

Saint Louis University Public Law Review

Volume 25

Number 1 *Strife, Liberty & the Pursuit of
Privacy: The Conflict Between Freedom of
Information and Privacy in the Post-9/11 ERA*
(Volume XXV, No. 1)

Article 5

2006

What, Me Worry? The Multi-Front Assault on Privacy

Andrew Askland

Follow this and additional works at: <https://scholarship.law.slu.edu/plr>



Part of the [Law Commons](#)

Recommended Citation

Askland, Andrew (2006) "What, Me Worry? The Multi-Front Assault on Privacy," *Saint Louis University Public Law Review*: Vol. 25 : No. 1 , Article 5.

Available at: <https://scholarship.law.slu.edu/plr/vol25/iss1/5>

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Public Law Review by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

WHAT, ME WORRY? THE MULTI-FRONT ASSAULT ON PRIVACY

ANDREW ASKLAND*

“Think, every day, something no one else is thinking. It is bad for the mind to be always part of unanimity.” Christopher Morley¹

There is consistent polling evidence that Americans are concerned about their privacy.² Although poll numbers fluctuate with current events, as demonstrated in headlines about the U.S. PATRIOT Act, this underlying pattern persists.³ However, there is no clear or comprehensive vision of how

* Andrew Askland (J.D., Ph.D) is Director of the Center for the Study of Law, Science, & Technology at the Arizona State University College of Law.

1. This often-cited quote is attributed to Christopher Morley, an American editor and author living from 1890-1957. For sources attributing the quoted material to Christopher Morley, see, Child Care Exchange, <http://www.childcareexchange.com/eed/issue.php?id=377> (last visited Feb. 14, 2006); Pittsburg Area Brain Injury Alliance, http://www.pabia.org/Archives/Newsletters/Cognitive%20Dissonance/cd_part_vii.htm (last visited Feb. 14, 2006); Quote Collection Website, <http://www.ptf.com/~vlb/Cuute/Quotes/quotes1.txt> (last visited Feb. 14, 2006); Quotes by Subject, <http://www.ifla.org/faife/litter/subject/pluralism.htm> (last visited Feb. 14, 2006).

2. For example, in the Harris Equifax, *Health Information Privacy Survey*, 75% of respondents worried that medical records for a computerized national health information system would be used for non-health purposes and 96% believed that federal legislation should designate all personal medical information as “sensitive” and impose penalties for unauthorized disclosures. *Health Information Privacy Survey*, HARRIS EQUIFAX 11-12 (1993). In the ACLU, *Live and Let Live* poll in 1994, 75% of respondents were concerned a “great deal” or a “fair amount” that health insurance companies are putting medical information about them into a computer information bank that others have access to. Medical Privacy Public Opinion Polls, <http://www.epic.org/privacy/medical/polls.html> (last visited Feb. 17, 2005). I do not propose that we devise policy based solely upon polling data. These polls do not measure trade-offs between privacy and other consumer preferences. They do not capture the choices that consumers make in the real world. They usually do not explore the available solutions to the problems that they identify, nor do they specify the legal and economic consequences of those solutions. Robert Weissberg, *Why Policymakers Should Ignore Public Opinion Polls*, CATO POLICY ANALYSIS, May 29, 2001, available at <http://www.cato.org/pubs/pas/pa402.pdf> (last visited Oct. 5, 2005). Despite these shortcomings, the polls do reveal a broadly shared concern about practices that threaten privacy.

3. Others phrase the ebb and flow in grander historic terms. The late nineteenth century, with the invention of the portable camera and the proliferation of sensational (so-called “yellow”) journalism, is identified as one crest that spurred Samuel Warren and Louis Brandeis to write their famous law review article, *The Right to Privacy*, which supported the right, as Judge Thomas Cooley articulated it, “to be left alone.” Richard M. Gellman, *Can Privacy be Regulated*

to express the concern for privacy. We perceive that our privacy is endangered, but we are not sure what to do about it. Some abuses focus our attention and grounds demands for specific redress, such as periodic efforts to regulate telemarketers. However, these responses are haphazard and disjointed. Part of the explanation likely lies in a disconnect among our preferences; we claim that we oppose intrusions upon our privacy even as we readily provide valuable personal information such as Social Security Numbers to telemarketers who ask for them.⁴ Perhaps we do not recognize the relationship between filing applications for “free” Caribbean holidays and store discount cards and the subsequent onslaught of spam emails, telephone solicitations, junk surface mail, and sometimes, identity theft. More likely, we want the benefits that are apparently offered and underestimate the costs that are entailed. There is abundant evidence of people holding contradictory preferences. For example, environmentalists sometimes drive gas-guzzling automobiles, peace activists sometimes resort to violence, and some who are devoutly religious limit their nominally universal vocation to fellow believers. Similarly, we may have inconsistent views about privacy: we may want its protections while we may also want the benefits that flow from practices that undermine those protections.

Another part of the explanation for this disconnect between expressed preferences and apparently contradictory practices is the expansive sweep of the concept of privacy. This concept is cited in many contexts to support varied policies and practices. We may perceive privacy violations in only some of these policies and practices and our sensitivities may vary sharply across the policies and practices. The preservation of intimacy in our relations with others is a privacy interest. The accumulation and dissemination of medical information (including genetic) impinges upon our privacy interests. Access to our financial records affects our privacy interests. The generation of a digital persona, created from data that is acquired, merged, and shared through connecting computer networks, whether with or without our complicity, evinces privacy concerns. The protection of our homes against

Effectively on a National Level? Thoughts on the Possible Need for International Privacy Rules, 41 VILL. L. REV. 129, 132-33 (1996). The computer revolution that rapidly accelerated in the 1960s stirred up another storm, resulting in various statutes addressing the informational privacy that was threatened by the unprecedented advances in information technologies. *Id.* at 133. According to the authors, the third wave is upon us, overdetermined by further IT developments combined with the enhanced security measures devised and implemented to confront the threat of international and domestic terrorism. Douglas J. Sylvester & Sharon Lohr, *Counting on Confidentiality: Legal and Statistical Approaches to Federal Privacy Law After the USA Patriot Act*, 2005 WISE. L. REV. 1033, 1033, 1036-38 (2005); Note, *Up in Smoke: Online Privacy Becomes the Latest Casualty in the War on Drugs*, 27 AM. J. TRIAL ADVOC. 169, 185 (2003).

4. See generally KEVIN D. MITNICK & WILLIAM L. SIMON, *THE ART OF DECEPTION* (2002).

physical intrusion and against physically non-intrusive surveillance invokes our privacy interests. So too does the use of surveillance technology to monitor our whereabouts in public places—either videotaping us or relying upon transmitters to track our location. The right to choose to have an abortion has been upheld as a privacy right.⁵ We likely have differing intuitions about the level of privacy protection that is appropriate for these and other privacy situations.

Moreover, there does not seem to be a simple conception of privacy that wholly underwrites these privacy policies and practices. There is likely a “family resemblance” among the privacy interests, à la Wittgenstein’s description of the relationship among games,⁶ but thus far, there is no consensus about a single definition that captures all of privacy’s ambit. Is it control of information,⁷ control of access to our person,⁸ control over who can sense us,⁹ control over the intimacies of personal identity,¹⁰ the protection of human dignity,¹¹ the development of personal autonomy (whether as an end in itself¹² or as promoting civil society¹³), or some other definition that is at the core of privacy concerns? This failure of a single, comprehensive definition is hardly fatal and certainly not unique. Many familiar terms are similarly inexact (indeed, they are often elastic) and nonetheless useful.¹⁴ We are dealing with an inexact term that will connote different meanings in different contexts.

Yet another aspect of our current ambiguities about privacy is the lack of historical precedent for many current challenges to privacy. The founders did not have deeply held convictions about the threats to privacy that alarm us because the technologies that ground those threats were in their infancy. Their society was considerably simpler, in part, because it was not thoroughly permeated by applied technologies. A right to privacy was not elaborately articulated because privacy could be taken for granted. The sanctity of the home and the security of personal papers and mailed correspondence were

5. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“The right to privacy. . . as we feel it is . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

6. Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1088, 1097 (2002).

7. Charles Fried, *Privacy*, 77 YALE L.J. 475, 483 (1968).

8. Ruth Gavison, *Privacy and the Limits of the Law*, 89 YALE L.J. 421, 423 (1980).

9. Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 276 (1974).

10. JULIE C. INNESS, *PRIVACY, INTIMACY, AND ISOLATION* (1992); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977).

11. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, N.Y.U. L. REV. 962, 1002 (1964).

12. C. Keith Boone, *Privacy and Community*, 9 SOC. THEORY & PRAC. 1 (1983).

13. Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, STAN. L. REV. 1373, 1426-28 (2000).

14. Paul F. Campos, *Reflections on the Intersection of Law and Linguistics*, WASH. U. L.Q. 971, 978 (1995).

salient concerns, but the founders' physicians and their medical records were not tied to computer networks. Government and private enterprises did not collect information about them on multiple accounts, nor was that information easily accessible and collative. The founders were not available via telephone or email to uninvited solicitors. A description of the differences between the mores and practices of an 18th century decentralized, rural society and our increasingly urban, centralized, and technology dependent society is worth more attention than can be paid here. The point is that our constitutional heritage does not directly address the privacy permutations that confront contemporary society.¹⁵ The variable issues of privacy protection that now concern us have emerged from our unprecedented technologies. We cannot expect to find specific guidance about how to resolve these difficulties in the wisdom of writers who could not have imagined that our lives would intertwine with technologies that both cushion and smother us.

