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LEGAL SCHOLARSHIP SYMPOSIUM: THE SCHOLARSHIP OF LAWRENCE M. FRIEDMAN

THE EYE THAT NEVER SLEEPS: PRIVACY AND LAW IN THE INTERNET ERA

Lawrence M. Friedman*

I. INTRODUCTION

In this talk, I want to discuss, in general, the influence of technology on the legal system; and, more specifically, its influence on privacy and related issues.

I hardly need to remind you that we live in an age of high technology. In this age of the computer, antibiotics, gene splicing, jet airplanes, digital cameras, kidney dialysis, and the contraceptives, it must be totally obvious to everybody how much a change in technology changes our world. And what changes our world, changes our law.

Legal systems, quite obviously, are not dead words on paper. A legal system is a living organism, a cluster of social actions and understandings. Rules, statutes, doctrines, are not the heart of the legal system. A law or a rule may or may not be important. Everything depends on its impact. A lot of what passes for legal research simply ignores this fact. But any serious effort to find out whether law works, or is important, has to pay attention to the effect of law in the real world.

I like to analyze impact in terms of what I call "legal culture." By legal culture, I mean the ideas, values, attitudes, and expectations that people have with regard to law and the legal system.¹ In this sense, everybody has a legal culture. Probably no two people have exactly the same legal culture. But undoubtedly there are patterns and tendencies that vary systematically. Similarly, all of us here on earth are utterly unique; but at the same time, we can be put into groups and classes and categories in a meaningful way. So, in general, we can assume that there are systematic differences between the legal culture of Americans on the whole, and Italians or Saudi Arabians, between teenagers and people who are over ninety years old, between Buddhists and

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1. Lawrence M. Friedman, *Legal Culture and Social Development*, 4 L. & Socy. Rev. 29 (1969).

Catholics, between men and women, and so on. There are surely differences between the legal culture of lawyers and that of certified public accountants; and among lawyers, between patent lawyers, labor lawyers, personal injury lawyers, and lawyers who make a living by defending gangsters.

Why is the concept of legal culture significant? For this reason: it is an obvious fact that social change leads to legal change. But exactly how does this happen? What, precisely, is the mechanism? An event or events occur: the attack on the World Trade Center, the United States Civil War, the AIDS epidemic, a dramatic rise in the stock market, or, conversely, a stock market crash. Or, some more fundamental type of change: industrialization, the decline of the extended family, the flight to the suburbs, the so-called sexual revolution. None of these events and none of these evolutions and revolutions mechanically and automatically bring about changes in laws, or in the working legal system. But they act as catalysts and agents of change. What happens is that they have an impact on legal culture. They bring about a change in the way people think, what they expect, how they look at the world. And changes in attitude in turn lead to changes in the pattern of demands on the legal system. The legal culture, in other words, is an intervening variable. It is a chemical agent, a factor that acts to convert social change into legal change.

When new science or new technology emerges, it creates a new situation. People begin to think differently; their attitudes, values, and expectations change. Perhaps new science and new technology does not impact everybody, and certainly not everybody in the same way, but sometimes (if the innovation is important enough) it has some impact on almost *everybody's* legal culture. To take one example out of many: in the nineteenth century, scientists discovered something amazing. They found out that certain tiny creatures, called bacteria, invisible to the naked eye, were the actual cause of some diseases that had plagued humanity for centuries. Once people understood this, it changed their way of looking at the world. They began to think and feel that something could actually be done about these diseases. This created demands for vaccines, sanitation, public health measures, cleaner water supplies, and so on. The discovery, in other words, changed the legal culture, changed the lines of force that were directed toward the legal system—and the system responded accordingly.

Consider also the automobile.² The automobile came into use around 1900.³ Eventually, it was within the reach of the whole middle class. People took to it eagerly. In 1910, dealers sold 181,000 cars; in 1920, almost two million; by 1970, there were 89,000,000 cars registered in the United States, and by 1990, 123,000,000.⁴ We had become an automotive society, with all the benefits and burdens of an automotive society. These benefits and burdens turned into wishes and demands and interests, and these in turn led to a whole new field of law: traffic law. Before the automobile, in the days of the horse and buggy, the rules of the road were few and simple and pretty unimportant. The modern traffic code is huge, and it has an impact on almost every one

2. For the following material, see Lawrence M. Friedman, *American Law in the Twentieth Century* 549-55 (Yale U. Press 2002).

3. *Id.* at 549.

4. *Id.*

of us, almost every day. License plates, drivers' licenses, drunk driving laws, mandatory automobile insurance, vehicular homicide, seatbelt laws, jaywalking laws, laws about car safety and pollution, highway laws—the list of legal reactions to the automobile is almost endless.⁵

The automobile also revolutionized and in a sense even created interstate crime.⁶ Bonnie and Clyde needed cars to race around robbing banks.⁷ The automobile was also a tremendous boost to organized crime; bank robberies and other heists would be difficult or impossible without “getaway cars.”⁸ The epidemic of bank robberies led, indirectly, to the creation of the FBI, and the nationalization of law enforcement.⁹

The economic importance of the automobile is hard to overestimate. Making cars is one of the great industries of the country. Consider, as well, the thousands of car salesmen, mechanics, and gas station operators. The millions of cars, trucks, and buses have an insatiable thirst for gasoline. Oil companies constitute, if anything, an even mightier industry than the auto industry. I hardly need mention the worldwide importance of oil, politically and economically. For most families—for almost every adult outside of a few large central cities—the automobile is an absolute necessity. It is also one of the most expensive things the average person owns. It is also a constant drain on the average person's time and money—for gas, repairs, insurance, and license taxes. Tort law feeds on the auto accident, its main source of claims and lawsuits—tens of thousands of claims every year, and a significant number of court cases as well. And more people die in auto accidents than from all but the most significant diseases.

