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## Intimacy, Privacy and Publicity

*Abstract:* The article analyses the distinction between the private and the public sphere from a conceptual and from a normative point of view. On the conceptual level, it is argued that the common dichotomous view is incomplete, giving rise to conceptual confusions which can be overcome by a careful distinction between the intimate and the private sphere. While the boundary between the private and the public is a conventional matter, the sphere of intimacy, including thoughts as well as a certain type of actions, is empirically delimited. On the normative level, a number of arguments for or against the extension or restriction of the private sphere as well as for or against the intervention of the state in its citizens' spheres of intimacy is discussed from a liberal point of view.

### 1. Examples

i) Two lecherous old men hide behind the trees in a park and observe a beautiful young woman taking a bath. They violate her intimacy, try to seduce her, and when they don't succeed, they slander her, accusing her of adultery. Her life is saved only by the intervention of a young man. The girl's name is Susanna, the boy's Daniel (*Book of Daniel*, 13). To the art-lover's delight, Lucas Cranach (the Older), Rembrandt and Berni have been inspired by that scene of 'private espionage'.

ii) A hunter surprises a goddess who is bathing naked in a spring deep in the woods. Ovid tells us the story: "The very colour the clouds tend to adopt when they reflect the rays of the sun, the colour of rosy Aurora, was what covered the goddess's face when she was seen without clothes; [...] and in revenge she said these words to him: 'So, go now and tell everyone that you have seen me unveiled, if you can.'" (Ovid 1994, 143 ff.) Of course, he could not: the angry goddess transformed the hunter into a stag that was devoured by his own hounds. Ovid adds: "Comments are controversial: some think that the goddess was overly cruel, whereas others praise her and believe that she acted in accordance with her strict chastity; both sides have their reasons." (Ovid 1994, 146) The goddess was called Diana, the hunter Actaeon. In the 16th century, Francesco Mazzola, the *Parmigianino*, decorated a room of the palace of Fontanellato with scenes from this legend.

iii) In early 1973, two renowned physicians came to the clinical conclusion that the presidential candidate suffered from arteriosclerosis and pericarditis: should he win the elections and take office, he would not live for more than a year. Another potential candidate was informed. The three men decided to

respect the politician's intimacy and not to inform the public. On September 23, 1973, the candidate was elected President by 61,58% of the votes. Duly confirming his doctors' prognosis, he died on July 1, 1974. His wife took over the Presidency—a fact that contributed to the unleashing of the greatest tragedy in Argentine history. The cast of this story were: doctors Taiana and Cossio, Héctor Cámpora, and Juan and Isabel Perón (cf. Bonasso 1997, 557). The photographic testimony of these events forms part of the documentation of an insanely criminal political process. The Argentines were not as lucky as the French who in 1988 unknowingly reelected a candidate suffering from prostate cancer. Only in 1994 did the public find out about this 'state secret'.

iv) In an unforgettable movie, trying to overcome the boredom resulting from being temporarily handicapped and to forget about the absence of his incredibly charming fiancée, one of the protagonists occupies himself with spying on his neighbours through his binoculars. He thus comes to discover a murder. Probably, all of us have seen *Rear Window* (the Spanish title *The indiscrete window* is more telling for our present topic) and remember James Stewart and Grace Kelly.

v) On May 15, 1998, an offended wife declares before a criminal judge that her husband has told her that the intellectual author of the assassination of a well-known journalist was a certain widely feared *maffia* boss. Shortly afterwards, the latter commits suicide when the police arrives to arrest him. The woman's testimony, in any case, seems to have facilitated a substantial progress in the solution of the murder case. The individuals involved in this story were: Silvia Belawsky, her husband Gustavo Prelezo, judge José Luis Macchi, journalist José Luis Cabezas and multimillionaire Alfredo Yabrán.

vi) One of the most lucrative activities of photojournalism is that of the *paparazzi*—eager techno-age emulators of those biblical old lechers of Babylon. One Sara Ferguson, in various stages of nudity, has for some time been one of their preferred targets. Not only the British royals, but also lesser figures of political and social life adorn the pages of the yellow press, from Rovaniemi to Sidney and from Tokyo to Lima, with their nudities and snapshots from private life taken by surprise.

vii) A former President of the United States was constantly monitored for his extramarital sexual conduct and publicly indicted for alleged feats which have become known by way of wiretappings. Gennifer Flowers, Kathleen Willy, Paula Jones and Monica Lewinsky were projected onto the centre of public attention not only in the United States, as the alleged victims of Bill Clinton's uncontrolled sexual urges.

viii) In March 1998, the Argentine magazine *Noticias* was sentenced by the National Court of Appeals to a fine of 150,000 pesos in punitive damages to President Menem for having violated his 'right to intimacy' by publishing photos and information about the illegitimate son he has with a woman called Martha Meza. This disclosure of presidential paternity undoubtedly reminded some readers of the information published on November 10, 1994, by *Paris Match* about François Mitterrand's illegitimate daughter Nazarine (cf. *Clarín* [Buenos Aires] of March 27, 1998, 42).

ix) Winston Smith lives in a country whose legal order includes a felony, the so-called *thoughtcrime*, sanctioned with the death penalty or twenty-five years in a forced-labour camp. An insuperably effective special police force, the *Thought Police*, is in charge of investigations: “Thoughtcrime was not a thing that could be concealed forever. You might dodge successfully for a while, even for years, but sooner or later they were bound to get to you.” (Orwell 1969, 19)

In *all* these instances, there is—or is said to be—a violation of intimacy, or of the private sphere as defined by the social standards reigning in each circumstance. But in the case of Susanna, the ‘peeping’ is accompanied by slander. In that of Diana, what offends is the inquisitive look and what provokes a reaction is the risk of a gossipy Actaeon giving rise to dirty jokes. James Stewart and Silvia Belawsky, in contrast, help to solve a crime. The cases about the respect of the intimacy of ailing presidential candidates have some features that seem to warrant their inclusion in the category of political deception—that old vice of political leaders which so much occupied the Marquis de Condorcet (1991, 183–219). Sara Ferguson’s nudity is not that of a goddess, nor does she seem to behave like Diana (at least not Ovid’s Diana). *Oval Office Operations* (or whatever one may call them) seem to be rather irrelevant for the political leadership of the most powerful country in the world. In the case of the magazine *Noticias*, what mattered to public opinion was in part the fact that the mother of this presidential son occupied a seat in Parliament on the ticket of the father’s party.<sup>1</sup> And, finally, in George Orwell’s utopian (really utopian?) nightmare, not even the most intimate thoughts can be concealed from *Big Brother*. So, with all these differences, is there anything these cases have in common that should allow us to draw some general conclusions concerning their evaluation from a moral point of view? Is it possible to draw precise boundaries between the private and the public? And is this private-public distinction exhaustive?

