

Privacy*

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Privacy has become the object of considerable concern. The purely fortuitous intrusions inherent in a compact and interrelated society have multiplied. The more insidious intrusions of increasingly sophisticated scientific devices into previously untouched areas, and the burgeoning claims of public and private agencies to personal information, have created a new sense of urgency in defense of privacy. The intensity of the debates about electronic eavesdropping and the privilege against self-incrimination are but two examples of this urgency.

The purpose of this essay is not to add yet another concrete proposal, nor even to call attention to yet another intrusion upon privacy. Rather I propose to examine the foundations of the right of privacy—the reasons why men feel that invasions of that right injure them in their very humanity.

I.

To bring out the special quality of the concern over privacy I shall first put a not entirely hypothetical proposal, which should serve to isolate from restrictions and intrusions in general whatever is peculiar about invasions of privacy.

There are available today electronic devices to be worn on one's person which emit signals permitting one's exact location to be determined by a monitor some distance away.¹ These devices are so small as to be entirely unobtrusive: other persons cannot tell that a subject is "wired," and even the subject himself—if he could forget the initial installation—need be no more aware of the device than of a small bandage. Moreover, existing technology can produce devices capable of monitoring not only a person's location, but other significant facts about him: his temperature, pulse rate, blood pressure, the alcoholic content of his blood, the sounds in his immediate environment—*e.g.*, what he

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1. For a discussion of these devices and the legal issues to which they give rise, see Note, *Anthropotelemetry: Dr. Schwitzgebel's Machine* 80 HARV. L. REV. 403 (1965).

says and what is said to him—and perhaps in the not too distant future even the pattern of his brain waves. The suggestion has been made, and is being actively investigated, that such devices might be employed in the surveillance of persons on probation or parole.

Probation leaves an offender at large in the community as an alternative to imprisonment, and parole is the release of an imprisoned person prior to the time that all justification for supervising him and limiting his liberty has expired. Typically, both probation and parole are granted subject to various restrictions. Most usually the probationer or parolee is not allowed to leave a prescribed area. Also common are restrictions on the kinds of places he may visit—bars, pool halls, brothels, and the like—or the persons he may associate with, and on the activities he may engage in. The most common restriction of the latter sort is a prohibition on drinking, but sometimes probation and parole have been revoked for “immorality”—that is, intercourse with a person other than a spouse. There are also affirmative conditions, such as a requirement that the subject work regularly in an approved employment, maintain an approved residence or report regularly to correctional, social, or psychiatric personnel. Failure to abide by such conditions is thought to endanger the rehabilitation of the subject and to identify him as a poor risk.

Now the application of personal monitoring to probation and parole is obvious. Violations of any one of the conditions and restrictions could be uncovered immediately by devices using present technology or developments of it; by the same token, a wired subject assured of detection would be much more likely to obey. Although monitoring is admitted to be unusually intrusive, it is argued that this particular use of monitoring is entirely proper, since it justifies the release of persons who would otherwise remain in prison, and since surely there is little that is more intrusive and unprivate than a prison regime. Moreover, no one is obliged to submit to monitoring: an offender may decline and wait in prison until his sentence has expired or until he is judged a proper risk for parole even without monitoring. Proponents of monitoring suggest that seen in this way monitoring of offenders subject to supervision is no more offensive than the monitoring on an entirely voluntary basis of epileptics, diabetics, cardiac patients and the like.

II.

Much of the discussion about this and similar (though perhaps less futuristic) measures has proceeded in a fragmentary way to catalogue the

disadvantages they entail: the danger of the information falling into the wrong hands, the opportunity presented for harassment, the inevitable involvement of persons as to whom no basis for supervision exists, the use of the material monitored by the government for unauthorized purposes, the danger to political expression and association, and so on.² Such arguments are often sufficiently compelling, but situations may be envisaged where they are overridden. The monitoring case in some of its aspects is such a situation. And yet one often wants to say the invasion of privacy is wrong, intolerable, although each discrete objection can be met. The reason for this, I submit, is that privacy is much more than just a possible social technique for assuring this or that substantive interest. Such analyses of the value of privacy often lead to the conclusion that the various substantive interests may after all be protected as well by some other means, or that if they cannot be protected quite as well, still those other means will do, given the importance of our reasons for violating privacy. It is just because this instrumental analysis makes privacy so vulnerable that we feel impelled to assign to privacy some intrinsic significance. But to translate privacy to the level of an intrinsic value might seem more a way of cutting off analysis than of carrying it forward. In this essay I hope to show that it is possible to discuss what it means to accord to privacy such a high status and to show why the value of privacy should be recognized.

