Privacy: History, Legal, Social, and Ethical Aspects

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THE GOVERNANCE OF THE United States is founded on the principle of individualism—a recognition of the basic rights of human beings. Prior to 1890, however, there was no compelling call for a sector in the law that recognized the "right of privacy" as one of these basic rights and the need to protect it legally. There were, of course, many elements in laws governing the United States that dealt with aspects of social behavior which might result in the loss or dimunition of an individual's privacy, but they were not contained in the law under the rubric "privacy." An understanding of the development of privacy in tort law may aid in thinking about the growing problems of dealing with the right of privacy, if it exists, in the new information age.

The language of discontent seems endemic in American society. It led to the Revolution, and in recent years inflamed many individuals and groups to engage in civil disobedience, to test laws deemed averse to individualism and to demand legal protection in the face of actual or potential offensive inroads by government agencies on the individuals' alleged right to be let alone. The language is strident and repeatedly reported in the news media. Hence it would seem unusual to think that the existence of a right to be let alone should ever be questioned and yet it has been. In part the argument is an issue of legal philosophy. In part, also, the issue is raised by the conflict between the proponents of the utility of the new computer-telecommunications technologies and those who fear the potential for these technologies to invade or reduce

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personal privacy. It is difficult to shape new laws to protect that which we call "privacy" and not at the same time to unduly impede useful innovations in technology.

Among other things, many people think that the Bill of Rights in the U.S. Constitution lays a clear foundation for the right of privacy. Yet, in the first ten amendments to the Constitution, the concept of privacy is not explicitly stated, and the word *private* (and any derivative of it) is used only once.[1] The Bill of Rights does tend to enhance the privacy of individuals, but its provisions are directed at outlawing specific acts in which a government might engage that are deemed anathema to the republic in which we live. Together these acts aim at a syndrome of the invasion of privacy, but they provide no relief in law based on the argument of the diminution of privacy.[2] It was not until 1965 that the Supreme Court found a way to provide a constitutional basis for the existence of privacy as a right to be protected.[3] And it was not until 1974 that Congress recognized the right specifically in a law. In the preamble to the Privacy Act of 1974, Congress stated:

> All people are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety, and happiness, and privacy.[4]

In ancient times privacy must have been maintained by conducting one's affairs secretly. For other than the upper or citizen classes, however, even secrecy was unnecessary—people had few rights and less property to preserve. To maintain status in ancient societies, one had to have a noble character defined according to social norms. Gossip served to spread the word about those who might have acted contrary to the norms, or who might have actually committed crimes, thus being subject to loss of status. There was no law against using gossip to invade privacy in Roman society, nor in those societies based on it. Gossip could, though, be dangerous for those who engaged in it, making them subject to the wrath of those against whom it was used. In some societies gossips could be punished for being nuisances but not for being invaders of privacy.

Secrecy was important to the individual who wished to foment revolution or to adopt a nonconformist religion. Again, eavesdroppers who reported information that others wanted to keep secret or who spread gossip about covert action generally did not violate any privacy laws. A person caught eavesdropping could be turned over to the law as a trespasser or a common nuisance but not as a thief of privacy. The

crime of eavesdropping became part of English law in the fourteenth century and was part of the common law of the colonies thereafter.[5]

Through the centuries to modern times one can easily recall both the movements aimed at improving or preserving the rights of human beings and the wars and inquisitions that were waged with individual rights at their core. Yet the right to privacy was generally not one of them, except as it might be inferred from the manner in which the other rights were to be protected. The English Parliament presented a bill of rights to King William and Queen Mary in 1689. It stands with the Magna Carta as the cornerstone of English liberty. Among other things, it referred to true, ancient, and indubitable rights and liberties of the people. The French have included a declaration of the rights of man and citizens in their constitutions since 1789, guaranteeing the freedoms of speech, religion, and the press and personal security. The right of privacy is implicit in these rights. None of these proclamations prevented individuals and groups from discriminating against those who chose certain religions and political beliefs, but, in the broadest sense, these discriminations were not illegal. The fact that they existed gave emphasis to the need some felt to keep their personal lives private.

The concept of privacy as something which could be given value for which someone could be compensated if one suffered its invasion, violation, or destruction has grown slowly in the United States as a consequence of the growth of the institutions and devices of communications. From message and postal systems that existed before the Revolution to the computer-telecommunication technology of modern times, society's need for laws protecting the sanctuary of the individual has been directly proportional to the complexity of the communication systems of the times.

During the first century of the American Republic, society was not so complex that a legal concept of privacy in tort law was deemed essential. This is not to say that people were unconcerned about others prying into their lives. There was just no compelling interest to seek recompense for the intrusion unless, of course, something of property value was stolen, or a life endangered, or a home invaded in the process. And then the laws of theft, battery, and mayhem could be invoked.

