. Even if a general consensus of privacy's importance were to develop, legal reasoning constrains or precludes this understanding from being codified de novo. Because there is no explicit right to privacy articulated in the Constitution of the United States, there is no place from which to begin. Nonetheless and in spite of the

inherent difficulties, for more than a century legal scholars have endeavored to find a way to incorporate privacy rights into the law.

Modern consideration of privacy arose in jurisprudential literature near the end of the 19th century. James Fitzjames Stephen wrote of the relationship between intimacy and privacy in 1873,[8] and Judge Thomas Cooley is said to have characterized privacy as "a right to be let alone" in 1880.[9] For most philosophers and jurisprudents, discussion of privacy's value and importance is most often dated to a law review article by Samuel Warren and Louis Brandeis in 1890. The Warren-Brandeis argument, in some senses, anticipated the actual establishment of a constitutional right to privacy by Justice William O. Douglas, writing for the majority, in Griswold v. Connecticut in 1965. Two law review articles, one by William Prosser in 1960[10] and one by Edward Bloustein in

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[8] James Fitzjames Stephen, Liberty, Equality, Fraternity (New York: Holt, 1873).

[9] Judge Thomas Cooley, The Elements of Torts (Chicago: Callahan, 1880) 29. "The right to one's person may be said to be a right to complete immunity; to be let alone." The phrase is often mistakenly ascribed to Justice Brandeis who included it in his dissenting opinion in Olmstead v. United States, 277 U.S. 438 (1928). Cooley's use of the phrase, "the right to be let alone," referred specifically to a person's immunity from the harm of assault and battery. Warren and Brandeis extended this meaning.

[10] William Prosser, "Privacy (A Legal Analysis)," California L Rev 48 (1960) 338-423.

1964[11] signalled an increasing awareness of and concern for privacy in the legal realm.

These early discussions of privacy highlight the tension between privacy conceived of as a property-based right as opposed to a more general, spiritual right. Had the issue been resolved in favor of the former characterization, little further debate would have been called for as the law concerning property was evolving on its own, without requiring discussion of privacy at all. However, some jurists considered the property-based model insufficient to protect the intangible aspects of privacy, specifically the values of sentiment and experience found in particular kinds of human companionship. Thus, issues of intimacy and individuality came to be included in jurisprudential debates about privacy.

James Fitzjames Stephen, an English jurist, was concerned with privacy in the context of the relationship between liberty and morals. I cite two passages in full because it is strikingly clear that Stephen anticipated, by a full 90 years, contemporary philosophical articulations of the central and most relevant values protected by privacy.

> Legislation and public opinion ought in all cases whatever scrupulously to respect privacy. To define the province of privacy distinctly is impossible, but it can be described in general terms. All the more

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[11] Edward J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," New York University L Rev 39 (1964): 962-1007.

> intimate and delicate relations of life are of such a nature that to submit them to unsympathetic observation, or to observation which is sympathetic in the wrong way, inflicts great pain, and may inflict lasting moral injury. Privacy may be violated not only by the intrusion of a stranger, but by compelling or persuading a person to direct too much attention to his own feelings and to attach too much importance to their analysis.[12]

> That any one human creature should ever really strip his soul stark naked for the inspection of any other, and be able to hold up his head afterwards, is not, I suppose, impossible, because so many people profess to do it; but to lookers-on from the outside it is inconceivable.
>
> The inference which I draw from this illustration is that there is a sphere, none the less real because it is impossible to define its limits, within which law and public opinion are intruders likely to do more harm than good. To try to regulate the internal affairs of a family, the relations of love or friendship or many other things of the same sort, by law or by the coercion of public opinion, is like trying to pull an eyelash out of a man's eye with a pair of tongs. They may put out the eye, but they will never get hold of the eyelash.[13]

Stephen emphasized several points which are recurring themes in today's privacy literature. First, he acknowledged that defining privacy is impossible although it is nonetheless real for this, but he agreed that we could attempt a general description by pointing, as it were. Although many have attempted definition, problems of circularity remain. Stephen's early conclusion stands as

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[12] Stephen 160. Echoed by Benn, Schoeman and Gerstein. See Chapter III.

[13] Stephen 162.

the general consensus today. Other points, by now familiar, are 1) privacy's central connection to intimate relationships, 2) the necessity of keeping private those aspects of our lives which require sympathetic understanding in order to survive undistorted, 3) a violation of privacy occurs when one is caused to become overly self-aware, and 4) the inconceivability of a complete lack of any privacy. In general, Stephen's arguments connect respect for privacy to respect for individual persons as moral beings. It is also important to note that Stephen concluded that public opinion is as much a threat to privacy as is the law.[14]

It was, in fact, a reaction to exposure in the society column of a Boston newspaper that prompted the germinal Warren-Brandeis law review article. The Warrens were of the elite of Boston society, entertained frequently and their parties were covered by the newspapers in personal and embarrassing detail. Because the standard of the time was for genteel people to keep their personal affairs out of the public eye and because the newspaper published an expose of his daughter's wedding, Samuel Warren, outraged, was pushed to act.[15] He approached his former law partner, Louis Brandeis, subsequently a Supreme Court Justice, to

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[14] This is the distinction I have made between political privacy and quasi-political privacy. The former is a claim against the state and its laws, the latter is a legal claim against other people.

[15] Prosser 338-39.

collaborate on the article with the intent to "consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is."[16]

Warren and Brandeis claimed to discover just such a principle by examining existing protections afford by common law rights to intellectual and artistic property. Protection afforded persons and property inevitably evolved from common law as advancing civilization brought increasing intensity and complexity to human life. As a result, "thoughts, emotions and sensations demanded legal recognition" and thus, the term "property," originally indicating corporeality, was extended to include every form of possession including intangibles such as the products and processes of the mind, works of literature and art, and goodwill.

Warren and Brandeis argued that the logical next step was protection of the person, securing the "right to be left alone." Invasion into the "sacred precincts of private and domestic life" by instantaneous photographs and newspaper reports motivated this move. They argued that the publication of gossip trivializes the intimate details of a person's life and "destroys at once robustness of thought

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[16] Warren and Brandeis 195. Note that their stated interest is in a principle of law implied by the black letter.

and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its (publicity) blighting influence."[17]

In their search for a principle of a right to privacy, Warren and Brandeis rejected laws of libel and slander because these offenses pertain only to damage to reputation in a material sense rather than a spiritual one. Instead, they were concerned with damage done to one's own feelings about oneself which is not included as an essential element in libel and slander. Libel and slander laws recognize no compensation for mere injury to feelings although it may be included as an addendum to other legal injury.

The common law rights to intellectual and artistic property, however, do offer the requisite principle because they are, according to Warren and Brandeis, instances of a general right to privacy. It is in this body of law they find the implication they make explicit by their reasoning. In securing to each individual the right to his or her intellectual and artistic productions, the common law recognizes the individual right to determine, ordinarily, to what extent his or her thoughts, sentiments and emotions shall be shared with others. This right does not depend upon the particular method of expression nor does it depend upon the value of the thought, the emotion involved or the excellence of the expression. This right is lost only when

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[17] Warren and Brandeis 194-95.

the author communicates his production to the public. Importantly, the law grants the author control over not only the means and content of the expression but whether there shall be an expression at all. An author may choose not to publish at all.

Warren and Brandeis acknowledged both that the right to prevent publication rests upon a property right and that this material orientation is difficult to extend to cases wherein the value lies in peace of mind or relief from anxiety provided by the ability to prevent any publication at all. However, they pointed out that personal letters to one's spouse or child are valuable simply because they are not published, i.e., they are intimate communications and control over their publication has nothing to do with the monetary value they may potentially have as published works. Thus, they argued that what is protected by the right of control over personal letters is the sentiment and thought expressed therein, a spiritual rather than material claim.

Warren and Brandeis conclude that the protection of thoughts, sentiments and emotions, expressed through writing or other arts, is an instance of a more general right, the right of the individual to be let alone.

> The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the

> principle of private property, but that of an inviolate personality.[18]

Warren and Brandeis argued that the right to restrain publication and reproduction is "the right to privacy, as a part of the more general right to the immunity of the person, - the right to one's personality."[19]

In considering whether this a "property" right, they responded that personal writings and other productions of the intellect can be understood as property only if the word is used in an extended and unusual sense. They denied that the principle protecting personal writings and any other production of the intellect or emotions is the right to property. Instead, they argued the principle is a right to privacy that deserves separate recognition. Warren and Brandeis maintained that no new principle was required to extend protection to personal appearance, sayings, acts and personal relations, domestic or otherwise.

They did not argue, however, that the right to privacy is unlimited and they acknowledged that determination of the exact line at which the "dignity and convenience of the individual must yield to the demand of the public welfare or of private justice would be a difficult task." To this end, they offered a few general rules analogous to those found in the law of slander and libel as well as the law of literary

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[18] Warren and Brandeis 200.

[19] Warren and Brandeis 201.

and artistic property.[20] They distinguished between matters of public concern and those of private citizens including the communication of otherwise private matters in court, legislative assemblies or other public bodies. They also articulated a distinction between the right to privacy and the law of libel and slander by noting that the truth of a personal matter made public is no defence against invasion of privacy, that such an invasion is equally injurious whether the motives are malicious or not. A right to privacy implies that the prohibition against exposure is not against inaccurate or malicious portrayal of private life but of its depiction at all.

By denying that privacy is a "property" matter in the strictest sense and by formulating a conception of privacy as protection for the "inviolate personality" and "the right to one's personality," Warren and Brandeis anticipated by some 60 years the shift in focus from privacy as a particular physical place, viz., the four walls of home, to an intangible value similar to liberty, peace and happiness. They made no effort to define what privacy is and left to posterity the task of understanding and clarifying their claim that a right to privacy exists and is implied in already existent law, a task which continues to this day.

Warren and Brandeis' reliance on tort law for the principle of a right to privacy was disputed by William L.

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[20] Warren and Brandeis 204.

Prosser, the foremost jurisprudent in the area of American tort law. He argued in 1960 that there is no distinct and separable right to privacy because there is nothing coherent or distinct about privacy claims taken as a whole.

At issue in early twentieth century litigation of "privacy" cases was whether a right to privacy existed at all. Very little concern was shown for what such a right would be, if it existed, or what it was that was being protected by the right. These two concerns have been addressed in legal writings only since mid-century. Prosser claims, in his survey of privacy case law, that what has emerged is in fact not one single tort (a right to privacy) but, instead, a complex of four distinct torts tied together by the umbrella term "privacy." According to Prosser, the only common feature of these four separate torts is that they all involve interference with the right of the plaintiff "to be let alone."[21]

He argues that Warren and Brandeis' right to privacy reduces to the following four separate torts which are clearly distinguishable from one another on the basis that some rules applicable to each are not transferable to the others.[22] They are:

(1) Intrusion upon the plaintiff's seclusion or

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[21] Why Prosser did not see this very fact as a cohering force he does not say nor can I guess.

[22] Prosser 344-45.

solitude, or into his private affairs.

(2) Public disclosure of embarrassing private facts about the plaintiff.

(3) Publicity which places the plaintiff in a false light in the public eye.

(4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

The first class of torts involves intrusion initially into such varied locales as a birthing room, a home, a hotel room, a woman's shopping bag in a store and later was expanded to include such nonphysical intrusions as wiretapping of private conversations and the telephone hounding of a debtor by a creditor at his home or office. Protection from illegal compulsory blood tests also falls under this particular kind of tort. Prosser says that, in these cases, what is intruded upon or pried into must be, and be entitled to be, private. He concludes that it "appears obvious that the interest protected by this branch of the tort is primarily a mental one," and seems to be an extension of laws of trespass, nuisance and the intentional infliction of mental distress.[23]

The second separate tort involves public disclosure of embarrassing private facts. Prosser illustrates this category with a famous 1931 California case, Melvin v. Reed. The plaintiff had at one time been a prostitute and

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[23] Prosser 347-48.

defendant in a murder trial. Subsequently, she had married Mr. Melvin and rehabilitated her life style to the degree that none of her friends and acquaintances were aware of her previous notoriety. Seven years after her marriage, the defendants produced a movie based on the facts of her life, including the plaintiff's maiden name, with the result that her life was ruined. The California court held the woman's privacy had been invaded on a vague constitutional provision that everyone has the inalienable right to "pursuing and obtaining happiness."[24]

Similar cases litigated under this category of torts involve publication of a person's name as a debtor, medical pictures of a person's anatomy, details of a woman's domineering tendencies and her use of profanity. Inclusion in this branch of the right of privacy requires that disclosure of private facts be a public disclosure and not a private one, that the facts disclosed are private ones, and that the disclosure must be such that a reasonable person of ordinary sensibilities would be offended. The veracity of the fact(s) revealed is no defense to the suit. This group of torts is distinguished from the intrusion cases in that the interest protected here is reputation with the mental distress component found in libel and slander. Prosser

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[24] Prosser 348-49.

claims that this kind of tort is an extension of defamation law.[25]

The third form of invasion of privacy involves publicity that places the plaintiff in a false light in the public eye. This tort takes several forms including falsely attributing to a plaintiff some opinion or utterance, fictitious testimony used in advertising and entry of someone into popularity contest of an embarrassing kind without his permission. Use of a person's picture to illustrate a book or article about an embarrassing illegal or immoral activity with which he has no connection also falls into this tort category. The false light need not necessarily be defamatory, it only need be something that would be objectionable to an ordinary person in reasonable circumstances.