It is my thesis that privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable. They require a context of privacy or the possibility of privacy for their existence. To make clear the necessity of privacy as a context for respect, love, friendship and trust is to bring out also why a threat to privacy seems to threaten our very integrity as persons. To respect, love, trust, feel affection for others and to regard ourselves as

2. The literature on privacy is enormous. A. WESTIN, *PRIVACY AND FREEDOM* (1967), provides an exhaustive bibliography as well as a critical review of the literature. In addition, Part One of that book presents a sensitive general theory of privacy much along the lines of the present article. Of particular interest also is the symposium on privacy in 31 *LAW & CONTEMP. PROB.* 251-435 (1966).

For an example of the fragmentary approach referred to in the text, as applied to one manifestation of privacy, the privilege against self-incrimination, see McNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Affection, Raison d'Être and Miscellaneous Implications*, 51 *J. CRIM. L.C. & P.S.* 138 (1960). Dean Prosser takes this fragmentary approach to the right of privacy as recognized by tort law. See Prosser, *Privacy*, 48 *CALIF. L. REV.* 383 (1960). And he has been criticized for it. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 *N.Y.U.L. REV.* 962 (1964).

the objects of love, trust and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion.

III.

The conception of privacy as a necessary context for love, friendship and trust depends on a complex account of these concepts, and they in turn depend on the more general notions of morality, respect and personality. If my sketch of this underlying perspective leaves the reader full of doubts and queries, I draw comfort from the fact that a more elaborate presentation of this system is in progress.³ I only hope that the sketch I give here has sufficient coherence to lay the basis for the discussion of privacy which is the primary concern of this essay.

Love, friendship and trust are not just vague feelings or emotions; they each comprise a system of dispositions, beliefs and attitudes which are organized according to identifiable principles. Though love, friendship and trust differ from each other, they each build on a common conception of personality and its entitlements. This conception is a moral conception of the basic entitlements and duties of persons in regard to each other, and the structure of that conception is articulated by what I call the principle of morality and the correlative attitude of respect.

The view of morality upon which my conception of privacy rests is one which recognizes basic rights in persons, rights to which all are entitled equally, by virtue of their status as persons. These rights are subject to qualification only in order to ensure equal protection of the same rights in others. In this sense, the view is Kantian; it requires recognition of persons as ends, and forbids the overriding of their most fundamental interests for the purpose of maximizing the happiness or welfare of all. It has received contemporary exposition in the work of John Rawls, who—summing up the fundamental interests of persons in the term “liberty”—has formulated the maxim that social institutions must be framed so as to entitle each person to the maximum liberty compatible with a like liberty for all.⁴

3. For a preliminary statement of the larger scheme, see Fried, *Reason and Action*, 11 NATURAL L.F. 13 (1966).

4. The ethical system I sketch here is essentially Kantian. Different aspects of it are expressed in I. KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (L. Beck transl. 1959) and in I. KANT, *METAPHYSICAL ELEMENTS OF JUSTICE* (J. Ladd transl. 1965). For a discussion of the use of the term morality to apply primarily to the principles governing the relations of persons with each other see Falk, *Morality, Self and Others*, and Frankena, *Recent Conceptions of Morality*, in *MORALITY AND THE LANGUAGE OF CONDUCT* (H. Casta-

The principle of morality does not purport to represent the highest value in a person's economy of values and interests. It necessarily assumes that persons have a variety of substantive values and interests and it is consistent with a large range of ethical systems which rank these values and interests in many different ways. It functions rather as a constraint upon systems and orderings of values and interests, demanding that whatever their content might be, they may be pursued only if and to the extent that they are consistent with an equal right of all persons to a similar liberty to pursue their interests, whatever they might be. Thus the principle of morality, far from representing a complete system of values, establishes only the equal liberty of each person to define and pursue his values free from undesired impingements by others. The principal of morality establishes not a complete value system but the basic entitlements of persons vis-à-vis each other.⁵

Correlative to this view of morality—and indeed to any view which recognizes moral entitlements in persons—is the concept of respect.⁶ Respect is the attitude which is manifested when a person observes the constraints of the principle of morality in his dealings with another person, and thus respects the basic rights of the other. Respect is also an attitude which may be taken in part as defining the concept of a person: persons are those who are obliged to observe the constraints of the principle of morality in their dealings with each other,⁷ and thus to show respect towards each other.⁸ Self-respect is, then, the attitude by which a person believes himself to be entitled to be treated by other persons in accordance with the principle of morality.

The principle of morality and its correlative, respect, lie at the bottom of our conception of justice and fair play, as moral philosophers

fieda & G. Nakhnikian eds. 1963). Much of what I say derives, however, not from Kant, but more directly from the writings of John Rawls, who in his published and unpublished work has developed a comprehensive system of concepts and principles. In addition to the published articles (*Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3 (S. Hook ed. 1964); *The Sense of Justice*, 72 *PHIL. REV.* 281 (1963); *Constitutional Liberty and the Concept of Justice*, in *NOMOS VI, JUSTICE* 98 (C. Friedrich & J. Chapman eds. 1963); *Justice as Fairness*, 67 *PHIL. REV.* 164 (1958)), I have profited greatly from an opportunity to read Professor Rawls' unpublished chapters on justice and his lectures on Kant and Hegel. See also Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175 (1955).

