

# PRIVACY AND THE LAW: A PHILOSOPHICAL PRELUDE

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## I

When Justice Douglas wrote for the Supreme Court, in *Griswold v. Connecticut*,<sup>1</sup> that various constitutional guarantees create “zones of privacy,” he was quite right in pointing out that the Court was dealing “with a right of privacy older than the Bill of Rights.” Indeed, “zones of privacy” can be found marked off, hinted at, or groped for in some of our oldest legal codes and in the most influential philosophical writings and traditions.

Almost the first page of the Bible introduces us to the feeling of shame as a violation of privacy. After Adam and Eve had eaten the fruit of the tree of knowledge, “the eyes of both were opened, and they knew that they were naked; and they sewed fig leaves together and made themselves aprons.”<sup>2</sup> Thus, mythically, we have been taught that our very knowledge of good and evil—our moral nature, our nature as men—is somehow, by divine ordinance, linked with a sense and a realm of privacy.<sup>3</sup> When, after the Flood, Noah became drunk, he “lay uncovered in his tent,” and Ham violated his father’s privacy by looking upon his father’s nakedness and by telling his brothers about it. His brothers took a garment, “laid it upon their shoulders, and walked backward and covered the nakedness of their father. Their faces were turned away, and they did not see their father’s nakedness.”<sup>4</sup>

Now, at least for the moment, let us leave the Garden of Eden and the tent of the second Adam and enter a “wilderness” as projected and defined by an act of Congress of 1964. A wilderness, says the act, is “an area where the earth and its community of life are untrammled by man, where man himself is a visitor who does not remain,” and which is to be protected and managed so as to preserve its “outstanding opportunities for solitude.”<sup>5</sup> This distance from the biblical garden to the statutory wilderness may have taken thousands of years to traverse; but surely that distance and the distance between the “zone of privacy” which two of Noah’s three sons respected and “the sacred precincts of marital bedrooms,” which the Supreme Court sought to protect in *Griswold*, cannot conceptually be great. Is it even surprising that a Justice of the Supreme Court who spends much of his free time

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<sup>1</sup> 381 U.S. 479, 486 (1965).

<sup>2</sup> *Genesis* 3:7 (Revised Standard Version).

<sup>3</sup> Cf. HELEN M. LYND, *ON SHAME AND THE SEARCH FOR IDENTITY* ch. 2 (1958).

<sup>4</sup> *Genesis* 9:20-27 (Revised Standard Version).

<sup>5</sup> Wilderness Act § 2(c), 78 Stat. 890, 16 U.S.C. § 1131(c) (1964).

climbing mountains and walking through areas "where the earth and its community of life are untrammelled by man," and who obviously needs and uses whatever "out-standing opportunities for solitude" become available to him,<sup>6</sup> should find in the Bill of Rights ample accommodation for "zones of privacy"?

## II

Once a civilization has made a distinction between the "outer" and the "inner" man, between the life of the soul and the life of the body, between the spiritual and the material, between the sacred and the profane, between the realm of God and the realm of Caesar, between church and state, between rights inherent and inalienable and rights that are in the power of government to give and take away, between public and private, between society and solitude, it becomes impossible to avoid the idea of privacy by whatever name it may be called—the idea of a "private space in which man may become and remain 'himself.'"<sup>7</sup> Western Man's interest in our subject is thus accounted for.

In the history of this profound but discrete idea it is doubtful if anyone can be said to have played a greater role than Socrates—the Socrates of the *Apology*, the *Crito*, and the *Phaedo*; the philosopher who discovered or invented the soul; the philosopher who, at the end of the *Phaedrus*, prayed that the gods would give him beauty in the inward soul and let "the outward and inward man be at one."<sup>8</sup> The most dramatic expression of the identification of the real self with the soul is in Plato's report of the last few moments before Socrates drank the cup of hemlock. Crito ventured to ask Socrates: "And in what way shall we bury you?" The question amused Socrates. To bury him, he answered, Crito would first need to catch him. "'Crito,'" he said,

fancies that I am the other Socrates whom he will soon see, a dead body—and he asks, How shall he bury me? . . . I would not have him . . . say at the burial, Thus we lay out Socrates, or, Thus we follow him to the grave or bury him . . . . Be of good cheer then, my dear Crito, and say that you are burying my body only, and do with that whatever is usual, and what you think best.<sup>9</sup>

Several centuries later it was not difficult for the Stoic philosophers to mark off, even more sharply than had been done by Socrates, the real self from the man who occupied public space. The first chapter of the *Discourses* of Epictetus is entitled "Of the things which are under our control and not under our control."<sup>10</sup> The basic distinction, argued Epictetus, is between "the knowledge of what is mine, and what

<sup>6</sup> See, e.g., WILLIAM O. DOUGLAS, *OF MEN AND MOUNTAINS* (1950).

