Privacy, publicity and security: the American context

Privacy is not only a right but also an obligation

Irving Louis Horowitz

When talking about privacy, one could take the easy route and simply refer to the dictionary definition that it is the state of being secluded from the sight, presence or intrusion of others. This is obviously too broad a notion to be of any use in the real world. And if that definition really were accurate, the USA would not see its cultural elites and its political system embroiled in debates about the problem of privacy as it relates to publicity. This is evident not only in the ongoing criticism of the PATRIOT Act, which allows federal law enforcement agencies to collect private information on citizens for the sake of national security, but also in the debates on whether private companies can collect and share financial, medical or consumer data, or can track individuals' access to websites. The issue is not so much the right of privacy at one end or the need for publicity at the other, as it is the best way to balance private interests and public needs.

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Another concept of privacy entails the notion of personhood, which is implicit for carving out a private realm secluded from others and society as a whole. The status of slaves and serfs is defined, in part, precisely by an absence of any right of privacy—that is, a realm exempt from the

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purview of their owners and masters. In more recent times, a woman's right to have an abortion has been framed in terms of her right to privacy in matters of personal morality. In short, privacy is inherently an ethical concept that is understood to represent something other than an individual's obligation to show and tell all. In this sense, the private also implies the secret, which an individual may share at his or her discretion with a select few, rather than with society as a whole. As a result, the American public is engaged in a fierce struggle over the right of a person to make independent decisions versus the right of society to know about that person and those decisions for the sake of national security, or the rights of corporations and other enterprises to collect this information for marketing purposes.

The first ten Amendments to the US Constitution, also known as the Bill of Rights, did not resolve the issue of the rights of an American citizen to privacy by restricting public admission to private dwellings—"the right to be left alone", as Justice Louis Brandeis stated in the context of refusing to participate in civic events or patriotic activities (Brandeis, 1928). The three Amendments that put an end to slavery—the thirteenth to the fifteenth—did much to establish the right not only to political participation, but also to personal non-participation. It did this almost inadvertently,

as an afterthought, by guaranteeing full personhood to all Americans whatever their racial backgrounds, as only a person could claim the privilege of privacy. It could never inherently be a condition of a corporation, for example, which might have secrets and other information that it does not want to share with external groups. Privacy is a privilege of personhood, which in turn is a right of citizenship.

Perhaps the most extreme presentation of privacy as an absolute right is described by Ayn Rand in *The Fountainhead*, a book much vilified by the literary class and much read by everyone else. Rand's hero says, "Civilization is the progress toward a society of privacy. The savage's whole existence is public, ruled by the laws of his tribe. Civilization is the process of setting man free from men" (Rand, 1943). At the other end of the spectrum is the Deweyan notion of a civilization, which regards social benefits as an absolute right and strives for the public good. By binding a community or a society into a whole that is greater than the private person, John Dewey sought to realize a higher civilization that recognizes the unevenness of human evolution. In his vision, the need for public interaction pre-empted the issue of privacy, by allowing each individual to contribute his or her specific qualities and talents to improve society and

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make it function properly (Dewey, 1929). Indeed, so thoroughly is American society infused with this pragmatic sense of the public good that, in a speech in New York City in 1933, the Irish writer George Bernard Shaw noted, “An American has no sense of privacy. He does not know what it means. There is no such thing in the country” (Shaw, 1933). Allowing for dramatic exaggeration, it is clear that the issue of the private versus the public good is deeply enveloped in the search for collective security as the embodiment of a good society.

Visions of both the private and the public are built into the fabric of the American Constitution. The rights and duties that belong to the sphere of the public—that is, the state—are well known: everything from coining money, to establishing and running post offices, regulating commerce and maintaining national defence and security. However, those who framed the Constitution were so disquieted by this emphasis on public rights and obligations that their first ten Amendments, passed in 1791, provided a veritable Bill of Rights—that is, rights reserved for the private person.

