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# THE RIGHT TO BE LET ALONE: A VIOLATION OF "PRIVACY"

A.W. SPARKES
Australia

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1.1 The one part of the Socratic heritage that has seeped deeply into our culture is the demand for definitions. The search for *clarity* is one of the most valuable parts of that heritage; the seach for *definitions* is one of the least. Socrates and just about everyone else (it sometimes seems) confuse clarity with *precision*. But exaggerating the importance of precision can work against clarity. Sometimes the clearest account of a concept which you can get will be messy and imprecise. The essence-stating, Socratic type of definition is usually not available. Most of our concepts simply do not have the requisite structure: Instead of a "common core", there is a "family resemblance" (Wittgenstein § § 65-67; Pitcher, p. 220). Sometimes the unifying element(s) is/are even more complex and even less available to direct empirical sensing (See Kovesi pp. 22-23). For narrow, technical purposes, it might be appropriate to fabricate a definition of the Socratic type, but if we believe that we have thereby given a definition of THE concept of whatever-it-is, we are probably deceiving ourselves. What we need to move towards is something we can call *an analysis*, a much more complicated, much less hermetically sealed, thing CF. Magee, ch. xi). What this amounts to is (e.g.): "*Don'l* try to define *literature*, but give reasons why one bit of writing might be said to be literary and reasons why another might be said not to be, and pay particular attention to borderline cases and the reasons why they are borderline".

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1.2. So definitions (in the sense of "Define your terms!") do not matter nearly so much as many people think. But definition (in the sense of delimiting an area of concern[1] matters a very great deal. There is nothing to be gained by letting the word "privacy" run riot over everything and become roughly equivalent to "liberty" or even "legitimate interest".[2] There is no good reason for allowing an already complicated and controversial topic to get tangled up with arguments about (allegedly) "victimless crimes". In the field of privacy and its protection, a mistaken stress on definition in the first sense has led to a lack of definition in the second sense.

1.3 Any attempt to define, delimit, delineate, analyse the concept of privacy must be constantly and directly related to those archetypal invaders, Peeping Tom, Paul Pry, and Nosy Parker (the eavesdropper, the letter-thief, the village busybody, the neighbourhood gossip) and their victims and that other archetypal victim, the person who becomes the focus of unwanted public attention. But we have been told so often and so strongly that we should never define by examples that many of us believe it. (See Geach (a) pp. 34-35, (b) p. 40). So, when asked what we are talking about when we say that something is an invasion of privacy, we leave the world of experience behind and tackle the great big abstract word 'privacy' on its own.

1.4 As a consequence, many people involved with or interested in the protection of privacy will, if pressed for a definition, say that the right to privacy is "the right to be let alone". Thus, Ernst and Schwartz's useful book is called "*Privacy: The Right To Be Let Alone*" and is studded with occurrences of the phrase, many in quotations from judicial statements. The Judge in the Sidis case, for instance, says: "We are asked to declare that this exposure transgresses upon Mr. Sidis' right of privacy, asrecognized in. . . Georgia, Kansas, Kentucky, and Missouri. Each of these states... grants to the individual a right to be let alone to a certain extent". *Ibid.* p. 183[3]

The phrase comes to us with a certain authority, both the au-

1 However fuzzy some of the edges may be. Cf. Wittgenstein § 71.

2 William O. Douglas, e.g., sees the right to *travel* as a species of the right to privacy (p. 57) and says (p. 59) "right of privacy extends to the right to be let alone in one's belief and in one's conscience as well as in one's home".

3 For some other occurrences, *see Ibid.*, pp. 49, 57, 119; Zelermeyer, pp. 86, 152-153; Holstadter & Herowit, pp. 68, 106, 163, 184, 343; Canada, p. 12; Busckley, p. 141; Miller, p. 190; ALRC (a) and (b) passim.

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thority of frequent use and the authority of being an established part of American legal discourse on privacy matters. And it cannot be denied that the phrase has an impressive sound, an impressiveness enhanced by the familiarity and superficial simplicity of its component words.

