Foreword--Privacy and Secrecy after September 11

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It is difficult to speak about privacy in the United States today without considering the significance of September 11. That day has had a profound impact on the public perception of privacy, the actions of Congress, the development of new technologies, and most likely even the decisions of courts. Polls indicate increased public support for new forms of surveillance.1 Congress has moved swiftly to expand the surveillance authority of the state.2 New technologically advanced means of surveillance, such as biometric identifiers and a National ID card,

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1. See, e.g., ABC News/Washington Post Terrorist Attack Poll #3, ABC NEWS/WASH. POST, Sept. 29, 2001 (indicating high levels of public support for expanded government surveillance, use of wiretap authority, and ID cards in the wake of the September 11 attacks); Robert O'Harrow Jr. & Jonathon Krim, A Changing America: National ID Cards Gaining Support, WASH. POST, Dec. 17, 2001, at A1 (indicating nearly 70% support for some form of National ID). But see E-Government Poll, WASH. POST, Feb. 27, 2002, at A21 (finding that Americans are sharply divided on the issue of national ID cards, with only 47% in support of a national ID, and 44% viewing it as "an invasion of people's civil liberties and privacy"); ROPER CTR. FOR PUB. OPINION RESEARCH, Bureau of Justice Sourcebook of Criminal Justice Statistics (1994) (illustrating longstanding public opposition (by three to one) to use of electronic surveillance as an acceptable investigative technique).

are now under serious consideration.\textsuperscript{3} Even the courts have shown a new deference to claims of national security.\textsuperscript{4}

During such periods in history it is appropriate to reexamine core values and consider the structure and purpose of principles in law that today are constantly under attack. This is only partly to reaffirm critical political goals; it is also to explore and clarify the relationship and significance of critical concepts that are too easily misunderstood.

In this Article I will examine two critical concepts in the world of privacy—privacy and secrecy—and discuss what the developments since September 11 tell us about the relationship between these two key legal categories. I will argue that they are very different ideas, reflecting very different political values, and that they are fundamentally at odds in the structure of privacy law in the United States. But it is fair to note at the outset that the terms are often used interchangeably. We speak of meeting “in secret” and meeting “in private.” We communicate secretly and we communicate privately. There are aspects of our lives that we wish to keep secret, or private. These terms require more careful examination, particularly after the events of September 11.

I. DIMINISHMENT OF PRIVACY BY LEGAL MEANS

One clear impact of September 11 has been the reduction in privacy protection under U.S. law. The USA PATRIOT Act is the most sweeping expansion of government surveillance authority since the passage of the Communications Assistance for Law Enforcement Act (CALEA) of 1994.\textsuperscript{5} Where CALEA established for the first time the premise that the government had the authority to require by law that new communication services be designed to enable surveillance by the state, the USA Patriot Act limited in multiple ways the scope, impact, and effect of many privacy laws previously in force in the United States.


To understand the impact of the USA PATRIOT Act on privacy law in the United States you must understand that the protection of privacy by statutory means typically incorporates a wide range of Fourth Amendment values, such as an articulated probable cause standard, a notification requirement, a nexus between the authority granted and the area searched, and means of judicial oversight.\(^6\) Taken separately and as a whole, these provisions limit the state's ability to conduct searches, thereby seeking to safeguard certain aspects of private life that may be recorded in paper or electronic records.

Broadly stated, these provisions develop from two lines of cases that provide the twin cornerstones for information privacy law in the United States. The first is the *Olmstead v. United States* and *Katz v. United States* line, which gave way to enactment of the federal wiretap act in 1968.\(^7\) The second is the *United States v. Miller*\(^8\) and *California Bankers Ass'n v. Schultz*\(^9\) line, which led Congress to recognize that if there were to be constitutional safeguards for the disclosure of personal information to police held by third parties, Congressional action would be required.\(^10\)

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6. The law enforcement provision in the Subscriber Privacy provision in the Cable Communications Policy Act of 1984 (the Cable Act) provides a good example:

Except as provided in subsection (c)(2)(D) of this section, a governmental entity may obtain personally identifiable information concerning a cable subscriber pursuant to a court order only if, in the court proceeding relevant to such court order—

1. such entity offers clear and convincing evidence that the subject of the information is reasonably suspected of engaging in criminal activity and that the information sought would be material evidence in the case; and

2. the subject of the information is afforded the opportunity to appear and contest such entity's claim.


