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## Confessional Culture

The current crisis of privacy is, or ought to be, especially surprising in the United States, because privacy concerns, historians and legal scholars attest, were a prime driver in the creation of the nation, and the erection and expansion of our basic freedoms. Our disregard for privacy is surprising for another reason: it defies predictions and expectations of how we are supposed to act under surveillance. Why, if we know we are watched – and we admit as much – is online behavior so shameless, seemingly open and free? Why do so many of us feel compelled to blare intimate details, and share mundane and embarrassing events with the whole world? What does that say about us? Is human nature changing before our very eyes, in the digital age, such that we show no compunction about living an utterly public life, in most all respects? How can we retain any enduring or grudging respect for privacy in this brave new world? Some people muster objections; some admit there is something wrong in privacy invasions – but what? We have a vocabulary of privacy, and a deep historical relationship to it (or so we are told), but hardly know what it means anymore, why it is of value, and worthy of defense. And in the digital age, privacy requires no modest or ordinary defense, but a monumental call to arms, to beat back the tidal wave of surveillance – which we invite, and facilitate.

Privacy is not mentioned in the US Constitution. Nevertheless, scholars have argued that privacy protections stem from the values and experiences of the nation's founders, and are clearly implied in the Bill of Rights. In one respect, "the history of America is the history of the right to privacy."<sup>1</sup> From the inception of this nation, immigrants were driven here by privacy concerns of a kind. The Pilgrims departed England, for example, because they wanted to

<sup>1</sup> Frederick S. Lane, *American Privacy* (Boston: Beacon Press, 2009), 1.

be left alone in peace to practice their faith. And the colonial struggle with England was galvanized by controversies over privacy invasions.

The seeds of the Revolutionary War were sown in the dispute over who would bear the cost of the French Indian War, and the ongoing efforts to protect the American frontier and the empire at large. Britain claimed that the colonists needed to bear a greater burden of the costs of such defenses. The colonists objected, and sought to avoid taxation by concealing the fruits of their trade. In Massachusetts in 1755, the English government tried to raise funds by issuing “writs of assistance,” which authorized custom house officers to “randomly search sailing ships, dockside warehouses and even private homes for untaxed property.”<sup>2</sup> The colonists chafed under this policy, and opposed efforts to renew the writs upon the death of King George II in 1760. In the hearing for their renewal, colonial lawyer James Otis eloquently articulated the opposition. “One of the most essential branches of English liberty is the freedom of one’s house,” Otis claimed. “A man’s house is his castle; and whilst he is quiet, he is well guarded as a prince in his castle. This writ [of assistance], if it should be declared legal, would totally annihilate this privilege.”<sup>3</sup> Otis cites a long-standing element of English Common Law known as Castle Doctrine – “one’s home is his castle,” a sacrosanct space where he is most perfectly free. Castle Doctrine is still prominently invoked in US law today, in, among other things, self-defense and gun rights concerns. Courts have recognized a robust right of self-defense for individuals wielding guns in the home, against unwanted strangers.

The concern for privacy became a major driver of the Revolutionary War, and though the term does not appear in our founding documents, its influence can be detected – and privacy protections inferred. In the Bill of Rights, for example, the Third Amendment, which prohibits soldiers being quartered in one’s home, is a clear reaction against British efforts to do the same, invading and occupying colonists’ private dwellings. The First Amendment protects our right to make up our minds privately, regarding political and religious affiliation. The Fourth Amendment, which protects against “unreasonable searches and seizures” of the citizenry, such as the British soldiers perpetrated, prominently articulates privacy concerns. In the 1960s, Fourth Amendment jurisprudence becomes the bedrock of a constitutional right to privacy recognized by the Supreme Court.

Prior to that, however, privacy makes a notable appearance on the US legal scene in the 1890s thanks to an influential article written by Samuel Warren

<sup>2</sup> Lane, 10–11.