Just as important, perhaps, has been the *indirect* impact of the automobile on society, on the legal culture, and on the operation of the legal system. The automobile has altered the lives of millions of people, in the United States and elsewhere in the world, in very basic ways. A person with a car can move about in ways that were unthinkable in the past. In Europe, a family can get up in Denmark in the morning and drive to Sweden or to Germany or to Belgium. A family can hop in the car in Chicago and visit Yellowstone National Park or the Everglades or Aunt Martha in Kansas City. The automobile makes it easy to live in the suburbs and drive to work in the city, or in other suburbs. It loosens the ties of extended families. Children drive off and never come back. Kids want their drivers' licenses as soon as possible—if they can get their license at sixteen, they have more chances at freedom from their families, and, unfortunately, more chances to get into trouble. At the same time, the automobile decreases cultural isolation: because people from everywhere are driving everywhere else, the constant influx and outgo helps bind the country together, culturally speaking.

The automobile is just one example of the way technology has reshaped the world. Every major innovation—or for that matter, every minor one—has left its imprint on society. There was hardly a more important discovery in the twentieth century than

5. *Id.* at 552-55.

6. *Id.* at 552.

7. Friedman, *supra* n. 2, at 552.

8. See Bryan Burrough, *Public Enemies: America's Greatest Crime Wave and the Birth of the FBI, 1933-34* (Penguin Press 2004).

9. Friedman, *supra* n. 2, at 552.

antibiotics. They too influenced the law: the Food and Drug Administration regulates them, they have been the subject of patent lawsuits, and so on. But they have had, perhaps, an even more important effect on the culture: on attitudes toward health, doctors, even toward life itself. Thanks in no small part to antibiotics, we routinely expect to be *cured* when we get sick. Many childhood diseases are history. Pneumonia no longer terrorizes the weak and the elderly to the extent it once did. People no longer think quite so much of life as a succession of unavoidable calamities. Expectations of health and long life, I would argue, affect many other things, including, perhaps, the law of torts, and even, perhaps, the development of the welfare state.¹⁰ But this is a topic for another time and place.

Many people have commented on what a difference the birth control pill and other methods of contraception have made on family life.¹¹ In a more indirect way, even such ordinary inventions as the washing machine and the stall shower have influenced family life and sexual behavior. People today are cleaner, and smell better than they used to. They also dress and undress more often. In the past, people, especially poor people, certainly did not change clothes every day. Many of them rarely undressed. Many people did not even undress when they had sex, except for the irreducible minimum amount.¹² After all, most poor people had very little space of their own, and very little privacy. Middle-class people today have more money, bigger houses, better sanitation; they have machines to clean their clothes and showers and tubs to clean their bodies. There is much less of a taboo on nudity—and when this taboo weakens, it affects, in turn, attitudes toward sex. These attitudes ultimately affect laws relating to sexual behavior; these in turn impact the law of the family. All modern Western societies have greatly relaxed laws against sexual behavior of all sorts between consenting adults.¹³ The laws against fornication and adultery are history. Of course, these social changes are deep and significant trends, which cannot be fobbed off on a single cause, especially if that single cause is the invention of the stall shower. But however you come to explain modern life and modern law, technology is bound to have a central place.

II. THE MASS MEDIA

Within the domain of new technology, with all due respect to the automobile, jet airplanes, and antibiotics, a special role has been played by the communication revolution. This has accomplished nothing less than the conquest of time and space. The first of these modern marvels were the telephone and the telegraph. The telegraph is now almost extinct, but the telephone marches on. Its latest incarnation is the ubiquitous cell phone, which makes it possible to talk anywhere—in the car, on the street, on a bicycle, in any room in the house or outside, any hour of the day and the night. Kids are

10. See Lawrence M. Friedman, *Total Justice* (Russell Sage Found. 1985).

11. See Andrea Tone, *Devices and Desires: A History of Contraceptives in America* (Farrar, Straus & Giroux 2001).

12. Alfred C. Kinsey et al., *Sexual Behavior in the Human Female* 365-66 (W.B. Saunders 1953). Many respectable people, according to Kinsey, did not have sex in the nude. *Id.* He claimed that a third of the women born before 1900 were “usually or always clothed” during intercourse. *Id.*

13. See Lawrence M. Friedman, *Private Lives: Families, Individuals, and the Law* (Harv. U. Press 2004).

particularly addicted to the cell phone; they scribble text messages to each other, take photographs with their phones, play games on them, and above all, talk, talk, talk. But business people are also addicted to the cell phone; together with the fax machine, email, and laptops, which are almost like an extra arm or leg, and which they carry with them everywhere, the cell phone keeps them in constant contact with their work life.

The popular press was the first example of what we now call the mass media. Cheap, accessible papers appeared in the nineteenth century. At the end of the nineteenth century, in the age of yellow journalism, the popular press had enormous influence. There were also magazines and periodicals—like the *National Police Gazette*, which was filled with lurid pictures of criminals and victims, and news about crime and criminals, and about boxers and other sports figures. Then came radio, and the movies; later, with incredible power, television; and finally and most recently, the Internet.

The impact of all these on society has been incalculable. They shape the very nature of interpersonal relationships. Television is in virtually every home; children watch it almost from the day they are born. Television brings ideas, images, and fashions from the outside world into the home; it neutralizes, to a certain extent, the power of the parents themselves. For families with computers, the Internet is another early and mighty rival of the parents—another threat to their control over what their children see, hear, and learn. The Internet might also just possibly turn the world of work upside-down—or perhaps shatter the workplace into a thousand distant screens.

