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MR. WEMMICK’S CONDITION; OR, PRIVACY AS A DISPOSITION, COMPLETE WITH SKEPTICAL OBSERVATIONS REGARDING VARIOUS REGULATORY ENTHUSIASMS

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I. IN WHICH WE MEET MR. WEMMICK	1
II. A FAMILY AFFAIR	3
III. FROM HOUSEHOLDS TO PERSONS.....	5
IV. NOSY PRESS, NOSY STATE	7
V. PEOPLE’S EXHIBIT A: CONTRACEPTIVE JELLY.....	13
VI. ENFEEBLED FAMILY, POWERFUL STATE	15
VII. ANXIOUS EXHIBITIONISTS.....	19
VIII. TRANSPARENCY AS VIRTUE	22
IX. AN OCEAN OF DATA.....	26
X. A TRIO OF BAD IDEAS	30
A. <i>The “Privacy Commons”</i>	30
B. <i>Anonymity as Privacy</i>	32
C. <i>The Right to Be Forgotten</i>	34
XI. REGULATING THE FLOOD	38

I. IN WHICH WE MEET MR. WEMMICK

“The office is one thing, and private life is another,” Mr. Wemmick instructs young Pip in Charles Dickens’ *Great Expectations*. Law clerk and factotum to the chancery lawyer Jaggers, Wemmick is a professional cipher, rendering unto Jaggers the services due an employer and keeping to himself his

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soul and private doings. He's the personification of privacy, showing us the regimentation of working life, its control by others, and its sharp separation from the private realm. On this occasion, however, Wemmick has invited his young colleague home for a meal to his tiny house. His "Castle," as he calls it, is surrounded by a moat which, though a mere two feet deep, marks an unambiguous perimeter in physical and spiritual space and is never breached except when Wemmick lowers a drawbridge to depart for work in the morning and again when he returns in the evening. From his roof every night at nine o'clock sharp, he fires a small cannon in an unvarying ritual, to the unbounded pleasure of his aged and mostly deaf father, whom he supports. "When I go into the office, I leave the Castle behind me," Wemmick instructs Pip on the long walk to his sanctum sanctorum, "and when I come into the Castle, I leave the office behind me. If it's not in any way disagreeable to you, you'll oblige me by doing the same. I don't wish it professionally spoken about."¹

Where did this rigid separation of working life and family life come from, and where did it go? Aristocratic society was always characterized by pride, honor, and reserve, but Mr. Wemmick was no aristocrat, and his outlook was not a feature of aristocratic society, because aristocrats didn't work. Nor was it characteristic of the working class, if only because the crowded conditions of working class life, in which much living took place in common or on the street, would not permit it. Mr. Wemmick's reserve was decidedly middle-class, and it represented the high-water mark of private, and especially familial, resistance to the intrusive demands of institutionalized life, commercial and otherwise. The public and the private realms of our lives create and define one another,² and our language reflects that relationship.³ Georges Duby, co-editor of the landmark study of European private life since Roman times, described privacy as a "zone of immunity" and of secrets that "belong only to ourselves, which concern nobody else, and which may not be divulged or shown because they are so at odds with those appearances that honor demands be kept up in

¹ Charles Dickens, *Great Expectations* (London: Penguin Books Ltd, 1996), ch. 25; 1st ed., London, Chapman and Hall, 1860-61 in 3 vols. Whatever his other idiosyncrasies, Wemmick's clear separation of work and home in both space and spirit was not one of them. The separation was a Victorian model. E.g., "[The shopkeeper] opened the door which led from the shop, and closing it behind him, found himself in the most snug and comfortable of sitting rooms, where his pretty wife and fine curly headed boy of some three years old hailed his entrance with delight." [Frances Mary Sibthorpe], *Home Is Home: A Domestic Tale* (London: William Pickering, 1851), p. 4, at Google Books, http://books.google.com/books?id=07ABAAAAQAAJ&printsec=frontcover&dq=editions:Ulx8Zgm3WX8C&hl=en&sa=X&ei=_uSOUL_mKfSa0gHrxIDYQC&ved=0CC0Q6wEwAA#v=onepage&q&f=false, accessed October 29, 2012.

² See, e.g., Duby and Ariès (eds.), *A History of Private Life*, v. 1 (*From Pagan Rome to Byzantium*, "Foreword" by Duby, (Trans., A. Goldhammer) (Cambridge: Belknap Press, 1987), p. viii.

³ The first among many definitions of "private" in the Oxford English Dictionary is, "Restricted to one person or a few persons as opposed to the wider community; largely in opposition to *public*."

public.”⁴ David Flaherty, the historian of privacy in colonial New England, put it this way: “The last resource of the individual is that no one can force him to bare his personality and expose his naked self to the shame of total understanding.”⁵ Deeply as we feel this, locating the boundaries of privacy and specifying the legal and social rights and obligations they imply remain elusive in both law and philosophy.⁶

We use the word to mean many things, never more so than now. Privacy refers to solitude, but also to intimacy; to personal secrets, but also to whatever is owned by individuals as opposed to the state, including premises open to the public; to protected space, or simply to whatever is not public. Applied to persons, it implies reserve and therefore boundaries and distinctions. More recently privacy has been identified with anonymity, while at the same time an increasing number of people, especially advocates of strict data regulation, equate privacy with an asserted right to control information *after* we choose to release it, often widely. Indeed, the latter meaning is what “privacy law” has come to be chiefly about. This is a tectonic shift. It cuts the cord between privacy and familial life as personified by Mr. Wemmick and between privacy and secretiveness, let alone modesty, in both personal and business life. In its more radical formulation proposed by the European Commission, “privacy” regulation would also uncouple behavior from reputation, as if one should be able to conduct one’s affairs publicly (and badly) without consequence. Mr. Wemmick would have been bewildered by these policy prescriptions. Indeed he would have been bewildered by the notion that privacy was a fit subject for law and policy at all. We will come to law and policy in due course, but first, let’s turn the looking glass back on ourselves, over a long time, and watch this fundamental, elusive, and unstable concept evolve.

II. A FAMILY AFFAIR

For centuries privacy was a household and family affair, not an individual concern and certainly not an individual right. Families, not individuals, were the unit of production in rural societies, and also in towns and cities until well into the Industrial Revolution. In most cases, the family was an individual’s only bulwark against cold, hunger, and privation of every kind, and the home was the chief bulwark against agents of the state. Persons living alone – that is, beyond the reach of “family government” – were rare for practical as well as moral reasons and were associated with sin and vagrancy. In Connecticut, every legal code before 1750 forbade solitary living.⁷ “In the little towns of

⁴ Duby and Ariès (eds.), *ibid.*

⁵ David H. Flaherty, *Privacy in Colonial New England* (Charlottesville: University of Virginia Press, 1972), pp. 3-4.

⁶ For a summary of philosophical positions on privacy, see *The Stanford Encyclopedia of Philosophy*, at <http://plato.stanford.edu/entries/privacy/>, accessed November 10, 2010 (“historical use of the term is not uniform, and there remains confusion over the meaning, value and scope of the concept of privacy.”)

⁷ Flaherty, *Privacy in Colonial New England*, p. 176-178.

Massachusetts ... there was no place of privacy, no time of a man's life when he could rest secure from scrutiny."⁸ Houses were shared family spaces with little or no personal privacy. Flaherty reports that the average house in Essex County, Massachusetts between 1638 and 1664 had 3.3 rooms and that crowding among the poor was severe. Floors and walls were often unfinished, with knotholes and cracks that served as peepholes. We know this from early court testimony of naked thighs, dropped trousers, and illicit sex.⁹ For the most part, offenses committed in private were also punished in private. Children taken to court, for example, were released upon the father's testimony that he had corrected the offense. Alternatively, courts would sentence offenders, "being under family government," to whatever punishment the parents saw fit to mete out.¹⁰

In Europe, too, privacy was a household and not an individual right. "If private life meant secrecy," observed Duby, "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."¹¹ This was true of the wealthy as well as the rest.¹² In Paris in the early seventeenth century, the royal architect to Henry IV "lived with his wife and seven children, and an unrecorded number of servants, in two adjoining rooms." Houses of the great were designed with rooms *en suite*, flowing one into another in sequence without corridors.¹³ In Europe as well as North America, a person who left the protection of this familial enclosure, or a monastic equivalent, "immediately became an object of either suspicion or admiration, regarded as either a rebel or a hero and in either case considered 'foreign' – the antithesis of 'private.'"¹⁴

⁸ Ibid., p. 8, n. 17, quoting Michael Zuckerman, *Peaceable Kingdom: New England Towns in the Eighteenth Century* [New York, 1970], p. 116.

⁹ According to a Maine court record from the 1690s, "Elizabeth Cresy loockt into a Crak and She See dot [Dorothy] upon hir Back and hir coats up and She saw hir thighs and His Breeches down and Laying upon hir and hir hands about his nek and forder seth not." Flaherty, *Privacy in Colonial New England*, p. 43, citing *Maine Ct. Rec.*, IV, 46.

¹⁰ Ibid., p. 58 at n. 27, citing various court records.

¹¹ Georges Duby and Philippe Braunstein "The Emergence of the Individual," in Georges Duby and Philippe Ariès (eds.), *A History of Private Life*, v. 2, *Revelations of the Medieval World*, (Trans., A. Goldhammer) (Cambridge: Belknap Press, 1987), p. 510. See Michelle Perrot, "Introduction," in Perrot, Michelle, ed. *A History of Private Life*, v. 4 (Cambridge: Harvard University Press, 1990), A. Goldhammer, Tr., p. 9, stating that personal privacy was understood in "a familial and spatial sense" through the Eighteenth Century.

¹² Ariès, Philippe, *Centuries of Childhood: A Social History of Family Life*, R. Baldick, Trans. (New York: Alfred A. Knopf, 1962), originally published as *L'Enfant et la vie familiale sous l'ancien régime* (Paris: Plon, 1960), p. 398:

"The historians taught us long ago that the King was never left alone. But in fact, until the end of the seventeenth century, nobody was ever left alone."

¹³ Witold Rybczynski, *Home: A Short History of an Idea* (New York: Viking Penguin, 1986), pp. 96, 41.

¹⁴ Georges Duby and Philippe Braunstein "The Emergence of the Individual," in Georges Duby and Philippe Ariès (eds.), *A History of Private Life*, v. 2, *Revelations of the Medieval World*, (Trans., A. Goldhammer) (Cambridge: Belknap Press, 1987), p. 510.

The foundation of life inside the boundary was mutual trust,¹⁵ not only among family members but also servants who were, so to speak, resident aliens in the closed circle. Servants overheard domestic talk, emptied chamber pots, and washed the bed sheets; they knew secrets.¹⁶ As one young servant testified in a Massachusetts court in 1657, “I beinge his servant I am privie to some things.”¹⁷ Consistent with the closed circle, a marriage supposedly created a unity: At common law “a man and wife were one” – though as the law school joke went, the man was the one. At the founding of the American Republic, married women still had no property rights.¹⁸ What they owned was household property, controlled by their husbands. The law protected the household. The Fourth Amendment guaranteed “[t]he right of the people to be secure in their persons, houses, papers, and effects.” But papers and effects were mostly kept in houses. The Supreme Court held in the 1886 that the core virtue was protection of “the sanctity a man’s home and the privacies of life.”¹⁹ More than a century later, the Supreme Court again declared that “the very core” of the Fourth Amendment was “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”²⁰ Similar values are reflected in Article 8 of the European Convention on Human Rights: “Everyone has the right to respect for his private and family life, his home and his correspondence.”²¹

III. FROM HOUSEHOLDS TO PERSONS

Moving the focus of protection from the family to the individual took centuries and has been fully realized only in our lifetimes, owing chiefly to three deep cultural shifts: a conception of selfhood that owed much to Protestant theology; increased wealth that permitted changes in domestic architecture; and the decline of the family as an economic unit and simultaneous growth of the state.

¹⁵ Duby and Ariès (eds.), *A History of Private Life*, v. 2, p. 8.

¹⁶ “Privy to the secrets hidden in the finest linen, the château’s washerwoman was an abundant source of information and enjoyed a special prestige in the village.” Michelle Perrot and Roger-Henri Guerrand, “Scenes and Places,” Perrot, Michelle, ed. *A History of Private Life*, v. 4, *From the Fires of the Revolution to the Great War* (Cambridge: Harvard University Press, 1990) (Trans. A. Goldhammer), p. 488.

¹⁷ Flaherty, *Privacy in Colonial New England*, p. 64 at n. 56.

¹⁸ Lawrence M. Friedman, *A History of American Law* (New York: Simon & Schuster, 1973), p. 184, citing Kent, *Commentaries*, v. 2 (2d ed., 1832), p.129.

¹⁹ *Boyd v. United States*, 116 U.S. 616, 630 (1886).

²⁰ *Kyllo v. United States*, 533 U.S. 27, 31 (2001), quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961) (internal quotation marks omitted). *Kyllo* expanded the protection against the state’s intrusion into the home, holding, “Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.” 533 U.S. at 40.

²¹ The European Convention on Human Rights, Art. 8 (1950), at http://en.wikipedia.org/wiki/Article_8_of_the_European_Convention_on_Human_Rights, accessed November 19, 2013.

Contrary to Catholic practice that inculcated ritual and doctrine from infancy, Protestant reformers stressed personal choices that could be freely made only by fully formed adult minds. Protestant theologians excoriated the Catholic practice of infant baptism, for example, because the child was merely a passive participant in a family and community ritual (which to its practitioners was precisely its strength). As the Schleithem Baptist Confession of 1527 put it, baptism should be given only to “those who have learned repentance and amendment of life, and who believe truly that their sins are taken away by Christ . . . and *demand it for themselves*.”²² This was the rallying cry of radical individualism – not of the culture, the family, or the priest, but of the individual electing his or her personal relationship with God. Outward display, associated with the Roman Church, was no guarantee of sincerity.²³ This is the core of the anti-ritual bias of Protestantism, which bias arguably came to full flower in its evangelical American versions, and of American society in general. Protestant baptism remained a communal event, but its emphasis on personal choice, personal emotion, and personal commitment was a powerful driver behind the growth of selfhood and personal worth that underlie modern conceptions of the individual. At the same time, the Reformation was creating a “culture of religious inwardness that emphasized feeling, reflection, and self-examination.”²⁴

But privacy required physical as well as spiritual space, and physical space required a level of prosperity little known in human society, even in the West, until about 100 years ago. You might have wanted to be alone, but you needed a place to do it. You could take a solitary walk or create figurative personal space in a diary, which became common in Europe in the first quarter of the nineteenth century,²⁵ but actual physical space indoors required rising incomes. The dramatic increase in wealth in western countries since the eighteenth century, and in the world at large since 1950,²⁶ created equally dramatic changes in health, life expectancy, sanitation, domestic architecture, and

²² The Schleithem (Baptist) Confession, 1527, at http://www.baptiststart.com/print/baptism_quotes.html, accessed September 21, 2009 (my italics).