5. For a discussion see Fried, *Natural Law and the Concept of Justice*, 74 *ETHICS* 237, 250 (1964).

6. The concept of respect is also Kantian. I. KANT, *CRITIQUE OF PRACTICAL REASON* 76-84 (L. Beck transl. 1956). The best recent discussion of this concept of respect and its relation to personality is J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (M. Gabain transl. 1948). An excellent and fundamental illustration of the importance of respect in human relations is Hegel's dialectic of the master and the slave, discussed in 2 J. PLAMENATZ, *MAN AND SOCIETY* 154-56, 188-92 (1963).

7. The condition is sufficient, not necessary, since children, lunatics, and some others are also to be considered persons. All persons are entitled to the respect of other persons.

8. See generally PIAGET, *supra* note 6; Rawls, *The Sense of Justice*, *supra* note 4.

have convincingly argued. Perhaps less obviously, they play an important part in our concepts of love, friendship and trust.⁹ It is my thesis that an essential part of the morality which underlies these relations is the constraint of respect for the privacy of all, by state and citizen alike.

IV.

There can be no thought of counting on an accepted core of meaning in developing the concept of love. What I say about love therefore cannot be taken as expressing a synthesis of all that has plausibly been thought and said on the subject. Nevertheless an important tradition of thought about love holds that it is a necessary feature of that emotion that the beloved person be valued for his own sake, and not on account of some attribute or product.¹⁰ This aspect of love corresponds to the respect which we are obligated to accord each other. But morality requires impartial respect; love, surely, is not so impartial. The respect required by morality is a necessary condition for love; it is not sufficient. The further element in love is a spontaneous relinquishment of certain entitlements of one's own to the beloved, a free and generous relinquishment inspired by a regard which goes beyond impartial respect. But a sense of freedom and generosity depends—logically depends—on a sense of the secure possession of the claims one renounces and the gifts one bestows. I shall argue that the nature of the gifts of love and friendship is such that privacy is necessary to provide one important aspect of security.

This account has emphasized the necessity to love of a voluntary relinquishment of rights. But love is not, of course, so negative nor so one-sided. Persons love, hoping to be loved in return, and thus the fulfilled form of the relationship is one of mutual relinquishment of entitlement, but not simply of relinquishment. The fulfilled form is the mutual relinquishment of rights in favor of new, shared interests which the lovers create and value as the expression of their relationship. Thus love is an active and creative relationship not only of reciprocal relinquishment but reciprocal support as well. The structure of this reciprocal relationship is complex and elusive,¹¹ and I shall not analyze it further here. For present purposes it is sufficient to see that the gift, the

9. For a discussion of the relationship between these concepts and the principle of morality see Rawls, *The Sense of Justice*, *supra* note 4. Although my account differs from Rawls' in some respects, it is based on his.

10. Cf. ARISTOTLE, *NICOMACHEAN ETHICS* bk. 8, chs. 2-3.

11. For an excellent discussion see M. SCHELER, *THE NATURE OF SYMPATHY*, especially ch. 7 (P. Heath transl. 1954).

relinquishment, is logically prior to the relationship which requires it; and if privacy is necessary to the first, it is necessary to the second.

Friendship differs from love largely in the degree of absorption in the relationship and of the significance which the relationship has in the total economy of a person's life and interests. Allowing for these differences of degree, love and friendship are close in that they have a similar relation to the more general concepts of morality and respect. And that similar relation is all that I propose here concerning friendship.

Intuitively, trust is an attitude of expectation about another person. But it would be a mistake to see it as simply a recognition of a disposition in another and a reliance that he will act in accordance with that disposition.¹² To be sure, we have expressions such as "trust him to do *that*," where "*that*" may be a vile deed which we know to be in character for that person, or perhaps a fit of sneezing during a grand evening at the opera on the part of a person given to sneezing when in close proximity to perfumed ladies. But these usages are ironical. Although trust has to do with reliance on a disposition of another person, it is reliance on a disposition of a special sort: the disposition to act morally, to deal fairly with others, to live up to one's undertakings, and so on. Thus to trust another is first of all to expect him to accept the principle of morality in his dealings with you, to respect your status as a person, your personality.

Trust, like love and friendship, is in its central sense a *relation*: it is reciprocal. Fairness does not require that we sacrifice our interests for the sake of those who are not willing to show us a similar forbearance. Thus as to those who do not accept morality, who are wicked and deceitful, the occasion for trust does not arise. We do not trust them, and they have no reason to trust us in the full sense of a relationship of mutual expectation, for our posture towards them is not one of cooperative mutual forbearance but of defensive watchfulness. Thus not only can a thoroughly untrustworthy person not be trusted; he cannot trust others, for he is disabled from entering into the relations of voluntary reciprocal forbearance for mutual advantage which trust consists of. At most an untrustworthy person can predict more or less accurately how another will behave, but the behavior he predicts will not arise out of a relation of mutual respect which each party has for the personality of the other

12. For a brilliant sociological analysis of trust, which seems perhaps to overemphasize this aspect of trust, see Garfinkel, *A Conception of, and Experiments with, "Trust" as a Condition of Stable Concerted Actions*, in *MOTIVATION AND SOCIAL INTERACTION* 187 (O. Harvey ed. 1963).

and a reciprocal willingness to work together according to the constraints of morality.

