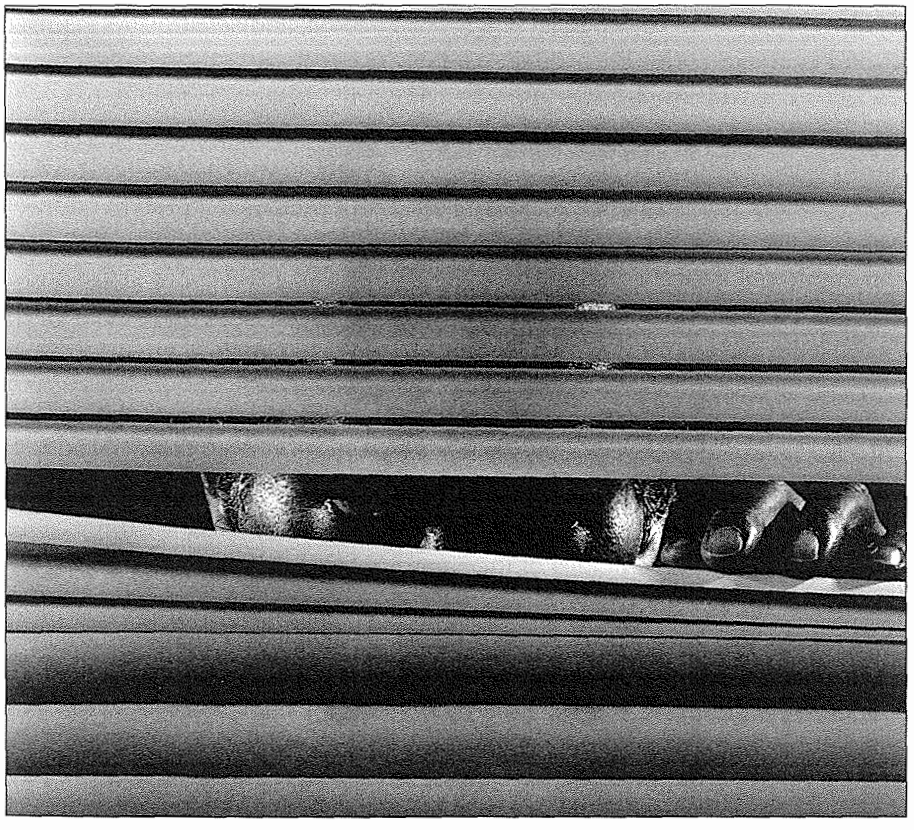
PRESERVING OUR PRIVACY

Technology's enchantments have a way of blinding us temporarily to their sometimes far-reaching social consequences. So it is that we are just beginning to confront the challenges that new information and genetic technologies pose to traditional notions of privacy—not just the right to be left alone but the right to determine how we will be known to the world. Yet we are not the pawns of technology. We have choices to make—and how we choose will shape our individual identities and define the future character of American society.



Jeffrey Rosen *on the meaning of privacy*
Phillip J. Longman *and* ***Shannon Brownlee*** *on the surprising implications of maintaining privacy in genetic testing*
Douglas Neal *and* ***Nicholas Morgan*** *on protecting privacy in a networked world*

