Introduction: Change and Continuity—Privacy and Its Prospects in the 21st Century

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> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society.
>
> Samuel Warren and Louis Brandeis, "The Right to Privacy"

> Even the smallest intrusion into private space by the unwanted gaze causes damage, because the injury caused by seeing cannot be measured.
>
> Jeffrey Rosen, "The Unwanted Gaze: The Destruction of Privacy in America"

> The fact that one cannot negotiate modernity without continuously revealing personal information to a variety of demanders has habituated most Americans to radically diminished informational privacy.
>
> Richard Posner, "Privacy, Surveillance, and Law."

> People have really gotten comfortable not only sharing more information and different kinds but more openly and with more people, and that social norm is just something that has evolved over time.
>
> Mark Zuckerberg, CEO, Facebook (quoted in Jeffrey Rosen, "The Web Means the End of Forgetting")

More than a century ago, Samuel Warren and Louis Brandeis warned of emerging threats to individual liberty associated with new business methods and technologies.[1] "Instantaneous photographs and newspaper enterprise," they said, "have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"[2] Warren and

Brandeis worried, in particular, about the press "overstepping in every direction the obvious bounds of propriety and of decency." "Gossip," they observed, "is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle."[3]

Against this background, Warren and Brandeis identified a right to privacy implicit in the Anglo-American common law that afforded individuals "full protection in person and property."[4] They set out to "define anew the exact nature and extent of such protection"—that is, to adjust the meaning of the right to privacy to meet the demands of a rapidly changing society.[5] They called for explicit legal recognition of the "right to be let alone."[6] As they saw it, this right is itself part of a more "general right to the immunity of person."[7] It is, in their words, "the right to one's personality."[8]

Warren and Brandeis's justifiably famous article offers but one important example of the legal imagination at work. These authors carefully reworked the materials of the common law to fashion a new legal concept. Confronting changes in society, they set out to imagine a new legality appropriate for changed circumstances. The work that Warren and Brandeis undertook at the end of the nineteenth century regularly is done today by legal scholars, judges, legislators, and administrators and is crucial in renewing and refreshing the law.

Yet the legitimacy of law depends, in part, on making the work of renewal seem continuous rather than disruptive. Like Warren and Brandeis, those who would imagine new legalities must fashion their imaginings out of existing legal materials, bringing about change while proclaiming fidelity to the past.[9] In this way law can be an instrument of continuity and change, fostering transitions from one form of behavior to another both inside and outside formal institutions.[10] Nonetheless, law's adaptability is not limitless. Far from providing reassurance in the face of change, law may be unsettled by it. Legal inventiveness and ingenuity may be strained, legal conventions and understandings may be called into question, and legal knowledge found wanting.

The twenty-first century is a time of great challenge for the American

legal order, a time when law's adaptability and inventiveness are being severely tested. In addition to challenges posed by a rapidly changing international arena, various domestic factors strain the capacity of existing legal regimes or doctrinal categories to accommodate them. Among the most important areas in which such strains are seen is the conception of public and private that Warren and Brandeis helped to develop.[11] Originating in the nineteenth century, that distinction has been foundational to liberal legality, positing a basic divide between the world of government action and the domain of individual autonomy defined in terms of negative freedom.[12] While the U.S. Constitution makes no explicit reference to a "right to privacy," by the late twentieth century that right was as venerated as any other right and arguably is as inseparable from liberty as any democratic ideal.[13] At the same time, the late twentieth century gave rise to trenchant questions about the very coherence or desirability of distinguishing public and private.[14] In response, today one can see a reassertion of privacy as a bulwark against new modalities of surveillance, new reproductive technologies, the biotechnology revolution, the rise of the digital technology, the excesses of the Bush administration, and the continuing war on terror.