Since the mid-1970s a range of privacy laws in the United States has been enacted to limit government access to a wide range of record systems, including government records, financial records, medical records, cable subscriber records, electronic mail records, video rental records, and more. In just the last few years, Congress extended new safeguards to medical information, financial information, and records on students.

The USA PATRIOT Act did not destroy the edifice of U.S. privacy law, but it did significantly weaken the structure and limit the coverage of many key statutes. The Act limits safeguards created by fifteen statutes. It reduces probable cause standards in key laws. It significantly expands the authority of the Foreign Intelligence Surveillance Act. It limits judicial review. It creates a new "sneak and peak provision" for police to undertake searches without the customary notification requirement.

Still, the USA PATRIOT Act is not the only means by which privacy provisions in the United States have been diminished since September 11. The Attorney General has also indicated that attorney-client privilege, one of the oldest privileges


17. Id. §§ 206-208, 214-215, 218, 225.

18. Id. § 213.
in common law, may be violated by police.¹⁹ And proposals currently pending in Congress would enable access by state police to records previously restricted under the Foreign Intelligence Surveillance Act.²⁰

Apparently the only area that the Attorney General believes should not be subject to reduced protection following September 11 are the records provided by individuals seeking the right to carry personal firearms. There the Attorney General has said that, because there is no current legal authority, investigators seeking access to this information should be restricted.²¹ The Attorney General had not made a similar argument during the debate over the USA PATRIOT Act with regard to the information that might be sought in telephone records, banking records, voicemail records, educational records, library records, or business records.

II. LOSS OF PRIVACY BY TECHNOLOGICAL MEANS

The expansion of state surveillance authority under the USA PATRIOT Act is only one way that personal privacy has been diminished after September 11. The government has also sought by technical means to expand monitoring and profiling of individuals. At the moment, the three proposals that have received the most attention are a National ID Card, new face recognition technology, and systems for border control.²²

A. NATIONAL ID CARD

The proposal for the National ID Card reflects, perhaps more than any other example, the great ambivalence of the American people about the appropriate response to the events of September 11. In the days following that event, public opin-

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ion polls showed sharp increases for support of a National ID.\textsuperscript{23} Prominent American businessmen, law professors, and political leaders also expressed support for the idea.\textsuperscript{24} A congressional hearing in the late fall suggested that a National ID Card, defined as one issued by the federal government that individuals in the United States would be required to carry, would still face strong political opposition.\textsuperscript{25} Technical experts also noted the significant privacy and security risks in the development of a true National ID.\textsuperscript{26} And subsequent polls indicated that the initial wave of support for a National ID Card had diminished.\textsuperscript{27} Thereafter, the focus shifted to a proposal put forward by the American Association of Motor Vehicle Administrators (AAMVA) to build upon the current state-issued drivers license and to create a document that was both more secure, by means


\textsuperscript{25} See Oversight Hearing on “National Identification Card” Before the Subcomm. on Government Efficiency, Financial Management, and Intergovernmental Relations of the House Comm. on Gov’t Reform, 107th Cong. (2001) [hereinafter Oversight Hearing] (statement of Rep. Horn, Chairman, House Comm. on Gov’t Reform); see also O’Harrow \& Krim, supra note 1, at A1 (“[T]he political hurdles to a national ID card remain huge. President Bush has publicly downplayed their benefits, saying they’re unnecessary to improve security. Bush’s new cyberspace security chief, Richard Clarke, recently said he does ‘not think it’s a very smart idea.’”).

\textsuperscript{26} See Oversight Hearing, supra note 25, (statement of Ben Schneiderman, Professor of Computer Science, University of Maryland) (“We must ask whether there is now a secure data base that consists of 300 million individual records that can be accessed in real time? The government agencies which come close are the Internal Revenue Service and the Social Security Administration, neither or which are capable of maintaining a network that is widely accessible and responsive to voluminous queries on a 24 hour by 7 days a week basis.”); Peter G. Neumann and Lauren Weinstein, Risks of National Identity Cards, 44 COMM. OF THE ACM 176 (2001); Bruce Schneier, National ID Cards, CRYPTO-GRAM NEWSLETTER, at http://www.counterpane.com/crypto-gram-0112.html#1 (Dec. 15, 2001).

of a biometric identifier, and more easily integrated with a variety of record systems. At present, it remains unclear whether the AAMVA proposal to create a de facto National ID Card will go forward. There are both legislative and budgetary obstacles, and Americans still appear deeply divided.