<sup>7</sup> HERBERT MARCUSE, *ONE-DIMENSIONAL MAN* 10 (1964).

<sup>8</sup> 2 *THE DIALOGUES OF PLATO* 282 (Jowett transl. 1937).

<sup>9</sup> 1 *id.* at 499.

<sup>10</sup> 1 *EPICETUS, THE DISCOURSES* 7 (Oldfather transl. 1925).

is not mine."<sup>11</sup> The inner man, and his dispositions and thoughts, are "what is mine"; it is these "which are under our control." Epictetus wrote:

"Tell your secrets." I say not a word; for this is under my control. "But I will fetter you." What is that you say, man? fetter *me*? My leg you will fetter, but my moral purpose not even Zeus himself has power to overcome. "I will throw you into prison." My paltry body, rather! "I will behead you." Well, when did I ever tell you that mine was the only neck that could not be severed?<sup>12</sup>

"Tell your secrets!" was precisely the command that the prosecution, acting for Henry VIII, made of Thomas More, whose stance was strictly in line with that of Socrates and Epictetus. Three questions were put to him:

1. Whether he could obey the King as Supreme Head [of the Church]?

He can make no answer.

2. Whether he will acknowledge the King's marriage with Queen Anne to be lawful, and that with lady Catherine invalid?

Never spoke against it, "nor thereunto can make no answer."

3. Where it was objected to him by the said statute he, as one of the King's subjects, is bound to answer the said question and recognize the King as Supreme Head, like all other subjects?

He can make no answer.<sup>13</sup>

"For this my silence," More told the court, "neither your law nor any law in the world is able justly and rightly to punish me."<sup>14</sup>

Socrates told the Athenian jury that they could not justly and rightly convict him *for what he had said*, and Thomas More told the court that they could not justly and rightly convict him *for his silence*. Silence may be a public act, and speech may be a private act; yet both may relate to the inner man, who is outside the jurisdiction of the state. Yet reasonable men may differ as to whether a refusal to salute the flag<sup>15</sup> or a speech from a soap box<sup>16</sup> shall be respected as a private act or punished as a public act.

To mark off the limits of the public and the private realms is an activity that began with man himself and is one that will never end; for it is an activity that touches the very nature of man; and man's nature is, to a considerable degree, made and not given. *Man* constantly transcends himself, and in the process of transcendence he discovers in himself new dimensions, new heights, and new depths. He reaches eminences never before dreamed of, and debasements to which no one before had

<sup>11</sup> *Id.* at 13.

<sup>12</sup> *Ibid.*

<sup>13</sup> E. E. REYNOLDS, *THE TRIAL OF ST. THOMAS MORE* 113 (1964).

<sup>14</sup> R. W. CHAMBERS, *THOMAS MORE* 336 (1935).

<sup>15</sup> *Cf.* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

<sup>16</sup> *Cf.* Feiner v. New York, 340 U.S. 315 (1951).

fallen. The Chorus in *Antigone* and the Psalmist thousands of years ago noted the wonder that is man<sup>17</sup>—man in tension, man in the process of becoming, emergent man. For our purpose, the figure of speech used by Locke to describe this process may be helpful; for in his description of the phenomenon of transcendence Locke saw and projected the distinction between public and private, which, despite disguises, can be detected in the rationale of privacy.