²³ R. Jay Magill, Jr., *Sincerity: How a moral ideal born five hundred years ago inspired religious wars, modern art, hipster chic, and the curious notion that we all have something to say (no matter how dull)* (New York: W.W. Norton, 2012), p. 25, quoting Protestant theologian John Frith.

²⁴ *Ibid.*, p. 35, citing Jerrold Siegel, *The Idea of the Self: Thought and Experience in Western Europe since the Seventeenth Century* (New York: Cambridge University Press, 2005).

²⁵ Alain Corbin, “Backstage,” in Perrot, Michelle, ed. *A History of Private Life*, v. 4, pp. 498-99.

²⁶ Groeningen Growth and Development Centre, “Statistics on World Population, GDP and Per Capital GDP, 1 -2008 AD,” at <http://www.ggdc.net/MADDISON/oriindex.htm>, accessed October 19, 2012. “It seems likely that average incomes in Japan, China, and parts of southeast Asia were comparable to (or higher than) those in western Europe even in the late eighteenth century.” Kenneth Pomeranz, *The Great Divergence: China, Europe, and the Making of the Modern World* (Princeton: Princeton University Press, 2000), p. 49. For a superb visual romp through the data on world wealth and health, see “Han’s Rosling’s 200 years, 200 countries, 4 minutes,” *Gapminder*, at <http://www.gapminder.org/videos/200-years-that-changed-the-world-bbc/>, accessed October 19, 2012.

personal privacy. The custom of equipping lavatories and bathrooms with locks, for example, did not become common until about 1900, making it “possible for people to experience their naked bodies without fear of intrusion.”²⁷ Indeed, before the twentieth century, most people didn’t have bathrooms at all – or toilets.²⁸

Throughout North America and in northwestern Europe, “same-sex children and youths shared bedrooms, and beds, until well into the twentieth century.” Not until falling birthrates after World War I reduced family sizes did the practice of one child per room begin to become common.²⁹ A German writer observed in 1889,

In the old style house, the architectural symbol of the individual’s relation to the family was the oriel. In the oriel, which essentially was part of the family room or living hall, the individual had indeed his corner for work, play, and sulking; he could withdraw there, but he could not close himself off since the oriel was open to the room.³⁰

Houses today are different. I have my bedroom, my study. With more privacy comes more isolation.

IV. NOSY PRESS, NOSY STATE

Privacy as a category of American law is well known to have originated in the collaboration of Samuel D. Warren, a Boston lawyer, with future Supreme Court Justice Louis Brandeis on what is probably the most famous *Harvard Law Review* article of all time, “The Right to Privacy.”³¹ The article was a passionate defense, written chiefly by Warren, of the sanctity of private life and the right “to be let alone.” Its rightful place in American intellectual history is so thoroughly misunderstood, however, that it’s worth a brief reprise, for the article is better described as a late, unsuccessful foray by the middle class guardians of familial – *Dare one say, patriarchal?* – life against the onslaught

²⁷ M. Perrot, *op. cit.*, pp. 498-99, 482. For more on the history of the bath, both social and private, see S. Gideon, *Mechanization Takes Command* (New York: Oxford University Press, 1948), Part VII (“The Mechanization of the Bath”).

²⁸ “In 1880, five of six Americans had “nothing more than a bucket and sponge to bathe with.” Peter Ward, *A History of Domestic Space: Privacy and the Canadian Home* (Vancouver: UBC Press, 1999), p. 57, citing Jean-Pierre Gouibert, *The Conquest of Water: The Advent of Health in the Industrial Age* (Princeton: Princeton University Press, 1989), p. 242. In Canada at that time, outdoor privies were the norm, and even upper middle class homes in Toronto were still being designed without toilets or bathrooms. *Ibid.*, pp. 51-53.

²⁹ *Ibid.*, pp. 82, 155.

³⁰ Jürgen Habermas, *The structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, Trans. T. Burger and F. Lawrence (Cambridge: MIT Press, 1991) pp. 260, n. 42 (1st ed., Germany, 1962), quoting W.H. Riehl, *Die Familie*, 10th ed. (Stuttgart, 1889), 187.

³¹ Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy,” *The Harvard L. Rev.*, vol. 5, no. 4 (December 15, 1890), available at http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html, accessed October 30, 2010.

of the popular press, rather than as an early harbinger of modern ideas or legal doctrine of privacy. And it has nothing whatever to do with current assertions of a right to engage in anonymous behavior on the Internet.

The story began January 25, 1883, when Warren and Mabel Bayard, daughter of Senator and Mrs. Thomas F. Bayard of Delaware, were married at the Church of the Ascension in Washington, DC in what *The Washington Post* called the marriage of the season, attended by “the Blue Blood of Delaware and Boston.”³² The couple and their families made good copy, and the press continued to treat readers to gossipy accounts of the Warren and Bayard families’ weddings, parties, and goings-on.³³ Then in 1886 Mabel Warren’s sister and mother both died within fifteen days. Sister Katherine, *The Post* breathily revealed, was a “still warm but unconscious form” as the stunned family rushed to her bedside, summoned by a child’s horrified scream, “Katie’s dead!” The real or invented scene around the open graves, the quivering lips, the color of the satin lining the coffins, family disagreements about the location of the funerals, even the loading of coffins onto railway cars – all was grist for the public mill and titillation for the curious.³⁴ Warren was appalled. If these scenes weren’t private, what was?

But the press did not let up, and when Mabel Warren’s closest friend, twenty-one year old Frankie Folsom, married President Grover Cleveland, aged forty-nine, the newspapers went into high gear. Cleveland was used to a nosy press. The dailies had covered his previous amorous dalliances and those of his former law partner, who by delicious coincidence was also his young wife’s father. But when reporters followed the presidential newlyweds on their honeymoon, the president was incensed, and he let loose in a speech at Harvard about the “purveyors of silly, mean, and cowardly lies that every day are found in the columns of certain news-papers which violate every instinct of American manliness, and in ghoulish glee desecrate every sacred relation of private life.”³⁵

Not to be outdone by the President, Mabel Warren’s father, Senator Bayard, then married a woman twenty years younger than him, and soon the press was reporting on the sour relations between Mabel, her sisters, and their father’s young wife. In the Warrens’ social circle, these were deplorable indiscretions, and the journalists who retailed them were contemptible. But indiscretions drove circulation. The public was willing to pay cash to read such

³² This account is based on Amy Gajda, “What if Samuel D. Warren Hadn’t Married a Senator’s Daughter?: Uncovering the Press Coverage that Led to “The Right to Privacy,” 2008 Mich. St. L. Rev. 35 (2008), at <http://www.msulawreview.org/PDFS/2008-1/Gajda.pdf>, visited November 5, 2010, citing “A Brilliant Bridal,” *The Washington Post*, January 26, 1883, p. 4; “The Washington Society World: Marriage of Senator Bayard’s Daughter,” *The New York Times*, January 26, 1883, p. 1; and “Thomas Francis Bayard,” *The Washington Post*, September 5, 1886, p. 6.

³³ *Ibid.*, p. 46.

³⁴ *Ibid.*, pp. 47-49.

³⁵ *Ibid.*, p. 52, quoting Don R. Pember, *Privacy and the Press: The Law, the Mass Media, and the First Amendment*, p. 24 (1972).

stuff, so as far as editors and publishers were concerned, discretion be damned.³⁶

As Warren and Brandeis saw it, the threat to privacy came from an unholy alliance between new technology and newspapers, which had become in their view the pandering and unreasonably powerful organs of indiscriminate mass culture. The new technology was photography. In 1888, the Eastman Dry Plate and Film Company of Rochester, New York had begun to market the world's first easily portable camera under the "Kodak" label. The company's slogan was, "You Push the Button – We Do the Rest." And so the snapshot was born. By 1900 the Kodak Brownie was selling for \$1 using film that cost 15 cents. All of a sudden, meaning in about 1/30th of a second, anybody with a small sum had the power to photograph anybody else, not as their subjects wished to present themselves to the world, but as they might be found, wherever they might be found: drunk or sober, on a public street or at a private party, properly dressed or very much otherwise. And the trouble was, you never knew who had one of these things and when they might pull it out and – *gotcha!* "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life," Warren and Brandeis wrote, "and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; and the evil of invasion of privacy by the newspapers" Gossip was no longer merely the pastime of the idle and the vicious, they said; it had become a trade, "broadcasting the details of sexual relations and idle gossip that threatened the domestic circle.

In the face of these encroachments, decent people needed solitude and protection. "When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance." "Dignity of print" strikes today's reader as quaint if not incomprehensible, but Warren and Brandeis were writing when little got into print without passing through the hands of editors and publishers, and when most people who wanted books needed access to a public library. Less was written down. More business was done orally. To make a copy of what you were writing, you needed "carbonated paper." Written words were not reproducible except by the

³⁶ As a leading Twentieth Century treatise on tort law put it, with the resignation of a socially old-school libertarian, these were "matters of genuine, if more or less deplorable, popular appeal." W. Page Keeton (ed.), *Prosser and Keeton on the Law of Torts* (St. Paul: West Publishing Co., 1984), 5th ed., p. 861. So were rich people's incomes. When the New York Times in 1868 first published the names of New York's ten millionaires, a member of the Roosevelt clan replied angrily, "I ask you whether it is the present opinion of the respectable newspapers that a rich man has no rights, or, in other words, whether the mere accumulation of property by a private citizen is of itself a sufficient offense to call for a public exposure and justify the interference of the press?" David McCullough, *Mornings on Horseback: The Story of an Extraordinary Family, a Vanished Way of Life, and the Unique Child Who Became Theodore Roosevelt* (New York: Simon & Schuster, 2001), p. 29.

tedious process of writing them out all over again. Printed words were fewer, and scarcity created value. In 1896 the *New York Times* adopted the motto, “All the News That’s Fit to Print,”³⁷ implying that if it didn’t fit, it wasn’t fit. To put words into print gave them dignity. But when printed words caused suffering, they were beyond legal redress so long as they were not false as well as harmful, even if they were wanton and malicious or an intentional violation of someone’s *honor*.

To find a remedy, Warren scoured the old law reports – chiefly the English law reports – for cases involving breaches of trust. In a reference to a case in 1820, for example, the Lord Chancellor had said, respecting an engraving of King George III during his long mental illness, that “if one of the late king’s physicians had kept a diary of what he heard and saw, the court would not, in the king’s lifetime, have permitted him to print and publish it.” Because in doing so the physician would have breached the implicit confidence placed in him by the King or his household when the physician was retained. In another case, the Lord Chancellor upheld an injunction issued on behalf of Prince Albert to prevent the publication of some etchings “of a private character” made by him and Queen Victoria that had been misappropriated by a workman in the print shop at Windsor Castle. Their inclusion in a catalog was an affront that violated the Prince’s property right and his royal trust, and the court stopped publication.³⁸

Breach of trust is a version of breach of contract – in those cases, breach of an implied contract – but Warren and Brandeis derived from these common law cases the basis for an action in tort. You don’t need a contract to bring an action in tort, which are based on generally accepted principles of social conduct. Drivers who collide at an intersection don’t have a contract with each other to drive carefully, and citizens don’t have contracts with newspapers that require the papers to report truthfully, fairly, and with discretion about their affairs. So Warren and Brandeis got creative. This is how the common law advances: From a particular liberty or prohibition, lawyers abstract a larger principle and try to persuade a court to use the larger principle (in this case, a generalized right of privacy) to expand the set of particular liberties or prohibitions they began with. And so Warren and Brandeis concluded that the “common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.” But how was the right to be enforced? If honor, decency, and personal integrity were at stake, money damages were an inadequate remedy. The authors therefore proposed that a plaintiff should have the right to stop publication.

But suppose the matter published were true. And suppose the publisher had acted in good faith, with no malice. Surely truth and good faith afforded a

³⁷ *Encyclopedia Britannica*, at <http://www.britannica.com/EBchecked/topic/850457/All-the-News-Thats-Fit-to-Print>, accessed October 30, 2012.

³⁸ The cases were *Wyatt v. Wilson*, 1 Hall & Twells 25 (1820), and *Prince Albert v. Strange*, 1 McN. & G. 25 (1849).

good defense? Brandeis and Warren didn't think so. When it came to privacy as opposed to defamation, malice was irrelevant, and so was truth. "Obviously this branch of the law should have no concern with the truth or falsehood of the matters published," they wrote. "It is not for injury to the individual's character that redress or prevention is sought, but for injury to the right of privacy. For the former, the law of slander and libel provides perhaps a sufficient safeguard. The latter implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all."

"The Right to Privacy" has been called "influential" so often that the adjective has almost become part of the title.³⁹ A "whole breed of common law tort claims" can be traced to it.⁴⁰ Yet the scope of this breed of legal action is narrow and the available remedies narrower still, and the influence of this obscure branch of the law on either private conduct or the behavior of the press, as opposed to the behavior of the law review mill, has been trivial.

The American tort of invasion of privacy is commonly said to fall into four categories.⁴¹ The first comprises misappropriation cases exemplified by the unauthorized use of someone's photograph for advertising purposes.⁴² But as Judge Posner pointed out many years ago, these cases aren't really about an aversion to publicity but rather "to not being remunerated for it." They are not about privacy at all and would be better characterized as cases of economic misappropriation.

The second category comprises "false light" cases. These are claims that one of the news media has distorted the plaintiff's character or behavior. But this is simply defamation by another name. Calling these cases privacy torts does nothing to expand the rights of individuals, and contrary to the Warren-Brandeis criteria for a privacy cause of action, they require proof of untruth, or at least the implied untruth required to cast a plaintiff in a false light.⁴³

³⁹ See, e.g., http://enculturation.gmu.edu/5_2/pdf/peters.pdf, accessed November 9 2010; http://www.pli.edu/public/booksamples/11513_sample5.pdf, accessed November 9, 2010; http://books.google.com/books?id=Y7D0ltnSGjgC&pg=PA62&lpg=PA62&dq=warren+brandeis+influential&source=bl&ots=p3m-gSFR6J&sig=t4X3ysmqzHQpxvaSFeZADUftW2A&hl=en&ei=PIXZTJi-LILGIQeLg-i7CQ&sa=X&oi=book_result&ct=result&resnum=7&ved=0CCoQ6AEwBg#v=onepage&q=warren%20brandeis%20influential&f=false, accessed November 9, 2010;

⁴⁰ *Howard v. Antilla*, 294 F.3d 244, 247 (1st Cir. 2002), citing Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 *Law & Contemp. Probs.* 326, 327 (1966) (hailing Warren and Brandeis's article as the "most influential law review article of all").

