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Privacy in Modern American Law and Society

*Joanna L. Grossman and Lawrence M. Friedman**

The Oxford English Dictionary traces the word 'privacy' back to the 15th century. Still, it seems obvious that the range of meanings, and probably the use of the term itself, has expanded greatly in the last century. Privacy, the right of privacy, and the problems of privacy, are high on the policy agenda today. The literature on privacy, as a legal and as a social issue, is enormous. But finding a definition of 'privacy,' or the 'right of privacy' is elusive. These are quicksilver terms, with many meanings and nuances. It would be hard to arrange them into a single, all-inclusive definition. But one core meaning, at least for the phrase 'right of privacy,' refers to some sort of right to be left alone, some zone of personal choice. A constitutional right to privacy was the basis in American constitutional law for many decisions of the Supreme Court, on marriage, intimacy, and reproduction—including the right to abortion, until the Court eliminated that right in 2022. But the legal right of privacy has many other meanings, which we explore in *The Walled Garden: Law and Privacy in Modern Society* (2022).

Imagine a young couple, Caleb and Lucinda. They live together in an apartment in Boston, Massachusetts. (No children yet). They have jobs; he's a construction worker, she's a receptionist. When the work day is over, they come home, by bus, or by car. They enter their apartment (or condo or house), and shut the door. At this point, they have entered what they (and everybody else) would consider a zone of privacy. Most evenings, they're alone at home. If it's a hot night, and the apartment is stuffy, they might sit around and watch TV in their underwear. Later on, if they're in the mood, they might have sex. They would surely be shocked—and outraged—if a peeping Tom looked in on them, or installed a video in their bedroom, or in the bathroom or the shower. What they do indoors is part of their 'private life.' They feel entitled to keep this life private, keep it to themselves, keep it secret, at least if they are so inclined.

Where did this feeling come from, this concept of a zone of privacy? Caleb and Lucinda's privacy is not something that has always been part of human experience. The caveman surely shared his cave with others. Peasants in the middle ages lived in huts with their children, not to mention perhaps an old grandma, along with the chickens and pigs. Even the rich and the high-born had less privacy than the middle-class now enjoys. Courtiers and nobles customarily watched Louis XIV get dressed. Queens gave birth before a crowd of people. These were practices we would consider grotesquely inappropriate today. The idea of a private sphere, an individual sphere, an exclusive sphere, is, for the most part distinctly modern; it belongs to the age of the industrial revolution, the technological and scientific revolution, and, in fact, the sexual revolu-

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tion. Caleb and Lucinda have a sensibility, a consciousness of rights, a consciousness of privacy, very different from that of their ancestors.

Closely related to the idea of privacy is what we might call the right to *anonymity*. When we walk down the street, or go to a movie house, or shop, or eat in a restaurant, we are 'in public;' but we don't expect to be watched; a friend might come over and say hello; but if a stranger started dogging our footsteps, we would feel distinctly uneasy. An outdoor crowd is, or was, a kind of mass anonymity. During the daytime, Caleb and Lucinda are often out of doors, in public spaces; she might be eating lunch in a restaurant; he might be sitting on a bench, having a sandwich. On weekends, they might go to a movie, or visit a park. People can and do see them in all of these places. There is no absolute, iron-clad boundary between the public and the private. You can be private and alone, in the midst of a crowd. If one of Lucinda's co-workers persistently stared at her at work; or followed her on the street, she might find this intolerable—an invasion, as it were, of her privacy. If somebody started obsessively photographing Caleb as he worked on his construction job, this would violate some norm, though he might not be clear exactly what norm, or how to enforce it. The home is a zone of privacy; but there are other zones, invisible zones, which surround us wherever we go. We resent people who 'violate our space.' There is a norm of anonymity, a zone of anonymity, which photographers would invade, if they filmed us without permission—even on a public street.

In short, we don't expect to be noticed, in a crowd; and we certainly don't expect snapshots or video recordings of our actions, even in public. At any rate, this was the expectation. Anonymity, today, is not what it used to be. This is in large part due to fear of crime or terrorism. In some cities, surveillance cameras are everywhere on the streets; and people tend to accept, with a shrug of the shoulders, or with downright approval, cameras that record us cashing money at an ATM, or entering a courthouse. It is the price we pay (we think) for personal safety.

