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2003 DANIEL J. MEADOR LECTURE:
PRIVACY ISN'T EVERYTHING: ACCOUNTABILITY AS A
PERSONAL AND SOCIAL GOOD

*Anita L. Allen**

I. ACCOUNTABILITY MATTERS TOO

Privacy, including private choice about personal matters, is a dominant theme in public policy in the United States. My scholarship has often emphasized the positive value of contested physical, informational, and decisional privacies.¹ Moreover, I have applauded recent federal efforts to mandate information privacy protections. The most conspicuous of these protections, Title V of the Gramm-Leach-Bliley Financial Services Modernization Act (Gramm-Leach-Bliley), the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and the Children's Online Privacy Protection Act (COPPA), are far from perfect legal regimes.² But there is value in asking the commercial sector to modify business practices to protect data relating to the sensitive areas of personal finance, health, and family life.

The spectacle of terrorism on American soil appears to have stunned some Americans into viewing privacy as a luxury we can no longer afford, a

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1. I discuss privacy sympathetically in a number of articles and three books. Including the aforementioned, *see supra* note *, my books are: *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988) and *RICHARD C. TURKINGTON & ANITA L. ALLEN, PRIVACY LAW* (2d ed. 2002). My survey articles include: *Constitutional Privacy*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 139 (Dennis Patterson ed., 1996); *Genetic Privacy: Emerging Concepts and Values*, in *GENETIC SECRETS* 31 (Mark Rothstein ed., 1997); *Privacy*, in *A COMPANION TO FEMINIST PHILOSOPHY* 456 (Iris Marion Young & Alison M. Jaggar eds., 1998); *Privacy as a Practical Value*, in *OXFORD HANDBOOK OF PRACTICAL ETHICS* 485 (Hugh LaFollett ed., 2003); *The Jurispolitics of Privacy*, in *RECONSTRUCTING POLITICAL THEORY* 68 (Uma Narayan & Mary Lyndon Shanley eds., 1996); and *The Public Right to Know*, in *THE ENCYCLOPEDIA OF ETHICAL ISSUES IN POLITICS AND THE MEDIA* 251 (Ruth Chadwick ed., 2000).

2. The Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in scattered sections of 12 U.S.C. and elsewhere), requires financial institutions to protect the security and confidentiality of customers' nonpublic personal information. The Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996), sets standards for security of confidentiality of health information and medical records. The Children's Online Privacy Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-728 (1998) (codified at 15 U.S.C. § 6501 (2000)) (COPPA), requires commercial Web sites to refrain from collecting personal data from children under thirteen without parental consent. I assess COPPA in Anita L. Allen, *Minor Distractions: Children, Privacy, and E-Commerce*, 38 *HOUSTON L. REV.* 751 (2001).

tool of our enemies. Even after the terrible deeds of September 11, 2001, however, I remain firm in my beliefs about the importance of informational privacy. The USA PATRIOT Act and other homeland security measures enhance the power of government to intercept communications and hold individuals captive.³ I share the worry of vocal privacy advocates and civil libertarians that new laws were hastily enacted and proposed innovations are overly broad.⁴ The proposed (but abandoned) "TIPS" program threatened to turn neighbors and public servants into community spies.⁵ The "Total Information Awareness" program would aggregate personal data on all Americans from diverse sources in an unprecedented effort to track a small group of people involved in terrorism.⁶ In an era of increased surveillance and security, we need to reassert traditional privacy claims voiced in free and democratic societies. Intimate relations, sex, health, and personal finances still merit a privileged status.

Because privacy is under siege in the contemporary world, it is tempting to downplay the positive value of accountability for private life. Yet, although privacy is important, it is not everything. Accountability matters too. "None of your business!" in response to accountability demands is not always warranted. Privacy and accountability each in their own way render us more fit for valued forms of social participation. Privacy is our repose and intimate accountability our engagement. It is important to understand that privacy is our repose and intimate accountability our engagement and, therefore, why some accountability demands that relate to archetypical "private" and "personal" realms are legitimate. It is also important to understand the dynamics of political order that saddle some people with too much of the most onerous forms of accountability.

In this Article, I will highlight personal and social goods that flow from accountability for private life. At the same time that I highlight the benefits of accountability, I will note significant risks. A series of illustrations relating to the privacy and private choices of African-Americans provides an especially useful context in which to see both the extent to which accountability for private life is a reality and the risks and benefits that flow from it. Standing in the wake of September 11, it is especially important to recognize the risks of injustice and indignity that can flow from governmental

3. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

4. See the ACLU, Electronic Privacy Information Center, civil liberties group, and privacy advocacy group positions at <http://www.aclu.org/Privacy/PrivacyMain.cfm> (last visited April 13, 2003), <http://www.epic.org/privacy/terrorism> (last updated Nov. 12, 2002), <http://www.libertydefense.com/privacy.html> (last visited Apr. 13, 2003), and <http://www.privacyrights.org> (last modified Mar. 31, 2003), respectively.