⁴¹ See, e.g., Richard A. Posner, "The Right of Privacy," *Georgia Law Review*, 12: 393, 411-21 (1978). Judge Posner's analysis remains penetrating and challenging 38 years after its publication.

⁴² *Haelan Laboratories v. Topps Chewing Gum*, 202 F. 2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953) (use of baseball player's likeness on baseball card in violation of player's exclusive contract with another bubblegum manufacturer).

⁴³ See *Time, Inc. v. Hill*, 385 U.S. 374 (1967). For the history of the case, see Wikipedia at http://en.wikipedia.org/wiki/Time,_Inc._v._Hill, accessed October 8, 2013.

The third category of privacy torts involves “[e]avesdropping, photographic surveillance of the interior of a home, ransacking private records to discover information about an individual, and similarly intrusive methods of penetrating the wall of privacy with which people surround themselves.”⁴⁴ In a famous case involving Mrs. Onassis, an aggressive photographer’s behavior was sufficiently obnoxious and *physically* intrusive that the theory was extended to protect Mrs. Onassis’s freedom of movement.⁴⁵ But this kind of case is rare.

The fourth category of privacy torts involves unwanted publicity, and with these cases we finally get to the heart of the matter. But a recent Massachusetts case indicates how unusual these cases are, and how they, too, are likely to be resolved as cases of economic misappropriation. In *Peckham v. New England Newspapers, Inc.*,⁴⁶ the victim of an automobile accident, realizing that his family had arrived on the scene, waved weakly to show them he was alive. The local newspaper captured the moment in a photograph and published the picture in four ways: (1) in its print edition, (2) in its online edition, (3) as a photograph from its archives, and (4) as an image that could be placed on T-shirts, mugs, and mouse pads.

A Massachusetts statute provided that “a person shall have a right against an unreasonable, substantial or serious interference with his privacy.”⁴⁷ Another Massachusetts statute created a cause of action for misappropriation when “any person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent.”⁴⁸ The accident victim sued under both statutes. Publication of the photograph in the print and online editions was plainly protected by the “newsworthiness” doctrine. That is, if a situation is newsworthy, the media can report it without risk of liability for a violation of privacy. Sale of the picture as a stand-alone item unaccompanied by a news account and on merchandise, however, raised jury questions and would not be dismissed. But the plaintiff could not succeed on his privacy claim, rather than his misappropriation claim, unless he could show “a morbid and sensational prying into private lives for its own sake.”⁴⁹

Two points (at least) are clear from this opinion. The first is that even the privacy claim would be viable only in connection with the sale of something for which the plaintiff received no payment. Thus the entire case is about misappropriation, which as Judge Posner says is not about an invasion of

⁴⁴ Posner, “Right of Privacy,” 420, citing *Roach v. Harper*, 143 W. Va. 869, 105 S.E. 2d 564 (1958); *Dietemann v. Times, Inc.*, 449 F. 2d 245 (9th Cir. 1971).

⁴⁵ *Galella v. Onassis*, 487 F. 2d 986 (2d Cir. 1973). Cf. *Nader v. General Motors Corp.*, 25 N.Y. 2d 560, 255 N.E. 2d 765, 307 N.Y.S. 2d 647 (1970), declining to find liability on privacy grounds where the plaintiff’s freedom of movement was not interfered with.

⁴⁶ U.S.D.C., D. Mass. (2012), available at http://www.gpo.gov/fdsys/pkg/USCOURTS-mad-3_11-cv-30176/pdf/USCOURTS-mad-3_11-cv-30176-0.pdf, accessed November 19, 2013.

⁴⁷ M.G.L. c. 214, § 1B.

⁴⁸ M.G.L. c. 214, § 3A.

⁴⁹ This was the standard of Restatement (Second) of Torts, § 652D, comment h (1977).

privacy but rather about not being paid for it. Second, the basis for liability was exactly the opposite of that proposed by Warren and Brandeis, which was to control an intrusive press. It's doubtful that even Warren and Brandeis would have regarded a photograph of an accident on a public road as violating one of the "sacred relation[s] of private life."

"The Right to Privacy" has had little effect on the development of our law and virtually none on the development of our culture. Making defendants pay for publishing the truth goes against the American grain, and our courts won't do it unless the matter is highly offensive according to prevailing opinion and, in most cases, intentionally so. Prevailing opinion shifts, and the opinions that prevail in law courts are no longer those of Sam Warren's social class, if ever they were. To a great extent, we all live in public now. The attacks on the press and the advocacy of pre-publication censorship seem particularly startling, and in fact our law has developed in a very different direction. The Supreme Court held in 1964 that the First Amendment prohibits holding the media liable for defamation of a public figure unless the plaintiff can prove malice.⁵⁰ "Public figure" is a loose and broad category, however, and malice is difficult to prove. This doctrine quickly bled over into privacy cases, too,⁵¹ so imposing liability on the media for the publication of invasive but truthful information is extremely rare.⁵² Prepublication injunctions are rarer still.⁵³

How, then, did privacy in America become a Constitutional issue?

It was about sex.

V. PEOPLE'S EXHIBIT A: CONTRACEPTIVE JELLY

In 1879, the state of Connecticut enacted a statute making it a crime for any person to use "any drug, medical article or instrument for the purpose of preventing conception."⁵⁴ The statute also criminalized the provision of "information, instruction and medical advice to married persons concerning various means of preventing conception."⁵⁵ This law remained on the books into the 1960s and led to the arrest of one Estelle Griswold and Dr. C. Lee Buxton. Griswold was the president of the Connecticut chapter of the Planned Parenthood League. Buxton, a physician and professor of medicine at Yale, worked at a family planning center run by the League. The very purpose of the center was to violate the statute by providing advice on contraception. Women were leaving the center and taking with them not only the unlawful advice of Ms Griswold and Dr. Buxton, but also "various contraceptive devices, drugs, and materials" with which to carry it out. But the state's attorney wasn't after the patients; his target was the Planned Parenthood staff, and he needed evidence. So he made a deal: The patients would waive their doctor-patient

⁵⁰ *New York Times v. Sullivan*, 376 U.S. 254 (1964)

⁵¹ *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

⁵² Keeton (ed.), *op. cit.*, p. 862.

⁵³ See *New York Times Co. v. United States* (403 U.S. 713) (The Pentagon Papers Case).

⁵⁴ C.G.S.A. § 53-32.

⁵⁵ *State v. Griswold*, 200 A.2d 479, 544 (Conn. 1964)

privilege and give evidence against Dr. Buxton, and the state would agree not to prosecute them.⁵⁶ Griswold was not a physician so her advice was not protected by a privilege. And so the state of Connecticut turned private lives inside-out on the public record: A Yale graduate student and mother of three confessed she had been prescribed birth control pills, which were new on the market. The wife of a Yale faculty member admitted she had been prescribed contraceptive jelly. Another woman, also married, surrendered to the public authorities her diaphragm and a partially used tube of the same sort of jelly.⁵⁷ Based on such state-compelled evidence, Griswold and Buxton were charged as accessories to a crime and convicted.

After the usual tedious slog through the trial and appellate courts, the case reached the Supreme Court, which threw out their convictions in 1965 in an opinion remarkable for its expansive interpretation – or more accurately, for its creation – of a Constitutional right of privacy. Seven of the nine justices agreed that such a right fell within the “penumbra” and “emanations” of other protected rights, as Justice William O. Douglas put it.⁵⁸ Seven years earlier the Court had held that the First Amendment right to peaceably assemble protected freedom of association;⁵⁹ marriage was a form of association, and the Court had recognized the right to privacy in associations. The Third Amendment recognized the privileged position of the home in private life and prohibited the forced quartering of soldiers in private homes. The Fourth Amendment protected persons against unreasonable searches and seizures.⁶⁰ From these disparate, raveling threads the Court stitched together a generalized right to privacy where before there had been none.

Griswold was about a state legislature’s right to tell people, including married people, what they could and couldn’t do in the privacy of their bedrooms. It was also about the interplay of state and federal law. When people argue about the case, they almost always quarrel about the second issue – whether federal law should override state law in this kind of case – and almost never about whether the government could dictate private sexual conduct at home. That’s because the result has always commanded broad agreement among the public, as it did among seven of the nine justices of

⁵⁶ “Griswold readily agreed to attempt to identify women who would cooperate with the police, provided that the women would not be singled out for personal prosecution under the old statute.” John Johnson, *Griswold v. Connecticut: Birth Control and the Constitutional Right of Privacy* (Lawrence: University Press of Kansas, 2005), p. 82.

⁵⁷ *Ibid.*, pp. 80-83.

⁵⁸ Justice Douglas appears to have borrowed the penumbra trope from Justice Holmes’ dissent in *Olmstead v. United States*, 277 U.S. 438, 470 (1928): “I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them.”

⁵⁹ *NAACP v. Alabama*, 357 U.S. 499 (1958).

⁶⁰ *Griswold v. Connecticut*, 381 U.S. 479 (1965). On thinner ice, Justice Arthur Goldberg concurred, citing the Ninth Amendment’s guarantee that rights not specifically named in the Constitution were reserved to the people, while Justices Harlan and White, concurring, invoked the due process clause of the Fourteenth Amendment.

divergent political views. Indeed, the justices' strained reasoning suggests how far they were willing to go to protect private and usually secret sexual conduct at home from a government inquisition. If there is such a thing as privacy bedrock in America, *Griswold* showed us where it is.

VI. ENFEEBLED FAMILY, POWERFUL STATE

Gradual but profound developments in religious and secular thought, in habits of prayer and reflection, and in better and larger housing represented expansions of the individual as opposed to the familial sphere, an expansion that is now essentially complete. Today the concepts of the family as an economic unit and as the fount of personal "government" are incomprehensible except to historians. Except on the vanishing family farm, families are not productive units, and families are rapidly losing their function as the source of education in morals, hygiene, and social behavior. In the United States the state compels education⁶¹ and in some cases compels health measures, regardless of family preference,⁶² and in a growing number of countries the state regulates corporal punishment in the family.⁶³ The state gives advice about proper diet⁶⁴ and provides meals for children outside school hours,⁶⁵ and state schools are expected to socialize young children and inculcate elementary expectations about acceptable social behavior. Except where contagious disease is concerned, these developments probably have less to do with the aggressive reach of the state than with the vacuum left by the shrinking and enfeebled influence of the contemporary family. No wonder privacy, especially in the minds of its organized advocates, is widely understood as an

⁶¹ In *Yoder v. Wisconsin*, 406 U.S. 205 (1972), the Supreme Court held that the state could not compel children's education beyond the eight grade, but only when such attendance violated the parents' religious convictions, which were protected by the First Amendment. The opinion of Justice Douglas, dissenting in part, marks the flow of individual vs. familial rights: "I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court's conclusion that the matter is within the dispensation of parents alone. The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.... On this important and vital matter of education, I think the children should be entitled to be heard."

⁶² See, e.g., Kevin M. Malone and Alan R. Hinman, "Vaccination Mandates: The Public Health Imperative and Individual Rights," [n.d.], at http://www.cdc.gov/vaccines/vac-gen/policies/downloads/vacc_mandates_chptr13.pdf, accessed 11 November 11, 2013.

⁶³ "Corporal Punishment in the Home," Wikipedia, at http://en.wikipedia.org/wiki/Domestic_corporal_punishment#United_States, accessed November 28, 2012.

⁶⁴ U.S. Department of Agriculture, Center for Nutrition Policy and Promotion, "Dietary Guidelines for Americans, 2010," at <http://www.cnpp.usda.gov/dgas2010-policydocument.htm>, accessed November 27, 2012, released pursuant to Public Law 101-445, Title III, 7 U.S.C. 5301 et seq.

⁶⁵ USDA Food and Nutrition Service, "School Breakfast Program," <http://www.fns.usda.gov/cnd/Breakfast/AboutBFAST/ProgHistory.htm>, accessed November 27, 2012.

individual and not a familial right or aspiration. Contrary to long historical practice and law, my wife's financial credit and my credit are today separate affairs.⁶⁶ When my daughter went off to college at age 18 – the age at which, under the prevailing legal fiction, she became an adult – I had no *legal* right to examine her grades, because under the Federal Educational Rights and Privacy Act,⁶⁷ the university could not disclose them to us without violating her privacy rights.

The state has intruded further into both familial and personal affairs in other ways too. Startling as it now seems, until 1967 federal officials could not seize personal papers and effects *even with a search warrant* unless the papers or effects were the fruits or instrumentalities of a crime. If your papers were “mere evidence” you had committed a crime, they were protected by the Fourth Amendment's prohibition against unreasonable searches and seizures and by the Fifth Amendment's prohibition against self-incrimination. In that year, however, the most liberal Supreme Court in American history threw out the “mere evidence” rule on the ground that it supposedly didn't protect privacy at all. Besides, in an era of increasing white-collar crime, asking a policeman to determine whether papers were evidence of a crime or the instrumentalities of a crime was asking the impossible.⁶⁸ The decision wasn't much of a surprise. A year earlier the Court had held that the police could compel a suspect to give a blood sample over his objection, when the point of the test was to obtain incriminating evidence. According to the Court, the evidence wasn't “testimonial” and therefore did not violate the Fifth Amendment's guarantee that no person “shall be compelled in any criminal case to be a witness against himself.”⁶⁹ These rulings would have stunned the Constitutional Convention of 1787, but they were not met with a public outcry. Nor did Congress forbid the practice by statute, as it could have done.

These decisions at the Constitutional level found a parallel in state and federal courts. At common law, for example, a husband or wife had a privilege not to be compelled to testify against the spouse, or to prevent the spouse from testifying, on the ground that the privilege fostered “the harmony and sanctity of the marriage relationship.”⁷⁰ The privilege was consistent with widely held beliefs about the privacy of the marital relationship and its immunity from public inspection through compelled judicial process, even in cases of cruelty

⁶⁶ See *Zamora v. Valley Fed. Sav. & L. Ass'n of Grand Junction*, 811 F.2d 1368 (defendant who employed wife not entitled to obtain credit report on husband, found liable in damages for breach of privacy).

⁶⁷ 20 U.S.C. § 1232g.

⁶⁸ *Warden v. Hayden*, 387 U.S. 294 (1967).

⁶⁹ *Schmerber v. California*, 384 U.S. 757 (1966).

