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American Privacy: Diffusion and Institutionalization of an Emerging Political Logic, 1870-1930

Author
Eiermann, Martin

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American Privacy:
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By

Martin Eiermann

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Committee in charge:

Professor Mara Loveman, Chair
Professor Marion Fourcade
Professor Christopher Muller
Professor Dennis Feehan

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Abstract

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It is tempting to treat privacy either as an anti-social idea that separates people from social life — thus placing it towards the fringe of sociological scholarship — or as a historical anachronism that can scarcely survive in the computational age. In this dissertation, I develop an alternative perspective that firmly anchors the study of privacy in the sociological tradition and historicizes the emergence of privacy as a salient political logic in the United States.

Focusing on the decades around the turn of the twentieth century, I use the tools of historical sociology and computational social science to investigate the gradual diffusion and uneven institutionalization of the logic of privacy, and I identify the consequences and socio-historical significance of this transformation for the organization of American society and the exercise of informational power. I develop my argument based on a multi-method analysis that combines two years of research in federal, state, and municipal archives with the analysis of census micro-data and digitized government records, a computational study of historical text, and a social network analysis of legal citation patterns.

An initial theoretical chapter lays the conceptual groundwork by distinguishing the dichotomization of public and private from the historically contingent constitution of privacy; and it outlines three sociological anchors of my argument: To study privacy as an emerging political logic suggests an analytical focus on episodes of contestation, on the practices of institutions and institutional actors, and on the entanglement of privacy and informational power with moralized, gendered, and racialized conceptions of the social order. Four empirical chapters then analyze the diffusion and institutionalization of privacy in empirically distinct theaters of world-making, focusing respectively on U.S. public discourse, urban reform movements and municipal legislation during the Progressive Era, American jurisprudence about the "right to privacy", and privacy governance within the expanding bureaucratic state.

I show (1) that the language of privacy carried a relatively stable meaning but gradually diffused into new domains of public discourse as it was applied to emerging social problems and invoked to comprehend and contest new technologies; (2) that tenement reform advocates incorporated demands for privacy into their political agenda and exploited local political opportunity structures to prevail in legislative battles, encoding a distinctly middle-class conception of familial privacy in tenement regulation and in the urban architecture of working-class neighborhoods; (3) that the right to privacy first gained a foothold in U.S. jurisprudence as an attempt to reign in the collection of personal information by non-state actors, but that it was ultimately consecrated by federal courts as a state-centric and constitutionally-grounded right after two decades of intra-judicial interpretive struggles over legal meaning and precedent; and (4) that the many-handed American state relied on a complex patchwork of exceptions to make the exercise of informational power compatible with expectations of — and institutional commitments to — privacy, thereby producing an uneven landscape of legibility that left some types of information and some populations uniquely exposed to the official gaze. As I show in the conclusion, legal codification and organizational path dependencies have allowed some of these historical changes to cast a shadow into the present day.

Each chapter yields historically bounded and empirically grounded conclusions about the diffusion and institutionalization of privacy as a political logic that remain attuned to the exigencies of specific situations and institutional circumstance. Collectively, they draw attention to the years between 1870 and 1930 as a period of transformative change that elevated the salience and social significance of privacy within the institutional infrastructure of American society. They document processes of institutionalization that settled struggles in the political domain and insulated political priorities against recurring challenges; they demonstrate the encoding of moral imaginaries and political ideologies in the language of spatial and informational privacy; they identify the routine use of exceptions as a central feature of bureaucratic rule and an important dimension of the uneven development of the so-called "new American state"; and they draw attention to the partial and selective application of privacy to a diverse populace.

This has several larger implications for the study of privacy and informational power. First, I add to an evolving sociological literature that has begun to reclaim privacy from legal historians and moral philosophers, treating it as a proper object of sociological inquiry and linking it to long-standing sociological debates about power, inequality, and the self/society relationship. Second, I provide a corrective to accounts that treat privacy norms as a straightforward expression of technological circumstance and lament the death of privacy in the twenty-first century. Third, I stake an analytical claim about the contextuality of privacy and the benefits of middle-range inquiry. Instead of searching for universal definitions or shared essences, sociologists can study the piecemeal constitution of abstract concepts (like privacy) in specific settings, focusing on the micro-social foundations of macro-social trends and on the amalgamation and sublimation through which varied discourses and proto-boundaries are assembled into a minimally coherent whole.

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The production of knowledge is a deeply social and often collaborative enterprise – solitary minds rarely make science happen. When I arrived in the Sociology Department at Berkeley, I was fortunate to find a group of advisers who saw the thread that runs through this project long before I did. Marion Fourcade made the whole endeavor seem manageable when I had nothing but vague ideas and a list of archives I wanted to visit, and later helped me to see the forest among the trees. Christopher Muller helped me to turn my ideas into an executable project and encouraged me to explore different methods for studying the distant past. His invisible fingerprints are all over this work. Dennis Feehan first introduced me to the tools of social network analysis and computational social science. Mara Loveman did all of the above, and more. She is the true *spiritus rector* of this project who encouraged me when I was doubtful and provided clarity when I was confused. Mara was the kind of PhD advisor that we all hope for, and that too few get to experience. She also brought together a superb group of graduate students who were interested in the sociology of knowledge production and the study of the modern state. When I say that this project is a collective endeavor, I think especially of the impact that this group had on my work: Antonia Mardones Marshall, Elizabeth McKenna, Robert Pickett, Michaeljit Sandhu, and Mary Shi.

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When I was already deep in the weeds of this project, I stumbled across two papers that took a similarly historical perspective on privacy – one written by Katherine J. Day at the University of Edinburgh in 1985, the other by David J. Seipp at Harvard in 1978. As far as I know, neither of them has been formally published, except as working papers. Yet they should have been. They gave me great guidance as I

assembled my materials, and I feel a strange kinship with their authors – especially because discussions of privacy were relatively rare in U.S. sociology even in recent years (there were some exceptions, most notably the work of James Rule, Barry Schwartz, David Lyon, Kevin Haggerty, and Richard Ericson). Thankfully this has now changed, in no small part due to the efforts of an emerging generation of scholars whose work sits at the intersection of history, technology studies, law, and sociology: Ruha Benjamin, Simone Browne, Dan Bouk, Virginia Eubanks, Sarah Igo, Sarah Seo, Scott Skinner-Thompson, Ari Ezra Waldman, Rebecca Wexler, and many more. I am indebted to their pioneering research.

The Sociology Department at Berkeley is infamous for the length of time it takes many of us to file a dissertation, and I am no exception. Consider this: In the time it took me to complete this research, my partner Devon Youngblood completed two Masters degrees, built an entire career, and moved back and forth across the United States. She has endured the ebb and flow of academic work with remarkable magnanimity, but I would love her no less if she refused to get dragged into any sociological discussion at all. The gratitude I owe her is first and foremost for many years of love and friendship.

Chapter 1:

Privacy For a New Age

Historical Sociology and the Study of an Elusive Idea

In 1885, after a lifetime of work as a teacher and superintendant in public schools throughout the Midwest, Josiah Hurty eased into retirement by embarking on an extended tour of the American South. Yet he was much better at attracting employment than he was at evading it: As he and his wife Ann travelled from Indiana into Mississippi and Louisiana, he accepted several additional appointments and turned a journey that had been conceived as a restful endeavor into a multi-year opportunity to spread the gospel of childhood education. He was on leave from his most recent posting and staying with his wife and his daughter Julia in Cincinnati when he died on October 1, 1889 at the ripe age of 79. Upon finding her father dead, Julia wrote to her four siblings and to the local parish in Paris, Illinois, where her parents had lived for twenty years and where Josiah Hurty desired to be buried. As the self-appointed historian of the family, she also organized her deceased father's papers, which included a scrapbook, an album with a short autobiographic account of his life, and newspaper clippings from the various school districts where he had served.[1]

Much of what we know about Josiah Hurty's life comes from these personal papers and from oral family recollections. There are no standardized birth or death certificates; no documents about retirement benefits or life insurance policies; no detailed financial records. The reason for this is simple: He belonged to the last generation of Americans who could live their lives largely without having their personal data recorded in any official database. The federal government had begun to track Civil War veterans who were owed a military pension, yet such efforts did not yet extend to the civilian popula-

[1]Details about Josiah Hurty's life are taken from: Thurman B. Rice, *The Hoosier Health Officer: A Biography of Dr. John N. Hurty.* Indiana State Board of Health, 1946.

tion.[2] The decennial census — haphazard as it was for most of the nineteenth century — would certainly have put Josiah Hurty into contact with traveling enumerators. But the focus of the Census Bureau was on aggregate patterns rather than personalized data, and it would have quickly merged his census form with those of millions of other Americans into a rudimentary statistical mosaic of the United States.[3] For the most part, and despite his local prominence as an educator, Josiah Hurty's personal data therefore stayed within the tight circles of his community or traveled in sealed letters along the network of postal routes that connected urban centers and gradually penetrated the American countryside. Born just two years after the War of 1812, he had lived through a period of profound social and political change. The United States had 19 states and a largely uncolonized Western frontier when Josiah Hurty was born, but 38 states and transcontinental networks of railroads and telegraphs at the time of his death. Yet efforts by governmental and corporate officials to track, measure, and examine American citizens and consumers had undergone no analogous transformation. In the late nineteenth century, the informational infrastructure of the United States was still closer in scope and sophistication to the early days of the republic than it was to any recognizably modern administrative state.

In the decades after Josiah Hurty's death, his son John would help to build a world that differed profoundly from the one that Josiah Hurty had inhabited. After an apprenticeship at a local drug store in Paris, Illinois, John N. Hurty attended the Philadelphia College of Pharmacy, settled as a pharmacist in Indianapolis, and began to rise through the medical ranks. He served as lecturer of chemistry at the Medical College of Indiana, was appointed as the head of the newly-established Purdue College of Pharmacy, and, in 1896, took over as the secretary of the Indiana State Board of Health.[4] The Board was still in its infancy, having convened its first meeting only in 1892, and it lacked the power and funding to accomplish much of anything. For the most part, its officers limited themselves to irregular and perfunctory sanitary inspections of local prisons.[5] John Hurty set out to change this. His initial campaigns aimed to combat the spread of infectious diseases like cholera, smallpox, and typhoid fever, which ranked among the most common causes of death in the United States and

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[2]Theda Skocpol. *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States.* Cambridge: Harvard University Press, 1995. The pension system was systematized with the Arrears of Pension Act in 1879, which made Union veterans eligible to apply if they could demonstrate to suffer from a war-related disability. Pensions were significantly expanded in 1890 with the Dependent Pension Act, which extended eligibility to all Union veterans and led to hundreds of thousands of new pension applications. By the mid-1890s, close to 40% of the federal budget went into the pension system.

[3]Margo J. Anderson. *The American Census: A Social History.* New Haven: Yale University Press, 1988.

[4]Rice 1946, pp. 17-19.

[5]Rice 1946, pp. 53-56.

killed around one in forty urban residents around the turn of the twentieth century.[6] Hurty worked to improve the quality of the water supply in Indianapolis, campaigned against the use of spittoons in bars and railroad cars, and helped to turn the public health bureaucracy from an administrative backwater into an organized sanitation police. Recognizing that it would take time (and a significant amount of money) to improve sanitation infrastructures and the scientific training of health officials, he urged his staff to focus on the enforcement of existing statutes. He demanded the mandatory reporting of infectious disease diagnoses by local physicians and ordered that buildings with potentially contagious patients were cordoned off with ropes, marked with red warning flags, and put under 24-hour police surveillance to keep their residents from leaving the premises. As one observer later noted, "everyone knew that once infection was found, the house quarantine was sure [to] descend."[7]

But John Hurty's ambitions extended far beyond so called "sentinel surveillance" campaigns at the local level. Before one could argue about the causes of death and disease, he reasoned, it was "evidently necessary" to acquire accurate data about diseases, births, deaths, and other crucial stages of an individual's life-course and health history.[8] Reflecting on his work during a 1910 speech to the American Medical Association, he remarked:

> *"The accurate collection, tabulation and analysis of records of births, still-births, deaths, marriages, divorces, and sickness may be said to constitute the bookkeeping of humanity. The bookkeeping of dollars is very important, but of far greater importance is the bookkeeping of those events in the lives of human beings which are fundamental to an understanding of the movements of mankind [. . .] Without vital statistics, a nation cannot know its vital latitude and longitude, its national time of day on the great ocean of time."*[9]

John Hurty was adamant that the systematic collection of personalized and statistical data could put public administration in the United States on a more scientific and more efficient footing. Just as the ability to record one's latitudinal position with ever-improving sextants had allowed prior generations of sailors to pilot their ships safely across the vast expanses of the Atlantic Ocean, it would allow political leaders and a growing cadre of government bureaucrats to steer the ship of state through the

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[6]Gregory L. Armstrong, Laura A. Conn, and Robert W. Pinner. 1999. "Trends in Infectious Disease Mortality in the United States During the 20th Century." *Journal of the American Medical Association* 281 (1): 61-66.

[7]Rice 1946, p. 97

[8]Rice 1946, p. 191.

[9]John N. Hurty. 1910. "The Bookkeeping of Humanity." *Journal of the American Medical Association* 55 (14): 1157-1160.

tumultuous waters of the Industrial Age and the Progressive Era.

Around the turn of the twentieth century, John Hurty joined a growing movement of physicians, social reformers, bureaucrats, politicians, statisticians, and business magnates that worked to increase the quality and quantity of data that the American state and American companies collected about the nation's citizens and consumers. In the public sector, the standardized recording of births and deaths, the collection of labor and employment data, the use of photographs and finger prints in local police departments, the expansion of the Census Bureau's efforts to count every American and to spread its statistical knowledge across the federal apparatus, and many additional efforts by local officials and individual agencies were like long-overdue eyeglasses for the American state and necessary prerequisites for the expansion of bureaucratic governance: For the first time in the nation's history, individuals and populations became systematically legible to government officials, traceable across time and place, and ennumerated in a growing set of official databases. In the private sector, the confluence of emerging technologies and emerging consumer markets likewise increased the circulation of personal data, the capacity to collect and analyze it, and the economic incentives for doing so. Companies like the American Telephone and Telegraph Company, now better known by its acronym AT&T, blanketed the United States with an increasingly dense network of telephone lines that democratized real-time long-distance communication. In 1890, almost no American household had access to a telephone landline. By 1920, a majority of them did.[10] Emerging publishers like William Randolph Hearst and Joseph Pulitzer seized on technological innovations in printing and film photography to establish tabloid newspaper empires on the back of human interest stories that reported on the crimes of the poor and the indulgences of the rich. And corporations in the growing consumer retail economy experimented with credit-worthiness calculations for individual consumers, thereby spawning not only a quantitative conception of financial risk but new subsidiary industries focused on credit rating and credit reporting.[11] As one observer noted, the everyday lives of Americans were transformed "with such amazing rapidity" by such ventures that the future appeared wide open, filled at once with great possibility and great uncertainty. Only the direction of change seemed clear: Away from "the quietude of a less advanced period" and towards greater visibility and social interdependence.[12]

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[10]Milton Mueller. 1993. "Universal Service in Telephone History: A Reconstruction." *Telecommunications Policy* 17 (5): 352-369.

