

The History of Privacy

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Abstract

This project examines the history of our contemporary notion of privacy. In the introduction, I present and defend the view that the desire for privacy is not distinctly modern or western, and that different privacy norms are reactions to a shared desire for privacy. Different understandings of privacy are best understood as different views on the *ideal balance* between privacy and other values.

Then, over three chapters, I examine various balance-ideals across Europe and then America from the Renaissance until the end of the 19th Century. Due to various events at the end of the 19th century (not least technological developments) there was an explosion of interest in various aspects of privacy in the 20th century (which I discuss in the fourth chapter): arguing about its newly articulated status as a ‘right’; finding a satisfactory definition for this right; questioning its universality – these all became important strands in an intellectual revolution concerning privacy. My discussion of this period will also include reference to the development of privacy legislation, which evolved in tandem with this changing theoretical landscape. This will naturally lead on to, and partly explain, our predicament in the 21st century, discussed in the final chapter alongside the question of how contemporary Western societies might tackle novel threats to their current balance-ideals of privacy.

Introduction

What would a history of privacy look like? Would it be a history of ideas, of laws, of societal practices? Different answers will lead to wildly varying conceptions of what privacy is today or has ever been. Is it an ideal, a right, a state of individuals or of societies?

The standard view is that privacy begins to emerge as a concept in the Enlightenment and has developed since then, its practical realization gradually increasing. This is the view implicit in Warren and Brandeis's classic article on the subject.¹ Before the Enlightenment, the argument goes, society's concerns and conceptual vocabulary are considered so different that no comparable notion of privacy exists. Privacy is a modern notion.

A different view is offered by Alan Westin: our desire for privacy is rooted in our "animal origins", and the struggle for privacy is a pervasive feature of all human cultures.²

If this universalist position is correct, it means that it is mistaken to see privacy as solely a modern notion, emerging in the 18th century and reaching its maturity in the present day.

Westin's view is often disputed using the great variance between social practices of different cultures as evidence of the uniqueness of privacy.³

But it is crucial to be clear about what these anthropological studies establish - namely, variance in the ways societies view privacy, rather than evidence that some societies simply lack any concern for it. In other words, differences in practice are evidence for a different, not absent, concern for privacy. We should of course recognise the heterogeneity of privacy norms. However, "this circumstance does not prove that there are no universal needs for privacy... it suggests only that each society must be studied in its own terms". Westin's view can in fact explain both cultural variance in the treatment of privacy and the apparent absence of certain concerns about privacy across history.

In what follows I argue, developing Westin's view, that what various privacy practices have in common is not some essential practical element (like separate rooms or certain activities being hidden) but a common *function*: a practice establishes privacy if and only if it allows the individual to achieve a certain kind of (psychological) state. It is this *state* which is universally desired.⁴

¹ Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy", *Harvard Law Review*, Vol. 4, no. 5 (1890): 193,

https://stem.elearning.unipd.it/pluginfile.php/1000752/mod_resource/content/0/Warren%2C%20Brandeis%20%20The%20right%20to%20privacy.pdf

² Alan F. Westin, *Privacy and Freedom*; with a Foreword by Louis Blom-Cooper. London: Bodley Head, 1970, 8.

³ See, for instance, Barrington Moore Jr., *Privacy: Studies in Social and Cultural History*. Armonk, N.Y.; M.E. Sharpe, 1984. Margaret Mead, in a study of Samoa, proclaimed "there is no privacy and no sense of shame". Westin is keen to point out that this is merely a statement of the absence of *our* privacy practices - others may be in effect: "the analysis must also recognise the fact that there are psychological ways of achieving privacy for the individual or the family as well as physical arrangements, ways which are crucial in those societies where communal life makes solitude or intimacy impossible within the living areas". See Westin, *Privacy and Freedom*, 12-20.

⁴ The exact nature of this state is an important question that will not be primarily discussed in this essay.

In developing a history of privacy, it is clear that the desire for privacy is in constant competition with others - above all, the desire to take part in public life, whatever form it takes: "the individual's desire for privacy is never absolute, since participation in society is an equally powerful desire. Thus each individual is continually engaged in a personal adjustment process in which he balances the desire for privacy with the desire for disclosure and communication of himself to others, in light of the environmental conditions and social norms set by the society in which he lives".⁵ It seems human beings are not only social animals, but private ones. The tension between these two values is one of the central issues in the politics of privacy. It is by examining the evolution of the tensions between privacy and other values that we gain an understanding of privacy's history.

The conflict between privacy and engagement, secrecy and surveillance, helps us view the conflicts of various ideologies across time: that of Athens and Sparta, Protestantism and the medieval church, liberalism and paternalism. What these traditions represent are different views on what balance between privacy and participation is ideal. For just as each individual is engaged in a "*personal* adjustment process", so each society is engaged in a *cultural* adjustment process as various forces come to influence what is seen as 'the way it should be' - what citizens should be entitled to as only theirs, what the state should be allowed to investigate, and so on. Crucially, the practicalities of life at the time exert a significant influence on these ideals; therefore, sufficiently different ways of life lead to very different ideals, including the society's conception of what privacy even is. This approach sees a society's view of privacy norms as similar to its view of, say, economic policy - a compromise between values leading to an ideal that is either championed or begrudgingly accepted in order to best realise what society desires. Just as attempts (and the desire to) to realise, say, low unemployment vary across societies, so privacy norms and the specific societal arrangement desired will vary.

The history of privacy, as the following chapters demonstrate, is the history of these developing balance-ideals.

Overall, then, this project has four aims:

1. To argue that the differences between various privacy practices disguise the underlying common desire for a particular kind of psychological state.
2. To argue that the nature of 'privacy' for a given society is determined by what it holds as the *ideal balance* of various values, of which privacy is one.
3. To consider examples of such balance-ideals in the history of Western Europe and America. This is to better understand what societal phenomena affects such balance-ideals.
4. To consider the discrepancies between the balance-ideal of contemporary Western Europe and America, and the law of these areas.

These four aims jointly contribute to an improved understanding of privacy and its history. It is hoped that this may inform new approaches to, and defences of, this value.

⁵ Westin, *Privacy and Freedom*, 7.

1. The Renaissance

"It is my throne, and I try to rule here absolutely, reserving this one corner from all society, conjugal, filial, and social. Everywhere else I have just a verbal authority, which is essentially doubtful. Miserable, to my mind, is the man who has no place in his house where he can be alone, where he can privately attend to his needs, where he can conceal himself!"⁶

- Montaigne, *Of Three Kinds of Relationship*

This chapter examines the notion of privacy present in the writings of Renaissance humanists. Having contended that the desire for privacy is universal, I must now face the challenge of explaining how that thesis can be maintained when presented with what appears to us as a very strange treatment of the notion. For while there are discussions of privacy present among the humanists, the specific issues they are concerned with do not strike as primarily privacy concerns at all, while what we see as archetypal worries about privacy do not appear. First, I will substantiate this claim by surveying a collection of discussions of privacy from a selection of humanist authors. Then I will explain why this apparent discrepancy does not reveal a lack of concern for privacy, only a distinctly pre-modern set of 'privacy problems'.

1.1: Otium and Negotium

Arguably the most important strand in intellectual thought which influenced the humanists' writings on privacy was neo-stoicism. This movement, founded by Justus Lipsius, aimed to fuse Christian and Stoic teachings.⁷ Two related and relevant strands of neo-stoic thought were that of the ideal relationship between the individual and the state, and the question of whether the moralities of public and private life were the same or distinct. It is the import attached to these questions which explains the focus of humanist views on privacy.

Let us consider the question of the ideal relationship between individual and state at the time. There were roughly two opposing camps on this issue: one thought that the best commonwealth would be ruled by a single man, a *Pater Patriae*: "where one person is in complete control, everyone else is able to pursue his own affairs in an untroubled way, and

⁶ Michel de Montaigne. *The Essays of Michel de Montaigne*; Translated with an Introduction by J.M. Cohen. London: Penguin, 1993, 263.

⁷ Jan Papy, "Justus Lipsius", *The Stanford Encyclopedia of Philosophy* (Fall 2023 Edition), Edward N. Zalta & Uri Nodelman (eds.), <https://plato.stanford.edu/archives/fall2023/entries/justus-lipsius/>

remains entirely free from public business".⁸ Whereas *negotium*, the life of courtiers and public servants, is inherently corrupt and corrupting.

This 'Platonist' view was informed by the Neo-stoic view that there is value in being isolated from the world, that we should desire to retreat from the *vita activa*. That is, "a life *otium*, of freedom from public duty, is indispensable for the achievement of our highest ends and hence our greatest happiness", whereas the state of *negotium*, known all too well to public servants, is deeply corrupting and undesirable.⁹ We find this view in the followers of Petrarch ("if you wish to remain pious, just, a respecter of truthfulness and innocence, remove yourself from the life of the court".¹⁰) right through to later humanists like Montaigne: "The most painful and difficult employment in the world, in my opinion, is worthily to discharge the office of a king."¹¹ Thus, the ideal state is one where all control is bestowed upon the *Pater patriae*, so that the citizens can avoid the corruption of *negotium* and better pursue *otium*. The ruler is therefore trusted to bring about a state conducive to the happiness of the citizens.

But another group of humanists disliked the idea of trusting your happiness to another – that rather than seeking a life of *otium*, we should seek a life benefiting the state and others. To do otherwise is to do wrong.¹² These 'civic' humanists took great inspiration from Roman republicans rather than stoics, with Cicero's *de officiis* a crucial text, expounding the ideal life of public engagement.¹³

Among humanists, this opposition between civics and Platonists was one of the most important questions of political and moral philosophy. Part 1 of More's *Utopia* is essentially a dialogue between these two positions (and I agree with Skinner that More is seeking to defend the civic stance). Within this dialogue the second strand mentioned above (the issue of a public/private morality distinction) also becomes prominent: Hythloday argues that the

⁸ Giovanni de Ravenna, Quoted in Quentin Skinner, "Sir Thomas More's *Utopia* and the Language of Renaissance Humanism.", in *The Languages of Political Theory in Early-Modern Europe*, edited by Anthony Pagden, 123–58. Ideas in Context. Cambridge: Cambridge University Press, 1987, 127.

⁹ Ibid.

¹⁰ Quoted in Ibid.

¹¹ *Of the Inconvenience of Greatness*, in Michel de Montaigne, *The Essays of Michel de Montaigne - Complete*, translated by Charles Cotton, Edited by William Carew Hazlitt (Project Gutenberg 2004).
<https://www.gutenberg.org/cache/epub/3600/pg3600-images.html#link2HCH0042>

¹² See for instance, Thomas Starkey's *Dialogue Between Pole and Lupset*.

¹³ Skinner, *Sir Thomas More's Utopia and the Language of Renaissance Humanism*.

Utopians have a perfect public morality but is less keen to endorse their private morality.¹⁴ In fact this distinction is quite crucial to the Platonist view Hythloday represents, for the precise way the prince governs to achieve a state in which the citizens can live a life of otium is left very open. There is a distinct 'ends-justifying-means' attitude about this; whatever public morality is used by the prince, if it brings about the ideal private morality of its citizens, it is justified, i.e. good. The most famous example of this distinction is of course found in Machiavelli's *The Prince*, and again, the distinction between a morality for private life and one for public affairs is the backbone of Machiavelli's exposition of political life. Indeed, the idea there *is* a distinction is part of what motivates the otium branch to advocate retreat from public life: if private morality, that espoused by God, is incompatible with political office (as it appeared to be) then why should anyone subject themselves to it? Why contaminate your goodness with the taint of the evils of politics, whether they be necessary or otherwise?

1.2: Montaigne's contribution

This issue of otium and retreat from public life was also explored in less explicitly political contexts.

The retreat endorsed in Montaigne's essays often seems to be from more than public office, but a more general and pervasive 'public' realm. He desires a much more substantial escape into privacy.

In the quotation above, Montaigne makes clear his contempt for public life. There are countless examples of this; many whole essays are devoted to related tasks.¹⁵ O'Neill has argued that it is misleading to say Montaigne had a distaste for public life.¹⁶ There is some truth to this, however, I agree with Green that it is more misleading to say he lacked such distaste.¹⁷ While O'Neill is right about Montaigne's own enthusiastic pursuit of public life when he was young, and about his occasional endorsement of the *vita activa*, what O'Neill fails to recognise (at least with sufficient clarity) is that Montaigne's endorsement of public

¹⁴ Thomas More, Francis Bacon, Henry Neville, and Susan Bruce. *Utopia*. Oxford: Oxford University Press, 1999, especially book two of More's *Utopia*. For discussion: Skinner, *Sir Thomas More's Utopia and the Language of Renaissance Humanism*.

¹⁵ See, for example, *On Glory* or *On the Disadvantages of Greatness*.

¹⁶ John O'Neill. *Essaying Montaigne: A Study of the Renaissance Institution of Writing and Reading* 2nd ed. Liverpool: Liverpool University Press, 2001.

¹⁷ Felicity Green. *Montaigne and the Life of Freedom*. Cambridge: Cambridge University Press, 2012.

life is conditional on the uninterrupted owning of the self – if public life leads to you 'hiring' yourself to others at your own expense, then it is slavery: "I have been able to involve myself in public office without departing one nail's breadth from myself, and to give myself to others without taking myself from me".¹⁸

With the above in mind, how does Montaigne advocate for retreat from public life, and what characterizes such a retreat?

In 'On Solitude', the political context of the otium question is replaced by a more personal one. First, we are told that "it is not enough to get remote from the public; 'tis not enough to shift the soil only; a man must flee from the popular conditions that have taken possession of his soul, he must sequester and come again to himself". This is followed by a quotation from Lucretius "*But unless the mind is purified, what internal combats and dangers must we incur in spite of all our efforts!*". What these jointly amount to is that this purification of the mind, the coming again to ourself, can only be achieved through *solitary* reflection: privacy is a necessary condition of self-development.¹⁹

He continues: "we must reserve a backshop, wholly our own and entirely free, wherein to settle our true liberty, our principal solitude and retreat. And in this we must for the most part entertain ourselves with ourselves, and so privately that no exotic knowledge or communication be admitted there". We should "disentangle ourselves from those violent importunities that engage us elsewhere and separate us from ourselves." Montaigne is offering a rejection of the classical assumption that the public takes precedence over the private (even less that such precedence is necessary or obvious). The life of the individual should not be a tool of the state or another: "The greatest thing in the world is for a man to know that he is his own".²⁰

Two important caveats to note: it does seem that this essay is primarily aimed at those at the age of retirement, who's services to the state are perhaps no longer required or desired. This can fuel a position like O'Neill's, that Montaigne holds the public in contempt only for some parts of some individuals' lives. However, as above, there is evidence elsewhere for a more universal disdain.