This third category is distinct from intrusion and disclosure of private facts. Although similar to the disclosure torts in that the interest protected is reputation, it differs from the former in that false light cases involve lies while the disclosure of private facts involves truths. Both require publicity. The false light cases offer a remedy not found under the other torts.[26]

The fourth and final category of privacy torts involves the appropriation of a person's name or likeness for one's

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[25] Prosser 355.

[26] Prosser 359.

own advantage or benefit. Case law relevant to this tort includes many plaintiffs who have recovered damages when their names, pictures or other likenesses have been used to advertise a defendant's product, to add luster to a corporate name or for other business purposes. It is not the name itself involved here but the name as a symbol of a person's identity. It is perfectly legal to use whatever name one wishes, even for oneself, unless the use of the name is for some advantage, e.g., to obtain credit or personal information, or to pose as another person for some other benefit.[27]

Appropriation is distinct from intrusion, disclosure of private facts and false light cases in that the interest protected is a proprietary one. A person may very well choose at some point to sell her name or likeness for her own monetary gain. According to Prosser, it is "pointless to dispute over whether such a right is to be classified as 'property'" because, once protected by law, it is a matter of right of value.[28]

Prosser admits there are some similarities to be found among these four classes of torts. The plaintiff's right is a personal one which does not extend to his family, unless, of course, their privacy has also been invaded in the same way. The right is not assignable, that is it does not seem

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[27] Prosser 361.

[28] Prosser 364.

to extend beyond the death of the plaintiff except where specifically provided for by law. The right pertains only to individuals and not to corporations or partnerships. In spite of these commonalities, Prosser argues that these torts are distinct and separable one from another and claims that the failure to understand this is the source of the present confusion in privacy law. Since Warren and Brandeis, the courts have found a single basis of liability with the result that the right to privacy has slowly expanded and encroached upon other distinct torts. Prosser describes this process as having occurred without plan, without realization of its significance and without consideration for its dangers. He did not maintain, however, that development privacy law is wrong. To the contrary, he acknowledged that it has been made necessary by abuses on the part of the defendants. But, Prosser argued that members of the bar should be aware of what they are doing in conflating four distinct and separate torts under the single umbrella of a right to privacy.

Although Prosser's analysis may be correct as far as it goes, as is true in philosophy, the price paid for reducing privacy to a conglomeration of interests is a diminished understanding of what it is we seek to protect. If we reduce privacy, as Prosser suggests we should, to issues of reputation, proprietary gain and emotional tranquility, we lose sight of the transcendent value in human moral and

social life provided by privacy which is not exhausted by any of the particular kinds of cases. That there is such a transcendent value is demonstrated by Prosser's inability to justify his reasoning about privacy without a reference to privacy itself. This situation is nearly identical to philosophical attempts to explain privacy's value by needed protection of private or personal affairs. Both suffer from circularity. Note that, in Prosser's argument, two of the branches of the privacy tort require further reference to privacy: intrusion upon the plaintiff's seclusion or solitude or into his private affairs, and public disclosure of embarrassing private facts. It would seem that Prosser's reduction of privacy to four separate and distinct torts relies, at least in part, on the very thing he claims does not exist as a coherent concept in itself.

Those who have recognized the inadequacy of reductive analyses like Prosser's have struggled to discover and articulate the principle joining otherwise superficially disparate concerns in cases involving privacy claims. Edward Bloustein, answering Prosser's law review article in 1964, defends Warren and Brandeis' thesis that a fundamental right to privacy requires protection. He characterizes the value protected by privacy claims as that of human dignity and, in so doing, contradicts Prosser's claim that no such single value transcends the seemingly disconnected conglomeration of privacy claims.

Bloustein's stated concern is motivated both socially and legally. Because we lack a clear sense of what interest or interests are protected in privacy cases, the courts have been unable to arrive at a consensus regarding the wrongs or the defenses to them. Bloustein characterizes such disorder as jurisprudentially and pragmatically distressing. He argues that an analysis of privacy is socially important because technological advances have enabled new and frightening invasions of privacy.[29] Thus, Bloustein's focus is twofold: to discover the interest or social value involved in individual privacy and, at the same time, mitigate the influential impact of Prosser's conception of privacy.

According to Bloustein, Warren and Brandeis were motivated to write their article from a fear that invasions of individual privacy would "destroy individual dignity and integrity and emasculate individual freedom and independence."[30] Although they were not successful in describing the interest violated by publicity of private lives, it is possible, by looking at their "asides of characterization and passing attempts at finding a verbal equivalent of the principle of privacy," to discover that at which they pointed.[31] He relies upon Warren and Brandeis

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[29] Bloustein 963.

[30] Bloustein 969.

[31] Bloustein 968.

for the following parameters: privacy is a spiritual value, invasions of privacy affect a man's estimate of himself and his feelings, and, most significant for Bloustein, the principle of privacy is based on protection of the inviolate personality.

Bloustein takes the principle of "inviolate personality" to involve "the individual's independence, dignity and integrity; it defines man's essence as a unique and self-determining being." He argues that individuality, defined in our culture as including the right to be free from certain types of intrusions as well as a "measure of personal isolation and personal control over the conditions of its abandonment, is the very essence of personal freedom and dignity."[32] It is because our tradition posits such dignity and independence that the law gives to a person the right to determine to what extent his thoughts, sentiments and emotions shall be communicated to others.[33]

Bloustein argues that this principle (or some other) underlies individual privacy cases, denying Prosser's claim that there is neither a single tort nor a single value protected by the four distinct torts. Through careful analysis of Prosser's four privacy torts, Bloustein finds

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[32] Bloustein 971. The relationship between privacy and liberty needs further serious consideration in law, as it does in philosophy. For an excellent beginning, see Judith DeCew, "Defending the 'Private' in Constitutional Privacy," The Journal of Value Inquiry 21 (1987): 171-184.

[33] Bloustein 969.

that the fundamental value of human dignity and integrity provide the principle underlying privacy claims. He illustrates this point by examining the "intrusion" tort of Prosser's analysis. Whereas Prosser sees the wrong involved in this kind of tort as resting upon the mental distress caused by the intrusion, Bloustein concludes that the mental distress, itself, is due to the invasion of the person's privacy and the companion affront to personal dignity. For example, Bloustein points out that a woman's legal right to give birth without unwanted onlookers is not grounded on the desire to protect her emotionally but rather on a desire to maintain her human dignity. When this right is violated, the emotional response, outrage, flows from the indignity done. Bloustein also observes that eavesdropping, wiretapping, unwanted entry into another's home and other such intrusions may cause distress and embarrassment but this is not what makes these acts wrong. They are wrong because they are demeaning of individuality, and they are such whether or not they cause emotional trauma.[34] Because one chooses privacy, at least in part, to protect personal dignity, mental distress results from invasion of privacy itself.

Bloustein maintains that Prosser has also missed the underlying value for which protection is sought in the second tort characterized as "public disclosure." Bloustein

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[34] Bloustein 970-71.

illustrates his claim by describing a case involving publication of a photo of a deformed newborn infant. Although Prosser concluded that this tort rested upon the concern for "reputation," the parents were not concerned with a possible loss of reputation. Instead, they were mortified and insulted that the world should be a witness to their private tragedy. Any potential scorn and ridicule are merely incidental wrongs.

Even if the public takes a sympathetic view, as in the deformed baby photo, the plaintiffs' complaint is that some aspect of their life has been held up to public scrutiny. In effect, unchosen, unwanted publicity is a kind of intrusion; it is as if thousands of people were suddenly peering in on one's private life. The complaint is not for loss of reputation but that a reputation has been established at all. Bloustein maintains that the real wrong here is intrusion on privacy. "The wrong is in replacing personal anonymity by notoriety, in turning a private life into a public spectacle." Publicity concerning aspects of a person's private life represents an imposition on and affront to a person's human dignity. "Physical intrusion and publicity concerning intimate affairs are simply two different ways of affronting individuality and human dignity. The difference is only in the means used to threaten the protected interest."[35]

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[35] Bloustein 974-77.

Bloustein argues that the same interest or value underlies Prosser's remaining two kinds of torts. "False light" cases, those involving the interest of reputation, also involve an assault on individual personality and dignity. The remaining tort category, "appropriation for the defendant's advantage of the plaintiff's name or likeness," involves the use, without the person's consent, of a likeness to advertise a product. Although Prosser understands the interest involved here to be a proprietary one, Bloustein notes that the plaintiffs primarily complain of loss of liberty, humiliation, loss of respect and admiration, mortification, and degradation, complaints which are not of a pecuniary nature. Bloustein notes that the individual degradation resulting from the use of a personal photograph for commercial purposes turns a person into a commodity and makes him serve the economic needs and interests of others against his will. What is demeaning is the commercialization of an aspect of personality. In other words, this is the reduction of an Arendt <u>who</u> to a <u>what</u>. Every person has the right to prevent commercialization of an aspect of his or her personality not because of its commercial worth but because to do otherwise would be demeaning to human dignity.[36]

Because Bloustein's interest is social as well as legal, he argues that Prosser's conclusion (the four kinds

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[36] Bloustein 982-88.

of torts are explanatory of privacy) fails to reconcile privacy in tort cases with non-tort cases and issues of nonlegal privacy, i.e., between family members. Bloustein points out that there are many forms of protection for privacy found in constitutions, statutes and common law which do not involve tort claims. For example, the Fourth Amendment protects against unreasonable governmental intrusion into a person's home. He argues that if Prosser is correct and the wrong here is the intentional infliction of emotional distress, then the conceptual link between the Fourth Amendment and privacy torts is lost. The constitutional protection involves individual liberty and security. However, if one sees the wrong as an affront to human dignity and integrity, there is coherence between the constitutional and statutory protections of privacy.[37]

Prosser maintained that the confusion in privacy law resulted from failure to separate the four distinct "privacy" torts. Bloustein argues the reverse, that the confusion in privacy law results from failure to understand that all privacy cases, torts, criminal and constitutional, have a common underlying principle, that is, violation of a person's privacy is an affront to their dignity, integrity, personality, and, in summary, their individuality and freedom.

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[37] Bloustein 989.

He also ascribes confusion to the fact that the language of law is exceedingly limited in vocabulary of the mind and, consequently, is unable to sufficiently distinguish between distress, humiliation, anxiety, indignity, mental suffering and the like. Bloustein further suggests that a proper and correct understanding of privacy cases can help us understand that the value at issue is a spiritual one and not a matter of property or reputation. Although the identification of a spiritual interest underlying all privacy cases does not, in itself, furnish a solution to privacy disputes, it can be instrumental in legal development. If the interest involved is conceived of as a spiritual one, the preservation of individuality and dignity, rather than one of property, the values against which it is weighed will be different. This will, in turn, have a significant influence on the development of the tort of privacy. Identification of the social value involved in privacy will help determine the character of new legal remedies for threats to individual privacy. Bloustein argues that conceptual unity in privacy cases is to be found in protection of individuality and personal dignity.

The essence of the debate between Prosser and Bloustein is whether or not there is or should be a right to privacy in itself. The debate also centers on whether privacy is adequately characterized as an interest in property, including the ownership of one's body, or interests in

spiritual values such as dignity, integrity and individuality.[38]

Stig Stromholm, in his comprehensive analysis of international law on the right of privacy and the right of personality, concludes that rights of privacy and rights of personality synthesize concerns revolving around an individual's freedom, bodily and mental integrity and property.[39] The dispute, according to Stromholm, is actually less one of definition and classification than discussion of the same notion occurring on different levels of abstraction. On the one hand, analyses like Bloustein's, based on conceptions such as "human dignity," are so general that they are not very helpful for practical purposes, that is, in deciding court cases. On the other hand, narrow definitions, such as Prosser's, are dangerous because they close the field of privacy law to new and unforeseeable developments which may be accepted if a broader and more general formula is admitted.

There is considerable difference between analyzing and protecting privacy in a strict sense and the protection of human personality in general which sees the "right to be let

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[38] This same kind of argument is found in philosophical literature, for example between Judith Jarvis Thomson and Thomas Scanlon. Thomson, "The Right to Privacy," and Scanlon, "Thomson on Privacy," Philosophy & Public Affairs 4 (1975): 295-322.

[39] Stig Stromholm, Rights of Privacy and Rights of Personality: A Comparative Study, (Stockholm: P.A. Norstedt & Soners Forlag, 1967) 43-48.

alone" as one element of the far wider concept of "rights of the personality." Although the notion of "right of personality" is wider and more vague than the concept of privacy, the actual conflicts covered by the two terms often coincide as far as the law is concerned. The fundamental question Stromholm sees in privacy law is whether it is better to lay down wide principles to accommodate future needs or to formulate more detailed rules and trust in the imagination of the courts and the possibility of future reforms.

