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PRIVACY: A BRIEF SURVEY OF THE CONCEPTUAL LANDSCAPE

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Privacy is a notoriously elusive concept. And the family of concepts to which it belongs is extraordinarily rich in complexity. Surveying this complexity will serve to underscore the philosophical difficulties that attend serious discussions about the nature and value of privacy. Giving a rough conceptual overview of the notions commonly associated with privacy may enable us to think more clearly about each one of them and about their relationships with one another. I also hope that this introduction will help to isolate those concepts most relevant to the implementation of IVHS.

One of the oldest definitions of "privacy" identifies it with the condition of *being let alone.* Warren and Brandeis propose this characterization in their "The Right to Privacy"[1] and Justice Brandeis' well-known dissent in *Olmstead v. U.S.*[2] argues that the right to be let alone is our most valued entitlement. Several other legal scholars advocate this broad view of privacy. Posner, for instance, claims that one sense of privacy is captured by the concept of seclusion and seclusion serves our interest in being left alone.[3]

Unquestionably, privacy and being let alone are close relatives, but should they be equated? Suppose that individual B hits A. B has not let A alone. What do we gain in conceptual clarity, though, by saying that B has invaded A's privacy? Are there not other concepts which more perspicaciously describe B's action against A, like assault and harassment? Of course if B had followed his assault by searching the dazed A's wallet and finding out that A was in psychotherapy for depression, then we would have compelling reason to accuse B of an invasion of privacy.

Another popular conception of privacy identifies it with *the control of information about oneself.* Thus, Alan Westin maintains that privacy is the claim of individuals, groups or institutions to determine

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1. Samuel D. Warren and Louis B. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195, 205 (1890).

2. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

3. RICHARD POSNER, THE ECONOMICS OF JUSTICE 272 (1981).

for themselves when, how, and to what extent information about them is communicated to others.[4] And Richard Wasserstrom, in discussing the Daniel Ellsberg case (where members of the so called "Plumbers' Squad" broke into the office of former defense department employee Ellsberg's psychiatrist searching for embarrassing information about him) writes: "here, it seems to me, the root issue captured by the idea of privacy is that of control that an individual will be able to maintain over information about himself or herself."[5]

But is it just any kind of information about someone whose acquisition diminishes her privacy? Should we say that anytime I walk or eat in public my privacy is thereby compromised?

To remedy this difficulty some have suggested that privacy be defined as *the control over personal information about ourselves.*[6] But consider the following case. A person is comatose. His doctor and family refuse to allow anyone to see him. They do this to safeguard his privacy; yet no comatose person can control personal information about himself.

Maybe privacy is better conceived as *the control over access to oneself*? On this view, privacy is understood to function like a boundary process whereby people can make themselves accessible to others or close themselves off.[7]

But, again, it would seem that individuals in a coma can meaningfully be said to have privacy - when others make them cognitivily inaccessible to others - even though they themselves lack control over such access. And there is also the scenario in which A invents a powerful X-ray device that enables her to look through walls. A points this device towards my home but declines to use it. Since she enjoys the power to discover virtually everything I am doing in my home it cannot truly be said that I retain control over personal information about myself vis-a-vis A with respect to actions done in my home. Nevertheless A does not actually invade my privacy until she activates the device.

For those who believe that the concepts of privacy and access are intimately related, the connection may be thought to be correctly captured by defining the former as *the limitation of access to oneself.* I

4. ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1970).

5. Richard Wasserstrom, *The Legal and Philosophical Foundation of the Right to Privacy*, BIO MEDICAL ETHICS 109, 110 (Thomas Mappes and Janc Zembaty, eds. 1981).

6. Charles Fried, *Privacy*, 77 YALE L. J. 475, 483 (1968); Hyman Gross, *Privacy and Autonomy, in* NOMOS XIII: PRIVACY 169, 170 (J. Roland Pennock and John W. Chapman, eds., 1971.)

