

SECTION 8

PRIVACY AND AUTONOMY

Privacy is the thing that most people think of as being compromised by surveillance. If for no other reason, the concept of privacy is important because it profoundly shapes public discourse, as seen with just about any news story about a new surveillance system or program, whether it be a cell phone app to track one's children, Facebook's collection of user data, or government-level data-collection schemes. The concept of privacy also offers a way to identify tangible problems with surveillance and seek redress. Thus, an understanding of privacy as a legal right, or even a human right, animates engagements with surveillance in legal systems and in public policy. It is further laden with importance as civil society organizations—such as the American Civil Liberties Union or the Electronic Frontier Foundation—invoke it in lawsuits contesting corporate or government violations of laws surrounding information access. In short, the link between privacy and surveillance is codified in legal and policy regimes and hardwired in the contemporary social imaginary.

Privacy is classically understood as the “right to be let alone” (Brandeis and Warren 1890), which can include things like protection from scrutiny in one's home, control over personal information, or confidentiality with regard to healthcare or educational data (Allen 2007). It is important to note that

even from the time of Louis Brandeis and Samuel Warren's foundational 1890 essay on “The Right to Privacy,” the orientation was toward threats from private parties and businesses, not principally from the government (Rotenberg 2007). The supposed galvanizing event for this essay was Samuel Warren's unwanted exposure to publicity, as he was outraged that tabloid publications of the time listed him as attending Boston society functions (Kersch 2004: 57). This sense of bourgeois elitism, of privacy as an individual right for the privileged, is something that later critics of privacy would revisit in questioning the utility of privacy rights discourses more broadly.

While privacy offers a vast legal and philosophical terrain for scholarly inquiry, for the field of surveillance studies, the concentration is on technology-based challenges to privacy, especially with regard to information systems used by corporate and government organizations (Kerr, Steeves, and Lucock 2009). Further, the field has directed attention to the varied responses to such challenges, such as the development of privacy-enhancing technologies or the work of civil-society groups to alter or ensure the enforcement of laws or policies (see Section 13). Perhaps more so than with other areas in surveillance studies, the work of legal and policy scholars overlaps with

and often complements the efforts of civil-society groups, policymakers, and legal practitioners working to develop (or enforce) privacy laws and policies.

It may seem counterintuitive, especially given the centrality of privacy in public discourses about surveillance, but the field of surveillance studies has an uncomfortable relationship with the privacy concept, sometimes bordering on an aversion. Some of the critiques are that it is a largely individualistic concept that is poorly suited to account for discrimination against groups (Gandy 1993; Murakami Wood et al. 2006), that it is empirically inaccurate in representing the concerns of marginalized populations with issues of domination and survival (Gilliom 2001), and that it is universalizing and therefore unable to effectively grapple with power inequalities or differences (Monahan 2015). Colin Bennett (excerpted in Chapter 45) has suggested that the field's attack on—or dismissal of—the concept of privacy stems from a generational difference, where “younger scholars” simply do not find it as “cool” as other things they might study. A more persuasive explanation would be that different *disciplinary* orientations inflect the interests of scholars, making some areas of study or conceptual approaches more compelling than others. For instance, philosophy, political science, and legal studies each have established track records of engaging with privacy issues. This makes sense given the importance of liberal individualism in the Western philosophical tradition—as well as in political science and legal studies—where concerns with issues of freedom, rights, and constraint are paramount. Thus, it is no accident that the pieces excerpted in this section, even the one that is challenging the privacy paradigm, are authored or coauthored by scholars trained in the disciplines of philosophy, political science, or legal studies.

The excerpts in this section each reveal a sensitive awareness of the limitations of the

privacy concept. They represent the internal tension in the field about whether privacy is the best approach to studying surveillance, but they also productively add complexity to the notion of privacy, seeing it as a dynamic social norm that is transformed through technological and institutional change. By shifting focus away from an exclusively individual-based privacy frame, and toward a broader understanding of privacy as a “social good,” the majority of the pieces excerpted here seek to recuperate privacy as a vital area of investigation, theorization, and advocacy.

The excerpt by Priscilla Regan explains that in the policy realm, when privacy is conceived of solely as an individual interest, then any other interests, especially organizational ones, are uncritically interpreted as social goods, which all but ensures the erosion of privacy rights over time. Jean-François Blanchette and Deborah Johnson pick up this thread and add that the right to be forgotten, through systematically planned data expulsion policies by institutions, will also yield valuable social benefits. Helen Nissenbaum develops a framework of privacy as “contextual integrity” to sidestep increasingly murky distinctions between “public” and “private” and instead to advocate for adherence to social norms about the expected purposes of data generated in specific contexts—in other words, data collection and exchange are not necessarily problematic as long as one maintains the integrity of the consensual context of data origination.

Julie Cohen takes a somewhat different tack, investigating the relationship between the ongoing project of personal identity construction and the less pliable identity patterns imposed by information systems; for her, “conditions for human flourishing” can emerge from the boundary management one does between these poles, so the ethical imperative is to keep those conditions for negotiation open. Based on his research



Eavesdropping, 1880, Théodore Jacques Ralli.

on the surveillance of welfare mothers, John Gilliom finds the privacy paradigm wanting; he instead draws upon the narratives of these women to illustrate how they prioritize an “ethic of care” for their families and engage in forms of everyday resistance to survive. The final excerpt by Colin Bennett defends the privacy concept and responds to the field’s critiques of it. He finds that many of the detractors construct “straw man” representations of privacy to easily knock down, but that these critiques fail to engage with the theoretical developments of privacy scholars or with the actual practices of legal authorities and regulators. Privacy frames, as he puts it, are here to stay.

REFERENCES

- Allen, Anita L. 2007. Definition of Privacy. In *Encyclopedia of privacy*, edited by W. G. Staples, 393–403. Westport, CT: Greenwood Press.
- Brandeis, Louis D., and Samuel D. Warren. 1890. The Right to Privacy. *Harvard Law Review* 4 (5):193, 195–97.
- Gandy, Oscar H. 1993. *The Panoptic Sort: A Political Economy of Personal Information*. Boulder, CO: Westview.
- Gilliom, John. 2001. *Overseers of the Poor: Surveillance, Resistance, and the Limits of Privacy*. Chicago: University of Chicago Press.
- Kerr, Ian, Valerie Steeves, and Carole Lucock, eds. 2009. *Lessons from the Identity Trail: Anonymity, Privacy, and Identity in a Networked Society*. Oxford: Oxford University Press.
- Kersch, Kenneth Ira. 2004. *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law*. Cambridge, UK: Cambridge University Press.
- Monahan, Torin. 2015. The Right to Hide? Anti-Surveillance Camouflage and the Aestheticization of Resistance. *Communication and Critical/Cultural Studies* 12 (2):159–78.
- Murakami Wood, David (ed.), Kirstie Ball, David Lyon, Clive Norris, and Charles Raab. 2006. *A Report on the Surveillance Society*. Wilmslow: Office of the Information Commissioner.
- Rotenberg, Marc. 2007. Louis D. Brandeis (1856–1941). In *Encyclopedia of Privacy*, edited by W. G. Staples, 72–76. Westport, CT: Greenwood Press.