Jurisprudence continues to salute and encourage development of privacy law along the lines of a general principle, such as those undertaken by Warren and Brandeis, Bloustein and Stromholm. Paul Freund observes that the formation of a distinct concept of privacy, in preference to working with the traditional property and breach of trust categories, reflects claims of democracy.[40] Freund offers essentially the same reasons for adoption of a unitary concept of privacy as were given by Stromholm: a large concept of privacy is needed to offset equally large rhetorical counterclaims such as freedom of inquiry, freedom of the press, right to know, etc. Secondly, he argues that a reduced conception, such as Prosser's, also reduces our chances to accommodate new relations. Finally, Freund

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[40] Paul A. Freund, "Privacy: One Concept or Many," Nomos XIII, 187.

argues that the choice need not be simple rejection or adoption of a legal conception of privacy. The law, like science, operates with different levels of generalities. A higher level of abstraction is more valuable in the statement of principles because it can assimilate more. "A principle is a more plastic formulation (than a rule), useful for predicting and shaping the course of legal development." He claims it is here that the right to privacy is of cardinal worth.[41]

American constitutional law took a dramatic turn towards a "large" concept of privacy and against the reductive analysis urged by Prosser when Justice William O. Douglas found a right to privacy implicit in the Constitution and Bill of Rights.

Case Law

The same year Bloustein's law review article supporting Warren and Brandeis was published, the Supreme Court of the United States heard arguments in Griswold v. Connecticut, a case involving the state of Connecticut's right to forbid use of contraceptives by married couples. As a result of the issues raised by Griswold, a constitutional right to privacy was established. Justice Douglas described it as a penumbra right, one which emanated from the rights

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[41] Freund 197.

explicitly guaranteed in the Constitution. As a result of this reasoning, the Griswold opinion was received with both applause and outrage in legal circles. Douglas was roundly criticized for lack of strict legal reasoning supporting his conclusions as well as for a return to a "natural rights" theory of law. The critics did not maintain that Douglas' reasoning was inherently faulty but that he had failed to rely on either the black letter or the precedent of case law.

Douglas prefaced his argument in Griswold by noting that the Court had previously found a wide variety of rights emanating from the explicit guarantees of the Constitution. The First Amendment has been found to protect freedom of association, the right to educate a child in a school of the parents' choice as well as the right to study a particular subject or foreign language even though there is no mention of these rights in the Constitution or Bill of Rights. He concluded, on the basis of the various arguments supporting such rights, that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[42]

After establishing precedence for the method he employed, Justice Douglas argued that various constitutional guarantees create zones of privacy: the First Amendment by guaranteeing the right of association; the Third Amendment

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[42] Griswold 484.

by forbidding the quartering of soldiers in any house in time of peace without the consent of the owner; the Fourth Amendment by affirming the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"; and, the Fifth Amendment by protecting persons from self-incrimination. Douglas buttressed his argument by citing the Ninth Amendment which says, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[43] On these bases, Douglas concluded that the right of privacy of married couples in regard to contraception is "a right of privacy older than the Bill of Rights - older than our political parties, older than our school system."[44]

Justice Goldberg, with Justice Brennan joining, wrote a concurring opinion in Griswold which relies almost exclusively on the Ninth Amendment. It was added to Douglas' majority opinion in order to emphasize the relevance of this amendment to the Court's holding. Goldberg argued that the Ninth Amendment is a repository for those personal rights that are fundamental yet not explicitly mentioned in the Bill of Rights or Constitution. In order to determine which rights are fundamental, judges

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[43] Griswold 484.

[44] Griswold 486. It is this comment to which critics refer when they claim that Griswold was a return to a "natural rights" theory of law.

"must look to the 'traditions and (collective) conscience of our people' to determine whether a principle 'is so rooted (there)...as to be ranked as fundamental.'"[45] The concurring opinion concludes that "the right to privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'"[46]

Although both Douglas and Goldberg argued for a general right to privacy, Griswold addressed and established marital privacy specifically. According to Justice Goldberg,

> (T)he entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected. ... The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family - a relation as old and as fundamental as our entire civilization - surely does not show that the Government was meant to have the power to do so.[47]

Despite vociferous criticism of Douglas for what are called his libertarian expansions of constitutional protections, "the decision endures because Douglas' conclusion was correct. In declaring a right to privacy, Douglas had identified the most critical constitutional

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[45] Griswold 493. Citations omitted.

[46] Griswold 494. Citations omitted.

[47] Griswold 495-96.

battleground for human dignity in the modern age."[48] Although Griswold has been under constant attack since its publication, it remains one of the most important constitutional decisions of the twentieth century. Highly controversial and consequential cases have been decided, in part, on its conclusions.[49]

Where Griswold found that a state could not forbid distribution of contraceptives to married couples, the Court subsequently concluded in Eisenstadt v. Baird that limiting contraceptive distribution to married couples only was unconstitutional and protected access to them for unmarried people as well.[50] In both Griswold and Eisenstadt, the issues raised related to decisions about child bearing.

> ... if the constitutional right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[51]

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[48] James F. Simon, Independent Journey: The Life of William O. Douglas (New York: Harper, 1980) 349.

[49] E.g., Roe v. Wade, 410 U.S. 113 (1973) concerning abortion; Stanley v. Georgia, 394 U.S. 557 (1969) concerning possession of "obscene" materials in one's home; and, Loving v. Virginia, 388 U.S. 1 (1967) concerning interracial marriage.

[50] Eisenstadt v. Baird, 405 U.S. 438 (1972). Also see Carey v. Population Services International, 431 U.S. 678 (1977) in which the Court found that the sales of contraceptives cannot be limited to pharmacists or to sales to persons over the age of 16.

[51] Justice Brennan in Eisenstadt, at 453. Emphasis in the original.

It is this line of reasoning that led to the famous and controversial decision in Roe v. Wade which established a woman's right to terminate her pregnancy, at least in the first trimester, as a fundamental right protected by Constitutional privacy. In Roe, the Court noted that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in a guarantee of personal privacy.[52] Case law makes it clear that this right has extended to include activities relating to marriage, procreation, contraception, family relationships and child rearing and education. Unfortunately, the Court did not elucidate what it meant by "personal" or "fundamental" rights nor did it say what the criteria could be for such a designation. This omission has subsequently become a crucially important issue in adjudicating privacy claims and we will see the ramifications of this fact in the Court's decision in Bowers v. Hardwick.[53]

Although Griswold, Eisenstadt, and Roe v. Wade all involve claims of privacy by married and single persons for decisions involving whether to bear children, Stanley v. Georgia, also based on Griswold, protected as private the right to view pornography in one's own home.[54] It is thus

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[52] Roe v. Wade 152. Citations omitted.

[53] Bowers v. Hardwick, 478 U.S. 186 (1986).

[54] Stanley v. Georgia, 394 U.S. 557 (1969).

possible and reasonable to conclude that matters pertaining to one's sexuality and its intimate expression are fundamentally personal in the requisite sense and, therefore, are protected by the right to privacy.

The gradual and apparently logical development of privacy case law protecting as fundamental the personal nature of one's sexually and intimate associations was abruptly halted when, in 1986, the Court found in Bowers v. Hardwick that homosexuals do not have a right to privacy for their sexual expression in their own bedrooms. The majority rejected Hardwick's claim to privacy because, in their view, homosexual activity cannot be logically connected to family, marriage, and procreation. They denied that, in itself, private sexual expression between consenting adults is constitutionally protected from state regulation.

Although the philosophical nature of privacy as a value is interesting in itself, the pragmatic ramifications of this interest are pushed to the forefront by Bowers. It is precisely the Court's denial that privacy rights extend to intimate sexual expression generally which inspired this project. On the basis of Bowers v. Hardwick, I came to the conclusion that either there was no clearly articulated principle of privacy in the law or that what I had intuitively taken to be the values at stake in claims to privacy were somehow unclear and/or mistaken. In either

case, a personal right to privacy appeared to be in jeopardy.

It is in the nature of the work of the Supreme Court to be continually faced with interpreting the various rights explicit or implicit in the Constitution and Bill of Rights. Although the values protected there are broad and vague, the issue of privacy is especially problematic. Privacy is a recently recognized right and the relatively short time it has been under serious scrutiny has yet to produced anything resembling a coherent and useful principle. As long as law lacks a principle underlying the wide variety of privacy claims, the course of legal development will likely continue to be incoherent and at odds with itself.

As the Bowers v. Hardwick decision strikingly indicates, individual privacy is fragile, left in a tenuous state, open to compromise or even denial. In order to fully appreciate our situation in this regard, it behooves us to examine the Court's rejection of Michael Hardwick's claim to privacy as protection for his intimate sexual expression in the confines of his bedroom.

CHAPTER VI

BOWERS V. HARDWICK

Bowers v. Hardwick, also known as the "Georgia Sodomy Case," was decided by the United States Supreme Court in 1986 to the effect that the State of Georgia has a right to deny privacy to Michael Hardwick specifically and homosexuals in general for their intimate sexual expressions, even in the confines of their own bedrooms. This case is significant because it illuminates the confusion in privacy law at the constitutional level. It is exceedingly difficult to justify the Court's denial of a right of privacy to homosexuals for their intimate expressions when, at the same time, the Court confirms a right to privacy for heterosexual couples for precisely the same sorts of personal expressions.[1] The general consensus of those who disagreed with the Court's decision is that the Justices in the majority reacted on the basis of homophobia. Although this is arguably true, such an analysis may also be too superficial.

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[1] "Paradoxical as it may seem, our prior cases thus establish that a State may not prohibit sodomy within the sacred precincts of marital bedrooms, or indeed, between unmarried heterosexual adults." Justice Stevens, dissenting, Bowers v. Hardwick 218. (Citations omitted.)

Supreme Court decisions since the Warren Court have taken the position that further expansion of civil rights not explicitly grounded in the Constitution is dangerous judicial activism. The majority explicitly noted this concern in Bowers, citing vulnerability to charges of illegitimacy when producing judge-made constitutional law.[2] Therefore, in deciding Bowers, the Court construed the issues involved in the most narrow possible sense with the result that the constitutionally protected zone of privacy was not extended and, arguably, was shrunk.

It can also be argued that the lack of a clearly articulated conception of privacy's value to serve as a principle of law contributed to the truncation of relevant case law evolution. The Bowers majority failed to comprehend the significance of privacy's role in individuality and intimacy, that is, in the development and sustenance of personhood generally. In fact, the Supreme Court's understanding of privacy is limited to its decisional and spatial components. As I have argued, this conception of privacy is inadequate to explain its full value.

Finally, and admittedly purely speculative, the lingering shadow cast by the ancient Greek public/private distinction may account, in part, for the predilection of the Court to distinguish between heterosexual and homosexual

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[2] Bowers 194.

intimacy, affirming the former as private and relegating the latter to public legislation.[3] Regardless of the grounds of the Bowers decision, the majority opinion fails to protect intimacy and individuality for all citizens and, instead, deprives some persons of a range of privacy on the basis of alternative sexual orientation. Specifically, the constitutional right to privacy does not grant equal protection to all of America's citizens.

In this chapter, I will examine the reasoning in the Bowers decision. I will then apply my conception of privacy's value to the case in order to test its applicability to real issues actually confronting the legal system, issues involving real people. Although this move from theory to practice is necessarily hypothetical, being after the fact, it may indicate a direction for the future.

The conception of privacy's value I have explicated in Chapter IV can serve as a valuable principle in privacy law, assisting the evolution of judicial decisions and legislative enactments towards a right of privacy for all people based simply on their personhood rather than gender, sexual orientation, class or any other reductive category

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[3] See Chapter II. Procreation and other activities related to the biological survival of the species were private. Since homosexual sex is unrelated to procreation and given the "public" discussion of it in the Symposium, one may reasonably suspect that ancient Greeks may have drawn the line in the same place as did the Court majority with the exception that homosexual sex was not the pariah for ancient Greek society that it was for the Bowers majority.

applicable to human beings. The value of a principle such as the one I propose becomes evident in its application to Bowers v. Hardwick. If this principle is successful in explaining privacy case law, it could carry pragmatic importance by influencing those who make decisions in law, be they judges or legislators. All persons should be protected by a right to privacy, its value and necessity properly understood.

Facts and Background

Michael Hardwick had failed to pay a fine for public drunkenness and on August 3, 1982, an Atlanta police officer was dispatched to contact Hardwick on this prior matter. The officer knocked on the door of Hardwick's home and the person who answered the door advised the officer that he did not know whether Hardwick was home. He invited the officer inside to check for himself. The officer walked down the hall and, finding a door ajar, looked into a bedroom. In the bedroom, the officer saw Michael Hardwick and another man engaged in sexual activities fitting the Georgia description of sodomy.[4] Hardwick was seized, handcuffed and arrested. He spent the day in jail following his arrest.

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[4] Georgia Code Ann. 16-6-2(a) (1984): "A person commits the offense of sodomy when he (intended to be gender neutral) performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."