[11]Sharon Hayes and Laura Miller. 1994. "Informed Control: Dun & Bradstreet and the Information Society." *Media, Culture & Society* 16(1): 117-140. Jonathan Levy. *Freaks of Fortune: The Emerging World of Capitalism and Risk in America.* Cambridge: Harvard University Press, 2012. Bruce G. Carruthers. 2013. "From Uncertainty Toward Risk: The Case of Credit Ratings." *Socio-Economic Review* 11 (3): 525-551.

[12]Guy H. Thompson. "The Right of Privacy as Recognized and Protected in Law and in Equity." *Central Law Journal* 47 (1898), p. 156.

It was during this period that the logic of privacy became widely diffused and increasingly institutionalized for the first time in American history. The term itself had a much longer history, yet the privacy debates that began to proliferate across different domains of social life would have been hard to imagine before the Civil War. Until the middle of the nineteenth century, the word "privacy" largely appeared in novels like Charles Dickens' *Barnaby Rudge*, in which an unexpected visitor "knocked with his knuckles at the chamber-door" and intruded "in this extraordinary manner upon the privacy of a gentleman" who had just withdrawn into his room.[13] This was no trivial infraction. How could the visitor be "so wholly destitute of self-respect as to be guilty of such remarkable ill-breeding," Dickens' character asked himself. Yet this understanding of privacy differed markedly from the debates of later decades. Framed in terms of intimate spaces and social roles, it remained almost entirelty absent from jurisprudence and Congressional debates until the late nineteenth century. It was a conception of privacy among peers and members of familial units that still had little to say about the relationship between individuals, governments, markets, and society writ large.

Yet these were precisely the issues that imposed themselves, with greater practical urgency and new significance, as the United States became more urbanized, more saturated with mass media and telecommunication technologies, and more reliant on large corporations and large-scale bureaucratic administration. What could and should be known about someone, by whom, and under what circumstances? How and towards what ends should such data be used? And what were the rules, procedures, and exceptions that helped to delineate a realm of informational privacy against a society with an increasing (and increasingly institutionalized) will to knowledge? In a nation that was both "searching for order" and actively building the institutions that could sustain a new economic and political order,[14] the logic of privacy seeped into the practices of governmental and private-sector organizations; became entangled with theories of governance, constitutional law, and social reform movements; and was made durable through formal legislation and social custom. Over the course of several decades, it emerged as the increasingly institutionalized correlate to the growing power of information — that is, the ability of "scripting into a database" the lives and life histories of specific individuals and entire populations, and of deploying such data in

[13] Charles Dickens. *Barnaby Rudge: A Tale of the Riots of Eighty.* Philadelphia: T.B. Peterson, 1841. Pp. 294-295.

[14] For a discussion of the ongoing "search for order" during the Progressive Era, see: Robert H. Wiebe. *The Search for Order, 1877-1920.* New York: Hill and Wang, 1967. For a history of the institutional growth of the American state, see: Stephen Skowronek. *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920.* Cambridge: Cambridge University Press, 1982.

the routines of administrative practice.[15]

This project is about the emergence of privacy as a political logic and the so-called "second-order effects" that struggles over the collection of personal data had for the organization and functioning of American society.[16] Developments that gathered steam around the turn of the twentieth century and helped to reshape the modern United States — the transition from a predominantly rural society into an urban one; the emergence of integrated national markets; and the shift from a relatively small state of "courts and parties" towards an expansive government bureaucracy — all touched on questions of privacy and often required that conflicts over the collection and use of personalized data be settled.[17] As I show in the following chapters, between the 1870s and the 1920s privacy suffused previously disparate domains and was gradually incorporated into the legislative, juridical, and administrative infrastructures of American society – often with lasting consequences for the exercise of informational power over a diverse populace and in a multitude of political and administrative contexts. One of the earliest comprehensive discussions of a legal "right to privacy" was published in 1890;[18] the first law aimed at protecting "privacy in city life" was passed by the New York State Assembly in 1901;[19] and a dedicated chapter on "privacy and the safeguarding of mail" was added to the U.S. Postal Rules and Regulations in 1924.[20] Each of these events, as well as countless others of smaller scale and local significance, helped to anchor the logic of privacy in the institutional fabric of American society. They gave permanence and legitimacy to emerging concerns and contested ideas. They structured how and over whom informational power could be exercised. And they helped to define the exceptions — for example, for the purposes of national security and epidemic control — that still shape discussions of state-sponsored surveillance and informational capitalism in the present day.

We sometimes think of ideas and ideologies as having a "life": They are brought into this world, grow, show signs of age, are retired or revived, and occasionally die

[15] Colin Koopman. *How We Became Our Data: A Genealogy of the Informational Person.* Chicago: The University of Chicago Press, 2019. P. 156. See pp. 35-65 for a history of informational power between the 1910s and the 1930s.

[16] Denise Anthony, Celeste Campos-Castillo, and Christine Horne. 2017. "Toward a Sociology of Privacy." *Annual Review of Sociology* 43: p. 263.

[17] The characterization of nineteenth-century American governance as a state of courts and parties is taken from Skowronek (1982).

[18] Louis Brandeis and Samuel Warren. 1890. "The Right to Privacy." *Harvard Law Review* 4 (5): 193-220. The legal institutionalization of this right is the topic of Chapter 5.

[19] "No Privacy in City Life". *Los Angeles Times*, 10 August 1902. The political struggles that preceded the passage of this law are covered in Chapter 4.

[20] Chapter 6 examines postal privacy in greater detail, as well as struggles over informational privacy in public health.

a permanent death. This is a coming-of-age story of sorts. It does not focus on ultimate origins, since privacy was not born in the turmoil of the Industrial Age. The language of privacy, as well as underlying concerns about access and visibility to which this language gives voice, pre-date not just the current computational age but the modern informational age more generally. Yet the decades around the turn of the twentieth century were the period when, in the United States, privacy grew in scope and significance and evolved into a distinctly political logic: A set of ideas and commitments that was tied into "a whole web of discourses, special knowledges, analyses, and injunctions" in American law, politics, capitalism, and culture; and a force that began to shape the exercise of power, reflected existing ideologies, and introduced new informational inequalities.[21] The goal of this project to to track this diffusion and its consequences, and thereby to grasp the sociological and socio-historical significance a protean concept with greater precision.

Strictly speaking, privacy in the singular is a misnomer. There was no simple *thing* called privacy but a jumble of different interpretations that varied across contexts, increasing in social significance but ever-changing in their articulation. Amidst the swirling currents of the late nineteenth and early twentieth centuries, they provided a set of anchors for debates about the relationship between individuals and society writ large, and a set of templates through which the involvement of government

[21] Michel Foucault. *A History of Sexuality: Volume 1.* New York: Vintage Books, 1990, p. 26. The logic of privacy is no uniquely American phenomenon, although it did not achieve a comparable degree of legal and political salience in several European countries until the latter half of the twentieth century. In France — perhaps the center of nineteenth-century European privacy discourse — the Napoleonic Code of 1804 articulated the concept of a protected "private sphere", which then reappeared in the 1850s in several civil cases about the (mis)use of photographs and was alluded to in a 1868 press law that imposed a fine of 500 francs on periodicals for publishing "a fact of private life." Yet comprehensive privacy legislation that covered violations by state *and* non-state entities was not introduced until the 1970s. In Germany, late-nineteenth century jurisprudence remedied grievances about the publication of personal photographs as a matter of libel and imposed few restrictions on the exercise of informational power by the Prussian bureaucratic state. For example, the so-called "secrecy of letters" was not elevated into the status of a civil right until 1919, and prior articulations — for example, in the 1871 Imperial Penal Code — focused on violations of the seal by other citizens rather than the state and its secret police. In English common law, the unauthorized distribution of personal communications was generally understood as a violation of property rights rather than an occasion for privacy claims (with the 1765 decision in *Entick v Carrington* and the 1818 decision in *Gee v Pritchard* being the most widely cited examples). However, the logic of privacy shaped the work of British social reformers during the Victorian period as they demanded reforms in the growing working-class neighborhoods near industrial centers like London and Sheffield. It also began to appear in discussions of state power in the late eighteenth century. In 1796, the *Gazette of the United States* from Philadelphia reprinted a debate from the British House of Commons in which a representative raised concerns about the expanding powers of officials, noting that "any magistrate can interfere with the privacy of domestic comfort – he can obtrude into a family, and enter the house without being responsible for such an unjustifiable obstruction." See: "House of Commons." *Gazette of the United States*, 02/22/1796.

agencies and private companies in the lives of American citizens and consumers could be contested. But if privacy was not reducible to a single *thing*, it was nonetheless thing-*ish*. It is no accident that the terminology of privacy migrated into so many different domains of social life at roughly the same time. This was *e pluribus unum* in action: The emergence of a shared set of concerns and commitments from a patchwork of parallel approaches to the problems of limited governance and social order in the modern United States. This is why, according to the legal scholar Lawrence Tribe, the logic of privacy represents "nothing less than society's limiting principle:"[22] It is the terrain upon which a wide array of conflicts over the exercise of power and the structure of society play out. Indeed, the applicability of privacy across many different domains of social life is precisely the reason why it evolved from a narrowly applied cultural trope into a public issue. By the turn of the twentieth century, the logic of privacy had become so pertinent in social life that it accompanied Americans from the moment of their birth until their death certificates had been issued. As the *Chicago Tribune* noted in 1902, primary school teachers, marriage license clerks, municipal health officials, gas inspectors, janitors, landlords, police officers, pawnshop owners, mortgage lenders, grocery store clerks, tabloid journalists, photographers, neighbors, factory employers, and morgue workers all seemed to intrude upon the privacy of the individual through their observations and examinations.[23]

This protean nature also means that privacy offers a lens through which we can catch a glimpse at American modernity more generally. Around the turn of the twentieth century, it provided a set of cognitive and political models to comprehend and contest an emerging tension in the fabric of American society. Even as U.S. culture embraced what the sociologist Émile Durkheim has called the "cult of the individual" that sits at the core of liberal-democratic and market-based conceptions of the social order — that is, a view of individuals as agentic, rights-bearing, and morally sovereign elementary units of social organization —, the social and economic challenges faced by state and non-state organizations required the coordinated management of entire populations and the increased legibility of individuals to institutional actors.[24] The individual citizen and consumer became not just "the object of a sort of religion," as Durkheim wrote in 1893, but also the target of organized efforts to extract and analyze personal data — more venerated but also more visible.[25] In fact, it is partially through such data points that individuals are constituted in the eyes of the state and the market. In

[22]Quoted in: Amy L. Fairchild, Ronald Bayer, and James Colgrove. *Searching Eyes: Privacy, the State, and Disease Surveillance in America.* Berkeley: University of California Press, 2007, p. xvi.

[23]"No Privacy in City Life." *Chicago Tribune.* Reprinted in the *Los Angeles Times*, Aug 10, 1902, p. C5.

[24]Anthony Giddens. 1971. "The 'Individual' in the Writings of Emile Durkheim." *European Journal of Sociology/Archives Européennes de Sociologie* 12 (2): 210-228.

[25]Emile Durkheim. *The Division of Labor in Society.* New York: Free Press, 1964, p. 172.

a very real and consequential sense, we *are* our credit scores, our criminal records, our age cohort, or citizenship status, and our educational credentials.[26] They determine the programs and services that a person can access and structure the distribution of opportunities and disadvantage across the social body. And it is partially through expanded and routinized data collection and the correlative regulation of privacy that the modern American state and the national credit economy were built, delimited, and firmed up. Refracted in the history of privacy are larger social and political forces that transformed the United States in idiosyncratic ways into a modern society.

In the shadow of the past

Today's discussions tend to ignore this long genealogy of privacy. Their orientation is decidedly presentist, focusing mainly on the ubiquity of *digital* surveillance efforts that threaten to catch people in tightly woven dragnets and sort them into finely calibrated categories. Within this cognitive and analytical framework, privacy is often treated as an endangered idea at best.[27] If one were to believe the loudest voices amidst this cacophony, one could easily be left with the impression that we find ourselves before "a giant ledger where privacy is slipping ever more swiftly into the deficit column," as Sarah Igo puts it.[28] And why would it not be seen as such, given the thrust of technological development and the central importance of commodified personal data to the business models of the digital economy? It is thus not surprising that, from the vantage point of the twenty-first century, the events of the 1900s appear as something akin to pre-history: Vaguely linked to the present but too distant to cast a meaningful shadow.

Yet it would be a mistake to treat the history of privacy and informational power merely as a history of the computational age — and not simply because magazine articles about the supposed "death of privacy" are as old as discussions of modern privacy itself.[29] As David Lyon has argued, the situation at the turn of the twenty-first century "resembles in some respects the surveillance situations of the earlier twentieth century."[30] In both cases, new technologies "helped constitute modernity" and bred

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[26]Marion Fourcade and Kieran Healy. 2017. "Seeing Like a Market." *Socio-Economic Review* 15 (1): 9-29.

[27]John Naughton. "Is Privacy Dead?" *The New Statesman*, February 28, 2020.

[28]Sarah E. Igo. *The Known Citizen: A History of Privacy in Modern America.* Cambridge: Harvard University Press, 2018. P. 16.

[29]Consider the following magazine and newspaper headlines: "The Era of Publicity" (*The Washington Times*, 1902); "No Privacy in City Life" (*Chicago Tribune*, 1902), "Is Privacy Dead?" (*Newsweek*, 1970), "Who Killed Privacy?" (*New York Times*, 1993), "The Death of Privacy" (*Time Magazine*, 1997), "The End of Privacy" (*Science*, 2015), "The Death of Privacy" (*New Statesman*, 2020). I return to a discussion of the alleged "death of privacy" in the final chapter.

[30]David Lyon. "Surveillance Technology and Surveillance Society." Pp. 161-183 in: *Modernity and*

new modes of social organization that changed how personal data could be collected and how it was used in the public and private sectors.[31] In both cases, too, increases in informational power sparked debates over the privacy claims of individuals, the informational rights of consumers, and the legitimacy of large-scale data collection in a liberal society.