<sup>3</sup> Lane, 12.

and the future Supreme Court Justice Louis Brandeis. Attempting to express an explicit right to privacy, which they felt was lacking, Brandeis and Warren claim that it amounts to or consists in a “right to be left alone.” The US Constitution and English Common Law (which is our Constitution’s forbear and foundation) recognize a citizen’s right to be protected from intrusion in his person and property. But, Brandeis and Warren explain, times had changed; new technology had emerged, and advanced civilization revealed a new realm in need of defense beyond the merely physical, namely, “man’s spiritual nature . . . his feelings and his intellect.”<sup>4</sup> US law had evolved to offer protection for intellectual property, the men point out. But this was insufficient to combat attacks on our emotional well-being, which privacy invasions constituted.

Brandeis and Warren are concerned primarily with gossip, and how technological innovations embolden and empower the gossip mongers, and stoke the general appetite for their wares. A more immediate motivation for their article, it seems, was Warren’s annoyance at the exuberant media coverage of his daughter’s wedding. The men single out “instantaneous photographs,” a new invention at the time, and the “newspaper enterprise” that disseminates them to a hungry public. The latter spurred journalists to pry more deeply into private lives, recording intimate details for posterity. “The press is overstepping in every direction the obvious bonds of propriety and of decency,” Brandeis and Warren complain. “To satisfy a prurient taste, the details of sexual relations are spread broadcast in the columns of 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.”<sup>5</sup>

They feel they are dealing with a new breed of offense, which is somewhat abstract – the feelings of hurt, or anger, or irritation that emerge when insight into one’s private life and emotions are disseminated to the curious, simply for curiosity’s sake. And when people hungrily absorb the details of private lives, this media indulgence promotes immoral behavior – prurience and indolence. This seems to be the focus of Brandeis and Warren’s ire, as opposed to the offense in privacy invasions, for those whose privacy is invaded. They are more confident in articulating, and more intent in highlighting, the ill that is media gossip, which “both belittles and perverts men,” than explaining exactly why and how privacy invasions hurt those whose lives are invaded.<sup>6</sup> This is a recurring theme

<sup>4</sup> Louis Brandeis and Samuel Warren, “The Right to Privacy,” *Harvard Law Review* IV, 5 (1890). [http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy\\_brand\\_warrr.html](http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warrr.html).

<sup>5</sup> Brandeis and Warren.

<sup>6</sup> Brandeis and Warren.

going forward: while the hurt from invaded privacy is *felt*, the offense – to those whose lives are exposed – is difficult to pinpoint or spell out. As a result, privacy protections become hard to justify, and easy to surrender.

Law evolves to offer protection for more abstract aspects of our lives, Brandeis and Warren maintain. Such is its natural progression, and it is the result of advancing civilization. Civilization satisfies our basic physical needs, and teaches that happiness consists in more than the satisfaction of those needs. Rather, happiness has a significant emotional and spiritual component. Intellectual property rights are one such creation of advanced civilization and mature jurisprudence, protecting intangible goods – prosecuting people who steal our ideas, for example, preserving ownership and authorship. To that extent, intellectual property protection might seem like a good jumping off point for defending against privacy invasions. But Brandeis and Warren argue it's the other way around. The foundation of intellectual property protections is not private property, but “inviolate personality,” that is, the notion of a sacrosanct personal space that ought not be invaded or robbed or exposed under any circumstances.<sup>7</sup> The right to be let alone is a foundational right, a precedent right in common law, which then infuses our Constitution. Until Brandeis and Warren put pen to paper, it was only in need of being pronounced; its growing and newfound significance was made clear by evolving technology and evolving culture.