The felony offense of sodomy in the State of Georgia is punishable by a sentence of not less than one year and no more than 20 years in prison. The district attorney decided not to prosecute Hardwick.[5]

Hardwick sought the assistance of the Southern District office of the American Civil Liberties Union and brought suit in Federal District Court challenging the constitutionality of the Georgia statute as regards criminalization of consensual sodomy. He was joined in his suit by a heterosexual married couple known as John and Mary Doe. The Does also wished to challenge the statute as it criminalizes sodomy, which includes oral sex, because it applied equally to all, whether married or unmarried, heterosexual or homosexual. Both Hardwick and the Does stated to the court that they intended to continue to engage in sexual activity which was criminalized by the state in the privacy of their homes. The Does further stated that the state had "interfered" with decisions regarding their private lives and that they had been "chilled and deterred" from such activity by the existence of the statute and Hardwick's arrest.[6]

The defendants, including Michael Bowers, Attorney General of Georgia, submitted a motion to the District Court

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[5] Bowers 188. "After a preliminary hearing, the District Attorney decided not to present the matter to the grand jury unless further evidence developed."

[6] Hardwick v. Bowers, 760 F.2d 1202, 1204 (1985).

maintaining that Hardwick had failed to state a claim upon which relief could be granted. The District Court granted the motion. It further ruled that the Does did not have standing to bring suit. Both Hardwick and the Does appealed the dismissal.

The United States Court of Appeals for the Eleventh Circuit heard the appeal and reversed the District Court, finding that the Georgia statute violated Hardwick's fundamental right to privacy, protected by the Ninth Amendment and by the Due Process Clause of the Fourteenth Amendment.[7] The Court further found that "the State must prove ... that it has a compelling interest in regulating this behavior and that this statute is the most narrowly drawn means of safeguarding that interest."[8] Regarding the standing of John and Mary Doe, the Court of Appeals agreed with the District Court in finding they did not have standing to bring suit because they did not show they were under immanent threat of arrest on the basis of the statute in question. Michael Bowers, on behalf of the State of

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[7] Hardwick 1212. The relevant constitutional provisions are: Amendment IX: The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. Amendment XIV: Section 1. (in part) No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[8] Hardwick 1213.

Georgia, appealed the Court of Appeals ruling to the United States Supreme Court.

United State Supreme Court

Oral arguments were held March 31, 1986 and the Court rendered its decision June 30, 1986, reversing the judgement of the Court of Appeals, finding in favor of the State of Georgia. The Supreme Court, in a 5-4 decision, found that the Constitution does not confer any fundamental right on homosexuals to engage in acts of consensual sodomy.[9]

Dissenting opinions argued that Hardwick's case implicated the constitutional right to privacy in both its decisional and spatial aspects and that the sodomy statute could not be justified by either claims of public health and welfare or on the grounds that traditional Judeo-Christian values proscribe the involved conduct. Dissent further found that the statute could not be constitutionally applied to married or unmarried heterosexual couples and the selective application of the statute to homosexuals on the grounds that the citizens of Georgia consider homosexual sex immoral is in conflict with the broad scope of the statute.[10]

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[9] The Court's majority opinion was written by White, joined by Burger, Powell, Renquist and O'Connor. Dissenting were Blackmun, Brennan, Marshall and Stevens.

[10] Bowers 219.

How are we to understand the Court's reasoning? The briefs filed by petitioner Bowers on behalf of the State of Georgia and by respondent Hardwick tell us part of the story. They offer two distinct and incompatible characterizations of the issues which, in turn, depend upon competing theories of constitutional law. The brief filed by Bowers relies, in the main, upon a strict and narrow construction of the Supreme Court's prior decisions in privacy cases, essentially the black letter. The respondent's brief filed by Laurence Tribe on behalf of Michael Hardwick hinges on articulation of a principle of law underlying the same cases.

Brief of Petitioner (State of Georgia)

The State of Georgia, through Bowers, maintained that the question was whether the Constitution guarantees a fundamental right to homosexual sodomy. This characterization is of critical importance to the outcome of the case. By successfully narrowing the scope of the issue, Bowers succeeded in arguing that (1) there was no precedent granting a fundamental right to homosexual sodomy, (2) homosexual sodomy is essentially unlike those kinds of behaviors previously found to be protected by a right to privacy, and (3) the Court could not establish such a right because according to the Court's own method for deciding

whether or not a personal right is, in fact, fundamental, homosexual sodomy fails the test.

The Petitioner's brief did not deny that there is a constitutionally protected right of privacy. However, it did argue that based on the Court's prior decisions, notably Roe v. Wade, "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy."[11] Bowers argued that "(n)o such basis exists for adding the crime of sodomy to the list of fundamental rights thus far recognized by this Court."[12] Thus, since homosexual sodomy is not a fundamental right, it cannot be protected by privacy in terms of the Ninth Amendment or by the Due Process Clause of the Fourteenth Amendment.

This argument relies on a particular understanding of the Court's methodology for deciding whether or not a claimed right is, in fact, fundamental. Bowers argued that prior Supreme Court cases had analyzed the specific acts involved in claims to privacy rights in order to determine whether they were among those rights not enumerated yet retained by the people under the Ninth or Fourteenth

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[11] Brief of Petitioner, Bowers 19. (Citations omitted.) From microfilm of Supreme Court Docket No. 85-140, University of Oregon Law School. Subsequently referred to as Petitioner's.

[12] Petitioner's 20. Also note the question-begging nature of this statement. Of course, if homosexual sodomy were protected by a right to privacy, it would not then be a "crime."

Amendments.[13] The Petitioner discussed each of the particular kinds of acts the Court had previously protected and argued that since the Court had not found homosexual sodomy to be a protected act, it could not now do so, because it is unrelated to the kinds of behavior protected in prior cases. The Petitioners' brief argued that the

> common principles of this Court's privacy decisions have revolved around marriage, the family, the home and decisions as to whether through procreation the ancient cycles will begin again and, if so, in what manner the new generation will be brought up. These rights have always been with us, and are part of us. Sodomy is not now and has never been a right, fundamental or statutory, in existence to be 'retained by the people' under the Ninth Amendment.[14]

Additionally, Petitioner argued that the right to homosexual sodomy cannot be considered an unenumerated but inherent liberty protected by the Fourteenth Amendment. In order for a right to find protection in this area of the Constitution, the right must exhibit traditional values or conventional morality. Bowers argued that the Justices "must look at the 'traditions and (collective) conscience of our people' to determine whether a principle is 'so rooted (there) . . .as to be ranked as fundamental."[15]

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[13] "It is not so much the place where any given activity occurs that determines whether the activity is protected as a fundamental right as it is the nature of the activity itself." Petitioner's 28.

[14] Petitioner's 25.

[15] Petitioner's 25. (Citations omitted.)

Instead, Petitioner argued that homosexual sodomy has been abhorred from time immemorial, citing the Old Testament, St. Paul, Roman Law, St. Thomas Aquinas, English Courts following Reformation as well as statutes from Common Law. They further claim that "there is no validation for sodomy found in the teaching of the ancient Greek philosophers Plato or Aristotle." Even more recent thinkers, namely Immanuel Kant, have found sodomy to be unnatural.[16] Thus, the Petitioners concluded that because homosexual sodomy is neither part of traditional values nor conventional morality, it cannot find protection under the Due Process Clause of the Fourteenth Amendment.

The State of Georgia further denied that homosexual sodomy is protected either because it occurs within the home or by a constitutional right of association. These denials rest on the fact that homosexual sodomy is a crime and cite Justice Harlan in his dissent in Poe v. Ullman, 367 U.S. 497, 552-53 (1961), "The right of privacy is most manifestly not absolute. Thus, I would not suggest that adultery, homosexuality, fornication, and incest are immune from criminal inquiry, however privately practiced."[17]

The United States Court of Appeals for the Eleventh Circuit had found that Hardwick's homosexual sodomy "lies at

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[16] Petitioner's 20. Apparently Plato's ode to homosexual love in Plato's Symposium has been completely disregarded.

[17] Petitioner's 26.

the heart of an intimate association beyond the proper reach of state regulation."[18] In response, Bowers argued that "(T)here are and must be limits upon this right of intimate association."[19] He asserted that Georgia's sodomy statute

> does not impact upon an individual's First Amendment freedom to cultivate and transmit even unpopular ideas or political doctrines. It does not tell individuals who their friends may or may not be, or with whom they may spend their time, worship, work or engage in legitimate yet personal discourse. The statute most certainly does not interfere with personal decisions concerning marriage or family life, the raising of children or their education, or which members of a family will be permitted to live together.[20]

Bowers maintained that if the Court were to find homosexual sodomy to be protected by a right of intimate association, it would also then be forced to protect polygamy, consensual incest and, perhaps, prostitution, as well as adultery and fornication.[21]

Since homosexual sodomy falls neither within the categories of protected activities by a right of intimate association nor a general right of privacy, and since there is no fundamental right to homosexual sodomy, Petitioner concluded that the State need only show that the statute is

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[18] Petitioner's 29.

[19] Petitioner's 32, citing Justice Brennan in Roberts v. United States Jaycees, --U.S.--,104 S.Ct. 3244, 3250 (1984).

[20] Petitioner's 32.

[21] Petitioner's 33.

not arbitrary and has a "rational relationship" to a legitimate state purpose.[22]

The State of Georgia was justified in enacting the sodomy statute, according to Bowers, because of its legitimate and compelling interest in maintaining a decent and moral society. Bowers cited various Supreme Court cases to support his assertion that the police powers of the State are rightfully engaged in matters of morality, rules of domestic relations and the maintenance of a "decent" society.[23] Furthermore, he argued that it is the province of state legislatures to identify what the prevailing morality is and act upon this determination. The State of Georgia, through its elected representatives, had found that homosexual sodomy is anathema to a decent and moral society.

Finally, Bowers addressed the argument that homosexual sodomy is similar in kind to marital intimacies and suggested that if the Court were to decriminalize homosexual sodomy, this would not uplift sodomy to the status of intimate expression but would rather demote the sacred institution of marriage. He further asserted that if this legal distinction is lost, "it is certainly possible to make the assumption, perhaps unprovable at this time, that the order of society, our way of life, could be changed in a

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[22] Petitioner's 34.

[23] Petitioner's 34-46.

harmful way."[24]

In summary, the State of Georgia characterized the issue as whether there is a fundamental right to homosexual sodomy. The brief argued that there is no such personal liberty, either as part of traditional morality or as implied in the concept of ordered liberty. Thus, homosexual sodomy cannot be considered a right protected by privacy.

Brief of Respondent (Hardwick)

Laurence Tribe, arguing on behalf of Michael Hardwick, characterized the issue as involving "a claim of constitutional protection for the associational intimacies of private life in the sanctuary of the home."[25] Michael Hardwick claimed that his intimate and consensual sexual affairs should be immune from government intrusion because they are protected by a right to privacy under the Ninth and Fourteenth Amendments. According to Respondent, the relevant question before the Court was whether the State of Georgia "may send its police into private bedrooms to arrest adults for engaging in consensual, noncommercial sex acts, with no justification beyond the assertion that those acts

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[24] Petitioner's 38.

[25] Petitioner's 7. Tribe is a Law Professor at Harvard University Law school and author of text books of Constitutional Law.

are immoral."[26] The Georgia statute prescribes punishment for the activities described in Section 16-6-2 even if engaged in by two willing adults, whether married or unmarried, heterosexual or homosexual, behind the bedroom doors in their own home.

Although both Petitioner and Respondent argued in terms of a right to privacy as well as fundamental rights inherent in a concept of ordered liberty, they relied on distinctly different interpretations of the Court's opinions in prior privacy cases. Tribe argued that consensual sexual intimacy in the privacy of the home is constitutionally protected by both a right of privacy under the Ninth Amendment and as a fundamental liberty under the Due Process Clause of the Fourteenth Amendment. The value and importance of intimate associations are deeply rooted in the traditions and moral values of American citizens.

Tribe argued that values of intimate association and of the sanctity of the home are central to our tradition of liberty under the Due Process Clause and, as such, intimate expression between consenting adults within the home is fundamental and should be constitutionally protected, both by a right to privacy and as part of the concept of ordered liberty. It is also part of our traditional values and conventional morality that the home, particularly the

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[26] Brief of Respondent, Bowers 1. From microfilm of Supreme Court Docket N. 85-140, University of Oregon Law School. Subsequently referred to as Respondent's.

bedroom, is immune from State intervention unless there is substantial justification for the intrusion.

Given that the relationship for which Hardwick was arrested was both private by virtue of being intimate and private because having occurred in his home, there is double reason for the State to be required to provide justification for its intrusion in this case. Tribe argued that the State of Georgia gave no good reason for having intervened in Hardwick's intimate affairs in his own bedroom.[27] It has merely asserted the tautology that, "inasmuch as homosexual sodomy offends 'traditional moral values,' the State has declared (such conduct) to be morally wrong."[28]

The State of Georgia claimed that the right of privacy protects only activities relating to marriage, decisions of whether to conceive or bear a child, child rearing and education. In order for Bowers to have drawn this conclusion, Tribe points out he had to wholly ignore the

> Court's long tradition of sensitivity to government intrusions into intimacy and the home, <u>independent</u> of its concerns for family integrity. Moreover, the State wrongly supposes that it is the facts alone of prior cases that matter, and not their underlying principles.[29]

But, Tribe pointed out, the "Court has long recognized that 'because the Bill of Rights is designed to secure

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[27] Respondent's 4.

