

MA MAJOR RESEARCH PAPER

Comprehending Privacy in Hindsight

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# MRP: Comprehending Privacy in Hindsight

## Introduction

In this paper, I will focus on reinvigorating a sense of what privacy is, tracing its cultural significance from an interdisciplinary perspective, culminating in a renewed definition of privacy in the digital age. I will add a brief examination of the Canadian legal context to ground what is predominantly a theoretical exploration. This paper is not primarily concerned with the actual scope of the loss of privacy, although it is based on the assumption that recent online developments are harbingers of the near total erosion of privacy. The premise of this paper is the curious paradox of living in a society that had had, until September 11, 2001, unprecedented levels of privacy protection, while at the same time undergoing rapid devaluation of privacy rights, seemingly voluntarily sacrificed by citizens/consumers in aid of market advantages through globalized networks.<sup>1</sup> In their study of online behavior of more than 4,000 Carnegie-Mellon University students, Gross and Acquisti found an “apparent openness to reveal personal information to vast networks of loosely defined

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<sup>1</sup> Gross, R. and Acquisti, A., Information Revelation and Privacy in Online Social Networks, 71-80 (hereafter GA). *Proceedings of the 2005 ACM workshop on Privacy in the electronic society*, ACM, New York, NY, USA, 2005.

acquaintances and complete strangers.” They warn that “[b]ased on the information they provide online, users expose themselves to various physical and cyber risks, and make it extremely easy for third parties to create digital dossiers of their behavior” (Gross and Acquisti, 79). I will delineate the boundaries and overlaps between surveillance and privacy, as current conditions mean that we can scarcely talk about one without mentioning the other. I will follow with a brief history of the concept of the public sphere, via Hannah Arendt and Jürgen Habermas, touching on the institutionalization of both surveillance and privacy and on the important limits on government power in light of well-grounded fears of totalitarianism. With that as the foundation, I will explore concepts of privacy that gather from the philosophical, political, legal, as well as psychological and anthropological approaches. Privacy will be evaluated as a philosophical concept, a biological imperative, a human right, and the essential ingredient in shaping personhood. I will discuss the way in which social network theory relates to discussions of privacy, and I will explore cultural contexts of privacy. This paper will conclude with a short list of general privacy principles garnered from the above explorations. Those principles could shed some light on future explorations beyond the scope of this paper that would promote creative reclamations of privacy for the protection of self, ‘other,’ community, and body politic. This is, in short, an attempt to comprehend privacy in hindsight, with the cool reflective sangfroid called for by epochal shifts in human culture.

Comprehension [...] does not mean denying the outrageous, deducing the unprecedented from precedents, or explaining phenomena by such analogies and generalities that the impact of reality and the shock of experience are no longer felt. It means, rather, examining and bearing consciously the burden that events have placed upon us—neither denying their existence nor submitting meekly to their weight as though everything that in fact happened could not have happened otherwise. Comprehension, in short, means the unpremeditated, attentive facing up to, and resisting of, reality—whatever it may be or might have been.<sup>2</sup>

### **The binaries: Privacy and Surveillance; Citizens and Consumers**

Any conceptual approach to privacy must contend with surveillance as privacy's alter ego. Defined by David Lyon as “a set of processes in which we are all involved, both as watched and as watchers,”<sup>3</sup> the striking scope of surveillance in a digital world, in which the numbers of watched and watchers grow exponentially, becomes evident. Coupled with capitalist consumption, surveillance may well become the defining element of our lives. “Indeed, one of the most striking areas of growth for systematically keeping an eye on ordinary people is that of consumption.” (Lyon, SS, 13) In order to understand privacy, we must delineate its boundaries and describe its features and principles. This requires us to set out the connections between surveillance, privacy, capitalism, consumerism and democracy in order to understand the import of privacy. As one of its early champions,

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<sup>2</sup> Arendt, Hannah, *The Origins of Totalitarianism*, [hereafter: Arendt, OT], Harvest/HBJ, New York, NY, USA, 1973, xiv. While Arendt was referring to the magnitude of a world war and annihilation of a people, her use of *comprehension* is useful here and, I hope, illustrates the “hindsight” aspect of my paper.

<sup>3</sup> Lyon, D., *Surveillance Studies: An Overview*, (hereafter Lyon, SS), Cambridge, UK: Polity Press, 2007, 13.

Hannah Arendt describes privacy as that which “cannot withstand the implacable, bright light of the constant presence of others on the public scene.”<sup>4</sup> In order to circumscribe the private sphere, we shall explore the public sphere, tracing its history and arriving at descriptions of personhood, self-determination and dignity.

From Lyon’s incisive comments on surveillance, we gain insight into the need for privacy, principally from its glaring absence in the current digital context. Surveillance, much like privacy, is perceived through a duality of needs: the perceived need for protection from threats originating both from the outside and from inside a particular group of people or peoples. A general definition, given by Lyon, is that surveillance is the “focused, systematic and routine attention to personal details for purposes of influence, management, protection or direction.” (Lyon, SS, 14). We must note here the aspect of power, connected to the purposefulness in surveillance. Surveillance is never undertaken without reason, even as protective force, its aim is to control; its scope is well beyond mere curiosity and is instead an active search for and collection of personal data. There are overlapping spheres of surveillance that pervade public life, from military applications to workplace monitoring, but crucially also private life in the most common application of the term, through everyday household consumption. At a base level, surveillance collects data about who we are in

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<sup>4</sup> Arendt, Hannah, *The Human Condition*, (hereafter Arendt, HC), Chicago, Ill.: The University of Chicago Press, 1958. P.51.

the physical world, from fingerprints and retina scans down to our DNA; surveillance also accumulates information about our social and psychological selves, our likes and dislikes, traits and tendencies. Moreover, all this can be linked to consumer behavior, what we buy, when and where. Our political leanings can be gleaned by associations<sup>5</sup> and by location data from cell phones. Surveillance can indeed construct a complete profile of our lives: images, words, communications, financial information, data about our connections to people, places, time and events. “We know where you are, we know what you like,” Eric Schmidt, Google CEO, is quoted as saying during a keynote at the International Funkausstellung in Berlin. “We can suggest what you should do next, what you care about.”<sup>6</sup> For clarity, let’s return to Lyon’s initial definition of surveillance: data collection for a purpose. Data that is collected for one purpose may well be used for another, by other people (Lyon, SS, 17-18). It may be used in real-time, to target ads<sup>7</sup> or it may be stored, compiled, correlated and used to create an evermore detailed profile. Surveillance data in that sense is becoming a commodity in itself, it is inherently possible to share, sell and re-sell this data. A case now before the Supreme Court of the US, *Sorrell v. IMS Health*, is testing the bounds of so-

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<sup>5</sup> Brustein, J., “On Twitter, Conservative (or Liberal) by Association”, in *Bits*, comments on a Duke University study that found that simply by analyzing twitter association—meaning who follows whom and in turn is followed by others,—people using twitter are “revealing their political leanings even if they are careful not to [directly] post about politics...” (<http://bits.blogs.nytimes.com/2011/03/21/on-twitter-conservative-by-association/>).

<sup>6</sup> <http://tcrn.ch/9kF7SE>.

<sup>7</sup> “The long-held promise of local is to deliver timely, relevant and measurable ads which drive actions such as commerce, so if facebook is moving in that direction, it’s brilliant,” said Reggie Bradford, CEO of Facebook software and marketing company Vitruve, quoted in: *Advertising Age*, “Facebook test mines real-time conversations for ad targeting, offers marketers the ability to target swells of sentiment, much like twitter”, <http://adage.com/print/149531>.

called data mining: In 2007, Vermont passed “a law that lets each doctor decide whether pharmacies can, for marketing purposes, sell prescription records linking him or her by name to the kinds and amounts of drugs prescribed. State legislators passed the law after the Vermont Medical Society said that such marketing intruded on doctors and could exert too much influence on prescriptions.”<sup>8</sup> At issue is not just the kind and amount of data being collected, but also the progressive loss of control over data of a deeply personal nature. While discrete aspects of that data may well be anonymous, data miners are able to correlate those pieces with other available information, like residency records, voter registration or health records data.<sup>9</sup>

Surveillance operates on the distinction between watchers and the watched (Lyon, SS, 15), a basic power dynamic that dissolves more and more with the continued commercialization of information. The newer term of “dataveillance” tries to describe the more “participatory” framework of surveillance and to point to its automation via digital tools. Now, surveillance appears not as a top-down design, but as a two-way exchange, using personal data systems in which information is freely given, or maybe more accurately, is surrendered without coercion in exchange for perceived benefits, be they economic or status-related.

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<sup>8</sup> <http://nytimes.com/2011/05/01/business/01stream.html?>

<sup>9</sup> Singer, N., *Data privacy, Put to the Test*, <http://www.nytimes.com/2011/05/01/business/01stream.html>.

Surveillance as a system is bound by legal, technological, sociological and economical frameworks. As dataveillance develops alongside the technologies that allow for ever-finer mesh in the data mining networks, its boundaries shift and become harder to define or even declare.

