Whither Privacy? An Introduction

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Recent revelations about the US National Security Agency offer a stark reminder of the challenges posed for US law by the rise of the digital age.[1] These challenges refigure the meaning of autonomy and the social in the face of new modalities of surveillance. We live in an age of new modalities of social interaction as well as new reproductive technologies and the biotechnology revolution. Each of these things seems to portend a world without privacy, or at least a world in which the meaning of privacy is radically transformed both as a legal idea and a lived reality. Each requires us to rethink

[1] See, for example, "NSA Surveillance Exposed," *CBS News*, available at http://www.cbsnews.com/feature/nsa-surveillance-exposed (accessed January 20, 2014).

the role that law can and should play in responding to today's threats to privacy.[2]

These concerns are, of course, not unique to the early twenty-first century. More than a hundred years ago, Samuel Warren and Louis Brandeis warned of emerging threats to individual liberty associated with new business methods and technologies.[3] "Instantaneous photographs and newspaper enterprise," they said, "have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"[4] Warren and Brandeis worried, in particular, about the press "overstepping in every direction the obvious bounds of propriety and of decency." "Gossip," they observed, "is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the

[2] Much of what follows is taken from Austin Sarat, Lawrence Douglas, & Martha Umphrey, "Change and Continuity: Privacy and Its Prospects in the 21st Century," in *Imaging New Legalities: Privacy and Its Possibilities in the 21st Century*, eds. Austin Sarat, Lawrence Douglas, & Martha Umphrey (Stanford, Ca: Stanford University Press, 2012).

[3] Samuel Warren & Louis Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890), 193. For another formulation of this right see Guy Thompson, "The Right of Privacy as Recognized and Protected at Law and Equity," *Central Law Journal* 47 (1898), 148. See also Patricia Ann Meyer Spacks, *Privacy: Concealing the Eighteenth-Century Self* (Chicago: University of Chicago Press, 2003).

[4] *Ibid*., 195.

details of sexual relations are spread in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle."[5]

Against this background, Warren and Brandeis identified a right to privacy implicit in the Anglo-American common law that afforded individuals "full protection in person and property."[6] They set out to "define anew the exact nature and extent of such protection"; that is, to adjust the meaning of the right to privacy to meet the demands of a rapidly changing society.[7] They called for explicit legal recognition of the "right to be let alone."[8] As they saw it, this right is itself part of a more "general right to the immunity of person."[9] It is, in their words, "the right to one's personality."[10]

[5] *Ibid*., 196.

[6] *Ibid*., 198.

[7] *Ibid*. See also Francis Bohlen, "Fifty Years of Torts," *Harvard Law Review* 50 (1936), 731.

[8] *Ibid*., 205. For an extended discussion of this formulation see Morris Ernst and Alan Schwartz, *Privacy: The Right To Be Let Alone* (New York: Macmillan), 1962.

[9] *Ibid*. For a different view see Rufus Lisle, "The Right of Privacy (A Contra View)," *Kentucky Law Journal* 19 (1930), 137.

[10] *Ibid*. Writing in 1968, as new technologies began to threaten increasingly invasive government intrusion into the traditional private sphere, Charles Fried identified "a new sense of urgency in the defense of privacy." See Charles Fried, "Privacy," *Yale Law Journal* 77 (1968), 475. In attempting to discover the theoretical foundations of the "right to privacy," he found that privacy allows us to develop the relationships that make us human. According to Fried, the protection

Warren and Brandeis' justifiably famous article offers but one important example of the challenges that threats to privacy pose to law. They carefully reworked the materials of the common law to fashion a new legal concept. Confronting changes in society, they set out to identify new legal responses to changed circumstances. The question for our time is whether we can identify similar responses in light of contemporary challenges. The work collected here offers examples of the way scholars are responding to those challenges. It ranges from full-throated defenses of privacy and optimistic offerings of new legal devices to protect it, to deep pessimism and doubt that the law can keep up with erosions in the lived reality of privacy.

While the US Constitution makes no explicit reference to a "right to privacy," by the late twentieth century that right was as venerated as any other right and arguably is as inseparable from liberty as any democratic ideal.[11] At the

of individual autonomy is the "necessary context for relationships which we would hardly be human if we had to do without – the relationships of love, friendship, and trust." *Ibid*., 477. He argues that the principles of "love, friendship, and trust" are at "the heart of our notion of ourselves as persons among persons." *Ibid*., 478.

