

# **THE RHETORIC OF PRIVACY**

*Ellen Beldner*

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Carnegie Mellon University  
College of Humanities and Social Sciences  
Department of English

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**ABSTRACT**

Modern Americans have three primary understandings of *privacy* or *private*. First, we have the notion that privacy indicates civic status: a private home is a building not open to general members of the community. Second, we understand privacy to mean secrecy: what a person seeks to preserve as private is something that she sequesters from others' view. Finally, we use privacy to indicate some level of personal autonomy, as with our notion that the "right to privacy" protects our ability to choose particular types of medical care without interference from political authorities.

The second and third senses of privacy today represent very powerful cultural notions. For this reason each is rhetorically appropriated in unusual situations; additionally, the rise of the computer culture in the 1990s has made the notion of privacy-as-secrecy almost compete with the notion of a "right to privacy." Both of these stages of discourse compete for use of the word privacy, and as a result, both discourses are clouded. Referring to the "right to privacy" as the "right to self-determination" is a more precise way to discuss that right and thereby clarify both debates.

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## INTRODUCTION

### ***No One Wants to Be a Nazi***

Jon Katz, a critic of and commentator on new media and its culture, wrote a column in October 1999 about *The War in Heaven*, “the world’s first Christian action game” (Eternal Warriors Software). Katz’s basic line of commentary was that the game, introduced to combat the perceived immorality of trigger-happy games like *Quake* and *Diablo*, was no less inherently violent than its secular brethren.

The new spirituality seems to work this way: if you obsessively kill characters on *Diablo* or *Quake*, you’re an evil, perhaps even murderous geek who might one day turn on your neighbors and classmates. But if you slaughter demons en route to heaven, you are merely acting out the will of God. (Katz, “Onward Christian Geeks”)

Katz’s article was published on Slashdot, a threaded messaging website dedicated to discussions of technology-related news and articles. One of Slashdot’s members responded with the following:

I must say it’s both sickening and funny that you guys PHEAR religion so much that you want to stomp out all traces of it. Hitler would be so proud. Btw any christians here—don’t hold your breath waiting for Katz to be removed, CmdrNAZI is the biggest religious hater of them all so you can guarantee Katz has a lifetime podium.

This message violates just about every principle of fair rhetoric, as apparently the Slashdot moderators thought: they slapped the message with “flamebait” status, ensuring

that virtually no readers would see the post since most Slashdot readers choose not to display “flamebait” messages. But what is particularly interesting is the way the poster invoked Nazism. CmdrTaco (the alias of Slashdot owner Rob Malda and the person referred to as “CmdrNAZI”) is not a member of the National German Socialist Workers’ Party, nor is he a follower of Adolf Hitler. Factually, then, there is no basis to call CmdrTaco a Nazi, and we can deduce that the writer had some rhetorical goal besides disseminating factual knowledge.

Nazism, in the American cultural mindset, is generally considered one of the greatest incarnations of evil to ever grace humanity’s history. Calling an opponent a Nazi—particularly if that label sticks—is a potent weapon in the hands of the arguer. This technique is an ad hominem tactic: since Nazis are held in such contempt, someone believed to be a Nazi will never have rhetorical authority over an average listener. So if an arguer can successfully label his opponent as a Nazi, the opponent will lose credibility. And then, in order for the “Nazi” to regain credibility, she must shift the focus of the debate from the topic at hand to a defense of her personal character.

It is rare to see the Nazi attack appear in major news media at the hands of op/ed writers and columnists. This is a very immature (and frankly, given the scope and nature of Nazism, crass and insensitive) argumentation tactic, and it usually appears only in flame wars. But it is the nature of Nazism as such a powerful, provocative cultural notion that it can have such a drastic effect on argumentation—even where it is unrelated to the topic at hand and its invocation is factually wrong. Indeed, the only motivation for using such a loaded term as a non sequitur is to appropriate the cultural power of the underlying concept, regardless of how well it fits the situation.

## **THE CULTURAL POWER OF PRIVACY?**

Nazism, however, isn't the only concept in American discourse that gets appropriated for the sake of rhetorical force. Consider, for example, the following excerpt from a letter to etiquette columnist Miss Manners:

Please tell parents to respect their single co-workers' privacy by not sharing their baby's, children's and/or grandchildren's every move or activity. I don't care to know.

Here, *privacy* is used to defend the notion that the claimant should not have to suffer a situation deemed undesirable. To some extent, this is a claim to have the boundaries of personal comfort respected, and in that way is plausibly a claim to privacy insofar as *privacy* might be about the unassailability of personal boundaries, or the right to control one's self.

In her reply,\* however, Miss Manners casts the situation not as a privacy concern but simply as a boredom-inducing one. She points out in her response that what the letter writer would really like to say is “stop boring me with [your stories]” and that “it is rude to seem too bored.” This characterization is, to the average speaker of English, more sensible, more plausible, more “correct” than the letter writer's. Generally if we are induced by social convention—but not compelled—to listen to something that we don't find at all interesting, we would say, “I'm bored” rather than “this violates my privacy.”

But suppose we ignore Miss Manners' wisdom for a moment and take the letter writer's position: *privacy* is synonymous with “control,” and specifically, control over all aspects of one's person and surroundings. This is a reasonable interpretation of the letter,

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\* Miss Manners' full reply: GENTLE READER: By learning a few polite phrases, none of which is “I have a full life without children so stop boring me with yours.” Miss Manners suggests, “Oh, how nice” in an even tone with a distracted look and a vague smile that announces that your mind is on your work. While it is rude to seem too bored, it is not rude to seem too busy.

since the writer believes she should not have to hear other people discuss topics she does not find interesting. Thus, she is arguing that she should have this degree of control over herself and her surroundings. She couches her argument in the language of privacy, indicating that her claim to control is a claim to privacy, and thus that the two concepts are roughly equivalent. (On the other hand, it doesn't appear that the writer intended to invoke *privacy* as "secrecy." She claimed that *her* privacy was being violated; since she was not revealing any information it is a far cry to interpret her argument as "confidential information about me has been disseminated.")

*Privacy* has three main denotations: the oldest, stemming directly from Latin, simply indicates something's civic status—private as opposed to public. Around the sixteenth century the notion of *privacy* as seclusion or secrecy developed; and in the past thirty years, the notion of *privacy* as self-determination has evolved out of America's legal traditions.

The letter writer's position leads us down the ideological path where a claim to *privacy* would allow an individual to seek redress when another person or entity has influenced any aspect of his life in some way, contrary to his wishes or without his consent. Although *privacy* is intertwined with the idea of personal autonomy, I consider the writer's use to be, in fact, a misuse—outside the normal set of acceptable *privacy* definitions. I cannot speak for all Americans, but it is my guess that most other people would also be inclined to accept Miss Manners' interpretation of the situation. What the letter writer was doing, rather than making a true privacy claim, was something akin to the Slashdot writer's invocation of Nazism. It is the nature of *privacy* as such a powerful concept in American culture that there is a great incentive for speakers to appropriate its rhetorical force in their discourse. Moreover, since there does exist a tenuous link between the letter writer's use of *privacy* and a more acceptable definition of the word, the writer's leap is not quite as egregious as the

Slashdot poster who called Maldas a Nazi.

To understand what it means to make a “legitimate” privacy claim, we have to understand both traditional semantic meanings of *privacy* and the cultural forces that gave rise to those semantic shifts. In this paper, I first examine historical semantic understandings of *privacy* (Chapter One), and then the cultural movements that have helped to form those understandings (Chapter Two). From there, I investigate how contemporary Americans talk about *privacy*, using the background of culture and semantics to understand why the idea has so much power (Chapter Three). Ultimately, I conclude that the current rhetoric of privacy clouds our discourse since we use the same language to describe two very powerful, but distinct concepts.

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## CHAPTER ONE

# ***Civics, Secrecy, Autonomy***

Dictionaries and usage manuals offer a prescriptive notion of what *privacy* is. But human language is piquant because we simply refuse to constrain our use to the mandates of a given dictionary. There are, of course, reasons to have a largely consistent language: if everyone's lexicon and syntax were arbitrary, we couldn't understand one another. Try, for example, to fully understand the first line of Lewis Carroll's poem "Jabberwocky," "'Twas brillig, and the slithy toves..." without benefit of a footnote to explain Carroll's made-up words. Yet despite their incomprehensibility, these new words add an element of whimsy and fantasy to the poem, and thus further entice readers who have already stepped through the looking glass.

Because of this dynamic between consistency and cleverness, it is difficult to decide what exactly we mean by *privacy*. Like all words, *privacy* has a range of denotations and connotations. If we apply a method of abstraction used in formal semantics, we could say that *privacy* as a variable  $x$  can take on a number of different values within a certain range. Each value is a different connotation or denotation of privacy; and while a definition such as "the ability to keep one's secrets to oneself" is in the range of acceptable values, "a female

slave or concubine in an Eastern harem, especially in the seraglio of the Sultan of Turkey”<sup>\*</sup> is not.

The values that *privacy* can take will have some sort of statistical distribution: the most common value will occur some  $p$  percent of the time, and other definitions, the more they deviate from that most common “actual” definition, will occur with less and less frequency. One of the basic precepts of statistical theory is that when we measure a sample we do not, except by chance, find the actual population’s value. And so it is when trying to pin down the definition of a given word, for we cannot possibly examine every occurrence and use of a word in order to somehow amalgamate this data and find its “true” definition. Too, it is difficult to decide what values are within the acceptable range of values and which are just beyond our limit. At what point do we draw the line between what is a clever deviation from the real definition and what is simply a misuse of the word?

I hesitate to use the statistical idea of a standard normal curve as more than a metaphor since that implies that definitions can be logically placed on a linear scale in a clear, undisputable order. However inaccurate it may be to invoke the language of mathematics to describe a linguistic phenomena, we do, at least, occasionally come across things that seem like outliers – uses of *privacy* that seem to radically depart in substance from the most frequent uses of the term.