1.5 But as a definition either of privacy or of the right of privacy, it just will not do. As the Younger Committee notes, the right to be let alone would make very strange law and very strange morals:

> . . ."the formula that 'privacy is the right to be let alone' turns out on closer examination to go so far beyond any right which the individual living in an organised society could reasonably claim, that it would be useless as a basis for the granting of legal protection. Any law which proclaimed this as a general right would have to qualify the right in so many ways that the generality of the concept would be destroyed". § 37 p. 10.

1.6 The formula seems to express a very *laisser faire, laisser aller* attitude, and I agree with the Marxists that that is not a satisfactory foundation for social morality. Taken literally, demanding such a right seems both irresponsible and neurotically agoraphobic (See Weekes). Do we *want* to be left alone all the time? *Is* the life of a recluse the ideal, the blessed life? The formula seems open to attack by (and also to lay concern about privacy open to attack by) such people as Martin Pawley and Lorenne M.G. Clark. Pawley seems to see concern about privacy as sheer irresponsibility which seeks to cancel out all concern for others or for what is going on in society at large. Ms. Clark is too angry to be entirely intelligible, but she seems at times to be saying that talk about privacy is just a bit of ideology designed to leave bourgeois capitalist male chauvinist pigs free to exploit the poor, beat their wives, and rape their children. Various excitable contemplators of The Human Condition have had much to say in censure of something called *privatisation* or *privatism*[4] and a view of right to privacy as the right to be let alone seems to bring all concern about privacy within the scope of their attack.

1.7 Then there are criticisms of the type made by Judith Jarvis

[4] Lasch has some sensible things to say about this, pp. 25-30.

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Thomson and H. J. McCloskey.[5] If you are drowning and I ignore your cries for help, I am letting you alone, but I am not thereby respecting your privacy. If I shoot you, I am not letting you alone, but I am not thereby invading your privacy. If I hide in a bush in order to watch what goes on in your bedroom, I am acting with intent to ivade your privacy, but also with intent to let you alone (if I don't let you alone, my snooping project will be frustrated).

1.8 Some might object: "But all this is taking the definition too far, interpreting it too literally. It needs qualification".
I am not sure that *a definition* can be defended in that way, but I shall let that pass. If the formula is qualified so as to be safe from all these objections, does 'right to be let alone' become anything more than a characterisation of *all* rights except rights of reception?

1.9 Most rights either are matters of non-interference or include non-interference. The right to vote, the right of an academic to conduct research —these are rights to be let alone in order to do something or to enjoy something. But the formula was given to us as definition of the right *to privacy*. A definition should mark its *definiendum* off from other things. This one makes privacy spread all over the place. The word moves away from the original paradigmatic invaders and victims, and becomes a very, very general word indeed. So now we need a new word to refer to those interests which we used to refer to as "privacy-interests" (before our thinking was illuminated by the definition, 'the right to be let alone').

1.10 In other words, both theoretically and practically, this impressive-sounding "definition" gets us absolutely nowhere.

— 2 —

2.1 Where does this spurious definition come from? We find it attributed (a) to Judge Cooley (e.g., by the Younger Committee pp. 18, 237) and by M.D. Kirby (UNSW p. 24), (b) to Warren and Brandeis (e.g., Canada p. 143), and (c) to Brandeis on his own (e.g., by Sir Zelman Cowan (UNSW p. 3) and by Douglas, J. US SC(b) p. 188). The attribution of the definition to Brandeis is

[5] Mrs Thomson and McCloskey are moderate critics of the concern with privacy. (They think too much fuss is being made.) But even they seem to believe that, by exposing the weaknesses of the "let alone" formula, they have proved more than they have: Yet another instance of its banefulness.

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often accompanied by the assertion that Brandeis believed the right to privacy to be "the most comprehensive of rights and the right most valued by civilized men". Few of those who attribute this view to Brandeis seem to find it as bizarre as I do.