B. FACE RECOGNITION

A second proposal to significantly expand surveillance is the idea of putting in place new "smart cameras" that have the ability to match in realtime the images of individuals viewed in public and private places against a stored database of facial images, which could be either those of suspected terrorists, licensed drivers, gamblers in Las Vegas casinos, or children in the Washington, DC public school system. Joseph Attick, CEO of the company Visionics, has argued that his system for face recognition would reduce the risk of terrorist threat, and several pilot projects are underway. However, independent studies have also raised questions about the reliability of face recognition systems, and at least one airport has decided not to go forward with the system after the chief of security determined that it might actually diminish the effectiveness of cur-

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31. See Karen Alexander, Airport to Get Facial Recognition Technology Oakland, L.A. TIMES, Oct. 29, 2001, at B1; O'Harrow, Facial Recognition System Considered for U.S. Airports, supra note 30, at A14; see also Interest in face scanning grows: Makers of technology struggle to meet demand since attacks, REUTERS, at http://www.msnbc.com/news/630735.asp (Sept. 18, 2001) ("Right now what we need to do is build our defenses, as we need to protect innocent lives and prevent this from happening again," said Visionics CEO Joseph Attick.").
C. BORDER CONTROL

A third area of significant focus is the effort to improve the tracking of non-U.S. citizens in the United States. It is clear that many people in the United States who receive visas often do not comply with the reporting requirements. It is also clear that current means to track those individuals are not particularly effective. But it is less clear what role technology would play in solving this problem. While it may be possible to integrate databases to enable more detailed monitoring of individuals in the United States on visas, the idea of real-time tracking, as has been proposed by some political leaders, would require extraordinarily intrusive surveillance techniques and also be extraordinarily expensive. It might also be fair to ask whether U.S. citizens traveling abroad would accept a system that would track their activities and their meetings with others.

Some systems for real-time tracking of individuals are currently being pursued for parolees and those serving in-home detention. These systems enable remote tracking of a person's location and are designed to ensure that an individual stays within a circumscribed geographic region. Similar technologies widely available for pets administer a small shock to the animal if the animal strays beyond the prescribed region.

We can briefly summarize this Part by noting that since September 11 there has been a dramatic reduction in privacy in the United States and that further proposals are under consideration. Some of this may be ascribed to specific changes in federal statutes; some to new technologies that enable greater surveillance and tracking. The interesting question now is whether we can say that there has been a similar decrease in secrecy.

32. See Liz Anderson, At the Assembly—About Face, PROVIDENCE J., Jan. 17, 2002, at B1 (reporting that T.F. Green International Airport in Providence, Rhode Island, one of the first airports to consider facial recognition technology, decided in January 2002 that they would not install it after all, citing the possibility of false matches and other technological shortcomings of facial recognition systems).


34. Id.


36. Id.
III. EXPANSION IN GOVERNMENT SECRECY

There are two ways to understand the expansion of govern- ment authority resulting from passage of the USA PATRIOT Act on October 26, 2001. One way is to assess the variety of ways in which personal information may be made more readily available to police in the course of a criminal or national security investigation. This is apparent in the diminished probable cause standard in several key statutes. We can reasonably say that these changes result in a diminished privacy protection for the person whose information is now more readily available to government agents.

The second way to assess the means of expansion of govern- ment authority is the various ways in which the conduct of government is more difficult to detect, is more readily concealed, or fails to follow the requirements that might otherwise apply. It is to this change—the increase in secrecy—that we now turn.

Central to this analysis is the expanded role of the Foreign Intelligence Surveillance Act (FISA) in the post USA PATRIOT Act world. The FISA was originally enacted in 1978 to address a problem raised in the Katz decision and left open by the enactment of the federal wiretap statute in 1968. That is what would be the statutory standard for a search undertaken in matters of national security. The Katz Court suggested that all forms of electronic surveillance that violated a reasonable expectation of privacy would be subject to a Fourth Amendment standard. But clearly there was concern that the standard appropriate for the investigation of a person engaged in an illegal gambling operation may not be the same as an agent of a foreign power, not a U.S. citizen, who intended harm against the United States. In 1978 Congress adopted the FISA with the narrow goal of

38. Katz v. United States, 389 U.S. 347, 363-64 (1967) (White, J., concurring) (noting that the Katz holding does not preclude a national security exception to the warrant requirement for wiretapping). But see id. at 359 (Douglas and Brennan, Jd., concurring) (objecting to Justice White giving a "green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels 'national security' matters").
39. Id. at 359.
40. Id.
enabling electronic surveillance of foreign agents in the United States pursuant to federal statutory authority. The Act also established the Foreign Intelligence Court, which, unlike a traditional Title III court, issued orders authorizing wiretaps without indicating the jurisdiction, purpose, or duration of the order. The FISA court met within the Department of Justice office building in Washington, DC and was in physical orientation as well as statutory structure more closely aligned with the interests of the executive branch of government than other courts.

