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THE PUBLIC INTEREST IN PRIVACY: ON BECOMING AND BEING HUMAN

George Anastaplo*

Recognition of the right to privacy is a relatively modern development. Nonetheless, the philosophical, religious, social and moral underpinnings of our western culture have affected the manner in which this legal concept has taken shape. In this Article, Dr. Anastaplo explores the variety of influences that are present in our concern for privacy, and concludes that our emphasis on individual rights reflects a loss of a sense of community.

And [Elisha] said unto [his servant]: "Say now unto her: 'Behold, thou hast been careful for us with all this care; what is to be done for thee? Wouldst thou be spoken for to the king, or to the captain of the host?'" [The servant spoke to her as he was ordered.] And she answered: "I dwell among mine own people."

—2 Kings 4: 13

I.

There is inevitable tension, if not even conflict, between *privacy* and *community*. This is evident upon consideration of the ways of the two ancient peoples from whom so much of the heritage of the West comes down to us.

Thus, the Greek *polis* made comprehensive demands upon its members for the sake of the community and of the best. Thus, also, ancient Israel very much depended, for its survival and for the development of the best of which it was capable, upon mutual support and mutual supervision.¹

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1. This Article has been developed from a talk given on April 27, 1976, at K.A.M. Isaiah Israel, the oldest Jewish congregation in Chicago. It was given shortly after publication of GOVERNOR'S COMMISSION ON INDIVIDUAL LIBERTY AND PERSONAL PRIVACY, STATE OF ILLINOIS, FINAL REPORT (1976). [hereinafter cited as FINAL REPORT]. The Commission was established and supported by Governor Daniel Walker. I had served the Privacy Commission as Research Director and Advisor. The opinions expressed in this Article are mine, how-

An insistence upon privacy, therefore — upon “a right to be let alone”² in one’s intimate relations, religious activities, and other associations — would have been seen by Hellenes and Hebrews alike to threaten the community in its efforts to develop and preserve a good life for all. Does not our insistence upon privacy sometimes disregard both the legitimate claims upon us of community and the natural desire of men to know?

Another way of introducing the problem of privacy, however, is that which is suggested upon consideration of the ghost of Hamlet’s father which appeared to Hamlet — the ghost who informs a son that his royal father had been murdered and who commands that son to avenge the murder. Without this ghostly communication, Hamlet would have taken no action against the uncle he instinctively despises, the man who is now king in place of his father.³

Can we not say that everybody would have been better off for Hamlet’s inaction? That is to say, an unnatural visitation (by the ghost) proved to be most disruptive, upsetting relations within

ever, not necessarily those of the Commission.

Bernard Weisberg served as Chairman of the Privacy Commission; Ellen M. Flaum served as its Executive Director. The other Commissioners were Doris R. Bernstein, Marvin Chandler, Cyrus Colter, Elliot S. Epstein, Linda R. Hirshman, Don Hyndman, Jack F. Isakoff, Robert W. McGaw, Wayne Parsons and Ray Stevens. The Commission staff included, in addition to Miss Flaum and myself, four research associates: Frank Eugene Kruesi, Sherry Bindeman Schwartz, Stanley R. Solomon and Elizabeth A. Weiner. It was evident to everyone involved that much of the success of the Privacy Commission was due to the dedication, cheerful competence and fairmindedness of its chairman, a Chicago lawyer.

The FINAL REPORT is drawn upon in notes 8, 13, 17, 23, 24, 32, 43, 47 and 48 *infra*. A substantial part of this instructive report may be found in *Attempt to Reconcile Open Records and Right to Privacy in Illinois Commission Report*, 11 FOCUS/MIDWEST 16 (No. 68, 1976). The complete report may be obtained by writing to the Chairman, Mr. Bernard Weisberg, at Room 1500, 120 South LaSalle Street, Chicago, Illinois, 60603.

The reader is urged, as with my other publications, to begin by reading the text of this Article without reference to the notes.

2. See Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195, 205 (1890). See also White, *The Right to Privacy*, 18 SOC. RESEARCH 171 (1951).

3. SHAKESPEARE, HAMLET, Act I, scene v. (That which I suggest may be “instinctive” Hamlet dramatically considers to be “prophetic.” *Id.* at 1. 40.) For a discussion of Hamlet himself, see generally G. ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT at 30-32, 436-38, 651, 687, 725 (1971) [hereinafter cited as THE CONSTITUTIONALIST] (Corrections for THE CONSTITUTIONALIST may be found in ABRAHAM LINCOLN, THE GETTYSBURG ADDRESS AND AMERICAN CONSTITUTIONALISM at 130-32 (L. de Alvarez ed. 1976)).

the community and between various critical people in it. Men do have a natural desire to know. But would not Hamlet's continued ignorance have been better for his community on this occasion?⁴

What, one may well ask, has *this* to do with the problem of privacy? And one may well answer, no more, but also no less, than what the notorious White House tapes have to do with the problem of privacy. Did not both King Hamlet's ghost and Mr. Nixon's tapes threaten the general welfare by making public *in an unpredictable manner* what would otherwise and naturally have remained private?⁵

Are not distortion and a general unbalancing of human relations likely when we have access to and rely upon information which is normally concealed from view? Does not such access interfere with normal (even natural) political expectations and developments? Does it not keep men from making responsible plans for themselves and for the community they serve? In short, does it not make chance even more of a problem for the community than it need be?⁶

4. Also, "better" would have been a more prudent response by Hamlet to the information provided him by his irresponsible father. On determinations of "better" and "worse" see Section VII *infra*.

For an analysis of other unnatural visitations which turned out well, see Anastaplo, *Notes from Charles Dickens' Christmas Carol* (to be published in INTERPRETATION Jan. 1978).

5. G. ANASTAPLO, *HUMAN BEING AND CITIZEN* 306 (1975) [hereinafter cited as *HUMAN BEING AND CITIZEN*]. Mr. Nixon, in minimizing certain unflattering remarks about him expressed by Henry Kissinger during a dinner conversation, observed: "[T]he only problem was that he didn't think to turn the microphone off, but on the other hand, I didn't turn it off either in the Oval Office on occasions, so I never held him for that." *N.Y. Times*, May 13, 1977, § A, at 8, col. 6 (city ed.) (second David Frost broadcast segment). This wry observation suggests, at least to me, that Mr. Nixon may not be beyond redemption. See also note 7 *infra*.

6. An unhealthy reliance upon chance may be seen in the publication by the press of prejudiced remarks which public officials believed they had been making in private. The most recent instances have involved Secretary of Agriculture Earl Butz, General George Brown (Chairman of the Joint Chiefs of Staff) and Congressman John Ashbrook. *Compare Politics and Private Conduct*, *Wall St. J.*, Nov. 5, 1976, at 12, col. 1 (editorial). An appetite for sensation, as well as an exaggerated sense of righteousness, can undermine among us the relaxed trust necessary for decent political life. Ordinary human (and hence humanizing) relations are discouraged if one's every remark made in private is considered fair game by the journalist. See notes 8, 13 & 48 *infra*.

The political (even presidential) lessons to be learned from ordinary human relations are suggested in the following letter to the editor I prepared in late April 1977. It was published in an edited form in the *Chi. Tribune*, May 7, 1977, § 1, at 10, col. 3:

This is not to defend the misdeed which is subjected to extraordinary exposure — whether the misdeed be a royal assassination or Presidential misconduct. But the question remains whether, for example, one invasion of privacy (the Watergate burglary) justified what may have been the most massive and consequential invasion of privacy in the history of the United States, the compelled publication of the White House tapes.⁷ Is a healthy

President Carter, we are told as he finishes his first hundred days in office, is still learning his job. Even more important than what he has yet to learn, however, may be what a self-assured man should not forget.

One lesson Mr. Carter should not forget was learned in his home town church. He evidently did not rely there upon tough "confrontation" responses to his fellow members' callous positions on race relations. He should remember such constructive patience as he deals with Congress and with the Russians.

Another "home town" lesson Mr. Carter and his colleagues should not forget has to do with how one remembers helpful strangers. This test of one's sense of justice affects one's ability to recruit allies in the future. In such matters, particular illustrations can be instructive.

Consider, for example, the case of Liese Ricketts of Crete, Illinois, a talented local government official in Republican Will County. She put her political career on the line in January 1976 when she became a Carter delegate to the Democratic National Convention. Since November she has been cavalierly ignored by the Carter people who had wooed her, while aggressive latecomers with inferior credentials are rewarded with posts and honors.

How many such cases are there? Mrs. Ricketts herself does not complain. But casual ingratitude, like reliance upon gratuitous confrontations, is bad politics — and bad politics tend to lead to bad government.

See also HUMAN BEING AND CITIZEN, *supra* note 5, at 259-60.

7. On Watergate and its ramifications, see Anastaplo, *Passion, Magnanimity and the Rule of Law*, 50 S. CAL. L. REV. 351 (1977). See also my essay entitled "Impeachment and Statesmanship" in HUMAN BEING AND CITIZEN, *supra* note 5, at 160. Of course, Mr. Nixon himself invaded the privacy of those people who met with him in the White House by taping their conversations. See note 5 *supra*.

Richard Nixon, I have argued, "brings out the worst in us." Anastaplo, *Abuse of Nixon Indicates Extent of Public Corruption*, Chi. Sun-Times, Apr. 12, 1976 at 38, col. 1. Compare *id.* at 39, col. 1 (editorial). Something of that "worst" may be seen in the presumptuous coarseness of the following exhortation directed to Mr. Nixon in the first David Frost broadcast segment:

F: Would you go further than "mistakes?" That you've explained how you got caught up in this thing . . . you've explained your motives. I don't want to quibble about any of that, but just coming to the sheer substance, would you go further than "mistakes?" The word that seems not enough for people to understand.

N: Well, what would you express?

F: My goodness, that's a . . . I think that there are three things since you asked me, I would like to hear you say. I think the American people would like to hear you say: One is . . . "there was probably more than mistakes, there was

political life possible for us with such systematic exposure of off-guard conversations as that publication represented?

I have put the problem of the public interest in privacy this way, if only to challenge the prevailing opinion about our "right to know." What *is* relevant for us to learn about each other? How does the law bear on this problem? Is the natural desire to know appropriate for men as human beings, not on all occasions for men as citizens?

Or, to put all this still another way, what kind of life do we want for ourselves and for one another?⁸

wrongdoing." Whether it was a crime or not? Yes, it may have been a crime too. Secondly "I did . . ." and I'm saying this without questioning the motives, right? "I did abuse the power I had as President, or not fulfill the totality of the oath of office." That's . . . that's the second thing. And, thirdly, "I put the American people through two years of needless agony and I apologize for that." And I say that you've explained your motives. I think those are the categories. And I know how difficult it is for anyone and most of all you, but I think that people need to hear it, and I think unless you say it you're going to be haunted for the rest of your life.

Wash. Post, May 5, 1977 § A, at 17, col. 3. I suspect the "people" who most "need[ed] to hear it" were Mr. Frost and his associates—and this in order to insure the commercial success of their venture. (I believe it a dubious practice, by the way, to permit self-aggrandizing entrepreneurs to edit out, for broadcast purposes, two-thirds of an extended interview. The substance as well as the tone of what was said can thereby be significantly altered. See notes 29 & 30 *infra*.)

It somehow seems fitting that it is in connection with the Watergate matter, with its legitimation of unrelenting exposure, that there should be a major break with "the high court's 188-year tradition of secrecy." Chi. Tribune, Apr. 22, 1977, § 1, at 1, col. 4.; NEWSWEEK, May 9, 1977, at 66. Compare the letter to the editor by Tao, N.Y. Times, May 6, 1977, ¶ A, at 28, col. 5 (city ed.).

8. The Illinois Privacy Commission prepared, as one of its recommended bills a "Public Records Access Act." It also prepared a "School Students Records Act," a "Fair Consumer Credit Reporting Act" and a "Personal Records Privacy Act," the last relating to records held by the state government. The School Students Records Act has been enacted. Pub. Act No. 79-1108, 1976 Ill. Laws [to be codified in ILL. REV. STAT. ch. 122 § 50-5 *et seq.*]. The texts of all four proposed acts may be found in the Commission's FINAL REPORT.