⁷⁰ *Trammel v. United States*, 445 U.S. 40, 44 (1980). For a fuller explanation of spousal privileges regarding communications and compelled testimony, see “Spousal Privilege,” Wikipedia, at http://en.wikipedia.org/wiki/Spousal_privilege, accessed November 12, 2010. For the rationale for abolishing the privilege in cases of spousal abuse, see Renée L. Rold, “All States Should Adopt Spousal Privilege Exception Statutes,” Missouri Bar Website, at <http://www.mobar.org/journal/1999/sepoct/rold.htm>, accessed November 12, 2010.

and infidelity. “There are private histories belonging to every family, which, though they operate powerfully upon individual happiness, ought never to be named beyond the home-circle,” counseled one widely read author of the 1840s.⁷¹ In many American states today, the marital privilege has been abolished in cases of spousal abuse – for unimpeachably sound reasons. Few would argue this change is not justified: Violence against spouses makes a mockery of the marriage relationship as we insist on understanding it. Nevertheless, the change illuminates our preference for protecting the individual rather than the family and marks yet another breach of the familial bulwark against state interference. The family is similarly losing its role in the moral, religious, and secular education and guidance of youth. Minors’ rights to purchase contraception drugs and devices and abortion rights in general are cases in point.⁷²

The law in this area, including the Supreme Court’s decision on abortion rights, *Roe v. Wade* in 1973, remains controversial in part because it does *not* fit the political alignment regarding the state’s power to control personal behavior. Vehement and deeply felt objections to *Roe* by anti-abortion groups rest in part on the view that human life begins at conception and that abortion is therefore murder. They also seek to re-inject “family government” into individual decisions, such as by requiring parental consent for a minor’s abortion as well as for the availability of contraception. That is a classically conservative, anti-statist stance. But they would do so, ironically, by re-injecting the state into questions of sex and reproduction. Abortion rights therefore create powerful crosscurrents of thought as well as emotion. Conservative advocates of family life are usually the strongest advocates of keeping the state out of private life. In this case, however, they prefer state regulation of private behavior, whereas the liberal groups that are generally more willing to tolerate or even advocate state intrusion in private life are in this case vehemently against it.

Public guarantees of employment, income, and health benefits have accelerated state intrusion into private life. Our lives are now the public’s business – and not only the lives of the poor. The family is even losing its function as a consuming unit of income and leisure time, as technology atomizes family activities and children have disposable incomes undreamed of by their grandparents, and thus independent market power. To a degree we scarcely grasp, individuals are now socialized by influences and authorities outside the family.⁷³ Official definitions of privacy reflect this by omitting references to the family. A semi-official United Nations source, for example,

⁷¹ Sarah Ellis, *The Daughters of England, Their Position in Society, Character, and Responsibilities* (London: Peter Jackson, 1842), p. 273, quoted in Karen Chase and Michael Levenson, *The Spectacle of Intimacy: A Public Life for the Victoria Family* (Princeton, NJ: Princeton University Press, 2000), p. 12.

⁷² For a summary of these laws, see Guttmacher Institute, “State Policies in Brief: An Overview of Minors’ Consent Law,” November 1, 2013, at http://www.guttmacher.org/statecenter/spibs/spib_OMCL.pdf, accessed November 11, 2013.

⁷³ See Habermas, *op. cit.*, pp. 155-56.

defines privacy as both a right and a “presumption that individuals should have an area of autonomous development, interaction and liberty, a ‘private sphere’ with or without interaction with others and free from State intervention and free from excessive unsolicited intervention by other uninvited individuals.”⁷⁴

One virtue of this presumption is that the “sphere” of personal space is set free from property and location. It’s mobile. We acknowledge the possibility of privacy in public spaces, such as restaurants and railroad cars, as well as in publicly owned but physically closeable private spaces like the rapidly vanishing phone booth. Here Americans differ from Europeans, at least in degree, in our willingness to invade others’ space and to be invaded. Writing in about 1880, the American novelist Henry James – an Anglophile if ever there was one, and still our subtlest observer of the differences between Europeans and Americans – remarked that one of his American characters “contracted friendships, in travelling, with great freedom, and had formed in railway-carriages several that were among her most valued ties.”⁷⁵ This was a snarky remark about Americans – Henry James would not have made pals with strangers in railway carriages – though it’s doubtful that current readers detect the edge in it. Similarly, in many parts of Europe it remains a breach of etiquette to address someone at another table in a restaurant, uninvited. At fancy restaurants in England forty years ago, it wasn’t even clear one was supposed to talk to people at *one’s own* table – whispering was the rule, preferably without moving one’s lips – for fear of incurring the displeasure of waiters who might have been mistaken for undertakers and who, as it turned out, were the rear-guard defenders of the high old ways, happiest when the only sound in the restaurant was the quiet clicking of knives and forks on porcelain, or the crinkle of an unwrapped cigar band. Britain has loosed up since then, but nothing like in the United States. According to a report on NPR, a food-loving couple from San Diego launched a quirky social experiment: They’d go to restaurants and ask if they could taste other people’s food. Surprisingly, most people happily complied — even offering their own forks.⁷⁶ There is no right or wrong in this, only custom. In America we care less about formality and the outward show of position, status, or office that are the hallmarks of social dignity. We also care less about private boundaries in public spaces.⁷⁷

⁷⁴ United Nations High Commission on Human Rights, “Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin” (Advanced Edited Version), A/HRC/13/37 28 December 2009, Art. III.

⁷⁵ Henry James, *Portrait of a Lady* (London: Penguin Books Ltd., 1976), c. 29, p. 306 (1st ed., 1881). James’s point of view was characteristic even of Americans of a certain social class. Theodore Roosevelt’s father, for example, warned his children, “Be careful always in chance acquaintances.” McCullough, *Mornings on Horseback*, p. 40.

⁷⁶ NPR, *All Things Considered*, June 29, 2007.

⁷⁷ Unlike Americans, the British have always understood the difference between behavior in restaurants and behavior in statecraft. After World War I, British tutelage was critical to American efforts to in signals intelligence and its handmaiden, which was making and breaking codes. Following the British example, the State Department after the war

The boundary between work and home, so clear to Mr. Wemmick, has also shifted. For centuries, home was the place of work, but beginning in the seventeenth century, family space moved to a different floor of the house, or the work was moved out of the house entirely.⁷⁸ By the height of the Industrial Revolution, the physical separation of home and work was complete, as Dickens showed us. Today this separation is being reversed. As the current slogan has it, work is something you do, not someplace you go. In 2009 the federal government reported that about 114,000 federal workers (5.7 percent of the federal workforce) were telecommuting, or working from home. This number is undoubtedly increasing. The same trend appears in the private sector, often with employers' encouragement.⁷⁹ The re-integration of work and home also represents the dissolution of the boundary between the public workplace and private and family space. Excepting manual workers and workers in some service jobs, one works where one wants, further enhancing the autonomy of the individual. At the same time we are ubiquitously and compulsively connected, thus rendering people constantly subject to the invasive demands of the workplace even while physically independent of it.

VII. ANXIOUS EXHIBITIONISTS

The German philosopher Jürgen Habermas described the public and private spheres as opposites in tension.⁸⁰ The English, characteristically, have

established a super-secret group called the Cipher Bureau, better known as the Black Chamber, and it began breaking Japanese diplomatic codes as early as 1919. Unfortunately the Black Chamber was abruptly shut down in 1930 by President Hoover's Secretary of State, Henry L. Stimson, who is chiefly if unfairly remembered, if at all, for his quaint remark that "gentlemen do not read each other's mail." Unknown to Stimson and other American gentlemen, their British friends had no compunction about reading American diplomatic traffic and were doing so right through World War I. G.J.A. O'Toole, *Honorable Treachery: A History of U.S. Intelligence, Espionage, and Covert Action from the American Revolution to the CIA* (New York: Atlantic Monthly Press, 1991), pp. 328–335; see David F. Schmitz, *Henry L. Stimson: The First Wise Man* (Wilmington: Scholarly Resources Books, 2001). For an account of British penetration of U.S. diplomatic traffic, see Barbara Tuchman, *The Zimmerman Telegram* (New York: Ballantine Books, 1966).

⁷⁸ Witold Rybczynski, *Home: A Short History of an Idea* (New York: Viking Penguin, 1986), p. 66.

⁷⁹ U.S. Office of Personnel Management, "Status of Telework in the Federal Government: Report to Congress," February 2011, at http://www.telework.gov/Reports_and_Studies/Annual_Reports/2010teleworkreport.pdf, accessed February 19, 2012. As for the private sector, see, e.g., Cisco, "Cisco Study Finds Telecommuting Significantly Increases Employee Productivity, Work-Life Flexibility and Job Satisfaction," at http://newsroom.cisco.com/dlls/2009/prod_062609.html, accessed February 19, 2012.

⁸⁰ "[T]he division of man into the *public person* and the *private person*" corresponded to the separation of state and society." Habermas, *op. cit.*, p. 125, quoting K. Marx, "On the Jewish Question," *Early Writings*, trans. and ed. by T. Bottomore, *The Marx-Engels Reader* (New York, 1963), 28-29. "The public sphere itself appears as a specific domain – the public domain versus the private." Habermas, *op. cit.*, p. 2. Marx thought the division of the integrated personality into the public and private person corresponded to the separation of state and society.

spent less energy than the Germans theorizing about the separation than living it with a vengeance. “[T]he English bourgeois house,” writes Witold Rybczynski, “was an isolated world into which only the well-screened visitor was permitted; the world was kept at bay, and the privacy of the family, and of the individual, was disturbed as little as possible.” These arrangements were sustained by custom, not by law, based on personal reserve. Even “next-door neighbors exchanged notes – which were delivered by a servant – in order to avoid an unannounced visit.”⁸¹

Reserve was not only for the rich, however. Mr. Wemmick was a middling clerk. His declaration to Pip – “The office is one thing, and private life is another” – is a bourgeois English and Anglophile point of view, not so much in contrast to Continental practice⁸² but certainly in contrast to the politicization of interior life represented by the French Revolution. In France during the 1790s “individuals were expected to accomplish interior, private revolutions that mirrored the revolution taking place in the state. As a consequence, private life was intensely politicized; the public threatened to engulf the private.”⁸³ The revolutionary state was importing into politics a quasi-religious demand for a sort of public baptism, but unlike the Baptist confession of the sixteenth century, if the believer did not demand the rite of the state, the state would demand it of the believer. This was not the first or last occasion when inquisitors would punish sins of thought, but now the demand was made on behalf of the secular, revolutionary state. It was a totalitarian vision in which the very notion of privacy was subversive, because it asserted a realm in which the state had no business. The state, meanwhile, was aggressively asserting a right to know. The twentieth century saw this totalitarian vision played out in one brutal human disaster after another as utopian theorists and their sadistic fellow travelers rooted out citizens who sought to hide their bodies and thoughts: in post-Revolutionary Russia, in Nazi Germany, in “re-education” programs during China’s Cultural Revolution under Mao Zedong and in Vietnam after 1975, and in the Khmer Rouge’s mass killings in Cambodia from 1975-79.

In contrast, in Mr. Wemmick’s universe and under English law, the moat and castle protected a household from the state as well as the workplace. It was here that the “individual prepared in private to confront the gaze of others.”⁸⁴

⁸¹ Rybczynski, *Home*, pp. 107-108.

⁸² In France one did not presume to call people one did not know. When a New York friend came to Paris to visit Gertrude Stein, Stein wrote, the friend “said she would like to meet so and so. Sorry I said I do not know them.” When her perplexed friend insisted that Stein was famous and could call whom she pleased, Stein was unmoved: What one might do without hesitation in New York was not done in Paris. Gertrude Stein, *Paris France* (London: Peter Owen Ltd, 1971) (1st ed. 1940).

⁸³ Lynn Hunt, “The Unstable Boundaries of the French Revolution,” in Perrot, Michelle, ed. *A History of Private Life*, v. 4, p. 16.

⁸⁴ Corbin, “Backstage,” in Perrot, Michelle, ed. *A History of Private Life*, v. 4, p. 486. See Esther Dyson, “Reflections on Privacy 2.0,” *Scientific American*, v. 299, no. 3 (September 2008), p. 55, who writes that the issue for many people “is not privacy so much as the

And it was here that the privacy of the family and increasingly of the individual had space to flourish and where opinions and embarrassing physical ailments and moral foibles were protected from view. Privacy in this sense protects dignity as well as life and limb, and as Jeffrey Rosen has repeatedly insisted, it is a reciprocal virtue, for it not only requires that we assert our own boundaries but also that we observe the boundaries of others. A quotation from the Talmud gives Rosen the title of his thin, elegant volume, *The Unwanted Gaze*: “Even the smallest intrusion into private space by the unwanted gaze causes damage, because the injury caused by seeing cannot be measured.”⁸⁵

Rosen delivers the unwelcome news “that privacy – understood as a protection for dignity or as a bulwark for liberty – is not an especially democratic virtue.” He sees it as historically associated with the aristocratic few “and extended, in Europe and America, to a broader population that often was indifferent to its benefits and demands.” Rosen is on to something important when he perceives a democratic distrust of privacy and reserve, but he overstates the case. The severe separation of home from work and public life was essentially a bourgeois, not an aristocratic, development. And he pays insufficient attention to the capacity of ordinary people in many societies for reticence, modesty, and self-control. Sexual modesty and well-regulated family life, in particular, are hardly characteristics of European aristocracy or of European royalty before Victoria in Britain and Louis Philippe in France; they have deep social, economic, and religious wellsprings. The rabbis who thought unwanted gazes were sins were no aristocrats. In Britain a century ago, discretion, respect, and especially modesty were more likely to be found in the middle class and people “in service” than in the aristocracy.⁸⁶ (In Britain today, they may not be found at all.) These virtues also seem more prevalent in Canada than in the United States. Rosen is surely correct, however, in saying, “Dignity requires a degree of self-restraint on the part of its citizens – good manners, reticence, self-respect, and a willingness to respect the dignity of others” And it is not readily found “in a nation of anxious exhibitionists, more concerned about attracting attention than deflecting it.”⁸⁷ His insistence on personal discretion as central to all discussions of privacy is welcome in a conversation too often confined to laws, which in their nature are public

presentation of self” But this formulation removes the possibility of private readiness for self-presentation from the realm of privacy, which is odd.

⁸⁵ Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (New York: Random House, 2000), from the epigraph. Rosen asserts that privacy protects the individual from being represented *out* of context, of being cast in a false light. This strikes me as profoundly incorrect. In my view, he confuses an aspect of defamation with a right of privacy, which, as Warren and Brandeis rightly said, protects chiefly from the embarrassment of being represented truthfully and *in* context.

⁸⁶ As one of Wilde’s charming snobs laments in the opening scene of *The Importance of Being Earnest*, “if the lower orders don’t set us a good example, what on earth is the use of them?”

⁸⁷ Jeffrey Rosen, “The Silver Bullet: Protecting Privacy and Security through Law and Technology,” *Proceedings of the American Philosophical Society*, v. 151, no. 3 (September 2007), p. 299.

intrusions into private behavior, and to the legal and engineering schemes that govern bits, bytes, and network connections involved in the handling of digitized information.

