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Jeffrey H. Reiman

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**DRIVING TO THE PANOPTICON: A
PHILOSOPHICAL EXPLORATION OF THE RISKS
TO PRIVACY POSED BY THE HIGHWAY
TECHNOLOGY OF THE FUTURE**

Jeffrey H. Reiman†

... the major effect of the Panopticon [is] to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power.

Michel Foucault

If we can never be sure whether or not we are being watched and listened to, all our actions will be altered and our very character will change.

Hubert Humphrey

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent.

Louis Brandeis

According to the IVHS AMERICA Legal Issues Committee, "IVHS [Intelligent Vehicle Highway Systems] information systems [will] contain information on where travelers go, the routes they use, and when they travel. This information could be used to disadvantage individuals, and should be secure."¹ This is from a list of what the Privacy Task Group of the Legal Issues Committee calls, interestingly, " 'Strawman' Privacy Principles." I hope that my title, "Driving to the Panopticon," indicates to you that I don't regard the threat to privacy posed by Intelligent Vehicle-Highway Systems as a strawman at all. Nor do I think that vague reference to use of information to individuals' disadvantage does anymore than begin to hint at the nature of that threat.

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† William Fraser McDowell Professor of Philosophy American University, Washington, D.C.

1. IVHS AMERICA Legal Issues Committee, 'Strawman' Privacy Principles - Comment Form, at 2.

The Panopticon was Jeremy Bentham's plan for a prison in which large numbers of convicts could be kept under surveillance by very few guards. The idea was to build the prison cells in a circle around the guard post. All the prisoners would be silhouetted against light coming into the cells from windows on the outside of the circle. Their movements would be visible to a single guard in the center. The French philosopher Michel Foucault used Bentham's Panopticon as an ominous metaphor for the mechanisms of large-scale social control that characterize the modern world.² He contended that it became, perhaps subconsciously, the model for institutions in nineteenth-century Europe and America. "Is it surprising," asked Foucault, "that prisons resemble factories, schools, barracks, hospitals, which all resemble prisons?"³

As Bentham realized and Foucault emphasized, the system works even if there is no one in the guard house. The very fact of general visibility—being *seeable* more than being seen—will be enough to produce effective social control.⁴ Indeed, awareness of being visible makes people the agents of their own subjection. Writes Foucault,

He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection.⁵

Foucault went on to stretch the panopticon metaphor beyond architecture to characterize the practices of conventional medicine, psychology and sex education, all of which he thought subject us to increasing social control because they create a world in which the details of our lives become symptoms exposed to a clinical gaze—even if no one is actually looking.⁶ I want to stretch the panopticon metaphor yet further, to emphasize not just the way it makes people visible, but the way that it makes them visible *from a single point*.

An intriguing and illuminating feature of the suspicion about the threat to privacy posed by IVHS is that the information that would be

2. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 195-228 (Alan Sheridan trans., New York: Vintage Books 1979) [Hereinafter *DISCIPLINE*] See p. 200 for a description of the architecture envisioned by Bentham.

3. *Id.* at 228.

4. "[I]t is at once too much and too little that the prisoner should be constantly observed by an inspector: too little, for what matters is that he knows himself to be observed; too much, because he has no need in fact of being so", *DISCIPLINE*, at 201.

5. *Id.* at 202-03.

6. "The panoptic schema . . . was destined to spread throughout the social body; its vocation was to become a generalized function", *Id.* at 207; *see also* 211-16.

accumulated by it is public. Wherever we drive, we drive in the public world, and thus normally subject to unobjectionable public observation. Courts have held that normal observation by police officers in or from public places does not intrude on a person's private affairs. And this has been specifically applied to "the following of an automobile on public streets and highways,"⁷ even when the following was done by tracking a beeper planted on an object in the driver's possession. In *U.S. v. Knotts*, the Supreme Court held that "While in [their] vehicles on public roads. . . , [t]he defendants had no privacy interest in what could have been visually observed in these public places."⁸

If there is a threat to privacy from IVHS, it comes from the fact that—as readers of detective fiction well know—by accumulating a lot of disparate pieces of public information, you can construct a fairly detailed picture of a person's private life. You can find out who her friends are, what she does for fun or profit, and from such facts others can be inferred, whether she is punctual, whether she is faithful, and so on. Richard Wasserstrom observes, in an article first published in 1978, that the information already collected in data banks at that time, if gathered together, could produce a "picture of how I had been living and what I had been doing . . . that is fantastically more detailed, accurate, and complete than the one I could supply from my own memory."⁹

There is, then, something to learn about privacy from the sort of threat that IVHS represents: namely, that privacy results not only from locked doors and closed curtains, but also from the way our publicly observable activities are dispersed over space and time. If we direct our privacy-protection efforts at reinforcing our doors and curtains, we may miss the way in which modern means of information collection threaten our privacy by gathering up the pieces of our public lives and making them visible from a single point. This is why the panopticon is a more fitting metaphor for the new threat to privacy than, for example, that old staple, the fishbowl.

