PRIVACY: THE DELICATE ENTANGLEMENT OF SELF AND OTHER

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I. INTRODUCTION – SCOPE OF THIS ARTICLE

Privacy is an entanglement of public, individual, and governmental interests. This article does not attempt to provide a compendium of United States Supreme Court cases charting a "right to privacy." While some case law, both United States Supreme Court and other courts, is included, the purpose of the article is not to describe the development of a United States right of privacy, nor present an apology for any particular iteration of such a right to privacy, either expanding or contracting what the courts have defined privacy to be up to this point. Nor does the article attempt to propose a single judicial or legislative approach to privacy. Moreover, even though the article contains some of the history of thought on privacy, that history is quite abbreviated and woefully incomplete. The portions of history on privacy included merely illustrate some of the development of thought on the topic, rather than attempting to gather or analyze all of the thought.[2] Those readers seeking such assistance should look elsewhere. This article also contains no definitive solutions to any of the entanglements discussed and analyzed. It does, however, propose a method of talking about privacy that may lead to more clarity for future analysis.

The intent of this article is to create dialogue and to foster discussion. Therefore, it should be read slowly because the contents are designed to provoke thought.[3] Essentially, the article seeks to identify some of the developments regarding the notion of privacy in Western thought as found in philosophy, legal analysis, and literature, and attempts to consider how people speak about privacy, as an expression of thought when people are simply working with it in their daily lives. The article then attempts to analyze some issues of privacy as a beginning groundwork for analyzing the delicate entanglement that privacy

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[2] The author apologizes for any omissions in the review of the history of privacy but a complete history is well beyond anything that could be published in a single article.

[3] It is a work in progress, being refined perpetually.

thoughts create in an open society.[4] Finally, using Ludwig Wittgenstein's familial resemblance theory,[5] examined beyond its application to privacy thought by Daniel Solove,[6] the article identifies the core family resemblance of all privacy discussion and concludes with an attempt to use the core's idea to understand some of the entanglements.[7]

II. SETTING FORTH THE PUZZLE

One feels empty
because there is nothing inside oneself
One tries to get inside oneself
that inside of the outside
that one was once inside
once one tries to get oneself inside what
one is outside:
to eat and to be eaten
to have the outside inside and to be
inside the outside

But this is not enough. One is trying to get
the inside of what one is outside inside, and to
get inside the outside.[8]

A. AN AIRPLANE TRIP

An airline passenger, Albert, sits in an airplane seat making notes for a law review article on privacy. Next to him another passenger, Bill, pulls a *People* magazine from his briefcase. Albert pensively glances to his right and notices the headline on the cover of the *People* magazine, "Paula Abdul's Medical Nightmare – Her Secret Story." Albert writes in his notebook the title of the article and the question "how can her story be a secret?" Albert then shields his notebook from Bill who is sitting next to him because he does not want Bill to read what he has

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[4] The term "open society" is appropriated from KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES (London Routledge Press 1945). However, the reader should not be misled into seeing "open society" as a political, philosophical statement supporting or incorporating Sir Karl Popper's philosophy.

[5] LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, §§ 66-67 and 561-568 (G.E.M. Anscombe, trans., 30 ed. 2001).

[6] Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1096-1099 (2002).

[7] The author's idea of "entanglements" arose from a long-standing appreciation regarding the intricacies of self and other explored by R.D. LAING *in* KNOTS (Vintage Books 1970) and *in* SELF & OTHERS (Pantheon Books 1969).

[8] R.D. LAING, KNOTS, *supra* note 6, at 83.

written. Does he do this because he does not want Bill to know that he has invaded Bill's privacy by looking at Bill's magazine? Would he not be pleased if Bill bought a copy of the article when it is written and read it? What if Bill does not care whether Albert sees his magazine? Is Bill's privacy dependent upon Albert's subjective intent? Why does Albert wish to preclude Bill from seeing his note – because Albert does not want to be seen as a snoop or because Albert is protecting his thoughts?

B. PRIVACY AND STRANGERS

Restaurant patron, Chris, sits peacefully in a small restaurant having a quiet conversation with her companion. At the next table, cell phone user, Diane, sits with her companion while she speaks on the cell phone about her recent surgery. Chris does not wish to hear about the surgery, but cannot help making eye contact with Diane. In spite of this, Diane continues to describe intimate details. Does Diane feel she is not losing "privacy" because only a stranger hears it? Would she change her behavior if she thought she might see Chris later in another setting? Or, if Chris were the mother of one of her child's friends?

C. COOKIES

Cookies are placed on individual user's computers by businesses for a variety of purposes.[9] Essentially a cookie is a piece of code that communicates with the entity that placed the code on the user's computer. For instance, when the user goes to Amazon.com's Web site, , the Internet Web page displayed is customized for that user based upon the user's previous visits to, and purchases from, Amazon.com.[10] Some users like the idea that Amazon.com provides them with suggested purchases. Other users find this to be an invasion of their privacy. In any event, unless the user affirmatively specifies that Amazon.com not customize the opening screen, Amazon.com will customize the Web page.[11]

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[9] For a description of some cookie technology, *see* Alan F. Blakley, Daniel B. Garrie, and Matthew J. Armstrong, *Coddling Spies: Why the Law Doesn't Adequately Address Computer Spyware*, 2005 DUKE L. & TECH. REV. 25 at *3. *See also*, In re Doubleclick Inc. Privacy Litigation, 154 F. Supp. 2d 497, 519 n. 28 (S.D.N.Y. 2001) (including a list of articles concerning the privacy issues raised by cookie technology). For a more fundamental description of cookie technology, *see Proof of Liability for Violation of Privacy of Internet User by Cookies or Other Means*, 67 AM. JUR. PROOF OF FACTS 3d 249, § 1 (2005).

[10] For a description of the Amazon Privacy Policy and Amazon.com's use of cookies, *see* Amazon.com Privacy Notice, http://www.amazon.com/exec/obidos/tg/browse/-/468496/103-0633146-3975857 (last visited 12/08/05).

[11] *Id.*

D. PRIVACY, ISOLATION, AND DISHONESTY

Henry David Thoreau isolated himself at Walden Pond. "I have, as it were, my own sun and moon and the stars, and a little world all to myself."[12] Thoreau defined his privacy in terms of isolation. In twenty-first century terms, physical isolation as Thoreau achieved in the mid-1800s is almost impossible. Is privacy a form of isolation? Do people need to abandon privacy to find meaningful existence in a community with others? Is privacy a way for one person to determine how he or she will be seen by the rest of the world? If privacy is the ability to portray oneself as one wishes, is this a form of dishonesty? Does a person asking a question of a stranger, or for that matter of anyone else, have a right to expect the other to answer truthfully? Is someone's right to privacy limited by another's right to information?

E. PUBLIC INTEREST

As society has increased in its efforts to impose rules on individuals, it has also increased its interest in information about individual behavior. For instance, information regarding individuals in public records is by and large open to inspection by any interested person.[13] However, as society increases its desire to know about individuals, individuals have developed an interest in learning about the behavior of public institutions. Consequently, a balancing of individual and public interests becomes necessary.

Public interest manifests itself in two ways. The first is by shedding *"sunshine on governmental activities*,"[14] by allowing individuals to evaluate public officials and the manner in which those officials fulfill their duties. This information is frequently communicated through protected channels, such as media coverage of candidates for public office. The second is through governmental disclosure of information about individuals to the public for self-monitoring. This reflects the natural tendency of human communities to keep an eye on their members, and exists today in programs such as those that divulge the prior criminal history of sex offenders. Both of these hark back not only to R.D. Laing's Knots, but also to the Platonic sense of complexity and danger in human nature, illustrated by the image in Plato's *Phaedrus* of the soul's consisting of a charioteer struggling to harness together a team of good winged horses and bad winged horses all pulling in different directions.[15] With consummate

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[12] THE WRITINGS OF HENRY DAVID THOREAU 144 (Houghton Mifflin 1906).

[13] *See* Doe v. City of Chicago, 360 F.3d 667, 669 (7th Cir. 2004). The court held that judicial proceedings are open, that there is a "presumption that parties' identities are public information." *Id.*

[14] Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1173 (2002).

[15] PLATO, PHAEDRUS 69 (R. Hackforth, trans. Cambridge, 1952).

understatement, Plato describes this task (which may be an apt description for the task of defining privacy) as "difficult and troublesome."[16]

III. BACKGROUND OF PRIVACY

Abstract concepts developed over time. For instance, the number zero did not exist as a concept in ancient times – neither Greeks nor Romans had a zero.[17] Even other numerical concepts required more abstraction than earlier civilizations could muster.[18] The only numerical concepts were those capable of concrete representation, two, three, and so forth.[19] Abstractions such as "zero" arose much later in Western thought.[20] Even now, "[v]ery few people are capable of defining what is meant by 'number,' or '0,' or '1.'"[21]

Similarly, in early times, other abstract concepts, such as the concept of "private" as distinct from "public," was equally elusive. Such an express separation was impossible in theocracies in particular, "[I]f God or Martians monitor all our thoughts and behavior, we have no privacy with respect to them . . ."[22] Rather, the populace saw the leader of the state as divine, because the state was identified as synonymous with that leader and, therefore, identified as divine, and omniscient. How could anything be "private," if the leader, the godhead on earth, could know it?

Although people use the word "privacy," is it, like "number," or "0," or "1,"[23] a concept that cannot be defined except through examples of what it is and what it is not? Initially, consider what "privacy" has developed into – an abstract concept, evolving in complexity so that it now includes more definitions than can be reconciled.[24] The fundamental privacy discourse still reflects a prehistoric,

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[16] *Id.*

[17] BERTRAND RUSSELL, INTRODUCTION TO MATHEMATICAL PHILOSOPHY 3 (George Allen & Unwin, Ltd., London, 11th Printing 1963).

[18] "It must have required many ages to discover that a brace of pheasants and a couple of days were both instances of the number 2." *Id.*

[19] *Id.* "And the discovery that 1 is a number must have been difficult." *Id.*

[20] *Id.*

[21] *Id.*

[22] Ferdinand Schoeman, *Privacy: Philosophical Dimensions of the Literature*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 4 (Ferdinand Schoeman ed. Cambridge 1984).

[23] *See* Note 20, above. Furthermore, even today, such concepts as "0" or "nothing" defy definition even among mathematicians. *See, e.g.* Peter Heath, *Nothing*, *in* 5 THE ENCYCLOPEDIA OF PHILOSOPHY, 524-25 (MacMillan 1967) for a playful, yet insightful attempt to describe "nothing."

