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PRIVACY RIGHTS, LIBERTY AND ORIGINAL INTENT
WHAT THE FOUNDERS GAVE US AND WHAT THEY MISSED

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Any attempt to discuss the nature of 'privacy' and whether we, as individuals, have specific rights to privacy is dependent upon answering questions about the nature of man. Are we, for example, primarily solitary and only secondarily social as a learned response to nurturing? Is our association with one another one of mutual dependency or of voluntaristic toleration? And, as has been raised again and again, are all or any rights of the individual, as a member in society, superior to those of the whole?

Government becomes important when one seeks to determine where the wellbeing of the whole permits (or requires) restraint on the free exercise of individual will. Is it important, as Judge Bork and others have argued, for us to understand then adhere to what the founders of our society thought and felt about this question?

Debate over what is called 'original intent' is at least one

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of the important issues raised by Judge Robert Bork and faced by the justices charged with the responsibility of ruling on the Constitutionality of laws. However, the mere fact that a law meets the test of original intent or is in other ways Constitutional necessarily may have only an incidental relationship to true justice; that is, what is legal and Constitutionally permitted is not automatically just. Thus, for rulings to meet higher, and hopefully objective moral and ethical tests, our justices must reach beyond the intent or wording of the Constitution when necessary. Yet, to do so requires that we develop (through application of reason and the thorough investigation of human history) what has been most elusive -- an objective standard by which to say which acts are or are not just.

In a very real sense, the strict constructionist approach to Constitutionality reflects a view that we cannot know what justice is; therefore, we must resist injecting contemporary value judgments onto the governmental framework established by the founders. Any changes desired by our citizenry must be achieved directly by amendment, through the political process, so that such changes will become structural and permanent rather than interpretive and fleeting. Such a view fails to consider that democracy (i.e., rule of the majority) assures nothing insofar as justice is concerned. History reveals that government has a strong tendency to become despotic and tyrannical, and that

the powers of government must be challenged continuously by a citizenry if liberty is to be protected. Among the founders Thomas Paine, for one, shared this view. In COMMON SENSE Paine wrote:

> Some writers have so confounded society with government as to leave little or no distinction between them; whereas they are not only different, but have different origins. Society is produced by our wants, and government by our wickedness; the former promotes our happiness positively by uniting our affections, the latter negatively by restraining our vices.

We are born into this world totally dependent upon others. Without nurturing (a crucial form of cooperative behavior, whether one views this as instinctive or learned) infant humans would not survive. Only after significant physical growth combined with learning from others does the human become a self-sustaining individual. That some degree of social organization and cooperative nurturing is essential to all adds to our uniqueness as a species within the animal world. As Paine makes clear, however, the cooperative nurturing process is imperfect; as we become more self-sustaining we also become more competitive, often overtly aggressive, sometimes unrelentingly cruel to others. We should not forget that genetically we have changed very little from the being who survived by hunting and foraging in a harsh and dangerous environment. Indeed, many individuals continue to survive under conditions similar to those of prehistoric man. Those same behavior patterns are demonstrated to be very near the surface in many of us still.

Anger and rage are as much a part of our emotional baggage as are compassion and tolerance. The natural and legitimate responsibility of government, as the agent of society, is to protect each citizen from the aggressions of others. As Locke might have said, government is there to see that individual liberties (i.e., just acts) are protected from licenses (i.e., unjust acts) exercised by others. Included within the scope of one's liberties -- and I suggest this cannot be otherwise -- is the 'right of privacy'.

Where we run into tremendous difficulty is in determining which acts are within the realm of liberty and, therefore, legitimately private, and which by their nature are licenses and, therefore, justly subject to governmental control. The authors of our text, CONSTITUTIONAL LAW, looked to John Stuart Mill as a key source for the framework of this debate:

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right. ... Over himself, over his own body and mind, the individual is sovereign.

I suggest that by definition the individual in order to be sovereign must also be competent; that is, must be beyond the stage of nurturing and no longer in a dependent (i.e.,

incompetent) position within society.

During the nurturing period, the individual has learned from others in society basic survival skills with which to function in life. In the language of eighteenth century philosophy, the individual is by virtue of competency capable of exercising 'free will'. Yet, the nurturing period has no definite length. Some of us, in fact, are doomed to lifelong incompetency because of certain physical, mental or emotional problems. One may often move out of and back into and out of the states of competency and incompetency. It is here, where government enters into relationships by making formal distinctions between those who are recognized to be competent (and, hence, by their competency responsible for their actions) and those who are not, by which a liberty construct on behalf of privacy has developed. A special responsibility of government, consistent with the protection of individual liberties, is to act as trustee or guardian of the interests of incompetents.