[28] Respondent's 25.

[29] Respondent's 8. (Emphasis in original.)

individual liberty, it must afford ... certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.'"[30] As long as the sexual activities criminalized by the Georgia statute do not involve children, commerce or coercion and take place in private, they must be considered to be within the realm of such "highly personal relationships."[31]

Hardwick's attorneys argued that the Supreme Court protected sexual intimacy between unmarried persons for purposes other than procreation and that this is apparent in the Court's decisions regarding the right of privacy in matters of contraception.[32] Although the Petitioner understood these cases as protecting narrow demographic decisions, i.e., whether or not to increase the size of one's family, Tribe maintained that they actually protect intimate human relationships. In order for the Petitioner to have read these cases so narrowly, the values protected therein had to have been ignored. Access to contraception confirmed in Eisenstadt and Carey as well as the right to abortion in Roe v. Wade were not limited to married couples. "In Eisenstadt, the Court declared a distinction between

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[30] Respondent's 9. (Citations omitted.)

[31] Respondent's 10.

[32] Respondent's 10, citing Carey v. Population Services Int'l 431 U.S. 678, 686 (1977); Eisenstadt v. Baird, 405 U.S. 438, 447-50 (1972); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

married and single persons unconstitutional. The plaintiff in Roe was unmarried. These decisions thus did not revolve around marriage or the family."[33] In fact, as part of each of these prior decisions, the Court protected the decision to engage in sex without procreating. "These holdings mandated heightened scrutiny ... of restrictions on non-procreative sex - sex solely as a facet of associational intimacy - whether between married partners or between unmarried individuals." Decisions regarding contraceptive use is protected from state intervention because they arise in the context of intimate sexual relationships which do not lose their intimate status when engaged in for reasons other than procreation.[34]

The State of Georgia conceded, in violation of the gender-neutral terms of its own statute, that it could not intervene between two consenting adult sexual partners so long as they are heterosexual; it argued solely against extending a right of privacy to homosexual practitioners. Tribe reasoned that since sexual intimacy between consenting adults (even involving those acts proscribed by Section 16-6-2) is constitutionally protected by an understanding of the Court's prior cases, and since homosexual sexual

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[33] Respondent's 11. Please note, however, that implicit in issues of contraception and abortion is the biological potential for procreation which is absent in homosexual relations.

[34] Respondent's 12.

intimacy is analogous to heterosexual sexual activities, including even the same physiological components, i.e., body parts, it should also be constitutionally protected. In other words, Hardwick's attorneys maintained that sexual intimacy in the privacy of the home is a generic sort of behavior. If noncoercive, noncommercial, adult sex is protected for some by a right to privacy, then it should be protected for all on the same basis.

Tribe also argued that the concept of ordered liberty includes a requirement that the private home be free from unjustified state intrusion. By extending its criminal arm into the bedrooms of private homes, the State of Georgia has ignored this fundamental principle, stated in United States v. Orito, 413 U.S. 139, 142 (1973): "The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, child rearing and education."[35]

As a long standing tradition, our commonly held values have given presumption to the sanctity of the home, as can be seen in the Fourth and Fourteenth Amendments.

> (I)n no (setting) is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home - a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their. . .houses. . .shall not

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[35] Respondent's 14.

be violated."[36]

The final argument offered on behalf of Hardwick responds to the assertion by the State of Georgia that its criminalization of homosexual sodomy is justified by the fact that the majority of the state's legislators deemed it to be immoral. His attorneys argued, to the contrary, that the mere invocation of contestable moral views is insufficient "to defend a law that so thoroughly invades individuals' most intimate affairs."[37] Furthermore, "consensual homosexual contact in private can no longer be deemed so transparently evil that a government need not explain its criminalization to any judicial authority."[38] For example, Justice Harlan, in Poe v. Ullman, could not justify criminalization of contraceptive use on the basis of general public opinion of an earlier day.[39] Justice however, condemned homosexual practices in the same case. But, in the intervening quarter century, more than half of the states have decriminalized private homosexual acts between consenting adults and the nation's professional societies have urged that homosexuality should not be

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[36] Respondent's 15, citing Payton v. New York, 445 U.S. 573, 589 (1980).

[37] Respondent's 4.

[38] Respondent's 14.

[39] Respondent's 18, citing Poe v. Ullman, 367 U.S. 497, 549-51 (1961), Justice Harlan dissenting.

condemned by medicine or law.[40] The Court's decision in Loving v. Virginia, 388 U.S. 1, 6 & n.5 (1967), found that interracial marriage cannot be deemed immoral after being decriminalized by most states that had once banned it.[41]

In fact, Hardwick's attorney argued that the State of Georgia should be required to explain or justify its criminalization of homosexual sodomy for some good reason other than that it is "immoral," and asked that the State of Georgia be required to prove it had a compelling interest in regulating this behavior.

Supreme Court Opinion

The foregoing summary of the briefs filed by Petitioner and Respondent in Bowers gives us the lines of reasoning followed by the Court in deciding the case. The divergence in the arguments centers on the particular description of the basic right being claimed. Bowers, for the State of Georgia, characterized the claimed right as one of homosexual sodomy; Hardwick, through his attorneys, portrayed his claim as one of intimate sexual association in the privacy of his home. The majority of the Court generally followed the reasoning laid out by Petitioner while the dissent found Hardwick's characterization more

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[40] Respondent's 8-9, Note 14.

[41] Respondent's 14.

compelling.

Majority

The Opinion of the Court concluded that the issue was "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such a conduct illegal and have done so for a very long time."[42]

The Court's majority found that, even accepting the decisions in prior cases conferring a right to privacy, none of the rights regarding child rearing and education, family relationships, procreation, marriage, contraception and abortion "bear any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case."[43] The majority argued that there is no connection between family, marriage and procreation on the one hand and homosexual activity on the other. Hardwick's claim was that prior cases represent the principle that private sexual conduct between consenting adults is constitutionally protected and this was denied on its face.

The majority also declined to find that there is a

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[42] Bowers 190.

[43] Bowers 190-91.

fundamental right to engage in homosexual sodomy under the terms of the Due Process Clauses of the Fifth and Fourteenth Amendments. They relied on two separate but related descriptions of fundamental liberties that are found in precedent. In Palko v. Connecticut, 302 US 319, 325-26 (1937), the Court characterized the rights qualifying for protection as those fundamental liberties "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if (they) were sacrificed." In Moore v. East Cleveland, 431 US 494, 503 (1977), Justice Powell characterized fundamental liberties as those that are "deeply rooted in this Nation's history and tradition." The majority concluded that neither of these formulations extends a right to homosexuals to engage in consensual sodomy.[44] The Opinion of the Court depended in part on the historical proscriptions against homosexual sodomy, both by the status of the forbidden conduct at the time the Bill of Rights was ratified and by the individual state proscriptions at the time the Fourteen Amendment was ratified.

Additionally, the majority explicitly noted the vulnerability of the Court to charges of illegitimacy when it deals with "judge-made constitutional law having little or no cognizable roots in the language or the design of the Constitution." As a result, they chose to resist expansion

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[44] Bowers 192.

of the substantive reach of the Due Process Clauses of the Fifth and Fourteenth Amendments. Hardwick's claim did not overcome this resistance.[45]

The majority also rejected the claim to protection by way of the sanctity of the home, finding, in essence, that the home protects only those conducts already determined to be fundamental rights. It expressed concern that if voluntary sexual conduct between consenting adults were to be found constitutionally protected, there would be no way for the Court to limit the claimed right. In such a situation, the majority felt the Court would be forced to distinguish only "by fiat" between homosexual sex and "adultery, incest, and other sexual crimes."[46]

Finally, the Opinion of the Court found that the presumed belief of the majority of the Georgia electorate that homosexual sodomy is immoral and unacceptable is an adequate rational basis for the Georgia statute. Thus, the judgement of the Court of Appeals was reversed.

Concurring

Chief Justice Burger's concurring opinion focused on the "ancient roots" of proscriptions against homosexual sodomy. He wrote that condemnation of such conduct is

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[45] Bowers 194.

[46] Bowers 195-96.

"firmly rooted in Judeo-Christian moral and ethical standards," it was a capital crime under Roman law, the law of England following Reformation, and the Common Law of England as received by the Colonies. For historical reasons, Chief Justice Burger concluded that to constitutionally protect homosexual sodomy as a fundamental right "would be to cast aside millennia of moral teaching."[47]

Justice Powell also concurred that there is no substantive right under the Due Process Clause as that claimed by Hardwick. However, he suggested that Hardwick may be protected under the Eighth Amendment on the grounds that a 20 year imprisonment for a single private, consensual act of sodomy could constitute cruel and unusual punishment. Because Hardwick had not been tried, convicted or sentenced and did not raise this specific issue, an Eighth Amendment constitutional argument was not before the Court, according to Justice Powell.[48]

Dissent

The dissenting opinions differ from the majority and concurring opinions along the same lines as the Brief of

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[47] Bowers 197.

[48] I include Justice Powell's contribution only because of his subsequent and highly unusual recanting of his vote in Bowers. I will return to this later.

Respondent differs from Brief of Petitioner, i.e., in the characterization of the issue. Justice Blackmun, joined by Brennan, Marshall and Stevens, argued that the Court's majority ignored the posture of the case and distorted the question the case presented. According to the dissent, the case was not about a "fundamental right to engage in homosexual sodomy." Rather, Blackmun argued that the case was about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone."[49] The dissent agreed with Hardwick's claim that the Georgia statute "involves an unconstitutional intrusion into his privacy and his right of intimate association does not depend in any way on his sexual orientation."[50] Thus, they argued, Hardwick's claim must be given consideration under the constitutional right to privacy. The dissent specifically confronted the majority opinion's obsession with homosexuality.

Justice Blackmun argued that the Court should not be precluded from considering whether homosexual sodomy conflicts with constitutional protections just because it is criminalized as an affront to morality. He cited Justice Holmes, who said:

> "(i)t is revolting to have no better

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[49] Bowers 199, citing Olmstead v. United States, 277 U.S. 438, 72 L.Ed. 944, 48 S.Ct. 564, 66 ALR 376 (1928), Justice Brandeis, dissenting.

[50] Bowers 201.

> reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation to the past." Holmes, "The Path of Law," 10 Harv L Rev 457, 469 (1897).[51]

Blackmun noted the State of Georgia's exclusive stress on prosecution of homosexual activity contrary to the gender-neutral terms of the sodomy statute. He argued that this, in itself, raised serious questions of discriminatory enforcement. Since the Georgia legislature decided the gender of the individuals is irrelevant to the criminal activity, the dissent found Bowers' defense of the statute solely on the grounds that Hardwick is a homosexual highly questionable.[52] Justice Blackmun noted that the Georgia statute criminalizes the described behavior without regard to the sex or status of the persons whose conduct it is. The Court, however, proceeded as though homosexuals were sufficiently different from other citizens to justify control of their lives in a way that would not be tolerated for other citizens.

Relegated to a footnote in Blackmun's dissent is the very important observation that homosexuality, despite historical views, is no longer viewed as a disease or disorder, citing Amici Curiae Briefs from the American

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[51] Bowers 199.

[52] Bowers 203, Note 2.

Psychological Association and American Public Health Association. Neither is homosexuality simply a matter of choice. Blackmun asserts that "(h)omosexual orientation may well form part of the very fiber of an individual's personality." Furthermore,

> (a)n individual's ability to make constitutionally protected "decisions concerning sexual relations," is rendered empty indeed if he or she is given no real choice but a life without any physical intimacy.[53]

Given this, the right of privacy, if it means anything, requires that the State of Georgia must do more than assert that homosexual sodomy is an "abominable crime" before it can prosecute its citizens for making choices about the most intimate aspect of their lives.

The remainder of Blackmun's dissent is devoted to analysis of Hardwick's claim under the constitutionally protected right to privacy regarding intimate association as well as the Fourth Amendment protection for sanctity of the home. He pointed out that the Court had found that the Constitution embodies a promise of a certain private sphere of individual liberty that is beyond the reach of the government. This right has developed constitutionally along two distinct yet related lines. The first involves the kinds of decisions it is most proper for the individual person to make. Second, the Court has recognized a privacy

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[53] Bowers 203, Note 2. (Citations omitted.)

interest having to do with a place, an area presumed to be private regardless of the activities occurring therein. Hardwick's claim to privacy involves both the decisional and spatial aspects.

Concerning the decisional dimension of privacy, the Court majority decided that the right to privacy does not extend to homosexual sodomy on the grounds that it does not resemble issues of family found to be protected in earlier privacy cases. Blackmun pointed out that in doing this, the Court has forgotten its own warning against "clos(ing) our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause."[54]

Justice Blackmun argued that certain personal life decisions are constitutionally protected because of the importance of individual liberty and, because the choices involved form a central part of a person's life. "(T)he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'"[55] Thus, the Court has protected decisions involving children, the family, and whether to marry because each of these decisions are central to an individual's

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[54] Bowers 204, citing Moore v. East Cleveland, 431 U.S. 494, 501 (1977), plurality opinion.