Why Privacy Matters

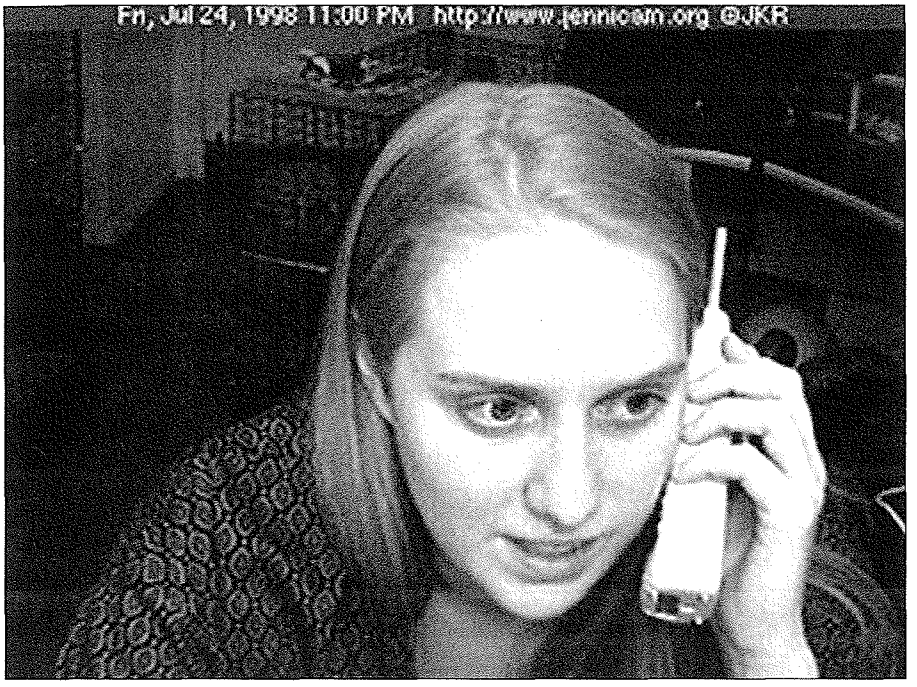
by Jeffrey Rosen

At the beginning of the 21st century, America is, more than ever, a culture of exhibitionism that also claims to be a culture concerned about privacy. Citizens cheerfully watch Big Brother TV, or set up Web cams in their bedrooms, even as they tell pollsters that privacy is one of the most important political issues facing the country today. The impulses toward exposure and concealment conflict with each other, obviously, but they also complement each other. "People worry about, and debate, ways to protect and preserve zones of intimacy and seclusion in a world with satellite eyes," as the legal historian Lawrence Friedman has observed. That debate—which often amounts to an alarmist muddle—has become a defining feature of life in what Friedman has called a horizontal society, in which identity is peculiarly open and authority is increasingly based on celebrity rather than on traditional notions of hierarchy.

In a horizontal society, being famous is a surer way of achieving status and authority than conforming to preordained social roles, and therefore the distinction between fame and infamy is elusive. Getting on television is itself a form of authority, regardless of whether one is there for behaving well or behaving badly. Those who exercise power in a horizontal society become celebrities, and celebrities, unlike the powerful in traditional societies, must surrender a great deal of their privacy. They must convey the impression of being accessible and familiar rather than remote and daunting, and they achieve this illusion by their willingness to share certain intimate details of their personal lives with faceless cameras.

A self-possessed private citizen has an inviolate personality, protected by boundaries of reserve that cannot be penetrated readily by strangers. A celebrity, by contrast, has an interactive personality: People feel free to approach a man like Sam Donaldson on the street. But the feelings of intimacy that celebrity generates are either misleading—we don't really know a television celebrity, even though he appears every night in our living room—or a sign of self-violation: When a celebrity leads so much of his life in public that nothing is held back for his genuine intimates, he becomes a buffoonish self-caricature, almost literally a talking head, devoid of the individuality, texture, and depth that characterize a genuinely self-possessed personality.

The culture of celebrity shows us the nature of the challenge to privacy that changes in law and technology are exacerbating at the dawn of the 21st century.



Twenty-four-year-old Jennifer Ringley hosts a round-the-clock Webcast from her apartment. "I don't feel I'm giving up my privacy," she says. "Just because people can see me doesn't mean it affects me—I'm still alone in my room, no matter what."

When we think we know Sam Donaldson, it is because we have confused information with knowledge—we have formed an idea about him on the strength of isolated pieces of information. In an age when thinking, writing, reading, and gossip increasingly take place online, and when all kinds of disaggregated personal information is widely recorded and permanently retrievable in cyberspace, private citizens run the risk of being treated like celebrities in the worst sense, defined by characteristics that have been wrenched out of context, or reduced to a set of inadequate data points.