Secondly, and more importantly, it is worth emphasising that the kind of privacy Montaigne is advocating is only like ours in some respects. Overall, the kind of privacy he wants to

¹⁸ Quoted in Ibid, 94. Similarly, "The freeman... has his own will: he is able to act *sui iuris* ('in his own right'), being responsible for his conduct and speech to no one but himself." Ibid, 104.

¹⁹ *On Solitude*, in Montaigne, *The Essays of Michel de Montaigne – Complete*. It is likely that Montaigne's Catholic distrust of the sensual also plays a part here – the fusion of stoicism and Christianity works both ways, so to speak. After the quoted passage, Montaigne discourages making happiness conditional on anything that you can't 'carry with you', including your family. This seems to go further than even his catholic asceticism and reach back to a Platonic level of reverence for the purity and isolation of the mental.

²⁰ Ibid.

champion is what we might call a 'classical' kind: 'privacy' as in a citizen's private life, rather than something secret or hidden. He's focused on the importance of us valuing ourselves over the state, rather than the importance of having an aspect of life hidden from public view.

In other words, Montaigne's conception of the private is broader than ours; it is roughly that which doesn't relate to the state, as opposed to what we don't want others to perceive. He asks why we value people's reputation (public) over their moral character (private). But under our contemporary conception, I think someone's moral character, while personal, would not be private. It does not seem accurate to us today that the question of someone's greed is a strictly private matter.

Another way to highlight the difference in privacy conceptions is this: Montaigne is worried about us concerning ourselves about the outer world. Whereas the primary modern worry often appears to be about the outer world concerning itself with us. He is challenging the priority assigned to the public realm, but he shows little active concern in keeping our private lives beyond the eyes of others.

Because of this much broader conception, we should pay attention to several issues which although we do not consider closely tied to the notion of privacy, Montaigne likely did. Notably, several ideas we *do* recognise as relevant to private life are applicable, due to Humanism's primary privacy concerns being to do with just that – private life (rather than, say private information).

Green emphasises the importance of independence, both epistemological and moral, to Montaigne. He has great concern not merely for independent inquiry, but independent agency. For Montaigne, "thinking independently matters not only for its own sake, or for the sake of the truth, but for the sake of living well."²¹ The concern for being true to the self - the desire to be authentic - which inevitably leads to a desire for independence, is again common to much humanist literature. We find the influence of Cicero here: "Each person should hold on to what is his, as far as it is not vicious...for what is most seemly for a man is the thing that is most his own".²² Erasmus would echo this, "if you do not express yourself, your discourse will be a lying mirror", and Montaigne claimed proudly that he possessed "a domestic and private style, [...] of a form all [his] own". It is difficult for us to realise that these fixations on literary style, themselves manifestations of anxieties over independence and authenticity, represent part of the theorizing of privacy done by these thinkers. For common to all these examples is a continuing rejection of the assumed priority of the 'public', whatever that happened to represent. Autonomy against conformity, removed criticism against active public service, goods accessible only to oneself qua oneself against those that are not. What these

²¹ Felicity Green, *Montaigne and the Life of Freedom*, 23.

²² Quoted in *Ibid*, 43.

cumulatively represent is a subversion of centuries of dominant thinking about the individual's place in society.

Of course, this subversion was only partial. It is easy to read retroactively a certain level of radicalism and even modernism in these various subtle ideas. Green rightly points out that much of this is misguided, and indeed, many of the supposedly modern trends in Montaigne's writings in fact trace back to classical authors.²³ However, there certainly is an identifiable trend in his writings (especially when they are located in general humanist intellectual activity) to expound the value of the private to a controversial degree.

1.3 Humanism and Private Property

Having seen how the issue of private life informed the humanist conception of privacy, we should consider another topic obliquely related to privacy that has been endlessly discussed since its inception: private property. And the crucial notion which emerges is that of self-ownership. A new rhetoric of property relations infuses discussion of selfhood. Greenblatt has argued that these thinkers see the self as a kind of property. Owning oneself entitles us to the property which that self owns. "We are returned forcefully to More's insight in *Utopia* that there is an essential relationship between private property and private selves".²⁴ Of course, there is a stark difference between what More and Montaigne think of private property, and thus, of the ideal 'self'. In Montaigne, we encounter a "possessive individualism" (Macpherson) pervading his sense of self.²⁵ The retreat to oneself is a retreat into one's private property. Whereas in More we find a total rejection not only of the institution of private property, but the social relations it creates. The concomitant absence of clear individuality in *Utopia* is, let us not forget, a statement of both political and social ideals. With the rejection of private property comes the rejection of private selfhood – quite what that latter rejection amounts to is unclear; perhaps unsurprisingly, a positive articulation of what such selfhood looks like is not discussed, at least explicitly, in *Utopia*.

Nonetheless, Montaigne seems to have voiced worries about the abdication of the self in the interests of the community which echo of Mill's 'On Liberty': "He who walks in the crowd, must step aside, keep his elbows in, step back or advance, even leave the straight way,

²³ Felicity Green, "Languages of the Self" in *Montaigne and the Life of Freedom*.

²⁴ Stephen Greenblatt, Quoted in Felicity Green, *Montaigne and the Life of Freedom*, 98.

²⁵ C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke*. Oxford: Clarendon Press, 1965.

according to what he encounters: He must live not so much according to himself, as according to others, not according to what he proposes to himself, but according to what others propose to him, according to the time, according to the men, according to the business."²⁶

This is not the only instance where the radicalism of *Utopia* sheds light on renaissance understandings of privacy. One tension stands out: Hythloday (in)famously proclaims that Utopia's cities are planned "so there is nothing private anywhere". Not long after, we get a description of the Utopians' electoral practices, which includes election of governors by a secret ballot. Yet the secret ballot is, in our modern eyes, a paradigmatically private act.²⁷ So there is, in some sense at least, privacy in Utopia. There is likely some truth in the unilluminating point that More likely only meant physical privacy in Hythloday's claim. What is much more interesting is that this distinction was both clear and unremarkable to More: that a secret ballot was not an instance of privacy, and that this was uncontroversial. This is a clear example of the heterogeneity of the conceptions of privacy, but the universal desire and concern for privacy.

We also have in Montaigne a wonderful example of the necessary conflict between the value of privacy and other values. He is a revealing case study of the 'personal adjustment process' Westin argues we all undergo.²⁸ For we have his own explanation for the extensive voluntary deprivation of privacy the essays represent. One of Montaigne's self-professed reasons for writing the essays is that he wants his private self to become better known to the public (although not out of a cheap desire for fame). He is "hungry to make himself known", he has "a mortal fear of being taken to be other than I am by those who come to know my name".²⁹ After his death, he doesn't want what is said of him to be false or distorted: "I leave nothing about me to be desired or guessed." What this reveals is that Montaigne's desire for accurate reference and representation of himself (especially posthumously) motivates him to deprive himself of privacy. In Montaigne's case, this intellectual force plays a decisive role in his personal adjustment process of working out his privacy ideal. Unlike what has been previously discussed, this is not evidence of a different conception of privacy, but rather evidence of a (personal) balance-ideal being undertaken. It also shows us how that process is necessarily impacted by the dominant concentration of privacy operating at the time.

²⁶ *On Vanity*, in Montaigne, *The Essays of Michel de Montaigne – Complete*.

²⁷ That this was not always the case is well put in: Crook, Malcolm, and Tom Crook. "REFORMING VOTING PRACTICES IN A GLOBAL AGE: THE MAKING AND REMAKING OF THE MODERN SECRET BALLOT IN BRITAIN, FRANCE AND THE UNITED STATES, c. 1600—c. 1950." *Past & Present*, no. 212 (2011): 199–237. <http://www.jstor.org/stable/23014789>.

²⁸ Westin, *Privacy and Freedom*, 7.

²⁹ *On Some Verses of Virgil*, in Montaigne, *The Essays of Michel de Montaigne – Complete*.

1.4: Conclusion

Having said all the above, it might be tempting to say that we are fighting against huge discrepancies in conceptions of privacy without reason or hope; that we should accept that in fact, the humanist notion of privacy was so far removed from our own and that it is foolish to try and tie them together. However, I think it is more accurate so say that although our notions of privacy were in many ways quite similar, the aspects of that notion discussed and emphasised were quite different due to what problems were ubiquitous at the time. There is evidence that many of the ideas about privacy we have were also shared by these thinkers, but they lack substantial discussion because they were not, to put it simply, considered problematic. For instance, at the very end of 'On Glory', Montaigne makes a few remarks on extra-marital sex: "they are actions so private and secret of themselves, as would be easily enough kept from the knowledge of others".³⁰ It is worth emphasizing the relative paucity of discussion of the idea of the privacy and secrecy of actions compared to, say, the importance of cultivating a private life or self.

Moreover, to Montaigne, this is just a practical fact that some things are more hidden. There isn't concern about this fact's moral import – there's no clear fear that the state or others might infringe on these secrets, or indeed that such infringements are objectionable – let alone the idea we have some sort of right to such privacy. The clear articulation of these ideas was not called for by the practicalities of life the time. There was not sufficient widespread concern over privacy infringements for them to matter in the dominant discussions of privacy.

Ultimately, the strangeness of these views is explained by understanding the extremely different historical and social circumstances in which these thinkers lived. Today, our notion of privacy is now "a matter of freedom rather than the product of necessity".³¹ But for these thinkers, much of what we consider essential to privacy was an inevitable aspect of life: that you would have moments alone, that you would have your own room(s) etc.³² This

³⁰ *On glory*, in *Ibid*.

³¹ Westin, *Privacy and Freedom*, 22.

³² Of course, these thinkers enjoyed a quality of life far removed from most of their compatriots. This inevitably impacts their theorizing on privacy. I have focused on them as the intellectual representatives of their age. But a contemporary peasant's views on privacy would likely be as different as the privacy problems salient to their lives.

fundamental difference explains the distance between current and humanist balance-ideals of privacy.

These thinkers clearly possessed most (although not all) of the conceptual architecture necessary to our theorizing of privacy.³³ But the practicalities of life meant that many of our paradigmatic privacy worries were not concerns of theirs at all – it was simply inevitable, amongst the intellectuals of the time, that you could keep a great deal of personal information hidden from others. Moreover, due to the technology of the time, this was not (in theory) exclusively privacy in virtue of privilege – they could recognise that no matter your standing, whispered words could remain secret, with a confidence we can no longer enjoy.

Thus, one of our deepest privacy related desires – that of being able to keep chosen information secret – seems to have been of minimal concern to them. But other cultural facts made issues we do not see as pivotal very important to them. I argue this is representative of the history of privacy in general: there is a universal desire for ‘privacy’, where ‘privacy’ is a particular state which performs certain functions for both the individual and wider society. But the concrete realizations of that state – that is, the actual practices which perform those functions in a society – are relentlessly culturally specific.

³³ One of the most notable absences is that of ‘the self’ as an independent or reified entity. The emergence of this concept is discussed in Charles Taylor, *Sources of the Self: The Making of the Modern Identity*. Cambridge, Mass: Harvard University Press, 1989. The importance of such a notion to the development of our modern conception of privacy is unclear.

2. The Enlightenment

Having considered both the conception of privacy present in Renaissance Europe and its place within the privacy balance-ideal espoused at the time, we can now consider the radical change that both elements underwent during the Enlightenment. In section 1, I present the principal influences on these changes (which although separated here, are intimately connected and constantly affected each other).³⁴ In section 2, I consider what responses were offered at the time by enlightenment thinkers. In section 3, I step back to ask what the general trend was in this revolutionary period: I argue that, overall, privacy came under new and powerful threats. But it also gained a new avenue for powerful defences through theories of religious toleration.

2.1.1: Religious Heterodoxy and Toleration

The single most important influence on the history of privacy in the Enlightenment was the new wave of religious heterodoxy that spread across Europe. After the Reformation and Counter-reformation, a previously unified church had split into various denominations. But the desire for universalism remained; the product was sectarian bloodshed. More than anything, it is this violence, and a desire for it to end, which principally motivated various arguments for toleration: "these developments were more prudential than principled."³⁵

I will discuss the Enlightenment response to this phenomenon in section 2. First however, it is worthwhile to discuss earlier treatments of religious toleration, to see what was special about the Enlightenment.

The concluding remarks of the preceding chapter – that the desire to keep certain information hidden was absent in Renaissance humanist writings – may well seem strange or erroneous. The obvious exception it seems, would be the desire of religious minorities to keep their faith secret to avoid persecution. That such desires existed is beyond question. But the few humanist treatments of the issue fall far short of spirited defences of toleration.

It is crucial to be clear about the extent of a given thinker's toleration. For instance, one of the most influential advocates of religious toleration in this period, Erasmus, only endorsed

³⁴ It is worth noting that, unsurprisingly, several of these influences are caught up in the emergence of the bourgeois public sphere which Habermas described in *The Structural Transformation of the Public Sphere*.

³⁵ Faramerz Dabhoiwala, *What Is Free Speech?: The History of a Dangerous Idea*. London: Allen Lane, an imprint of Penguin Books, 2025, 29.

ecumenism. Moreover, his defences often seem prudential rather than principled; motivated by a desire for peace rather than belief in the independent value of toleration, difference, or privacy. He merely opposed the persecution of those known to be dissenters, rather than defended the view that faith was a private matter that could legitimately be kept beyond the eyes of a prying observer. Erasmus was not unique in this way – several tolerationist thinkers endorsed quite a limited form of toleration. In this way, their support of toleration was much more an attack on certain public actions than a defence of certain private rights (Similar things can be said of Hythloday’s description of toleration in *Utopia*).³⁶

More explicit and radical defences of religious toleration did not exert a strong influence on the dominant intellectual climate of the time until the Enlightenment. Earlier defences were branded as heretical and thus illegitimate. In their illegitimacy, the impact they could have on mainstream political discussion was limited. This is why the issue of toleration is only treated lightly by the humanists. Ultimately, it was the deep crisis that engulfed Europe after the reformation that demanded a more substantial look at toleration. And after the Reformation, intense criticism of Rome’s censorship meant many previously ‘heretical’ books began to circulate, bringing new defences of toleration into the discourse.

Thus, fundamental to the Enlightenment was an unprecedented inquiry concerning the place of religion and the church in people’s lives. This inquiry concluded that people should have greater freedom to choose what place *they* wanted religion to have in their lives – and this freedom was gradually expanded beyond purely theological content.