On the "right to know" see Warren & Brandeis, *supra* note 2, at 214-16; Anastaplo, *The Occasions of Freedom of Speech*, 5 POLI. SCI. REVIEWER 383, 398-401 (1975); Anastaplo, *Why We Need Access to Our Public Records*, Chi. Tribune, July 23, 1976, § 2, at 4, col. 4. See also note 48 *infra*. Compare Henry James, *THE ASPERN PAPERS IN THE GREAT SHORT NOVELS OF HENRY JAMES* (P. Rahv ed. 1965). *E.g.*, at 511-12 ("Do you write about *him* — do you pry into his life?"), 523 ("which would have been in the worst possible taste if anything less vital — from my point of view — had been at stake."), 528 ("Do you think it's right to rake up the past?"), 530 (" . . . the last violence of self-exposure . . ."), 538 (" . . . an appetite well-nigh indecent . . ."); 540, 542-43, 545, 547 ("Ah you publishing scoundrel!"), 552 ("I thought it more decent not to show greed again so soon after the

II.

The primary definition of "privacy" in the *Oxford English Dictionary* reads,

1. The state or condition of being withdrawn from the society of others, or from public interest; seclusion.

This sense of "privacy" in English seems to go back to the late Sixteenth Century; it may even go back to the middle of the Fifteenth Century.⁹

Our sense of privacy today is somewhat more assertive than

catastrophe . . ."), 556 ("In this case it must seem to you that to part with [the papers] would be an impiety of the worst kind, a simple sacrilege!"), 557 ("But don't let me stand here as if I had it in my soul to tempt you to anything base."), 558 (" 'She had an idea that when people want to publish they're capable —.' And she paused, very red. 'Of violating a tomb? Mercy on us, what must she have thought of me!'", 560 ("I cursed the extravagant curiosity that had put [a colleague] on the scent of [the papers]"). Are ruthless invasions of privacy the peculiarly American vice? See *id.* at 466-67. See also note 6 *supra*. Does the problem of invasions of privacy reflect the legitimation among us of the greed of the marketplace? See THE CONSTITUTIONALIST, *supra* note 3, at 544, 690-91, 693-94. (Justice Black observed that the protections of the First Amendment do not apply to a " 'merchant' who goes from door to door selling pots!") *Breard v. City of Alexandria*, 341 U.S. 622, 650 (1951) (dissenting opinion). See also notes 25, 45 & 47 *infra*. (I note in passing that the story we do have about the scholar's efforts to get the Aspern papers is probably better than anything the papers themselves would have revealed.)

9. SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE gives the following definitions for "privacy":

1. State of being secret; secrecy.
2. Retirement; retreat . . .
3. [*Privauté*, Fr.] Privacy; joint knowledge; great familiarity. *Privacy* in this sense is improper . . .
4. Taciturnity.

Consider the use of "private" in the following comments on the shepherd's life in SHAKESPEARE, *AS YOU LIKE IT*, Act III, scene ii; 1. 13-18:

Truly, shepherd, in respect of itself, it is a good life; but in respect that it is a shepherd's life, it is naught. In respect that it is *solitary*, I like it very well; but in respect that it is *private*, it is a very vile life. Now in respect it is in the fields, it pleaseth me well; but in respect it is not in the court, it is tedious." [emphasis added].

Consider, also, the temptation by Satan of the Son of God with the lure of public achievements in J. MILTON, *PARADISE REGAIN'D* at III, l. 21-30 [emphasis added]:

These God-like Vertues wherefore dost thou hide?
Affecting *private life*, or more obscure
In savage Wilderness, wherefore deprive
All Earth her wonders at thy acts, thy self
The fame and glory, glory the reward
That sole excites to high attempts the flame
Of most erected Spirits, most temper'd pure
Aethereal, who all pleasures else despise,

this, more demanding upon the public. Thus, two scholars have written,¹⁰

The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, behavior and opinions are to be shared with or withheld from others. The right to privacy is, therefore, a positive claim to a status of personal dignity — a claim for freedom, if you will, but freedom of a very special kind.

This sentiment is summed up by them,¹¹

All treasures and all gain esteem as dross,
And dignities and powers all but the highest?

And, in the concluding lines of the poem at IV, l. 636-39, there is a return by the Hero to a private station after resistance to all temptations [emphasis added]:

Thus they the Son of God our Savior meek
Sung Victor, and from Heav'nly Feast refresht
Brought on his way with joy; hee unobserv'd
Home to his Mothers house *private* return'd.

But see *Matthew* 5:5.

Consider, as well, H. MENCKEN, *THE AMERICAN LANGUAGE* 478 n.2 (Supp. I 1962):

In 1935 when Rudyard Kipling's *The Light That Failed* was being done as a movie in Hollywood, the author made a number of changes in the script, seeking to substitute English locutions for Americanisms. Associated Press dispatch from Hollywood, July 31: "Where Torpenhow says: 'He had some very important *personal* business,' Kipling's question is, 'What does this word *personal* mean?' He substitutes *private*." So, in English usage, before *letter*, etc.

For references to "personal privacy" see notes 13 & 48 *infra*.

10. Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 *COLUM. L. REV.* 1184, 1189-90 (1965). One of these authors was a lawyer, the other the President of the Russell Sage Foundation. See note 13 *infra*.

11. *Id.* at 1198. On the conditions for and the just use of liberty see the talk entitled "Character and Freedom," in Anastaplo, *Passion, Magnanimity and the Rule of Law*, 50 *SO. CAL. L. REV.* 351, 370-72 (1977). See also notes 27, 29 & 34 *infra*.

Consider, on the relation of the just to the legal, von Oppen, *Religion and Resistance to Nazism* (Center of International Studies, Princeton University, 1971):

Let us go back to an earlier stage in the sequence of segregation, deportation, extermination, which *sequence* was not known at the time it started, though we know it now. And let me tell you the case of a school in Holland, a boarding school where there were, among others, a lot of Jewish children from Germany. After the Germans had invaded and occupied Holland — and it was all done in five days in May 1940 — they first ordered the segregation of these Jewish children, mostly boys and girls in their teens. The segregated children then consulted those among the staff they trusted most and whose judgment, one must assume, they trusted most; for even at that stage these children knew that there were now life-and-death decisions to be made. They asked either one

The essence of the claim to privacy is the choice of the individual as to what he shall disclose or withhold, and when he shall do so.

Consider as well the rhetorical question put in a publication concerned with the implications of computer technology:¹²

person, A, or another, B. They may, of course, have talked it over with both. But in the end they accepted the advice of A or B. A advised legality, judging that evading the prescribed registration would lay that young person open to the risk of discovery and punishment. A thought the risks of registering as the law required were less than the risks of the course advocated by B, which was illegality: going into hiding, probably with forged papers, going "underground" as they called it, not an easy thing to do in a flat country and, of course, requiring strong nerves, helpful people to hide you, and the willingness to accept their help at the risk they would run. About half the young people acted on the advice of A, about half on that of B. Virtually all who took the advice of A perished, virtually all who took that of B survived. Yet who could *know* at the time who was right?

Id. at 32. The right of revolution is considered throughout Miss von Oppen's report. I understand, by the way, that when A came to give advice to her own youngster, she gave the kind of advice B had given. Thus, instinct (or was it common sense?) prevailed over convention. Is there not also in the right to privacy respect for certain instincts? See text Section III.

Consider also Berns, *Political Philosophy and the Right to Rebellion*, 5 INTERPRETATION 309 (1976). See notes 23, 41, 46 & 51 *infra*.

12. *Privacy and the Computer*, at 2 (in *Ethical Perspectives*, Monograph No. 5; New York: Publications Committee of the New York Society for Ethical Culture, 1974).

See, on the relation between technology and privacy, Warren & Brandeis, *supra* note 2, at 195, 206 & 211. The following sources are offered as a sampling of recent discussions on the subject: 123 CONG. REC. H333 (daily ed. Jan. 12, 1977); H959 (Feb. 8, 1977); H1865 (Mar. 8, 1977); E1341 (Mar. 9, 1977); S4841 (Mar. 24, 1977); E2424 (Apr. 25, 1977); S7671 (May 16, 1977); Stanford, *What's Happening to Your Privacy?*, PARADE, Feb. 27, 1977, at 24; Halverson, *Business vs. 'Big Brother' in Privacy Bill (HR 1984)*, CHRISTIAN SCI. MONITOR, May 13, 1977, at 11. See also J. MACDONALD, THE LAST ONE LEFT 145-47 (1967):

[H]e realized that ever since he had learned of the new marvels in electronic espionage, he had been gradually accustoming himself to speak less openly to everyone in his own offices and in those he visited. He had thought of it as merely a sensible precaution. If one assumed everything was overheard and recorded, one could cease worrying about what might be safe to say. It made a life more drab, more guarded, more ceremonious. All men of any degree of responsibility had begun to speak for the record, for the unseen audience, and old intimacies had withered because closeness must depend upon the exchange of the innermost thoughts. Orwell, in 1984, had not considered the consequences of such a diffusion. An ever-watchful Big Brother could be outwitted, but a gnat-throng of little brothers could only be endured. Miniaturization of electronic circuitry was effecting that great change in human relationships which, in other cultures, had been created only by using secret arrest, imprisonment and torture to turn brother against brother.

What will be the effect on each of us when we realize that everything we do is being recorded permanently and can be made available to any interested party?

One can answer this question by suggesting that the effect would not be altogether bad, that, indeed, certain salutary consequences can be anticipated from a more detailed knowledge of one another, a knowledge which can both restrain misbehavior and identify the lonely (or alienated).¹³

Yet, as is evident in the MacDonald story, electronic "marvels" (as well as fudging on a lawyer's duty to his client) can be used to see justice done. See also White, *supra* note 2, at 182. See notes 6 *supra* and 13, 15 & 32 *infra*.

13. See, on alienation and vice, M. SHELLEY, *FRANKENSTEIN* (1818), and note 38 *infra*. Consider also this passage from E. WILSON, *THE WOUND AND THE BOW* 39 (1941) [emphasis added]:

Friedrich Engels, visiting London in the early forties, had written of the people in the streets that they seemed to "crowd by one another as if they had nothing in common, nothing to do with one another, and as if their only agreement were the tacit one that each shall keep to his own side of the pavement, in order not to delay the opposing streams of the crowd, while it never occurs to anyone to honor his fellow with so much as a glance. The brutal indifference, *the unfeeling isolation of each in his private interest*, becomes the more repellent the more these individuals are herded together within a limited space."

Has it not been believed that it *would* be salutary to have it generally understood "that everything we do is being recorded permanently" with a view to the Last Judgment? See H. BLACK, JR., *MY FATHER: A REMEMBRANCE* 175-76 (1975). See also *THE CONSTITUTIONALIST*, *supra* note 3, at 777.

Two principles relied upon by the Illinois Privacy Commission in developing its proposed legislation (note 8, *supra*) should be noticed here:

The basic problem, it seems to us, is one of control, so much so that we are obliged to counsel that we probably should not collect what we cannot control. Unless we are able to govern and regulate the collection, use and dissemination of personal information, we cannot adequately protect our personal privacy. The need for such controls has by now been amply documented by Congressional committees, federal study commissions, professional bodies, and other public and private research organizations. In addition, we have seen in recent years a succession of public controversies centering on abuses by government and private business in the collection and handling of personal information about individuals.

FINAL REPORT *supra* note 1, at 15-16.

This Commission recognizes the concern expressed by the credit reporting industry that sources can be expected to dry up or become quite cautious if confidentiality should be explicitly disavowed at the outset of an interview. But this Commission believes that that consideration must be balanced against the right of an individual to learn the source of unfair or inaccurate information about himself. If an individual's opportunities to obtain jobs, credit or insurance are to be jeopardized by a neighbor's gossip, he should be accorded something comparable to the time-honored right to know one's accusers. This provision of

The deeper problem with our attitude toward privacy begins to emerge when we realize that what we moderns cherish and protect as privacy was not a lively concern for our predecessors in antiquity. They not only did not discuss it as we do; they often did not even seem to have had a word for it, which does suggest that it was for them neither a problem nor an aspiration.¹⁴

Consider, for example, the vocabularies of the two peoples already referred to — the *ancient* Greeks and the *ancient* Hebrews. My preliminary inquiries have supported what I had suspected, that there is in neither ancient vocabulary a word which was in common use and which can be literally translated as "privacy." Thus, two rabbis I consulted both had the same initial response to my question, "Is there a Hebrew word for 'privacy'?" "Of

the bill could encourage healthy restraint upon uninformed and uninhibited gossip. More responsible sources of information are likely to be developed and relied upon by credit agencies if the dubious informant is discouraged. If it is known in advance by everyone involved that individuals are entitled to inspect the credit files compiled about them, it will be more likely than heretofore that only information which is morally justified and legally permitted will find its way into those files.

Id. at 31. See notes 12 *supra* and 32 *infra*.