In what follows, I will suggest a negative answer to the last question, and I will take a closer look at the other two, from the point of view of a reasonably tolerant liberal democrat who is therefore not a relativist—neither in the sense

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<sup>1</sup> The problem of the political relevance of the sexual conduct of politicians has been lucidly analysed by Frederick Schauer 2000, 293–309, cf. also Dobel 1999, 170 ff. In 2003, this question received some international attention in the wake of articles in the *Mail on Sunday*, published in London, about the alleged marital unfaithfulness of German chancellor Gerhard Schröder. A German court issued an injunction threatening the paper with a fine of (250,000 Euro if it repeated its allegations about the chancellor’s marriage. The paper reacted by inviting German citizens to send in any evidence that might confirm the story (cf. *El País* [Madrid] of January 21, 2003, 56). A similar invitation aimed at peeping into the private life of public figures was issued by the Danish magazine *Se Og Hoer* in May 2002; it offered (1,345 Euro to anyone who would produce a photograph of Prince Frederik with a mysterious Australian girlfriend and suggesting to its readers to “take a camera with them whenever they leave the house”—a kind of *paparazzization* of the entire citizenry (cf. *El País* of May 3, 2002, 47). As Schauer points out, the relevance of information about the private life of a politician depends on the conception one has of the office in question and of the supposed causal relationship between the private conduct and the performance in that office. In a democracy, it is not always easy to discover what that relationship is since it depends on everyone’s moral beliefs which, in turn, play a role in the election of a candidate to public office. And if that election is expression of individual autonomy, then, Schauer 2000, 308, says, “the information an individual needs to make his or her own voting decision cannot be subject to majority control”.

of Julius Ayer with his exclamations of approval or rejection nor in that of Jean-François Lyotard who was willing to accept that everyone plays his own game, whatever it may be. I assume, of course, that the definitions I propose have a claim not to truth, but only to plausibility, and that they merely facilitate the intellectual journey through a territory mined by what in my view are conceptual confusions.

## 1. Conceptual Distinctions

First of all, it seems useful to propose some conceptual distinctions. To begin with, I think we can and should distinguish an *intimate*, a *private*, and a *public* sphere.

What I am interested in is to determine what each of these terms denotes, that is, to trace the limits of three spheres of which at least the first two are often confused or treated as at least partially if not totally overlapping. I think these distinctions are relevant, because they enable us, in turn, to be more precise in the moral or legal evaluation of acts or activities performed in these different spheres.<sup>2</sup>

The sphere of *intimacy* is the realm of our thoughts, our decision-making, of doubts that sometimes cannot even be clearly formulated, of what we repress,<sup>3</sup> of what has not yet been expressed and perhaps never will be, not only because we do not wish to express it, but because it cannot be expressed;<sup>4</sup> often it is the morass psychoanalysts have been interested in ever since Freud taught them to distinguish between *id*, *ego*, and *super-ego*.<sup>5</sup> Thomas Hobbes already knew this:

“The secret thoughts of a man run over all things, holy, profane, clean, obscene, grave, and light, without shame, or blame; which

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<sup>2</sup> This is not the opinion of Raymond Geuss, however, when he writes: “There is not such a thing as *the* public/private distinction, or, at any rate, it is a deep mistake to think that there is a single substantive distinction here that can be made to do any real philosophical or political work. [...] It is thus unlikely one could come up with an interesting, general, substantive theory of the public and private.” (Geuss 2001, 106) I will attempt to show that it *is* possible to stipulate *one* plausible distinction between the intimate, the private and the public, and that at least concerning the private and the public this is the distinction that is fundamental for the determination of the normative scope of a politico-legal system.

<sup>3</sup> This is the case of Esteban, the protagonist in Jacinto Benavente’s *La Malquerida*, when he says: “We all think something bad sometimes, but then the bad thought goes away and one doesn’t think of it anymore. When I was very little, one day my father scolded me and beat me very badly, and I was so mad that I remember suddenly having thought: ‘I wish he’d die’, but it was nothing more than a thought and I had hardly had it when I got terribly scared [...]” (Benavente 2002, 202 f.)

<sup>4</sup> Hannah Arendt plausibly holds that some personal experiences, as for example great physical pain, are “at the same time the most private and least communicable at all. Not only is it perhaps the only experience we are unable to transform into a shape fit for public appearance, it actually deprives us of our feeling for reality to such an extent that we can forget it more quickly and easily than anything else. *There seems to be no bridge from the most radical subjectivity, in which I am no longer ‘recognizable’, to the outer world of life.*” (Arendt 1959, 46, emphasis added)

<sup>5</sup> I am grateful to Francisco Laporta for having reminded me of Freud’s interpretation of personality.

verbal discourse cannot do, farther than the judgement shall approve of the Time, Place, and Persons. An anatomist, or a Physitian may speak, or write his judgement of unclean things; because it is not to please, but profit; but for another man to write his extravagant, and pleasant fancies of the same, is as if a man, from being tumbled into the dirt, should come and present himselfe before good company. And 'tis the want of Discretion that makes the difference.” (Hobbes 1957, ch. 8, 34)<sup>6</sup>

And the Eskimos seem to know it too, since “they zealously guard their thoughts about others and refuse to answer personal questions” (Margalit 1998, 203).

Actions the performance of which neither affects others nor requires their participation also belong to the sphere of intimacy: self-centred actions or actions of a physiological kind in which the presence of others is not only unnecessary, but embarrassing.<sup>7</sup>

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<sup>6</sup> Hobbes seems to exclude the possibility of shame or resentment from the sphere of intimacy. If one accepts that “[t]he basic experience connected with shame is that of being seen, inappropriately, by the wrong people, in the wrong condition”, as Bernard Williams (1993, 78) remarks, then one must conclude that shame can be felt only in interpersonal relationships. But remember Esteban (cf. n. 3) who is ashamed of himself for his repressed patricidal urgings. A bad conscience often includes a sizable degree of shame and resentment *in foro interno*.

<sup>7</sup> Thus, according to Margalit 1998, 203, the Eskimos who must live closely together for months in an igloo “take care of their bodily functions in such a way that they cannot be seen”. Williams’s observation on shame to which I referred in n. 6 applies here. If, besides, it is taken into account that, as Williams 1993 points out, there is an etymological affinity in classical Greek, which also exists in other languages (as in German, Spanish, etc.), between the word for shame (*aidos*) and the word for genitals (*aidoia*), then one might come to conclude with Beate Rössler 2001, 17, that the sphere of intimacy has “mostly erotic or sexual connotations”. I think that this conclusion is premature. Esteban’s patricidal thought, though it certainly has no erotic or sexual connotation at all, clearly belongs to the sphere of the intimate and repressed. The reference to the ‘unnecessary’ presence of others or the performance of ‘embarrassing’ acts or activities opens up the possibility of something like a slippery slope that may lead from the sphere of intimacy to that of publicity and is mainly linked to the idea of ‘shame’. It is well known that Diogenes of Sinope converted his intimacy into a public affair, as Raymond Geuss 2001, 12, recalls. To do so, he not only claimed that one ought to aim at self-sufficiency (autarchy); he also infinitely expanded the sphere of the ‘non-shameful’, with the result that nothing was left that would fall under the restrictions of Hobbesian discretion. According to Geuss, “true self-sufficiency requires complete shamelessness”. One should be like a dog “which ignores human social conventions and is completely free of any form of shame” (Geuss 2001, 27). That is why from the word for dog (*kyon*) the name of the cynical school is derived. (Let it be said in passing that there is another interesting interpretation of the connection between ‘dog’ and ‘cynical’: according to Max Wundt 1908, 397, the analogy with a dog refers to the docility with which this animal suffers jokes and insults.) From the point of view of the theory of the state, note that by infinitely extending the sphere of the intimate (and also of the private), on the cynical conception social regulations are converted into obstacles and “social interests are distractions” (Barker 1960, 121). Diogenes proclaimed himself a “citizen of the world” (he was probably the first to use the term ‘cosmopolitan’; cf. Laertius 1958, 65: “Asked where he [Diogenes] came from, he said, ‘I am a citizen of the world’”) and denied belonging to any particular *polis*. As Barker (1960, 122) observes, “If he (Diogenes) acknowledged any citizenship, it was citizenship of the world; and that was not citizenship”. Taken to its ultimate consequences, autarchy makes the state superfluous.