This book does not seek to provide a comprehensive overview of threats to privacy and rejoinders to them. Instead it considers several different conceptions of privacy and provides examples of legal inventiveness in confronting some contemporary challenges to the public/private distinction. In the remainder of this introduction we provide a context for that consideration by surveying the meanings of privacy in three domains—the first, involving intimacy and intimate relations; the second, implicating criminal procedure, in particular the Fourth Amendment; and the third, addressing control of information in the digital age. The first two provide examples of what are taken to be classic breaches of the public/private distinction—namely, instances in which government intrudes in an area claimed to be private. The third has to do with voluntary circulation of information and the question of who gets to control what happens to and with that information.

Intimacy and Privacy

In the realm of intimate relations, the right to privacy was first recognized in the landmark 1965 case of *Griswold v. Connecticut*.[15] In *Griswold*, the Supreme Court struck down a Connecticut law banning the sale or use of contraceptives to, and by, married couples. The Court identified a right to privacy grounded in the "penumbras" and "emanations" of the First, Third, Fourth, Fifth, and Ninth Amendments to the Constitution and argued that the right to privacy in marriage was older than the Bill of Rights itself.[16] As Justice Douglas put it,

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[17]

Eisenstadt v. Baird (1972)[18] extended Griswold's privacy protections to unmarried individuals, a shift in logic that provided the doctrinal basis for the Court's subsequent decision to protect women's reproductive freedom in *Roe v. Wade*,[19] and its decision striking down a Texas antisodomy statute in *Lawrence v. Texas*.[20] Michael Sandel argues that this doctrinal path is marked by a regrettable change from Douglas's substantive assertions about the value of marriage to what Sandel calls a "voluntarist conception" of privacy grounded in the belief in the "neutral state" and the desirability of an "unencumbered self."[21] The voluntarist conception is associated with the belief that government should remain neutral among different conceptions of the good so that individuals can freely choose how to lead their own lives.[22]

As Sandel sees it, "So close is the connection between privacy rights and the voluntarist conception of the self that commentators frequently assimilate the values of privacy and autonomy."[23] Thus, Jon Mills writes, "Individual privacy is at the core of personal identity and personal freedom."[24] Moreover, in "Supreme Court decisions and dissents alike, the justices have often tied privacy rights to voluntarist assumptions."[25] As Justices Souter, Kennedy, and O'Connor note in their defense of sexual privacy,

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the

> liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[26]

Others join Sandel in criticizing liberalism's tight linkage of privacy and individual autonomy. Daniel Solove, for example, views privacy as more than the protection of autonomy and selfhood when he writes, "Privacy, then, is not the trumpeting of the individual against society's interests, but the protection of the individual based on society's norms and values."[27] He argues that privacy is "not reducible to a singular essence; it is a plurality of different things that do not share one element in common but that nevertheless bear a resemblance to each other."[28] Still others describe the right of privacy as a flight of judicial fancy, ungrounded in the Constitution itself.[29]

Feminist critics,[30] and scholars such as Rosa Ehrenreich, warn against the modern preoccupation with the "language of privacy."[31] Writing about *Roe*, Catharine MacKinnon argues that in its reliance on privacy as the basis for women's reproduction rights, *Roe* "translates the ideology of the private sphere into the individual woman's legal right to privacy as a means of subordinating women's collective needs to the imperatives of male supremacy."[32] For MacKinnon, privacy doctrine masks gender inequality by keeping the state out of the home, contributing to state abdication in a realm that requires intervention. She writes, "*Roe v. Wade* presumes that government nonintervention into the private sphere promotes a woman's freedom of choice."[33] However, according to MacKinnon, what the law of privacy protects is not a woman's right to choose, but the existing distribution of power within the private sphere. For her, abstract privacy protects nothing but abstract autonomy. "The right to privacy is a right of men 'to be let alone' to oppress women one at a time."[34]

Like MacKinnon, Ehrenreich suggests that "privacy issues . . . might be better described and analyzed as issues of *power*."[35] She writes, "The problem with the concept of 'privacy,' however defined, is that whatever work it does, its problematic overuse can obscure certain issues of power and consequential harm."[36] As Ehrenreich points out, generally "those who have power have the luxury of defining what is and what is not private."[37] The denial of privacy, even in civilized societies, becomes a "mechanism of social control."[38] According to Ehrenreich, modernity demands that we "confront the issues of power that lie at the heart of privacy."[39]