But consider the sensibleness of permitting students to waive access to the letters of recommendation they request of their teachers. Do not schools tend to be less selfish and more reliable than credit agencies in passing judgment on the young? Is it primarily privacy that is desired, or accuracy and just assessments? See PLATO, REPUBLIC 367E-368A.

Consider, also, on the relation of publicity to good behavior, this comment in *Dobbert v. Florida*, 97 S. Ct. 2290 (1977): "One who is reasonably suspected of murdering his children cannot expect to remain anonymous." Consider, as well, the concern expressed to me by the director of an opinion research organization about "the issues which particularly perplex survey research organizations":

For example, even under court order, should we release data collected under promise of confidentiality? — a particularly difficult question when we are dealing with patients in a drug abuse rehabilitation program, and ask them (in effect) to confess to criminal behavior by answering such questions as, "Do you use drugs? If so, where do you get them?"

More generally, the survey research technology puts us in the difficult intermediate role between government (and its need for information on which to base rational policy decisions) and the citizen (for whom the collecting of such information involves an intrusion into his privacy).

See notes 10 *supra* and 43 *infra*.

Consider, finally, the concern of "the white archivist who found the oldest known identified photos of black slaves in the United States": ". . . she felt uncomfortable about the nude pictures, and wondered, 'If these were my ancestors, would I want them to be seen this way'" Chi. Sun-Times, June 2, 1977, at 48. See note 45 *infra*.

14. On the significance of "having a word for it" see HUMAN BEING AND CITIZEN, *supra* note 5 at 8f, 49, 52, 97-101; note 19 *infra*; and text Section VI.

course, there surely is," each said — but when pressed, they could not think of one. The word used today by Hebrew-speaking Israelis is, I understand, essentially a modern adaptation.¹⁵ The same is true of Greek — but with one modification, and that is (as I understand it) that modern Greek (unlike modern Hebrew) is still without a word for our "privacy." And this, it is my impression, does reflect the "outgoing" character of Greek life to this day.¹⁶

15. THE BABYLONIAN TALMUD, TRACTATE BABA KAMMA at 27B (I. Epstein, ed. 1935) has implied in the following passage a word ("stealthily") which suggests an aspect (but not one of the more engaging aspects) of "privacy": "Do not enter [stealthily] into thy neighbour's premises for the purpose of appropriating without his knowledge anything that even belongs to thee, lest thou wilt appear to him as a thief. Thou mayest, however, break his teeth and tell him, 'I am taking possession of what is mine.'" See also TRACTATE BABA BATHRA at 2B. In the Middle Ages, I am told, Jewish mystics had a term for going into seclusion, "hitbod'dut," which some might translate as "privacy." But has not the dominant opinion in Judaism long been that individual Jews usually had no private relation with God, that they were all (or almost all) together in whatever relation there was with God? Compare note 33 *infra*.

See also HUMAN BEING AND CITIZEN, *supra* note 5 for a discussion of Israel (Essay No. 13, "The Case for Supporting Israel").

16. Ancient Greek has a word, "idiota," which suggests an aspect (but not one of the more engaging modern aspects) of "privacy": it refers to one who separates himself from public duties. These additional words should be noted: "eremia" (solitude), "oikia" (household), "katidion" (according to one's own), "monasmos" (living alone), and the words formed with "auto" such as "autites," (to be by oneself). Consider, as well, the concern with the "auto," (the self) with which Plato's PHAEDO, in its examination of the possible immortality of the soul, literally begins. See HUMAN BEING AND CITIZEN, *supra* note 5 at 319, note 7 *supra* and note 28 *infra*. The complexity of the Greek understanding of these things is further suggested by Nietzsche's distinction between Apollo (with the *principium individuationis*, which is related to subjectivity) and Dionysus (with complete self-forgetfulness). F. NEITZSCHE, THE BIRTH OF TRAGEDY, 36-37, 38, 40, 45-46, 48-49, 50-51 (1967). A useful introduction to Nietzsche is provided by W. DANNHAUSER, NEITZSCHE'S VIEW OF SOCRATES (1974).

In modern Greece, the tendency is to share all one has with one's "in-group," from whom one gets in turn support and criticism. It is expected that all know one another quite well in that group. (The American visitor can be startled to find himself asked, by new acquaintances, the most intimate questions about his financial circumstances and family relations.) In modern Greek, there are words for secrecy ("mistikotis"), separateness, ("idiateros") and loneliness ("monohikotis").

Something of the Middle Eastern (and hence Greek?) way of life and its lack of privacy *within* the household is suggested by the protest of a harried Saudi Arabian official: "I work all day and it isn't easy. It's one decision after another and government life is one long fight. Must I fight at home every night? [My wife] says I don't talk to her. When am I supposed to talk to her? It's part of our way of life to have an open house with friends walking in at any time. I can't lock our door against them to make time to talk to her. And I don't want to. What else is there that matters in life but your friends and your family?" It is further reported that one of this official's friends is building a three million dollar home in Riyadh: "This will be that other man's first home of his own. He and his

The origins of the English word seem to go back to the Latin *privatus*, where it seems to have referred to a deprivation or release or setting apart.¹⁷ I suspect that there was something about later Roman political (and, still later, religious) developments which made it not uncommon and somehow respectable if not even desirable that one step aside from communal activities.¹⁸

III.

The modern notion of privacy¹⁹ ultimately draws, I suspect,

wife started in a large family compound with all his brothers and cousins and their families, a place teeming with people and protective warmth. Now they share a house with just one brother's family. The next step is the [new] house on the hill — one man, one wife, three children. The empty marble house will seem like a mausoleum to him." *Chi. Tribune*, June 12, 1977, § 5, at 1, col. 5 (report by Linda Blandford). *Compare* notes 40 & 42 *infra*.

On modern Greece see my articles in the Fifteenth Edition of the *ENCYCLOPEDIA BRITANNICA* (1st & 2nd printings); *HUMAN BEING AND CITIZEN*, *supra* note 5, Essay No. 1, "Dissent in Athens"; *THE CONSTITUTIONALIST*, *supra* note 3, at 564.

17. The Illinois Privacy Commission in *FINAL REPORT* *supra* note 1, at 6, drew its epigraph from the following deeply instructive passage in the essay on Kurt Riezler in *L. STRAUSS, WHAT IS POLITICAL PHILOSOPHY?* 260 (1959):

Riezler's analysis of the passions culminates in his analysis of shame and awe as respect for the vulnerable and the secret. Human dignity, Riezler suggests among other things, stands and falls by shame and awe because man's greatness is co-present in his littleness and his littleness is co-present in his greatness. It was ultimately because he grasped the meaning of shame and awe that Riezler was a liberal, a lover of privacy. By invading men's privacy one does not come to know them better — one merely ceases to see them. For man's being is revealed by the broad character of his life, his deeds, his works, by what he esteems and reveres not in word but in deed — by the stars for which his soul longs if it longs for any stars. Not anguish but awe is "the fundamental mood" which discloses being as being. Because he was animated by this spirit, he felt more at home in the thought of ancient Greece than in the thought of his time.

The serious student of privacy, with Mr. Strauss's essay to build upon, should study, among other things, Warren & Brandeis, *supra* note 2; White, *supra* note 2; the useful writings in this field of Alan F. Westin and Arthur R. Miller; Kalven, *The Problem of Privacy in the Year 2000*. *DAEDULUS* 876 (Summer 1967); H. ARENDT, *THE HUMAN CONDITION* (1958). See also Essays Nos. 2, 4, 6, 8 and 9 in *HUMAN BEING AND CITIZEN*, *supra* note 5. For a collection of authors influenced by Mr. Strauss, see *A Contemporary Bibliography in Political Philosophy and in Other Areas*. It may be obtained from Mr. Harvey Lomax, ed., 4215 Glenaire Drive, Dallas, Texas, 75229.

18. "On that celebrated ground, the first consuls deserved triumphs; their successors adorned villas, and *their* posterity have erected convents." E. GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE*, vol. I, at 20 (Modern Library ed.) See also Essay No. 2, on *PLATO'S APOLOGY* in *HUMAN BEING AND CITIZEN*, *supra* note 5; note 39 *infra*.

19. The emergence of new words, or the development of new meanings for old words, can reveal the presuppositions and inclinations of an age. Consider, for example, our use

upon attitudes among men about the exposure of the private parts of the body, the exposure of those parts which men normally keep covered.²⁰ Something of this natural modesty may be seen in what is said in *Genesis* both about the nakedness of which Adam and Eve became aware and about the responses by Noah's sons to their father's nakedness.²¹

The grounding of privacy in the natural modesty of civilized beings seems to have been lost sight of by us.²² Symptomatic of this forgetting is what may well be the most traumatic invasion of privacy routinely experienced among us today, and that is the compulsory nudity required of high school (and even of some grade school) children in physical fitness and athletic programs.²³

of "the masses" when the ancients might have said "the many" or "the mob" or "the people;" or our use of "mature" or "adjusted" or "secure" when the ancients might have said "virtuous" or "good;" or our use of "state" and "society" and "church" when the ancients might have said "community" or "*polis*." I suspect that the shifts in these three sets of cases have something in common with the emergence of privacy among us, reflecting thereby a quite changed view of human life.

On the discipline of language, see Section VI, *infra*. On the standards to which that discipline should be dedicated, see text Section VII, *infra*.

20. What is the relation of respect for privacy to the recognition of a male-female distinction? And when that distinction breaks down, as in the "Nighttown" sequence in James Joyce's *ULYSSES*, is not respect for privacy likely to be weakened? (The male-female distinction is reflected in the institutions of family life: thus, female fidelity guarantees heredity; and modesty serves fidelity. See notes 33 & 38 *infra*.)

21. *Genesis* 2:25 and 3:7; *Genesis* 9:20-7.

22. Does the doctrine of Original Sin draw upon the natural modesty of civilized beings? Does it distort this modesty? See note 25 *infra*.

23. Thus, I have heard of a German woman who, upon coming to the United States as a teenager, was appalled to find that her college gym class took nudity for granted. She left it after the first day, never to return. And I have talked with a German criminologist who was shocked both by the crowding and by the "cages" (that is, the cells) evident in the Cook County Jail and in Joliet Prison. In Germany, he reported, prisoners are kept in rooms with doors, with (at most, but often with not even) a peephole in the door. (One can appreciate from such German responses — both to nudity and to prison cells — how unhuman the Jews must have been regarded by the Germans who systematically exterminated them by the millions. Otherwise, wholesale slaughter becomes "unbelievable." On the truly human, see note 11 *supra* and text Sections VI and VII *infra*. On G. Lessing's *NATHAN THE WISE*, see *THE CONSTITUTIONALIST*, *supra* note 3, at 503.

See, on viewing and being viewed naked, *PLATO*, *LAWS* 772a; *THOMAS MORE*, *UTOPIA* (E. Surtz, ed. 1964). We are told by the narrator Raphael that "nothing is private" in Utopia. *Id.* at 146. Is this because of the critical importance of that "one single monster, the chief and progenitor of all plagues . . . Pride"? *Id.* at 150. (Raphael disparages private property. *Id.* at 16-19, 53-5. Compare *id.* at 151. But he does like to live as he pleases [which property, and hence privacy, permits]. *Id.* at 17-18.) Is not philosophy dependent on what we know as privacy? *Id.* at 4. See notes 31 and 51 *infra*.

Failure to respect the grounding of privacy in natural modesty may be seen in still another, and in many ways more serious (albeit less obviously traumatic), development — and that is in the growing toleration among us of the most blatant obscenity. The toleration of obscenity is often put in terms of individual choice — but it is nevertheless a development which affects everyone in the community, almost as much those who would not choose obscenity for themselves as those who not only choose it but actively seek it. This coarsening development affects very much the language, the conversation and the concerns of the day.²⁴

Many of the people who have been in the forefront of the effort to protect privacy have also opposed legal (and sometimes even social) restraints upon obscenity. Yet, does not obscenity repudiate the respect for that concealment of the private parts upon which privacy is somehow grounded? Does not widespread obscenity tend to undermine among us the sanctity of the private?²⁵

Be all this as it may, the Illinois Privacy Commission did include among its recommendations that further study be made of "the need for and objections to compulsory 'public' disrobing by school children in pre-collegiate physical education classes . . ." FINAL REPORT, *supra* note 1, at 17.

24. In respectable shops in Chicago's Loop opaque masks are used to cover certain "girlie" magazines offered for sale. The masks are there, one is told, to save female customers from embarrassment. The concluding recommendation of the Illinois Privacy Commission reads:

Finally, it is recommended by this Commission that there be established, at least once a decade, a temporary privacy commission composed for the most part of private citizens. Each such commission should survey enduring as well as emerging privacy problems in this State; suggest appropriate legislation; call public attention to coarsening "cultural" developments threatening those human sensibilities upon which an abiding respect for privacy rests; define privacy-related matters in need of extended study; and otherwise assess, correct and continue the work of its predecessor privacy commissions.

