

On Privacy

Chapter 2 Privacy, Equality and the Freedom of Expression

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Oliver Sipple and the Ethics of 'Outing'

Oliver Sipple was a former US Marine, injured while serving in Vietnam. Sipple lived in San Francisco, and on September 22, 1975, he joined the crowd gathered outside the St. Francis Hotel to see President Ford. He was standing beside Sara Jane Moore, when she pulled out a gun to shoot the President. Sipple managed to deflect her aim, and to prevent further shots. The police and the secret service immediately commended Sipple for his action at the scene. President Ford thanked him with a letter, and the news media portrayed Sipple as a hero.

Harvey Milk, San Francisco's openly gay City Councillor, and a friend of Sipple's, saw this as his chance to strike a blow for gay rights. So, without consulting Sipple, he leaked the fact that Sipple was gay to Herb Caen, of the *San Francisco Chronicle*. Caen duly published the news, which was picked up and broadcast round the world.

Though he was known to be gay among members of the gay community in San Francisco, and had even participated in Gay Pride events, Sipple's sexual orientation was a secret from his family, for whom it came as a shock. Outraged, Sipple sued the *Chronicle* for invasion of privacy, but the Superior Court in San Francisco dismissed the suit. Sipple continued his legal battle until May 1984, when a State Court of Appeals rejected his case on the grounds that Sipple had, indeed, become news, and that his sexuality was part of the story. Sipple died in February 1989, aged 47.

Sipple's story has several distinctive features. Most notably, Milk's intentions were not vindictive, and he clearly had no desire to hurt Sipple. His goal was to use Sipple's fame to remove the prejudice, contempt and fear of those who are sexually attracted to other members of their sex. So, by contrast with efforts to 'out' politicians who have lied about their sexuality, or who have condoned, even actively promoted, homophobia, Milk was not trying to threaten or harm Sipple. Indeed, Milk may not even have realised that Sipple would disapprove of his actions, or would suffer from the hostility of his family. Given his openly gay life in San Francisco, Milk may wrongly have assumed that there was no downside at all to outing his friend. Nonetheless, Sipple's case helps to illustrate the difficulties of outing as a political strategy, and points to the reasons why it is so often wrong to publish true facts about another person without their consent.

Several things seem to be wrong with outing Sipple. The first is that Milk's failure to ask Sipple for permission to talk to the press seems exploitative and contemptuous. After all, even if one's sexuality were altogether unremarkable, one might object to having it broadcast to all the world; and if it were likely to make one notorious, the subject of hateful abuse and, even, violence, one might well hesitate to have it widely known, even if one felt no shame about it. Hence, Milk's actions would be troublingly even if we

ignored the fact that, as Sipple's friend, he had duties to consider Sipple's interests and feelings that would not have applied to a stranger.

Secondly, Sipple's case highlights how easily we can be deceived (or can deceive ourselves) into thinking that we know more about other people's lives and interests than we do. Most cases of outing do not involve one friend outing another, but are motivated by anger at what is, or seems to be, the hypocrisy, injustice or selfishness of some else. So Sipple's experience suggests that those doing the outing are very likely to underestimate the harm that they inflict on others – both on their immediate victims, and on those who care for, or depend upon, them.¹ Hence, outing will often be unjustified on instrumental or consequentialist grounds – because its benefits are uncertain, unpredictable and, such as they are, may be achievable in other ways. By contrast, the harms are usually considerable, unavoidable and the full extent of the damage from outing can be easy to underestimate.

Outing means using someone simply as a means to one's own ends. Strikingly, the Sipple case suggests that this can be morally troubling even when those ends are ones which the victim shares, and has actively endorsed. And this interesting feature of the Sipple case points, I think, to the *political* dimension of *ethical* objections to outing, and to the ways that these differ from a consequentialist weighing of likely benefits and costs, or a Kantian concern with the ways that people can be misused by others. Those are objections to outing which we might have regardless of the society we live in, or our assumptions about the legitimacy of democratic government. By contrast, a political perspective on outing centres on the power which outing involves, and the difficulties of justifying this type of power from a democratic perspective.

