

## **A Call From the Panopticon to the Judicial Chamber “Expect Privacy!”**

Julia Alpert Gladstone  
Bryant University  
Smithfield, RI, USA

### **Abstract**

*Privacy is necessary in order for one to develop physically, mentally and affectively. Autonomy and self definition have been recognized by the United States Supreme Court as being values of privacy. In our technologically advanced, and fear driven society, however, our right to privacy has been severely eroded. Due to encroachment by government and business we have a diminished expectation of privacy. This article examines the detriments to self and society which result from a reduced sphere of privacy, as well as offering a modest suggestion for a method to reintroduce an improved conception of privacy into citizens' lives.*

**Keywords:** *Privacy, Technology, Judiciary, Autonomy, Statute*

### **INTRODUCTION**

Citizens often pay scant attention to their privacy rights until a consciousness raising event, such as the late 2005 exposure of the unauthorized wiretapping performed by the United States Executive Branch, heightens their interest and concern to protect previously dormant privacy rights. The scholarly literature on privacy is plentiful which broadly explains privacy as a liberty or property right, or a condition of inner awareness, and explanations of invasions of privacy are also relevant. This article seeks to explain why privacy remains under prioritized in most people's lives, and yet, privacy is held as a critical, if not, fundamental right. Privacy is defined according to social constructs that evolve with time, but it is valued, differently. It is valued as a means to control one's life. This difference creates dissonance within individuals and between factions of society.

In our technologically advanced society, our definition or sphere of privacy is diminished and thus we are sacrificing the capabilities to develop our individuality and our inner moral selves. The legal system, which embraces social change, codifies the eroded privacy into living law. A social, self fulfilling prophecy process takes over. The purpose of this article is to demonstrate that privacy is a value necessary to develop an autonomous ethical self which is fundamental to human beings, and to provide an explanation of the way that the United States (U.S.) judiciary crafts the law to reflect and influence social change. While recognizing that the social and legal culture may evolve to a place “beyond our feeble powers to predict”<sup>1</sup>, this article suggests that the judiciary take on the role of educating the public of the importance of privacy. Without an increase in the value placed on privacy, people will lead impoverished lives that will result in oppression by the government and others.

Part I examines the development of the right to privacy in the U.S. under the common law and the Constitution. Advanced information technology, together with the events resulting from the September 11, 2001 terrorism, impacted society reducing nearly everyone's expectation of privacy. The qualities of privacy which are needed to develop self definition and autonomy are explained in Part II. The Panopticon model of a prison developed by Jeremy Bentham, which has been used as a metaphor for social control, is used to vividly demonstrate how the loss of privacy impacts individuals and society. Part III describes the realist view of jurisprudence and examines two pivotal privacy cases to illustrate this legal philosophy and method. The contrast of the *Bowers* and *Lawrence* cases, demonstrates how a shift in society's attitudes can be institutionalized into law by the courts .

---

<sup>1</sup> Freidman, Lawrence, *The Eye that Never Sleeps : Privacy and Law in the Internet Age*, 40 Tulsa L. Rev. 561, ( 2005).

**PART I HISTORICAL DEVELOPMENT OF PRIVACY**

The concept of being or having privacy predates Christianity and it is evident in the Bible: sex, secrecy and privacy are the keys themes of the story of Adam and Eve. The discussion of privacy in the U.S. begins with the 1890 seminal Harvard Law Review article by Warren and Brandeis entitled, "The Right to Privacy" where the authors set out the value of the "right to be let alone." Warren and Brandeis were themselves responding to a technological innovation, namely, the spontaneous photograph which they found was changing the boundaries and extent to which one's action would be voluntarily and involuntarily exposed. They describe the harm of photographic journalism of the day as "gossip", as a trade which is no longer the resource of the idle and the vicious but which has become a trade which "has been pursued with industry as well as effrontery."<sup>2</sup> For Brandeis and Warren, recognizing a right to privacy strengthened rules of propriety and morality which were faltering in society. Privacy was also thought to be necessary to the development of the "inviolable personality" which is a concept that reflects John Stuart Mills' understanding of an autonomous self.<sup>3</sup>

The media appears to have been responding to the insatiable public lust about the rich and famous along with the shocking and the excessive which broke down barriers between classes. It was generally believed that public propriety through privacy was a means to maintain the separation between classes. An example of the shift to regain public decorum is seen in the legal approach to adultery. In several states the crime of adultery was reduced to only those acts which are "open and notorious".