If I buy a home in Washington, D.C., for example, the purchase price is recorded online, and if I teach at a state university, my salary, too, may be available. And if, in a moment of youthful enthusiasm, I once posted intemperate comments to an Internet newsgroup, those comments are likely to be recorded on a Web service such as Dejanews, where anyone can retrieve them years later simply by typing my name into a popular search engine. In certain social circles, it is not uncommon for prospective romantic partners to perform Internet background checks on each other, and it's not unheard of for former partners to post reports in cyberspace about each other's performance.

In the past, these bits of information were strictly the stuff of gossip, and its subjects enjoyed a certain protection from easy judgments. When intimate personal information circulates among a small group of people who know us well, its significance can be weighed against other things they know about us. But when information is separated from its original context and revealed to strangers, we are vulnerable to being misjudged on the

basis of our most embarrassing, and therefore most memorable, tastes and preferences. In a world where people are bombarded with information, they form impressions quickly, based on sound bites, and those impressions are likely to misrepresent our complicated and often contradictory characters.

Privacy protects us from being judged out of context in a world of short attention spans. Genuine knowledge of another person is the culmination of a slow process of mutual revelation. It requires the gradual setting aside of social masks and the incremental building of trust, which leads to the exchange of personal disclosures. It cannot be rushed, which is why, after intemperate self-revelation in the heat of passion, one may feel something close to self-betrayal. True knowledge of other people, in all their complexity, can be achieved with only a handful of intimate friends, lovers, or family members. To flourish, the intimate relationships on which true knowledge of others depends need time and private space—sanctuary from the gaze of the crowd, where mutual self-disclosure, measured and gradual, is possible.

In the vertical society of the 18th century, before the onset of modernity, notions of private property were a safeguard to privacy. If you wanted to read my diary, you had to break into my house, and if you broke into my house, I could sue you for trespass. The framers of the Fourth Amendment to the Constitution considered the search for a private diary without the permission of its author the paradigmatic example of an unconstitutional search. By the end of the 19th century, Louis D. Brandeis, the future Supreme Court justice, and Samuel D. Warren, his former law partner, worried that changes in technology as well as law were altering the nature of privacy. What had been seen as a physical threat now looked like a more insidious danger. "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life," they lamented in the most famous essay on privacy ever written. In that 1890 article they invoked the right to an "inviolate personality" to constrain the press.

But technological and legal change continued apace as the 20th century unfolded, eroding the protections for privacy to an extent that only became clear during President Bill Clinton's impeachment. The Supreme Court invoked a constitutional right to privacy in *Roe v. Wade* (1973), but the Court relied upon an amorphous vision of privacy—it was really a misnomer for the freedom to make intimate decisions about reproduction. Meanwhile, the Court neglected a more focused vision of privacy that has to do with our ability to control the conditions under which we make different aspects of ourselves accessible to others. Thus it was during the 1970s and 1980s that the long-standing principle that private diaries couldn't be subpoenaed as "mere evidence" in civil or white-collar criminal cases was quietly allowed to wither away.

And it was during the 1980s and 1990s that the Supreme Court's vague definition of sexual harassment (in addition to sexual extortion, the Court rec-

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ognized a more ambiguous category known as "hostile environment" harassment) paved the way for increased monitoring of private speech and conduct. The Lewinsky investigation showed just how completely the legal climate had been transformed. Monica Lewinsky's own fate revealed the personal price, and pointed up the central value of privacy that had been lost. "It was such a violation," she complained to her biographer, recalling the experience of having her bookstore receipts subpoenaed and drafts of love letters retrieved from her computer. "It seemed that everyone in America had rights except for Monica Lewinsky. I felt like I wasn't a citizen of this country anymore."

Much has been made of the fact that transactions in cyberspace tend to generate detailed electronic footprints that expose our tastes and preferences to the operators of Web sites, who can then sell the information to private marketers. But to the frustration of professional privacy advocates, Americans don't always seem terribly concerned about the commercial exploitation of clickstream data. It is personal misinterpretation, as Lewinsky's ordeal so forcibly reminded us, that is the deeper threat. What individuals want in an exhibitionist society is not the right to be left alone, but the right to control the conditions of their own exposure. And that is what the new technology, along with legal developments, is making so difficult.