*Privacy* has three major denotations: opposite-of-public, privacy-as-secrecy, and privacy-as-autonomy. These last two, which are the most rhetorically powerful in modern America, are arguably one in the same: both keeping something secret or secluding oneself require the right of self-determination that we allude to when talking about privacy-as-autonomy. But such reductionism fails to capture much that is interesting in the cultural and

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<sup>\*</sup> “Odalisque,” *The New Shorter Oxford English Dictionary*. CD-ROM.

rhetorical development of *privacy*. Indeed, very few people even explicitly consider *privacy* synonymous with “personal autonomy”: in the *Collins Cobuild Dictionary*, none of its nine definitions of *private* mention anything like “personal autonomy.” Instead, all of *Cobuild’s* usage-based definitions have more to do with secrecy, confidentiality, and [lack of] publicity. Despite the apparent dearth of evidence for privacy-as-autonomy, modern usage patterns demonstrate otherwise.

So we are faced with a history of common use which gives us privacy-as-secrecy and opposite-of-public. But instances like the letter to Miss Manners (discussed in the Introduction) use *privacy* to indicate an individual’s degree of personal autonomy in the face of certain types of influences. These three definitions converged from two separate sources—opposite-of-public and privacy-as-secrecy from linguistic tradition, and privacy-as-autonomy from a nineteenth-century legal use which then worked its way into legalese and has since pushed its way into popular language. In the past decade, moreover, privacy-as-secrecy has astronomically grown in use and rhetorical import: just as a liberal Supreme Court made “privacy as autonomy” a household concept in the 1960s and 70s, the rapid rise of networked computing since the 1980s has given tremendous new strength to the notion of privacy-as-secrecy, and the two definitions are now almost competing.

### **PRIVACY BY THE BOOK**

Private: In general, the opposite of *public*. 1. Withdrawn or separated from the public body. (*Oxford English Dictionary*, 2nd)\*

Public: Of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation. (*The New Shorter Oxford English Dictionary* on CD-ROM).

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\* I discuss *private* and *privacy* almost interchangeably. Each dictionary I consulted defined one extensively and the other less so, considering the second a different part of speech than the one defined extensively. There was little consistency between dictionaries on this point.

The word *private* comes from the Latin *privatus*, which meant “privately, as a private person, in private life,” or “at home,” (*privatim*, *Cassell's*). It was the opposite of *publicus*, which meant “of the people,” or “open to all.” (The Latin word *secretum* denoted our conception of “solitude” or “a solitary place.”) The Latin household was private in the sense that it was not part of the grounds open to the entire community, nor a body acting on behalf of the general community of people. But *privatus* could hardly have had connotations of *secretum*: as Paul Veyne explains in “The Roman Empire,” “remember that these people had slaves constantly at their beck and call and were never alone... [Roman houses] were more densely populated than today’s low-rent apartment houses... The omnipresence of slaves was tantamount to constant surveillance,” (Veyne, 72-73). The ancient word *privatus*, then, simply indicated a person or thing’s civic status: available to or concerned with the community rather than the individual.

*Pryvat* first appeared in the Middle English sermons of John Wycliffe, a fourteenth-century English theologian and forerunner of the Protestant reformation. In 1380 he applied the word to friars, specifically in opposition to “alle Cristene men,” (*OED* 2nd). Wycliffe was still using the word in essentially the Latin sense; except in this case, the “public” was the community of English Christendom rather than the more secular general public that existed in ancient Rome. With this use, however, we can see how traces of *secretum* could begin to creep towards *privatus*. For friars, in their religious meditations, had a secrecy, an isolation, a seclusion: and if the friars were the first people in the English speaking world to be *pryvat*, the connotation of “seclusion” could quite easily have backpedaled onto the definition of *pryvat*.\*

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\* This process is similar to the fallacy “A → B, therefore B → A”. Just because friars are private does not mean that other attributes of being a friar are inherent parts of being private; but then, I am not about to argue that language evolution follows the rules of formal logic.

By 1606, the *secretum* concept had become fully integrated into the meaning of *privacy*, as we see in Shakespeare's *Troilus and Cressida* (among other works). Achilles complains to Ulysses that a band of Greeks has passed his tent without recognizing him. "They pass'd by me / As misers do beggars... What, are my deeds forgot?" he asks Ulysses. Ulysses retorts that no one would forget him "if thou wouldst not entomb thyself alive / And case thy reputation in thy tent." But no, that is impossible, Achilles responds – "Of this my privacy I have strong reasons," (all from *T&C*, 3.3). Achilles is guilty of secluding himself, withdrawing from his military and civic duties as a soldier, out of romantic love for a woman. Opposing Achilles' privacy, according to Ulysses, are "reasons... more potent and heroic" than his love for a woman. Privacy is a seclusion and an isolation; it certainly allows Achilles to pursue his love for a woman, but this same secrecy is responsible for a decrease in Achilles' civic, public activities.

From at least Shakespeare's time onward, privacy-as-secrecy has replaced privacy-as-civic-status as *privacy's* primary denotation:

Privacy: The state or quality of being private. 1.a. The state or condition of being withdrawn from the society of others, or from public interest; seclusion. 3. a. Absence or avoidance of publicity or display; a condition approaching to secrecy or concealment. (*OED* 2nd).<sup>7</sup>

What has happened is that *privacy*, meaning non-public in the civic sense, melded with *secluded* or *secret* when being out of the public's view also meant being alone. Samuel Johnson, in his 1755 *A Dictionary of the English Language*, defines privacy first as "Not open; secret" – drawing from Shakespeare; indeed, most of his definitions and usages were culled from Elizabethan literature ("Samuel Johnson," *Encyclopedia Britannica*). Privacy is "opposed to publick" or "not relating to the publick." Johnson, however, was far from being a social revolutionary. He did not just define, but also attempted to promote piety and morality. For instance, he excluded on moral grounds as a source Enlightenment philosopher Thomas

Hobbes. Coincidentally, Hobbes was one of the philosophers who purported the idea of a social contract between individual and government, which helped create an ideal of individualism inimical to our modern definition of *privacy*.

But because Johnson based his dictionary on Elizabethan rather than contemporary usage, he missed much of the effect that Enlightenment ideals had on thought in general and *privacy*, specifically. The Enlightenment spread the notions of individualism and rationalism throughout the Western intellect; political writers such as John Locke, Jean-Jacques Rousseau, and Hobbes philosophized governments that operated as contractual agreements between citizens and their governments. At least in theory individuals reigned supreme. The body politic was not an end in itself, but only a means to secure the rights of the individual. From Enlightenment ideals came the American and French revolutions in the late eighteenth century: and around this time, the first traces of “privacy *from* the public” appeared, as cited by *Oxford*:

Privacy: 1.b. The state or condition of being alone, undisturbed, or free from public attention, as a matter of choice or right; freedom from interference or intrusion. (*OED* 2nd)

If government was a beast that must be kept chained up in order to prevent it from devouring individual liberties, and privacy was seclusion from the civic or public sphere – then we can see how privacy began to take on its modern connotations of a condition implicit in the notion of liberty. For government was destructive, abusive: and the individual, for whose benefit the state existed and who must be protected from the whims of the public majority, must have the right to seclude himself from the public and civic spheres. Privacy was no longer merely a civic state or the characteristic of seclusion. It was now enmeshed with the idea of the individual versus the state – a competition in which the individual had the moral high ground, according to the Enlightenment’s natural law.

The *Oxford English Dictionary*, while indubitably a marvelous piece of scholarship which does not ignore American sources, is British in its bent and certainly does not try to capture standard American English (SAE). Lexicographer Noah Webster, however, created a dictionary specifically for America. Like many Revolutionary-era Americans (he served in the Revolutionary War) Webster was a patriot who sought to promote an American culture (democratic and liberal) which was distinct from Britain's (ostensibly snobbish, arrogant, and classist). Webster almost single-handedly reformed British spelling in the eighteenth and nineteenth centuries to make it more "democratic" for the American republic, and emphasized American usage over British in his 1828 *American Dictionary of the English Language*. *Privacy* is "A state of being in retirement from the company or observation of others; secrecy. 2. A place of seclusion... 5. Secrecy; concealment of what is said or done."\*

More telling of *privacy's* meaning in early America, however, is Webster's definition of *private*. Definitions (3) and (4) are concerned with privacy-as-secrecy. Definitions (1), (2), (5), and (6) all are forms of privacy-as-civic-status:

1. belonging to or concerning an individual only... 2. opposed to public, or to the general interest of nations. 5. Not invested with public office... 6. Individual; personal; in contradistinction from public or national.

According to Webster, the private individual lives "in contradistinction" to the public interest. The individual's private interests are opposed to "the general interest of nations." This is, so far, the strongest semantic dichotomy that has been set up between *privacy* and the public. Interestingly, the modern version of Webster's dictionary, *Merriam-Webster's Collegiate Dictionary*, defines *private* in a more rhetorically restrained way than Noah Webster did in 1828. At the same time, the modern *Webster's* lists a broader range of definitions, including, for example, "carried on by the individual independently of the usual institutions; also: being

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\* Definitions three and four are listed as "not used," i.e., obsolete at the time of writing.

educated by independent study or a tutor or in a private school,” and “not general in effect (a private statute).” Otherwise, the modern *Merriam-Webster’s* lists various forms of privacy-as-secrecy – personal, sequestered, and secret – and opposite-of-public.

The *Collins Cobuild Dictionary*, like the modern *Merriam-Webster’s*, does not indicate in its definitions the rhetorical force that *privacy* (or *private*) can have. Part of this could be attributable to the *Cobuild Dictionary’s* sources and production context: the dictionary’s definitions were culled from the [British] University of Birmingham’s Cobuild database. This database, called the Bank of English, is a 320-million word corpus derived from, among other things, periodicals, novels, scholarly books, informal communications such as email, and transcripts of the spoken language. Cobuild specializes in creating reference materials for non-native speakers of English, and does not restrict itself to any particular regionalization of English. Thus, it is not the most accurate reflection of strict SAE.

On the other hand, the *Cobuild Dictionary’s* definitions read as unique given their basis in actual usage. So *private* is defined “something that is private is for the use of one person or group of people only, rather than for the general public.” Synonyms and antonyms are listed in the book’s margins, and *private* is found to be synonymous with *personal*, *confidential*, *secret*, *secluded*, *reserved*, and *independent*. It is opposed to *public* (in its first four definitions) and *the state* in two other definitions.