In this respect, no Amendment is more forceful or elegant than the Fourth. It plainly states that “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The sticking point comes when searches and seizures are less direct or physical, and are more as a consequence of information management—such as when private information is plucked from websites or when institutions or corporations sell private information about their customers or employers to interested third parties (Bork, 1990).

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Even this less direct intrusion into what are considered private matters is not entirely a new concern. The first US nationwide census in 1790—and here it might be duly noted that the Amendments to protect privacy were ratified one year later—raised issues as to who is to be counted, and in what sort of proportion. Would slaves count as full persons or as three-fifths of a person; would masters count as one or, if landholders, more than one? These issues, far from disappearing over the years, have only grown, albeit in different contexts—and not always in a peaceful manner. Long after the Civil War ended, bitter struggles revolving around poll taxes continued to plague the struggle for equal and full citizenship; the claim was made that taxation, in one or another form, was a necessary demonstration of citizenship responsibilities. The public issues we talk about today are as old as the nation itself but, at the same time, as young as the new millennium. Various reports have indicated that employers are giving millions of employment and salary records to outside companies, which share the data with landlords

and other interested parties (Baig *et al.*, 1999a,b). Large companies, such as the drugstore chain Walgreens (Deerfield, IL) and the airplane maker Boeing (Seattle, WA), have been so inundated with requests from bankers and landlords that they have hired firms specializing in employment verification (Markoff, 1999a,b). These firms have quietly amassed more than 28 million records, covering one-fifth of the American workforce. The concern for privacy has thus moved from the dusty realm of legal theory to the glare of public interest.

However, instead of laying a theoretical groundwork for the social bases of this breakdown in privacy, our political leaders and their academic acolytes have conflated the issue into a need for legislative relief. As we enter the latter half of the first decade of the new millennium, the national legislative agenda lists the following ten pending 'acts': Financial Services Act, Financial Information Privacy Act, Personal Privacy Protection Act, Integrity in Voter Registration Act, Freedom and Privacy Restoration Act, Consumer Intent Privacy Protection Act, Collections of Information Anti-piracy Act, Patient Protection Act, Fraud Protection Act and Transportation Equity Act. One shudders to think what the coming years will bring, as each of these proposed pieces of legislation will inevitably enlarge federal bureaucracy. Either a new agency will be created, or there will emerge new divisions of established agencies. Such mandating of privacy from above abolishes even the most remote sense of personal choice and responsibility.

We thus enter the present situation, in which privacy is guaranteed not by personal behaviour but by federally mandated legislation. What this contradiction in terms highlights is that adding legislation and bureaucracy does not change the basic problems of civilization and society. It does, however, compel more serious thinking on how the rights of the individual—in particular, the right for privacy—come up against the demands of the public. As classical Greek philosophy pointed out, technology advances by leaps and bounds; morality advances very slowly, if at all. Thus, we are faced with a growing disparity between invention, innovation and discovery in the material, scientific realm, and the desperate clutching of the individual in the spiritual realm.

Let me emphasize that I do not intend to advocate a Manichaeian struggle between the private and the public, or the social and the personal. But it seems evident that all is not well in this larger realm. Americans, and all those who partake in the new worldwide information age, live in a world in which parallel rights are constantly articulated. However, the search for a sense of parallel obligations is bogged down in a series of national and cross-national legal bottlenecks (Moore, 1997).

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In this climate, a polarization of American public opinion is inevitable. On one side, we have those who view the Internet as a direct assault on privacy. Among the starkest and most hyperbolic critics is Amitai Etzioni, who argued that "Nineteen eighty-four is here, courtesy of Intel, Microsoft, and quite a few other corporations" (Etzioni, 1999). Etzioni went on to urge for the establishment of a legally binding international regulation of privacy that would hold "that any personal information about the citizens of its member countries cannot be used without the citizen's consent". Joining this chorus of those who would "liberate cyberspace" are Simon Davies and Ian Hosein, who claim that "liberty [itself] is on the line" (Davies & Hosein, 2000). From their vantage point, the struggle is between privacy-enhancing technology rather than technologies of control. As we are not told how such technology can enhance privacy instead of control it, we are left with a sentiment rather than a new science. However, it is clear that concerns over the effects of invasive communication technologies on individual privacy are deep and widespread.