Some of these conflicts are obscured in the present. In contemporary discussions, resistance to the continued expansion of personalized tracking and dragnet surveillance appears only "at the margins," with few obvious pathways to reorganize the prevailing landscape of data collection.[32] Surveillance has become a widely accepted way of life; and the technologies that sustain it are widely "promoted and perceived as more objective or progressive" than prior technologies of rule, as Ruha Benjamin observes in a discussion of what she calls "the new Jim Code".[33] Data collection at scale appears as a natural fact of the world rather than a technological, political, economic, and often racialized project. This is one reason why a historical perspective can provide additional analytical leverage. It forces us into a world that is much less familiar than the present one and turns us, however temporarily, into strangers who have not yet lost the capacity to be amazed and surprised. As Georg Simmel — one of the forefathers of social network analysis — once wrote about the person who enters a new community (and is thus placed in the liminal position of being within a group but not *of* a group), the stranger is "not radically committed to the unique ingredients and peculiar tendencies" of their new environment and thus able to see things that would otherwise be obscured by the forces of habit and experience.[34] Perhaps we can gain some insight into the society we inhabit by stepping several generations into the past.

There is yet another argument for historical inquiry. The struggles of the early twentieth century helped to set in motion a series of political, economic, and legal developments that baked the logic of privacy into law and administrative routines, and even into the built environment of the American city.[35] Codified in official texts and cemented into the material infrastructure of everyday life, some features from this

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Technology, edited by Thomas J. Misa, Philip Brey, and Andrew Feenberg. Cambridge: The MIT Press, 2003. P. 173.

[31]Lyon 2003, p. 173.

[32]Scott Skinner-Thompson. *Privacy at the Margins.* Cambridge: Cambridge University Press, 2020.

[33]Ruha Benjamin. *Race After Technology: Abolitionist Tools for the New Jim Code.* New York: Polity Books, 2019, p. 6

[34]Georg Simmel. "The Stranger." Pp. 143-149 in *Georg Simmel on Individuality and Social Forms*, edited by Donald N. Levine. Chicago: The University of Chicago Press, 1971.

[35]The sociologist James Mahoney has argued that institutionalization is at the core of so-called path dependencies: Contingent events "set into motion institutional patterns or events" that affect the structure of events during subsequent periods. See: James Mahoney. 2000. "Path Dependence in Historical Sociology." *Theory and Society* 29 (4): 507-548.

period have survived into the present. They pre-structure discussions of privacy and surveillance and have shaped conditions of legal and political possibility in the wake of the 9/11 terror attacks, during the COVID-19 pandemic, and in the context of an increasingly data-hungry digital economy that relies on the extraction of "behavioral surplus data" to generate corporate profits.[36] This is why a return to the decades between the end of the Civil War and the onset of the Great Depression is not merely an exercise in historical inquiry but a "perpetual exercise in judgment", as the historian Cushing Strout once wrote about his professional craft.[37] The historical manifestations of privacy and informational power are more than archaeological facts that can be excavated from the archives to shed light on distant events. They also form part of a genealogy that illuminates more proximate experiences. They force us to examine not just what privacy *is*, but why particular conceptions of privacy are adopted and proliferate under specific socio-historical conditions. They enable us to assess more precisely the conditions of possibility we face today.[38] And they allow us to re-inscribe the past into the present by asking how we have, of all possible worlds, ended up in this one.[39]

A political logic

It is tempting to treat privacy as the antithesis of the social (and thus place it outside the proper scope of sociological inquiry): To have privacy means to be shielded from the gaze of others and withdrawn from social relationships. Privacy, in that sense, is a purely negative space. It excludes the social world and protects against undue intrusions through laws, custom, coercion, or physical and technological barriers. It allows us to be left alone.[40] This is why Kevin Haggerty and Richard Ericson have lamented the "disappearance of disappearance – a process whereby it is increasingly difficult for individuals to maintain their anonymity, or to escape the monitoring of social institutions."[41] And it is why Edward Shils identified the nineteenth century

[36]Shoshana Zuboff. *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*. New York: Public Affairs, 2019.

[37]Quoted in: Ferenc M. Szasz. 1975. "The Many Meanings of History, Part III." *The History Teacher* 8 (2): p. 213.

[38]Koopman 2019, p. 23.

[39]Koopman (2019, pp. 23-24.), summarizing his own work as well as Michel Foucault's writings on genealogy as a method of inquiry, discusses three aspects of the genealogical method: Conditions of possibility; historical contingency; and sociological complexity. Notably, Koopman is less interested in the genealogical analysis of discourses than the analysis of conduct, i.e. the action of individuals and institutions in the real world. I adopt a similar approach.

[40]Louis D. Brandeis and Samuel D Warren. "The Right to Privacy." *Harvard Law Review* 4:5 (1890): 193–220.

[41]Kevin D. Haggerty and Richard V. Ericson. 2000. "The Surveillant Assemblage." *British Journal of Sociology* 51 (4), p. 622.

as the golden age of privacy. Before the advent of photography and the invention of the telephone, and before the growth of cities and the federal bureaucracy, it was still feasible to isolate oneself against society.[42] "The mania of governments for information was still in a nascent state," Shils wrote, while "the isolation of villages from each other meant that if anyone did come into one from the outside, his past remained his own possession."[43] This sentiment — which treats the pre-industrial past as an idealized world of quietude and solitude — was perhaps most famously captured by the writer Henry David Thoreau. Writing from his hermitage at Walden Pond in Massachussets, Thoreau remarked that "it is as solitary where I live as on the prairies. [...] I have, as it were, my own sun and moon and stars, and a little world all to myself."[44]

As the multigenerational story of the Hurty family at the opening of this chapter suggests, the rhythms of everyday life in the United States during the 1800s were indeed different from those of the 1900s or the 2000s. Still, privacy was anything but anti-social even during pre-industrial times. David Flaherty has shown, in a study of privacy norms in colonial New England, that early American settlers desired to live in the community of others but also to retain for themselves a sphere of domesticity into which they could at times retreat — a sphere that was protected as much by social custom as it was by architectural means.[45] Yet the gated fence and the front door were not primarily designed to keep the remainder of colonial society out but to provide individuals and families with agency over when it could enter. Privacy sustains social relationships by offering *partial* reprieve from the judgment of others and the pressure of social obligations.[46] Encoded into informal customs and formal laws, it presents us with a means of egress from the "front stage" of social action without requiring us to abandon social life altogether.[47] The writer Virginia Woolf captured this well when she wrote, in her 1931 novel *The Waves*, that "I want someone to sit beside after the day's pursuit and all its anguish, after its listenings, and its waitings, and its suspicions. After quarrelling and reconciliation I need privacy — to be alone with you, to set this hubbub in order."[48] Privacy prevents social relations from fraying under too

[42]Edward Shils. 1966. "Privacy: Its Constitution and Vicissitudes." *Law and Contemporary Problems* 31 (2): 281-306.

[43]Shils (1966), p. 292.

[44]Henry David Thoreau. *The Portable Thoreau*, edited by Jeffrey S. Cramer. New York: Penguin, 2012. P. 303.

[45]David H. Flaherty. *Privacy in Colonial New England, 1630-1776*. New York: Columbia University Press, 1967.

[46]Barry Schwartz. 1968. "The Social Psychology of Privacy." *American Journal of Sociology* 73 (6): 741-752.

[47]Erving Goffman. *The Presentation of Self in Everyday Life*. London: Allen Lane, 1959.

[48]Virginia Woolf. *The Waves*. Orlando: Harcourt Inc., 1931. p. 128.

much social and social-psychological pressure, and thereby helps to sustain communal life and economic production.[49] There is no privacy on a deserted island, for example, because "the need for privacy is a socially created need."[50]

But privacy is deeply social in yet another sense: Because claims about privacy originate in specific socio-historical settings, its contours tend to reflect the pressures and preoccupations of a given time and place. They are not derived from moral philosophy but from lived experience and shaped by the "the state of technology, the division of labor, and system of authority."[51] To illustrate this point, consider what Karen Hansen wrote about visiting practices in antebellum America. She found that the strict division of households into two "separate spheres" of domestic privacy and public-facing entertainment was less a factual description of family life than an ideological framework that masked the gendered power relations within the home and helped to legitimate the exclusion of women from labor markets and civic participation.[52] To speak of privacy was to speak of gender roles; and to speak of gender roles was to speak of social hierarchies and the power of social custom. One can make an analogous argument about privacy and racial hierarchies: The logic of privacy was never applied to millions of slaves who were shipped to the United States, bought and sold at auction, and forced to prop up the cotton economy of the South. Their claims to privacy vanished alongside their agency from the moment they were forced into the crowded belly of a slave ship.[53] In both cases, the contours and limits of privacy — the burdens and benefits that came with it, or the ability to claim it in the first place — were directly tied to the promises and prejudices of American society.

There is no privacy *against* society but only privacy *within* society, since the logic of privacy is not something that can be deduced from first principles alone. Instead, it constitutes an "evolutionary product of social development" and a shared "stock of knowledge" that structures social relations and societal change more generally.[54] This

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[49]Barrington Moore. *Privacy: Studies in Social and Cultural History.* London: Routledge, 1984. See p. 9 and p. 270 for a discussion of gendered privacy, domesticity, and the labor economy.

[50]The analogy to desert islands paraphrases Daniel Solove: Daniel J. Solove. 2002. "Conceptualizing Privacy." *California Law Review* 90 (4), p. 1104. The quote is taken from Moore 1984, p. 73.

[51]Moore 1984, p. 12.

[52]Karen V. Hansen: "Rediscovering the Social: Visiting Practices in Antebellum New England and the Limits of the Public/Private Dichotomy." Pp. 268-302 in *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy*, edited by Jeff Weintraub and Krishan Kumar. Chicago: The University of Chicago Press, 1997.

[53]Simone Browne. *Dark Matters: On the Surveillance of Blackness.* Durham: Duke University Press, 2015. See pp. 31-62 for a discussion of the "panoptic" vision of slave traders and Southern plantation owners.

[54]Moore 1984, p. 268. Peter Berger and Thomas Luckmann. *The Social Construction of Reality.*

is one reason why the term itself has become so capacious: At different times and in different places and academic disciplines, it has been understood as the ability to evade scrutiny; the power to shield personal data against surveillance; a legally codified right; *ex ante* consent over data-sharing; control over physical spaces; solitude and isolation from others; physical and emotional intimacy; a prerequisite for a fulfilling and virtuous domestic life; and a collective social good.[55] And it lies at the core of the perspective I propose here: To treat privacy as a political logic that emerged during a relatively specific historical period when it diffused into a great number of conversations and contestations about the visibility of individuals, the limits of the law, and the power of the American state; and when it was gradually and selectively institutionalized through legislative action, juridical practice, and the work of countless officials who collectively sustain the system of bureaucratic rule.

Emphasizing the historical contigency of privacy and its embeddedness in socio-technological circumstance also explains why it continues to evolve under stress from the myriad forces that act upon society. For example, the "right to privacy" in American jurisprudence originated as an attempt to constrain advertisers and yellow press newspapers that had begun to publish personal photographs and tattletales about prominent citizens in the late 1800s. In the 1960s, it was tied to debates about bodily integrity and contraception.[56] And during the 2000s, it moved to the forefront of debates about the commodification of personal data and electronic surveillance.[57] This evolution reflected technological innovations – from the development of flexible photographic film by George Eastman in 1885 to the introduction of targeted advertising through Google AdSense in 2003 – but it also revealed struggles between legacy publishers and insurgent yellow press journalists, between conservative jurists and women's rights organizations, and between online corporations and consumer advocates. By uncovering path dependencies and the seeds of alternative possibilities, it becomes possible to conceptualize privacy not as the logical outcome of particular

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New York: Anchor Books, 1967. Pp. 67-72.

[55]Samuel H. Hofstadter and George Horowitz. *The Right to Privacy.* New York: Central Book Co, 1964; Edward Shils. 1966. "Privacy: Its Constitution and Vicissitudes." *Law and Contemporary Problems* 31 (2): 281-306; Alan F. Westin. *Privacy and Freedom.* New York: Athenum. 1967; Leon A. Pastalan. 1970. "Privacy as a Behavioral Concept." *Social Science* 45 (2): 93-97; Debbie V. S. Kasper. 2007. "Privacy as a Social Good." *Social Thought & Research* 28: 165-189; Amitai Etzioni. *The limits of Privacy.* New York: Basic Books, 2008.

[56]Dorothy J. Glancy. 1979. "The Invention of the Right to Privacy." *Arizona Law Review* 21 (1): 1–39; David J. Garrow. *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade.* Berkeley: The University of California Press, 1998; Caroline Danielson. 1999. "The Gender of Privacy and the Embodied Self: Examining the Origins of the Right to Privacy in U.S. Law." *Feminist Studies* 25 (2): 311–344.

[57]Julie E. Cohen. *Between Truth and Power: The Legal Constructions of Informational Capitalism.* Oxford: Oxford University Press, 2019.

circumstances but as something that was produced through persistent struggles.

Three points of intersection

The literature on privacy and informational power is vast and rich. Chapter 2 will address this literature more directly, delineate the aims of this project, and develop its conceptual scaffolding. For now, let me outline three points of intersection that situate the study of an elusive and every-evolving concept within the sociological imagination. They may not deliver us safely across "the great ocean of time", as John Hurty wrote in 1910, but they can help to navigate the muddy waters of historical idiosyncrasy.

First, privacy is contestation. Neither its meaning nor its scope are self-evident or foreordained. Instead, as alluded to above, the logic of privacy is perpetually emergent: It is produced and reshaped through persistent struggles in the cultural, political, and legal domains about the relationship between individuals, communities, and institutional actors. It has to be *made*, tied together as a coherent concept, demarcated against other concepts, rendered intelligible in relation to concurrent systems of belief, advocated for, and encoded into specific institutions. Prior developments can impose certain path dependencies and boundary constraints especially when they are deeply anchored in law and custom. This, after all, is one reason why contemporary observers can benefit from a serving of social history. Yet such dependencies and constraints are best understood as probabilistic factors rather than logic gates: They pre-structure the terrain of struggle in the present without necessitating any particular outcome.[58] They load the dice but do not roll them. This implies a departure from the common view that privacy — its scope, or the possibility of having it at all — is a direct consequence of technological circumstance. In many pop-scientific accounts, privacy appears to shrink as the capacity for information extraction increases.[59] Yet obituaries to the logic of privacy are not just premature but misconstrue its protean qualities.[60] It perpetually evolves under the pressures of institutional practice and collective action. The social history of privacy is a history of contingent developments, of abandoned alternatives, and of reinvention.

Second, privacy is entanglement. The norms that govern the use of space and the social

[58]The language of "pre-structuring" alludes to the distinction between "underlying" and "precipitating" conditions in causal explanation: The former shape whether, and how, precipitating conditions can become manifest. See: Stanley Lieberson and Freda B. Lynn. 2002. "Barking Up the Wrong Branch: Scientific Alternatives to the Current Model of Sociological Science." *Annual Review of Sociology* 28 (1): 1-19.

[59]Zuboff (2019); Haggerty and Ericson (2000). For a Hegelian reading of the history of privacy, see: Marco De Boni and Martyn Prigmore. 2004. "A Hegelian Basis for Privacy as an Economic Right." *Contemporary Political Theory* 3 (2): 168-187.