The potential for eroding privacy by entrusting one's messages to the mails was noted in the earliest days of colonial times in America. Governor Bradford of the Pilgrim group in Massachusetts intercepted letters of disgruntled settlers and accused the writers of slander and false accusations. Benjamin Franklin assumed that his mail was being opened even though he forbade the employees of his postal service from

opening bags of mail. The first law establishing a postal service contained language that made it illegal to intercept, read, or destroy mail entrusted to it. This prohibition has been repeated in subsequent legislation concerning the postal service. Most people who use the mail now assume that no one intercepts and reads their letters.[6]

The census, required by the Constitution in order to determine the size of Congress, is another function that many have believed is an ominous device by which the government can invade privacy. It was at first most notably a political device and was viewed with suspicion in the eyes of proponents of states' rights. As the country grew in all dimensions, proposals for adding questions relating to manufactures, other elements of economics, and personal characteristics of the people have been made. Those in charge of the census have sought to assuage the fear of the invasion of privacy. For example, the following language appeared in the circular of the census in 1840:

> Objections, it has been suggested, may possibly arise on the part of some persons to give the statistical information required by the act, upon the ground of disinclination to expose their private affairs. Such, however, is not the intent, nor can be the effect, of answering ingenuously, the interrogatories. On the statistical tables no name is inserted—the figures stand opposite no man's name; and therefore the objection can not apply. It is, moreover, inculcated upon the assistant that he consider all communications made to him in the performance of his duty, relative to the business of the people, as strictly confidential.[7]

Still, objections to questions in the census prevail. In the latest census it was considered an invasion of privacy to count the number of bathrooms in residences. It is most appropriate to this current essay to note that the intensity of the federal government's data gathering in the census has only increased, partly due to the innovations in tabulations that began in the late nineteenth century when Hollerith used his punch card innovation to handle the vast array of statistics being gathered.[8] Now that the census data exists in machine-readable form, the census has entered the arena of argument about the impact of the computer on society. The Federal Office of Management and Budget (OMB) is promoting the use of commercial agencies to disseminate government data. The Census Bureau is thus faced with a conflict. Its data are filed in its CENDATA computer database. Two commercial agencies have asked for access to the file in order to offer public services. "Given its pledge to compile information confidentially, the agency is sensitive to allowing end-user access directly to a government computer, and does not want even a perception of anyone being able to dial up private information."[9]

The potential for the invasion of privacy increased with the invention of telegraphy. Furthermore, whereas formerly the government was the villain people wished to restrain, now private industry was in a position to be suspect also. In the Civil War and during the impeachment deliberations over President Johnson, the government sought and received enormous quantities of copies of old telegrams. Moreover, in order to examine the questions of irregularities in elections in the various states, Congress sought more. Western Union's own regulations forbade its employees from divulging information in telegrams. Its rule was:

> All messages whatsoever—including Press Reports, are strictly private and confidential, and must be thus treated by employees of this Company. Information must in no case be given to persons not clearly entitled to receive it, concerning any message passed or designed to pass over the wires or through the offices of this Company.[10]

In this manner, a private industry had attempted to extend the restrictions of the government to its own employees.

Through much of the nineteenth century, the legal philosophers paid more attention to the need to administer a system that was based on the notion that people were constantly threatened by the government while at the same time they tried to sustain the notion that in this nation such a threat did not exist. An influential writer of the time, Thomas Cooley, said it was a matter of principle that "it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his trunks broken open, his private books, papers, and letters exposed to prying curiosity...."[11]

American society changed rapidly following the Civil War. At the same time that people were moving into new territories the cities were growing. In the West a person was both more visible because of the sparse population and more able to move on to escape a bad reputation. In the cities people needed privacy more because of the crowds but gained it easier through anonymity. As individuals came to need more privacy it gained value.

Slowly an aura of the concept of privacy's value spread in American society. More people learned to read and this led to the impact of another "device" on the notion of the value of privacy—that was "yellow journalism." It was fostered by the urge of entrepreneurs to sell newspapers to the growing reading public.[12] In earlier days the newspaper was a medium for reporting events and political opinion. Now a portion of the press turned to sensationalism to increase sales. By the late 1800s the phenomenon of reporting personal items in spicy language attracted

essayists of great visibility to urge reform. One writer noted that: "A man's private life is inviolably his own....None should cross his threshold. Therein is the sanctum of privacy, the violation of whose rights is sacrilege."[13] The President of the University of Wisconsin called for new defenses to be set up on behalf of the individual to protect the individual from the press because it was "breaking in on many of the amenities of social life, and scattering as news things of private interest only and of dear personal concern."[14] Without new laws an individual could only attach social discredit to invasions of privacy on the part of the press.[15]

Finally the recognition of a right to privacy, the violation of which could be made the subject of suit in court, was argued by two young lawyers in Boston—Samuel D. Warren and Louis D. Brandeis. Their article in the *Harvard Law Review* argued that the individual had a right to be let alone.[16] That set the course for the passing of privacy laws in the states for the next ninety years.