Anita Allen has provided a useful typology in which privacy interests are categorized according to their informational, physical, proprietary, and decisional meanings.¹⁶ These are helpful categories, but they are conventional rather than essential. They might be misleading to the extent that they suggest that the boundaries of the meanings are crisp and obvious or that they provide doctrinal guidance with which to sanction or disallow particular privacy claims. In contrast, hacker access to our personal computer files can involve all four meanings. The physical invasion is slight, but nonetheless noticeable, as even the slightest physical intrusion can have an impact disproportionate to its material footprint. The compromise of proprietary information may be significant if the data accessed without permission has commercial value. The impact upon decisional liberty may be implicated if the files obtained include research and writing that concerns personal decision-making. These interpretations are not strained because we increasingly rely upon our computers for all-purpose business and personal processing, as well as storage support. Likewise, we may suspect that our privacy interests are implicated in situations that do not neatly fall within one of these meanings. For example, a person might judge the extent to which privacy is threatened by the willingness of others to surrender their own privacy, as the norm of what one can reasonably expect to be protected is thereby diminished.¹⁷ This is a broader

15. A strict constructionist view of the Constitution would limit its protection for privacy to the enumerated instances, e.g., there can be no quartering of soldiers in private homes. Other privacy abuses not mentioned, the Ninth Amendment notwithstanding, are then left for legislative action. Carl T. Rowan, *Equality as a Constitutional Concept*, 47 MD. L. REV. 10, 12 (1987).

16. RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW: CASES AND MATERIALS* 25 (1999).

17. The *Katz* standard makes this acutely relevant. Courts are directed to protect actual (subjective) expectations "that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). If the expectation is not present, then

concern than covered by any of the four specific meanings, but it clearly should qualify as a legitimate privacy claim.¹⁸

The United States has been reluctant to offer programmatic and systematic protections to privacy, either by legislation, by judicial interpretation, or by executive order.¹⁹ Most European countries have attempted a systematic, omnibus approach with a comprehensive set of national privacy laws (and enforcement mechanisms such as an office of data protection).²⁰ Their approach arises from a different consensus about the role of government regulation of private enterprise.²¹ Europe regards privacy as a personal right that is nonproprietary in nature and shifts the burden of persuasion to those whose practices affect privacy interests.²² In Europe, privacy is a right; in America, it is an economic commodity.²³ The United States prefers a *laissez faire* view of the government's relations with private enterprise.²⁴ The United States does not presume that new practices violate privacy interests and responds to individual problems only as they broach relevant thresholds of public alarm.²⁵ One can phrase this response as pragmatic, a case-by-case approach that respects the nuances of particular settings and parties. More sharply, one can criticize the response as an ad hoc, hodge-podge reaction in which sensationalized abuses are the focus of piecemeal legal intervention even as a quiet accretion of incremental changes undermine important privacy interests, sometimes with government endorsement. "Oversight . . . is decentralized. [Privacy] protection is not a core mission of any government agency."²⁶ There is no overarching view of a systemic problem because privacy problems are regarded as discrete and isolated epiphenomena.²⁷

the reasonableness prong is likely moot. *United States v. Meriwether*, 917 F.2d 955, 959 (6th Cir. 1990).

18. This concern for reduced expectations of privacy leads to Anita Allen's suggestion that perhaps we should "force privacy" on people. Anita L. Allen, *Coercing Privacy*, WM. & MARY L. REV. 723, 732-34 (1999).

19. Joel R. Reidenberg, *Setting Standards for Fair Information Practice in the U.S. Private Sector*, 80 IOWA L. REV. 497, 500 (1995).

20. PRIVACIES: PHILOSOPHICAL EVALUATIONS 28 (2004).

21. Julia M. Fromholz, *The European Union Data Privacy Directive*, 15 BERKELEY TECH. L.J. 461, 470 (2000).

22. GENETIC SECRETS: PROTECTING PRIVACY AND CONFIDENTIALITY IN THE GENETIC ERA 395 (1997).

23. Eric Dash, *Europe Zips Lips; U.S. Sells Zips*, N.Y. TIMES, Aug. 17, 2005, available at <http://www.nytimes.com/2005/08/07/weekinreview/07dash.html?ex=1128830400&en=d6c0d50bab23d734&ei=507> (last visited Oct. 16, 2005).

24. Lawrence Lessig, *The Architecture of Privacy*, 1 VAND. J. ENT. L. & PRAC. 56, 62 (1999).

25. Gellman, *supra* note 3, at 130, 134.

26. Dash, *supra* note 23.

27. Fromholz, *supra* note 21, at 471-72.

I have already averred to the difficulty of identifying a single comprehensive definition of privacy with which to engage the varying practices that can be phrased as threats to privacy. I do not propose to proffer yet another definition. However, I do propose to follow the example of Alan Westin and suggest that we should look to the functions that privacy performs as the best way to understand privacy and how we should devise means to protect it from encroachments.²⁸ I shall first describe some of the challenges that face privacy in our technology rich society. I will employ the four categories articulated by Westin to order that presentation. Westin described “basic states of individual privacy”²⁹ and, while I am not wedded to his definition of these states, they nonetheless offer a useful means to parse the various challenges to privacy that I will describe.

Westin’s four basic states are: solitude, intimacy, anonymity, and reserve.³⁰ With solitude, “the individual is separated from the group and freed from the observation of other persons.”³¹ Westin acknowledged that various other stimuli might affect the person in solitude.³² This stimuli ranges from physical stimuli, such as noise and odors, to psychological intrusions, like the presence of God or one’s conscience.³³ Still, there is separation from others in solitude that serves as a model of isolation.³⁴ With intimacy, the person is a member of “a small unit that claims and is allowed to exercise corporate seclusion so that it may achieve a close, relaxed, and frank relationship.”³⁵ The traditional husband–wife relationship is a clear instance, but work cliques also qualify.³⁶ With anonymity, “the individual is in public places or performing public acts but still seeks, and finds, freedom from identification and surveillance.”³⁷ The individual “does not expect to be personally identified and held to the full rules of behavior and roles that would operate if he were known,” as the individual has merged into the “situational landscape.”³⁸ Lastly, reserve is “the creation of a psychological barrier against unwanted intrusion.”³⁹ This is what George Simmel called “reciprocal reserve and indifference,”⁴⁰ a mental distance that protects personality and “is the

28. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 31 (1967).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. WESTIN, *supra* note 28.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 32.

40. WESTIN, *supra* note 28, at 32. Per Simmel, the intensification of nervous stimulation was the gravest problem for the modern person. THE FIN DE SIECLE 62 (2000). The modern

dynamic aspect of privacy in daily interpersonal relations.”⁴¹ Reserve is the most elusive of the four states, however, despite the difficulty of specifying a definition, it is an important part of our functional expectations for privacy.

A. Anonymity

This is a curious category of concern because its ubiquity is tied to modern urbanization. In a rural setting, it is difficult to be anonymous, at least in one's own community, because everyone knows each other. Even in small towns, though the degree of familiarity is less, most people are recognizable to each other, while those who are not recognized stick out as different. The cities at the time of our nation's founding were large in comparison with the towns and villages from which they evolved, however they did not approximate the numbers that cities now total.⁴² Furthermore, one was known within a sector of the city. Cities by their size and function promote anonymity, but the repetition of encounters within a neighborhood personalized the exchanges.⁴³ Movement within these cities was not facilitated by mass transportation and travel from one's neighborhood to another was often regarded as risky business.⁴⁴ In effect, technological limitations forced people to interact with each other.⁴⁵ In addition, though migrants founded the country and periodic migrations (recurrently west) mark its history, the stability of communities persisted through these migrations.⁴⁶ Even though many people merely passed through places, more people stayed.⁴⁷ The terms might be measured in years or decades rather than generations, but these early urban neighborhoods retained the characteristics and functions associated with small rural communities. Thus, one would not be truly anonymous in a city of neighborhoods, or at least the anonymity would be limited in scope.

Modernity changed the conditions of urban life. Technology enables us to shake loose of a dependence upon a local support system.⁴⁸ The massive, mobile, and independent populations of large cities make anonymity unavoidable. One cannot take the time to make the acquaintance of everyone

struggles to preserve a subjective life against the overwhelming power of metropolitan forces. *Id.* at 61.

41. WESTIN, *supra* note 28, at 32.

42. A POPULATION HISTORY OF NORTH AMERICA 1 (2000).

43. Jessica Bulman, *Publishing Privacy: Intellectual Property, Self-Expression, and the Victorian Novel*, 26 HASTINGS COMM. & ENT. L.J. 73, 78 (2003).

44. HENRY WILLIAM ELSON, HISTORY OF THE UNITED STATES OF AMERICA 290-92 (1905).

45. Bulman, *supra* note 43, at 78-79.

46. ROGER DANIELS, COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE 125 (2002).

47. *Id.*

48. B.J. FOGG, PERSUASIVE TECHNOLOGY: USING COMPUTERS TO CHANGE WHAT WE THINK AND DO 8 (2003).

that they encounter. Indeed, one cannot make eye contact with the uncountable many that one faces each day, as exhaustion would result from too many salutes, nods, and greetings. Instead, one melts into the flow of bustling humanity individually purposeful, observing norms of efficiency and politeness, but otherwise disinterested. We suspend the demands of social interaction that would otherwise slow and confuse us.