[60]Igo (2018).

roles within the household are inextricably linked to gender hierarchies. Social activists who pushed for the application of privacy rights to legal disputes over contraception and abortion during the 1960s were well aware of this, conceiving of privacy as a quintessentially gendered concept, albeit one that was closely tied to middle-class and heterosexual notions of womanhood.[61] This tendency towards entanglement between the logic of privacy and other logics of social organization often remains obscured in philosophical accounts that derive privacy claims from general principles of moral philosophy. It is also absent from some liberal interpretations of privacy as an individual right that can be neatly divorced from debates about social status and group membership.[62] But wherever privacy is placed under the empirical microscope and examined as a feature of the social world (as opposed to a purely intellectual construct), the convictions and commitments embedded within it become visible. Privacy is gendered, racialized, and classed because legal frameworks and social customs are infused with moral and ideological content and because informational power is unevenly focused on certain types of data and unevenly exercised over different groups. The light always "shines more brightly on some than on others."[63] African slaves had no privacy because they were considered property and thereby denied the dual privileges of individuality and agency that sit at the core of many privacy claims; and the disproportionate surveillance of black bodies has continued well into the present day.[64] Likewise, the privacy to which middle-class families are so accustomed often remains elusive for the American poor, since the price of access to social services in the contemporary United States is often paid in informational currency as poor families consent to electronic monitoring in order to become eligible for support.[65] Such latent connotations of privacy are easily obscured, especially when they not expressed as overtly political judgments but are re-coded in informational terms. But we can catch glimpses of them, for example when privacy claims are made subject to conditions and exceptions. Understanding who cannot establish such claims, and which types of information are not shielded against governmental or corporate extraction, can provide clues about the nature of privacy's entanglement with matters like race, gender, class, political ideology, or citizenship.

Third, privacy is a cause. Contemporary debates usually emphasize the inverse of this statement, treating privacy norms as a consequence of prior developments or concurrent technological circumstance. Yet privacy is not just something that exists *in* the social world, but also something that happens *to* the social world. To frame

[61]See Igo (2018), p. 157.

[62]Kasper (2007), pp. 167-168.

[63]Browne (2015), p. 68.

[64]Browne (2015).

[65]Virginia Eubanks. *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor*. New York: St. Martin's Press, 2018.

something – an issue, a mode of governance, or a set of corporate practices – in terms of privacy may have lasting implications for the institutions of American society. For example, to speak of "privacy against the state" is not just a descriptive statement but a call to action. It implies restrictions on the conduct of state officials, urges a distinction between legitimate and illegitimate interventions in the lives of citizens, and conditions how liberal-democratic governments can acquire knowledge about specific individuals and entire populations. Ian Hacking refers to this as the power of "world-making": Our categories of thought and practice constitute the social world by constraining the space of possibilities for social action.[66] This is one reason why many of the following chapters do not foreground popular attitudes *towards* privacy or abstract discourses *about* privacy but examine how privacy claims were incorporated into bureaucratic or corporate practice, written into legal codes, or encoded into the built environment.

Domains of world-making and inquiry

The diffusion of the logic of privacy into multiple domains of social life and its encoding in different organizational settings is a central feature of the early twentieth century. It also poses a challenge. Writing chronologically about the disjointed landscape of privacy and informational power would require sudden jumps from one setting to another and might tangle the analytical thread. Instead, I have chosen to arrange the following chapters by what I call "domains of world-making". Apart from Chapter 2 and the conclusion, each chapter focuses on a particular domain — public discourse, collective action, jurisprudence, and bureaucratic rule — where competing conceptions of the social order could clash and where struggles over data collection and its legitimacy were resolved.[67] This means that each chapter covers a distinct empirical terrain, with little overlap between them. People and organizations that appear in one chapter are unlikely to reappear in subsequent chapters. But it also allows me to trace the confluence of privacy and informational power across multiple domains and thus to assemble disparate pieces into a complete historical mosaic.

The literature on privacy stretches across many different fields, each with idiosyncratic traditions and emphases. I therefore begin in Chapter 2 by surveying the landscape develop a set of core statements about the nature and significance of privacy in the social world, surrounded by auxiliary claims and preliminary conjectures that can be

[66] Ian Hacking. *The Social Construction of What?* Cambridge: Harvard University Press, 1999. p. 44. Also see: Pierre Bourdieu. 1986. "The Force of Law: Toward a Sociology of the Juridical Field." *Hastings Law Journal* 38: 805–853.

[67] I borrow the term "world-making" from Ian Hacking and Pierre Bourdieu, who saw the symbolic power of naming as one aspect of the political power to create social order. In addition to Hacking, see Bourdieu (1986); Nelson Goodman. *Ways of Worldmaking.* Indianapolis: Hackett Publishing Co, 1978.

put to the test.[68] I first distinguish the study of *privacy* from discussions of the larger public/private dichotomy. The two occasionally converge and often intersect, but they are not synonymous. (The public/private dichotomy is also a much more unwiedly thing to write about.) I then lay out a framework for thinking about privacy as a political logic rather than, say, a purely psychological need or a purely intellectual construct. This chapter is rich in theory but thin on empirical data, yet it should make the reader feel more at ease in the world which I have come to inhabit.

The following chapters dive deep into the historical record. I begin with a bird's eye view in Chapter 3: What can we say about the the logic of privacy between 1870 and 1930? How did public discourse *about* privacy and the application *of* the logic of privacy evolve? I answer these questions by looking at historical newspaper records — perhaps the closest thing we have to a real-time graph of a society's pulse before social media allowed everyone to become a de-facto publisher. The chapter demonstrates the diffusion of privacy into a wide range of previously disconnected domains of U.S. public discourse and social life. Urban overcrowding and medical and financial records would have hardly been considered matters of privacy during the first half of the nineteenth century, yet they gradually found space under the ever-growing conceptual umbrella that the concept of privacy provided. Such discussions in local and national newspapers helped to carry existing connotations of confidentiality and secrecy into the Progressive Era and the twentieth century. Congress also became involved, as representatives took to the floor to discuss the seizure of telegraph messages, telephone wiretapping, and mail privacy. No longer limited to conversations about social roles and intimate spaces, the logic of privacy became more commodious and more closely tied to law and politics than during any prior period of American history.

Chapter 4 examines the vibrant and volatile world of Progressive Era social activism. Towards the end of the nineteenth century, a growing chorus of reform-oriented voices cast living conditions in the nation's densely populated tenement neighborhoods as a fundamental challenge to the moral fabric of society and to American citizenship. Writers like Jacob Riis and politicians like Theodore Roosevelt — then governor of New York — embraced the quest for privacy in city life as a third pillar of tenement reform alongside health and fire safety. Through municipal and state legislation, they worked to embed a vision of the nuclear family as the locus of personal privacy into the built environment of the nation's expanding working-class districts. The removal of bedroom access, the rise of personal toilets within individual apartments, and the rearrangement of exterior windows encoded the moral concerns of the social reform movement into physical space. Long before the suburban home came to

[68] Imre Lakatos. "Falsification and the Methodology of Scientific Research Programmes." Pp. 91-196 in *Criticism and the Growth of Knowledge*, edited by Imre Lakatos and Alan Musgrave. Cambridge: Cambridge University Press, 1965.

represent an idyllic vision of private family life, privacy norms already reshaped the inner city.[69] I show that this institutionalization of urban privacy was the result of orchestrated political mobilization that allowed social reformers to exploit favorable opportunity structures in New York politics. The resulting legislation codified middle-class commitments to familial privacy in the modern city even if it left the root causes of poor living conditions and the persistent overcrowding of tenement apartments unaddressed, and even if it occasionally ran against the lived experience and stated preferences of working-class immigrant families. The chapter also serves as a reminder that seemingly mundane objects and spaces – like doorways, toilets, and bathrooms – can become important boundary objects in political struggles about privacy and individuality that are laden with moral and ideological overtones. Contemporary struggles over transgender bathroom access are but the latest episode in a long history of politicized personal hygiene and carnal privacy.

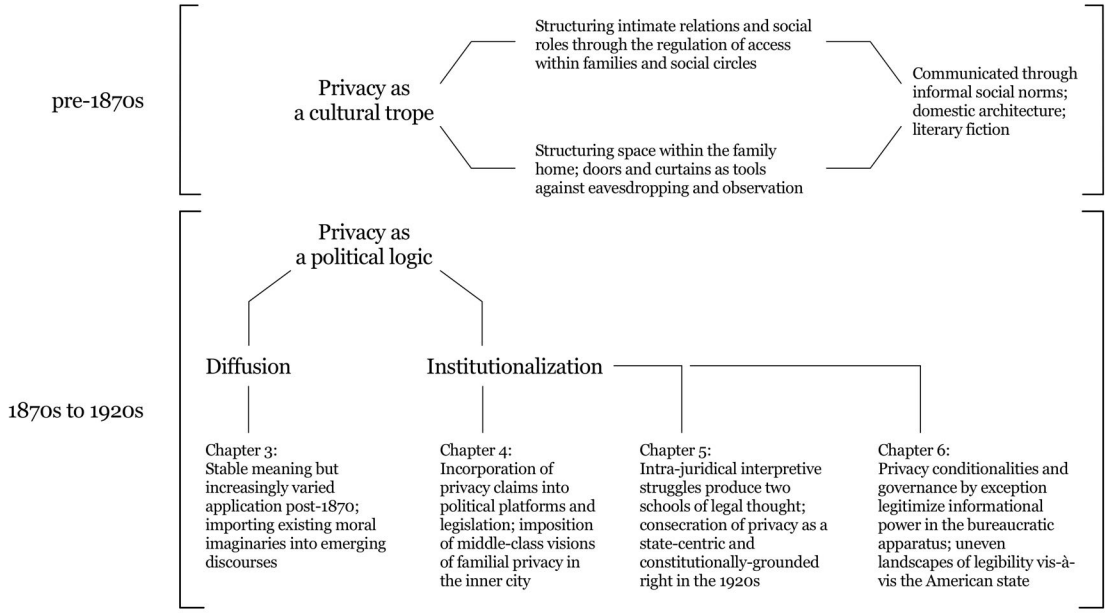

Figure 1.1: *Schematic summary of privacy as a political logic*

Chapter 5 focuses on the American legal field, treating U.S. jurisprudence is not simply as a method for resolving disputes but as a powerful mechanism through which conceptions of the social order are reaffirmed.[70] It demonstrates that the institutionalization of the right to privacy in American jurisprudence involved a decisive

[69]See Igo (2018), Chapter 4.

[70]Ian Haney Lopez. *White By Law: The Legal Construction of Race*. New York: NYU Press, 1997.

pivot from market-centric towards state-centric conceptions of personal privacy. This was not a foreordained outcome: Between 1890 and 1920, state and federal courts in the United States produced a growing body of caselaw about the "right to privacy" that was primarily concerned with the misuse of personal information in the private sector. Yet legal professionals began to draw an increasingly clear line between the justiciable conduct of government officials and the collection of personal data by private companies. The former was folded into a constitutionally-grounded right to privacy; the latter was relegated to the realm of tort law and narrowly circumscribed. By the late 1920s, the focus of privacy jurisprudence had flipped. Citizens could raise claims against a potentially overbearing state but consumers had fewer remedies to contest the use of personal data by advertisers or publishers. Judges and lawyers had begun to see the state and the economy as distinct domains that were subject to different rules and logics, and they had turned away from natural law and towards the U.S. Constitution as a "creedal" document that could provide justification for previously unarticulated privacy rights of American citizens.[71] This state-centric and constitutionally grounded approach to privacy was consecrated by federal courts. It also set the tone for U.S. privacy jurisprudence during much of the twentieth century – indeed, market-centric approaches have gained ground only in recent years after nearly a century of juridical neglect that dates back to the initial institutionalization of the right to privacy in the 1920s.

Chapter 6 turns directly towards the American state. It documents the institutionalization of a system of governance by exceptions that selectively excluded specific populations and specific types of personal data from seemingly universal privacy protections. The chapter puts two state agencies under the microscope: the Public Health Service and the Post Office Department. Health officials like John Hurty helped to lay the groundwork for the nationwide collection of vital statistics and the targeted surveillance of local populations during public health emergencies, thus marrying the scientific ethos of the American medical community to the power of law enforcement. But while nonwhite populations were undercounted in national vital statistics until the late 1920s, they were frequently overexposed to local health surveillance campaigns. In a different corner of the expanding federal administrative apparatus, officials employed by the Postal Inspection Service worked to trace sexually explicit and treasonous content through the U.S. postal network – a project that was accelerated by conservative anti-vice campaigns during the late nineteenth century and the implementation of mail censorship during World War I. In both cases, officials aimed to present the uneven and targeted collection of personal data as a legitimate exercise of state power that remained compatible with expectations of privacy and the tenets of limited governance. In doing so, they turned privacy into a logic de-

[71] Aziz Rana. 2015. "Constitutionalism and the Foundations of the Security State." *California Law Review* 103 (2): 335-386.

fined by myriad qualifications and exceptions as officials subordinated demands for privacy to the necessities of infectious disease management and selectively excluded sexually explicit and politically radical communications from the protective shield it offered. Some of these qualifications have survived until today, expressed in specialized language like the so-called *salus populi* doctrine that grants considerable power to government agencies during public health crises.[72]

Yet the laws of historical inquiry are not the laws of gravity: What goes down must come up. In the concluding chapter, I emerge from the depths of American history and expand the generalogy of privacy into the present. Contemporary contests over informational and personal privacy are manifold, but several stand out above the rest: The balancing of privacy and national security in the post-9/11 era; the privacy claims of consumers in an economy that relies on the collection and commodification of personal data; the expansion of data collection into new domains to capture genetic information and other types of personalized data; and the risks and benefit of online anonymity. Each of these contests reveberates with with echoes of the past, sometimes loudly and sometimes as a subtle hum. Some of them are also directly connected to the struggles of decades past through institutional path dependencies as well as cultural histories and legal precedent. They give concrete meaning to William Faulkner's insistence that the past is never *truly* past.

But how can we come to know this past, seemingly so near to the present yet simultaneously so far removed? Years ago, the assyrologist Niek Veldhuis described to me the challenge of assembling a representation of ancient cultures from fragments of cuneiform texts and material artifacts. He compared it to "wringing water from stones," thus capturing both the effort required to extract meaningful information from raw data and a researcher's fears about obtaining none at all. Thankfully, two recent developments have the potential to become force multipliers in historical social science. First, an increasing number of datasets is being digitized by libraries and universities across the United States and the world. This makes historical data not only more accessible (since digitization eliminates the need for some – but certainly not all – archival visits) but also means that they can be processed and analyzed in novel ways. Second, the tools of computational social science and the computing power they require have progressed in leaps and bounds. It is now a relatively trivial challenge to analyze one hundred million census records or ten housand historical texts.