2.1.2: Changing Living Conditions

A more mundane, but equally important factor in the rethinking of privacy were various social changes. Urbanization led to a dramatic change in population density, which altered what kind of privacy was possible. In London, by 1700 the population was around half a million. This "made it almost impossible to find solitary space even making it unlikely one would be able to sleep alone. Most adult inhabitants would be living with at least one stranger, possibly more".³⁷ There is a plethora of data about the dramatic decrease in the

³⁶ More, *Utopia*, especially 106-118.

³⁷ Alex Wakelman, “The Public House – the struggle to find privacy in the eighteenth-century home”, *Doing History in Public*, April 22, 2020, <https://web.archive.org/web/20200422211847/https://doingshistoryinpublic.org/2016/10/11/the-public-house-the-struggle-to-find-privacy-in-the-eighteenth-century-home/>

housing to person ratio in cities across Europe. Moreover, it is easy to forget that the realities of housing created other limitations on privacy – Wakelman points out “that even behind locked doors one’s activities weren’t safe from the ears of strangers.”³⁸

Often, the only form of total privacy that could be achieved would be through the use of a personal locked box.³⁹ This is evidence that the desire for privacy persisted, and that the practicalities of the day made physical privacy a rare luxury. However, it would be remiss not to mention that although there was thus a great reduction in physical privacy, there was a large increase in anonymity. The possibility of becoming ‘anonymous’ reached new levels with these new cities. Whether one of physical privacy or anonymity is a more significant or more genuine kind of privacy is a deep question, which I will not pursue.⁴⁰ But this is a reminder not only that ‘privacy’ contains a host of heterogenous manifestations, but also that these distinct kinds of privacy can compete with one another.

Similar problems afflicted the upper classes as well: Stone points out that because the house functioned as a symbol of status, the desire for the private ‘Englishman’s castle’ (“a haven from snooping strangers”) competed with the desire for a public statement of class position.⁴¹ Once again, the personal adjustment processes which individuals were perpetually undergoing took privacy as but one of a selection of incompatible values. And the outcomes of these processes informed societal norms and intellectual trends which make up a history of privacy.

Women faced an even greater level of privacy-denial. In fact, many of the ideals of ‘the home’ which originated in this period are the source of the deep issues with privacy which were highlighted by feminists in the twentieth century: “From parlour to kitchen, from cellar to garret, she is at the mercy of children, servants, tradesmen, and callers. So chased and trodden is she that the very idea of privacy is lost to her mind; she never had any, she doesn’t know what it is, and she cannot understand why her husband should wish to have any “reserves”, any place or time, any thought or feeling, with which she may not make free”.⁴² Although the use of a ‘domestic sphere’ as a tool of patriarchal oppression predates this period, many ideals which made its implementation and exploitation both easier and more powerful originate here.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ My own view however is that this question fails to acknowledge the cultural relativism discussed previously. The question only makes sense if it presupposes a specific conception of privacy – asking if physical privacy is a more genuine form of privacy tout court, of *the* privacy, is an empty question.

⁴¹ Amanda Vickery, “An Englishman’s Home Is His Castle? Thresholds, Boundaries and Privacies in the Eighteenth-Century London House”, *Past & Present*, Volume 199, Issue 1, May 2008, Pages 147–173, <https://doi.org/10.1093/pastj/gtn006>

⁴² Charlotte Perkins Gilman, *The Home: Its Work and Influence*. New York: McClure, Phillips, 1903, 40.

This is not to deny that people continually found ways to achieve, at least in part, the form of privacy that they desired.⁴³ And the new anonymity ushered in a relatively new kind of widespread privacy. But many previous methods of achieving privacy (especially physical privacy) became untenable in the eighteenth century.

2.1.3: Enlightenment Republicanism

General trends in enlightenment thought were also an important influence in the shifting understanding of privacy. A full exploration of this less tangible influence is not possible here. However, I will provide an examination of what is one of, if not the most significant of these trends: reinvigorated republican tendencies. This put a new pressure on the privacy of the individual.

In part, this is all just a natural consequence of the opposition to absolute monarchy that is so distinctive of the Enlightenment. But with this republicanism comes an advocacy for just the opposite of the earlier ‘Platonist’ view. Now, not only is public office not to be avoided, it is to be heroically sought after. The civic humanists’ love of Cicero and his view of public office was taken to much greater lengths; the Enlightenment’s even greater love of classical, especially Roman texts, led to huge admiration for the values expounded therein. The model citizen became a Cato-like figure, engaging passionately for the good of the state and defending its values resolutely. In other words, thanks to the Enlightenment, the call to the Forum now rang out again all the louder – only now in the form of, say, the *Assemblée nationale*.

But whatever shape the forum takes, such a demand necessarily impacts both the conception and possibility of privacy. When these republican tendencies reached their apex, much of what Westin says about twentieth-century totalitarian regimes is applicable: “with their demand for a complete commitment of loyalties to the regime, the literature of both fascism and communism traditionally attacks the idea of privacy as “immoral”, “antisocial” and “part of the cult of individualism.” This attitude is most strongly expressed in the consolidation phase of a new totalitarian regime.”⁴⁴ This war on privacy that Westin identifies was also present in the French Revolution. He notes that this is often achieved by creating an atmosphere of distrust where even obedience is not sufficient proof of loyalty: “the individual is not allowed to gain security by conforming without opposition and quietly doing his job.” The regime does this “by creating fear and distrust”. The role of paranoia in the French

⁴³ The article by Vickery mentioned above examines just this.

⁴⁴ Westin, *Privacy and Freedom*, 23.

Revolution has been extensively explored.⁴⁵ A brief survey of some of Robespierre’s rhetoric also makes this point clear: “I don’t include among the patriots those who only wear the mask, and I will unmask the conduct of two or three traitors who have here been the artisans of discord and dissension.”⁴⁶ Indeed, the ‘unmasking’ of traitors was an enduring preoccupation of the Revolution: “If the same perfidious ones who guide the rage of the assassins aren’t yet visible to all eyes, I will leave to time the task of lifting the veil that covers them, and I will restrict myself to recalling those truths that alone can save this Republic.”⁴⁷ A claim of apoliticism is a form of a privacy claim – one Montaigne would applaud, and Robespierre denounce.

Of course, most of the time republicanism was not as extreme; and the impact on privacy was proportional. But the impact was undoubtedly there, only lessened – even something so elusive and ineffable as ‘privacy’ was constantly impacted by the political upheavals of the time.

2.1.4: Cultural shifts

Each of the above societal changes contributed to various shifts in cultural mores, which themselves created a noticeable shift in the societal conception of the private. Above all, the decline of the authority of the Catholic Church and the media revolution combined to change dramatically both what could be discussed, and how those discussions took place.

It is too crude to say that these trends were generally for or against privacy. As above, they augmented certain manifestations of privacy and diminished others. For instance, the new anonymity of cities meant that the risk of being surveilled was lessened, while the decline of the church meant that many previously private topics could be discussed in public print. Regardless of any new opportunities to achieve privacy, like greater anonymity, the recognition of those opportunities *as* private was itself under pressure. In other words, often these new privacy opportunities were not achieved by a clear demarcation and defence of a private sphere, but by the changing nature and understanding of ‘the public’. There were

⁴⁵ See, for instance, David P. Jordan, 'Rumor, Fear, and Paranoia in the French Revolution', *The Fundamentalist Mindset: Psychological Perspectives on Religion, Violence, and History* (New York, 2010; online edn, Oxford Academic, 1 May 2010), <https://doi.org/10.1093/acprof:oso/9780195379655.003.0014>

⁴⁶ Maximilien Robespierre, *For the Defense of the Committee of Public Safety*, translated by Mitch Abidor for Marxists.org, accessed 20th July 2025, <https://www.marxists.org/history/france/revolution/robespierre/1793/defense-committee.htm>

⁴⁷ Maximilien Robespierre, *On the Enemies of the Nation*, translated by Mitch Abidor for Marxists.org, accessed 20th July 2025, <https://www.marxists.org/history/france/revolution/robespierre/1794/enemies.htm>

significant forces which were blurring the line between the public and private spheres.⁴⁸ So even if it is difficult to say whether privacy triumphed or was attacked in the Enlightenment, we can see that the *conception* or *recognition* of privacy certainly did face deep problems – it threatened to be subsumed under a new understanding of what is public.

Firstly, the new phenomenon of newspapers brought with it another novelty: readership interaction. Vast numbers of letters (often anonymous) would be sent in to be printed. In this way, personal opinions, a previous paradigm of privacy, became public. Crucially, not only opinions on decidedly public matters – but opinions on anything the paper had published. At the same time, the papers were discovering a new booming trade – gossip. The public were eager to buy the private, and it turned out to be very profitable. Discussions of ‘immoral women’ were particularly popular. The significance of this emerging business not only signifies a new relationship where businesses inform the public of private information, but also a dramatic shift in mores where discussion of private details is totally acceptable. And we should not be surprised that the conventions of the papers found themselves exported elsewhere: “exposure to the popular press itself inescapably instructed readers in the new opportunities and conventions of publicity.”⁴⁹

The interest in private details is a recurring theme. In literature, the old paradigm of semi-universal archetypes playing out tales which could serve as moral lessons was replaced by a new desire for particularity: the more infused with detail a character was, the more ‘real’ they were.⁵⁰ This personalization augmented the truth of the story, which was now deemed more important than the universality lost. “reading about the private affairs of the dead and the living, and collecting their portraits, had become something of a national pastime.”⁵¹ We see this in visual art too: Hogarth’s *A Harlot’s Progress* (1732) is the most obvious example of a previously ‘private’ subject matter becoming public.

All of this contributed to a new sense that a person’s ‘true’ character was not revealed by their actions, but reflected some ‘inner’ self. This inner self was hidden deep, and only perceivable through the kind of intimate details provided by novels or newspapers: the more inaccessible these details, the more revealing.

⁴⁸ This seems to be quite like the blurring (although on a different scale) which Habermas identified in the 20th century (see *The Structural Transformation of the public sphere*). But rather than the line between the state and society being blurred, it is that between the individual’s private and public life.

⁴⁹ Faramerz Dabhoiwala, *The Origins of Sex: a History of the First Sexual Revolution*, New York: Oxford University Press, 2012, 318.

⁵⁰ For discussion, see Michael Mckeeon, *The Origins of the English Novel, 1600-1740*. Baltimore: Johns Hopkins University Press, 1988.

⁵¹ Dabhoiwala, *The Origins of Sex*, 334.

This has two principal effects on privacy: not only is a new understanding emerging, with this ‘inner self’ as a, perhaps *the* paradigm of a private object, but also, the scope of that which can be legitimately hidden from others is constantly shrinking – including that self. Every detail about a person is valuable, because it contains information about that person otherwise inaccessible.

2.2: Reponses

For much of the above, discussing a separate ‘reaction’ is misleading. There either wasn’t a clear reaction due to the subtle or obfuscated nature of the change; or the reaction was deeply embedded in the change itself. The emergence of the public sphere, for instance, happened in society’s subconscious, so to speak: it was not until the 19th century that it became ‘self-aware’. Meanwhile, Enlightenment republicanism was as much a product of contemporary theorists and opponents as it was of its adamant supporters – critiques and critics were a significant part of the changes themselves. However, two of the above deserve separate treatment: the changing religious and media landscape. The first, because toleration was distinctively a reaction to the new theological realities of the day and represents the struggle of enlightenment thinkers to come to terms with new ideas about religion. The second, because the new nature of media, particularly mass printing, created such enormous changes that it triggered a reaction concerned with the proper transmission of opinion.

2.2.1: Religious Toleration

First it is worth emphasising the variance in approaches to toleration at this time – there was no single movement for religious toleration. Sometimes the disagreements between tolerationists were just as substantial as those had with self-styled absolutists. Israel’s discussion of this is particularly clear: The two principal 17th century theories of toleration, Arminian and Republican, culminated in the theories of Locke and Spinoza (respectively), which are separated by a “gulf”.⁵²

Locke proceeded by arguing that each individual's ultimate goal is to ensure the eternal salvation of their soul. Since it is the *individual's* goal, they must be allowed to go about this

⁵² Jonathan I. Israel, “Spinoza, Locke and the Enlightenment Battle for Toleration.” Chapter. In *Toleration in Enlightenment Europe*, edited by Ole Peter Grell and Roy Porter, 102–13. Cambridge: Cambridge University Press, 1999.

as they see fit. Thus, Locke is primarily concerned with accommodating variance in forms of worship. This variance is justified as an expression of the more widely accepted (though still controversial) freedom of conscience. It is plain that Locke's whole approach to toleration is rooted in religion. Because it is fundamentally theological, it is not granted to all – for instance, since atheists don't believe in salvation, they are not granted this toleration.

Spinoza's toleration extends beyond freedom of worship. He is primarily concerned with freedom of thought and expression, ensuring the '*libertas philosophandi*': "[Spinoza's] toleration is chiefly about individual freedom".⁵³ This is not to say that religion is ignored; rather, it is subsumed under a more general toleration. Simply put, Spinoza is much more liberal in who he is willing to tolerate.

Locke's freedom of religion was much more widely accepted (because it was less radical) than Spinoza's freedom of thought and expression. In Locke, we find the evolution of Erasmus's ecumenism: a '*Tollerantismo* between the Christian churches' (Concina, 1754).⁵⁴ While in Spinoza, we find an "anti-theological and republican" view, one much more novel.⁵⁵ within the *Tractatus-Theologico-Politicus*, we find concomitant views on the proper role of the state. Its ultimate purpose, we are told, "is, in reality, freedom".⁵⁶ Meanwhile, in Spinoza's views about the importance of keeping religion open to flexible interpretation is the underlying commitment that "truth then can only be striven for, and grasped, individually and philosophically... It is for this reason that freedom of thought and speech, and not freedom of conscience and worship, is the true core of toleration in Spinoza's philosophy."⁵⁷

This focus on truth is not incidental; it informs another of Spinoza's defences of freedom of speech: "there is no characteristic to distinguish and know a true church from a false one" This idea that certainty of truth is unattainable, and so repression is unjustifiable, is reminiscent of Mill's extended defence of freedom of speech in 'On Liberty'.⁵⁸

In fact, using truth to justify free speech is a powerful tool, but one which is only possible within a climate suffused with a certain degree of scepticism; the possibility of falsehood

⁵³ Ibid.

⁵⁴ Quoted in Ibid, 102.