Trust is like love and friendship in that it is a "free" relationship. Morality does not require that we enter into relations of trust with our fellow men. But trust differs from love or friendship in that it is not always a relation we seek simply for its own sake. It is more functional. Persons build relations on trust in part because such relations are useful to accomplish other ends. (In a sense love and friendship are needed for the pursuit of ends too, but they are ends that arise out of the relationship itself, and are shared in it.) However, the other ends never dominate entirely: they may be attainable without genuine trust, and the recourse to trust is then an independent and concurrent affirmation of respect for human personality. So, whether as individuals or as states, we conduct our business when we can on the basis of trust, not just because it is more efficient to do so—it may not be—but because we value the relations built on trust for their own sake. Finally, trust is also less intrusive than love or friendship. Trust can be limited to the particular matter at hand, and does not imply a disposition to seek more and more mutually shared ends. Thus, one can trust persons for whom one has neither love nor liking, although friendship and love imply, at least in the standard cases, trust as well.

V.

Privacy is closely implicated in the notions of respect and self-respect, and of love, friendship and trust. Quite apart from any philosophical analysis this is intuitively obvious. In this section I shall try to make the connection explicit. In general it is my thesis that in developed social contexts love, friendship and trust are only possible if persons enjoy and accord to each other a certain measure of privacy.

It is necessary at the outset to sharpen the intuitive concept of privacy. As a first approximation, privacy seems to be related to secrecy, to limiting the knowledge of others about oneself. This notion must be refined. It is not true, for instance, that the less that is known about us the more privacy we have. Privacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves.

To refer for instance to the privacy of a lonely man on a desert island would be to engage in irony. The person who enjoys privacy is able to grant or deny access to others. Even when one considers private situa-

tions into which outsiders could not possibly intrude, the context implies some alternative situation where the intrusion is possible. A man's house may be private, for instance, but that is because it is constructed—with doors, windows, window shades—to allow it to be made private, and because the law entitles a man to exclude unauthorized persons. And even the remote vacation hide-away is private just because one resorts to it in order—in part—to preclude access to unauthorized persons.

Privacy, thus, is control over knowledge about oneself. But it is not simply control over the quantity of information abroad; there are modulations in the quality of the knowledge as well. We may not mind that a person knows a general fact about us, and yet feel our privacy invaded if he knows the details. For instance, a casual acquaintance may comfortably know that I am sick, but it would violate my privacy if he knew the nature of the illness. Or a good friend may know what particular illness I am suffering from, but it would violate my privacy if he were actually to witness my suffering from some symptom which he must know is associated with the disease.¹³

VI.

There are reasons other than its relation to love, friendship and trust why we value privacy. Most obviously, privacy in its dimension of control over information is an aspect of personal liberty. Acts derive their meaning partly from their social context—from how many people know about them and what the knowledge consists of.¹⁴ A reproof administered out of the hearing of third persons may be an act of kindness, but if administered in public it becomes cruel and degrading. Thus, for instance, if a man cannot be sure that third persons are not listening—if his privacy is not secure—he is denied the freedom to do what he regards as an act of kindness.

Besides giving us control over the context in which we act, privacy has a more defensive role in protecting our liberty. We may wish to do or say things not forbidden by the restraints of morality, but which are nevertheless unpopular or unconventional. If we thought that our every word and deed were public, fear of disapproval or more tangible retalia-

13. These modulations are explored with great subtlety and a wealth of concrete illustrations in E. GOFFMAN, *BEHAVIOR IN PUBLIC PLACES* (1963); E. GOFFMAN, *ENCOUNTERS* (1961); E. GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

14. The writings of Erving Goffman, *supra* note 13, are replete with illustrations of the connections between context and relations among persons.

tion might keep us from doing or saying things which we would do or say if we could be sure of keeping them to ourselves or within a circle of those who we know approve or tolerate our tastes.¹⁵

For these important reasons, among others, men would value privacy even if there were nothing in the world called love, friendship or trust. These reasons support the familiar arguments for the right of privacy. Yet they leave privacy with less security than we feel it deserves; they leave it vulnerable to arguments that a particular invasion of privacy will secure to us other kinds of liberty which more than compensate for what is lost. To present privacy then, only as an aspect of or an aid to general liberty, is to miss some of its most significant differentiating features. The value of title to control of some information about ourselves is more nearly absolute than that. For privacy is the necessary context for relationships which we would hardly be human if we had to do without—the relationships of love, friendship and trust.