Although there are limits to this sanctioned lack of regard for each other, within them we are allowed to act as though we are invisible.⁴⁹ We are located in public space and can call attention to ourselves by violating the governing norms of conduct—like, for example, if we sing a popular tune too loudly or bustle too aggressively. Nevertheless, the norms allow a tremendous degree of unencumbered actions without accountability. Surely, we surrender something that is important by distancing from others and we would not want this distancing to define our social lives. On the other hand, if we must submit to the pace and indifference of a massively populous circumstance, we should be allowed the benefits of its apparently boundless scale and blissful obliviousness.

This increasing anonymity in urban places coincides with the rise of individualism, both as creed and practice.⁵⁰ Anonymity serves to reinforce norms that promote individualism.⁵¹ For example, you can read more daringly if you can acquire reading material anonymously.⁵² The strictures of a small, parochial place might dissuade its denizens against exploratory reading, especially if the unfamiliar reading material were regarded as risqué or threatening. Associations, too, are more freely developed in the anonymity of a large place.⁵³ One can test the attractions of new ideas and different people more readily where one need not justify the dalliance to family and acquaintances. This license to explore anonymously is not without shortcomings, as not only *positive* self-expression is empowered. Pornography, for example, is consumed in greater quantities when it can be

49. The contrast of orientation between personal relations in a rural setting and impersonal relations in an urban setting has been cited as a ground for the difference between shame and guilt as a basis for morality. See generally BERNARD WILLIAMS, *SHAME AND NECESSITY* (1993).

50. Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 BERKELEY WOMEN'S L.J. 47, 52 (1995).

51. *Id.*

52. Ready access to a patron's borrowing record at a library threatens that patron's independence. The PATRIOT Act includes a provision granting access to a patron's records and that provision is strongly resisted and resented by professional library associations. Kathryn Martin, *The USA Patriot Act's Application to Library Patron Records*, 29 J. LEGIS 283, 290 (2003). It is noteworthy that the publication of a record of the videotapes rented by a prominent judicial nominee led to federal legislation protecting video rental records. Jonathan Zittrain, *What the Publisher Can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication*, 52 STAN. L. REV. 1201, 1234 (2000).

53. W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* 3 (1999).

accessed anonymously, as witnessed by the proliferation of pornography on the Internet.⁵⁴ Anonymity enables a kind of schizophrenia in which the life that one displays to the public may be wholly unlike the life that one lives undetected by others.⁵⁵ The contrasting uses of anonymity are yet another instance of the burden of personal freedom. The fact that we are free to choose for ourselves does not assure that we will choose wisely or well. We are trying both to assure personal freedom and to promote its responsible exercise, but we cannot assure the latter without compromising the former.

Technological advances are redefining the terms of urban anonymity.⁵⁶ Camera surveillance is a primary vector for this redefinition.⁵⁷ The proposition to video-monitor public streets was initially concentrated on low-end criminal activity.⁵⁸ If police officers could not be present at all times on streets where drug distribution or prostitution were rampant, camera surveillance could serve as substitutes, taping the illegal activities and empowering later arrests and prosecutions.⁵⁹ Equipment costs have declined and surveillance is budgeted for implementation in an increasing number of locations.⁶⁰ Public alarm about the threat of terrorism has fueled the expanded use of surveillance technologies, especially in the aftermath of the airline suicide attacks of September 11, 2001, and the 2005 subway bombing episodes in London (with the video tapes of the perpetrators).⁶¹ Public transportation depots are being outfitted with elaborate camera systems to support both active surveillance and ex post facto analysis of taped events.⁶² It is unlikely that surveillance systems, once installed, will be dismantled.

54. PAMELA PAUL, *PORNIFIED: HOW PORNOGRAPHY IS TRANSFORMING OUR LIVES, OUR RELATIONSHIPS, AND OUR FAMILIES* 49 (2005).

55. This control of information to deceive others defines the core use of privacy. Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978). He regards privacy protection as the means by which one hides information from others in order to manipulate or otherwise take advantage of them. "Very few people want to be let alone. They want to manipulate the world around them by selective disclosure of facts about themselves . . ." *Id.* at 400-01.

56. TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE 10-12 (1997).

57. Electronic Privacy Information Center, *Spotlight on Surveillance: More Cities Deploy Camera Surveillance Systems with Federal Grant Money*, available at www.epic.org/privacy/surveillance/spotlight/0505.html (last visited Feb. 16, 2006).

58. REG WHITAKER, *THE END OF PRIVACY* 81 (1999).

59. See DAVID D. BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM* 5 (1998).

60. Martha T. Moore, *Cities Opening More Video Surveillance Eyes*, USA TODAY, July 18, 2005, available at <http://usatoday.printhis.clickability.com> (last visited Feb. 14, 2006).

61. Alice Lipowicz, *London Bombings Sound Security Alarm*, WASH. TECH, www.washingtontechnology.com/news/20_14/cover-stories/26592-1.html (last visited Feb. 16, 2006).

62. Lindsay Isaacs, *Transit Surveillance: Wrecks, Lies, and Videotape*, AM. CITY & COUNTY, Jan. 1, 2003, at 20.

Shopping malls have replaced stores fronting on public streets as the standard setting for retail shopping, largely because private ownership of the property surrounding shops provides the owners with considerably greater control over invitees who enter the property.⁶³ First Amendment rights are not protected on private property to the same extent as in public places.⁶⁴ In addition, many actions, such as unsanctioned solicitations and loitering, are more easily controlled on private property.⁶⁵ Control is the key consideration, and surveillance cameras are a logical extension of the control that mall owners already exercise. Many private security officers are charged to patrol shopping malls and can monitor a higher number of places more efficiently with a network of surveillance cameras.⁶⁶ For this reason, in a shopping mall one should presume that cameras are watching, as there is no longer anonymity in that quasi-public space.

The task is monitoring shopper activities. Surveillance of shopper movements with cameras is one approach, but there are other monitoring options. We shall not soon reach the extremes of the movie *Minority Report*, in which scanners recognized an identity imprint on each person's eyes and entreated that person by name to buy goods in the shops they were passing.⁶⁷ The scanners likely knew each person's purchasing history and framed their entreaties accordingly. Instead, Radio Frequency Identifications ("RFIDs") placed on merchandise will enable scanners to read the tags from a few feet away.⁶⁸ RFIDs are an important commercial development because they will help deter shoplifting and will facilitate inventory control.⁶⁹ If the tag is removed when a sale occurs, then there is no further communication between the tag and the readers.⁷⁰ If the tag is disabled rather than removed, other readers can still read the tag (and track the movement of the merchandise to which it is attached) if the disabling is reversible.⁷¹ Indeed, consumers may be attracted to reactivated tags to catalogue their belongings and to assist in recovery if they are stolen.

63. PACO UNDERHILL, *CALL OF THE MALL* 32-33 (2004).

64. Dahlia Lithwick, *Why Can Shopping Malls Limit Free Speech*, SLATE, <http://www.slate.com/id/2079885/> (last visited Feb. 14, 2006).

65. See Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 594 (2005).

66. See *id.* at 588-90.

67. See *MINORITY REPORT* (Twentieth Century Fox 2002).

68. Gal Eschet, *FIPs And PETs For RFID: Protecting Privacy In the Web of Radio Frequency Identification*, 45 JURIMETRICS J. 301, 302 (2005).

69. *Id.* at 302; Catherine Yang, *The State of Surveillance*, BUS. WK., Aug. 8, 2005, at 54 (2005).

70. Oleg Kobelev, *Big Brother on a Tiny Chip: Ushering in the Age of Global Surveillance Through the Use of Radio Frequency Identification Technology and the Need for Legislative Response*, 6 N.C. J.L. & TECH. 325, 328 (2005).

71. See *id.*

RFID sensing technology was initially developed for aircraft in World War II to identify and distinguish friend from foe.⁷² It was later employed with other military equipment and then with cattle and railroad cars.⁷³ Today, a tire company embeds tags in its tires.⁷⁴ Technological improvements and economies of scale are projected to reduce costs per application from dimes and quarters to pennies and make RFIDs a viable technology for retail merchandise.⁷⁵ Rather than being attached after manufacture, RFIDs will be integrated into merchandise during the manufacturing process.⁷⁶ The tags will be a less obtrusive, permanent part of the product.⁷⁷ It may even become impossible to determine if a product contains an RFID. The tags provide the means to track the merchandise (and anyone wearing the merchandise) via a network of readers.⁷⁸ Prisons, hospitals, and elementary schools have legitimate reasons to monitor their wards, and tagged clothing would assist that tracking. Similarly, other industries might be concerned with tracking the whereabouts of the employees or guests of their facilities at all times. Otherwise, we may be alarmed by a technology that compiles a record—an electronic trail—in remarkable detail of our everyday activities, limited only by the placement of online readers.

RFIDs can be active, but are less expensive when passive.⁷⁹ When active, RFIDs have an on-tag power source and an active transmitter.⁸⁰ When passive, they are without either a power source or a transmitter.⁸¹ Passive RFIDs do not emit a signal, but present themselves to be read by scanners.⁸² The advantage they provide to merchandisers and to the monitoring of prisoners, minors, and patients will hasten their widespread adoption.⁸³ RFIDs will be present in an increasingly large amount of the clothing that we wear and will provide the means to generate a chronology of the daily location of anyone conventionally clothed.⁸⁴ Profliigate use will undermine informational

72. Eschet, *supra* note 68, at 307.

73. Kobelev, *supra* note 70, at 328.

74. ANN CAVOUKAIN, TAG YOU'RE IT: PRIVACY IMPLICATIONS OF RADIO FREQUENCY IDENTIFICATION (RFID) TECHNOLOGY 12 (2004).

75. Declan McCullagh, *RFID Tags: Big Brother in Small Packages*, CNET news.com, http://news.com.com/2102-1069_3-980325.html?tag=st.util.print (last visited Feb. 14, 2006).