In addition, there is also something we might call the right to evanescence—the right to make the past disappear. At one time, if we got a letter, we could keep it, if we wished, or throw it away. When the letter was gone, it was truly gone, unless someone had made a copy, which rarely happened. The right to evanescence is under severe pressure, these days, from technology. We can press a key on our computer, and 'delete' an email. But it turns out that the message is never really gone. People with the right skills can find it—somewhere. In the computer age, nothing gets deleted; everything, it seems, is recorded. If young people say foolish things on social networks; or send a foolish picture, they sometimes find that their folly comes back to haunt them.

In general, it is modern technology that threatens older, and conventional, ideas of privacy, anonymity, and evanescence. A shopper who walked into a grocery store, a hundred years ago, outside of his neighborhood; and bought a loaf of bread for cash, enjoyed all three. The customer who pays for the bread with a credit card today, has actually or potentially *lost* all three. Technology, of course, is a tool; the machines that

are robbing us of privacy are not rogue robots; they are manned by human beings, acting because of decisions made by human beings, and for purposes that human beings consider important.

Caleb and Lucinda's private life, their private sphere, their home life, represents one important part of the privacy equation—the rights half. People's homes are supposed to be their castles. The outside world cannot, in general, intrude. Or should not. This kind of privacy—the privacy of the home, the privacy of private life—includes an element of choice; you can close the door or leave it open; you can stay in or go out; you can pull the blinds, or not. Privacy rights, in one important sense, are, essentially *elective*.

There is also the *duty* half; the other side of privacy--that which *must* be kept private. Suppose Caleb and Lucinda are strolling through the park, at noon, on Sunday. It is high summer, and the sun is beating down on them. They might feel like taking off their clothes. Or the warm sun might arouse an urge to have sex. They would be well advised to go home and forget these urges. Nudity or sexual behavior in public might be (and perhaps is) against the law; it would certainly shock some people, and would violate all sorts of social norms and customs. The duty to maintain some aspects of privacy is as important as the right to *be* private; law (and custom) prescribe rules about things that must stay hidden—private, in a word. A lawyer who blurts out what his client has told him in private; a priest who betrays the confessional—these would be violations of a duty to keep certain matters private. These privileges can be waived; but there are rules about who can waive them, and how.

Privacy, obviously, is a *social* concept; and different societies define it in different ways. We are concerned here with the modern concept, as it has evolved. And as it continues to evolve. Probably each society defines privacy its own way; each society has its own norms and customs. And, of course, there are always ambiguities—unanswered questions; gray areas. Privacy rights are controversial, at least at the margins. Where do they begin and end? Some “privacy” norms are social customs, rules of etiquette, widely observed, but unenforceable. Others have hardened into law. This is true with regard to both rights and duties. Moreover, not everybody has the same right of privacy. In this regard, privacy is different from, say, the right to practice a religion (or not): a right that everybody enjoys, from Presidents and Prime Ministers and Kings on down. Caleb and Lucinda have more right to the sanctity of their private lives than people who are considered 'celebrities' or 'public figures.'

Privacy is on the whole a modern invention and a modern idea; people probably always had some awareness of privacy, some sense of a private zone, some aspect of life that belonged to them and them only. The modern concept is different. It is, among other things, the product of modern individualism. The notion that the self, like a plant, needs to be watered; needs privacy, room to grow, needs personal space. Modern privacy norms also owe a lot to affluence—to middle class life: the idea, for example, that kids need and should get a room of their own.

Human beings are social animals. Group life, family life, have always been enormously important; indispensable, in fact. This is not likely to change fundamentally. *Privacy* defines, in many ways, where the individual begins and ends; how much of life is the social part, how much each person's secret garden. Four broad themes emerge from the study of privacy in American law and society:

1. Ideas about privacy depend on modern technology; but technology is also at the same time the greatest threat to privacy. A kind of arms race is going on. Society develops legal and social tools to control invasions of privacy. At the same time, technology has developed tools—wire-tapping was an early example-- whose sole point is the invasion of personal privacy; cameras morph into surveillance gadgets; and modern ways of talking and communicating with people leave traces behind; nothing is ever gone with the wind.
2. In our times, emphasis has shifted from *duties* of privacy—taboos against nudity, censorship of books, plays and movies—to rights of open and free expression. Censorship has almost vanished. So has much self-censorship. In a celebrity society, too, news and gossip about public figures flood the media. The right to know has developed into a powerful enemy of privacy; most obviously, with regard to public figures.
3. Privacy norms, when they are not matters of personal or national security, are closely tied to norms of sexuality. The most jealously guarded zone of privacy is the zone of human sexuality. Much has been changing, however, in the age of the so-called sexual revolution—an age of extreme permissiveness. A surprising number of the older taboos and prohibitions have been abolished, both by law and society. The older traditions survive as minority views; and produce a certain amount of backlash and resistance.
4. More than anything else, *privacy* is a cultural concept; the cultural concept in turn gives birth to its legal definition; like all cultural (and legal) concepts, the concept of privacy, and the rights and duties of privacy, evolve over time, in response to social change and social pressure.