A. DIMINISHED ACCESS TO PUBLIC RECORDS

Not only has the prosecution of crime been made more secretive since September 11, but so too have the routine activities of government. The Attorney General indicated in a memo published on October 11 that federal agencies would be encouraged to withhold public records that are subject to the Freedom of Information Act if there was a "reasonable basis" for the application of a statutory exemption. This standard is in contrast to the one under which the federal agencies operated when Janet Reno served as Attorney General. As President Clinton's Attorney General, Reno had required that agencies adopt a "foreseeable harm" test, similar to the standard that Attorney General Levy had adopted in the 1970s.

The new standard for litigating FOIA cases is a clear indication that the Department of Justice is less committed to open government since September 11. On several occasions the At-
AFTER SEPTEMBER 11

Attorney General has expressed his opinion that the U.S. federal government cannot make information publicly available that may be a threat to the country.47 This policy has extended to decisions to severely limit the availability of public information that was previously available over the Internet prior to September 11.

B. CLOSED HEARINGS

Government secrecy has also become apparent in the reluctance of the President and the Congress to pursue public hearings in what many have described as a "massive intelligence failure."48 While CIA Director George Tenant appeared in an open hearing to discuss the annual CIA budget request, subsequent hearings on the adequacy of intelligence gathering prior to September 11, the current status of the Anthrax investigation, the justification for significantly expanding certain CIA programs, as well as a range of questions related to the effectiveness of the CIA have been kept from public review.

C. CONSEQUENCES OF GOVERNMENT SECRECY

One of the consequences of the expanded secrecy is clearly that public accountability is diminished. This has consequences both large and small. In the context of electronic surveillance undertaken pursuant to the new powers created by the USA PATRIOT Act, it means that targets of government searches who might previously have been notified that they were subject to government surveillance will not be so told.49 It


49. USA PATRIOT Act, Pub. L. No. 107-56, § 213, 115 Stat. at 285-86 (amending the U.S. Code to allow for delayed notification of the execution of a
means that public reporting of the use of surveillance authority by federal investigators will be less detailed and less useful than reports on similar activities in the past. And on large open questions, like who was responsible for the dissemination of deadly anthrax spores in the nation's capital in mid-October, the government can continue to make representations about the status of the case with little opportunity for the public to probe the government's claims because information associated with the investigation remains secret.\(^{50}\)

**IV. UNDERSTANDING PRIVACY AND SECRECY**

What we have witnessed since September 11 is both the diminishment of personal privacy and the expansion of government secrecy. Now this is a significant development that bears some exploration however we may feel about the specific steps taken in the wake of September 11. It is my aim at this point to look more closely at the interplay of these two trends and to see if the traditions in privacy law help us understand the transformation taking place since September 11. Should it surprise us that as personal privacy is diminished, government secrecy expands?

We can begin with the observation of some commentators that there is a tradeoff between privacy and transparency or privacy and openness. According to this view privacy stands in opposition to these values, and we may give up some privacy to gain greater public accountability.

The communitarian scholar Amitai Etzioni, for example, has argued that privacy must be balanced against competing interests.\(^{51}\) Since September 11 Etzioni has endorsed a number


\(^{51}\) See generally ETZIONI, supra note 33.
of proposals to expand surveillance, including adoption of a National ID card and new airport screening procedures.\textsuperscript{52} It is Etzioni's view that these measures will promote public safety and reduce the risk of future terrorist acts.\textsuperscript{53}

David Brin, author of \textit{The Transparent Society}, argued in similar fashion that privacy should give way to other social interests, particularly the need for greater openness and transparency that characterizes democratic society.\textsuperscript{54} Brin has also argued since September 11 for greater tracking and monitoring procedures.\textsuperscript{55}

