

EGALITARIAN JUSTICE VERSUS THE RIGHT TO PRIVACY?

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INTRODUCTION: BROAD PRIVACY

In their celebrated essay “The Right to Privacy,” Samuel Warren and Louis Brandeis identify as the generic privacy value “the right to be let alone.”¹ This same phrase occurs in Louis Brandeis’s dissent in *Olmstead v. U.S.*² This characterization of privacy has been found objectionable by philosophers acting as conceptual police. For example, William Parent asserts that one can wrongfully fail to let another person alone in all sorts of ways such as assault that intuitively do not qualify as violations of privacy and thus cannot be violations of the right to privacy.³

The right to privacy that was claimed by the U.S. Supreme Court in *Griswold v. Connecticut* to have constitutional status has also attracted objections to the effect that the conception of privacy defined by the judges was constructed by misclassification and confusion.⁴ *Griswold*, an officer of the Planned Parenthood League of Connecticut, had been convicted as an accessory under a Connecticut statute that prohibited any person from using “any drug, medicinal article or instrument for the purpose of preventing conception.” *Griswold*’s specific act had been to counsel married couples regarding contraception. The Court reversed his conviction on the ground that the Connecticut statute as applied to his case violated a right of privacy that was within the penumbra formed by the specific guarantees of privacy in the Constitution. This decision has proved controversial on several counts, one being that the Court was really protecting a

liberty or autonomy interest, not anything that could properly be called “privacy.” Among the philosophers and academic lawyers who have pursued this line of criticism, Hyman Gross warns that “there is some danger that privacy may be conceived as autonomy,” a danger to which “The United States Supreme Court succumbed completely in 1965 in its opinion in *Griswold v. Connecticut*.” The error according to Gross is that “[i]n the *Griswold* situation there had been an attempt by government to regulate personal affairs, not get acquainted with them, and so there was an issue regarding autonomy”⁵ --which the Court confounded with privacy.

In fact there is a plain and simple construal of “the right to privacy” for which “the right to be let alone” is a good paraphrase.⁶ Any society enforces rules and conventions that carve out a boundary between matters that are socially regulated and those left to individual discretion and control. The boundary will be multi-dimensional: In different contexts of choice or spheres of social life the line between what is public business and what is not may be drawn in different ways. The right of privacy in a particular society is fixed by the ensemble of the protections against social regulation and control that the current rules and conventions establish. Alongside this sociological usage we can find a critical or philosophical ideal of privacy. The right to privacy in the critical sense in a particular society is the right of privacy in the sociological sense that morally ought to be accepted and enforced.⁷

When private and public are contrasted in this way, the private sphere is not a sphere of anarchy. If the individual is to be free to do what she chooses and not to be accountable to society for the exercise of discretion for some range of decisions, then other persons must be prevented from interfering.

Taken by itself, the right to privacy that is equivalent to the right to be let alone is an empty shell, purely formal, lacking in substantive content. Content is filled in by some normative theory or set of principles that specify where boundary lines between public and private should be drawn. This may be part of what University of Chicago Law Professor Harry Kalven meant when he suggested that the right of privacy might be a “residual.”⁸ Writing about the right of privacy regarded as having constitutional standing, Kalven observes that this right to privacy may be whatever is left over when everything that is legitimately a matter of public business is subtracted. One could just as easily say that what is legitimately a matter of public business is a residual category; it is what remains when all matters that normatively belong to the private sphere are subtracted. At any rate, bare appeal to the right of privacy as the right to be let alone will not do any work in arguments for or against any law or policy. The work is done by principles—libertarian, communitarian, totalitarian, what have you—that give specific content to the idea by specifying the extent to which people should be let alone.

Broad, diffuse, and contentless, the right to privacy construed as the right to be let alone does not capture all that one might have in mind in invoking a public/private distinction in political argument. The distinction can be made between behavior that is considered appropriate in private places such as within private homes and behavior that is deemed appropriate in public spaces such as streets, parks, and businesses open to the public.⁹ A society might have different codes of behavior for public and private spaces without endorsing the idea that individual discretion should reign in the private spaces. Individual conduct might be strictly regulated in both spheres, but differently in each. Rules that specify appropriate behavior in public and private might take the form of

conferring rights on persons that others behave in public and private in these approved ways. In this way when a couple romantically inclined makes love in a public park, this is an invasion of the privacy of those who wish to use the park without being distracted by this sight, or rather, an invasion of the public sphere by what ought to be conduct done in private. An example of intrusion of public behavior into the private sphere would be my launching into a sermon, as though to my Sunday congregation, at a private dinner party.

Privacy is often understood in another way that is narrower than the broad notions we have canvassed. In this sense an individual enjoys privacy when she is not accessible to others. Access can be variously understood. One kind of access to a person is gained when others learn facts about that person. Another kind of access is physical proximity, or perhaps physical proximity accompanied by the direction of attention toward the person.¹⁰ Much ink has been spilled in the analysis of this family of notions. Often the analysis is guided by the polemical aim of showing that only one of the candidate interpretations of the narrower notion is legitimate or that no broader usage of the notion than one being analyzed by the writer is conceptually licit.

I shall leave aside this literature and ponder broad privacy as the right to be let alone. If some moral theory would have it that I should be let alone along some dimension of conduct to some extent, to bring it about that I am thus let alone much stage setting must be in place, only some of which gets associated with privacy. If I am to be free to X or not as I choose, others must be prevented from interfering with this choice. If I am to be free, the government must neither force me to X nor prohibit me from Xing. It will be useful for me to be able to assure myself of seclusion by placing myself where I

will not be disturbed by anybody who is not coordinating with me to X. If my doing X is something I would prefer others not to know about, the cost to me of doing X is lessened if I can keep this fact of my Xing secret. There is a strong affinity between privacy in this broad sense and private property. If I want to assure myself the freedom to X, without suffering disturbance, in seclusion, being free to keep detailed knowledge about my doing X from becoming widely known, a good strategy to follow is to inhabit a regime that does not ban Xing, own some property in land, retire to it with persons who want to do X with me and agree not to publicize our doing it, and carry on with means to X which I own or have secured from their owners.

EGALITARIAN CONSEQUENTIALISM AND ORWELLIAN WORRIES

So far I have urged that talk of privacy and of rights of privacy lacks determinate normative content in the absence of some theory or set of moral principles capable of fixing and justifying lines of division between public and private. Yet appeal to privacy also surely functions as a constraint on moral theory acceptance. We have intuitions about ways in which individuals should be left free from certain sorts of social interference that serve to test proposed moral theories. The theories that are incompatible with our firm privacy intuitions must be rejected. Perhaps the firmest such privacy intuitions reflect the twentieth-century experience of totalitarian governments and even more the fantasy of totalitarianism as an ideal type as in George Orwell's *1984*. In this essay I shall explore the suspicion that maximizing consequentialist moralities cannot adequately reflect the depth of our commitment to rights to privacy. This worry that consequentialism cannot take rights seriously haunts discussion of utilitarianism. In the

face of these worries the strategy I shall follow is to argue that an egalitarian version of utilitarianism generates a plausible approach to issues of privacy.

The utilitarianism of John Stuart Mill holds that institutions and policies should be set and actions chosen so as to maximize the aggregate sum of human pleasure. Mill has a complex story to tell about pleasure, but the complications to my mind do not overcome the difficulty that the human good is not plausibly identified with pleasure: Quality of life does not reduce to quality of experience. To render Millian consequentialism plausible it must incorporate as the goal to be maximized whatever is picked out by the soundest theory of human well-being. (One can regard Mill himself as taking incomplete steps in this direction when he proposes that pleasures differ in quality as well as in quantity.) For the sake of the argument, let's suppose we have done our homework and have that soundest theory ready to hand.¹¹ From now on I'll identify the human good to be maximized with well-being rather than pleasure, without supposing that I have done more than give a name to a problem that eventually must be solved.