The focus on sex as a matter of privacy has driven the development privacy law for the first two thirds of the twentieth century. Obscenity laws would not only prohibit pornography, but information about abortion or contraception was limited under laws that were based on the restriction of harmful speech.<sup>4</sup> Books that were considered to incite impure thoughts or to incite sexual passions in the hands of children were banned from libraries and bookstores. Sex in movies was similarly constrained in keeping with society's expectations of privacy. Around the turn of the century, a Chicago city ordinance, which required a permit from the police before showing certain movies, was found to be constitutional by the Illinois Supreme Court. The secrecy paradigm of privacy where sex is not to be mentioned, seen or heard in public fostered the Victorian ideal of repression, prudery and moderation. It guaranteed the anonymity of the privacy of the family, to the point where mechanisms of protection were excluded. Unreported domestic abuse is regarded as a negative result of this secrecy.

As society evolved, the concept of privacy in the U.S. changed and the legal culture adapted accordingly. The unprecedented migration of citizens from American cities to the suburbs in the mid twentieth century reduced the boundaries of privacy in society. The development of neighborhoods and social pressures for conformity lead to shrinking spheres or expectations of privacy.<sup>5</sup> During this time, in *Griswold v Connecticut*, 381 U.S. 479 (1965), a case involving access to contraceptives to married couples the U.S. Supreme Court found a right to privacy in the Constitution for the first time. This case suggests the fundamental nature of the right to privacy because it is derived from one or more of the amendments in the Bill of Rights. Justice Douglas spent considerable time in a rather short opinion discussing the penumbras of the First Amendment as contributing to the right of privacy whereby he cites a freedom of opinion as inherent in the right to assemble, and the freedom of inquiry and thought is to be derived from the right to speech. He emphasizes the dependent relationship of self expression to privacy. Justice Douglas finds the right of privacy inherent in the institution of marriage which predates the Bill of Rights; this once again suggests that privacy like marriage is a natural or fundamental right to be protected from government interference. Justice Goldberg concurs with the majority but explains

---

<sup>2</sup> Brandeis and Warren, *The Right to Privacy*, Harvard Law Review, 1890.

<sup>3</sup> See *infra* Part II.

<sup>4</sup> The Comstock Laws of 1873.

<sup>5</sup> Chafe, William, *The Unfinished Journey*, Fifth Edition Oxford University Press (2001)

how the Ninth Amendment, which was intended to clarify that the fundamental rights of the people were not exhausted by the Bill of Rights, suggests that the Constitution guarantees privacy.

The constitutional meaning of the right of privacy which the Courts have been defining since *Griswold* and the most recent U.S. Supreme Court privacy opinion, which was *Lawrence v Texas*<sup>6</sup>, does not focus on restricting impure thoughts. Rather the new view of privacy demands a freedom for the individual to make intimate personal decisions. The “new privacy” which can be described as “the right to be let alone” does not need to hide behind closed doors, rather it can be had prancing about and parading in public.<sup>7</sup> Privacy which has also been referred to as “decisional autonomy”<sup>8</sup> is generally interpreted as freedom from unwanted interference from one’s decision making by government or business. There has been a major shift in our culture towards openness about oneself, and communication technology and the media have played a crucial role in bringing about this less coveted self.

The telephone has effectively transformed the private into the public. In the 1950s and the 1960s, one would not speak on the telephone in front of others; it was considered disrespectful to ignore those in your present company and violating a confidence of the person on the telephone. Today, with the prevalent use of cell phones, lively and animated conversations take place in a variety of public places. The airing of intimate phone conversations and a third party’s tolerance of this intrusion highlights the loss of protection we used to have for our vulnerable selves.

One can observe the shift in views of privacy following a timeline of digital innovation and media consumption. The initial quiz or game shows on television where regular people were participants quickly led to the “trash show talk shows” where the audience could become the celebrity and discuss outrageous intimate tales. The exhibition of such a wide range of behavior, together with improvements in video technology, has led to “reality” television where lives are exposed simply for the thrill of publicity. In an atmosphere of George Orwell’s 1984 dystopia people turn their lives into public displays that are viewed by others willing to devote time to the observation practice.