[24] These include (1) the state or condition of being withdrawn from the society of others, or from public interest; (2) the state or condition of being alone, undisturbed, or free from public attention, as

implicit struggle against an incursion upon every aspect of life by a seemingly omniscient institution, or, at least, an institution that the individual perceives as potentially omniscient whether religious, governmental, or commercial. Somehow the notion of privacy also includes some fear that the omniscient entity, once it acquires knowledge, will do something with it against the individual's wishes.

As urban society continues to occupy all the spaces in most individuals' lives, privacy becomes more and more problematic. Technology amplifies the problem. For instance, technology currently allows police to locate people and objects through solid walls.[25] When will technology eliminate boundaries altogether?

A. DISTILLING PRIVACY CONCEPTS FROM EARLY THOUGHT

Even in the earliest times, before any explicit discussion of privacy, individuals seemed to implicitly realize that at least certain of their thoughts and actions were hidden from the godhead. Whether labeled as such or not, such thoughts and actions were private. The biblical story of Adam and Eve[26] finds the anthropomorphized godhead wandering through the Garden of Eden after the primordial pair have eaten the fruit from the tree of knowledge. Adam and Eve are "covering their nakedness."[27] This demonstrates that the tradition from which the story derives has some notion, even if undeveloped, of the difference between public and private. Adam and Eve must have believed that covering their "private parts" would prevent even the omniscient godhead from viewing them.[28] In addition, the tradition implies that the godhead must question them to know why their behavior has changed.[29] Should he not know whether they ate the fruit of the tree if he is truly omniscient?[30] This story indicates that some

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a matter of choice or right; (3) private or retired places; private apartments; places of retreat; (4) a secret place; a place of concealment; (5) absence or avoidance of publicity or display; a condition approaching to secrecy or concealment; (6) keeping of a secret; reticence; (7) a private matter; a secret; (8) the private parts; (9) intimacy; confidential relations; and (10) the state of being privy to some act. *See Private*, 2 COMPACT ED. OF THE OXFORD ENGLISH DICTIONARY 2306-2307 (3d. ed. 1973).

[25] *Through a Wall, Clearly*, BUSINESS 2.0, 28 (Jan./Feb. 2006).

[26] *See The Book of Genesis* 2:15-3:24 (The New Oxford Annotated Bible, pp. 3-5, 1973).

[27] *Id*. at 3:10.

[28] *Id*. Much like a very young child who covers his eyes believes that this prevents *others* from seeing *him*.

[29] *Id*. at 3:11, where God must ask "Who told you that you were naked? Have you eaten of the tree of which I commanded you not to eat?" An omniscient godhead would not need to ask.

[30] This story, with its anthropomorphic godhead, implies that the human ruler of the community, like this godhead may not be truly omniscient and, consequently, without using the concept gives an early precursor of some notion of "privacy."

undefined notion of some private things existed in Western thought as early as the tenth century B.C.E., the time of the likely origins of the Adam and Eve story.[31]

A common ancient theme asks the question: How could bad things happen to good people?[32] When people saw bad things happening to someone previously thought to have conformed to all societal norms, they initially thought that the person had secretly, or "privately," violated the mores of society. Then, they came to realize that bad things happened to *them* even when they knew they had done nothing wrong and, sometimes, nothing bad happened to them even when they had violated a norm "in private." Slowly people realized that even though they thought the godhead, or its incarnation, the political leader, was omniscient, they had secrets and private thoughts. They committed acts "in private" that could be hidden from others including the political and religious leaders. These early notions of privacy were never well-defined. Just as people must have had a notion of an empty vessel – that is, "nothingness" or "zero," – without having defined the concept, so these early misgivings led to some notion of "privacy," even without definition or explicit statement.

B. ADDITIONAL LAYERS OF COMPLEXITY

In the evolution of the public-private distinction, the trend has been in the direction of creating additional layers of complexity by attempting to define what is private and what is not. Each passing age seems to add a new variable to the equation. The Greeks, for instance, did not raise privacy to the level of importance it holds in contemporary society. "To live an entirely private life means above all to be deprived of things essential to a truly human life: to be deprived of the reality that comes to being seen and heard by others, to be deprived of an 'objective' relationship with them that comes from being related to and separated from them through the intermediary of a common world of things, to be deprived of the possibility of achieving something more permanent than life itself."[33] Arendt, in describing the Greek view of privacy, explains that at the time of the Greeks, people were defined in light of their relationship to society.[34]

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[31] Eugene H. Maly, *Introduction to The Pentateuch*, in THE JEROME BIBLICAL COMMENTARY 3 (1968).

[32] In the Judeo-Christian tradition, the biblical Book of Job, written between 450 and 600 B.C.E., *see* R.A.F. MacKenzie, *Job*, *in* THE JEROME BIBLICAL COMMENTARY 512 (1968), seeks to answer this question. Job lived a blameless life, and yet was "punished." The godhead took away all of his possessions, killed his family and afflicted Job with disease. Ironically, only after he "cursed God in his heart" did he recover what he had lost. Moreover, God lectures Job that Job can never understand his reasons, implying they are cosmically sound. But, in fact, they're not. The godhead is toying with Job to prove a point to one of his servants – and not one of his nicest servants – but rather Satan, the fallen angel. *See The Book of Job*, *in* THE NEW OXFORD ANNOTATED BIBLE 613-655 (1973), esp. p. 654, 42:3, where Job acknowledges that only God has private thoughts.

[33] HANNAH ARENDT, THE HUMAN CONDITION 58 (University of Chicago Press, 1958).

[34] *Id.* at 22-24.

Privacy was seen as a deprivation leading to loneliness.[35] Arendt identifies an emerging variable in the equation of privacy as "the profound connection between private and public, manifest on its most elementary level in the question of private property."[36] For the Greeks, then, privacy can only be understood in coexistence with the public realm.[37]

Likewise, the Romans distinguished between *publicus* and *privatus*, but distinguished these based on physical spaces.[38] The house was "a little commonwealth" over which codified law had no jurisdiction.[39] However, this concept was physical and did not encompass individual personal privacy.[40]

While few early writings explicitly attempt to define privacy, it is clear that its foundation lies in these notions, implicit in behavior or speech, that later develop into speech about privacy.[41] These notions underlie many different fields of thought. They must be carefully teased out, like brushing sand and debris from dinosaur bones. For instance, the development of the jury system and the end of trial by ordeal, betrays a subtle shift in attitudes from the purely physically private (what occurs inside a closed room) to the personally private (what occurs in the person's mind). The end of the practice of trial by ordeal is some evidence of the shift from the belief in an omniscient godhead capable of seeing into an individual's private thoughts.

Prior to the Fourth Lateran Council in 1215, one of the prime methods of determining guilt in a criminal proceeding was trial by ordeal.[42] Such "trials" typically consisted of submerging a person in cold water to see whether the accused would drown or if the godhead would save the person.[43] If the person

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[35] *Id*. at 59.

[36] *Id*. at 61.

[37] *Id*. at 59.

[38] Thomas J. Farrell, *Privacy and the Boundaries of Fabliau in The Miller's Tale*, 56 ELH 4, 773 (Winter, 1989).

[39] *Id*.

[40] *Id*.

[41] This theme that ideas and notions can be understood by examining the ordinary language used to describe them is a fundamental theme throughout this article. Ordinary language philosophy is perhaps best known from the work of Ludwig Wittgenstein in his philosophical investigations. *See supra* note 4. The underlying belief in a method divined by ordinary language philosophy is that people express themselves in ordinary language, and by understanding that ordinary language, philosophers can understand the context and the concept being expressed. There is a branch of analytical philosophy that attempts to analyze concepts rather than creating metaphysical systems.

[42] Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 214 (2005).

[43] *Id*. at note 48.

did not drown, he or she was innocent. If the person died, he or she was obviously guilty. The practice arose from the belief "that God would save an innocent man from death or injury."[44] A foundational premise of this belief was that the godhead could *know* what the accused had done, and "know the person's heart," that is, the *mens rea* of the person. At the time of the Lateran Council in 1215, "Pope Innocent III forbade the clergy from performing religious ceremonies in association with ordeals and the English crown rapidly recognized that decree."[45]

The end of trial by ordeal is some evidence that people began to believe, among other things, that more than physical space could be private, that personal space could be held private even from the theoretically omniscient godhead.[46] Even after the practice of trial by jury began, although the jury wanted to learn the private thoughts of the accused, courts quickly began to limit what the jury could consider as admissible evidence.[47] Much later, at the end of the eighteenth century, this curtailment, codified within the United States Constitution's Bill of Rights, afforded the accused the explicit right not to disclose his or her personal thoughts to a jury.[48]

C. UP TO ENLIGHTENMENT

By the sixteenth century, the tension between public and private had emerged and writers began attempting to define the abstract concept. Jurgen Habermas hypothesizes that this "opposition between the public and private spheres"[49] did not exist until the Protestant Reformation, which, by investing divine authority in the individual instead of the church, required definition of the

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[44] *Id.* at 214.

[45] *Id.*

[46] This is not to say that the *reason* that Pope Innocent III sought to abolish the Church's role in trial by ordeal was the development of a belief in privacy. Rather, one of the implications of the abolition of trial by ordeal is a movement toward a belief in the existence of personal privacy. After all, if the only reason to abolish trial by ordeal was the inhumane treatment of the accused, many other, much more cruel actions would have been abolished. *See, e.g.* Andrea McKenzie, *"This Death Some Strong and Stout Hearted Man Doth Choose": The Practice of Peine Forte et Dure in Seventeenth- and Eighteenth-Century England*¸ 23 LAW & HOST. REV. 279 (2005) in which the author describes the use of piling on weights until the accused was crushed to death or otherwise died (more gruesomely than need be repeated here) when that accused persisted in refusing to speak. Abolishing the trial by ordeal does indicate that society as a whole began to believe that trial by ordeal was a bizarre way of trying a case.

[47] *See* Courselle, *supra* note 41, at 214.

[48] U.S. CONST. Amend. V.

[49] Gary Schneider, *The Public, the Private, and the Shaming of the Shrew*, 42 (i. 2) STUDIES IN ENGLISH LITERATURE, 1500-1900, 236-237 (Spring 2002)..