In his detailed political theory and policy recommendations Mill consistently tilts toward equality, a tilt he claims to derive from neutral utilitarian summation. But he never squarely addresses the issue of the distribution of well-being (utility) by considering whether we should have no preference between any of many possible future states of the world in which the distribution of utility across persons varies enormously provided the net sum is the same in all of these possible futures. I endorse amending Mill's utilitarianism by incorporating a preference for equality directly in the fundamental principle. This yields what nowadays is called prioritarianism: institutions and policies should be set and actions chosen so as to maximize moral value, with the

value of a gain in well-being that we could obtain for a person being greater, the greater its size, and greater, the lower the person's lifetime well-being expectation prior to receipt of the benefit.¹² Prioritarianism is sometimes referred to under the heading "weighted well-being." The prioritarian aims to maximize not well-being in the aggregate, but well-being weighted by priority to the worse off.

Contrasting prioritarianism with utilitarianism clarifies the former idea. For the utilitarian, the right policy is the one that maximizes the sum of utility (human well being). For the prioritarian, the right policy is the one that maximizes the sum of moral value. Moral value accrues from utility (human well being) gains obtained for persons, but the moral value of each gain is adjusted depending on its size (other things being equal, more utility is better than less) and also depending on the prior utility level of the recipient (other things being equal, utility to a badly off person is better than a similar gain obtained for an already well off person). The extent to which prioritarianism in practice would yield recommendations for policy different from those utilitarianism would recommend depends on the specific degree of priority to the worse off that is assigned. Prioritarianism encompasses a family of principles that give more or less priority to the worse off.

Along with utilitarianism and a straight preference for equality of distribution, prioritarian accounts of justice attract criticism on the ground that they fail to distinguish deserving and undeserving, responsible and irresponsible agents. One line of response is to stiff-arm the criticism. If arranging institutions to reward unproductive agents establishes perverse incentives that operate over time to lower productivity to the point that the weighted well-being sum is less than it could be if incentives were better

structured, then prioritarianism demands the better structure of incentives that would result in maximization over the long run. Prioritarianism like utilitarianism accommodates responsibility as an instrumental value. But this degree of accommodation may be insufficient. If we must choose between providing a gain (avoiding a loss) for a saint or a sinner, where the weighted well-being gain would be the same whichever person we favor, and there are no further consequences to consider, it seems intrinsically morally more valuable to achieve the gain for the saint. Think of the saint as someone who fulfills her moral obligations and within these moral constraints uses her well-being opportunities efficiently for her advantage, while the sinner squanders well-being opportunities for others and for himself.

Without trying to be more precise about responsibility, I suppose it matters morally, so we should amend prioritarianism to yield responsibility-catering prioritarianism. On the latter view, the moral disvalue of imposing a loss on a person or transferring benefits from her is greater, the greater the person's degree of responsibility for the well-being expectation she currently enjoys (if it is high, so she is among the fortunate), and the moral value of conferring a gain on a person or transferring benefits to her is greater, the lower the person's degree of responsibility for the well-being she currently enjoys (if it is low, so she is among the unfortunate). This yields a version of weighted well-being in which the moral value of well-being increments we might obtain are adjusted twice—once to give priority to the worse off, and again to reflect the degree of responsibility of each individual for her present condition (whether she is well off or badly off in well-being prospects).

Taken as a standard for assessing the laws, practices, and social norms of modern democratic societies, responsibility-catering prioritarianism might appear to be preposterous. The idea that we might adjust our behavior toward people based on our estimation of their overall deservingness of responsibility seems entirely chimerical. Individuals do not display responsibility scores on their foreheads, and the attempt by institutions or individuals to guess at the scores of the people they are dealing with would surely dissolve in practice into giving vent to one's prejudices and piques. The criminal justice system has a difficult time making reliable determinations of an individual's guilt or innocence of a particular criminal act; the thought that we could construct a distributive justice system that assesses people's lifetime responsibility is surely a nonstarter.

The component of responsibility-catering prioritarianism that says that social policy should tilt toward the worse off also looks problematic on its face. Should we adjudicate conflicts of interests among citizens based on hunches about their comparative welfare as well as about the rights and wrongs of their dispute? Should we have one law for the rich (presumed to have a better quality of life, on the average) and another for the poor?

These doubts echo familiar right-wing suspicions that left-wing egalitarian goals are incompatible with firm respect for individual rights, the firmness being the indispensable ground of decent social relations. Friedrich A. Hayek once warned that "any policy aiming directly at a substantive ideal of distributive justice must lead to the destruction of the Rule of Law."¹³ The argument is straightforward. Individuals are different, and circumstances vary continuously, so to bring it about that the outcomes

individuals reach match the outcome specified for them by distributive justice, no set of laws specified in advance and firmly adhered to and applied uniformly across persons can be embraced. Either the laws must change capriciously or the laws must give so much discretion to officials that individual citizens cannot predict how the laws will be applied to them and so the ideal of the Rule of Law is defunct in either case. In a similar spirit Robert Nozick has observed, “Patterned distributional principles do not give people what entitlement principles do, only better distributed.”¹⁴ The “rights” that one is assigned as means to egalitarian goals are always liable to disappear whenever marginally more efficient fulfillment of the goals requires alteration or abolition of these individual rights. Hence Nozick’s charge that the realization of any pattern of egalitarian justice in distribution requires continuous and wrongful interference with the liberty of individual persons to live their private lives as they would choose.

In responding to these criticisms, the egalitarian can learn lessons from the history of similar criticisms of the general family of consequentialist views, of which egalitarian justice views are members. Mill anticipates these lines of criticism in *Utilitarianism* and *On Liberty*.¹⁵ The upshot is that a consequentialist moral principle is to be understood as a criterion of right conduct and the right arrangement of social practices, not necessarily as a decision procedure or practical guide to deliberation and policy choice. Given the limited knowledge, limited intelligence, and limited altruism of actual human beings, the social rules that it would make sense, on consequentialist grounds, to teach them to obey will need to be more rigid, specific, easy to grasp and apply, and resistant to biased misapplication than very general and abstract principles. Given the importance of stability and predictability of laws, and of the provision of assurance to individuals that if

they build a house today, others will not have the right to tear it down or occupy it tomorrow, it makes sense, on consequentialist grounds, to implement a legal code that achieves the Rule of Law values and avoids perverse incentives. Given that people need liberty and privacy to have good lives, these values must be secured. Consequentialist principles successfully applied would not give rise to Orwellian tyranny, so opposition to the latter is not any sort of reason for rejecting the former.

How far can the consequentialist go in promoting stability and assurance in the set-up of legal and social rules? (The consequentialist obviously will not make a fetish of specifically legal instability. A war or a natural disaster or a severe economic shock or other sudden large changes in circumstances can upset people's reasonable expectations and prudent plans just as a change in the tax laws can.) In *On Liberty* Mill proposes that we ought to conform conduct and social policy to his Liberty Principle absolutely and without exception—even in circumstances when we reasonably foresee that violating the Liberty Principle would produce better consequences. The argument is that we cannot reliably distinguish the situations in which the Liberty Principle would best be violated from other seemingly similar situations in which adherence despite appearances would be best, so treating the Liberty Principle as an absolute and exceptionless rule predictably does more good than any policy of partial compliance we could devise and implement. In other words, we cannot devise any fine-grained policy that carves out categories of exceptions to the Liberty Principle, which would have greater expected utility than the coarse-grained Liberty Principle that allows no exceptions, so adherence to the coarse-grained Principle is best.¹⁶

Suppose we say that if some person has a moral right to X, then it must be the case both that somebody is under a duty to X and that the person who has the right is wronged if this duty is not fulfilled. In Mill's terms, the idea of a right involves the idea of a claim that should be honored plus the idea of a specific person who is wronged if the claim is not honored. We might impose as an additional constraint that if someone has a moral right to X, then she does not cease to have right to X just because the denial of her claim to X would produce the best consequences. Moral rights so construed can be justifiable in a consequentialist moral theory. The lessons of *Utilitarianism* and *On Liberty* apply. If best consequences would flow from guaranteeing individuals a certain right, then consequentialism endorses the establishment of the right, which should be upheld even when cancelling the right in specific circumstances would on that occasion produce best consequences, given our inability reliably to distinguish the true cases where exceptions should be made from cases that mimic the true cases and falsely appear to be justified exceptions.