Finally, the *Cobuild Dictionary* states in its entry for *privacy*, “if you have privacy, you are alone or can be alone, so that you can do things without other people seeing you or disturbing you.” *Privacy* is equated with solitude and contrasted to publicity.

But what of autonomy? There is nary a trace of privacy-as-autonomy in any of these definitions. Certainly we have here hit upon two of the modes in the tri-modal statistical distribution that represents the definition of *privacy*. But the third mode, the sense of privacy-

as-autonomy, arose out of American culture in the 1960s. It is to culture that we have to turn to investigate this aspect of *privacy*, rather than our dictionaries.

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## CHAPTER TWO

# ***Privacy in Culture***

The telescreen received and transmitted simultaneously. Any sound that Winston made, above the level of a very low whisper, would be picked up by it; moreover, so long as he remained within the field of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized. (Orwell, 6-7)

The dystopian world of George Orwell's *Nineteen Eighty-Four* is a terrifying vision for proponents of Western-style liberalism. Orwell wrote the book as a cry against the growing fascism and totalitarianism he saw around him in 1948. The novel's premise is that the state can control its citizens and enforce political orthodoxy with a combination of constant surveillance and sufficient force to back up its dictates.

And so Orwell introduced us to the telescreen. Any citizen of Oceania could be constantly monitored: if not via telescreen, then by other citizens, always on the lookout for signs of unorthodoxy in coworkers, friends, passersby, and family. The state-corrupted families of Oceania are particularly shocking to a Western reader: Winston, the book's

protagonist, observes that the Party\* turns children into “ungovernable little savages,” (Orwell, 24) and that the children of his neighbor, Mrs. Parsons, must make her “lead a life of terror,” (Orwell, 24). Children, who in the United States are more or less legally subject to their parents’ rule, in *Nineteen Eighty-Four* become “eavesdropping little sneak[s]” who watch their parents “...day and night for symptoms of unorthodoxy,” turning their parents over to the authorities for certain punishment (Orwell, 24).

We never learn whether it is possible for a citizen to be monitored all of the time: when the Thought Police eventually capture Winston, we learn that they have been watching him from a hidden telescreen in a room that he had thought was unmonitored. We never discover how many of his secluded activities were actually monitored, even when he was hiding in the wilderness with his lover in order to escape scrutiny.

Although Orwell was British and *Nineteen Eighty-Four* is set in Britain-turned-Airstrip-One, the tale’s hold is powerful in the United States. Discussions about surveillance, especially authoritarian surveillance, almost always invoke this mythical representation of The State’s power over its citizens, enforced by mass surveillance. For example, *The New York Times* ran an article in November 1981 with the headline “Enter Big Brother.” The article began,

If the shade of George Orwell returns in *1984* [sic] to assess the accuracy of his predictions, he will have some cause for gloomy satisfaction: Most of the world is indeed ruled by ruthless and arbitrary dictatorships. Even in the Western democracies there has been some erosion of individual privacy.

But the article’s topic was not global politics. It was not about history or the psychology of privacy; nor was it a denunciation of declining personal freedoms. In fact, the article was about bridge tournaments—specifically about the decision that the Board of

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\* The governing and only political party of Oceania.

Directors of the American Contract Bridge League made to purchase videotape equipment. The equipment was to be used to film certain bridge tournaments, creating a record in case players were suspected of illicit communication during the game. Did Orwell's vision make us paranoid? Or did he simply give us the words and the icons to express a preexisting fear of a totalitarian state? Either way in this chicken-and-egg scenario, the fact that Orwell's idea can even make bridge tournaments seem ominous demonstrates how ingrained Big Brother is in our culture.

*Nineteen Eighty-Four* concerns itself with Winston's attempts to subvert the state's control over his life. Each time Winston does this, he must remove himself from Big Brother's scrutiny, for if he is observed committing Thoughtcrime he will be punished. Frequently we hold things as "private" if we can be held liable for them, legally, socially, economically, or otherwise, but are not harming other people: most nose-pickers do so in the solitude of their bathrooms due to the social stigmas attached to that particular activity, just as a person performing oral sex in Minnesota must take care that the police do not see him or her, since it is technically a crime.

Anthropologist Michel Foucault explicitly discussed the relationship between surveillance and authority in "Panopticon," a chapter in his 1975 book *Discipline and Punish: The Birth of the Prison*. Surveillance breeds conformity, he argues, by the individual's fear of authority. Foucault illustrates the idea of total surveillance—a constant lack of privacy as secrecy—using Bentham's panopticon, an "architectural figure" in which "visibility is a trap," (Foucault, 200). The panopticon is a prison-like structure, but criminals are not tossed into dark cellars. Rather, they are imprisoned in rooms illuminated with windows and light. All these cells face inward towards a central observation tower; the tower is constructed so that no one outside its walls can tell whether or not there is someone observing. Just as with

the telescreen, there is no way for the observed to know when, or if, he is under observation; but the possibility exists that at any given moment he is being watched. Hence, with the specter of punishment for rulebreaking hanging over his head, he has no choice but to conform to whatever rules are placed upon him. Surveillance makes us constantly check our behavior. If we can escape surveillance we escape both internalized and external disciplines: controlling privacy-as-secrecy allows us to exert personal autonomy without fear of retribution or consequence.

Big Brother is not a ruler *per se*; he is not the head of state or a member of the police. The government is not watching the citizens of Oceania—it is a friendlier figure, a brotherly one, part of the family and the immediate social sphere who is always watching. The eyes of all society are on you, not just the eyes of official government power, and so you must discipline yourself to at all times conform. Foucault comments, “We are neither in the amphitheatre, nor on the stage, but in the panoptic machine, invested by its effects of power, which we bring to ourselves since we are part of its mechanism,” (Foucault, 217). People today, Foucault’s argument runs, exist in an invisible panopticon: we constantly check our behavior and natural impulses, afraid of chastisement from friends and strangers alike.

Consider the 1998 movie *The Truman Show* (Paramount Pictures), in which protagonist Truman Burbank lives his entire life on camera but doesn’t know it. In the movie, a television company adopts Truman as a baby. Truman’s life is the subject of the show; the company broadcasts Truman’s every moment, even when he sleeps. The draw of the television show is not a well-crafted plot or its actors, but the fact that the audience members get to observe the natural life of one of their fellows, a life unmediated by the fact that they are observing him. Truman does not actually have any privacy-as-secrecy (nor does he have many forms of privacy-as-autonomy, as evidenced by his thwarted attempts to leave

the fabricated town of Sea Haven), but he lives his life under the assumption that the only people who can observe him are the people he permits to do so through his own actions. When he is locked in the bathroom by himself he makes faces in the mirror, believing he is alone—and of course millions of viewers giggle at him doing the thing that they, too, do in the [presumed] true solitude of their own bathrooms.

Our culture is additionally replete with “exhibitionist” behaviors that implicitly accept the Orwellian/panoptical role of privacy in power relations. One of the many forms of power is social power, expressed by condemnation or acceptance from those one wishes to emulate or please. Take, for example, the historical shame attached to homosexuality in American culture. Open homosexuality would historically lead to almost certain social ruin (if not physical abuse); but the gay rights movement that began in the 1960s was based on the idea that homosexuality is not a cause for shame. Homosexuality was flaunted: rather than hiding this characteristic for fear of social retribution, many gays began to assert that they would no longer feel ashamed of this behavior, would not and should not suffer social punishment because of it, and would no longer hide the behavior out of fear.

Surveillance is antithetical to privacy because it exposes behaviors to the view of those who might use or exert their power over the observed. This can apply to behaviors that the actor finds acceptable, such as homosexuality, closet nose-picking, or recreational drug use; it can apply to behaviors that even the actor condemns in herself, perhaps murder or adultery. The common factor in seeking privacy is that the actor does not wish to face punishment for the behavior, above all other things. And so he seeks secrecy, “privacy.” Sometimes this desire to escape punishment is not primary to the human psyche: martyrs of many sorts engage in activities they know will elicit punishment, but because the martyr believes that those behaviors must be held aloft as somehow noble or at least non-shameful,

she is willing to expose their behavior and accept the corresponding punishment. Often this is done in the hopes that if the public realizes how many of its members engage in this behavior, it will no longer condemn it as a marginal activity.

Understanding the cultural conception of private issues helps us to understand why Americans use *privacy* the way they do, particularly in the sense of privacy-as-secrecy. Authors like Orwell have created a notion that a lack of privacy-as-secrecy leads to the destruction of all that Western society holds dear. Privacy is freedom in the context of Big Brother; if the judges of a bridge tournament decide to use video cameras to monitor players' integrity, then the judges are exerting control via surveillance, thus violating privacy, thus harming freedom, thus getting even the bridge-ignorant impassioned about the fascist judges. The idea of privacy has great force if it can make even a question of bridge tournament procedure seem like the crux of political freedom.

### **PINPOINTING THE RISE OF THE WESTERN INDIVIDUAL**

In modern America, bathing is undoubtedly a private activity. Examine our architecture: the vast majority of our showers and bathtubs are built to fit only one person. Bathing facilities for multiple people are generally only for intimate couples—for example, a husband and wife might have a two-person shower or a Jacuzzi installed in their bathroom—or in the very functional, practical communal shower of the gym. Communal showers are certainly not intimate; although friends may converse while showering, there are very strict cultural norms that prevent intimate touch, too much eye contact, or even too much sensuousness. Moreover, showers are quick and speedy. We “jump in the shower” and that we must stand is evidence of the shower's utilitarian nature. Baths are slow and relaxed: we can fall asleep, read a book, and recline. The fact that America has only communal

showers, not communal baths, indicates that our communal bathing is supposed to be utilitarian rather than sensuous and social in nature.

Compare this to the traditional bathhouses of Russia and Japan or the *thermae* of ancient Rome. Melissa Tedone, a fourth-year doctoral student in Yale University's department of Slavic language and literature, describes a recent visit to a Russian *banya* with two friends:

The country *banya* had an outer room, where we rested and drank tea and ate homemade wild strawberry jam; a middle room, where we soaped and washed our hair in big basins of cool water; and an inner chamber with a gigantic old-fashioned brick stove that heated the room to a dry (steam would've killed us) 110 degrees Celsius. We sat in the inner chamber until it hurt to breathe (about three minutes, and you can't breathe through your nose because it scorches your nasal passages) and took turns beating each other with bundles of birch leaves/branches that had been soaked in hot water. This promotes circulation and purges your body of toxins, or so they say. Then we would return to the middle chamber and pour basins of cool water over our heads, slather each other with honey from head to toe (nature's best moisturizer) and sit in the inner chamber until the honey and sweat had all poured off us; then we would run outside and roll a round in the snow (it was 20 below outside that night) and then go back inside and start the whole process all over again. This goes on for about three hours...