"first sphere of private autonomy" in religious conscience.[50] The trend toward an individual self was confirmed by the Reformation's creation of a "religious conscience" separate from the church, government and society. Accompanying this new individual freedom was a renewed effort to "civilize" the population. Society stopped believing in the omniscient godhead able to impose public values on the private sphere. What would replace the "holy other"? From the time of the Reformation, different systems developed. One such example, the Puritanical system of mutual surveillance, moved in a direction opposed to personal privacy.[51]

Enlightenment thinkers, on the other hand, were largely responsible for elevating the values of autonomy, personality, and dignity, which were part of lifting the human condition above narrow dogma. Immanuel Kant, a prime spokesman for Enlightenment thought, defended the autonomy of the mind and the independent thinking it engenders. "Kant was the philosopher of human autonomy, the view that by the use of our own reason in its broadest sense, human beings can discover and live up to the basic principles of knowledge and action without outside assistance, above all without divine support or intervention."[52]

Autonomy itself is a prerequisite to other forms of personhood. The creation of a unique self, or personality, in a removed "field of operation within which to engage in the conscious construction of self" is necessary.[53] This Enlightenment sentiment persists even today. Undue encroachment on the personal sphere offends fundamental dignity; lack of autonomy threatens personhood. "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

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[50] Milette Shamir, *Hawthorne's Romance and the Right to Privacy*, AMERICAN QUARTERLY 49.4, 748 (1997).

[51] *See Id*. at 751 & 756.

[52] Paul Guyer, *Kant, Immanuel*, CONCISE ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY, 432 (Routledge, 2000).

[53] Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000). This is similar to the heirarchy of needs postulated by Abraham Maslow. *See*, ABRAHAM MASLOW, MOTIVATION AND PERSONALITY, 146-150 (Harper & Roe, 1954). Prior to a person's meeting higher needs, such as love, self-esteem, or autonomy, he or she must meet fundamental needs, such as food and shelter. *Id*. at 84-92. Similarly, until the person has a sense of autonomy, he or she cannot develop a notion of personhood. Maslow divides needs into four sets: safety; belongingness and love; esteem; and, self-actualization. *Id*. at 84-92. Each requires the previous needs to have been met. *Id*. at 91. By his definition, personhood does not truly become established until the third set, esteem needs, are met. *Id*. at 91. Esteem must not be based on the opinion of others. *Id*. Esteem needs are the need for independence and freedom that lead to feelings of self-confidence, worth, strength, capability, and adequacy – of being useful and necessary in the world. *Id*. at 90-91. In other words, finding identity as an individual.

an individual merges with the mass.... Such a being, although sentient, is fungible; he is not an individual."[54]

The American legal tradition incorporated these values. The Constitution's First Amendment protects a "zone of privacy," safeguarding the individual's freedom of thought and conscience.[55] Furthermore, "the state has no legitimate interest in 'control (of) the moral content of a person's thoughts,' . . . and we need not quarrel with this."[56] The Constitution through its Fifth Amendment also protects "a private inner sanctum of individual feeling and thought, and proscribes state intrusion to extract self-condemnation."[57] The U.S. Supreme Court in *Whalen v. Roe*[58] describes two sorts of privacy interests arising under the United States Constitution. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."[59] Long before these interpretations of the Constitution, Samuel Warren and Louis Brandeis wrote an article in 1890 that took account of the privacy of "thoughts, sentiments, and emotions," of "the inviolate personality,"[60] fearing that the intrusion of the press into private affairs "destroys at once robustness of thought and delicacy of feelings."[61]

Protecting individual personhood requires limiting the collection and disclosure of information about that person. Information an individual entrusts to family and friends (such as preference for the color green over orange, comedy over tragedy, classical music over jazz) usually differs from the information collected in public records (such as date of birth and marriage, address, and Social Security number). The common denominator between what family and friends know and what the public collects and reveals is control of access. What makes one type of access public and another type private? Philosophers and

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[54] Jeffrey H. Reiman, *Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future*, 11 SANTA CLARA COMPUTER & HIGH TECH. L.J. 27, 41 (1995)(quoting Edward Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser*, *in* RICHARD WASSERSTROM, PRIVACY: SOME ARGUMENTS AND ASSUMPTIONS, IN PHILOSOPHICAL DIMENSIONS OF PRIVACY 165 (Ferdinand Schoeman, ed., 1984)).

[55] *See, e.g,*. Stanley v. Georgia, 394 U.S. 557, 564 (1969). "It is now well established that the Constitution protects the right to receive information and ideas . . . This right to receive information and ideas, regardless of their worth, . . . , is furnished to our free society." *Id.*

[56] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973).

[57] Couch v. U.S., 409 U.S. 322, 327 (1973).

[58] 429 U.S. 589, 599-600 (1977).

[59] *Id.*

[60] Shamir, *supra* note 49, at 761.

[61] *Id.*

psychologists demand that some items fit in each category to protect the person. For some a telephone number is a very private thing, for others it is not. What is the difference? How can it be defined?

Taken together, all of these bits and pieces define the person individually and in relation to others. Thus, during the Enlightenment and the period leading up to it, people began to realize that the misappropriation of someone's personal information can have damaging consequences at several levels of personhood. It can threaten dignity, for, as Shakespeare wrote, misuse of personal information may constitute a harm of the highest order:

> Good name in man & woman, dear my lord,
> Is the immediate jewel of their souls:
> Who steals my purse steals trash; 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that felches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.[62]

D. THE NINETEENTH CENTURY AND INTO THE TWENTIETH CENTURY

By the nineteenth century, the heightened tension between public and private focused on economics and the unleashing of market forces. A fundamental principle of the developing laissez-faire economics was that the public realm of government should not interfere with private business. Originally conceived as a theory of economics and business only, the principles of laissez-faire and market forces soon became such a dominant part of societal belief that it also evolved into a political ideology.[63]

As the modern state emerged in the nineteenth century it began to collect information about its citizens for health, education, tax, and other purposes. This movement toward a 'surveillance culture' can be seen in pre-Industrial society in the Puritan principle of mutual surveillance.[64] Furthermore, Jeremy Bentham's Panopticon proposed in 1787,[65] in which a single prison guard could monitor the actions of all the prisoners simultaneously,[66] takes collection of information to a

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[62] WILLIAM SHAKESPEARE, OTHELLO act 3, sc, 3; and see the discussion of this in Brook Thomas, *The Construction of Privacy In and around The Bostonians*, 64 (i. 4) AMERICAN LITERATURE, 725 (December 1992).

[63] *Id*. at 724-725.

[64] *See, e.g*., Edward Griffin, *Enoch Walked with God*; *available at* http://www.puritansermons.com/pdf/griffin6.pdf (last visited Jan. 16, 2006); *and see* Shamir, *supra* note 49, at 751.

[65] *See* JEREMY BENTHAM, THE PANOPTICON WRITINGS 29-95 (Miran Bozovic, ed., Verso,1995).

[66] *Id*. at Letter II.

new level. "Panopticon," literally meaning "all-seeing," allows a single person to monitor the private behavior of many individuals without their knowing when they may or may not be monitored. This uncertainty is central to Bentham's plan.[67]

In the nineteenth century, authors began to write about the concept of privacy in the political arena. In 1890, an article in *Scribner* stated that "[i]n the great future battle of the world between the two systems of Socialism and Individualism, one of the vital points of difference is to be *privacy*."[68] Writers began to try to define privacy as a part of political philosophy. Privacy was sometimes defined as class-based, "a social right, a matter of bourgeois propriety and morals."[69]

In literature, the concept of privacy as hidden from the world began to emerge more and more in the nineteenth century. Robert Browning in *Paracelsus* wrote, "I give the fight up: let there be an end/A privacy, an obscure nook for me./I want to be forgotten even by God."[70] But, interestingly, the speaker's second choice is to be lost in a crowd. "But if that cannot be, dear Festus, lay me,/when I shall die, . . ./. . . where such graves are thickest; let it look/no wise distinguished. . . . "[71] Perhaps the Industrial Revolution and the increase in population caused more and more people to desire isolation or privacy that could be found either by being alone or by being immersed in the public. For Browning, privacy was to be left alone or to be hidden in the masses. For Henry David Thoreau, only one type of privacy seemed appealing:

> For what reason have I this vast range and circuit, some square miles of unfrequented forest, for my privacy, abandoned to me by men? My nearest neighbor is a mile distant, and no house is visible from any place but the hill-tops within half a mile of my own. I have my horizon bounded by woods all to myself; a distant view of the railroad where it touches the pond on the one hand, and of the fence which skirts the woodland road on the other. But for the most part it is as solitary where I live as on the prairies. It is as much Asia or Africa as New England.

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[67] *Id*. at Letter I.

[68] Thomas, *supra* note 61, at 723.

[69] *Id*. at 724.

[70] Robert Browning, *Paracelsus, Part V*, ll 363-65, *in* IAN JACK & MARGARET SMITH, 1 THE POETICAL WRITES OF ROBERT BROWNING, 455 (Oxford 1983).

[71] *Id*. at ll 366-370, 455.

> I have, as it were, my own sun and moon and stars,
> and a little world all to myself.[72]

The anonymity Browning sought in the crowd comes from being undistinguishable and, therefore, able to maintain privacy. Perhaps Diane on her cell phone[73] mirrors Browning's belief. Nineteenth century writers explicitly showed their discontent with the publication of an individual's private information on a mass scale, thus destroying both anonymity and privacy. For instance, Henry James' notes about *The Bostonians* fulminate against "the vulgarity and hideousness of . . . the impudent invasion of privacy – the extinction of all conception of privacy."[74] Moreover, in James' later novel *The Reverberator*, he portrays an American reporter in most unpleasant and vulgar terms when the reporter almost terminates the engagement of a French-American couple by publishing information that the woman confidentially discloses about the private life of her family-to-be.[75]

By 1890, legal scholars were writing about privacy as well. In one of the most famous early American statements about privacy, Samuel D. Warren and Louis D. Brandeis published an article in the Harvard Law Review, defining privacy as the right to be left alone.[76] The impact of government, economics, and population growth seems to have led to the need to define what would be private from what would be public.

The need for control of information in American jurisprudence can therefore be traced to at least the 1890s and the argument of Warren and Brandeis that society should give legal protection against the use of personal information, whether true or not.[77] Warren and Brandeis were especially concerned about intrusion of the public into private realms by the media's growing influence.[78]

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a *trade*, which is pursued with industry as well as effrontery....*modern enterprise and*

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[72] Henry David Thoreau, *Walden*, *in* THE WRITINGS OF HENRY DAVID THOREAU, *supra* note 11, at 144.

[73] *See* § IB above.

[74] Joyce A. Rowe, *"Murder, what a lovely voice!": Sex, Speech, and the Public/Private Problem in The Bostonians*, 40 (i. 2) Texas Studies in Literature and Language, 158 (Summer 1998).

[75] Thomas, *supra* note 61, at 723.

[76] Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[77] Thomas, *supra* note 61, at 721.

[78] *Id*.

> *invention* have, through invasions upon privacy, subjected [the individual] to mental pain and distress, far greater than could be inflicted by mere bodily injury.[79]

Physical spaces as well as personal space have formed the foundation of privacy discourse in America. American legal dialogue appropriated the notion of house as an extension of the sphere of privacy early in the development of the United States government.