Love and friendship, as analyzed here, involve the initial respect for the rights of others which morality requires of everyone. They further involve the voluntary and spontaneous relinquishment of *something* between friend and friend, lover and lover. The title to information about oneself conferred by privacy provides the necessary something. To be friends or lovers persons must be intimate to some degree with each other. But intimacy is the sharing of information about one's actions, beliefs, or emotions which one does not share with all, and which one has the right not to share with anyone. By conferring this right, privacy creates the moral capital which we spend in friendship and love.

The entitlements of privacy are not just one kind of entitlement among many which a lover can surrender to show his love. Love or friendship can be partially expressed by the gift of other rights—gifts of property or of service. But these gifts, without the intimacy of shared private information, cannot alone constitute love or friendship. The man who is generous with his possessions, but not with himself, can hardly be a friend, nor—and this more clearly shows the necessity of privacy for love—can the man who, voluntarily or involuntarily, shares everything about himself with the world indiscriminately.

Privacy is essential to friendship and love in another respect besides providing what I call "moral capital." The rights of privacy are among those basic entitlements which men must respect in each other; and mutual respect is the minimal precondition for love and friendship.

15. Cf. Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. PA. L. REV. 157, 157-58, 161-65 (1954).

Privacy also provides the means for modulating those degrees of friendship which fall short of love. Few persons have the emotional resources to be on the most intimate terms with all their friends. Privacy grants the control over information which enables us to maintain degrees of intimacy. Thus even between friends the restraints of privacy apply; since friendship implies a *voluntary* relinquishment of private information, one will not wish to know what his friend or lover has not chosen to share with him. The rupture of this balance by a third party—the state perhaps—thrusting information concerning one friend upon another might well destroy the limited degree of intimacy the two have achieved.

Finally, there is a more extreme case where privacy serves not to save something which will be “spent” on a friend, but to keep it from all the world. There are thoughts whose expression to a friend or lover would be a hostile act, though the entertaining of them is completely consistent with friendship or love. That is because these thoughts, prior to being given expression, are mere unratified possibilities for action. Only by expressing them do we adopt them, choose them as part of ourselves, and draw them into our relations with others.¹⁶ Now a sophisticated person knows that a friend or lover must entertain thoughts which if expressed would be wounding, and so—it might be objected—why should he attach any significance to their actual expression? In a sense the objection is well taken. If it were possible to give expression to these thoughts and yet make clear to ourselves and to others that we do not thereby ratify, adopt them as our own, it might be that in some relations at least another could be allowed complete access to us. But this possibility is not a very likely one.¹⁷ Thus this most complete form of privacy is perhaps also the most basic, as it is necessary not only to our freedom to define our relations to others but also to our freedom to define ourselves.¹⁸ To be deprived of this control not only over what we do but over who we are is the ultimate assault on liberty, personality, and self-respect.

Trust is the attitude of expectation that another will behave according to the constraints of morality. Insofar as trust is only instrumental to

16. Compare M. MONTAIGNE, *De la Solitude*, in *ESSAIS*, ch. 38, with J.-P. SARTRE, *BEING AND NOTHINGNESS* pt. 2 (H. Barnes transl. 1956).

17. Perhaps it is, after all, one of the functions of psychoanalysis to provide such a possibility.

18. Erving Goffman has suggested to me in conversation that new methods of data storage and retrieval pose a threat to privacy in that it is possible to make readily accessible information about a person's remote and forgotten past. This means a person is unable to change his own and other's definitions of him as readily as once may have been the case.

the more convenient conduct of life, its purposes could be as well served by cheap and efficient surveillance of the person upon whom one depends. One does not trust machines or animals; one takes the fullest economically feasible precautions against their going wrong. Often, however, we choose to trust people where it would be safer to take precautions—to watch them or require a bond from them. This must be because, as I have already argued, we value the relation of trust for its own sake. It is one of those relations, less inspiring than love or friendship, but also less tiring, through which we express our humanity.

There can be no trust where there is no possibility of error. More specifically, a man cannot know that he is trusted unless he has a right to act without constant surveillance so that he knows he can betray the trust. Privacy confers that essential right. And since, as I have argued, trust in its fullest sense is reciprocal, the man who cannot be trusted cannot himself trust or learn to trust. Without privacy and the possibility of error which it protects that aspect of his humanity is denied to him.

VII.

The previous sections have explored the meaning of the concept of privacy and the significance of privacy to the notion of personality and to the relations of love, trust and friendship which are inseparable from it. The conclusions have been abstract and entirely general. But the concrete expressions of privacy in particular societies and cultures differ enormously. It remains to be shown why such differences both are to be expected and are entirely consistent with the general conceptions I have put forward.