Like most other communal bathing practices, the Russian *banya* experience is a ritual that serves a purpose other than simple hygiene. The ritual is social and more sensuous than American communal showers. Bathing is an experience to promote health, akin to a modern American day-visit to a health spa (which notably is an activity that only the very wealthy engage in on a regular basis). Hence, what Americans today consider to be a private activity is not necessarily an objectively private activity. There is no fundamental psychological need for humans to be alone while bathing, as evidenced by the variety of bathing practices in different times and places. The difference in bathing practices is due to culture, not a basic drive of human psychology.

There are very few—if any—institutions that are universally *private*. If we examine

cultural institutions to help inflect our semantic understanding of *privacy*, we must first choose which institutions to observe. This is a somewhat delicate process: which definition of privacy do we choose in order to select institutions for study? Do we choose all institutions that are not public, in the civic sense? Do we choose any institution governed by rules of secrecy and seclusion? Do we choose institutions that we consider private and then compare how private those same institutions are in other cultures?

Privacy even remotely like a modern American understands it did not appear until the Renaissance. Implicit in our idea of *privacy* is the notion of the solitary individual, whether that individual creates the physical privacy of his own apartment; the information privacy of encrypting all of her electronic journals; the autonomous privacy of deciding whether or not to have an abortion. But when there was no notion of the individual as autonomous unit, there was no *privacy* in the modern sense.

In feudal times, "...there was no room for individual solitude," (Duby, 509). Life was tightly controlled by lord and family; there was no privacy of personal autonomy. "And if private life meant secrecy, it was a secrecy shared by all members of the household, hence fragile and easily violated. If private life meant independence, it was independence of a collective sort," (Duby, 510). Indeed, if we talk at all about private life in ancient and feudal times we do so only to have a convenient way to discuss non-governmental and non-economic institutions. We are not discussing nuances of isolation, solitude, personal autonomy, secrecy, and the like, for these things simply did not exist.

The first signs of the individual as a fundamental unit of society began to appear with the rise of personal property. Duby reports in "The Emergence of the Individual" that the twelfth century first saw these signs of personal autonomy. There are more mentions of coffers and purses, more keys and locks: individuals began to collect personal property to

reduce their dependency on their families. Even more telling are the changes in statuary and paintings that occurred during this time. Beginning around 1135, church iconography began to give individualized expressions to each figure in its art; by the end of the thirteenth century "...the advent of portraiture in sculpture [began] the quest for likeness." Knights settled into their own families and "the basic cells of private life" became the smaller household, although "for a long time the individual remained the prisoner of the family," (all from Duby, 512-14).

In the Renaissance, however, we see the real beginnings of the modern sense of privacy. Philippe Ariès argues that during the Renaissance, three major developments were responsible for the shift in attitudes about privacy: the growth of the state; Europe's discovery of movable type and the corresponding spread of literacy; and the development of personal piety in addition to traditional communal worship. (It is during this time that the word *privat* appeared in the English language.)

The rudimentary property-individualism of the Middle Ages turned inwards during the Renaissance. People reflected on their personalities and selves. Reading, at least among the middle and upper classes, became a silent, individual activity rather than a communal storytelling one. Tied in with this shift was Martin Luther's message that each person might read the Bible for himself. He later abandoned this precept, but Protestantism did encourage a personal relationship with God and by the end of the 17th century the Protestant churches instructed their members to learn for themselves what was in the Bible (Castan, Lebrun, and Chartier, 119). God was no longer mediated by the clergy—he was accessible to the individual. People began to keep diaries; usually they left instructions that these diaries be destroyed upon their death. They decorated their homes, creating spaces that reflected their particular aesthetic tastes and preferences. Residential architecture tended towards homes

with many smaller rooms, each with a separate purpose, and with passageways as intermediate “no man’s lands” to permit residents to move from one room to the other without having to enter actual rooms in the process. Privacy, in this period, has ceased to be merely the things that the government did not interfere with. It has expanded to include the notion of an individual who can have secrets, seek solitude, and even be isolated.

It is in the late Renaissance, too, that the seeds of American culture were sown. Ariès calls England “the birthplace of privacy,” (Ariès, Introduction, 5), and of course the British culture was the seed that grew into the United States. The American Revolution and resulting Constitution gave rise to the notion of privacy as autonomy: the American political philosophy enshrined the individual as the basic unit of society. Rather than God vesting the government with its authority to rule, individuals granted power to the government solely for the purpose of protecting their rights as individual, autonomous units. Surely there were still strong ties of community, family, and church, but now, the individual stood opposed to the state and its powers of compulsion.

American liberalism is based on the idea of a society that protects the individual rights of life, liberty, and property acquisition.\* In his book *Original Meanings*, Constitutional scholar Jack Rakove notes that “on the principles of government, a broad consensus reigned [in the 1780s]. Government existed for the good of the many, and to protect the liberty, property, and equal rights of the citizen,” (Rakove, 19). We should, the theory goes, have the freedom to pursue our own interests and direct the course of our own lives, insofar as we do

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\* Although the inclusion of “property” does not resonate with readers who have just had the Declaration of Independence invoked, the right to acquire property is evident in many other texts that form the basis of American political philosophy and, of course, in the Fourteenth Amendment. For a succinct discussion of Jefferson’s omission of this right, see *American Sphinx: The Character of Thomas Jefferson*, by Joseph Ellis (ISBN: 0-679-76441-0), pgs. 62-68. Essentially the phrase was replaced by “pursuit of happiness” because “the right to acquire property” could have been used to support slaveowners’ rights to their human property.

not harm anyone else. Regardless of how well or poorly this may be encoded in our laws, it is certainly the textbook teaching that most Americans espouse without question (as Rakove says, “axioms do not solve problems... the entire enterprise of constitution making in revolutionary America centered on determining which forms of republican government were best suited to securing the general principles all accepted,” (Rakove, 19)).

### **THE BACKBONE OF AMERICA’S RIGHT TO PRIVACY**

The United States’ Constitution does not mention the word *privacy*. This fact, of course, has been at the center of much legal debate since the 1970s Supreme Court rulings legalizing abortion; but undoubtedly the Constitution does protect the individual in several spheres that fell into the contemporary domain of *privacy*. Noah Webster’s 1828 *American Dictionary of the English Language* defines *private* in part as “...unconnected with others; hence, peculiar to one’s self... 6. Individual; personal; in contradistinction from *public* or *national*.” Privacy is “A state of being in retirement from the company or observation of others; secrecy... retreat; solitude; retirement... 5. Secrecy; concealment of what is said or done.” If the government is prohibited from intruding on aspects of life that were at the time by definition private, then the Constitution can certainly be said to protect at least some forms of privacy even though it does not use the word *privacy*.

The recent debates, however, ask whether the Constitution enumerates specific types of privacy for protection in order to ensure that *only* those forms be protected, or in order to ensure that no matter how the definition of *privacy* might change, those particular areas would remain sacrosanct and outside the domain of governmental control. Moreover: if the forms of privacy enumerated in the Constitution fully comprise that contemporary understanding of privacy, should our modern constitutional law similarly protect all things

that *we* consider private? Or should it continue to only protect the precise spheres enumerated in the Bill of Rights?

Without considering privacy-as-autonomy—an idea which I argue did not develop until the mid-twentieth century—the Constitution certainly protects various types of privacy as understood at the time. By the definition in Webster’s 1828 dictionary, of course, each amendment in the Bill of Rights protects privacy in the sense that they all restrict the government’s authority over the civically private lives of individuals. The other dominant sense of privacy that Webster’s defines is that of privacy-as-secrecy, and this sense is addressed in the Third, Fourth, and Fifth Amendments. The Third prohibits the government from quartering soldiers in citizens’ homes without their consent: the government may not invade the seclusion of the home. The Fourth Amendment, which prohibits unjustified government searches and seizures of citizens’ property, is also a form of privacy-as-secrecy. The amendment protects the individual’s personal belongings from government inspection; anything which the individual does not want the government to be able to examine at its leisure must only keep it out of plain view. The Fifth Amendment provides a more literal protection of privacy-as-secrecy. Individuals are legally allowed to preserve the secrecy of facts which might incriminate them.

At the time the Constitution was drafted, *privacy* was not as important and weighty a concept as it is now. It could imply that something was secret, as a letter or diary might be; it could indicate something’s civic status—a private citizen rather than a government official, or a private residence rather than a public building. It was without the rhetorical force that it has gained in modern times. Thus, the fact that the word is not used in the Constitution is unsurprising. And the word’s absence has little bearing on whether or not the Constitution protects the rights gathered under our modern umbrella of privacy. What is more important

is to decide whether the specific enumerations in the Constitution provide legal ground for the extensions we wish to create. Some people say that the legal ground's name is *privacy* and thus, since the Constitution guarantees us that ground, anything else deemed *private* is worthy of the same types of protections. Other people argue that we must not look for that common ground, and moreover, we cannot also assume that some unenumerated action is protected because it too shares the common ground.

To muddle things further, this common ground was expressed only as specific instantiations of privacy in order to prohibit the privacy invasions which were considered antithetical to political freedom. There were no telescreens in late eighteenth century America; the closest thing to surveillance was having the government invade your home, search through your things, and use force to elicit information that otherwise you would not reveal. The invasions which the Bill of Rights prohibits equated to tyranny in the minds of early Americans, just as today telescreens are tantamount to fascism and Big Brother. Early Americans didn't use the word *privacy* because at the time, it was not an appropriate word to use; but the sentiments that the word has since come to represent (the right of personal autonomy) were indeed what the Constitution attempted to protect.