In the state of nature, Locke wrote, the earth and all the fruit produced by nature belong to mankind in common. "The fruit or venison which nourishes the wild Indian . . . must be his, and so his—*i.e.*, a part of him—that another can no longer have any right to it before it can do him any good for the support of his life."<sup>18</sup> "[E]very man has a 'property' in his own 'person.' This nobody has any right to but himself."<sup>19</sup> But a man is more than his skin and bones. A man works with his body and his hands. He thus transcends his skin. His very sweat, as he works, reaches out beyond his skin. By labor, man extends "his own person." That with which he mixes his labor becomes a part of his person. Since a man has "a property in his own person," that with which he mixes his labor becomes "his property."<sup>20</sup> But if "property" is that which pertains to a man's "own person," then the term encompasses his life and liberty as well as that with which his sweat has mixed.<sup>21</sup> What is important here, in the context of our discussion, is Locke's view of each man being and making his "own person," so that all that he becomes and all that he makes are part of "his own person."

Perhaps no thinker carried the logic of this view further than did Ralph Waldo Emerson. "Person makes event, and event person," he argued.<sup>22</sup> The event, he said, is only the actualization of the soul's thoughts. "The event is the print of your form. It fits you like your skin. . . . Events are the children of his body and mind."<sup>23</sup> Events, he wrote, "grow on the same stem with persons; are sub-persons." Almost as if he were recalling Locke's *Second Treatise of Civil Government*, Emerson wrote:

Each creature puts forth from itself its own condition and sphere, as the slug sweats out its slimy house on the pear-leaf, and the woolly aphides on the apple perspire their own bed, and the fish its shell.<sup>24</sup>

Once man's power of self-transcendence is posited, it becomes impossible to confine the self within marked-off limits and to say positively, "*This* is the self, *this* is a man's 'own person,' and the rest is not self." The transcendent character of man cries out against any attempt to fence him in. Locke was satisfied to let the matter go after

<sup>17</sup> SOPHOCLES, *ANTIGONE*, ll. 330-70 (Jebb transl. 1900); *Psalm* 8.

<sup>18</sup> JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* 129 (Everyman's Library, 1924).

<sup>19</sup> *Id.* at 130.

<sup>20</sup> *Id.* at 130-31.

<sup>21</sup> *Ibid.*

<sup>22</sup> RALPH WALDO EMERSON, *Essay on Fate*, in *THE CONDUCT OF LIFE* 42 (1899).

<sup>23</sup> *Id.* at 43.

<sup>24</sup> *Id.* at 44.

saying that a man's life, liberty, and estate are his "property" because they pertain to his very own person; Emerson was not satisfied until he made all a man's actions, and even all the events in his life, his *sub-persons*.

### III

Until 1937,<sup>25</sup> the United States Supreme Court gave almost literal constitutional application to Locke's philosophy in so far as property in the sense of an interest considered as a possible source of wealth, including business, was concerned. Such property looked to the Court very much like a sub-person. Indeed, in *Coppage v. Kansas*,<sup>26</sup> the Court, in an opinion by Justice Pitney, came close to adoption of Locke's position in almost his own terms. But now, as Justice Douglas said in *Griswold v. Connecticut*, the Court is no longer concerned to determine "the wisdom, need, and propriety of laws that touch economic problems [or] business affairs."<sup>27</sup> Of the interests which, according to Locke, go to the very essence of man—his life, liberty, health, limb, and possessions<sup>28</sup>—the last is now an interest seemingly detached from the person. Property is no longer a sub-person. Though still the subject of constitutional protection, the "wisdom" of the regulation of the distribution or production of property is no longer subject to judicial review.

The heart of the Lockean conception of man defined as a transcendent self, however, remains. It not only remains, but it has, I believe, gained dignity and strength. For the person protected by the Constitution is a "creature [who] puts forth from itself its own condition and sphere." "Do you suppose," Emerson asked, that a man "can be estimated by his weight in pounds, or that he is contained in his skin—this reaching, radiating . . . fellow? The smallest candle fills a mile with its rays, and the papillae of a man run out to every star."<sup>29</sup>

It is against such a view of the nature of man that one can best understand the Court's opinion by Justice Douglas in *Griswold v. Connecticut*.<sup>30</sup> First comes the re-interpretation of certain constitutional guarantees as "emanations," "penumbras," "zones," or "facets" of "privacy." This is true of the first amendment freedoms; of the prohibition in the third amendment against the quartering of soldiers "in any house" in time of peace without the consent of the owner; of the affirmation, by the fourth amendment, of the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"; of the self-incrimination clause of the fifth amendment, and of the ninth amendment, which provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

<sup>25</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

<sup>26</sup> 236 U.S. 1 (1915).