Surveillance/dataveillance today exists on multiple levels; it is not always linked to just one purpose or even just one actor. Who is the watcher and who is the watched may shift many times. State actors who order surveillance on civilians, for instance, are themselves subject to everyday-surveillance by street and shop cameras; they may become subject to freedom of information access requests or their surveillance systems themselves may be hacked. The power differential between the watchers and watched, however, is real in every instance.<sup>10</sup> Surveillance's purpose-linked state—be that purpose personal curiosity, political scrutiny, social scrutiny or commercial usefulness—functions only in the hierarchy of one having information on another.

Widespread acceptance of surveillance—the average US citizen is caught on camera nearly 200 times daily; in the UK, citizens are captured on camera on average over 300 times daily<sup>11</sup>—goes hand in hand with

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<sup>10</sup> Add to this the prurient aspect of what I term 'surveillance entertainment,' which summarizes such cultural phenomena as the TV shows *Jail*, *Big Brother* and *Ride-Along*. Paradoxically, these shows reinforce the false security of the at-home TV watchers: They identify with the more powerful person engaged in surveillance in these shows (the jail guard, the all-seeing camera, the policeman), because it is these perspectives, literally the view points, that dominate those shows. The TV audience at home forgets that the cameras outside their own controlled private sphere are turned on them as subjects of surveillance themselves.

<sup>11</sup> Bennett, J., "Smile! You're on Hidden Camera", *Newsweek*, Nov.19, 2007 at <http://www.thedailybeast.com/newsweek/2007/11/19/smile-you-re-on-hidden-camera.html>; and "CCTV: Does it work?", *BBC News*, Aug. 13, 2002 at [http://news.bbc.co.uk/2/hi/uk\\_news/2071496.stm](http://news.bbc.co.uk/2/hi/uk_news/2071496.stm).

devaluation of privacy. What some consider necessary surveillance, others consider a gross infringement on their privacy. Workplaces monitoring employees to ensure work gets done; middle-class North American parents monitoring daycare centres and their nannies; stores monitoring their goods; all these we may consider acceptable. Ensuring our families' safety, ensuring the safety of the citizenry of a nation seem, to most, acceptable categories of a surveillance matrix, at least in the abstract. "Since September 11, 2001, the National Security Agency (NSA) of America has been collecting detailed call history and conversations from the nation's three largest phone companies in the hopes of building what it calls the largest database ever assembled in the world."<sup>12</sup> In 2010, the EU Parliament proposed to retain all internet search traffic data, with the express purpose to "establish a European Early Warning Service to detect child pornography and sexual harassment by requiring retention and analysis of web searches."<sup>13</sup> The original purpose-driven intent of selective surveillance of pre-identified "threats" has expanded to a far-flung net of preemptive surveillance that seeks to establish patterns of threat before actual criminal activity takes place, casting aside former conceptions of liberal freedoms from state intrusion. In organizational terms, we can call this scope creep, or more accurately, rapid scope expansion. Politically, international NGOs like Privacy International

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<sup>12</sup> See also: Solove, D. J., "Nothing to Hide: The False Tradeoff Between Privacy and Security", New Haven, CT, USA: Yale University Press, 2011, 12; and Webb, M., "Illusions of Security: Global surveillance and democracy in the post 9/11 world", San Francisco, CA, USA: City Light Books, 2007, 111-123.

<sup>13</sup> [www.privacyinternational.org/article/european-parliament-calls-search-engine-companies-spy-all-eu-citizens](http://www.privacyinternational.org/article/european-parliament-calls-search-engine-companies-spy-all-eu-citizens), accessed, July 2, 2011.

(PI) call this “draconian, ill-informed, unlawful and deeply intrusive.”<sup>14</sup> The scope of surveillance that could be expressed as coordinates of place, time, persons and events (Lyon, SS, 18), has expanded to a blanket of data collection for a range of purported purposes, but scalable to encompass one’s whole life in all its manifestations and including all one’s connections to people, places and events.

Surveillance operates within the essential tension that is also evident in constructions of privacy, between personhood and power. To understand those concepts in turn, we have to look to the broader concepts of private sphere and public sphere and their histories. None of the concepts so far mentioned is static; each is a reaction to history—to histories of societies, of philosophies and of politics. Each is, indeed, a concept we employ while “facing up to, and resisting of, reality—whatever it may be or might have been” (Arendt, OT, xiv).

## **Privacy and the Public Sphere**

One way to approach the conceptual development of privacy is to follow its related concept of the public sphere. We can tease out some core aspects of privacy and some core connections, for instance, between private,

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<sup>14</sup> [www.privacyinternational.org/article/european-parliament-calls-search-engine-companies-spy-all-eu-citizens](http://www.privacyinternational.org/article/european-parliament-calls-search-engine-companies-spy-all-eu-citizens), accessed, July 2, 2011.

public and commercial spheres. In conjunction with the evolution of the public sphere, we can trace the developmental stages of privacy.

Jürgen Habermas, in *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*,<sup>15</sup> builds on Hannah Arendt's *The Human Condition* to expand a timeline for the development of the public sphere. Following the Arendtian formulation, he deftly delineates private sphere from intimate sphere, from public sphere, and poses their respective functioning in and constitution of civil and political society. The private sphere—in Greek antiquity the “breeding ground” for political participation<sup>16</sup>— the area in which, when physical necessities are taken care of, private man can elevate himself to political participation; this private sphere splits off again into the, still private, sphere of economic activity and ‘the intimate sphere.’ “In the intimate sphere of the conjugal family privatized individuals viewed themselves as independent even from the private sphere of their economic activity—as persons capable of entering into ‘purely human’ relations with one another” (Habermas, T, 48). The public sphere as “a functional element in the political realm was given the normative status of an organ for the self-articulation of civil society with a state authority

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<sup>15</sup> Habermas, J., *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, (hereafter Habermas, T), Cambridge, Mass.: MIT Press, 1991.

<sup>16</sup> Arendt, in *The Origins*, explains: “The realm of the *polis*, on the contrary, was the sphere of freedom, and if there was a relationship between these two spheres, it was a matter of course that the mastering of the necessities of life in the household was the condition for freedom of the *polis*. What all Greek philosophers, no matter how opposed to polis life, took for granted is that freedom is exclusively located in the political realm, that necessity is primarily a prepolitical phenomenon, characteristic of the private household organization, and that force and violence are justified, in this sphere because they are the only means to master necessity—for instance, by ruling over slaves—and to become free” (Arendt, OT, 31).

corresponding to its needs” (Habermas, T, 74). The public sphere at this stage is a physical meeting place of rational men who articulate for themselves and others their needs to an authoritarian state. Habermas’ “bourgeois public sphere” develops during the Renaissance in Europe, and in the United States, under specific social and market conditions:

The social precondition for this ‘developed’ bourgeois public sphere was a market that, tending to be liberalized, made affairs in the sphere of social reproduction as much as possible a matter of private people left to themselves and so finally completed the privatization of civil society (Habermas, T, 74).

Habermas early on notes a direct link between markets and social relationships:

For in proportion to the increasing prevalence of the capitalist mode of production, social relationships assumed the form of exchange relationships. With the expansion and liberation of this sphere of the market, commodity owners gained private autonomy (Habermas, T, 74).

In other words, here lie the origins of what we are accustomed to calling private enterprise. Those men who owned property, enough to trade, assumed equal status as private holders and traders of wealth.

## **Core Concepts of Privacy through Habermas**

While one may argue human ‘rationality’ and the actual effectiveness of a Habermasian public sphere, we shall use his efforts here to tease out relevant concepts as they concern privacy. The core concepts in relation to privacy that we shall look at through Habermas are: social realms; intimacy; authority; subject/subjectivity; public versus mass; public and publicity; commodification; and functions of privacy.

### ***Social realms***

As distinct from Arendt's polis, for Habermas, "[t]he bourgeois public sphere may be conceived above all as the sphere of private people come together as a public;" (Habermas, T, 27). In the 18<sup>th</sup> century, a schema of social realms distinguishes between civil society (including the realm of commodity exchange and social labor and the realm of the conjugal family claiming its internal, intimate space), the public sphere ( the political realm, the world of letters, including clubs and presses and the market of culture products), the state (the realm of police authority), and the court (the noble society) (Habermas, T, 29).

The line between state and society, fundamental in our context, divided the public sphere from the private realm. The public sphere was coextensive with public authority, and we consider the court part of it. [...] Included in the private realm was the authentic 'public sphere', for it was a public sphere constituted by private people (Habermas, T, 30).

The concept of conjugal family is constitutive here of the private realm. Privatization of family was a process in which the "line between public and private sphere ran right through the home," from salon to intimate living rooms (Habermas, T, 45).

### ***Intimacy***

"The decisive historical fact is that modern privacy in its most relevant function, to shelter the intimate, was discovered as the opposite not of the political sphere but of the social, to which it is therefore more closely

and authentically related.” (Arendt, HC, 38). The intimate thus sheltered relates on the one hand to the necessities of life “our private possessions, which we use and consume daily, [and which] are much more urgently needed than any part of the common world;” (Arendt, HC, 70) and on the other hand to “the only reliable hiding place from the common public world, not only from everything that goes on in it but also from its very publicity, from being seen and being heard” (Arendt, HC, 71). Arendt, while not explicitly talking about the intimate, but of an early stage in the private realm, argues that, “we shall see that there are very relevant matters which can survive only in the realm of the private. For instance, love, in distinction from friendship, is killed, or rather extinguished, the moment it is displayed in public” (Arendt, HC, 51). Habermas points to the “intimate sphere of the conjugal family” (Habermas, T, 48) as that in which individuals, free from economic and other restraints, can be “persons capable of entering into ‘purely human’ relations with one another” (Habermas, T, 48). As the ‘conjugal family’ itself disintegrates, so does the ‘intimate’:

“To the degree that state and society permeated each other, the institution of the conjugal family became dissociated from its connection with processes of social reproduction. The intimate sphere, once the very center of the private sphere, moved to its periphery to the extent that the private sphere itself became deprivatized” (Habermas, T, 151-152).