As it developed, four aspects of damage from the invasion of privacy have been recognized:

—intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
—public disclosure of embarrassing private facts about the plaintiff;
—publicity which places the plaintiff in a false light in the public eye;
—appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[17]

Many have argued that Warren-Brandeis contained false assumptions or exaggerations. The literature of the examination of the right to be let alone is extensive with many authors setting forth their own reworking of the definitions. Still, by 1982 a right of privacy of some dimension was recognized in forty-eight states and the District of Columbia.[18] One influential author, William Prosser, argues away most of the torts growing from Warren-Brandeis. Nevertheless, he notes that the laws are not wrong: they have resulted from public demand. They have grown without plan, however, and it may be time to call a halt to their passage.[19]

It was not the Warren-Brandeis article alone which impelled the public to push for privacy legislation. Innovations in the devices of communication increased the fear that government agents could learn things about the individual and use them to discomfort or harm people even though there might not be actual evidence of such action. The American's penchant for keeping one's counsel and remaining private grew stronger when faced with the possibility of the degradation of these

characteristics. Without doubt, this fear, though seemingly irrational, has often led lawmakers to err on the side of individualism and privacy in advance of damage. Many cases were to be brought to court: space here does not allow discussion of their variations. No one was guaranteed complete privacy by the law, but:

> The general policy prevailed that information about a person belonged under his control until society could show an overriding need for its disclosure. The right to privacy was emphatically a right of the individual as it entered the body of American law at the close of the nineteenth century.[20]

Legal innovations have not been rapid. With the microphone, invented in 1889, government agents and police could engage in eavesdropping without being on the premises of suspected wrongdoers.[21] Wiretapping and bugging of rooms were the tools of the detective trade. And soon the arguments began: if one's premises were not invaded and no mail, no telegram, or no message had been stolen, had one lost something of value? These questions became more poignant particularly if one were engaged in criminal activity. In a landmark case in 1928 the Supreme Court ruled that electronic communications were not tangible enough to be seizable unless they were seized on a person's property in which case the action would then be subject to the Fourth Amendment.[22] One of the dissenters on the Court was Justice Louis Brandeis!

This was an important but not a definitive case. It is the character of legal proceedings that each case might present some special circumstances. Hence, while appearing to be similar to a previous case, a new case might truly be without precedent. Furthermore, one of the variations might consist of the *mechanism* for the alleged violation of a right of privacy. Through the first sixty years of the twentieth century the conflict between the issues of the individual's right to know and his or her right to be let alone have been exacerbated by continued innovations in communcation and the law to deal with them. Old laws have been strained to cover new technologies. When telegraphy was added to mail, could old regulations about learning something from the content of an illegally opened letter be applied to telegrams? Can something learned through a phone tap miles from the room in which a word was spoken be controlled by laws against stealing letters? Law was strained when messages began to be sent over the air by radio and not contained within a wire. Government agents are constrained by law from opening a traditional letter or eavesdropping on a telephone call. There is no law yet against someone reading someone else's electronic mail.

In Detroit a federal grand jury, investigating an alleged drug dealer, subpoenaed an electronic mail operator for "printouts of any and all records, data, documents, or electronic mail about the suspect, his associates and their business operations."[23] The company claimed that the information was privileged under the law and refused to give it out. The court never acted on the company's claim, however, because an indictment was issued without the information. The Rhode Island Supreme Court has only recently ruled that information gleaned from listening to cordless phone messages could be used to convict a drug dealer even though the police had not obtained permission to tap the communication. The court reasoned that where there was no wire there had been no wiretap, hence no warrant was required. "When Congress put limits on eavesdropping, the judges held, it didn't have the cordless phone in mind."[24] Society is faced with two extraordinarily complicated sets of issues—is there a "right to be let alone," and when is it violated? The dilemma for society lies in determining how it should promote the innovation of new communications technology while not finding itself faced with an unrecognized capability in the technology for breaching the legal barriers against the invasion of privacy.

The Communications Act of 1934 brought together a number of laws relating to the telephone and radio and created the Federal Communications Commission (FCC) to establish regulations that would protect the communications industry while preserving the rights of the people. The law for radio was thus extended to telegraphy and the telephone as the FCC was given jurisdiction over them all including a penalty for the unauthorized interception and divulgence of wire messages.[25]

Now we are faced with a much more sophisticated technological environment, that of the computer-communication combination controlled by the microscopic integrated circuit. The FCC early forbade the telephone companies from offering computer services, even though computers came to be essential to the operation of the telephone network in the United States. Furthermore, the phone companies would not allow manufacturers of electronic equipment to sell their products to the public for unattended attachment to the phone lines. The *Carterfone* decision by the FCC broke the barrier against "foreign" attachments to the phone system. Then value-added networks and bulk resellers of phone lines spawned the forces which have led to the dismemberment of the American Telephone and Telegraph Company (AT&T). The current national mood, also, is instrumental in reducing the authority of the FCC in many areas as the forces of the marketplace replace government intervention.