76. Kobelev, *supra* note 70, at 329.

77. CAVOUKAIN, *supra* note 74, at 9.

78. *Id.* at 7.

79. *Id.* at 5.

80. *Id.*

81. *Id.*

82. *Id.* at 6.

83. Kobelev, *supra* note 70, at 326.

84. Jane Black, *Playing Tag with Shoppers' Anonymity*, BUS. WK. http://www.businessweek.com/technology/content/jul2003/tc20030721_8408_tc073.htm?campaign_id=search (last visited Feb. 14, 2006).

self-determination, which will affect our autonomy and anonymity.⁸⁵ Credit card records already provide a kind of biography of each cardholder, limited in scope to those aspects of the person that are captured by expenditures. RFIDs will provide a more ambitious biography, chronicling our daily activities.⁸⁶ Because we must affirmatively manage our acquisition of tagged goods to avoid its coverage, it will rob us of default anonymity in location and movement.

The widespread use and acceptance of RFIDs is anticipated by the proliferation of Global Position System ("GPS") devices in automobiles and cell phones.⁸⁷ In both cases, the initial motivation to make GPS devices standard equipment was safety enhancement.⁸⁸ In many emergency situations, people in distress had the means to call for help, but were unable to provide information about their location.⁸⁹ Similarly, trucks laden with goods can be tracked with GPS technology so that their locations can always be identified.⁹⁰ The transportation of goods can be managed more efficiently when their locations can be easily determined. The technology has two effects: it permits the GPS user to determine their own location and allows others to determine the location of the GPS user.⁹¹ The on-going monitoring of location permits the monitoring of speed.⁹² One car rental agency attempted to charge penalty fees to its customers for each instance that the vehicle exceeded the posted speed limit.⁹³ Regardless of the initial motivation, GPS technology provides a reliable and accurate means to track and record the location of transmitters assigned to a cell phone or an automobile. The automobile is ubiquitous in American life and the cell phone is insinuating itself rapidly, especially among today's youth. In each case, we are making ourselves traceable by anyone who gains access to the GPS. These technological conveniences may betray us by making our past and current locations an open record.

85. See JAY STANLEY & BARRY STEINHARDT, ACLU REPORT, BIGGER MONSTER WEAKER CHAINS: THE GROWTH OF AMERICAN SURVEILLANCE SOCIETY 7 (Jan. 2003), available at http://www.aclu.org/FilesPDFs/aclu_report_bigger_monster_weaker_chains.pdf.

86. CAVOUKIAN, *supra* note 74, at 1.

87. GPS originated in the 1960s as a means to enable submarines to identify their location away from shore. Lee Gomes, *Military's Use of GPS, a Civilian Mainstay, Is at Core of Its Might*, WALL ST. J., Mar. 24, 2003, at B1. A system of orbiting satellites provides real-time location coordinates using triangulation techniques. *Id.*

88. Carolyn Said & Carrie Kirby, *GPS Cell Phone May Cost Privacy*, SAN FRANCISCO CHRON., Mar. 19, 2001, at C4.

89. Peter Loftus, *In Case of Emergency . . . Dial 911 and the Police Will Know Where You Are; At Least That's the Theory*, WALL ST. J., Sept. 23, 2002, at R12.

90. WHITAKER, *supra* note 58, at 87.

91. CHRISTIAN PARENTI, *THE SOFT CAGE* 2, 4 (2003).

92. RICHARD HUNTER, *WORLD WITHOUT SECRETS* 55 (2002).

93. *Id.*

RFIDs and GPS are high-technology tracking systems. Comparatively simpler tracking systems already compile records of credit card use, website visits, grocery and prescription purchases, driving license data, and scores of other important information about us.⁹⁴ Computer systems used to be opaque and discrete, as data collected by one system was unavailable to another.⁹⁵ The practical effects of Moore's Law⁹⁶ are a tremendous growth in capacity and a dramatic reduction in storage costs.⁹⁷ Connectivity problems between databanks have proven largely surmountable, and, coupled with programming innovations, data collection and manipulation are inexpensive and pervasive.⁹⁸

These advances have enabled companies like ChoicePoint, Acxiom, and LexisNexis to connect multiple databanks and create intricate dossiers of information about almost anyone.⁹⁹ Originally, the motivation for the companies was the profits available for the commercial applications of collated and cross-referenced data.¹⁰⁰ These companies could sell lists of ingeniously collated information to buyers who might, for example, have a reason to selectively market to individuals who recently registered a late model luxury automobile and spend in excess of \$1,500.00 each year on air transportation.¹⁰¹ These uses are alarming, but after September 11, 2001, ambitions for the use of information greatly expanded.¹⁰² The federal government had separated the data systems of its various agencies and programs from each other as a matter of law and policy.¹⁰³ There were legitimate concerns about the centralization of power in government hands and that concern encompassed the power of information.¹⁰⁴ Post 9/11, our priorities shifted. The largest data warehouse companies offered to share their information databases with the federal government.¹⁰⁵ The motives were both patriotic (to assist in the location of terrorists and bolster the country's defenses) and economic.¹⁰⁶ Although programs like Total Information Awareness ("TIA") Program suggest that the

94. DAVID BURNHAM, *THE RISE OF THE COMPUTER STATE* 7-8 (1988).

95. *See id.* at 11-12.

96. Gordon Moore predicted in 1965 that the number of transistors per integrated circuit would double every year. ROBERT O'HARROW JR., *NO PLACE TO HIDE* 42 (2005). The pace has slowed somewhat in recent years, but growth remains exponential. *Id.*

97. *Id.* at 42-43.

98. *See generally id.* at 39-41.

99. *See id.* at 39-40.

100. SIMSON GARFINKEL, *DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY* 11 (2000).

101. *See id.* at 158.

102. STANLEY & STEINHARDT, *supra* note 85, at 1.

103. The Computer Matching and Privacy Protection Act of 1988, 5 U.S.C. 552a(o) (1999).

104. JEFFREY ROSEN, *THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE* 150-51 (2004).

105. O'HARROW, *supra* note 96, at 56-57.

106. *Id.* at 56-58.

federal government wants to compile information databases itself,¹⁰⁷ if the government is unable to do so, they can instead contract with private industry for the information services that it needs.¹⁰⁸ The coordination of data derived from the simplest exchange in the smallest system is now subsumed in the maw of the data warehouse giants and, through them, the federal government.¹⁰⁹

B. *Personal Intimacy*

Medical records provide an appropriate segue from anonymity to personal intimacy. The medical profession promotes an ideal physician–patient relationship in which the patient unhesitatingly confides in the physician.¹¹⁰ The physician–patient privilege is built upon this model, which “enables a patient to secure medical attention without fear of betrayal and unwarranted embarrassing and detrimental disclosure in court of information which might deter him from revealing his symptoms to a doctor to the detriment of his health.”¹¹¹ However, the model is built upon a notional relationship that has proven problematic.¹¹² In practice, the relationship may not have been as fiduciary as it was described in theory, and it may have been objectionably paternalistic.¹¹³ With changes in the marketing of medical services, many patients now insist upon an active role in their diagnosis and treatment.¹¹⁴ The idealization and evolution of the relationship is a complex subject beyond the reach of this paper. What is relevant is a two-step attack on the privacy that grounds that relationship. The first step is concerned with advances in genomics that enable personalized medicine. The second step is concerned with managed health care and computerized medical records. Both directly undermine the intimacy of the patient-physician relationship and diminish expectations of anonymity.

107. See generally GINA MARIE STEVENS, REPORT FOR CONGRESS: PRIVACY: TOTAL INFORMATION AWARENESS PROGRAMS AND RELATED INFORMATION ACCESS, COLLECTION, AND PROTECTION LAWS, available at <http://www.fas.org/irp/crs/RL31730.pdf> (last visited Feb. 16, 2006) (describing the Total Information Awareness (TIA) Programs of the Department of Defense).

108. Bradley Graham, *Poindexter Resigns But Defends Programs: Anti-Terrorism, Data Scanning Efforts at Pentagon Called Victims of Ignorance*, WASH. POST, Aug. 13, 2003, at A2.

109. See ROSEN, *supra* note 104, at 150-51.

110. HOWARD BRODY, *THE HEALER’S POWER* 60-61 (2002).

111. *Stempler v. Speidell*, 495 A.2d 857, 860 (N.J. 1985) (quoting *State in Interest of M.P.C.*, 397 A.2d 1092, 1095 (N.J. Super. Ct. App. Div. (1979))).

112. KEN COX, *DOCTOR AND PATIENT: EXPLORING CRITICAL THINKING* 69 (2000).

113. ALBERT R. JONSEN, *THE NEW MEDICINE AND THE OLD ETHICS* 97 (1990).

114. Ezekiel J. Emanuel & Linda L. Emanuel, *Four Models of the Physician-Patient Relationship*, 267 J. AM. MED. ASS’N 2221, 2223 (1992).