He sets out for us what is at stake: “In our day this domain, abandoned under the direct onslaught of extrafamilial authorities upon the individual, has started to dissolve into a sphere of pseudo-privacy” (Habermas, T, 157). This development

goes hand in hand with an institutionalization of what was a private domestic domain.

“[F]or to the extent that private people withdrew from their socially controlled roles as property owners into the purely ‘personal’ ones of their noncommittal use of leisure time, they came directly under the influence of semipublic authorities, without the protection of an institutionally protected domestic domain” (Habermas, T, 159).

In unburdening ourselves from providing for the necessities of life from within each family unit, we opened the door to those authorities that promised to take care of the necessities in exchange for our privacy.<sup>17</sup>

### **Authority**

Public, as we mostly understand it today, is the sphere of public authority:

“The reduction in the kind of publicity involved in representation that went hand in hand with the elimination of the state-based authorities by those of the territorial ruler, created room for another sphere in the modern sense of the term: the sphere of public authority. The latter assumed objective existence in a permanent administration and a standing army” (Habermas, T, 18).

In other words, a public bureaucracy takes over the public realm and institutionalizes representation both inwardly, facing its own citizens and outwardly, facing other states.

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<sup>17</sup> Feminist critical theory has developed a cogent critique of this view of the private realm as nostalgic and masculinist or a ‘haven from the heartless world’ afforded exclusively to male public actors under patriarchal terms. See for instance: Mills, P.J., *Woman, Nature, and Psyche*, Yale University Press: New Haven, Conn., 1987. This is but one of the critiques of Habermas building on others in the Frankfurt school, a full exploration of which is beyond the scope of this paper. See also Crossley, N. and Roberts, J. M. (eds.), *After Habermas: New perspectives on the public sphere*, Blackwell Publishing: Sociological Review, Oxford, UK, 2004.

In contrast to this conception of the public sphere, the private one, as consisting of both intimate and civil society spheres, codifies through civil law a system “free from impositions by estate and state, at least in tendency” (Habermas, T, 75). Through that codification, we see the development of institutions of privacy guarantees: “the basic freedoms of contract, of trade, and of inheritance” (Habermas, T, 75). Within the private realm, then, the expectation of relationships is that of equals, much as it had been the constituent aspect of the Greek polis. This, however, proved elusive:

Under conditions of imperfect competition and dependent prices, social power became concentrated in private hands. Within the web of vertical relationships between collective units, conditions emerged that were partly characterized by one-sided dependency and partly by mutual pressure. Processes of concentration and crisis pulled the veil of an exchange of equivalents off the antagonistic structure of society. The more society became transparent as a mere nexus of coercive constraints, the more urgent became the need for a strong state (Habermas, T, 144).

We now have, on opposite ends, spheres of public authority versus private interests, which, as they become organized into groups of interests or group interests, seek to exchange “private social power for political power” (Habermas, T, 146).

### ***Subject/subjectivity***

“Public authority was consolidated into a palpable object confronting those who were merely subject to it and who at first were only negatively defined by it. For they were the private people, who, because they held no office, were excluded from any share in public authority” (Habermas, T, 18).

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Anyone not represented by any 'private' interest group is now excluded from exerting any influence in public life. Civil society evolved from the need to converse with and explain to the state the needs of citizens, to be the counterbalance to a depersonalized state authority. The private sphere's function in this is to provide space, quite literally, for subjective individuals to develop. In this understanding, private does not mean intimate or self-oriented, but the opposite—an audience-oriented 'interior domain' (Habermas, T, 162). In Hannah Arendt's *The Human Condition*, the power of and the need for subjectivity is perhaps clearer:

“As distinguished from this 'objectivity', whose only basis is money as a common denominator for the fulfillment of all needs, the reality of the public realm relies on the simultaneous presence of innumerable perspectives and aspects in which the common world presents itself and for which no common measurement or denominator can ever be devised, for though the common world is the common meeting ground of all, those who are present have different locations in it, and the location of one can no more coincide with the location of another than the location of two objects” (HA, HC, 57).

And it is in the private sphere that we find the un-common, the subjective, individual aspects of ourselves and our lives which, shared with others, constitute the social, and indeed public, spheres.

### ***Mass society***

Both Arendt and Habermas lament that in place of this crucial space for the flowering of the individual person, we have witnessed instead the rise

of 'mass society' which in turn forces those individualistic matters of distinction and difference into the private sphere.

The rise of mass society, on the contrary, only indicates that the various social groups have suffered the same absorption into one society that the family units had suffered earlier; with the emergence of mass society, the realm of the social has finally, after several centuries of development, reached the point where it embraces and controls all members of a given community equally and with equal strength (Arendt, HC, 41).

The term 'mass society' punctuates the shift from an active, engaged 'politic' public to a mass audience that passively receives authorized opinions and is itself without real autonomy in thought and action. The change from 'politic' public to mass audience is facilitated by a shift from public in its participatory sense, to publicity, as hollow spectacle.

### ***Public and publicity***

Publicity as distinguished from publicness, which refers to a public representation of (feudal) status<sup>18</sup>, is infused with issues of authority and power. With 'publicity', the public, formerly conceived as a meeting of equals, disappears into a mass of individuals who, rather than discuss their own opinions, receive, via mass media, those of the organized and authorized few. Actors on the stage of the polis become addressees of state power. "Inasmuch as they [the state authorities] made use of this instrument [the press] to promulgate instructions and ordinances, the addressees of the authorities'

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<sup>18</sup> "Publicness (or 'publicity') of representation was not constituted as a social realm, that is, as a public sphere; rather, it was something like a status attribute" (Habermas, T, 7).

announcements genuinely became ‘the public’ in the proper sense” (Habermas, T, 21). It may be clearer to use the term ‘publicum’ here, which Habermas himself does later in the text (Habermas, T, 23). The publicum, as “the abstract counterpart of public authority” (Habermas, T, 23), reacts in two ways: one is to turn inward and renew a sense of the intimate, divorced from any political striving; the other is to turn to publicity, to make public that which was formerly hidden in private.

It means first, that everything that appears in public can be seen and heard by everybody and has the widest possible publicity. For us, appearance—something that is being seen and heard by others as well as by ourselves—constitutes reality. Compared with the reality which comes from being seen and being heard, even the greatest forces of intimate life—the passions of the heart, the thoughts of the mind, the delights of the senses—lead an uncertain, shadowy kind of existence unless and until they are transformed, deprivatized and deindividualized, as it were, into a shape to fit them for public appearance (Arendt, HC, 50).

And here we arrive at the next paradox inherent in privacy: We develop our subjectivity, our distinctiveness from fellow humans, our individuality per se in the “intimacy of a fully developed private life” (Arendt, HC, 50), but can find and express our reality only through “being seen and being heard,” that is, in some form or another, in public (Arendt, HC, 50-51).

### ***Commodification***

Another shift in privacy occurs in tandem with liberalization of markets. While property owners gain autonomous power and control over their possessions, and these possessions and the trading of commodities and

services become the focus of the property owning class, a 'positive meaning' of private in Habermas' terms (Habermas, T, 74), the expanded sphere of social relationships, under capitalist influence, "assumed the form of exchange relationships" (Habermas, T, 74). It followed that market systems pervaded not only the public, but also the social and private spheres.

When the laws of the market governing the sphere of commodity exchange and of social labor also pervaded the sphere reserved for private people as a public, rational-critical debate had a tendency to be replaced by consumption, and the web of public communication unraveled into acts of individuated reception, however unified in mode (Habermas, T, 161).

The 'traditional' role of the private sphere as, literally and figuratively, breeding ground for private people, who "gathered together as a public [and] articulated the needs of society with the state" (Habermas, T, 175), collapses with growing commodification of relationships (private, social, public, political) and the consequent intermeshing of the previously separate realms of the public and private. Institutions, both public and private, take on the roles of political debate, fragmenting the public sphere and pushing the private one into political irrelevance.<sup>19</sup>

For one more category in relation to privacy that is hinted at in Habermas,<sup>20</sup> we turn back to Hannah Arendt and the issue of *performance* and the need to show 'excellence':

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<sup>19</sup> "The process of the politically relevant exercise and equilibration of power now takes place directly between the private bureaucracies, special-interest associations, parties, and public administration" (Habermas T, 176).  
<sup>20</sup> Habermas hints at the 'audience-oriented' aspect of privacy: "Leisure behavior supplies the key to the floodlit privacy of the new sphere, to the externalization of what is declared to be the inner life. What today, as the

Every activity performed in public can attain an excellence never matched in privacy; for excellence, by definition, the presence of others is always required, and this presence needs the formality of the public, constituted by one's peers, it cannot be the casual, familiar presence of one's equals or inferiors. [...] The presence of others who see what we see and hear what we hear assures us of the reality of the world and ourselves, and while the intimacy of a fully developed private life, such as had never been known before the rise of the modern age and the concomitant decline of the public realm, will always greatly intensify and enrich the whole scale of subjective emotions and private feelings, this intensification will always come to pass at the expense of the assurance of the reality of the world and men" (Arendt, HC, 50).