⁵⁵ Ibid, 103.

⁵⁶ Spinoza, Quoted in Ibid, 107.

This statement also represents an interesting modification, perhaps even synthesis, of the civic/otium debate: But rather than the state ensuring the individual's life of otium, it ensures the individual's right to pursue a life of their choice, of which one of otium is a possibility. However, not only does this exposition lack the negativity the Platonists' attached to public life, but a life of public service must also be one possible choice for the citizen.

⁵⁷ Ibid, 108.

⁵⁸ John Stuart Mill *On Liberty; with, The Subjection of Women; and, Chapters on Socialism*; Edited by Stefan Collini. Cambridge: Cambridge University Press, 1989, 32-64.

must be accepted for the defence to get off the ground. Just such a fertile intellectual climate was created by the Enlightenment.

But again, at no point anywhere in enlightenment Europe was toleration total or secure. Nor was there a single approach to its defence, as we have seen. But combined with other factors, the intellectual broth explored above came to exert a profound influence on conceptions of privacy. Above all, religious toleration had the effect of partitioning the world into the external and internal, along with the radical claim that the state only had a right to interfere with the former realm. That is, actions, as external expressions of an individual, could be interfered with, but dissention, at least within the Christian church, was beyond the state. Overtime, both the scope of the internal would expand beyond Christian sects, and the justification for this kind of toleration become secular.

2.2.3: Liberty of the Press and Freedom of Speech

The media revolution which emerged led to new ideas about the nature, especially the political nature, of speech. These changes are well documented in Dabhoiwala's *What is Free Speech?: The History of a Dangerous Idea*. here, I will simply point out how they are relevant to the history of privacy.⁵⁹

Briefly, this was the consequence: in new defences of free speech like *The Letters of Cato*, many of the tolerationist arguments had both their targets and justifications secularized. Thus, something beyond religion was added to the Lockean 'inner realm' beyond the scope of the state. Not only that, but they added that this freedom of expression was in fact a political *right*. This notion of a right to free speech deeply informed Mill's 'On Liberty', which would itself become a classic attack on state paternalism and defence of the *right* of the individual 'to be let alone', an idea so central to our modern conception of privacy. What this represented was a decisive shift for the public to recognise an individual's right to express *private* opinions in *public*.⁶⁰ and that is an important step towards the public recognition of a whole private sphere to which the individual is entitled, and with which the public must not interfere .

⁵⁹ My focus on Cato's letters is indebted to this book. In addition, Dabhoiwala's emphasis on the politically motivated, even bad-faith nature of the letters, and the 'confused' conception of free speech they have created today, applies equally, in my view, to our modern understanding of privacy. The problematic tension between freedom of speech and acceptable subjects of discussion is parallel to the tension between legitimate public activity and invasions of privacy.

⁶⁰ To what extent such opinions remain 'private' is unclear.

2.3: Explicit Discussions of Privacy

Overall, then, in the Enlightenment, aspects of privacy which had previously been safe and secure came under threat. This had the effect of drawing attention to these aspects. And it is this new attention, I argue, that chiefly informed the modern notion of privacy that we still (roughly) hold to this day. The attention of earlier thinkers had been firmly set on a certain set of ‘branches’ of the ‘tree’ of privacy; those concerning the ideal subject-state relation. As various new forces came to hack away other branches – particularly those concerning disclosure of personal information – the attention was shifted towards them. Inevitably, the part that the attention is focused on at any time defines what the whole is taken to be: just as before, ‘privacy’ concerns were almost exclusively those concerning the ideal relation, now they shifted towards concerns about private information and spaces.

To end the chapter, I will examine some of the explicit discussions of privacy which resulted from this new attention.

2.3.1: Rousseau

Rousseau’s concerns about privacy, discussed in *The Social Contract* and *Emile*, were subsumed under and in line with his general views on the state: we start with privacy within the state of nature, and as the ‘state’ is created by a social contract and assumes greater power, we lose privacy. Inequality between subjects motivates (in contemporary legal terminology) ‘horizontal’ invasions of privacy, which are dealt with by granting the state more power, and thus more potential for ‘vertical’ invasions of privacy. The social contract represents humanity’s volunteering to tyranny.

In fact, the danger posed to privacy is greater than generally realised - while abuses of power targeting a few individuals are bound to be noticed and pose threats to the state’s continued exercise of power, the state has another method by which to undermine the individual’s claims to privacy: alter the society-wide understanding of privacy. In other words, the state can ‘move the goalposts’ of privacy and make everyone more vulnerable but no more wary of the state. Ownership “is inviolable and sacred for the sovereign power, so long as it remains a private individual right; as soon as it is viewed as common to all the citizens, it is subject to the common will, and this will may destroy it. Thus the sovereign has no right to touch the

property of one or many”.⁶¹ An invasion of *all* is not considered so egregious. This is compatible with my thesis that conceptions of privacy shift over time; according to Rousseau, such shifts are utilised as a weapon of subjection.

2.3.2: Kant

Kant’s discussions of privacy are not based on any underlying social contract theory.⁶² As such, they pay closer attention to the strange and difficult relationship between the public and private. He certainly assigns a greater level of importance to the public, partly due to a general scepticism of private interests in line with his moral philosophy. However, he does recognise (perhaps to the surprise of some) the value of a private sphere – although his justification does seem to be based on considerations for the public sphere: allowing a space for individuals to pursue individual ends creates a better balance between public and private interests and fosters peace in society.

Kant’s thoughts on privacy were also influenced by his ideas about private property. In fact, his attempt to protect privacy proceeds via a protection of private property: by assigning private property as *the* location of private activity, a successful protection of the former will (he thinks) function as a sufficient protection of the latter. Regardless of flaws in this line of thinking, there is an identifiable concern for protecting private spaces, the explicit articulation of which marks a significant step: it signals a newly acute concern for these privacy issues which strike us as quite close to several modern ones.

Above all, Kant best articulated the difficulty in resolving the tension between individual interests (including privacy) and those of the public, manifested via the state. While other authors, like Montesquieu, did consider such issues, and still more had the problem lurking, unarticulated, in the background of a great deal of their writings on individual liberty, like Voltaire, Kant tackled the problem head-on:

“There is a third part to the preservation of the state, namely, the right of inspection (*ius inspectionis*). No association which can have an influence on the public welfare of society (*publicum*) can be kept secret (by political or religious illuminati), but rather it must not refuse revealing their constitution when asked to do so by the police. The searching of the

⁶¹ Rousseau, Jean-Jacques, and Barbara Foxley. *Émile*. London: Dent [etc.], 1974, 425.

⁶² See Immanuel Kant, *Kant : Political Writings*, Edited by Hans Reiss. Translated by H. B. Nisbet. Second English edition. Cambridge: Cambridge University Press, 1990.

private quarters of an individual is only an emergency measure for the police, and something for which it must always be authorized by a higher authority in each particular case.”⁶³

This general method of resolving the tension – allowing privacy until it threatens the public – is common to countless discussions of privacy since (e.g. Mill’s ‘On Liberty’) but also older, particularly classical texts.

However, the vagueness of “could influence the public welfare of society” should strike us as a weakness. What exactly counts as an ‘influence’? This is not an easy question – a large amount of ‘On Liberty’ is dedicated to answering it. Kant’s views here are perhaps best seen comparatively; he is much more generous about what an ‘influence’ is than say Mill, and his conception of the private sphere is limited accordingly. Kant’s ‘private right’ to do as one pleases is much more limited than our understanding today.

Kant’s accurate and perceptive separation of the government and public society (no doubt influenced by the emerging public sphere as an institution independent of government) can also be exploited – Kant is much more concerned with invasions of liberty and privacy from the state than from general society. This seems to be a blind spot; for as Mill argued extensively, the threats to the individual from the ‘soft power’ of society should not be underestimated.

Overall, however, Kant’s discussion of privacy represents a distinct transition to a new set of privacy concerns.

2.4: Conclusion

As above, making a general claim about whether privacy was aided or damaged in this period is too simplistic. The ways for individuals to realize privacy are constantly shifting, and are so heterogeneous that they rarely increase or decrease together. Cato’s letter’s protected the public expression of private opinion; but in doing so represented a threat to the secrecy of the private sphere. These tensions are inevitable, themselves manifestations of the tension Westin describes between the desire for privacy and the desire to participate.

That said, as above, there was a general trend for the private/public distinction to collapse; and this dramatic shift in the understanding of privacy applied a great deal of pressure to

⁶³ Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*; Edited and with an Introduction by Pauline Kleingeld; Translated by David L. Colclasure; 1st ed. New Haven: Yale University Press, 2006, 123

those wishing to hang on to some such distinction to come up with new arguments for it. Moreover, any such distinction would have to deal with the new practical challenges, like population density, which were diminutions of privacy. It is not inconsistent to say that privacy was undermined in a great many ways in the enlightenment.

However, nearly all of these undermining phenomena were made possible by something which also made possible the single greatest exception to the trend for privacy to be undermined: the decline of the Catholic church. This decline made possible, for instance, the discussion of the lives of prostitutes in newspapers or novels. But it also paved the way for the movement for religious toleration. Toleration is the great exception; and in it, the seeds had been sown for almost all subsequent defences of privacy, and thus significant parts of our contemporary conception of privacy.

Thus, in the enlightenment, both the motivation (in the form of the distinction collapse and new pressures) and tools (via tolerationist arguments) had been created for a powerful defence of a new notion of privacy.⁶⁴

Another way to view this shift is through a change in the nature of liberalism. Skinner viewed the 18th century as a transitional period: Previously, the 'neo-Roman' tradition of liberalists had seen freedom in terms of citizen participation in the commonwealth – freedom *to* participate. The desire for free participation was greater than the desire for privacy. Whereas in the 19th century liberalists like Mill see freedom as essentially negative, as a protection from the external - freedom *from*. It was in the 18th century that the change took place.⁶⁵ It is plausible that what is distinctive about our modern notion of privacy is that it is tied to this negative conception of freedom. The modern understanding could only get off the ground once a sufficiently robust view of 'negative freedom' had been articulated.

⁶⁴ I wonder if today, we have the motivation, provided by our own technological developments, but lack sufficiently powerful tools, for our own novel defence of privacy in the 21st century.

⁶⁵ Skinner, Quentin. *Liberty before Liberalism*. of *Canto Classics*. Cambridge: Cambridge University Press, 2012.

3. Mill's *On Liberty* – a case study of privacy in the 19th century

"[T]here is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation."

- J.S. Mill, *On Liberty*⁶⁶

I concluded the previous chapter with two remarks: on the one hand, the eighteenth century saw a subtle but important change in the conception of freedom to a roughly negative understanding: freedom as freedom from external influences. But the more tangible changes concerning privacy were the incredibly powerful and varied threats to privacy which emerged. The two developments which would prove most consequential for the history of privacy were 1) those threats and 2) the development of doctrines of religious toleration. Over time, 1) would provide the motivation for thinkers to reconsider the problem of privacy in the stark new light the contemporary circumstances called for, while 2) would provide the basis for a novel defence of privacy which still underpins our thinking about the concept today.

Throughout the Enlightenment, the public/private distinction which had previously held sway began to collapse. Newspapers could publish intimate details of any variety (and there was certainly appetite for them); triumphant republican ideals increased what the public was entitled to know about those holding public office; and new living conditions meant that for many, a 'private space' was total fiction. But just as tolerationists had objected to the Catholic Church's pervasive control over religious and moral matters, a new movement, influenced heavily by tolerationist arguments, would object to society's pervasive influence on our lives – whether 'society' takes the form of the state or of fellow subjects.

⁶⁶ Mill, *On Liberty*, 15.

3.1: The Development of Toleration

The potency of arguments for toleration was clear; but while they remained explicitly theological, they were necessarily limited. The secularization of these arguments is a significant part of intellectual history, and very relevant to the history of privacy. Obviously, this was a long and complicated path – we saw even in the last chapter that not all arguments for religious toleration were based on religious principles (e.g. those of Voltaire or Spinoza). I cannot trace the subtle developments here. Instead, I will discuss the intellectual culmination of this trajectory of secularized tolerationist arguments – Mill's 'On Liberty' (1859).

3.2: *On Liberty*

In the essay 'On Liberty', Mill set forth "the single most eloquent, most significant, and most influential statement of the irreducible value of human individuality".⁶⁷ As part of that statement, we get Mill's reaction to the problems from the Enlightenment – in particular, the pressure on the private/public distinction. He proposes a hard line between the two. Hard; not clear – 'On Liberty' is famously vague at points. This is, I think, due to the incredible difficulty in resolving the tension between privacy and freedom. What Mill represents is a development of the Lockean split between the legitimate sphere of the state and the individual.⁶⁸

The peculiarities of 19th century Victorian Britain highlighted certain issues and obfuscated others. Above all, the oppressive power of public opinion was on Mill's mind. We should remember that Mill's discussion of problems of privacy is motivated by one kind of privacy problem, and we should be hesitant to transmit his conclusions to others, and read 'On Liberty' as a definitive statement of any *total* conception of privacy as opposed to a part of such a conception.⁶⁹

⁶⁷ Ibid, vii.

⁶⁸ Section 1.1 of Beate Roessler and Judith DeCew, "Privacy", *The Stanford Encyclopedia of Philosophy* (Winter 2023 Edition), Edward N. Zalta & Uri Nodelman (eds.).

⁶⁹ Collini discusses this in his introduction to the edition of *On Liberty* above.

A full treatment of the view of privacy contained in ‘On Liberty’ cannot be attempted here; instead, I will highlight the most salient differences between the understanding it reveals and those which had come before.

3.3: The Harm Principle

The core of ‘On Liberty’ is the ‘harm principle:

"the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant".⁷⁰

The sharp distinction between private and public is contained herein; it is the culmination of the secularization of Locke’s inner and outer realms. For any action not affecting (non-consenting) others: "there should be perfect freedom, legal and social, to do the action and stand the consequences."⁷¹ The legitimate bounds of the state’s exercise of power are limited to intervening for the good of others.

First, it is worth comparing this passage to the one from Kant in the previous chapter. We see that the general thrust of the argument is similar, but the articulation is notably different: Mill says society can only make public what might affect it, while Kant says the individual can only keep private what won’t affect society. These are roughly equivalent; but the presentation is importantly different. Which of the state or the individual is identified as the ‘actor’, which is seen as being allowed to behave in such a way in ‘only’ such and such conditions, radically alters the light under which the statement is made. Briefly, in Mill’s principle, the *state* is viewed as the greedy agent desperate to overstep its mark and in need of restriction; in Kant the *individual* is portrayed in this way.⁷² This is the familiar modern idea that privacy is a kind of ‘aura’, originating in the individual that need be protected from the state.⁷³

⁷⁰ Mill, *On Liberty*, 13.