Privacy and the Fourth Amendment

At the start of the twentieth century the Fourth Amendment prohibition of unreasonable searches and seizures was rooted in property rights, and a "search" was understood as a physical trespass.[40] Critics of this approach questioned whether "the Constitution affords no protection against such invasions of individual security,"[41] and warned that the property-based conception of the Fourth Amendment rendered it useless as a protection against "subtler and more far-reaching means of invading privacy."[42]

In 1967, the Supreme Court established a new standard for characterizing a Fourth Amendment "search."[43] Justice Stewart, writing for the majority in *Katz v. United States*, argued that "the Fourth Amendment protects people, not places."[44] The *Katz* decision also established a "reasonable expectation of privacy" standard for determining whether a Fourth Amendment violation had occurred.[45]

Some now argue that *Katz* did not really alter the doctrinal basis for determining whether an unconstitutional search has occurred. As Kerr writes, "Although no one theory explains the entire body of Fourth Amendment doctrine, property law provides a surprisingly accurate guide."[46] He argues that the Fourth Amendment's "reasonable expectation of privacy" arises from the property right "to exclude others."[47] In his view, if surveillance does not invade the individual's right to exclude others, the surveillance "generally does not violate his reasonable expectation of privacy."[48]

Other Fourth Amendment scholars reject the language of privacy altogether. For example, Thomas Clancy advocates what he calls a "security" approach to the Fourth Amendment and argues that the Fourth Amendment was intended to protect "security."[49] He defines this right to "security" as the right to "exclude government agents from unreasonably intruding."[50]

Similarly, Jed Rubenfeld believes that the purpose of the Fourth Amendment is to protect the right of the people as a whole to be secure, arguing that the core meaning of the Fourth Amendment has been obscured by the Court's "overemphasis" on the "reasonable expectation of privacy" doctrine.[51] He takes issue with three elements of this approach. First, he sees an inherent danger of circularity in the test for what constitutes a "reasonable" expectation of privacy. He claims, for example, that if the president merely announces that telephone

conversations will be monitored within the United States, no citizen could reasonably expect privacy in his phone calls. Second, Rubenfeld argues that in an increasingly pluralistic society, it is nearly impossible to determine what is a reasonable expectation. It is illogical, he claims, to base a conception of what is "reasonable" on largely unidentifiable, changing social norms. Third, using state surveillance as an example, Rubenfeld claims that a search should be unconstitutional when it "undermines the security of law-abiding citizens."[52] The destruction of security "can be fully effected even when no particular individual can show a violation of his reasonable expectation of privacy."[53]

Today some commentators worry that, whatever its basis, Fourth Amendment protections, and privacy more generally, are being eroded.[54] According to Jack Balkin, the government aims to obtain any and as much information as possible, and, as a result, Fourth Amendment protections often are inadequate. As he puts it, "[E]lectronic surveillance is not its only tool."[55] Today, "Governments can also get information out of human bodies."[56] "Bodies are not simply objects of governance," he notes; "they are rich sources of information that governments can mine through a multitude of different technologies and techniques."[57] Genetic information is "particularly sensitive because it reveals unique and immutable attributes" that are not only personal but also shared between family members and across generations.[58]

Writing about the impact of 9/11, Jeffrey Rosen observes, "Before September 11th, the idea that Americans would voluntarily agree to live their lives under the gaze of a network of biometric surveillance cameras, peering at them in government buildings, shopping malls, subways and stadiums, would have seemed unthinkable, a dystopian fantasy of a society that had surrendered privacy and anonymity."[59]

One of the most significant components of the surveillance about which Rosen is concerned is data mining, or "the government's ability to obtain and analyze recorded information about its citizens."[60] Daniel Solove describes data mining as "a new technological tool to pinpoint the terrorists burrowed in among us."[61] In the past, law enforcement largely had been investigative and reactive. Today the focus is increasingly on prevention. As a result government and businesses are increasingly partners in surveillance, data mining, and information analysis.

