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The Right to Privacy

Colleen Angel

> Thoughts, emotions, and sensations demand legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.
>
> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone"
>
> (Warren & Brandeis, 1890, p. 195).

Patterns of Ancient Laws

The right to privacy is a relatively newly recognized right in the recorded history of humankind. In a few pre-Christian law codes found from previous civilizations there was no mention of privacy (Hammurabi's Code, laws of the Hittites, Greeks, and Romans). Most of those laws seemed to deal with the regulation of commerce, retribution or recompense for murder, theft, adultery, incest, sodomy, and treason with some references to fornication, false witnessing, slavery, debt, and sorcery. Much of the aim of these early law codes seemed to be to establish/maintain accurate inheritance lines and compensation for injuries done. Since these were male-dominated, conquering, nomadic groups, the necessity of identifying true heirs was paramount. Thus the taboos

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on intergenerational incest and the usual practice of killing a wife found "with" another man.

Many law codes did not suggest the "eye for an eye, tooth for a tooth" of Hammurabi's Code. Instead the transgressor was legally bound to pay fees to those deprived of persons or property. People of means (generally men since women often could not own property) were not so much "above the law" as they were able to pay the price necessary to comply with the required fee structure. (The life of a free person would be worth twice that of a slave. Therefore, it made sense to take out bad temper on slaves. It cost less to compensate for them.) The term "blood money" referred to the practice of paying off the relatives of a murdered person. To forestall the usual human desire for revenge creating a continuing blood feud, many laws provided for a fine or fee to be paid to the king/ruler of the area (McWhirter & Bible, 1992). As noted in *Privacy as a Constitutional Right*,

> [A murderer] could pay a fee, called the "fredum," to his king, count or duke to buy protection. The amount of the payment was greater depending on the territory of the person providing the protection. Montesquieu believed this was the origin of the modern word "freedom." Montesquieu was writing about the relationship between morality and law, but he could find little among the ancient Germanic law codes that spoke to this issue. (1992, p. 25)

Thus, the concept of freedom at that time, even for an acknowledged murderer, depended only on "paying one's debt" to those injured and to the king/ruler/protector. Today we hear that criminals who have stayed in prison for the time sentenced have "paid their debt to society."

The replacement of "tribal law" by "common law" followed the adoption of primogeniture, which developed to ensure the continued rule of a given family in an attempt to stabilize societies and avoid bloodshed upon the death of a recognized "ruler." As nomadic invasion was replaced by integration of the conquering groups into farming/feudal societies, a "common law" began to develop in old England (and in some other European areas also, but England is the primary historical source of American law).

Roots of the current American "right to privacy" and many other "inalienable rights" may be traced to the Magna Carta (13th century England) which, perhaps for the first time in recorded history, guaranteed certain personal rights to all free men ("men" is used intentionally, as women were denied these same rights). These rights included, but were not limited to, the right to move about without interference from royal deputies, the right to have an elected group examine unfair practices in local, regional, and even some national royal governmental arenas, and (what eventually became) the right to trial by a jury of one's peers. Britain's Bill of Rights (17th century) became an additional forerunner to the Declaration of Independence, the American Bill of Rights, and the United States Constitution a century later.

Philosophical Roots of Individual Rights

Several philosophers have written about the "natural law" and rights that should exist simply because of man's abilities. John Locke's work encouraged a belief in man's abilities to discern what was best for each individual self. He wrote convincingly against the "God-given divine right of kings" in his *First Treatise of Government* using both logic and Biblical scripture to "prove" that each man has a right to self-determination and choice of government: "...men may put government into what hands and under what form they please" (Locke, 1947, p. 100).

Jean Jacques Rousseau concurred in his *Social Contract*:

> ...besides the public person, we have to consider the private persons who compose it [the group being governed], and whose lives and liberty are naturally independent of it. The point here is to distinguish properly between the respective rights of the citizens and the Sovereign ... and the natural rights which they [private persons] ought to enjoy in quality of men. (1947, pp. 27– 28)

Moreover, John Stuart Mill wrote a plea to limit both the tyranny of the government and the tyranny of the majority opinion:

> Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to ... prevent the formation, of any individuality not in harmony with its ways.... There is a limit to the legitimate interference of collective opinion with individual independence.... (1975, p. 6)

New Statements of a Growing Idea

From the Magna Carta and the British Bill of Rights, the founding fathers of the United States had both a will and a way to declare their freedom from a tyrannical system of government, and from the opinion of the Loyalists in America and the popular public opinion in England. The Declaration of Independence clearly stated their grounds for separation and self-rule, predicated upon a belief in pre-existing rights— rights that are inborn and able to be claimed by all.