Though humans are genetically identical to a remarkable extent (99.9%),¹¹⁵ given that the human genome contains approximately 3 billion base pairs of DNA, there are some three million genetic differences between almost any two individuals.¹¹⁶ Thus, we are as crucially different as we are incredibly alike.¹¹⁷ The differences underwrite toxicogenomics, the study of gene expression in response to toxic exposure,¹¹⁸ and toxicogenetics, the study of genetic variations that affect susceptibility to toxins.¹¹⁹ Given the pace of current studies, soon we shall be able to predict which particular individuals are more likely than the general population to contract illnesses (or otherwise compromise their health) on account of their particular polymorphisms, genetic variations, and known, identifiable conditions in specific environments.¹²⁰

Given an ability to identify susceptible individuals (at least for some illnesses), we can anticipate that concerned parties, such as employers, will adopt screening procedures to preempt the exposure of susceptible individuals to the triggering toxin.¹²¹ The screening procedures may be adopted as a condition for employment.¹²² If an applicant tests positive for the relevant polymorphisms, he or she will be ineligible for employment.¹²³ The ground for the ineligibility is the identified health risk.¹²⁴ The employer is making a judgment on behalf of the applicant about his or her susceptibility to the health risk and also making a judgment about their own potential tort liability to compensate that person if, or when, the illness arises.¹²⁵ In response, a comparable temptation to intervene on behalf of employees will likely arise among legislators and regulators.

115. Gary E. Marchant, *Genomics and Toxic Substances: Part II—Genetic Susceptibility to Environmental Agents*, 33 ENVTL. L. REP. 10641 (2003).

116. George Orphanides & Ian Kimber, *Toxicogenetics: Applications and Opportunities*, 75 TOXICOLOGICAL SCI. 1 (2003).

117. Jonathan Weems, Commentary, *A Proposal for a Federal Genetic Privacy Act*, 24 J. LEGAL MED. 109, 111 (2003).

118. Polymorphism affecting susceptibility generally involves both the oxidation stage of metabolism, in which foreign substances are oxidized to form high-energy reactive intermediates, and the conjugation stage, in which the reactive metabolite forms a non-reactive, water-soluble molecule that can be secreted by the body. Marchant, *supra* note 115, at 10642. The greatest risks arise from exposure to toxins that produce a rapid variant for the oxidation stage gene and a slow variant for the applicable conjugation stage gene. *Id.* at 10643.

119. *Id.* at 10071.

120. Lynn L. Bergeson et al., *Toxicogenomics*, ENVTL. FORUM, Nov.-Dec. 2002, at 28, 31.

121. Jennifer R. Taylor, *Mixing the Gene Pool and the Labor Pool: Protecting Workers from Genetic Discrimination in Employment*, 20 TEMP. ENVTL. L. & TECH. J. 51, 57 (2001).

122. ELLEN ALDERMAN & CAROLINE KENNEDY, *THE RIGHT TO PRIVACY* 275-76 (1995).

123. Taylor, *supra* note 121, at 55.

124. *Id.* at 57.

125. Katherine Brokaw, Comment, *Genetic Screening in the Workplace and Employer's Liability*, 23 COLUM. J.L. & SOC. PROBS. 317, 326 (1990).

This is an example of how knowledge of the human genome is going to affect health care before the onset of symptoms. Knowledge of an individual's genome will permit the personalization of medical care.¹²⁶ Rather than adopting treatment plans according to their probability of success in the general population, physicians will devise treatment plans that respond to the particular genome of each patient.¹²⁷ The identification of these "susceptibility genes" can encourage a reductionist-view of human capacity. Despite the caution that most susceptibility genes are probabilistic and express themselves differently according to varying environmental conditions, the qualifications can get lost in the translation to popular understanding and commercial application.¹²⁸ Susceptibility may be mistakenly viewed as certainty and market forces may drive employers and insurers to discriminate based on genetic constitution.¹²⁹ Although there is legislation prohibiting this discrimination,¹³⁰ such legislation will likely prove futile as genetic testing becomes a regular part of medical care and gene test reports become a routine feature of medical folders.¹³¹ As physicians inform their decisions about treatment options with the relationships between medication efficacy and genetic polymorphisms, genetic profiles will be decipherable from the treatments pursued in individual cases. Even without a genetic record, a knowledgeable reviewer will be able to extrapolate some genetic polymorphisms from a treatment record.

126. Josh Fischman, *On Target: A New Generation of Drugs Offers Customized Cures*, U.S. NEWS & WORLD REP., Jan. 20, 2003, at 52.

127. That aspect highlights the individualizing impact of the genetic revolution. A second aspect is the need for data from maximally many people. In order to generate the database of susceptibility genes that will empower individualized medicine, research requires cooperation of many volunteers who will permit access to their genome. It is possible to accumulate this data and treat the volunteers with respect. Only a few decades ago, researchers often ignored their obligations to their subjects, but current practices are improved by protocols that stress the informed consent of subjects. Funding sources that support genetic research are insisting upon the implementation of these protocols. Even when conducted with respect for its subjects, the scope of the research is population wide. It seeks to generalize from genetic facts and individual peculiarities are washed out in these conclusions.

128. Jamie A. Grodsky, *Genetics and Environmental Law: Redefining Public Health*, 93 CAL. L. REV. 174, 213 (2005).

129. George J. Annas, *Genetic Privacy: There Ought to Be a Law*, 4 TEX. L. REV. 9, 12 (1999); Richard R. Sharp & J. Carl Barrett, *The Environmental Genome Project and Bioethics*, 9 KENNEDY INST. ETHICS J. 175, 182 (1999).

130. New Jersey, for example, provides a broadly phrased protection against discriminatory uses of genetic information. Genetic Privacy Act, N.J. STAT. ANN. §§ 10:5-43-10:5-49 (West 2002).

131. Scott Burris & Lawrence O. Gostin, *Genetic Screening from a Public Health Perspective: Some Lessons from the HIV Experience*, in GENETIC SECRETS: PROTECTING PRIVACY AND CONFIDENTIALITY IN THE GENETIC ERA 137, 150-51 (Mark A. Rothstein ed., 1997).

The increasing sophistication of insured citizens, as well as the ease of access to and reduced costs of genetic testing will precipitate changes in current laws and regulations limiting employer/insurer access to, and use of, genetic tests. As individuals with susceptibility genes marking the certainty of a later disease test themselves and over-insure against the later disease, insurance companies will petition for the authority to test for those diseases to protect their basic commercial premise—dividing costs of coverage among claimants with comparable probabilities of risk. Without that change, insurers will be victimized by adverse selection, as those seeking insurance will know more about the probability of future disease than the insurers and will over-insure, while those who do not anticipate gene-related illness will under-insure.

Within these strategies, there is a tendency to bleed away the contingencies of each person's life choices and instead focus on a genetic profile. The tilt toward genetic reductionism will erode patient confidence in their physicians, who will be expected to order genetic testing because it will be indicated by the governing standard of care. Genetic test results will be available to whomever the physician is obligated to provide them, which means that health insurance companies will be able to acquire and trade the reports.¹³² Insurance companies will have legitimate grounds to acquire and analyze the reports and they will not be able to resist the temptation to expand their use to purposes that do not benefit the patient. The use of medical/genetic records will undermine the confidential relationship that is critically important for accurate and effective health care. If physicians are the point of contact for a network that gathers genetic information about the patient and imposes burdens or otherwise disadvantages the patient, the patient will regard the physician as primarily loyal to the network and its priorities.

In addition, patients will not be able to maintain control of their genomes. Rather, the data will be accessible to whoever is authorized to access it. The authorization protocols will likely be managed by the health insurance company rather than the patient.¹³³ A condition of coverage will likely be the grant of permission to the insurance company to access and use the data. Gradual "mission creep" will lead to use of the data for scientific research, perhaps broadly construed, and other purposes not directly benefiting the patient such as cost containment. Laws and regulations will aim to preserve a degree of anonymity for the patient's records, but the control valve, however constrained, will be held by insurers. Anonymity will be protected, or not, as it comports with the priorities of the insurer. Even if the insurer adopts policies and practices to protect patient anonymity, it is difficult to assure that the data

132. Robert M. Gellman, *Prescribing Privacy: The Uncertain Role of the Physician in the Protection of Patient Privacy*, 62 N.C. L. REV. 255, 259-60 (1984).

133. See generally Lawrence O. Gostin, *Health Information Privacy*, 80 CORNELL L. REV. 451 (1995).

will not be accessed illegally. It is also difficult to assure that those who manage the data system will possess the attitude and commitment that the insurer presumes will guide their performance. Public choice theory suggests that they will not.¹³⁴ Effective anonymity then depends upon managing a chain of employees acting to further their own private or vested interests.

Health care is managed by corporations focused on economies of scale and wide-ranging standardized procedures.¹³⁵ Care is individualized to the degree that each patient's unique characteristics permit a more accurate diagnosis.¹³⁶ Each patient is also reduced to the sum of those characteristics and the treating physician is answerable to the relevant health insurer for care that deviates from the prescribed standard.¹³⁷ There is a deep irony in this juxtaposition of improved diagnostics enabled by genetic research and a diminished confidence in the physicians informed by these improvements because their patients have been reduced to the sum of their biomarkers. It may be that treatment improves at the cost of reduced confidence in the treatment providers.

The cost pressures of health care have already undermined patient confidence in treatment aside from genetic developments.¹³⁸ The model of a physician with a personal relationship with each of her patients may have always been unachievable in practice, but it served aspirational purposes.¹³⁹ The adoption of managed health care practices has largely subverted that aspiration.¹⁴⁰ Most patients have severely limited contact with the doctors who treat them.¹⁴¹ The health care industry relies heavily upon underpaid and under-trained staff and overtaxed nurses to contain costs.¹⁴² There are too few opportunities for patients to connect with their caregivers as fellow human beings, open to each other's unique qualities and experiences.¹⁴³

134. See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); RUSSELL HARDIN, *COLLECTIVE ACTION* (1982).

135. Paul M. Schwartz, *Privacy and the Economics of Personal Health Care Information*, 76 TEX. L. REV. 1, 12-13 (1997).

136. Mark A. Rothstein & Phyllis Griffin Epps, *Ethical and Legal Implications of Pharmacogenomics*, 2 NATURE REV. GENETICS 228, 230 (2001).