Mills describes the "totality of current technology and the demand for in-

formation" in terms of what he calls the "panopticon effect."[62] The design of Bentham's Panopticon prison allows for the creation of a "round-the-clock surveillance machine."[63] Technology allows governments to deploy modern panopticism as a form of "subtle coercion" against which the Fourth Amendment may be no longer an adequate safeguard.[64]

Digital Technologies and the Erosion of the Public/ Private Distinction

The Internet and digital technology pose yet other and perhaps more fundamental challenges to the public/private divide. Traditionally people worried about public invasions of the private domain, but social networking sites now invite disclosure of information that previously would have been regarded as private. In the digital age new communities are established and new identities formed, and the threat of intrusion into the private domain no longer originates primarily or exclusively with the state.[65]

Current privacy threats involving the Internet are, at least in part, the result of individuals willingly exposing their private lives to millions. "In the digital world of online social networks," Samantha Millier writes, "users have grown accustomed to the free flow of information and expansive opportunities for self-expression."[66] As Gelman puts it, "[D]igital dossiers . . . are not dossiers compiled by covert spies skulking in dark corners with penlight cameras, nor by government agents scouring the data files held by bid data aggregators." They are autobiographic. In turn, she asks, "Why do people post content on a medium available to the whole world when that content is not intended for the whole world?"[67]

For Gelman, the answer lies in "blurry social networks."[68] In her view, Americans are not exhibitionist, just confused.[69] Internet users often are not entirely sure who has access to their personal information, photos, and videos.[70] "Given the choice," she notes, "of the binary options the Internet currently offers—making information available to the world, or password-protecting it for a perfectly defined set—internet posters are choosing the former."[71] People mistakenly believe that what they post will be accessed only by the people for whom they intended it. Moreover, the information individuals post online is rarely limited to identifying information about themselves. The Internet has

effectively "changed who makes decisions regarding what private information to make public and to which audience to publish it."[72] At the same time, new technology "creates an illusion of privacy and control that users can fall victim to."[73]

The digital age also brings to the fore a tension between privacy protection and market efficiency. As Richard Warner notes, "In general, market economies depend on a flow of information."[74] Wagner argues that technology has greatly improved efficiency, creating the possibility of targeted advertising that, in his view, benefits both businesses and customers.[75] In addition, Peter Swire observes that, despite "the reaction that it is somehow 'creepy' to have everything we browse go into giant databases,"[76] individuals benefit from personalization that such developments allow and companies "get their messages out to the most relevant customers."[77]

Yet even those who see benefits to these new understandings of public and private worry about the dangers posed by the new technologies. Targeted advertising is accomplished largely by way of data aggregation.[78] When consumers divulge relatively limited pieces of information, it is nearly impossible for them to predict the ways in which that information will be used in the future. "[F]ar from giving us a new sense of control over the face we present to the world," Jeffrey Rosen notes, "the Internet is shackling us to everything that we have ever said, or that anyone has said about us, making the possibility of digital self-reinvention seem like an ideal from a distant era."[79]

Many believe that the law has failed to keep up with the realities of life in the digital world.[80] As Millier puts it, "People's expectations of privacy are transforming, and as social networks like Facebook scramble to react to these changes, privacy law in the United States has been at a relative standstill."[81] To take but one recent example, in *Moreno v. Hanford Sentinel, Inc.*, the California Court of Appeals dealt with the question of "whether publishing information on a public network available to the world could be considered private if the intent was to reach only a limited audience."[82] Unsurprisingly, the court found that an individual who published information on the Internet could not have a reasonable expectation that it would remain private.[83] As a result, some call for new forms of public regulation that they hope "can prevent the invasions of privacy resulting from the aggregation of information that, bit by individual bit, poses no privacy threat."[84]