VIII. TRANSPARENCY AS VIRTUE

The attack on the hidden self – the demand that citizens be transparent – may have been perfected by twentieth century totalitarian states, but it was not a twentieth century invention. For that we are indebted, if it is a debt, to Geneva’s most famous citizen, Jean-Jacques Rousseau, and to the publication in 1781 of his *Confessions* and his promise, scandalous in its time, that he would put on public display the full truth of his naked self. Rousseau advertised this autobiographical project as an attack on dissimulation that “had no precedent and that will have no imitator.”⁸⁸ As it turned out, Rousseau has had millions of imitators and became, like Freud after him, a whole climate of opinion in which the display of the true, authentic self was the chief goal of psychic health, and in which attempts to screen the inevitably blemished self from view implied that one was trafficking in the spiritual equivalent of counterfeit coin.⁸⁹ This was not a mainstream point of view, to say the least – if by “mainstream” we mean ordinary people. It was completely at odds with the prevailing social and moral view inherited from the Greeks: namely, that it was good to bring personal ethics into public life and good to conceal one’s private life from public view. The latter precept required occasional dissimulation, so that dissimulation employed to maintain the balance of public and private space was counted a virtue. John Adams called dissimulation “the first Maxim of worldly Wisdom.” It could be used for good or evil, he confided to his diary, but when it simply meant concealing from others our sentiments and intentions such “as others have not a right to know,” it was commendable. “This Kind of Dissimulation, which is not more than Concealment, Secrecy, and Reserve, or in other Words, Prudence and Discretion, is a necessary Branch of Wisdom, and so far from being immoral or unlawful, . . . is a Duty and a Virtue.”⁹⁰

The romantics, following Rousseau, rejected this view. Dissimulation was a deception, and deception was by definition morally base and merely served to

⁸⁸ “I have begun a project that has no precedent and that will have no imitator. I want to show to my fellow mortals a man in the full truth of his real nature – and that man is going to be me.” J.-J. Rousseau, *Les Confessions* (Paris: Classiques Garnier, 1980), p. 1 (my translation).

⁸⁹ These metaphors have produced a mother lode of rich literature, notably Oscar Wilde, *The Picture of Dorian Grey* (London: Ward, Locke and Co., 1891), and André Gide, *Les Faux-monnayeurs* (Paris: NRF, 1925), in English as *The Counterfeiters*. The phrase “whole climate of opinion” is from W.H. Auden, “In Memory of Sigmund Freud,” *Selected Poems* (New York: Vintage Books, 1989), p. 93, also available at the website of the Academy of American Poets, <http://www.poets.org/viewmedia.php/prmMID/15543>, accessed November 13, 2010.

⁹⁰ Flaherty, *Privacy in Colonial New England*, p. 363, quoting Adams’ Diary, I, 363.

uphold social convention.⁹¹ This was a doctrine confined to intellectuals, artists, bohemians, psychoanalysts, and miscellaneous other members of the secular elect until the First World War left a social order in ruins and romantic doctrine could be married to an inexpensive technique in the form of the Brownie camera. The history of the family photograph album has yet to be written, but it will be the history of candor and its imitations. Peruse your own family album starting with your black-suited great grandfather seated in a studio chair, with your great grandmother standing dutifully at his elbow.⁹² Watch this pose's formality and convention give way gradually to groups of men in uniform, or to men and women pausing from labor; to men and women at ease, dancing (as shutter speeds got faster), enjoying themselves on the beach with naked arms and legs, and then in the 1950s to children cutting up for the camera, refusing to stand still; and finally, as candor achieved doctrinal status of its own, to the pose of candor, the carefully thought-out pose of having no pose at all. We begin with ancestors who had carefully prepared themselves for the recorded public gaze, craving a permanent image of rectitude. We watch our parents and grandparents display for the camera their pride in hard-won leisure after the Great Depression and another world war, and progress to our own indifference to images of rectitude. Preparing in private to confront the gaze of others is out of fashion. It's an affront to authenticity. We want instead images of candor, and when the lens doesn't capture us unawares, we play candor's masquerade. Nor do we enact the unprepared only for the photographer's lens. We have become relentlessly anti-*soignée* in our dress and manners. Thus do we purchase new clothes that are already half worn-out, even torn. Thus have no-iron garments given way to pre-wrinkled garments. Thus do women's hairdressers and manicurists place their clientele before broad plate-glass windows at street level, without objection, preparing to confront the gaze of others while being gazed at themselves, like French kings and queens at their *levée*.

Transparency has turned privacy inside out. We follow Rousseau, not Adams.

A bar in Brooklyn drums up business with "cringe readings," or as NPR called it, "Sharing Private Shame for Public Laughs." The idea is to dig out your most horrific old diaries, poetry, and journals and read the most

⁹¹ See Magill, *Sincerity*, p. 105, who notes, in a comment that echoes Protestant objections to infant baptism, that romantics objected to the idea of a social role because it was "inherited from tradition, circumstance, profession, or class; it was not freely chosen."

⁹² These studio portraits no doubt imitated the tradition of European portrait painting in which many photographers had been trained, and to which the growing middle class aspired. See Ariès, Philippe, *Centuries of Childhood: A Social History of Family Life*, R. Baldick, Trans. (New York: Alfred A. Knopf, 1962), originally published as *L'Enfant et la vie familiale sous l'ancien régime* (Paris: Plon, 1960), p. 349, stating that European family portraits tended to show family members arranged rather stiffly. "Even when they are more lifelike, the pose in a solemn attitude intended to underline the bond joining them together." Even in the Netherlands, where portraits often showed families "depicted as in a snapshot, at a moment in its everyday life," portraits showed the life of a family, not individuals." *Ibid.*, p. 350.

embarrassing bits out loud in public.⁹³ Rousseau's shocking revelations have been transformed into a narcissist's party game, and a dull game at that. A more precise metric of our exhibitionism, however, comes from the pornography business. Sales of pornographic videos skyrocketed early in the last decade, but in 2006 they started to fall. Why? Competition from free amateur porn was glutting the market. The pros saw sales plunge 30 percent in 2006-2007. Pay-for-porn has been making a marginal comeback lately in the form of "camming" – live shows for paying followers. But camming traffic is slim compared to the traffic on sites offering free, pre-recorded content. Making a living as a hard-working, tax-paying, grown-up porn star is tough when the girl next door and her boyfriend, who have lots of privacy and a dead-bolt on the door, are churning the stuff out as fast as they can.

Transparency is speeding up, followed closely by its cousin, the public confession. The political class, assorted celebrities, and formerly anonymous housewives and husbands are barging into onto the airwaves to confess their sins or ravage their marriages under media's equivalent of the evangelist's big tent. In 2009 we were treated to the spectacle of the former House majority leader, Republican Tom DeLay, shimmy-ing across the floor in toreador pants on "Dancing with the Stars," and Mackenzie Phillips gave new meaning to the Mamas, and especially the Papas, when she confessed on "Oprah" that she happily had sex with dad. Watching these spectacles, Alessandra Stanley of *The New York Times* observed, "Politicians can no longer talk their way out of trouble, they have to shake it off by revealing their inner dancing fool. Celebrities can't just write a tell-all biography and earn a coveted appearance on 'Oprah,' they must disclose a horrifying secret." Stanley called this "transparency as currency,"⁹⁴ but what we are really watching in these cases is counterfeit transparency – the sinner's stool as guaranteed limelight; or as Lionel Trilling nicely put it in another context, the shameless with which people exhibit their own shame.⁹⁵

Since 2009 we are already experiencing yet another shift in which celebrities and politicians caught *in flagrante delicto* no longer bother with even the pretense of shame but assert they are victims of a condition to be treated. San Diego Mayor Bob Filner, for instance, tried the gambit of heading

⁹³ NPR, *Weekend Edition Sunday*, July 15, 2007 at <http://www.npr.org/programs/weekend-edition-sunday/2007/07/15/13125521/?showDate=2007-07-15>, accessed November 12, 2010.

⁹⁴ Alessandra Stanley, "Critic's Notebook: Where Political Comebacks and Celebrity Comebacks Meet," *The New York Times*, September 27, 2009, at http://www.nytimes.com/2009/09/27/weekinreview/27stanley.html?_r=0.

⁹⁵ Paraphrasing Lionel Trilling, *Sincerity and Authenticity* (Cambridge: Harvard University Press, 1961), p. 33. Trilling was discussing Denis Diderot's *Rameau's Nephew*, a literary study of this type written two centuries before psychiatrists caught on to the technique: "The significance of the exploitation of exhibitionism as defence lies in the fact that it represents a technique for giving without giving, by means of a substitute of 'showing' for 'giving.'" M. Masud R. Khan, "Aspects of the Schizoid Personality," *The Privacy of the Self* (London: Hogarth Press, 1974), p. 15, quoting W.R.D. Fairbairn. At this level, transparency as virtue is merely a substitution for authenticity, and its shortcomings in that role are clear.

for behavioral therapy rather than resigning after multiple women accused him of sexual harassment. He blamed the city for failing to give him anti-harassment treatment. Because, gosh, how's the city's chief executive supposed to realize it's a no-no to ask his communications director to show up at work with no panties unless some junior employee explains the law?⁹⁶ And in New York we recently had former Congressman and mayoral candidate Anthony "Carlos Danger" Weiner continuing to troll for phone sex on the Internet using photos of what used to be called his privates.⁹⁷

Do we like this transparency, both the real and the fake?

The difficulty is that a tidal wave of transparency doesn't permit us to choose the parts we like and don't like. As a result of changes in both technology and attitudes, it builds slowly and hits the whole beach. A hundred years ago, "Women were seen at home with their hair down, although only maids and prostitutes appeared that way in public."⁹⁸ Pregnant women were shut away, as if Western society was embarrassed by evidence that the human race could reproduce itself. Abandoning these practices represented transparency as well as equality, but like other dramatic advances in the social and political equality of women,⁹⁹ they were gradual. One of those gradual changes has been the digitizing of information – the rendering of words, pictures, and data of all kinds into binary bits, or long strings of ones and zeros. Computer scientists understood this process decades ago, and scientific laboratories relied on it to create and store information and to communicate electronically over what came to be known as the Internet. But until 1992, it was *against the law* to use the Internet for commercial purposes. The scientific community liked it that way. Opening the Internet to commerce, they feared, would corrupt it. And then Congress changed the law,¹⁰⁰ blowing up the dam

⁹⁶ Catalina Camia, "San Diego Mayor Bob Filner to Undergo Therapy," *USA Today*, at <http://www.usatoday.com/story/news/politics/2013/07/26/filner-san-diego-mayor-sexual-harassment/2590237/>, accessed August 1, 2013.

AP, "Lawyer for San Diego Mayor Bob Filner blames city for failing to provide sexual harassment training," August 1, 2013, at <http://www.nydailynews.com/news/politics/lawyer-filner-blames-city-sex-harassment-training-article-1.1414462>, accessed August 1, 2013.

⁹⁷ Catalina Camia, "Anthony Weiner: 'Quit isn't the way we roll' in NYC," *USA Today*, July 30, 2013, at <http://www.usatoday.com/story/news/politics/2013/07/30/weiner-new-york-mayor-resign-sexting/2601211/>, accessed August 1, 2013.

⁹⁸ Corbin, "Backstage," in Perrot, *op. cit.*, p. 487.

⁹⁹ Other important changes in the position of women would be difficult to classify under the transparency rubric: Women couldn't vote. Their property rights were tenuous. Divorce was difficult or impossible, and a woman suffering from domestic violence – always more widespread than publicly reported – had few places where she could turn.

¹⁰⁰ The Scientific and Advanced Technology Act, Pub. L. 102-476, § 4, Oct. 23, 1992, 106 Stat. 2300; Pub. L. 102-588, title II, § 217, Nov. 4, 1992, 42 U.S.C. § 1862(g) ("In carrying out subsection (a)(4) of this section, the Foundation is authorized to foster and support access by the research and education communities to computer networks which may be used substantially for purposes in addition to research and education in the sciences and engineering, if the additional uses will tend to increase the overall capabilities of the networks to support such research and education activities.")

that had kept digitized information from going viral in the private sector and letting loose a wave of electronic transparency that has bowled us over.

IX. AN OCEAN OF DATA

Computing's cheap, and so is data storage. Which is why you can carry around millions of pages of documents in a thumb drive dangling on your key-chain and watch two-hour movies on your smart-phone. The game processor in the toy you just bought your kid can do a billion operations per second. The smallest iPhone currently for sale stores 16 GB of data. It has more communications capability than President Kennedy had in the White House during the Cuban Missile Crisis, more computing power than any computer available to any government in that era, and more storage capacity than any computer anywhere until quite recently. IBM did not produce a hard drive with more than a 1 gigabyte capacity until 1980. "It was the size of a refrigerator, weighed 550 pounds (250 kg), and the price when it was introduced ranged from \$81,000 to \$142,400."¹⁰¹

We are swimming in an ocean of data, and the ocean is growing at a head-spinning rate. To be more precise: The 16 "gigs" of data in your smart phone are the equivalent to sixteen pick-up trucks full of words on paper. But data experts don't talk in terms of gigs anymore. They're too small. According to experts at IBM, at the beginning of this century there were about 800,000 petabytes of data stored in the entire world. A petabyte is a million gigs. But that unit is also getting small. IBM expects this number to reach 35 zettabytes by 2020. A zettabyte is a million petabytes, or 1 followed by 21 zeros. Every day, every hour, every second, the data ocean is expanding.¹⁰²

There are now more than one trillion web addresses – far more than the 7.1 billion people on Earth. About a quarter of the world's population, about 1.5 billion people, now use the Internet – and most of them don't live in the United States or Europe. The Internet was invented in the United States, and about 75 percent of the U.S. population uses it. That figure is about the same in United Kingdom, Japan, and South Korea. But China, not the United States, is the world's biggest Internet user, yet only about 22 percent of its population is online, and in India the figure is only 7 percent.¹⁰³ Users from these and

¹⁰¹ Pingdom, "The history of computer data storage, in pictures," *Royal Pingdom*, at <http://royal.pingdom.com/2008/04/08/the-history-of-computer-data-storage-in-pictures/>, accessed August 1, 2013.

¹⁰² Paul C. Zikopoulos *et al.*, *Understanding Big Data: Analytics for Enterprise Class Hadoop and Streaming Data* (New York: McGraw Hill, 2012), pp. 5-6, available at <http://www.ibm.com/developerworks/wikis/display/db2oncampus/FREE+ebook+-+Understanding+Big+Data>, accessed December 26, 2012.