⁷¹ Ibid, 76.

⁷² This rhetoric is pervasive: in his chapter on applications of his theory, Mill bemoans various "gross usurpations upon the liberty of private life (Ibid, 88).

⁷³ For discussion of this notion of a privacy ‘aura’, see Adrienn Lukács, *Employees’ Right to Privacy and Right to Data Protection on Social Network Sites with Special Regard to France and Hungary*, Szeged: Iurisperitus 2021, 32, <https://publicatio.bibl.u->

Secondly, moving beyond the articulation, we see that Mill's description is not in fact equivalent: where Kant identified potential for 'influence' as a sufficient reason for public action, for Mill it is instead *harm*. This is a much more demanding standard to meet – there are many kinds of influence which are not harm. Of course, it is quite likely that Kant had in mind *some* kind of limitation on what counted as 'influence'; but that is no defence to the charge of vagueness. Granted, Mill does not entirely escape this either (as we shall see), but 'harm' is certainly clearer than 'influence' (especially when elsewhere Mill hints rather strongly that by harm he only means physical harm).

Having considered the principle itself, we can look at some of the surrounding passages. These are quite revealing. Especially when Mill explains his motivation for this principle. He thinks that until then, whenever the state tried to interfere with private life, people approved or condemned according to no principle, but just their 'sentiments' and 'personal preferences'.⁷⁴ This led to instances of wrongly permitted and wrongly banned intervention. He now hopes to provide a universal underlying guiding principle to ascertain objectively whether society's interference is justified. Leaving aside questions of whether he succeeded, this description reveals a specific attitude to privacy which persists, but which I argue is wrong. Mill's search for a universal standard by which to judge privacy invasions betrays a belief that there is a universal, single idea of privacy which has failed to be realized previously, rather than there being no such notion, and merely a series of different balance-ideals.

It could be argued that this does not necessarily follow; Mill is merely searching for the underlying principle of his society's balance-ideal. There are two problems with this argument: first, it has to explain Mill's recurring universalist language, and second, it has to explain why Mill would then regard judgement on the basis of 'sentiments' as problematic – if 'sentiments' are manifestations of society's balance-ideal, then they are perfectly trustworthy indicators of the legitimacy of a privacy invasion. This is not to say that Mill's attempt to eliminate the role of those sentiment-based reactions is 'wrong': but it constitutes something quite different from what Mill seems to have in mind. It is itself a shift in the balance-ideal. In other words, it is a rejection of *those* sentiments for *these* ones – the lack of rigour that Mill (rightly) perceives is deemed to be unacceptable. But any universal principle no more reveals the 'true' nature of privacy than any of those whimsical 'sentiments'. It can at best reveal the underlying *conception of privacy* operating at that time.

An analogy might clarify this point: Mill objects to current treatments of state intervention in the same way the Lords objected to King John's taxes – there was no stable basis for these

[szeged.hu/22977/1/Lukacs_EmployeesRighttoPrivacyandRight to Data Protection on Social Network Sites 2021.pdf](https://szeged.hu/22977/1/Lukacs_EmployeesRighttoPrivacyandRight%20to%20Data%20Protection%20on%20Social%20Network%20Sites%202021.pdf)

⁷⁴ Mill, *On Liberty*, 12.

judgements, and so they appeared utterly arbitrary. They followed the direction of the wind. What Mill is offering is a Magna Carta: a stable basis to replace the fancies of the crowd. But such a basis is merely a statement of ideals; it gives no independent authority to those ideals beyond what is bestowed upon them. And the ultimate source of those ideals is also that of the supposedly arbitrary ‘sentiments’.

This attitude is still present in our idea that there is a single thing called ‘privacy’. I have flagged here what I take to be a compelling argument that this is mistaken. Regardless of whether I am right, the emergence of this view is an important step in the history of privacy, and made all the easier the 20th century emergence of the understanding of privacy as a (human or universal) *right*.

3.4: Mill’s Privacy as a Response to the Contradictions of Liberalism

Habermas portrays Mill’s position as a revised liberalism, reacting to the contradictions that Hegel and Marx showed to be embroiled in the classical liberal project.⁷⁵ Part of this revision, I think, is the new recognition of privacy contained within ‘On Liberty’. Although Kant and others may have recognised the tension between the freedom liberalism was so keen to gain and the privacy it threatened, Mill set forth a new valuation of ideals, in which a revised understanding of ‘privacy’ played a significant role. It was no longer a temporary or partial privilege granted to a select few; nor was it something that states should have the power to grant or deny. Instead, it was one of the most important values to realize as part of Mill’s commitment to human individuality. An assurance of the inviolability of private judgement is essential to protecting the ability of the individual to control their own life: “he who does anything because it is the custom, makes no choice.”⁷⁶

⁷⁵ Habermas, Jürgen. *The Structural Transformation of the Public Sphere : An Inquiry into a Category of Bourgeois Society*; Translated by Thomas Burger with the Assistance of Frederick Lawrence. Cambridge: Polity, 2015.

⁷⁶ John Stuart Mill, Mark Philp, and F Rosen. *On Liberty, Utilitarianism, and Other Essays*; Edited with an Introduction and Notes by Mark Philp and Frederick Rosen. New edition. Oxford: Oxford University Press, 2015, 57.

3.5: Is Public Conformity Virtuous?

There are many novelties to the balance-ideal expounded in 'On Liberty'. Here, I take one as a case study, a substantial change from Montaigne to Mill which could easily be missed due to the relative brevity of its treatment by both authors: their attitude towards public conformity, in particular public conformity when you disagree with the norm privately. When the subject *agrees* with the norm privately, their views roughly align – their attitude depends on the cause of your agreement. If your agreement is your own, so to speak, your conformity is justified. If, however, it is caused by the pressures of the crowd, then their objection is not primarily the conforming action itself, but the stifling atmosphere which prevents freedom of thought. For both authors agree on the importance of 'free-thinking'.⁷⁷ They both abhor the power of the majority to eliminate the individual's freedom to think: Mill states that "every one lives as under the eye of a hostile and dreaded censorship... in what concerns only themselves, the individual or the family do not ask themselves – what do I prefer?.. It does not occur to them to have any inclination, except for what is customary."⁷⁸ Meanwhile, Montaigne paints a vivid picture of the stifling power of conformity: "He who walks in the crowd, must step aside, keep his elbows in, step back or advance, even leave the straight way, according to what he encounters: He must live not so much according to himself, as according to others, not according to what he proposes to himself, but according to what others propose to him, according to the time, according to the men, according to the business."⁷⁹ But this agreement masks a related *disagreement*, which reveals a significant gap between their beliefs about the individual's relationship to society.

If you disagree with a common practice in private (thanks to your protected ability to think freely), should you go along with it in public? In starker language, should you obey objectionable norms? Here, Montaigne and Mill's views diverge, due to a difference in their balance-ideals: namely, the attitude the individual should take up towards the state. For Montaigne, it is one of reverence and respect, whereas for Mill it is much more ambivalent.

For Mill, part of the importance of free discussion is that false opinions are corrected. This idea – that truth is only achieved through disagreement - provides the basis for much of his justification of free speech. Thus it is vital to him that those with false views share them, so that they can be corrected and society benefit from that process.⁸⁰ Likewise, he insists that

⁷⁷ Ibid, 56-64.

⁷⁸ Ibid, 60. Mill has a wonderful comparison: "one whose desires and impulses are not his own, has no character, no more than a steam engine has a character." Ibid, 59

⁷⁹ From *On Vanity*, quoted in Green, *Montaigne and the Life of Freedom*, 100.

⁸⁰ Whether this pressure to participate is itself a threat to privacy – and I think it is – is an issue which Mill seems blissfully unaware of. It seems likely this is because this issue did not affect the privacy problems he faced as an individual; there is much to be said that '*On Liberty*' is a defence of the life Mill wants to lead, and the problems he tackles are obstacles to that life.

society encourage such discourse so that false unorthodox views do not "continue to smoulder".⁸¹ To conform while you privately believe in the wrongness of the practice is therefore both a betrayal of yourself and society. Such an agent fails to recognise what Mill takes as obvious: "his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode."⁸² You wrongly abdicate your autonomy, and such autonomy is of immense value to Mill's ideal society.

While Montaigne endorses conforming publicly while privately deviating (even if such deviation is only in thought), he certainly does have concerns about the power of the 'mob', as discussed above (see footnote 14). Although in such passages we see a precursor to both Mill's fears and rhetoric, it seems that Montaigne takes free thought as a sufficient remedy for these concerns; little additional value is placed on freedom of action. The dreaded crowd is an intellectual one; we do not physically step aside, but acquiesce to stasis of thought. And elsewhere, we have rather explicit comments advocating obedience: "the wise man should withdraw his soul within, out of the crowd, and keep it in freedom and power to judge things freely; but as for externals, he should wholly follow the accepted fashions and norms".⁸³ The supposed existence of an 'inner realm' enabled Montaigne to abandon the external world to pervasive authority, as long as the internal remained sacrosanct. He admired Socrates for obeying even a false judgement. Indeed, trusting the judgements of society, even if they differ from our own, is deemed crucial: "society in general can do without our thoughts, but the rest – our actions, our work, our fortunes, our very life – we must lend and abandon to its service."⁸⁴ Green argues that we shouldn't view Montaigne as advocating total obedience and convincingly uses his embracing of contradiction and vagueness to show that he is less clear on this than often supposed. His views on this matter, like many others, are not black and white. But Green's analysis does not sufficiently acknowledge how strong some of his endorsements of obedience are; it is not plausible to portray him as committed to deviancy in action.⁸⁵

Thus, the contrast between even a moderate interpretation of Montaigne's views and Mill's is stark: conformity despite misgivings is seen by one as commendable (or maybe just expected), in the other a moral failing. This difference reveals the distance between the two balance-ideals: in one, the individual's service to the state's actions is more desirable than giving all individuals the inviolable authority to disobey. In the other, such inviolable

⁸¹ Mill and Collini, *On Liberty*, 34.

⁸² *Ibid*, 67.

⁸³ Quoted in O'Neill, *Essaying Montaigne: A Study of the Renaissance Institution of Writing and Reading*, 161.

⁸⁴ *Ibid*, 161.

⁸⁵ Green, *Montaigne and the Life of Freedom*.

authority is a pillar of individuality and must be protected from social manipulation. . These different conceptions naturally affect their view of privacy; for Mill, the existence of a private sphere is very important, but so is expression of the beliefs formed there. Whereas Montaigne says of any such belief, true or false: let it smoulder!

3.6: Conclusion

Mill begins 'On Liberty' by saying that in his day, the problem of liberty "presents itself under new conditions, and requires a different and more fundamental treatment". Something similar can be said for the problem of privacy, then and now. Mill represents the apex of a centuries long liberal revolution and gives us a powerful statement of the value of human freedom, which inevitably has stark consequences for privacy.

Thus, by the end of the 19th century, conceptions of privacy and freedom had been transformed, and part of that transformation lay in the intertwining of the two. They had been given a philosophical treatment that took into account the social and political realities of the time. The intellectual current they were part of would form the basis of the 20th century understanding of privacy as a *right*, and the various attempts in law to recognise it.

4. The 20th century – A new legal approach to privacy

4.1: Warren and Brandeis

Any History of Privacy must consider a certain article in the Harvard Law Review of 1890: “The Right to Privacy” by Samuel Warren and future Supreme Court Justice Louis D. Brandeis. Its immense influence is frequently touted.⁸⁶ Yet locating its precise role within the history of privacy is surprisingly difficult, partly due to what seems like the author’s erroneous beliefs about their own role. From reading the article, one certainly gets the impression that the authors proposed something truly novel – a new kind of protection for the individual, motivated by a new concern or desire for such protection. As time goes on, they argued, the legal defences granted to the individual must be constantly redefined, and in 1890, a definition recognizing something new – the right to privacy – was required. This development was inevitable as humanity realised that “only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition...”. we get the picture of an evolving body, ‘the law’, which is being supplemented by a new mutation, privacy rights. Their famous formulation of the right to privacy is the “right to be let alone”.⁸⁷

But only a part of their proposal was revolutionary, and it is important to dissect where the original and derivate parts lie. To do this, I will make use of various discussions present in Alan Westin’s *Privacy and Freedom* (1967). This book represents a turning point in legal attitudes to the issue of privacy, and I shall say more about it in due course. With it, I aim to show which parts of Warren and Brandeis’ article warrant its being described as “the outstanding example of the influence of legal periodicals upon the American law”.⁸⁸

4.2: US Privacy Law from 1790 to Warren and Brandeis

"[T]he notion put forward by legal commentators from Brandeis down to the present – that privacy was somehow a "modern" legal right which began to take form only in the late

⁸⁶ “one of the most brilliant excursions in the field of theoretical jurisprudence”. - Elbridge L. Adams, “The Right of Privacy and its relation to the Law of Libel” *American Law Revue*, 39 no. 1 (1905): 37

⁸⁷ Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy”, *Harvard Law Review*, Vol. 4, no. 5 (1890): 193,
https://stem.elearning.unipd.it/pluginfile.php/1000752/mod_resource/content/0/Warren%2C%20Brandeis%20%20The%20right%20to%20privacy.pdf

⁸⁸ William L. Prosser, ”Privacy”, *California Law Review*, 48, No. 3 (1960): 383.

nineteenth century – is simply bad history and bad law. Pre-Civil war America had a thorough and effective set of rules with which to protect individual and group privacy from the means of compulsory disclosure and physical surveillance known in that era."⁸⁹

Having examined the radical changes to understandings of privacy in the Enlightenment, we will be well positioned to appreciate why US law of this period was equipped with such exemplary privacy protections, according to Westin. US law of this period is perhaps the ultimate expression of the liberal enlightenment project, as far as the structuring of society is concerned. The entire legal framework possessed a huge debt to the philosophy of Locke.⁹⁰ The individualism advocated there was very compatible with legislation concerned with protecting privacy, for it was ultimately an expression of the "moral primacy of the private over the public sphere of society."⁹¹ The constitution itself abounds with implicit privacy protections.⁹² I will not repeat Westin's excellent discussion here; overall, he convincingly shows that "This framework of American law on privacy was a mature and sophisticated system for the first century of national life."

