

Chapter 39

The Right to Privacy Is Dying: Technology Is Killing It and We Are Letting It Happen

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ABSTRACT

This chapter explores privacy in American jurisprudence from its inception until the present day. This examination starts with the first challenge of defining privacy. The second section examines the body of research on the importance of privacy. The third section focuses on privacy in American jurisprudence from its inception to its current state. This examination will include analysis of specific cases where technology has advanced and privacy has retreated. The purpose of this examination is to elucidate how current privacy doctrine no longer represents either the original intent nor the wishes of the citizens. The final section examines different paths the U.S. can take at this important point in privacy jurisprudence.

INTRODUCTION

Privacy is at the very core of a democratic society. It permits people to decide what personal information they share, to whom, and when. Privacy is so important that without it other fundamental rights are in jeopardy. The importance of privacy is not unique to a single nation; privacy is of global concern. However, each society differs greatly in how it chooses to balance privacy with other important considerations such as security. As a result, legal protections differ greatly between nations and should reflect the values of each individual nation. For this reason, this chapter will focus exclusively on privacy in the United States.

Because of the importance of privacy, the Supreme Court has declared it a fundamental right subject to the highest legal protections (*Griswold v Connecticut*, 1965). Research confirms that people in the United States consistently rank privacy as one of their most important constitutional rights (Best, Krueger & Ladewig, 2006). The importance of privacy has continued undiminished and this year the Pew Research Center confirmed that the vast majority of adults believe that privacy is important. “93%

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of adults say that being in control of *who* can get information about them is important...[and that] 90% say that controlling *what* information is collected about them is important” (Madden & Rainie, 2015).

Despite the importance of privacy, a technology CEO famously declared it “dead.” In 1999 Scott McNealy, CEO and founder of Sun Microsystems declared “[y]ou have zero privacy anyway. Get over it” (McNealy, 1999). It is no surprise that a technology CEO made this declaration since technology has permitted the government to erode the right to privacy. The exponential advance of technology makes the impossible of the past commonplace today. With these advances come dramatic changes in society. Advancements in technology are neither good nor bad for society. The problem lies with the government and how it permits technology to be used. Technology is a double-edged sword in relationship to society. In some cases, it provides amazing benefits while in others it allows a severe erosion of rights.

On the one hand, technology has offered amazing tools that help rights and democracy to flourish. For example, communication technology has facilitated the near free exchange of information and connects people in ways previously inconceivable. Technology now gives people around the world wide and nearly unfettered access to opinions and ideas that was previously impossible (Edwards & Santos, 2014). Technology such as cryptography also has made it possible for people to protect information and communications.

On the other hand, technology has a darker side. It has provided tools that allow the government to erode rights. For example, technological innovation has also made it possible for surveillance to an extent unfathomable at the time of the drafting of the Constitution and the Bill of Rights.

These advances in technology are not new, but technology is advancing at an exponential rate. In 1965 Intel co-founder Gordon Moore observed and theorized that that number of transistors on integrated circuits double every two years and will continue to do so. He remains correct. This exponential rate of advancement helps fuel the rapid advance in technological achievements. This increasing pace of technical advancement occurs in other fields as well. Take for example flight. In only 66 years, humans went from the first flight to landing on the moon (Aldrin, 2013, p.31). The achievements did not stop there. In only 45 years from the first landing on humans on the moon, researchers have now sent and landed a probe 4 billion miles to a comet traveling at 11,000 mph (European Space Agency, 2015).

Technology has helped the governments prevent, deter, and catch wrongdoers but it also has facilitated the erosion of the right to privacy for everyone. Preventing and punishing crime is important but so are fundamental rights such as privacy. Technology provides new tools that when used inappropriately can infringe upon fundamental rights. It is the Constitution and the government, especially the judicial branch, which must be vigilant in preventing the use of technology from infringing upon fundamental rights. Often catalyzing events give rise to substantial changes in policy. Terrorist attacks are the type of events that often lead to policy responses that risk infringing upon rights. The Oklahoma City bombing in 1995 was one such catalyzing event that caused some to call out for caution, “[o]ur response to terrorism should be carefully measured. If our First Amendment rights suffer as a result of the awful domestic terrorist attack....the terrorists have indeed, won” (Ocala Star-Banner, 1995, p. 4B). We have not heeded this warning.

While technology continues to advance at an exponential rate, the law has failed to. The result has been an erosion of the right to privacy. Along with advancements in technology, privacy has retreated so that the current right to privacy is a mere shadow of what the drafters intended. It is this disconnect between the importance of privacy and its shrinking legal protections that calls out for legal reform. Society has two choices: accept the death of privacy or force the law to change. Change can occur through either the courts or the legislature. Both paths present significant challenges. An amendment

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