137. E. HAAVI MORREIM, *BALANCING ACT: THE NEW MEDICAL ETHICS OF MEDICINE'S NEW ECONOMICS* 54-55 (1991).

138. See Shirley Eiko Sanematsu, Comment, *Taking a Broader View of Treatment Disputes Beyond Managed Care: Are Recent Legislative Efforts the Cure?*, 48 UCLA L. REV. 1245, 1250 (2001).

139. See generally BRODY, *supra* note 110, at 60 (discussing the ideal physician-patient relationship).

140. WILLIAM F. MAY, *THE PHYSICIAN'S COVENANT* 187 (1983).

141. ARTHUR KLEINMAN, *THE ILLNESS NARRATIVES: SUFFERING, HEALING, AND THE HUMAN CONDITION* 263 (1988).

142. *Id.*

143. See generally BRODY, *supra* note 110, at 60 (discussing the importance of the human relationship in conjunction with medicine).

Considerations of efficiency often promote an indifference to the basic requirements of care-giving that nurture interpersonal bonding.¹⁴⁴ There is already a reduced amount of patient confidence available to confront the new challenges to genetic knowledge.¹⁴⁵

Although the focus is primarily upon technology-based threats to privacy, it is useful to briefly acknowledge other threats to intimacy that arise from lifestyle choices. These choices affect many of the relationships traditionally regarded as intimate. As we reconfigure those relationships and squeeze intimacy out of them, we diminish their privacy content and impact. The mobility of the modern nuclear family stretches the support of extended family that fosters intimate relations.¹⁴⁶ There are sound evolutionary reasons for expanding a circle of concern to include more than the immediate family. A larger circle of kin relations provides more opportunities for intimate connection and protects against breaks in core family relationships.¹⁴⁷ The extended network provides reinforcement and resiliency.¹⁴⁸ With a peripatetic life, one is thrown back on the core family with each change of location. Efforts to supplant kin relations with networks of friends can strain under the pressure of short durations and frequent turnover. Households with two working spouses or only one parent are routine, and it can be difficult for these parents to devote adequate time and energy to their children. These stresses are better reported elsewhere, but nonetheless contribute to the general diminishment of intimacy within families.

The influence of the mass media (television, the music and motion picture industries, videogames, iPods and other pocket sized ultra light audio players, the Internet, etc.) is relevant, in part, because their combined impact is not outweighed by contrasting values inculcated during extensive familial activities.¹⁴⁹ There may not be enough family events to constitute an effective counterweight.¹⁵⁰ School is expected to provide skills and attitudes that were

144. See KLEINMAN, *supra* note 141, at 265.

145. See Sanematsu, *supra* note 138, at 1250.

146. See generally BERNARD WONG, FAMILY, KIN, AND COMMUNITY (2001).

147. See ROGER M. KEESING, KIN GROUPS AND SOCIAL STRUCTURE 8 (1975).

148. Interestingly, the challenge of the nation-state is to expand that circle of concern broadly enough to encompass fellow citizens, though likely at a less demanding level than required by kin relations. One might view the complaint against western culture lodged by the less developed countries, particularly by religious fundamentalists in those countries, as that it disdains traditional values as a recognition that the west has succeeded in creating a nation-state ethos, but surrendered part of its family-oriented heritage en route.

149. See generally, LAWRENCE GROSSBERG ET AL., MEDIAMAKING: MASS MEDIA IN A POPULAR CULTURE 258-59 (1998).

150. JAN. E. DIZARD & HOWARD GADLIN, THE MINIMAL FAMILY 6-9 (1990).

once the province of the family.¹⁵¹ Increased reliance upon organized sports and other organized activities deserves mention as well. They provide alternative sources of norms and intimacy, which, on balance, contribute to a child's development, but they may also supplant the core intimacy of the family.¹⁵² The result of the reduction in the amount and quality of time shared with family members is that many children are influenced less by their parents than by the mass media and by their school and extracurricular experiences.¹⁵³

Another consideration bears mention. A criticism of past privacy practices is that abuses within the family were shielded from detection by conventions that forbade or hindered outside interference as violating the sanctity of the family.¹⁵⁴ This is the crux of the feminist complaint, which points out that much of the subjugation of women occurred in households and that the political impact of the subjugation was ignored by tunnel vision apologies for family insularity.¹⁵⁵ The family should not be a free-fire zone for sexual, physical, or psychological abuse, and victims should be encouraged to recognize and report the abuse. We want to empower victims to see beyond the confines of their particular family's practices.¹⁵⁶ On the other hand, we do not want family members to presume that their family is objectionably dysfunctional. Efforts to identify abuse and intervene can be overly zealous and interfere with families whose practices are not abusive, but instead are different. Some abuse is readily identifiable, but other purported abuse may not be easily ascertained. Is corporal punishment always abuse? Is martinet parenting necessarily abusive? It is less important to answer these and related questions (such as those concerning the political implications of the allocation of authority within the family) than to recognize that their resolution affects the independence and stability of the nuclear family.¹⁵⁷ The imposition of conventional expectations may undermine trust and intimacy in families that are merely unconventional. We want to protect norms that stretch beyond the conventional. We should be cautious about uncritically endorsing motives to

151. See James P. Comer, *Educational Accountability: A Shared Responsibility Between Parents and Schools*, 4 STAN. L. & POL'Y REV. 113 (1993) (pointing out that parents must be more involved in order for schools to effectively educate children).

152. *Id.* (explaining the importance of a parent's influence on a child, stating that "[p]arents bring to the educational experience valuable knowledge and perspectives . . .").

153. NICK STEVENSON, *UNDERSTANDING MEDIA CULTURES: SOCIAL THEORY AND MASS COMMUNICATION* (2002).

154. Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2118 (1996).

155. *Id.*

156. See generally EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* (1990).

157. See generally DEAN TONG, *ASHES TO ASHES...FAMILIES TO DUST: FALSE ACCUSATIONS OF CHILD ABUSE* (1997) (discussing the implications of accusations of child abuse on the family unit).

peer within the family in search of aberrations. If we want families to serve as asylums and incubators in which children become adults under the guidance and care of their parents, we should preserve norms of non-intervention.

Finally, it is worth noting that Americans do not enlist in community organizations, which can function as family amplifiers and surrogates, as they historically did.¹⁵⁸ DeToqueville remarked about his journeys among us in the early 19th century that we were consummate joiners, that civil society flourished among the several states he visited because Americans flocked to civic, religious, and other organizations that both provided useful services to the community and reinforced shared values and social bonds among their members.¹⁵⁹ As has been noted, Americans now “bowl alone.”¹⁶⁰ We do not join leagues with others but instead pursue our individual interests by ourselves.¹⁶¹ The widely shared penchant for computer games and other individualized interactions with computer technologies exacerbate the problem.¹⁶² This preference for solo activities is not reducible to increased individualism with each person pursuing a uniquely differentiated life.¹⁶³ Indeed, we are often doing the same things as our neighbors.¹⁶⁴ Our “social capital” has plummeted because we now do by ourselves what we used to do together.¹⁶⁵ The theme deserves more attention than is appropriate here, but it is another instance of a contraction of intimacy, in this case a reduced number of people with whom one shares experiences and thereby reveals oneself to another and receives the revelations of another.

C. Solitude

If we are not comforted by regular contact with our extended family or are estranged from our fellow citizens, perhaps we are compensated with ample peaceful seclusion as partial consolation. What we lose in relations that instill traditional family and community values within us, perhaps we gain in an independent subscription to values and activities that better suit our personal preferences, unhindered by family or social group pressures. Unfortunately, it has not worked out that way. We have not created private enclaves within

158. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 43-45 (Simon & Schuster 2000).

159. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 595 (2004).

160. *See generally* PUTNAM, *supra* note 158.

161. *Id.* at 15.

162. HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* 1-2 (1993).

163. JOSEPH TUROW, *BREAKING UP AMERICA: ADVERTISING AND THE NEW MEDIA WORLD* 1 (1997).

164. JOHN MCKNIGHT, *THE CARELESS SOCIETY: COMMUNITY AND ITS COUNTERFEITS* 154 (1995).

165. *See* PUTNAM, *supra* note 158, at 43.

which to examine the foundations of our personal identities in order to create ourselves afresh. We have not heeded Rilke's advice to "[g]o into yourself."¹⁶⁶ Rather, we attend to the images and messages of the mass media that largely drive us to consume.¹⁶⁷ We are creatures of the market economy, buying through boom and bust, adorning ourselves with material goods that promise to salve our spirits.¹⁶⁸ We have mistaken lock-step movement through advertising's crafted ruts as personal progress.¹⁶⁹ We are bombarded with pleas for our attention, from spam that congeals our web servers to telemarketers whose relentless prompts us to assume that incoming phone calls are unwanted. The media that we hoped would open new worlds have been co-opted so that we are preoccupied with defending ourselves against them.¹⁷⁰ The acceleration in media saturation has affected our physiology. It appears that the neural networks of children are different than their parents.¹⁷¹ In striking contrast to their parents, children's brains are hardwired to multi-task and seamlessly interact with their multiple computers.¹⁷² These youth may need a steady diet of electronic stimuli to satisfy their hyped-up neural networks.