[55] Bowers 204, citing Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. at 77, n. 5, (Stevens, J., concurring), quoting Fried, Correspondence, 6 Phil & Pub Affairs (1977): 288-289.

self-definition and happiness and not in order to maintain stereotypical households. The Court has also acknowledged that the "ability to independently define one's identity which is central to any concept of liberty" depends on the "emotional enrichment from close ties with others."[56]

It seemed obvious to the dissent that sexual intimacy is fundamental to human existence and the development of human personality.

> The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.[57]

The Court has recognized in a variety of cases that individual liberty entails the fact that different choices will be made by different individuals. For example, the Court has declared that "(a) way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."[58] In Bowers, Blackmun notes, the Court refused to recognize the fundamental interest all individuals have in controlling the nature of their intimate association, rather than merely

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[56] Bowers 205, citing Roberts, 486 U.S. at 619.

[57] Bowers 205. (Emphasis in original.)

[58] Bowers 206, citing Wisconsin v. Yoder, 406 U.S. 205, 223-24 (1972).

refusing to recognize a fundamental right to homosexual sodomy.

The right to privacy, according to Blackmun's dissent, is more than protection for a list of particular behaviors; it is also protection for the sanctity of the home. As to the spatial dimension of Hardwick's claim, the Fourth Amendment's guarantee of "(t)he right of the people to be secure in their...homes," protects a citizen's beliefs, thoughts, emotions and sensations from governmental intrusion. Justice Blackmun: "the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy."[59]

What of the State of Georgia's justification for its sodomy statute? Bowers gave two general arguments supporting the State's infringement of Hardwick's rights. The first is that the criminalized acts have adverse consequences for the general public health and welfare and, second, the State has a right to maintain a decent society. In the view of the dissent, neither of these two justifications warranted dismissing Hardwick's claim.

First, according to Blackmun, the State would have had to show an actual connection between the forbidden acts and the ill effects it seeks to prevent and there is no evidence in the record to support any connection between homosexual

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[59] Bowers 208.

sodomy and physical danger to the participants or others. Where the majority linked homosexual sodomy with adultery, incest and other sexual crimes, Blackmun pointed out that there is a sound distinction between certain kinds of private, consensual sexual conduct, on the one hand, and adultery and incest, on the other. Both adultery and incest entail the possibility of harm to third parties. Blackmun found it striking that the Court did not explain why it grouped private, consensual homosexual activity with adultery and incest rather than with private, consensual heterosexual activity, including oral or anal sex within marriage.[60]

Bower's central argument was that Georgia's statute acts to maintain a "decent society." The State argued that it was justified in banning the acts criminalized in Section 16-6-2 because they have been condemned for hundreds, if not thousands, of years, as immoral. Blackmun, however, argued that it does not matter how long or how passionately a majority has held certain convictions, it is insufficient reason to avoid judicial scrutiny. He cited precedent including Roe v. Wade (abortion); Loving v. Virginia, 388 US 1 (1967) (interracial marriage); and, Brown v. Board of Education, 347 US 483 (1954) (segregated schools). He also quoted Justice Jackson, writing for the Court in West Virginia Board of Education v. Barnett, 319 U.S. 624, 641-42

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[60] Bowers 209, Note 4.

(1943):

> "(F)reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."[61]

Because the issues raised by Bowers v. Hardwick are central to individuality, the dissent urged that the Court be especially sensitive to the rights of those whose choices upset the majority.

> No matter how uncomfortable a certain group may make the majority of the Court, we have held that "(m)ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."[62]

Blackmun argued that asserting traditional Judeo-Christian values as justification for Section 16-6-2 is insufficient grounds for the State to impose the judgement on all citizens. In fact, according to Blackmun, reliance on religious doctrine has undermined the State's argument that the statute represents a legitimate use of secular coercive power. "The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine."[63]

Furthermore, Section 16-6-2 is not a morally neutral

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[61] Bowers 211.

[62] Bowers 212, citing O'Connor v. Donaldson, 422 U.S. 563, 575 (1975).

[63] Bowers 211.

exercise of State power. The dissent indicated that both the Court and the State of Georgia failed to distinguish between protecting public sensibilities and enforcing private morality. Laws controlling public sexual activity protect individuals from unwilling exposure to the sexual activities of others. However, just because a certain activity is punishable when it occurs in public does not dictate that the activity is under State control when it is intimate and in private. Blackmun argued that the conduct for which Hardwick was arrested does not involve interference with the rights of others:

> (t)he mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.[64]

Justice Blackmun closed his dissent with the hope that the Court would soon "reconsider its decision and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do."[65]

In a separate dissent, Justice Stevens discussed the general question of the constitutionality of Section 16-6-2.

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[64] Bowers 213.

[65] Bowers 214.

His two questions were: Can a state criminalize sodomy generally? Can a state enforce its statute against homosexuals only? He concluded that the State of Georgia may not, under the Constitution, criminalize sodomy within marriage or between unmarried heterosexual adults. He cites the, by now familiar, cases of Griswold, Carey and Eisenstadt. These cases were decided on the basis of individual liberty that "makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable."[66] Bowers conceded Stevens' point: "Indeed, the Georgia Attorney General concedes that Georgia's statute would be unconstitutional if applied to a married couple."[67]

Stevens asked if Georgia may not generally proscribe sodomy, how can it justify selective application of the law to homosexuals? Either homosexuals do not have the same liberties others have or there is some other justification. In Stevens' view, the first possibility is "plainly unacceptable."

> From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally

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[66] Bowers 217, citing Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716, 719-720.

[67] Bowers 218, Note 10.

burdensome.[68]

The second possibility was equally unacceptable to Justice Stevens. Selective application of a law must be justified by a neutral and legitimate interest of the State. It must be more substantial than habitual dislike or ignorance and neither the State nor the Court had identified such an interest.

Although the Court and the Petitioner have justified the sodomy statute on the basis that the majority of the Georgia electorate believes homosexual sodomy is immoral, it is clear from the statute itself that the legislators enacted a law that finds all sodomy immoral. Furthermore, the justification cannot be a belief that all homosexual sodomy is immoral for the law, as it is, has not been applied to all homosexuals. Thus, it is difficult for the Georgia prosecutor to maintain that homosexual sodomy, itself, is considered unacceptable conduct.

> Indeed, at this stage, it appears that the statute indiscriminately authorizes a policy of selective prosecution that is neither limited to the class of homosexual persons nor embraced all persons in that class, but rather applies to those who may be arbitrarily selected by the prosecutor for reasons that are not revealed either in the record of this case or in the text of the statute.[69]

In spite of the reasoned eloquence of the dissents, the

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[68] Bowers 218-19.

[69] Bowers 220, Note 13.

Supreme Court of the United States of America, by a 5-4 vote, denied a right to privacy to Michael Hardwick for his intimate sexual behavior with a consenting adult in his own bedroom. This decision remains difficult to justify. How are we to understand that Michael Hardwick and, by extension, all homosexuals, have been denied the privacy we all value and take for granted?

Summary and Analysis

Legitimate Reasoning, Homophobia or Both?

The Bowers decision clearly illustrates the fundamental problems of privacy jurisprudence and adjudication of claims to a right to privacy. One problem is that privacy conceptually yields to varying levels of abstraction. As Stromholm and Freund both indicated, narrow definitions of privacy are dangerous because they preclude accommodation of alternative or unforeseeable claims which could be accepted under a larger concept.[70] Freund argues that a large concept of privacy is necessary to offset equally large counterclaims, e.g., in Bowers, the control of an individual's self-regarding behavior for reasons of community morality. A higher level of abstraction is more valuable because it can assimilate more. But, enlargement

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[70] See pages 183-85 supra.

of the scope of personal privacy rights is precisely what the Court's majority sought to avoid, explicitly stating as much.

The ideological bent of the Supreme Court in 1985, and since, is to halt runaway expansion of civil liberties via judicial activism. This was accomplished in Bowers by employing a narrow rather than large concept of privacy. Not only did the Court prevent expansion of privacy rights, in their zeal they constricted the scope of civil liberties for a particular segment of American society. Although the Court's reasoning may have been strict and legitimate, it was unprincipled because driven by homophobia.

Professor Laurence Tribe concludes that the fundamental explanation for the Bowers decision is the differing characterizations of the question involved. "The Court's error in Hardwick was that it used the wrong level of generality to conceptualize the plaintiff's claim of liberty and to test its pedigree."[71] The correct question, as the dissent recognized, was "whether private, consensual, adult sexual acts partake of traditionally revered liberties of intimate association and individual autonomy." Thus, "the relevant question is not what Michael Hardwick was doing in the privacy of his own bedroom, but what the State of

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[71] American Constitutional Law, 2nd Ed., (Mineola, NY: Foundation Press, 1988) 1427. Hereafter referred to as Tribe.

Georgia was doing there."[72]

It is easy to conclude that the Bowers majority suffered from, as do many others, homophobia. Both Justice Blackmun, in his dissent, and Professor Tribe, in his text book of constitutional law, note the Court's obsessive focus on homosexual activity in spite of the fact that the statute at issue proscribes sodomy regardless of who the participants are, married or unmarried, heterosexual or homosexual. The Court majority's narrow conception of the issue presented by the facts in Bowers as well as the general language of condemnation of homosexuality throughout the opinion indicate a bias against homosexuality.

Additionally indicative of this bias is the Court's acceptance of the analogy comparing homosexual sex with crimes of adultery, incest, polygamy, prostitution and fornication while rejecting its analogic similarity to heterosexual intimacy and family relationships. The Court's reliance on the former analogy is based on two features allegedly shared by homosexual sex and incest, fornication and the like. First, they are criminal acts and, second, they are condemned as immoral on the basis of Judeo-Christian proscription.

The question begging nature of the Court's reasoning here is clear. They reasoned that homosexual sodomy is immoral because commonly thought to be so and, for this

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[72] Tribe 1428.

reason, it is rightfully illegal. But, this is just the question before the Court: can the State of Georgia criminalize private, noncommercial sexual expression between consenting adults in their own homes? Both the State of Georgia and the Court's prior opinions concede that heterosexual sodomy, also proscribed by Section 16-6-2, is constitutionally protected even if considered immoral by the Georgia legislature. As such, it cannot be criminalized. Furthermore, as Justice Stevens indicated in his dissent, the State of Georgia cannot justify its arrest of Hardwick on the grounds that the majority of Georgia voters believes homosexual sodomy specifically is immoral because the statute finds all sodomy immoral.

Even if the Georgia legislature believed sodomy, in a general sense, to be immoral, it could not codify this belief in statute because consensual sex between heterosexuals is constitutionally protected as private. This fact leaves us to conclude that Hardwick's arrest under Section 16-6-2 was a result of heterosexism, bias against homosexuality. In my language, certain of Georgia's citizens are reduced to a single characteristic - homosexuality - and are, thus, denied protection afforded to all other persons.

Was the Court's reasoning legitimate? Perhaps, strictly speaking. Was it principled? Clearly not, based as it is on bigotry. Although the dissent recognized this

bias, the vote was a narrow 5-4. In such close calls, the single swing vote is extraordinarily important. A single Justice ends up affecting the everyday lives and exercise of liberties of American citizens in profound and far reaching ways. The swing vote in Bowers was Justice Lewis Powell. Gratifying to those who supported Hardwick but of little practical effect, Justice Powell recanted his vote in Bowers. In the annual James Madison lecture before the law students of New York University in mid-October 1990, Powell was asked how his vote in the Bowers decision could be reconciled with his vote in Roe v. Wade, in which he voted to extend the right to privacy to a woman's decision to have an abortion.[73] He stated, in reference to Bowers, "I think I probably made a mistake in that one."[74] Powell elaborated by saying that when he reread the opinions a few months after their publication, he thought the dissent had the better of the arguments. He conceded that it was his vote that constituted the majority. The painful irony of Powell's change of heart has not been lost on those who defend the rights to privacy for all persons. Bowers v. Hardwick illustrates the political dimensions and profound ramifications of Supreme Court decisions.

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[73] Abortion is also deemed immoral by many people on the basis of Judeo-Christian ethic.

[74] Jay Wishingrad, "Justice Powell's 'Mistake'," New York Law Journal 204 (11-20-90) 2. Justice Powell retired from the Court in 1987.

The Concept of Privacy

Jurisprudence, generally, and the Supreme Court of the United States, specifically, lack a clearly articulated concept of privacy adequate to ensure the personal liberties of all persons. If the Court had such a conception of privacy, it could not have denied Hardwick his right to privacy for his intimate associations on the grounds that he is homosexual.

The concept of privacy explicitly employed in the Bowers case is one having both spatial and decisional aspects. Hardwick's claim to a right to privacy for his intimate sexual expressions was denied under both understandings. The spatial component relates to claims about the privacy of one's bedroom and home generally. Claims to decisional privacy relate to choices one makes in which the state may not intervene. I have already argued in some detail (see Chapter III) that both "kinds" of privacy are inadequate and Bowers clearly illustrates my claim.