2.2 Actually, though the phrase "the right to be let alone" occurs in the writings of all three men, none of them believed he was defining *right of privacy* and one of them was not talking about privacy at all. 2(a): *Cooley*.

2.3 In the 1880 edition of Cooley on Torts, the passage containing the phrase "right to be let alone" reads:

> "*Personal Immunity*. The right to one's person may be said to be a right of complete immunity, to be let alone. The corresponding duty is not to inflict an injury, and not, within such proximity as might render it successful, to attempt the infliction of an injury. In this particular the duty goes beyond what is required in most cases; for usually an unexecuted purpose or an unsuccessful attempt is not noticed. But the attempt to commit a battery involves many elements of injury not always present in breaches of duty; it involves usually and insult, a puting in fear, a sudden call upon the energies for prompt and effectual resistance. There is very likely a shock to the nerves, and the peace and quiet of the individual is disturbed for a period of greater or less duration. There is consequently abundant reason in support of the rule of law which makes the assault a legal wrong, even though no battery takes place. . . " (p. 29).

Cooley is noting that, speaking in very general terms, the law recognises the right of a human being not to be injured by other human beings. He finds the phrase "right... to be let alone" a convenient summary for this aspect of the law. Cooley notes also that this right is not exclusively concerned with obvious physical injury, but that, in certain kinds of case, it concerns also psychological injury in the absense of obvious physical injury.

2.5 But one thing Cooley is NOT doing is defining (or even thinking about) *privacy*. I would have said that that is perfectly obvious, but not everyone would agree: for example, Ernst and Schwartz. Apparently in all seriousness, they say: "This seems to be an

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instance where the definition for a word pecedes the word itself". (p. 49)

2(b): *Warren and Brandeis*

2.6 Warren and Brandeis certainly use the phrase "the right to be let alone" in their classical article, "The Right to Privacy", but they do *not* use it as *a definition* of *right to privacy*. They use it precisely as Cooley does: as a characterisation of that general right to immunity and protection which it is the business of the law to protect. They argue that the right to privacy should be recognised "as a part of the more general right to the immunity of the person, the right to one's personality". (p. 207).

2.7 The common law has always recognised "that the individual should have full protection in person and property" (p. 193), but its recognition of what that "full protection" must amount to has widened as the law has come to grips with new problems and new ways of thinking:

> "... Political, social, and economic changes entail the recognition of new rights, and the common law. . . grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property... Then the 'right to life' served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term 'property' has grown to comprise every form of possession intangible, as well as tangible". (p. 193).

2.8 There Warren and Brandeis have used the phrase "right to be let alone" but they have quite obviously *not* used it as a definition of *right of privacy*. Their "cue" seems to have been Cooley's remarks about *assault* as distinct from *battery:* his point that there is at least one type of case in which the law offers protection against psychological suffering unaccompanied by the infliction of abvious physical harm. Indeed, they go on immediately to talk of this development, seeing it as part of the common law's growing awareness of people's needs. (pp. 193-194).

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2.9 The right to be let alone is the right not to be "*got at*", the right to be protected from serious harm and gross annoyance. And if you were to ask Warren and Brandeis which harms are serious and which annoyances are gross, they would probably reply that you know already. That is not en *entirely* inadequate answer. Even in 1981, there is —fortunately— a measure of consensus on such matters, but even in 1890, it could be exaggerated.

2.10 After their remarks on property, Warren and Brandeis turn to their main topic, privacy. They argue that recent (in 1890) technological and social changes require that if the right to be let alone is to be adequately protected, then there must be adequate protection for the right to privacy, not because the two are identical, but because privacy could be and was being invaded as never before:

> "Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone'. Instantaneous photographs and newspaper enterprises have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops' " (p. 195)

2.11 Once again Warren and Brandeis use the phrase "right to be let alone" *and* they use it in connexion with the phrase "right of privacy", but they do NOT use the former phrase as a definition or explication of the latter. What they are saying is that, these days, adequate protection cannot be given to the right to be let alone (i.e., the right to enjoy life [See 2.7] and the right to complete immunity [See 2.3])[6] *unless* adequate protection is given to privacy.