The unrelenting yammering of marketing techniques affects our self-conception and our most intimate desires. Spam and telephone solicitations are mechanisms in a larger consumerism that encourages us to view ourselves as the sum of what we own. We express ourselves in the accumulation of mass-produced things. The global complaint lodges against a market economy that impels us to consume and a mass media that maneuvers our tastes and preferences. They both aim to squeeze contrary models from the realm of reasonable alternatives where one abstains from a cultivated compulsion to consume. The particular complaint is that it is extremely difficult to escape the insinuation of mass marketing mechanisms. The phones ring, the mailbox fills, the email account overflows, the television rants, and, consequently, our brain is cluttered with a behavioral model that fills all the available space. It is

166. RAINER MARIA RILKE, LETTERS TO A YOUNG POET 64 (2000).

167. *See generally* JAMES J. FERRELL, ONE NATION UNDER GOODS: MALLS AND THE SEDUCTION OF AMERICAN SHOPPING (2003).

168. *See generally* JEREMY RIFKIN, THE AGE OF ACCESS 4 (2000).

169. MICHAEL SCHUDSON, ADVERTISING, THE UNEASY PERSUASION: ITS DUBIOUS IMPACT ON AMERICAN SOCIETY 11 (1984).

170. ANN CAVOUKIAN & DON TAPSCOTT, WHO KNOWS: SAFEGUARDING YOUR PRIVACY IN A NETWORKED WORLD 3 (1997).

171. *See* National Institute on Media and the Family, Television's Effect on Reading and Academic Achievement, http://www.mediafamily.org/facts/fact_tveffect_print.shtml (last visited Feb. 16, 2006) (explaining how media saturation negatively affects the development of children's brains because children between the ages of 3 and 5, unlike their parents, are at a "critical stage in brain development" and "heavy television viewing can influence the development of brain neural networks").

172. *See generally id.*

difficult to secure solitude when we carry the jingles of commerce deeply internalized within our consciousness. We are satiated with the message to the degree that we cannot imagine a world, both as place and point of view, without it.

Rilke said, “[e]verything is gestation and birthing.”¹⁷³ He was endorsing the value of reflection upon the meaning of things that might span years and even decades before its significance could be appreciated. It might require calm consideration, sustained over a lengthy period of time, to produce an important insight. Solitude operates like dreams in this respect: it is the occasion for our brain to sort through the vagaries of everyday experience and identify themes and recognize meaning. Many of us cannot function without dreams.¹⁷⁴ Consistently repressed REM sleep can lead to temporary psychosis.¹⁷⁵ The argument here is that we do not function well without periodic solitude and that we are systematically shrinking our capacity for solitude.

D. Reserve

It is not clear where the boundaries for our personal space, both physical and psychological, are anymore. Reality shows, such as *Jerry Springer*, indicate a weakening of the instinct to preserve a private life, removed from the criticisms of those without knowledge of the broader, subtler context of that life. Cell phone use, for example, is demonstrably without boundaries. If we want to be available all the time (which we apparently do), then we take calls whenever they come, wherever we are. The content of most of these conversations seems mundane, its banality outweighing the time and energy expended. Indeed, most conversations seem more about social reassurance or expressions of tribal hierarchy than the conveyance of useful information, something like lesser primates picking lice off each other as a gesture of rapport. However, content does periodically surface from the cell phone din and no subject is inappropriate. The new convention for the practice allows the cell phone user to conduct himself as though he were isolated from others. He pretends that others do not hear his cell phone conversations, but, of course, they do. Others pretend they have not heard the conversation, but, of course, they have.

173. Reliquaries for our Sacred Feminine, http://www.mayatekinc.com/gueswel/sculpture/reliq_about.html (last visited Feb. 15, 2006) (attributing the quote “[e]verything is gestation and birthing” to Rainer Maria Rilke, in his book *LETTERS TO A YOUNG POET*).

174. See Dream-Theories and the Function of the Dream, <http://www.psywww.com/books/interp/chap01g.htm> (last visited Feb. 16, 2005) (explaining the essential function of dreams).

175. See generally ALLAN MOFFITT ET AL., *THE FUNCTION OF DREAMING* 273 (1993).

Parents now can, and do, monitor the activities of their children and their children's babysitters with very small video cameras.¹⁷⁶ Parents are otherwise permitted to observe their children, but the babysitter does not expect to be recorded. This practice has implications for solitude and intimacy, but it also raises reserve concerns. Whatever respect we normally accord one another, to the effect that we accept each other at face value unless and until we have reason to do otherwise, the videotaping of babysitters is an example of how we are stretching exceptions to the norms of polite indifference.

Parents, of course, have a right to protect their children,¹⁷⁷ but we all have rights that can be impinged by others. We radically alter the terms of our normal interactions with others if we insist upon a right to videotape these interactions. What is especially interesting is that many who opt to videotape such transactions seem blind to the grounds for the objection, as though it merely expressed a peculiar idiosyncrasy.¹⁷⁸ We do not stare at each other because that conduct would violate prevailing norms of civility and reserve, but if we can use a video camera to stare for us, at least some people are persuaded that the norm has not been violated.

The key may be that technology transforms the norm because it abruptly reconfigures its shape and texture. It is likely easier to act remotely than directly in many contexts and so what might feel objectionable in person feels unobjectionable from afar. To the extent that some norms of reserve are built upon widely shared instincts, when the instinct is attenuated with a technological intermediary, the norms may weaken as the technology becomes widespread. Reserve may be particularly susceptible to the effects of mediating technology because its norms can be somewhat vague and depend upon widely shared intuitions. If technology weakens those intuitions, then the norm may lose its force. The polite indifference that facilitates the interaction of many people in close places may be retooled in significant ways to accumulate new intuitions.

Government, too, is constricting reserve's boundaries. The right to remain silent is engraved in our Constitution as a bold empowerment of the individual to resist the coercive force of government.¹⁷⁹ It is not phrased to enable efficient law enforcement, but rather to recognize the special status of the person and appropriate privileges that should support that status.¹⁸⁰ It would

176. Sue Shellenberger, *Yes, It's Okay to Spy on Your Babysitter: The Do's and Don'ts of the Nannycam*, WALL ST. J., May 8, 2003, at D1.

177. APA Congressional Testimony on Media Violence and Children, May 20, 2004, <http://www.apa.org/ppo/issues/mediavioltest504.htm> (last visited October 27, 2005).

178. Trine Fotel & Thyra Uth Thomsen, *The Surveillance of Children's Mobility*, 1(4) SURVEILLANCE AND SOC'Y 535 (2003), available at <http://www.why-war.com/resources/files/children.pdf>.

179. *Miranda v. Arizona*, 384 U.S. 436, 498 (1966).

180. *Id.* at 491.

appear that at least some of us are willing to reduce significantly the force of the right, at least in exigent circumstances. An omen of the direct attack on the right to remain silent arose in the context of drinking and driving investigations.¹⁸¹ Driving has been determined to be a privilege allowed to citizens by the state and conditions can be imposed upon that privilege.¹⁸² Thus, a license to drive can be revoked for failure to submit to a breathalyzer test or to perform field sobriety tests.¹⁸³ In effect, testing is compelled for the accused because road safety has been judged to outweigh the right of the driver to not cooperate in providing evidence of his guilt. There is widespread agreement that drunk driving offenses present a substantial hazard to the safety of others. That agreement has been steadfastly managed by special interest groups, particularly Mothers Against Drunk Driving (MADD), to make DUI a crime punishable by jail terms and conditions of probation comparable to serious felonies, like burglary and forgery.¹⁸⁴ A consequence of the agreement is a diminishment of the right of the accused to remain silent when facing arrest and trial.

There is a more recent diminishment that is more alarming. The federal government relies upon the War on Terror to justify various law enforcement activities, which strain the traditional interpretation of protections provided by the Constitution to those accused of committing a crime.¹⁸⁵ Most of the activities focus on individuals apprehended on foreign soil and charged with waging war against the United States. Enemy combatants properly belong to a different category than United States citizens who have violated the law. The rub is that some United States citizens charged with crimes that occurred in the United States are being prosecuted as though they were enemy combatants

181. See MICHAEL D. LAURENCE, ET AL., *SOCIAL CONTROL OF THE DRINKING DRIVER* 164 (1988).

182. See, e.g., *State v. Uskea*, 709 N.E.2d 1200, 1204 (Ohio 1999).

183. See, e.g., ARIZ. REV. STAT. ANN. § 28-1321(D) (2005), N.J. Stat. Ann. § 39:4-50.4a(a) (West 2005), OREGON REV. STAT. § 813.100(3) (2003).

184. MADD is a “non-profit grass roots organization” with a mission to “stop drunk driving, support the victims of this violent crime and prevent underage drinking.” MADD, <http://www.madd.org/aboutus/1094> (last visited February 16, 2006). For a list of MADD’s official position statements, see Official Position Statements, <http://www.madd.org/aboutus/10518> (last visited February 16, 2006). Though the statutory maximum penalties for serious felonies exceed those for DUI offenses, the pressures of a tightly focused public scrutiny affects the sentences actually imposed. Thus, a second offender burglar might be treated leniently and escape detention because he was being treated for the drug problem that underlie his burglary. A second offender DUI would almost certainly get some jail time. Indeed, it is often statutorily mandated. For examples of common state statutes criminalizing the offense of driving while intoxicated, see ARIZ. REV. STAT. ANN. § 28-1381 (2005), DEL. CODE ANN. tit. 21, § 4177 (2005), and N.H. REV. STAT. ANN. § 265:8 (2005).