Corporate leaders such as Scott McNealy and Larry Ellison have also argued that the interests of privacy must be traded against the interests of openness and both have argued since September 11 for the creation of a system of national identification.\textsuperscript{56} Ellison has specifically proposed that software and services developed by his company could provide the basis for greater information sharing across federal agencies.\textsuperscript{57}

In my view, none of these scholars, writers, or business leaders properly understands the relationship between privacy and secrecy. For privacy scholars and advocates, the relationship between privacy and transparency is well understood. It was expressed most famously, and a bit paradoxically, by the European scholar and early architect of data protection laws Jan Freese, who said, "We must protect privacy to enable the free flow of information."\textsuperscript{58} But whereas many have seen a sharp contrast between the U.S. privacy and the European privacy tradition, the similarities are significant, particularly in understanding the proper relationship between privacy and secrecy.

\textsuperscript{52} Amitai Etzioni, \textit{You'll love those national ID cards}, CHRISTIAN SCI. MONITOR, Jan. 14, 2002, at 11.
\textsuperscript{53} See id.
\textsuperscript{57} See Ellison, supra note 56.
I would like to turn now to the American tradition of seeking to protect both privacy while limiting government secrecy. It is my contention that this tradition, the one that sees privacy and openness as complimentary values, is most at risk after September 11. To make this point I will point to three critical historical references: the opinions of Justice Brandeis, the post-Watergate reforms of the U.S. Congress, and the establishment of the OECD Privacy Guidelines in 1980.

To understand the complimentary nature of privacy and openness, it is useful to look briefly of the legacy of the jurist most responsible for the legal right of privacy in America. Louis Brandeis is well known for the publication of the 1890 article on *The Right to Privacy*, which became the basis for the American privacy tort, and almost as well known for the 1928 dissenting opinion in *Olmstead v. United States*, in which he described privacy as "the most comprehensive of rights." But Brandeis is less well known, at least in many of the popular debates on privacy, for his views on the First Amendment and open government. It was Brandeis who said, "[s]unlight is said to be the best of disinfectants. . . ." It was Brandeis who, together with Justice Holmes, wrote opinions that challenged the World War I convictions for unpopular speech under the Seditious Act. In these opinions and others, Brandeis championed a view of the world in which both a secure private sphere could be protected in law and a robust public sphere of debate and

60. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
61. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY, AND HOW THE BANKERS USE IT 92 (1914) ("Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").
62. See Abrams v. United States, 250 U.S. 616, 626 (1919) (Holmes, J., dissenting and Brandeis, J., concurring in the dissent). Cf. Schaefer v. United States, 251 U.S. 466, 482 (1920) (Brandeis and Holmes, J.J., dissenting) ("The constitutional right of free speech has been declared to be the same in peace and in war."); Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

[The founding fathers] knew order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

Id.
democratic activity could be achieved.  

My second piece of historical evidence are the statutes enacted by Congress in the post-Watergate era that sought to protect the rights of citizens and to limit abuse by government, particularly in the context of new information technologies. In enacting both the Privacy Act of 1974 and adopting the amendments that same year which significantly strengthened the Freedom of Information Act, Congress sought to ensure that personal information collected and maintained by federal agencies would be properly protected while also seeking to ensure that public information in the possession of federal agencies would be widely available to the public. The complementary goals of safeguarding individual liberty and ensuring government accountability were enabled by legislation that protected privacy on the one hand and promoted government oversight on the other. To this day, the twin goals of limiting disclosure of personal information held by government agencies and enabling access to public information has been followed by nations around the world.

Finally, let us consider the OECD Privacy Guidelines of 1980, considered by many the most widely adopted articulation of privacy rights in the world. The OECD Guidelines clearly impose restrictions on the collection and use of personal information. Indeed, one of the critical contrasts between the OECD Guidelines and other less robust means for privacy pro-

63. See generally PHILIPPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM (1993); PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE (1984); cf. Intl News Serv. v. Associated Press, 248 U.S. 215, 263 (1918) (Brandeis, J., dissenting) (suggesting that, given the vast public interest in news stories, such information should not be copyrightable, because to do so would "effect an important extension of property rights and a corresponding curtailment of the free use of knowledge and of ideas.").


65. See PRIVACY LAW SOURCEBOOK, supra note 64, at 39, 60.


69. See OECD Privacy Guidelines, supra note 67.
tection, such as the FTC articulation of Fair Information Practices, is the failure to specifically include such concepts as "use limitation," "collection limitation," "disclosure limitation," or "secondary purposes."  