The legal notion of a right to privacy began, it is widely credited, with an 1890 article in the *Harvard Law Review*. The article, written by Samuel Warren and later-to-be Supreme Court justice Louis Brandeis, focuses on "the right to be let alone" (a phrase which Brandeis did not, in fact, coin; Brandeis was quoting one Judge Cooley). Brandeis and Warren begin the body of their argument with a discussion of intellectual property rights. They cite a British case from 1849 in which etchings made by Prince Albert and Queen Victoria were protected not just from reproduction, but from description and cataloging. No one else was allowed to know about the etchings, as they were deemed the private property of the Prince

and Queen. But the central point that the authors make is that traditional property rights were not adequate: there was some other principle, not yet stated as legal edict, which would ensure that certain “indecentcies” being perpetrated would not go unpunished. They called this the “right to privacy,” construing it to have the power to protect the property of man’s spirit, feelings, and intellect—an addition to the existing protections given to tangible property.

Notably, Brandeis and Warren outlined the basis for a privacy tort (i.e., the right to privacy in civil law), although they expressed a desire “that the privacy of the individual should receive the added protection of the criminal law.” Privacy tort law is today ugly, twisted, and complex—it is a mass of conflicting rulings, ill-defined torts, and has a general lack of ideological cohesion.\* But the original standard that Brandeis and Warren proposed was quite thorough, even elegant:

First. The right to privacy does not prohibit any publication of matter which is of public or general interest.

Second. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.

Third. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.

Fourth. The right to privacy ceases upon the publication of the facts by the individual, or with his consent.

Fifth. The truth of the matter published does not afford a defense.

Sixth. The absence of “malice” in the publisher does not afford a defense. (Brandeis, 1890)<sup>†</sup>

Almost forty years after the Brandeis-Warren article, the United States Supreme Court ruled that tapping a telephone line without a warrant was not a violation of the Fourth

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\* For a thorough and engaging discussion of privacy tort law in the United States, see Alderman and Kennedy, *The Right to Privacy*.

† In the article Brandeis provided fairly lengthy discussions of each of these principles. The explanations are quite enlightening; at the time of this writing, the article was available at <http://www.louisville.edu/library/law/brandeis/privacy.html>.

Amendment, as the Amendment could not be enlarged “beyond the possible practical meaning of ‘persons, houses, papers, and effects,’ or so applying ‘searches and seizures’ as to forbid hearing or sight,” (277 US 438 (1928), p 465). Brandeis, who was on the court at the time, wrote in his now-landmark dissent, “clauses guaranteeing to the individual protection against specific abuses of power, must have a... capacity of adaptation to a changing world,” (Brandeis 1928, 472). He continues to argue that constitutions must be based on a more general language that can adapt to new situations over long periods of time, rather than be written to address specific evils of the moment. This was not new legal thought, but it is one of the pillars that the legal community has since used to support its findings of a Constitutional right to privacy. In a passage almost redolent with red, white, and blue, Brandeis says

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. (Brandeis 1928, 478)

Brandeis was, perhaps unintentionally, the link between the traditional idea of privacy-as-secrecy and privacy-as-autonomy. Even in *Olmstead* when he talks about the right to be let alone, he finds that the broad principle behind the Fourth Amendment is the right of Americans to not have their secrecies intruded upon. He primarily argued that a telephone conversation deserves the same Fourth Amendment protections as physical objects enumerated in the Constitution, such as a written letter. Both a letter and a telephone conversation are communications that the participants might attempt to keep secret, and the mere difference in media should not influence the level of Constitutional protection that either receives. But it was the phrase “the right to be let alone” that became the segue to

privacy-as-autonomy: later generations have not interpreted this phrase in the fairly literal sense that Brandeis used it, but rather invested it with the more metaphoric connotation of “the right to not have the government bother me about things I choose to do.”

### **PRIVACY LAW SINCE *OLMSTEAD***

Although Brandeis was the dissenting voice in *Olmstead*, he was vindicated a generation later in the 1967 case *Katz v. United States* (389 U.S. 347 (1967)). The justices in *Katz* drew heavily on Brandeis’ right to privacy, citing both the *Harvard Law Review* article and the *Olmstead* dissent. Thus, the right to privacy-as-secrecy in the face of government searches became the *de facto* meaning of the Fourth Amendment for a period of time.

But the greater revolution, that of privacy-as-autonomy, happened with the 1965 court case *Griswold v. Connecticut* (381 U.S. 479 [1965]). By that time, the idea that there was some general right to personal autonomy had crept to the edges of the legal field: “in the 1920s, the Supreme Court held that ‘liberty’ encompasses a parent’s right to make certain decisions about his or her child’s education without state interference...” (Alderman and Kennedy, 55). In the *Griswold* case, the director of Connecticut’s Planned Parenthood (Griswold) and the organization’s medical director (Buxton), were convicted of violating a pair of Connecticut laws. One of the laws prohibited the use of contraceptives; the other, on which grounds Griswold and Buxton were convicted, was a general prohibition against aiding and abetting another crime.

The Supreme Court ruled in a 7-2, 6-opinion ruling that there was, indeed, a general right to privacy in the Constitution, which in this case prevented Connecticut from regulating the childbearing decisions of married couples. This was a right of privacy that did not just prevent the government from conducting unjustified searches: instead, this new

right to privacy prohibited the state from regulating the civically private aspects of life. It was the individual's prerogative to make this sort of decision; that principle was couched as a privacy claim, and thus the legal notion of privacy-as-autonomy is born explicitly, part of the common law.\*

I would guess that were it not for *Roe v. Wade* (410 U.S. 113) in 1973, the notion of privacy-as-autonomy would have remained largely in the legal field: controversial perhaps, but the debate would have been in the arcane realm of legalese, rather than something that the average American concerned himself with on a regular basis. But in *Roe v. Wade*, this relatively new right to privacy became justification for a medical procedure that a substantial portion of the American population found grossly immoral. And although the Court ruled that only personal rights “implicit in the concept of ordered liberty” (*Roe v. Wade*, 152) were protected by this right of privacy, its enumeration of these rights did nothing to ease the ruling's perceived blow to traditional morality. This right of privacy protected the individual's right to make decisions about marriage, procreation, contraception, family relationships, and child rearing and education—all without undue interference from the government. Even today many conservatives adamantly oppose the notion of a “right to privacy” in the Constitution partially because it is the mechanism that legalized abortion and that might allow gay marriage and any other number of objectionable activities.†

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\* In his dissent, Justice Potter Stewart made the following enticing statement: “I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do,” (Stewart, *Griswold v. Connecticut*). Conversely, Potter said on a separate occasion “The Fourth Amendment and the personal rights it secures have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion,” (qtd. McWilliams, 137).

† Primarily, however, political conservatives disagree with the “right to privacy” interpretation because this

The controversy surrounding *Roe v. Wade* made people begin to think of *privacy* as one's right to govern the civically private aspects of one's life. And this struck rhetorical gold, as it were: finally there was a name for the hazy "liberty" of the Declaration of Independence. Americans now had a seemingly concrete name for the principle of personal autonomy that has served as the foundation of our legal and social tradition. Had it not been for the rise of a networked computer culture in the early 1990s, *privacy* might have evolved past its old definitions of "civic status" and "secrecy." But the Internet has reinforced the idea of *privacy-as-secrecy*: our culture of individualism has catapulted *privacy-as-secrecy* into the same near-holy realm that *privacy-as-autonomy* reached in the 1970s. We talk about *privacy* more often than we did ten years ago and we apply it to a wider variety of situations. Both senses of *privacy* speak to the primacy of individual freedom in the United States, and because both senses invoke almost equally powerful concepts, *privacy* is open to rhetorical appropriation in a huge variety of contexts—in addition to its "legitimate" uses.

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## CHAPTER THREE

# *The Privacy Bandwagon*

Privacy is a basic American value—in the information age, and in every age... You should have the right to choose whether your personal information is disclosed; you should have the right to know how, when, and how much of that information is being used; and you should have the right to see it yourself, to know if it's accurate. (Gore, 7/31/98, qtd. Murrieta "Gore: Protect Privacy," *Wired News*)

Widespread computerization has made privacy an extremely popular issue in the United States. The power of computers to collect and transmit data means that it is much easier for our lives to be monitored. Although this is not surveillance in the literal sense that a telescreen and panopticon enable, the data that computers collect and disseminate can produce data very similar to what direct observation produces. Perhaps a marketing firm did not actually watch me open the package from Amazon.com and take out *A History of Private Life: Volume IV*, but if it has access to Amazon's purchasing records or my credit card history, the resulting "invasion" is the same in terms of the information collected.

### **AN "EVER-GROWING THREAT"?**

Untested assumptions are a threat to quality research. Before I wrote a paper discussing how important the concept of privacy is in contemporary American culture, I

wanted to see whether there was any data to support this thesis. Are we talking about privacy more often now than we were, say, twenty years ago? Can more things be called *private*, and are people making privacy claims about wider varieties of subjects? Or is privacy a more academic concern, unconnected with most people's lives?

Finding data to support such a thesis is somewhat tricky. I wanted to examine a time-based datasource that, to the greatest extent possible, contained speech events from a wide variety of sources, with no topical limitations, and which reflected the speech of as many different people as possible. However, there is no vast database of every American communication in the past 15 years that would let me track relative frequencies of *privacy* incidences (although people who believe in the all-powerful NSA-run Echelon spy system might argue otherwise). I instead settled for a survey of the Lexis-Nexis news database.

Lexis-Nexis is a full-text database with, among other things, twenty years of news articles from the 50 highest-circulation U.S. newspapers (as listed in *Editor & Publisher Yearbook*). It also has a similar collection for magazines and journals. I searched these parts of the database for incidences of *privacy* in headlines and keywords, compiling data for each six-month period since 1980.\* There are several flaws in my methodology, and my conclusions rest on assumptions that, if proven wrong, would make said conclusions somewhat dubious. Primarily, I was not able to measure the relative frequency of *privacy* – i.e., what proportion of articles were about privacy. I was only able to gauge the absolute number of articles about privacy. This is fine if and only if the total number of newspaper articles published has remained approximately constant; that way, a change from ten *privacy* articles to a thousand in a six-month period is clearly a change in the amount of space

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\* From about 1992 onward, I had to conduct this search in one-month intervals for the newspapers, since Lexis-Nexis returns an error if a query yields more than 1,000 results. I then tallied the month-by-month results to obtain the desired six-month count.

devoted to privacy issues. I have no reason to doubt that the total number of articles published in the 50 most widely-circulated newspapers has remained fairly constant over the past 20 years, so I do not discredit my data on those grounds.