185. See JAMES X. DEMPSEY & DAVID COLE, *TERRORISM AND THE CONSTITUTION* 152 (2002).

seized abroad.¹⁸⁶ The melding of categories is important because enemy combatants held at Guantanamo Bay may be subject to functional Magnetic Resonance Imaging (“fMRI”), which are physical examinations that purport to provide foolproof evidence about the examinee relevant to whether they did the deeds for which they are charged.¹⁸⁷

An fMRI is a brain fingerprint that can “detect brain activity that is associated with particular kinds of recollection.”¹⁸⁸ A suspect can be shown an image, such as a crime scene or a terrorist training camp, and the device will detect whether he recognizes the image, or if he has been in that location before.¹⁸⁹ This is an extremely powerful truth and lie detector device that does not require that the examinee answer questions. The cooperation required from the examinee is minimal. However, it seems clear that the use of fMRI is an invasion of the privileged mental life of the examinee. It is also clear that the technology is very effective and that its effectiveness will argue for its selective use in important cases. Of course, the boundaries of selective use may be difficult to firmly demarcate.

Arguments for the use of torture in exceptional cases, such as when a madman knows where a dirty bomb that will kill hundreds of thousands of innocents is located, are standard fare for utilitarian calculations of correct conduct. These thought experiments drive us to accept that torture is acceptable at some extreme tradeoff in what it accomplishes and then, having stepped onto the slippery slope, ratchets back from the tipping instance to less obvious cases. It is likely that fMRI will follow that precedent. We know already that the relaxed standards for criminal procedures that were passed into law in order to more effectively pursue international terrorism, such as the U.S. PATRIOT Act,¹⁹⁰ are being used in domestic investigations.¹⁹¹ If fMRI is appropriate to address the threat of foreign terrorism, why should we resist its use with domestic terrorists or individuals suspected of heinous crimes? It is doubtful that the right to remain silent will survive uncompromised if the government can impose fMRI examinations in special circumstances. The

186. Jenny S. Martinez, *José Padilla and the War on Rights*, VA. Q. REV., available at <http://vqronline.org/viewmedia.php/prmMID/8959> (last visited October 26, 2005).

187. See, Matthew Teague, *The End of the Lie*, PHILADELPHIA MAG., Nov., 2005, available at (LEXIS, News) (discussing the possibility of using fMRI technology in Guantanamo Bay).

188. Jeffrey Rosen, *Supreme Futurology*, TIMES, August 28, 2005, at 27.

189. *Id.*

190. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

191. Larry Abramson, *Patriot Act: Alleged Abuses of the Law*, NAT'L PUB. RADIO, July 20, 2005, available at <http://www.npr.org/templates/story/story.php?storyId=4756403> (last visited Feb. 16, 2006); Michelle Mittelstadt, *Patriot Act's Reach Goes Beyond Terror. Prosecutors Using Law for Everyday Crimes; Critics Say It's Intrusive.*, DALLAS MORNING NEWS, Sept. 8, 2003, available at <http://foi.missouri.edu/usapatriotact/pareach.html> (last visited Feb. 16, 2006).

Constitution's conception of the person and the privileges to which she is entitled will be diminished pro rata as well.

E. Privacy

Privacy provides us with the time and tools to sort through our experiences and construct a coherent life's narrative. We do not immediately know how to evaluate our experiences, especially those that are unfamiliar to us.¹⁹² Without a sense of ourselves separate from the flow of events and people around us and the prevailing evaluation of what they mean, we are inclined to adopt the prevailing view as our own.¹⁹³ Privacy fuels the formation of a self that is distinct from the rush of events and exchanges, which entices an unthinking conformity.¹⁹⁴ We would otherwise lose a sense of ourselves as beings choosing a life's course in the constant immediacy of the present.

We are intrinsically social beings.¹⁹⁵ Aristotle nominated us political beings,¹⁹⁶ which raises the ante somewhat to assert a need to interact with others in order to govern ourselves. As a species, we cannot provide for ourselves until many years after birth without the active assistance of others. Beyond this physical dependence upon others for the necessities of life, we are also dependent upon others for the criteria with which we assess meaning in our lives.¹⁹⁷ We are cultural beings and do not generate criteria de novo, but depend upon inherited standards with which we measure ourselves or against which we rebel.¹⁹⁸

It is not necessary to specify exactly how humans accommodate their social natures to make the point that, inevitably, we make sense of our lives while living in communities with others. Privacy is a fundamental prerequisite for that search for meaning.¹⁹⁹ Various psychologists, philosophers, and theologians address the particulars of the search and we need not quibble with the contrasting emphases of the varying elaborations.²⁰⁰ It is sufficient to highlight some key features of that search to make it evident that the process of personal growth depends upon privacy as a condition for its progress.

192. MICHAEL SHERMER, WHY PEOPLE BELIEVE WEIRD THINGS: PSEUDOSCIENCE, SUPERSTITION, AND OTHER CONFUSIONS OF OUR TIME 7 (1997).

193. *See generally* CHRISTOPHER LASCH, THE MINIMAL SELF: PSYCHIC SURVIVAL IN TROUBLED TIMES 52 (1984).

194. DECKLE MCCLEAN, PRIVACY AND ITS INVASION 71-72 (1995).

195. The Case of Joanne Harris, <http://www.ualberta.ca/~jpdasddc/ethics/articles/edwards1997.htm> (last visited October 27, 2005).

196. ARISTOTLE, THE NICOMACHEAN ETHICS 1-2 (1998).

197. NORBERT ELIAS, THE CIVILIZING PROCESS: THE DEVELOPMENT OF MANNERS 5 (1978).

198. *See generally* CARL D. SCHNEIDER, SHAME, EXPOSURE, AND PRIVACY (2002).

199. *See* JUNE & WILLIAM NOBLE, THE PRIVATE ME 76 (1980) ("To develop a strong sense of identity, of individual worth . . . [y]ou need private, unrushed space in which to work.").

200. DONALD E. BROWN, HUMAN UNIVERSALS 92 (1991)

The human species is remarkably malleable.²⁰¹ We acclimate to extreme varieties of weather and geology throughout the world. We also accommodate to widely varying social conditions. We have lived and prospered in small, remote bands. We manage to build purposeful lives amid the tumult of large, congested cities. We adapt to repressive, authoritarian regimes where thugs rule arbitrarily, and we adjust to colonial rule where distant, unseen powers dictate policy for people unlike themselves. In these often dysfunctional circumstances, the human species manages to survive. The malleability is sometimes frightening. We are capable of turning on our neighbors when our own survival seems dependent upon that betrayal. The Milgram experiments surprised even the test administrators by demonstrating a willingness to inflict pain on innocent others, if the infliction was sanctioned by appropriately attired and mannered authorities.²⁰²

There are numerous instances where individuals have joined cults and subjected themselves to the often bizarre or self-destructive mandates of the cult. Cult leaders frequently pursue brainwashing techniques to persuade neophyte members to take up the cult's cause in earnest.²⁰³ Whether structured or haphazard, a consistent tactic in the reinforcement of the cult's solidarity is the elimination of privacy.²⁰⁴ It is important to control the schedule of cult members to reduce their opportunities to discuss the indoctrination procedures.²⁰⁵ Indeed, cults encourage their members to report on each other.²⁰⁶ There are no truly private conversations because everyone is charged to report anything irregular to the cult leadership.²⁰⁷

We are not inevitably independent thinkers. We are not teleologically promised ever-increasing person freedoms. We possess qualities as a species that strongly suggest a deeply rooted interest in, and perhaps a need for, self-expression. We seem to prefer forms of government that cultivate a mutual respect and support for self-expression, though this is a more speculative claim. However, we should not presume that enhanced self-expression for maximally many people is our ineluctable future. We have proven resilient during our limited time on this planet, but part of that resilience is explained by our ability to suffer through hardship and deprivation for long periods of time. This includes centuries that were not conducive to personal freedom and self-

201. See generally DESMOND MORRIS, *HUMAN ZOO: A ZOOLOGIST'S STUDY OF THE URBAN ANIMAL* (1969).

202. STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* 13-14, 123 (1974).

203. Laura B. Brown, *He Who Controls the Mind Controls the Body: False Imprisonment, Religious Cults, and the Destruction of Volitional Capacity*, 25 VAL. U. L. REV. 407, 412 (1991).

204. *Id.* at 450.

205. Susan Landra, *Children and Cults: A Practical Guide*, 29 J. FAM. LAW 595, 602 (1991).

206. *Id.*

207. *Id.*

expression. The best means to promote a future that supports personal freedom for maximally many people involves the protection of the conditions precedent for a consciousness that strives for personal freedom and recognizes its value for others. It is only by enabling the development of persons who can reflect upon the meaning of their lives and associate with others to advance that understanding and support its expression that a program to promote personal freedom makes sense. It is not sufficient to remove obstacles and shout encouragement to credibly make a claim that personal freedoms flourish. Individuals, not external constraints or the lack thereof, are the loci of personal freedom. Unless individuals have the resources and the motivation to express their freedoms, those freedoms exist only as abstract entities. Without a sense of self and judgment about what matters to that self, there is no substance to a roster of personal freedoms.

We are simultaneously resilient and fragile. For all that science tells us, it cannot tell us the meaning of our lives. That question is beyond its ken. We are charged with identifying meaning for ourselves, however tenuous and fleeting our conclusions may be. However difficult the search and however elusive the answer, it is a responsibility charged to each of us individually to undertake the search. We conduct the search among others and we rely on their guidance and encouragement to persist in this venture. Each of us has direct access to only our own consciousness and each of us must secure a unique reading of the meaning of our life. That reading is genuine only if it results from a deliberation that feeds heavily on the resources of privacy.