The chapters that follow sit at the intersection of the old and the new. They embrace what is sometimes called a "multi-method" approach and combine years of traditional archival research in the National Archives, state archives in Massachussets

[72] John Fabian Witt. *American Contagions: Epidemics and the Law From Smallpox to Covid-19*. New Haven: Yale University Press, 2020.

and California, municipal archives in New York City, and university research libraries with the analysis of large datasets of digitized text. The close readings of historical documents, excavated from the dusty boxes and dog-eared folders that fill miles of shelf space at the National Archives headquarters in College Park, MD, can uncover intra-organizational processes with a granularity that simply cannot be matched by computational approaches. Yet computational work can capture latent patterns that are only detectable from a distance and can help to identify subtle shifts that might otherwise go unnoticed. Most importantly, having multiple methodological arrows in one's quiver makes it possible to ask new kinds of questions, or to ask old questions in new ways, because there now is a greater chance of answering them in a rigorous manner.

I introduce each dataset and each method when the argument requires it. Generally speaking, I rely on documents obtained from archival visits and on the qualitative analysis of texts to establish a historical narrative and to examine the confluence of privacy and informational power within specific organizations and agencies like the Public Health Service and the Post Office Department. To track shifts in the meaning and application of the terminology of privacy over multiple decades, I run several computational models on a large dataset of historical newspaper articles collected from national and local publications in 46 U.S. states between 1870 and 1920. I then leverage the centrality of precedent in American jurisprudence to trace the legal institutionalization of the so-called "right to privacy" through a citation network analysis of 677 court cases, legal essays, and statutes. One advantage of a networked approach is that it allows me to understand individual legal interventions not as isolated occurrences but as elements of a larger discursive environment that fit into distinct schools of legal thought. Additional data comes from digitized collections and includes census micro-data, conference proceedings of the social reform movement, scanned floorplans of tenement buildings, and historical magazine articles. Taken together, the following chapters seek to craft a coherent argument on the basis of this disjointed array of sources. Still, the presentation of knowledge is a bit like rain on a roof: You never know where the water might come through. In the best case, each chapter will spark associations that I have failed to see and raise questions that I have not answered. The plugging of those holes is what we call science.

Chapter 2:

The Rise of a Political Logic

Towards a Historical Sociology of Privacy

Talk about privacy can have a Jekyll-and-Hyde quality. On the one hand, it has become commonplace to delare that privacy is everywhere under threat. We find ourselves "in the midst of a [...] panic": Privacy seems to be elusive in practice and less valued as a social good than in the past as societies appear to come under "total surveillance" and vast amounts of personal data are collected and commodified.[1] Thus the magazine *Science* declared to its readers in 2015, "privacy as we have known it is ending," while the *New Statesman* warned that we have now "sleepwalk[ed] into a world without privacy" (Fig. 2.1).[2] Consumers trade it away for added convenience; companies find it incompatible with their business models; states subordinate it to the prerogatives of efficient governance and national security. The "privacy war is long over," *The Atlantic* concluded in 2018, "and you lost."[3] Even a landmark achievement of the 1970s – the judicial embrace of abortion and contraception as basic rights, initially couched in the language of privacy and bodily integrity – is now on the chopping block. When the Supreme Court's opinion overturning *Roe v. Wade* was first leaked to the press in May 2022, U.S. Vice President Kamala Harris swiftly declared

[1]Samantha Barbas. 2011. "Saving Privacy From History." *DePaul Law Review* 61: 973-1048; Reginald Whitaker. *The End of Privacy: How Total Surveillance is Becoming a Reality.* New York: New Press, 1998.

[2]Martin Enserink and Gilbert Chin. "The End of Privacy." *Science* Vol. 347, Issue 6221 (2015). p. 491; John Naughton. "Slouching Towards Dystopia." *The New Statesman*, 02/26/2020. Available at https://www.newstatesman.com/2020/02/slouching-towards-dystopia-rise-surveillance-capitalism-and-death-privacy. Accessed 05/05/2022.

[3]Ian Bogost. "Welcome to the Age of Privacy Nihilism." *The Atlantic*, 08/23/2018. Available at: https://www.theatlantic.com/technology/archive/2018/08/the-age-of-privacy-nihilism-is-here/568198/. Accessed December 14, 2021.

that "if the right to privacy is weakened, every person could face a future in which the government can potentially interfere in the personal decisions you make about your life."[4] While the *language* of privacy still surrounds us, perhaps these examples confirm that "for all practical purposes, privacy no longer exists."[5] As Calvin Gotlieb has argued in a retrospective assessment of privacy during the computational age, most people no longer care enough about their privacy to balance it against competing social goods or to defend it against attacks and gradual erosion.[6]

Perhaps Edward Shils was therefore correct when he lamented the disappearance of a "golden age of privacy."[7] From the vantage point of the twenty-first century, the pre-industrial world of small towns and villages that Shils described – where each was known to kin and neighbors, and knew them in turn – has given way to pervasive surveillance assemblages rather than an anonymous mass society;[8] and the expansion of civic and political rights has not just allowed us to address the racism and sexism of prior decades, however imperfectly, but has also fueled a reactionary counter-movement.[9] This is a world where, in the prescient words of Karl Marx, "everything seems pregnant with its contrary."[10] The newfangled forces of technology that facilitate global information flows have also turned into tools of perpetual examination and algorithmic judgment; the liberal agenda of the postwar decades has met a fierce backlash.

But on the other hand, privacy is *everywhere*. It appears in discussions of e-commerce data, instant messaging and social media platforms, geo-coded cellphone records, closed-circuit cameras, physical spaces, psychological testing, digital avatars, genetic information and ancestry databases, and in a wide range of other contexts that have relatively little in common with each other, save for the use of that magical word.[11]

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[4]Kamala Harris. Twitter Post. 05/03.2022, 1:15 PM. Available at: https://twitter.com/VP/status/1521584127568498689. Accessed 05/10/2022.

[5]Calvin C. Gotlieb. "Privacy: A Concept Whose Time Has Come and Gone." Pp. 156-171 in: *Computers, Surveillance, and Privacy*, edited by Lyon, David and Elia Zureik. Minneapolis: The University of Minnesota Press, 1996.

[6]Gotlieb (1996), p. 156.

[7]Edward Shils. 1966. "Privacy: Its Constitution and Vicissitudes." *Law and Contemporary Problems* 31(2), p. 292.

[8]Kevin D. Haggerty and Richard V. Ericson. 2000. "The Surveillant Assemblage." *The British Journal of Sociology* 51 (4): 605-622. For a Marxist critique of the logic of privacy, see: Mark Neocleous. 2002. "Privacy, Secrecy, Idiocy." *Social Research* 69 (1): 85–110.

[9]On counter-movements, see: Karl Polanyi. *The Great Transformation*. Boston: Beacon Press, 1944.

[10]Karl Marx. "Speech at the Anniversary of the People's Paper." P. 577 in *The Marx-Engels Reader*, edited by Robert C. Tucker. New York: W. W. Norton & Co, 1978.

[11]See, for example: Debbie V. S. Kasper. 2007. "Privacy as a Social Good." *Social Thought & Research* 28: 165-189.

Figure 2.1: *Magazine covers: Newsweek (1970); TIME Magazine (1997); Science (2015); The New Statesman (2020).*

This proliferation of privacy discourse in the public arena is mirrored by legislative and judicial interventions. The European Union passed its *General Data Protection Regulation* in 2016; California adopted a consumer privacy law in 2018; Virginia and Colorado followed in 2021. Other bills don't carry privacy in their titles but impose constraints on the collection and sharing of personal data in the context of credit scores or educational records.[12] Even the Federal Trade Commission and the computer manufacturer Apple have joined the fray, issuing fines against companies who mislead customers about end-to-end encryption capabilities and staging a nationwide ad campaign under the slogan "Privacy. That's iPhone" (Fig. 2.2).[13] And this is merely from the vantage point of Western society. Elsewhere across the globe, the "panhuman trait" of privacy – in Barrington Moore's words – takes many additional forms and results in a tapestry of norms and practices that is richer than anything we could observe in a single country.[14] Perhaps instead of lamenting the death of privacy,

[12]See, for example, the Fair Credit Reporting Act (FCRA), the Children's Online Privacy Protection Rule (COPPA), and the Family Educational Rights and Privacy Act (FERPA). At the time of this writing, at least 30 bills before the U.S. Congress incorporated the language of privacy. See: https://iapp.org/news/a/privacy-bills-in-the-117th-congress/.

[13]Federal Trade Commission. "FTC Requires Zoom to Enhance its Security Practices as Part of Settlement," 11/09/2020. Available at: https://www.ftc.gov/news-events/news/press-releases/2020/11/ftc-requires-zoom-enhance-its-security-practices-part-settlement. Accessed 05/01/2022; Mike Wuerthele. "'Privacy. That's iPhone' ad campaign launches, highlights Apple's stance on user protection." *AppleInsider*, 03/14/2019. Available at: https://appleinsider.com/articles/19/03/14/privacy-thats-iphone-ad-campaign-launches-highlights-apples-stance-on-user-protection. Accessed 05/01/2022.

[14]Barrington Moore. *Privacy: Studies in Social and Cultural History.* London: Routledge, 1984. p. 276; Jeff Weintraub and Krishan Kumar (eds). *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy.* Chicago: The University of Chicago Press, 1997; Syed Ishtiaque Ahmed, Md Romael Haque, Shion Guha, Md Rashidujjaman Rifat, and Nicola Dell.

we can witness the coming of another "golden age" – especially since liberal visions of privacy and individual privacy rights can in principle coexist with informational capitalism or even help to legitimate the exercise of informational power.[15]

Figure 2.2: *Billboard in San Francisco, May 2022.*

This mélange of often contradictory assessments explains why the question, "does privacy still exist?" has no easy answer. Indeed, there is a good reason for prevarication: It is far from certain what privacy even *is*; its essence and scope being the objects of perennial struggle.[16] There is privacy as freedom, privacy as a middle-class privilege, privacy as control over personal data, privacy as consent over data sharing, privacy as non-interference or limited access, privacy as trust, privacy as contextual integrity, privacy as a desire for seclusion and solitude, and many more variations. More than

2017. "Privacy, Security, and Surveillance in the Global South: A Study of Biometric Mobile SIM Registration in Bangladesh." *Proceedings of the 2017 CHI Conference on Human Factors in Computing Systems*: 906-918; Payal Arora. 2019. "Decolonizing Privacy Studies." *Television & New Media* 20 (4): 366-378; Divya Dwivedi and Viswanathan Sanil (eds). *The Public Sphere from Outside the West*. London: Bloomsbury Publishing, 2015.

[15]Marc Langheinrich. 2018. "The Golden Age of Privacy?" *IEEE Pervasive Computing* 17: 4-8; Sami Coll. 2014. "Power, Knowledge, and the Subjects of Privacy: Understanding Privacy as the Ally of Surveillance." *Information, Communication & Society* 17 (10): 1250-1263.

[16]William M. Beaney. 1966. "The Right to Privacy and American Law." *Law and Contemporary Problems* 31: 253-271.

two hundred competing definitions exist in the English literature alone.[17] To some extent, these "pernicious ambiguities" and the definitional vagueness of privacy are products of the division of labor, as different industries and academic disciplines have pursued approaches that fit their idiosyncracies.[18] Privacy is now linked to so many specialized bodies of knowledge that the resulting scholarship is necessarily fragmented.[19] The "inconclusive" conversation around privacy also reflects the unique views of observers who are embedded not just into specialized fields but into social hierarchies, and thus serve as a reminder of Karl Mannheim's observation that "the same concept in most cases means very different things when used by differently situated persons."[20] Privacy looks different from the perspective of a scandal-plagued politician than it does from the perspective of a welfare recipient whose access to services depends directly on participating in a state-run monitoring regime.

But much of this definitional ambiguity is also rooted in the social life of privacy itself. It has never carried a stable and unambiguous meaning but resembles "a many splendored and complicated thing" that has historically defied attempts to confine it to one narrow category or another.[21] Conceptions of privacy differ across societies and have evolved over time, and different approaches co-exist in any given time and place.[22] The broad language shrounds, in the words of Neil Smelser, "a galaxy of connotations" that actually exist in the world.[23] There is no universally shared interpretation or valuation of privacy and no universally "correct" way of safeguarding it, and to assume or even demand a single approach regardless of circumstance risks tasking the logic of

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[17]Katherine J. Day. "Perspectives on Privacy: A Sociological Analysis." University of Edinburgh Ph.D. Dissertation, 1985.

[18]Stephen T. Margulis. 1977. "Conceptions of Privacy: Current Status and Next Steps." *Journal of Social Issues* 33 (3): 5-21. Daniel J. Solove. "Conceptualizing Privacy." *California Law Review* 90.4 (2002): 1087–1155. Christian Fuchs. 2011. "Towards an Alternative Concept of Privacy." *Journal of Information, Communication and Ethics in Society* 9 (4): 220–237.

[19]Alan F. Westin. *Privacy and Freedom.* New York: Athenum. 1967; David Vincent. *Privacy: A Short History.* London: Polity, 2016.

[20]Vincent (2016), p. vii; Karl Mannheim. *Ideology and Utopia.* London: Routledge, 1964. p. 245. Donna Haraway. 1988. "Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective." *Feminist Studies* 14 (3): 575-599.

[21]Harriet F. Pilpel. "The Challenge of Privacy." Pp. 19-44 in *The Price of Liberty*, edited by Alan Reitman. New York: W. W. Norton and Co, 1969. p. 44. Quoted in Day (1985), p. 4.

[22]Westin (1967); Debbie V. S. Kasper. "The Evolution (or Devolution) of Privacy." *Sociological Forum* 20.1 (2005): 69–92. Denise Anthony, Timothy Stablein, and Emily K. Carian. 2015. "Big Brother in the Information Age: Concerns About Government Information Gathering Over Time." *IEEE Security & Privacy* 13 (4): 12-19.

[23]Neil Smelser. *Social Change in the Industrial Revolution.* Chicago: The University of Chicago Press, 1959. p. 2.

privacy "with doing work beyond its capabilities."[24]

Seen from this angle, the difficulty of nailing down a general definition is a signal rather than noise. It tells us something important about the kaleidoscopic nature of privacy, and it serves as a reminder that definitional coherence is commonly imposed from the vantage point of the present upon an unruly past.[25] As Deborah Poole and Ruha Benjamin have argued, the "all-encompassing gaze" that seeks singular interpretations and infers static meaning is itself an effect of power which obscures "myriad interpretations or meanings" that proliferate in different social settings and at different times.[26] No surprise then, that the "collective singular" implied by the term privacy often rubs uneasily against the irreducible plurality of social experience and against the varied manifestations of privacy in the world.[27] It functions less as a concrete idea than a "seedbed for social thought" that allows different constituencies to articulate their perspectives, hopes, and grievances through the shared language of privacy and to mingle under the capacious umbrella it provides.[28]

Instead of asking what privacy *is* (as if there was a hidden essence that could be discovered if we only peeled back a sufficient number of layers, and thus discovered a common core beneath the variegated outer skin), I am therefore interested in how privacy *became* a salient political logic in the United States around the turn of the twentieth century. Far from being a self-evident historical fact, the prominence of privacy in public life and politics demands an explanation. Legal historians have recognized this when tracing the origins and evolution of privacy jurisprudence.[29] That is why the legal history of privacy is frequently told with a distinct temporality, marked by periods of intense juridical activity that have reshaped and canonized privacy law since the beginning of the twentieth century. *What* types of knowledge are

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[24]Daniel J. Solove. 2012. "Introduction: Privacy Self-Management and the Consent Dilemma." *Harvard Law Review* 126 (1): 1880-1903.