With Hobbes, the veil that protects our intimacy could perhaps be called ‘the veil of discretion’. This is a veil of total opacity that can only be lifted by the individual itself. This is, in fact, what made Augustine write his *Confessions*:

“There are many [...] who want to know who I am [...] who, although they have heard me speak or have heard others speak about me, cannot put their ears on my heart, where I am what I am. They want to know, undoubtedly, by a confession of mine what I am internally, where they cannot reach with their eyes or ears or mind.” (Augustine 1956, 711 f.)

What terrified Winston Smith was precisely the certainty that in Room 101 his thoughts could be found out, without his authorization, by the *Thought Police*. In this case, there was not confession, but the objective to make it possible for the state to share the ‘privileged epistemic access’ we all have to our own intimacy (cf. Geuss 2001, 62).

The content of the intimate in the Hobbesian sense escapes moral evaluation—unless morality is understood not only as a set of rules that govern interpersonal relations but as something ultimately linked to the Augustinian relationship between man and a supraempirical being such as a God; in this latter case, obviously, ‘evil thoughts’ too may be the object of moral reproach, but that is not what I am interested in here. And the same applies to intimate *actions*, i. e. actions which as such neither affect others nor require their participation—unless they are publicly performed and thereby offend others; but in this case, the moral reproach refers not to the action as such, but only to its public display.<sup>8</sup>

On the other hand, we should keep in mind that according to the interpretation I have proposed, it is in the sphere of intimacy where the individual can fully exercise its personal autonomy; it is the last resort of one’s personality, where ‘I am what I am’. Here, the individual is truly sovereign, as John Stuart Mill says; here, we decide about our social, private or public conduct—and it is this conduct which is the proper subject of morality. Failure to distinguish between intimacy and privacy has been the source of many sterile discussions, and of moral positions which give the ‘right to privacy’ a pre-legal supremacy, i. e., which immunize it morally against its positive legal regulation. I cannot see why any restriction of the sphere of privacy should be ‘immoral’; it does, however, seem obvious to me that any intervention in a person’s intimate sphere affects her autonomy and, in the last instance, her human dignity.<sup>9</sup>

<sup>8</sup> A paradigmatic example of this kind of offense provoked by the public display of intimate actions is the ‘self-centered’ practice Diogenes habitually performed “in the middle of the Athenian marketplace” (Geuss 2001, 12).

<sup>9</sup> Lloyd L. Weinreb, for instance, extends the use of the word ‘private’ to what I have characterized as ‘intimate’: “A person’s unexpressed thoughts, emotions, and attitudes may seem to be private if anything is. One’s ‘interior’ mental life is private as a practical matter, and its insulation from investigation by the government is widely regarded as a prominent aspect of liberty. From a practical perspective, however, the privacy of one’s unexpressed thoughts and the rest is only contingent. Were human beings suddenly to acquire the power to ‘read minds’, our behavior would likely be affected, and we might adjudge individuals’ responsibility for their actions differently in some circumstances, but there would be no basis for concluding that

*Privacy* is the sphere where only the desires and preferences of the individual reign. The existence of such a space is a necessary condition for the *exercise* of individual freedom. Paraphrasing Amartya Sen, one can say that privacy characterizes the *recognized personal sphere* liberals must accept as the starting point for social decision-making if it is to conform to the ideals of liberalism (cf. Sen 1993).

But one does not need to be a liberal to accept a sphere of privacy and to agree that we need some space exclusively reserved to a kind of interpersonal situations or relationships where what happens is the result of the free choice of those involved.<sup>10</sup> Susanna wanted to be alone when she took her bath; Diana only accepted the company of the nymphs, and these, in Ovid's words, "when they saw a man enter the scene, began to beat their chests" and tried to protect her by assembling around her (Ovid 1994, 143). That circle of nymphs marked the limits of the private sphere, of what was not to be seen by another's eyes.

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human beings were no longer autonomous and that responsibility itself was overthrown. [...] Liberty may well be involved and, were the privacy of private thoughts generally lost, the sense of individual responsibility might be affected. But unless the capacity of self-determination were eliminated altogether, personal autonomy would remain. A person's interior life may well deserve special protection, but so far as privacy itself is concerned, it falls within the general topic of informational privacy" (Weinreb 2000, 34 f.). According to the conception I propose, the question is not so much whether it is possible to have access to the sphere of intimacy; it is not merely a practical question. It is a fundamental difference between intimacy and privacy that whereas the latter can be totally eliminated (in some indigenous societies living in the Amazonas region, privacy is practically inexistent) and one might even be able to give moral reasons for this, the elimination of intimacy would mean the total destruction of individual autonomy, of the source of personal morality; and I do not see what moral argument could possibly be given for the elimination of the very possibility to act morally. When Jeffrey H. Reiman (1976, 41) says that "privacy is essential to the creation and maintenance of selves", I suppose he is referring to intimacy in the sense I have proposed. There is no reason why the fact that someone peeps into my private sphere should affect my sense of self or my identity. This is certainly true in case I don't even know that someone is spying on me: for someone who doesn't know that he is spied upon, the spy simply does not exist. And if I know that someone is spying on me, this may of course terrify me, and I may also try to modify my external conduct, but this does not imply that I will cease to be who I am in my intimate life. Reiman's examples (cells which instead of walls have only bars, permitting the permanent surveillance of a prisoner) show the conceptual confusion I am trying to point out: a prisoner under these conditions may feel humiliated, but he is not destroyed in his personal identity. On the contrary, the humiliation may even reinforce this identity and, for example, trigger hatred against the humiliator. One does not need to invoke the case of Spartacus to understand this. Since Reiman does not accept the conceptual distinction between intimacy and privacy, it is no surprise that he comes to the conclusion that "Ownership of my thoughts requires a social practice as well. It has to do with learning that I can control when, and by whom, the thoughts in my head will be experienced by someone other than myself and learning that I am entitled to such control—that I will not be forced to reveal the content of my consciousness, even when I put those contents on paper. The contents of my consciousness become mine because they are treated according to the ritual of privacy" (Reiman 1976, 43). I think there is still another noteworthy confusion here: my own thoughts do not cease to be mine when others can know them without my authorization. 'Property' in the case of thoughts has a genetic source that is immune to their 'publication': they are still mine, even when I am obliged to reveal them or they become known somehow; and only because they remain 'mine' I can be made responsible for them, as was the task of the *Thought Police*.

<sup>10</sup> The "free choice of those involved" must here be understood in a wide sense: it refers not only to the *inclusion* of those who interact but also to the possible *exclusion* of observing eyes or ears. In the private sphere, there is no room for snoopers.

In the case of Sara Ferguson when she was still a member of the royal family, the protective veil was much thinner and, therefore, less exclusive.

The limits to privacy, in any case, seem to be something that depends on the social and cultural context. I will come back to this later.

The *public* sphere is characterized by free access to the conduct and decisions of people in society. Moreover, when people hold offices endowed with political or legal authority, the *publicity* of their actions is an essential feature of the rule of law. In Appendix II to his *Perpetual Peace*, Kant underscored the transcendental nature of publicity: without it “there would be no justice (which can only be conceived as *publicly pronounceable*) and therefore also no law, which is given only by justice”. More precisely, Kant says:

“Once we have thus abstracted from all empirical elements contained in the concept of political and international law [...] we can call the following proposition the *transcendental formula* of public law:

‘All actions concerning the rights of other people whose maxim is incompatible with publicity are unjust.’