America’s culture of self revelation may be a response to social anxiety about one’s place in a world where change is constant and our status is uncertain.<sup>9</sup> Citizens in today’s world which may be characterized by insecurities can no longer rely upon the traditional or established hierarchies to support their identities or to give them guidance about who to trust or rely upon. In the technologically driven and changing world in which we live there is a lot of anxiety about one’s status and one is eager to win the trust of others.<sup>10</sup> Conceptions of personal truthfulness up through the mid twentieth century relied on the principle of sincerity; today truth and trustworthiness is founded on proof of authenticity. Personal and intimate disclosure has become an efficient way to build trust fast and to maintain it longer.

When an individual exhibits sincerity, he will avoid being duplicitous and an honest correlation between what is felt in private and what is exposed in public is made. To be authentic, one must get honest with himself and then expose everything that is deeply felt.<sup>11</sup> Self disclosure of a psychological nature has become the measuring stick of trustworthiness in our society. By exposing ourselves and expecting the same from others we are accepting risk which is the new means of generating trust. Opening our sphere of privacy is an attempt to reduce stress by making people feel connected.

---

<sup>6</sup> *Lawrence v Texas*, 539 U.S. 558 (2003), is discussed more fully in Part III.

<sup>7</sup> Freidman, Lawrence. *The Eye that Never Sleeps : Privacy and Law in the Internet Age*, 40 *Tulsa L. Rev.* 561 (2005).

<sup>8</sup> Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 *Iowa.L.Rev.* 553 (1995).

<sup>9</sup> Rosen, Jeffrey, *The Naked Crowd*, Random House Trade Paperback (2005).

<sup>10</sup> Anthony Giddens at <http://www.hewett.norfolk.sch.uk/curric/soc/giddens/tgiddens.htm> Visted 2/20/06

<sup>11</sup> Rosen, Jeffrey, *The Naked Crowd*, Random House Trade Paperback (2005).

There are social forces which encourage self disclosure, but the choice to be watched by a video camera, or to be the subject of dataveillance<sup>12</sup> is not always given to the citizen. People can become public figures in numerous ways. We are on television when we walk on many public streets, travel on interstate highways, go to the ATM, enter a courthouse, etc. It has been estimated that an average Englishman is photographed 300 times a day.<sup>13</sup> Data is gathered about citizens at an astounding rate, yet we often do not seem to notice or instead we act as though it has little consequence. We submit to body searches at airports and upon entering government buildings, accept tailored advertising both on and off the Internet and allow unwarranted wiretaps. Is this the price we must pay to live in society today?

## **Part II PRIVACY LOST**

The relationship between society's expectation of privacy and what the law defines as privacy have been directly related in American jurisprudence since 1967. The positive correlation between society's expectation and the establishment of law can be a problem for upholding standards of privacy because the encroachment on privacy from various forms of dataveillance becomes embedded into peoples' expectations. Once the privacy is eroded by the powers dictating the technological mechanisms, these encroachments become internalized. Once individuals have internalized the reduced view of privacy, they will not recognize and no less expect, that privacy was once possible in that encroached area.<sup>14</sup>

It was in the case of *Katz v United States*, 389 U.S. 347, (1967) that the Fourth Amendment was found to protect people not places. The Fourth Amendment's protection against unreasonable search and seizure was found to protect a person speaking in a public telephone booth because he had an expectation of privacy. *Katz* was a case of the FBI's unauthorized use of a wiretap which was a new technology at the time, and a petition to suppress the evidence that was obtained. Although *Katz* was in "plain view," what he sought to exclude "was not the intruding eye but the unwanted ear."<sup>15</sup> Working with the expanded or "new" definition of privacy, the *Katz* court states, "the average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately."<sup>16</sup> *Katz* widens the scope of privacy from the secrecy paradigm of Warren and Brandeis by adding the two part "expectation driven" test. First, the defendant must have an actual or subjective expectation of privacy; secondly, the expectation must be one that society is prepared to recognize as reasonable.

The use of the expectation of privacy test for defining privacy and its interplay with technology is well demonstrated in the court's analysis in *Kyllo v United States*, 533 U.S. 27 (2001). Based upon the tip of an informant, law enforcement officers used a thermal imaging device to scan the defendant's home from across the street to reveal that portions of the house were unusually hot. Using the information from the imaging scan the officers obtained a search warrant to find that the defendant was in fact growing marijuana in his house. The Court held that the warrantless use of the thermal imaging device constituted an unreasonable search under the Fourth Amendment.