In concrete situations and actual societies, control over information about oneself, like control over one's bodily security or property, can only be relative and qualified. As is true for property or bodily security, the control over privacy must be limited by the rights of others. And as in the cases of property and bodily security, so too with privacy the more one ventures into the outside, the more one pursues one's other interests with the aid of, in competition with, or even in the presence of others, the more one must risk invasions of privacy. Moreover, as with property and personal security, it is the business of legal and social institutions to define and protect the right of privacy which emerges intact from the hurly-burly of social interactions. Now it would be absurd to argue that these concrete definitions and protections, differing as they do from society to society, are or should be strict derivations from general principles, the only legitimate variables being differing empirical

circumstances (such as, for instance, differing technologies or climatic conditions). The delineation of standards must be left to a political and social process the results of which will accord with justice if two conditions are met: (1) the process itself is just, that is the interests of all are fairly represented; and (2) the outcome of the process protects basic dignity and provides moral capital for personal relations in the form of absolute title to at least some information about oneself.¹⁹

The particular areas of life which are protected by privacy will be conventional at least in part, not only because they are the products of political processes, but also because of one of the reasons we value privacy. Insofar as privacy is regarded as moral capital for relations of love, friendship and trust, there are situations where what kinds of information one is entitled to keep to oneself is not of the first importance. The important thing is that there be *some* information which is protected.²⁰ Convention may quite properly rule in determining the particular areas which are private.

Convention plays another more important role in fostering privacy and the respect and esteem which it protects; it designates certain areas, intrinsically no more private than other areas, as symbolic of the whole institution of privacy, and thus deserving of protection beyond their particular importance. This apparently exaggerated respect for conventionally protected areas compensates for the inevitable fact that privacy is gravely compromised in any concrete social system: it is compromised by the inevitably and utterly just exercise of rights by others, it is compromised by the questionable but politically sanctioned exercise of rights by others, it is compromised by conduct which society does not condone but which it is unable or unwilling to forbid, and it is compromised by plainly wrongful invasions and aggressions. In all this hurly-burly there is a real danger that privacy might be crushed altogether, or what would be as bad, that any venture outside the most limited area of activity would mean risking an almost total compromise of privacy.

Given these threats to privacy in general, social systems have given symbolic importance to certain conventionally designated areas of privacy. Thus in our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self-esteem.²¹ But there does not seem to be any reason

19. Cf. Rawls, *Legal Obligation and the Duty of Fair Play*, *supra* note 4.

20. Thus, for instance, so long as the mails are still private, wire tapping may not be so severe an imposition, particularly if people do not in any case consider telephone conversations as necessarily private.

21. There is another form of mortification in total institutions; beginning with ad-

connected with the principles of respect, esteem and the like why this would have to be so, and one can imagine other cultures in which it was not so, but where the same symbolic privacy was attached to, say, eating and drinking.²² There are other more subtly modulated symbolic areas of privacy, some of which merge into what I call substantive privacy (that is, areas where privacy does protect substantial interests). The very complex norms of privacy about matters of sex and health are good examples.

An excellent, very different sort of example of a contingent, symbolic recognition of an area of privacy as an expression of respect for personal integrity is the privilege against self-incrimination and the associated doctrines denying officials the power to compel other kinds of information without some explicit warrant. By according the privilege as fully as it does, our society affirms the extreme value of the individual's control over information about himself. To be sure, prying into a man's personal affairs by asking questions of others or by observing him is not prevented by the privilege. Rather it is the point of the privilege that a man cannot be forced to make public information about himself. Thereby his sense of control over what others know of him is significantly enhanced, even if other sources of the same information exist. Without his cooperation, the other sources are necessarily incomplete, since he himself is the only ineluctable witness to his own present life, public or private, internal or manifest. And information about himself which others have to give out is in one sense information over which he has already relinquished control.

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

....

New audiences not only learn discreditable facts about oneself that are ordinarily concealed but are also in a position to perceive some of these facts directly. Prisoners and mental patients cannot prevent their visitors from seeing them in humiliating circumstances. Another example is the shoulder patch of ethnic identification worn by concentration-camp inmates. Medical and security examinations often expose the inmate physically, sometimes to persons of both sexes; a similar exposure follows from collective sleeping arrangements and doorless toilets. An extreme here, perhaps, is the situation of a self-destructive mental patient who is stripped naked for what is felt to be his own protection and placed in a constantly lit seclusion room, into whose Judas window any person passing on the ward can peer. In general, of course, the inmate is never fully alone; he is always within sight and often earshot of someone, if only his fellow inmates. Prison cages with bars for walls fully realize such exposure.

E. GOFFMAN, *ASYLUMS* 23-25 (1961) (footnotes omitted).

22. See generally A. WESTIN, *PRIVACY AND FREEDOM* ch. 1 (1967). It is apparently traditional for the commanding officer of a naval vessel to cat alone.