¹⁰³ "Internet Promotion," at <http://www.internetpromotion-australia.com.au/internetpromotionblog/?p=250>, accessed December 14, 2012.

other developing nations will increasingly dominate Internet usage and will drive its growth, and they will carry their connectivity wherever they go.¹⁰⁴

A communication doesn't simply transfer information. The act of communicating also creates information – masses of it. An American postmark on a letter used to identify the post office from which you mailed the letter; it rarely does that any more, but the electronic trail of your emails identifies your location and the machine from which it was sent with precision. The wording of your emails also creates patterns, and now that your wording is expressed electronically, those patterns can be analyzed to determine your interests and identity.¹⁰⁵ Those ubiquitous “like” buttons that you probably click on compulsively – they're invitations to give away information about yourself. They mark you as a member of the swarming hive. Your behavior creates electronic communications, just as your list of “friends” tells advertisers who influences you. All that information is stored in many places. When you get on the bus or subway using an electronic pass, or pay an electronic toll, change the TV channel, or pay for groceries or coffee electronically, you leave a data trail of where you've been, what you eat, what you're doing, and where you are. You generate data as you drive past a traffic camera, enter the elevator at work using an electronic pass, pay the rent or mortgage, buy a shirt or cup of coffee with a credit card, and make a hotel or airline reservation. As I have explained elsewhere,¹⁰⁶ as a result of these choices, data now comes to us unbidden based on what we bought last time, who our friends are, our income level, and where we live. But those choices represent only the communications we are aware of. Your phone communicates with several cells towers every few seconds, and probably also with several GPS satellites, even when you're not using it. It knows where you are. Why? Because your phone carrier can't send you calls if it doesn't know where you are. And because the mapping service, the restaurant finder, the car service, and lots of other apps you installed *and demanded* rely on location to give you the information you ask them for.

¹⁰⁴ International Telecommunications Union (“ITU”), “Key Statistical Highlights: ITU Data Release June 2012,” at http://www.itu.int/ITU-D/ict/statistics/material/pdf/2011%20Statistical%20highlights_June_2012.pdf, accessed December 14, 2012. For Internet usage by country, see International Telecommunications Union, “Internet World Stats,” at <http://www.internetworldstats.com/stats.htm>, accessed December 14, 2012.

¹⁰⁵ Gmail users, who have many options, agree to analysis by contract. This is not a secret, though European regulators remain leery of the practice. In an audit of Facebook, e.g., Irish data commissioners said, “we remain firmly convinced of the view that it would be a surprise for users if keywords were extracted from the content of messages and chat on the site for advertising purposes.” Facebook does not engage in this practice, at least in Ireland. [Ireland] Data Protection Commissioner, “Facebook Ireland Ltd: Report of Re-Audit,” September 21, 2012, p. 18, at http://dataprotection.ie/documents/press/Facebook_Ireland_Audit_Review_Report_21_Sept_2012.pdf, (“Facebook-Ireland Re-Audit Report”), accessed December 28, 2012.

¹⁰⁶ Joel Brenner, *America the Vulnerable: Inside the New Threat Matrix of Digital Espionage, Crime, and Warfare* (New York: Penguin, 2011), chapter 1.

And so our lives have become thoroughly transparent. More people know, or can discover, lots of information about us that used to be obscure. Ubiquitous data also confronts us with a truth we resist – that our behavior is predictable. All this data not only tell others what we liked and where we've been; it also tells them what we *will* like and where we're likely to go next, even if we haven't figured it out ourselves.¹⁰⁷ Data also permit others to draw conclusions that we could previously keep to ourselves. The best known example of this was Target's ability determine from a customer's purchasing pattern that she was pregnant – not before she knew, but before she was ready to tell anyone else.¹⁰⁸ How did this happen? Because her purchasing pattern made it easy to infer, and Target knew the pattern. The fundamental problem in such cases is that data one *does* want to share, or that one does not own, implies conclusions that one may *not* want to share.

Law did not create this predicament, and while law must play a role in shaping market behavior and punishing abuses, law will not fundamentally alter the growth of the data ocean or the transparency that has come to all aspects of modern life. We've disclosed all sorts of information about ourselves, sometimes in exchange for a discount at the grocery store, and sometimes for no good reason at all. You could pay cash at Target or the gas station, and you could stop and fish for coins at the tollbooth, but it's a nuisance. Paying with credit, and thus divulging your purchasing habits, is convenient. Besides, you can't shop online, pay the hospital bill, or buy a house with cash, and if you pay cash on systems like the Washington, DC Metro, you pay extra. Nobody does it anymore.

Search engines like Google and social networking services like Facebook understand the craving for convenience. They provide free services and make money through advertising. Most people like this. Their real business is providing information about us to their advertisers; the services are the means to that end. Service quality must remain high if the companies are to remain competitive, but the service is incidental to the business of collecting and processing data. That's why Harvard's Professor Zittrain quipped, "If what you are getting online is for free, you are not the customer, you are the product."¹⁰⁹

¹⁰⁷ See, e.g., the company called Recorded Future, <https://www.recordedfuture.com>, accessed October 23, 2013.

¹⁰⁸ Charles Duhigg, "How Companies Learn Your Secrets," *New York Times*, February 16, 2012, at http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html?_r=0, accessed November 17, 2013. The episode outraged the young woman's father, who had apparently violated her privacy by opening her mail to find coupons relating to her pregnancy. He was outraged because he could not believe his daughter was pregnant. He later apologized to Target.

¹⁰⁹ Alexander Furnas, "It's Not All About You: What Privacy Advocates Don't Get About Data Tracking on the Web," *The Atlantic*, March 15, 2012, Quoting Harvard professor Jonathan Zittrain, at <http://finance.yahoo.com/news/not-privacy-advocates-dont-data-192301630.html>, accessed December 15, 2010.

In all this discussion, it's hard to miss the tendency to reduce privacy to a question of data control, as if this ancient value had nothing to do with behavior and was nothing but a sub-specialty of computer engineering and law. Technology facilitates and conditions our behavior, but culture matters. People tend to do what they want, singly or in groups. So what do most people want, and what do they fear? Most people, it seems clear, want a very high degree of electronic connectivity and seamless convenience, and what they fear, as William Deresiewicz put it, is "isolation from the herd."¹¹⁰ Accordingly, our once private lives – what we buy and read, the house we live in, the vacation we took, and perhaps the table we danced on drunk – have become an open book to strangers as well as friends and companies that want to sell us things.

Do we have more privacy or less now? If we judge by the separation of home from work or the role of the family as a bulwark against the state or the larger culture, we have dramatically less than in centuries past. Public and private lives are collapsing into one another. If we judge by the average person's command of physical space and the ability, whether or not exercised, to be alone and create the terms of one's own daily life, we have dramatically more.¹¹¹ Either way, most people like this state of affairs, all in all. Me? I'm not so sure, but I swim in this ocean and I'm skeptical about our ability to regulate it. At this moment of writing I'm bombarded by annoying text messages and emails asking how I like some things I just paid for. Everybody who sells you something expects you to take a survey. My daughter says this is great because it focuses instantly on bad service. It's efficient! But too much efficiency is inhumane, and insisting that others respond to our compulsions or participate in our employee evaluation programs is rude. The growing assumption is that if you're hot happy ever after in this constant feedback loops, you're a crank. In this respect I have lost some privacy and I am cheerfully cranky (there's a combination!). I want to be left alone.

Comparing net privacy gains and losses across generations is complex. Even if we judge by such interruptions and by the transparency of our purchasing habits, it would be difficult to conclude, overall, that we have less privacy than our forebears did in the villages and towns of Europe or North America, where most people still lived in a hundred years ago, and where people knew a great deal about their neighbors. In colonial New England

¹¹⁰ The phrase comes from William Deresiewicz, "The End of Solitude," *The Chronicle Review*, January 30, 2009, at <http://chronicle.com/article/The-End-of-Solitude/3708>, accessed September 23, 2013. Many people also say that the worst thing about cell phones is that they are constantly available to others, but on balance, they want the connectivity. Aaron Smith, "The Best (and Worst) of Mobile Connectivity," Pew Research Center, November 30, 2012, at http://pewinternet.org/~media/Files/Reports/2012/PIP_Best_Worst_Mobile_113012.pdf, accessed October 23, 2013.

¹¹¹ See, e.g., Michael Tortorello, "Chronicles of a Bed Unmade," *New York Times*, January 9, 2013, at <http://www.nytimes.com/2013/01/10/garden/the-do-not-enter-diaries-a-new-web-site-documents-teen-bedrooms.html>, accessed January 14, 2013, on the mysteries of what goes on in the bedrooms of teenagers.

villages, David Flaherty reminds us, “there was no place of privacy, no time of a man’s life when he could rest secure from scrutiny.” However unsettling this parallel may be, at least we should not be troubled any longer by the *gesellschaft* romanticizers of rural village life.

But alas this is not to be.

X. A TRIO OF BAD IDEAS

A. The “Privacy Commons”

If you think of the Internet as “the commons,” as many privacy commentators do, you’re likely to conjure an image of an expansive green sward where sheep may safely graze and village folk fraternize, a peaceable community with no rules other than the gentle pressure of the live-and-let-live morality of the country village green and common pasture. At English law, a commons was land to which no one held title, though it was ultimately Crown land, on which tenants and property owners in a borough had a right to pasture their animals.¹¹² Nearly all common land in England was enclosed and titled by acts of Parliament between 1727 and 1845.¹¹³ We have no exact equivalent in the United States. The closest parallel was the open range in the West, which was federally owned and was long ago fenced and parceled into titled lots. Sometimes we refer to a “common,” like Boston Common, but that’s legally a municipal park, owned by the City of Boston.

The “privacy commons” metaphor is widely used, however, by the privacy professoriat as well as cyber anarchists who recall the early, heady days of a completely free Internet community and who think that world can be recaptured.¹¹⁴ Many, but not all, of this group also equate freedom and privacy with anonymity. This is ironic, since the one feature missing from this romantic conjuring is that everyone on a real village commons knew everyone else. As Rousseau himself described the golden age of simple manners (No matter how far back you go, the golden age was always a long time ago), “Men found their security in the ease with which they knew one another.”¹¹⁵ There were very few secrets in a rural village, where much was done in common and little was private. Thus the notion of a “privacy commons” is not only deeply confused and powerfully misleading, it is oxymoronic. What is

¹¹² Frederick W. Pollack and Frederic Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed. (Cambridge: Cambridge Univ. Press, 1968), v. 1, p. 653.

¹¹³ Phyllis Deane and W.A. Cole, *British Economic Growth, 1688-1959* (Cambridge: Cambridge Univ. Press, 1969), pp. 95, 272. The enclosures pushed the poorest rural population out of agriculture and into urban areas and caused great dislocation and suffering, especially when they were most intense, between 1793 and 1815. They also raised land values and led to an increase in agricultural output.

¹¹⁴ The notion of a privacy commons is proposed in Edward J. Janger & Paul M. Schwartz, *The Gramm-Leach-Bliley Act, Information Privacy, and the Limits of Default Rules*, 86 *Minn. L. Rev.* 1219, 1244 (2002).

¹¹⁵ J.-J. Rousseau, *Du Contrat Social* together with other works (Paris: Giraudon, 1963), p. 204 (my translation).

held in common is not private. We do not live or communicate on a village common (or, for that matter, on an information highway – another popular trope). We live in a highly integrated, post-industrial society in which we make manifold, sometimes difficult decisions daily about whom to trust among hundreds of people we interact with around the world, most of whom we do not know well, or at all.

Expounders of the privacy commons theory generally found their position on the assertion of market failure. As one of them put it, “The emerging verdict of many privacy scholars is that existing markets for privacy do not function well.”¹¹⁶ This is loose talk – privacy scholars are not known for their economic literacy, and creating a market for being left alone would present serious difficulties – but let’s assume this writer refers to the market, or lack of a market, in personal data. The argument goes like this: (1) If the data is about me, I (and only I) own it; (2) other people are using it commercially and making money from it, but I don’t get a dime; *ergo* (3) these users are taking my property without paying for it. The proposed solution is to award me an apparently exclusive property right in information about me.

There are at least three serious difficulties with this position. The first is that it fails to explain why the counter-party to any transaction with me has no right to information about the transaction. That’s certainly not the law now. The legislature could create such a right, but in doing so it would have to divest the counter-party of existing rights, so the new rule would arguably involve a taking or compulsory purchase that no one proposes to pay for, particularly if it were retroactive.

The second difficulty is that the proposal would have horrible implications for free expression. If all information about me, or some exceedingly hard to define class of information about me, would belong to me exclusively, then I could (in some formulations) prevent you from using it or at least tax your use of it. Such proposals would presumably permit individuals, though not the government, to prevent the publication of information about themselves they didn’t like, or to require other to remove it from view after publication, or (in a watered down formulation) make you pay for it. In effect, these proposals resurrect the Warren-Brandeis remedies while applying them to a range of information that Warrant and Brandeis never dreamed of.

The third difficulty with the proposal is that determining how to price personal information would be wildly complicated for both primary and secondary users.¹¹⁷ It would be an administrative nightmare, particularly as counter-parties would obviously retain rights to information under some circumstances and for some purposes. At bottom, the proposal to create unilateral property in data is a complicated and pernicious regulatory scheme

¹¹⁶ Paul M. Schwartz, “Property, Privacy, and Personal Data,” 117 *Harvard L. Rev.* 2055, 2076 (2004).

¹¹⁷ See Rubinstein, Ira, “Regulating Privacy by Design” (May 10, 2011), *Berkeley Technology Law Journal*, vol. 26, p. 1409, 2012. Available at SSRN: <http://ssrn.com/abstract=1837862>.

needlessly expressed in the language of property rights and based on a romantic oxymoron.

B. *Anonymity as Privacy*

Another drum major in the parade of bad privacy ideas is the assertion, sometimes violently made by people wearing masks in public places, that anonymity is a core aspect of privacy. Equating privacy with anonymity turns the privacy's core instinct – the wish to be let alone – into an asserted right to interact with others in a faceless, traceless, and unaccountable manner, even if one causes harm. This is a fundamental contradiction and it turns privacy inside out. I'm not saying anonymity is irrelevant to privacy. It protects my ability to go places, buy things, and read things I do not want others to know about and do not want to admit doing. That is, anonymity protects hypocrisy. This is hard to swallow if you believe hypocrisy is always evil. But that's a shallow and moralistic position. In some contexts hypocrisy is called courtesy, kindness, or regard for another's feelings. In other contexts it's "the first Maxim of worldly Wisdom," as Adams put it, and simply means concealing from others sentiments and intentions such "as others have not a right to know." Which is a pretty good gloss on privacy. But in all these cases we are implicitly or explicitly dissembling. And in electronic villages, as in physical villages, dissembling is difficult. This isn't a matter of preference, it's just a fact.