What, then, most clearly falls within the realm of privacy where competents are concerned? Society, says Locke, establishes government in order that "all men may be restrained from invading others' rights and from doing hurt to one another ..." or, additionally, the goods produced by an individual's labor. The most fundamental privacy right therefore is that of control over oneself and the products of one's labor. Conversely, any acts (by individuals or government) that intrude on these privacy

rights are by their nature acts of license. A discussion of the most important privacy rights and how we should think about them follows.

THE INDIVIDUAL AS FAMILY GROUP MEMBER

The most basic biological and human relationship is that between parent and offspring. The infant is (from conception and growth in the mother's womb) an incompetent. Granting that as a society we have yet to reach either a moral or legal concensus over the privacy rights of the unborn infant, one fact is self-evident. For most of the period during which the life within a woman's womb develops, government cannot effectively invoke its responsibility of trustee on behalf of the incompetent infant without either cooperation from the mother or rather severe coercion. Once the infant is born, however, government can then act if necessary to enforce the infant's basic privacy right of protection from physical, emotional or mental harm. Parental privacy rights do not therefore include full and unbridled ability to exercise licenses where they involve offspring.

Government's responsibility to step in to prevent parents from physically or mentally injuring a child would seem to appropriately fall into the realm of self-evident truths to which Locke and some of the founders ascribed with great importance.

Moreover, there is a strong case to be made that a government that does not do so is negligent in its duties. In order to fulfill this responsibility, government must be provided flexible, yet well reasoned guidelines by which to judge parental actions toward children. To err on the side of greater protections for the privacy rights of incompetents is to apply the most government on behalf of society's weakest members.

The challenge for society is to restrain government from coercively imposing its will where no direct licenses have been taken against the privacy rights of the incompetent. One example would be where, as a solution to the generational cycle of poverty, children are forcibly taken from their natural parents and -- 'for the good of the child' -- placed with families whose financial status will provide much greater opportunities for material success. Doing so would break a bond that is both natural and desirable for the survival of our species, by which government acts on the basis of subjective, material criteria for reaching a value judgment. Because of the family bond, government's authority to coercively break such bonds must be restrictively applied and diligently monitored by nongovernmental societal agencies.

The relationship between individuals as spouses involves equal privacy rights of two competents. As in the protection of the rights of incompetents, however, clear and descriptive guidelines are needed in order to judge when the acts of one

spouse represent licenses exercised against the privacy rights of the other. The right to not be physically abused is the most obvious, yet inconsistently protected of such privacy rights as applied to women and their spousal relationships with men in the real world. Despite progress in the protection of privacy rights for women, we are often reminded even in our society of a time when (as observed by historian John C. Miller) "law and custom relegated women to an inferior status, [when] a married woman had no existence apart from her husband [and] was his chattel to do with very much as he pleased." Where such licenses are sanctioned and protected by the force of law, even when constitutionalized, the self-evident nature of the license obligates those who follow to bring an end to such acts of license. Failure on the part of government to do so challenges the legitimacy of such government.

INDIVIDUAL BEHAVIOR IN SOCIETY

Mill's secondary argument is that society has no right or responsibility to protect one from one's own rashness, so long as the individual actions do not violate the liberty of others. The primary difficulty arises, again, when government must fulfill its legitimate responsibility of determining when, by the actions (or inactions) of the individual, competency has been lost to incompetency. When, then, does society resort to government to

invoke its role as guardian?

Key to this question is how we identify 'normal' behavior. Who is to judge what is or is not normal behavior in a society built not on homogeneity but ostensibly on tolerance and pluralism? On this crucial question we continually reach for answers as a society with very unsatisfying result. Certain self-evident truths are there for us to grasp upon, so that such truths suggest universal 'goods' the achievement of which justifies governmental intervention. The clearest example of this is our legal prohibition of suicide; to voluntarily take one's life is a license not granted to the individual. Thus, anyone who attempts to do so is by virtue of such an attempt categorized as an incompetent. Unfortunately, a wide range of individual behaviors lack such a self-evident test for incompetence. Mill, as a utilitarian, assigned the greatest benefit to the least amount of intervention, writing that "because the tyranny of opinion is such as to make eccentricity a reproach, it is desirable, in order to break through that tyranny, that people should be eccentric."