So was there nothing new in that Warren and Brandeis' article? The concern only increases when we learn there had been discussion of the right "to be let alone" earlier.⁹³ The key lies at the end of the critical quote from Westin above: "Pre-Civil war America had a thorough and effective set of rules with which to protect individual and group privacy from the means of compulsory disclosure and physical surveillance *known in that era.*" (my emphasis). Just as Mill represents a reaction to various societal pressures of Victorian England, Warren and Brandeis are above all a reaction to the societal pressures – including those due to technological developments – of late 19th century America. It is well documented that Warren's passion for the right to privacy was triggered by an incident with the paparazzi.⁹⁴ The new realities which motivated the article are also what led to the novelty in the treatment of privacy. What was really novel about Warren and Brandeis was that they recognized that privacy had to be protected in a new way. Specifically, a way that did not refer to outdated methods of protection or invasion – indeed, ideally without referring to methods at all. That

⁸⁹ Westin, *Privacy and Freedom*, 337-338

⁹⁰ See Ibid: 330, or Gordana Bekčić-Pješčić. "US legal system in the context of English legal heritage and theory of the natural rights of John Locke". *Strani pravni zivot (2018)*: 95-106. 10.5937/spz0-20548.

⁹¹ Westin, *Privacy and Freedom*, 330.

⁹² In 1833, Joseph Story remarked on the First Amendment's protections of "private sentiment" and "private judgement". Story, Joseph. *Commentaries on the Constitution of the United States*. Boston: Hilliard, Gray, and Company, 1833.

⁹³ Quoted in Westin, *Privacy and Freedom*, 344.

⁹⁴ See, for example, Irwin R. Kramer, "the Brith of Privacy Law: A Century since Warren and Brandeis", *Catholic University Law Review*, 39, no. 3 (1990), 709.

is, to recognize the need to protect privacy as an *independent* right. At the time, privacy was only protected if it was violated in certain ways, and they wanted to give it a fuller treatment, which meant a treatment more explicit and direct than any that had preceded it, especially in law.⁹⁵ But they were certainly wrong to think that the concern for privacy was new. Even when Westin acknowledges their "path-breaking" approach, he shows their chief contribution lies in triggering a new wave theoretical analysis of privacy, including recognizing privacy as an interest independent of property or liberty. Their actual contribution to the legal protection of privacy was more limited (although I think Westin's separation of theory and law, while accurate, is misleading: a contribution to one inevitably affects the other).

4.3: Privacy Law Post Warren and Brandeis

We can now consider the wave of theoretical and legal treatments of privacy which followed Warren and Brandeis' article. I will aim here to describe the general trends in legal and philosophical thought during the twentieth century.⁹⁶

Triggered by that 1890 article, a new interest in theorizing the 'right to privacy' emerged. In fact, part of the interest was privacy's treatment as a right. It is somewhat difficult for us to understand today that the understanding of privacy as a right is only relatively recent (this project partly aims to correct just that misconception). But this new 'rights-talk' made a more fundamental treatment of privacy easier – it no longer had to be tied to, say, a property claim. This made the independent treatment of privacy discussed above possible: the "law could no longer protect privacy of conversation and "free communion" solely by guarding the physical site from physical invasion or by guarding physical records from unreasonable seizure. The new developments demanded that American law define what rights of privacy were *inherent in personal acts and conversations themselves*."⁹⁷ However, in the first half of the 20th century, US law never adequately dealt with rapid changes in technology. This failure has put US (and arguably international) privacy law on the backfoot ever since.

⁹⁵ For instance, since 1792 there had been protections about uninvited reading of letters. These were certainly privacy protections. But Warren and Brandeis recognized their limited capacity in the late 19th century – above all, the law seemed incapable of dealing with the new 'instantaneous photography'. Westin, *Privacy and Freedom*, 330-338.

⁹⁶ The Stanford encyclopaedia of philosophy entry on 'Privacy' contains an excellent survey of the philosophical questions of the century.

⁹⁷ Westin, *Privacy and Freedom*, 339 (my emphasis).

Partly, this was due to a preponderance in the Supreme Court at this time for a generally laissez-faire approach, especially where businesses were concerned. Suspicion of government interference in the market was high. This deference granted to businesses partially contributed to an erosion of the privacy rights of individuals.⁹⁸ An excellent example of both the reticence to intervene and the consequent sluggish defence of privacy in US law is the famous case *Olmstead v. United States*.⁹⁹ In this case, the Supreme Court ruled 5-4 that an individual's constitutional rights were not violated by wiretapping conducted by federal agents. Arguably more famous than the case, was Brandeis' dissenting opinion: that opinion represented an emerging divide between pro-surveillance and pro-privacy camps.¹⁰⁰ The decision was finally overturned in 1967.¹⁰¹ What this almost 40-year gap shows is not only a change in attitudes, but how long it took to occur. These failures by constitutional bodies extended to the common law as well.

The second half of the twentieth century contained a markedly different attitude to privacy. Dominant attitudes in jurisprudence circles and supreme courts shifted to a more pro-privacy stance; however, this shift did not (initially) materialize in the form of positive legislation, but only judicial action.¹⁰² Part of this was that the second technological revolution of this period, a revolution of polygraphs and micro-cameras, prompted a new recognition of the need for protections which had until then been lacking. It is also likely that the awful consequences of the fascist regimes of the first half of the century, and the ongoing totalitarianism amongst the communist nations, bred a new fear of state surveillance and intervention which was conducive to a push for greater privacy. Books like 1984 only contributed to an attitude of suspicion towards the state.¹⁰³ These fears were only later exacerbated by the Watergate scandal. Therefore, during this period there was a new drive to recognize privacy in law. This new attitude in the second half of the century is exemplified by the protection of privacy in the Universal Declaration of Human Rights in article 12.¹⁰⁴

Although not strictly a legal volume, and deeply informed by the theoretical developments discussed in the next section, Alan Westin's *Privacy and Freedom* (1967) exerted a significant influence on the law and legal thought. His painstaking study of the threats to

⁹⁸ It is worth noting that often private property claims and privacy claims conflicted. For instance, when a company wanted to put devices in its factories (i.e. its property) which will enable it to spy on its workers. *Ibid*, 339-341.

⁹⁹ *Olmstead v. United States*, 277 U.S. 438 (1928)

¹⁰⁰ The pro-surveillance camp was often in favour of prohibition and viewed privacy claims as an undesirable threat to that project.

¹⁰¹ *Katz v. United States*, 389 U.S. 347 (1967)

¹⁰² Again, Westin's discussion of this period is excellent (338 – 364).

¹⁰³ The cultural significance of threats to privacy seems to gain much traction during this period; consider, for instance, Hitchcock's *Rear Window* (1954).

¹⁰⁴ Other examples of this international movement towards recognition of privacy rights include: Article 17 of the International Covenant on Civil and Political Rights (United Nations, 1966), Article 8 of the European Convention of Human Rights (Council of Europe, 1950) and Article 7 of the Charter of Fundamental Rights of the European Union (2000)

privacy in the contemporary US, combined with the cultural atmosphere described above, provided motivation for a move, both in the US and abroad, towards greater concern for privacy, including new legislation. He also advanced awareness of the peculiar tension surrounding privacy as a value which both competes with and is vital to human freedom – in his discussion of potential policy changes, he emphasises the importance of "developing criteria for weighing conflicting interests".¹⁰⁵ It is these criteria which are crucial before one can pass any legislation with confidence. The search for such criteria constitute a 20th century attempt at Mill's mission for a "recognised principle by which the propriety or impropriety of government interference is customarily tested"¹⁰⁶

A particularly salient privacy worry today concerns the use of personal data. This issue had already begun to emerge by the 1960s point, and Westin does pay it heed: "we have become the greatest data-generating society in human history".¹⁰⁷ Organizations began to harvest huge amounts of data, and sell it on to each other; a new desire to conform, to have an unexceptional file, is created. Meanwhile, the modern state required an ever-increasing amount of data to perform its functions.¹⁰⁸ New technology had eliminated previous limits to public access; and "The boundaries of the private must be made secure over and over again".¹⁰⁹ In imagining how these developments might progress into the future, Westin comes strikingly close to many of the realities of the present day, or at least certain interpretations of them. This is a product of the initially indolent legislative response to these technological developments: "the present dossiers and computerized information systems continue to increase, without many legal or administrative guidelines as yet to cope with the issues of privacy that they raise."¹¹⁰ Part of this reticence may be due to a preference for public interests in the balance-ideal. This would be a natural consequence of post-war nationalism (note how this consequence of the war pushes in one direction concerning privacy, while others, like fear of totalitarianism, pushes in another – this is one example of the complexities of tracing ideology). This naturally fed into the familiar sentiment that those resistant to new technologies were luddite reactionaries either not aware or not in favour of the vast benefits to society which the implementation of such technology could bring. This technological optimism persists in the present and remains antagonistic to attempts to increase privacy.

¹⁰⁵ Westin, *Privacy and Freedom*, 370.

¹⁰⁶ Mill and Collini, *On Liberty*, 12.

¹⁰⁷ Westin, *Privacy and Freedom*, 158-159.

¹⁰⁸ This is part of the intertwining of society and state that Habermas identifies in the modern welfare state. As Westin put it, society's 'information theory' had changed. (322-323).

¹⁰⁹ Wolfgang Sofsky, *Privacy: A Manifesto*; Translated by Steven Rendall. Princeton, N.J.; Princeton University Press, 2008, 21.

¹¹⁰ Westin, *Privacy and Freedom*, 168.

Gradually however, the threats became clearer, and privacy concerns grew accordingly. For instance, in 1965, The US Bureau of the Budget's 'Dunn Report' recommended setting up a 'national data centre', a project which received much attention and criticism.¹¹¹ This trend continued, most tangibly in legislation meant to tackle the new problems: above all, the 1974 Privacy act.¹¹² But they nonetheless failed to keep pace with the accelerating rise of data collection - a great deal of US privacy legislation was created in the last years of the century (the Health Insurance Portability and Accountability act in 1996, and the Children's Online Privacy Protection act and Gramm-Leach-Bliley act, both in 1998). This failure has consequences in the present day, which will be explored in the next chapter. Indeed, the extent to which these technologies have transformed our lives is hard to overstate: "These are not simply "new technologies": they fundamentally change the social practices in which they are embedded."¹¹³

It is worth noting that concerning legislation, the US has generally been behind Europe. Press discussion of private lives has been punishable by French law since 1868.¹¹⁴ There was even privacy legislation in the USSR.¹¹⁵ And Europe continued to be ahead of the US in dealing with the new problem of data privacy: in 1981, the Council of Europe passed the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, and in 1995 the EU passed the *data protection directive*. Despite being ahead of the US, these reactions were still later than, in retrospect, would have been desirable. Moreover, no country's law has fully been able to tackle the problem of data protection. Having explored the practical history of privacy in the 20th century, I will now turn to theoretical and philosophical developments.

4.4: Privacy Theory Post Warren and Brandeis

After Warren and Brandeis' claim that there exists a right to privacy, there naturally arose two questions: 1) why was privacy a right? 2) exactly what does this right consist in? Interestingly, the second question initially attracted little attention – it seems everyone thought it was very clear what everyone meant by privacy. I will return to this erroneous

¹¹¹ See Arthur R. Miller, "The National Data Centre and Personal Privacy, *The Atlantic*, November 1967, <https://www.theatlantic.com/magazine/archive/1967/11/the-national-data-center-and-personal-privacy/660146/>

¹¹² Which was itself a reaction to the Watergate scandal. See, for example, the US department of Justice's Overview of the act: https://www.justice.gov/Overview_2020/dl?inline

¹¹³ Introduction to Roessler, Beate and Judith DeCew, "Privacy", *The Stanford Encyclopedia of Philosophy* (Winter 2023 Edition), Edward N. Zalta & Uri Nodelman (eds.), <https://plato.stanford.edu/archives/win2023/entries/privacy/>

¹¹⁴ Section 11 of the 1868 *Loi Relative à la Presse*

¹¹⁵ The 1977 Constitution (Fundamental Law) of the Union of Soviet Socialist Republics, article 56

assumption. For now, we can turn to the question which dominated theoretical debates – was privacy indeed a right? Until the 1930s the existence of the right to privacy became the subject of ongoing debate with people siding with one court decision or another: this theoretical debate evolved in parallel to the rocky path that Warren and Brandeis's view faced in the courts. But in the late '30s, the side defending the existence of the right began to dominate.¹¹⁶ nor has this been, in my view, seriously challenged as a philosophical position; even substantial attacks on aspects of the view agree on privacy's nature as a right.¹¹⁷

As this convergence occurred, the second question demanded a response. One of the most influential early attempts at an answer came from Prosser (1960).¹¹⁸ His conclusion, which has recurred in privacy literature since, is that 'privacy' is in fact "a complex of four distinct and only loosely related torts".¹¹⁹ That is, "the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common, except that each represents an interference with the right... 'to be let alone'."¹²⁰ The four torts are:

1. "Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, to the defendant's advantage, of the plaintiff's name or likeness."

It is the second tort, disclosure, that Warren and Brandeis' article discussed. Prosser's discussion of these torts reveals much about our contemporary conception of privacy, including potential faults in it – he mentions the mysterious relationship between defamation and privacy torts which still plagues jurisprudence.¹²¹

This second question which Prosser answered is closely related to the quest of various philosophers to *define* the right to privacy. Nor is this of purely theoretical interest: just as defences of privacy like those in the UDHR act as a kind of definition, so attempts to identify *the* definition can and should inform any concrete legislation. One influential attempt was Parker's: "privacy is control over when and by whom the various parts of us can be sensed by others."¹²² It is now generally accepted, however, that these attempts were misguided -: "we

¹¹⁶ Prosser, "Privacy".

¹¹⁷ See, for instance, Kalven, who merely objects to the right's being treated in tort law.

Harry Kalven Jr., "The Right of Privacy in Tort Law – were Warren and Brandeis wrong?", *31 Law and Contemporary Problems*, 326-341 (Spring 1966).

¹¹⁸ Prosser, "Privacy".

¹¹⁹ *Ibid*, 422.

¹²⁰ *Ibid*, 389.

¹²¹ This is an extensive and ongoing debate. Both Blom-Cooper's introduction to Westin's *Privacy and Freedom* and the Kalven article cited above include discussion of it.