David Lyons has argued that the reconciliation between consequentialism and rights countenanced above is unsuccessful.¹⁷ Suppose Mary has a moral right to use her car as she chooses. Then she is morally at liberty to carry out many acts with her car—any of those that do not wrongfully injure or otherwise violate the moral rights of others. But consequentialism as a moral theory asserts that one should always do whatever will produce best consequences. Applied to Mary, consequentialist morality implies that she is not after all morally at liberty to carry out any of a wide variety of innocent acts with her car, because she morally ought to do only one of those acts that produce

consequences as good as any alternative available to her. Consequentialist moral principle is then incompatible with recognition and endorsement of moral rights.

A reply is available to defend the consequentialist against Lyons's argument. This reply begins by distinguishing, perhaps artificially, between (1) the act that it is right to do, that one morally ought to do, that one has most reason to do and (2) the act that one is morally obligated to do and that is such that, if one fails to perform it, one incurs blame or other punishment. The consequentialist can hold that an act is right (is what one morally ought to do) just in case doing it would produce consequences at least as good as would be produced by any alternative act one might choose. At the same time the consequentialist can stipulate that an act is morally obligatory (one would be blameworthy for failing to perform it) just in case it is a member of a class of acts such that a social practice of punishing them would produce best consequences.

Now back to Mary. We are wondering whether a society run on consequentialist principle could coherently accord her a moral right to use her car as she pleases. Suppose the society does accord her such a right. What would this amount to? Despite the assignment to her of the right to use her car as she chooses, it remains the case (let us say) that there is some unique act she could perform with her car that would produce best consequences, so this is the act that she morally ought to do. Yet it could be the case that she is under no moral obligation to perform this optimific act, and would not be blameworthy if she does not. If punishing a person for doing a less than best act with her car would be counterproductive, then she should not be punished in any way for this innocent act. If there are many such acts, Mary is in a sense morally at liberty to perform

any of them, in that she would not suffer blame or reproach from herself or others if she does any of these innocent less than best acts with her car.

The point can be put in terms of socialization practices in a consequentialist society. We are imagining that the social training practices that would produce best consequences, and which a consequentialist society would implement, would bring it about that well brought up individuals would not be morally obligated always to do the act, of those available, that would produce best consequences, and would not feel blame or otherwise suffer punishment if they failed sometimes to do the act that consequentialism singles out as best. In such a society, Mary's moral right to do as she chooses with her car (so long as she does not harm others) is given by the fact that she is not morally obligated to do whatever act with her car would produce best consequences in the circumstances plus facts about the obligations of other people not to interfere in various ways. Why shouldn't the socialization practices be ratcheted up so that the Marys of the world are morally obligated to do whatever they ought in the circumstances to do? If the society is already run according to consequentialist principle, then the level of obligation has been optimally set, and any raising or lowering of it would dampen the production of good consequences.

PRIORITARIANISM AND PATERNALISM

These comments on the structure of consequentialist moral theory leave untouched the more specific suspicions that egalitarian consequentialism provokes. One is the idea that guiding social policy by measurements of individual responsibility would be disastrous. Another suspicion is that tilting social policy toward the worse off as prioritarianism bids us to do conflicts with the principles of equal treatment and equal

protection of all citizens under law that are important aspects of the ideal of the rule of law.

Regarding responsibility, I simply maintain that it is intrinsically morally more valuable to secure a benefit for a person in bad straits if the person is not reasonably deemed responsible for bringing about her plight. The extent to which actions or social policies could be guided by this principle depends on what the best account of individual responsibility turns out to be and the degree to which the information needed to apply this account can be made available to decision makers in ways that do not cost more in moral terms than they are worth. There is also an issue about the extent to which indirect policies can be devised in some cases that achieve responsibility-catering goals without directly making use of information about individual levels of achieved responsibility. For example, it might be possible to construct educational policies that tend to foster individual responsibility of the kind we seek to promote. But I take no stand here on these difficult issues. If it turns out to be empirically the case that the relevant information is unavailable and useful indirect policies are not to be had, then responsibility, though important in principle, would become irrelevant to practice.

It might turn out that in some circumstances it would be empirically possible to cater to the responsibility element in responsibility-catering prioritarianism, but only at great cost to prioritarian values. That is to say, one could to some extent channel benefits toward people according to their differential deservingness, but this would be very costly, so far fewer resources would then be available to improve the condition of the worse off. One would then need to decide what weight to accord the responsibility element as against the priority element in responsibility-catering prioritarianism.

Regarding tilting toward the worse off, I do not see a conflict with requirements of stability and good order and the Rule of Law. One wants a regime that maximizes the achievement of prioritarian values over the long run, so arrangements that would undermine social stability and trigger perverse incentives and the like would not qualify. It is surely not the case that the choice for prioritarianism impedes the choice of sound institutions to implement this conception of justice. One should also note that the requirement that institutions and practices should be set so as to maximize a sum of human well-being that is adjusted to give greater weight to gains for the worse off is a requirement on the system as a whole, which might not necessarily involve instituting policies that explicitly tilt toward the worse off in every sphere of social life. For example, if a “nontilting” tort law system, in concert with some overall package of institutions, would maximize weighted well-being, then that would be preferable to a similar system but with a tort law system tilted to favor the worse off. The same point holds for individual actions. If individual actions in some domain, for example, promises and contracts, would do better for the worse off in the long run if they eschew deliberately trying to tilt in favor of the worse off, then nontilting actions would satisfy prioritarian morality in that domain. I do not mean to do more here than raise a possibility, not settle any substantive issues.

But in fact I suspect that the shape of laws and institutions that would satisfy prioritarian principles often would have to be designed with special consideration for their impact on the worse off. Consider Mill’s nemesis, paternalism—the restriction of someone’s liberty against her will for her own good. The Liberty Principle espoused by Mill holds that the only good reason to restrict individual liberty is to prevent harm to

nonconsenting others, which appears absolutely to rule out paternalism. Some of Mill's detailed discussions suggest qualifications. If someone lacks access to facts that are material to a self-regarding decision, or one is in a poor condition to make competent decisions from one's own standpoint, some restriction of liberty may be acceptable to Mill. Also, The Liberty Principle is intended to apply only to sane nonfeebleminded adults. Mill holds that the principle against paternalism should be qualified along these lines, but that this qualified principle should be followed strictly and without exception. Adherence to such antipaternalism according to Mill would maximize the sum of utility in the long run. I have no idea whether or not Mill's speculation on this point is correct. For the sake of the argument, suppose it is. This would not settle the issue, whether paternalistic policies are ever morally justified. Mill's argument ignores the distribution of utility. For all that he has claimed, it could be the case that strict adherence to his version of antipaternalism would maximize human utility because the costs that it inflicts on badly off persons are more than offset by gains for already better off persons. Indeed, if Mill's conjectures are correct, this may be likely.

Human beings no doubt vary in their ability to determine where their good lies and to choose actions well calculated to gain their good as they see it and to execute their choices. For simplicity divide the population into good and bad choosers. I submit that it is plausible to hold that on the whole and on the average, bad choosers will lead lives worse in well-being than good choosers. Even though luck and favorable initial circumstances interact with the degree of one's prudential ability to determine life prospects, other things being equal, those with greater talent for prudential choice and conduct will do better. Paternalistic restriction of liberty would never benefit well-

informed ideally good choosers, who will choose only options that are prudently sensible. But paternalistic restriction can improve the life prospects of bad choosers, because subtracting options that are tempting but bad for them can render them likely to make choices that are more likely to be conducive to their well-being. An example would be paternalistic laws restricting people's liberty to consume dangerous recreational drugs. With the drug use options in place, good choosers opt for them only when doing so works to their long-run advantage, whereas bad choosers may opt for drug use that is self-harming overall. If this is so, then the policy choice whether or not to enact paternalistic laws such as drug control laws may present conflicts of interest between good choosers and bad choosers and ultimately between relatively advantaged and disadvantaged persons. Even if Mill is correct that no-paternalism as he conceives it maximizes human well-being over the long run, this is fully compatible with paternalistic drug control laws being justifiable according to prioritarian principle, because prioritarianism gives greater moral weight to achieving gains and avoiding losses for those whose well-being expectations are low.