But it is equally clear that the other metric by which privacy policies often fail to match the standards set out by the OECD Guidelines is the absence of a corresponding requirements for transparency. The OECD Privacy Guidelines make clear that for privacy protection to be effective, transparency and access concerns are paramount. In many respects the OECD Guidelines mirror the goal set out in the 1973 report that gave way to the adoption of the Privacy Act in 1974, and that was to ensure that there were no secret databases in government tracking the lawful activities of citizens.

In outlining this argument that privacy and openness are complimentary values, I do not intend to deny that there are hard cases that may place these interests in conflict. This was clear in the Court's consideration of Bartnicki v. Vopper last term, in which the Court held that the First Amendment precluded liability under the federal wiretap statute for publication of information obtained by means of illegal wiretap where the publisher was not the person who had committed the unlawful interception. Although it is fair to note that there are competing free speech values for the participants in a conversation who wish to make use of new technology to exchange information that might not otherwise be disclosed absent the statutory protection, for those who wish to publish the contents

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71. "The right of individuals to access and challenge personal data is generally regarded as perhaps the most important privacy protection safeguard." PRIVACY LAW SOURCEBOOK, supra note 64, at 290 (citing OECD Privacy Guidelines).


73. Fla. Star v. B.J.F., 491 U.S. 524 (1989), which held a rape shield statute unconstitutional, is clearly one such case.

of the conversation, their right to publish conflicts directly with the privacy interests of the parties to the conversation.

There are similar clashes over access to court records in electronic form and the publication of private matters by the press.\textsuperscript{75} Even EPIC faced the difficult question of whether to proceed with a Freedom of Information Act lawsuit against the Department of Justice to determine the status of those who were detained after September 11.\textsuperscript{76} Clearly that case illuminates the concern that the disclosure of a person's detention could be stigmatizing and could create actual harm as to future employment and economic opportunity for the individuals whose status was disclosed. But it was also out of recognition that the privacy interests of the detainees could not become a proxy for the desire of government to maintain secrecy surrounding these possibly unlawful detentions that we at EPIC decided to go forward. It was and is our view that mechanisms could be created to enable disclosure of detainees' status that would minimize the privacy risk while maximizing the likelihood that some light would be shed as to the government's conduct.\textsuperscript{77}

More broadly, we might say about modern privacy law that the aim is to enable both personal privacy and government accountability in the use of new technology by limiting the collection and use of personal information where possible and by imposing disclosure and reporting requirements where such collection occurs. Privacy law has made clear the particular importance of this goal in the area of new technologies where systems of surveillance dramatically amplify state authority.\textsuperscript{78}


\textsuperscript{76} See EPIC, CNS v. DOJ, at http://www.epic.org/open_gov/foia/cnss_v_doj.html.

\textsuperscript{77} For example, in EPIC's 1993 litigation seeking the release under FOIA of Secret Service records pertaining to the search and seizure of 2600 employees, EPIC obtained signed statements from targets of investigation to go forward with the FOIA request for relevant records held by the Secret Service. See EPIC, 2600 Archive, at http://www.epic.org/security/hackers/2600/.

\textsuperscript{78} So much is made clear in the Congressional findings and statement of purpose for the Privacy Act of 1974:

(a) The Congress finds that—

(1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Fed-
But these hard cases typically arise where there is a specific matter in dispute, a specific claim before a court. They rarely speak prospectively, as statutes do, to the ordering of privacy claims and publication requirements. And most significantly, the disputes outlined above do not require the simultaneous diminishment of personal privacy and expansion of government secrecy.

Privacy is, as Professor Raymond Shih Ray Ku suggests in his article, about power. And privacy law is established to rec-

eral agencies;
(2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use or dissemination of personal information;
(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;
(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and
(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

(b) The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to—
(1) permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;
(2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;
(3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;
(4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;
(5) permit exemptions from the requirements with respect to records provided in this Act only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority; and
(6) be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act.

PRIVACY LAW SOURCEBOOK, supra note 64, at 40-41.

tify asymmetries in power and to protect the rights of individuals against institutions that are able to delve deeply into our private lives. Viewed in this light, the developments since September 11 should be seen as an expansion of state power and a consequential limitation on the freedom of individuals. The balance between the authority of the state and the rights of the individual has shifted. There has been no beneficial tradeoff between privacy and openness, as Etzioni, Brin, or Ellison have suggested. There has simply been greater exposure of private life and greater secrecy surrounding the actions of government.