This is to be regarded not only as an *ethical* principle (belonging to the doctrine of virtue) but also as a *legal* principle (concerning the rights of people). Because a maxim that I may not proclaim loudly without thus frustrating my own purpose, which must by all means remain *secret* if it is to prosper and which I cannot *publicly admit* without inevitably provoking everyone’s opposition against my objective—such a maxim cannot draw that necessary and universal, and therefore *a priori* intelligible, counter-action of all against me from anything but the injustice it threatens everyone with.” (Kant 1968b, 381)

For conceptual reasons, the principle of publicity in Kant becomes a principle of legitimacy: By definition, only actions and purposes that can be openly expressed are legitimate (on the relationship between publicity and legitimacy in Kant, see Laursen 1986).

While the intimate was characterized by total *opacity*, the characteristic feature of the public is *transparency*. Between the two extremes, we can place the sphere of the private as that space where there is *relative transparency*. Privacy, as it is understood here, presupposes the presence of at least two agents. Their interaction is what makes total opacity impossible since this would exclude all communication. In the private sphere, discretion is replaced by rules of conduct, many of which are valid only within that sphere, but whose moral quality does not exclusively depend either on the private legislator’s ability to enforce them or on the consent of their addressees. Private morality is not different from public morality; rather, both are expressions of one single morality. It is advisable to stay clear of the Weberian temptation to stipulate a radical distinction between an ‘ethics of conviction’ and an ‘ethics of responsibility’.

The threefold distinction I have proposed largely coincides with the spatial approach advocated by Jeremy Waldron when he says:

“The public/private distinction is primarily a matter of *geography* rather than a question of the different nature of the moral standards involved.” (Waldron 1993, 128)

### 3. The Relations of Intimacy, Privacy and Publicity

Now, suppose these conceptual proposals are accepted. The question that immediately arises with respect to our topic, then, is how the three different spheres or levels are related, and to what extent it is possible and/or morally legitimate to expand or constrain the range of each one of them at the cost or to the benefit of the other two.

To the extent that one not only can, but also ought to expand or reduce the frontiers of these spheres, the corresponding concepts are not purely descriptive, but have a partly normative meaning. This does not require a revision of the definitions presented earlier, it only requires to remember that the content of, say, the sphere of privacy may vary, depending on the moral framework one accepts. It is one thing to say that in the private sphere “only the desires and preferences of the individual reign”, and quite another to specify which individual desires and preferences are legitimate in the first place. The possibility I am interested in here is not merely factual, but deontic. To say that an action or activity is private, or public, is a *normative* adscription of the respective character.<sup>11</sup> The normative framework I will adopt here is that of a liberal, democratic *sozialer Rechtsstaat*.

Within this frame, in order to pursue the question of the relationship between the three spheres, I suggest we take two itineraries of exactly opposite directions. The first runs from the intimate to the public, and the second the other way round, from the public to the intimate.

So let us now start down the first one. The transition *from the intimate to the public* sphere obviously is necessary for our survival, but it also entails risks, depending on the extent to which one’s intimacy or privacy is unveiled and on the expediency of doing it. First of all, if one concedes that the veil protecting our *intimacy* may only be lifted by the respective individual itself, on its own discretion, one will also accept without further argument that someone who wishes to do so can, in general, disclose the intimate sphere of his personality. Whether this can be done completely is something more than doubtful. In any

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<sup>11</sup> Frederick Schauer 2001 has pointed out the adscriptive nature of the terms “private” and “public”, following H. L. A. Hart’s proposals in his famous essay “The Adscription of Responsibility and Rights”. On a similar line, Lloyd L. Weinreb asserts that privacy has descriptive as well as normative content: “That’s private’ is both a statement of fact and a prescription of how one ought to behave.” (Weinreb 2000, 27) Since in my view the adscriptive conception is plausible, I cannot agree with Carlos Castilla del Pino who asserts that “the private sphere is defined by the subject himself” or “private is what each one says it is” (Castilla del Pino 1989, 27). To accept this would, *a contrario sensu*, also mean that “the public sphere is defined by the subject himself” or the “public is what each one says it is”. This is a position a Diogenes of Sinope would probably endorse, but which in the last instance would lead to the negation of any legal regulation, i. e., from autarchy to anarchy.

case, those who write diaries or autobiographies usually aim in that direction (on the relation between intimacy and a personal diary, cf. Puértolas 1989). But one should not forget that revealing one's own intimate sphere means eliminating or reducing what is secret, often including confused or transitory feelings and thoughts that may be difficult for others fully to understand. Therefore, there is a great risk that we may convey only a distorted version of our personality. Thus, one could think that the Hobbesian idea of discretion is somehow related to our notion of self-respect. In the complicated process of developing our own identity, we usually want to keep to ourselves the choice of plans or intentions we may or may not be willing to convert into externally manifest actions. And there is still another risk, namely, the unilateral discovery of a secret or the possibility that someone else has access to such a secret of ours puts us in a situation of inferiority in our interpersonal relations. As Sissela Bok observes:

“To have no capacity for secrecy is to be out of control over how others see one; it leaves one open to coercion.” (Bok 1984, 19)

This explains why the voluntary disclosure of our intimacy typically takes place only in the case of exceptional relationships such as those forged by love<sup>12</sup> or a very special kind of friendship which, not accidentally, we call ‘intimate’.<sup>13</sup> In those cases, disclosure is usually reciprocal and is regarded as the most authentic form of surrendering oneself to the other. We could thus speak of ‘shared intimacy’—certainly a contradictory expression if one takes into account that when the intimate is expressed it ceases to be intimate and is instead transferred to the private, and sometimes even to the public, sphere. The possibility that the latter might happen was what preoccupied the Countess Boufflers-Rouverel, the mature Hume's great unhappy love, when in a letter of March 13, 1761, she asked him to keep “the most profound secret” about the feelings of unlimited admiration which “against prudence and propriety” and forgetting that “reserve and even privacy are more suitable to my sex” she had expressed to him (cf. Mossner 1980, 425 f.).

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<sup>12</sup> Keith Dromm 2002 presents a suggestive analysis of the extent to which in such intimate relationships as those of ‘romantic love’ the lovers have a moral obligation to reveal their intimate sphere to each other. Not to do so would seem to be a kind of deception with severe consequences since the other lover would then not really know whom (s)he is loving. The problem is only that, because of the ‘idealization’ of the loved person involved in the process Stendhal called “crystallization”, lovers replace a realistic image of the loved one with another image which “is inspired by the original, but is constructed mostly by imagination” (Dromm 2002, 161) and which they do not wish to correct. This is a case of what I like to call “cherished ignorance” (cf. Garzón Valdés 2001). Besides, there is also the question of who we really are and to what extent we are capable of expressing our self. We have here returned to the starting point of Augustine's confession. Psychology has attempted to answer the question by subscribing to one of the two classical roads, the Aristotelian or the Cartesian, without having come as yet to a definitely acceptable solution (cf. von Wright 1994).

<sup>13</sup> James Rachels 1975, 326, holds that the value of privacy (and this would apply with even more reason to intimacy as I have defined it) is based “on the idea that there is a close connection between our ability to control who has access to us and to information about us, and our ability to create and maintain different sorts of social relationships with different people. According to this account, privacy is necessary if we are to maintain the variety of social relationships with other people that we want to have, and that is why it is important to us.”