5. See <http://whitehouse.gov/news/releases/2002/01/20020130-8.html> (last visited Apr. 13, 2003).

6. See Jim Garamone, *Boards to Oversee Total Information Awareness Program*, AMERICAN FORCES PRESS SERVICE, Feb. 7, 2003, available at http://www.dod.mil/news/Feb2003/n02072003_200302074.html. See also ACLU and EPIC positions at <http://aclu.org/Privacy/Privacy.cfm?ID=11323&c=130&Type=s> (Mar. 23, 2003), and <http://www.epic.org/privacy/profiling> (last updated Feb. 3, 2003), respectively.

and non-government accountability mandates. By accountability mandates, I mean expectations or requirements that we (1) inform others of what we do, (2) explain ourselves to others, (3) justify our conduct to others, (4) submit to punishments or other sanctions, or (5) live routinized, transparent lives.

II. ACCOUNTABILITY IN LAW AND SOCIETY

Privacy is a good. But accountability is also a good. It is a fact, and it should be a value. Accountability for conduct is a pervasive feature of human association.⁷ Accountability operates explicitly and implicitly in the fields of public administration and corporate governance.⁸ Accountability imperatives drive the law of tort and crime. Accountability should not and cannot be total in any domain. Still, in every sector of society a degree of accountability for conduct is critical.⁹ In the United States, as in other places, accountability and concerns about accountability range beyond the affairs of government and business enterprises. They range also into the territory of the personal affairs of private individuals and non-commercial enterprises.

When designating certain realms or activities "private," "personal," and the like, we imagine ourselves as citizens of a free society, each entitled to enjoy a number of states, feelings, thoughts, acts, and relationships for which we owe others no accounting. Although others have a say in what we do in our capacities as managers, employees, and motor vehicle license holders, they have no similar say in what we do as private persons. We imagine that other people are allowed to share in our private lives or not, at our discretion and on our terms, subject to a very few exceptions. We often think and talk this way, drawing a sharp divide between public and private. The political philosophies some of us hold dear pay tribute to *On Liberty*, the classic essay in which John Stuart Mill famously wrote that "the individual is not accountable to society for his actions, insofar as these concern the interests of no person but himself."¹⁰ American jurisprudence on occa-

7. Richard McKeon, *The Ethics of International Influence*, in *ETHICS* 120, 187-203 (1960).

8. See, e.g., *ACCOUNTABILITY IN URBAN SOCIETY: PUBLIC AGENCIES UNDER FIRE* (Scott Greer, Roland D. Hedlund, & James L. Gibson eds., 1978); MARK BOVENS, *THE QUEST FOR RESPONSIBILITY: ACCOUNTABILITY AND CITIZENSHIP IN COMPLEX ORGANIZATION* (1998); *CORPORATE CONTROL AND ACCOUNTABILITY* (Joseph McCahery, Sol Picciotto & Colin Scot eds., 1993); PETER FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* (1984); ROBERT B. WAGNER, *ACCOUNTABILITY IN EDUCATION* (1989).

9. Accountability "is an essential and undismissible desideratum for orderly social interaction" without which "it is impossible to conceive of a society resembling an organized interlocking of individual actions, or for that matter maintaining sociality and intersubjectivity." G.R. Semin & A.S.R. Masteed, *The Accountability of Conduct: A Social Psychological Analysis*, in *EUROPEAN MONOGRAPHS IN SOCIAL PSYCHOLOGY* 32, 32-185 (1983).

10. JOHN STUART MILL, *ON LIBERTY* 115 (Oxford University Press 1948) (1859). In the second paragraph of Chapter V of *On Liberty*, Mill lays out the maxim I quote that "the individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself."

sion prominently echoes Mill's sentiment. Dissenting in *Poe v. Ullman*,¹¹ Justice John Marshall Harlan exploited the familiar political ideal of the private home, marriage, and family to build a revolutionary constitutional case for reproductive freedom that set the stage for *Griswold v. State of Connecticut*¹² and *Roe v. Wade*.¹³ Justice Harlan vigorously attacked Connecticut statutes on the ground that laws criminalizing contraception intrude "into the very heart of marital privacy" and require "husband and wife to render account before a criminal tribunal of their uses of . . . intimacy."¹⁴

However, accountability for the uses of intimacy is a common imperative, expectation, and deeply felt obligation in our society. As individuals, couples, families, and communities, we live lives enmeshed in webs of accountability for conduct that include accountability for intimacies relating to sex, health, child rearing, finances, and other matters termed "private." We are accountable for nominally private conduct both to persons with whom we have personal ties and to persons with whom we do not have personal ties. We are accountable to the government, and we are accountable to non-government actors. We are accountable for plainly harmful and other-regarding conduct in our nominally private lives, for example, date rape; and we are accountable for the best candidates we have for harmless and self-regarding conduct, for example, consensual oral sex between monogamous partners in their own bedrooms. We do not simply face others' "[a]dvice, instruction, persuasion, and avoidance[.]" devices Mill approved.¹⁵ We face social and legal demands for sanctions and other reckoning of which he disapproved. Mill's assertion that individuals are "not accountable to society" for actions that concern only themselves is debatable as a matter of ethics or political morality and as Mill himself regretted, flatly inaccurate, as a matter of fact.¹⁶ Not only are we held accountable for what is commonly termed private life, but our accountability for some personal, arguably self-regarding, conduct extends to the extreme of criminal liability.