The specter of the remote agent gaining access to a computer data bank containing information about an individual and linking it with other data banks to create an invisible, virtual, and insidious file on an individual began to rise in the 1960s. The government was forced by public demand to drop its attempt to create a Federal Data Center although the courts did uphold the use of computers to cross-check the earnings of recipients of government benefits.[26]

The social environment of consumerism, individualism, and computers collided in the 1960s. Computers were gaining wide acceptance for the storage and manipulation of credit information: individuals demanded and got a credit law which gives them access to data about themselves and the means for correcting improper records.[27] In the same year (1968) the Omnibus Crime Control and Safe Streets Act, however, only gave protection to oral communications transmitted by wire.[28] Other potentially troublesome technologies were yet to be introduced into the marketplace. It wasn't until 1974 that the Privacy Act was passed regulating the federal government in keeping and providing access to records. The explosion of communications technology is now rapidly outpacing the law.

> Legislated policy is ambiguous, incomplete or nonexistent with regard to a number of technological innovations, among them: digitally transmitted telephone conversations, calls on cellular or cordless phones, data communication between computers, electronic mail, database surveillance, pen registers, closed circuit television and electronic beepers.[29]

Of 142 federal agencies surveyed, 25 percent use or plan to use electronic surveillance. The extent of the private sector's use of electronic surveillance is unknown.[30]

One important part of the Privacy Act was the creation of a Privacy Protection Study Commission. It examined individual privacy rights and record-keeping practices in many environments, including the private sector. The commission's report made many recommendations for federal and state governments for laws and practices to protect the privacy of the individual. Perhaps its enduring contribution, however, is the conclusion that an effective privacy protection policy must have three concurrent objectives:

> —to create a proper balance between what an individual is expected to divulge to a record-keeping organization and what he seeks in return (*to minimize intrusiveness*);
> —to open up record-keeping organizations in ways that will minimize the extent to which recorded information about an individual

is itself a source of unfairness in any decision about him made on the basis of it (*to maximize fairness*); and
—to create and define obligations with respect to the uses and disclosures that will be made of recorded information about an individual (*to create legitimate, enforceable expectations of confidentiality*).[31]

Not all students of the problems of legislating privacy in the modern world are sanguine about achieving these objectives. Some social ideals cannot be translated into intelligible legal theory. "Some elude legal resolution because we cannot clearly identify and balance the relevant social and moral values; and we refuse to resolve some human problems by law because we are unwilling to bear the cost that legal solutions would impose."[32] But too much is at stake for both the individual and the communication industries: law is required to prevent anarchy, a state in which the individual's rights would be lost.

Ithiel de Sola Pool's closing comments in his last book contain the most optimistic view:

> The easy access, low cost, and distributed intelligence of modern means of communication are a prime reason for hope. The democratic impulse to regulate evils, as Tocqueville warned, is ironically a reason for worry. Lack of technical grasp by policy makers and their propensity to solve problems of conflict, privacy, intellectual property, and monopoly by accustomed bureaucratic routines are the main reasons for concern. But as long as the First Amendment stands, backed by courts which take it seriously, the loss of liberty is not foreordained. The commitment of American culture to pluralism and individual rights is reason for optimism, as is the pliancy and profusion of electronic technology.[33]

Americans hold dear both individualism and freedom from government invasion of their private lives. Their laws and court proceedings reflect these values and governmental institutions do change, if slowly, as a result of societal pressures. Even if the Constitution does not recognize privacy, it embodies a system that can sustain this right. But the future is far from clear:

> As the United States becomes more economically, socially, and politically information-oriented, personal privacy promises to become a matter of increasing litigation, legislation, and political concern. Indeed, the political ideal of privacy is destined to increase rather than lessen in importance within the polity.[34]

References

1. The reference appears in the Fifth Amendment which says, among other things, that private property shall not be taken "for public use, without just compensation."

2. Those amendments which seem most allied to the notion of privacy are: *first*—prohibiting free speech and press, and the rights of people peacably to assemble; *second*—prohibiting infringement of the people to keep and bear arms; *third*—prohibiting the quartering of soldiers in anyone's home in time of peace without the consent of the owner; *fourth*—guaranteeing the right of a people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures; *fifth*—making a people immune from compulsion to be witnesses against themselves, and protecting their property from seizure without due process of law; and *eighth*—saving a person from cruel and unusual punishment.

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