Justice Scalia writing for the majority held that the use of the thermal imaging device was a violation of the Fourth Amendment because the defendant had an expectation of privacy in his home which this device violated. Scalia cited evidence that this technology is not in general use, but suggested that when the device is commonly used a defendant will no longer have such an expectation

---

<sup>12</sup> Dataveillance which is "data surveillance" is defined as the systematic use of personal data systems in the investigation or monitoring of the actions or communications of one or more persons.

<sup>13</sup> Rosen, Jeffrey, *Isaac Marks Memorial Lecture: The Naked Crowd: Balancing Privacy and Security in an Age of Terror*, 46 *Ariz.L.Rev.* 607 (2004).

<sup>14</sup> See generally, Spencer, Shaun, *Reasonable Expectations and the Erosion of Privacy*, 39 *San Diego L.Rev.* 843 (2002).

<sup>15</sup> *Katz v United States*, 389 U.S. 347, (1967).

<sup>16</sup> *Id.* at footnote 4.

of privacy in his home. The quality of the material detected with the machine has no bearing upon whether the privacy right has been violated. Justice Scalia specifically discusses that the lack of finding of intimate details does not sanction use of the device.

The expectation driven conception of privacy is used by the courts both in finding an invasion of privacy tort and in defining a right to privacy in the Constitutional sense. Common law precedent and statutes are guidelines, but the court will also look at contemporary community standards and become an arbiter of norms. Government, business and other social institutions influence society's expectation of privacy which has led to an effective encroachment by incremental incursion into unsettled expectations and once the incursions are in place they become internalized.<sup>17</sup> Therefore, defining privacy according to expectations becomes a self fulfilling prophecy outside of the control of the watched person.

This dilemma of asking whether a government action or "search" violates subjective expectations of privacy, which are lowered in response to new technology, was publicly addressed by the former Canadian Supreme Court Justice La Forest.<sup>18</sup> He rephrased the question and posited the inquiry about privacy as whether the technology is consistent with the goals of a free and open society. LaForest has developed a four part test as an alternative to the expectation driven test which determines the invasiveness of the search proportionate to the seriousness of the crime. It asks whether the technology is empirically effective at stopping a crime, whether it is necessary or closely connected to stopping crimes or acts of terror and whether it is the least restrictive means of achieving the goal without violating privacy

An individual's freedom from unwanted interference in personal decision making has been reduced in recent years by technology. Encroachment comes from many sources. The current most controversial technologies involve data mining systems which consolidate both public and private information about individuals. Analysis of public databases which may contain driving records, tax information or criminal records together with private databases that contain consumer browsing habits, customer purchases or magazine subscriptions which is referred to as "mass dataveillance"<sup>19</sup> has become very sophisticated since September 11, 2001. Using elaborate expensive neural computer networks, the U.S. government began a total information awareness program that combined government data with private data held by companies like ChoicePoint and Axiom. Final authorization under the U.S. Defense Department for this program was not granted, however. Another example of "mass dataveillance" was the screening system developed by the Transportation Security Administration (TSA) which collected passengers' personal information which could be analyzed against a broader set of government and commercial data. As intended, this CAPPS-II program would use the collected information to produce a security code to predict and classify the security risk of air travelers. Although the CAPPS-II program was cancelled in 2004 the next iteration of passenger screening which is known as "Secure Flight" and uses "mass dataveillance" to create digital dossiers is well underway. Has the psychology of fear gotten into partnership with the expectation of privacy so that the public is willing to make this self sacrifice?

Privacy has been categorized in the scholarly literature into a variety of hierarchies depending upon the personal interest that is affected. For example, the initial conception of privacy as discussed in Part I was based upon keeping personal sexual matters secret. There is a formalistic interpretation of the Fourth Amendment which seeks to protect one's person and home against unreasonable search and seizures. More recently there has been a focus on protecting the information which is generated externally about oneself. The European model of privacy protection has concentrated on data protection

---

<sup>17</sup> Spencer, Shaun, *Reasonable Expectations and the Erosion of Privacy*, 39 San Diego L.Rev. 843 (2002).