Accountability for and in private life is thus no mere oxymoron or confusion. Social norms of every category—religious, ethical, moral, legal, and customary—foster accountability. We are held accountable, and we hold others accountable. We feel accountable, and we feel owed accountability.

11. 367 U.S. 497 (1961).

12. 381 U.S. 479 (1965).

13. 410 U.S. 113 (1973).

14. *Poe*, 367 U.S. at 553 (Harlan, J., dissenting). Quoting the Justice in full:

In sum, even though the State has determined that the use of contraceptives is as iniquitous as any act of extra-marital sexual immorality, the intrusion of the whole machinery of the criminal law into the very heart of marital privacy, requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy, is surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection.

Id. Harlan was not prepared in this case to extend the realm of non-accountability to traditionally prohibited acts including adultery or homosexuality. *Id.*

15. *MLL*, *supra* note 10, at 115.

16. *Id.*

As citizens and scholars we debate what is and is not private and what should and should not be private, always against the backdrop of a culture in which accountability subsists in virtually every corner of our lives.¹⁷ Accountability for private life means that the broad areas of individual and group life regularly labeled private are not walled off. We do not label dimensions of life private because they are immune from scrutiny and judgment by official and unofficial or public and private “agents of accountability.” Flourishing accountability practices and policies examine and evaluate what goes on in the personal and intimate arenas.

Legal liability for sex and sexual orientation is one of the most emotionally charged forms of accountability. Philosophers, like legal theorists, understandably focus on the implications of legal accountability because of the onerous, coercive nature of civil and criminal sanction. Legal liability for personal choices can feel particularly unjust where the individual expected to account does not share the moral, ethical, or religious outlook of the person demanding the accounting. But non-legal sanctions for conduct are potentially coercive and punitive too. It wounds the soul to suffer the social sanctions of censure and isolation.

Liability to sanction is but one form of accountability. Accountable individuals are called on to reckon with others for acts and omissions that violate norms in several other important senses. An observer would miss a stark feature of American life were he or she to allow pervasive liberal values, aspirations, and rhetoric—much of which I find congenial—to obscure the richly diverse ways in which we are constantly called upon to report, explain, justify, and otherwise answer to others for the choices we make about own lives.

In the spirit of toleration for individual differences, political liberals are skeptical of collective interference with individuals' own assessments concerning their affairs. Liberals are for leaving people alone, living and letting live. But a society cannot afford fully to leave people alone. And liberals know it. The practical reality that the non-judgmental outlook fosters mischief was captured in *Accountability*, an ironic poem crafted in ersatz African-American dialect by the troubled African-American poet Paul Laurence Dunbar.¹⁸ The poem begins:

17. While some tolerant individuals try to avoid the most overtly moralistic accountability discourses and practices, it is nonetheless fair to say that:

In our private lives we wade in a constant stream of accountability initiatives. People hold their children, parents, partners, friends, neighbors, colleagues, and fellow citizens accountable for any kind of presumptive misbehavior—for political incorrectness, insubordination, disorderliness, bad memory, drinking and smoking, sexual misconduct, sinful behavior, lack of courtesy, strategic errors, factual ignorance, whatever. Because there are lots of rules that guide our private lives, there are lots of opportunities for private agents of accountability to step in to monitor and enforce compliance.

Andreas Schedler, *Conceptualizing Accountability*, in *THE SELF-RESTRAINING STATE 2* (Andreas Schedler, Larry Diamond, & Marc F. Plattner eds., 1999).

18. PAUL LAURENCE DUNBAR, *Accountability*, in *THE COMPLETE POEMS OF PAUL LAURENCE DUNBAR* 5, 5-6 (1895).

Folks aint got no right to cen/suah othah folks about dey/habits;
 Him dat giv' de squir'ls de bush/tails made de bobtails fu'
 de/rabbits.

....

We is all constructed diff'erent,/d'ain't no two of us de same;
 We cain't he'p ouah likes an' dis/likes, ef we'se bad we ain't
 to/blame.¹⁹

The words of the poem's narrator make the case against accountability, while the actions of the narrator as revealed in an unquoted final stanza illustrate the case for it. People not subject to "censuah" may lack incentives for avoiding antisocial behavior. The poem's narrator delivers a lovely philosophical argument for respecting what he characterizes as God-given human differences, but it turns out that the narrator's tribute to toleration is merely a ploy to deflect criticism for having broken the law. His words are self-serving rationalization. He is about to dine on a stolen chicken, "one o' mastah's chickens," to be exact.²⁰

Accountability makes sense to committed liberals when the white man's chickens begin to disappear. Liberals recognize reasons to hold others accountable for personal matters if harm can thereby be averted. The fights are about what constitutes the relevant sorts of harm. Sex and health are considered very personal. Yet, accountability makes sense in the case of a public official whose flagrant sexual immoralities impair public duties, or a sexually active man who has concealed his AIDS from unsuspecting partners. And many liberals are prepared to recognize respects in which "personal" and "self-regarding" acts are also social and other-regarding, for example, recreational drug use, casino gambling, and third-trimester abortion. But these are modern examples. To really understand the depth of accountability for personal affairs, to really understand what counts as a chicken, we need to turn the clock back a bit.