The privilege is contingent and symbolic. It is part of a whole structure of rules by which there is created an institution of privacy sufficient to the sense of respect, trust and intimacy. It is contingent in that it cannot, I believe, be shown that some particular set of rules is necessary to the existence of such an institution of privacy. It is symbolic because the exercise of the privilege provides a striking expression of society's willingness to accept constraints on the pursuit of valid, perhaps vital interests in order to recognize the right of privacy and the respect for the individual that privacy entails. Conversely, a proceeding in which compulsion is brought to bear on an individual to force him to make revelations about himself provides a striking and dramatic instance of a denial of title to control information about oneself, to control the picture we would have others have of us.²³ In this sense such a procedure quite rightly seems profoundly humiliating.²⁴ Nevertheless it is not clear to me that a system is unjust which sometimes allows such an imposition.

In calling attention to the symbolic aspect of some areas of privacy I do not mean to minimize their importance. On the contrary, they are highly significant as expressions of respect for others in a general situation where much of what we do to each other may signify a lack of respect or at least presents no occasion for expressing respect. That this is so is shown not so much in the occasions where these symbolic constraints are observed, for they are part of our system of expectations, but where they are violated.²⁵ Not only does a person feel his standing is gravely compromised by such symbolic violations, but also those who wish to degrade and humiliate others often choose just such symbolic aggressions and invasions on the assumed though conventional area of privacy.

VIII.

Let us return now to the concrete problem of electronic monitoring to see whether the foregoing elucidation of the concept of privacy will

23. The struggle between Thomas More and King Henry VIII's officers to compel More to state his views on Henry's claims to ecclesiastical supremacy provides an example of how this aspect of privacy is linked to conceptions of personal integrity. See R. CHAMBERS, *THOMAS MORE* (1935).

24. It is just because the privilege bears this relation to the notion of personal integrity, at once intimate and symbolic, that criticisms which examine it as a tool for accomplishing this or that other purpose—e.g., 6-7 J. BENTHAM, *Rationale of Judicial Evidence*, in *THE WORKS OF JEREMY BENTHAM* (J. Bowring ed. 1843); McNaughton, *supra* note 2—seem so unanswerable yet one feels they somehow miss the point.

25. Erving Goffman gives numerous examples of subtle, implicit norms, of whose pervasive and powerful hold on us we are quite unaware until they are violated. E. GOFFMAN, *BEHAVIOR IN PUBLIC PLACES* (1963).

help to establish on firmer ground the intuitive objection that monitoring is an intolerable violation of privacy. Let us consider the more intrusive forms of monitoring where not only location but conversations and perhaps other data are monitored.

Obviously such a system of monitoring drastically curtails or eliminates altogether the power to control information about oneself. But, it might be said, this is not a significant objection if we assume the monitored data will go only to authorized persons—probation or parole officers—and cannot be prejudicial so long as the subject of the monitoring is not violating the conditions under which he is allowed to be at liberty. But this retort misses the importance of privacy as a context for all kinds of relations, from the most intense to the most casual. For all of these may require a context of some degree of intimacy, and intimacy is made impossible by monitoring.

It is worth being more precise about this notion of intimacy. Monitoring obviously presents vast opportunities for malice and misunderstanding on the part of authorized personnel. For that reason the subject has reason to be constantly apprehensive and inhibited in what he does. There is always an unseen audience, which is the more threatening because of the possibility that one may forget about it and let down his guard, as one would not with a visible audience. But even assuming the benevolence and understanding of the official audience, there are serious consequences to the fact that no degree of true intimacy is possible for the subject. Privacy is not, as we have seen, just a defensive right. It rather forms the necessary context for the intimate relations of love and friendship which give our lives much of whatever affirmative value they have. In the role of citizen or fellow worker, one need reveal himself to no greater extent than is necessary to display the attributes of competence and morality appropriate to those relations. In order to be a friend or lover one must reveal far more of himself. Yet where any intimate revelation may be heard by monitoring officials, it loses the quality of exclusive intimacy required of a gesture of love or friendship. Thus monitoring, in depriving one of privacy, destroys the possibility of bestowing the gift of intimacy, and makes impossible the essential dimension of love and friendship.

Monitoring similarly undermines the subject's capacity to enter into relations of trust. As I analyzed trust, it required the possibility of error on the part of the person trusted. The negation of trust is constant surveillance—such as monitoring—which minimizes the possibility of undetected default. The monitored parolee is denied the sense of self-respect inherent in being trusted by the government which has released

him. More important, monitoring prevents the parolee from entering into true *relations* of trust with persons in the outside world. An employer, unaware of the monitoring, who entrusts a sum of money to the parolee cannot thereby grant him the sense of responsibility and autonomy which an unmonitored person in the same position would have. The parolee in a real—if special and ironical—sense, cannot be trusted.