More seriously, I have made the assumption that coverage in major news sources reflects popular attention to the issue. While sometimes it is the case that public interest drives media coverage, the media sometimes devotes attention to topics that its audience does not care about: compare voter turnout in the 1996 elections (49.1 percent [FEC]) to the amount of media coverage that elections receive. This is a discrepancy caused by the media's view of itself as the watchdog of the government; and as privacy rights are within the domain of politics and government, there is a possibility that the media's coverage does not represent popular interest very well. Using a source such as the University of Birmingham's Cobuild database would have eliminated this bias; however, Cobuild is not time-based and draws very heavily from British sources.

On the other hand, I am not holding this inquiry, as it were, to a high standard of scientific rigor. I was merely searching for some level of corroboration that the discourse on privacy has elevated. My hypothesis, too, was that the spread of computerization in the 1990s has caused a heightened interest in privacy; as computerization is in the domain of technology more than politics, I find no reason for the media to cover *privacy* disproportionately to the public's interest. If anything, the mass media lags in covering technology issues.

The data I collected showed such a dramatic increase in articles relating to privacy that it is quite safe to conclude that privacy has become increasingly more important since 1980, and that the sharpest increase in interest has occurred since the massive popular adoption of computing and networking technologies around 1992. (Please see Figures 1 and

2 for a graph of the results.)

Figure 1: "Privacy" Lexis-Nexis Search Results, 1980-1999

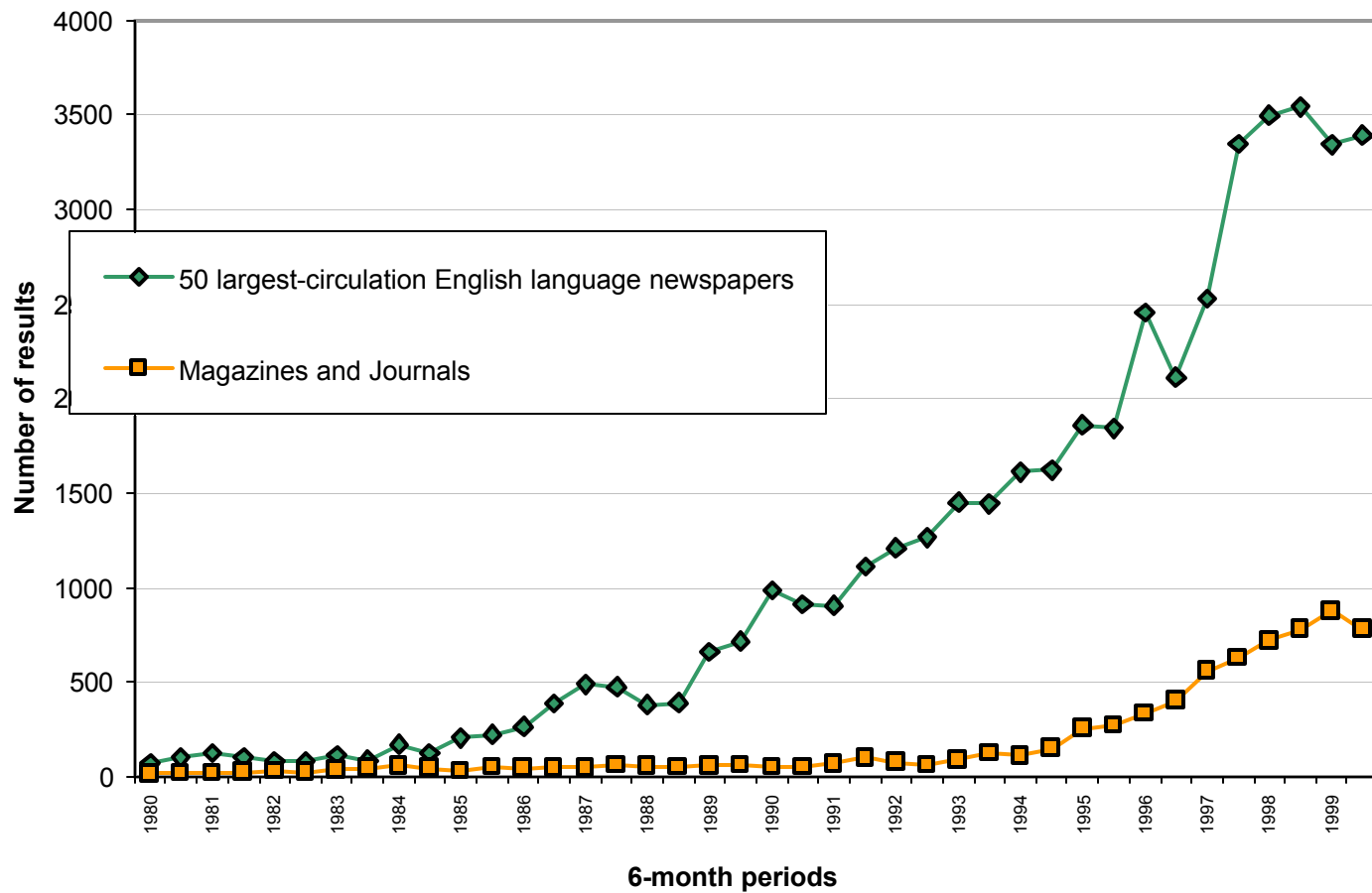
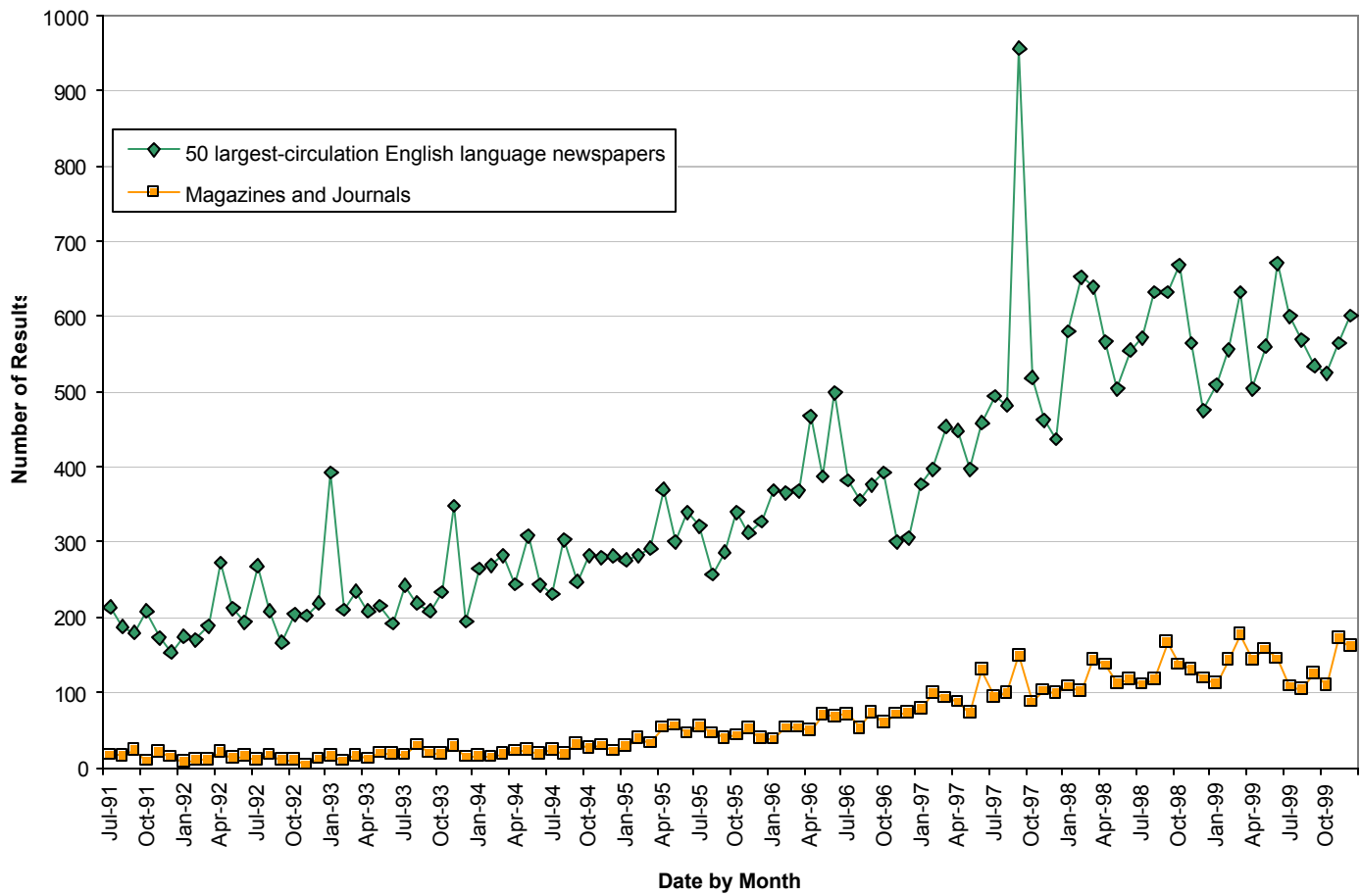


Figure 2: "Privacy" Lexis-Nexis Search Results, 1991-1999



## **CASE STUDY: PRINCESS DIANA**

When I initially examined the Lexis-Nexis data, I noticed a dramatic spike in privacy occurrences in September 1997. There were nearly twice as many occurrences as there were in the previous and successive months. That was the month that Princess Diana was killed in a Paris car accident, caused, it was accused, by paparazzi reporters hounding the Princess' car. The media proceeded to engage in several weeks of finger-pointing, metadiscourse, and self-immolation; in addition, since the Princess was such a popular figure in both Britain and the United States, the public was immensely interested in event coverage and the issues her death raised.