Only in the 1960s, when the US Supreme Court was presided over by Justice Earl Warren, did the right to privacy receive the full legal recognition and sanction that Brandeis and Warren anticipated. The term “privacy” is pronounced in only 88 Supreme Court cases prior to the 1960s, but in 107 cases under Earl Warren’s tenure, suggesting that “the Warren Court made privacy a central legal concept in American law.”<sup>8</sup> Justice William O. Douglas was its chief evangelizer. In one notable case, *Griswold v. Connecticut*, Douglas wrote the majority opinion, and explained that while certain rights are not explicitly mentioned in the Constitution or under any single provision of the document, they become evident if we would hope to fully enact the provisions of the Bill of Rights.<sup>9</sup> The right to privacy is one such right – and is implied by the First Amendment. We cannot exercise freedom of speech, assembly, or religion without an antecedent right to privacy, which creates an inviolate zone that government, or other powers and interests, dare not trespass. Of itself, the First

<sup>7</sup> Brandeis and Warren.

<sup>8</sup> Lane, 153–4.

<sup>9</sup> *Griswold v. Connecticut*, 381 US 479 (1965).

Amendment implies a right to privacy, but other provisions combine to carve out a space where we must be let alone, in order to fully enjoy the freedoms spelled out in the Constitution.

Strikingly, Douglas aims to lend privacy an air of longevity, declaring that the institution is “older than the Bill of Rights – older than our political parties, older than our school system.”<sup>10</sup> Privacy is as old as the institution of marriage, too, he claims, which is at issue in the case at hand, concerning the state of Connecticut’s right to prohibit married couples from learning about contraception. Marriage is a sacred institution, Douglas maintains, and privacy is essential for protecting the intimacy of this bond. This claim is dubious on a few fronts. For one thing, as we will see in Chapter 5, the notion of privacy is hardly monolithic or eternal, but has changed over the centuries. What’s more, marriage has changed, too; the institution that Douglas hails was not in fact the repository of sacred intimacy in times past.

In a later case, *Papachristou v. City of Jacksonville*, Douglas invokes the right to be let alone in the case of those accused of loitering and wandering where they are not wanted or permitted. We have a right to meander, uninterrupted and uninterfered because it is one of those private activities “responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity,” which is the lifeblood of democracy.<sup>11</sup> Democracy requires that privacy be protected, because it nurtures an independent spirit, and emboldens citizens to experiment, with their travels as with their thoughts. People in a democracy should feel free to speak out, unconstrained by social pressure, perhaps liable to uttering what is wild and offensive on occasion, because this is the ground of dissent, which expands the frontier of liberty in unexpected ways. Douglas leveled this argument against the backdrop of the civil rights movement, whose proponents had to persevere amidst immense social pressure, and outright oppression. It was clear to him, as to many, that privacy is a necessary protection for the expansion of rights that we soon take for granted. Individuals must be allowed to consider, cultivate and express potentially dangerous ideas, free from the intrusion and coercion of social forces intent on maintaining stability, and the status quo.

Privacy and personal independence are inseparable, according to Douglas, and, tellingly, he invokes Thoreau in this regard. Thoreau and his mentor Emerson eloquently and memorably celebrate a strong brand of American individualism, perhaps the quintessential expression thereof. And their account presumes no small degree of privacy, protecting the individual from

<sup>10</sup> *Griswold v. Connecticut*, 381 US 479 (1965).

<sup>11</sup> *Papachristou v. City of Jacksonville*, 405 US 156 (1972).

the corrupting influence of society, secluding him as far as possible, so that he might hear the authentic voice of his conscience – and more. It is an account that clearly resonates in later iterations and defenses of privacy.

Douglas admires Thoreau’s “Walking,” which endorses an individual’s free and unplanned departure into nature, sauntering in the fields with no prescribed agenda or plan. One is purified in this venture, Thoreau maintains, liberated and opened to hear the voice of truth, which a person can only detect when alone with his thoughts. Society compels us to focus on economic gain, and the lures of wealth and class, none of which truly fulfills us. To the contrary, society infects us with a kind of madness. Unfortunately, we are born into its bondage, which is why so many people take for granted the economic and social demands placed on us, and mindlessly heed them. But real freedom beckons nearby. We only need to stride out into the fields and woods – alone.