In political speech, anonymity protects security, not privacy. In some countries it protects political speech and the right to organize and can be the difference between life and death. In American history the anonymous pamphlet and petition played an important role in struggle for independence, and we value the secret ballot as proof against intimidation, though it is not guaranteed by the Constitution and was not uniformly used in American Presidential elections until 1884 (twelve years after the British adopted it). In China, relative anonymity in electronic communications has been a significant impediment to the Chinese government's ability to police free expression, which is why they have outlawed it. But it is confused, and wrong, to think that protecting political organizing and political speech from tyrants is a question of privacy rather than politics, which is a quintessentially *public* affair.

A free, civilized order requires that people be permitted to communicate any way they want, in relative anonymously or otherwise, unless they harm someone else. This is one of the oldest and most basic principles of both Roman and Common law, classically expressed as *Sic utere tuo ut alienum non laedas*, which loosely means you must use what's yours so as not to injure the lawful rights of others.¹¹⁸ When people in a free and civilized order do interfere with the lawful rights of others, they have no right to anonymity, even if anonymity were technically achievable.

¹¹⁸ See Joel F. Brenner, "Nuisance Law and the Industrial Revolution," *Journal of Law and Economics*, v. 3, p. 403 (1974).

As a description of the world, true anonymity is a myth in any case. Encrypting and “de-identifying” data¹¹⁹ make it harder to steal, and that is very much worth doing. But real anonymity is impossible to achieve. With mundane details like the make of your car and your gender and zip code, you can be identified with near certainty. A “computerized distributed personal information aggregator” can match real names with pseudonyms used on blogs and social network sites.¹²⁰ Nobody needs your permission to do this. A free market in data makes the task easier, but it is not essential so long as people publicly post information about themselves – and so long as information about us in public data bases is widely available. That information used to be public but hard to get. Now it’s public and easy to get, for mostly good reasons. Technology has outrun the law’s ability to regulate it except in very general ways.

Yet some authorities keep trying. The consensus among E.U. data processing authorities that Facebook should abandon its insistence that users use only their real names is a case in point.¹²¹ Facebook does not want anonymous users. European data regulators don’t like that. (Observing that people are free to avoid Facebook strikes these regulators as impertinent. They are interested in law, not behavior.) They therefore propose rules that they selectively enforce and would have the perverse effect of requiring data crunchers and advertisers to spend more resources to correlate your behavior across difference platforms in order to create a unified picture of your behavior – which they can and will do.

Should we be uneasy about this? I think so. We are doing it – whatever “it” is – like goldfish in the privacy of bowls. If you think love and private life thrive best in the shade, as I do, you don’t like this. Yet there are many forms of cultural surveillance you may like, such as the ability to monitor electronically your children’s Internet browsing habits. Unfortunately the same technology that permits reasonable public and familial regulation and behavior in Europe or the United States – such as by the identification and sequestering of malware, or the tracking of your children’s viewing habits – facilitates truly draconian police measures in the hands of authoritarian regimes. We can regulate the export of this technology, but we cannot un-invent it, and we cannot prevent others from inventing their own versions of it.

Social media cause unease for other reasons too. Their ad-supported business model conflicts with any kind of data restriction, including restrictions

¹¹⁹ See the Department of Homeland Security’s guidelines on anonymizing data at <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveridentities/De-identification/guidance.html>

¹²⁰ Joel Brenner, *Glass Houses: Privacy, Secrecy, and Cyber Insecurity in a Transparent World* (Penguin, 2013), p. 23.

¹²¹ See, e.g., the “Report of Re-Audit” of Facebook Ireland Ltd by Ireland’s Data Protection Commissioner, 21 September 2012, p. 3; Karen Matussek, “Facebook Scores Win in Legal-Regime Dispute with Germany,” *Bloomberg*, February 15, 2013, at <http://www.bloomberg.com/news/2013-02-15/facebook-scores-win-in-legal-regime-dispute-with-germany.html>. accessed November 17, 2013.

chosen by their users, so clarity and brevity of disclosure have not been their hallmark. And even the best-written disclosures are difficult for most people to understand. Regulators will continue to skirmish with Facebook, Google, and other companies over their voracious appetite for data. But if a media company tells you clearly that by signing up you are giving up your contacts; if it tells you that some other user has the right to distribute information about you whether you like it or not; if it tells you that anything you post can be used by the company in its advertising,¹²² and you still use it – what then? In that case you have freely parted with your information, and complaining about your lack of privacy is silly. Expecting a government agency to restore it for you is sillier still.

Technology may provide some help. Emerging companies like Snapchat, for example, destroy chat sessions automatically as soon as they're done. And in the end, people will learn some degree of self-control, just as they're learning to turn off tracking features, clear their browsing histories, and be more selective about their "friends."¹²³ But technology cannot be a complete solution to a problem that is behavioral as well as technological, and behavior is unlikely to shift radically away from a preference for convenience. Data security officials have learned to their chagrin that when convenience butts heads with security, convenience wins every time. So it is with privacy too. It is not difficult to share photographs with family and close friends in ways you can control, but it takes a bit of thought and time to do it. Posting them on social media you can't control is quicker and easier. An unprotected Wi-Fi network in your house is like a marine radio channel: Anyone can listen. A simple password would protect against Google Streetview. A policy that pretends otherwise rewards carelessness and indiscretion and, instead of educating people about technology, has the opposite effect. Indiscretion has costs, and it should. Disgraceful behavior brings disgrace, and it should.

C. *The Right to Be Forgotten*

Freedom of expression is a fundamental right in every civilized society. In the United States it is nearly absolute. Americans can read, say, and write what they want with very narrow exceptions such as obscenity (that's pretty much a dead letter) and incitement to violence.¹²⁴ American courts don't censor libelous publications, though the writer and publisher may be liable for words that are false and defamatory, and they don't censor information on national security grounds,¹²⁵ though in a *very* narrow class of cases they presumably

¹²² Vindu Goel, "Facebook Reasserts Posts Can Be Used to Advertise," *New York Times*, November 15, 2013, at http://www.nytimes.com/2013/11/16/technology/facebook-amends-privacy-policies.html?_r=0, accessed November 17, 2013.

¹²³ Jan Lauren Boyles et al., "Privacy and Data Management on Mobile Devices," Pew Research Center, September 5, 2012, at <http://pewinternet.org/Reports/2012/Mobile-Privacy.aspx>, accessed September 25, 2013; Aaron Smith, "The Best (and Worse) of Mobile Connectivity," Pew Research Center, November 30, 2012.

¹²⁴ *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729 (2011).

¹²⁵ See *New York Times Co. v. United States*, 403 U.S. 713 (1971).

could.¹²⁶ Falsity, not reputational damage, has been the touchstone of American defamation law since 1800.¹²⁷ We are outliers in our nearly absolute protection of free expression and in our relative lack of judicial protection for reputation. European law bends in a different direction. Article 10 of the European Convention on Human Rights, for example, proclaims that freedom of expression carries with it duties and responsibilities and may be restricted for a variety of reasons. Some of them, such as national security, public safety, and the protection of morals, roughly correspond to exceptions to the American First Amendment. But the Convention makes another exception for “the protection of the reputation or rights of others.”¹²⁸ And therein lies the basis of the most dangerous privacy proposal now under consideration, the so-called “right to be forgotten and to erasure.”

In January 2012, the European Commission proposed a regulation for approval by the European Parliament and Council on data protection¹²⁹ that would assert sweeping new authorities to regulate information, based in part on “respect for private and family life.”¹³⁰ Article 17 of this mammoth regulation proposes a right to be forgotten and to erase offending information about oneself. It would give every “data subject” – that would be you, me, everybody – the right to obtain “without delay” the erasure of any information about that person in a range of circumstances that basically boil down to their not liking it. The right would not be restricted to minors. This proposed “right” is bad in principle, bad in practice, and certain to have perverse effects.

First, a person would have the right of erasure when the data “are no longer necessary in relation to the purposes for which they were collected or otherwise processed.” This is obviously intended to reduce the data available for targeted advertising, but it could be used to prevent useful information from

¹²⁶ See *ibid.*, concurrence of Justice Stewart, suggesting that publication could be stopped if it would “surely result in direct, immediate, and irreparable damage to our Nation or its people.”

¹²⁷ Stanley Nider Katz, “Introduction” to James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* (Cambridge: Belknap Press, 1963), pp. 31-32.

¹²⁸ The European Convention on Human Rights is available at http://en.wikipedia.org/wiki/European_Convention_on_Human_Rights, accessed November 19, 2013. Another exception in Article 10, section 2 permits judicial gag orders in the interest of impartial trials and “preventing the disclosure of information received in confidence.” The latter echoes the English cases cited by Warren and Brandeis. Breach of confidence may be ripe for a revival as a cause of action in American courts.

¹²⁹ “Proposal for a Regulation of the European Parliament and Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation),” No. 2012/2011 (COD), (referred to below as the “Data Protection Regulation”), January 25, 2012, available at <http://www.europarl.europa.eu/document/activities/cont/201305/20130508ATT65776/20130508ATT65776EN.pdf>, accessed November 19, 2013. For one of many summaries of this regulation, see Claire Walker, “EU’s Data Protection Regulation: Practical Advice on How Your Business Will Be Affected,” Olswang, January 25, 2012, at <http://www.olswang.com/articles/2012/01/eus-data-protection-regulation-practical-advice-on-how-your-business-will-be-affected/>, accessed November 19, 2013.

¹³⁰ *Ibid.*, p. 7, § 3.3.

being used for any number of reasons. As a group of French archivists has pointed out, the idea that data should be erased when they “are no longer necessary” means that public archives – the very basis of our political, legal, and social history – would be denuded of information critical to writing the history of our nations.¹³¹ Besides, important data are not confined to public archives. They are increasingly found everywhere. In a private conversation with a high-ranking European regulator, I was told not to worry about this because the Commission would never interfere with the kind of data historians need, as if a group of bureaucrats, however enlightened, could possibly foretell what data will be relevant to future inquiry.

Second, the right would apply when anyone, adult or minor, having given consent to process or store information, *changes his or her mind*, even many years later, about the prudence of having posted God-knows-what. The moral basis of this proposition, if there is one, eludes me. And it would be a nightmare administratively. It would commit Google or Yahoo!, for example, to the impossible but never-ending task of chasing down information across the data universe and perhaps into places it does not control. Because the liabilities for failing to comply would be crushing, that requirement would perversely require companies to increase, not decrease, their surveillance of traffic in their hunt for proscribed information.

Third, the right would apply to data used for profiling – principally to profiling for advertising purposes.¹³² Here we arrive at the emotional core of this proposition and of the entire regulation, which is hostility among the European policy makers to the very commerce that made Europe rich, and to advertising in particular. “Where personal data are processed for direct marketing purposes, the data subject shall have the right to object free of charge to the processing of their personal data for such marketing.”¹³³ This is simply one of several instances where the Commission explicitly states its hostility to commerce. In case you were worried that you might have to comply with this directive yourself, you are assured that the “Regulation should not apply to processing of personal data by a natural person ... *without any gainful interest and thus without any connection with a professional or commercial activity.*”¹³⁴ The entire Regulation rests on the implicit, startling premise that private economic activity occurs outside civil society.

Fourth, data do not get “erased” from the Internet. You can make Google de-link names, but the compromising data do not disappear. Today’s archivists and scholars may overlook it, but savvy investigators, miscellaneous geeks, and cyber-literate blackmailers will find it.

¹³¹ Eric Pfanner, “Archivists in France Fight a Privacy Initiative,” *New York Times*, June 16, 2013, at http://www.nytimes.com/2013/06/17/technology/archivists-in-france-push-against-privacy-movement.html?_r=0, accessed June 16, 2013.

¹³² Are you against profiling? If you are a Right Thinking Person you must raise your hand. But profiling is simply another name for inductive logic, and the situations in which it is morally obnoxious are very few.

¹³³ *Ibid.*, Art. 19, § 2, which is imported into Article 17 through Art. 17, § 1 (c).

¹³⁴ Data Processing Regulation, p. 20, clause 15 (my italics).

We don't have to speculate on the manifold ways in which this proposed right would lead to information control, because a variety of courts are already showing us. A prominent British racing official recently persuaded a French court to order Google to remove photos of a naked bacchanal at which someone snapped his picture.¹³⁵ An Argentine court has ordered Google and Yahoo! to take down racy photos of an Argentine pop star who changed her mind about the usefulness of having such stuff available. The photos violated Argentina's version of the right to be forgotten – and now you can find nothing about her on those search engines. By one count there are at least one hundred thirty such suits pending in Argentine courts,¹³⁶ which are hospitable to celebrities who'd like to clean up their reputations, often from messes they created themselves. *These cases stand for the astounding proposition that people have a right to a good reputation regardless of their own conduct, and that courts will enforce this right by controlling what you and I can know about them.* This is a pernicious doctrine, and it is already having unintended consequences. In Brazil, for example, a large mutual fund successfully sued Google and Yahoo! to take down YouTube postings by a man who was warning customers about hidden investment fees. The judgment is under appeal. According to the *Wall Street Journal*, this is one of hundreds of such cases every year in Brazil, where famous people can ban unauthorized biographies of themselves.¹³⁷ Spanish courts have also been ambitious in ordering search engines to delete information the courts deem irrelevant, harmful to reputations, and so on.

In Britain, the Justice Committee in the House of Commons has criticized the entire regulation as unworkable,¹³⁸ and it is. But impracticality is a secondary issue. With this regulation, the E.U. Commission is proposing to put governments in the business of controlling knowledge. No institution in Europe has held this power since the late Medieval Catholic Church. The Commission does so for what it believes are the best intentions, out of “respect for families and private life” among other things. But the Church was well intended in wanting to save souls. Advocates of this regulation will be shocked at the comparison. They are, after all, men and women of moderation and judgment. They do not propose an index of banned books, just a list of information you shouldn't know. This is nevertheless an assault on free

¹³⁵ Alexandra Sage, “Google Ordered to Remove Max Mosely Sex Party Images,” *Reuters*, November 6, 2013, at <http://www.reuters.com/article/2013/11/06/france-google-idUSL5N0IR3SL20131106>, accessed November 19, 2013.

¹³⁶ Jeffrey Rosen, “The Right to Be Forgotten,” *New Republic*, February 13, 2012, at <http://www.newrepublic.com/article/politics/100664/freedom-forgotten-internet-privacy-facebook>, accessed November 19, 2013.

¹³⁷ Loretta Chao, “Brazilians on Social Media at Fore of Free-Speech Battle,” *Wall Street Journal*, October 9, 2013, at <http://online.wsj.com/news/articles/SB10001424127887324807704579087550683336712>, accessed October 9, 2013.