But a threat to privacy is only worrisome insofar as privacy is valuable or protects other things that are valuable. No doubt privacy is valuable to people who have mischief to hide, but that is not enough to make it generally worth protecting. However, it is enough to remind us that whatever value privacy has, it also has costs. The more privacy we have, the more difficult it is to get the information that

7. *U.S. v. Knotts*, 460 U.S. 276, 281 (1983).

8. *Id.*

9. Richard Wasserstrom, *Privacy: Some Arguments and Assumptions*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY*, 325-26 (Ferdinand Schoeman, ed., 1984) [hereinafter PDOP].

society needs to stop or punish wrongdoers. Moreover, the curtain of privacy that is traditionally brought down around the family has often provided cover for the subjugation and abuse of women and children. Privacy is not a free lunch. To believe, as I do, that privacy is essential to a free society is to believe that it is worth its costs. But then freedom, itself, is not a free lunch. A free society is a dangerous and often chaotic one. Let us then look at the value of privacy.

By *privacy*, I understand the condition in which other people are deprived of access to either some information about you or some experience of you. For the sake of economy, I will shorten this and say that *privacy is the condition in which others are deprived of access to you*. I include experience alongside information under access, since I think that privacy is about more than information. Your ability to take a shower unwatched is part of your privacy even though watchers may gain no information about you that they didn't already get in their high school biology course. Or, if you think that they might after all gain some information about your particular physiognomy, I would say that it is a matter of privacy that you are able to keep your body unobserved even by people who have already seen it and thus who already have that particular information. This said, I shall primarily speak of the value of privacy regarding information, since it is information about us that will be collected by IVHS.

Note that I have defined privacy in terms of the condition of others' lack of access to you. Some philosophers, for example Charles Fried, have claimed that it is your *control* over who has access to you that is essential to privacy. According to Fried, it would be ironic to say that a person alone on an island had privacy.¹⁰ I don't find this ironic at all. But more importantly, including control as part of privacy leads to anomalies. For example, Fried writes that "in our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing."¹¹ But, in our culture one does not have control over who gets to observe one's performance of the excretory functions, since it is generally prohibited to execute them in public.¹² Since prying on someone in the privy is surely a violation of

10. Charles Fried, *Privacy*, in PDOP, *supra* note 9, at 209-10.

11. *Id.* at 214.

12. If it is said that such prohibition doesn't take away your ability to display such functions, it only ups the cost of doing so, then it will follow that no one has any privacy in his home since crooks can break in even though it is prohibited. On the other hand, it might be objected that I can after all invite someone to watch me perform my excretory functions, and in this sense even the privacy that I have here includes my control over who gets access to me. But to think that this shows that such privacy necessarily includes control, one would have to maintain that if

privacy, privacy must be a condition independent of the issue of control.¹³

It's easy to get confused here since there are some private matters in which control is of great importance. For example, we don't simply want to restrict access to our naked bodies, we want to be able to decide who gets to see or touch them. The privy should remind us, however, that cases like these do not exhaust our interest in privacy. To include control in the definition of privacy would restrict our understanding of the value of privacy to only that part of privacy in which control is important—which is precisely the result in Fried's case. He ends up taking privacy to be a value because it gives us a kind of scarce resource (access to ourselves) to distribute. And he claims that our ability to distribute this resource is the key to our ability to have intimate relations.¹⁴ I think that Fried is wrong about intimate relations, since I think that intimate relations are a function of how much people care about each other, not how much they know about each other. One may have an intensely intimate relationship with someone without—or at least before—sharing a lot of private information with them; and one can share private information with one's shrink or priest or even with a stranger on an airplane without thereby having an intimate relationship with them.

If we include control in the definition of privacy we will find the value of the sort of privacy we want in the bedroom, but not of the sort we want in the bathroom. In our bedrooms, we want to have power over who has access to us; in our bathrooms, we just want others deprived of that access. But notice here that the sort of privacy we want in the bedroom presupposes the sort we want in the bathroom. We cannot have discretion over who has access to us in the bedroom unless others lack access at their discretion. In the bathroom, that is all we want. In the bedroom, we want additionally the power to decide at our discretion who does have access. What is common to both sorts of privacy interests, then, is that others not have access to you at their discretion. If we are to find the value of privacy generally, then it will have to be the value of this restriction on others. Sometimes its value

I couldn't invite a witness in to watch (say, because of draconian laws or unfailing taboos against doing so), that would mean that those functions were no longer shielded by privacy—and that sounds quite implausible.