¹²² Quoted on page 304 of Judith Jarvis Thomson, "The Right to Privacy." *Philosophy & Public Affairs* 4, no. 4 (1975): 295–314. <http://www.jstor.org/stable/2265075>.

can see that there is no single definition, analysis or meaning of the term “privacy”, either in ordinary language or in philosophical, political and legal discourse.¹²³ Precisely why this is so itself constitutes a deep philosophical problem which may have serious consequences for our understanding of the nature, and perhaps even value, of privacy. I agree with Solove that ‘privacy’ behaves as a Wittgensteinian ‘family resemblance’ concept, and I detect sympathy from a great variety of authors: Geuss’ sympathy with reductionism (discussed below) is certainly amenable: “this right [privacy] does not exist in the sense that it fails to designate any kind of coherent single property or single interest.”¹²⁴ Likewise, the above Prosser quotation is certainly compatible (“*nothing in common*”), and Nissenbaum’s rejection of a universal definition of privacy is also close to this view.¹²⁵

The result is we are left with a concept that nearly everyone agrees is valuable but is not definable (at least in the usual sense). I think this is partly explained by the view that privacy is not a single reified entity but a culturally dependent notion: “there is not *one* history of the concept of privacy, but that the rules that protect privacy today (and the reflection that has gone along with those rules) have been driven by developments and concerns in different political and social areas. The history of privacy may therefore include more than what counts as “private” at any particular time”.¹²⁶ This also explains how we should understand some of our contemporary critiques of past ‘privacy’ conceptions. For instance, when Kalven says of Warren and Brandeis “one may perhaps wonder if the tort is not an anachronism, a nineteenth century response to the mass press which is hardly in keeping with the more robust tastes or mores of today”. Kalven takes this as evidence of its failure to capture *the* essence of privacy. But rather, it should be viewed as evidence of shifting balance-ideals: it is, then, an anachronism – but that doesn’t reveal any error when considered relative to *its* day.

This scepticism about the unitary nature of privacy evolved in parallel to a scepticism about the nature, even ontology, of privacy rights. This is not surprising - discovery of a ‘fractured’ nature (revealed by lack of a unitary definition) will inevitably have consequences for what kind of thing it could be. An extreme form of this scepticism is best articulated by Thomson’s influential ‘The right to Privacy’, which argues that “every right in the right to privacy cluster

¹²³ Introduction to Roessler and DeCew, “Privacy”.

¹²⁴ Geuss quoted in section 2.1 of Ibid.

¹²⁵ See section 3.2 of Ibid. I think this is a paradigmatic case where the old Socratic quest for a ‘unified’ definition has been shown to be misguided.

¹²⁶ Introduction to Ibid.

is also in some other right cluster”.¹²⁷ The right to privacy is in this way, *reducible* to other rights (hence ‘reductionism’).¹²⁸

4.5: Conclusion

The 20th century was not new in trying to protect individuals’ privacy interests in law. But it *was* new in trying to codify a *right* to privacy *explicitly* (i.e. not indirectly, through other protections). Whether it did so successfully is unclear, and is only made more so when we begin to consider, in light of philosophical developments, that maybe there is no single ‘privacy violation’ the law was trying to treat, but rather, “a complex of more fundamental wrongs.”¹²⁹ But these new philosophical approaches to privacy themselves represent a significant achievement, partly spurred on by activity in the law. The new theoretical interest in privacy manifested in other ways too, such as anthropological studies of privacy.¹³⁰ These all contributed to a greater awareness and understanding of ‘privacy’ which makes projects like this one possible. But we must nonetheless recognise that the law’s failure to sufficiently tackle contemporary technological developments has had stark consequences for our way of life today. And unless we are more successful in dealing with novel technologies, we can expect history to repeat itself.

¹²⁷ Thomson, “The Right to Privacy.”, 312.

¹²⁸ Thomson is also notable for explicitly acknowledging the idea of privacy claims competing with others. Her example is of the right to a free press competing with the privacy claims of those discussed therein.

¹²⁹ Davis quoted in *Ibid.*, 314.

¹³⁰ See for instance, Moore Jr., *Privacy: Studies in Social and Cultural History*.

5. The 21st century – privacy today

"A larger amount of information can now be made available to a larger number of people by a larger number of people." - Robison¹³¹

5.1: What is to be done?

The discussion in the previous chapter paints a bleak picture. It makes us wonder - how we can possibly adapt to the problems of today? The answer lies in the balance-ideals I have been discussing. My thesis has been that although the desire for privacy might be thought to be a universal human one, exactly what 'privacy' consists in is deeply context-specific; moreover, all practical realizations of any conception of 'privacy' will be moderated by other values of that society, values like freedom and equality. Individual thinkers will have different views about the ideal combination and *balance* between these values; the dominant ideal in a society constitutes that society's balance-ideal.

So far, I have aimed to offer case-studies of different epochs in Western culture to better understand both their balance-ideals and therefore to reflect on our own. I have also tried to trace the development of such ideals to offer a history of privacy. Now, I turn to the problem of A) the balance-ideal of contemporary Western European societies, and B) the implementation of such ideals. That is, "the task of restoring the balance of privacy in our society".¹³²

Two clarifications. First, this 'restoration of balance' is not a restoration of any objective 'privacy'. Rather, it is restoring the practices of a society to those that manifest its balance-ideal. Second, regarding task A), there will of course be extreme variation in the balance ideals across these societies. But we can identify certain common threads, which lie at the heart of our contemporary understanding of privacy.

¹³¹ Wade Robison. "Digital Privacy: Leibniz 2.0" *ORBIT Journal*, 1, no. 2 (October 2017): 7, [10.29297/orbit.v1i2.54](https://doi.org/10.29297/orbit.v1i2.54)

¹³² Westin, *Privacy and Freedom*, 329

5.2: Today's ideal

Having seen why the view that privacy is a distinctly modern notion is false, we can also understand why it seems plausible: the modern period's liberalism contributed to the birth of *our* current conception of privacy, and the modified liberalism of the 19th century played a decisive role in refining it, especially locating it in relation to other modern values like freedom. I think today's ideals regarding privacy are (in general) not particularly dissimilar from those expounded by Mill (for example). That is partly why so many of his ideas seem obvious and agreeable. What is different is how those ideals are to be applied to a radically different social moment.

Mill's passionate advocacy can also disguise the great import of other values which compete with freedom, individuality, and privacy. This potential for us to forget what we give up by protecting privacy should be guarded against: Frequently, it leads to questionable ideals. This kind of forgetfulness is exemplified by many contemporary libertarians.¹³³ A similar problem can plague otherwise excellent discussions of the value of privacy.¹³⁴

This is where the theorizing of privacy discussed in the last chapter can be particularly helpful: by understanding its relation to other rights and values, we can make more informed conclusions about what trade-offs we want to make – and indeed what kind of thing we are pursuing. For instance, Robison's innovative metaphysics of the relationship between an individual and their data could underpin a new approach to data protection.¹³⁵ And recognition of the malleable nature of privacy has already, I think, yielded concrete benefits – it encouraged the European Court of Human Rights to establish a flexible case law and outlook on privacy.¹³⁶

¹³³ I think at points even Robert Nozick is guilty of this. Libertarians less concerned with theorizing are often even more prone to this. The various intellectual inheritors of Ayn Rand are an example. Arguably most saliently, Javier Milei's election shows the political potential of this position.

¹³⁴ Sofsky, *Privacy: A Manifesto*. Sofsky is at his best when acknowledging the tension between our desire for privacy and for other conflicting things, like the welfare state. But often these illuminating moments are obscured by more substantial political theses which fail to acknowledge this tension.

¹³⁵ Robison, "Digital Privacy: Leibniz 2.0".

¹³⁶ See Adrienn Lukàcs, *Employees' Right to Privacy and Right to Data Protection on Social Network Sites with Special Regard to France and Hungary*, Szeged: Iurisperitus 2021, 36-47, https://publicatio.bibl.u-szeged.hu/22977/1/Lukacs_EmployeesRighttoPrivacyandRight_to_Data_Protection_on_Social_Network_Sites_2021.pdf

5.3: Responding to technology

Once we understand our ideal, we then have to set about implementing it in contemporary society. The most significant challenge for such an implementation today is responding to technology: both those which have been around for a while but inadequately dealt with in law (like social media) and those technologies which are emerging today (like A.I.). Dealing with the latter kind is especially difficult because of the rapidly changing nature of these technologies – legislation risks being made redundant almost immediately.

There are three problems I wish to discuss here. I will discuss the issue of data protection, as it is arguably the most ubiquitous yet unique privacy infringement of today's world. Then, I will pick up on the related issue of the capacity of the individual to challenge the veracity of the data stored about them. This issue seems to me to not have received enough attention. Finally, various relevant problems about our relationship to technology are discussed.

5.3.1: Data Collection

The problem of data collection is not new. Westin and Flaherty identified it as a growing problem in the latter half of the twentieth century. Today, practically unlimited quantities of information about us can be stored systematically and permanently. Just as the technological developments in the Enlightenment diminished some opportunities for privacy and created others, the impact of data collection on privacy is not straightforward. Szabó points out that as data collection increases, there arises a private/public parallel in the online/offline distinction, just as there is one in the domestic/work distinction. As a consequence, our offline lives become more private and withdrawn: our separation from the digital world extends to a more general separation.¹³⁷

But even taking into account this form of privacy gained by the offline world (if 'privacy' is the best way to describe it), data collection on balance is not good for privacy. Of course, the catch is that such collection often reaps immense social benefits: better taxation, better healthcare, better product recommendations. It is worth emphasising that this way of thinking is not 'wrong': it is the very societal adjustment process by which a society realises what it most desires.¹³⁸ But we must constantly be asking what trade-offs we are willing to make. Likewise, we must be vigilant about what 'society' desires: this adjustment process is perfectly vulnerable to the exercise and abuse of power. It seems uncontroversial to say that

¹³⁷ Ibid.

¹³⁸ And it is this way of thinking that often justifies suspicion of privacy, from French Jacobins to Robert Owens' 'silent monitor'. And often, such thinking and its conclusions are correct: consider the benefits of the (privacy-violating) contract tracing during the Covid-19 pandemic. And as even Sofsky admits, privacy must be sacrificed in the pursuit of justice.

many of the most powerful individuals in the world benefit from such data collection (in fact, power almost always does. This is only exacerbated by the fact that "information is the central source of power for the modern bureaucratic state."¹³⁹). So we should not be surprised – although we should be wary – when ‘society’ seems to desire it too.

5.3.2: Storing the Truth

A problem closely related to (in fact, arising out of) the problem of data collection is that of ‘data veracity’. Even in the early days of data collection, Westin identified one potentially deep problem with the whole system: how can subjects alter their files if they are inaccurate? Especially if data is being collected covertly, unknown to the supplier, then how could they challenge a false record.¹⁴⁰ Dismissing the capacity for error in either humans or machines is not convincing: "Past mistakes, omissions, or misunderstood events become permanent evidence capable of controlling destinies for decades".¹⁴¹

However, I think this threat has been compounded by the emergence of generative AI. Not only do permanent records of actual activities exist; but now too do records of fictitious activity. The ability of individuals to claim a file is not truly of them will only diminish as these technologies become more powerful and deceitful. Moreover, if such deceit becomes common practice and known as such, then our belief in the truth of what we hear and see will only decrease – this represents a serious threat to, amongst other things, our democracies.¹⁴²

5.3.3: Technology and Us.

John Perry lamented, “our claims to privacy are pretty hard in a world where nobody cares about it anymore”.¹⁴³ this phenomenon is not in fact new; it’s a natural consequence of the push and pull we feel between competing desires – desires for privacy, desires to participate, desires to be known, and so on. It is the contemporary incarnation of what Simmel called

¹³⁹ Sofsky, *Privacy: A Manifesto*, 102.

¹⁴⁰ And as Robison points out, this ‘epistemic shortfall’, where we don’t know about privacy invasions, partly explains the lack of outrage at the new threats to privacy. This should worry us – such outrage historically plays a significant part in reestablishing privacy protection.

¹⁴¹ Westin, *Privacy and Freedom*, 160.

¹⁴² Not to mention our social relationships: "The digital age has made us mini-gods, capable of treating far more, far more easily, as objects. Kant’s vision of an ideal world where we treat each other with respect is that much more difficult to achieve when treating others as objects is so much easier." - Robison, “Digital Privacy: Leibniz 2.0”, 8.

¹⁴³ John Perry, “The Right to Privacy”, Philosophy talk, April 2014, <https://philosophytalk.org/shows/the-right-to-privacy/>

‘self-invasion’.¹⁴⁴ During the planning of a national data centre, Donald Michael noted "we can expect a great deal of information about the social, personal, and economic characteristics of individuals to be supplied voluntarily – often eagerly".¹⁴⁵ But it does seem that A) the technological realities make mass disclosure easier than ever before, and B) there is a noticeable cultural shift towards a kind of privacy-apathy. The impact of this on public, social activities and institutions is an important question for the present today.¹⁴⁶ While there are frequently protests about governmental measures threatening privacy, disclosing your attendance at such a protest online isn't thought twice about. It's unfair to say our concern for privacy has diminished; yet many of our actions exhibit a lack of thought or care about it.

A significant cause of this is undoubtedly a lack of education. Specifically, education about the nature and uses of technology, and ultimately, what each click is giving away.¹⁴⁷ Amongst others, Flaherty has emphasised that in today's world, each individuals must take greater responsibility for their privacy decisions – they must be their own “privacy commissioner”.¹⁴⁸ Robison and Lukacs both emphasise that a simple lack of understanding of technology powers produces so many privacy problems today.

5.4: Implementing the Ideal

5.4.1: The Law so far

In recent years, there have been two notable attempts to protect privacy in light of the above. One is the EU's GDPR (2016).¹⁴⁹ The other is California's CCPA (2018).¹⁵⁰ Each are motivated by a desire to protect consumer's data, and they have their own strengths and weaknesses. These are the most substantial attempts to protect privacy in law in light of new technologies. They are also crucial in granting more powers of litigation of private parties against private parties (the ‘horizontal effect’). In this, the immense suspicion of the state so distinctive of the history of privacy is finally being directed (partially) to businesses. In my view, Blomfeld could not have been more right in his remark that "far too little attention has

¹⁴⁴ Quoted in Westin, *Privacy and Freedom*, 52.

¹⁴⁵ Ibid, 313.

¹⁴⁶ See section 4.6 of Roessler and DeCew, "Privacy", for discussion.

¹⁴⁷ A distinct but related issue surrounds that of consenting to cookies or similar. Is implied consent, consent? Should skipping over the terms and conditions invalidate such consent? Westin's discussion at the end of *Privacy and Freedom* (349-390), concerning implied consent, is especially relevant here, and contains useful insights for today.