[25]As Nietzsche observed, the recounting of history usually serves the interests of the living rather than the memories of the dead. Friedrich Nietzsche. "On the Uses and Disadvantages of History for Life." Pp. 57-125 in *Untimely Meditations*, edited by Daniel Breazeale. Cambridge: Cambridge University Press, 1997.

[26]Deborah Poole. *Vision, Race, and Modernity: A Visual Economy of the Andean Image World*. Princeton: Princeton University Press, 1997. p. 18; Ruha Benjamin. *Race After Technology: Abolitionist Tools For the New Jim Code*. London: Polity, 2019. See Solove (2002), p. 1903 for an analogous argument against the search for "common denominators."

[27]Jan-Werner Müller. "On Conceptual History." Pp. 74-93 in *Rethinking Modern European Intellectual History*, edited by Darrin M. McMahon and Samuel Moyn. Oxford: Oxford University Press, 2014. p. 80.

[28]Sarah E. Igo. *The Known Citizen: A History of Privacy in Modern America*. Cambridge: Harvard University Press, 2018. p. 16.

[29]Dorothy J. Glancy. 1979. "The Invention of the Right to Privacy." *Arizona Law Review* 21 (1): 1–39.

shielded against *whom* and with *which* justifications – those are the moveable corner stones of privacy jurisprudence in the United States. The same emphasis on emergence also informs the work of social historians who focus on popular understandings of privacy. Americans thought differently about it during the immediate postwar years than they did in the 2000s because the information they sought to safeguard and the intrusions they feared also differed between those two periods of American history[30] Both of these perspectives regard privacy as something that remains perennially open to reinterpretation and rises to the fore during specific historical moments.

Still, this remains a rather narrow perch. To frame privacy as a category of expert legal knowledge, an individual right, or a personal attitude risks losing sight of its distinctly social origins; and to value privacy solely for the reprieve it grants from the gaze of others is to under-estimate its wider social significance.[31] Privacy norms "matter" not just because they reflect individual interests and attitudes and not only for those who seek to evade scrutiny.[32] Their social significance often stems from their incorporation into legal frameworks, organizational routines, and everyday practice, or what one might call "privacy at scale": When privacy norms become widely diffused and institutionalized – and thus tied into an entire network of specialized discourses about morality, law, capitalism, statecraft, and informational power –, they can affect the lives and life courses of large numbers of people who participate in social life as consumers and citizens.

To put the social at the heart of the study of privacy is to understand it as a product *of* society, as a logic that remains embedded *within* society, and as a force that acts *upon* society. As Debbie Kasper puts it, privacy is a social good "which is necessary for the functioning of society and which is interconnected with other fundamental societal characteristics."[33] By understanding the combination of symbolic constructions and concrete practices related to privacy, we can perhaps explain why and with what

[30]Ponnurangam Kumaraguru and Lorrie Faith Cranor. "Privacy Indexes: A Survey of Westin's Studies." Institute for Software Research Working Paper. Carnegie Mellon University, 2005; Igo 2018. Alan Westin's survey work during the 1970s has demonstrated that attitudes towards privacy in the United States have shifted significantly and, sometimes, quite suddenly. For non-Western perspectives on attitudes towards privacy and the private, see: Vladimir Shlapentokh. *Public and Private Life of the Soviet People: Changing Values in Post-Stalin Russia.* Oxford: Oxford University Press, 1989. Yan Yunxiang. *Private Life Under Socialism: Love, Intimacy, and Family Change in a Chinese Village, 1949–1999.* Redwood City: Stanford University Press, 2003.

[31]Priscilla M. Regan. *Legislating Privacy: Technology, Social Values, and Public Policy.* Chapel Hill: U.N.C. Press, 1995. p. xiv.

[32]Daniel J. Solove 2011. "Why Privacy Matters Even If You Have 'Nothing to Hide'." *Chronicle of Higher Education* 15. Available at: https://www.chronicle.com/article/why-privacy-matters-even-if-you-have-nothing-to-hide/. Accessed 05/16/2022.

[33]Kasper (2007), p. 166. On the functional importance of privacy, also see: Barry Schwartz. 1968. "The Social Psychology of Privacy." *American Journal of Sociology* 73 (6): 741–752.

consequences it emerged as a powerful political logic in the United States around the turn of the twentieth century – diffusing across a wide range of thematic contexts and findings its law into legislative documents and juridical doctrine –; to grasp the *thingness* of privacy and the uneven protections it has historically offered; and to corral the fatalism that so often accompanies mentions of privacy in the twenty-first century without clinging to a misplaced faith in its emancipatory potential.[34]

In this chapter, I begin by disentangling privacy from the more prevalent public/private dichotomy. They two are intimately related and partially nested within each other. But privacy isn't simply synonymous with "the private". Public and private commonly function as foundational categories of political thought that help to distinguish the economy from the state, the state from civil society, and society from the autonomous individual. Like other "principles of vision and division," they carve up the social world into two antipodal and mutually exclusive camps.[35] In contrast, I propose that we understand privacy as a political logic with a distinct genealogy. It had to be incited into existence, tied together from a loose bundle of concepts, and linked to existing modes of governance and legal doctrines. The history of privacy is a varied history of *becoming* – of coupling up discourses, of claiming and then defending a terrain, of different groups saying things in different ways and in order to obtain different results.[36] Studying this history requires a focus on processes of diffusion and institutionalization through which the logic of privacy evolved into a protean and politically expedient logic of social organization aimed at managing the relationship between the individual self and modern society.

This sociology of a political logic has three implications, which I outline in the latter half of this chapter. First, it draws attention to struggles over the visibility of people and the exercise of power in specific historic settings. Any particular approach to privacy (and there are many!) is not so much an unmediated expression of macro-historical conditions but is born from disagreements and uncertainties during periods of social and technological change. Those conflicts are settled when the logic of privacy becomes institutionalized in the practices and decision-making of government agencies or private companies and is thus rendered durable beyond its moment of origin. Second, privacy is a cause as well as a consequence. Much of the existing literature focuses

[34]Roger Friedland and Robert R. Alford. "Bringing Society Back In: Symbols, Practices and Institutional Contradictions." Pp. 232-263 in *The New Institutionalism in Organizational Analysis*, edited by W. W. Powell and P. J. DiMaggio. Chicago: The University of Chicago Press, 1991. See p. 232 for an introduction to "logics".

[35]Pierre Bourdieu. *Language and Symbolic Power*. Cambridge: Harvard University Press, 1991. p. 232

[36]The last part of this sentence paraphrases Foucault's account of the rise of "sexuality" as an issue of public concern and a distinct object of knowledge. See: Michel Foucault. *A History of Sexuality: Volume 1*. New York: Vintage Books, 1990. p. 27.

on the privacy-enabling or -foreclosing effects of new technologies, new techniques of governance, and new business models. Yet to speak of privacy is also to place concrete demands upon the conduct of individuals and organizations. This is precisely why it "matters": The contours of privacy affect the distribution of burdens and benefits in society by conditioning the exercise of informational power, by encouraging specific forms of bureaucratic practice, and by marking certain forms of behavior as transgressive. Third, the logic of privacy is entangled with other ideologies and moral imaginaries. It can become a docking port for substantive political programs and cultural norms, which are re-articulated through the language of privacy and often re-formulated in informational terms. The historical intermingling of privacy and gender – often expressed as the belief that the "privacy of the home" is a sphere that naturally suits the sensibilities of women – is merely the most widely known manifestation of a more general tendency towards entanglement. Since the late nineteenth century, racial hierarchies, class distinctions, principles of citizenship, and liberal economic and political ideologies have all become entangled with the logic of privacy and explain why privacy protections are often highly uneven and selectively expose certain populations and certain types of data to the inquisitive gaze.

The "grand dichotomy" of public and private

Human experience is a messy continuum. We make it understandable by carving it into chunks and pressing it into pre-molded categories that allow us to pass judgments about similarity and difference, familiarity and strangeness, rank and order.[37] Some of these categories are defined by biographical markers like graduation, marriage, or childbirth; others are determined by custom or context.[38] And many categories are populated through formal examination on the basis of personalized data. The eligibility of individuals for loans, mortgages, promotions, or parole – as well as the concurrent placement of those individuals in "high" or "low" categories or their

[37] Georg Simmel. 1994. "Bridge and Door." *Theory, Culture & Society* 11: 5–10; Eviatar Zerubavel. 1996. "Lumping and Splitting: Notes on Social Classification." *Sociological Forum* 11 (3): 421–433; Marion Fourcade. 2016. "Ordinalization: Lewis A. Coser Memorial Award for Theoretical Agenda Setting 2014." *Sociological Theory* 34 (3): 175-195. Also see: Rebecca Jean Emigh, Dylan Riley, and Patricia Ahmed. *How States and Societies Count: Antecedents of Censuses from Medieval to Nation States*. New York: Palgrave Macmillan, 2016. There is a spirited debate whether such categories are figments of our imagination or whether they capture some real essence of "the world". This is not the place for such a debate. But if pressed, my own position would perhaps be closest to Ian Hacking's "dynamic nominalism": When we impose categories onto the world, the world has a way of pushing back. It is out of this interaction between names and the named that categories acquire substance, become durable, and are validated as "true" representations of social or biological facts. See: Ian Hacking. 2007. "Kinds of People: Moving Targets." *Proceedings of the British Academy* 151: 285–318.

[38] Georg Simmel. "The Stranger." Pp. 143-149 in *On Individuality and Social Forms*, edited by Donald N. Levine. Chicago: The University of Chicago Press, 1971.

distribution along an ordered scale – usually depends on a standardized assessment of risk and merit. Through the informational detritus we unwittingly leave behind, and through the information that is specifically extracted and collected from us, we become intelligible to states, markets, and our peers.[39] Some of these classificatory moves are less perceptible than others, but all categories are consequential. They shape how we see the world, how the world sees us, and how we can move through the world. They structure access to opportunities and affect how, and over whom, power is exercised.

Yet some categories seem so fundamental as to have a certain transcendental quality. Public and private are two such categories.[40] They allow us to divide states from societies; public administration from capitalist markets; political engagement from familial life; or families from their social environments.[41] They sit at the heart of what it means to live in the community of others. For ancient thinkers, the protection of a private sphere was integral to the development of human virtue.[42] Two thousand years later, Immanuel Kant and John Stuart Mill regarded the "public use of man's reason" – i.e. the freedom to speak one's mind despite the judgment of others – as a central element of mankind's emancipation from religious dogma and political oppression.[43] In fact, many classical works that seem at first glance to touch on *privacy* are in fact about *the private*.[44] Aristotle's distinction between the *oikos* and the *polis* – juxtaposed spheres of family life and political activity – falls into this camp, and so do Thomas Moore's description of the "private" as "the prime hindrance to the public interest" in the land of *Utopia* and William Shakespeare's characterization (in

[39] James C. Scott. *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*. New Haven: Yale University Press, 1998; Dan Bouk. *How Our Days Became Numbered: Risk and the Rise of the Statistical Individual*. Chicago: University of Chicago Press, 2015; Marion Fourcade and Kieran Healy. 2016. "Seeing like a Market." *Socio-Economic Review* 15(1): 9–29; Colin Koopman. *How We Became Our Data*. Chicago: The University of Chicago Press, 2019.

[40] Note the circularity of making a categorizing statement about categories. To quote William James, "it's rocks all the ways down." William James. 1882. "Rationality, Activity and Faith". *The Princeton Review* 58: 58-86.

[41] Jeff Weintraub. "The Theory and Practice of the Public/Private Distinction." Pp. 1-42 in *Public and Private in Thought and Practice*, edited by Jeff Weintraub and Krishan Kumar. Chicago: The University of Chicago Press, 1997.

[42] For a detailed discussion on Aristotle's writings on public and private, see: Judith A. Swanson. *The Public and the Private in Aristotle's Political Philosophy*. Ithaca: Cornell University Press, 1992.

[43] Immanuel Kant. "An Answer to the Question: 'What is Enlightenment?'" *Political Writings*, edited by H. S. Reiss. Cambridge: Cambridge University Press, 1991; John Stuart Mill. *On Liberty, Utilitarianism, and Other Essays*, edited by Mark Philip and Frederick Rosen. Oxford: Oxford University Press, 2015.

[44] Sjoerd Keulen and Ronald Kroeze. "Privacy from a Historical Perspective." Pp. 21-56 in: *The Handbook of Privacy Studies: An Interdisciplinary Introduction*, edited by Bart van der Sloot and Aviva de Groot. Cambridge: Cambridge University Press, 2018.

plays like *The Tempest*) of the private sphere as an instigator "of vice and political conspiracy" that threatened the divine rule of kings.[45]

Norberto Bobbio thus describes the juxtaposition between public and private as nothing less than the "grand dichotomy" of Western thought that is still used to subsume a wide range of other distinctions and encourages a binary view of the social world.[46] This overstates the case. While public and private feature heavily in the Western intellectual canon, they are not an exclusively Western invention.[47] Ancient Hebrew texts distinguished public and private moral codes, and Chinese writers proffered a sharp juxtaposition of public and private as far back as the third century B.C.[48] In India, writers like K. Ramakrishna Pillai wrote extensively about the complicated politics of "the public" during British colonial rule.[49] And despite Walter Benjamin's proclamation that "Bolshevism has abolished private life",[50] the distinction between public and private remained alive and well in many socialist societies during the twentieth century.[51] The Western dominance of discussions about public and private is precisely that – a form of intellectual dominance rather than a reflection of global lived realities.

Still, the language of public and private has been widely invoked to describe the development of European and North-American societies since the eighteenth century. For writers like Richard Sennett or Norbert Elias, the cultural affirmation of public and private went hand-in-hand with the reorganization of economic exchange and governmental rule after the French Revolution. The protection of a "private sphere" and the re-classification of formerly "public" practices as private matters (from sexual intercourse to personal hygiene and the rearing of children) reflected the growing cultural valuation of the individual, the rising importance of the nuclear family, and

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[45]Keulen and Kroeze (2018), pp. 25-26. For a discussion of Aristotle, see Arendt (1958). For a discussion of Moore, see: Stephen Greenblatt. *Renaissance Self-Fashioning: From More to Shakespeare*. Chicago: The University of Chicago Press, 2005. For a discussion of privacy as deceit, see p. 23 in: Cecile M. Jagodzinski. *Privacy and Print: Reading and Writing in Seventeenth-Century England*. Richmond: University of Virginia Press, 1999.