<sup>27</sup> 381 U.S. at 482.

<sup>28</sup> See LOCKE, *op. cit. supra* note 18, at 5.

<sup>29</sup> EMERSON, *op. cit. supra* note 22, at 42.

<sup>30</sup> 381 U.S. at 483-85 *passim*.

Second comes the notion that just as man needs the zones of privacy that are recognized by these express constitutional provisions, so, too, the constitutional guarantees themselves generate sub-guarantees. The process of transcendence cannot be arbitrarily contained. So—to go back to Justice Douglas's opinion—the first amendment has “a penumbra” in which “freedom to associate and privacy in one's associations” are to be found. So, the right to educate one's children as one chooses, and the right to study a foreign language in a private school, flow out of the first amendment. So, freedom of speech and press includes also the right to distribute, to receive, to read, to teach, and to pursue inquiry. So, the constitutional amendments mentioned protect the intimate relation of husband and wife and their relation to their physician—a “zone of privacy created by several fundamental constitutional guarantees.” These zones of privacy are nowhere expressly stated in the Constitution; but the express provisions “create zones of privacy.”

The conception of constitutional emanations or penumbras probably flows out of Justice Brennan's notion of “breathing space.” In *NAACP v. Button*,<sup>31</sup> Justice Brennan said for the Court that the first amendment freedoms are “delicate and vulnerable”; they need, he said, “breathing space to survive.” In that case, the exercise of first amendment rights was held to need the right to enforce constitutional rights through litigation assisted by an association. This was the “breathing space” that the first amendment freedoms needed.

In *New York Times Company v. Sullivan*,<sup>32</sup> Justice Brennan, again writing for the Court, said that freedom of the press needed “breathing space” in order “to survive.” In that case the Court held that the exercise of the first amendment freedom of the press needed the legal immunity to publish libelous misstatements of facts about public officials, provided there is no actual malice—this is a needed “breathing space.”

It is, of course, *man* who in the first instance needs the “breathing space”; and it is *his* needs that generate the penumbras and emanations. How much “breathing space” does he need? Which of his emanations are so essential to him that they *must* become a part of the very definition of the “life” or “liberty” that makes up his “own person”? There is no definitive answer to such questions, since man himself can never be fully delineated. His nature changes as it emerges, as it is created. Society, through conscience and its various organs, must constantly examine and re-examine what it considers to be the nature of man, and its decisions will in turn contribute to the emergent nature of that which it examines. In the process of explication there is no room for absolutizing. We have noted, for example, that property is no longer a supreme value in our constitutional scheme. But surely a man's home is his property, and his bedroom is his property, and these certainly come close to his very skin and bones.

<sup>31</sup> 371 U.S. 415, 433 (1963).

<sup>32</sup> 376 U.S. 254, 272 (1964).

It was Justice Douglas who, in a sit-in case involving a restaurant, said:

The property involved is not, however, a man's home or his yard or even his fields. . . .

The problem with which we deal has no relation to opening or closing the door of one's home. The home of course is the essence of privacy, in no way dedicated to public use, in no way extending an invitation to the public. Some businesses, like the classical country store where the owner lives overhead or in the rear, make the store an extension, so to speak, of the home. But such is not this case. The facts of these sit-in cases have little resemblance to any institution of property which we customarily associate with privacy.<sup>33</sup>

In the same case, Justice Goldberg pointed out that "constitutional protection extended to privacy and private association" is an assurance against "the imposition of social equality." He said:

Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.<sup>34</sup>

But we know that these words of Justices Douglas and Goldberg may not be acceptable in all their reach. Our antidiscrimination housing laws<sup>35</sup> by no means absolutize the term "home" in such a way as to assure a person full enjoyment of his "social intimates" "solely on the basis of his personal prejudices including race." And it is doubtful if insurance companies, banks, and some other businesses will forever be permitted to be organized and conducted in such ways that the choice of "business partners" will be made on the basis of race or religion.<sup>36</sup> Questions of privacy may touch vital issues of justice and public order which cannot be answered by mere verbal definitions. Such questions call for delicate judgment—judgment that will reflect our changing views of the nature of man and that in turn will contribute to emerging views of man's nature.