Outing involves one person or a group claiming the right to make potentially life-changing decisions for a competent adult, although they have not been authorised to do so, are typically in no position to make amends for any harms their actions cause; and cannot be considered either impartial or expert judges of the claims which they propose to over-rule. This unilateral, unrepresentative and unaccountable power over others makes it difficult to reconcile outing with democratic politics. Hence, moral and political objections to absolute government, however benign or well-intentioned, help to explain what is ethically troubling about outing, even when it achieves legitimate objectives, including ones which have the support of its victim.

¹ An example of this can be seen in Richard Mohr's view that 'To lose a child in a custody case for prejudicial reasons [i.e. because of prejudice against homosexuality] is, to be sure, to suffer an indignity' – which seems like a breathtakingly inadequate description of one potential harm of outing. Nor, of course, is this a perspective that pays any attention to the likely harm to the child. That is because Mohr believes that 'the indignity bred and maintained by the convention of The Secret is so great and pervasive [that] it is unlikely that any individual indignity suffered will cancel the dignity gained in the convention's destruction through outing'. However, while Mohr is right that the harms of the closet are not trivial, but substantial and pervasive, it still needs to be shown that the harms created by any individual act of outing are justified – whether by the likely gains of that particular act to the project of changing social conventions, or for some other reason. See Mohr's *Gay Ideas: Outing and Other Controversies* (Beacon Press, Boston, 1992), p. 34. For an interesting discussion of outing in the context of identity politics more generally, see Patricia Boling, 143-151.

Privacy and the Ethics of Publication

Democratic concerns for freedom, equality and responsibility, then, mean that people ought to have broad, though not absolute, rights over true information about themselves, whether the point of publicising that information is to enlighten others, to entertain them, or to advance a legitimate moral or political cause. Publicising sensitive personal information, however true, undermines people's privacy, and threatens their social standing and equality with others. It turns some people into instruments for public amusement or edification regardless of the damage that this may do to their self-respect, their ability to command the respect, trust, affection and loyalty of others, and regardless of its impact on third parties.

Such publication, we are often told, is justified by the moral failings of the victim, whether those failings involve acts of hypocrisy, ingratitude, sexual infidelity, attention-seeking or, indeed, illegality.² But while our interests in controlling sensitive information may be self-serving, there is more to our interests in privacy than that. Control of personal information enables us to protect the feelings of other people, as Sipple's case shows, and to respond to their needs and concerns, even when we do not share them. Such control enables us to act with tact, discretion, respect, and out of a sense of duty, whether or not confidentiality protects our own interests. It enables us to distinguish what is owed to those who have cared for us, or for whom we have special duties of care, from what is owed to those for whom we have no special duties. In short our interests in confidentiality are not reducible to interests in avoiding embarrassment, pain, shame or indignity – important though these are – but include interests in meeting the needs and claims of others for whom, with all their limitations of imagination and sympathy, we may feel love, as well as duties of consideration and care.

Protection for privacy, therefore, can promote personal, as well as political freedom, and our ability to form a variety of personal and political, ties to others. Whether our expressive interests are artistic, scientific, sexual or religious – and whether our medium of communication is gestures and behaviour or words and pictures – protection for privacy protects our ability to explore the world and our place within it, and to communicate what we have found to others without exaggerating its importance or having to vouch for its truth, beauty or utility. Thus, while it is natural for people whose lives revolve around the excitement and frustrations of scientific work to wish to talk

² See, for example, 'The Threat to Our Press' by Paul Dacre, in *The Guardian* 10 Nov. 2008. Dacre rightly complains that Britain's libel laws constantly threaten newspapers and journalists with the threat of bankruptcy for publishing matters of legitimate public interest. 'Today, newspapers, even wealthy ones like the Mail, think long and hard before contesting actions, even if they know they are in the right, for fear of the ruinous financial implications. For the local press, such actions are now out of the question. Instead, they stump up some cash, money they can't afford, to settle as quickly as possible, to avoid court actions - which, if they were to lose, could, in some cases, close them'. However, he also appears to suppose that it is the role of the media to police the nation's morals, and therefore takes it as self-evident that consensual sado-masochistic sex is so evidently 'perverted, depraved, the very abrogation of civilised behaviour' that newspapers ought to be entitled to publish accounts of that behaviour, if they can persuade one of the participants to furnish the salacious details for pay. <http://www.guardian.co.uk/media/2008/nov/10/paul-dacre-press-threats>

about that with others who share those excitements and frustrations, it is equally natural that those whose interests are primarily familial – who want to discuss the new baby and its failure to sleep through the night – should be free to discuss that, without being obliged to bring the whole world into their discussion, or to pretend that their interest in discussing these matters are of significance to anyone other but themselves.³