<sup>18</sup> Rosen, Jeffrey, *Isaac Marks Memorial Lecture: The Naked Crowd: Balancing Privacy and Security in an Age of Terror*, 46 Ariz.LRev. 607 (2004).

<sup>19</sup> Clarke, Roger's website at, <http://www.anu.edu/people/Roger.Clarke/DV/> (February 19,2006)

for many years.<sup>20</sup> All of these categories describe a kind and degree of control that individuals exercise over their physical, mental and affective lives and consequently it seems most accurate to define privacy as a right of autonomy. People have come to expect an environment where privacy is nearly nonexistent; this surveillance has impacted individuals in hidden but harmful ways. The following discussion draws upon Jeremy Bentham's design of prisons to explain how society is put at risk by modern information gathering techniques.

The Panopticon was a model prison designed by Bentham which was based upon the principle that one guard could watch many prisoners at the same time. The prisoners would not know whether or when the guard was watching him because of the circular architecture of the building, the placement of windows and the use of light. Consequently, the prisoner believed he was always being watched. The French philosopher Michel Foucault drew upon the Panopticon as a metaphor for the modern mechanisms that are used to control society, showing its use in the design of factories, schools and hospitals.

Foucault and other philosophers, who have used the Panopticon to describe the system of control that permeates society today, recognize that the watchful eye will work even when there is no one in the guardhouse, which is similar to the internalization process of the reduced expectation of privacy. Parties other than the government participate in the data surveillance and contribute to the awareness or sense of always being visible. Prying on someone is a violation of privacy and thus to achieve social control is not necessary to make people agents of their own subjection.

A specific modern example of dataveillance that directly reflects the Panopticon is Intelligent Vehicle Highway Systems (IVHS). They are joint government and private projects for the purpose of making highways safer, speedier and more efficient. An IVHS can take a variety forms and use different technologies but in essence it allows vehicles to be geolocated on the roadway. With the data of an automobile's location, traffic patterns can be analyzed, accidents located and information can be distributed to the driver. Additional features of an IVHS include tracking vehicles, toll ramp monitoring and onboard navigation.

Geolocation information refers to reporting what is clearly evident and in the open and the United States Supreme Court has ruled in *United States v. Karo*, 468 U.S. 705, 714 (1984) that, "while driving in their vehicles which can be observed in public places" defendants have no privacy interest. It is because the data from the IVHS may be accumulated and combined with other publicly available data to construct a personal profile that concerns of privacy invasion arise. The capturing and collating of public information violates one's privacy as it is used to find out more information about one than is naturally available. Privacy does not need to be private to be invaded.

The harms which lack of privacy cause to humans can be measured in terms of degrees of loss of freedom to the point that when we have no freedom we have lost our moral selves. The first loss to freedom is to act spontaneously and the benefits which can be enjoyed from that. The actions one take will have a different nature when they are observed than when they are not. This is clear when we know that we are performing before an audience, but the case with the Panopticon is equally relevant. In the Panopticon world, one is either driving to point A at time B or driving to point A at point B and creating a record of it. In 2006 we are no longer free to act without making a record.<sup>21</sup>

In addition to the loss of spontaneity, knowing that one is being observed one innately incorporates the impression of one's observer's viewpoint. This effects one's perceptions and thoughts in unalterable ways. The purpose of the Panopticon was social control, and people's behavior is constrained when they believe that they are under constant surveillance. In a free society there are actions thought to be moral by the majority, but the individual is left to decide for himself on many

---

<sup>20</sup> Gladstone, Julia *The U.S. Privacy Balance and the European Privacy Directive: Reflections on the United States Privacy Policy*, Willamette Journal of International Law and Dispute Resolution, Volume 7:2000

<sup>21</sup> Reiman, Jeffrey, *Driving to the Panopticon, A Philosophical Exploration of the Risks to Privacy Posed by the Information Technology of the Future*, in *Privacies, Philosophical Evaluations*, edited by Beate Rossler, Stanford University Press, (2004).

matters whether something is right or wrong. Indeed this is a part of the process of maturing. In *On Liberty* John Stuart Mill explains that the highest level of morality is found only with the freedom to choose between right and wrong. Mill argued against legal enforcement of morality as it would rob the individual of the capacity to develop the inner conscience and to form his own morality. Conditions similar to the Panopticon deprive one of the privacy to development this moral self.