And of course, there is also the asymmetrical revelation of secrets to the confessor or to his secular version, the psychoanalyst. The extent of dependency these unilateral relationships can create is well known by Catholics and more than a few patients (on the dependency relation between believer and confessor, cf. Haliczer 1998, 191 ff.).<sup>14</sup>

In the *private sphere*, we accept rules of community life which, on the one hand, tend to preserve our intimacy and, on the other, erect barriers against intrusions by the public. In this sphere too, there are kinds of behaviour we prefer to perform without witnesses, as well as thoughts we jealously keep to ourselves. The private sphere only allows for a reduced number of members, and it may have different characteristics, depending on the kind of interpersonal relationships that take place within its confines. Often it is also the most appropriate realm for revealing some part of our intimacy (because, in general, this is less dangerous here than in the public sphere). And since the private sphere is the sphere of the assumed unconstrained dominion of our personal freedom, in it we usually attempt to impose our preferences as much as possible.

When we enter the *public sphere*, we come equipped with the veil of our intimacy and the cloak of our privacy. This leads to attitudes which can create ambiguous, if not outright paradoxical situations.

Because, actually, in a way we come to the public sphere under false pretences, trying to hide our intimate personality and to preserve our privacy, but also wishing that public decisions—at least if we live in the context of a liberal democracy—take into account our individual preferences, i. e., that they express to some degree our personal freedom. Thus, in the public sphere we want to be good Paretian liberals while, at the same time, keeping our sphere of unrestricted personal freedom. As everyone knows, the combination of these two goals has given rise to a famous paradox that still occupies the minds and pens of many theorists of Public Choice.

In the public sphere we try to preserve our intimate personality and the scope of our privacy which we know is threatened by a twofold danger: that of the ingression of others who try to jump the fence that protects our private life, and that of the imposition of public regulations which attempt to control the egoistically expansive impulse of privacy. We know, that is, that our conduct should comply with social demands whose violation could result in costs that are inexistent in the private sphere. The sphere of public life imposes normative constraints which are at the foundation of any social organization hoping to overcome the insecurity that results from attempts to pursue our desires and

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<sup>14</sup> Jeffrey H. Reiman observes that the disclosure of intimate information not always presupposes a relationship of friendship or love, but only a special interpersonal context: “One ordinarily reveals information to one’s psychoanalyst that one might hesitate to reveal to a friend or lover. That hardly means one has an intimate relationship with the analyst. And this is not simply because of the asymmetry. If two analysts decided to psychoanalyze one another alternately—the evident un wisdom of this arrangement aside—there is no reason to believe that their relationship would necessarily be the most intimate one in their lives, even if they revealed to each other information they withheld from everyone else, lifelong friends and lovers included.” (Reimann 1976, 33) With this in mind, it seems advisable to relativize the assertion of Rachels mentioned in n. 13.

preferences without any control. This is the idea on which any justification of the state is based—even that of a minimal state. The basic difference between such a state and a *sozialer Rechtsstaat* is that while what is expected of the minimal state is the effective protection against the first danger, and the total abstention from intervening in the sphere of privacy, the latter should not only protect us against others, but also ensure the provision of goods which can be obtained only by constraints on our private preferences. In the minimal state, the right to privacy is the criterion for assessing the state’s legitimacy; in the social state, by contrast, this right may be hedged in by the priority given in some cases to the public, to the benefit, in the last instance, of an increase in the quality of the private life of every individual.

Normative constraints are more or less intense, depending on the kind of behaviour that is regulated, and on the respective institutional design. From the point of view of efficacy, what matters is that the norms are indeed complied with, regardless of whether this is done enthusiastically, out of internal conviction and adhesion to the content of the norms, or merely for personal convenience. The moral quality of such constraints, in turn, does not depend on the internal adhesion of its addressees. Factual consent is not a good standard for the assessment of the moral quality of normative provisions. It is, certainly, a good criterion for assessing the stability of the system they belong to. But the stability of a system is one thing, and its legitimacy quite another (on the relationship between the stability and the legitimacy of political systems, cf. Garzón Valdés 1987).

Let us now take a closer look at these constraints, starting with those we may call ‘soft constraints’. I think one can easily accept that our life in society does oblige us, first of all, to practice what Thomas Hobbes (1957, 49) has called *Small Moralls*, i. e., “decency of behavior; as how one man should salute another, or how a man should wash his mouth, or pick his teeth before company”. The behaviour prescribed by these *Small Moralls* usually comes in a rather innocent version we call ‘politeness’ or ‘good manners’. Thus, for instance, greeting one’s neighbour or acquaintance on the street or offering one’s seat to a lady on the bus are acts that are perhaps trivial, but which do have some moral relevance since they are usually an expression of respect for our fellow-men and contribute to a more pleasant life.<sup>15</sup> Kant too attributed moral importance to polite gestures:

“*Höflichkeit* (Politesse) ist ein Schein der Herablassung, der Liebe einflößt. Die Verbeugungen (Complimente) und die ganze *höfische* Galanterie samt den heißesten Freundschaftsversicherungen mit Worten sind zwar nicht immer Wahrheit (Meine lieben Freunde: es giebt keinen Freund! ARISTOTELES), aber sie *betrügen* darum doch auch nicht, weil ein jeder weiß, wofür er sie nehmen soll, und dann vornehmlich darum, weil diese anfänglich leeren Zeichen des Wohlwollens und der Achtung nach und nach zu wirklichen Gesinnungen dieser Art hinleiten.” (Kant 1968a, 152)

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<sup>15</sup> In this sense, Stuart Hampshire’s observation seems correct: “There is a large overlapping, even in modern societies, between the claims of good manners and morals claims.” (Hampshire 1978, 26)

The rules of politeness do not require, and sometimes even prohibit, *honesty*, that is, the disclosure of our intentions and interests. Not only in Oxford, as Thomas Nagel (1998, 6) recalls, but practically in all Western societies, when someone says to someone else “Let’s have lunch together one of these days” it means that they will never have lunch together. And someone who, out of politeness, asks someone else how he is doing certainly does not expect a true report, not to speak of a complete one. The former could be disconcerting, the latter plainly boring. In Nagel’s words,

“It is impolite to draw attention to one’s achievements or to express personal insecurity, envy, or the fear of death, or strong feelings about those present, except in a context of intimacy where these subjects can be taken up and pursued.” (Nagel 1998, 13)

Thus, the first step from the private to the public sphere may imply a voluntary reduction of honesty. This has a double origin: on the one hand, out of concern for others we often do not wish to act as if the members of society at large might be as interested in our desires and concerns as are possibly the members of our household or family; on the other, we also know that in many cases it is quite convenient for us that others do not really know how little we are interested in their desires and concerns. The first of these honesty-reducing sources is of a moral, the second of a prudential nature. Now, the ways of prudence are subject to social pressures and may lead to behaviour that is not only *polite*, but indeed *hypocritical*. Schopenhauer, for whom politeness was “the fig leaf to cover our egoism”, wrote memorable sentences about the slippery slope that leads from politeness to hypocrisy:

“Politeness is the conventional and systematic denial of egoism in the petty things of daily relations and is, of course, accepted hypocrisy; it is promoted and praised, however, because the egoism it hides is so repugnant that one does not want to see it, although it is known that it is there, just as we cover unpleasant objects with a curtain. [...] It is very fortunate that prudence and politeness spread a cloak [over indifference, E. G. V.] and do not let us see how common mutual malevolence is and how the ‘bellum omnium contra omnes’ continues, at least mentally.” (Schopenhauer 1962, 729 f. )

“Politeness is prudence; therefore, impoliteness is stupidity: to create oneself enemies by it unnecessarily and intentionally is lunacy, it is like putting one’s own house on fire. Because politeness is like a token: a notoriously false coin: to save it would be a sign of stupidity; to use it generously, by contrast, of intelligence. [...] We must keep in mind that politeness is only an ironic mask and not scream to heaven when it slips a bit or is withdrawn for a moment.” (Schopenhauer 1962, 552 f.)