In a famous ode to our rightful independence, Thoreau declares that society has us “study the laws of matter at and for our convenience, but a successful life knows no law. It is an unfortunate discovery . . . that of a law which binds us where we did not know before that we were bound. Live free child of the mist!”<sup>12</sup> To discover authentic existence, and live fully, we must detach ourselves from the laws of men. In so doing, we find favor with God, and emulate how He also transcends law – the law of Nature. On one hand, alone in the wilds, we may finally enjoy the peace and quiet to hear the voice of God, and discern his will. In liberating ourselves from human law in this manner, furthermore, we emulate God, the creator of the laws of Nature, who also transcends them.

Thoreau engages in a more elaborate and insistent exercise in self-purification at Walden Pond, where he holes up in a cabin on land owned by his friend Emerson. Embarking on this two-year experiment, Thoreau declares that he will learn how to live deliberately, that is, simply, thoughtfully, consciously. He will isolate and identify his real needs, which he suspects are few. Society dictates that our needs are many, and then sends us endlessly chasing their fulfillment – creating new needs all the while. This is a lie, an unnecessary complication. Authentic living, *real* living, can only be achieved through a kind of separation and isolation – privacy, if you will. Thoreau constructs the cabin himself, bereft of creature comforts; he grows and forages for food, drinks from the stream, and bathes in the pond. He sits on his doorstep listening to the birds, contemplating the sights and sounds around him, straining to detect the immanent wisdom of nature. Most of all, however,

<sup>12</sup> Henry David Thoreau, “Walking,” in *Nature/Walking* (Boston: Beacon Press, 1991), 113–14.

Thoreau quiets the din of outside voices, voices that issue demands, fears, worries, and concerns, which, when immersed in the workaday world, seem utterly normal. From his perch, aloof and apart from the common worries of men, their ridiculous nature is readily apparent. Everyone would do well to enjoy this kind of privacy, even for a while, and box out all the chatter. “Let us settle ourselves and work and wedge our feet downward through the mud and slush of opinion and prejudice and tradition and delusion and appearance . . . till we come to a hard bottom and rocks in their place, which we call reality.”<sup>13</sup>

Thoreau is moved to compassion at the sight of his peers, weighed down with needless concerns, driven by insatiable and nonsensical social pressures. But Emerson, his intellectual ally, depicts society as nothing less than an adversary; one must be utterly insulated against its assaults and corruptions. A person is properly “Self-Reliant,” Emerson argues in his famous essay celebrating individualism. If you would attain the truth and discover the sacred kernel of life, you must ruthlessly block off outside influence and look within. Thoreau relishes his time at Walden Pond, for it reveals the eternal wisdom of the philosophers he has read – it makes clear the truths others have taught for generations. For Emerson, however, you must strike out on a radically new and independent path to attain wisdom. “When good is near you, when you have life in yourself, it is not by any known or accustomed way; *you should not discern the footprints of any other*; you shall not see the face of man; you shall not hear any name—the way, the thought, the good shall be wholly strange and new.”<sup>14</sup> Society has nothing to recommend you – nor does history, or tradition, it seems.

Nature is a conduit to authenticity, by this account. Or better yet, nature is the purifying force or milieu that makes each of *us* a conduit for the truth – an empty vessel for the divine. “In the woods,” alone, Emerson writes, “all mean egoism vanishes. I become a transparent eyeball; I am nothing; I see all; the currents of the Universal Being circulate through me; I am part or particle of God.”<sup>15</sup> I need not physically remove myself from society to enjoy this vision. I can learn to commune with nature in quiet moments when it offers itself to me – which can be anywhere. I must practice the art of solitude, and embrace sacred loneliness whenever possible. Emerson describes doing so while crossing the town commons in the snow, enveloped in silence, and stopping to gaze up at the stars; suddenly, he is one with them.

<sup>13</sup> Henry David Thoreau, *Walden* (New York: Dover Publications, 1995), 16.

<sup>14</sup> Ralph Waldo Emerson, “Self-Reliance,” in *Nature and Selected Essays* (New York: Penguin Books, 1982), 181.

<sup>15</sup> Ralph Waldo Emerson, “Nature,” in *Nature/Walking* (Boston: Beacon Press, 1991), 8.