Newsreels, television, and the Internet have also had a deep effect on politics. Candidates approach voters today mostly “through political ads on television”; political advertising “can make or break a candidate.”¹⁴ This is likely to become even truer in the future. In political life, image and personality have, to a frightening extent, replaced substance, policies, and ideologies; people vote for the nicer man, the better speaker, the one with more charisma, the better leader, and never mind what he stands for. Political figures have become celebrities; politics and entertainment seem to be converging, just as network news and entertainment have been converging.¹⁵ And if politicians have become celebrities, then why not turn celebrities into politicians? We have already had a movie star president and a movie star governor of California.¹⁶

The mass media have also become crucial instruments of cultural convergence. The conquest of time and space is also the conquest of regional differences, local customs and habits, and all sorts of pockets of peculiarity. Everything tends to be leveled out. Fashions, ideas, jokes, and anything else that can be put into words or pictures race about the world with incredible speed. Everyone is accessible to everyone else, or can be. For this reason, the mass media are the deadly enemies of small languages and little cultural enclaves. Local dialects shrivel and die.¹⁷ Isolated communities assimilate, and their special ways of life pass into the endless night of

14. *Lights, Camera, Campaign! Media, Politics, and Political Advertising* x (David A. Schultz ed., Peter Lang 2004) [hereinafter *Lights, Camera, Campaign!*].

15. See Lawrence M. Friedman, *Lexitainment: Legal Process as Theater*, 50 DePaul L. Rev. 539 (2000); see also David A. Schultz, *From Saxophones to Schwarzenegger: Entertainment Politics on Late-night Television*, in *Lights, Camera, Campaign!*, *supra* n. 14, at 215.

16. See e.g. *Lights, Camera, Campaign!*, *supra* n. 14, at 215, 220.

17. Lawrence M. Friedman, *The Horizontal Society* 123-24 (Yale U. Press 1999).

extinction.¹⁸ The whole country shows a tendency to homogenize. The same stores are in malls all over America. Anchorage, Alaska or Key West, Florida—it does not matter; there is a Starbucks and a McDonald's, and, probably, a Victoria's Secret. Actually, this is not just a national tendency; it is downright international.

Not only do the technologies let us send messages with incredible speed, the technologies themselves are spreading more and more rapidly. Almost everybody in the developed world has a television set, and the number of people who are connected to the Internet increases year by year. Even in the less developed countries, the middle and upper classes enjoy the tools and toys of modern society. Technological innovation itself seems to be racing ahead at breakneck speed.

III. PRIVACY AND ANONYMITY

There is so much that could be said about the impact of the new technologies. But I want to focus on two key issues of modern life. One is privacy, and the other, somewhat less well known, is what I like to call anonymity.

The word privacy has many overlapping and confusing meanings. Two of these are important for our purposes. They seem on the surface to be in conflict; but they harbor, in a sense, a deeper underlying affinity. The first meaning refers to a zone of action immune from outside knowledge. The second refers to a zone of action free from outside interference. The "privacy" or "right of privacy" that the United States Supreme Court talks about in its famous line of cases on contraception, abortion, and sodomy, is the second kind of privacy.¹⁹ The behavior discussed in these cases is not necessarily, or even usually, "private" in the sense of secret. It may be anything but. It is private, however, in the sense that private individuals get to choose for themselves—whether to carry a child for nine months, whether to have sex with this or that person, whether to use a condom or a birth control pill. These actions are also "private" in the sense that they involve relationships we think of as relationships of "intimacy."²⁰

People in modern societies value the right to choose, the right to make their own decisions, in as many aspects of life as possible, including those concerning sex and marriage, jobs, where to live, what religion to follow, and so on.²¹ Of course, there are severe limits on choice—some of which flow from customs, norms, or habits that most people take for granted or are not even aware of. But the zone of actual choice, for middle-class people at least, and in the developed societies, has expanded greatly. And a good deal of that expansion is phrased (legally speaking) in terms of "privacy."

Privacy is thus a matter people are constantly talking about, debating, and insisting on. Anonymity is another matter. We rarely stop to think, however, how much we depend not only on choice, but on anonymity. Imagine the following situation (not so

18. *Id.* at 118.

19. See David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (Macmillan 1994); John W. Johnson, *Griswold v. Connecticut: Birth Control and the Constitutional Right of Privacy* (U. Press Kan. 2005).

20. Julie C. Inness, *Privacy, Intimacy, and Isolation* 74-75 (Oxford U. Press 1992). An "act or activity" is intimate when it "draws its meaning and value from . . . love, liking, or care." *Id.*

21. I dealt with this issue in Lawrence M. Friedman, *The Republic of Choice: Law, Authority, and Culture* (Harv. U. Press 1990).

unrealistic): highways are monitored by radar and computers, so that every time—every single time—we drive faster than the speed limit, the computer catches us. It records our speed, it matches it immediately to the car we are driving, and imposes a swift, automatic fine. Such a regime would be, I suspect, intensely unpopular. Driving on the highway would no longer be anonymous; there would always be a watchful eye. Go one step further: imagine that there were cameras installed at the offices, stores, or factories where we work, so that any time we violated some rule or law, we would be instantly caught. People would, I think, find this intolerable. Even worse, imagine the cameras were installed in our homes. Notice that I am not assuming any change in the actual laws. If you were totally law-abiding, you would have nothing to fear. Most people, I imagine, would not meet this standard. But even if they could, they would resent the loss of anonymity. They would resent the fact that their private lives were no longer private. Here anonymity is plainly an adjunct of privacy. A person with a camera in the bedroom is neither private nor anonymous. A person sitting in a café full of people, none of whom she knows, is not in a “private” situation but is nonetheless anonymous, and this may be something she feels is important.

Anonymity is a value that is not often recognized or appreciated. Take the highway situation. If we asked people whether they approved of speeding laws, probably most would say that they do. Nevertheless, all of us violate these laws from time to time. We assume that there is some slack, some give in the system. We assume that enforcement is imperfect. We feel free, consciously or unconsciously, to deviate from the norms, so long as we do not deviate too much or too often. This “right” to deviate depends on anonymity: the fact that most of the time, nobody (or at least no police officer) is actually looking and that drivers of other cars, though they might see us, have no idea who we are, and do not care. But new technology can act as a threat to this cozy and convenient situation. I will return to this theme.