As Louis Brandeis recognised, your privacy interests in your diary do not depend on its economic or artistic value, or its importance for other people, but on the fact that you created its contents and do not wish to expose them.⁴ Hence, he thought, you should be able to keep your diary to yourself, or to show it only to those you trust, even though your descriptions of beautiful sunsets, disappointments in love, hopes for the future are, when looked at objectively, entirely banal and unlikely to distinguish you from hundreds, perhaps thousands, of other people. Similarly, for your nightly chats with friends. These may be fairly generic, and unlikely to reveal anything damaging about you or them. But, even if you had nothing to fear were their content overhead, what is essential to many of our conversations is less the intrinsic interest of what we say, or the gestures we make, than their role in creating, recognising, cementing – or ending– our relationship with others.

Privacy enables us to give meaning to utterances and objects which, taken objectively, have no special value, just as it enables us to distinguish and give meaning to relationships and associations which reflect our different likes and dislikes, our different interests and, therefore, our particularity as people. Protection for privacy, then, enables us to express ourselves in ways that would otherwise be difficult or impossible because embarrassment, self-consciousness, shyness, the desire not to offend, the fear of boring others, or of exposing our ignorance prevent us from trying to articulate our thoughts, feelings and experiences, or from conveying them to others.

Some of that expression, of course, may be unattractive – selfish, boorish, racist – and the minds and bodies revealed may be feeble, lazy or ugly. And it is certainly true that some of the things that privacy enables us to say and do are – and ought to be – illegal, and therefore discoverable and punishable by law. But it is hard to see how people are to lead rich and satisfying lives if they are unable to differentiate their relationships with others; or how they are to fulfil their different duties unless they are able to identify, consider and order the different demands for attention, time and care to which these give rise. Hence, privacy protections for confidentiality and for intimate, as well as political,

³ For example, there is no reason to think that your claims to form a sports group should depend on showing that churches, workplaces, etc. do not organize sports events — nor on the claim that it would be impossible for them to do so. In short, people should not have to make implausible claims for the uniqueness, merits and need of their associations in order to be free to join with others on some common project. As Weinstein notes, discussing Hegel, there are good reasons to value the fact that privacy removes the need to overstate the merits of one's position or association. W. L. Weinstein's 'The Private and the Free: A Conceptual Inquiry', in J. Chapman, and R Pennock (eds.) *Privacy: Nomos XIII*, (Atherton Press, New York, 1971) footnote 29, p. 47.

⁴ See 'The right to Privacy [The implicit made explicit]' by Samuel D. Warren and Louis D. Brandeis, originally published in the *Harvard Law Review*, and reprinted in *Philosophical Dimensions of Privacy: An Anthology*, ed. Ferdinand D. Schoeman (Cambridge University Press, 2007)

expression are important, enabling people to develop their moral and political capacities, including their sense of themselves as individuals, and as members of a potentially infinite number of different groups.

This is not to say that rights to privacy are absolute, or that they invariably trump rights to freedom of expression if, and when, the two conflict. These are not the implications of the secret ballot, which concerns true, but potentially sensitive, information about our political choices, identities, values and allegiances. So there is no reason to suppose it true when what is at stake is information about our personal choices, identities, values and allegiances.

If you are well-known and obviously ill, you can expect to be the object of gossip and speculation. But it hardly follows that you should therefore have to anticipate what, now, is almost inevitable: the public broadcasting of such gossip, and its treatment as a means to fame and fortune by strangers. Likewise, if you are well known and seen to be staggering around drunk, or hanging out with people who are notorious, you can expect to be regarded unfavourably by those in the know. As John Stuart Mill emphasised, such knowledge and personal condemnation is the inevitable consequence of social life in a free society. As he puts it,

‘A person who shows rashness, obstinacy, self-conceit — who cannot live within moderate means — who cannot restrain himself from hurtful indulgences... must expect to be lowered in the opinion of others, and to have a less share of their favorable sentiments’.⁵

What is not inevitable, however, is the industrialisation of gossip and of its marketing to a mass audience as a form of entertainment, titillation and education.