In theory, one could imagine policies that distinguish good choosers and bad choosers and provide freedom for the former and restriction for the latter. Recent proposals to render physician assisted suicide legal in a limited range of cases gesture toward this strategy by proposing that the category of cases in which assisting someone's suicide be permitted should be tailored to include only cases in which suicide is almost certainly in the interest of the one who dies. But attempts to separate good and bad choosers sometimes generate extra costs, because the separation can heighten the insult of paternalism, the authoritative judgment by another person or, even worse, by state

agency, that you are not competent to run your own life properly. Paternalism imposes stigma on its intended beneficiaries, and the costs of stigma tend to increase with the effort to discriminate good and bad choosers.

In some cases these costs of stigma may be worth bearing, all things considered, so that the best policy choice is paternalism targetted toward the class of bad choosers. In other cases the cost of stigma and insult tip the balance against any paternalism in some policy domain, so in that domain, no paternalism is best. In a third class of cases, the cost of stigma might tip policy toward blanket paternalism that treats good choosers and bad choosers alike and makes no effort to distinguish them.

“Get the state off our backs!” is a perennially popular cry. No doubt state intervention to help prevent people from suffering self-inflicted harm is often misguided, incompetently administered, or generated by the failure adequately to imagine and empathize with the lives and outlooks of people different from the policy planners. But prioritarianism alerts us to the possibility that denunciations of paternalism reflect the self-interest of the already advantaged.¹⁸ If we should care about the distribution of human well-being, then debates about the line between public and private should be reconfigured.

PRIVACY AND THE NEED FOR THEORY

Conflicting recommendations regarding privacy require some theory, consequentialist or other, for their resolution.

Arguing for a legal right of privacy in the sense of a right against publication of personal facts about an individual without her consent, Warren and Brandeis assert that gossip in the press is corrupting and serves no significant and rational interest of its

readers. In response, Richard Posner proposes rational purposes that gossip might serve.¹⁹ Posner's discussion is hamstrung by his assumption that the satisfaction of any desire that a well-informed agent chooses to pursue must increase rather than lessen the agent's welfare. But rejecting that assumption still leaves it entirely open what substantive value should be assigned to the interests that gossip serves and frustrates. One needs a full assessment of the moral costs and benefits of possible privacy regimes to know whether or not the Warren and Brandeis position is acceptable.

Writing in favor of more expansive and stringent informal privacy norms in the U.S. now, Thomas Nagel cites three putative benefits of strengthening these conventions.²⁰ Since divulging irrelevant personal matters in the context of schemes of cooperation tends to be distracting and divisive, cooperative enterprises will function more efficiently if privacy norms inhibit the divulging. Norms that require reticence about personal matters in social interactions also protect the inner mental life of individuals, the source of individuality and the site where much that is valuable in individual life occurs, according to Nagel. Finally, Nagel notes that conventions of privacy facilitate selective disclosure of personal information in ways that enable intimate friendships to flourish. Nagel stresses that conventions of privacy that limit candor are needed in varying degrees in all types of social interaction, even the most intimate personal relations.

The considerations that Nagel cites can pull together but sometimes tug apart. Nothing guarantees that the privacy conventions that would best enhance the efficiency of cooperative enterprises would coincide with the privacy conventions that would best protect the sphere of individuality constituted by the inner thoughts of each individual.

Perhaps in some settings insistence on divulging what are ordinarily thought to be legitimately personal and private matters does promote group productivity. Perhaps the privacy norms that best promote the appropriate degree of candor in personal friendships would conflict with the needs both of social productivity and of the flourishing of individual thought. Where such conflicts occur, how should the balance be struck? Nagel argues that conventions of reticence are needed because in a diverse modern society people inevitably will disagree widely and deeply about how to live, so an increase in candor increases tension, hostility, and conflict. But if people disagree about the right and the good in diverse democracies, surely one such important sort of disagreement is how to draw morally legitimate boundaries between public and private in both the legal domain and the sphere of informal social norms.

Nagel confidently pronounces that the considerations he adduces justify strengthening the existing informal privacy norms. This may be so. But to decide whether or not privacy norms should be strengthened, weakened, or left alone, some further argument must be supplied that involves some overall assessment of moral costs and benefits associated with the alternatives one might choose. I do not mean to imply that an inclusive argument need be consequentialist. One might instead identify all the distinct deontological considerations that bear on the privacy issue, according to one's preferred deontology, and come to an all things considered judgment. But some theoretical perspective is needed.

Consider the practice of outing—the public revelation of the homosexuality of a prominent person who wishes to keep her sexual orientation a secret and who has worked to keep this aspect of her romantic life from becoming public knowledge. I focus on such

acts done by persons who believe they are striking a blow for tolerance of gays and do not aim to call down hostility and prejudice on the figure who is exposed. If there is a right not to have personal facts about oneself made public without one's consent, it is plausible to suppose that this right includes the right that one's sexual orientation not be disclosed against one's will. If there is such a right, what are its basis and justification? One might think that moral analysis here bottoms out in a deontological judgment. But surely the consequences will be a big part of the basis for moral judgment even if one denies they are all of it.

In some historical contexts being identified in a public way as a homosexual rendered one susceptible to the gallows, the dungeon, or violent death at the hands of an angry mob. But in the contemporary U.S.A., prejudice and discrimination against homosexuals are variable and waning, though still virulent. Active political movements combat discrimination against gays. Many homosexuals in recent years have "come out of the closet," openly affirming their sexual orientation and making no secret of it. I suppose the case for outing would go as follows. Let's suppose that at this time in the U.S.A., the greater the number of homosexuals who openly affirm their sexuality, the lesser the stigma that attaches to openly acknowledged homosexuality and the easier it is to lead a life that eschews this sexual secrecy. The open acknowledgement of homosexuality by one individual confers a benefit on all others who also openly acknowledge their homosexuality. Although this is less clear, I will assume that the open acknowledgement of homosexuality by some does not have any impact, positive or negative, on the life prospects of those homosexuals who continue to keep their sexual orientation a secret. I assume further that the more generally well-known the individual

who reveals his sexual orientation, the greater the impact of the revelation on the disposition of public opinion toward tolerance. A celebrity has more clout in this regard than a nobody.

The advocate of outing envisages a desirable future state of American culture in which being lesbian or gay is not regarded as shameful or sinful, no stigma attaches to nonheterosexuality, and no one has any reason to be secretive about her sexual orientation. The claim then must be that the costs to self versus the gains to others of openly declaring one's sexual orientation if one is well-known and gay are such that the prominent gay is morally obligated to take this course, so forcing this course on the unwilling is at least morally permissible. I have no idea whether the advocate wins or loses the argument because I have no clear idea as to the likelihood of the several empirical claims the argument presupposes. What does seem true to me is that the characterization of an act as an invasion of privacy even in this extreme case does not settle its moral status, which requires here as always a calculation of consequences and a set of principles for weighting their moral value or disvalue.

EGALITARIAN OBJECTIONS TO RESPONSIBILITY-CATERING PRIORITARIANISM

Perhaps a sign that the brand of egalitarian justice I favor fails to accommodate morally legitimate individual rights of privacy is that this very complaint has been forcibly asserted by some egalitarians.