Decisional privacy remains intertwined and confused with autonomy, itself a problematic concept. The fundamental conflict between the opposing sides in Bowers was based on differing characterizations of Hardwick's claim

to decisional privacy.[75] The State of Georgia described his claim as a right to choose to participate in homosexual sodomy. Hardwick, however, maintained that he had a right to decide the nature of his intimate associations. Again, we see the problem of varying levels of abstraction discussed earlier.

The Court's majority decided that Hardwick's narrower choice, homosexual sodomy, was not protected even though the larger one may be. The incoherence of this position is illustrated by the following analogy. Even if one is free to choose to be homosexual (if such a way of being is chosen, which I doubt), in some states one is not free to choose to express in practice one's sexual orientation. Is one of these choices protected by decisional privacy but not the other? If so, and this appears to be the case, on what basis is this difference explained? One's religious orientation is similar to one's sexual orientation. It is debatable whether either is "chosen" in the usual sense. The Constitution protects the freedom to choose one's religious orientation and this right would be hollow indeed if, at the same time, expression and practice in worship were proscribed. Both aspects are constitutionally protected, largely because one's religion and its expression

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[75] If he had successfully defended his right to privately choose the nature of his sexual expression, the right to spatial privacy would have followed as a matter of course.

are fundamental to who one is. By the same argument, if one is free to "choose" a sexual orientation, prohibition of its expression through practice makes the first choice an empty one, much as being Catholic, Jew or Hindu, for example, would be hollow unless one were allowed its expression. It is difficult to make sense of a jurisprudence that protects a more abstract choice as private and, at the same time, denies protection to its expression in practice.

I have also argued that privacy is inadequately conceived of as a place, in spatial terms. It certainly seems the most natural thing in the world to claim that what one does in one's own bedroom is private, if anything at all is private. However, Hardwick's claim to the privacy of his own home and bedroom failed before the Court because homosexual sodomy is criminal in Georgia. However, as indicated earlier, if Hardwick's freedom to decide the nature of his intimate associations had been found to be protected as private, he would also have been protected in terms of spatial privacy.

According to Professor Tribe, the area of associational rights presents the most difficult problems of rights of privacy and personhood. "The tension between the rights of individuals to be the sorts of persons they wish to be, and the rights of those among whom they live to create and maintain the sort of community in which they wish to

settle." [76] The Court has tried to escape this dilemma either by exercise of governmental control over perceived harms (those that are harms in the eye of the beholder alone), or through Constitutional constraints upon the community's power over persons, in terms of protected sanctuaries as well as the choices implicit in special personal relationships. Tribe says that Bowers reveals "the deficiencies of the Supreme Court's contemporary privacy jurisprudence, and a glimpse of what it could become."[77]

In this work, I have argued that privacy is valuable because it provides a condition for wholeness of being, for the irreplaceable totality each person is qua person. Essential to full expression of human potential are individuality and intimacy, both of which require wholeness of being. Individuality certainly includes, at or near its foundation, one's sexual orientation which governs choices of one's intimate sexual associations. If homosexuality is permissible, that is, not illegal, yet its most intimate expression is prohibited, a homosexual person's being is emptied of its substance in a fundamental and significant manner. A consequence of enforced proscription of homosexual sexual activity is forced abstinence. Thus, if sexual intimacy is "a sensitive, key relationship of human existence...and the development of human personality," as

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[76] Tribe 1313.

[77] Tribe 1314.

Justice Blackmun wrote in his dissent, then to deprive homosexuals of sexual intimacy is to deny them a central aspect of human life and personality.

Not surprisingly, Professor Tribe shares my orientation toward privacy. He identifies privacy as that which protects "those attributes of an individual which are irreducible in his selfhood."[78] He argues that however difficult and daunting a task it is to come to grips with useful understandings of personhood and privacy, it must be done "if the essence of personality is to be protected."[79] "The best we can hope for is to encourage wise reflection - through strict scrutiny of any government action or deliberate omission that appears to transgress what it means to be human at a given time and place."[80]

The Court has acknowledged the fundamental importance of sexual intimacy itself in human life by extending privacy protection to use of contraception by unmarried heterosexuals.[81] However, the Bowers decision seems to imply a denial that homosexuals are fully persons in some requisite sense. Alternatively, the Court may have denied that homosexual sex could have the requisite component of

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[78] Tribe 1304, quoting Freund, 52nd ALI Ann.Mtg. 42-43 (1975).

[79] Tribe 1307.

[80] Tribe 1308.

[81] E.g., Griswold, Eisenstadt and Carey. See Note 32 supra.

intimacy. These two possibilities amount to the same thing if intimacy is considered a fundamental human expression. The Opinion of the Court found it "facetious" that Hardwick claimed to be involved in an intimate association entitled to constitutional protection on the grounds that it was not related to issues of family, marriage or procreation. It seems the Court could not comprehend the reality of homosexual intimacy.

Hardwick petitioned the Court to protect the privacy of his intimate associations. However, there is nothing in the record of the Court or, for that matter, anywhere else, to indicate the quality of the relationship for which he was arrested. Various possibilities exist which could substantially affect an argument supporting Hardwick's privacy for intimate association. Had Hardwick been involved in a "one night stand," for example, an argument claiming privacy for his intimate associations would have been weakened unless one maintains that all sexual acts are intimate, which I do not. His petition for privacy to protect intimacy could have remained, but on a strictly theoretical level.

A search of the court documents and the many briefs filed in Bowers v. Hardwick found no mention of the nature of the relationship for which Hardwick was arrested. The question was answered in a conversation with one of Hardwick's attorneys, Kathleen Wilde, Southern District

Office of the American Civil Liberties Union in Atlanta.[82] According to Ms. Wilde, Michael Hardwick had been with an old friend who was visiting him from out of town at the time of his arrest. Hardwick's relationship was intimate even under a narrow conception of intimacy.

But, questions about the quality of Hardwick's relationship are unnecessary. Professor Kenneth Karst argues that there must be a presumption of intimacy in personal associations because every intimate association, including the paradigmatic marital relationship, begins with an initial point of intimacy which may or may not extend further or develop fully.[83] Karst's conception of intimacy is similar to the one proposed in Chapter IV.

> It is an individual's intimate associations that give him his best chance to be seen (and thus to appreciate himself) as a <u>whole person</u> rather than as an aggregate of social roles.[84]

Had the Supreme Court understood the importance of privacy to the possibility of intimacy, and the contribution of intimacy to personhood, it would have guaranteed to Hardwick, and each and every person, a right to privacy for his or her intimate associations, that is, on the basis of personhood alone.

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[82] Personal telephone conversation 4-23-89. Ms. Wilde was Michael Hardwick's original attorney and represented him before the U.S. Court of Appeals, 11th Circuit.

[83] Kenneth Karst, "The Freedom of Intimate Association," <u>Yale Law Journal</u> 89 (1980): 633.

[84] Karst, 635. (Emphasis added.)

I have argued on an intuitive and philosophical basis what Professor Tribe maintains from a well of constitutional knowledge. The evolution of privacy law is towards protection for those aspects of a person's life which are intrinsic to his or her personhood, especially one's individuality and intimate relationships. Although the Court has recognized the importance of the freedom to enter into intimate associations, its initial focus has been on the traditional nuclear family. However, the Court importantly has not restricted these constitutional protections to family relationships. Tribe describes the characteristic qualities of the kinds of relationships the Court has protected as those of deep attachments and commitments to the other individuals with whom one shares the distinctly personal aspects of one's life. Sexual intimacy is prominent among such personal aspects because of its central role in human existence and the development of personality; humans define themselves in significant ways through their intimate sexual relationships.[85]

Choices in sexual relationships involve values of individuality and intimacy which, as I have argued, are inextricably entwined with the value of privacy. I have also argued that there is an internal relationship between

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[85] Tribe 1421. Citing Rotary International v. Rotary Club of Duarte, 107 D.Ct. 1940,1946 (1987), Paris Adult Theatre I. v. Slayton, 413 U.S. 49,63 (1973), and Bowers v. Hardwick, 106 S.Ct. 2841,2851 (1986).

privacy and wholeness of persons and that individuality and intimacy necessarily require wholeness of being. If privacy is valuable to persons gua persons in these senses, to deny privacy to homosexuals for intimate sexual expression is reductive of them as persons and inherently denies their personhood.

The Future

The power and importance of the Bowers decision cannot be overstated. Professor Tribe's analysis of the Bowers decision is that it portends both good news and bad news. The nature of the implications for privacy law depends on whether the case is seen to have been decided on the basis of homophobia or on principled argument.

If Bowers was decided on principled grounds, "it prepares the way for replowing that constitutional soil and repudiating the entire privacy line, both root and branch."[86] It poses a threat to privacy protection in the area of intimate sexual relationships, particularly regarding contraception and abortion. For example, if one follows the Court's reasoning in Bowers, contraception is neither specifically mentioned in the Constitution, nor was it a fundamental right at the time of the adoption of the Fourteenth Amendment. The same reasoning may be applied to

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[86] Tribe 1430.

abortion rights. Thus, the established right to privacy in the areas of contraception and abortion may be in danger of being overturned. This is the "bad news."

The "good news" is that Michael Hardwick was denied his right to privacy on the basis of homophobia. If the Court's denial of privacy to Hardwick was substantially prejudicial, Bowers "does not necessarily doom any and all sexual privacy claims relating to unorthodox or nonmarital sex between consenting adults."[87]

It is imperative that the Supreme Court understand and embrace a principle of privacy law as that which protects the possibility of each person's wholeness of being, the irreplaceable totality that each of us is. If it does not do this, it will fail to protect individuality and intimacy which are the hallmarks of full human potential.

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[87] Tribe 1431.

CHAPTER VII

PRIVACY AND PERSONHOOD

> The courts are the capitals of law's empire, and judges are its princes, but not its seers and prophets. It falls to philosophers, if they are willing, to work out law's ambitions for itself, the purer form of law within and beyond the law we have.[1]

Perhaps privacy's modern value is explainable, in part, by the absence of the purely Public with its resultant distancing of individual citizens from participatory self-governance. It surely is related to the rise in significance of the individual person since the 17th century as an outgrowth of developing liberal ideology. Marx suggested that as the economic influence on human society has evolved to the present condition, wherein our labor is for the profit of others, the home has become the only place a person can have himself, that is, be free. Whatever the evolutionary explanations may be, privacy is highly valued in western cultures as a way of being free from the intrusions not only of government, but of unchosen individuals as well. We value the possibility of being

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[1] Dworkin (1986) 407.

alone or secluded with intimate others.

The preceding chapters, as well as most extant literature devoted to analysis of privacy, manifest a web of interconnected conceptions - privacy, individuality, intimacy and personhood. I say "web" rather than "cluster" because I do not believe it is possible to separate these interests from one another. Although there are other concerns connected to privacy that have not been considered here, e.g., information stored in data banks, I have focussed on what I call the ontology of privacy, that is, privacy as a way of being whole, a "who" rather than a "what," a person.

Privacy is an intriguing and difficult philosophical problem in itself but it is also important to take seriously the pragmatic implications of privacy scholarship. Significant and substantial repercussions of the adjudication of claims to a right to privacy affect our daily lives. The legal aspects of privacy implicate fundamental concerns of American citizens such as procreation and sexual intimacy, among many others. We have seen, for example, that homosexuals do not have the constitutional protection of privacy for intimate associations except on a state-by-state basis. Because Supreme Court decisions involving privacy have a concrete effect on our everyday choices and actions, it is incumbent that questions of privacy be given thoughtful and passionate

consideration.

Furthermore, as privacy claims are more frequently made under state constitutions, the theoretical basis of privacy's value draws closer to home. If federal Constitutional protection of privacy remains tenuous over the next few decades, which is a distinct possibility following the reasoning in Bowers, articulate and informed dialogue at the state level may have an immediate and consequential effect.

Although this work has been devoted to the philosophical notion of privacy and its implication in practice, this should not be understood as ignoring or minimizing the importance of our common and shared public. I have not maintained, nor do I, that privacy is more important than participation in the public, political or social realms for the full development of persons. I do not wish to leave such an impression. Private is but one of the important ways we have of being as we live our lives. It is not, however, an optional way of being.

Some would argue that approaches to privacy such as this one perpetuate the insidious and false public-private dichotomy found in liberal ideology, privacy that separates and isolates persons one from another. Most feminists,

including Catharine MacKinnon and Alison Jagger[2], have argued extensively against the public-private dichotomy especially on the grounds that the paradigmatic privacy of the home has been instrumental in the oppression of women. Roberto Unger, critic of liberal ideology and a proponent of communitarian social organization, has urged that we publicize the private and privatize the public as a means of overcoming the antinomy which, he argues, fosters a split personality.[3]

However, at the same time Professor Unger criticizes the traditional public-private dichotomy, he maintains that we cannot relinquish privacy altogether.[4] Both public and private are social ways of being and are foundational to all human relationships. Inherent in concepts of public and private is the metaphysical distinction of universal and particular. One's conception of self is born in the realization that one is neither everyone nor anyone else. The basic existential realization, that I am not you, splits

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[2] Catharine MacKinnon, Feminism Unmodified: Discourse in Life and Law (Cambridge, Mass.: Harvard UP, 1987) Chapter Eight, "Privacy and Equality: Beyond Roe v. Wade" (1983). Alison Jagger, Feminist Politics and Human Nature (Totowa, NJ: Rowman & Allanheld, 1983) throughout. Feminists often claim that "the personal is political" is the same as "the private is public." This is a mistake in my view and is impetus for future enquiry.