FINAL REPORT, *supra* note 1 at 50 [emphasis added].

25. See THE CONSTITUTIONALIST, *supra* note 3, at 546; Essay No. 10, "Obscenity and Common Sense" in HUMAN BEING AND CITIZEN, *supra* note 5 at 117. Consider the opening paragraph of a review by Virginia Wright Wexman in the Chi. Reader, May 6, 1977, at 15, col. 1: "'Do you enjoy watching us?' Sada, the heroine of *In the Realm of the Senses*, asks a serving maid at one point in the film. It's an embarrassing question for the audience as well as for the maid, because we've been sharing the maid's view of an activity normally relegated to normal privacy: sexual intercourse." Consider also the devastating review by Bruno Bettelheim in THE NEW YORKER, Aug. 2, 1976, at 31, of a movie which presumed to exploit concentration camp atrocities for their "comic" effects. (A juvenile version of his kind of exploitation may be seen in MEL BROOKS' YOUNG FRANKENSTEIN.) Consider as

All this suggests that when we plead for privacy, at the same time that we support those who share with us their obscenities, we do not really understand what it is we are asking for. The connection between an insistence upon privacy and the protection of (if not even indulgence in) obscenity is, however, not accidental. For privacy is, in certain respects, an affirmation and gratification of the "self," of that individuality which is so much a product of modern times. We have legitimated among ourselves an emphasis upon self — and hence upon self-expression and self-gratification — and this, in turn, easily leads to such experiments in self-gratification and self-expression as obscenity. These experiments in language and in conduct threaten the very privacy which serves the self.²⁶

well the review by Irving Howe in *THE NEW YORK REVIEW OF BOOKS*, Nov. 23, 1975 at 3, of the publication of the most intimate letters written by the young James Joyce to his wife.

The "sanctity of the private" should remind us of piety. See text Section V *infra*. We should also be reminded that Justice Douglas could speak of "the sacred precincts of marital bedrooms" and of marriage as being "intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 485, 486 (1965). (On privacy and sexual relations, see AUGUSTINE, *CITY OF GOD* (Baltimore: Penguin Books, 1976) at 245-46, 577, 579-80, 581-82, 586-87, 590f). Certainly, we should be reminded that the relation of "prurient curiosity" to invasions of privacy has long been recognized. See e.g., Warren & Brandeis, *supra* note 2, at 196, 220. See also notes 8 *supra* and 47 *infra*.

The Ann Landers column in the *Chi. Sun-Times*, May 1, 1977, (see section entitled "Living") at 4, col. 1 is largely devoted to "the questions [put by journalists] that don't need to be answered." Compare, at page 15 of the same section, another article in which such intimate questions are thought fair game for the journalist. (It should be added that features such as the Ann Landers column have helped break down resistance to the public discussion of intimate matters. A "natural" culmination may be seen in a report in the *Chi. Sun-Times*, May 15, 1977, at 2, col. 2: "Two Massachusetts Institute of Technology coeds have created a campus furor by publishing a 'Consumers Guide to MIT Men' in which they rated the sexual performances of 36 male students by name, awarding each from four stars to none.") For a discussion of the concept of "an ultimate sanctity of the individual as individual," see *THE CONSTITUTIONALIST*, *supra* note 3, at 734.

On the need for a cautious approach to anti-pornography legislation see 123 CONG. REC. E3059 (May 17, 1977). See also, *HUMAN BEING AND CITIZEN*, *supra* note 5 at 290; H. BLACK, JR., *supra* note 13, at 184-86; note 52 *infra*.

26. See, on the "self," Essay No. 7, "In Search of the Soulless 'Self,'" in *HUMAN BEING AND CITIZEN*, *supra* note 5, at 87. Much is made of a "right to one's personality" and of "an inviolate personality" in Warren & Brandeis, *supra* note 2, at 205, 207, 211 & 213. (Consider *persona*, the mask behind which there may be nothing?) "Self," "personality" and "individuality" seem to be terms intimately related to one another. Compare note 28 *infra*. GOETHE'S *SORROWS OF YOUNG WERTHER* celebrates the emotional revelations of the private individual; AUGUSTINE'S *CITY OF GOD* can speak of pride and the rule of self (see, e.g., *id.* at 5, 404-05, 410, 471, 477, 551-52, 555, 572-73, 575, 590, 592-93, 852, 857, 891, 1022, 1065; compare *id.* at 247, 253, 285, 293, 359-60, 415, 487, 510, 1022f). (Andy Capp can be

But it is not this threat to the private by self-indulgence which is central to discussions today of the problem of privacy. Rather, the principal threat is said to be posed by the "prying" of large, impersonal government agencies and by non-government organizations (including the mass media) which are themselves so important and so pervasive as to have many of the powers and effects of government. Thus, government and government-like intrusions are dreaded as threats to the precious individuality of the self.²⁷

told by his wife, in the comic strip of Mar. 20, 1977, "You've got no consideration for me. All you think about is self, self, self.") And a baseball player reports:

Losing breeds individuality, and that's the big difference I noticed [at Oakland]. When I was with the Cubs the first time, you might be in the bullpen cheering out loud for your guy on the mound to do well, but down deep, maybe you were hoping he'd get rocked. That's selfishness. In Oakland, there wasn't any of that, and there were a lot of guys who didn't play. But it was a team, everybody pulling for everybody, and that's why it worked.

Chi. Tribune, Mar. 25, 1977, § 4, at 2.

Consider also, Milton Mayer's observation in his article entitled *Defense of Dialogue*, THE CENTER MAGAZINE, Jan./Feb. 1977, at 12, 14:

. . . What disheartens dialogue . . . is (a) the demand for the immediacy of the relevance and (b) the need to exclude the time and the place in favor of the person. If it didn't happen within his little span of individual experience, it didn't happen. Others are bent, like him, on finding themselves, but the possibility of communication (much less communion) among them is negligible because each is lost in his own immediate forest. Cut off from the total stranger next to him, he is, of course, cut off from all the total strangers who have gone before him. His only reference point to goodness, truth, and beauty is the eye of the beholder, individuated, incommunicado.

See text Section VII *infra*.

27. A man in the country concludes, "I'm going to get my solitude and rural peace in the only place where they can be found in France, a fourth-floor apartment off the Champs Elyseés." STENDHAL, RED AND BLACK 185 (New York: W.W. Norton & Co., 1969). But may not solitude (or privacy) sometimes be purchased at the cost of humanity? Consider ROUSSEAU, THE FIRST AND SECOND DISCOURSES 132 (R. Masters, ed., New York: St. Martin's Press, 1964):

In fact, commiseration will be all the more energetic as the observing animal identifies himself more intimately with the suffering animal. Now it is evident that this identification must have been infinitely closer in the state of nature than in the state of reasoning. Reason engenders vanity and reflection fortifies it; reason turns man back upon himself, it separates him from all that bothers and afflicts him. Philosophy isolates him; because of it he says in secret, at the sight of a suffering man: Perish if you will, I am safe. No longer can anything except dangers to the entire society trouble the tranquil sleep of the philosopher and tear him from his bed Savage man does not have this admirable talent, and for want of wisdom and reason he is always seen heedlessly yielding to the first sentiment of humanity.

IV.

When we talk of individuality and the self, we are of course resorting once again to modern terminology — in this case to language which refers to what would once have been called “the soul.”²⁸ And in so doing we are apt to fail to appreciate, or even to notice, the role of the community in shaping us, in determining the kind of souls we have. Thus, we do not seem to realize that we may have choices in determining the character we are to have. We no longer seem to realize, for example, that our literature helps make us the people we are and that it may very much be a legitimate communal concern what that literature does and what it undoes.²⁹

Similar sentiments may be found in Nietzsche's *THE BIRTH OF TRAGEDY*. See note 51 *infra*.

Stendahl observes, at the conclusion of *RED AND BLACK* at 408: “The great disadvantage to the reign of public opinion, which does achieve *freedom*, is that it meddles in matters where it does not belong, for example: private life. Hence the gloom of America and England . . .” See note 11 *infra*.

The true philosopher, it should be added, is aware of the conditions for the community which makes philosophy possible. See notes 31 & 41 *infra*. Compare notes 33 & 35 *infra*. See also note 52 *infra*.

28. Is “self” that aspect of the soul which emphasizes particular experiences, not that which is universal and hence the same in all reasonable beings? It is pointed out in Plato's *LAW*s at 903 that creation is not primarily for man's benefit; he himself exists for the sake of the universal. See note 16 *supra*.

See, in the index for *HUMAN BEING AND CITIZEN*, *supra* note 5, the entries for “individualism,” “self” and “soul” (for example *id.* at 317 n. 4). See also *THE CONSTITUTIONALIST*, *supra* note 3, at 437, 672, 691, 734, 771-73, 789, 790.

29. See Anastaplo, *Self-Government and the Mass Media: A Practical Man's Guide*, in *THE MASS MEDIA AND MODERN DEMOCRACY*, (H. Clor ed. 1974) (an extended argument for the total abolition of broadcast television in the United States). Compare Sharp, *Self and Soul*, 2 U. CHI. LAW ALUMNI J. 29, 30 (1976) (a review of *HUMAN BEING AND CITIZEN*). See also notes 7 *supra* and 30 *infra*.

I had occasion in December 1976 to prepare the following assessment of the American Civil Liberties Union (a most useful association):

One critical problem with the A.C.L.U. is that it promotes a sense of continuous crisis. If one is not able to appreciate the remarkably good shape civil liberties are in today, one may not be able to recognize and respond properly to truly serious threats when they again develop.

Another critical problem (and, indeed, a crisis worth taking seriously) is that the A.C.L.U. does not address itself to the steady deterioration among us in language, in the communal sense of discipline, and in authoritative traditions. That is, it does not recognize any obligation to concern itself with the character appropriate to a people entrusted with unprecedented powers of self-government.

See notes 11 *supra* and 51 & 52 *infra*.

To speak of a legitimate communal concern is particularly difficult in times when a foolish war has made the community even more questionable than it would normally be in an age which finds individuality in the ascendancy.³⁰ But is not the tendency to encourage everyone to look out for himself apt to promote an unhealthy and irresponsible sense of privacy? Is not the emphasis apt to be placed *not* upon what is aimed at — the full development of the human being — but rather upon what is to be avoided? Such an emphasis is not likely to contribute to a social order in which the human soul can truly flourish.³¹

What *is* to be avoided? Perhaps, most of all, there is among us the desire to avoid the feeling that there is no way of escaping surveillance. The computer, of which so much is heard in privacy discussions, reinforces the feeling in modern life that there is no place to hide.³² The realization of this may make us, more than

30. For a discussion of this war see Essay No. 12, "Vietnam and the Constitution," in *HUMAN BEING AND CITIZEN*, *supra* note 5, at 151. A society which sacrifices community to mere individuality can undermine significant individuality itself:

The development of society [since Wordsworth] was making life, for the great mass of men, more and more uniform, and it has since made poetry, a few centuries ago known and enjoyed in every peasant community, a thing which is written for the few, while the mass of the people now read the news and go to the cinema, or sit before a television set.

E. MUIR, *THE ESTATE OF POETRY* at 7 (1962). (What "sit[ting] before a television set" can mean should be evident upon considering the difference between watching a baseball game on television and seeing it at the ball park: at the park one can choose and is able to follow the more subtle developments of the game; the camera, on the other hand, emphasizes the more easily observable and hence more public "action." See notes 7 and 29 *supra*. See also C. Lasch, *The Corruption of Sports*, *THE NEW YORK REVIEW OF BOOKS* 24-25 (Apr. 28, 1977)).

31. An emphasis on what is to be avoided reminds one of Thomas Hobbes and, behind him, Lucretius. Does an excessive concern with self-preservation lead to indulgence in self-expression (and hence to sentimentality)? See *THE CONSTITUTIONALIST*, *supra* note 3, at 171-73. Compare Hobbes' *LEVIATHAN* in chapter 46: "And this private measure of good, is a doctrine, not only vain, but also pernicious to the public state." (This is said in the context of a discussion which distorts the Aristotelian teaching of the definition of good and evil. See text Section VII *infra*.)

It is the full development of the human being, in which the entire community somehow shares, which justifies, if anything does, the philosopher's recourse to the private life. See *PLATO, REPUBLIC* 330a. See also notes 23 & 27 *supra* and 41 & 51 *infra*.