IV. PRIVACY: ITS FIRST INCARNATION

“Invasion of privacy” is a tort. Any discussion of this tort will start from the famous article by Samuel D. Warren and Louis D. Brandeis, *The Right of Privacy*, published in 1890.²² The authors were arguing for privacy in the original sense—immunity from outside knowledge. What stimulated Warren and Brandeis to write this article? One factor was a new invention, the Kodak or candid camera, which made it possible, for the first time, to take somebody’s picture without their permission or even without their knowledge.²³ This struck them as a terrible threat to privacy. But above all, these two distinguished gentlemen found the popular press shocking and excessive. Newspapers were going far beyond the bounds of decency. They were breaking down old standards. They were also breaking down barriers between the elites and the common person; they catered to an insatiable public lust for gossip about the rich and the famous. For Warren and Brandeis, recognizing a right to privacy would help keep a

22. 4 Harv. L. Rev. 193. Warren and Brandeis argued that the materials—the doctrines and concepts—for building up this right already existed in the tool chest of the common law. *Id.*

23. See Robert E. Mensel, “Kodakers Lying in Wait”: *Amateur Photography and the Right of Privacy in New York, 1885-1915*, 43 Am. Q. 24 (1991).

respectable distance between social classes; it would strengthen rules of propriety and traditional morality.

These barriers between classes were important to society, and elites, consciously or unconsciously, struggled to keep them strong and impermeable. Public propriety was important. This was one of the points of laws about obscenity and pornography and the stringent laws controlling sexual behavior. Adultery, for example, had historically been a crime. But in many states in the nineteenth century, the laws were refashioned to forbid, not simple adultery, but only “open and notorious” adultery. Adultery was a sin; but it was only an actual crime when a man and woman brazenly flouted the law, or flaunted their immoral behavior.²⁴

The obscenity laws, too, were concerned with standards and public behavior. Some of the material that was considered obscene would astound us today. In 1873, when Congress passed the so-called Comstock Law, it became illegal to send obscene material through the mails.²⁵ Under the Comstock Law, any material about contraception or abortion was obscene.²⁶ People who advocated “free love” could go to jail.²⁷ Free speech, apparently, was unable to trump free love. The Connecticut statute on obscenity, in the first part of the twentieth century, not only prohibited pornography, it also banned printed material which was “devoted to . . . criminal news, police reports or pictures, and stories of deeds of bloodshed, lust or crime.”²⁸ The Kentucky statute made it a crime to print material if its “principal characteristic” was to “depict by illustrations men and women influenced by alcoholic beverages, drugs or stimulants.”²⁹ As late as 1930, a Massachusetts court upheld the conviction of one Donald S. Friede for selling a copy of Theodore Dreiser’s book, *An American Tragedy*.³⁰ This book is, of course, a classic American novel, which nobody would blink at today. The court, however, found the book obscene.³¹ Some of its passages “had a manifest tendency to incite impure thoughts, excite the sexual passions, and corrupt the morals of youths into whose hands the book might come.”³² One might ask why it was wrong for a book to excite the sexual passions; after all, the human race could hardly go on if nobody excited these passions. But these had to be strictly private passions. They were not supposed to have any public exposure or recognition. Sex was a powerful, vital force, a force that could easily spin out of control and harm the very core of society. Society had to find ways to keep sex in its proper place.

This meant keeping sex under wraps. Sex was private. It was part of private life; it was not to be mentioned, discussed, seen, or heard about in public. It was exclusively for the private domain. And only one kind of private domain: the bedroom of married

24. Lawrence M. Friedman, *Crime and Punishment in American History* 130 (Basic Bks. 1993).

25. 17 Stat. 598 (1873).

26. Paul Starr, *The Creation of the Media: Political Origins of Modern Communications* 247 (Basic Bks. 2004).

27. *Id.*

28. Conn. Gen. Stat. § 6398 (1918).

29. Ky. Rev. Stat. § 436.130 (1946).

30. *Commonwealth v. Friede*, 171 N.E. 472 (Mass. 1930).

31. *Id.*

32. *Id.* at 473.

people. Sex, as it were, was supposed to stay hidden, in a dark, locked room; a room with the shades tightly drawn.³³ Moderation in all things was a highly valued public virtue.³⁴ Only through self-discipline, hard work, and morality could society preserve itself. For the sake of the individual soul, and the soul of society, the body had to remain under stern moral tutelage.

This was prudery, of course—Victorian prudery. Looking back, we think of it as impossibly narrow, as repressive and repressed, perhaps as hypocritical. But this kind of prudery served a social function. It created a zone of immunity. It drew a rigorous boundary between the private and the public domain. It guaranteed the anonymity of the private sphere. This had its pluses and its minuses. It preserved, for example, so much privacy and anonymity within the family, that husbands could (in practice) browbeat, oppress, or even beat their wives, and behave in ways that are completely unacceptable today.

Today, this refusal of the state to intervene is seen in a negative light—as one more instance where law served the interests of the powerful in society and within the family and left the powerless helpless and suppressed. No doubt this is true. But these social and legal arrangements also strongly affirmed values of privacy and anonymity. They were part of a coherent system of norms and values and a coherent hierarchical structure. In the last half of the twentieth century in particular, this structure went into decline, and large parts of it collapsed, like a building weakened by floods or earthquakes. But in the nineteenth century, and the early parts of the twentieth century, the structure was strong, dominant, and unassailable. It rested, too, on some core beliefs—implicit, perhaps—about what society needed to hold itself together. This included norms of privacy. Debate, and even discussion, of intimate relationships had to be kept out of sight and out of print. Above all, society had to protect, and quarantine, as it were, members of society who were most vulnerable. This meant children and young people, and also, to a large degree, ordinary people—workers, immigrants, the lower orders in general.