On the other side are those who argue that privacy may be more perilous than the lack of it, under given circumstances. Because serial numbers are now built into Pentium silicon chips, computer hackers who create virus elements are more readily apprehended than in the past. Furthermore, electronic identity is important for providing location information to the Federal Communications Commission,

and above all, for supplying information on the history of patients with cardiac and cancer ailments to the appropriate medical personnel. Instead of starting *de novo*, a medical team can simply consult medical records, which can save not just time, but also lives. Patient data, when collated, can also establish epidemiological patterns that advance the cause of medicine or public health in general. However, without better knowledge of the technology in question and its use, the consumer is largely left alone to balance the risks and benefits of giving up some privacy to gain information. Internet users are unnerved by the ability of Intel to track web surfers through the identification of codes on their new Pentium chips, but they are also unwilling either to relinquish or to pay for the information flow that comes from such services as Google and Wikipedia. The computer age has not changed the character of ethical issues, but it does give current discourse a new shape and a new dimension that adds a note of concrete pressure to find specific answers (Ermann *et al.*, 1997; Glotz & Bertsch, 2005).

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What we witness at the level of public opinion is a desire for privacy but, at the same time, a demand for maximum access to information. From computers to cellular phones to digital video players, everyday devices and software programs increasingly embed tell-tale numbers that let them interact. Whether such digital developments constitute a threat to privacy or are simply a characteristic of advanced computer systems is a matter of debate. One problem is that constitutional safeguards against the physical invasion of a person's home or office are difficult to extend to privately used computers. However, the newest thinking is that the computer is itself its networking capacity. Jonathan Schwartz, the president of Sun Microsystems (Santa Clara, CA, USA), spoke about this condition directly in his weblog. "As strange as it may sound, consumers are way ahead of most enterprises when it comes to using grids (and paying for them). Most of us live on the

grid at home—we use Google and Yahoo!, we love eBay, we upload and share photos and movies, and gather our news from various sources on the web. Most of us bank from home, we leverage network email services—and if you think about it, that transformation all occurred within the last decade” (Schwartz, 2006). His point is that the hardware manufacturers of computers, rather than the end-users, are dragging their feet—partly in doubt and no less in fear of the legal and moral environments being created (Schwartz, 2006; Johnson & Nissenbaum, 1995).

Among these polarized options and visions, I argue that we need fine distinctions instead of crude journalistic jeremiads. At this stage, the technology must be able to distinguish between national security needs and personal anonymity, between corporate needs and personal identity, and between corporate mergers and group privacy. For example, a bitter struggle ensued when Barnes & Noble proposed to purchase the Ingram Book Group, which would have given them access to Ingram’s sales data of independent bookselling competitors. This could have allowed the chain to stock its stores with popular books that might be in short supply, while forcing a competitor such as Amazon.com to wait for delivery of the same title. In this case, both parties ultimately backed away from the merger, realizing that, either through court action or public opinion, this sort of monopolization of ideas would have been thwarted. Such dangers of monopolization can be multiplied tenfold depending on the industry involved. But the point is the same: group privacy or ‘huddling rights’, no less than personal privacy, may be eroded by the Internet and a variety of information resources. The erosion of privacy is not simply a matter of individuals, but spills over into the nature of business as a whole.