Emerson and Thoreau offer an account of individualism that will be essential for privacy advocates: if I am to be a proper individual, robust and self-determining, authentic and in touch with “reality,” I must filter out external influences and prejudices. I must heed only the voice that wells up within – provided I am able and allowed to hear it. This will prove to be a high bar for privacy, indeed.

The legal, cultural and political forces elevating privacy arguably culminated in the twentieth century, such that privacy became a “fixation . . . of US public culture,” where it has been “foundational to [our] sense of personhood and national identity.”<sup>16</sup> Indeed, the language of privacy is very familiar to us, ingrained as it is in our national narrative and legal system. We instinctively know that privacy matters, and thus find it perfectly normal, or at least unremarkable, when privacy is invoked in public commentary or political speeches. And as I will soon argue, the concern for privacy is still operative or manifest in certain quarters of our lives, in some form or fashion. For the most part, however, in our daily behavior – in cases where privacy concerns should figure prominently – we tend to forsake it with little thought or compunction. Which suggests that, in practice, privacy rings hollow. Few people seem to know what it really means, what it consists in, why it ought to be defended – nor do they seem to care. It attests to a stark disconnect in our culture. Some may retort (or complain) that we hear about privacy incessantly; it is hardly a lost value or norm, but something that still reverberates in our society – the media is littered with its mention. I would contend that the people who matter are not the ones raising the issue, bandying it about, championing it – cherishing it. Increasingly privacy concerns emanate from a select population of scholars, advocates, journalists, and policy makers. And their arguments and warnings do not seem to resonate with the general population. An effective defense of privacy, such as we would require in the digital age, demands a deeper, broader foundation.

For digital technology has made privacy so much more vulnerable, and, in 2013, Edward Snowden exposed an expansive spying program, carried out by the US government, to collect copious amounts of information about its own citizen population, from the digital trails we leave behind in our daily business. Unique to this age and economy is how we, who know that our digital behavior exposes intimate details of our private lives, largely assist our monitors, readily and continuously offering up personal information. To be specific, Snowden, a former contractor for the National Security Agency (NSA), uncovered its PRISM program, which collects data on our digital interactions from major

<sup>16</sup> Sarah Igo, *The Known Citizen* (Cambridge, MA: Harvard University Press, 2018), 2, 4.

internet companies, with their compliance. The budget for this program was relatively small (\$20 million), suggesting how easy it is for government spies to gather the desired information.<sup>17</sup> We practically volunteer the information. Political philosophers and theorists have long warned that privacy is a prime target of ruling powers, who would happily invade it in order to subdue or control us. What's new today is that we the citizens join in its destruction – actually, we are the principal agents of its demise. The NSA, and anyone else interested in monitoring us (and they are legion) only has to sit back; the intimate details of our lives fall into their laps.

Snowden's revelations were not, nor should have been, terribly surprising to most, upon minimal reflection. Since the War on Terror ramped up last decade, it was well known that the US government was interested in spying on its citizens, and anyone else. Almost immediately after the 9–11 attacks, the Bush administration authorized the NSA to eavesdrop on US citizens and residents, searching for evidence of new terrorist plots.<sup>18</sup> It was revealed at the time that the government had pressured communications companies to enable said eavesdropping, and the government seemed to back off – temporarily. Thus, the American population knew that widespread surveillance of the home population was a likely temptation for our ruling parties, and a perennial threat. And when Snowden revealed the NSA spying operations, there was a profound outcry – at least publicly, and in the press. Scholars, politicians, and civil rights advocates bemoaned the news, and still do for the most part. But average citizens were not impressed, it seems. One study noted that only about a third of those familiar with Snowden's revelations were motivated to improve privacy measures as a result.<sup>19</sup> And in fact, according to another study released soon after Snowden's leak, a majority favored NSA efforts to “[track] the telephone records of millions of Americans,” and felt “it is important for the federal government to investigate possible terrorist threats, even if it intrudes on personal privacy.”<sup>20</sup>

A summary report three years later suggested that Snowden's revelations were perhaps even less impactful. Subsequent terror attacks prompted people

<sup>17</sup> Leo Kelion, “Q&A: NSA's Prism Internet Surveillance Scheme,” *BBC.com*, July 1, 2013, [www.bbc.com/news/technology-23051248](http://www.bbc.com/news/technology-23051248).