WHAT ARE WE TO DO?

It might be tempting at this point to stop and congratulate ourselves for this important insight about the relationship between privacy and secrecy and the underlying purpose of privacy protection in law. Much of legal study is indeed the careful consideration of doctrine, an examination of key concepts, decisions, and statutes. But I would argue today that after September 11 we have a greater obligation than just the production of a descriptive model that is intellectually satisfying.

As law students, teachers, and advocates, we should build on our legal tradition, on our Constitutional democracy, and participate in the public debates that affect us not simply as experts in the field but also as citizens who will live with the consequences of action taken or not taken by the government that we have created. We should understand that in the battle to protect privacy lies also the struggle to maintain Constitutional democracy, to safeguard the rights of citizens, and to hold government accountable. Privacy remains today as fundamental a measure of democratic society as it was when democracy when born.

80. See supra notes 52, 55, 56 and accompanying text.

81. Just as our political life is free and open, so is our day-to-day life in our relations with each other. We do not get into a state with our next-door neighbour if he enjoys himself in his own way, nor do we give him the kind of black looks which, though they do no real harm, still do hurt people's feelings. We are free and tolerant in our private lives....

If there are to be proposals to establish new systems of public surveillance, then the legal community has an obligation to assess these developments and to determine their impact on current law and the rights of citizens.\footnote{For example, the American Bar Association created a new committee, the Cyberspace Committee Task Force, to examine the legal issues surrounding electronic surveillance, security, and privacy in the wake of September 11. The task force was developed to formulate guidelines in the face of "[t]he new frontier forged by the intersection of data protection, electronic communications and Cybercrimes, including CyberTerrorism, [which raise] novel business problems, particularly in light of new laws and standards related to the privacy of customer information." \textit{See} Press Release, New ABA Cyberspace Committee Task Force to Examine Legal Issues Surrounding Electronic Security \& Privacy (Jan. 30, 2002) (on file with author). In particular, the Task Force "will work to identify and interpret the ramifications of new laws, such as the anti-terrorism USA Patriot Act of 2001." \textit{Id.}}

In going forward with this effort, I would like to make three points. First, we should understand that the balance to be achieved here is not the one too often stated as between security and freedom. Benjamin Franklin rightly cautioned that those who would sacrifice "essential liberty for temporary security" will have neither liberty nor security.\footnote{\textit{See} \textsc{The Oxford Dictionary of Political Quotations} 141 (Anthony Jay ed., 1996).} The balance that must be achieved is between the authority created for government and the means of oversight to ensure that these new powers are not misused. This tradition is well established in law and it remains critical that every proposal put forward by Congress after September 11 explains how new state authority will be balanced by new means of oversight.

Second, we must avoid the risk of allowing the descriptive to collapse into the normative. By this I mean that we should not simply restate the observation that during times of national crisis, the authority of the government is necessarily expanded and the rights of the citizens are necessarily diminished. It is descriptively correct to say that Japanese Americans were interned during World War II. It is also normatively fair to say that the internment was wrong and should not have occurred. Those who cite the internment of the Japanese during the Second World War, the prosecution of pacifists during the First World War, and arguably even the suspension of habeas corpus during the Civil War in support of new restrictions on the rights of citizens should not go unchallenged. Many injustices occur in times of crisis, and the fact of prior injustice should not justify the commission of new injustice.
Most critically, we must oppose the fatalism that has captured the minds and hearts of too many Americans. We should reject the premise that after September 11 we can no longer afford the privacy or freedom that we previously enjoyed. The United States has survived world war, presidential assassination, domestic riots, and economic depression. We have had nuclear weapons targeted on the nation's capital by foreign adversaries for much of the twentieth century. But none of these developments has required a permanent sacrifice in the structure of liberty established by the Constitution or by law, or, specifically, a sacrifice of the individual's freedom to limit the oversight of government. To allow crisis, even of the magnitude of September 11, to necessarily diminish the rights of citizens or the responsibility of government is a path without end.

And that remains our challenge today, after the events of September 11, and that remains the special obligation of the legal profession and legal educators. Alexis de Tocqueville told us that in the American form of government, lawyers come forward when there are great challenges. We are at a similar point in history. We have a duty to safeguard privacy, to oppose secrecy, and to ensure the protection of constitutional freedom.


85. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 290 (Random House 1945) (1835).