We locate privacy at the intersection of assurance of reality (public) and the ability to be individuals in that reality (private). They are, for Arendt, sides of the same coin: "Since our feeling of reality depends utterly upon appearance and therefore upon the existence of a public realm into which things can appear out of the darkness of sheltered existence, even the twilight which illuminates our private and intimate lives is ultimately derived from the much harsher light of the public realm" (Arendt, HC, 51).

The essential function of privacy throughout its history, and still, under the onslaught of commodification and consumerism, has been to shelter the formation of the ethical, moral individual—the assured, autonomous individual who participates in public, that is, political, life and who finds fulfillment in demonstrating "excellence" in public and finding love in private.

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domain of leisure, is set off from an occupational sphere that has become autonomous, has the tendency to take the place of that kind of public sphere in the world of letters that at one time was the point of reference for a subjectivity shaped in the bourgeois family's intimate sphere" (Habermas, T, 159).

We must return to our original conundrum, the seeming willingness of people in the twenty-first century to voluntarily give up privacy and thereby any “distinction and difference” (Arendt, HC, 41), something which can only grow in the private sphere of the individual.

While philosophically convincing, neither Arendt, nor Habermas offer enough of a definitive description of the origin, need and shape of privacy to suffice for our goal of a strengthened definition of privacy for the digital age. However, resting on their work, we can now claim privacy as an essential component of a democratic society, one important building block in the bulwark against totalitarianism. To further guard us against such fallacies as the claim that, ‘if you haven’t done anything wrong, you needn’t fear surveillance,’<sup>21</sup> we turn to other approaches to privacy: legal, psychological and anthropological. Throughout, we shall remain aware of the link between expectations of privacy and privacy protection.<sup>22</sup>

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<sup>21</sup> In his “Schneier on Security” blog, Bruce Schneier reported on February 23, 2006, that Houston’s police chief [on Wednesday] proposed placing surveillance cameras in apartment complexes, downtown streets, shopping malls and even private homes to fight crime during a shortage of police officers. “I know a lot of people are concerned about Big Brother, but my response to that is, if you are not doing anything wrong, why should you worry about it?” Chief Harold Hurtt told reporters [Wednesday] at a regular briefing. Bruce Schneier is an internationally renowned security technologist and author.  
[http://www.schneier.com/blog/archives/2006/02/police\\_cameras.html](http://www.schneier.com/blog/archives/2006/02/police_cameras.html).

<sup>22</sup> In Canada, for instance, privacy regulation rests heavily on the concept of reasonable expectation of privacy. The test to determine the difference between reasonable and unreasonable search and seizure for example, rests on the answers to the following questions:

- Did the accused have a subjective expectation of privacy?
- Was that subjective expectation objectively reasonable, having regard for:
  - place/subject matter/– public view/– abandonment/– third party access/control/– reasonableness of technology/– nature of information revealed by technology

## Categories of Privacy

Ferdinand Schoeman, in *Philosophical Dimensions of Privacy*,<sup>23</sup> offers a few categories useful to approaching privacy: human dignity, legal rights, coherence and distinctiveness, as well as cultural relativity. Though entitled 'Philosophical Dimensions,' this collection of essays mainly investigates legal approaches to privacy, which, as formulations of state limitations on incursions into privacy, offer valuable and concise insights. Schoeman defines privacy in terms of access and control:

Some have regarded privacy as a claim, entitlement, or right of an individual to determine what information about himself (or herself) may be communicated to others. Privacy has been identified also as the measure of control an individual has over: 1. Information about himself; 2. Intimacies of personal identity; or 3. Who has sensory access to him (Schoeman, 2).

Schoeman's definition of privacy finds an echo in Nissenbaum<sup>24</sup>: privacy can be defined primarily in two concomitant ways, positively, as access, and negatively, as control. 'Access' refers to the negotiated degree and nature of access to individuals, directly (physically) and indirectly (through related information). 'Control' refers to the degree of autonomy we exercise over the information about us (Nissenbaum, 66).

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From: *The true colours of judging/Workshop on the reasonable expectations of privacy*, Canadian Association of Provincial Court Judges, Moncton, New Brunswick, September 14, 2006, <http://idtrail.org/content/view/529/89/>.

<sup>23</sup> Schoeman, F. (edit.), *Philosophical Dimensions of Privacy: An Anthology*, Cambridge University Press, 1984.

<sup>24</sup> Nissenbaum, H. *Privacy in Context: Technology, Policy, and the Integrity of Social Life*, Stanford, Cal.: Stanford University Press, 2010.

Nissenbaum and Schoeman, though using different terminology, arrive at yet another way to distinguish approaches to privacy, via morality. The main issues in this context is whether privacy is a moral principle and hence an a priori right, or whether privacy is contextual, relative to shifts in social norms (Nissenbaum, 3). Schoeman teases out separate strands of the moral concerns with privacy (Schoeman, 5). The position that there is something fundamental in common to most privacy claims, he calls 'coherence thesis,' in which the moral principals involved exist quite independent of privacy definitions and claims; and the position that "privacy claims are to be defended morally by principles that are distinctive to privacy" he labels the 'distinctiveness thesis' (Schoeman, 5). Schoeman argues from a legal point of view in making this distinction. Stating that privacy cases share something fundamental, distinctive, and coherent, attributes moral status to privacy. Schoeman though also points to other theorists who do not assign such a sweeping moral status to privacy, instead basing any legal claim to privacy on diverse values that are common to socially and legally accepted categories, such as trespassing, misappropriation of property, including another's identity, and inflicting emotional distress.

### **Human dignity**

Privacy as a right in and of itself is a relatively modern concept. It appears first within a seminal article by Warren and Brandeis, *The Right of*

*Privacy*, from 1890.<sup>25</sup> According to Bloustein,<sup>26</sup> it was the personal experience of having the press intrude into their personal lives that caused Warren and Brandeis to develop a concept of privacy as an independent legal value. This is distinct from the then prevailing framework in which privacy is a composite of the interests in reputation, emotional tranquility and intangible property (Bloustein, 962). Warren and Brandeis felt

that the term 'privacy' was in itself a completely adequate description of the interest threatened by an untrammelled press; man, they said, had a right to privacy, a right to be let alone, and this was, for them, a sufficient description of the interest with which they were concerned (Bloustein, 970).

Subsequent analyses attempt to draw privacy back into a framework of clearly defined rights through which it may be protected without naming it *per se*—the rights to be protected from intrusion upon one's seclusion or solitude or into one's private affairs; from public disclosure of embarrassing facts; from publicity which places one in a 'false light'; and from appropriation of one's name or likeness (Bloustein, 990). All of these are legal rights derived from the principle of private property. Bloustein argues instead that privacy relates to the principle of 'inviolable personality' (Bloustein, 971): "I take the principle of inviolable personality to posit the individual's independence, dignity and integrity; it defines man's essence as a

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<sup>25</sup> Louis Brandeis was an Associate Justice on the Supreme Court of the United States from 1916 to 1939. Samuel D. Warren was his partner in the Law Firm of Nuttall McClennen & Fish in Boston. They co-wrote the Harvard Law review article "The Right To Privacy" in 1890, in which they argue that the law should recognize a right to privacy and impose liability in tort for intrusions on it. This is, in American law, considered the birth of the right to privacy as such.

<sup>26</sup> Bloustein, E.J., *Privacy as an aspect of human dignity: an answer to Dean Prosser*, 39 *N.Y.U. Law Review*, 962, 1964.

unique and self-determining being” (Bloustein, 971). The absence of privacy, or intrusion upon it, is “demeaning to individuality, is an affront to personal dignity” (Bloustein, 973). This concept of personal dignity, of individual and inviolate personhood, though cast by Bloustein as quintessentially human, is nonetheless culturally specific as he himself points out:

The fundamental fact is that our Western culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts (Bloustein, 973).

The essential human dignity argument<sup>27</sup> hinges on a moral understanding of privacy’s value. To illustrate, Bloustein links the right to privacy with intrusion upon it:

Thus, only with the emergence of newspapers and other means of communication did degradation of personality by the public disclosure of private intimacies become a legally significant reality [...] The right to privacy in the form we know it, however, had to await the advent of the urbanization of our way of life including, as an instance, the institutionalization of mass publicity, because only then was a significant and everyday threat to personal dignity and individuality realized (Bloustein, 984).

In clear reference to Arendt, Bloustein rescues the concept of privacy as essential for human dignity:

The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique

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<sup>27</sup> “He who intrudes upon another at will is the master of another and, in fact, intrusion is a primary weapon of the tyrant” (Bloustein, 974).

personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual” (Bloustein, 1003).

Intrusion into privacy threatens our “liberty as individuals to do as we will, just as an assault, a battery or imprisonment of our person does” (Bloustein, 1002). In short, arbitrary intrusion into privacy threatens personhood per se, because personal dignity is essential to personhood and privacy is essential to dignity.