Such industrialised gossip is hard to justify morally, even if we are inclined to think that it should be legal. As Stanley Benn argued, it is wrong to treat an entertainer’s life simply as a source of entertainment,⁶ because doing so wrongly treats the entertainer as a person with no feelings which can be hurt, and no aspirations or plans which can be harmed by our intrusive attention. Public education can usually be secured by means other than the unwelcome and enforced publicity which outing involves, just as it can usually be secured by means other than the enforced public tutorials beloved by proponents of open voting. So, whatever legitimate purposes the publication of gossip serves can usually be met without humiliating and degrading people, however foolish or complicit they may have been in their humiliation.

Moreover, it is usually invidious publicly to single out particular individuals as a lesson for others - whether of the evils of abusing alcohol or drugs; the virtues of monogamy,

⁵ The quotation comes from Mill’s *On Liberty*, ch. 4, ‘Of the limits to the authority of society over the individual’. The complete text of *ON Liberty* is available free of charge on the web, but there are some excellent scholarly editions which can be easily bought.

⁶ Stanley Benn: ‘To even an entertainer’s life simply as material for entertainment is to pay no more regard to him as a person than to an animal in a menagerie’. P. 233 ‘Privacy, Freedom and Respect for Persons’ in ed. Schoeman, 223-244.

the temptations and pitfalls of fame - when hundreds, perhaps thousands of other victims might have been chosen with equal justification and success to illustrate the lesson. This is especially true when the tutor is self-appointed, not demonstrably of good character, and often incapable of acknowledging, let alone of rectifying, the damage caused by the lesson. As in the case of outing by a single individual, such as Milk, so with the publication of salacious, embarrassing, amusing or surprising gossip by journalists: the justification for publicity, in any particular case, is likely to seem artificial, speculative and unpersuasive, and to beg the question of why *this* individual is entitled to over-rule the desire for privacy of *that* particular person.

Still, outing is not always immoral. Sometimes there is no other way to challenge damaging forms of hypocrisy, manipulation and prejudice than to expose those involved – or no way to do so that does not involve comparable harms to the interests and rights of others. Given the importance that the Conservative Party, under Prime Minister Margaret Thatcher, attached to ‘family values’, as a guide to economics and public morality, it was scarcely surprising that Ministers, such as Cecil Parkinson, who were engaged in adulterous affairs were ‘outed’ by journalists and, as in his case, forced to resign their Ministerial position.⁷ Nor does it seem unreasonable to ask Prime Minister Blair whether or not he had had his children vaccinated, given the furor around the safety of the MMR vaccine at the time, and his public assurances of its safety and importance to public health.⁸ By contrast, while illegal behaviour opens us to legal investigation, punishment and prosecution, we are not always justified in publicising such behaviour, or of reporting it in a way that is likely to make it the subject of wide attention, speculation and discussion. Laws are sometimes unjust and, even when justified, their violation may not be evidence of bad character or ill will, rather than of momentary distraction, or of depression, mental confusion, and despair. So, even in the case of illegal behaviour, what we are justified in publicising depends on our personal or professional responsibilities and the alternatives before us rather than on the legal status of the behaviour alone.

Privacy, Freedom of Expression and the Press

People’s claims to privacy in true facts about themselves, then, can be quite complicated. Immorality or illegality do not automatically deprive us of claims to privacy in true information about ourselves – whether or not they do, it seems likely, depends on the importance of the particular rights to privacy for our freedom, equality and social standing, and of their relative importance compared to the moral and political considerations which would justify us in breeching that privacy.

For example, the gravity of election fraud, from a democratic perspective, would justify legal scrutiny of ballots by election officials, although duplicitous voting would not, even though the former might have been conducted with the best of intentions, and with no evident effect on electoral outcomes, whereas the latter may have meant breaking a legally binding promise, or committing a grave moral wrong. Similarly, the public

⁷ The details can be found at http://en.wikipedia.org/wiki/Sara_Keays#Parkinson.27s_resignation