III. ACCOUNTABILITY TO JUDGE AND JURY

Eighty years ago a wealthy New York man, Leonard "Kip" Rhineland, sued to have his marriage annulled.²¹ The peculiar ground for annulment was that his wife, Alice Jones Rhineland, had deceived him as to her race. The legal proceedings and journalistic frenzy that followed led to

19. *Id.* at 5. The narrator makes a case for both toleration and divine intent:

When you come to think about it,/how it's all planned out it's/splendid.

Nuthin's done er evah happens,/dout hit's somefin' dat's in/tended; Don't keer what you does,you has/to, an' hit sholy beats de/dickens,—/Viney go put on de kittle, I got/one o' mastah's chickens.

Id. at 6.

20. *Id.* A rational slaveholder who wanted to reduce the likelihood of losing food to rational underfed unpaid labor would have to increase surveillance or increase the penalty of detection.

21. See generally EARL LEWIS & HEIDI ARDIZZONE, LOVE ON TRIAL: AN AMERICAN SCANDAL IN BLACK AND WHITE (2001).

expectations of accountability for the most intimate aspects of the young couple's lives. The courtroom drama that ensued demanded the ultimate in accountability of the information-emphatic and explanation-emphatic sorts. Mr. Rhinelander endured opposing counsel reading aloud in court his sexually explicit love letters to his future bride. His wife's lawyers hoped to brand him in the minds of the jury as a perverted and unmanly seducer. Attorneys asked Mr. Rhinelander to explain intimacies (possibly oral sex) referred to obliquely in intimate correspondence. Alice Rhinelander was the eventual victor in the case. However, after listening to her premarital trysts with her husband detailed in court, her own lawyer insisted, with the approval of the judge in the case, that she bare her "dusky" naked breasts and legs to the jury to prove that her lover-turned-husband had to have known she was "colored" when he married her. Bizarrely, Al Jolson, the famous blackface entertainer, was dragged into court to deny an affair with Mrs. Rhinelander, solely because she once mentioned in a letter that someone she met at work called "Al Jolson" was a flirt. That a perfect stranger to the litigants was held accountable for his sex life, too, is evidence of the sweeping character of private life accountability at the time.

In the light of the Rhinelander case, blaming feminism for Anita Hill's or Monica Lewinsky's frank testimony looks like fallacious *post hoc ergo propter hoc* reasoning. We had accountability for private life long before Anita Hill and Betty Freidan were born. Clarence Thomas's experience in Congress might fruitfully be compared to Kip and Alice Rhinelander's.

IV. ACCOUNTABILITY TO THE MEDIA, PUBLIC, AND RACE

In January 2000, newspapers reported that Reverend Jesse Jackson, a married Christian minister, civil rights leader, and one-time presidential candidate, had fathered a child by a woman not his wife.²² His lover worked

22. Lauren Janis, *Q&A—Clarence Page on Jesse Jackson*, COLUM. JOURNALISM REV., Mar./Apr. 2001, at 9-10, available at <http://www.cjr.org/year/01/2/qanda.asp>. Page stated:

We will always be aggressive in looking for accountability of public figures. I was one of the first reporters to report on the questions surrounding Jackson's operation Push for Excellence and their expenditures of federal funds back in 1980. Jackson doesn't like accountability. But that hasn't stopped us. When it gets into private life, I know I am less aggressive in pursuing those stories.

....

When it comes to the private life of any official, you approach it with ambivalence. But my philosophy is, when in doubt, let it out. Our impulse should be in favor of releasing information to the public, not suppressing it.

....

As an African-American who has been covering the Reverend Jackson and other civil rights figures for over thirty years, I particularly feel that it is my responsibility to be as aggressive as possible. . . . I am very concerned about leadership in general and about the quality of black leadership. And he is the most widely known and respected black leader. I feel obliged to be more aggressive because I feel a special responsibility to African-Americans and others in Jesse Jackson's constituency to hold him accountable. Like a sort of consumer advocate.

Id.

for Jackson's civil rights organization.²³ Some people responded to the news with calls that Jackson be "held accountable" for his private conduct. Among them was Clarence Page, Pulitzer Prize-winning reporter for the *Chicago Tribune*.²⁴ Claiming special ambivalence about holding others accountable for their personal lives, Mr. Page told a *Columbia Journalism Review* interviewer that he felt a special obligation to hold Jesse Jackson closely accountable, qua African-American leader.²⁵

People who agreed with Page that Jackson should be held accountable could have disagreed about what forms of accountability were appropriate. When the news of a "love child" hit the stands, some people thought it would be sufficient for Reverend Jackson to confirm or deny what newspapers were reporting. They thought it would suffice for Reverend Jackson to say publicly something akin to this: "I had a sexual relationship with Ms. So-and-so, an employee of my organization, and fathered a daughter, to whom I provide this and that type of support from monies earned in this and that way."