In a nutshell, the problem is that versions of egalitarianism that seek to accommodate concerns of personal responsibility and deservingness appear to require for their implementation vast amounts of what would otherwise be private and merely

personal information about people's lives. Suppose we say that justice requires equalizing people's opportunities for well-being. On this view, if one person is badly off now because she never had any opportunity to achieve a decent quality of life, there is a justice reason to compensate her for her misfortune, whereas if another person is equally badly off now because she squandered the rich opportunities that were available to her, there is no justice reason to compensate her and there may even be a case for transferring resources away from her so as to improve the opportunities of those whose initial options were bleak. But on this view upholding egalitarian justice requires agents of society to ferret out the information about individuals that will enable these classifications of people into different levels of responsibility for their current fate. Moreover, agents of society must make complex and discriminating moral assessments of people's conduct of their lives. To some, theories of distributive justice with these implications amount to rationalizations for a Big Brother state.

Jonathan Wolff imagines an individual who cannot secure employment even in a tight labor market.²¹ Economic conditions are favorable, so in order to plead that despite appearances he has no genuine opportunity for employment and the improved quality of life that employment would bring, he has to demonstrate that his personal deficiencies interact with the favorable economic conditions so as to render his continued unemployment an affliction that is beyond his power to control. Opportunity-oriented versions of egalitarian justice impose on people in this type of situation a requirement of shameful revelation. One must explicitly confront in one's own mind and then openly acknowledge to others facts about oneself that one regards as deeply shameful. In modern democratic culture, where a competent adult is expected to be self-supporting,

personal deficiencies such as abject lack of talent relevant to employability qualify as deeply shameful, and the individual who must shame himself in this way in order to be eligible for state income support will find it difficult to sustain his sense of self-respect, his belief that he is fundamentally an equal among equals in his society.

According to Wolff a similar problem arises when one considers how institutional security measures in a government bureaucracy charged with the task of administering resource transfers to aid the disadvantaged can express strong distrust of those who are being monitored. An individual who is able to view himself as sharing a status of democratic equality with all others in society will regard himself as entitled to a presumption of trustworthiness. If one's conduct is monitored by state authorities, whereas ordinary nonpoor citizens are not subject to this degree of monitoring and scrutiny, one reasonably feels distrusted. Here again state action menaces one's sense of self-respect and one's belief in one's fundamentally equal status in society. To invoke an old example, the knock on one's door in the dead of night may not be the Gestapo or the police, but rather one's social service caseworker, checking on the truthfulness of one's declaration that one is living alone and supporting one's children and not cohabiting with a boy friend who should be counted an extra source of opportunities for resources that reduces one's need for state support.

Wolff suggests a moderate response to these difficulties. Alongside distributive justice principles of fairness we should embrace a principle of respect, which forbids treating people in disrespectful ways or in ways that threaten their self-respect. Sometimes fairness should give way to respect when the two values conflict. Without directly discussing purported flaws in egalitarianism, Avishai Margalit identifies "the

decent society as one whose institutions do not humiliate people,”²² where humiliation involves banishing someone from the human commonwealth or denying a person control over her vital interests, in short, treating someone as a nonperson or as less than fully human. Margalit discusses invasions of privacy as one type of humiliation which the decent society avoids. His book The Decent Society conveys the impression that maintaining the decent society is morally a more urgent matter than establishing justice. Even if decency is part of justice, it is the preeminent part.

Elizabeth Anderson emphasizes the disrespectfully negative judgments about the traits and lives of individual persons that the egalitarian institutions convey to those who are classified as deserving of aid as well as to those deemed undeserving. Her target is a family of views of distributive justice she calls “luck egalitarianism.” According to the luck egalitarian, the problem for social justice is that people suffer from undeserved bad luck, and what justice requires in response is that compensation and transfers be implemented so that the good and bad fortune that each person gets through no fault or choice of her own is the same for all. Anderson objects that the attitude that lies behind this conception of justice is an unsavory disrespect--disrespectful pity toward those labelled unfortunate and presumptuous hectoring of those deemed at fault and hence responsible for the mess we say they have made of their lives. In the same vein, criticizing a luck egalitarian essay by G. A. Cohen,²³ Christine Korsgaard expresses a preference for conceptions of distributive justice that allow us to “avoid having to make moralizing judgments about individual cases.”²⁴

Anderson asserts a further objection against luck egalitarianism, one that partly explains its tendency to offensive moralizing and paternalistic invasion of privacy. She

holds it to be a mistake to include natural as well as social inequalities within the scope of social justice. The view she criticizes would have it that it is unfair that some are born handsome and charming and some plain and uncharming, so perhaps the state should investigate, assign romantic endowment scores to persons, and organize compensation for those destined to be unlucky in love, unless their misfortune along this dimension is outweighed by good fortune along other dimensions. According to Anderson, once the domain of inequality with which justice is supposed to deal is erroneously extended, the social justice principles that underwrite the extension are bound to go disastrously wrong in setting boundaries between public and private, so that the social agencies assigned to dispense egalitarian justice inexorably trample on people's private lives in the name of public business.

In response: All of these criticisms sound plausible but none is correct. Or at least, none makes serious trouble for responsibility-catering prioritarianism.

First of all, we need to keep straight at what level of abstraction the discussion is supposed to proceed.

A counterexample to a moral principle envisages the successful implementation of a principle in specified circumstances, and argues that the implications of accepting the principle in these circumstances are morally unacceptable, so to block these implications we must either reject or qualify the principle. The arguments of the critics are supposed to demonstrate that values such as privacy and self-respect have weight independent of human well-being and perhaps should be accorded predominant weight. But the scenarios conjured up by the arguments as I read them tend to be ones in which ham-fisted institutions smash privacy and human well-being as well. Read that way, the

arguments cannot succeed. You cannot refute a moral principle that tells us we ought to achieve a certain aim to the greatest extent that is possible by pointing out (what is surely true) that some seemingly sensible ways of trying to achieve this aim would be counterproductive. Such a refutation only shows that the policies proposed for fulfilling the principle would be unsuccessful. They leave the principle untouched.

In order to ensure that we are not slipping into this unhelpful construal of the objections, it is fair to concentrate on examples in which it is clear that egalitarian justice as responsibility-catering prioritarianism is best fulfilled by means the critics deem repulsive and immoral. The conflict is then squarely posed. The critic is invoking a deontological standard for what counts as a violation of privacy that is taken to be independent of the consequences of violating privacy construed according to the standard.²⁵ The critic seeks our agreement that if the facts fit a certain characterization, then conduct so characterized is morally wrong regardless of its consequences (at least up to some threshold level of consequences).

So let us consider a drug control policy that requires the state, in a world troubled by child abuse and human disarray in families whose adult guardians overuse problematic recreational drugs such as alcohol, heroin, and cocaine, to encourage children to inform on their parents. Here we have Big Brother with a vengeance. We might imagine that such a family-splitting policy might yield bad results with no offsetting benefits, but then consequentialist views such as prioritarianism will condemn the policy, so on those facts it is not a good test case for assessing the independent moral weight of privacy. So to isolate the moral urgency of the right to privacy per se, we stipulate that the policy has unequivocally good results when these are assessed by responsibility-catering

prioritarianism. The policy predictably corrodes family ties and mutual trust among family members, and these effects are worse in families in which parents accused by their own children are either entirely innocent or guilty of some minor peccadillo that is disproportionate to the suffering they along with their children are made to undergo. The policy puts state officials in the uncomfortable position of training children to be snitches, a task they find odious, and which exposes the children to increased risk of physical and emotional harms. But over time, let us suppose, the policy does more good than harm, as weighted by consequentialist principle, and indeed maximizes moral good by comparison with any alternative policy. The net results are that social workers, an already well off group, are made slightly worse off, and parents of targetted families are on the average neither better off nor worse off, but children, though some gain and some lose, are on the whole substantially better off, and the gains are concentrated among the children whose ex ante prospects living in miserably abusive settings placed them badly off even within the class of impoverished and disadvantaged children. So weighted well-being is substantially increased.