> In 1761, the Superior Court in Mass Bay debated issuing a writ filed by Charles Paxton, collector of customs, which would authorize officers to search any home. Prominent Boston attorney James Otis stated as part of his argument against the writ that 'one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet he is as well guarded as a prince in his castle.[80]

While James Otis eventually lost the case, John Adams, who was present in the courtroom, wrote years later that "American Independence was then and there born."[81]

The sanctity of the domestic sphere is prominently placed in the Third Amendment's prohibition against the quartering of soldiers without the consent of the owner,[82] and in the Fourth Amendment's prohibition of unreasonable searches and seizures.[83] While the protection of the privacy of the household gained an early purchase in American common law, by the time of *Terry* it expanded to include privacy as much for a "citizen on the streets of our cities as to the homeowner closeted in his study."[84] As early as 1822, however, a court approved an individual's right of slamming his door shut in the face of anyone, including a government official, for example.[85] Even non-owners have a right of privacy in the premises that they occupy.[86] Landlords do not have an absolute

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[79] Quoted in *Id*. at 721, from Warren and Brandeis, *supra* note 75, at 193 (emphasis added).

[80] Shamir, *supra* note 49, at 753.

[81] *Id*.

[82] *Id*. at 754 and *See, e.g*., *Whalen*, 429 U.S. at 607 n. 1 (1977) (Stewart, J., concurring).

[83] Shamir, *supra* note 49, at 754 and *see* Terry v. Ohio, 392 U.S. 1, 8-9 (1968).

[84] *Terry,* 392 U.S. at 9.

[85] North Carolina v. Armfiled, 9 N.C. 246 (2 Hawks) (N.C. 1822). "If the officer cannot enter peacefully before the door is shut, he ought not to attempt it, for this . . . is as much a violation of the owner's right, as if he had broken the door at first." *Id*.

[86] Chapman v. U.S., 365 U.S. 610, 616-617 (1961).

right to enter the premises they own if occupied by their tenants.[87] To allow landlords, government officials or anyone else to force entry into tenant property "would reduce the amendment to a nullity and leave peoples' homes secure only in the discretion of police officers."[88]

Moreover, in 1890, Warren and Brandeis indicated that they were not creating new thoughts about privacy, but rather were reiterating the developing theme of privacy and making, the implicit explicit. "The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle and prurient curiosity?"[89] As a Justice, Brandeis famously reiterated this sentiment in his *Olmstead* dissent: "Ways may some day be developed by which the government . . . . will be enabled to expose to a jury the most intimate occurrences of the home."[90] At the time, this seemed a theme from science fiction. Later, Justice Douglas echoed this outlook in *Griswold v. Connecticut,*[91] where he held that the Constitution creates a zone of privacy protecting the sanctity of the home against government intrusions.[92]

This theme of dehumanization by the superimposition of the public onto the internal workings of the private appears with increasing frequency in twentieth-century literature even before *Griswold*. For instance, in Franz Kafka's *The Trial*, the protagonist is observed, indicted, and tried by a faceless, omnipotent bureaucracy, in a "thoughtless process of bureaucratic indifference, arbitrary errors, and dehumanization," in which people are alienated from their own information.[93] Similarly, T.S. Eliot has the pathetic J. Alfred Prufrock[94] measure out his life in coffee spoons, a tiny insignificant measure, for a tiny insignificant Everyman who scuttles around like claws without a body. Eliot's

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[87] *Id*.

[88] Johnson v. U.S., 333 U.S. 10, 14 (1948) (cited and expanded to include tenants' rights against landlords by *Chapman*, 365 U.S. at 617).

[89] Shamir, *supra* note 49, at 761 (*quoting* Warren & Brandeis, *supra* note 75).

[90] Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

[91] 381 U.S. 479 (1965).

[92] *Id*. at 484.

[93] Daniel J. Solove, *Access & Aggregation*, *supra* note 13, at 1193-94.

[94] T.S. ELIOT, *The Love Story of J. Alfred Prufrock*, THE COMPLETE POEMS & PLAYS (Harcourt, Brace & World 1962). "I have measured out my life with coffee spoons;/I know the voices dying with a dying fall/Beneath the music from a farther room/ . . . /And when I am formulated, sprawling on a pin,/When I am pinned and wriggling on the wall/ . . . /I should have been a pair of ragged claws/Scuttling across the floors of silent seas." *Id*. at 5.

poem *The Hollow Men*[95] describes the condition of humanity as isolated and immersed in a shallow society. Samuel Beckett captures the fragmented nature of a society in which information is exchanged through impersonal channels in *The Unnameable*, whose narrator comments: "What puzzles me is that I should be indebted for this information to persons with whom I can never have been in contact."[96] All of these themes of alienation and vulnerability come together and impact notions of privacy during the twentieth century.

These feelings are understandable since Europe, between the two World Wars (1918-1939), saw the rise of totalitarianism and the decline of individual rights.[97] The rise of totalitarianism can be seen as a perfected result of the emergence of the supremacy of humanity at the end of the eighteenth century.[98] "It meant nothing more nor less than that from then on Man, and not God's command or the customs of history, should be the source of law."[99] If rights come only from the sovereign, the sovereign may define rights any way he chooses. The state can define privacy away.

E. THE LATER TWENTIETH CENTURY

Of course, the later twentieth century saw not only the increase in technology allowing views into the curtilage of the home,[100] but an increasing emphasis on privacy in literature, law, politics, technology, religion, philosophy, and practically every other area of thought. As government, law and technology seemed to become ever more present in personal lives, the boundaries between the different disciplines continued to blur. Geoffrey Fisher, Archbishop of Canterbury, entered the legal realm: "There is a sacred realm of privacy for every man and woman where he makes his choices and decisions – a realm of his own essential rights and liberties into which the law, generally speaking, must not intrude."[101] As early as 1966, United States Supreme Court Justice William O. Douglas, predicted: "We are rapidly entering the age of no privacy, where

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[95] "We are hollow men/We are the stuffed men/Leaning together/Headpiece filled with straw. Alas!/ . . . /This is the dead land/This is the cactus land." T.S. ELIOT, *The Hollow Men*, THE COMPLETE POEMS & PLAYS at 56-57.

[96] Gary Kemp, *Autonomy and Privacy in Wittgenstein and Beckett*, 27 PHILOSOPHY AND LITERATURE, 183 (2003).

[97] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 268 (Harcourt Brace 1951).

[98] *Id*. at 287-288.

[99] *Id*. at 287.

[100] *See, e.g.,* California v. Ciraolo, 476 U.S. 207, 209 (1986).

[101] LOOK MAGAZINE, March 17, 1959.

everyone is open to surveillance at all times; where there are no secrets from government."[102]

In contemporary society, modern data collection techniques allow the collection and potential mishandling of personal information that go beyond many science fiction predictions. The advancement of technology presents new challenges to personal autonomy by potentially reducing individuals to a series of database fields, turning them into "objects of choices and trades made by others."[103] This objectification recalls the totalitarian system, in which people are classified without regard to personal conviction, sympathies or may even be sent to concentration camps without knowing why.[104] Individuals are dehumanized by being selected only in terms of objective standards, for instance, religious or racial factors.[105] In fact, in 1933, Nazi Germany gave IBM an incentive to advance its punch card technology by commissioning its German subsidiary to use punch cards and sorters to identify Jewish people quickly.[106]

The process of observing people out of context in private spaces transforms them from subject to object, which is "not merely an offense against dignity, or a recipe for social misjudgment, but also an intrinsic injury against the autonomous self"[107] because it reduces an individual's ability to define himself or herself.

Seventy years after the Warren and Brandeis article, Dean William Prosser reported over 300 cases recognizing privacy in American common law, and grouped them around four distinct interests.[108] Three of these four interests relate to information: public disclosure of private facts; false light; and appropriation.[109] All relate to control of disclosure of self. Today, these have

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[102] Osborn v. United States, 385 U.S. 323, 341 (1966) (Douglas, J., dissenting).

[103] Julie E. Cohen, *supra* note 52, at 1373.

[104] ARENDT, THE ORIGINS OF TOTALITARIANISM, *supra* note 96, at 421.

[105] Irving Louis Horowitz, *Totalitarian Visions of the Good Society: Arendt*, 66 (i. 2) PARTISAN REVIEW, 263 (1999); and *see* ARENDT, THE ORIGINS OF TOTALITARIANISM, *supra* note 96, at 421.

[106] EDWIN BLOCK, IBM & THE HOLOCAUST 56-69 (Crown 2001) (arguing that this opportunity was partially responsible for IBM's phenomenal advancements and growth).

[107] Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2124 (2001) (discussing Robert C. Pont's & Lawrence Lessig's thoughts on that symposium issue of Geo. L. J.)

[108] William L. Prosser, *Privacy*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY 107 (Ferdinand Schoeman, ed., 1984).

[109] *Id*. The other, interference with seclusion, relates to physical invasions.

been incorporated into the Restatement (Second) of Torts[110] and into the laws of most states.[111]

However, the Supreme Court has been even more explicit than the common law in recognizing "disclosural privacy," or the right of an individual to maintain control over information about his or her personal life.[112] Evidencing a concern for individuals, the Court explicitly recognized the "individual interest in avoiding disclosure of personal matters."[113] In other cases the Court has reiterated that the right of public access is not absolute. "Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes."[114] Seeming to view the world of today with extensive records compiled by private and public sectors, including commercial credit bureaus, law enforcement and intelligence agencies, Justice Douglas predicted an Orwellian age in which the computer is "the heart of a surveillance system that will turn society into a transparent world."[115]

Other courts predict equally dismal futures for people based on advances in technology. "In these days of 'big brother,' where through technology, and otherwise, the privacy interests of individuals from all walks of life are being ignored or marginalized – it is imperative that statutes explicitly protecting these rights be strictly observed."[116] Perhaps partially to respond to early concerns about computerized records, a House committee in 1984 held hearings called "1984 and the National Security State."[117] "For tens – if not hundreds – of thousands of consumers, the promise of the information highway has given way

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[110] *See* RESTATEMENT (SECOND) OF TORTS §§ 652B, 652C, 652D, and 652E (1976).

[111] Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1432 n. 197 (2001) (citing to a 1998 Minnesota case that stated that prior to that case, "[o]nly Minnesota, North Dakota, and Wyoming have not yet recognized any of the four privacy torts." Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 234 (Minn. 1998)).

[112] Louis F. Hubener, *Rights of Privacy in Open Courts--Do They Exist?*, 2 EMERGING ISSUES ST. CONST. L. 189 (1989) (*quoting Whalen*, 429 U.S. at 599).

[113] *Id.*

[114] Nixon v Warner Communications, Inc., 435 US 589, 598 (1978).