After Reverend Jackson provided the basic facts, though, some members of the public and the media were still not satisfied. They seemed to think the Reverend owed the public, or at least *his* public, an explanation of the facts and circumstances of the affair:

Although I was married at the time, and although I profess that adultery is a sin, I faltered; I had a sexual relationship with Ms. So-and-so, an unmarried employee of my organization, with whom I had enjoyed working for many years. I fathered a daughter and assumed financial responsibility for her care. I know that I have caused my wife and children pain and disappointed loyal supporters.

Others seemed to want even more from Reverend Jackson. They seemed to want an explanation that included an earnest effort at justification. The most complete explanations are both explanations *that* and explanations *why*. Justifications are explanations *why*. They explain, for example, why a person's conduct seemed acceptable or was acceptable under the circumstances:

I was very lonely and feeling the emotional stress and isolation of long days and nights away from my wife, necessitated by my civil rights mission; I was overcome by Ms. So-and-so's kindness and devotion to her work; I believed I was in love with her; I ignored the call of conscience and betrayed my faith; I am a sinner, we are all sinners, but I have asked for and received forgiveness; I am pro-

23. *Id.*

24. *Id.*

25. *Id.* at 9-10.

viding financial support for my daughter using only my own personal financial resources, not those of any organization.

A few people seemed to want yet more from Reverend Jackson. Beyond the information, the explanations, the justifications, they wanted his head. They wanted to bring the big guy down. They wanted him punished with moral censure, ostracization, and any criminal or civil liability appropriate for adultery and hypocrisy. They wanted accountability in the punishment-emphatic sense.

Recall that Clarence Page said, in connection with his coverage of Jesse Jackson, that as an African-American journalist he held African-American leaders to a higher standard of accountability than leaders of other races.²⁶ A public figure may be accountable in one sense and to one degree to the general public, but in further senses and to further degrees to members of his or her identity group.

The late Supreme Court Justice Thurgood Marshall was accountable for his personal life, not simply to the public, but also, and critically, to his African-American public. Vivian "Buster" Burey Marshall, Marshall's first wife of twenty-five years, died in 1955. That same year he married his second wife, Cecilia Suyat, who was not, in the parlance of the day, a "Negro." The victorious attorney in *Brown v. Board of Education*,²⁷ Marshall was one of the most influential men in the United States. Known to have had a large ego, Marshall enjoyed his stature as a voice of leadership within the NAACP. One might guess that in mid-twentieth century America, such a man could marry whomever he wanted, no questions asked. But that was far from the truth in the decade before *Loving v. Virginia*.²⁸ Marshall's closest advisors knew that questions would be asked about his motives for out-marriage and his intentions about continuing at the forefront of the fight for black civil rights. Marshall's second marriage threatened to be a political liability for the NAACP. His personal choice could have cost the organization money and support at a critical juncture. Showing both moral sensitivity and political savvy, NAACP leaders successfully urged Marshall to hold a press conference in which he graciously introduced his bride and affirmed his commitments to civil rights work.

More than a half-century later, accountability for out-marriage remains on the moral landscape.²⁹ Only about ten percent of black men marry women who are not black. Blacks are the most endogamous of the major "racial" groups in the country. Among African-Americans, those who out-marry still face a surprising degree of negative accountancy premised on

26. Janis, *supra* note 22, at 9.

27. 349 U.S. 294 (1955).

28. 388 U.S. 1, 12 (1967).

29. RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003).

feelings of betrayal. African-Americans are not the only minority group many of whose members feel accountable to the group for personal choices.

Problems of intra-group accountability exist in the world of child-rearing and adoption, too. Native American women seeking to place their children for adoption are accountable to tribal authorities for adoption decisions. Although one might think that a parent's decision to place his or her child for adoption is a personal one, federal law gives Native tribes the right to veto the placement of an Indian child with a non-Indian family. Thurgood Marshall implicitly knew that accountability is an effective signaling strategy for rational, self-interested actors. If I routinize my conduct, I signal that it is safe to be my friend, lover, or partner. Having successfully evidenced the intent to cooperate, individuals can reap the benefits of appearing to be desirable partners in cooperative endeavors.³⁰

V. ACCOUNTABILITY TO GOVERNMENT

The House of Prayer is a Christian congregation of African-Americans who take seriously the Biblical maxim that to spare the rod spoils the child.³¹ In March 2001, Atlanta police seized forty-one children whose parents belonged to the church after one boy showed up at school with welts on his body.³² He said he had been beaten with a switch at church.³³ They also arrested sixty-eight year old Reverend Arthur Allen and five House of Prayer members alleged to have encouraged or participated in child-beatings.³⁴ Nearly a decade earlier, in 1992, Reverend Allen had been sentenced to prison for beating a sixteen-year-old girl accused of premarital sex.³⁵ In trouble with the law again, Allen complained to a reporter, "We're getting persecuted. They want to dominate us with their way of life."³⁶

To hold House of Prayer adults accountable to the state for their religious practices is indeed to dominate them with "our" way of life. But this is an apt example of the benevolent domination by the state that feminist legal theorists have urged for years. Tear down the doors of "private" citizens in "private" homes and "private" institutions as needed to protect the vital interests of vulnerable people. It is also the kind of domination that would not much worry a political theorist for whom freedom in pluralist societies entails or consists in non-domination. The restriction placed on the House of Prayer is not an arbitrary, whimsical power play, but an attempt at humane law by fair-minded authorities.