My response to this imaginary case is that privacy values have already been included in the calculation that establishes people's overall well-being increases and losses, so giving further weight to a purported "right of privacy" in a moral assessment of the policy involves illegitimate double counting. Privacy, like many important human values, might be an instrumental value; its importance would then be derivative. Privacy of various sorts contributes to human flourishing in many settings, so we honor it. Rights of privacy to the extent that they are defensible are tailored to conduce to well-being, just as healthy diets are designed to secure weight loss and other health goals, and a "good

diet” that does not contribute to weight loss or other health values has no independent claim on our allegiance. Privacy might well figure into the weighted well-being approach in another way, as a constituent of well-being rather than as a means to it. Achieving certain privacy values might in and of itself, other things being equal, make one’s life go better. But to the extent that privacy is rightly regarded as a component of well-being, then a principle that urges us to maximize human well-being as weighted by fair distribution considerations already incorporates adequate concern for privacy, so if it turned out that we can maximize weighted well-being by violating privacy, this is no more problematic, and no more an objection to weighted well-being, than discovering that in many circumstances we must endure or produce some physical pain in order to maximize weighted well-being, notwithstanding the fact that pain avoidance is no doubt a component of well-being. So the undoubted importance of privacy need not impel us to postulate privacy as a distinct and independent moral value. Everyone agrees that privacy conventions differ greatly from one culture to another. Do we really have a grip on how to evaluate these various privacy conventions apart from assessing their effect on the sum and distribution of well-being?

Whether well-being and its distribution could credibly serve as a single fundamental value in a theory of justice depends in part on how well-being is conceived, In this essay, “well-being” serves as a placeholder. How it is best conceived is a topic for other occasions. But the reader should substitute the best account of well-being into the prioritarian proposal in order to give it a fair hearing. If a perfect implementation of a prioritarian principle would bring it about that people are leading debased and miserable lives, then we are deploying an unsatisfactory conception of human well-being. For

example, if well-being is conceived as preference satisfaction, then the society that achieves the prioritarian goal might be one in which people overwhelmingly are satisfying benighted and foolish preferences that would not withstand reasonable critical scrutiny. If this outcome strikes us as morally unsatisfactory, the likely culprit is the conception of well-being as desire satisfaction, not prioritarianism.

Notice that my example of the privacy-destroying state policy that maximizes weighted well-being and should be regarded as morally satisfactory just on that account requires that egalitarian justice at the fundamental level be concerned with individual well-being. Suppose instead that egalitarian justice was conceived as fundamentally requiring a fair distribution of resources. For simplicity, let's suppose that egalitarian justice requires an equal distribution of resources according to some standard for determining, given that different individuals hold different amounts of different resources, what their overall or all things considered resource holding is. We then confront this conception of justice as equal resource provision with the objection that the most efficient means to bring about the achievement of social justice might involve cruel violations of privacy as in the example of state encouragement of children to inform on their parents. The reply is that however morally bad we regard privacy invasion to be, there is no problem, because in the example the privacy invasion is required in order to secure egalitarian justice, and we are supposing that justice is the moral value that takes priority over all others. Absent this privacy invasion, an equal distribution of resources to people could not be secured. The trouble with this line of response is that the distribution of resources, stuff that people can use to help in achieving their goals, is not per se something that anybody should care about. We will want to look beyond the equal

resource distribution to see what it does for people and whether it enhances the quality of their lives. Nothing guarantees that it will do so. Getting the postulated equal and fair share of resources may not do anything for my life, or may not do much. But in this case the response to the privacy objection looks fetishistic. We suppose plausibly that the invasion of privacy that we are considering has significant negative costs on people's lives: values that matter to the good life are being corroded and destroyed. One cannot reasonably assuage this worry by cheerfully remarking that the costs that privacy loss incurs are more than counterbalanced by the distribution of resources, such as bank account wealth, that could not be achieved (so well) if the privacy loss were not accepted. But for all that has been said so far, it could be the case that no one regards the loss of privacy as fair compensation for the extra piles of resources that are offered as compensation, and for all that has been said so far, everyone who so regards the matter might be entirely reasonable to do so. In order that social justice can plausibly be regarded as a preeminent moral value, one that trumps all others, the currency of justice must be well-being rightly construed.

A fundamental moral principle that tells us to maximize weighted well-being will not be operationalizable. One cannot directly apply it as a guide to policy and law. One will need intermediate principles that posit measurable proxies for the values we really care about, which, even if measurable in principle, will not be directly measurable in practice. But the resultant moral structure, with its levels of abstraction from fundamental principles to applicable policy guides, must be anchored in a credible understanding of what we think really matters from the moral standpoint.

I want briefly to tout another virtue of responsibility-catering prioritarianism that is manifest in the discussion of egalitarian justice versus privacy. This virtue can be claimed for prioritarianism only if it is bounded in some respects. Prioritarianism holds that the moral value of securing a benefit for a person (or avoiding a loss for him) increases, the lower the person's prior well-being level, measured on an absolute, not a comparative scale. (This last point means that the moral value of gaining a particular benefit for a person at a particular level of well-being does not vary depending on whether other people are better or worse off. Prioritarianism's judgments are not directly comparative. But if Smith is worse off than Jones, it will turn out that conferring a one unit benefit on Smith rather than Jones has greater moral value.) By how much does the moral value of providing a benefit get increased weight in this way? At one extreme, vanishingly extra weight is assigned, and prioritarianism with almost nil weighting becomes hardly distinguishable from straight utilitarianism. At the other extreme, the extra weight assigned in this way is always infinite, which renders prioritarianism a leximin doctrine.²⁶ This is an implausibly stringent reading of priority to the worse off. Prioritarianism as leximin would hold that if we have a choice between bringing it about that a worse off person gets a smaller benefit or that a better off person gets a larger benefit, priority to the worse off always takes priority over size of benefit, so we should opt for getting the tiniest increment of benefit for a worse off person if our choice is doing that or instead getting a benefit of any size no matter how enormous for a person who is better off. Or at least, this is so provided that either the benefit we can confer is a lump that cannot be divided into components or the shift in benefits will not render the previously worse off person better off after the change than the previously better off

person. When I appeal to prioritarianism I have in mind some version of the doctrine which stipulates a “middling” weighting rule that avoids both extremes, but I have no precise proposal for identifying the best version. So in what follows I want to identify prioritarianism with a version of this doctrine that stipulates some middle-range weighting rule.

With this proviso in place, prioritarianism yields plausible results in its application to policy choice when competing policy proposals involve gains and losses to better off and worse off persons. In the stylized invasion of privacy example discussed above, we supposed that already well-off social workers on the average find their position worsened by the shift to an aggressive drug control policy that encourages children to inform on their drug-abusing parents. For this consequence to be tolerable, it is important that the potential gains and losses of the better off are not virtually disregarded by being discounted by an extreme weighting rule. If the policy choice affects an equal number of social workers and children, and the gains to the worse off children are worth one penny, whereas the losses to the better off social workers are worth millions of dollars, the social workers will have a reasonable basis of complaint. If the ratio of the cost-to-worse-off to the benefit-to-better-off is sufficiently small, the morally preferable policy choice is the one that secures benefits to the already better off.

Some might respond to my example by denying that it is empirically plausible to suppose that in circumstances modern societies are likely to face, egalitarian justice principles could be efficiently served by gross intrusions on privacy. I have no quarrel with this response. The relevant facts are hard to discern. My concern is to urge that for

various sets of circumstances we can envisage, likely and unlikely, the implications of egalitarian justice when thought through carefully will make good sense.

The complaint that egalitarian justice is limited to ending oppression, not reasonably conceived as striving to undo all cosmic bad luck, requires more discussion than I can give it here. Very briefly, I would hold that if Smith is born blind or talentless, and will lead a miserable life unless society helps him, but can be enabled to lead a good life if he is helped, there is just as much reason to aid Smith as if he was made equally badly off by human intervention, say by the way that we have chosen to arrange the social system, but can be compensated by comparable aid. But I agree one's view on this point will greatly affect one's view of the legitimate scope of social action to achieve egalitarian justice.