[11] The 1987 hearings on the nomination of Robert Bork to be a Justice of the United States Supreme Court provide one piece of evidence of such veneration. Explaining why he could not support Bork, Republican Senator Robert Packwood explained, "I am convinced that Judge Bork feels so strongly opposed to the right of privacy that he will do everything possible to cut and trim, and eliminate if possible, the liberties that the right of privacy protects."

See Linda Greenhouse, "The Bork Hearings: Packwood, Seeing Threat to Privacy, Opposes Bork," *The New York Times*

same time, the late twentieth century gave rise to trenchant questions about the very coherence or desirability of defending privacy.[12] Today, threats to privacy are ubiquitous. They take the form of new modalities of surveillance, new reproductive technologies, the biotechnology revolution, the rise of the digital technology, the excesses of the Bush Administration, and the continuing war on terror.

This book does not seek to provide a comprehensive overview of threats to privacy and rejoinders to them. Instead it considers several different conceptions of privacy and provides examples of challenges to it. In the remainder of this introduction I survey the meanings of privacy in three domains: the first, involving intimacy and intimate relations; the second, implicating criminal procedure through, in particular, the Fourth Amendment; and the third, addressing control of information in the digital age. The first two provide examples of what are taken to be classic invasions of privacy, namely instances when government intrudes in an area claimed to be private. The third has to do with voluntary circulation of information and the question of who gets to control what happens to and with that information.

(September 22, 1987), available at http://www.nytimes.com/1987/09/22/us/the-bork-hearings-packwood-seeing-threat-to-privacy-opposes-bork.html

[12] See, for example, Duncan Kennedy, "The Stages of the Decline of the Public/Private Distinction," *University of Pennsylvania Law Review* 130 (1982), 1349. Also Robert Mnookin, "The Public/Private Dichotomy: Political Disagreement and Academic Repudiation," *University of Pennsylvania Law Review* 130 (1982), 1429.

Intimacy and Privacy

In the realm of intimate relations, the right to privacy was first recognized in the landmark 1965 case of *Griswold v. Connecticut*.[13] In *Griswold*, the US Supreme Court struck down a Connecticut law banning the sale or use of contraceptives to, and by, married couples. The court identified a right to privacy grounded in the "penumbras" and "emanations" of the First, Third, Fourth, Fifth, and Ninth Amendments to the US Constitution and argued that the right to privacy in marriage was older than the Bill of Rights itself.[14] As Justice Douglas put it,

> We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[15]

Eisenstadt v. Baird (1972)[16] extended *Griswold*'s privacy protections to unmarried individuals, a shift in logic that provided the doctrinal basis for the court's subsequent decision to

[13] *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[14] *Ibid*., 484.
[15] *Ibid*., 488.
[16] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

protect women's reproductive freedom in *Roe v. Wade*[17] and its decision striking down a Texas anti-sodomy statute in *Lawrence v. Texas*.[18] Michael Sandel argues that this doctrinal path is marked by a regrettable change from Douglas' substantive assertions about the value of marriage to what Sandel calls a "voluntarist conception" of privacy grounded in the belief in the "neutral state" and the desirability of an "unencumbered self."[19] The voluntarist conception is associated with the belief that government should remain neutral among different conceptions of the good so that individuals can freely choose how to lead their own lives.[20]

As Sandel sees it, "So close is the connection between privacy rights and the voluntarist conception of the self that commentators frequently assimilate the values of privacy and autonomy."[21] Thus, Jon Mills writes, "Individual privacy is at the core of personal identity and personal freedom."[22] Moreover, in "Supreme Court decisions and dissents alike,

[17] *Roe v. Wade*, 410 U.S. 113 (1973).

[18] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[19] Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge: Harvard University Press, 1998), 91. Andrew Taslitz argues that "to invade privacy is to unsettle our very identity, distorting relationships with others, self-esteem, and self-concept." See Andrew Taslitz, "The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions," *Law and Contemporary Problems* 65 (2002), 129–130.

[20] Sandel, *Democracy's Discontent*, 91.

[21] *Ibid*., 93.