### **Legal Approaches following Warren and Brandeis**

So far, privacy has been, in legal terms, discussed as being based on either (other) fundamental rights or on inviolate personhood. Jed Rubenfeld, in *The Right Of Privacy*,<sup>28</sup> approaches privacy from a different point of view, that of what privacy laws affirm rather than what they prohibit. The right to privacy as enshrined in law “has everything to do with delineating the legitimate limits of governmental power” (Rubenfeld, 737). Rubenfeld notes that most groundbreaking cases surrounding privacy have had to do in one way or another with sexuality, contraception, marriage and abortion. Rubenfeld notes that case law in the US seems to show “a tacit agreement that sexuality is an area of life into which the state has no business intruding” (Rubenfeld, 738). This is one of the prevailing tendencies in privacy case law in the US, which he terms ‘privacy doctrine’. But the privacy doctrine reaches beyond sexuality far into the sphere of personhood. Privacy’s main principle in this approach is the concept of inviolate personhood. In contrast,

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<sup>28</sup> Rubenfeld, *The Right Of Privacy*, *Harvard Law Review*, 102, 4, 1989, 737.

Rubinfeld proposes an analysis of privacy on the basis of its “affirmative power in the law” (Rubinfeld, 740), approaching privacy from the *consequences* its legal enforcement have on individuals’ lives. The right to privacy on that basis is substantive not because it is based on personhood, but because it is based on conduct, governing the “conduct of other individuals who intrude in various ways upon one’s life” as well as “immunizing certain conduct [...] from state proscription or penalty” (Rubinfeld, 740).

With this definition, we seem to have arrived back at the issue of choice in a substantive sense, the freedom to make one’s own decision about ‘private’ matters. (Rubinfeld, 745). The difficulty with framing privacy as relating to personhood is its ambiguity. Personhood as it relates to self-identity in legal terms may mean “identity *qua* persons, focusing on whatever it is that makes you *a* person—a human being” (Rubinfeld, 753); or it means “personal identity, focusing on what makes you *the* person you are” (Rubinfeld, 753). The identity-based personhood principle in law centers on the right to self-definition, to the extent that no state authority may be allowed to interfere with those decisions a person makes that are ‘defining’ to that person’s identity. This right to self-definition must, in law, come to an end where it negatively impacts on others’ identities. Hence what Rubinfeld calls the harm-principle: “We need not pass judgment on identities: as long

as an individual does not harm others, he has a right to be whatever he chooses" (Rubinfeld, 756).

This is, of course, an "individualistic idea of self-definition" (Rubinfeld, 761), basing the individual in opposition to or at least apart from society. Opposed to this individualistic stance "stands the idea of political or communal self-definition" (Rubinfeld, 761). Obviously related to the idea of the polis and thence the public sphere, this stance proposes that to be human, individuals must realize their humanity through participation in common life or they remain incomplete. It follows that human identity itself is seen in a different light: rather than seeing identity as a matter of independence and choice, "a person's identity is understood not as prior to but rather as defined by his intimate relations, his community, and his deepest values" (Rubinfeld 764).

However, returning to sexuality as it relates to identity, Rubinfeld concludes that "personhood finally comes to rest its case on the fundamental importance of sexuality: a person's sexual life (in the broad sense of the term) is simply more definitive of and more deeply rooted in who that person is than his neighbor's conduct can ever be. That is personhood's final defense" (Rubinfeld, 770). Rubinfeld's tracing of the historical development of personhood arrives at a fundamentally Freudian conception of personhood in which sexuality plays a defining role and "delineates an inner

boundary of the strictly personal that the state ought not to be able to cross” (Rubinfeld, 770).

Foucault, on the other hand, in *The History of Sexuality: An Introduction*,<sup>29</sup> refutes the claim that sexuality plays such an integral part in forming identity, arguing instead that sexuality is part of a cultural power dynamic within society. Society has been captivated by sexuality, is in thrall to it, continually problematizing sexuality rather than—as in Freudian terms—repressing it. In this view, sexuality is not fundamental to personhood, but just an external complication in social relations. Where this divergence of opinion over identity as relating to sexuality becomes of importance is in cases of privacy law dealing with homosexual rights. The personhood argument for homosexual rights rests on distinguishing homosexual identity from heterosexual norms. This identifies homosexuals as a different classification of individuals, running the risk of reproducing discrimination rather than alleviating it. “In defending homosexuality because of its supposedly self-definitive character, personhood reproduces the heterosexual view of homosexuality as a quality that, like some characterological virus, has invaded and fundamentally altered the nucleus of a person’s identity” (Rubinfeld, 780).

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<sup>29</sup> Foucault, M., *History of Sexuality*, New York, NY.: Vintage Books, 1990.

In the personhood argument, sexuality is seen as integral to forming identity and its consummation becomes the focus of personhood, rather than being seen as one aspect of power dynamics within the social order, as in Foucault's deliberations. The conundrum evident in this is that through defending the right to privacy on the basis of personhood, supporters of this personhood argument perpetuate the notion of *conduct* as defining of identity, "reintroducing into privacy analysis the very premise of the invidious uses of state power it seeks to overcome" (Rubinfeld, 782). On the basis of personhood, privacy rights are based on certain *conduct* constituting identity whereas they could (and should, according to Rubinfeld) be based on avoiding "being forced in to an identity [...]. Resisting an enforced identity is not the same as defining oneself" (Rubinfeld, 782). The important distinction here refers back to privacy as normatively based:

The principle of the right to privacy is not the freedom to do certain, particular acts determined to be fundamental through some ever-progressing normative lens. It is the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state (Rubinfeld, 784).

The danger then, is "a particular kind of creeping totalitarianism, an unarmed occupation of individuals' lives. [...] a society standardized and normalized, in which lives are too substantially or too rigidly directed. That is the threat posed by state power in our century" (Rubinfeld, 784). Or in Hannah Arendt's words:

Only where things can be seen by many in a variety of aspects without changing their identity, so that those who are gathered around them know they see sameness in utter diversity, can worldly reality truly and reliably appear[...] The end of the common world

has come when it is seen only under one aspect and is permitted to present itself in only one perspective.” (Arendt, HC, 57-58).

In legal terms, the “burden of elaborating a conception of privacy based on an anti-totalitarian principle is to perceive how a single law may operate positively to take over and direct the totality of our lives” (Rubinfeld, 787). Though again situated at the line where state authority crosses into ‘private’ lives, this anti-totalitarian principle concerns itself with the *effect* of privacy laws (or their breach) not on individual behavior, but as a permanent, irrevocable change in individuals’ lives. “The anti-totalitarian right to privacy, it might be said, prevents the state from imposing on individuals a defined identity (homosexual, child-bearing woman...) whereas the personhood right to privacy ensures that individuals are free to define their own identities” [...] The point is not to save for the individual an abstract and chimerical right of defining himself; the point is to prevent the state from taking over, or taking undue advantage of, those processes by which individuals are defined in order to produce overly standardized, functional citizens”(Rubinfeld, 794). Rubinfeld sides with what would appear to be the majority position in defining privacy. Most see it in opposition to state authority, located somewhere in the contested ground between individual control over one’s identity and society’s need to safeguard the ‘common,’ or that which defines the common social bond.

### **Cultural Relativity**

There are contrasting moral frameworks of privacy that claim either relative contexts or objective facts as basis for their authority. Cultural relativity is one avenue to explore with these opposing frameworks in mind. The backdrop of cultural differences may on first glance easily support the relativists in their assertion that privacy is a relative concept, based on very different conventions within different societies. Privacy as a moral fact would have to prove itself to be important among all peoples. If it were not, if its importance varied within different societies, privacy would be just another vague social value, dispensable if it proved to be in the way of personal, state, or commercial interests. The question arises whether there are aspects of privacy that are shared across cultures; is sexuality, for instance, inherently a private matter. In Arendt, sexuality in pursuit of procreation is an elemental aspect of the division between public and private and historically has been universally so.

The distinction between the private and public realms, seen from the viewpoint of privacy, rather than of the body politic, equals the distinction between things that should be shown and things that should be hidden. Only the modern age, in its rebellion against society, has discovered how rich and manifold the realm of the hidden can be under the conditions of intimacy; but it is striking that from the beginning of history to our own time it has always been the bodily part of our existence that needed to be hidden in privacy, all things connected with the necessity of the life process itself, which prior to the modern age comprehended all activities serving the subsistence of the individual and the survival of the species (Arendt, HC, 72).

In *The origins of modern claims to privacy*,<sup>30</sup> Alan Westin provides an excellent summary of cultural differences in attitudes toward privacy. Beginning with man's "animal origins" (Westin, 56), Westin delineates several basic purposes, mechanisms and principles of privacy. Territorial patterns in both animal life and human societies serve to "promote individual well-being and small-group intimacy" (Westin, 57). We can differentiate territorial spacing further into personal distance setting, intimate distance, social distance and flight distance. "[M]an sets basically the same kinds of personal, intimate, and social distance in his interpersonal relationships as do mammals in the animal world" (Westin, 57). We, much like our animal kin, rely on sensory input to determine private space and signal intrusion.