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. – That to secure these rights, Governments...[must be] deriving their just powers from the consent of the governed.

The Constitution delineated how the government would be formed, and how it would operate within a system of checks and balances and be responsive to and controlled by the people/electorate of the Nation.

In an attempt to further define the limitation of rights held by governing bodies, and to retain all those held by the people, a Bill of Rights and several other Amendments to the Constitution were written. Although neither the Constitution nor the subsequent Amendments specifically name a "right to privacy" for U.S. citizens, many aspects of these writings make reference to rights that are guarantors of privacy. "Various Supreme Court rulings have held that the Constitution bestows on individuals some right of privacy in accordance with the First, Fourth, Ninth and Fourteenth Amendments" (Long, 1997, p. 26). In *Griswold v. Connecticut* (related to privacy and contraception) Supreme Court Justice William O. Douglas said this "right to privacy is 'peripheral' and 'penumbral' to, and 'emanates from,' various specific guarantees in the Bill of Rights" (Eastland, 1995, p. 91).

The First Amendment's separation of church and state assists to guarantee religious freedom. It also guarantees both free speech and freedom of access to information. Amendment Four protects against unwarranted search and seizure; the Fifth Amendment prevents forced self-incrimination; the Ninth Amendment says no listing of rights in the Constitution may be used to limit or "to deny or disparage others retained by the people." The Fourteenth Amendment directs State governments not to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor ... deprive any person of life, liberty, or property without due process of law...."

> A primary moral foundation for the value of privacy is its role as a condition of freedom. A shield of privacy is absolutely essential if one is freely to pursue his or her projects or cultivate intimate social relationships.... Thus there is a close relationship between privacy and freedom. (Long, 1997, p. 26)

Justice Douglas further wrote in his opinion on *Roe v. Wade* that "the Blessings of Liberty" referred to in the *Constitution* "includes customary, traditional, and time-honored rights, amenities, privileges, and immunities ... within the meaning of the term 'liberty' ... in the Fourteenth Amendment" (Eastland, 1995, p. 104). He also noted that the Ninth Amendment and the Constitution "encompassed" the following rights:

> First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality....
>
> Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.
>
> Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf.

In the opinion of the above writers and the considered legal opinions of these Supreme Court Justices, we have a right to privacy: *Griswold v. Connecticut*: Supreme Court Justices William O. Douglas, William J. Brennan, Arthur J. Goldberg, Byron White, and Chief Justice Earl Warren; *Roe v. Wade*: Harry A. Blackmun, Potter Stewart, William O. Douglas, and Chief Justice Warren E. Burger (Eastland, 1995). There can be no doubt that United States citizens have, and always have had, a right to privacy. Yet, the ability to keep this right intact is proving far more difficult than the "proof" that it exists.

Current Threats/Violations of the Right to Privacy in America

Although each person would probably prefer to have the right to privacy in his or her own life and experiences, it is instructive to note past and present attempts, as well as their outcomes, to curtail or encroach upon private life. In the past, abolition, prohibition, and Pro-Choice movements caused changes in state and federal laws and in society as a whole, each reversing common acceptance of some aspect of "private life." Certainly slavery's abolition was just and overdue — for how can one person's "unalienable rights" allow total disregard of another's in a "just" world or a democracy? Although many prohibition laws were later struck down, now most areas of the US do not allow driving while intoxicated for the safety of self and others. Anti-abortionists are still hoping for Supreme Court decisions that will invalidate or reverse the right-to-choose trend begun by *Roe v. Wade*. Some states are chipping away at this right in so called "partial-birth abortion" restrictive legislation.

