

# Daily Journal

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## Just admit it: privacy is mostly dead

By Timothy D. Reuben

Recent reports of the U.S. government spying on its own citizens have fueled the debate about the legal limits of privacy. What is worse, technology evolves at a far faster pace than jurisprudence, so that with the widespread proliferation of all the gadgets and cameras and recording devices, less and less can be thought of as private. Today, anyone can look at virtually any location in any major city through Google Maps or other like applications. With the continued development of technology, all phone calls can be tapped, all emails viewed or recovered, and anything even just slightly in public view can be photographed from virtually any point of view, even from huge distances (like outer space). Private speeches can be recorded (as we learned in the last election), and any pattern of activity can be documented and analyzed for a particular purpose, such as the websites visited, the purchases made, the music listened to or television watched, where our vehicles are located, etc.

Sometimes this Big Brother reality of current times is incredibly helpful, such as all the videotape of the horrific and tragic Boston Marathon bombing — the suspects were quickly identified beyond doubt. And with the growing number of mass shootings or bomb scares around the country, the government certainly has a cogent argument in favor of its current spying activities. The well-known First Amendment lawyer, Floyd Abrams, even acknowledged recently in the Los Angeles Times that “There’s no arguing with the proposition that, as the president stated, you can’t have 100[ percent] security and 100[ percent] privacy.” We do want the government to foil these terrible plots against our safety, so we are willing to accept some significant intrusion into our lives if it will actually save a human life

— and in light of recent terrifying events, most choose security over privacy. Indeed, in light of all the information available to just about anyone with an iPhone or a computer, there is a credible argument that we have all implicitly given up a great deal of our privacy rights anyway — all in favor of getting the best new technology and Internet options.

While some employers have tried to install cameras in the bathrooms, at least these locations still remain more or less private. Yet bathrooms do remain a security concern in most buildings, as recorded cases of rape, assault and robbery have demonstrated. And while Kim Kardashian may have originally created her now considerable celebrity status by an Internet video of her bedroom antics, it appears we can all still agree that bedrooms are mostly private places — as long as we close our curtains and are not committing an illegal act! Moreover, since many bedrooms are equipped with computers, televisions and other gadgets, there is an obvious ability for some hacker to actually take hold of that technology and peek behind the closed doors.

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Most would still agree these are private places, but beyond the bathroom and the bedroom, is there any privacy left that can and should be subject to legitimate protection?

There is of course financial privacy — but that is also subject to debate. For example, many Americans have their net worth largely tied up in their homes. However, not only are public documents that show the purchase price, tax basis and mortgage on the property more available than ever through the Internet, but there are myriad online resources such as Zillow to provide estimates

of current value. (After purchasing my home, my teenage children at the time immediately told me the purchase price despite my effort to keep it secret from them!)

The remarkable success of social media has further eroded any sense of privacy — indeed the whole purpose of such social networking is to make available information to the world about its participants. These sites are sometimes researched by employers who decide that anyone depicting themselves to the world in an inebriated state should not be hired, so be careful what you post.

Privacy rights serve a number of very legitimate ends. First, they put a limit on government intrusion — and government obviously must be subject to limits. That is in part of the reason why we have a Fourth Amendment, which in the words of Justice William O. Douglas, “marks the right of privacy as one of the unique values of our civilization.” *McDonald v. United States*, 335 U.S. 451, 453 (1948).

Second, the feelings and self-respect of the individual are important in a free society. Not only is it creepy to think of someone (be it governmental or private) searching through your stuff and recording your activities, but it is just plain demeaning. A society which loses respect for the private rights of the individual is likely to lose its way very quickly.

Third, there is value in allowing someone the privacy to be undignified or to make mistakes — and not subject an individual to judgment or embarrassment because of conduct not intended to be seen. Who has not done something in private that could be subject to criticism if publicly known? The vast majority of such acts should remain private — even if by doing so, a percentage will get away with even terrible conduct. Anthony Weiner became a national joke because of his odd behavior — which he presumably intended to be private — and but for that foolish-

ness he would still be in office. Eliot Spitzer’s private conduct may have been technically illegal, but because of it coming to the light of day, it destroyed one of the country’s most promising politicians.

Interestingly, a private right of action for violation of privacy requires both a “reasonable expectation” of privacy and that the intrusion would be “highly offensive to a reasonable person.” As to the former, two 20 year old female college students recently commented to the author that because of technology, they had no expectation that anything they do is private — although they wish it were not so. As to the offensiveness requirement, it certainly is not highly offensive if by invading privacy the government ensures greater security for society. And how offensive can invasions of privacy truly be? What are the actual damages one could possibly contend exist?

So where does this confusing situation leave us? Perhaps sadly, we really can no longer claim to have a reasonable expectation of privacy or that most invasions are either offensive or not predictable. We must assume the government has looked at who we call, and that multiple companies have tracked our economic and behavioral patterns — and that we have willingly accepted the sacrifice of privacy for living in a more exciting and faster paced technologically controlled world. All we have left is some limit on governmental intrusion some of the time. Let’s just admit it: privacy is mostly dead.



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