13. Ruth Gavison gives additional reasons for excluding control from the definition of privacy. Ruth Gavison, *Privacy and the Limits of Law*, in PDOP, *supra* note 9, at 349-50.

14. "But intimacy is the sharing of information about one's actions, beliefs, or emotions which one does not share with all, and which one has the right not to share with anyone. By conferring this right, privacy creates the moral capital which we spend in friendship and love" Fried, *supra* note 10, at 211. I criticize this view in *Privacy, Intimacy and Personhood*, 6 *Philosophy & Public Affairs* 26-44(Fall 1976) reprinted in PDOP, at 300-16.

will lie precisely in the fact that the restriction leaves room for our own control. But other times it will lie just in that others lack the access. And this is important for our purposes, since the information that IVHS systems will gather is not the sort which it will be terribly important for us to be able to give out at our discretion. It will be information that we simply do not want others to have.

From the definition of privacy just given follows a specific conception of the *right to privacy*. The right to privacy is not my right to control access to me—it is my right that others be deprived of that access.¹⁵ In some cases, though not all, having this right will protect my ability to control access to me.

Having privacy is not the same thing as having a right to privacy. I can have either without the other. I can have privacy without the right to privacy, say, when I successfully conceal my criminal activities. And, I can have a right to privacy and not have privacy, say, when others successfully violate the right.

For there to be a right to privacy, there must be some valid norm that specifies that some personal information about, or experience of, individuals should be kept out of other people's reach. Such norms may be legal. I've already quoted some of the legal norms governing the right to privacy in the United States.¹⁶ If, however, we think that people ought to have others deprived of access to some of their personal affairs whether or not a law says so, then we think that there is (something like) a moral right to privacy. And we will want our laws to protect this moral right by backing it up with an effective legal right. Since I think that IVHS threatens our privacy in ways that go beyond current legal rights, I am concerned to defend a moral right to privacy.

To say that someone has a moral right to privacy doesn't say much unless we know what the scope of that right is, what things or activities a person has a right to keep out of other people's view. For anyone who doesn't live in a cave or in a desert, a completely private life is impossible. Normally, we will think that some things are rightly within the scope of a person's privacy (say, their religious beliefs), and other things (say, the color of their eyes) are not. Often, as

15. It might be objected that, if I have a right that others be deprived of access to me, then I can waive that right, and thus effectively I would have the right to grant individuals access to me. This would bring control back in, not back into the definition of privacy, but into the definition of the right to privacy. But, there are rights that people have but cannot waive in the sense here needed. For example, my right to life is not generally taken as one that I can waive and thereby have a right to stop living; and my right to not be enslaved is not generally taken as one that I can waive and thereby have a right to sell myself into slavery.

16. See notes 7 and 8 above, and accompanying text.

cases like *Roe v. Wade*¹⁷ and *Bowers v. Hardwick*¹⁸ show, precisely what should or should not come under the scope of the right to privacy is controversial. As these cases testify, some will argue that citizens of a free society should have as extensive a right to privacy as is compatible with reasonably safe social coexistence, while others will argue that only certain specific areas of people's lives (for example, bodily processes, intimate relationships, activities relating to the formation of political opinions and plans) should be protected. And, as the tension between current law and fears about IVHS shows, there is disagreement over whether the accumulation of bits of public information should come under the scope of privacy.

To resolve such disagreements, we must get clear on the value of privacy. If we know why having privacy, or, equivalently, having an effective right to privacy, is an especially important and good thing for human beings, we will be able to determine what must come under the scope of privacy for that value to be realized.

To do this, I propose that we imagine together the world in which the full IVHS project is completed, and then see what losses we might suffer as a result of the information about us that would then be gathered. Here it is of great importance that a fully developed IVHS will not exist in an informational vacuum. IVHS's information will exist alongside that provided by other developments already in existence and likely to grow, such as computerization of census and IRS information, computer records of people's credit-card purchases, their bank transactions, their credit histories generally, their telephone calls, their medical conditions, their education and employment histories, and of course the records of their brushes with the law, even of arrests that end in acquittal. Add to this the so-called "information highway" on which we will all soon be riding, with its automatic recording of all interactions, not to mention the FBI's desire to keep it eternally wire-tappable.¹⁹ It has been observed, by the way, that as people conduct the business of their daily lives more and more via digital communications, mere knowledge of who people call—knowledge now readily available to police agencies—"would give law enforcers extensive access to people's habits and daily activities."²⁰

It is this whole complex of information-gathering that I think threatens us. It is this whole complex that, in its potential to make our

17. *Roe v. Wade*, 410 U.S. 113 (1973).

18. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

19. Interestingly, the "information highway" is the inverted image of IVHS: here the intelligence comes first and then the roadways.

20. John Schwartz, *Industry Fights Wiretap Proposal: Group Says Clinton Plan Would Scare Consumers Off 'Data Highway'*, Wash. Post, Mar. 12, 1994, at C1, C7.

lives as a whole visible from a single point, brings to mind the panopticon. Accordingly, it is as helping to bring about this whole complex that I shall consider the threat posed by IVHS.

It might seem unfair to IVHS to consider it in light of all this other accumulated information—but I think, on the contrary, that it is the only way to see the threat accurately. The reason is this: We have privacy when we can keep personal things out of the public view. Information-gathering in any particular realm may not seem to pose a very grave threat precisely because it is generally possible to preserve one's privacy by escaping into other realms. Consequently, as we look at each kind of information-gathering in isolation from the others, each may seem relatively benign.²¹ However, as each is put into practice, its effect is to close off yet another escape route from public access, so that when the whole complex is in place, its overall effect on privacy will be greater than the sum of the effects of the parts. What we need to know is IVHS's role in bringing about this overall effect, and it plays that role by contributing to the establishment of the whole complex of information-gathering modalities.

I call this whole complex of which IVHS will be a part the *informational panopticon*. It is the risks posed to privacy by the informational panopticon as a whole that I shall explore.

Ride with me, then, into the informational panopticon and consider what we stand to lose if our lives become generally visible. I think that we can characterize the potential risks under four headings: *First*, the risk of extrinsic loss of freedom; *second*, the risk of intrinsic loss of freedom; *third*, symbolic risks; and, *fourth*, the risk of psychopolitical metamorphosis. All these strange titles will become clear in due course. I have given the last category a particularly unwieldy and ugly title precisely because it is the one that I regard as least familiar, most speculative and most ominous. The reference to Kafka is intentional. This said, I should add that these headings are not put forth as airtight metaphysical divisions. They are meant simply to get unruly ideas under control. Like many philosophical categories, they will crumble if pressed too hard. If, however, we see them for what they are, they will give us an orderly picture of the risks that IVHS and the rest of the informational panopticon pose to privacy. But, more, this picture will be just a negative image of the value of privacy.

21. Fried observes in a note that "so long as the mails are still private, wire tapping may not be so severe an imposition, particularly if people do not in any case consider telephone conversations as necessarily private", Fried, *supra* note 10, at 221 n.18.

I. THE RISK OF EXTRINSIC LOSS OF FREEDOM

By extrinsic loss of freedom, I mean all those ways in which lack of privacy makes people vulnerable to having their behavior controlled by others. Most obviously, this refers to the fact that people who want to do unpopular or unconventional actions may be subject to social pressure in the form of denial of certain benefits, jobs or promotions or membership in formal or informal groups, or even blackmail, if their actions are known to others. And even if they have reason to believe that their actions *may* be known to others and that those others *may* penalize them, this is likely to have a chilling effect on them that will constrain the range of their freedom to act.²² Remember, it is by inducing the consciousness of visibility that the panopticon, in Foucault's words, "assures the automatic functioning of power."

Ruth Gavison writes, "Privacy . . . prevents interference, pressures to conform, ridicule, punishment, unfavorable decisions, and other forms of hostile reaction. To the extent that privacy does this, it functions to promote liberty of action, removing the unpleasant consequences of certain actions and thus increasing the liberty to perform them."²³ This is not just a matter of the freedom to do immoral or illegal acts. It applies equally to unpopular political actions which have nothing immoral or illegal about them.

Moreover, in a free society, there are actions thought immoral by many or even a majority of citizens that a significant minority thinks are morally acceptable. The preservation of freedom requires that, wherever possible, the moral status of these actions be left to individuals to decide for themselves, and thus that not everything that a majority of citizens thinks is immoral be made illegal. (Think here of pornography, gambling, drunkenness, homosexual or pre- or extra-marital heterosexual sex.) If it would be wrong to force people legally to conform to the majority's views on such issues, it will be equally wrong to use harsh social pressure to accomplish the same effect. For this reason, Mill argued in *On Liberty* against both legal enforcement of morality and its informal social enforcement by stigmatization or ostracism.²⁴

22. "The usual arguments against wiretapping, bugging, a National Data Center, and private investigators rest heavily on the contingent possibility that a tyrannical government or unscrupulous individuals might misuse them for blackmail or victimization. The more one knows about a person, the greater one's power to damage him", Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, in PDOP, *supra* note 9, at 226.