Today, the right to privacy is being assailed in ways the founding fathers could not have imagined. The kinds of personalized "censorship" being practiced are more than just the Communications Decency Act proposal to prevent smut on the Internet (Rist, 1999). Today some US citizens (and the government they empower) want to tell others what Internet sites they can visit (Mayes, 1999), what all children will be taught in school (Thevenot, 1999), whether people can videotape programs in their homes (Frank, 1982), if they can take drugs at work or at home (Flynn, 1999), with whom (and in what manner) they can have sex (Coyle, 1999), whether they can have access to contraception (Baird, 1997) and sexual aids (Reeves, 1999), when and if they can have an abortion, and when and if (and how) they can choose to die (Forsythe, 1995). A current controversy is whether adoptees' "right to know" their parentage and genetic make-up should supersede the time-honored tradition of a guarantee of secrecy for birth parents who give a child up for adoption (Cloud, 1999; Clemetson, 1999).

The "Recent inventions and business methods" decried by Samuel D.

Warren and Louis D. Brandeis in 1890, which would "make good the prediction that 'what is whispered in the closet shall be proclaimed from the housetops'" (Warren & Brandeis, 1890, p. 195) have gone even further. Private citizens may see themselves on national TV without ever being asked for permission (Rosenberg, 1998), and/or even after permission is denied to use their private person and information — even though the taping was unauthorized, even after reporters were told it would cost the subject her job (Owen, 1995). Anyone in a story deemed "newsworthy" may be subjected to "hounding, harassing, intimidating and frightening" behavior from "journalists" (Slobodzian, 1996). This seems a bit worse than the constant hounding of celebrities (Riccardi, 1996; Garmisa, 1997; Waxman, 1996), since many believe "public figures" have less right to privacy because they are "of interest" to the public (Horn, 1998).

Also invasive actions by private citizens toward each other are becoming more common with secret videotaping of non-celebrities both in public places (Bowles, 1996; Dozier, 1993; Man, 1997) and in private spaces (Weymouth, 1993; Herman, 1992; Carlsen, 1990; Hensel, 1989; Fracassa, 1997; Nissimov, 1998). From men videotaping "upskirt" (Warren, 1998; Sink and Spice, 1998) and "downblouse" shots to sell to websites on the Internet, to ministers videotaping female parishioners in bathrooms (Harmon, 1996), public places are no longer "safe" from "video voyeurism." More disturbing are the cases where renters, neighbors, and friends are being videotaped by landlords, neighbors, and "friends" in their own homes—bathrooms and bedrooms—(McConnaughey, 1998) during all the normally private activities that take place in those rooms. Despite the right to privacy there are few specific laws against such action unless the subjects being videotaped are under the age of 18 (Smith, 1996), so many of these videotaping voyeurs are charged only with a misdemeanor or trespassing even if they have sold the tapes or shared the tapes with friends.

Other cases of videotaping occur in business settings, such as the taping of customers by clerks at American TV & Appliance stores—in a supposed effort to train clerks to be better service people (Ortiz, 1999; Mixtacki, 1999), on public streets (Marshall, 1999; Salkever, 1998) to deter theft and prostitution, and parks (Simpson, 1992) to correct "public indecency problems." Also, there has been illegal videotaping of inmates while they were with their attorneys at the Colorado State Penitentiary (Lane, 1997). Some states provide names, addresses, "place of employment and even photos of convicted sex offenders [on the Internet]..." (Ryan, 1999). Wisconsin's Sexual Predator Law is just one example of the right to privacy being "revoked" for certain citizens.

Businesses like Boston's Sheraton Hotel (Lewis, 1993; Blanton, 1998) and K-Mart (Zalud, 1993) are invading the privacy of their employees with secret videotaping (Zachary, 1998) in areas where clothes are changed as well as small

employers videotaping in restrooms (Woman, 1995). A survey done in 1997 revealed more than a third of employers use "electronic surveillance" to monitor employees, such as "listening to employees' phone calls or voicemail messages, reading electronic mail or computer files and videotaping the way workers perform their jobs" (Silverstein, 1997; Lissy, 1993).

In addition to private citizens and municipal or prison officials invading the privacy of American citizens there is a "business" of providing information about the general citizen (Rothfeder, 1992; Lowry, 1999) to financial lenders, organizations (Shelton, 1999), business (Meeting, 1999) and advertising concerns (Fleming, 1986), and sometimes anyone (Jones, 1999) who demands it or is willing to pay for it. This can include generally available information such as addresses and phone numbers, or individual/private data including social security numbers (License, 1999) and drivers license photos (Sale, 1999). It can come from a state's motor vehicle department (Cobb, 1999), from a phone company, or from electronically collected data from using banks (Thompson, 1999; FDIC, 1999; Barancik, 1999), computers (Katz, 1999; Opel, 1999), and/or plastic cards for identification. Intel's new computer chip (Hachman, 1999; Clausing, 1999) has an "identification feature [that] gives computers a sort of fingerprint that Intel says adds security to online activities..." (Van Slambrouck, 1999; Bradner, 1999). Intel changed this feature in response to the outcry from privacy advocates and the general public. Finally, Wells Fargo is fingerprinting people who come in to cash a check (Levine, 1999).