[46]Norberto Bobbio. *Democracy and Dictatorship: The Nature and Limits of State Power*. Cambridge: Polity Press, 1989.

[47]Weintraub (1997).

[48]Barrington Moore. *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World*. Boston: Beacon Press, 1967; Bonnie S. McDougall and Anders Hansson (eds). *Chinese Concepts of Privacy*. Leiden: Brill, 2002.

[49]Divya Dwivedi and V. Sanil (eds). *The Public Sphere from Outside the West*. London: Bloomsbury Publishing, 2015. See especially Chapter 5 ("Ambivalences of Publicity"), by Udaya Kumar.

[50]quoted in: Tatiana Klepikova. 2015. "Privacy As They Saw It: Private Spaces in the Soviet Union of the 1920-1930s in Foreign Travelogues." *Zeitschrift für Slavische Philologie* 71 (2), p. 1.

[51]Shlapentokh (1989); Yunxiang (2003).

the redistribution of power from the landed nobility towards the emerging urban bourgeoisie.[52] Economically, the public/private dichotomy justified a focus on private property and trade beyond the reach of any central authority.[53] It made it possible to think of a market, or a market economy, as something that had its own distinct logic and could be separated from centralized economic planning. Politically, it reflected an emancipation from ecclesiastical authority – which was relegated to the realm of "private life" and reconstituted as personal faith – and a reappraisal of governmental power.[54] As Benjamin Constant wrote in 1814, the separation of a "public sphere" from a "private sphere" of familial life was nothing less than a precondition for political liberalism.[55] In contrast to absolute monarchies, it implied explicit limits to the exercise of state power and positioned civil society as an essential counterweight to the state apparatus. In the United States, Alexis de Tocqueville thus observed that the revolution which had birthed the country had also allowed Americans to "enjoy the pleasures of private life" by drawing a clear distinction to the "public life" of political engagement.[56] The danger that Tocqueville foresaw in the United States was not a renunciation of public and private but an embrace of the latter at the expense of the former – an atomistic society that neglected to reactivate its associational glue.[57]

This concern about civil society also lies at the heart of what has arguably been the most influential perspective on the public/private dichotomy since the early decades of the twentieth century. Scholars like Jürgen Habermas, Hannah Arendt, and Walter Benjamin all focused on public discourse and sociability – exemplified by the coffee houses of Vienna or the arcades of Paris – as crucial elements of democratic governance.[58] To them, only a lively public sphere could ensure the development

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[52]Norbert Elias. *The Civilizing Process: Sociogenetic and Psychogenetic Investigations.* Oxford: Blackwell Publishing, 2000. Richard Sennett. *The Fall of Public Man.* New York: W. W. Norton & Co, 1974.

[53]Adam Smith. *The Wealth of Nations.* New York: Bantam Classics, 2003. The term "private" appears more frequently in *The Wealth of Nations* than the term "wealth". Also see Neocleous (2002).

[54]Karl Marx. "On the Jewish Question." Pp. 26-52 in *The Marx-Engels Reader*, edited by Robert C. Tucker. New York: W. W. Norton & Co, 1978.

[55]Benjamin Constant. *Constant: Political Writings*, edited by Biancamaria Fontana. Cambridge: Cambridge University Press, 1988. As David Vincent writes, "liberal governmentality derived its authority from a deliberate act of withdrawal from the private sphere." See Vincent (2016), p. 118.

[56]Alexis de Tocqueville. *Democracy in America.* New York: Penguin Books, 2003, p. 701 and p. 604.

[57]For a contemporary version of this argument, see: Amitai Etzioni. 1999. *The Limits of Privacy.* New York: Basic Books.

[58]Jürgen Habermas. *The Structural Transformation Of The Public Sphere.* Cambridge: MIT Press, 1991. Hannah Arendt. *The Human Condition.* Chicago: The University of Chicago Press, 1958. Walter Benjamin. *The Arcades Project.* Cambridge: Harvard University Press, 1999.

of democratic "habits of the heart" and serve as a check on institutional power.[59] Even critics of the liberal approach have generally embraced "public" and "private" as important categories of thought and political organization. For example, Nancy Fraser has pointed out that "the public sphere" has historically excluded women and those with low economic capital. Yet her vision of political emancipation still relies on a more inclusive definition of "the public" and a more adequate conception of the public sphere rather than a renunciation of the public/private dichotomy.[60] The same is often true for accounts that question how pristine the distinction between public and private is in practice.[61] For example, political scientists tend the treat the interpenetration of public and private as a characteristic feature of U.S. state development. The so-called "infrastructural power" of the bureaucratic apparatus relies at least partially on the outsourcing of responsibility to "private" charitable organizations, which provide welfare services that would in other countries fall within the portfolio of government agencies.[62] Likewise, the construction of markets is usually accomplished through regulatory action rather than freedom from "public" interference. Governments and administrative agencies shape the rules that govern competition and make contractual market exchanges possible.[63] And as contemporary scholars have pointed out, "public" morals and social norms are widely refracted in the bodies and "private" lives of women, the poor, and nonwhite communities.[64] But although such accounts question the impermeability of the boundary between public and private, they do not deny its social significance. Rather, their claim tends to be that a clear distinction between public and private constitutes a form of lived privilege – enjoyed by the few rather than the many – or an ideological construct that veils an important truth about social relations.[65] Public and private still matter greatly from this perspective, but they

[59]Robert Bellah, Richard Madsen, William M. Sullivan, Ann Swidler, and Steven M Tipton. *Habits of the Heart: Individualism and Commitment in American Life.* Berkeley: The University of California Press, 2007.

[60]Nancy Fraser. 1990. "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy." *Social Text* 25/26: 56–80. Also see Chapter 16 in Dwivedi and Sanil (2015).

[61]Karen V. Hansen. "Rediscovering the Social: Visiting Practices in Antebellum New England and the Limits of the Public/Private Dichotomy." In: *Public and Private in Thought and Practice*, edited by Jeff A. Weintraub and Krishan Kumar. Chicago: University of Chicago Press, 1997.

[62]William J Novak. 2008. "The Myth of the 'Weak' American State." *The American Historical Review* 113 (3): 752–772; Charlie Eaton and Margaret Weir. 2015. "The Power of Coalitions: Advancing the Public in California's Public-Private Welfare State." *Politics & Society* 43 (1): 3-32.

[63]Neil Fligstein. *The Architecture of Markets: An Economic Sociology of Twenty-First-Century Capitalist Societies.* Princeton: Princeton University Press, 2002.

[64]Virginia Eubanks. *Automating Inequality.* New York: St. Martin's Press, 2017. Jeanne Flavin. *Our Bodies, Our Crimes: The Policing of Women's Reproduction in America.* New York: N.Y.U. Press, 2008.

[65]For example, as Karl Marx has argued, it was precisely through the "division of man into the public person and the private person" that the fiction of an independent market economy could be

do so as tools of domination rather than emancipatory ideas or factually accurate descriptions of society.

So deeply engrained are public and private into the political imagination and the historical development of society that they appear "not as a single clear distinction" but as "a series of overlapping juxtapositions".[66] If anything, we tend to underestimate their significance because a clear appraisal is complicated by their manifold expressions.[67] For example, Jeff Weintraub has distinguished at least four schools of thought that "rest on different underlying images of the social world, are driven by different concerns, generate different problematics, and raise very different issues":[68] A liberal model that juxtaposes the market economy against the state apparatus; a republican approach that distinguishes voluntary associations and communities of citizens – the "public" of Habermas' coffee house society – from private enterprise as well as administrative agencies; an anthropological perspective that differentiates social roles performed "in public" from the roles we embrace "in private"; and a feminist perspective that investigates the distinction between the private realm of the family and the larger socio-economic order. In that sense, public and private function less like specific categories of distinction and more like guiding principles that orient our "vision and division" of the world by carving it into two mutually exclusive and collectively exhaustive domains.[69] Like other nomological distinctions – Réne Descartes' mind and body dualism, or Emile Durkheim's separation of sacred and profane – they are not abstracted from particular empirical phenomena but appear as general mental structures through which we perceive reality and (mis-)recognize contingent divisions as "natural" facts of the world.[70] Their precise meaning might differ across contexts, yet their juxtaposition predates any single application in the modern world. To speak of "the public" implies the existence of "the private" – one does not exist without the other. They are linked as corresponding antipodes, reappearing as a dichotomous pairing in different times and social settings.

Diffusion and institutionalization of a political logic

This is where, despite all similarities, privacy parts with "the private". To speak of privacy is to claim that something – a particular space, a type of information, et cetera – rightfully belongs into the private realm, generalizing from particular practices to

sustained and the alienation of man from his fellow men could be justified. Marx (1978), p. 17 and 35.

[66]Raymond Geuss. *Privatheit: Eine Genealogie*. Frankfurt: Suhrkamp, 2013. p. 17.

[67]Geuss (2013).

[68]Weintraub (1997), p. 2.

[69]Pierre Bourdieu (1991), p. 232

[70]Pierre Bourdieu. 1989. "Social Space and Symbolic Power." *Sociological Theory* 7 (1): 14–25.

abtract principles.[71] Yet as a concept, privacy lacks the transcendent and dichotomous qualities of public and private. It can be juxtaposed to a concurrent need or desire for publicity.[72] But it can also appear as the antipode to confidentiality – thus shifting the focus from questions of access to and control over personal data to questions of responsible data management –; as a social good that needs to be weighed against the demands of national security or infectious disease management during epidemic outbreaks; as a prerequisite of trust and security in digital information systems; or as something that comes under threat through institutionalized surveillance efforts.[73] While public and private re-appear as inextricably linked categories of thought and practice across time and space, the dichotomous counterpart to privacy is far from obvious.[74]

Privacy more closely resembles what Andrew Abbott has called a "thing of boundaries": an emergent logic that acquires shape and substance during specific historical moments and thus comes into existence as part of the legal, cultural, and political imagination.[75] Before privacy was a salient and distinctly political logic, it had to be internally constituted and externally demarcated.[76] Its meaning and structure derived not

[71]Solove (2002), p. 1093; Sarah A. Seo. 2016. "The New Public." *Yale Law Journal* 125: 1616–1671.

[72]Eviatar Zerubavel. 1979. "Private Time and Public Time: The Temporal Structure of Social Accessibility and Professional Commitments." *Social Forces* 58 (1): p. 39. Also see Igo (2018).

[73]Randolph C. Barrows Jr. and Paul D. Clayton. 1996. "Privacy, Confidentiality, and Electronic Medical Records." *Journal of the American Medical Informatics Association* 3 (2): 139-148; Julie E. Cohen. 2012. "What Privacy is For." *Harvard Law Review* 126 (7): 1904-1933; Neil M. Richards. 2012. "The Dangers of Surveillance Symposium: Privacy and Technology." *Harvard Law Review* 126 (7): 1934-1965; Siani Pearson. "Privacy, Security and Trust in Cloud Computing." Pp. 3-42 in: *Privacy and Security for Cloud Computing*. London: Springer, 2013; Ari Ezra Waldman. *Privacy As Trust: Information Privacy For An Information Age*. Cambridge: Cambridge University Press, 2018.

[74]It is similarly telling that the terminology of privacy is wholly or partially missing from some languages, unlike the ubiquitous terminology of public and private. The French words *privauté* and *intimité* come closest to the substantive meaning of the English term "privacy", yet they aren't exact synonyms. In German, the closest equivalent is the relatively generic term *Privatsphäre* – the "private sphere" –, which partially explains why German privacy laws instead tend to rely on the language of *informationelle Selbstbestimmung* (informational self-determination). In Arabic, the closest matches are *alkhususia* and *eazala*, which are commonly translated into English as "peculiarity" and "solitude" rather than "privacy".

[75]As Abbott writes, "it is wrong to look for boundaries between preexisting social entities. Rather we should start with boundaries and investigate how people create entities by linking those boundaries into units." Andrew Abbott. 1995. "Things of Boundaries." *Social Research* 62 (4): 857–882.

[76]I use the term "political" in a broad sense. Issues are "political" if they are articulated in familiar political terms, and are thus treated as matters of civic concern and as potential areas of legal and regulatory action. For detailed discussions, see: Margaret Weir. 1987. "Full Employment as a Political Issue in the United States." *Social Research* 54 (2): 377-402. Charles Maier. "The Politics of Time: Changing Paradigms of Collective Time and Private Time in the Modern Era".

from the juxtaposition to any single antipode or any immanent truths but from the amalgamation and sublimation through which varied discourses and proto-boundaries were gradually assembled into a minimally coherent concept.

"Things were said in a different way" in the wake of this re-constitution, Michel Foucault writes in an analogous discussion of sexuality in the eighteenth and nineteenth centuries, "it was different people who said them, from different points of view, and in order to obtain different results."[77] To Foucault, asserting the historicity of sexuality as a "public issue" is not to deny its longer history as a biological reality or a factor in social relations and religious doctrine. But it is to assert that, during a specific historical period, sexuality became entangled with concerted campaigns to elevate its economic and political salience, to treat it as a social fact to be measured and managed by the state and the market, and to facilitate such measurement and management by tying conceptions of sexuality into institutional logics and organizational practices. It became linked to "a whole web of discourses, special knowledges, analyses, and injunctions settled upon it" and thereby accrued salience and significance in the cultural, legal, and political domains.[78] Similarly, to approach privacy as an emerging political logic is to study its gradual diffusion and piecemeal institutionalization as well as its demarcation against those things which were subsequently designated as not-privacy – publicity, exposure, visibility, confidentiality, or libel.[79] It pushes the analytical focus beyond discourses *about* privacy towards the emergence and effects *of* privacy in the social world.[80] The history of privacy as a political logic is not just the history of an idea but the history of institutional practices, legal codification, and reconstituted relationships between self and society.

Of course, the language of privacy is significantly older than any recognizably "modern" logic of privacy – just as the terminology of markets and states pre-date the capitalist market economy and centralized state apparatuses. Scholars have traced discussions of privacy to sexual relations and private prayer in the Middle Ages, letter-writing and diary cultures during the Renaissance era, and the re-valuation of domestic space among the early modern bourgeoisie.[81] As Jill Lepore has argued, privacy is mystery

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In: *Changing Boundaries of the Political*. Charles Maier (ed.). Cambridge: Cambridge University Press, 1987.

[77]Foucault (1990), p. 27.

[78]Foucault (1990), p. 26.

[79]Reinhart Koselleck. *The Practice of Conceptual History*. Redwood City: Stanford University Press, 2002; Reinhart Koselleck. *Futures Past: On the Semantics of Historical Time*. New York: Columbia University Press, 2004.

[80]Keulen and Kroeze (2018).