2.12 If, anyone says that that amounts to a definition of the phrase "right to privacy", I can only say that I do not understand what he means by "definition" and that neither does he.

2 (c): *Brandeis in the Olmstead Case*

2.13 Brandeis's dissenting opinion in *Olmstead* is regarded as a clas-

6 And cf. Warren and Brandeis, pp. 205 and 20/ (". . . the right to privacy, as a part of the more general right to the immunity of the person, the right to one's personality.")

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sic of privacy-literature, which it is. It is also regarded as a place in which *the right to privacy* is defined as *the right to be let alone*. That, it most certainly is not. Neither is it true that Brandeis describes —still less that he defines— *the right to privacy* as "the most comprehensive of rights and the right most valued by civilized men". That would be sheer mental flatulence and Brandeis rarely, if ever was guilty of *that*. He must not be confused with William O. Douglas.

2.14 The Olmstead case turned on the admissibility of evidence obtained by illegal telephone-tapping. The defence contended that the evidence must be rejected because obtaining it violated two constitutional amendments: the fourth (against unreasonable searches and sizures) and the fifth (against compelled self-incrimination).

2.15 By a majority decision, the Court rejected the appeals. Broadly speaking, the ground was that the actions of the investigators simply did not satisfy the necessary *physical* conditions for being either a compelling of the accused to testify against themselves or a search and seizure of their premises and effects. (See judgment of Taft, C.J., especially pp. 950-951; 463-166).

2.16 Brandeis was one of the dissenters. His opinion (pp. 958-960; 471-485) contains several arguments, but principally he is concerned with the interpretation of Amendments IV and V, especially IV. The majority rested their conclusion on the kinds of *physical action* the Founding Fathers had in mind when they adopted the Bill of Rights on 15 December 1791. In effect, the majority argued that the manifest intention was to prohibit such acts as forced or surreptitious entry and seizure of papers by Government agents. Since telephone-tapping involved no entry and no seizure of papers, it was not forbidden (or in any way touched on) by the Bill of Rights.

2.17 Brandeis argued from the general *tele* (Cf. Benn, pp. 62 ff) of the Bill. He argued (in effect ) that the manifest intention was to protect the people against arbitrary, illegal, and unreasonable exercise of power by the Government. He argued also that, though wire-tapping, *considered as a physical action,* is unlike the searches and seizures which the founding Fathers and in mind, its *purpose and effects* are of precisely the same type, and it therefore comes within the scope of Article IV. Indeed, Brandeis maintains, wire-tapping can be a far more severe, far more intrusive exercise of power than searches and seizures of the conventional kind.

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2.18 Brandeis's arguments are of great philosophical and legal interest. Putting the matter in Kantian terms, he *looks for the universal maxims* underlying the Fourth Amendment and the action of the Federal Agents. Using quasi-Aristotelian terms, Taft stresses the *material elements* of the actions under review: Brandeis stresses the *formal elements.*[7]

2.19 "The makers of our Consitution undertook to secure conditions favourable to the pursuit of happiness. . . They knew that only a part of the pain, pleasure, and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the government, the right to be let alone —the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment. And the use, as evidence. . ., of facts ascertained by such intrusion must be deemed a violation of the 5th.

"Applying to the 4th and 5th Amendments the established rule of construction, the defendants' objections to the evidence obtained by a wire-tapping must. . . be sustained. It is. . . immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement". (pp. 956-957; 478-479)

2.20 The first of those paragraphs is the one often quoted from. When we place it in context, we can see that Brandeis has no intention

7 (1) Here I have particularly in mind Kovesi's excellent book, *Moral Notions.* In Brandeis's opinion, There are some uses of the words "form" and "formal". These bits of the language have had such a queer history that no one will be surprised to find that Brandeis uses these words in much the same sense as Kovesi uses "matter" and "material".