[22] Jon Mills, *Privacy: The Lost Right* (Oxford, UK: Oxford University Press, 2008), 18.

the justices have often tied privacy rights to voluntarist assumptions."[23]

Others join Sandel in criticizing liberalism's tight linkage of privacy and individual autonomy. Daniel Solove, for example, views privacy as more than the protection of autonomy and selfhood when he writes, "Privacy, then, is not the trumpeting of the individual against society's interests, but the protection of the individual based on society's norms and values."[24] He argues that privacy is "not reducible to a singular essence; it is a plurality of different things that do not share one element in common but that nevertheless bear a resemblance to each other."[25] Still others describe the right of privacy as a flight of judicial fancy, ungrounded in the US Constitution itself.[26]

Feminist critics[27] and scholars such as Rosa Ehrenreich warn against the modern preoccupation with the "language

[23] Sandel, *Democracy's Discontent*, 92.

[24] Daniel Solove, "'I've Got Nothing to Hide' and Other Misunderstandings of Privacy," *San Diego Law Review* 44 (2007), 763.

[25] *Ibid*., 756.

[26] John Hart Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," *Yale Law Journal* 82 (1973), 920.

[27] See, for example, Ruth Gavison, "Feminism and the Private/Public Distinction." *Stanford Law Review* 45 (1992), 1. Also Linda McClain, "Inviolability and Privacy: The Castle, the Sanctuary, and the Body," *Yale Journal of Law and Humanities* 7 (1995), 195; Elizabeth Schneider, "The Violence of Privacy," *Connecticut Law Review* 23 (1990–1991), 973; Jeannie Suk, "Is Privacy a Woman?," *Georgetown Law Journal* 97 (2009), 485.

of privacy."[28] Writing about *Roe*, Catharine MacKinnon argues that in its reliance on privacy as the basis for women's reproduction rights, *Roe* "translates the ideology of the private sphere into the individual woman's legal right to privacy as a means of subordinating women's collective needs to the imperatives of male supremacy."[29] For MacKinnon, privacy doctrine masks gender inequality by keeping the state out of the home, contributing to state abdication in a realm that requires intervention.

Like MacKinnon, Ehrenreich suggests that "privacy issues . . . might be better described and analyzed as issues of *power*."[30] She writes, "The problem with the concept of 'privacy,' however defined, is that whatever work it does, its problematic overuse can obscure certain issues of power and consequential harm."[31] As Ehrenreich points out, generally "those who have power have the luxury of defining what is and what is not private."[32] The denial of privacy, even in civilized societies, becomes a "mechanism of social control."[33]

[28] Rosa Ehrenreich, "Privacy and Power," *Georgetown Law Journal* 89 (2001–2002), 2047.

[29] Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987), 93. For a different view see Laura Stein, "Living With the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality," *Minnesota Law Review* 77 (1993), 441 and Julie Inness, *Privacy, Intimacy, and Isolation* (New York: Oxford University Press), 1992.

[30] Ehrenreich, "Privacy and Power," 2054 (original emphasis).

[31] *Ibid*., 2052.

[32] *Ibid*.

[33] *Ibid*., 2060.

According to Ehrenreich, modernity demands that we "confront the issues of power that lie at the heart of privacy."[34]

Privacy and the Fourth Amendment

At the start of the twentieth century the Fourth Amendment prohibition of unreasonable searches and seizures was rooted in property rights, and a "search" was understood as a physical trespass.[35] Critics of this approach questioned whether "the Constitution affords no protection against such invasions of individual security,"[36] and warned that the property-based conception of the Fourth Amendment rendered it useless as a protection against "subtler and more far-reaching means of invading privacy."[37]

In 1967, the Supreme Court established a new standard for characterizing a Fourth Amendment "search."[38] Justice Stewart, writing for the majority in *Katz v. United States*, argued that "the Fourth Amendment protects people, not places."[39] The *Katz* decision also established a "reasonable

[34] *Ibid*.
[35] See *Olmstead v. United States*, 277 U.S. 438, 473–474 (1928).
[36] *Ibid*.
[37] See, for example, Richard Julie, "High-Tech Surveillance Tools and the Fourth Amendment: Reasonable Expectations of Privacy in the Technological Age," *American Criminal Law Review* 37 (2010), 128–129.
[38] See *Katz v. United States*, 389 U.S. 351 (1967).
[39] *Ibid*., 353.