7. *See* Irwin Altman, *Privacy Regulations: Cultually Universal or Culturally Specific?* 33 THE J. OF SOC. ISSUES 66, 67 (1977).

believe that this is roughly how Anita Allen conceives of privacy.[8] Ruth Gavison endorses it as well,[9] as does Jeffrey Reiman in his essay for this volume.

"Access" is ambiguous. It sometimes means physical contact or proximity but it is also used to connote the acquisition of knowledge about a person. The difficulty with definitions of "privacy" in terms of making physical contact is that we have more accurate terms with which to describe this behavior, including trespass and the loss of repose. Defenders of privacy as the limitation on cognitive access confront the following problem. A taps B's phone and overhears several of B's conversations thereby uncovering some intimate details about him. Official constraints, though, have been placed on A's snooping - e.g. she must get prior authorization from a judge. So there are limits of A's cognitive access to B. But do we want to say that under these circumstances B retains his privacy?

In response to the above counter examples I proposed the following characterization of privacy. It is *the condition of a person's having undocumented personal information about herself not known to others.*[10] Undocumented information consists of all facts about someone that are not part of the public record and as such available for public inspection. "Personal information" designates facts either that most people in a given culture choose not to reveal about themselves (except to close friends, family, counselors, etc.) or about which a particular person is especially sensitive and which therefore he does not choose to reveal about himself (except to close friends, family, etc.).

One difficulty with my account is its implication that a person's discovering an obscure fact about my life that is publicly available in, say, old newspapers does not constitute a loss of privacy for me even if the discovery is published again and millions of people read about it.

Two more recent conceptions of privacy merit brief mention. Julie Inness defines it as *the person's having control over their entire realm of intimate decisions*, including decisions about physical access to oneself, cognitive access to oneself, and intimate behaviors.[11] Intimacy in turn, is conceived as a function of motivation from love, liking, or care.

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8. ANITA L. ALLEN, UNEASY ACCESS 3 (1988).

9. Ruth Gavison, *Privacy and the Limits of the Law* 89, YALE L. J. 421, 428 (1980).

10. William A. Parent, *Recent Work on the Concept of Privacy*, 20 AM. PHIL. Q. 341, 346-347 (1983); William A. Parent, *A New Definition of Privacy for the Law*, 2 L. AND PHIL. 305, 306-09 (1983).

11. JULIE C. INNESS, PRIVACY, INTIMACY, AND ISOLATION 7 (1992).

But could not a person have this kind of control without having much privacy because, for instance, her every move at home is being monitored by the use of powerful snooping technology without her knowledge? And might not our comatose patient have a good measure of privacy despite his total lack of autonomy with regard to intimate matters?

Ferdinand Schoeman suggests that privacy be conceived as *the system of norms which facilitate personal expression within domains of private life.*[12] But we have once again to ask whether it isn't possible for us to have little or no privacy notwithstanding the presence of such norms. Thus someone might be stealthily observing me expressing myself in bed under a system of laws that encourages such expression.

Perhaps we should begin to suspect that Schoeman's definition, like several of the others we have examined, confounds privacy with the closely related but distinct idea of liberty?

Schoeman's proposal brings to mind one of the conceptions of privacy that the Supreme Court now embraces. Mr. Justice Stevens characterizes it as *independence in making certain kinds of important decisions.*[13] In an earlier case Mr. Justice Brennan formulated it thus:

> If the right to privacy means anything, it is the right of the individual, single or married to be *free from unwarranted government intrusion in the matters so fundamentally affecting a person as the decision whether to bear or beget a child.*[14]

But does not the intrusion that concerns the Court in cases involving the criminal prohibition of contraception and abortion have essentially to do with liberty or freedom of choice and not privacy?