[3] Robert Unger, Knowledge and Politics (New York: Macmillan, 1975). Professor Unger teaches at Harvard Law School and is a renowned critical legal theorist.

[4] Unger 274.

the particular from the universal, the individual person from humanity. Awareness of self as distinct is particularity and it cannot be sacrificed to universality without loss of individual self-consciousness. The public must also disappears along with the loss of individual consciousness. Particular individuality cannot be merged with universal humanity. As long as human experience includes awareness of self and others, we will have the private and the public.

It might also appear that I have ignored the deep criticisms of the public-private dichotomy itself. Any such misunderstanding arises only because of the limited scope of my inquiry. In order to discuss the value of privacy, one is forced to accept the operative dichotomy itself. If the public and private were not at least theoretically separable concepts, questions addressed here would not have arisen.

In spite of this, it is exceedingly difficult to conclude that the public and private are clearly distinct and separable. Instead, it is helpful to understand public and private as comprising a continuum and, indeed, they are relative to one another depending on varying contexts. For example, a person may be perfectly willing to discuss personal problems with some people but not others. These choices are governed in part by the degree of intimacy shared. I do not reveal personal issues to those who are unlikely or unable to place what I tell them in the overall

context of my life. The kinds of experiences and concerns one person considers to be appropriate for public discussion may be much broader or narrower than some other person. Some hopes, fears and fantasies are completely private, that is, they may never be shared with anyone else. In spite of this, they constitute part of who a person is. There are some things about people that are wholly public. My profession is an example. I teach in a public university and I am the public's employee. Likewise, there are degrees to which a person is willing to be public. A letter to the editor is as public as most of us choose to be in a large town or city. A bumper sticker on one's automobile may make public a moral or political view others hold privately.

Finally, and perhaps most importantly, the private and public bleed into one another in and over time. Bowers v. Hardwick has shown the confusion inherent in the evolving nature of the concept of privacy. Is the substance of a person's intimate associations a matter of privacy? One would certainly think so however, the Supreme Court disagreed. Did the Court want to maintain that Michael Hardwick's sex life is a public matter? Clearly not, in terms of its display. But, the Court concluded that the regulation of homosexual sodomy is a public matter, warranted by a compelling state interest in maintaining a decent and moral society. If homosexual sex is neither private nor public, are we to think of it as both or

neither?

Given the lack of distinct boundaries or clear conceptions of public and private, neither readily lends itself to understanding. Privacy has been notoriously recalcitrant to definition; all attempts to date have reflected varying degrees of ambiguity. Given this, I concluded that an alternative approach to thinking about privacy was called for and I chose, following the lead of others, to examine and acknowledge privacy's value. I have argued that privacy is internally related to personhood because necessary to individuality and intimacy. Privacy is required for establishment and continuation of one's experience of self as a unique and complex whole being. It is also required for extension, expansion and completion of one's self through intimate relationships with other persons. I have argued that privacy is necessary to wholeness of being because our public life, the social realm as it exists, most often manifests and depends on reduction of persons to the many things that we are and do.

I have maintained that without privacy, a person becomes fragmented and this hinders or preclude experience of one's self as whole or integrated. Because of the complexity of the human condition and the requirement of efficient social functioning, we often relate to others as though their personhood was exhausted by the particular things they are or do. For example, in the moment, the gas

station attendant is rarely acknowledged as being more than his function. Women are all too frequently reduced to their gender. Racism, sexism, ageism, heterosexism, all the "isms," result from reduction of who the person is to a particular and narrow aspect of their lives. Reduction of a person to facets of her life or her public roles fosters a conception of her that is exhausted by the particular things that she is and does which are relevant to the context. This reduction is the antithesis of individuality which celebrates and is the unique irreplaceable totality that each one of us is as a particular human person.

A personhood-based conception of privacy such as the one proposed here has several advantages over spatial and decisional models. First and foremost, it acknowledges the importance of privacy to all persons, unreduced on the basis of gender, age, race, religion, sexual preference, etc. An additional strength is that it is responsive to the evolutionary dimensions of privacy. It is able to retain its relevance as our understanding of the meaning and value of personhood evolves.

Given an understanding of privacy grounded in the development and nurturing of full human potential, what might the future hold? Roberto Unger envisions one possible future for human social organization that includes a healthy mixture of the public and private, diminishing the tension between the private individual and public society.

Professor Unger's characterization of public and private in terms of the particular and universal is a useful orientation to what Tribe refers to as the "dilemma of contemporary individuals."[5] Unger describes the dilemma as one in which "(t)o the extent they sacrifice the private self to the public one, they surrender their individual identities. When they try to cast off convention in order to follow their own course without definite roles, they undergo the disintegration of the unity of self." This condition has become the ordinary circumstance of life.[6] If we grant that experience of particularity as self-consciousness entails a logical separation from an experience of the universality of humanity, both of which we yearn for, how can we hope to minimize what Unger considers to be the resulting split personality?

Privacy nurtures and sustains our individuality and personhood in the face of social organizations which offer roles, require conformity, and favor organization. Individuality is disruptive to the efficiency of a job-holding economic system which can tolerate but little deviation from the standard requirements. As a result, there is little opportunity or inclination to get to know

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[5] Tribe 1418.

[6] Unger 62. The paradox of individuality and community is but one of the many manifestations in our daily lives of the ontological problem of universals and particulars. Reason and desire, theory and fact are others Unger suggests.

well those with whom we work. Little of our personal selves is available in public because of the overarching significance of the things we are and do there. We fill roles when we work and we understand our co-workers in the limited terms of how well they satisfy the requirements of their positions. After work, everyone goes home, sometimes to required roles, but more often to a constantly varying involvement in intimate relationships where our hopes and dreams, our values and desires are permitted existence. The more than less static role playing gives way to the possibility of a richly textured and dynamic life.

To be a professional means, in great part, that our personal lives are kept separate from our work. It would be unacceptable for the grocery store clerk to stop his work and tell you of the problems he is having with his teenage daughter, no matter how distressed he is. Not only would most people be very uncomfortable listening to his sorrows but the efficiency of the grocery check out system would be crippled. Teachers are expected to set aside their personal concerns in the classroom, even to keep hidden their political and moral orientation to the questions they ask. There is, likewise, a limit to the forgiveness offered to students for late assignments because of problems at home. Most relationships which seem like friendships at work fail to make the transition to a nonwork setting. Somehow, the illusion of work-based friendship is entirely context

dependent.

How is it possible to bring these two seemingly separate worlds together. Unger suggests that if people were to live in small communities where the distinction between work and home was minimized, there would be a mixing of the two worlds benefiting both individual persons and our shared humanity. In a small community

> individuals would have to live together in a situation sufficiently varied, intimate and stable to allow them to know and treat each other as concrete persons rather than role occupants.[7]

Perhaps when we shop at the local mercantile, we may understand the clerk's difficult situation with her teenager because they may be our neighbor or we may see them in other and varying settings.

As Unger envisions it, the dialectic between the universal and particular in a small community would enhance and nurture individual persons and, at the same time, enrich our shared humanity.[8]

> Unless individuals deal with one another in a multiplicity of different ways, they cannot discover the organic unity of each other's personalities. When another is always seen as

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[7] Unger 221.

[8] Unger's view is in contrast with Arendt's specifically in regard to outcome of a dialectic between the public and private. Unger sees the outcome as a positive evolution in human affairs, where Arendt laments the rise of the social and the concomitant death of the polis. For an interesting comparison of Unger and Arendt, see Andrea Asaro, "The Public/Private Distinction in American Liberal Thought: Unger's Critique and Synthesis," American Journal of Jurisprudence, 28 (1983): 118-148.

> the performer of a particular role, he must tend to become that role, first in his fellows' eyes, then in his own. ...The more rigid such outlooks become, the more will they hinder the growth of individual personality and the manifestation of the species nature in social practice.[9]

For example, it is asserted and can be argued that homosexual persons who identify themselves as such to their acquaintances, neighbors and coworkers create conditions of acceptance for homosexuality generally. It is exceedingly difficult to maintain a heterosexist attitude when the whole person is available to be known. Many people do know homosexual persons but are unaware of this fact. Bigotry is disempowered by personal knowledge of the unique totality who happens to have the reductive quality that grounds the bias.[10] Unger envisions a social organization that nurtures the uniqueness of individuals which, in turn, enhances our shared humanity. It is an appealing possibility for bridging the private/public dichotomy.

Is it possible to incorporate a personhood grounded concept of privacy into law? Following the reasoning in Bowers v. Hardwick, constitutional privacy shields only those activities commonly acceptable at the time of enactment of the Fifth, Ninth and Fourteenth Amendments.

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[9] Unger 262-63.

[10] I have often wondered if the majority in Bowers were aware they knew homosexual persons. An entirely unsubstantiated story attributes Justice Powell's recanting of his vote with the majority in part to the fact that he became aware that he knew homosexual persons.

This kind of privacy fails to protect the unique and irreplaceable totality each of us is. What might have been protection for the dynamic expression of individuality becomes, instead, a means of static maintenance of traditional, procreative family matters and then only to a certain stereotypical degree. But, there is an alternative to the reasoning that decided Bowers.

Judge J. Braxton Craven, Jr. has suggested a different model for considering people's claims to liberty. In his article, "Personhood: The Right to Be Let Alone," he suggests that the courts would be more efficient and sensitive if there were a judicial recognition of a universal right of personhood.[11] This right would be legitimate within the protection of the Ninth Amendment. Personhood, according to Judge Craven, includes elements of individuality, autonomy and privacy, but is none of these alone.[12] It is constituted by the innumerable array of human activities which, taken separately, seem to be trivial. The list is inexhaustible, for example, rights to wear a hat, attend a football game, ride a bicycle or eat what one wishes. Since none of these rights would be deemed fundamental, the judiciary would not know how to deal with threats against their free exercise.

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[11] Duke Law Journal, 4 (1976): 699-720. Judge Craven is Circuit Judge, United States Court of Appeals, Fourth Judicial Court.

[12] Craven 702.

Judge Craven suggests that a universal right of personhood would protect individuals from arbitrary and capricious governmental action. The practical effect of recognizing such a universal right would be a fundamental shift in emphasis when a citizen claims her or his liberty has been infringed upon by government. Under the current judicial approach, a citizen who challenges a state regulation in federal court must demonstrate that the government has infringed upon an enumerated or fundamental right. As we have seen in Bowers, the citizen who is unable to establish the liberty claim as fundamental is left without remedy. Given the Supreme Court's methodology in deciding what constitutes a "fundamental" right, the citizen loses most of the time.

Judge Craven maintains that important rights may be protected by reversing the order of inquiry. If there were a presumption of a personhood right, the state that seeks to limit a citizen's freedom would be obliged to argue that the restriction was required for a demonstrated state interest and that the means in force was reasonably related to the end. Shifting the burden of argument to the government is already acceptable in law.

> This approach is not entirely inconsistent with normal trial procedure if we accept that the individual's right of personhood creates a presumption that all regulation of his activity is invalid. By enacting a statute circumscribing his freedom...the state is, in effect, filing a complaint against him, alleging that his activity is causing some public harm. Since it has

> initiated the complaint, the state should be made to show the harm - to justify its regulation. This, of course, is the reasoning behind the presumption of innocence in criminal cases.[13]

If the state is going to restrict the personhood of its citizens, it should be required to argue that the restriction furthers some legitimate state objective.[14]

Judge Craven argues that when an asserted right is not found explicated in the Constitution or its case law, the inquiry should not end. Instead, this should be the beginning point. He draws attention to the fact that recognition of personal rights in the Constitution generally takes a negative form. The Constitution contains a series of negative restrictions on the power of the government with respect to the rights of persons. He also asserts that any definition of liberty is a limitation and denial of it.

> How many words, how many pages, how many volumes would it take to delineate perfectly the right of a person residing in these United States? It is mindboggling to contemplate merely listing every item of food that one may lawfully consume.[15]

Since we must abandon any idea of listing all of the rights of citizens, Judge Craven suggests the opposing stance: "An individual should retain the right to engage in any form of activity unless there exists a countervailing state interest of sufficient weight to justify restricting

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[13] Craven 714.

[14] Craven 715.

[15] Craven 706.

his conduct."[16]

The conception of privacy I have argued for in this work is in harmony with Judge Craven's proposal of a shift in judicial orientation regarding individual liberty. A conception of privacy based on personhood as wholeness of being also fits with Professor Unger's vision of a society that bridges the separation between our public and private lives. Following after and building upon privacy inquiries in philosophy and law, I have outlined a framework within which questions of privacy may be considered.

Privacy provides the condition for wholeness of being and protects the irreplaceable totality that each one of us is, our personhood. It is valuable and should be protected because it is inextricably entwined with individuality and intimacy which are essential to full expression of our human potential. As such, privacy is important to each of us and should be protected as a right for all of us.

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[16] Craven 706.

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