30. ERIC A. POSNER, *LAW AND SOCIAL NORMS* 5 (2000).

31. *Proverbs* 23:13-14.

32. Amanda Ripley, *Whippings in the Pulpit: A Congregation Loses 41 of its Children to the State After a Boy Tells the Police What Happened at Church*, *TIME*, Apr. 2, 2001, at 47.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

Child discipline is one of those components of family life that is sometimes defended by reference to privacy, as well as religious freedom. Though the sternest of libertarians can see the justice of attempting to intervene on behalf of the House of Prayer youth. I am assuming that libertarians oppose violence against children, though I admit that some libertarians may disagree with me about whether corporal punishment amounts to violence or other serious harm.

I believe one of the fathers of Libertarianism, John Stuart Mill himself, would agree with me that child beating of the sort at issue in the House of Prayer case—nonconsensual, ritualized, capable of leaving marks—constitutes harm. Preventing physical harm to children is a clear prerogative of the just, liberal state, even if what counts as physical harm is not so clear. People who harm children should be accountable for the wrong they do. Mormonism was a much-maligned religion in Mill's day, chiefly for its claim to a latter-day saint and to the virtues of polygamy. Emphasizing its remoteness in the American frontier and the voluntary nature of polygamy, Mill defended toleration of Mormonism. I do not think he would have urged similar liberty for a Christian variant closer to home that practiced child-beating.

Mill published *On Liberty* in 1859,³⁷ more than three decades before "privacy" and the "right of privacy" entered the American legal lexicon.³⁸ Yet American jurists and scholars commonly cite Mill as a champion of personal privacy. Mill was indeed a champion of personal privacy.³⁹ More accurately, he was a stern opponent of accountability to government and society.⁴⁰ Thought, discussion, and actions that are not harmful to others should be free.⁴¹

In Chapters 1 and 4 of *On Liberty*, Mill argued that moral justice requires laws and other rules, practices, and institutions that maximize aggregate long run happiness or "utility."⁴² Although some people are better at judging what conduct is conducive to utility than others, when it comes to self-regarding conduct, each person is the best judge of what conduct will promote his or her own utility.⁴³ We have what philosophers sometimes call "privileged access" to our own emotions and needs. Therefore, as a general rule, a just government and society should only prohibit conduct that harms third parties.⁴⁴ Society should strictly limit interference with self-regarding conduct to conduct that harms others.⁴⁵ Legal paternalism and legal moralism are rejected in Mill's ideal just society. While Mill does not put it this

37. MILL, *supra* note 10.

38. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 *passim* (1890).

39. MILL, *supra* note 10, *passim*.

40. *Id.*

41. *Id.*

42. *Id.* at 5-21, 92-114.

43. *Id.* at 93-94.

44. MILL, *supra* note 10, at 92-93.

45. *Id.*

starkly, it would seem to follow from his premises that accountability for any aspects of personal or private life that are self-regarding and not harmful to others is morally unjust. Hence, there should be limits on governmental and societal requirements that persons report what they think or do to others, explain what they think or do to others, justify what they think or do to others, submit to others' sanctions and punishments, or lead a transparent, predictable lifestyle for the sake of others.

In Chapter 2 of *On Liberty*, Mill argued that individual and social utility results from tolerance of diverse thought and discussion.⁴⁶ Humankind is not yet perfect. Until such time as it is, tolerating even unpopular thought and discussion will be conducive to aggregate, social happiness. How so? First, Mill argues, it is unwise to limit thought and discussion because what one thinks of as a dangerous falsehood may be true.⁴⁷ Humans are fallible.⁴⁸ Second, says Mill, toleration facilitates the ultimate reign of truth.⁴⁹ In addition, sacred truths tend to become moribund, unthinking dogma, unless perpetually revitalized by the challenge of dissent and falsehood.⁵⁰ We need not fear the reign of falsehood because over time truths overcome falsehoods.⁵¹ Falsehoods being inherently less useful tend to fade away.⁵² They attract few buyers in the marketplace of ideas.⁵³ Third, Mill concludes, there may be a kernel of truth in ideas and opinions that are largely false.⁵⁴ Those truths must not be lost to humankind.⁵⁵

In Chapter 3 of *On Liberty*, Mill defended freedom of action.⁵⁶ Just as thought and discussion should be free, actions/conduct should be free, he urged.⁵⁷ Individuality should be tolerated in actions as well as in word and thought.⁵⁸ Yet Mill readily admitted that "no one pretends that actions should be as free as opinion."⁵⁹ Mill proposed, though, that actions should be free, subject to the obligation to refrain from harming others.⁶⁰ He urged that:

[I]f he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgement in things which concern himself, the same reasons which show that

46. *Id.* at 22-68.