V. HOLLYWOOD

Social control over the making and showing of movies illustrates this point. Movies burst on the scene in the twentieth century like a bombshell. Within a few years, there were nickelodeons everywhere, in every city, and later in small towns as well. By 1907, there were well over one hundred nickelodeons in Chicago alone.³⁵ Movies were cheap and accessible. They appealed to the masses. They were visual, vivid, and powerful. A picture really is worth a thousand words, and a moving picture probably even more words than that. Respectable people—elite people—saw movies as a threat to traditional values.³⁶ The nickelodeon set off a kind of upper-class panic. One response

33. And with, perhaps, a minimum amount of actual exposure of human flesh. See generally *supra* n. 12.

34. Charles E. Rosenberg, *No Other Gods: On Science and American Social Thought* ch. 3 (Johns Hopkins U. Press 1976).

35. Raymond J. Haberski, Jr., *Reel Life, Real Censorship*, 29 *Chi. Hist.* 5, 7 (Fall 2000).

36. Steven Starker, *Evil Influences: Crusades Against the Mass Media* (Transaction Publishers 1989).

was a wave of censorship.³⁷ States and cities quickly set up censorship boards, to keep out unwholesome movies and to snip out and discard any unwholesome pieces in otherwise wholesome movies. Under a pioneer Chicago ordinance in 1907, no one could show a movie without a permit from the chief of police.³⁸ The Illinois Supreme Court upheld the ordinance.³⁹ Movie theaters, said the court, attracted people of “limited means”; the audiences included people “whose age, education and situation in life . . . entitle them to protection against the evil influence of obscene and immoral representations.”⁴⁰ In 1908, the Mayor of New York went so far as to shut down the city’s nickelodeons, and in 1909 the city established a Board of Censorship.⁴¹ Ohio also established a Board of Censors, which was supposed to approve only films of a “moral, educational or amusing and harmless character.”⁴² How many movies today could pass this kind of a test?

When we look back, we find the prudery of this period absolutely amazing. And the elitism as well. But the fears and the panic were not groundless. The movies, and the mass media in general, were indeed helping to break down boundaries. Hollywood was violating understandings of what was public and what was private; and this was seen—correctly—as a threat to a whole way of life. It helped dismantle systems of implicit control: systems that underlay nineteenth century understandings of what society needed to stay stable and orderly.

Movie censorship, official and unofficial, has had a complex history. The Supreme Court upheld censorship of movies in a 1915 case.⁴³ There were subjects, said the Court, which should not have “pictorial representation in public places and to all audiences.”⁴⁴ Censorship boards did not last, but they were replaced by a Production Code with voluntary controls, which made sure that movies never used dirty words, never showed nudity, never said anything favorable about crime, irreligion, or adultery, taught that crime never paid, and were, in short, as wholesome as possible.⁴⁵

In the second half of the century, however, the controls came to an end. Censorship of movies is gone, replaced by a rating system that simply warns parents not to let the kids see certain movies. The movies themselves are free to say and do almost anything. Censorship of dirty books is almost completely extinct. Pornography leers at people from every corner. There are limits. The daily newspapers are much franker than they used to be, but they are still fairly careful. And television—or at least network television—still labors under certain restrictions. There was an enormous hullabaloo

37. See generally Richard S. Randall, *Censorship of the Movies: The Social and Political Control of a Mass Medium* (U. Wis. Press 1968).

38. *Block v. City of Chicago*, 87 N.E. 1011 (Ill. 1909).

39. *Id.*

40. *Id.* at 1013.

41. Nancy J. Rosenbloom, *In Defense of the Moving Pictures: The People’s Institute, The National Board of Censorship and the Problem of Leisure in Urban America*, 33 *Am. Stud.* 41, 46-47 (Fall 1992).

42. Ohio Rev. Code Ann. § 871-49 (1926).

43. *Mut. Film Corp. v. Ohio Indus. Commn.*, 236 U.S. 230 (1915).

44. *Id.* at 242.

45. John Springhall, *Censoring Hollywood: Youth, Moral Panic and Crime/Gangster Movies of the 1930s*, 32 *J. Pop. Culture* 135, 142 (1998) Gangster movies were “poisoning the minds of the youth;” they were serving as a “kindergarten of crime.” *Id.*

(and a big fine) when a bit of a woman's breast was revealed on prime time television.⁴⁶ In a way, this seems odd, since hardcore pornography is readily available to anybody who wants it. What vestiges of censorship remain, justify themselves in ways that remind us of the justification for censoring movies and books. Now, however, the class to be protected, the class to be shielded at all costs from anything improper, pretty much consists exclusively of children.⁴⁷

VI. PRIVACY: THE CONSTITUTIONAL DIMENSION

Warren and Brandeis's idea of privacy reflected a genteel world, a Victorian world, not the raucous world of the modern media. Their dream of protection for privacy was never really realized. Some states recognized the right, but in many ways it never took hold, especially for celebrities and public figures. A new meaning for "privacy," the second and constitutional meaning, is now much more important.

The Supreme Court hammered out this new meaning of privacy in a line of cases that began, as is well known, with *Griswold v. Connecticut*,⁴⁸ in 1965. This case struck down a Connecticut law that basically outlawed contraception.⁴⁹ The Justices did not agree on why the law was unconstitutional; still, the majority felt that the United States Constitution did protect something that the Court called a "zone of privacy."⁵⁰ The line of cases went from there to the celebrated case of *Roe v. Wade*.⁵¹ In this (still controversial) case, the Supreme Court held that a woman had the constitutional right to choose to undergo an abortion, certainly in the early months of pregnancy.⁵² Most recently, in *Lawrence v. Texas*,⁵³ the Supreme Court added to this line of cases, by striking down all the surviving statutes that made homosexual sodomy or behavior a crime.

This constitutional right of privacy, in some ways, turns Warren and Brandeis on their heads. And it is the antithesis of the ideology of censorship. No longer are there restrictions on expressing "impure thoughts." Now everybody has a right to impure thoughts, a right, indeed, to sexual passions, and (as it were) to corrupt and immoral forms of behavior. The message is this: government may not interfere with whatever intimate, personal decisions consenting adults might make. Legally, most controls over sexuality, vice, gambling, and the like, have collapsed completely. Now, once again, the law creates and supports a private sphere, but this sphere does not depend, as it did in the

46. See Bill Carter & Richard Sandomir, *Halftime-Show Fallout Includes F.C.C. Inquiry*, 153 N.Y. Times D1 (Feb. 3, 2004).