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Defenders of transparency argue that more information, rather than less, is our best protection against misjudgment. We might think differently about a Charles Schwab employee who ordered *Memoirs of a Geisha* from Amazon.com if we knew that she also listened to the Doors and subscribed to *Popular Mechanics*. But even if we saw the logs of everything she had read and downloaded for a week, we would not come close to knowing who she really was. Instead, we would misjudge her in all sorts of new ways. If complete logs of every citizen's reading habits were available on the Internet, the limits of the average attention span would guarantee that no one's logs were read from beginning to end. Overwhelmed by information, citizens would click to a more interesting Web site. When attention spans are so short, privacy protects citizens from the misjudgments that can result from the exposure of both too much information and too little.

Defenders of transparency, however, question the social value of privacy. Richard Posner, the federal appeals court judge, argues that privacy can be inefficient and contribute to social fraud and misrepresentation, because it allows people to conceal true but embarrassing information about themselves

from other people in order to gain unfair social or economic advantage. Philosopher Richard Wasserstrom suggests that our insistence on leading dual lives—one public, the other private—can amount to a kind of deception and hypocrisy; if we were less embarrassed by sexual and other private activities that have traditionally been associated with shame, we would have less to fear from disclosure because we would have nothing to hide. David Brin argues in the same vein in *The Transparent Society* (1998), and quotes John Perry Barlow, former lyricist for the Grateful Dead, now an advocate on cyberspace issues: "I have no secrets myself, and I think that everybody would be a lot happier and safer if they just let everything be known. Then nobody could use anything against them."

These defenders of transparency are confusing secrecy with privacy. But secrecy is only a small dimension of privacy if privacy is defined as the ability to control the conditions under which personal information is disclosed to others. Even those who claim that society would be better off if people were less embarrassed about discussing their sexual activities in public manage to feel annoyed and invaded when they are solicited by telemarketers during dinner. Moreover, the defenders of transparency have adopted a view of human personality as essentially unitary and integrated. They see social masks as a way of misrepresenting the true self. But that view of personality is simplistic and misleading. Instead of behaving as a single character, people display different characters in different contexts. I may (and do) wear different public masks when interacting with my students, my close friends, my family, and my dry cleaner. Far from being inauthentic, each of those masks helps me to act in a manner that suits different social settings. If the masks were to be violently torn away, what would be exposed would not be my true self but the spectacle of a wounded and defenseless man, as the ordeal of Clarence Thomas shows.

THE HEIGHTENED SURVEILLANCE AND MONITORING THAT GOVERNMENT OFFICIALS EXPERIENCE ARE INCREASINGLY COMMON IN PRIVATE WORKPLACES.

If this "dramaturgical" view of character is correct, and if privacy is defined broadly as the ability to protect ourselves from being judged out of context, then there are clear political, social, and personal costs attached to the changes in the architecture of privacy. First, let's consider the political costs. The philosopher Judith Shklar gave a helpful example of the political value of privacy when she argued that, in a democracy, we don't need to know someone's title to avoid giving offense. The democratic honorifics *Mr.* and *Ms.* suggest that all citizens are entitled to equal respect, without revealing their rank or family background or pro-

Room in New York *(1932), by Edward Hopper*

fessional accomplishments. Democracy is a space where citizens and strangers can interact without putting all their cards on the table—and privacy allows citizens who disagree profoundly to debate matters of common concern without confronting their irreconcilable differences.