Another front where privacy is under attack is the medical records and materials arena (Blood Feud, 1999). People fear that genetics of "vulnerable families ... will be used against them by insurers and employers..." (Schmickle, 1999). Michigan law requires "health professionals to submit blood samples of all newborns to the state." It has been suggested that these samples be "permanently" preserved. And there is an increased interest in creating DNA databases. "Now, there is a major push to massively expand DNA testing to everyone arrested, regardless of the crime ... or whether they are convicted..." (Willing, 1999). Is mandatory provision of DNA data at birth the next step?

Although many people support the violation of criminals' rights to privacy, New York Judge Allen Schwartz has stopped a New York City "Perp Walk" where suspected "perpetrators" are paraded in front of the news media before they are charged, let alone convicted (Judge, 1999). Using another "criminal" excuse the FBI is attempting to broaden its "legal" ability to wiretap (Hanchette, 1999; Loeb, 1999). Sometimes people forget that what is lost to one may be lost to all: the slippery slope appears to be getting much slicker in the information age.

Many books, pamphlets, and websites encourage individuals to be wary about giving out personal information by phone, on the Internet, or in any

fashion (Givens, 1997; Alderman, 1995; Rothfeder, 1992). The less you tell organizations and businesses about yourself, the less likely it is that someone can steal your identity. Some organizations have websites to help people who want more information on what can be done (and is already being done) to protect the right to privacy. Some are well-known, nationally recognized like the American Civil Liberties Union (*http://www.aclu.org*), the Electronic Frontier Foundation (*http://www.eff.org*), the Electronic Privacy Information Center (*www.epic.org*), and the Voters Telecommunications Watch (*http://www.vtw.org*). These and others offer ideas and forums for those citizens who would like to guard their own privacy and help to prevent the erosion of privacy in general (Safire, 1999).

Is There Hope That the Right to Privacy Will Survive?

The Right to Privacy can be maintained if US citizens and their Supreme Court judges are willing to stand up for it (Blackmun, 1999; Leonard, 1999), to guard it against further violations (Lissy, 1993), and to shore it up where it has begun to crumble (Slobodzian, 1996; Tevlin, 1999). Attempts to maintain the right to privacy are ongoing, and fortunately there are groups that dedicate themselves to helping citizens recognize potential right to privacy violations. The Electronic Privacy Information Center is one such organization. Joined by Junkbusters and the Electronic Frontier Foundation it "took on" Intel by boycotting Intel's overly eager monitoring of computer users by installation of the new Pentium III chip in computers to allow "fingerprinting" of the individual processor. It is, according to Intel, "intended to enhance the security of electronic commerce and safeguard against software piracy" but, according to privacy advocates, the chip "would make it easy for on-line marketers, even governments, to track people on the Internet" (Clausing, 1999). It has been suggested that the ID in the chip could be "stolen" and used as a Social Security Number type of unique identifier, making another way for identities to be stolen and unwary consumers to be victimized. Businesses need to pay attention to how they handle personal information (Schick and Schick, 1998). The ethical choice is the right choice (Lowry, 1999).

One of the best ways to ensure the right to privacy in American society is to maintain strong ethical conduct codes for professions that deal with personal information (financial, medical, government, business, computing, etc.). Many professions already have well-developed codes of ethics (which include privacy rights) as delineated by professional organizations and associations. Some of these include the Code of Professional Ethics of the American Association of University Professors, the ALA Code of Ethics of the American Library

Association, the ACM Code of Ethics and Professional Conduct of the Association for Computing Machinery, American Society for Information Science Professional Guidelines, American Society for Public Administration Code of Ethics, and the Hippocratic Oath of the medical profession. Other occupations have ethical guidelines as signified by the Oath of Office taken by those who serve in elected and appointed positions within the different levels of government. In cases of misconduct or illegal activities, lawyers can be disbarred, doctors can lose their license to practice medicine, political personages can be censured, and presidents can be impeached.