(2) The legal aspect of Brandeis's reasoning is something on which I am not qualified to speak. The question of the proper relation of legislators' intent to the meaning of an enactment is a controversial one. (See *Reform.*) The practice of American judges is more "liberal" and less "strict" (*Ibid.* p. 48 col. 2) than Anglo-Australian practice, but it is worth noting (1) that Brandeis emphasises the special status of a Constitution, and (2) that English judges do invoke legislative intent when what Lord Denning calls "the literal words" (*Ibid.*) are rather slippery. Unsurprisingly this has been done when judges have been required to construe some of the vocabulary of *publicness-and-privateness* (See e.g. WPLD (a), (b) pp. 225-226.)

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of *defining* the right to privacy as *the right to be let alone*, nor is he saying that the right to privacy is "the most comprehensive of rights and the right most valued by civilized men". What Brandeis is talking about is the purpose and general tendency of the Bill of Rights: To provide limits to governmental power. The government is required to respect the welfare and security of citizens just as each citizen is required to respect the welfare and security of his fellows. Just as the law of torts and the criminal law limit the power which one individual can exercise over another, so the Bill of Rights limits the power which the Government can exercise over individuals. In *Olmstead*, Brandeis argues that adequate protection of the individual against governmental arbitrariness necessitates taking certain privacy issues seriously. Similary, nearly forty years earlier, he and Warren had argued that adequate protection of the individual against other individuals necessitates taking certain privacy issues seriously.

2.21 If someone claims the right to be let alone, he sounds as if he is doing something parallel to (though considerably odder than) what is done by someone who claims the right to vote, to criticise the government, or not to be beaten up, and all the objections made earlier count against his claim. But if one talks of "the right to be let alone" in the context of clashes of interest of the kinds dealt with in the law of torts or in Bill-of-Rights litigation, the phrase is clearer. It is an elliptical expression, to be completed grammatically by some such phrase as "from harm and serious annoyance". Logically, it is incomplete and, given social and psychological diversity, incompletable. Greater specificity, however, is available, provided there is a reasonable measure of consensus concerning what things are harm and serious annoyance and concerning how disputes over such matters (including disputes over what things are harmful and seriously annoying) are to be dealt with.

— 3 —

3.1 Cooley, Warren, and Brandeis all use the phrase "the right to be let alone". None of them, however, sees himself as talking about another right on the same level as the right to vote, the right to criticise, the right not to be beaten up, the right to grow petunias in your garden if you want to.[8] What they believe they are doing is expressing what is (or should be) the (or an indispensable part of the) rationale of a legal system. *The right to be let alone* is put

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forward as a principle to be used by judges in interpreting the law and by legislators in formulating the law. Less explicitly, it is put forward as a principle in terms of which laws and lawmakers can be criticised.

3.2 Warren and Brandeis *argue* that the notion of personal protection summed up in the phrase "the right to be let alone" cannot be adequately realised unless certain privacy-interests are recognised and protected. The idea that they (and Cooley) used the phrase as a definition of *right to privacy* distracts attention from those arguments.

3.3 As a definition, it is absurdly wide and liable to attack on other grounds as well. A misplaced reverence for definitions and the purely superficial neatness of the phrase make it attractive to many working in the field of privacy-protection. This can lead only to muddle and is more likely to impede attempts to protect privacy than to assist them. It distracts the attention of privacy-protectors from the more important conceptual tasks of marking out the areas in which privacy-concerns are likely to arise and of elucidating the often confused terms in which privacy claims are made. The definition is very liable to attack and, with the "overkill" often found in controversy, can be used as an apparent argument against all attempts to protect privacy. As a definition, "the right to be let alone" is a violation of the concept of privacy.

[8] To treat the right to be let alone as a right on the same level as these would be to commit a Rylean category-mistake. See Ryle (a); (b) pp. 16-18.

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