Related to the need for privacy and again found in both animals and humans, is the need for social stimulation and the "struggle to achieve a balance between privacy and participation" (Westin 59). Where Rubenfeld pointed to two distinct principles of self-definition, the individualist versus the political or communal idea (Rubenfeld, 761), Westin finds similar division in culturally different approaches to privacy: "Life among the Tikopia<sup>31</sup> [...] with their greater emphasis on social rather than individual values, produces very different practices" (Westin, 59). While there may be different practices—physical and psychological ones—Westin argues that there are also general aspects of privacy that "apply to men living together in

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<sup>30</sup> Westin, A., *The origins of modern claims to privacy*, in: Schoeman, F. (edit.), *Philosophical Dimensions of Privacy: An Anthology*, Cambridge University Press, 1984.

<sup>31</sup> The Tikopia are inhabitants of a small Island in the Solomon group and were subject of a study by the American anthropologist, author and philosopher Dorothy Lee, *Freedom and Culture*, which Westin cites here.

virtually every society that has been systematically examined” (Westin 61). Social norms in each society vary, but privacy has a crucial function, if different for different groupings, in every society. Thus, individuals, family groupings or the community as a whole, may not adhere to identical protocols. However, the balancing act between seeking privacy and companionship is seen as a universal process, based on the human need we all share to play different roles with different persons in any society and to be able to do so, each individual places restraints on the information available about him at any given time to a given group of people (Westin, 61).

Norms and taboos shared by most societies are related to women especially, because they are almost universally associated with sexuality, nature and the private.<sup>32</sup> Women also determine household settings, who may gain entrance, limiting access and exposure. Privacy may be achieved through physical restraints—walls or physical seclusion—or through psychological defenses, like strict rules of behavior, emotional restraint or taboos.

Privacy norms function both to include and exclude, preserving privacy for a select group and reinforcing group identity<sup>33</sup>. The dual aspect of

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<sup>32</sup> “Virtually all societies have rules for concealment of female genitals, and restrictions on the time and manner of female genital exposure” (Westin, 62). See also Mills, P.J., *op cit*.

<sup>33</sup> “Virtually every society holds ceremonies for special groups from which various segments of the whole tribe or community will be barred—ceremonies for warrior males, cult members, women, and the like. Strict sanctions are imposed on invasion of the privacy of these occasions. In addition, there are taboos forbidding

privacy extends to the curious aspect of man's desire to both be watched and to communicate, apparently "common to all races of mankind" (Westin, 66). Fear of isolation "leads individuals in human societies to believe that they are never wholly alone, even when they are in physical solitude" (Westin, 66).

Yet another dual aspect of privacy, from an anthropological point of view, is that the desire for one's own privacy seems to go hand in hand with the desire to invade that of others. Westin differentiates two forms of curiosity, the socially acceptable active 'simple curiosity,' which serves to find and refine one's status within a group in relation to what is known of others; and 'anti-social curiosity,' the limits of which are negotiated within each society, but which always breaks some social taboo, sacred or otherwise (Westin, 68-69). These societal rules and taboos are enforced by a "socially approved machinery for penetrating the privacy of individuals or groups in order to protect personal and group rights" (Westin, 69). This is what Westin calls "the universal process of surveillance by authorities" (Westin, 68). All human societies include social norms, all social norms need enforcement and all such enforcement utilizes some form of surveillance.

To sum up, Westin's thesis is that what we all share, with different emphases and different mechanisms, but based on the same human need, is

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anyone other than priests or some special elite from entering sacred quarters or going to sacred places" (Westin, 66).

the difficult task of balancing the values of privacy, disclosure, and surveillance.

## Psychological dimensions of privacy

Irwin Altman builds on Westin and arrives at the concept of privacy as an interpersonal boundary control process, including different states of privacy, functions and mechanisms.<sup>34</sup> His analysis suggests not only that people seek a balance between access and control, but also that these dialectic processes vary over space and time and that takes on different types linked to a variety of mechanisms. Altman expands on the concept of privacy as “control of interpersonal events” (Altman, 10) toward a balancing of “desired versus achieved privacy” (Altman, 13). Altman points to Laufer, Proshansky and Wolfe in parsing out dimensions of privacy that range from personal individual development of a sense of self versus others—the self-ego dimension—to an ecology-culture dimension, which encompasses environmental factors that shape and control interactions (Altman, 10, 11).<sup>35</sup> Altman continues from dimensions to features, noting first “units of privacy,” meaning, in short, that there are “differences in privacy dynamics for various

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<sup>34</sup> Altman, Irwin, “Privacy: A Conceptual Analysis”, *Environment and Behavior*, 8:1 1976, 7.

<sup>35</sup> These dimensions of privacy encompass the “self-ego dimension, or the idea that social development involves the growth of autonomy and a person’s learning when and how to be with or to be separate from others;” the same dialectic of being with and being apart from applies to the “interaction dimension, which deals with people coming together with others;” and the “control dimension,” which refers to “the freedom over interaction with others, to either increase or decrease stimulation from and to others.” Further dimensions explore the variability of privacy: the “life cycle dimension [...] implies that privacy is not a static process, but shifts over one’s life history;” and an “ecology-culture dimension” deals with the physical environment’s impact on interactions. There are also a “task orientation dimension,” a “ritual privacy dimension” and a phenomenological dimension,” the latter approaching privacy as experience, in behaviour and psychology (Altman, 10-11).

social units," (Altman, 11) from individual to family to social group. The "dialectic nature of privacy" describes privacy as interaction in which the pull from one 'social unit' to another is balanced by the wish to move apart. The importance here lies in privacy as a process, which aims to achieve a "momentary ideal level of interpersonal contact" (Altman, 12).

This leads to the next feature, "the nonmonotonic nature of privacy," which describes the concept of ideal privacy as the "optimal level of social interaction" which, on a continuum, can be both under- and over-achieved (Altman, 12). Optimal privacy lies in the balance between seclusion and openness. "Privacy as a boundary process," Altman's fourth dimension, focuses in on that aspect of the balance-achieving process that shifts with changes in the internal and external environment (Altman, 13). Most notably, privacy is seen in this framework as a "regulatory process" (Altman, 13), that is geared toward a balance between desired and achieved privacy through input and output processes (Altman, 13-14).

The mechanisms employed by any social unit, individual, family or group, "function as an integrated system" of behaviours. The mechanisms themselves, much like the features of privacy itself, are "dynamic and responsive to ongoing events and environmental influences" (Altman, 17). This aspect includes cultural differences in the expectation and regulation of privacy. While the mechanisms, "nonverbal, verbal, or other means (Altman,

21), may differ, the goal is the same: achieve the best possible balance between input and output, between desired privacy and achieved privacy. This, so Altman (Altman, 24) comes at a cost, which adds another dimension to the dynamics of privacy regulation. To achieve the best possible privacy outcome, one must weigh physical, emotional and social costs into the equation. Privacy in itself though is not the goal. Its functions are related to the needs of the individual and of groups.

### **Functions of privacy**

In Altman, privacy is important because it fulfills certain functions in human interactions. It is not privacy itself that is important, but its role in enabling and supporting interactions and identity. In more detail, Altman proposes three main functions of privacy: “relationships”, the “interface of the self and others,” and “self-definition and self-identity” (Altman, 24). The function for *relationships* relates to the boundary-shaping feature of privacy, the need to strike a balance between access and control. The *interface* function relates to the process of integrating and reflecting on experiences and information. The function of privacy is to provide the space and opportunity to evaluate and integrate information and to adapt behaviour.

*Self-identity* as a function of privacy is, in Altman’s framework, the “ultimate goal” (IA, 25). “It includes knowing where one begins and ends vis-

à-vis others, what aspects of the physical and social environment are parts of the self and which aspects are parts of others. It encompasses some understanding of one's capabilities and limitations, strengths and weaknesses, abilities and disabilities" (IA, 25). Self-identity, including concepts of self-respect, autonomy and dignity, give the individual the means to think and act from a strong core, developed through integration of and reflection on experiences and information.

### *Dialectic Process*

Altman, throughout his framework, stresses the aspect of ability and dialectic process. "[P]rivacy mechanisms serve to define the limits and boundaries of the self;" it is this control that enables the self to develop as an independent individual, that allows for self-definition. The consequences of a failure to regulate those boundaries between self and world are not just personal, but also societal. Failure of the individual to achieve sufficient privacy regulation results in the individual incorporating that failure to establish boundaries into his or her self-image.<sup>36</sup> This will impact how one defines oneself in relation to others and has far reaching implications for our society. While the immediate consequence may be on a personal level, manifesting as withdrawal and alienation, an additional outcome of this failure is ever-diminishing privacy, in tandem with diminishing expectations.

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<sup>36</sup> "If I see that I cannot regulate inputs from others or outputs to them when I desire to do so, I am thereby provided with some important information about the social environment and my ability to regulate it. [...] [S]uch information will contribute to how I ultimately define myself as a person" (Altman, 25).

A shift in self-definition that incorporates experiential loss of privacy alters the expectation of privacy and ultimately the desire for it. I say ever-growing, because, as we have seen, the current mainstream legal reasoning vis-à-vis privacy, and the formal, judiciable protection of it, is based on reasonable expectations of privacy, and these expectations diminish with diminishing control, without alleviating the psychological, physical, social or indeed political need for privacy. In other words, as we consistently experience invasions of privacy, we come to expect that state as normal, we don't expect any better any more. That diminished expectation fuels further intrusions into our privacy with the (legal) argument that in a society under constant surveillance, "reasonable" expectation of privacy is very limited. While we now accept the very limited circumference of our private sphere, our actual need for privacy may be much greater than our "reasonable" expectation would allow.