¹³⁸ House of Commons Justice Committee, “The Committee's Opinion on the European Union Data Protection Proposals,” Third Report of Session 2012-13, vol. 1, November 1, 2012, at <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/572/572.pdf>, accessed November 19, 2013.

expression. The road they have set upon is the road to knowledge control, and it leads where roads paved with good intentions have always led.

The European Court of Justice will soon decide whether search engines can be held responsible for what others post. In a rebuke to proponents of the right to be forgotten, the court's independent advocate general has filed a formal opinion saying that websites, not Google, are responsible for what they publish.¹³⁹ If the court agrees, the right to be forgotten will be a shambles, though not a dead letter. But the outcome is uncertain, and tendency to use "privacy" as a cloak to control knowledge will not disappear.¹⁴⁰ The Data Protection Regulation, of which the right to be forgotten is merely a part, remains under consideration.

XI. REGULATING THE FLOOD

During the debates on the U.S. Constitution in the late 1780s, Patrick Henry of Virginia ranted against encroaching federal authority. Without a bill of rights, Henry warned, multitudes of federal taxmen would "go into your cellars and your rooms, and search, ransack, and measure, every thing you eat, drink, and wear."¹⁴¹ As it turns out, most Americans don't seem to care much that the bank, the supermarket, and the data aggregators ransack our transaction data to measure everything we eat, drink, and wear – they do it with less objection, and far more thoroughly, than Henry could have imagined. But we still care when the government does it, because the government can tax us and put us in jail.

Across the Atlantic, Europeans are more accepting of government surveillance (the Germans are an exception) and have carried identity cards, which Americans will not tolerate, for decades. But Europeans are far more guarded about their private lives. They are famously tight-lipped about discussing their salaries and personal finances, for example, and reluctant to invite working colleagues, let alone strangers, into their homes – but far readier to frolic naked on public beaches.¹⁴² For the most part, these differences about

¹³⁹ Opinion of Advocate General Jääskinen, *Google Spain SL Google Inc. v. Agencia Española de Protección de Datos*, Case C-131/12, at http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=138782&occ=first&dir=&cid=124792, accessed November 19, 2013.

¹⁴⁰ For an excellent summary of well-intended efforts to limit free speech, see Jonathan Turley, "Shut Up and Play Nice: How the Western World Is Limiting Free Speech," *Washington Post*, "October 14, 2012. For a tragi-comic episode in the modern privacy saga, see Angélique Négroni, *Le Figaro*, "Ces chauffards qui ne sont pas contrôlés par leurs employeurs," April 20, 2012, at <http://www.lefigaro.fr/actualite-france/2012/04/20/01016-20120420ARTFIG00582-ces-chauffards-qui-ne-sont-pas-controles-par-leurs-employeurs.php?page=&pagination=7>, accessed April 28, 2012, explaining that French employers, who are legally responsible for their employee-driver's behavior, have no right to examine those drivers' driving history because it would be a breach of their privacy rights.

¹⁴¹ *Warden v. Hayden*, 387 U.S. 294, 316 (1967), Douglas, dissenting, quoting *Elliot's Debates*, v. 3, pp. 448-49.

¹⁴² See James Whitman, "Two Cultures of Privacy: Dignity versus Liberty" (2004), Yale

the behavior that's appropriate to different circumstances are not matters regulated by law. They represent a collective disposition. The law does not tell you whom to invite into your home or oblige you to discuss your salary with strangers on a train, read your diary in a bar, or blow up your marriage on TV.

Europe is basically hostile to the corporate market in information. So long as the government isn't gathering the information, most Americans don't much object. So long as corporations aren't making a profit on the data, most Europeans don't much object. Not surprisingly, European data regulation law is detailed, complex, and expensive to comply with – but without dramatic differences in results. For example, under European law it's not permissible to use data except for the purpose for which it was gathered. This leads European regulators to conduct detailed audits that examine, say, whether an expressed interest in “photography” permits a service provider to display information about “wildlife” or “nature.”¹⁴³ This sort of inquiry fattens the ranks of the unproductively employed, but whether it yields a socially significant result is doubtful. Americans restrain abusive practices under less intrusive regulation. California and some other states require online business to post privacy policies. If you want to do business in those states, you follow their law everywhere, and since large companies do business nationwide, they follow these rules in every state. The privacy policies say what data is gathered and how it's used. Violations result in enforcement proceedings by state attorneys general and the Federal Trade Commission, not to mention expensive class-action lawsuits. The decentralized American legal regime is difficult for Europeans to understand – it's fragmented, it's not logical – but it has had a significant effect on actual market behavior.

European and American regulations share an important similarity in spite of their organizational differences: Both are both based on notice and consent. That is, the business must tell you in supposedly plain and simple terms what data it gathers and what it will do with it, and if you don't like it, you can go elsewhere. The United States moved hard in this direction in 1999 with the Gramm-Leach-Bliley Act, which restructured the financial industry. As part of a deal to get it through Congress, Democrats insisted that financial institutions issue privacy notices to their customers.¹⁴⁴ The law also required these institutions in some cases to permit their customers to “opt out” – that is, instead of simply declining to do business with the bank, customers could decline to permit the institution to disclose nonpublic personal information to unaffiliated third parties. Rules like this explain why you get those tedious privacy notices in the mail about three times a week, and lengthy “terms of service” agreements that pop up on your computer screen. Nobody reads them except lawyers. If you want to download an app for a smart phone, for

Faculty Scholarship Series, Paper 649, at http://digitalcommons.law.yale.edu/fss_papers/649, accessed December 28, 2012; Jeffrey Rosen, “The Silver Bullet: Protecting Privacy and Security through Law and Technology,” *Proceedings of the American Philosophical Society*, v. 151, no. 3 (September 2007), pp. 291-299.

¹⁴³ “Facebook-Ireland Re-Audit Report,” p. 16.

¹⁴⁴ This portion of the act is codified at 15 U.S.C. §§ 6801-6809.

example, you're electronically led to an agreement that's likely to be some sixty screens long. *Nobody* clicks through sixty screens. So there's typically a convenient "I agree" button on the *first* page. Users click on that and keep going. This looks like a charade¹⁴⁵ but it isn't useless, because it provides regulators and plaintiffs' lawyers a basis to police the marketplace; and as a lawyer practicing in this area, I can say that compliance in the United States has ratcheted up sharply if unevenly. Indeed while the rules in the E.U. are strict, enforcement is far spottier by comparison – except against large U.S. companies. Ironically, American companies seem generally more advanced in *implementing* data controls than their E.U. counterparts.

Europeans and Americans differ in how they implement the notice and agreement rule, however. The difference is over the opt-in/opt-out rule. On first look the difference seems crucial. Every law abiding website you visit will tell you what it does with your information and how it proposes to deal with you. In the United States, the default rule is that the website owner can use or sell your data for whatever purpose they tell you about. If you don't like the terms you can refuse to deal with the site or take the trouble to "opt out" of the arrangement. In contrast, a European website cannot use your information for any purpose other than facilitating the immediate transaction unless you take the trouble to consent to the proposed use of your data. That's called "opting in." A preference for an opt-out or opt-in regime has nothing to do with liberty. Both regimes are consistent with freedom of contract. The difference lies in the trivial but annoying trouble it takes to opt in or out. Few people do it. They just accept the default rule and move on. Defenders of the opt-out rule argue that it makes advertising more efficient. No doubt it does, but efficiency in advertising is not a basic human right in any legal system I know of. Whether you prefer a regime that favors the thoughtless sharing of personal information for commercial purposes (the U.S. opt-out rule) or its thoughtless withholding (the E.U. opt-in rule) depends on whether you think people *should* share information about themselves and whether you think targeted advertising is bad. These are core political choices, and they reflect the different dispositions. I like the opt-in rule, but in the long run the difference won't matter much. When faced with an opt-in regime, Internet companies simply get more aggressive in offering free services that people want in exchange for people's opting in – which they will do. That's why the data ocean is growing on both sides of the Atlantic, and why data is becoming more powerful for science, commerce, and venal curiosity alike.

In the face of this inexorable tide, the proponents of still more regulation in the United States and Europe assert that the notice-and-consent regime has been a failure.¹⁴⁶ What they mean by this – the *only* thing they can mean – is

¹⁴⁵ See Fred H. Cate, "The Failure of Fair Information Practice Principles," ch. 13 in Jane K. Winn, ed., *Consumer Protection in the Age of the Information Economy* (Burlington, Vt.: 2006), available at http://www.informationpolicycentre.com/files/Uploads/Documents/Centre/Failure_of_Fair_Information_Practice_Principles.pdf, accessed December 30, 2013.

¹⁴⁶ See, e.g., Eduardo Ustaran, "Yes, Consent Is Dead. Further, Continuing to Give it a Central Role Is Dangerous," *Privacy News*, December 18, 2013, at

that they abhor the result the market has produced, even under the opt-in rule. As a result, the reflexive regulator who disapproves of a robust data market has only one choice, and that is to prohibit the secondary data market altogether. In other words, to prohibit any secondary trading in information about people, at least in the “free” on-line service market. That rule would probably destroy the market for free on-line services and drive on-line services to a fee model. Larger users probably would not mind that. Nor would relatively wealthy people who like their privacy. But almost everyone else probably would.

In Europe as well as the United States, the privacy conversation has largely been reduced to demands for the legal control of commercial data. It is only a slight exaggeration to say that this is like a conversation about the legal control of flooding; it's a rear-guard sand-bagging operation against waters that are already pouring over the window sill. This is not to say that law is irrelevant to the data environment. On the contrary, law is affecting the data market in a variety of ways – some of them desirable, some of them pernicious, and some of them futile but expensive. Europeans and Americans will continue to struggle with deceptive practices that even careful adults cannot readily understand, and we will regulate them. But the flood will continue to rise everywhere. Data create productivity for business and convenience for ordinary people. Data also create power. Google has accurately predicted influenza outbreaks faster than public health authorities, based on over-the-counter drugstore purchases. We are on the verge of being able to identify (and distinguish) man-made and natural pathogens based on huge aggregations of data. In the coming years we will probably see a breakthrough in urban and intercity traffic management based on data flows. In these cases we don't need to identify individuals; de-identified data will do. In other cases, we do need to know. Genetic databases, for example, are allowing us to diagnose and treat diseases with previously unheard of precision. Personalized data will bring major advances in private health management. Who gets access to personally identifiable data, and who will police its use, are controversial political questions and rightly so.

Meanwhile habits are changing in Europe as well as in the United States. European restrictions on data will continue to affect the tone and aggressiveness of marketing on the Continent, but people there are giving up data about their purchases and habits with almost as much alacrity as Americans do. Targeted advertising in Europe may be moving somewhat more slowly than in North America, but it will arrive at much the same destination, which is dramatically greater transparency about personal and household habits. A Frenchman who can save a Euro on a kilo of grapes by joining a supermarket loyalty program – and at the same time give up information about his eating habits – will do it about as readily as an American who can save a

dollar on a pound of tomatoes by doing the same thing. He will also make “friends” whom he has never met on social networking sites that share his information according to shifting policies he will have trouble understanding. We will all know a great deal about one another. Regulating government’s access to and use of this information remains a pressing issue, particularly in the United States. I do not underestimate the importance of that task, but ironically it will be easier to do than regulating the availability of data generally, and it is this general availability that diminishes our sense of privacy. In 1964, the Canadian seer Marshall McLuhan wrote, “after more than a century of electric technology, we have extended our central nervous system in a global embrace, abolishing both space and time as far as our planet is concerned.”¹⁴⁷ The “global village” McLuhan envisioned is rapidly coming into being, more radically than even he could have imagined. It is nothing like the idealized village common from Rousseau’s imaginary golden age. Rather it has similarities to those seventeenth century cottages with no curtains at the windows. To welcome it or resent it is almost beside the point. It is happening.

* * *

As for Mr. Wemmick, his circumstances have changed since we last saw him at his evening ritual, pulling up the drawbridge to his tiny Castle in 1860. John – that’s what he’s called now – is a senior associate, specializing in data regulation, at the law firm of Jagers Bartleby & Senard PLC, with offices in London, Brussels, Frankfurt, Amsterdam, Madrid, New York, San Francisco, Sao Paolo, Beijing, Singapore, and Dubai. You’d hardly recognize the Castle. John’s contractor raised the roof and did a complete renovation, and it’s forty feet from a noisy intersection with a multi-story car park across the road. The moat was filled in years ago after the Borough Council declared it a hazard to pedestrians, and the drawbridge is permanently down. Thanks to the discounts John gets with his loyalty cards at the supermarket and neighborhood shops, the shops and his bankcard company know what he eats and wears. European data directives and U.K. law prevent merchants from selling this information without John’s consent, but he regularly consents because, like most people, he doesn’t much care so long as his online services are free, and he widely shares his likes and dislikes, his purchases and his whereabouts on several social media and a personal blog to which he posts dozens of photos every week. When he flew to Paris for an overnight business trip to collaborate with his continental colleagues on marketing material for a French cloud-service provider about the supposedly superior privacy protections of E.U. vs. American law, the hotel immediately gave the French police all information it had about John and how long he’d be staying, with no limitations on how the information could be used. When he booked a package holiday in Spain, ads popped up for Spanish lessons, which he didn’t have time for, and swimwear, which reminded him he had no bathing suit. They also know his favorite vacation spot and his girlfriend’s birthday – his ex-girlfriend, actually – and his

¹⁴⁷ Marshall McLuhan, *Understanding Media* (New York: Signet, 1964), p. 3.

social networking sites know who his friends are and what they like too. John works hard, but some days he doesn't bother to go to his law firm's shiny glass-enclosed headquarters on Threadneedle Street. He'd rather work from his electronically connected home office, which used to be his Aged Parent's bedroom. What with his long hours, keeping his enfeebled father at home became impossible, so Dad now lives in a rest home in Hammersmith, about an hour away across metropolitan London – not convenient really, but affordable. Dad has never been a complainer, however, and John visits when he can. When he does go to the office, John is photographed when he passes the car park and photographed again when he enters the Tube station; and when he drives, a camera snaps the registration number of his car as he crosses into Central London. In a real sense, however, John carries the office with him wherever he goes, on a laptop and the latest smartphone – issued, of course, by the firm, and carrying a warning that, with some exceptions, communications on these devices may be monitored. The electronic traffic of incoming emails and tweets never ceases, night or day. In the morning, before the alarm rings, John wakes to little electronic pings announcing messages from Hong Kong and Singapore; and at midnight, when he's dead tired, his phone is still going off because he's working on a deal for one of the partners in San Francisco, where it's four in the afternoon. John has been passed over for partnership, but the San Francisco partner, whom he regards as a mentor but has never actually met, has told him not to lose hope. After all, his mastery of the arcana of the new E.U. Data Regulation proposal is very valuable, and the firm is making boatloads of money advising companies on how to comply with it.