47. *Id.* at 65.

48. *Id.*

49. MILL, *supra* note 10, at 65.

50. *Id.*

51. *Id.* at 22-68.

52. *Id.*

53. *Id.*

54. MILL, *supra* note 10, at 65.

55. *Id.*

56. *Id.* at 69-91.

57. *Id.*

58. *Id.*

59. MILL, *supra* note 10, at 69.

60. *Id.*

opinion should be free, prove also that he should be allowed, without molestation, to carry his opinions into practice at his own cost.⁶¹

To make his case for individual freedom of action, Mill asserted that “ape-like imitation” of others leaves the distinctive human capacities of reason, judgment, and making life plans unexercised.⁶² Human nature is like a tree, not a machine.⁶³ Each of us grows under the influence of nutrients into a unique shape, though we, like two maples or two oaks, belong to the same species.⁶⁴ Mill urged that human character and genius flourishes through individuality.⁶⁵ And, finally, nations flourish through a diversity of character and culture.⁶⁶

The case Mill makes for tolerating freedom of action and thought does not offer a moral refuge for the House of Prayer, if child beating is harmful to children. Child-rearing practices are not self-regarding in Mill's sense. Like John Locke, Mill believed the authority parents have over children is custodial and protective. Children are not parental property. The special control pregnant women have over fetuses in view of physical connectedness is not shared by the parents of fully-born children. We can also distinguish the House of Prayer incident from *Wisconsin v. Yoder*⁶⁷ and *Meyer v. Nebraska*.⁶⁸ In those cases the Supreme Court allowed religious or ethnic minorities to “harm” their children by removing them from regular public school at age thirteen and by enrolling them in private parochial school offering foreign language instruction.⁶⁹

VI. THE GOOD OF ACCOUNTABILITY

Accountability chills, deters, punishes, prompts, pressures, and exposes. These are evils when they amount to unjust domination or frank violation. They are not, however, always evils. Indeed, there are positive dimensions to accountability's qualification of privacy and private choice. Accountability protects, dignifies, and advantages. This was true in the House of Prayer case.

Accountability protects. That a society looks after health and safety by holding others accountable reflects the esteem in which its members are held. The forty-one Atlanta children were taken from their homes for a time because Fulton County values their well-being. At first, parents whose children were removed from their homes refused to agree to stop church-

61. *Id.* at 69-70.

62. *Id.* at 69-91.

63. *Id.*

64. MILL, *supra* note 10, at 69-91.

65. *Id.*

66. *Id.*

67. 406 U.S. 205 (1972).

68. 262 U.S. 390 (1923).

69. *Yoder*, 406 U.S. at 213-36; *Meyer*, 262 U.S. at 399-403.

supported corporal punishment. They eventually relented. Accountability (the threat of criminal punishment, the loss of parenting privileges, and the loss of reputation in the eyes of the wider community) was protective of the children. It was also ennobling of the children's angry and befuddled parents. Accountability dignifies. The society that holds individuals to account dignifies them by presupposing intelligence, rationality, and competence for dialogic social performances of reckoning. No one expects hamsters and centipedes to give account. That is one of the reasons they get squished and locked into little cages. The fact that we expect accountability of fellow humans is a measure of the seriousness with which we regard them. A parallel point is made by moral philosophers about moral agency in general all the time. Ascribe moral rights, obligations, duties, or responsibilities as a measure of respect.

Of course, accountability can be a feature of ignoble compulsion rather than protectionism or moral dignity. Serfs and slaves are expected to answer to masters, expectations enforced with whip and chain. The threat of brutality has led subordinated peoples to signal intent to cooperate at a considerable loss to self-esteem. The accountability norms that deeply ennoble are the type that are egalitarian and reciprocal. Some African-Americans interpreted the House of Prayer intervention as secular society's unequal, non-reciprocal subordination of black's minority culture. Reverend Allen suggested that his arrests for beating children were emblematic of the majority society's disrespect for African-American religious and cultural traditions. Yet the laws that prohibit excessive child discipline apply equally to all racial and religious groups. White, secular child abusers get arrested too in Atlanta, a Christian-dominated city with a recent history of black mayors and many black police officers.

Accountability demands that are not strictly reciprocal and egalitarian are potentially ennobling, if they flow from the requirements of care and caretaking rather than from political domination. Accountability is a demand of love and nurture. The intense accountability for intimacies demanded by long-term lovers is missed when Alzheimer's, Huntington's, or senile dementia sets in. Intense accountability is part of the parent-child relationship, too. Parents need and want accountability of their children. One of the saddest things about having a child who is mentally disabled is missing out on the experience of teaching the arts of description, explanation, justification, censure, and seeing those lessons consistently put to work. A remote, autistic son speaks not at all; when manic, a bipolar daughter does not provide coherent reasons and explanations for conduct.