## **Networking privacy**

Philosophical and psychological concepts help us understand what privacy is. To understand the current devaluation of privacy rights and diminishing expectations of privacy, we have to look further into concepts that explain at least some aspects of online networks, which is the field in

which this perceived loss of privacy mainly occurs. To that end, we will look at network theory, a field of computer science that finds application in many areas of study, including physics, social sciences, biology and economics. Related to that is signaling theory, which developed in evolutionary biology, but has application in economics and social sciences. Signaling theory is concerned with competitive environments, trying to understand why certain signals are reliable and others are not and what the consequences of deceptive or unreliable signals are.

The digital world in which we are attempting to find some meaning for privacy, has a multi-faceted relationship with an individual's personal networks, both online and off-line. Network theory explores the connections people build online, their strengths and weaknesses and how the flow of information is organized. Network theory is one approach trying to understand why we are willing, in some instances, to reveal deeply personal information to complete strangers or impersonal entities. Signaling theory is a related concept, which is in turn closely related to the boundary setting framework discussed in Altman, and which proposes that "[u]nderlying all the networking sites are a core set of assumptions—that there is a need for people to make more connections, that using a network of existing connections is the best way to do so, and that making this easy to do is a great benefit."<sup>37</sup>

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<sup>37</sup> Donath, J. and boyd, d., "Public displays of connection", *BT Technology Journal*, 22:4, 2004.

In signaling theory, access to a large network can create a more reliable signal, that is, one that can be verified by a large number of members of that network. On the other hand, with a larger network comes the increased risk of exposure should the signal be deceptive. But the extend of our networks not only influences our online personal connections. The ability to have constant access to online networks and thereby faster and more accurate information, affects the way we work and live our daily lives, from deciding what to wear according to up-to-the-minute weather reports to facilitating a successful job search. Access to networks of people and information determines the kind and scope of personal and professional opportunities we are presented with and facilitates social status within one's networks. There is a link between network access and equality in society, which arises from the role of access to information as enabler for political, social and economic forces within our society.

### ***The display of connections***

The advanced version of watching and being watched we practice in our contemporary culture seems to have less to do with flow of information than with disclosure, voyeurism and self-performance.<sup>38</sup> In that regard, the display of connections in online social networks serves to enable users to

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<sup>38</sup> "At the same time, the general erosion of privacy appears to contribute to a cultural milieu that tolerates and even rewards disclosure, performance, and even exhibitionism." Van Herk, A., "Privacy As Commodity: Divulgence and Diversion", in Matheson, D., (edit.), "Contours of Privacy", Cambridge Scholars Publishing, 2009, 111-130.

observe a wide range of previously inaccessible people. Aritha van Herk asserts that “watching and being watched function as forms of cultural transmission, that process of passing on relevant knowledge, skills, attitudes, and values from person to person or from culture to culture” (AvH, 111).

Interpersonal links as displayed in online social networks differ from ‘traditional’ social connections in several ways: they are generally mutual, in that the connection shows up publicly on both sides of the link—the person who requests the connection and the person who grants it; these links are public, permanently on display—or at minimum, hard to permanently delete; links are not nuanced, the distinction between stranger and friend is reduced to friend or friend of a friend; and—this aspect seems currently to be the most contested, in the courts and in online fora—these links allow only limited categorization: once access is given to one group of connections, i.e. “friends” or “friends of friends,” that access includes one’s profile, connections, often e-mail lists, pictures and other contacts. It is not in these program’s default settings to be able to filter access to one’s online information either by type of information or by who gets to have access (Donath and boyd, 72). The display of connections can increase one’s status—based on the assumption that more connections mean more access to information and increased influence. Display of connections may also serve as memorial, or as testament of strong ties to family, community or other individuals. Connections can be valued as instruments to foster work relationships, discuss issues, find solutions and break down barriers between

groups and departments. In all cases, displays of connections serve to enhance social capital.<sup>39</sup>

This is where signaling theory offers its observations: “[W]e rely on signals, which are more or less reliably correlated with an underlying quality. Some signals, often termed ‘honest’ or ‘assessment’ signals are deemed to be inherently reliable because they are costly in terms of the quality they are signaling” (Donath and boyd, 73). The associated costs of signaling in terms of social networks are possible loss of reputation and the danger of social expulsion. One function of a display of connections is to verify one’s identity: the more people I am connected to who don’t publicly disagree with my displayed image, the more likely other people are to believe in my identity and come to rely on the veracity of any claims I may make (Donath and boyd, 73).

Another function of the display of connections is the meshing of contexts. “Underlying [...] is the assumption that having a mutual acquaintance, or even just being connected via a chain of acquaintances, provides context for connecting” (Donath and boyd, 77). More and more, finding common ground can be as simple as finding a shared “friend.”

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<sup>39</sup> Richard Florida briefly defines social capital as “the idea that strong social networks--tight communities bound by shared norms, trust, and reciprocity--enhance cooperation and productivity. When people belong to communities with high levels of social capital, the theory goes, they’re far more willing to work together and take chances on risky ideas.” (Florida, Richard, Cushing, Robert, Gates, Gary, Harvard Business Review; Aug2002, Vol. 80 Issue 8, p20-20). Against that positive aspect of strong social networks, the authors of that article propose that strong ties that form cohesive communities, can inhibit diversity and innovation. Larger networks with weaker ties seem to allow for more acceptance of new ideas while maintaining enough information flow to sustain a community of interest.

Connections may evolve around people—some that are more ‘networked’ than others may serve as hubs and have greater influence over expansion of networks—or around issues. The strength of online social networks is in their ability to conflate different networks and break down barriers between disparate aspects of our lives. This, of course, is also their inherent danger: “By making all of one’s connections visible to all the others, social networking sites remove the privacy barriers that people keep between different aspects of their lives” (Donath and boyd, 78).

With this aspect of privacy, the combining of contexts, we have circled back to the concept of contextual privacy, which allows privacy settings to be modulated; some groups of connections are allowed full access, others only partial, and still others may be denied access completely. This may be one way that privacy adapts to shifting expectations and norms, as Westin predicted.

## **Facets of Privacy**

The difficulty in fixing privacy echoes the difficulty in demarcating surveillance. Surveillance today is a multi-level, multi-directional process with overlapping spheres of scrutiny. Privacy today is similarly a multi-directional process in overlapping spheres of social units. Both privacy and surveillance are located in the negotiated space between individual and

group interests. Privacy today faces erosion both from within and without. Concomitant with state interests that “moved in the direction of a culture of control”<sup>40</sup> (Cohen, 2), that put security above individual freedoms<sup>41</sup>, we are faced with commercial interests that, in a global economy, commodify not just general knowledge, but every bit of personal information, from who one’s friends are to individual genetic profiles. “Never before in the history of the planet have so many people—on their own—had the ability to find so much information about so many things and about so many other people”<sup>42</sup>. What drives searching for and getting information online, making it a huge business, is the ability to target advertising. Individuals voluntarily forfeit their right to privacy, not just to the state, but to corporations that are accountable only to their stakeholders. Privacy is viewed through the lens of profitability, rather than from an ethical or communal perspective.

Friedman, in *The World is Flat*, recognizes the enormous power information has, but focuses on the positive aspects of the “formation of global communities, across all international and cultural boundaries” (TF, 184). The commercial side of that coin is that “just about everything there is

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<sup>40</sup> Cohen, E., *Mass Surveillance and State Control: The Total Information Awareness Project*, Palgrave Macmillan, New York, NY, 2010.

<sup>41</sup> “Since September 11, 2001, the increase in measures of exception adopted by democratic governments in the ‘global war on terror’ has been accompanied by growing interference from systems of surveillance in everyday lives of their citizens. Mounting security concerns have met with a mounting technological response. In a situation of escalating military and police repression, one must not forget that the tension between security and freedom, secrecy and transparency, constraint and consent, and subjection and resistance are part of a less discernible, long-term trend.” Mattelart, A., *The Globalization of Surveillance: The origin of the securitarian order*, Polity Press, Cambridge, UK, 2010.

<sup>42</sup> Friedman, T.L., *The World is Flat: A brief history of the twenty-first century*, Farrar, Strauss and Giroux, New York, NY, 2006.

to know about you—what you buy, where you go—is worth something to someone. And the more we live online, the more companies learn about us.”<sup>43</sup> Facebook is able to mine real-time conversations to target ads: Google knows where you are and which shoes you want to buy. Online advertisers can target ads to consumers where they are whenever they engage in any online interaction: “With real-time delivery, the mere mention of having a baby, running a marathon, buying a power drill or wearing high-heeled shoes is transformed into an opportunity to serve immediate ads, expanding the target audience exponentially beyond usual targeting methods such as stated preferences through ‘likes’ or user profiles.”<sup>44</sup> The shift undermining privacy may be understood in light of a shift toward a total commercialization of information. With that shift, even personal information turns into a commercial commodity under corporate control.