32. One is reminded, of course, of *GEORGE ORWELL*, 1984. See also note 12 *supra*. The Illinois Privacy Commission commented:

It should be emphasized that the concern today for privacy and the need to protect the individual against improper use and dissemination of personal information about him remain whether or not the information is computerized. But

was once true, *want* to hide. Of course, the citizens of ancient communities were very much in public; they were quite well known to one another. But there were at least two critical differences from our circumstances today. Those citizens had never had nurtured in them the same sense of privacy we have.³³ And those citizens seem to have had the feeling that they knew better than we feel we know ours, the government by which they were ruled (even when their government was the most repressive in practice and our government has been the most benevolent in intention).

In a genuine community, one can put up with considerable gossip and nosiness. Indeed, these aggressive forms of caring may even be useful, in that they help to promote moral standards and to protect salutary conventions. But we do not want gossip to become institutionalized and turned into "hard facts," into data which can be filed away and given official sanction. There is about this something cold-blooded, inhuman and hence inaccurate and misleading. Intimacy is undermined and we become strangers to one another.³⁴

the widespread and rapid growth of computerized information systems—systems which increase considerably our ability to collect, store, manipulate and disseminate information—has dramatized the urgent need to adopt protective regulations.

Furthermore, the current state of computer technology is such that the information storage and retrieval capabilities of computerized systems presently operating far surpass developments in control techniques, especially with respect to processing from remote data entry terminals. Consequently, it may often be technologically impossible for many automated information systems to comply with existing or proposed legislative controls. The representations as to safeguards made on behalf of some systems may not be presently susceptible of independent verification. In short, the controls anticipated by many legislative proposals go beyond existing computer practices and, as to certain problems, beyond existing technology.

FINAL REPORT, *supra* note 1, at 14-15. (This passage continues in note 13 *supra*). See also THE NEW YORKER at 35 (Aug. 22, 1977).

33. Our sense of privacy may go back, ultimately, to the Christian notion that each of us is responsible for the salvation of his immortal soul. Compare notes 15 *supra* and 39 *infra*. Consider the relation between respect for privacy and the status of virginity since the advent of Christianity. Compare Thomas Hardy's poem, "The Ruined Maid."

"It was, no doubt, difficult for so great a philosopher [as Porphyry] either to acknowledge all this society of demons or to censure them with confidence, whereas any Christian old woman would have no hesitation about the fact of their existence, and no reserve about denouncing them." AUGUSTINE, CITY OF GOD 387. See also *id.* at 404-05, 498-500, 561, 594, 854-57, 879, 891, 971-74, 979-82, 1065, 1068, 1089-90. Compare notes 27 *supra* and 41 *infra*.

34. Oral gossip seems to be bearable. See Warren & Brandeis, *supra* note 2, at 196, 217.

But we are, by and large, prosperous and pampered strangers. That is to say, we *do* want many of the benefits of the technology which threatens both our sense of community and the sense of privacy with which we seek to compensate for the loss of community. Certainly, it does not seem likely that men will deliberately dismantle the technology which makes them so comfortable, especially in circumstances where that technology also contributes to their defense against other men who have an advanced technology of their own.

And so desperate measures are resorted to in an effort to have both modern technology and the old-fashioned sense of community. The most radical Twentieth Century experiments to this end have not been happy ones, however illustrious some of their supporters have been. Indeed, they have even been inhuman — perversely and deeply inhuman — in their efforts either to mechanize the community or to subject technology to complete community control.³⁵

Be that as it may, it should be evident from what I have said that the really serious problem today may not be the invasion of privacy (unsettling though that may be) but the undermining

Has privacy become for us something of a substitute for intimacy? If, because of our numbers and mobility, we cannot have solid knowledge of one another — if we cannot be properly known — do we prefer “to be let alone”?

And yet there *is* much to be said for our technology. I, for one, continue to marvel at how easy it is to rent a new automobile for days or weeks at a time. That is, one can be entrusted with the automobile (sometimes within a matter of minutes) by strangers who believe themselves to have readily available to them reliable data with respect to one's trustworthiness. The technology which makes such data available is something we have become quite used to. Indeed, this technology has become almost a second nature for us. Such familiarity means, among other things, that one can drive thousands of miles without having to honk one's horn — or having had to be honked at. (Consider, on the uses made of technology to recover some of the privacy that technology has stripped us of: “The one thing whose efficacy I'm dubious about in the Carter proposals,” says the editor of the *Privacy Journal*, “is the plan to increase the gas tax in order to promote car pooling and the use of mass transit. A lot of people are going to be willing to pay an extra fifty dollars a year for the privilege of driving to work by themselves. That's because a lot of people have their families at home and work in offices where the partitions don't run all the way to the ceiling. Driving to and from work is the only privacy many people have.” *THE NEW YORKER*, at 30 (May 30, 1977)). See notes 43 & 50 *infra*.

35. See, in the index for *THE CONSTITUTIONALIST*, *supra* note 3, and for *HUMAN BEING AND CITIZEN*, *supra* note 5, the entries for Martin Heidegger. For a reminder of what an excessive regard for “community” can do to education, see Swearer, *Higher Education in Contemporary China*, *THE KEY REPORTER* 2 (Winter 1974-75). See note 27 *supra*.

among us of a sense of community. And what *community* is and should be depends, in turn, upon a sound awareness of what the human soul is like, what it needs for its nurture, what it looks like in its perfection.³⁶ But it is difficult, in an age which has so spectacularly devoted itself to the conquest of nature (for that is what our technology means),³⁷ to speak effectively of the human soul and of right and wrong — for these things do depend upon an idea of and a respect for nature. The nature of the soul, the nature of reason and the nature of morality have to be dealt with.³⁸

All this is *not* to say that we should not take seriously the privacy problems we confront. It *is* to suggest that those problems should be seen for what they are, symptoms of even deeper problems, problems which may be inevitable so long as we follow (for good reasons as well as bad) the way of life we now happen to have. It is also to suggest that the standards to be applied in these matters are not derived, ultimately, from what we know as “the right to privacy.”

It is to these suggestions I now turn by returning to the ancients who did *not* speak much (if at all) of privacy.

36. It has been said, “This is what Abraham did. He forsook community and deception to live with Truth in solitude.” A. HESCHEL, *A PASSION FOR TRUTH* 21 (1973). See also *id.* at 322. But once Abraham did whatever he did, in an authoritatively dramatic way, he could then form an enduring community? See *id.* at 74, 227. See note 42 *infra*.

37. On the conquest of nature see Berns, *An Introduction to the Political Philosophy of Francis Bacon*, (Ph.D. diss., The Univ. of Chi., 1957). See also, 117 CONG. REC. H12557 (Dec. 14, 1971); 120 CONG. REC. E6228 (Oct. 2, 1974); J. CROPSEY, *POLITICAL PHILOSOPHY AND THE ISSUES OF POLITICS* 221f, 252f (1977).

38. This discussion anticipates Sections VI and VII *infra*. I observe, in the concluding passage of a talk, “Victims and Vices in Mary Shelley’s *Frankenstein*” (May 14, 1977):

Frankenstein’s presumptuous enterprise covers some seven years. On the other hand, [the narrator’s] enterprise — the period covered by his letters home about his mission — takes some nine months. That is, Frankenstein’s story [about his creation of the monster and the consequences of that creation] is set in the frame of that nine-month experience of the narrator. One should be reminded here, of course, of the normal gestation period for bringing forth new human life. (This does not seem to have been noticed by the critics, evidently because they have not taken seriously enough the “frame” of the story.) Thus, it can be said, the nine-month frame of the story is a tacit reaffirmation of the female principle in human relations and, indeed, of nature and the nature of things

See note 20 *supra*.

V.

The ancients, I indicated at the outset of these remarks, were not by and large private men. They were members of communities. They were citizens. It has not been the citizen's way of addressing public issues to put them in terms of the right to privacy.³⁹

The ancient citizen, when he found himself in conflict with his community, invoked *not* the right to privacy but rather (in most cases) one of three things: the family, nature or the divine. All three of these have become suspect among us, as has the community itself. Family ties have been undermined by modern mobility and by democracy (which teaches children that they can say and do to their parents what their parents say and do to them);⁴⁰ the philosopher (the student *par excellence* of nature) has been confused with the intellectual (who tends to be irresponsible, relativistic and determinedly optimistic);⁴¹ and the gods are either so diminished or so "dehumanized" and hence undisciplined and undisciplining as to have become inconsequential.⁴²

39. Is *privacy* to the bourgeoisie what *patriotism* is to citizens? Does the desire for privacy become extreme, against the community, only after the sense of community breaks down (that is, only after the community changes radically in character)? See note 18 *supra* and note 40 *infra*. Privacy may also rise in importance as religion declines — but this may be partly because those who exercise power become "uninhibited." See THE CONSTITUTIONALIST, *supra* note 3, at 688, 782. Does privacy appeal to and reinforce the sense of worth that certain religions can better minister to in most people? See notes 33 *supra* and 50 *infra*.

See Berns, *Two Old Conservatives Discuss the Anastaplo Case*, 54 CORNELL L. REV. 920, 921 n. 4 (1969); Bloustein, *The First Amendment and Privacy: The Supreme Court and the Philosopher*, 28 RUTGERS L. REV. 41 (1974). See also notes 45 & 46 *infra*.

40. Shame and awe (note 17 *supra*) may depend upon the family. See note 20 *supra*. We have seen the right to privacy, which may have originally been a right exercised by the family against "the others," routinely invoked by the child against his own family. See ARISTOPHANES'S CLOUDS. See also notes 16 & 39 *supra* and note 42 *infra*.

41. On the limits of intellectuals see my book review in 9 SW. U. L. REV. 273 (1977). See also Anastaplo, *Passion, Magnanimity and the Rule of Law*, 50 SO. CAL. L. REV. 351 (1977). Philosophy supports resistance to the demands of government (or of government-like organizations) both for the sake of the common good and for the sake of philosophy itself. Thus, political philosophy provides trustworthy grounding for those challenging the community's judgment in the name of better government. (This is reflected in the Declaration of Independence and its right of revolution.) On the other hand, philosophy in itself is concerned about the conditions for philosophizing (and for this, some privacy, at least for the student of philosophy, is critical). See White, *supra* note 2, at 194f. See also notes 11, 23, 27 & 31 *supra*; notes 51 & 52 *infra*.

42. In the best of times, family, philosophy and the divine more or less cooperate with

It is instructive and salutary to try, in every case where the right to privacy is invoked today, to determine how the problem involved would have been addressed by the thoughtful citizen heretofore. The various things which we gather together under the banner of "privacy," the ancient citizen might have seen as raising the problem of love or the problem of wisdom or the problem of piety. He might, if pressed, have even reduced all these to the problem of wisdom, but wisdom as concerned primarily with the virtue of justice.⁴³ Such wisdom understands and makes due al-

each other under the aegis of the community. See on shame and awe, note 17 *supra*. (What is the relation between deception and community? See PLATO, *REPUBLIC*, 414-15; also note 36 *supra*.) I have had occasion, in a recent letter to a social scientist, to make these observations:

. . . A respect for evidence, it seems to me, should make one realize how difficult it is to pass judgment on what happens in others' families. Marriage, as you also must realize, is most difficult to assess, and to assess with propriety, from the "outside."

Be that as it may, it can be a mistake to make too much of happiness (as ordinarily understood) in assessing a prospective marriage. Indeed, it may be closer to the truth to say that the critical consideration (in the arrangement of any marriage) can well be something as old-fashioned as courtesy. This can be vital to domestic tranquillity (among the various parties involved) and hence to the enduring happiness of the couple itself.

Courtesy, in turn, may be related to the notion of piety. But now, I fear, I expose myself as hopelessly old-fashioned.

Curiously enough, the problem of piety may also be of some importance to the capital punishment issue [we have been discussing]. Consider in this connection my tentative opinions on the subject, as suggested in the enclosed review of Elmer Gertz's *To Life*.

(For the Gertz review, see note 52 *infra*.) The courtesy referred to is particularly critical in one's dealings with one's elders. Discourtesy can be seen, for example, in the self-centered replacement of one set of elders or "authorities" (determined by nature) by another which is more permissive or less challenging. See *HUMAN BEING AND CITIZEN*, *supra* note 5, at xi-xii.

On the relation of obscenity to piety see *HUMAN BEING AND CITIZEN*, *supra* note 5, at 290.