23. Gavison, *supra* note 13, at 363-64.

24. JOHN STUART MILL, *ON LIBERTY* 9 (Hackett Publishing Company, 1978; originally published in 1859), *inter alia*.

Mill was not, by the way, against people trying to persuade one another about what is moral. Actually, he thought we should do more of that than we normally do. He distinguished, however, between appeals to reason and appeals to force or its equivalent, harsh informal social penalties. Trying to persuade the minority by making arguments and producing evidence can be done in public forums without pointing fingers, and thus without putting any particular person at risk. Most importantly, it leaves the members of the minority free to make up their own minds.²⁵ Threatening the minority with stigmatization or ostracism works like force because it changes people's actions by attaching painful consequences to them, without changing their minds at all. Privacy protects people from the operation of this force, and thus preserves their freedom.

Some may wonder whether the idea that people need privacy to act freely is based on too dim a view of human character. Those who raise this doubt think that people with strong characters will be able to resist social pressure, and thus only those with weak characters need dark private corners in order to act freely. In different ways, this objection can be raised against all the risks to privacy that I shall describe, and so I want to give a general answer to it. The answer has three parts:

First, laws and social practices generally have to be designed for the real people that they will govern, not for some ideal people that we would like to see or be. Just as Madison observed that if people were angels we wouldn't need government at all,²⁶ so we might add that if people were heroes we wouldn't need privacy at all. Since people are neither angels nor (except in a few instances) heroes, we need both government and privacy.

Second, just because people are not angels, some will be tempted to penalize those who act unconventionally. Even if people should ideally be able to withstand social pressure in the form of stigmatization or ostracism, it remains unjust that they should suffer these painful fates simply for acting in unpopular or unconventional ways. In any actual society we will need privacy to prevent this injustice.

Third, suppose we wanted to make our citizens into the sorts of strong-willed people who could resist social pressures. We would still have to give them experience in formulating their own judgments and in acting upon those judgments. And this experience will have to be given to them before they have the strong characters we hope them to attain. They will have to be sheltered from the pressures toward social

25. It also forces the majority to test its own beliefs in the open court of public discussion.

26. Federalist No. 51 (James Madison).

conformity while they are still vulnerable, in order to become the sorts of people who are not vulnerable. They will need privacy in order to become the sorts of people who don't need it.²⁷ Much as Mill felt that liberty was a school for character,²⁸ so too is privacy. And, since this school must provide continuing education for adults as well as for children, we will need privacy as an abiding feature of the society. In short, the vast majority of actual people need privacy for free action, and those who do not will need privacy to become that way. With or without heroes, we will need privacy.

II. THE RISK OF INTRINSIC LOSS OF FREEDOM

By intrinsic loss of freedom, I point to ways in which denial of privacy limits people's freedom directly, independently of the ways in which it makes them susceptible to social pressure or penalties. Put differently, I want here to suggest that privacy is not just a means of protecting freedom, it is itself constitutive of freedom in a number of important ways.

To start, recall the discussion about the place of control in the definition of privacy.²⁹ I concluded there that control is not part of privacy, but in some cases it is part of what privacy makes possible. For me to be able to decide who touches my body, or who knows the details of my personal history, those things must be generally not accessible to others at their discretion. That means that if those things are not shielded by privacy, I am automatically denied certain important choices. This is what I mean by an intrinsic loss of freedom. I am not here denied the choices by fear of certain consequences; I am denied them directly because privacy is the condition of their being choices for me in the first place.

Another intrinsic loss of freedom is the following. A number of writers have emphasized the ways in which some actions have a different nature when they are observed than they do when they are not.³⁰ This is clearest in cases that are distant from IVHS: Criticizing an

27. "[P]rivacy also contributes to learning, creativity and autonomy by insulating the individual against ridicule and censure at early stages of groping and experimentation", Gavison, *supra* note 13, at 364.

28. "He who lets the world, or his own portion of it, choose his plan of life for him has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself employs all his faculties", MILL, ON LIBERTY 56.

29. See notes 10 through 15 above, and accompanying text.

30. "The observer makes the act impossible . . . in the sense that the actor now sees it in a different light", Benn, *supra* note 22, at 226. "Aware of the observer, I am engaged in part in viewing or imagining what is going on from his or her perspective. I thus cannot lose myself as completely in the activity", Wasserstrom, *supra* note 9, at 324. See also, the sensitive discussion in Robert S. Gerstein, *Intimacy and Privacy*, in PDOP, *supra* note 9, at 265-71.

individual in front of others is a different act than uttering the same critical words to him in private. And, of course, making love before an audience is something quite different from the same act done in private. In the case of our informational panopticon the alteration is more subtle. Every act, say, driving to destination X at time T, is now a more complex event: It now becomes driving to X at T and *creating a record of driving to X at T*. These differ from one another as leaving a message on someone's answering machine differs from rehearsing the same words in one's imagination. If my every driving act (not to mention all the other acts visible in the informational panopticon) is also the depositing of a record, not only are my acts changed, but my freedom is limited: I am no longer free to do the act of simply driving to X at T *without leaving a record*.