[115] Sampson v. Murray, 415 U.S. 61, 96 n.2 (1974) (Douglas, J., dissenting) (*quoting* Arthur Miller, *Computers, Data Banks and Individual Privacy: An Overview*, 4 COLUM. HUM. RTS. L. REV. 1, 2 (1972)).

[116] McVeigh v. Cohen, 983 F. Supp. 215, 220 (D.D.C. 1998); discussed in Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, *supra* note 110, at 1429.

[117] Priscilla M. Regan, LEGISLATING PRIVACY 93 (1995); *see also* 140 CONG. REC. H9797-05, H9810 (Sept. 27, 1994) (statement of Rep. Kennedy) (concerning the Consumer Reporting Reform Act of 1994, Senate Bill 783).

to an Orwellian nightmare erroneous and unknowingly disseminated credit reports."[118]

Everyone, it seems, has an expressed view of some aspect of privacy. Many have tried to define the concept. Dictionaries have numerous definitions.[119] Has thought progressed to the point that the concept of privacy is so intertwined with other concepts and has become so muddled that it is no better defined today because it has been *overdefined*? Privacy has perhaps become a concept, that can only be defined by saying, "[b]ut I know it when I see it. . ."[120] Can any sense be made of this quagmire?

IV. THE PERCEIVED INCOMPATIBILITY OF PUBLIC AND PRIVATE

In order to understand privacy, perhaps it must be contrasted with that which is public. Is there a fundamental tension between public access and individual privacy? Must society balance the common good demanding public access to information and the individual good, the interest of the individual citizen to privacy? Must there be a trade-off between public and private interests? When one is advanced must the other be hindered? Considering the contradistinction between privacy and public access may illuminate the definition of privacy.

A. PRIVACY AND PUBLIC ACCESS ARE NOT NECESSARILY OPPOSED

The personal interests furthered by privacy include protecting an individual's personhood and personal space. This, in turn, promotes the public good by protecting the individual, whose strength and creativity is essential to the public good. Public access, on the other hand, furthers the public good by shedding light on both governmental activities and the activities of other members of society. This promotes efficient and honest government and self-reliance in communities. Public access also serves the private interest by facilitating business decisions and economic competition and entrepreneurship.

Thus, too much privacy threatens to hide important information from the public vision, or, at a minimum, reduces the optimal functioning of our economic system. However, too much public access threatens to deaden the growth and creativity of individual thought and spirit and, in turn, weaken the system that

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[118] 140 CONG. REC. H9797-05, H9810 (Sept. 27, 1994) (statement of Rep. Kennedy), *quoted in* Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, *supra* note 110, at 1394 n.4.

[119] *See* OXFORD ENGLISH DICTIONARY definitions, *supra* note 23.

[120] *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)(Stewart, J., concurring). This, oft-cited statement about the difficulty of defining pornography might seem apropos for a concept like privacy that has such varied definitions.

public access seeks to protect. Privacy and public access need each other. Neither alone is sufficient to build a healthy society. How should an urban society deal with the tension between competing but not necessarily inconsistent values?

Isaiah Berlin's essay "The Pursuit of the Ideal" offers an approach.[121] First, tension between equally important values is inevitable. Such a tension may exist in analyzing the concepts of privacy and public access. Both privacy and public access are necessary to a healthy society; neither is complete in itself. As Berlin notes "[t]he notion of the perfect whole, the ultimate solution, in which all good things coexist seems to me to be not merely unattainable – that is a truism – but conceptually incoherent."[122] Attempting to remove the tension between public and private may likewise lead to an incoherent solution. Perhaps because the parameters of these competing values cannot be separated, they may only be defined by considering their relation to each other.

The public interest is served by public access in two ways. The first benefit is *shedding sunshine on governmental activities*,[123] allowing citizens to evaluate public officials and the integrity with which they fulfill their duties. This information is frequently communicated through protected channels, such as media coverage of candidates for public office. The second prong of public interest comes from governmental disclosure of information about individuals to the public for *self-monitoring*. This reflects the natural tendency of human communities to keep an eye on their members, and exists today in programs such as those that collect and disseminate information about convicted criminals.[124] The Platonic image of the winged charioteer trying to control winged horses, some good, some bad, returns to mind—at least a difficult and troublesome enterprise.[125]

B. SHEDDING LIGHT ON GOVERNMENT

The underlying belief in a need to shed sunshine on government activities can be traced at least as far back as the Enlightenment. During the Italian Enlightenment, Cesare Beccaria, expressed the notion of public access as a check on judicial power and, consequently, public trials as a check against the misuse of judicial power. "Let the verdicts and proofs of guilt be made public, so that

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[121] Isaiah Berlin, *The Pursuit of the Ideal*, *in* THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS, 1-19 (Knopf 1991).

[122] *Id*. at 13.

[123] Daniel J. Solove, *Access and Aggregation*, *supra* note 13, at 1197.

[124] *See* Ohio Department of Rehabilitation and Correction Offender Search, *at* http://www.drc.state.oh.us/OffenderSearch/Search.aspx (last visited January 4, 2006).

[125] Plato, *supra* note 14, at 69.

opinion . . . may serve to restrain power and passions; so that the people may say, we are not slaves, and we are protected . . . ."[126] Similar fundamental beliefs have been incorporated into American jurisprudence. Oliver Wendell Holmes asserted that public access to court records ensures "that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."[127] The Supreme Court has also affirmed the goal of a right of access is to "shed any light on the conduct of any Government agency or official."[128] These are both restatements of the Enlightenment view.

Many philosophers seem suspicious of government in general. For instance, Thomas Hobbes favored limited government because of a fundamental distrust of power. Hobbes favored absolute political authority as a practical necessity to prevent war and to foster peace.[129] Hobbes struggled with limitations on that political authority. As he saw it, one of the prime struggles was between God's law and human authority.[130] Further, because the sovereign is not omniscient, it may get it wrong.[131] Even the extremely conservative Edmund Burke stressed the necessity of monitoring the balance of state power and acknowledged that some means of change is necessary.[132]

C. COMMUNITY SELF-MONITORING

The impulse for communities to monitor themselves reflects the notion of privacy as a dangerous absence of moral constraints – leading to the conclusion that too much privacy is as great an evil as too little.[133] The tension between individual and society is well-illustrated in medieval literature, where this tension underpinned an entire literary genre in France called the *fabliau* – a technique artfully employed in Chaucer's Canterbury Tales. These stories "construct a private universe, one where society's concerns and well-being are subordinated to

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[126] Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy In an Age of Electronic Information*, 79 Wash. L. Rev. 307, 307 n.3 (2004) (*quoting* Cesare Beccaria, ON CRIMES AND PUNISHMENTS, 22-27, 99 (Henry Paolucci trans., Bobbs-Merrill Co. 1963) (1764).

[127] Cowley v. Pulsifer, 137 Mass. 392, 394 (1884).

[128] U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

[129] Thomas Hobbes, LEVIATHAN 138, J.C.A. Goskin, ed., Oxford University Press 1998 (1996).

[130] *Id*. at 390.

[131] *Id*. at 400-401.

[132] Edmund Burke, REFLECTIONS ON THE REVOLUTION IN FRANCE 24 (1955).

[133] Julie E. Cohen, *Privacy, Ideology, and Technology: A Response To Jeffrey Rosen*, 89 Geo. L.J. 2029, 2039 (2001).

the satisfaction of some character's personal desires."[134] Such insistence upon the private ("pryvete") – the personal, the selfish, the hidden, is antithetical to justice, which necessarily involves publicity.[135] Thus, only if the action becomes "apert," or open and public can justice prevail.[136]

Even after the Reformation's construction of the "religious conscience," a private inner sphere, societies tended strictly to limit privacy to the sphere of the mind. For example, although the Puritans recognized that one's thoughts are beyond the power of government or church to control directly and fully, Puritan life was characterized by constant intrusion from all spheres.[137] The community controlled individuals through legal authority by, for instance, enforcing residency laws, regulating visitors, and supervising marital relationships. Church authorities exercised control, by daily maintenance of faith.[138] Other members of the household (including servants and lodgers) and fellow members of the congregation monitored individual actions and did not hesitate to invade neighbors' homes in order "not to Suffer Sin in My Fellow Creature or Neighbour."[139] Indeed, their hall-and-parlor house was designed to facilitate vigilance, since it lacked a distinct division between public and private spaces, and contained only minimal partitions to limit the privacy of individual members of the household.[140]

The tension between individual demands and societal interests continued to rise as society attempted to maintain control over the private realm by imposing public rules of civility on social intercourse. The attempt of society to exert control over individuals appears in literature from an early date. "The rules of civility were in one sense a technique for limiting or even negating private life."[141] William Shakespeare's play *The Taming of the Shrew* gives a literary example of such a process. Kate (the shrew) is reintegrated into society, that is, tamed, by exposing her private life to the public, and imposing public standards

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[134] Thomas J. Farrell, *Privacy and the Boundaries of Fabliau in The Miller's Tale*, 56 English Literary History 744(1989).

[135] *Id*. at 775-776.

[136] *Id*.

[137] Milette Shamir, *Hawthorne's Romance and the Right to Privacy*, American Quarterly 49.4, first page, 751 (1997).

[138] *Id*.

[139] *Id*.

[140] *Id*.

[141] Gary Schneider, *The Public, the Private, and the Shaming of the Shrew*, 42 Studies in English Literature, 1500-1900, first page, 238 (Spring 2002).

on her private behavior. In the end, her transformation is manifested in her respectful treatment of her husband and family.[142]

The idea that subjecting an individual to public scrutiny will lead to socialization finds expression today in legislatures' decisions to allow public access to criminal records. For instance, the Supreme Court has found a qualified First Amendment right of access to criminal trials and to records directly related to criminal trials.[143] Most information which is part of the public record is not confidential,[144] including arrest and conviction records[145] and information in police reports.[146] "Public scrutinizing of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process with benefits to both the defendant and to society as a whole."[147] In fact, all information which is "already fully available to the public . . . is not constitutionally protected" and can be thus disseminated by the government.[148] If the government wishes to close a portion of a trial, for instance in "criminal sex abuse trials during the testimony of minor victims,"[149] "it must be shown that the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest."[150]

D. PUBLIC ACCESS FOR PRIVATE BENEFIT

Public access outside the criminal realm does not necessarily interfere with private interests. Sometimes public access helps the individual by facilitating economic interactions and reducing the cost of providing goods and services. Public access to information may enhance commerce in several ways. By using information, a business may attract and retain those individuals most likely to make use of the business' services. A business may identify these customers and potential customers through personal credit information collected by credit reporting agencies, or utilize information gathered by corporations for

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[142] *Id.* at 251.