43. For us, the problem of justice is perhaps most conveniently reflected in our understanding of property. What property can mean to us is suggested by the fact that a San Antonio woman could arrange to have herself buried "in her best lace nightgown and seated in her Ferrari." *Chi. Tribune*, May 20, 1977, § 1, at 1, col. 2. It is also suggested by the following comment by the Illinois Privacy Commission in *FINAL REPORT*, *supra* note 1, at 48:

Financial disclosure requirements came in for repeated discussion by the Commission as it received inquiries and complaints by individuals who believed that the required disclosure was a serious invasion of their privacy. Although the Commission recognizes the need to promote confidence in the integrity of public servants, it is obliged to wonder whether the present financial disclosure requirements discourage many worthy citizens from government service and whether

lowance for the nature of things, including a recognition by reasonable men of the proper place in a community for divine worship and for the family.⁴⁴

Thus, one discovers, as one listens to discussions of particular problems today, that underlying invocations of the right to privacy *are* certain old-fashioned notions about love (or desire for life) and wisdom (or justice) and piety (or honor), notions which it may no longer be fashionable to make explicit but which nevertheless continue to have some salutary effect in a decent community. To invoke privacy considerations may not be the best way to discuss such problems — for privacy considerations are likely to be most individualistic in their tendency and to be isolated from the centuries of disciplined analysis accompanying the more old-fashioned standards. Even so, the invocation of privacy considerations may be one immediately practical way of discussing certain problems, inasmuch as people *can* be induced to respond sympathetically to this approach to contemporary problems. In a sense, then, fire can be used to fight fire.⁴⁵

they are unduly intrusive with respect to many of the categories of public servants now subject to them

Consider the attempt, in Warren & Brandeis, *supra* note 2 to work from traditional property concepts.

On the relation of property to liberty (and hence to privacy?) see Anastaplo, *Book Review*, 9 Sw. U.L. REV. 273 (1977); note 34 *supra*. See also THE CONSTITUTIONALIST, *supra* note 3, at 213-17, 672.

A modern Greek proverb reminds us of one of the intimate charms of property: "In another's house, one is a blind man." See also THUCYDIDES, PELOPONNESIAN WAR II 3-4.

We should be reminded as well of the warning implicit in the opinion of the Court in *Breard v. City of Alexandria*, 341 U.S. 622, 625-26 (1951):

All declare for liberty and proceed to disagree among themselves as to its true meaning. There is equal unanimity that opportunists, for private gain, cannot be permitted to arm themselves with an acceptable principle, such as that of a right to work, a privilege to engage in interstate commerce, or a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose.

See notes 8 & 16 *supra*.

44. For a suggestion of the tension between divine worship and family ties, see PLATO, EUTHYPHRO. Compare notes 40 & 42 *supra*.

45. The public is vitally interested in the private in two ways: it wants to see it protected (for some public, as well as for private reasons); but it also wants to see it (that is, to invade it, if only for titillation). Thus, people are often willing, if not eager, to see someone else's privacy diminished. See, e.g., M. Royko, "That 'nothing to hide' game," Chi. Daily News, Mar. 31, 1975, § 1, at 3, col. 1. Anne Morrow Lindberg has observed that "fame" may be "a kind of death." Chi. Sun-Times, Jun. 25, 1977, § 1, at 35. See

The thoughtful citizen distinguishes, however, between rhetoric which takes due account of circumstances, on the one hand, and the standard of virtue and happiness to which that rhetoric should be dedicated, on the other hand. We are, I have suggested in this introduction to the public interest in privacy, more apt to speak and act responsibly on behalf of a decent community if we realize both the limitations of appeals to privacy and the reason why such appeals may be somewhat effective today.⁴⁶

notes 8 *supra* and 47 *infra*.

Even so, privacy causes do tend to arouse support that cuts across traditional political differences. (Perhaps this is partly because abandonment of the old way is another facet of the modern desire for privacy: that is, we want to be able to "live our own lives." See note 51 *infra*. Consider, for example, how the American Civil Liberties Union and one of its severest critics can team up on occasion. NATIONAL REVIEW 218 (Aug. 29, 1975).

During the 1940's and 1950's a right to privacy (in the form of the privilege against self-incrimination) was sometimes invoked as protection against attempted invasions by government investigators of the right to freedom of speech. Thus, the more self-centered Fifth Amendment was successfully resorted to in place of the First. See, on those troubled times, HUMAN BEING AND CITIZEN, *supra* note 5, at 105-114, 283-88; THE CONSTITUTIONALIST, *supra* note 3, at 331-418.

In any event, one *can*, in the course of privacy discussions, deal plausibly with other, even more important, matters.

46. On privacy and the law, see Kurland, *The Private I: Some Reflections on Privacy and the Constitution*, 10 UNIV. OF CHI. RECORD 107 (July 19, 1976). It would require another article to develop the salutary case to be made against the mode of constitutional interpretation and legal argument (orthodox though it may be) employed by Mr. Kurland in his useful article. A series of quotations from his article should suffice to suggest what I consider in need of corrective comment:

[(a)] In whatever form, strict construction has never been anything more than a rhetorical tool. In part, this is due to the fact that many of the phrases of the Constitution do not lend themselves to simplistic readings . . . Constitutional limitations, like all law, are a reflection of a society. The law does not create the society, society creates the law. (*Id.* at 110).

[(b)] The arcane aspect of American constitutional law, then, derives from the fact that the Constitution is largely a document of the imagination but is always treated as if it were real. (*Id.*)

[(c)] And the very notion of the national Constitution is that there are aspects of individual behavior that no government, federal or state, could subject to control. To the best of their not inconsiderable ability, the authors of the Constitution and the Bill of Rights detailed those areas. (*Id.* at 118).

[(d)] If the Declaration of Independence which we are so assiduously celebrating this year were a constitutional document . . . (*Id.* at 116).

[(e)] Every law that compels a person to do what he would not choose to do is or should be constitutionally suspect. (*Id.* at 119).

[(f)] For, from the beginning, this country has seen the contest between the ideals of Jefferson and the principles of Hamilton resolved in favor of the latter. (*Id.* at 123.).

To assume as I do that there are standards which we share with ancient citizens assumes also that there is in most men a deep-rooted sense of justice, a sense of justice which tends to have its effect (if one has been raised in a decent community) despite the relativistic opinions of the day. That is, we are again obliged to notice the dictates of nature in human affairs.⁴⁷

The more we examine the enduring standards invoked by men — the more we examine those standards in the light of what the common good calls for in particular circumstances — the more

[g] Excuse me, my biases are showing. (*Id.* at 121.).

Compare, Anastaplo, *The Declaration of Independence*, 9 ST. LOUIS U. L.J. 390 (1965); THE CONSTITUTIONALIST, *supra* note 3, at 15-16, 454, 582-84, 764; "American Constitutionalism and the Virtue of Prudence" in ABRAHAM LINCOLN, THE GETTYSBURG ADDRESS AND AMERICAN CONSTITUTIONALISM (L. deAlvarez ed. 1976). Compare also, Wollan, Jr. *Crosskey's Once and Future Constitution*, 5 POLI. SCI. REVIEWER 129 (1975); H. JAFFA, CRISIS OF THE HOUSE DIVIDED (1959); H. JAFFA, THE CONDITIONS OF FREEDOM 149f (1975); West, Book Review, 9 SW. U. L. REV. 278 (1977); M. Bradford & G. Anastaplo, "Slavery and the Constitution — A Conversation," *Univ. Dallas Politics Dept. Newsletter*, 1 (Spring 1977).

A recent review of Supreme Court privacy rulings may be found in *Carey v. Population Services Int'l*, 45 U.S.L.W. 4601 (1977). See also *Nixon v. Administrator of General Services*, 45 U.S.L.W. 4917 (1977); Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670 (1973); note 39 *supra*.

There is now available the Report to Congress and the President by the Privacy Protection Study Commission created by the Privacy Act of 1974. PERSONAL PRIVACY IN AN INFORMATION SOCIETY (1977).

47. It may be of some significance that the Illinois Privacy Commission devoted itself primarily to the development of proposed legislation, not to straightforward educational efforts. The recourse to lawmaking in such matters may be distinctively modern, particularly since it is more generally assumed today than formerly that whatever the community does not trouble to proscribe by law is entirely up to the individual to do with as he pleases. See HUMAN BEING AND CITIZEN, *supra* note 5, at 294.

On the other hand, the Commission did refer to certain problems (for example, with respect to "lie detectors and other surveillance techniques") as "touch[ing] upon the most elementary, perhaps even natural, sense of privacy . . ." FINAL REPORT, *supra* note 1, at 48. See also THE CONSTITUTIONALIST, *supra* note 3, at 308-10. Compare J. CROPSY, POLITICAL PHILOSOPHY AND THE ISSUES OF POLITICS 181-82 (1977).

A revealing photograph of an actress is circulated without her knowledge. She protests — and the protest is duly reported by a national magazine which also publishes the offending photography, thereby giving it much more circulation than it originally had. NEWSWEEK, May 23, 1977, at 65; June 13, 1977, at 9 (a reader protests). See notes 8, 13, 25 & 45 *supra*. See also Kalven, *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 1966 L. CONT. PROB. 326.

Would not privacy abuses be somewhat moderated in this country if journalists were better trained? See I. SPARROW, CONTROVERSIAL ESSAYS, 21 (1966).

likely we are to be responsible (as well as effective) in our invocations in public councils today of "the right to privacy." In addition, we are more apt to be able to understand what is really going on — and thereby better able to know ourselves.⁴⁸

VI.

We can, in our effort to know ourselves, consider further what human nature means and how the Greek and Biblical teachings already referred to bear on that meaning, by examining in some detail a poem by Edwin Muir. We can consider, that is, how one of the best poets of the century draws upon that fusion of the

48. The Illinois Privacy Commission, in introducing its proposed Public Records Access Act, made these observations:

A self-governing people needs to know, and to believe itself to know, what its government is doing. This requires that there routinely be made available to it information which is held and used by public servants. Such information is also needed if citizens are to be able to protect their rights intelligently, including their rights to privacy, and to make proper use of government services.

Public servants, in exercising the powers and in performing the duties entrusted to them, depend upon the confidence of the community. They cannot be sure of such confidence if the people at large remain uninformed, or believe themselves to be uninformed, about what is being done in government and why. The known availability of public records can do much to remove causes of suspicion and cynicism in a community, thereby allowing public servants to get on with their work.

FINAL REPORT, *supra* note 1, at 40. The Commission goes on to explain:

The bill is different in several important respects from comparable legislation elsewhere. There is in the bill substantial provision for the personal privacy of citizens, except where there is a critical public interest in disclosure. The problem of how to protect personal information from inappropriate access by the general public is dealt with inadequately by all of the legislation of this type reviewed by this Commission. For this reason, the manner in which the bill deals with the personal privacy interest should be emphasized.

Thus, unlike the other exemptions contained in the bill — which for the most part may, but need not, be invoked by public officials in denying public access to certain documents —, this bill *prohibits* the public inspection or copying of information "the disclosure of which would constitute an invasion of personal privacy unless there is a compelling, demonstrable and overriding public interest in disclosure or such disclosure is expressly required by applicable law or is consented to in writing by the individual subject of such information." Furthermore, individuals may file suit in Circuit Court for relief against a violation of the provision protecting personal privacy.

Id. at 41-42. See also note 8 *supra*.

See Belair, *Less Government Secrecy and More Personal Privacy?* CIV. LIB. REV. 10 (May/June 1977); Miller, *The Privacy Act: More Confusion than Protection*, THE PROGRESSIVE 30 (May 1976).

Hebrew and Greek sources — the Biblical and the philosophical sources — which we know as Western civilization:⁴⁹

The Animals

They do not live in the world,
Are not in time and space.
From birth to death hurled
No word do they have, not one
To plant a foot upon,
Were never in any place.

For with names the world was called
Out of the empty air,
With names was built and walled,
Line and circle and square,
Dust and emerald;
Snatched from deceiving death
By the articulate breath.

But these have never trod
Twice the familiar track,
Never never turned back
Into the memoried day.
All is new and near
In the unchanging Here
Of the fifth great day of God,
That shall remain the same,
Never shall pass away.

On the sixth day we came.

Much is made in the poem of "they." Indeed, almost all of the poem is devoted to the unnamed and unspeaking "they." Only in the last line of the poem does someone other than "they" come upon the scene: "On the sixth day we came." The narrator, it seems, is one of those who came on the sixth day.