The most pressing societal issue of our day involves this type of struggle between the individual's 'free choice' to be eccentric and societal protection of those who have shown themselves to be incompetent. I refer to the widespread and growing consumption of 'drugs'; that is, substances shown by scientific testing to damage the physical and mental health of

the user. On the one hand society has instructed government to treat the manufacture and sale of such drugs as a criminal license, for which severe (though many would argue not severe enough) penalties are attached. Users of such drugs are, on the other hand, viewed largely as victims of their own individual weakness, as having lost the quality of rational decision-making associated with competent behavior. And, so, as a society we delegate to government the responsibility to intervene in an effort to rehabilitate the individual (i.e., re-establish competency). By any measure, however, the effort is failing; for reasons too involved to present in this writing, the criminal exercise of drug trafficing now involves more individuals than ever before.

Every increase in governmental attempts to apply greater coercion to slow the trafficing has the effect of causing trafficers to become more brutal themselves. The results are an escalation of violence over control of the drug market, as well as an escalation of drug users themselves exercising criminal licenses in order to obtain the funds to pay for their addiction. Which raises the most difficult of the moral questions for society; which is, when the committing of an act reveals a clear loss of competency should the individual be punished or rehabilitated?

Loss of competency, as opposed to never having had competency, suggests a crucial distinguishing measurement for

behavior. Clearly, a five year old child is not competent to understand the consequences of many actions; with maturity (which must be assessed on a case-by-case basis) is it not self-evident that the individual should be held responsible for criminal licenses committed, even though the act of taking such license suggests a loss of competency? By this standard for behavior, then, there can be so such thing as a plea of 'temporary insanity' to excuse the criminal acts perpetrated by one individual against the privacy rights of others. Even then, however, an unresolved moral dilemma is that of degree of punishment, a subject related to but beyond the scope of this paper.

INDIVIDUAL PRIVACY RIGHTS TO CIVIL LIBERTIES AND ECONOMIC EQUALITY

Would those who interpret the Constitutional powers of government as does Judge Bork use the court to protect privacy rights as a function of civil liberty and economic equality? One of the dangers presented by Judge Bork's positions is that they are argued on principle. As Bernard Bailyn observed in his classic study of the revolutionary literature:

> Formal discourse becomes politically powerful when it becomes ideology; when it articulates and fuses into effective formulations, opinions, and attitudes that are otherwise too scattered and vague to be acted upon; when it mobilizes a general mood; when it clarifies, symbolizes, and elevates to a structured consciousness the mingled urges that stir within us.

There can be no doubt that those who cling to strict constructionist, original intent rhetoric have an ideological agenda. As the submission accompanying my course essay argued, this so-called 'conservative' ideology is injurious to the securing of our liberties because of its inconsistencies in logic. How, for example, is the guarantee of liberty furthered by protecting monopolistic and unnatural property in the economic value of licenses and titleholdings, when such values belong to no individual and exist only because society exists?

Although the ideology to which Judge Bork ascribes is given the identifier 'libertarian', this term is certainly a misnomer. By failing to recognize that values not produced by the individual are by their nature societal and not private property, the Bork ideology systematically invades the privacy rights to oneself and one's property (i.e., production) identified by Locke, thereby sanctioning private confiscation of the property of others. This by no means suggests that those identified with so-called 'redistributive' policies are on any firmer moral ground; ostensibly designed to more fairly distribute the burden of paying the expenses of government based on ability to pay, the system tends to confiscate wealth earned by production (of goods or services) while allowing so-called 'capital gains' to escape taxation until an asset is sold, and then making sure such gain is taxed at a rate lower than that experienced by income from production. With the greatest of ironic twists our Federal tax

system makes no distinction at all between the increases in value that fall to the holders of titles and licenses -- values having nothing whatever to do with the efforts of the recipients -- and the increases in the value of tangible capital assets that only hard work and success in the market can bring. That nature cannot be individual property and that production cannot be otherwise is a truth so self-evident that I cannot but attribute the failure of so many to recognize that this is so to, as Locke concluded, "fear that an impartial inquiry would not favour those opinons which best suit their prejudices, lives, and designs ..." Bork is merely one of the more articulate in a field of many candidates for membership in the flat earth society.