Living without privacy under constant vigilance, one senses that one can not withdraw himself from the scrutiny of others which is the condition in our society today. The message is that we do not control who will view data about us and thus we have lost ownership of our physical and psychic selves. Unable to escape being accounted for, we have a profound loss of freedom. As a result, we have cauterized our decision making so that we conform that we have lost our mental and affective selves. People are less likely therefore to acquire selves that think of themselves as owning themselves. They will say mine with less authority and yours with less respect.<sup>22</sup>

One's moral status depends upon an awareness and understanding of oneself as a sentient being. The void of privacy in our society as depicted in the Panopticon metaphor robs individuals of this capacity. The development of a self is eloquently described by Mill in his *Autobiography* as a departure from the rationalist habit of analysis and fatal questioning, to the cultivation of feelings.<sup>23</sup> Mill, who spent his childhood and early adult years engaged as a brilliant student of philosophy, pedagogy, math, military and penal practices, describes his life as, "stranded at the commencement of my voyage, with a well equipped ship and rudder, but no soul; with any real desire for the ends which I had been so carefully fitted out to work for."<sup>24</sup> Mill had no affect and described himself as emotionally dead because he had never taken the time to develop an independent autonomous self. He had followed his father's views on life which lead him to an existential crisis. Mill writes that he acquired a habit of leaving, "my responsibility as a moral agent to rest on my father, my conscience never speaking to me except by his voice."<sup>25</sup> Mill discovers his self through poetry which awakens feelings and the power of imagination. Through the cultivation of this inner life he is able to act autonomously and contribute to his community and society.

This transformation of Mill's life illustrates the importance or need for having a sense of self autonomy. Mill's father was a highly critical, performance driven mentor who pressured Mill to the point that he had lost his humanity. Mill endured a mental break down in order to recognize his inner self which brought him non extrinsic joy. It is this same self which one is being cut off from when one is denied privacy under the conditions of a Panopticon. The harms produced from lack of privacy and sense of self, extend from the individual to others as one acts with less respect towards others. Reintroducing privacy into society is a desired goal that is being pursued in various venues. The following section presents a modest proposal which relies on the legal system to inform society of the value of privacy to encourage change in the expectation of privacy. The judiciary in the U.S. has the power to shape the development of our laws and the recent decision of the U.S. Supreme Court in *Lawrence v Texas*, 539 U.S.558 (2003) demonstrates judicial recognition of the value of privacy in providing self definition, autonomy and a full life.

### **Part III LEGAL REALISM AND THE ENHANCEMENT OF PRIVACY RIGHTS**

The decline in one's sphere of privacy can be attributed to increased sophistication of information technologies and surveillance techniques which have reduced society's expectation of privacy. This impoverished conception of privacy by citizens has in turn been drawn upon by courts in interpreting

---

<sup>22</sup> Id. at 206.

<sup>23</sup> Mill, John Stuart, *Autobiography*, ed. Jack Stillinger Boston, Riverside Editions, Houghton Mifflin Company,(1969).

<sup>24</sup> Gatens, Moira, Privacy and the Body, The Publicity of Affect, in *Privacies, Philosophical Evaluations*, edited by Beate Rossler, Stanford University Press (2004).

<sup>25</sup> Id.

statutes and setting precedent. The events of September 11, 2001 fueled the government to pass regulations which lessened the protections of the Fourth Amendment and preyed on the fear of terrorism. Increasingly, there has been reliance on federal statutes rather than on court decisions to define the privacy arena.<sup>26</sup> These laws are designed to protect consumer privacy interests and to regulate business and other institutions which are likely to infringe on our privacy, but they also establish provisions for government access. The list of statutes is lengthy but the general tendency of recent legislation is reflected by the provisions of the USA PATRIOT ACT.<sup>27</sup>

There are differing opinions whether privacy under the Fourth Amendment is better protected by the legislature or judicial rule. Since the end of the rights focused criminal procedure cases, the Warren Court- a dualistic system with statutes making up a large portion of the rules concerning privacy- has emerged. The implications of the shift from a constitutional to a statutory regulation of the coexistence of security and privacy are thoroughly examined by Orin Kerr and Daniel Solove.<sup>28</sup> The discussions focus primarily on whether members of Congress are more adept at understanding and keeping up with new technologies and more equipped to create comprehensive balanced and flexible rules than the judiciary. Paying attention to underlying human values in understanding the contours of privacy is a key part of lawmaking, which the U.S. judiciary, rather than the legislature, has expressed coherently in its recent jurisprudence.