[143] *See, e.g.* Press-Enterprise Co. v. Super. Ct. of Cal. for Riverside County, 478 U.S. 1, 11-12 (1986)(holding that public access plays a significant role in the process and that hearings that are sufficiently like a trial must also be open to the public).

[144] *See, e.g.* Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 Stan. L. Rev. 1393, 1400-0103 (2001).

[145] Cline v. Rogers, 87 F.3d 176, 179 (6th Cir. 1996).

[146] Scheetz v. The Morning Call, Inc., 946 F.2d 202, 207 (3d Cir. 1991).

[147] Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 606 (1982).

[148] Russell v. Gregoire, 124 F.3d 1079, 1094 (9th Cir. 1997).

[149] *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1305 (1983).

[150] *Id.* at 1305-06 (*quoting* Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 607 (1982)).

direct marketing, such as computer "cookies." Furthermore, a business may communicate to the public at large, for instance, regarding public figures and important events.[151]

E. REACHING POTENTIAL CUSTOMERS

The need to provide information to serve economic interests is rooted in a theory of free markets. According to this theory, accurate and timely information is critical to the efficient functioning of the free marketplace and should not be withheld. For businesses, information is critical in making profitable decisions about the allocation of resources – and this, bolstered by the Enlightenment desire to know, leads us to believe that personal information will bring us the ability to predict preferences and behaviors.[152] This faith is underwritten by the Enlightenment's confidence in the human ability to make sense of the world, to understand society and human nature, and to manipulate nature for the benefit of mankind.[153]

Proponents of this line of thinking conceive of personal information as property, and control of it as a legal entitlement that includes a bundle of rights such as the right to use, possess, exclude or transfer. Thus seen, the market's invisible hand functions automatically to achieve the most efficient distribution of information in the marketplace.[154] If privacy is not afforded much protection, it is because people value other things more than privacy – such as convenient transactions, or celebrity gossip. Moreover, because people want targeted marketing offers for products tailored to their desires and enjoy having information about people in the public eye, businesses are not only justified in, but should be lauded for, providing these goods. "The free exchange of information in the public domain drives competition and our economy."[155] This public interest may even extend to exchanges between two private individuals.[156]

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[151] For a description of some cookie technology, see Alan F. Blakley, Daniel B. Garrie, and Matthew J. Armstrong, *Coddling Spies: Why the Law Doesn't Adequately Address Computer Spyware*, 2005 Duke L. and Tech. Rev. 25, 27. *See also In re Doubleclick Inc. Privacy Litigation*, 154 F. Supp. 2d 497, 519 n.28 (S.D.N.Y. 2001) (including a list of articles concerning the privacy issues raised by cookie technology). For a fundamental description of cookie technology, see *Proof of Liability for Violation of Privacy of Internet User by Cookies or Other Means*, 67 Am. Jur. Proof of Facts 3d, 249, § 1(2005).

[152] Cohen, supra note 132, at 2031.

[153] *Id*.

[154], Shamir, *supra* note 136, at 755ff.

[155] Cordell v. Berger, 2001 WL 1516742, *5 (D. Utah 2001).

[156] Johnson v. Yurick, 156 F. Supp. 2d 427, 433 (D.N.J. 2001).

In addition, this perspective exposes another reason why impeding the free exchange of information is dangerous – highlighting what might be closer to a moral concern than a market-based one. Judge Richard Posner views privacy in terms of control of information, seeing information as a form of property.[157] Viewing privacy in this way ensures that individuals have true information about themselves and fosters more efficient transactions.[158] Returning to an example at the beginning of this article,[159] Judge Posner sees the attempt to maintain privacy as, in some ways, dishonesty by allowing "a person . . . to conceal discreditable facts about himself."[160]

An interest in other people's information informs much of American jurisprudence. There is a strong presumption toward the right to "inspect and copy public records and documents, including judicial records and documents."[161] The effect of this is magnified by the corollary freedom subsequently to publish those records, which has received the highest order of protection under the First Amendment. For example, the legal recourse afforded "public figures" for false information is limited to cases in which the publisher consciously and maliciously disregards the truth.[162] This allows publishers much more leeway to print speculations and sensationalist stories – thereby circulating more information to the public while, of course, increasing sales. Sometimes, freedom of the press has even been found to override the privacy interests of a rape victim to remain anonymous, though the victim reasonably fears that the publication of her name would cause her to become further victimized.[163]

Further, a direct expression of the free market approach can be found in "fair information practices" legislation. In many countries, including states within the United States, such legislation represents the dominant paradigm in privacy statutes.[164] Such statutes are grounded on the postulate that the efficiency of business and government can coexist with privacy concerns. The market's invisible hand will prevent excessive privacy invasion, and so privacy regulation should be constructed to minimize the detrimental effects on the

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[157] Richard A. Posner, *The Economics of Justice*, 233 (1981).

[158] *Id.* at 235.

[159] See § I.E.

[160] Richard A. Posner, *Economic Analysis of Law* 46 (5th ed. 1998)

[161] Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978).

[162] New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

[163] *See, e.g.,* Florida Star v. B.J.F., 491 U.S. 524 (1989).

[164] *See, e.g.*, Rosie D. v. Romney, 256 F. Supp. 2d 115, 117 (D. Mass. 2003)(discussing Massachusetts' Fair Information Practices Act & the balancing test necessary for the public disclosure of private information).

individual, on business and on government. Such an approach was adopted on an international scale by the Organization for Economic Development in 1980 to ensure that the proliferation of heterogeneous privacy protection laws would not create trade barriers and harm economic growth.[165]

Today's discussion of the public and private finds itself at a nexus of interactions between households, individuals, governments, and commercial enterprises. And as the debate has evolved to make room for new participants, the parameters of public-private interaction have changed. The traditional source of intrusions into personal space and collections of personal information were friends, family, and neighbors, who preserved information through gossip and storytelling. In the twentieth century, techniques for intrusion, collection, and preservation have been expanded to include computers, photocopy machines, the Internet, anonymous data banks, parabolic microphones and devices that "see" through walls.

V. PRIVACY AS SERVING THE PUBLIC INTEREST

Privacy actually serves the public interest. It protects *democratic government* and by protecting the *free market system*, it not only protects individuals but the public at large. The proper functioning of a democratic, capitalist system depends directly on contributions made by individuals. Individuals need privacy to develop into complete, autonomous beings. This creates a seeming paradox where favoring the privacy of individuals over public access is actually necessary to advance the public interest.

A. PROTECTING DEMOCRATIC GOVERNMENT

Democracy is also served by privacy. Privacy fosters growth of independent citizens, who engage in full public dialogue. Also, allowing some public activities (such as information disclosed to a public entity such as a hospital) to remain private, encourages people to use those public institutions for sensitive matters. Privacy is intimately related to citizenship because privacy is necessary to an individual's personhood and because free-thinking citizens are essential to maintaining a healthy democracy.

The argument, as developed in detail by several scholars, is that privacy creates strong-willed citizens who can resist social pressures. "Privacy also contributes to learning, creativity and autonomy by insulating the individual against ridicule and censure at early stages of groping and experimentation."[166] John Stuart Mill argued that it is wrong to use harsh social pressure to force

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[165] Roger Clarke, *A History of Privacy in Australia* (Oct. 11, 1998), *at* http://www.anu.edu.au/people/Roger.Clarke/DV/OzHC.html, (last visited January 6, 2006).

[166] Reiman, *supra* note 53, at 37 n.27.

people to conform to the majority's views – and that disclosing private information is just such an enforcement mechanism.[167]

This dovetails with several strains of philosophical thought in the twentieth century. For example, one of the theories of ordinary language philosophers such as Wittgenstein is that human thought emerges from immersion in "human practices" such as language, which infuse consciousness with content.[168] Thus, limiting critical thought, action, and language has the potential to dehumanize, leaving an empty shell of a person. In literature, Samuel Beckett's characters recognize that their voices and their stories are not absolutely their own creations.[169] Rather, the self is a fabrication imposed externally. "I'm in words, made of words, others' words, . . . [h]aving no words but the words of others." [170]

Hannah Arendt uses Nazi concentration camps to illustrate the dehumanization that occurs when irrational forces are at work as well as the breakdown of society that can occur when personal privacy disappears.[171] In such a system, the categories arbitrarily assigned to inmates became their identities.[172] Personhood is destroyed most easily by taking people "who had done nothing whatsoever that, either in their own consciousness or in the consciousness of their tormentors, had any rational connection with their arrest"[173] and abusing them arbitrarily. The result is a failure of the society to thrive.

Those individuals, innocent in every sense, are the most suitable for thorough experimentation in disenfranchisement and destruction of the juridical person. . . ."[174] The private in these individuals is destroyed because neither their existence nor their expression of it in language can reconcile with the public world around them. The balance between public and private, essential to personhood, is equally essential to society. Without either, the person loses identity, and society loses its context.

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[167] *Id*. at 35.

[168] Gary Kemp, *Autonomy and Privacy in Wittgenstein and Beckett*, 27 Philosophy and Literature 167 (2003).

[169] *Id*. at 168.

[170] *Id*. at 179.

[171] Arendt *supra* note 96, at 421-422.

[172] *Id*. at 421.

[173] *Id*.

[174] *Id*.

Furthering invasive process, totalitarianism seeks to obliterate the individual's private conscience, folding it into that of the state.[175] However, once the individual is destroyed, the state as collection of individuals has no meaning. Totalitarian philosophy, loosely based on Hegel's defense of a strong state, crucially overlooked Hegel's mistrust of power, which led him to insist that the state be balanced by other institutions such as family and church and always subject to a complicated dialectical moment.[176] Without diversity, there can be no dialectic.

Fear of an authoritarian state inspired many important literary works of the twentieth century, including such ":anti-utopian" novels as Orwell's *1984*.[177] The author fears constant surveillance, describing governments dominating citizens' thoughts and actions. Unlike the simple social mechanism of "civilizing" people, bringing them into society by ingraining in them social mores, Orwell depicted forced compliance of social norms. Others have approached this topic historically. Foucault's revival of Bentham's *Panopticon* as a metaphor for technological surveillance, for instance, reflects this concern about authoritarian societies.[178] This broad government control of information has been seen as an effort to completely collapse the private sphere into the state.[179]

The fear of "government gone too far" appears frequently in American jurisprudence, especially in the latter half of the twentieth century. Many discussions make explicit reference to literature, especially George Orwell. For instance, Justice Brennan quoted a passage from *1984* to criticize the majority's holding that viewing the defendant's greenhouse from a low-flying helicopter was not a search.[180] As recently as 2001, a dissenting appellate decision said, "The first reaction when one hears of the Agema 210 [thermal imaging device used to detect heat emissions from the home] is to think of George Orwell's *1984*. Although the dread date has passed, no one wants to live in a world of Orwellian

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[175] *See Oid. at* 414-428. (discussing the dehumanization caused by totalitarianism especially in light of Nazi concentration camps during the period 1933-1945, and their impact on individual's loss of any sense of identity outside the state).