Return to the objection that egalitarian justice in its prioritarian guise compels individuals to engage in shameful revelation and that this constitutes wrongfully disrespectful treatment of persons or, what may or may not come to the same, treatment of persons that undermines their self-respect. The thought is that as a condition of getting aid I must acknowledge to state officials that I am incompetent in ways that render me a failure or no-account in my own eyes and in the eyes of observers.

I will forego the response that in the circumstances as described one is not compelled to undergo shame because one could refuse to engage in the self-revelation and forego the state aid. In some circumstances one's material need might be at a level such that one has no viable options that eschew shameful revelation and do not lead straight to personal disaster. Or in some cases one might feel a strong obligation to ensure support for one's children by any morally legitimate means including testifying

against oneself. So let us accept that in the case we are imagining shameful revelation is in effect compelled. Must this be wrongful?

In passing it should be noted it is not necessarily so that the implementation of responsibility-catering egalitarian justice must force individuals to reveal personal information about themselves to aid-administering government agencies. We may be able to succeed in devising policies that target the badly off for aid and the well off for provision of aid. A very simple example is a tax law that imposes progressively higher rates of tax, the higher one's income. Such a tax to a very rough degree imposes burdens on the more talented and fortunate, who on the average will tend to have higher income than others. Another example would be provision of aid to the needy able-bodied by way of offering public-sector low-skill employment at low wages. The aid would be open to anyone physically able to work who has low income, but would tend to be more attractive to those among the class of citizens with low income who are less able, have fewer marketable skills. Talented individuals who have low income because they have a strong preference for leisure over work will have access to more skilled and highly paid part-time employment and will not want the provided public-sector employment. So it is not the case that egalitarian policies automatically and inherently require individualized "shameful revelation." The social planner may devise other means of appropriate targeting of transfers to the truly disadvantaged.

Other things being equal, a society trying to implement egalitarian principle of distributive justice will prefer policies that precisely target the needy for benefits and the advantaged citizens for burdens, and will thus prefer policies that elicit whatever information is needed to secure this targeting. But if the gathering of information causes

well-being loss, because individuals find it offensive or shameful to reveal the needed information, then, provided these responses are reasonable, other things being equal, society will prefer policies that economize on information extraction and protect individual privacy.

A successful policy optimizes the attainment of these sometimes conflicting goals. In a similar fashion, other things being equal, a society prefers greater compliance with its just rules, and hence favors monitoring of individuals to ensure a high rate of compliance. But monitoring itself generally imposes costs, including the feeling on the part of the monitored individual that she is not trusted by her fellow citizens, which may engender an atmosphere of suspicion and mistrust rather than solidarity. The best policy will again compromise, balancing these conflicting goals. The issue then becomes whether responsibility-catering prioritarianism provides the right norms to assess these trade-offs. This principle will give weight to privacy, individual freedom, and other values only in a subordinate role as instrumental to weighted well-being. Some may feel that this gives insufficient weight to the subordinated values, which may be claimed to have intrinsic value in their own right. But this position must confront the plain fact that not all invasions of privacy are created equal, and some do not seem offensive at all. The responsibility-catering prioritarian theorist has an explanation for this. The intrusions on privacy that intuitively strike us as wrongful invasions are not serving to help bring about a fair distribution of well-being. Intrusions on privacy that are effective means to achieve this fair distribution are not viewed as wrongful.

The objection to be considered is that privacy violations that are productive in this way are still wrongful because they manifest disrespect for persons or wrongfully undermine the self-respect of those whose privacy is violated.²⁷

These are two quite different ideas, not alternative formulations of the same thought. The worry about undermining a person's self-respect is that there is something good the individual has, which the privacy-violating act dictated by consequentialism might have the effect of destroying. In contrast, the imperative not to behave in a way that shows disrespect is viewed as being inherently bad, independently of its effects on anybody. Even if the person one proposes to treat disrespectfully would be oblivious of this fact, and even if one could predict this in advance, this would not alter the inherently disrespectful quality of one's act. So we have two separate objections to consider.

The imperative not to treat people disrespectfully might be simply a way of signalling adherence to a deontological morality according to which morality commands that one should not do acts that satisfy certain descriptions whatever the consequences of doing so (at least up to some threshold of ignorable consequences). This raises an issue beyond the scope of this essay. My aim has been to indicate the plausibility and attractiveness of a form of consequentialism, not to defend consequentialism per se against nonconsequentialist ethics.

But one might interpret the objection more narrowly. One might think that disrespectful treatment of another human is an identifiable type of conduct, which morality bids one always to avoid. Jonathan Wolff notes that a consequentialist egalitarianism might regard treating someone disrespectfully as *prima facie* wrongful but must suppose that the wrong of disrespect can in principle be offset or compensated by

other benefits.²⁸ This he regards as perverse, a way of not recognizing the inherent wrongfulness of disrespect. I am willing to concede that one should never treat another person disrespectfully, but I am inclined to interpret this requirement as satisfied whenever one behaves toward others in accordance with principles that as rational agents they could accept, the principles that are in fact best supported by reasons. If you come after me with a pitchfork or invade my privacy, whether these acts fail to treat me with the respect that is owed to persons depends on whether or not these acts are morally justifiable. If so, then it is a mistake to appeal to the rule against disrespect in order to argue that the acts are not justifiable. That just begs the question.

I turn now to the second thought, that if treating someone in a certain way undermines her self-respect, the act can never be justified. In effect this is to assert a consequentialist ethic in which self-respect is the top value that trumps all others. Is this lexical priority of self-respect a plausible position? This seems to me the position Wolff is led to, though he retreats from asserting it for a reason I do not understand. He says giving lexical priority to self-respect might be self-defeating, leading to a situation in which self-respect is undermined. But this just says that self-respect is in fact the moral value that has lexical priority, but it does not follow from this that embedding this priority into institutional rules or employing it in our practical deliberation is justified, because there is at least a logical possibility that these acts might reduce self-respect.

The plausibility of the position that the value of self-respect is lexically prior to all other values depends on how we are to understand self-respect, but I submit that on any remotely plausible interpretation of that phrase, it should not be accorded a supreme position in morality. If self-respect had lexical priority, we would have to rank the

scenario in which one has self-respect to a high degree as superior to any alternative position in which one has slightly less self-respect, no matter what one's life is otherwise like. But at the risk of making light of integrity I confess that I would prefer to have less self-respect and not be tortured slowly to death over the entire course of my life than to have more self-respect and a lifetime consisting entirely of torture. Self-respect is a constituent of well-being, not something that plausibly outweighs it. Invasions of privacy that bring about net losses of individual self-respect but overall gains in weighted well-being strike me as morally acceptable, not violations of some absolute moral command. For example, it may be that firmly believing that I am a human and fundamentally as worthy as any other (to insert one possible interpretation of self-respect) requires that some act I do and regard as shameful not be exposed to full view either in my own mind or in the public eye. If my privacy in this regard is violated, I inevitably come to think of myself as not fully human. And let us suppose this is a situation in which my self-respect is on the line and no one else's, so that respecting my privacy does not entail any cost to anyone else's self-respect, eschewing any act that reduces my self-respect necessarily imposes large costs on the lives of others and perhaps on my own life as well. In this case and others self-respect should give way.

It is fully compatible with this argument to assert that being treated with the honor and equal respect that any human is due is a very significant component of anyone's good. I take no position on the weight that should be accorded self-respect. My claim is that whatever weight the best theory of well-being accords it is the weight it should get, and this weight will not be infinite, so lexical priority is out. I also take no stand on the degree to which respecting all humans as equals in one's conduct in practice ever comes

in conflict with the pursuit of other constituents of human well-being. That there are conflicts and hard tradeoffs here is suggested by this remark by Lieutenant Steve Laguerre, head of the Meridien, Connecticut SWAT unit of the police: “And we don’t care if we’re dealing with the lowest vermin in the street, it’s ‘yes sir, no sir.’ We never dehumanize these people.”²⁹

CONCLUSION.