¹⁴⁸ Quoted in Lukacs, *Employees' Right to Privacy and Right to Data Protection on Social Network Sites with Special Regard to France and Hungary*, 262.

¹⁴⁹ See also the UK's extremely similar 'UK GDPR': <https://www.legislation.gov.uk/eur/2016/679/contents>

¹⁵⁰ This is another instance of Europe being ahead of the US in protecting privacy.

been paid to the incursions by non-governmental agencies".¹⁵¹ It is disappointing that since that statement, there has not been a sufficient effort to change this. I discuss more recent efforts in this area below.

One of the most exciting aspects common to these pieces of legislation is the so-called “right to be forgotten” or right of erasure, whereby one can demand another party delete their data. There are of course many exceptions to this rule which limit its power, but the underlying principle represents a bold new approach to data protection.

However, parallel to these innovations in data protection law have been radical changes, indeed regressions, in other aspects of privacy law. In the US, privacy law has generally been preoccupied with ‘decisional privacy’, that is, the right to do what you want in private. It was primarily on the basis of privacy that the US supreme court disallowed: a law banning contraceptives for married couples (*Griswold v. Connecticut*, 1965); state criminalization of homosexuality (*Lawrence v. Texas*, 2003); and state bans on abortion (*Roe v. Wade*, 1973). These cases would often refer to the ‘implied privacy’ of various amendments to the US constitution. In the light of the overturning of *Roe v. Wade* in 2022, the use of ‘privacy’ as a basis for such rulings has been thrown into question.¹⁵²

5.4.2: Next Steps

An inevitable result of privacy’s undefinable nature is the difficulty in codifying it in law. As Lukacs recommends, this is a problem to be acknowledged and accepted, but not avoided.¹⁵³ The flexibility and vagueness of the concept is ineliminable and possibly essential in creating a sufficiently broad defence of privacy. However, defining certain aspects or sides of privacy will be required by the particular pressures of a given society. For instance, the flurry of attention to data protection and the related definitions that follow suggest that protecting privacy in the present day will require explicit protection in terms of informational agency.¹⁵⁴ This is an unavoidable consequence of the fact that the nature of ‘privacy’ and its protection changes in line with (amongst other things) changes in technology.

¹⁵¹ Blomfeld, introduction in Westin, vii. This point was also realized by the postmodernists, although they generally adopted a more extreme position. For instance, Lyotard argued privacy only really exists for corporations which turn personal information into profit: Jean François Lyotard. *The Inhuman: Reflections on Time*; Translated by Geoffrey Bennington and Rachel Bowlby. Stanford, Calif: Stanford University Press, 2000.

¹⁵² To be more specific, the supreme court decided it could not find evidence that the right to privacy was protected by the constitution.

¹⁵³ Lukàcs, *Employees’ Right to Privacy and Right to Data Protection on Social Network Sites with Special Regard to France and Hungary*, 36-47.

¹⁵⁴ For example, in 1983, the federal constitutional court of Germany designated the right to privacy as the right to “*informational self-determination*.”: Bundesverfassungsgericht. Federal Constitutional Court. (1983). *Judgment of 15 December 1983*.

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1983/12/rs19831215_1bvr020983en.html

There is a close connection to Parker’s emphasis on control (see footnote 122).

Another point requiring more attention is the lack of the horizontal effect in privacy law. The problem has only been exacerbated by the new dominance of technology companies in the present day.¹⁵⁵ But positive steps to address this have been relatively recent, and are yet to be widespread: the GDPR and CCPA represent a move in the right direction, but more needs to be done.

Above all, new protections of privacy must be flexible enough to deal with changes in technology. It is impossible to predict what, say, AI will look like in 10 years, and therefore some degree of reaction and adjustment is unavoidable. But the law cannot simply evolve as a frequent series of piece-by-piece reactions to specific technologies. The 20th century shows us that such a process is too vulnerable to hesitancy due to political motivations, a lack of understanding, and abuses of power.

6. Overall Conclusion

In this project, my aim has been four-fold:

1. To argue that the desire for ‘privacy’ is universal, but that what exactly constitutes ‘privacy’ is deeply culturally specific.
2. To argue that the nature of ‘privacy’ for a given society is determined by what it holds as the *ideal balance* of various values, of which privacy is one.
3. To consider some examples of such balance-ideals in the history of Western Europe and America. This is to better understand what societal phenomena affects such balance-ideals, and to gain a better understanding of the specific nature of our own.
4. To consider the discrepancies between the balance-ideal of contemporary Western Europe and America, and the law of these areas, in order to understand how we can amend such discrepancies.

These four aims jointly contribute to the improved understanding of privacy necessary for a new defence of it today.

Westin concludes *Privacy and Freedom* by reiterating that although the technologies we face are new, “the choices are as old as man’s history on the planet. Will the tools be used for man’s liberation or his subjugation? ... Science and Privacy: together they constitute twin conditions of freedom in the twentieth century.” Those twin conditions remain relevant in the 21st century.

¹⁵⁵ Lukàcs, *Employees’ Right to Privacy and Right to Data Protection on Social Network Sites with Special Regard to France and Hungary*.

Bibliography

Adams, Elbridge L., "The Right of Privacy and its relation to the Law of Libel" *American Law Revue*, 39 no. 1 (1905).

Bekčić-Pješčić, Gordana, "US legal system in the context of English legal heritage and theory of the natural rights of John Locke". *Strani pravni zivot (2018)*: 95-106. 10.5937/spz0-20548.

Crook, Malcolm, and Tom Crook. "REFORMING VOTING PRACTICES IN A GLOBAL AGE: THE MAKING AND REMAKING OF THE MODERN SECRET BALLOT IN BRITAIN, FRANCE AND THE UNITED STATES, c. 1600—c. 1950." *Past & Present*, no. 212 (2011): 199–237. <http://www.jstor.org/stable/23014789>.

Dabhoiwala, Faramerz. *What Is Free Speech? : The History of a Dangerous Idea* / Fara Dabhoiwala. London: Allen Lane, 2025.

Dabhoiwala, Faramerz. *The Origins of Sex a History of the First Sexual Revolution* / Faramerz Dabhoiwala. New York: Oxford University Press, 2012.

Gilman, Charlotte Perkins. *The Home : Its Work and Influence*. New York: McClure, Phillips, 1903, 40.

Green, Felicity. *Montaigne and the Life of Freedom* / Felicity Green. Cambridge: Cambridge University Press, 2012.

Habermas, Jürgen. *The Structural Transformation of the Public Sphere : An Inquiry into a Category of Bourgeois Society* / Jürgen Habermas ; Translated by Thomas Burger with the Assistance of Frederick Lawrence. Cambridge: Polity, 2015.

Israel, Jonathan I., "Spinoza, Locke and the Enlightenment Battle for Toleration." Chapter. In *Toleration in Enlightenment Europe*, edited by Ole Peter Grell and Roy Porter, 102–13. Cambridge: Cambridge University Press, 1999.

Jordan, David P., 'Rumor, Fear, and Paranoia in the French Revolution', *The Fundamentalist Mindset: Psychological Perspectives on Religion, Violence, and History* (New York, 2010; online edn, Oxford Academic, 1 May 2010), <https://doi.org/10.1093/acprof:oso/9780195379655.003.0014>

Kalven Jr., Harry, "The Right of Privacy in Tort Law – were Warren and Brandeis wrong?", *31 Law and Contemporary Problems*, 326-341 (Spring 1966).

Kant, Immanuel, *Kant: Political Writings*, Edited by Hans Reiss. Translated by H. B. Nisbet. Second English edition. Cambridge: Cambridge University Press, 1990.

Kant, Immanuel, Pauline Kleingeld. *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*; Edited and with an Introduction by Pauline Kleingeld ; Translated by David L. Colclasure; 1st ed. New Haven: Yale University Press, 2006.

Katz v. United States, 389 U.S. 347 (1967)

Kramer, Irwin R., "the Brith of Privacy Law: A Century since Warren and Brandeis", *Catholic University Law Review*, 39, no. 3 (1990), 709.

Lukács, Adrienn, *Employees' Right to Privacy and Right to Data Protection on Social Network Sites with Special Regard to France and Hungary*, Szeged: Iurisperitus 2021, 32, https://publicatio.bibl.u-szeged.hu/22977/1/Lukacs_EmployeesRighttoPrivacyandRight_to_Data_Protection_on_Social_Network_Sites_2021.pdf

Lyotard, Jean François. *The Inhuman : Reflections on Time* / Jean-François Lyotard ; Translated by Geoffrey Bennington and Rachel Bowlby. Stanford, Calif: Stanford University Press, 2000.

Macpherson, C. B. *The Political Theory of Possessive Individualism : Hobbes to Locke* / Crawford Macpherson. Oxford: Clarendon Press, 1965.

McKeon, Michael. *The Origins of the English Novel, 1600-1740* / Michael McKeon. Baltimore: Johns Hopkins University Press, 1988.

Mill, John Stuart, and Stefan Collini. *On Liberty : With, The Subjection of Women ; and, Chapters on Socialism*. Cambridge: Cambridge University Press, 1989.

Mill, John Stuart, Mark Philp, and F Rosen. *On Liberty, Utilitarianism, and Other Essays*; Edited with an Introduction and Notes by Mark Philp and Frederick Rosen. New edition. Oxford: Oxford University Press, 2015.

Miller, Arthur R., "The National Data Centre and Personal Privacy, *The Atlantic*, November 1967, <https://www.theatlantic.com/magazine/archive/1967/11/the-national-data-center-and-personal-privacy/660146/>

Montaigne, Michel de, *The Essays of Michel de Montaigne*; Translated with an Introduction by J.M. Cohen. London: Penguin, 1993.

Montaigne, Michel de, *The Essays of Michel de Montaigne - Complete*, Translated by Charles Cotton, Edited by William Carew Hazlitt (Project Gutenberg 2004).

<https://www.gutenberg.org/cache/epub/3600/pg3600-images.html#link2HCH0042>

Moore Jr., Barrington, *Privacy : Studies in Social and Cultural History*. Armonk, N.Y.; M.E. Sharpe, 1984.

More, Thomas, Francis Bacon, Henry Neville, and Susan Bruce. *Utopia*. Oxford: Oxford University Press, 1999, especially book two of *Utopia*.

Olmstead v. United States, 277 U.S. 438 (1928)

O'Neill, John, *Essaying Montaigne : A Study of the Renaissance Institution of Writing and Reading* 2nd ed. Liverpool: Liverpool University Press, 2001.

Papy, Jan, "Justus Lipsius", *The Stanford Encyclopedia of Philosophy* (Fall 2023 Edition), Edward N. Zalta & Uri Nodelman (eds.)

<https://plato.stanford.edu/archives/fall2023/entries/justus-lipsius/>

Perry, John, "The Right to Privacy", Philosophy talk (Podcast), April 2014,

<https://philosophytalk.org/shows/the-right-to-privacy/>

Prosser, William L., "Privacy", *California Law Review*, 48, No. 3 (1960).

Robespierre, Maximilien, "For the Defense of the Committee of Public Safety.", Translated by Mitch Abidor for Marxists.org, accessed 20th July 2025,

<https://www.marxists.org/history/france/revolution/robspierre/1793/defense-committee.htm>

Robespierre, Maximilien, "On the Enemies of the Nation", Translated by Mitch Abidor for Marxists.org, accessed 20th July 2025,

<https://www.marxists.org/history/france/revolution/robspierre/1794/enemies.htm>

Robison, Wade, "Digital Privacy: Leibniz 2.0" *ORBIT Journal*, 1, no. 2 (October 2017): 7, [10.29297/orbit.v1i2.54](https://doi.org/10.29297/orbit.v1i2.54)

Roessler, Beate and Judith DeCew, "Privacy", *The Stanford Encyclopedia of Philosophy* (Winter 2023 Edition), Edward N. Zalta & Uri Nodelman (eds.),

<https://plato.stanford.edu/archives/win2023/entries/privacy/>

Rousseau, Jean-Jacques, and Barbara Foxley. *Émile*. London: Dent [etc.], 1974.

Skinner, Quentin. *Liberty before Liberalism*. of *Canto Classics*. Cambridge: Cambridge University Press, 2012.

Skinner, Quentin. "Sir Thomas More's Utopia and the Language of Renaissance Humanism." Chapter. In *The Languages of Political Theory in Early-Modern Europe*, edited by Anthony Pagden, 123–58. Ideas in Context. Cambridge: Cambridge University Press, 1987.

Sofsky, Wolfgang. *Privacy : A Manifesto* ; Translated by Steven Rendall. Princeton, N.J. ; Princeton University Press, 2008, 21.

Starkey, Thomas, Thomas F Mayer, Great Britain. Public Record Office., Camden Society, and Royal Historical Society. *A Dialogue between Pole and Lupset / Thomas Starkey* ; Edited by T.F. Mayer. London: Royal Historical Society, 1989.

Story, Joseph. *Commentaries on the Constitution of the United States*. Boston: Hilliard, Gray, and Company, 1833.

Taylor, Charles, *Sources of the Self: The Making of the Modern Identity*. Cambridge, Mass: Harvard University Press, 1989.

Thomson, Judith Jarvis, "The Right to Privacy." *Philosophy & Public Affairs* 4, no. 4 (1975): 295–314. <http://www.jstor.org/stable/2265075>.

U.S. Dep't of Justice, Overview of the Privacy act 1974, 2020.

https://www.justice.gov/Overview_2020/dl?inline

Vickery, Amanda, An Englishman's Home Is His Castle? Thresholds, Boundaries and Privacies in the Eighteenth-Century London House, *Past & Present*, Volume 199, Issue 1, May 2008, 147–173, <https://doi.org/10.1093/pastj/gtn006>

Wakelman, Alex, “The Public House – the struggle to find privacy in the eighteenth-century home”, *Doing History in Public*, April 22, 2020, <https://web.archive.org/web/20200422211847/https://doinghistoryinpublic.org/2016/10/11/the-public-house-the-struggle-to-find-privacy-in-the-eighteenth-century-home/>

Warren, Samuel D. and Louis D. Brandeis, “The Right to Privacy”, *Harvard Law Review*, Vol. 4, no. 5 (1890): 193,

https://stem.elearning.unipd.it/pluginfile.php/1000752/mod_resource/content/0/Warren%20%20Brandeis%20%20The%20right%20to%20privacy.pdf

Westin, Alan F., *Privacy and Freedom*; with a Foreword by Louis Blom-Cooper. London: Bodley Head, 1970.