[176] *Id.*Arendt, *supra* note 96, at 249.

[177] This book is a frequent favorite of courts in writing about privacy issues and the incursion of the state on private matters. *See, e.g.*, Florida v. Riley, 488 U.S. 445 (1989); United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979); Dalia v. U.S., 441 U.S. 238 (1979); and Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963). It would be an interesting project to see how many times this book, either by name or by referring to its contents, e.g. "Big Brother," has been cited by courts since its publication.

[178] Reiman, *supra* note 53, at 27ff.

[179]*Id.*

[180] *See* Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 Stan. L. Rev. 1393, 1397 (2001) (discussing Brennan's dissent in Florida v. Riley, 488 U.S. 445, 466 (1989)).

surveillance."[181] "Congress passed the Privacy Act to give individuals some defenses against governmental tendencies towards secrecy and 'Big Brother' surveillance."[182] While courts do not discount the value of public access completely, they seem to fear uncurtailed access as a step in the destruction of society.

Privacy contributes to the optimal functioning of the democratic system by encouraging use of institutions that might have access to information. The mere possibility of collection and disclosure of personal information could severely curtail people's behavior, most frequently with negative effects. Who would talk to a psychiatrist if the conversation could be disclosed? Who would seek treatment for a sexually transmitted disease? Society needs people to become healthier. Society needs privacy.

This insight has received a place in the mosaic of American privacy jurisprudence. In *Whalen v. Roe*,[183] the plaintiffs challenged a state law requiring that records be kept of people who obtained prescriptions for certain addictive medications on the grounds that it infringed upon their right to privacy.[184] They argued that this use of their information caused them to decline treatment due to fear of governmental misuse of information.[185] Crucially, they attributed the effect not to the actual enforcement of the law, but rather to the *fear* that the law creates.[186] The Court acknowledged that the record indicated that some people were not getting the drugs they needed because of concern about the law. However, the Court found the public was not denied access to the drugs, since more than 100,000 prescriptions were filled before the law had been enjoined.[187] However, this was an invalid logical inference because, as one scholar notes, the Court could not measure the extent of the deterrence, since it did not know how many prescriptions had been filled before the law had been passed. [188] "Even if there were only a few who were deterred, the anxiety caused by living under such a regime must also be taken into account."[189]

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[181] Solove, supra note 179 at 1397, n.17 (quoting United States v. Kyllo, 190 F.3d 1041, 1050 (9th Cir. 1999) (Noonan, J., dissenting) *rev'd*, 533 U.S. 27 (2001)).), *See* note 79.

[182] Solove, supra note 179 at 1397, n.18 (quoting United States v. Cuevas-Sanchez, 821 F.2d 248, 251 (5th Cir. 1987) (stating that "indiscriminate video surveillance raises the spectre of the Orwellian state"). *See* note 79.

[183] 429 U.S. 589 (1977).

[184] *Id*. at 591.

[185] *Id*. at 595.

[186] *Id*.

[187] *Id*. at 603.

[188] Solove, *supra* note 179, at 1436.

[189] *Id*. at 1437.

An argument similar to the plaintiff's argument in *Whalen* has been made to counter the news policy of reporting the names of rape victims. Without privacy, people may be deterred from turning to the courts for justice. When Federal Rule of Evidence 412 was amended in 1994,[190] the committee wrote:

> The strong social policy of protecting a victim's privacy and encouraging victims to come forward to report criminal acts is not confined to cases that involve a charge of sexual assault. The need to protect the victim is equally great when a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as background, that the defendant sexually assaulted the victim.
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> The reason for extending Rule 412 to civil cases is equally obvious. The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping, and the wish to encourage victims to come forward when they have been sexually molested do not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief.[191]

B. PROTECTING THE FREE MARKET

Just as protecting the free market is a benefit to the individual, privacy serves a public interest in the *free market* by limiting it so that, taken to the extreme, it cannot destroy itself. If information is nothing more than property, privacy ceases to exist. As *The Economist* put it: "[t]here is little reason to suppose that market-driven practices will, by themselves, be enough to protect privacy."[192]

Consumers do not consent to the collection and release of much of their data, and thus, they cannot set the price for it. Furthermore, the government is often a supplier of information to the private sector and is a major source of databases.[193] This means that citizens who have been required to submit personal information, for instance, to obtain a drivers license, face the prospect of having that information divulged to unknown parties for unknown uses.[194] This occurs without the citizen's knowledge, much less his or her consent, and has been found constitutional, for example, when a court permitted New York to sell its motor vehicle records: "[w]hat the State has done in practical effect is to tap a

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[190] Fed. R. Evid. 412(a) advisory committee's note.

[191] *Id.*

[192] *Virtual Privacy,* The Economist, February 10, 1996, at 16-17.

[193] Solove, *supra* note 179, at 1409.

[194] *Id.* at 1410.

small source of much-needed revenue by offering a convenient 'packaging' service."[195] Copyright law adds another dimension to ownership of information. The Supreme Court has refused to recognize copyright in an alphabetic list of names, addresses, and telephone numbers,[196] but an arrangement of information could be copyrighted.[197]

The second problem is that a market approach has difficulty assigning the proper value to personal information. Even if consumers do sometimes sell their information, or at least consent to its release, it is impossible for them to value it correctly because consumers do not know how their information is going to be used. This problem is exacerbated when information is collected from diverse sources and analyzed in the aggregate: "[i]t is the totality of information about a person and how it is used that poses the greatest threat to privacy. As Julie Cohen notes, '[a] comprehensive collection of data about an individual is vastly more than the sum of its parts.'"[198] Finally, the end use may frequently result in power that should not be tradable for any price. For example, the value of a Social Security number is in its ability to provide to others power and control over an individual, to make the individual vulnerable to fraud.[199]

This concern for information in the aggregate has also been clearly recognized by the Supreme Court. In *United States v. Reporters Commission for Freedom of the Press*,[200] the Court held that the release of FBI rap sheets was an invasion of privacy on the grounds that their contents had a different character if they were available on computerized files, as opposed to being stored in remote courtrooms.[201] Recognizing that "[i]n an organized society, there are few facts that are not at one time or another divulged to another,"[202] the Court focused on the manner of giving information, not the fact of giving it up. The "degree of dissemination" of personal information and "the extent to which the passage of time rendered it private"[203] were fundamental factors in the calculus of the right to privacy in the common law. "Plainly there is a vast difference between the

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[195] *Id*. at 1437, n.229(quoting Lamont v. Comm'r of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y. 1967)).

[196] Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 957 F.2d 765 (1991).

[197] Robert Gellman, *Public Records: Access, Privacy, and Public Policy* (1995), *at* http://www.cdt.org/privacy/pubrecs/pubrec.html.

[198] Solove, *supra* note 179, at 1452.

[199] *Id*.

[200] 489 U.S. 749 (1989).

[201] *Id*. at 763-4,

[202] *Id*.

[203] *Id*.

public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."[204]

VI. A CONTEMPORARY APPROACH

Daniel Solove has proposed an approach to understanding privacy by looking at particular examples of privacy and attempting to conceptualize a common element.[205] Professor Solove uses some of philosopher Ludwig Wittgenstein's ordinary language analysis[206] to suggest a method of approaching privacy using what Wittgenstein calls "family resemblances."[207] Professor Solove uses the examples from Wittgenstein of games and family members to detail his method of conceptualization.[208] He posits two methods of conceptualizing. The first method is to see "spokes linked by the hub of a wheel, all connected by a common point. This common point, where all spokes overlap, defines the way in which the spokes are related to each other."[209] He proceeds to suggest that Wittgenstein believes that sometimes instead of wheel and hub, a concept is better defined as "a web of connected parts, but with no single center point. Yet the parts are still connected."[210] This does not mean, in Professor Solove's reading, that concepts are borderless;[211] however, it does mean that some "boundaries can be fuzzy or can be in a state of constant flux."[212] When thinkers encounter concepts of this sort, rather than seeking the external fixed and sharp boundaries,[213] they should instead look to what constitutes the core essence or the family resemblance.[214]

Professor Solove's use of Wittgenstein and ordinary language philosophy is good to a point; however, he fails to identify that core family resemblance that

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[204] *Id.* at 764.

[205] Daniel J. Solove, *Conceptualizing Privacy*, 90 Cal. L. Rev. 1087 (July 2002).

[206] *Id.* at 1096-1099.

[207] *Id.* at 1097-1098.

[208] *Id.* at 1097-1098.

[209] *Id.* at 1098.

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.* at 1099.

underlies privacy. Professor Solove concludes that "the conception of privacy as intimacy fails to capture the problem"[215] and any "conception of privacy as control over information only partially captures the problem."[216] Professor Solove believes that pragmatism is necessary to complete the process of conceptualizing privacy.[217]

The first step in a successful contemporary approach is to speak only of privacy and not a "right" to privacy. Speech about privacy as a right prior to defining privacy can only create more confusion. On the other hand, once the core concept of privacy is identified, speech about a right to privacy may make sense.

While Professor Solove's work is helpful as a first step in identifying that core, a further analysis of Wittgenstein's *Philosophical Investigations* may help illuminate the process of defining the fundamental family relationship.[218] Early in Wittgenstein's *Philosophical Investigations*, he discusses family resemblances and uses "game" as a good example of denotational definitions as contrasted with connotational definitions.[219] Later in *Philosophical Investigations*, Wittgenstein makes the move from a list denotating something to finding that central element of the family resemblance. The process defined by Wittgenstein is much like process of scientific inquiry where the scientist looks at examples, attempts to define the common element by making a hypothesis, and then tests that hypothesis with other examples. So, for instance, Wittgenstein in looking for the family resemblance indulging games posits that the proper definition of game is something that "has not only rules but also a *point*."[220] Once he posits this, he looks at that which is essential and that which is inessential to a game.[221] Wittgenstein looks at the use of the king in chess to determine "which of the players gets white before any game of chess begins."[222] He suggests that one of the rules may be that one player hold a black king in one hand and a white king in the other hand while the other player chooses one hand or the other, similar to

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[215] *Id*. at 1153.

[216] *Id*. at 1154.

[217] *Id*. at 1126.

[218] Ludwig Wittgenstein, PHILOSOPHICAL INVESTIGATIONS(GEM Anscombe, trans., Blackwell Publishing 3rd ed.)(2001).