One need look only as far as the Covid-19 pandemic to see the important and complex role privacy plays in our society. The virus appeared out of the ether in 2020 and sickened people all over the world; eventually, some millions died. Governments fought this invisible enemy; parts of the economy were shut down, and people were locked into their homes as much as possible. As time went on, pressure to 'reopen' the economy became too great to resist, but, as a condition, people sometimes had to answer invasive questions about their health and their vaccination status, for example. The war on the pandemic, like the so-called war on terror, required people to trade some of their rights to personal privacy, in exchange for security and control over visible and invisible enemies. In the strange world of the pandemic, hugging, shaking hands, personal contacts of any kind were frowned on; expressions of affection could

spread the infection from person to person. 'Social distancing' meant that—unless you were part of an actual household—you could move about in society (if you could move about at all) as if surrounded by an invisible six-foot barrier; only as if enclosed in a suit of armor made up of empty space. At times, you were required to wear masks in stores and workplaces and on airplanes. Familiar faces could become masked and unfamiliar.

Privacy during the pandemic was a privilege. Professionals largely shifted to remote work, work in the privacy of their own homes (but not necessarily free from the probing eye of their computers). Millions of others, especially service workers, had no chance to enjoy even this much privacy: you cannot pick lettuce from home, or cut hair, or mop floors, or care for the home-bound elderly. And people who lived in densely populated housing, including those in prisons, immigration detention centers, and even nursing homes had no immunity from invasions of privacy. A big percentage of the people who do these jobs, and who live in prisons and detention centers, are members of racial and ethnic minorities. The harms of the pandemic fell disproportionately on those groups.

'Wars' tend to erode long-established rights. This was true of the so-called war on terror; and it also became true of the war against the invisible viral enemy. Among these wounded rights were rights to personal privacy. Moreover, all modern wars, including the 'wars' on terror and the pandemic, are fought with data and data control, as well as with actual weapons. This produces conflicts. After all, privacy rights very notably include data rights: the right to own, and control information about the self. In many ways, the problem of 'data' is new: the very concepts of 'data' or 'personal data' are distinctly modern: older societies did not produce the same amount and type of 'data.' If you went to the store, bought a bread and a bottle of milk, and paid in cash, you did not generate any 'data' about yourself. Today you do: you pay with a credit card, and your image is captured by surveillance cameras.

In many ways, the pandemic led to a higher degree of invasion of privacy. The war on terror had prepared the way. People had come to accept more and more surveillance; cameras followed them wherever they went; there were metal detectors in airports, in banks, and at the entrance to court houses. Photographs of people's bodies became routine. The U.S. Equal Opportunity Commission (EEOC) allowed employers to exclude workers if a thermometer showed they had a fever. There was no public enforcement; but plenty of private enforcement, by institutions, and by workplaces.

The pandemic, which upended the world as we know it, upended privacy norms as well. Eventually, the virus will probably be tamed. Vaccines and medications have made it easier to live with the disease. But whether things will go back to the way they were is an open question. We live in what Ulrich Beck has called the risk society. Beck wrote his book a generation ago, after the disastrous nuclear accident at Chernobyl. The risk society is a society which faces huge man-made risks, like climate change, and the threat of nuclear war. The pandemic is not man-made in the same sense; but

it is global in nature, and the conditions of modernity are what has made it global. It is also powerful enough to bend the arc of history. Risks like the pandemic tend to swell the power of central governments, just as the threat of terrorism has done. Only central governments have the technological power, and the sheer power of force, to cope with risks of this magnitude. But in the process, the risk society grows into the surveillance society, the society that can and does amass mountains of personal data on its citizens. The enigma of data protection—and data use—has profound implications for both privacy and anonymity.