⁸ See, for example, <http://news.bbc.co.uk/1/hi/health/5118166.stm> and <http://news.bbc.co.uk/1/hi/health/1803609.stm>

importance of accurate information about whether Steve Job is seriously ill is different from the public importance of accurate information about the HIV status of a retired, albeit revered, sportsman like Arthur Ashe. Millions of people are unavoidably affected by the fate of Apple, and the legal obligations of a great many people will be affected by Job's health, given its likely implications for the financial status and prospects of Apple. Hence, while it is easy to sympathise with Job's efforts to keep his ill-health secret, there are good reasons to think that he had moral obligations truthfully to disclose that he was suffering from cancer if he was, so long as he intended to maintain his position at Apple.⁹

By contrast, the ill-health or imminent death of someone like Ashe might well be a source of sadness to people who had not known him personally, but who had admired his achievements in the world of tennis, and his efforts to confront racial injustice and prejudice in the USA and abroad. Nonetheless, accurate information about Ashe's health had no obvious bearing on the moral or legal duties of strangers. Consequently, there was no reason why, during his lifetime, Ashe should have been threatened with the publication of his HIV status, or treated as a poster boy for the significance of non-homosexual transmission of the disease in the West.

It would therefore be wrong to confuse freedom of the press with freedom of expression, or to suppose that privacy and freedom of expression are antagonists, locked in a zero sum game, in which gains to the one can only come at the expense of costs to the other. Our interests in being able to express ourselves freely, and to communicate with others, are varied and not reducible to interests in untrammelled access to other people's ideas and experiences. Hence, freedom of expression must be understood to include private jokes, codes, grumbles, complaints, expressions of love, hope, passion and need, or the ability to talk in ways that draw on shared experiences, meanings and ideas implicitly, rather than explicitly.

Protection for people's privacy, therefore, means that it should be legally possible to demand and win damages for wrongful invasions of privacy, and that the press should be regulated in a way that respects people's claims to privacy. Hence we cannot resolve conflicts over the respective claims of privacy and press freedom by assuming that the one is intrinsically more valuable than the other. Instead, we will have to identify and evaluate the expressive and privacy interests at stake, when conflict arises, bearing in mind that if the right to publish, in a democracy, does not depend on literary, moral or political merit, respect for privacy is not just for the virtuous, sensible or the uninteresting. In some cases this means that autobiographical accounts of people's lives will have claims to invade the privacy of other people which will be lacking in journalistic and biographical accounts of seemingly similar subject-matter.

There is, for example, little to recommend the average 'kiss and tell' story, recounting the one-night stand, or lengthy affair of someone who is not famous with someone who is.

⁹ For an interesting discussion of the issue see *The Financial Times*, Wed. July 30, 2008, p. 12: 'Judgement Call: Four Professionals Offer expert advice: Do investors have a right to know about a CEO's illness?' My sense is that it is not just investors who need to know, but investment professionals and, indeed, those working for the company.

The format does not lend itself to much variation or reflection, but provides an excellent vehicle for personal grudges, self-justification and self-congratulation. However citizens must be free publicly to describe their lives and affairs, to use their lives as art, as science and as an example to others. Because our lives are bound up in the lives of others, it follows that if we are legally entitled to describe and publicise the details of our lives, there is much about the lives of others which we must be legally entitled to publish also, and which we must be able to publish without their permission. Otherwise, most people would find it nearly impossible freely to describe, discuss and publicly to explore the significant events, relationships, constraints and opportunities in their lives. This means that it must be legal to publish stories, autobiographies and reports which are of questionable quality and taste, and which exhibit moral failings such as selfishness, complacency, insincerity and dishonesty, so long as they are not libellous or defamatory.

‘Kiss and tell’ stories, therefore, are an example where the privacy interests of those who wish to avoid publication are unlikely to justify legal constraints on a person’s ability to publish ‘their story’, and to profit financially from the legal freedom to do so.¹⁰ However, this does not mean that protection for privacy has no role in determining other aspects of the publication of ‘kiss and tell’ stories. For example, it may be desirable to limit how intensely, and how frequently journalists are allowed to pursue and try to question third parties to such stories, such as children and spouses, even if this makes it more difficult to question the story’s author and its main subject. In the UK, for example, the families of those caught up in a media frenzy suffer from behaviour – packs of journalists and photographers following them around; endless ringing of their doorbells and of their phones; the inability to leave the house without being surrounded by a scrum of journalists – which looks very much like harassment and which is likely to be frightening for children, and even for the adults involved. No one’s right to self-expression justifies such behaviour, nor is there any ‘right to publish’ or to know what people are feeling or thinking, which does so either.