There are also social costs of privacy's erosion. The heightened surveillance and monitoring that government officials experience in the political sphere are increasingly common in private workplaces as well, with similarly inhibiting effects on creativity and even productivity. Several surveys of monitoring in the workplace have suggested that electronically monitored workers experience higher levels of depression, tension, and anxiety, and lower levels of productivity, than those who are not monitored. It makes sense that people behave differently when they fear their conversations may be monitored. As the philosopher Stanley Benn noted, the knowledge that you are being observed changes your consciousness of yourself and your surroundings; even if the topic of conversation is not inherently private, your opinions and actions suddenly become candidates for a third party's approval or contempt. Uncertain as to when electronic monitoring may take place, employees will be more guarded and less spontaneous, and the increased formality of conversation and e-mail makes communication less efficient. In certain occupations, moreover, individuals will exaggerate the risks of public exposure: How many ambitious lawyers and law professors have changed their e-mailing habits in anticipation of U.S. Senate confirmation hearings that may never materialize?

Finally, there are the personal costs of the erosion of privacy. Privacy is

important not only, or even primarily, to protect individual autonomy but also to allow individuals to form intimate relationships. In one of the most thoughtful essays on the subject, the Harvard University legal philosopher Charles Fried has written that, without a commitment to privacy, "respect, love, friendship, and trust" are "simply inconceivable." Friendship and romantic love can't be achieved without intimacy, and intimacy, in turn, depends on the selective and voluntary disclosure of personal information that we don't share with everyone else. In her story "The Other Two," Edith Wharton coolly describes a twice-divorced woman who finds herself serving tea to all three of her husbands at the same time. "She was 'as easy as an old shoe'—a shoe that too many feet had worn," Wharton writes. "Her elasticity was the result of tension in too many different directions. Alice Haskett—Alice Varick—Alice Waythorn—she had been each in turn, and had left hanging to each name a little of her privacy, a little of her personality, a little of the inmost self where the unknown god abides."

Properly shielded, friendships and loving relationships provide us with opportunities to share confidences and test ideas because we trust that our confidences won't be betrayed. ("A friend," said Emerson, "is someone before . . . [whom] I can think aloud.") To the degree that jokes, rough drafts, and written confidences can be wrenched out of context and subjected to public scrutiny, it is less likely that those confidences will be shared in the first place. Friendship, of course, will survive the new technologies of monitoring and surveillance. If I fear that my e-mail to my friends may be misinterpreted, I will take care to talk to my friends over the telephone or in person. But instead of behaving like citizens in totalitarian societies, and passively adjusting our behavior to the specter of surveillance, we should think more creatively about ways of preserving private spaces and sanctuaries in which intimate relationships can flourish.

There is also an important case for privacy that has to do with the development of human individuality. "Without privacy there is no individuality," Leontine Young noted in *Life among the Giants* (1966). "There are only types. Who can know what he thinks and feels if he never has the opportunity to be alone with his thoughts and feelings?" Studies of creativity show that the most creative thought takes place during periods of daydreaming and seclusion, when individuals allow ideas and impressions to run freely through their minds, in a process that can be impeded by the presence of others.

We are trained in this country to think of all concealment as a form of hypocrisy. But we are beginning to learn how much may be lost in a culture of transparency: the capacity for creativity and eccentricity, for the development of self and soul, for understanding, friendship, even love. There are dangers to pathological lying, but there are dangers as well to pathological truth telling. Privacy is a form of moral opacity, and opacity has its value. We need more shades and more blinds and more virtual curtains. Someday, perhaps, we will look back with nostalgia on a society that still believed opacity was possible—and was shocked to discover what happens when it is not. ❑

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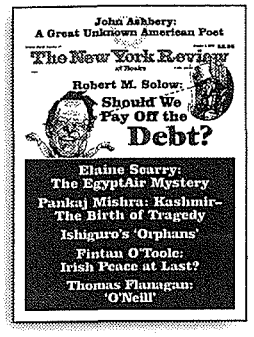

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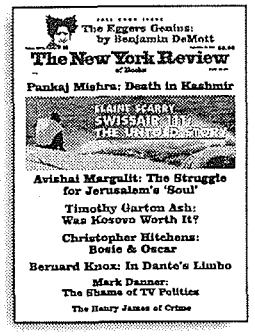

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