47. Marjorie Heins, *Not in Front of the Children: "Indecency," Censorship, and the Innocence of Youth* (Farrar, Straus & Giroux 2001).

48. 381 U.S. 479 (1965). On the development, in general, of the privacy line of cases in the United States Supreme Court, see Garrow, *supra* n. 19.

49. *Griswold*, 381 U.S. 479.

50. *Id.* at 485.

51. 410 U.S. 113 (1973); see Garrow, *supra* n. 19; N. E. H. Hull & Peter Charles Hoffer, *Roe v. Wade: The Abortion Rights Controversy in American History* (U. Press Kan. 2001).

52. *Roe*, 410 U.S. 113.

53. 539 U.S. 558 (2003). In this case, the Supreme Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had, by a narrow five to four vote, refused to strike down a Georgia sodomy statute. *Lawrence*, 539 U.S. at 578-79.

Victorian period, on literal privacy, that is, the secrecy of the home, the closed doors, drawn shades, a privacy safeguarded and guaranteed by prudery, censorship, rigid customs, and long, unrevealing bathing suits. The new privacy does not have to be “private” at all. It can thumb its nose at convention. It can prance about and parade in public.

Clearly, this major shift in the law reflects a major shift in society. What has caused this is a complex question. Probably no one factor is responsible. But the role of the media is, I think, crucial. The media transmit, express, and disseminate the culture of permissiveness. They promote the idea that each of us is a unique individual, that we all have the right to go our own way, and do our own thing. They project and reinforce expressive individualism.⁵⁴ They also, at the same time, reflect the norms, images, and ideas of mass society, which they in turn helped to create. Caste and class lines have great practical effects on the way we live, but they have fewer and fewer ideological effects. The critics early in the century were, in a way, right about the impact of the movies. They were a danger to traditional values. Radio and television were even more dangerous. The Internet may be the final nail in the coffin.

For millions of people, the new order is exciting, liberating, and exhilarating. At the same time, most of us still value privacy and anonymity—we want the right to decide how much of these goods we should enjoy, and we do not want others to decide it for us. We are not hungry for our fifteen minutes (or more) of fame. And we definitely do not want our bodies, souls, medical records, and bank accounts thrown open to the world.

The new media, and the new technology, are both opportunities and dangers. A small minority, however, see only the magnificent opportunity, not the danger. Privacy and anonymity are not their values. They love the fact that the media have opened the door for people who want to go public, whose “privacy rights” really mean the right not to be private—the right to be public, to display themselves, so to speak, to the entire world (or to so much of the world as is interested). These are people who crave notoriety. They have a hunger for the limelight; they want their names in the paper or, better yet, their faces on television. For quite some time, there have been programs in which ordinary people are the stars, or at least the center of attention. It began, perhaps, with harmless quiz shows, or game shows, or programs like *Queen for a Day*.⁵⁵ From here, the path led downward to the so-called “trash talk shows,” programs on which people discuss the most intimate details of their sordid lives before a studio audience and a television audience of millions. The more shocking their revelations, the more the viewers love it.

There are dozens of these programs, and some of them have been extremely popular. The people that appear on them are an incredible array of exhibitionists—a stream of transvestites, sexual athletes, incestuous uncles, lustful baby-sitters, adulterers

54. Expressive individualism is defined as a form of individualism which “holds that each person has a unique core of feeling and intuition that should unfold or be expressed.” Robert N. Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life* 333-34 (U. Cal. Press 1985).

55. This program began on radio in 1945, then shifted to television in 1950; it lasted until 1964. Maxene Fabe, *TV Game Shows* 176 (Doubleday & Co. 1979). Five women would appear and tell their tales of woe; the audience voted, and the applause meter would decide who was to become *Queen for a Day* and get a pile of loot. *Id.* at 174-76.

of every stripe, serial philanderers, seducers of the innocent, “transsexual call girls . . . gay twins . . . hermaphrodites, boys who want to be girls, female-to-male transsexuals,” and so on.⁵⁶ There is a certain amount of exhibitionism, too, in the hapless, dim-witted litigants who appear on Judge Judy’s show, and in the other imitation courtrooms. They seem willing, even eager, to tell their stories, to make their complaints before a massive audience and to listen to other people berate them and accuse them of this or that failure or misdeed. Meanwhile, the judge herself rails and squawks and carries on. One has to mention, too, the explosion of “reality television.” These shows—*Survivor*, *Big Brother*, and the like—are not really about reality. But they use real people, instead of professional actors. These programs attract big audiences, and are extremely cheap to produce.

Reality television is not just an American disease. Many countries have their own version of *Big Brother*, a show in which a group of people live in a rented house, relentlessly spied on by cameras. In the United Kingdom, “[f]ive thousand people sent videos of themselves to the . . . production team,” hoping to get on the show.⁵⁷ The prize money was “modest”; the real lure was the thrill of being “watched by 37 cameras for nine weeks, to be seen 24 hours a day on the Big Brother website,”⁵⁸ and some twenty-one hours a day on television. The appetite for reality shows seems worldwide: in Norway, in 2003, there was *The Senior Club*, twelve people over sixty-two years of age, shut in a house together, watched by hidden cameras; in Germany, there was a show in which contestants were “holed up in a haunted Transylvanian castle”⁵⁹ in Dracula country.