Physical discipline is a common expectation of good parenting in most African-American families, communities, and churches, notwithstanding the opposition to corporal punishment in the wider society. It is not just the tiny House of Prayer that tells black parents to beat black children. The House of Prayer parents who subscribed to church beatings believed that physical discipline teaches accountability. They believed corporal punishment molds children into respectful youth and law-abiding citizens. Some forms of ac-

countability proffered in the name of love and care are ill-conceived. African-Americans must understand that harsh corporal punishment, though customary and Biblical, is not a cause of good citizenship in a modern society. Children who are spanked, whipped, or beaten by well-intentioned parents may be more likely to turn into violent adults. There is absolutely no evidence that the factors that lead black youth to crime include parents withholding the switch. Black church practices do evolve and change. In the meantime, black children remain accountable to black parents, who remain accountable to grandparents, neighbors, and churches for the choices they make concerning discipline.

Accountability norms are ties that bind. If you imagine lines drawn between each one of us and the people to whom we are accountable for personal matters, the resulting picture is a dense network of such lines—a web of accountability. The web of accountability relationships is both flexible and sticky. The web is sticky in the sense that socially determined and reinforced expectations impel us. Expectations impel us, for example, to tell our mothers certain things, to explain certain things to our friends, and to justify much to our employers. The web is flexible in the sense that we have a good deal of freedom to stretch and mold the connections to suit individual taste. Not all accountability imperatives result from contract or choice. Still, it is oftentimes possible to avoid reporting, explaining, justifying, and so on, because we live in a society that permits a degree of “exit,” economists’ compact term for voluntary separation and self-isolation. It is not costless to escape societal accountability imperatives—the cost is sometimes loneliness—but we can often do it. We can work ourselves loose. We do not have to tell our mothers everything. We can compartmentalize our friends and get new jobs. We stick, but the good news about life in the United States is that we are not generally stuck.

To be sure, some people feel more stuck than others. Just how stuck we are and feel is an empirical question. Faced with evidence of a great many people unable to express a core identity and associated preferences because of punitive accountability norms, I would abandon my belief that “we are not generally stuck.” In liberal societies, political freedom limits accountability to the state. The extensiveness of political freedom in the United States underlies my observation that “we are not generally stuck.” But in any society, including the most liberal, the combined force of accountability to state, community, kin, and friend will qualify both freedom and privacy.

Some cautionary points follow from the web of accountability relationships one observes in the United States. First, in the name of public health, safety, security, and morals, punitive legal accountability for certain forms of ordinary personal conduct have flourished in modern liberal societies. It has not been so long that birth control bans, interracial marriage prohibitions, and sodomy strictures were pervasive in American law. We still live with criminal sodomy and adultery bans. Liberalism has never meant the end of accountability to the state for what a great many people consider their personal lives. A perpetual danger is that the ambition to protect will

result in simple intolerance and oppression. A perpetual regret is that, in addition to affronts to privacy and freedom, affronts to culture and identity will be costs of accountability to the state for personal matters. Ethno-racial and sexual orientation minorities pay such costs everyday; sometimes for better, as in the case of the House of Prayer's disciplinary violence, sometimes for worse, as in the case of legal intolerance of gays and lesbians.

Second, although in liberal societies the government steps back from extremes of intervention, extremes of accountability are not limited to legal norms or totalitarian regimes. Unofficial, normative accountability in liberal democratic societies can be constraining in many of the same ways that official accountability to the state is constraining. A liberal society—or segments of a liberal society—may be a moralistic or clannish one, for example, in which people are bound to admit, confess, forbear, etcetera, because of their creeds and affiliations. Accountability is a device of group identity and solidarity employed by many familial, religious, and racial groups to positive effect. But suffocating, harsh, non-governmental accountability can make a person wretched.

Finally, I use the term “the New Accountability” to stand for the observed intensification of accountability experienced in the United States in the past decades. The New Accountability is a product of Americans' extensive social, economic, and political freedoms, and our ambivalence about forms of privacy that secret truths useful to others. The fact that people in liberal societies are not generally subjected to state punishment for their beliefs or “self-regarding” conduct may itself heighten accountability expectations. Indeed, contemporary Americans are expected to exteriorize internal and intimate worlds in ways they would not if there were a price to pay. In societies in which sexually active unmarried women are stoned, no one would think to design a television program in which women are asked to talk about their sex lives.

The New Accountability means a demand for bare private facts and then, inevitably, more. For with the revelation of bare private facts comes the call for detail. State that you have AIDS and expect people to want to know how and why you contracted it. They will want to know what medications you are taking and your prognosis. They will want to know if you have a partner and your partner's AIDS status. It feels good sometimes to speak intimate truth to strangers. It feels good to know that others take a compassionate interest in the details of your life. So we talk. But we are not always socially free to stop talking. The New Accountability means strangers may have no compunction about demanding more than you wish to tell and putting facts about you to uses that offend and hurt you. The freedom and openness of our conduct means just that many more people know of it and perhaps witness it. Just that many more curious, interested, nosey, inquiring people exploit accountability-entitling ties. The links they find may be as attenuated as membership in the public claiming a right to know what is at all interesting, educational, informative, newsworthy, or governmental. As

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the New Accountability demonstrates, substantial accountability for personal life is a product of excessively tolerant and intolerant societies.