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Thus, we need the following: a conceptual map to distinguish between national security and personal anonymity; measures of corporate needs versus personal identity; and corporate merger requirements that do not intrude on group privacy,

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as in the struggle between chain stores and individually owned stores. In a democratic society, there is no simple solution to resolve the conflicts between public interests and personal claims—they are constantly mediated and refined. Indeed, the greatest danger is a final resolution that ultimately could result either in some form of dictatorship at one end or anarchy at the other. Instead, we should rely on the common proceedings in a functioning democracy to hold both state and society in check. It is therefore encouraging to see that in the 2006 revisions of the PATRIOT Act, provisions were added to protect the right of privacy and to minimize invasion of random searches in public archives no less than in private dwellings.

In this dynamic and unstable situation, we are left with social preferences rather than demands for more legislation or policies. My own preference is towards strict constitutionalism: to leave to private citizens all those rights that are not explicitly stated as belonging to the state or government. In this, we should remember that the US Constitution does not explicitly grant the people all those rights by law. This may be a parochial reflection on American legal tradition, but I suspect that in every open society, one can find similar precedents. My great fear is not so much an autocratic government encroachment, but a voluntary surrender of privacy as an individual right. The spate of unchecked television and literary mannerisms in which people continually reveal their most personal sexual and social habits is an indicator of such a situation, one that harkens back to Rand’s fears of savagery and Shaw’s unnerving observations on America.

Alexis de Tocqueville long ago pointed out in *Democracy in America* a difference between Europeans and Americans: the reticence of the former to speak freely for the record, and the willingness of the latter to give their opinions on a wide range of issues, even those of which they know little (de Tocqueville, 1835). Today, not only tendering opinions but also baring personal narratives in public places has become a problem. The endless stream of television programmes that feature self-revelations of sexual preferences and longings, marital breakdowns and

extramarital affairs move America from merely registering public opinion into expressing in public what in all past eras would have been viewed as sacrosanct and privileged. In part, the English tradition, or what is left of it, of a high wall between the public and private has broken down. In part, too, such public expression of private woes is an expression of dissatisfaction with the rewards of the private, non-expressive life. I suggest that it is time to recognize limits to this openness. The high wall of separation between the private and the public is itself a protection of liberty. The habits and customs of individuals, even more than juridical and legal safeguards, are the best defences of privacy against incursions of presumed public needs in the cyberspace age.

Privacy issues, elevated to a fever pitch by the infusion of technology bonded by networking, will sink back into a secondary realm when individuals recapture the first principles of classical ethics and constitutional law. The founding fathers—James Madison, Alexander Hamilton and John Jay—who co-authored *The Federalist Papers* had it right: this is not a question of choice, either for privacy or for publicity, but of safeguarding the person while extending the realm of information and knowledge. In this, as they freely acknowledged, they were following the precepts of the Hebrew Prophets. As God reveals and conceals, so human beings disclose and withhold. Taken to one extreme, privacy results in total isolation and denies the social bases of human existence. At the other extreme, unlimited communication and the end of privacy leaves the human subject depleted of self and of personality. Both unbridled solipsism and pure collectivism are forms of spiritual decay. The tensions exacerbated by new information technology illustrate the strains of maintaining some balance in the USA between national security and personal freedom. Seen in this light, information technology is another classic case of advances and breakthroughs that can be used for constructive or destructive purposes (Katz, 1999, 2003). The terribly slow pace of ethical responsibility for self and others, rather than the amazingly fast pace of information technology, needs closer examination. Although the content of the privacy versus publicity debate is universal and long-standing, its security context has become uniquely, and one might add, peculiarly Americanized.

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Irving Louis Horowitz is author of *Communicating Ideas* and major articles on this subject in the *Journal of Information Science*, the *International Social Science Journal* (UNESCO), and *Knowledge, Technology & Policy*. His most recent work is *Soziale Ideologien und politische Systeme*. He is chairman of the board of directors of Transaction Publishers, and Hannah Arendt Distinguished University Professor Emeritus of Sociology and Political Science at Rutgers, The State University of New Jersey, New Brunswick, NJ, USA.
E-mail: ihorowitz@transactionpub.com

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