One of those issues was celebrity privacy. Celebrity privacy generally is opposed to publicity. It is form of privacy-as-secrecy, tinged with touches of the civic notion of privacy that a public figure must be accessible to the public. Said a letter to the editor in the *Atlanta Constitution*:

We are sorry, Diana, that we went too far. All we ever wanted was to intrude into your life, to fill our emptiness with a dream life that you lived... We made the media chase you around the world... We felt that you belonged to us, had no right to privacy, no right to go off stage. (Heike Donyavi, "Star Chasers Grieve")

This letter writer equates the right to privacy with the right to be left alone ("to go off stage"), much as Brandeis and Warren did in "The Right to Privacy" – in fact, one of the motivations for the 1890 article was Warren's anger about the gossipy, intrusive coverage his daughter's wedding had received in a newspaper's society column. When the Princess died, this very public figure, it turned out, had had a right to privacy all along. This privacy invasion indirectly caused her death, and even the media condemned its own actions. The cost of a lack of privacy had been very high indeed.

## **PRIVACY, CONSUMERISM, AND COMPUTERS**

At the base of America's political philosophy lies a distrust of government, of power, of collectivism. This distrust is the reason that computerization has made privacy such an important issue since 1990. Given Americans' association between privacy, technology, and freedom, as our fascination with Orwell's Big Brother demonstrates, the past decade's widespread computerization has played into our fears of surveillance. Computers are excellent at gathering data. A computer can monitor what CDs you listen to and how often you use each program installed on your machine. Copying documents in the real world takes some amount of effort—even if that only means locating a photocopier—but on a computer, it is trivial for another person to copy your files and distribute them widely. The Internet makes it easy to transmit large amounts of data from one person to another. Major web browsers are currently programmed so that they cannot transmit, for example, the list of websites that a user has visited in the past week, but the browsers by default store this information on each user's computer. Additionally, browsers are set by default to let websites store small chunks of data on users' hard drives. Almost all websites use these data chunks—cookies—to keep a record of when someone on that particular computer last visited the site, what links they clicked on, whether they purchased something, etc. And although the cookies are limited to a fairly small size, websites merely need to store a unique identification number in each cookie and then match that ID with as much data as they care to store on their own servers. Most websites are programmed such that they require cookies, and many sites are unusable without them (although generally this required use is not as sinister as surveillance), so disabling them is not an option for most users.

Additionally, very few people use encryption, other than the default form that web browsers and e-commerce sites use—and in that case, it is not a deliberate action that the

user must take. Unbreakable\* encryption such as Pretty Good Privacy is available free for download, but very few people encrypt their email, for example. And this is although encryption protects email not only when it is sent over data networks, which are susceptible to data interception, but also when it is stored on the recipient's hard drive. Without encryption, anyone with access (legitimate or illicit) to that computer can read emails stored therein.

A Lexis-Nexis search for “privacy AND encryption” in major newspapers for the second half of 1994 yields 45 results. For the second half of 1999, this same search returns 225 articles. On the other hand, a 1994 search for “privacy AND consumer” returns 142 articles, and the corresponding 1999 search returns 723 articles. This information suggests that in the news media, privacy gets discussed more frequently in the context of consumerism than it does in the context of encryption. Before the sharp upswing in e-commerce that occurred around 1997, the Internet was the home of information—be it academic, government, entertainment, or consumer—but not of transactions. Encryption was an excellent way to preserve privacy under this information-based system, since most personal data that users sent over the Internet was in the form of email, rather than today's product orders and credit card numbers.

But once the web became the domain of consumerism, this rather lackadaisical approach to encryption and consumer privacy reversed. Consumer privacy is all over the media. It is relatively rare to see a phrase like “individuals' privacy” or “citizens' privacy”

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\* No encryption is technically unbreakable; given enough time, any encryption schema can be broken. However, sufficiently strong encryption is, for all practical purposes, unbreakable; most encryption schemas are based on the difficulty of factoring very large prime numbers. A 200-digit prime number would take, at optimal 1998 computer processing speeds, 52,000,000 years to crack by brute force, by which point in time the usefulness of cracking the code would presumably have disappeared. Today's keys are a standard size of greater than 1,024 bits; this is roughly a 309-digit prime number, and it is quite easy for encryption users to have 2,048-bit encryption keys.

compared to “consumer privacy” in discussions of Internet privacy issues; privacy is only important in the context of the consumer. In light of the United States’ capitalist economy, it is not surprising to see issues of consumer privacy raised; it is, however, somewhat unexpected to see consumer privacy take the prominent role that it has.

*Businessweek* magazine published a cover story ostensibly about online privacy in its March 20, 2000 issue. Really, however, the article was about consumer privacy. The article emphasizes the result of a Harris Interactive telephone survey, conducted between March 2-6, 2000 with a sample size of 1,014. The article does not contain any information on the survey’s margin of error or methodology.\* The results that *Businessweek* reported focus almost exclusively on marketing data, fears of credit card fraud, and whether or not respondents were willing to make online purchases in various situations. One question asks, “If you go online, to what extent would a [guaranteed privacy policy] encourage you to do the following?” The list of various activities began with the relatively innocuous “Use the internet more” (40 percent of respondents said “a lot”) and end with “Purchase products or service from that company” (37 percent said “a lot”). Note that consumer privacy concerns are not so great that privacy guarantees would entail a sharp upswing in web-based consumption, despite the fact that 41 percent of respondents say they are “very concerned” about the use of personal information.

Two of the poll’s major topical categories are “Online buyers dread junk mail” and “Nonbuyers worry about privacy and fraud.” Respondents were not “respondents,” “people,” “citizens,” “Americans,” or “computer users.” Their fears are only worth studying

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\* Harris Interactive is a well-respected polling company which, generally, uses as statistically valid a methodology as any other polling organization. For the telephone poll “The Use and Abuse of Personal Consumer Information,” conducted between December 2 and 7, 1999 with a sample size 1,009, Harris used a 95% confidence interval for a margin of error of  $\pm 3\%$ . Assuming Harris used the same confidence interval for the *Businessweek* survey, it too would have a calculated margin of error of  $\pm 3\%$ . ([http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=8](http://www.harrisinteractive.com/harris_poll/index.asp?PID=8))

because they are “buyers” and “online shoppers” (96). The response category “An online profile is discomforting” asks respondents whether they would be comfortable with various levels of profiling, from tracking movements without using identifying information to creating profiles that combined web usage data with credit data, medical information, and the like. And of course, this is marketing profiling: the section is preceded by the background,

Some web sites track users’ personal information to match users with *products and services that meet the users’ needs*. Other Web sites *profit by sharing or selling* user information to other organizations. (“Rules in Wonderland,” 96; emphasis added)

All that is important is finding out what will make consumers happy to consume.

The *Businessweek* article does mention other types of privacy concerns. On the article’s first full page, it says “We have all heard the examples of sociopaths who stalk their victims online. We have seen the statistics on ‘identity theft,’ in which criminals suck enough personal data off the Net to impersonate other people,” (“Rules in Wonderland,” 84). These types of privacy invasions are inarguably more serious than consumer privacy invasions, since they are direct attacks against the person and can lead to physical harm or fraud. Given the relative seriousness of these types of privacy violations, it seems like a fairly obvious topic for authors Heather Green et al to investigate. They do not, and instead spend the rest of the article discussing privacy only in the context of consumerism. Indeed, on page 85, there is a pullquote in the middle of the page which says, “Because privacy breaches are so corrosive *to consumer trust*, some Web executives welcome broad national standards,” (emphasis added).

Of course, page 84 would also seem like an opportune moment for the authors to review “the examples of sociopaths” and “the statistics on identity theft,” but no such information is forthcoming. As a reader, as far as I am concerned these examples and

statistics are a figment of the authors' imagination, since the authors provide no corroborating evidence. As a heavy user of the Internet since 1993 and a person who has had a long-standing interest in privacy issues, I have never once come across statistics on identity theft, and indeed have only read one or two cases of this—in a weakened form usually boiling down to credit card fraud. Moreover, as far as Internet stalking goes, the pseudo-stalking that can occur over the net is *per se* harmless. It is when the stalking becomes actual, i.e., physical, that it poses a true threat, and while protecting one's privacy can make it more difficult for a stalker to find useful information, stalking existed long before the Internet could facilitate it.

The authors used these unsubstantiated privacy concerns to appropriate the concepts' rhetorical force. Web users may be concerned about their consumer privacy, but they are not so terrified of consumer privacy invasions that they refuse to log on or make purchases. The *Businessweek* survey indicates that since 1998, users' (consumers') confidence in making Internet purchases has in fact gone up markedly: and this happened at the same time that sites began collecting, amalgamating, and selling larger quantities of data. Users may be concerned, and they may want changes, but they are not so concerned that they won't use the web.

So far the web's usefulness has outweighed consumers' privacy concerns. Thus, in order to grab the reader's attention, the authors casually toss in two examples of privacy invasions that can cause actual harm. They have no factual basis for their claims, but since it doesn't appear that consumers are terribly afraid to consume, the authors have to associate consumer privacy invasions with more directly harmful privacy invasions to add weight to their argument.

In most cases, consumer privacy issues are nothing but a value tradeoff between

expected return and the cost of revealing data. Consider the March 1, 2000 Kansas City Star column by writer Kris Knowles, titled “Grocery store ID cards raise price of privacy for shoppers.” It is literally more expensive for shoppers to withhold their personal information.

Throughout the article Knowles casts the situation as a tradeoff:

In *exchange* for allowing me to pay ordinary prices instead of inflated “regular” prices, the stores get to create computer records of everything I buy. Supposedly they are going to use this information to better serve me. So far that hasn’t happened... *Since I’m not getting any noticeable benefits* from these shopping cards, I’m uncomfortable that they’re keeping records on what I buy. (emphasis added.)

Presumably, however, if Knowles received a greater reward he would be more willing to use the shopping cards. He does cite an advocacy group’s warnings that these records could theoretically be used against individuals— “records could be subpoenaed, perhaps to show that an ex-spouse is not a fit parent because of purchases of condoms, beer, or... mocha fudge ripple ice cream.” But this is not *his* concern. It is hypothetical, an abstract possibility that he does not give much saliency to when weighing the costs versus the benefits of using the shopping card.