In each arena, standards are set by the development and professional acceptance of and the adherence to ethical codes of conduct. When these standards are violated each profession must correct its members who are in violation. By educating members (and the general public) and taking internal corrective measures with members when needed, professional organizations shape the public's expectations and the behavior of their members. If invasion of privacy occurs, the reference points of expected conduct and censure encourage the legal system to follow professional ethics guidelines, which show what can reasonably be expected of members of a profession. Professionals must educate the population in what to expect from them, and when to challenge questionable conduct and practices. Professional organizations and consumer advocate groups can help with this educational process. It is important for people to recognize that a right not exercised is more easily lost.

Together, professional organizations, the press, and informed citizens must monitor governments' actions – bills proposed, laws passed, actions taken. The recent FBI proposals for increased wiretap and electronic surveillance rules have drawn fire from the ACLU, the EFF, and EPIC. They have filed "a formal comment with the FCC, urging rejection of the FBI's proposed rules" (Hanchette, 1999). These are explanations of the ideas contained in the FBI's proposals:

> One would enable law enforcement agencies to track the location of individuals through usage of their own cellular phones.
>
> Another would let police agents continue wiretapping a telephone conference call — even after the individual for whom the original court order was obtained hangs up.
>
> A third would allow federal agents to capture and retain digits punched during a long distance call — even if they have nothing to do with the call's destination, and even if they contain sensitive computerized financial or personal information sent through after the call is routed. (Hanchette, 1999)

Further inroads on privacy have been suggested by the FBI that would allow "new provisions for obtaining business records and tracing telephone calls amend[ing] a little-known statute called the Foreign Intelligence Surveillance Act (FISA)" (Loeb, 1999). FISA permits secret warrants to be issued against

"terrorist suspects" without the usually required need for "intent." The FDIC's "Know Your Customer" proposal was presented as an anti-laundering measure. It would have required tellers in banks and other financial institutions to keep track of customers' spending habits and report "unusual" transactions to authorities (Barancik, 1999).

In this endeavor the "free press" is an important partner since without the knowledge of ethical standards and their violation, there can be limited success in monitoring government for lapses in standards. Supreme Court Justice Hugo Black wrote the following in response to the Pentagon Papers trial — the Nixon government's attempt to silence the *New York Times* and *Washington Post*:

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. (Harrison and Gilbert, 1996, p. 39)

Since government sets the legal standards and passes the laws, but exists by the consent of the governed, the legal system should respond to citizens when they are united in their intent and demands.

The government also has suggestions for the press on ethical standards. In the August 1998 issue of *OVC Bulletin*, the U.S. Justice Department suggests that

> The news media should adopt codes of ethics or guiding principles that clearly delineate policies sensitive to and respectful of crime victims. These guidelines should include policies that discourage the identification of victims of sexual assault and other vulnerable victims, including children, without the victim's consent.
>
> News organizations, victims, and victim-serving providers should sponsor frequent educational forums for journalists on sensitive media coverage of crime and victimization. (pp. 4–5)

In the search for privacy and the attempt to safeguard individual information some government agencies already have to deal with the question of how much information about individuals to allow others to access. The Society of American Archivists is attempting to create better and clearer guidelines on how personal information may be accessed and for what purposes:

> ...archivists are charged with the responsibility to safeguard the integrity of the records in their custody — a responsibility that carries with it an implicit

> obligation to protect the integrity of particular relationships between citizens and their government to which the records bear witness and to intercede on behalf of record subjects in the administration of access to such records.... [T]he archivist has the immediate responsibility for maintaining rigorous standards in the protection of personal privacy on behalf of persons who may be unable to assert their rights—because they are legally incompetent to do so (children, institutionalized persons) or because they are unaware that records involving them have been transferred to an archives. (MacNeil, 1992, p. 174–175)

Conclusion

Many people, organizations, businesses, and professionals are interested in maintaining and reclaiming the right to privacy as an "unalienable right." What is needed is a balance between privacy and safety, between information for the sake of "news" stories and preventing more distress to crime victims, between access for access sake and purposeful, ethical use of information about individuals, between freedom and responsibility, in both professions and individuals.

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