With this, I lose as well the freedom of acting spontaneously. In a society which collected data on all of an individual's transactions, Richard Wasserstrom writes,

one would be both buying a tank of gas and leaving a part of a systematic record of where one was on that particular date. One would not just be applying for life insurance; one would also be recording in a permanent way one's health on that date and a variety of other facts about oneself. No matter how innocent one's intentions and actions at any given moment. . . persons would think more carefully before they did things that would become part of the record. Life would to this degree become less spontaneous and more measured.³¹

When you know you are being observed, you naturally identify with the outside observer's viewpoint, and add that alongside your own viewpoint on your action. This double vision makes your act different, whether the act is making love or taking a drive. The targets of the panopticon know and feel the eye of the guard on them, making their actions different than if they were done in private. Their repertoire of possible actions diminishes as they lose those choices whose intrinsic nature depends on privacy.

III. SYMBOLIC RISKS

Elsewhere I have argued that privacy is a social ritual by which we show one another that we regard each person as the owner of herself, her body, her thoughts.³² It is for this reason that privacy is generally absent from organizations like monasteries, armies, communist

31. Wasserstrom, *supra* note 9, at 328.

32. Jeffrey Reiman, *Privacy, Intimacy, and Personhood*, Phil. & Pub. Aff. 26-44 (1976), reprinted in PDOP, *supra* note 9, at 300-16.

cells and madhouses, where individuals are thought to belong to some larger whole or greater purpose. This is also why invasions of privacy are wrong even when they don't pose any risk to reputation or freedom, even when the invader will not use what he observes in any harmful way, even when the individual is unaware that her privacy is being invaded. Aside from any harms that invasions of privacy threaten, such invasions are, in addition, *insults*. They slight an individual's ownership of himself, and thus insult him by denying his special dignity. The peeping tom treats his prey with unmerited, and thus unjust, contempt.

Privacy conveys to the individual his self-ownership precisely by the knowledge that the individual gains of his ability and his authority to withdraw himself from the scrutiny of others. Those who lose this ability and authority are thereby told that they don't belong to themselves; they are specimens belonging to those who would investigate them.³³ They are someone else's data. It is no accident that the panopticon was a design for a prison, an institution which in effect suspends a person's ownership of himself because he committed a crime. And since our informational panopticon effectively suspends self-ownership though no crime has been committed, it conveys an unmerited, and thus unjust, insult.

I said earlier that I wanted to emphasize the way in which the panopticon makes our lives visible from a single point. Here it is worth noting that that point is outside of us, where the guardian stands. The panopticon symbolizes a kind of draining of our individual sovereignty away and outside of us into a single center. We become its data to observe at its will—our outsides belong to its inside rather than to our own.

I have called this a symbolic risk because it affects us as a kind of message, a message inscribed in an institutional structure. We are not deprived of our self-ownership in the way that slaves are deprived permanently or the way that prisoners are deprived temporarily. Rather, the arrangement of the institution broadcasts a image of us, to us, as beings lacking the authority to withdraw ourselves from view. It conveys the loss of self-ownership to us by announcing that our every move is fitting data for observation by others. As a symbolic message, it insults rather than injures.

33. "A man whose home may be entered at the will of another, whose conversation may be overheard at the will of another, whose marital and familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account." Edward J. Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser*, in PDOP, *supra* note 9, at 165.

But, of course, what is symbolic is almost never merely symbolic. By such symbols do we come to acquire our self-conceptions. They shape the way we identify ourselves to ourselves and to one another, and thus they shape our identities themselves. Growing up in the informational panopticon, people will be less likely to acquire selves that think of themselves as owning themselves. They will say *mine* with less authority, and *yours* with less respect. And I think that selves that think of themselves as owning themselves are precisely what we understand as "moral selves". They are selves that naturally accept ownership of their actions and thus responsibility for them. They naturally insist on ownership of their destinies and thus on the right to choose their own way. Here the loss of privacy threatens an incalculable loss. What will it be worth if a man should gain the world but lose his soul?