The function of the judiciary is to decide cases and controversies drawing upon facts and legal precedent. Legal realism is a widely accepted philosophy of law which explains law making.<sup>29</sup> According to legal realism, a judge has the power not merely to interpret the law but he makes the law as he decides the case according to how he believes the law ought to be. According to the realist, the role of the judge therefore is not to merely state the law but rather to create it. Law is a reflection of the people, but it is also an expression of the philosophy of society. Ronald Dworkin, who uses an interpretative legal realism to explain the nature of adjudication, suggests that law includes more than the rules that the political community accepts as authoritative. The law must combine the rules, plus the best moral principles that can be understood to lie behind these rules.<sup>30</sup> The judiciary, therefore, is an appropriate institution to instill the values of privacy which are needed for autonomy and self definition.

Drawing upon legal realism, the majority in *Lawrence v Texas* found a right to self definition in privacy and liberty which was sufficient to declare a Texas statute that criminalized sodomy between two homosexuals unconstitutional. In September 1998 police officers entered a Texas home and witnessed two male adults engaged in anal sex. The two men were arrested and criminally convicted under Texas law. The constitutionality of the statute was challenged and found to violate the Due Process clause and *Bowers v Hardwick* 478 U.S. 186 (1986) where the Supreme Court had found a similar statute in Georgia to be constitutional, was overtly overruled.

The *Bowers* decision is legendary as bad law; Justice White speaking for the majority states that there was no fundamental right to engage in homosexual sodomy in part because proscriptions against that conduct have ancient roots.<sup>31</sup> The framing of the issue in this manner which places homosexual sodomy in an unrealistic position demonstrates the discretion with which justices are empowered. The majority in *Lawrence* succinctly states in reference to White's remark "That statement

---

<sup>26</sup> See generally, Solove, Daniel, *The Coexistence of Privacy and Security: Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 Fordham L.Rev. 747 (2005)

<sup>27</sup>Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ( USA PATRIOT ACT) empowers the government to enter the lives of citizens with more precision and with less oversight from impartial third parties.

<sup>28</sup> Kerr, Orin, *The fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich.L.Rev. 801 (2004) and Solove, Daniel, *The Coexistence of Privacy and Security: Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 Fordham L. rev 747 (2005)

<sup>29</sup> Luban David, paraphrasing Oliver Wendell Holmes, Jr., in *Lawyers and Justice, An Ethical Study*, Princeton University Press, 1988

<sup>30</sup> Dworkin, Ronald, *Taking Rights Seriously*, Harvard University Press, copyright 1978.

<sup>31</sup> *Bowers v Hardwick* 478 U.S. 186 (1986), at 192.



discloses the Court's own failure to appreciate the extent of liberty at stake."<sup>32</sup> Rewording the issue to focus on the rights of the individual would have led to a different outcome.

Much attention has focused on the *Bowers*'s court's inflexible reliance on history which was directly and immediately criticized by Justice Blackman in his dissenting opinion in *Bowers*. In typical realist fashion Blackman found it, "revolting to have no better reason for a law than that it was laid down in the time of Henry IV."<sup>33</sup> The reliance on a misconceived "presumed belief" of the people leads Justice Burger in his concurrence to state that prohibitions against homosexual conduct are, "firmly rooted in the Judeo-Christian moral and ethical standards," noting that homosexual sodomy was a capital crime under Roman law.<sup>34</sup> Imposing moral implications into history which becomes explicit with Burger's assertion that, "to hold that the act of homosexual sodomy is some how protected as a fundamental right would be to cast aside a millennium of moral thinking."<sup>35</sup> was rejected by the *Lawrence* Supreme Court.