The Internet only intensifies the process and presents more opportunities for self-promotion. Now it is no longer necessary to find a producer and a sponsor to get on a reality show. You can become a star all by yourself. In the late 1990s, Jennifer Ringley, a young woman who lived in Washington, D.C., began to live her life under the eye of the camera. Everybody who had a computer and access to the Internet now could watch Jennifer live her life in front of cameras; they could see her get dressed, sleep, eat, and so on.⁶⁰ She started a trend. “[P]aying customers” in Tampa, Florida, in 2001, could get a “24-hour look at the lives of four college-age residents,”⁶¹ thanks to four Internet cameras positioned inside their house. Dozens of “amateurs” send pictures of themselves to pornographic Web sites. A somewhat more wholesome use of the Web was the wedding of Larissa Lindsay and Stuart Bailey in the Viva Las Vegas Wedding Chapel in 2004; the groom wore a “1970s powder-blue tuxedo with bell-bottom pants

56. Joshua Gamson, *Freaks Talk Back 5* (U. Chi. Press 1998).

57. Germaine Greer, *Watch with Brother*, *The Observer* (London, England), <http://observer.guardian.co.uk/review/story/0,6903,511493,00.html> (June 24, 2001).

58. *Id.*

59. John Plunkett, *Media: Global Appetite for Reality Bites*, *The Observer* (London, England) 6 (June 1, 2003).

60. In the very successful American movie, *The Truman Show* (Paramount Pictures 1998), young Truman Burbank has lived his whole life under the eye of television cameras. His whole world is a sham. The people he meets are actors; but he is the only person who does not know this, and does not know a huge audience is out there watching his every move. In the end, Truman breaks through to the “real world.” The story is a fantasy, of course, but it is also possible—or soon will be—to observe other people’s lives in this way.

61. Brenna R. Kelly, *3 Neighbors Protest Tampa Voyeur Web Site*, *Tampa Tribune* 2 (Mar. 12, 2001).

and a ruffled shirt”⁶²—which he bought on eBay. Anybody could watch this webcast wedding, which cost the family a mere six hundred dollars (basically a bargain).⁶³

The people on these programs, and those who install cameras in their houses, are, after all, volunteers. In some cases, these programs may have some sort of social function—as Joshua Gamson has argued, the trash talk shows give a voice and a platform to sexual minorities, though often by exaggerating their deviance, and showing them as weird and out of touch.⁶⁴ Most people, of course, have no desire to be characters on a reality show, or on television in general. They can choose to stay private. Or can they? Not always. People sometimes become public figures against their will: by winning the lottery, or, conversely, as victims or witnesses to some awful crime. And all of us are already on television—not network television, but on closed-circuit cameras in banks, stores, office buildings and the like, or when we draw money out of an ATM machine. We hardly notice this any more. For most of us, all this has little or no consequence. Nor do we mind going through metal detectors in courthouses, or in other public buildings. We submit to pat-downs, x-ray machines, and random searches through our luggage at airports. All of this seems, for now, acceptable—part of the price we have to pay (we think) for life in an endangered society.

We assume that it costs money to take our picture when we cash a check or buy groceries, and that nobody wants to keep these images on file. Personally, we have no ambition to be shoplifters or bank-robbers. We assume that after a while, the pictures are wiped out. But are they? We are on the edge of a world where governments and large institutions can compile incredible amounts of data—data about everybody and everything—and store this data (in infinite amounts) for indefinite periods, perhaps forever, and can cross-list, cross-reference, and access any of the data by pushing a button or two. Storage and searching through databases costs virtually nothing. In this new world, perhaps, every word we utter and every thing we do can be recorded.⁶⁵

There is danger, too, from tiny hidden cameras and sneaky computers. The possibilities are chilling. Government, of course, is one danger—the FBI, the CIA, and “homeland security” in general. But if the technology gets easy enough and cheap enough, anybody can become a little CIA. In a startling California case from 1998, a woman named Ruth Shulman was badly injured in a car accident.⁶⁶ A rescue helicopter flew her to a hospital.⁶⁷ The flight nurse wore a tiny microphone that recorded what Ruth was saying—her suffering voice, which expressed, at one point, a wish to die.⁶⁸ Later, the whole world heard this conversation on television.⁶⁹ Shulman sued for

62. Salatheia Bryant, *Couple to Wed on Web*, Houston Chronicle B1 (Aug. 2, 2004).

63. *Id.*

64. Gamson, *supra* n. 56, at 224-25.

65. Ironically, there are those who worry about the opposite problem: whether changes in hardware and software will make it impossible to read or retrieve data collected and stored. See Katie Hafner, *Digital Memories, Piling Up, May Prove Fleeting*, 154 N.Y. Times A1 (Nov. 10, 2004).

66. *Shulman v. Group W Productions*, 955 P.2d 469, 475 (Cal. 1998).

67. *Id.* at 476.

68. *Id.* at 475-76.

69. *Id.* at 476.

damages and won her case.⁷⁰ Although the accident was a matter of public concern, the court clearly recoiled at the intrusion, the callous invasion of her privacy.⁷¹ A secret microphone recording a woman's agony—this was simply too much.

But how much eavesdropping is too much? Whenever we order airline tickets or buy products on the phone, a voice tells us that the calls are monitored (for quality control, supposedly, or for our own benefit).⁷² Some companies snoop on the e-mail that their workers send and receive, or examine their computer files and listen to their phone calls. Nearly two-thirds of the companies in one survey “engaged in some form of electronic surveillance in the workplace.”⁷³ As we said, it is not only the big boys that threaten privacy. Cell phones (which are everywhere) have morphed into cameras. This opens up some disturbing possibilities. People have been known to sneak their little cameras into toilets and locker rooms. A high school student in Connecticut, in 1998, used his hidden camera to videotape girls changing into swimsuits at two pool parties.⁷⁴ One Stephen Glover, of Monroe, Louisiana, put tiny cameras in the attic of his neighbor's house to spy on a married woman and her family.⁷⁵ For six months, he videotaped them secretly.⁷⁶ He was caught, charged, and fined.⁷⁷ In the same year, a nineteen-year-old male got in trouble with the law for using his hidden camera to take pictures under women's dresses in a department store.⁷⁸

Of course, there is the hope that counter-technology will find ways to protect us from these hidden invaders. We can, and do, make people like Glover criminally liable. But are laws of this sort effective? And how can we make sure that big institutions, and big governments, obey the rules? How much anonymity will really be left, say, twenty years from now? Technology gave us space, leeway, mobility, opportunity, ways to hide and be unknown. Will it take all of this away? Our sense of freedom, our civil liberties, have always rested on certain assumptions—not only assumptions about the law, but assumptions about what government and big institutions could do, assumptions about what was technologically feasible. A person's home was a castle not only because there were laws about searches and seizures, but also because once the doors were closed and the shades were drawn, we were secure, private, and beyond probing outside eyes.