In the Internet’s context, a huge swath of websites allow users to register and create personal profiles; this allows sites to provide value-added services to users, such as Amazon.com’s personalized book recommendations (based on users’ purchasing history at Amazon) and my.mp3.com’s streaming mp3 service. (my.mp3.com scans CDs that users place in their CD-ROM drive and registers that user’s account as owning that CD; the user can then stream mp3s of that CD from any computer with a net connection. This of course creates a list of the CDs that the user owns, along with data about frequency of use.) Users may not like having their information traded about and revealed, but it is a cost that, so far, they have been willing to bear in exchange for the services that these websites provide.

On the other hand, when users receive no perceived benefit from having their

information gathered, or the amount of data gathered exceeds what users are willing to trade for the service rendered, they do indeed protest.

### **CASE STUDY: DOUBLECLICK**

Consider the case of web ad company DoubleClick. Many websites use DoubleClick to serve targeted ads to users. Whenever a user clicks on a DoubleClick ad, DoubleClick stores a record of that click in its databases, matches the record to a unique ID, and stores the ID as a cookie. As users click through more web ads, their DoubleClick profile grows and DoubleClick can target users with ads that reflect past click-through decisions.

In June of 1999, DoubleClick announced that it was buying Abacus Direct, a data marketer with huge databases of consumers' names, addresses, contact information, and purchase histories from 1,100 different catalogues ("DoubleClick's Single Focus: You," *Wired News*). The databases have five-year records on 88 million American households. DoubleClick's plan was to connect the web surfing behaviors in its databases with the identifying information in the Abacus database. After the announcement, DoubleClick's stock dropped from \$88.81 to \$70.25—a 21 percent fall—and Abacus' stock dropped 9.5 percent, from \$74.56 to \$67.50. The plan became a public relations disaster for the company, and by late February it had abandoned its plans to merge web data with names and addresses.

The DoubleClick story boasted a dramatic difference [from other cases of privacy concerns]: the company's stock was negatively impacted...Pretty dramatic bottom-line movement, marking the first time privacy-related problems dramatically affected a company's value on Wall Street... Customers AltaVista and Kozmo.com were distancing themselves from DoubleClick over concerns about its handling of user data. ("A Turning Point for E-Privacy," *Wired News*)

The only argued benefit to customers was that they could receive targeted

advertising. On the other hand, users have no control over whether they visit a page with DoubleClick-served advertisements, or any ability to control the amount of data that is being collected about them. Users might willingly provide their name, address, email address, and other information to a site from which they receive a service; but the public reacted violently at the prospect of having their behavior monitored and recorded by a company that gives nothing in return. Compare DoubleClick to RealNetworks, distributor of audio and video streaming software, caught monitoring users' listening and viewing habits. Real's customers protested and Real changed its practices, but its stock didn't drop at all. Its business model was providing software and delivering content, not collecting data; the benefits that users receive from the software and content was enough to prevent boycotts.

Americans, so far, are ambivalent about privacy-as-secrecy in consumer culture. Computer users are willing to trade their privacy as they would trade their money; it is not clear that revealing marketing data can be used to harm them, as distasteful as some may find the idea of purchase-history dossiers. Data collection and aggregation might be an invasion of privacy, but it is one that most people are willing to allow depending on what they receive in return.

Introduce other types of violations, however, and Americans still make very strong claims to privacy. We still put up privacy fences and cover windows with shades and curtains; property can be landscaped to shield its residents from others' view. Bathroom windows, where they exist, are almost invariably covered: the majority of Americans don't want their next door neighbor to be able to see them taking a shower since our cultural tradition tells us to hide the naked body. Teenagers lock up their journals so their parents and siblings can't read their private thoughts.

## **CASE STUDY: SCIENTOLOGY**

The Church of Scientology is an organization that ferrets out private information about opponents and broadcasts that information in an attempt to embarrass and discredit critics. Consider the case of Keith Henson, a resident of Clearwater, Florida who regularly protests Scientology's actions. In a March 29, 1999 news article in the *St. Petersburg Times*, Pulitzer Prize-winning reporter Lucy Morgan reports that

Scientology has accused Henson of being a dangerous, crazed man who is capable of cutting off human heads and exploding bombs like the one that blew up the federal courthouse in Oklahoma. Henson says the allegations come from the days he worked with a cryogenics program that takes the heads from dead bodies to be frozen in hopes that medical science will one day find a cure for whatever caused their death. His experience in bombmaking dates back to a job for the mining industry in the Arizona desert where he used dynamite and other explosives.

Scientology unearthed information about Henson which would normally be considered private, i.e., outside the general public interest, and revealed it to the public's view in order to discredit him. Although the Church's actions as reported in the *Times* article were rhetorically devious, their statements that Henson was *capable* of cutting off human heads and exploding bombs were not factually incorrect. Scientology is using civically private information to wield power over Henson: if the public believes the Church, Henson will be publicly condemned—and rhetorically discredited—once the public learns that he chops off people's heads and blows up buildings.\*

Privacy today is most frequently discussed as privacy-as-secrecy. We talk about information privacy, whether in the context of purchases, our DNA sequences, or our driver's license photographs. Our legal tradition still retains the notion of privacy-as-

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\* I remember reading an criticism of Scientology about five years ago which the author began with a full disclosure of his [recreational] drug use, sexual proclivities, eating habits, and several other tidbits of personal information. He commented that he was disclosing this information so that the Church could not "expose" him in an attempt to discredit his message. Unfortunately I have no recollection of what magazine it was published in, so I am unable to legitimize the anecdote with a citation.

autonomy, and that concept is finding specific instantiations beyond reproductive health, as in the cases of drug legalization referendums, school voucher programs, and even highway speed limits. Certainly this deregulation is not a universal trend in our legal system—as with Supreme Court rulings permitting random mandatory urinalysis drug testing of student athletes in the name of the War on Drugs.

But what of our definition of privacy, when we try to apply the word to such equally powerful concepts? If, for example, privacy-as-autonomy were not important in our culture, privacy-as-autonomy would likely fade out of use and anyone saying *privacy* would automatically think of privacy-as-secrecy. Given, though, that personal autonomy and personal secrecy are so valued in American culture, what can we conclude?

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## CONCLUSION

### ***A Well-Defined Discourse***

Since the popularization of the Internet, privacy-as-secrecy has become a phenomenally important issue to many Americans. And the whole country is not yet wired; as our refrigerators get hooked up to the Internet and schoolchildren sit under trees surfing a wireless web with their Internet appliances, the amount of personal data collected can do nothing but grow.

As I mentioned in Chapter One, it would be easy to couch this “right to preserve the secrecy of information” as another instance of privacy-as-autonomy. The distinction that prevents me from doing so is that privacy-as-secrecy demands not only right of the individual to choose *what* information she wishes to keep secret, but also the right to then actually keep that information secret. Similarly the “right to abortion” is not, as the Courts have held, merely the right to choose whether or not one is willing to have an abortion – it necessarily encompasses the right to actually have an abortion without fear of [legal] repercussion.

In the April 16, 2000 *Miss Manners* column titled “Public announcements aren’t confessionals,” Judith Martin writes

No one is without the means of making every event in her or his lifetime known to millions of strangers, and embellishing it with every accompanying thought, feeling and fantasy, not to mention pictures. Why anyone would want to do this is another question... And what exactly does modern society mean by all that indignation about imminent threats to our sacred right to privacy? That while we were busy posting the details of our romances and diseases, someone tattled to one catalogue business about something similar we had purchased from another such business? (Martin, 4/16/00)

It is the nature of privacy-as-autonomy that we can elect to renounce all privacy-as-secrecy. We can be complete exhibitionists, but still retain privacy-as-autonomy. For the right of privacy-as-autonomy is the general right to make choices about one's own life. It is the underlying foundation of the more traditional idea of privacy-as-secrecy. However, individual instantiations of privacy-as-autonomy, such as the right to an abortion and privacy-as-secrecy, are emergent properties of privacy-as-autonomy. They have their own characteristics and must be treated as unique entities.

The right to self-determination is the true underlying principle of what I have been calling "privacy as autonomy". This is what underlies everything else that we claim as *private*. Every notion of *privacy* that we have stems from our belief that the individual should be able to direct the course of her own life. The right of self-determination is the right to exercise choice, and we specifically enumerate decisions that the government may not punish – as with the right to assemble with whomever we choose, the right to deny a roving police officer entrance to our home, the right to an abortion. Sometimes the right to choose certain things must be balanced against other rights; and sometimes, the right to self-determination is not absolute. For example, a non-public individual generally cannot sue a newspaper that has published her photo. Even though she would have chosen that the photo not be published, the newspaper's right of free speech outweighs that choice.

Brandeis had it wrong when he said that *privacy* is "the right to be left alone." What he was aiming at is instead something better phrased the right to self-determination. A rose

by any other name may still be a rose, but we confuse the public debate and public policy by trying to mash the notion of self-determination into the rather smallish box that *privacy* provides. Privacy-as-secrecy is not gracefully evolving out of the dictionary to make way for privacy-as-autonomy. *Privacy* cannot hold the entirety of “self-determination,” and this is where much of the debate over the “right to privacy” has occurred. If *privacy* means *secrecy*, then claiming that a right to privacy should permit abortions is, on the semantic level, something of a stretch.

Unfortunately for the information privacy debate people have constrained the definition of *privacy* to its traditional implications of secrecy without explicitly recognizing that the right to self-determination must exist for us to have a meaningful right to privacy. Advocates of data privacy are beginning to implicitly recognize this: current policy suggestions propose to return data ownership to the individuals to whom the data refers. Rather than a marketing company owning data, each individual would be able to control who sees that information, who may disseminate it, and what it might be used for.

Perhaps the various definitions of privacy do not make public discourse confusing and impenetrable. But more accurate labels for the concepts that we are discussing can only help clarify our discourse. In the words of George Orwell,

The words democracy, socialism, freedom, patriotic, realistic, justice, have each of them several different meanings which cannot be reconciled with one another... A bad usage can spread by tradition and imitation, even among people who should and do know better. [A defense of the English language] has nothing to do with archaism, with the salvaging of obsolete words and turns of speech, or with the setting up of a “standard English” which must never be departed from. On the contrary, it is especially concerned with the scrapping of every word or idiom which has outgrown its usefulness. (Orwell, “Politics and the English Language”)

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