Relying on a misguided view of tradition and history the *Bowers*'s justices attempted to enshrine the presumed "majoritarian moralism"<sup>36</sup> as the basis for law. In *Lawrence v Texas*, the role of history and tradition were placed in a realistic perspective and critical realism was the constitutional method used to find in favor of Lawrence. Prior to *Bowers*, history and tradition had been used to bolster the protection of individual rights which is evidenced in the line of decisions which follow from *Pierce v Society of Sisters*, 268 U.S. 510 (1925) through *Griswold v Connecticut*, 381 U.S. 479 (1956). Justice Kennedy writing for the majority in *Lawrence* states that history and tradition ought to be treated as evolving concepts to account for contemporary life. He summarizes and emphasizes his point that the historical grounds relied upon in *Bowers* were more complex than that court indicated and "their historical premises are not without doubt and, at the very least, are overstated."<sup>37</sup>

The power of the judiciary to craft law and its influence upon society is apparent in contrasting the *Bowers-Lawrence* cases. *Lawrence* is an important case for establishing a realm of personal liberty or privacy which the government can not enter. Although the *Lawrence v Texas* decision is famous for its role in broadening the value of privacy, the word privacy is used only in reference to *Griswold*, while liberty is referenced more than twenty five times. The Court indicates at the outset of the decision that the values inherent in liberty are implicit in privacy:

Liberty protects the person from unwarranted government intrusions into our dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.<sup>38</sup>

The *Lawrence* majority views laws which impose on one's intimate sexual conduct to violate more than simply one's right to privacy or to liberty. The Court finds that to allow *Bowers* to continue as precedent would demean the lives of homosexuals. Justice Kennedy writes that the State "cannot demean... (homosexuals) or control their destiny by making their private sexual conduct a crime."<sup>39</sup>

The freedom to engage in a homosexual relationship is a vital form of self identification. The value of privacy is directly tied to personhood. The need for autonomy in order to find one's "inner

<sup>32</sup> *Lawrence v Texas*, 539 U.S. 558 (2003) at 567.

<sup>33</sup> *Bowers v Hardwick* 478 U.S. 186, 199 (1986).

<sup>34</sup> *Id.* at 196.

<sup>35</sup> *Id.* at 197.

<sup>36</sup> Valdes, Francisco, *Culture by Law: Backlash as Jurisprudence*, 50 *Vill.L.Rev* 1135 (2005).

<sup>37</sup> *Lawrence v Texas*, 539 U.S. 558 (2003) at 566

<sup>38</sup> *Id.* at 562.

<sup>39</sup> *Id.* at 578.

self” which is so eloquently described by Mill in his *Autobiography* is expressed by Justice Kennedy in a reference to the *Planned Parenthood v Casey*, 505 U.S. 833 (1992). He writes that a homosexual person “make seek autonomy” for the purpose of “defining the attributes of personhood” by “defining one’s own concept of existence, of meaning, of the universe, and the mystery of human life.”<sup>40</sup> The Supreme Court’s decision in *Lawrence* fortifies the view of privacy as essential to establishing one’s identity and autonomy.

## CONCLUSION

Jeremy Bentham used a circular architecture when designing a prison which would allow perpetual observation of the prisoners. The maintenance of constant surveillance, or the impression of such scrutiny will serve to control a population. This Panopticon model has been used as a metaphor for the social and political conditions in our society as a whole due to intrusions on citizens’ privacy by the government and other dominant sectors of the economy.

Privacy is a concept that has been continuously interpreted and reinterpreted for centuries and the United States legal system defines it in terms of one’s expectation of privacy. The general sphere of privacy has gotten smaller because we have accepted intrusion of more and more sophisticated monitoring techniques. Many members of society today, particularly those born into the Information Age, do not know what it means to live without surveillance. Their lives are not free because they never believe that they are alone and they can not make decisions autonomously. Living under such conditions or constraints blocks one’s development of an “inner life”<sup>41</sup> The principle of autonomy is the sole principle of morals, according to Kant, and autonomy gives people respect, value and correct motivations.

The development of the physical, mental and affective self with innate morality requires freedom from scrutiny .The harms, which this deficiency produces for the individual and a democratic society, are manifest. The United States Supreme Court has expressed the value of privacy in terms of self definition and autonomy which are vital to finding meaning in life. There may be no way to capture the lost privacy, but deference to the judiciary as a broad educational effort is an optimistic suggestion.

---

<sup>40</sup> Greene, Jamal, *Beyond Lawrence: Metaprivacy and Punishment*, <http://lsr.nellco.org/yale/ylsspps/papers/1>, visited 2/01/06

<sup>41</sup> Gatens, Moira, **Privacy and the Body, The Publicity of Affect**, in *Privacies, Philosophical Evaluations*, edited by Beate Rossler, Stanford University Press (2004).