The home, in other words, was a haven of privacy. Most public spaces were also havens of anonymity. People valued what I like to call “the right to evanescence.” By this, I mean the right to bury the past. Every day, we do all sorts of things: talk, write notes, make phone calls, send messages, drive cars, visit people, go shopping, make love, go to work, watch television, and take a nap. But we expect our words, notes, messages,

70. *Id.* at 497.

71. *Shulman*, 955 P.2d at 497.

72. See Ken Belson, *Your Call (and Rants on Hold) Will Be Monitored*, 154 N.Y. Times A1 (Jan. 11, 2005).

73. Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* 57 (Random House 2000).

74. Clay Calvert, *Voyeur Nation: Media, Privacy, and Peering in Modern Culture* 199 (Westview Press 2000).

75. *Id.* at 198-99.

76. *Id.*

77. *Id.*

78. *Id.* at 201.

and behaviors to be gone with the wind. We never expect to leave a paper or electronic trail. Nor do we want to. Yet the new technology has the power to destroy all this. It threatens our right to evanescence.

A lot of people found it repulsive that the United States government, under the Patriot Act,⁷⁹ and in the name of fighting terror, assumed the power to rummage about in our lives, figure out what books we took out of the library, and perhaps even track our movements. People are also doing more and more business on the Internet—buying airline tickets, books, groceries, and reserving hotel rooms. Hence more and more of the simple things people do every day get recorded, noted, and perhaps stored in some kind of giant cyber-warehouse. There the data sits, maybe forever.

What does this do to our sense of personal privacy? Or our sense of anonymity? In traditional societies, there was little or no privacy; whole families shared space in some hut or cottage, perhaps along with the chickens and pigs. For millions of people in modern societies, there was enough room and money and facilities for a good measure of both privacy and anonymity. But now big brother may be truly watching us. A report in September, 2004, informed us that Chicago was about to adopt a “highly advanced system of video surveillance.”⁸⁰ This, said the Mayor, would make people “much safer.”⁸¹ London had used such a system at a time when there was widespread fear of “Irish terrorists”; another model was the system used in Las Vegas casinos.⁸² Anyone “walking in public,” said the Mayor, “is liable to be almost constantly watched.”⁸³ One wonders how many of the good people of Chicago found this idea more unsettling than comforting.

The Chicago story encapsulates a dilemma of our times. The public of course is eager to fight terrorism. People want to feel secure. They want to win the war on crime. They also like the convenience of the new technology. In most ways, they like the fact that data can be stored and cross-referenced. It is a useful thing if your doctor can bring up on the computer the results of old blood tests, or follow, over the years, your cholesterol level. It is nice to be able to find out, in a few seconds on the Internet, who won the Nobel Peace Prize in 1926, or the population of Bhutan, or the weather forecast for Rio de Janeiro. So much information, and so many images, are at our fingertips. I have already mentioned the convenience of shopping on the Internet. All it takes is some simple information about our credit cards. But then that information, and a lot of personal data, is noted and stored. It may go into hibernation, but it does not die.

We have come to expect, and to value, an amazing amount of access to information. We expect, in the long run, to have absolutely everything online. This fact leads us to expect other kinds of access—especially access to events and personalities on the big stage of the world. We expect footage of every flood or earthquake; we expect to watch every major event in sports, politics, and international affairs. And, very

79. Pub. L. No. 107-56, 115 Stat. 272 (2001).

80. Stephen Kinzer, *Chicago Moving to 'Smart' Surveillance Cameras*, 154 N.Y. Times A18 (Sept. 21, 2004).

81. *Id.*

82. *Id.*

83. *Id.*

significantly, we expect our political leaders to be visible, available, to give press conferences, and to make their lives an open book.

We expect political leaders, in short, to be celebrities. That is, we expect them to be familiar, to be available for scrutiny. This is the legal culture of the modern world. Modern politics is the politics of television, and political life has become a television show. Image is everything. A successful politician has to have charisma. Or, if not charisma, at least charm and an ability to communicate. Those who are “wooden” or have no personality also have no political future. The candidates barnstorm; they race up and down, from state to state, campaigning. But what matters is that they appear on television every day so that we can see, hear, and assess them. A candidate who fails on television, who projects the wrong image, is politically dead.

Thus politics itself becomes a kind of reality show. The voters are the audience. Candidates act as the stars of the show. And politics blurs with entertainment. Political rallies and conventions are an incredible *mélange* of colors and images: hoopla, balloons, banners, cheering sections, and brass bands, as if politics was some kind of gigantic birthday party, or, perhaps, a kind of high school football game. The candidates are also, of course, competitors. They slug away in their speeches, ads, and press conferences. On election day, the audience chooses winners and losers, in a political game of *Survivor*. Whether all this is healthy for a democratic society, whether it makes for honest and serious debate over important issues, is another question. What is clear is that technology—the technology of the media—has transformed political life, and with it, the life of society.

How can we protect body and soul in the age of the Internet and the age of television? The answer is not obvious. Technology liberates and confines; it creates and it destroys. It brings us marvelous gifts, but it is dangerous and powerful as well. What the new world of technology means for a free society is not yet clear. A free society, after all, does not rest on formal laws—documents, constitutions, and codes. These are, of course, important. But a constitution is only a vessel, a conduit. What matters is the constitutional system: the living law. Ultimately, the health of society depends on practices and understandings, on norms, habits, and traditions.

Legal culture is never static. It changes with the times. Yesterday is already history. Yesterday leaves its traces behind, but today and tomorrow are what really count. Technology has changed our society, and continues to change it. Where the road is taking us, is something beyond our feeble powers to predict.