The second conception of privacy mentioned by Stevens pertains to *the disclosure of personal matters.*[15] It is the privacy at stake in many Fourth Amendment cases. It is also the second of William Prosser's four privacy torts[16] and is certainly one of the values imperiled in cases like *Sidis v. F-R Publishing Corp.*[17]

Prosser maintains that "the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff - which interests have almost nothing in common except that each represents

12. FERDINAND D. SCHOEMAN, PRIVACY AND SOCIAL FREEDOM 19 (1992).
13. Whalen v. Roe, 429 U.S. 589, 599 (1977).
14. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
15. Whalen, 429 U.S. at 606.
16. William L. Prosser, *Privacy* 48 CAL. L. REV. 383, 392-98 (1960).
17. *See* 113 F. 2d 806 (2d Cir. 1940). Discussed in Prosser's essay, id., 392-93 and 397.

an interference with the right of the plaintiff to be let alone."[18] In addition to the disclosure wrong there is *intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.* This tort is exemplified by the case of a young man who intruded upon a woman giving birth. The woman did not know the intruder and was very disturbed by his uninvited presence.[19]

But should we describe every instance of this kind as a privacy invasion? If a soundtrack disturbs my peace or repose do we need also to condemn it in privacy terms? What do we gain in conceptual clarity by doing so?

The third of Prosser's torts is *publicity that places the plaintiff in a false light in the public eye.*[20] Yet privacy, one would think, quite distinctively concerns certain kinds of facts that are known about a person. A taxi driver who sues because a photograph of his face was published in an article on the cheating propensities of cab drivers[21] should articulate his grievance on grounds of libel and defamation, not privacy.

Prosser's fourth tort is *appropriation for the defendant's advantage of the plaintiff's name or likeness.*[22] However, since this form of appropriation does not involve finding out personal facts about individuals mustn't one question whether it has anything to do with privacy properly conceived? Should not cases like *Pollark v. Photographic Corp.*, in which a photographer took plaintiff's picture and put it on sale without her consent, be handled instead under the right of property? And if the gravamen of petitioner's complaint concerns the perception of her choice, then ought not it be stated in the language of liberty rather than privacy?

Two additional concepts in the privacy family come from Supreme Court search and seizure analyses. The first is that of *plain view* and it essentially means that "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view and doesn't otherwise unmistakably reveal its contents."[23] This doctrine would seem to offer some legal protection to occupants of automobiles who, for example, have tinted windows.

The second Fourth Amendment privacy concept is that of *open fields.* In Mr. Justice Holmes' words: "The special protection ac-

18. Prosser, *supra* note 16, at 389.
19. *Id.* The case is DeMay v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881).
20. *Id.* at 398-401.
21. Peay v. Curtis Pub. Co., 78 F.Supp. 305 (D.D.C. 1948).
22. Prosser, *supra* note 16, at 401-07.
23. United States v. Ross, 456 U.S. 798, 822-23 (1982).

corded by the Fourth Amendment to the people in their persons, houses, papers, and effects' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."[24] That individuals may not legitimately demand privacy for activities conducted out of doors in places cognitivily accessible to the public would seem to have direct implications for the implementation IVHS.

The final concept in the privacy family deserving of brief mention makes a conspicuous appearance in the Warren and Brandeis essay. They write: The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an *inviolate personality.*"[25] Jeffrey Reiman uses similar language in his more recent defense of privacy:

> Privacy is a social ritual by means of which an individual's moral title to his existence is conferred. Privacy is an essential part of the complex social practice by means of which the social group recognizes - communicates to the individual - that his existence is his own. And this is a precondition of *personhood.*[26]

So I conclude with two queries: Is privacy indeed necessary to protect, or even an essential component of, our moral inviolability?; and does IVHS in any way pose a threat to that privacy and inviolability?

24. Hester v. U.S., 265 U.S. 57, 59 (1924). *See also* Oliver v. U.S., 466 U.S. 170 (1984).

25. *Privacy, supra* note 1, at 205.

26. Jeffery Reiman, *Privacy, Intimacy, and Personhood* 6 PHIL. AND PUB. AFF., 26, 39 (1976).