The contention of the authors of our text that "the meaning of privacy ... is not too clear" is a current problem in large measure because the discussion has failed to focus on identifying acts of license. As you have been good enough to provide an agenda for discussing a number of other specific privacy rights falling in the realm of civil liberties, I shall offer my thoughts on 'how to think' about these rights.

I. THE RIGHT TO BELIEVE WHAT ONE WANTS TO BELIEVE

Can it be otherwise? Inherent in this right is, however, the restriction that while the thought is protected by one's right to privacy, any action taken by a competent party (and many

taken by an incompetent party) is not so protected. Actions must be judged on the basis of whether they are an exercise of liberty or license.

II. THE RIGHT OF PARENTS TO INCULCATE RELIGIOUS BELIEFS INTO THEIR CHILDREN

To the extent that specific religious inculcation is consistent with the higher moral and ethical values on which liberty is based, parents are fulfilling their nurturing responsibilities to their children. Although our society is pluralist and tolerance for divergence of thought is a protected liberty, government has a responsibility on behalf of society to intervene as guardian of the right of children to not be indoctrinated where the ideas involved clearly involve an exercise of license. While this is sometimes difficult to achieve in practice, mankind's religious beliefs do have a strong core of commonality -- with most differences occurring in the particulars of ritual. A most obvious example of license guised to look like religious practice would be the worship of 'Satan' and the teaching that the violation of the liberties of others is demanded by followers of such a pseudo-religion.

III. THE RIGHT NOT TO BE INDOCTRINATED

If to be indoctrinated is to be coerced into accepting certain statements as 'truths' or actions of government as 'proper' without question, then we need a carefully reasoned definition of coercion. Much of the indoctrination we are concerned about today has to do with solicitation of the young for membership in so-called religious cults, where acceptance requires the individual to abandon existing social and family nurturing relationships and to relinquish all privacy rights within the political system to the belief system of the cult. Again, there are difficulties in proving coercion. Is the individual merely entering into a private, contractual arrangement with the cult under which the individual is to be represented (i.e., protected) by the cult leadership? Or, is the individual's decision to enter such a cult an indisputable sign of loss of competency the knowledge of which requires government intervention on behalf of the privacy rights of the individual?

IV. THE RIGHT TO SILENCE
THE RIGHT NOT TO BE INTRUDED UPON
THE RIGHT NOT TO BE FORCED TO DIVULGE INFORMATION
THE RIGHT NOT TO HAVE INFORMATION ABOUT ONESELF GATHERED UNREASONABLY, OR DIVULGED TO OTHERS

I have grouped the above four categories of privacy rights together because, in the context of our rights as competents, the responsibilities of government to protect society center on acts of criminal license. At issue is whether society is at greater

risk from individual criminal licenses or from the historical tendency of government when too great power is vested therein to be tyrannical and despotic. Admittedly, striking a balance between these two evils has never been satisfactorily resolved. Widespread poverty caused by the concentrated control of both socio-political institutions and wealth are conditions which have pushed individuals in many societies to act violently, sometimes by selfserving, violent acts against their neighbors; or, when able to form a political bond with others, in attempts to overthrow the oppressive governments under which they must live.

In the United States, we suffer from many of the same symptoms but do not look too deeply for root causes or for solutions. Most of us are convinced of the general goodness of our socio-political system and therefore tend to concentrate on such problems as racial discrimination or ethnic bigotry as causes rather than as symptoms. Then, there is the already huge cost of government.

As a result of the strong opposition to any large-scale increase in the police powers of government (or for the expenditure of funds to hire more law enforcement officers or build more prisons) we are forced to live fearful of the growing exercise of private, criminal licenses against our privacy rights. Once again, we are traumatized by the limited scope of options entertained. The Bork faction suggests we must, given the times, relinquish some of our privacy rights to preserve

order in society. Those who recognize that poverty, discrimination and low self-esteem are somehow inter-related as underlying causes of criminal licenses, have voted to spend hundreds of billions of dollars to build a welfare state that ignores the fundamental structural problems I have described as self-evident.

In general terms, Earl Warren gave us good advice in 1972 when he wrote in A REPUBLIC ... IF YOU CAN KEEP IT, that "a nation which enforces its laws while violating the fundamental rights guaranteed to its citizens is contributing to its own ultimate destruction." And, so we are.

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