Now let us consider the argument that however intrusive monitoring may seem, surely prison life is more so. In part, of course, this will be a matter of fact. It may be that even a reasonably secure and well-run prison will allow prisoners occasions for conversation among themselves, with guards, or with visitors, which are quite private. Such a prison regime would in this respect be less intrusive than monitoring. Often prison regimes do not allow even this, and go far toward depriving a prisoner of any sense of privacy: if the cells have doors, these may be equipped with peep-holes. But there is still an important difference between this kind of prison and monitoring: the prison environment is overtly, even punitively unprivate. The contexts for relations to others are obviously and drastically different from what they are on the “outside.” This, it seems to me, itself protects the prisoner’s human orientation where monitoring only assails it. If the prisoner has a reasonably developed capacity for love, trust and friendship and has in fact experienced ties of this sort, he is likely to be strongly aware (at least for a time) that prison life is a drastically different context from the one in which he enjoyed those relations, and this awareness will militate against his confusing the kinds of relations that can obtain in a “total institution” like a prison with those of freer social settings on the outside.

Monitoring, by contrast, alters only in a subtle and unobtrusive way—though a significant one—the context for relations. The subject *appears* free to perform the same actions as others and to enter the same relations, but in fact an important element of autonomy, of control over one’s environment is missing: he cannot be private. A prisoner can adopt a stance of withdrawal, of hibernation as it were, and thus preserve his sense of privacy intact to a degree. A person subject to monitoring by virtue of being in a free environment, dealing with people who expect him to have certain responses, capacities and dispositions, is forced to make at least a show of intimacy to the persons he works closely with, those who would be his friends, and so on. They expect these things of him, because he is assumed to have the capacity and disposition to enter into ordinary relations with them. Yet if he does—if, for instance, he enters into light banter with slight sexual overtones with

the waitress at the diner where he eats regularly²⁶—he has been forced to violate his own integrity by being forced to reveal to his official monitors even so small an aspect of his private personality, the personality he wishes to reserve for persons towards whom he will make some gestures of intimacy and friendship. Theoretically, of course, a monitored parolee might adopt the same attitude of withdrawal that a prisoner does, but in fact that too would be a costly and degrading experience. He would be tempted, as in prison he would not be, to “give himself away” and to act like everyone else, since in every outward respect he seems like everyone else. Moreover, by withdrawing, the person subject to monitoring would risk seeming cold, unnatural, odd, inhuman to the very people whose esteem and affection he craves. In prison the circumstances dictating a reserved and tentative facade are so apparent to all that adopting such a facade is no reflection on the prisoner’s humanity.

Finally, the insidiousness of a technique which forces a man to betray himself in this humiliating way or else seem inhuman is compounded when one considers that the subject is also forced to betray others who may become intimate with him. Even persons in the overt oppressiveness of a prison do not labor under the burden of this double betrayal.

As against all of these considerations, there remains the argument that so long as monitoring depends on the consent of the subject, who feels it is preferable to prison, to close off this alternative in the name of a morality so intimately concerned with liberty is absurd. This argument may be decisive; I am not at all confident that the alternative of monitored release should be closed off. My analysis does show, I think that it involves costs to the prisoner which are easily overlooked, that on inspection it is a less desirable alternative than might at first appear. Moreover, monitoring presents systematic dangers to potential subjects as a class. Its availability as a compromise between conditional release and continued imprisonment may lead officials who are in any doubt whether or not to trust a man on parole or probation to assuage their doubts by resorting to monitoring.

The seductions of monitored release disguise not only a cost to the subject but to society as well. The discussion of trust should make clear that unmonitored release is a very different experience from monitored release, and so the educational and rehabilitative effect of unmonitored release is also different. Unmonitored release affirms in a far more significant way the relations of trust between the convicted criminal and society which the criminal violated by his crime and which we should now

26. Cf. E. GOFFMAN, *ENCOUNTERS* 37-45 (1961).

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be seeking to reestablish. But trust can only arise, as any parent knows, through the experience of being trusted.

IX.

The discussion of privacy in this essay has explored the meaning and significance of the concept. It reveals privacy as that aspect of social order by which persons control access to information about themselves. How this control is granted to individuals and the means for bringing about the social structures which express the notion of privacy have not been of direct concern. Clearly many of the social structures by which persons express their respect for the privacy of others are informal and implicit. The sanctions for violating the expectations set up by these structures, if they exist at all, are often subtle and informal too. But legal rules also play a large part in establishing the social context of privacy. These rules guarantee to a person the claim to control certain areas, his home, perhaps his telephone communications, etc., and back this guarantee with enforceable sanctions. Now these legal norms are more or less incomprehensible without some understanding of what kind of a situation is sought to be established with their aid. Without this understanding we cannot sense the changing law they demand in changing circumstances.

What is less obvious is that law is not just an instrument for protecting privacy; it is an essential element, in our culture, of the institution itself. The concept of privacy requires, as we have seen, a sense of control and a justified, acknowledged power to control aspects of one's environment. But in most developed societies the only way to give a person the full measure of both the sense and the fact of control is to give him a legal title to control. A legal right to control is control which is the least open to question and argument; it is the kind of control we are most serious about. As we have seen, privacy is not just an absence of information abroad about ourselves; it is a feeling of security in control over that information. By using the public, impersonal and ultimate institution of law to grant persons this control, we at once put the right to control as far beyond question as we can and at the same time show how seriously we take that right.