Increasingly, all aspects of information and communications, from content to formatting to dissemination are subject to corporate management, with the sole aim of maximizing return on investment for shareholders.<sup>45</sup> The power relationship between commodification of information, surveillance and privacy leaves privacy, as guardian of access to information, on the losing end of the equation. “The battle between technology innovators and regulators will determine how quickly existing privacy boundaries can be

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<sup>43</sup> Singer, N., *Data Privacy, Put To The Test*, [www.nytimes.com/2011/05/01/business/01stream.html](http://www.nytimes.com/2011/05/01/business/01stream.html), accessed May 03, 2011.

<sup>44</sup> Advertising Age: *Facebook test mines real-time conversations for ad targeting*, <http://adage.com/print/149531>, march 23, 2011.

<sup>45</sup> Schiller, D., *Digital capitalism: networking the global market system*, MIT Press: 2000.

redrawn to accommodate the ambitions of Web giants such as Facebook” (G&M, A 16).

### Canadian context

So far we’ve explored privacy mainly from a theoretical perspective. However, neither Arendt, nor Habermas was content to explore these matters purely and apart from the public realm. Both thinkers link their work to explicit concerns with how matters of privacy and public deliberations affect actual democratic processes. Following preoccupations imminent to their theoretical explorations, I will briefly situate this paper’s threads of privacy, public deliberation and networked linkages in the contemporary Canadian legal context to see if we are developing an intellectual arsenal for understanding the contemporary risks to privacy.

After a strong beginning, Canada has slipped in the international privacy ranking and is now considered to have “some safeguards, but weakened protections”<sup>46</sup> where it once was considered to have “significant protections and safeguards.” Canada’s Charter of Rights and Freedoms, does not include a guarantee of privacy. What Canada’s courts have recognized is an individual’s right to a reasonable expectation of privacy as part of the Charter right to be secure against unreasonable search or seizure (Section 8).

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<sup>46</sup>This according to Privacy International in its *The 2007 International Privacy Ranking State of Privacy Map*

The degree of actual privacy protection under Section 8 depends, however, on the reasonable expectations of the individual in the circumstances; it is, in other words, relative or contingent. Provincially, Ontario's Privacy Commissioner operates under several Acts: *The Freedom of Information and Protection of Privacy Act (FIPPA)*, the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* and the *Personal Health Information Protection Act (PHIPA)*. The right to privacy in this context encompasses both access and control. However, protecting your privacy is mainly left to the individual, with a complaints process in case of violation that involves contacting the 'offending' party as a first step. "If the matter cannot be resolved with the government organization or the health information custodian, the individual may contact the IPC to file a privacy complaint." (<http://www.ipc.on.ca>). When it comes to access, the Privacy Commissioner takes a far more active role and has devised a strategy to actively encourage access to information management in government organizations, called "Access By Design". This strategy is in place to enhance transparency, accountability, collaboration, and quality of information. The Canadian Association of Professional Access and Privacy Administrators (CAPAPA) is signatory to the Madrid Privacy Declaration (appendix a), a document with a broad range of individual and organizational signatories, that reaffirms international instruments for privacy protection, identifies new challenges, and calls for concrete actions.

## Conclusion

We have analyzed privacy from historical, political, philosophical, anthropological, legal and psychological points of view and found various frameworks within which to describe, contain and maintain its integrity.

A few core concepts stand out:

- Privacy is a necessary element in the development of an autonomous individual
- Privacy is a necessary element in the development and maintenance of democratic society
- The need for privacy is common to all humanity.
- The concept of privacy is rooted in social interaction.
- Privacy is dialectical in nature.
- Legal concepts of privacy, which are, by necessity, constricting and exclusionary, cannot address all aspects of privacy, but legal defense of the right to privacy is vital for a non-totalitarian society.
- While state intrusion remains a core concern of the right to privacy, commercial intrusion poses as much, if not more danger.

While some—and a growing number—may choose to forego exercising their right to privacy, seeking validation in exposure to uncounted

audiences instead of through direct relationships, privacy remains a fundamental human right.

Privacy as a moral concept can be seen as either relative or objective. For the relativists, expectations of privacy are based on personal experience and expectations. These can alter from person to person or be based on conventions within a society; we've discussed this view through Nissenbaum Westin and Altman. Objectivists deem privacy to be a moral fact of human existence, as in Arendt and as a part of what creates personhood through human dignity, as seen in Bloustein. This moral conception of privacy may be based in privacy as essential per se, or it can circumscribe privacy through the consequences of either living with or denying the right to privacy.

The need for privacy does seem to be universal and we have a universal legal framework for privacy in the United Nation's Universal Declaration of Human Rights, Article 12, *Right to privacy*:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

In current online culture, however, the concept of privacy as a relative value dominates. If users think they are giving up power—or at least social status—by insisting upon privacy, then privacy will continue to make way for real or imagined celebrity, however short-lived it may be, and for extended

shopping opportunities. “If privacy is a cultural and social construction, then our participation in its effectiveness is inflected by the extent to which we are willing to negotiate the uneasy tension between power and visibility.”<sup>47</sup>

It may be that we already live in an era beyond privacy, in which physical existence is less relevant than online performance and in which humanity is almost exclusively transmitted online, whether passively exposed or actively shared. However, the insistence on privacy is the insistence on choice. It is not a matter of having nothing to hide, but a matter of deciding in whom to trust. Other democratic freedoms depend on it, freedom itself does: the choice of association and freedom of thought, indeed the very existence of self is predicated on the preservation, adaptation, and protection of the value of privacy.

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<sup>47</sup> Van Herk, A., *Privacy as Commodity: Divulgence as Divergence*, in *Contours of Privacy*, Matheson, D., (edit.), Newcastle Upon Tyne, UK: Cambridge Scholars Publishing, 2009, 128.

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## Appendix a: The Madrid Privacy Declaration

### **The Madrid Privacy Declaration**

3 November 2009

Madrid, Spain

*Affirming* that privacy is a fundamental human right set out in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and other human rights instruments and national constitutions;

Reminding the EU member countries of their obligations to enforce the provisions of the 1995 Data Protection Directive and the 2002 Electronic Communications Directive;

*Reminding* the other OECD member countries of their obligations to uphold the principles set out in the 1980 OECD Privacy Guidelines;

*Reminding* all countries of their obligations to safeguard the civil rights of their citizens and residents under the provisions of their national constitutions and laws, as well as international human rights law;

*Anticipating* the entry into force of provisions strengthening the Constitutional rights to privacy and data protection in the European Union;

*Noting* with alarm the dramatic expansion of secret and unaccountable surveillance, as well as the growing collaboration between governments and vendors of surveillance technology that establish new forms of social control;

*Further noting* that new strategies to pursue copyright and unlawful content investigations pose substantial threats to communications privacy, intellectual freedom, and due process of law;

Further *noting* the growing consolidation of Internet-based services, and the fact that some corporations are acquiring vast amounts of personal data without independent oversight;

*Warning* that privacy law and privacy institutions have failed to take full account of new surveillance practices, including behavioral targeting, databases of DNA and other biometric identifiers, the fusion of data between the public and private sectors, and the particular risks to vulnerable groups, including children, migrants, and minorities;

*Warning* that the failure to safeguard privacy jeopardizes associated freedoms, including freedom of expression, freedom of assembly, freedom of access to information, nondiscrimination, and ultimately the stability of constitutional democracies;

Civil Society takes the occasion of the 31st annual meeting of the International Conference of Privacy and Data Protection Commissioners to:

(1) Reaffirm support for a global framework of Fair Information Practices that places obligations on those who collect and process personal information and gives rights to those whose personal information is collected;

(2) Reaffirm support for independent data protection authorities that make determinations, in the context of a legal framework, transparently and without commercial advantage or political influence;

(3) Reaffirm support for genuine Privacy Enhancing Techniques that minimize or eliminate the collection of personally identifiable information and for meaningful Privacy Impact Assessments that require compliance with privacy standards;

(4) Urge countries that have not ratified Council of Europe Convention 108 together with the Protocol of 2001 to do so as expeditiously as possible;

(5) Urge countries that have not yet established a comprehensive framework for privacy protection and an independent data protection authority to do so as expeditiously as possible;

(6) Urge those countries that have established legal frameworks for privacy protection to ensure effective implementation and enforcement, and to cooperate at the international and regional level;

(7) Urge countries to ensure that individuals are promptly notified when their personal information is improperly disclosed or used in a manner inconsistent with its collection;

(8) Recommend comprehensive research into the adequacy of techniques that deidentify data to determine whether in practice such methods safeguard privacy and anonymity;

(9) Call for a moratorium on the development or implementation of new systems of mass surveillance, including facial recognition, whole body imaging, biometric identifiers, and embedded RFID tags, subject to a full and transparent evaluation by independent authorities and democratic debate; and

(10) Call for the establishment of a new international framework for privacy protection, with the full participation of civil society, that is based on the rule of law, respect for fundamental human rights, and support for democratic institutions.

*(At the time of the annual meeting of the Privacy and Data Protection Commissioners' conference in Madrid, more than 100 civil society organizations and privacy experts had signed the Madrid Privacy Declaration. More information about the Declaration, including translations, is available at [thepublicvoice.org/madriddeclaration](http://thepublicvoice.org/madriddeclaration))*

source: <http://thepublicvoice.org/madrid-declaration/>