Here, another somewhat lengthy citation from Nagel may underscore the point:

“The liberal idea, in society and culture as in politics, is that no more should be subjected to the demands of public response than is necessary for the requirements of collective life. How much this is will depend on the company, and the circumstances. But the idea that everything is fair game and that life is always improved by more exposure, more frankness, and more consensus is a serious mistake. The attempt to impose it leads, moreover, to the kind of defensive hypocrisy and mendacity about one’s true feelings that is made unnecessary by a regime of reticence. If your impure or hostile or politically disaffected thoughts are everyone’s business, you will have reason to express pure and benevolent and patriotic ones instead. [...] The decline of privacy brings on the rise of hypocrisy.” (Nagel 1998, 14)

This last sentence of Nagel deserves a comment. On the one hand, it is true that the reduction of the private sphere may result in an increase of public hypocrisy. This is the case whenever there is a discrepancy between the values (or disvalues) we profess in the private sphere and the values (or disvalues) implemented (or which ought to be implemented) in the public sphere. Obviously, the moral ‘net value’ of such a discrepancy depends on the moral quality of the respective conflicting value systems. But it is obvious too that for the sake of a peaceful social life it is better to observe the rules of respecting our fellow-men and to relegate the demands of honesty to a secondary rank. The imperatives of so-called *political correctness*<sup>16</sup> seem to derive from such a conception.

*Small Moralls*, politeness, political correctness, and hypocrisy all have a common core: they are forms of conduct that correspond to a number of rules which help us cross the borders of the private sphere with some chance of success. In this sense, effective rules for life with human beings whom we often dislike and whose personal preferences we do not share force us to be, or to appear to be, moral.

So far, I have only talked about constraints that can be called ‘soft’ or ‘weak’. But, of course, the more important ones are those that may be called ‘strong constraints’. We know that we cannot subsist in our narrow realm of privacy; and that is why we formulate and accept (if only verbally) more demanding rules which impose severe restrictions on our selfish desires. If the social enterprise is to be successful, and if we assume that this is possible only if we overcome the limitations of the minimal state, we must admit two fundamental principles: the prohibition of harming others (the *harm principle* so clearly formulated by Mill), and the obligation to contribute to the production of public goods, that is, to give up a parasitic conduct.<sup>17</sup> The cost of the violation of a strong constraint

<sup>16</sup> The expression was coined about two hundred years ago not in the United States, but in Germany. In Friedrich Schlegel’s *Literarische Notizen 1797 bis 1801*, we already find the term “*politische Correctheit*”. With it, Schlegel meant to denote a respectful treatment of others or, in his own words, the “mystical interpretation of the conventions of politeness” (“*mystische Deutung der Höflichkeitsconvenienzen*”). Cf. Lucht 1997, 13.

<sup>17</sup> I am grateful to Ruth Zimmerling for having reminded me of the importance of the production of public goods for life in society.

obviously is greater than in the case of a weak constraint, and the control of compliance with it is more severe.

Now, the greater the *public* aspects of the role someone plays in a society, the more reduced will be their private life—possibly so much so that it becomes difficult even to draw a precise line between the private and the public. This reduction is a consequence of the fact that the gathering of information by others becomes more permissible and the exercise of public powers requires greater normative control. The love affairs of the Princess of Wales could have had institutional consequences, and gaining public office through the procreation of children is not something citizens can be expected to be indifferent about. It also does make a difference for the political destiny of a society whether or not voters have information about the state of health or the life-expectancy of those who present themselves as candidates for the highest political office of a country. Hence, the physicians who knew how seriously ill Perón or Mitterrand were when they campaigned for the presidency not only could have, but should have informed the public about these facts.<sup>18</sup> That this would have been politically the right thing to do is testified by the recent past of Argentina.

No-one in our societies claims that those who govern should be subject to the rituals of the French monarchs of the *ancien régime* and undergo a modernized version of the *levée du Roi* (and this is good, if only for aesthetic reasons) or that they should institutionalize their lovers and elevate them to ranks comparable to those of the *maîtresses* of Versailles. The political relevance of Clinton's sexual adventures is close to zero (on the public relevance of the private life of political office-holders and representatives, cf. Dobel 1999). What does, however, seem more relevant is knowledge about the private financial situation of rulers, and about the sources of sharp increases in their wealth should they occur during their years in office. Thus, as the requirement of transparency increases, the toleration of hypocrisy must decrease. For example, corruption (a form of conduct which, in a sense, could well be characterized as hypocritical) is inexorably criticized in the case of politicians or judges; and I think it is good that this is so.

We thus come to the public sphere with our load of private preferences (not all of which are benevolent) and with a mixture of honesty and hypocrisy. In both cases, we try to adapt our conduct to the rules of the politico-legal system to which we belong. When that system is legitimate, i. e., when its rules and principles are in accordance with the rules and principles of ethics, the step from the private to the public sphere can be understood in the Kantian sense as a step towards greater morality in the actual behaviour of people, because this is not always fostered by maintaining or supporting the private nature of things, but on the contrary by subduing them, constraining them or simulating the elimination of our egoism. This is the first step, as Schopenhauer said, to overcome the 'bellum omnium contra omnes'.

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<sup>18</sup> I know that this would violate one of the conclusions of the *Nordic Conference on the Right of Privacy* (cf. Parker 1981, 279) which says that the disclosure of information obtained "in circumstances of professional confidence" is morally prohibited; but I do think that in cases like those I have mentioned this violation is legitimate.

Now, what about the opposite itinerary, that is, the one that runs *from the public to the private and the intimate* sphere?

For some time, it has been a matter of concern that the public increasingly seems to ‘invade’ the private sphere, not least because of the ever increasing availability of technical means which make this possible (cf. on this point Pérez Luño 1986, 345 ff.). We should, therefore, take a closer look at the reasons for this concern and try to separate the good ones from the bad ones.

In the 19th century, Benjamin Constant proposed a clear distinction between liberty in the modern sense and liberty in the classical sense. While the former consisted in the active and permanent participation in the exercise of collective power, the latter was based on the “peaceable enjoyment of private independence” (Constant 1836, 547). In Constant’s conception, the purpose of many individual rights is the protection of privacy. And it is not without interest that this old liberal thought that one of the typical expressions of a due respect for private life was the secret of the banker’s accounts “to which no-one but himself should have access” (Constant 1957, 1236, quoted from Béjar 1988, 44).

In the mid-18th century, an aristocrat from Paris, the marchioness Louise d’Epinay, in an act of democratic enlightenment, decided to send her children to a public school. She thus opened up a part of her private sphere and allowed the state to intrude into a realm that had until then been exclusively private, to wit, the field of the education of the aristocracy. Her friend Rousseau was so impressed by that decision, it seems, that it inspired him to write his *Emile* (cf. Badinter 1984).

Today, the cases of Constant’s banker and Madame d’Epinay’s children seem somewhat extravagant. All reasonable citizens of a democratic and liberal society would probably be willing to agree that the investigations of the Internal Revenue Service and the imposition of compulsory public education are intrusions into the private sphere that can be justified although they do restrict the exercise of the autonomy of the family.

Concerning the problem of compulsory education, in 1983 James S. Fishkin dedicated an entire book to the analysis of the question to what extent a liberal could accept state interventions in the sphere of the family, that is, in the last instance, the violation of the autonomy—or we can also say: of the privacy—of the family, in order to permit the regulation of children’s education and thus guarantee the implementation of the principles of equal opportunity and of non-discrimination for reasons of race, sex, or social class (cf. Fishkin 1983). According to Fishkin, this leads to a trilemma, which I do not need to consider here in detail. What is important, though, is to underscore that only by giving up part of the autonomy of the family we can guarantee more justice in the public sphere. If the choice is between a father who, in order to uphold his private preferences, prohibits his child to participate in a system of education that will better his or her opportunities in the public sphere, and a father who in this matter permits the intrusion of the public into his private life, I think there are better moral reasons for the latter.