The utilitarian egalitarianism whose praises I have been singing may in the end seem a dreary and uninspiring doctrine. Its romance is bureaucracy. In *Homage to Catalonia* George Orwell observes that a “fat man eating quails while children are begging for bread is a disgusting sight,”³⁰ but the doctrine I espouse, taking men as they are and laws as they might be made, cautions that before arriving at a final assessment we must determine whether subtracting from the man’s quails will do anything to increase the children’s (or anyone else’s) bread consumption, and exactly what losses the man must sustain to get exactly what benefits for others. In the same book Orwell declares that “the thing that attracts ordinary men to socialism and makes them willing to risk their skins for it . . . is the idea of equality,” which Orwell associates with a community where “no one was on the make. . . [and there was] no privilege and no boot-licking.”³¹ In contrast, prioritarianism recommends that we calculate the optimal degree of inequality and optimal degree of social hierarchy and for that matter the optimal degree of invasion of individual privacy.³² I applaud the idea that a just society is constituted by human relationships as well as by the pattern of the distribution of goods, but both of these must ultimately be assessed by their impact on the quality of the individual lives that better off

and worse off people are enabled to lead. To neglect this bottom line is bad romanticism not good ethics.

¹. Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy,” Harvard Law Review 4, no. 5 (December, 1890), 193-220. The quote appears on p. 193.

². *Olmstead at al. v. U.S.*, 277 U.S. 438 (1927).

³. William A. Parent, “Privacy, Morality, and the Law,” Philosophy and Public Affairs, vol. 17. No. 4 (Fall, 1983), pp. 269-288; see p. 272.

⁴. 381 U.S. 479 (1965).

⁵ Hyman Gross, “Privacy and Autonomy,” reprinted in Joel Feinberg and Hyman Gross, ed., Philosophy of Law, Third Edition, (Belmont, California: Wadsworth Publishing, 1986), pp. 291-296; see p. 296.

⁶. Of course this point has no particular bearing on the question whether or not the Griswold majority opinion by Justice Douglas was a reasonable Constitutional interpretation.

⁷. In the sociological sense, the morality of a society at a time is the set of norms actually accepted and enforced as morality. In the critical sense, the society’s morality is the set of norms that ought to be accepted and enforced as morality.

⁸. Harry Kalven, “Privacy in Tort Law—Were Warren and Brandeis Wrong?”, Law and Contemporary Problems, vol. 31, no. 2 (Spring, 1966), pp. 326-341; se p. 327.

⁹. Avishai Margalit recounts hearing an elderly Englishwoman remonstrating at the sight of a woman sunbathing in a park in bra and panties. A query whether this was more objectionable than sunbathing in a bikini elicited the reply, “That’s different. Underwear is private.” Margalit, The Decent Society (Cambridge and London: Harvard University Press, 1996), p. 202.

¹⁰. Here I follow the analysis in Ruth Gavison, “Privacy and the Limits of Law,” Yale Law Journal, vol. 89, no. 3 (January, 1980), pp. 421-491. There is a voluminous literature devoted to the analysis of the concept of privacy.

¹¹. For some discussion, see my :Human Flourishing versus Desire Satisfaction,” Social Philosophy and Policy, vol. 16. no. 1 (Winter, 1999), pp. 113-142.

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- ¹² . On prioritarianism, see Derek Parfit, “Equality or Priority?”, *The Lindley Lecture* (Department of Philosophy, University of Kansas, 1995); also Dennis McKerlie, “Equality and Priority,” *Utilitas* 6, no. 1 (May, 1994): 25-42. To the best of my knowledge the first philosophical discussion of the idea is in Paul Weirich, “Utility Tempered with Equality,” *Nous* 17, no. 3 (September, 1983): 423-439.
- ¹³ Friedrich A. Hayek, *The Road to Freedom* (Chicago and London: The University of Chicago Press, 1944), p. 79.
- ¹⁴ . Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 167.
- ¹⁵ J. S. Mill, *Utilitarianism*, in his *Collected Works*, vol. 10, ed. J. M. Robson (Toronto: University of Toronto Press, 1969); and Mill, *On Liberty*, in his *Collected Works*, vol. 18, ed J.M. Robson (Toronto: University of Toronto Press, 1977), pp. 213-310.
- ¹⁶ . This reading of Mill’s argument is presented in John Gray, *Mill on Liberty: A Defence*, 2nd edition (London and New York: Routledge, 1996). The Liberty Principle that Mill actually defends is subtler than what I present in the text, but this does not affect the point that Mill argues for a (subtle) Liberty Principle, to be accepted as an exceptionless rule as a strategy for promoting utility.
- ¹⁷ . David Lyons, *Rights, Welfare, and Mill’s Moral Theory* (New York and Oxford: Oxford University Press, 1994), pp 147-175.
- ¹⁸ . What about the responsibility element in responsibility-catering prioritarianism? It complicates but does not undo the prior discussion. The principle bids us to tilt in action in favor of the worse off, and also in favor of those whom it would not be reasonable to hold personally responsible for their worse off plight.
- ¹⁹ . Richard Posner, “Privacy, Secrecy, and Reputation,” *Buffalo Law Review*, vol. 28, no. 1 (Winter, 1979), pp. 1-55; see pp. 23-24; Posner, “An Economic Theory of Privacy,” *Regulation*, May/June, 1978.
- ²⁰ . Thomas Nagel, “Concealment and Exposure,” *Philosophy and Public Affairs*, vol. 27, no. 1 (Winter, 1998), pp. 3-30.
- ²¹ . Jonathan Wolff, “Fairness, Respect, and the Egalitarian Ethos,” *Philosophy and Public Affairs*, vol. 27, no. 2 (Spring, 1998), 97-122.
- ²² . Avishai Margalit, *The Decent Society*, tr. By Naomi Goldblum (Cambridge and London: Harvard University Press, 1996), p. 1.

²³ . G. A. Cohen, "Equality of What? Of Welfare, Goods, and Capabilities," in The Quality of Life, ed.

Martha Nussbaum and Amartya Sen (Oxford: Clarendon Press, 1993), 9-29.

²⁴ . Christine Korsgaard, "Commentary [on essays by G. A. Cohen and Amartya Sen]" in *ibid.*, p. 61.

²⁵ . Another possibility is that the critic holds that the standard for good consequences set by responsibility-catering prioritarianism is inadequate. This might be held to be so because this doctrine fails to recognize fully the value of privacy. The critic might also hold that one or more of the values of increasing human well-being, giving priority to the worse off, or adjusting priority by people's differential responsibility for their condition is flawed. Comments in the next paragraphs respond to these criticisms.

²⁶ . A leximin principle of distribution holds that as a first priority, one should maximize the benefit level of the worst-off person; as a second priority, one should maximize the benefit level of the second-worst-off person; and so on, up to the best-off person. In each instance the priority is absolute, so that one should prefer the slightest gain that can be made to improve the condition of (for example) the worst off person at no matter what cost to the condition of the second-worst-of person (so long as she remains second-worst-off) or to the condition of any better-off persons.

²⁷ . Wolff alternates between these phrasings on p. 107 of "Fairness, Respect, and the Egalitarian Ethos."

²⁸ . Wolff, *ibid.*, p. 107.

²⁹ . Quoted in Timothy Egan, "Soldiers of the Drug War Remain on Duty," New York Times, March 1, 1999, p. A16.

³⁰ . George Orwell, Homage to Catalonia (New York: Harcourt, Brace, and World, 1952), p. 115.

Originally published in 1938.

³¹ . *Ibid.*, p. 105

³² . Of course this is misleading in a way, because if the dreariness of prioritarianism muffles allegiance to it, this very doctrine recommends that inspiring mid-level principles be devised that can elicit people's loyalty in ways that will better achieve prioritarian ends.