IV. THE RISK OF PSYCHO-POLITICAL METAMORPHOSIS

The risk just discussed is not that we shall lose something we now enjoy, but that we will become something different than we currently are, something less noble, less interesting, less worthy of respect. This is the fear expressed in the quote from Hubert Humphrey.³⁴ What I shall say now continues in this vein.

The film *Demolition Man* portrays a future society characterized by wide-spread information gathering, including a full IVHS system. However, to me, the most interesting feature of the film is that the denizens of the society depicted there speak, and thus seem to think, in a way that can only be described as childish. They have an oversimplified way of labeling things and experiences, and appear to have a repertoire of responses that is limited in number and nuance. Their emotional lives are, you might say, reduced to the primary colors, without shade or tone, disharmony or ambiguity. I want to suggest that this is a product of the informational panopticon in which they live. Total visibility infantilizes people. It impoverishes their inner life and makes them more vulnerable to oppression from without.

There is already a widely recognized correlation between privacy and adulthood. But it is normally understood in the reverse direction: The less mature a person is the less privacy he gets, and he gets more privacy as he moves toward adulthood. I want to suggest that this is a two-way street. The deprivation of privacy stunts maturity, keeps people suspended in a childish state.

34. Hubert H. Humphrey, *Forward to EDWARD V. LONG, THE INTRUDERS*, at viii (New York, 1967).

How does this happen? Consider the words of Edward Bloustein, President of Rutgers University:

The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.³⁵

But this is only the beginning. Consider the process and where it leads: To the extent that a person experiences himself as subject to public observation, he naturally experiences himself as subject to public review. As a consequence, he will tend to act in ways that are publicly acceptable. People who are shaped to act in ways that are publicly acceptable will tend to act in safe ways, to hold and express and manifest the most widely-accepted views, indeed, the lowest-common denominator of conventionality.³⁶ (Think here of the pressure that TV sponsors exercise against anything unconventional, in their fear of offending any segment of the purchasing population.) But, thought and feeling follow behavior. (Pascal said: "Kneel down, move your lips in prayer, and you will believe.")³⁷ Trained by society to act conventionally at all times, people will come so to think and so to feel. Their inner lives will be impoverished to the extent that their outer lives are subject to observation. Infiltrated by social convention, their emotions and reactions will become simpler, safer, more predictable, less nuanced, more interchangeable. This much is noted by Bloustein, but I think the process goes further.

As the inner life that is subject to social convention grows, the still deeper inner life that is separate from social convention contracts and, given little opportunity to develop, remains primitive. Likewise, as more and more of your inner life is made sense of from without, the need to make your own sense out of your inner life shrinks. You lose both the practice of making your own sense out of your deepest and most puzzling longings, and the potential for self-discovery and creativity that lurk within a rich inner life. Your inner emotional life is

35. Bloustein, *supra* note 33, at 188.

36. "In the absence of privacy we would dare less, because all our failures would be on record", Gavison, *supra* note 13, at 364.

37. This is attributed to Pascal, without citation. LOUIS ALTHUSSER, *LENIN AND PHILOSOPHY* (B. Brewster trans., 1971).

impoverished, and your capacity for evaluating and shaping it is stunted.

Thus will be lost—and this is the most ominous possibility of all—the inner personal core that is the source of criticism of convention, of creativity, rebellion and renewal. To say that people who suffer this loss will be easy to oppress doesn't say enough. They won't have to be oppressed, since there won't be anything in them that is tempted to drift from the beaten path or able to see beyond it. They will be the "one-dimensional men" that Herbert Marcuse feared.³⁸ The art of such people will be insipid decoration, and their politics fascist.

Here, I think, we reach something deep and rarely noted about the liberal vision—something that shows the profound link between liberalism and privacy, and between those two and democracy. The liberal vision is guided by the ideal of the autonomous individual, the one who acts on principles which she has accepted after critical review rather than simply absorbing them unquestioned from outside.³⁹ Moreover, the liberal stresses the importance of people making sense of their own lives, and of having authority over the sense of those lives. All this requires a kind of space in which to reflect on and entertain beliefs, and to experiment with them—a *private space*.

Deeper still, however, the liberal vision has an implicit trust in the transformational and ameliorative possibilities of private inner life. Without this, neither democracy nor individual freedom have worth. Unless people can form their own views, democratic voting becomes mere ratification of conventionality, and individual freedom mere voluntary conformity.⁴⁰ And, unless, in forming their own views, people can find within themselves the resources for better views, neither democracy nor individualism can be expected to improve human life.

This concludes my catalogue of the risks posed by loss of privacy. As I suggested earlier, the risks give us a negative image of the value to us of maintaining privacy. I can sum up that value as: the protection of freedom, moral personality, and a rich and critical inner life. If IVHS endangers these values, then we will have to bring the heretofore public information about travel on public streets under the scope of privacy.