There can be no fixed inventory of the things, acts, and values that pertain to the inner man and those that pertain to the outer man; for inner and outer, like soul and body, are terms that describe living processes. In passing the Civil Rights Act of 1964,<sup>37</sup> Congress was compelled to move men, acts, and values from the inner to the outer realm; and even when it comes to what may be admitted to belong to the inner realm, values may be in conflict *there*—*e.g.*, the Roman Catholic Church must consider whether in the marital bedroom privacy or scruples

<sup>33</sup> *Bell v. Maryland*, 378 U.S. 226, 252-53 (1964) (concurring opinion).

<sup>34</sup> *Id.* at 313 (concurring opinion).

<sup>35</sup> *E.g.*, MASS. ANN. LAWS ch. 151B, § 4(6) (1965).

<sup>36</sup> See, *e.g.*, an article on discrimination in insurance companies and the possible lines of legal attack on this problem, N.Y. Times, March 20, 1966, p. 1, col. 1.

<sup>37</sup> 78 Stat. 241, 42 U.S.C. §§ 1971, 1975a-d, 2000a (1964).

over the use of contraceptives shall mark out the superior, decisive value. The need for judgment, the need to discriminate competing values and to choose between them if their coexistence cannot be arranged, is inescapable.

This need can be felt with almost painful humiliation when one recalls that Warren and Brandeis<sup>38</sup> took the phrase, the right "to be let alone," from Cooley's treatise on torts.<sup>39</sup> But it was the Supreme Court in *Adair v. United States*,<sup>40</sup> rather than Warren and Brandeis, that conveyed the spirit of what Judge Cooley meant by this right "to be let alone." Declaring a federal anti-yellow dog statute unconstitutional as "an invasion of personal liberty" guaranteed by the fifth amendment, the Court quoted with approval from the treatise by Cooley:

It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern.<sup>41</sup>

What to Cooley was a civil right, a right "to be let alone," has now become a denial of a civil right. And the humiliation becomes more painful as we note that the Court's opinion in *Adair* was by the first Justice Harlan, whose (dissenting) views on civil rights have become the law of the land.<sup>42</sup> Public and private change places, rough places become plain, the plain becomes a rough place, as generations pass and come, as man tries desperately to make something of himself, as he keeps tasting of the fruit of the tree of self-knowledge.

The great contribution made by Cooley, however, should be gladly acknowledged; for his phrase, "the right to be let alone," is preferable to the Warren-Brandeis phrase, "the right to privacy." For the latter is too restrictive in its implications; it suggests what has been withdrawn from public view—like the marital bedroom in *Griswold* or a respectable married woman's past immoral life.<sup>43</sup> It suggests secrecy and darkness. But the opinions of Justices Douglas and Goldberg in *Griswold* rightly imply, as we have seen, that "privacy" may also be the character of acts performed in public view—for example, joining the National Association for the Advancement of Colored People or performing an act of public worship in a church or synagogue. A person may be asserting his right of "privacy" when he dresses in an unorthodox way<sup>44</sup> or when he "loafs" in a public park.<sup>45</sup> A person may claim the right to be let alone when he acts publicly as when he acts privately. Its essence is the claim that there

<sup>38</sup> Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>39</sup> COOLEY, TORTS 29 (2d ed. 1888).

<sup>40</sup> 208 U.S. 161 (1908).

<sup>41</sup> *Id.* at 173, quoting COOLEY, TORTS 278 (2d ed. 1888).

<sup>42</sup> See MILTON R. KONVITZ, *THE CONSTITUTION AND CIVIL RIGHTS* ch. 2 (1947); *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>43</sup> See *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931).

<sup>44</sup> See *People v. O'Gorman*, 274 N.Y. 284, 8 N.E.2d 862 (1937).

<sup>45</sup> See *Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931).



is a sphere of space that has not been dedicated to public use or control. It is a kind of space that a man may carry with him, into his bedroom or into the street. Even when public, it is part of the inner man; it is part of his "property," as Locke would say, the kind of "property" with respect to which its owner has delegated no power to the state.