Similarly, the controls of the IRS (at least, ideally) serve the purposes of distributive justice. Of course, few things can be more annoying than being

investigated by the tax inspectors, but that unease is usually caused by the bad conscience practically every taxpayer has. To invoke the principle of privacy in such a case not only would be useless; it could also be regarded as an expression of the desire to hide some kind of tax evasion.

Not only in liberal, but in almost all societies, sexual activities are a prototypical case of the performance of actions belonging to the private sphere. The idea is that under what circumstances and in what way such acts are performed is everybody's own private business: gone are the times of the *ius prima noctis* or the requirement to prove the consummation of marriage by showing bloody sheets to the public. But still, not just any kind of sexual relationship is permitted. With good reason, feminists have recently insisted—more precisely, neither only feminists nor only recently<sup>19</sup>—that rape should be punished even if committed within matrimony. The intrusion of the criminal law into the private home has probably contributed to a decrease of this type of crime, as well as of cases of sexual child abuse.

The examples of intrusions into the private sphere that liberals can rationally and reasonably defend could be multiplied. Common to all those cases is that the public interferes in order to support the two principles already mentioned, which make survival possible: the prohibition of harm to others (as in the case of rape within marriage) and the obligation to contribute to the production of public goods (as in the cases of tax evasion or the education of new generations). This means that the private sphere cannot be a protected area inside of which one would be free to commit crimes. Of course, every intervention in the private sphere involves a reduction of individual control, but from here one cannot infer straight away, as does Avishai Margalit (1998, 207), that there is a “causal relation between the violation of privacy and humiliation in the sense of loss of control”.

Loss of control undoubtedly means a reduction of power in the private sphere; but that does not necessarily imply humiliation. A society does not cease to be decent simply because it does not tolerate impunity in the private sphere. It would really be grotesque if Jack the Ripper would invoke his right to privacy, alleging that no-one has the right to enter his bathroom, only to ensure that he will be undisturbed in his ‘private’ undertaking of sawing up his wife in the bathtub. Such an argument, I suppose, would also not have convinced James Stewart to take off his binoculars and stop observing the evil fat man who was packing suitcases and digging holes in his yard in which to deposit the corpse of his wife. And I am also inclined to think that Silvia Belawsky did not act immorally when she informed the public about private conversations she had with her husband.

If one accepts the two principles of public social organization I have repeatedly referred to earlier, then one must conclude that Diana (the one in the

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<sup>19</sup> John Stuart Mill already presented the issue very clearly: “The almost despotic power of husbands over wives need not be enlarged upon here, because nothing more is needed for the complete removal of the evil than that wives should have the same rights, and should receive the protection of law in the same manner, as all other persons; and because, on this subject, the defenders of established injustice do not avail themselves of the plea of liberty, but stand forth openly as the champions of power.” (Mill 1962, 238)

woods) and Susanna (the one in the Bible) had reasons to feel humiliated by the indiscreet, spying eyes of Actaeon and the old lechers of Babylon, respectively. But in these cases, humiliation seems to arise not from the observation as such, but from how it is *subjectively* perceived. And this subjective aspect of intimacy may be different from one person or one culture to another. Thus, there is some truth in it when Umberto Eco remarks:

“Today, the common person does not want privacy. Cuckolded men rush in front of television cameras to fight it out with their unfaithful partner in front of millions of viewers; people with horrible diseases demonstrate in public displaying placards on which they support the rights of their fellows in disaster [...] and even remorse has become an explicit way of renouncing the keeping of terrible secrets. [...] From this it follows [...] that the real task the authorities (which in different countries are in charge of the protection of privacy) must face is not that of guaranteeing the privacy of those (relatively small segments of the total population) who want it, but to make those who have enthusiastically given it up appreciate how precious a good it is.” (Quoted from *La Nación* [Buenos Aires] of June 14, 1998, sect. 7, 6)

Indeed, the right to privacy, the “right of the individual to be left alone” (in order not to omit quoting the formulation of Louis Brandeis and Samuel Warren that has become a commonplace in just about every work on privacy; cf. Warren/Brandeis 1890) is usually invoked for two reasons: (a) fear that public knowledge of conducts which the social environment qualifies as private may put the observed person in a situation of informational dependency, foster distorted interpretations and even provoke public resentment,<sup>20</sup> and (b) the intention to keep state control within confines in which the imposition of heteronomous provisions affect the exercise of individual autonomy as little as possible.

As for (a), of course no morally sensitive defender of the right to privacy would claim this right explicitly for covering up crimes. The argument rather refers to the fact that if certain acts or activities, no matter how innocent they may be, are monitored by others or by the state, the actor is put in a situation where, if he is to avoid interpersonal shame, he will either have to constrain his range of conducts or take recourse to hypocrisy, that toolbox for covering up and hiding things; in other words, he would have to act in his private life just as in many situations of public life. Another defense could perhaps be mutual intromission, as found in little villages where everyone seems to be well informed about their neighbours’ private life. While moral hazard can thus be reduced,

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<sup>20</sup> Antonio-Enrique Pérez Luño (1986, 323 ff.) has pointed out the reason that made Louis D. Brandeis seek out the help of his former classmate to write his famous essay: Brandeis’s wife came from a well known Bostonian family and wished to liberate herself from the scrutiny of journalists who published data about her lavish dinner parties and receptions. In 1928, being Justice of the Supreme Court, Brandeis held that the right to privacy can be inferred directly from the 4th Amendment to the U. S. Constitution.

the price is an increase in that fatigue which was so disconcerting to John Stuart Mill in those villages where “everything is everyone’s business”.<sup>21</sup>

And as for case (b), modern constitutional law stipulates constraints on majority decisions in good part with the purpose of protecting the sphere of individual decisions, not only in the public, but also in the private realm. These constraints were what Justice Brandeis grounded his defence of privacy in.

With respect both to case (a) and case (b), if one is willing to accept—as I think one should—a genetic relationship between an individual and/or social interest in a private sphere and the creation of a legal protection of privacy, one must also agree that if the former changes, the means for its protection will have to change too. This has indeed happened in the course of history and continues to happen today. There is no such thing as an immutable private sphere and a single way of expressing one’s interest in the respect of privacy.<sup>22</sup> And this is what explains why privacy is generally protected by an entire *bouquet* of rights of different kinds and scopes.<sup>23</sup> This is not the same with intimacy, as I have here defined it; but I will come back to this later. Let me first give some examples of the different scopes of the private sphere.

While Diana (the goddess) uttered those threatening words “So, go now and tell everyone that you have seen me unveiled, if you can”, and 100 years ago the Bostonian lawyers were concerned about “idle gossip, which can only be procured by intrusion upon the domestic circle” (Warren/Brandeis 1890, 196), nowadays a good part of the fame of the alleged ‘famous’ is based on the self-propagated exposure of their nakedness, and on gossip and rumours fomented by themselves. The names of Gennifer Flowers, Kathleen Willy, Paula Jones, Monica Lewinsky or the Argentine Samanthas would not be known beyond the circle of their families, colleagues and next-door neighbours if they had not shouted out at the top of their lungs that someone actually more famous than themselves had attempted or consummated the performance of acts which the rest of us mortals practice without much ado. And the same seems to be the case with some of the actually famous: divulging their private actions seems to have the beneficial effect of augmenting their own pleasure. Even Queen Victoria, who was such a prude (or wasn’t she?), used to comment in public that “In our wedding night we didn’t sleep much” (could she have thought that this was an

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<sup>21</sup> Williams 2002, 117; for the question under scrutiny, Williams’s further reflections on the same page are also clarifying: “Not everyone, certainly, equally deserves the truth. People can put us in situations in which deceit is a necessary defence or precaution against their threats or manipulations or other damaging intentions. [...] Even in the State of Nature, not everyone has a right to know everything. [...] small traditional societies are full of lies, because it is so hard to keep anything secret.”