38. HERBERT MARCUSE, *ONE-DIMENSIONAL MAN* (Beacon Press, 1964).

39. See Benn, *supra* note 22, at 241 for a statement of this ideal and a discussion of its relation to privacy.

40. "Part of the justification for majority rule and the right to vote is the assumption that individuals should participate in political decisions by forming judgments and expressing preferences. Thus, to the extent that privacy is important for autonomy, it is important for democracy as well," Gavison, *supra* note 13, at 369-70.

But that is just the beginning of what is necessary. Here we should remember Bentham's and Foucault's recognition that the panopticon works even if no one is in the guard house. The risks that are posed by the informational panopticon come not from being seen, but from the knowledge that one is visible. And this means that protecting ourselves from the risks I have described will be harder than we might imagine.

Consider that privacy can be protected in two ways, which I shall call, respectively, the formal conditions of privacy and the material conditions. By the *formal* conditions of privacy, I mean generally the rules that either specifically give one a right to privacy or that have a similar effect (such as conventions of modesty or reserve, of appropriate levels of curiosity or prying). Such rules might be legal or customary or moral, or some combination of these. By the *material* conditions of privacy, I mean physical realities that hinder others in gathering information about or experiences of you, things like locks, fences, doors, curtains, isolation and distance.

It should be clear that one might have formal conditions without the material, and that the formal conditions might be effective without the material being in place. For example, people packed like sardines in a rush-hour subway train have a way of respecting each other's privacy even though they have, materially, extensive access to one another's bodies. On the other hand, one can have the material conditions of privacy without the formal, and the material conditions might be effective without the formal being in place. For example, after my students are duly shocked by Hobbes' defense of absolute political authority,⁴¹ I remind them that, when Hobbes wrote, it took about a week to travel from the west coast of England to the east coast, and about two weeks from north coast to south.⁴² An absolute sovereign in Hobbes' time, without any formal constraints, surely had less actual ability to invade his subjects' lives than, say, a contemporary U.S. president, even with all our constitutional safeguards.

That constitutional safeguards can be and have been ignored by the powerful bears a lesson for us: Material conditions of privacy more reliably prevent invasions of privacy than formal conditions can. Material conditions have a kind of toughness that the formal conditions never can match. Thus, formal conditions of privacy can never

41. THOMAS HOBBS, *LEVIATHAN* (Prometheus Books, 1988)(1651).

42. J. CROFTS, *PACKHORSE, WAGGON AND POST: LAND CARRIAGE AND COMMUNICATIONS UNDER THE TUDORS AND STUARTS* 84-88, 122-24, 141-142 (Routledge and Kegan Paul, 1967); and Sidney and Beatrice Webb, *THE STORY OF THE KING'S HIGHWAY* 62-84, (Vol. V of *English Local Government*)(Archon Books, 1963)(1913). I am indebted to my colleague Terence Murphy of the American University Department of History for these references.

fully guarantee protection of privacy when the material conditions for invading privacy are at hand. The material conditions for invading privacy are a kind of power, and power is always tempting, often corrupting, and, to paraphrase Lord Acton, the more power there is the more corrupting it is likely to be.

This is important because the accumulation of detailed information about people's goings and comings is a material condition for invading privacy. What's more, the continued and increasing amassing of this and all the other sorts of information that make up the informational panopticon seems to me to be inevitable. This is for the simple reason that, as with IVHS, all of the elements of the informational panopticon serve good purposes and can and will be put in place with the best of intentions. Here we should remember Louis Brandeis's warning, quoted at the outset,⁴³ and watch out for threats of liberty dressed in beneficent intentions. The existence of all this collected information and of the technical ability to bring these different records together will add up to an enormous capacity to amass detailed portraits of people's lives—in short, material conditions for invasion of privacy on unheard-of scale. One has to be very optimistic indeed about the power of rules, to think that formal guarantees of privacy will protect us. And, to the extent that we are not so optimistic, we will experience ourselves as visible even if we are not being observed, which will bring in its train all the risks earlier described.

To the extent that the material conditions for our virtually total visibility come ineluctably into place in the years ahead, we will need not only to prevent the misuse of information *but to prevent the fear that it is being misused*. That is the lesson of the Panopticon. We will have to protect people not only from being seen but from feeling visible. Thus, we will need more than ever before to teach and explain the importance of privacy, so that respect for it becomes second nature, and violation of it repugnant. And, of course, we will need more than ever to make sure that our fellows are complying with the formal rules that protect privacy. If we are going to protect privacy in the informational panopticon, we're really going to have to keep an eye on one another!

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