<sup>18</sup> Eric Lichtblau and James Risen, “Bush lets U.S. spy on callers without courts,” *New York Times*, December 16, 2005, [www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html](http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html).

<sup>19</sup> “CIGI-IPSOS Global Survey on Internet Security and Trust,” Centre for International Governance Innovation and IPSOS, November 24, 2014, [www.cigionline.org/sites/default/files/documents/internet-survey-2014-slides.pdf](http://www.cigionline.org/sites/default/files/documents/internet-survey-2014-slides.pdf).

<sup>20</sup> “Majority views NSA phone tracking as acceptable anti-terror tactic,” Pew Research Center, June 10, 2013, [www.people-press.org/2013/06/10/majority-views-nsa-phone-tracking-as-acceptable-anti-terror-tactic/](http://www.people-press.org/2013/06/10/majority-views-nsa-phone-tracking-as-acceptable-anti-terror-tactic/).

to worry more that national security programs did not go far enough in fighting terror, and were less concerned about civil rights protections, in comparison.<sup>21</sup> Most people have taken modest measures to protect privacy online, but the Snowden affair did not inspire widespread adoption of anything more sophisticated which might prove a greater obstacle for NSA spying.<sup>22</sup> Of course, many plead ignorance about sophisticated programs to protect their privacy. They say they would like to do more to protect their data, but are not aware of the best, most effective options. And many remain cynical that they could still elude government surveillance, even after enacting available privacy protection measures. What's more – and what is perhaps especially frustrating for privacy advocates and Snowden doomsayers – most people report that they are not principally worried to block out government spying. Among those who took measures to maintain anonymity online, they indicate that they sought to “avoid ‘social surveillance’ by friends and colleagues rather than the government or law enforcement.”<sup>23</sup> In fact, government and police are dead last among potential monitors that internet users wish to elude.<sup>24</sup>

Political theorists will find this troubling because governments have proven to be a serious threat when they have access to and collect our sensitive personal information. This lends government immense power, which is too easy to abuse, and often leads to and assists oppression. Some argue that the destruction of privacy was essential to twentieth-century totalitarian regimes that aimed at nothing less than total domination of the citizen population. And there is something almost obscene in the fact that Americans of all people are so little concerned with government surveillance, and more worried about snooping family and friends. Protecting our privacy is a central lesson of our nation's history. If we learn anything from the birth of our nation and its founding documents, it's that privacy – from government intrusion – is a supreme virtue and must be jealously defended.

I suspect most Americans know this one way or another; or they should, if they paid attention to their history. Most of us instinctively affirm that privacy is an important value, worthy of protection, if not reverence. As I have argued, we are steeped in a tradition of privacy, from accounts of our history, to essential legal arguments, and our very notion of individualism. Perhaps this is why we will *say* we care about privacy, and would *like* to do a better job

<sup>21</sup> Lee Rainie, “The state of privacy in America,” *Pew Research Center*, September 21, 2016, [www.pewresearch.org/fact-tank/2016/09/21/the-state-of-privacy-in-america/](http://www.pewresearch.org/fact-tank/2016/09/21/the-state-of-privacy-in-america/).

<sup>22</sup> Rainie, “The state of privacy in America.”

<sup>23</sup> Rainie, “The state of privacy in America.”

<sup>24</sup> “The state of privacy in post-Snowden America,” *Pew Research Center*, September 21, 2016, [www.pewresearch.org/fact-tank/2016/09/21/the-state-of-privacy-in-america/](http://www.pewresearch.org/fact-tank/2016/09/21/the-state-of-privacy-in-america/).