Little is said explicitly about "we." But everything that has gone before is, to some extent, about "we" as well as about "they." We are the ones, for instance, who do live in the world, who do have access to the word, who make use of names and hence who know of and know death. Indeed, it can be said, we

49. E. MUIR, COLLECTED POEMS 1921-1951 at 192 (1953). See note 30 *supra* and note 50 *infra*. See also THE CONSTITUTIONALIST, *supra* note 3, at 556.

and only we are the ones who really live. In saying this, however, I anticipate our careful reading of this poem.

Here, again, are the first two lines:

They do not live in the world,
Are not in time and space.

The subsequent twenty lines — that is, all the remaining lines but the last one — can be understood as an explication of these first two, a development of what is said here. When it is said that *they* do not live in the world, does that mean that they do not live at all? The “world” is referred to, not the “earth;” perhaps they *are* associated with the earth, something which may be less the product of thought, of consciousness, than is the world. Perhaps, also, time and space are dependent on intellect or perception. Does genuine living take time and require space?

To say that they do not live, however, is not to say that they have no existence at all. Existence, the barest of existence, is suggested in the next line:

From birth to death hurled

There is a beginning and end for these things — do they themselves perceive birth and death? — but there is for them no movement on their own, no order, no serenity, no moment for reflection. To be hurled suggests what happens to something inanimate, such as a rock.

No word do they have, not one
To plant a foot upon,
Were never in any place.

They do not, it seems, stand or walk: they have no place to plant a foot upon. Perhaps they do not even have a foot. (Paws and hooves are not really feet?) Words, it seems, are critical for standing. Genuine existence — being somewhere and sometime — it also seems, depends on words. Without the understanding that words make possible, and stand for, there can be no meaningful existence.

This is spelled out in the seven lines which immediately follow. The first two lines of this most abstract stanza of the poem read:

For with names the world was called
Out of the empty air,

This takes us back to the first line: there is, without words — without names — no world for them to live in. *Genesis* seems to be drawn upon. Was the original Creation a kind of naming? Certainly, Adam's naming of his fellow creatures is called to mind. (Is to call something to mind to make it or only to discover it, to realize it?) The world itself did not really exist before there were names — names, those most potent of words, those words which permit identification and hence full being.

The potency of the name words, in filling the empty air, is recognized in the next line:

With names was built and walled,

That is to say, with names the world was built and walled — in this sense it was called out of the empty air. And what the world means here is indicated in the two following lines:

Line and circle and square,
Dust and emerald;

These are the things the world is made up of: circles and squares are variations of lines; emeralds are one variation of dust. These are the simple things and their most complex manifestations, things both immaterial and material, the forms and the matter, out of which the world is made. To speak of dust and emerald — and not, say, of atoms — is to speak from a human (and natural?) rather than a scientific (and artificial?) perspective.

All this prepares us for the central line of the poem and its immediate aftermath:

Snatched from deceiving death
By the articulate breath.

What, one must wonder, is snatched from deceiving death? The world, it would seem, and the things in it. The articulate breath — words, especially names — does something about death. It may not simply abolish death, but it can nullify the deception of death, if only the deception (for the inarticulate) that death is like everything else, that there is nothing special about it. That is, it may be only the articulate, and hence the knowing, who recognize death for what it is — who recognize it — and who thereby really live, if only for awhile. Thus, death, too, is named — and seen for what it truly is. Perhaps, also, unexamined death promises rest. But may not only personal oblivion follow? Names

may salvage something from such oblivion. Perhaps, as well, those who do not understand do not even know that they die: they are deceived as to — ignorant of — what becomes of them. One can somehow live only when one learns one dies? To become articulate is to have the breath of life, the spirit, added to one's material existence.

To know that one dies, to live, can mean that both past and future have meaning. Consider, however, the plight of the inarticulate. Here we return to the "they" of the opening lines:

But these have never trod
Twice the familiar track,
Never never turned back
Into the memoried day.

There is for "these" no memory, nothing truly familiar — even though all they do is trod the familiar track, repeating themselves by a kind of instinct. Indeed, there may be for them no real distinction between themselves and the track they trod, between themselves and others (whether other animate or even inanimate things). Or, put another way, they have no sense of identity, to say nothing of individuality or a sense of privacy. Or, put still another way, they never recall what they have done and they never knowingly repeat themselves, although they do little but repeat themselves.

They are all they will ever be when they begin: what they will be is intrinsic to them from the outset. It is this we call instinct. And it is this which seems to be reflected in the lines which follow:

All is new and near
In the unchanging Here
Of the fifth great day of God,
That shall remain the same,
Never shall pass away.

"New and near" are the most they can partake of "time and space." There is for them no past, no future, only the "unchanging Here." Their day, their time, is such that (for them) it never changes, it never passes away. They may pass on, or seem to, but they are replaced imperceptively and unperceivingly by others like themselves. Perhaps (one can say) it is for them the same whether they emerge from sleep or from birth.

The "fifth great day" is not really theirs, even though they depend upon it. Indeed, there are for them no days at all. Certainly, there is for them no realization of what has come before: all is always present before them. If they adapt to changing circumstances, it is not with any awareness of what or where they have been or of what lies ahead. Everything can change around them — but since they cannot make comparisons, nothing changes. Thus, they are in their changelessness God-like; but in an even more critical respect they are not God-like, for they do not understand at all.

Who "they" are is, of course, confirmed by the invocation of the fifth day. But, we should recall from the first chapter of *Genesis*, the creation of the fifth day extended into the sixth day. From the perspective of the unreasoning, however, there is no difference between the fifth and the sixth days: the fish and fowl are created on the fifth day, the land creatures on the sixth. For this reason, perhaps, it is called the "fifth *great* day of God": what is essential to that day's creation continues into the sixth day. (That the fish, fowl and land creatures are to be considered together may be seen in the fact that it is three times said in *Genesis* that they are given under the dominion of man. These three kinds of creatures share a wordless character.)

Although the land creatures came on the sixth day, things remained as they had been on the fifth day — until "we came." One price of eternity, of changelessness, it seems, is lack of development, of understanding, of what we call "individuality." And with us came, among other things, names. We are the naming creatures. We can reason (with poetry a particularly intense, beguiling and hence instructive form of naming). Not much has to be said about what happens with us: *we* can speak for ourselves. A sample of what and how we think may be found in the twenty-two lines of the poem which set the stage for the final line:

On the sixth day we came.

It is at this point, and not before, that "they" can be named by *us*. That is, it is only for the entire poem that a name can be provided, "The Animals."

Men, it would seem, can be regarded as animals with a profound difference. Or, put another way, that which is most animalistic about men (and which the thoughtless man exhibits) can be

attributed to the fifth day; that which is truly human can be attributed to the sixth day. (Does not the assignment of land creatures to the sixth day reflect the realization that they among the animals are most susceptible to, even if they are not themselves capable of, the reasoning power of men?)

Only on the sixth day do there emerge creatures capable of self-consciousness and hence of full realization. Is it not in this sense that man can be said to have been created in the image of God? Only man can imitate, if only imperfectly, what God does with that uncovering (or discovery) of the nature of things which we call creation. (Is it not such uncovering that the more persistent "invasions of privacy" attempt to imitate?)

The animals, on the other hand, are like rocks (whether dust or emerald) in one critical respect: they continue unaware, and hence unchanging, from beginning to end. This is not to say that the animals are of no consequence. Not only is animality vital to what is man, but this poet, as is evident in other poems of his, respects the animals, even preferring them in some ways to men. But there is not in animals more than the dimmest awareness of death — and hence there can be for them nothing poetic. A lively awareness of death makes a full life possible. Tragedy, one form of the poetic, helps make death enduring for most men.

I return to my remarks about the poet's use of his sources. The emphasis in this poem seems to be Greek, but within the framework provided by the Hebrew Bible. The Hebrew influence may be seen, of course, in the account of the Creation taken from *Genesis*. This account is restated, so to speak, in the opening lines of *The Gospel of John*, with its emphasis on the importance of the Word. This emphasis can be said to reflect the Greek understanding of things.

VII.

We have, in our inquiry into the problem of privacy, considered the meaning of human nature and the role played in the life of man by reason, by the power men have to uncover what is hidden from view.⁵⁰

50. To speak, as I did in concluding my commentary on the Muir poem, of "the Greek understanding of things" is to bring to mind philosophy — and this, in turn, reminds us

We have yet to consider explicitly what standards of right and wrong there may be available to guide men in their actions, including in their determinations of what *is* to be uncovered, by whom and how. It does seem that the good, upon which determinations of right and wrong depend, has become something of a problem for us.

We make much today of something called openmindedness. But should we not take care lest a civilized willingness to hear out arguments become nothing more than a perverse mindlessness?

One is asked again and again by liberated intellectuals, especially when serious matters are under discussion, "Who is to say who is right?" This tiresome rhetorical question usually implies that one is entitled to do no more than express the preferences

of the ancient struggle for supremacy between philosophy and poetry. One complaint lovers of poems, if not poets themselves, have is against those of philosophical inclinations who subject poetry to an inappropriate analysis, an analysis which draws too much on the rational and not enough on the instinctive — which draws too much (one might even suggest, speaking poetically) on the Sixth Day, and not enough on the Fifth. See NIETZSCHE, *THE BIRTH OF TRAGEDY*. Compare HUMAN BEING AND CITIZEN, *supra* note 5, at 135-38. Compare also Anastaplo, *THE ARTIST AS THINKER* (to be published by Swallow Press).

See, as bearing on Muir's "The Animals," Thomas Hardy's "Heredity;" Essay No. 17, "On Death: One by One, Yet All Together," in HUMAN BEING AND CITIZEN, *supra* note 5; Shakespeare, *THE TEMPEST*, I, ii, 1. 351-56. The following discussion by Muir bears both on poetry and on the human sensibilities required for and served by a proper respect for privacy:

. . . Now that we buy in shops shoulders of beef, loaves, chairs, beds, pots and pans, automobiles, and refrigerators, almost everything that has become necessary or convenient for us, we are eased of a great deal of labor, and have lost touch with a world of experience. I am not advocating a return to a past that has gone forever, or romanticizing the coarseness of peasant life, or its poverty and hardship. All I want to suggest is that the vast dissemination of secondary objects isolates us from the natural world in a way which is new to mankind, and that this cannot help affecting our sensibilities and our imagination. It is possible to write a poem about horses, for, apart from the work they do for us, they have a life of their own; it is impossible to write a poem about motor cars, except in the false rhetorical vein, for they have no life except what we give them by pushing a starter. The finished article is finished in a final sense; sometimes we can admire its functional beauty, but it is impervious to the imagination. This artificial world which we have made out of the world, the monotony of the work which produces it, the abundance of the distractions which vainly try to make up for that monotony — all these things, it seems to me, help to explain the depressed state of poetry, and the present neglect of it. Poetry flourishes when there is a public with a natural affinity for it.

E. MUIR, *THE ESTATE OF POETRY* 8-9 (1960). Compare note 34 *supra*.

one happens to have. To pass judgment on another — to speak of right and wrong — is considered provincial, if not bigoted.

“Right” and “wrong,” as well as “good” and “bad,” are explained away by the liberated as merely conventional ways of indicating one’s preferences, the preferences determined (for the most part, if not altogether) by one’s environment. Indeed, these advanced thinkers are incapable of any sustained argument, independent of “arbitrary” religious and legal prohibitions, against even such a practice as (to take an extreme case) a routine indulgence in cannibalism.

Such openminded people (who, of course, happen personally to abhor cannibalism and other such social aberrations) do consider themselves *thinkers*. That is, the old-fashioned respect — perhaps an almost instinctive respect — for man’s nature continues to assert itself in their implicit assumption that thinking is both possible and desirable. Thus, it is assumed proper, if not necessary, for men and women to attempt to think. Is it not also assumed that there are correct and incorrect conclusions following from the thinking one might attempt?

Many openminded people do have decided opinions critical of social injustice (including improper invasions of privacy), of bigotry, and (perhaps above all) of those who are not openminded. But why should one bother to complain about what others are (or are not) doing or saying if right and wrong are but matters of opinion, if men have no defensible basis for the choices they make about the good and the bad? Why should one bother to try to “improve” things if one’s preferences cannot be other than a matter of chance?

A matter of chance? If one’s preferences are decisively determined by one’s environment, and if one’s environment and hence upbringing are essentially matters of chance, what basis *is* there for preferring or promoting one kind of environment over another, for preferring one set of preferences over another? Will not whatever we change into be as much subject to chance (with *its* successor eventually becoming as appealing to some partisans) as whatever we may now happen to be? So, again, why bother to change things?