<sup>22</sup> Etzioni 1999, 202, is right when he says: “The lack of a clear basis for an absolute or ‘natural’ right of privacy brings us again to the idea that privacy varies with context. Social scientific comparative studies leave no doubt that the scope of what is considered a matter of privacy varies greatly not only across societies but also within a given society over time, including democratic societies.”

<sup>23</sup> Judith Jarvis Thompson 1975 has expressed doubts about a univocal relationship between private interest and positive law. For the Spanish case, cf. Martínez de Pisón Cavero 1993.

experience exclusive to herself?).<sup>24</sup> It seems that nowadays Diana's threat has been inverted: "Beware of what will happen to you if you don't tell everyone that you have seen me unveiled!" The *paparazzi* usually do not humiliate the subjects of their pictures; on the contrary, they satisfy a desire of those they photograph as well as of a public that laments not to have itself anything of interest to offer that could be disclosed.

I will leave this point here, and turn to the other direction, from privacy to intimacy. The issue is: Can it be morally permitted to monitor a person not only in her external relationships but also when she is physically alone and performs acts that do not affect anyone else? Can a *Thought Police* be morally legitimate? What about our thoughts, that last resort of intimacy?

I think here we come to a final, unsurmountable barrier. But perhaps this has less to do with the possible immorality of many of our thoughts, i.e., with what made Goethe say that "All of us have in our nature something that, if publicly expressed, would necessarily provoke disgust" (Goethe 1974, 345), than with the fact that such thoughts are often an expression of very short-lived, fleeting states of mind or desires the emergence of which we cannot control but which we then repress. It is in our intimacy where we develop our identity and the ideas or plans of action which we later manifest in private or in public if we deem it appropriate. One does not need to be Isaac Newton to agree that a large part of our personality is the result of what he described as a process of 'incubation' in our innermost intimacy: *nocte dieque incubando*.<sup>25</sup> And the possibility of intrusion in our intimacy contains the enormous danger that this process might be interrupted or distorted. The public exposure of short-lived mental states and desires, or of thoughts and attitudes which we do not even allow to have an impact on our private life, opens the doors for the uncontrolled manipulation of fragments of our intimacy which have nothing to do with what we are or what we wish to be.

In other cases, however, when what is at issue are thoughts or intentions that were concluded and/or are expressed in interpersonal actions or activities, it may be true that it is privately or publicly relevant to know about them. It is only such knowledge which allows us to distinguish between a murder and an accidental killing, or an intended insult from a carelessly dropped remark. The illocutionary force of sentences and words is precisely a matter of the intention with which they are uttered on a given occasion. Besides, if one accepts the conception of, for instance, Georg Henrik von Wright (1963), according to which an actor's intention is logically connected with the identification of the action he performs, then it seems that the only way of knowing what someone whose veracity we doubt has done is to penetrate his sphere of intimacy. And if the purpose of doing this is the prevention or punishment of a harm to another, we might conclude that where acts have interpersonal criminal relevance the

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<sup>24</sup> For more details about the life of this queen whose name has come to be a synonym for the jealous protection of one's private life, cf. Erickson 1997.

<sup>25</sup> This is the answer Newton gave when he was asked how he had come to discover the laws of mechanics (cf. Norton 1995, 126), but I think it applies just as well to the inception of many of our conducts and projects in life that constitute our identity.

violation of a delinquent's sphere of intimacy ought to be permitted and may even be obligatory. It would certainly have been a good thing for the wife of the murderer observed by James Stewart to know about her husband's intention.

But does this conclusion really solve the problem with the *Thought Police*? Isn't there something that disturbs and even scares us? How can we reach a morally acceptable balance between the benefits of the possibility to prevent or punish crimes, on the one hand, and the dangers of the destruction of the personality of the 'inspected', on the other? Particularly after the terrorist attacks of September 11, 2001, these questions have gained renewed relevance.

The following options are logically feasible, in an order of decreasing radicalism:

- i) Permitting the action of a *Thought Police* all over society, without any distinction of innocents, suspects, or the guilty.
- ii) Restricting the action of the *Thought Police* to suspects and the guilty.
- iii) Restricting the action of the *Thought Police* exclusively to the guilty.
- iv) Prohibiting entirely the action of a *Thought Police*.

In favour of option (i), it might be said that any society aiming at the greatest possible measure of social peace, that is, the least possible number of punishable offences, has a legitimate interest in discriminating between good and bad citizens, and if there is any doubt, it is best to overcome it and find out in which of the other two basic categories the person really belongs. This would speak against option (iv). Option (iii) would be insufficient since it would only become effective once a crime has been committed and the perpetrator identified. And option (ii) would be merely a weakened version of option (i) and, besides, often difficult to implement because of the blurry boundaries between 'suspect' and 'innocent'.

At the other extreme, those who advocate option (iv) will hold that it is one thing to try to find out, through factual evidence, contextual analysis and the declarations of the agent or others, what the intention behind the performance of a given act has been, and quite another to violate a person's intimacy, with the ensuing destruction of her personal autonomy. From this point of view, any of the versions permitting a *Thought Police* would ultimately amount to a refined type of torture: the annihilation of the spirit of the 'intruded'.

Seen in this light, with the proposal of any of the options (i)–(iii) one would have jumped the fence of the liberal, democratic *sozialer Rechtsstaat* on which my reflections were based.

In a society of transparent, closely scrutinized citizens the possibility to commit crimes would probably be inexistent. This is the aspiration of the totalitarian state, taken to its ultimate consequences: the total denial of individual liberty which, as Kelsen used to say, consists, among other things, in the factual possibility to become a delinquent; in this sense, he says, we are all 'potential delinquents', and it is precisely this capacity to commit crimes which is the foundation for the legal faculty and gives meaning to the imposition of legal duties

(cf., for example, Kelsen 1960, 162 ff.). Let me add: not only the foundation for the legal faculty, but also for the capacity to be a moral agent. The omniscience of a *Thought Police*, in linking knowledge to control, is intended to surpass even the divine omniscience which for centuries occupied theologians and philosophers who understood that the validity of moral codes of allegedly divine inspiration needed to accept and even to presuppose the existence of a Nero or a Judas whose condemnation makes sense only if it is assumed that they acted in the exercise of their uncontrollable individual autonomy.

Today, I think there is reason for concern about the current attitude of some politicians who want to combat the scourge of terrorism by advocating something like option (iii) or even option (ii). If we even begin to proceed on this road of increasing control, it is very likely that we will end up eliminating the spheres of privacy and of intimacy, and in the last instance, the public sphere as well.

My answer to the questions I have formulated earlier is, then, first, that we have reason to fear a *Thought Police* in any of the versions (i)–(iii) and, second, that there can be no morally acceptable balance between the inspection of a person's intimacy and the prevention or punishment of crime.

And, finally, if I am right, then it is not idle to insist that the two opposite itineraries I have proposed must be pursued, in both directions, with great caution. If we stray from the confines of the framework I have tried to present, we run the risk of fatally losing our north.

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