It may be also desirable for newspapers to report the sums they offered, and subsequently, paid for their ‘kiss and tell’ stories; to inform their readers whether they were the ones who solicited the story, or merely agreed to publish it, and so on. Were this standard practice, readers would be better placed to judge how far newspapers are being used to carry out a grudge or feud, and how actively they are instigating stories which, under the guise of autobiography, publicly describe and evaluate the private life of well-known figures. Reporting the fees that such stories command may increase their supply for a while, and the invasions of privacy that accompany them. But it is public knowledge that selling one’s story of sex with the famous is a way to make money and, even, to launch a career, so there is no reason why newspapers should not disclose the sums involved, and the way that they are negotiated. This would promote public understanding of the economics of a lucrative branch of journalism, and would make it easier to understand the market price, if not the value, of privacy.

¹⁰ Newspapers have an interest in paying as little for these stories as possible; so it seems unnecessary, as well as undesirable to make it illegal for newspapers to pay people to publish these sorts of stories about their lives, even if payment is likely to increase their supply and, thus, the invasions of privacy which they involve.

However, autobiographical justifications for publishing privacy-invasive material do not automatically apply to third-person publications, whether biographical or journalistic. Where celebrities do not wish to relinquish their privacy, and have taken steps to secure it – for example, by not going out publicly together, being discreet, and so on – it is hard to see why journalists should be entitled actively to pursue them, and to publish stories about their sex lives. Such stories may be entertaining, even informative, but curiosity about the sex lives of consenting adults cannot explain why people who are otherwise entitled to privacy should be deprived of it. Hence, the reasons why it should be legal to publish kiss and tell stories, invasive though they are of people’s privacy, do not apply to those cases where none of the people involved wish to relinquish their privacy.¹¹

This is not because autobiography is more important, more expressive or more interesting than biography, nor that it is morally superior to write about oneself than about other people. Often the reverse is true. Any democratic conception of freedom of expression will provide significant protections for journalistic and biographical accounts of people’s ideas, actions and experiences, and the importance of protecting such expression will very likely justify limits on the privacy of politicians and other people who hold positions of political power and influence.¹² However, when it comes to stories about the sex lives of celebrities, or would-be celebrities, I have argued, people have a stronger claim to publish stories about their own lives, even if this means publishing details about the lives of others, than they do to publish stories about people who, however fascinating, have neither the desire nor the obligation to relinquish their privacy.

In the last two chapters, I have argued that we have important personal and political interests in confidentiality, which are intimately related to democratic ideas about the way power should be distributed, used and justified in a society. On that view, ordinary people, with their familiar moral failings and limited, though real, capacities for sensitivity, altruism and wisdom are entitled to govern themselves and, in so doing, to take responsibility for the lives of others. This suggests that they are not in need of constant hectoring or supervision in order to act well, although they are rightly accountable to appropriate public authorities for their exercise of public powers, their use of public resources and their respect for each others’ rights. Hence, as we have seen, people’s claims to confidentiality do not depend on the usefulness of that confidentiality to others, or on the moral, aesthetic or, even, political and economic worth of the things that they wish to do with it.

¹¹ <http://www.guardian.co.uk/media/2010/apr/10/newspapers-phone-hacking-inquiry>. On 3 October 2010, *The News of the World* printed an apology to Vanessa Perroncel for invading her private life, and accepted that its claims that she had had an affair with the footballer John Terry were untrue. <http://www.guardian.co.uk/media/greenslade/2010/oct/07/newsoftheworld-john-terry>

¹² For a helpful discussion of privacy for politicians – and one which pays attention to questions of power and responsibility within different government bodies and administrative agencies, see Dennis F. Thompson’s *Political Ethics and Public Office*, (Harvard University Press, 1987), ch. 5.

In the next chapter, we will move from an investigation of the informational aspects of privacy to its associations with the sexual, familial and domestic. We have seen that in a democracy our words and thoughts do not have to be especially revealing, expressive, dangerous or embarrassing in order for us to be entitled to keep them to ourselves, anymore than we have to show that they are of special aesthetic, scientific, moral or political importance in order to justify their publication. As we will see, this means that people must have considerable latitude in the conduct of their sexual, familial and domestic relationships, even if their intrinsic merits are uncertain, as is their value to others.