Why bother, if there is not something in the nature of man which demands (or at least permits) an ordering of alternatives, which suggests a hierarchy of better and worse ways of shaping,

developing and preserving both men and their communities? What sense does it make to speak of "progress" if men do not have some sense — if only a dim awareness — of what the very best would be for human beings?⁵¹

51. Genuine progress, rooted in nature and in an awareness of the good, is measured by standards which are to some extent outside (above?) individual feelings, personal opinions and the sense of self. Since, according to this understanding of progress, what is good is not merely a matter of how one happens to feel, it follows that the private should not be made much of in ordinary circumstances. That is, *privacy* does tend to be unduly self-centered: one is to be let alone to do as one pleases. See notes 39 and 45 *supra*. See also *THE CONSTITUTIONALIST*, *supra* note 3, at 777-78. (Philosophy, on the other hand, means that one who is properly equipped should be allowed, if not even obliged, to work toward certain goals. See notes 23, 31 and 41 *supra*.)

A talk entitled "Martin Luther King and the Soul of America", that I prepared for a University of Chicago conference on April 7, 1968 (three days after Mr. King was murdered), bears on the meaning of progress and its relation to nature and the good:

Much remains to be done. It is said, moreover, that little if anything has been done to secure for all Americans the rights to which all are entitled. When the impatient young say this, one can understand their mistake. When their elders say this, they are not only mistaken, they are irresponsible: for they not only mislead the young but they even deny the possibility of any progress at all, since they thereby deny there are standards by which the direction of permanent change can be charted. To disparage what has already been done will eventually discourage further deliberate effort since it will undermine among us faith in the power of reason to shape our affairs.

We have heard much the past few days of our "sick society," of American repudiation of its principles, of the inability of the United States to face up to its serious problems. It is natural, in one sense, for men to believe the worst when one of their best is murdered. But it is also natural, in the finest sense, to examine things properly so as to be able to understand what the circumstances are in which one finds oneself.

Had someone in Martin Luther King's position in his community been murdered a generation ago, there would not have been the public response there this weekend: the President might not even have noticed the event; certainly, the country would not have stopped, with flags at half-mast, to mourn his death; the white mayor of Atlanta would not, immediately upon hearing the news from Memphis, have driven the victim's wife to the airport. A sensitivity to Negro rights and a concern for Negro opinion compel the public response we have witnessed and which we join in our own way this Sunday morning.

Some will say that whites express grief merely to turn away anger on the part of Negroes. It is no doubt prudent to make such grief evident. But one must take care in talking about this matter lest the effort to repudiate destructive white racism legitimate and encourage black racism, which is no more fair or healthy for the community. One must take care, for instance, to challenge the repeated insistence that the murder of Mr. King has been committed by White America, that we all had a finger on that trigger, that we are all responsible for the events of this week. Such talk should remind us of the hate-twisted determination of the white racist to ascribe to all Negroes the crimes of a minority. We should

be reminded as well that Martin Luther King stood where he did in the estimation of the world in large part because of the support and respect he enjoyed in his lifetime from many white Americans.

The decisive initial steps toward Negro enfranchisement, it should be remembered, were taken by white men: by the authors of the Declaration of Independence, who proclaimed to a skeptical world the authoritative American doctrine that all men are created equal; by the authors of the Emancipation Proclamation and the Thirteenth, Fourteenth and Fifteenth Amendments, who gave that doctrine concrete application; and by the authors of the Supreme Court opinion of 1954, who have insured that the best opinion of the community stands irrevocably behind the determination to see these American constitutional principles applied. Many men—black and white alike—prepared the stage for the Court's opinion, which, more than anything else in recent years, has marked out the path the American people are now bound to follow. Desperate acts of violence by demented men, encouraged by the bigotry of others who should know better, will not change the course we must take in these matters, a now irreversible course that is reinforced by the steadily growing and increasingly self-conscious power of the Negro electorate.

Martin Luther King's great talent in his decade-long career was to exploit for his purpose the resources he had at hand, the principles of the Constitution and of the Declaration of Independence and the imagery of the Old Testament and of the New. He could do what he did because he had at hand ancient aspirations to fire an eloquence suited for his people. We, too, must make use of what we have, what we have said, and what we have done. Indeed, I know of no country which has made the progress in racial matters since the Second World War that the United States has. It is neither honest nor helpful for us—and especially for intellectuals—to debase and hence to cripple ourselves by refusing to recognize in speech how far we have come, where we are, and where we are destined to go. If one does not know what one is saying, that suggests that one does not realize what one is doing either.

The United States knows that it has to do. It also knows that it has available, despite its folly in Viet Nam, the resources with which to do it. Neither panic nor distortion of the facts is of use to us. Progress can never be as fast as one would like, because any political process worthy of free men must take into account the lingering resistance of the ignorant as well as the insistent demands of the just. If our judgments are unreasonable, we sacrifice what we could gain—and we mislead the young and the ill-informed, condemning them to a childish view of the world. The misguided adults who permitted their young to roam the streets of our cities this weekend and to destroy their own neighborhoods did their community and their neighbors a disservice. One sees here the danger of allowing to go unchallenged the irresponsible opinion that no significant progress has been made or is being made by the American Negro in the only country he has. It should be acknowledged that the efforts this weekend in Chicago by the often-negligent "establishment"—by the police and the army, by firemen and city officials—surpassed not only in service to the community but also in nobility of aspiration the activities of self-destructive rioters. We can detect a connection, in the news reports, between the "silly smile" of Martin Luther King's murderer and the senseless laughter of youngsters looting and burning. Much more worthy of praise is the effort of organized gangs of youngsters to prevent the spread of senseless destruction to their own neighborhoods. This heralds that political organization by Negroes which will secure for them their rightful share in the governing of their country.

Perhaps, then, we ought to replace openmindedness by simple-mindedness. The paralyzing openmindedness criticized here depends upon and reinforces a determined, if not suicidal, thoughtlessness. A certain simplemindedness, on the other hand, may at least have the merit of acknowledging the primacy of the reason, and hence of thinking, in human affairs.

Who is to say who is right? The simpleminded answer is, "Whoever knows what is right." But, it should at once be recognized, there are all kinds of foolish people who *believe* themselves to know what is right. Is not even this, however, a reflection of man's natural yearning for, and perhaps openness to, goodness and truth? (Beauty, I suggest in passing, may be the pleasure-inducing manifestation, often in corporeal form, of the good or of the true.)

We must distinguish, therefore, between those who know what is right and those who mistakenly believe themselves to know. It is one thing to recognize that it is often difficult to know what is right or good; it is quite another to conclude from this long-familiar difficulty that it is always impossible to know what is right or good. To recognize this vital distinction, as well as the perils of unexamined dogmatism, is to give ourselves a chance to

Mr. King preached a doctrine of dedicated non-violence—a doctrine supported in his speeches by arguments both principled and pragmatic. There is one further argument, however, which should also be noticed by anyone who cares for his Negro friends and for the soul of America, and that has to do with the dreadful vulnerability of our Negro fellow-citizens (an easily identifiable minority) if the "confrontation" in this country between black and white should really be taken to the streets. I have long doubted that provocative marches through the streets of our cities, in the name of freedom of speech, constitute a right that any community is obliged to permit to be exercised, especially where other means of communication (culminating in the ballot-box) are available. In any event, anyone of stature who is at the center of bitter controversy has the duty—for the good of his people and of his potential murderers, if not of himself or of his family—to take reasonable precautions for his physical safety. Good men have always been hard to find: We are entitled to keep them alive as long as possible, once we have been so fortunate as to discover them and to raise them up for all the world to admire. Especially is this so when, as now, much remains to be done.

See ARISTOTLE, NICOMACHEAN ETHICS 1123b3-7. See also, "Race, Law and Civilization," in HUMAN BEING AND CITIZEN, *supra* note 5; note 11 *supra*. On nuclear violence and a due regard for humanity see Anastaplo, *Book Review*, Chi. Sun-Times, June 26, 1977, at 8 (Showcase/BookWeek).

begin to understand what can indeed be known and done about human beings.⁵²

52. Such understanding, to which serious education (such as that attempted by St. John's College) should be directed, rests upon (1) an array of refined intellectual skills (as well as psychic maturity); (2) a body of carefully-sifted information (including information about the obvious and the self-evident, as well as about the apparently self-evident); and, (3) an awareness of the fundamental questions thoughtful men have always recognized to be worthy of repeated investigation.

To approach seriously what can be "done about human beings" is to direct our attention to the question of the appropriate "relation of the individual to the community." That relation is examined in a review I once had occasion to prepare of Elmer Gertz's *TO LIFE* (1974). That review follows:

Elmer Gertz, a prominent Chicago attorney and a very nice man, has written a lively account of his busy career which has been devoted "full time to the practice of law, full time to the teaching of law and full time to writing." He has in his many books and articles "tried to write with a dual purpose in mind—to give those legally trained an adequate account of celebrated litigation, and to interest laymen, completely unfamiliar with the technicalities of our craft." He has certainly succeeded in writing an interesting book which one can read with pleasure and to which one can and should return with profit to think through the many serious problems he touches upon.

Mr. Gertz's clients have included Nathan Leopold, Henry Miller and Jack Ruby. His libertarian efforts, both legal and political, have made contributions to the law of obscenity, the law of libel, civil rights litigation against police excesses, racial integration, the Illinois constitution, Chicago public housing, and (perhaps most deeply felt by him) the suspension of capital punishment. He observes that he "wanted to have cases worth winning, cases with substance and meaning beyond fees earned." This desire has certainly been realized in the course of his full and rich life.

His chapter on capital punishment, stressing as it does the arbitrariness of our recourse in recent decades to such punishment, is particularly valuable. It is there that his zest for life finds its most fervent expression—the zest of the Hebrew toast (*L'chayim*, "To Life") from which the book's title is taken. It is in this chapter also that readers may be most challenged, as Mr. Gertz would want them to be, by the general position implied in his writings on the relation of the individual to the community.

It must be noticed, first, that the more serious arguments for recourse to capital punishment in carefully defined circumstances are not faced up to by most opponents today of capital punishment. Is it mere prejudice which still disposes so many of our fellow citizens to believe that some criminals deserve to be executed, that natural justice calls for such retribution? Can such public sentiment safely be disregarded? Certainly, it is difficult to see capital punishment as "cruel and unusual" (in the sense of the Eighth Amendment to the Constitution), however plausible the argument against it may be on due process or equal protection grounds because of the highly fortuitous character of its use. Is there not a sense in which recourse to capital punishment reasserts among a people the claims of community and thereby the seriousness with which it takes its duties, its prerogatives and its vulnerability? There may be better ways for a community to express such concerns—but this one is not simply inconsequen-

Thus, we have returned to the question which, it seems to me, underlies the contemporary concern with and any useful expansion of the right to privacy: what kind of people should we want to be? Or, put another way, what kind of community is most apt in our circumstances to produce citizens and human beings who do not require special legislation to induce in them both a proper respect *for* and a responsible use *of* privacy?

tial or simply barbaric in all circumstances.

The problem of "community" is raised as well by Mr. Gertz's permissiveness with respect to obscenity. Is not the community entitled and even obliged to try to shape its citizens by supervising to some degree public arts and entertainment (as distinguished from the discussion of political issues)? Mr. Gertz recognizes the proper role of law and of public education with respect to racial discrimination: "When people learn that the law forbids discrimination, they will eventually learn not to discriminate at all. When the practice of discrimination disappears, the roots of prejudice of which it was an expression will eventually wither and die." He also recognizes the strength and integrity of the immigrants he knew as a boy and of his Jewish forebears. But does not such character depend upon a community determined and empowered to establish and maintain decent standards of sentiment as well as of action?

Mr. Gertz can speak sensitively of the many remarkable people, both famous and obscure, he considers himself privileged to have known and served. What he does not address himself to, however, is the coarsening effect among us of the new permissiveness, a coarsening which Mr. Gertz does *not* himself share. Thus, one hears today intelligent men and women casually using language, in mixed company and even at the dinner table, which would have been considered unbecoming in a barracks a generation ago. What can and should be done about such developments? What, indeed, are the rights and requirements of community?

In short, one may be usefully provoked by this libertarian book to ask: What does this gifted author understand as legitimately available to our community if it is to shape authoritatively, in the generations to come, lawyers and other citizens as human, conscientious and humane as Elmer Gertz is revealed in these pages to be?

Several aspects of matters which bear upon the public interest in privacy are usefully anticipated in this review. *See also* notes 29 and 42 *supra*.

To speak as I have on this occasion of nature is to challenge the relativistic presuppositions of many intellectuals with respect to both the truth and the good. *See* notes 27 & 41 *supra*. That is, to speak as I have is to suggest that many things are not good because they are normal but rather normal because they are good.