[219] *Id*. at § 69 (discussing what a game is to someone by pointing at a set of examples. This is a denotational device. In contrast, a connotational definition is the type of definition that might appear in a dictionary where something is defined by its core concept.)

[220] *Id*. at § 564.

[221] *Id*. at § 561-568.

[222] *Id*. at § 563.

drawing lots.[223] Is this function, he asks, an essential or inessential element of the role of the king of chess?[224] By honing the definition, more and more, Wittgenstein hopes to get to that element that describes the family resemblance of all those things on the list of "games" that gives people the ability to determine when confronted with a new activity whether that activity constitutes a game.

VII. THE FAMILY RESEMBLANCE AT THE HEART OF PRIVACY

In the same way, the goal of defining privacy is to identify that which is common to all discussion about privacy in such a way that when a new situation arises, it will fit within the same definitional core. Professor Solove is correct in his determination that the conceptual core "of privacy is control over *information* only partially captures the problem."[225] The problem with defining privacy in terms of control of *information* is that other realms beyond the informational fit within the denotation of privacy. Privacy must be understood as it relates to places,[226] and it must also be understood in terms of public access and issues of personhood.

What then can be a hypothesis of the core family resemblance of all speech about privacy? Begin with the core concept that privacy is **the control of disclosure of self**. This conceptualization avoids the limitations of Solove's "control of information" and provides a starting point. Consider the core concept with respect to the four examples given at the outset of this article, and other ideas developed through literature.

In the first example, Albert is sitting on an airplane next to Bill, he looks at Bill's magazine, and makes notes about its content. The first question is whether he shields the view of the notebook because he does not want Bill to know that Bill's privacy has been invaded. Consider this question in terms of the control of disclosure of self. One's choice of reading material discloses something about one's self. When someone else looks at that reading material, the person discloses something and gives up some control of a definitional element of self. For instance, some people may be very reluctant to let others know that they read *People* magazine or that they are interested in a particular article.

If Albert allows Bill to see his notebook, Albert is disclosing some of his self and giving up control of some definitional elements of his self, of his personhood, to Bill. On the other hand, since Albert would be happy for Bill to read the finished article, this shows that once the article is published, Albert intends to release control of his thoughts that are put into that article and

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[223] *Id.*

[224] *Id.*

[225] Solove, *supra* note 204, at 1154 (emphasis added).

[226] *See e.g.*, I. Setting Forth the Puzzle above.

consequently would be pleased if Bill would read the final document. The question is control – control of content and of timing – of disclosing self.

In the second example, one restaurant patron is sitting at a table adjacent to a cell phone user. That cell phone user, Diane, is speaking in a loud enough voice for the other person to hear about her physical condition. Diane is speaking to a close friend, a stranger overhears it, and Diane knows the stranger overhears it. By casting this in terms of control of disclosure of self, the reader can see that there is no privacy issue involved. Diane is in fact voluntarily relinquishing control of disclosure of self to her friend on the telephone; however, she is not relinquishing control of disclosure of self to the stranger. To relinquish control of disclosure of self, the person receiving it must have a benchmark self to receive more information about. Because Diane has no identity with Chris, Chris cannot "invade her privacy" by listening. Diane simply does not care because she'll likely never see Chris again.

The next example involved cookies placed on individual user's computers by businesses. The example uses Amazon.com's customization of the viewing Web page as an example. Some users like this and some do not. Again, by placing this in the context of control of disclosure of self, those who like it have agreed either explicitly or implicitly to relinquish control of disclosure of self in the limited manner as to what they prefer to read to get the benefit of having books recommended to them. Others, in balancing the desire to see books recommended to them with the desire not to relinquish control of disclosure of self, tip the scales in favor of not receiving the information from the outside source and, therefore, maintaining stricter control. These people do not care for Amazon.com's use of cookies in this manner.

Does this core concept – control of disclosure of self – describe the historical context of privacy? The story of Adam and Eve[227] so far as it is a story about omniscience and privacy is a story about control. The primordial pair cover themselves so as not to relinquish control of disclosure of self to the godhead.

Further, privacy to the Greeks was a deprivation leading to loneliness.[228] Can this not be as easily understood by saying: "Failing to relinquish control of self leads to isolation?" The Roman definition[229] based on physical space lends itself even more to using a core concept of control.

The identification of control as the core family resemblance mirrors the balance of personal interests and public interests that, understood together, comprise the role of privacy in society. Who is to have control and what does that control mean? Disclosures about public entities ensure control of government.

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[227] *See supra* text accompanying notes 25-29.

[228] *See supra* note 32, at 59 and accompanying text.

[229] *See supra* text accompanying notes 36-38.

Disclosures about the market helps the economy. Forced disclosure of self must be strictly monitored.

The reader can decide whether the family resemblance of control of disclosure of self works in the multitude of situations in which people speak of privacy. It is a useful step in discussing privacy from a philosophical and psychological standpoint. Autonomy and personhood require privacy, that is, the ability to control what others know about one. The choice whether to disclose one's self is fundamental.

VIII. IS ANYTHING ACCOMPLISHED?

Does this family resemblance advance any understanding in law, however? Some might complain that the move from discussing privacy to discussing control of disclosure of self has merely shifted the problem from one of understanding "privacy" to one of understanding "control," "disclosure," and "self." Furthermore, has the shift in description led to any benefit for jurisprudence?

By moving from a concept such as privacy that as Wittgenstein might say has vague boundaries[230] to an internal core family resemblance that is common to all uses of the word "privacy," the examples above show that the concept is tightened and given more utility. The balance of public and private interest becomes the balance of who controls disclosure of self and what limits society wishes to place on that disclosure. Courts have greater familiarity with concepts such as "control" and "disclosure" than they do of a concept like privacy that has grown up with vague boundaries.

Consider, for example, one of the court cases described but not identified above, *California v. Ciraolo*.[231] In that case, the United States Supreme Court held that the warrantless aerial observation of fenced-in backyards was not an unreasonable search under the Fourth Amendment. Rather than viewing this case as a privacy case, it can be seen as the question of who has the authority or right to control what is seen from airspace. Furthermore, someone who places items in a place that allows them to be visible from any source has relinquished control of disclosure of that space. with the result that the person has relinquished control over something about him or herself. This leads to the same result as that achieved by the Court's analysis but with much tighter reasoning.

Or consider *California v. Greenwood*.[232] In that case, Justice White wrote that "[t]he warrantless search and seizure of the garbage bags left at the curb outside . . . would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as

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[230] *See* Wittgenstein, *supra* note 217, at § 71.

[231] 476 U.S. 207 (1986).

[232] 486 U.S. 35 (1988).

objectively reasonable."[233] The Court must define "objectively reasonable," "subjective expectation," how this expectation is "manifested" and "privacy" before concluding that the warrantless search is allowed.[234] Using the familial relationship of control of disclosure of self as a substitute for "privacy," it becomes immediately clear that by placing items where one intends others to take them away is a relinquishment of control. The city or the waste collection company are expected to take the garbage; dogs may tear the bag open or drag it away.[235] Using this core concept gives an easier, clearer method of understanding the legalities of privacy.

By convention (that is, the United States Constitution), the control of disclosure of some elements of self are predetermined in United States jurisprudence. The Fifth Amendment to the United States Constitution prohibits the forced relinquishment of control of statements about self to public authorities during criminal proceedings. This is an example of society's predetermining the balance between public and private interest in one direction.

Similarly, the Fourth Amendment limits society's incursion into control of disclosure of self through searches and seizures. The word "privacy" that has become so fraught with meanings as to become virtually meaningless is not necessary to understand the core conceptualization of control of disclosure of self that underlies all of these denotations.

A recent case, *Poli v. Mountain Valley Health Centers, Inc.*,[236] dramatizes the difficulty of using the word "privacy" that can be eliminated by using the core concept of control of disclosure of self. In *Poli*, the court states that "'a "reasonable" expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms . . . [and is] relative to the customs of the time and place, to the occupation of the plaintiff, and to the habits of his neighbors and fellow citizens.'"[237] This is a reasonable person standard.[238] The reader probably can notice all of the vague and undefined terms in this definition: "reasonable," "privacy," "entitlement," "community norms," "customs," and "habits." However, considering the question as who has the authority to control disclosure of self in a situation such as *Poli* a case about disclosure of medical information gives courts better guidance and leads to more uniform and reasonable results, in conformity with constitutional principles. The analysis can be much cleaner and less reliant upon undefined terms. In *Poli*, the plaintiff had the right to control disclosure of self in the form of medical information, based on the public policy protection afforded under the Health

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[233] *Id.* at 39.

[234] *Id.* at 43.

[235] *Id.* at 40, n. 2.

[236] 2006 WL 83378 (E.D. Cal. January 11, 2006).

[237] *Id.* at *4 (citation omitted).

[238] *Id.*

Insurance Portability and Accountability Act.[239] Finding there is no countervailing public interest in the disclosure of self concerning the health-care information, the court need not consider the reasonable person or any other difficult to apply standard. The statute tells who has control. The person did nothing to relinquish that control.

Does this, however, shift the question to determining the public interest in the disclosure? This determination, one might argue, is an equally amorphous concept. However, public interest has been well defined and can be used along with control and disclosure to inform the discussion of privacy. Furthermore, in creating laws such as HIPAA, Congress balances these concerns in defining who controls disclosure of self.

One further example may demonstrate the benefits of substitution of "control of disclosure of self" for "privacy." In *Katzenbach v. Grant*,[240] the plaintiff among other things contended that viewing photographs on a Web site created by the plaintiff could be the subject of invasion of privacy.[241] The court, however, held that since the plaintiffs did not deny the existence of the Web site or the photographs on the Web site, those "photographs posted on a Web site cannot be the subject of invasion of privacy"[242] because the photographs were posted by the person depicted in them. The court goes on to say that "websites are not, by definition, private; one of their very purposes is to be viewable by and accessible to the public at large."[243] The same result occurs without the use of terms that have fuzzy boundaries like "privacy" by using "control of disclosure of self." When one relinquishes control concerning the disclosure of self by placing one's photographs on a Web site, that is, in a public place, one has relinquished that control to the public at large and, therefore, cannot complain when someone views the photographs.

IX. CONCLUSION

The benefit for philosophy, as well as political thought and jurisprudence, of moving from talk about privacy to talk about control of disclosure of self, is the movement from terms that have definitions with vague boundaries to terms that through prior usage have become well defined. Not only does the core concept defined by the family resemblance comport with the denotational list of privacy interests, but it is useful in determining whether new instances fit within the definitional realm.

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[239] 42 U.S.C. § 1320 (cited in Poli at *1).

[240] 2005 WL 1378976 (E.D. Cal. June 7, 2005).

[241] *Id.* at *13 n.10.

[242] *Id.*

[243] *Id.*