[81]Sennett (1974); Bruce Redford. *The Converse of the Pen: Acts of Intimacy in the Eighteenth-Century Familiar Letter*. Chicago: The University of Chicago Press, 1986; Cecile M. Jagodzinski. *Privacy and Print: Reading and Writing in Seventeenth-Century England*. Richmond: University of

made secular – with the distinction between public visibility and private seclusion replacing the religious dichotomization of profane and sacred – and wrapped into cultural custom rather than theological doctrine.[82] Yet more significantly, the language of privacy has long been linked to the so-called "cult of the individual" – the social valuation of individuals as the elementary unit of Western society.[83] Before there was privacy there was rising social interdependence and the division of labor; the rejection of ecclesiastical authority and divine rights of rule; and the rise of liberal political thought. Indeed, the "liberal conceptual apparatus" that appeared in many Western societies roughly after the seventeenth century – the centering of individuals as moral agents, right-bearing entities, and economic actors; the conceptual separation of those individuals into private and public-facing selves; and the conceptual distinction between state and civil society – still forms the basis for many articulations of privacy today.[84] It also explains why some consider privacy to be unsuited for an emancipatory political agenda. A focus on privacy tends to produce narrow critiques of legibility by directing attention "to the individual whose privacy is invaded," while a focus on surveillance infrastructures "directs attention to the exercise of power and to the groups that undertake it."[85] The close entangement with political liberalism can help to explain the lasting juridico-political appeal of privacy in many Western societies but also accounts for the resistance it elicits in radical political circles. It also clarifies why authoritarian rulers are rarely proponents of privacy laws: Their case against privacy is often a case against individual self-determination, emphasizing the alleged primacy of the nation and the collective over the individual.

Despite this longer terminological history and the centuries-old link between privacy and modern individualism, the language of privacy primarily appeared in magazines

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Virginia Press, 1999; Diana Webb. *Privacy and Solitude in the Middle Ages*. London: Hambledon Continuum, 2007; Jessica Martin and Alec Ryrie (eds). *Private and Domestic Devotion in Early Modern Britain*. Farnham: Ashgate, 2012; Jill Lepore. 2013. "The Prism: Privacy in an Age of Publicity." *The New Yorker* 06/24/2013.

[82]Lepore (2013).

[83]Michael McKeon. *The Secret History of Domesticity: Public, Private, and the Division of Knowledge*. Baltimore: Johns Hopkins University Press, 2006; Lepore (2013); Emile Durkheim. *The Division of Labor in Society*. New York: Free Press, 2014. For an alternative history that traces conceptions of privacy in pre-modern Jewish law, see: Kenneth A. Bamberger and Ariel Evan Mayse. 2021. "Pre-Modern Insights for Post-Modern Privacy: Jewish Law Lessons for the Big Data Age." *Journal of Law and Religion* 36 (3): 495-532.

[84]Neocleous (2002), p. 86.

[85]See p. 65 in: Brian Martin. *Information Liberation. Challenging the Corruptions of Information Power*. London: Freedom Press, 1998. Quoted in: Laura Huey. 2009. "A Social Movement for Privacy/Against Surveillance-Some Difficulties in Engendering Mass Resistance in a Land of Twitter and Tweets." *Case Western Reserve Journal of International Law* 42 : 699-709. Also see Neicleous (2002).

and works of literary fiction before the 1870s, where it was used to characterize physical spaces and social roles within the household. "If you are gentlemen, you will leave the lady's privacy undisturbed",[86] one serialized romance novel declared, while another writer urged their audience not to "invade [a woman's] domestic privacy and expose to the rude glare of public criticism those family relations and hearthstone scenes held sacred to the humblest among us."[87] When the language of privacy was invoked outside the context of domesticity, it usually alluded to conversations among confidantes and protected against "near friends [who] are too apt to assume the power of prying into and criticizing each other's hearts."[88] Yet it would have been unusual, before the late nineteenth century, to see privacy mentioned in American jurisprudence or to have it applied to discussions of corporate and governmental conduct. In a society where personal information tended to circulate in smaller social circles; where communication was often oral and seldom long-distance; and where interactions with officials were relatively rare, perhaps there was simply "no need of making such a rumpus about other people knowing."[89] The lexicon of privacy existed before privacy became a political logic in the United States.

In the four empirical chapters that follow, I examine the impact that this political logic had on the organization of U.S. society and on the exercise of informational power. I focus on diffusion and institutionalization as two key processes through which privacy was transformed from an idea with relatively narrow meaning and applicability into a salient and durable political logic.[90] It was adopted by different constituencies and applied to a diverse set of social problems in the modern United States related to urban life, mass media, and bureaucratic rule; and it was gradually incorporated into formal legislation, administrative regulations, urban architecture, and the canon of American jurisprudence.

Diffusion helps to create shared understandings and interlinked communities of adopters, increasing the resonance of an idea and making it possible "to rationalize [an] emerging entity as a single thing" despite the hugely varied domains in which it appears.[91] It can also contribute to the reinforcement of destabilization of social hierarchies, especially when ideas and claims are explicitly used to frame social prob-

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[86] Mary W. Ewart. "Ellen Campbell, or King's Mountain: A Thrilling Romance of the Revolution." Reprinted in *The Yorkville Enquirer*, 06/21/1860.

[87] "To the American People – A Voice from Ashland." *The Wilmington Journal*, 10/03/1856.

[88] "Privacy." *M'Arthur Democrat*, 11/17/1859.

[89] Henry James. *The Reverberator*. London: Macmillan and Co, 1922. p. 174. Also quoted in Solove (2011).

[90] Jeannette A. Colyvas and Stefan Jonsson. 2011. "Ubiquity and Legitimacy: Disentangling Diffusion and Institutionalization." *Sociological Theory* 29 (1): 27-53.

[91] Abbott (1995), p. 869; Colyvas and Jonsson (2011), p. 35.

lems and justify a political agenda.[92] As Jeannette Colyvas and Stefan Jonsson thus suggest, "structure shapes diffusion, but the spread of practices and organizational forms, in turn, shapes social structures."[93] Institutionalization then helps to increase the "resilience and invulnerability" of resonant ideas and political claims to "competing alternatives."[94] It infuses lasting structural arrangements with values, and thereby contributes to the perpetuation of those values over time.[95] And it contributes to the sedimentation and durability of political programs, especially when legislation or other forms of codification reify ideas and ideologies and thereby insulate them against recurring challenges.[96] Diffusion and institutionalization are therefore linked without being reducible to each other: Ideas and discourses can widely diffuse without becoming institutionalized, eventually fading into obscurity or fragmenting; and practices or regulatory frameworks can be adopted in specific institutional settings without spreading beyond them and without having far-reaching effects.[97] In the former scenario, durability is lacking. In the latter scenario, reach is limited. A crucial task is therefore to spell out under what conditions discussions of privacy spead into new domains – vastly outgrowing the confines of the family and the conceptual umbrella of earlier periods –, and why and with what consequences they ended up sticking.

My argument is as follows: In the closing decades of the nineteenth century, the logic of privacy evolved into the many-headed hydra that has become familiar to observers from the twentieth or twenty-first centuries.[98] It expanded beyond discussions of families and social circles when it was invoked by journalists, social reformers, and politicians to make sense of the societal and technological realities of the Progressive

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[92]Mayer N. Zald. "Culture, Ideology, and Strategic Framing." Pp. 261-274 in: *Comparative Perspectives on Social Movements*, edited by Doug McAdam, John D. McCarthy, and Mayer N. Zald. Cambridge: Cambridge University Press, 1996; Gili S. Drori. *Global E-litism: Digital Technology, Social Inequality, and Transnationality.* New York: Worth Publishers, 2005.

[93]Colyvas and Jonsson (2011), p. 35.

[94]Colyvas and Jonsson (2011), p. 33.

[95]Philip Selznick. *Leadership in Administration.* Berkeley: The University of California Press, 1957. Also see Nils Brunsson and Johan P. Olsen. *The Reforming Organization.* London: Routledge, 2018.

[96]Peter L. Berger and Thomas Luckmann. *The Social Construction of Reality.* New York: Anchor Books, 1967; Pierre Bourdieu. 1987. "The Force of Law: Toward a Sociology of the Juridical Field." *Hastings Law Journal* 38: 805–853.

[97]See p. 30 in Colyvas and Jonsson (2011): "A crucial distinction between diffusion and institutionalization is that the former is concerned with spreading, or how things flow, whereas the latter is concerned with stickiness, or how things become permanent." For another discussion of diffusion as an interactional/networked process, see: Damon Centola and Michael Macy. 2007. "Complex Contagions and the Weakness of Long Ties." *American Journal of Sociology* 113 (3): 702-734.

[98]Pilpel (1969); Kasper (2005); Vincent (2016); Igo (2018).

Era and to confront the social problems of that time through political agitation and legislative action. Older discourses and moral frameworks were adapted to discuss the possibilities of privacy in urban life and the privacy of personal data, thereby importing some of the customs and cognitive frames of a prior period into the modern United States. Yet the logic of privacy was not simply mapped onto pre-existing controversies, because there had not previously been a comparable debate about the bureaucratic appropriation and the commodification of personal data.[99] Before the American Civil War, the exercise of state power was a relatively bare-bones endeavor that did not require the accumulation of detailed knowledge about an entire population, and many forms of economic activity did not yet rely on standardized assessments or mass advertising.[100] Before the widespread adoption of the telegraph, the invention of the telephone, and the expansion of postal delivery routes in the United States, it would likewise have been hard to identify a "political, economic, and technical incitement" to talk about the informational integrity of interpersonal communication, much less to designate it as a matter of informational privacy.[101] Such issues became genuinely political issues – and were thus constituted as matters of public concern, subjected to the specialized language of the law, and addressed through institutional action – only towards the end of the nineteenth century. The rising salience of privacy revealed a reconstituted relationship between self and society, while also giving shape and structure to that relationship.

This increasingly protean conception of privacy gradually found its way into the regulatory and legal architecture of the United States. It was embedded into specific institutional practices and distinct political temporalities based on internal push factors and internal pull factors.[102] Extra-institutional forces helped to push privacy onto the legal and political agenda, turning it from a widely diffused idea into a specific object of political and juridical struggle. For example, social movements began to organize around privacy, folding it into the articulation of shared grievances and the framing of political campaigns. These included progressively-minded reformers who sought to protect urban privacy for millions of immigrants living in the overcrowded tenement apartments of the inner city, but also conservative anti-vice campaigners who aimed to redefine mail privacy and expand postal surveillance for sexually explicit and morally dubious content. The rise of tabloid journalism and newspaper photography

[99]David J. Seipp *The Right to Privacy in American History.* Harvard University Program on Information Resources Policy Publication P-78-3, 1978.

[100]Theda Skocpol. *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States.* Cambridge: Harvard University Press, 1995; James C. Scott. *Seeing Like a State.* New Haven: Yale University Press, 1999. Also see: Dan Bouk. *How Our Days Became Numbered: Risk and the Rise of the Statistical Individual.* Chicago: University of Chicago Press, 2015.

[101]Foucault (1990), p. 23.

[102]Colyvas and Jonsson (2011), p. 32.

similarly sparked concerns about the unauthorized use of a person's image and the publication of intimate details, which were imperfectly addressed by existing libel and property law and suggested that "the conditions of modern life and society require the recognition of" privacy as a legally codified right.[103] These larger societal forces intersected with the priorities and institutional commitments of government officials and legal professionals, who encoded a selective vision of privacy into regulatory frameworks and worked to balance demands for personal privacy against the interests of the American state and the exigencies of bureaucratic rule. When the logic of privacy was consecrated and codified through state legislatures, federal courts and the U.S. Supreme Court, and the administrative rules and regulations that govern the work of the U.S. Postal Service or the Public Health Service, the result was therefore a patchwork of different approaches and a highly uneven landscape of legibility. Some types of information and some populations were explicitly excluded from legal and institutional protections, turning privacy into a kind of negative space: It was often defined by what it did not protect, and the limits of the protections it offered tended to reflect the moral imaginaries and institutional logics of a given time and place.

The net result of this diffusion and institutionalization was a structuring of social space in relation to privacy – not just cognitively but administratively, insofar as the logic of privacy was encoded into the legal corpus and the priorities of bureaucratic and corporate organizations, placed legal and political demands upon such organizations, and shaped their subsequent organizational conduct. It was written into existence, codified through legislative action, and mobilized as a political weapon to facilitate and contest the exercise of state power and the commodification of personal data. This institutionalization made it possible for privacy to endure "in the various ecologies in which it is located," and thus leave a mark not just on individual moments of American history but on trajectories of historical development since the late nineteenth century.[104] Some of the legal and political frameworks that emerged during this time remain with us today and allow us to historicize the uneven surveillance of nonwhite populations, the balancing of privacy against national security, or the precarious state of abortion and contraception rights.

Privacy and sociology

In the remainder of this chapter, I connect the study of privacy to core sociological themes by focusing on three conceptual anchors: Privacy as contestation over the

[103] Henry T. Terry. 1914. "Constitutionality of Statutes Forbidding Advertising Signs on Property." *Yale Law Journal* 24 (1): 1-11.

[104] Abbott (1995), p. 872. Also see: B. Guy Peters, Jon Pierre, and Desmond S. King. 2006. "The Politics of Path Dependency: Political Conflict in Historical Institutionalism." *The Journal of Politics* 67 (4): 1275-1300.

exercise of informational power and social control; privacy as a cause of organizational realignments and shifting landscapes of legibility; and privacy as the entanglement of informational and moral orders. But it is first instructive to consider two other perspectives on privacy, if only to delineate this approach and to situate ourselves in relation to existing scholarship.

One alternative approach is to treat privacy as something that exists primarily in the world of ideas and is shaped by the intellectual currents within that world. Scholars who pursue this approach are often interested in the relation of privacy to legal doctrines or philosophical schools of thought, and they aim to make a case for or against privacy on the basis of first principles.[105] Is it possible, for example, to defend privacy from the standpoint of communitarian ethics, or to deduce a personal "right to privacy" from natural law and constitutional texts?[106] These are no idle questions, as debates over the legal foundations of the *Roe v. Wade* decision continue to illustrate. Linking specific claims about the essence and scope of privacy to long-standing intellectual traditions and philosophical propositions helps to concretize and legitimate an abstract idea. Depending on where we look, the principled philosophical and legal case for privacy is wrapped into arguments about human dignity and autonomy, inviolate personalities and invisible selves, control over data or informed consent to data-sharing, and the defense of liberal rights.[107]

But throughout the twentieth century, the logic of privacy has not just been shaped by the ideas and philosophical principles that are marshalled in its support or raised against it. Indeed, it is difficult to account for the twists and turns of privacy regulation the United States by focusing on conceptual coherence and logical deductions, without also recognizing the expansion of governmental surveillance during World War I, the so-called "constitutional revolution" in the American legal community during the New Deal years, the sexual revolution of the 1960s, the proliferation of electronic databases since the 1970s, or the aftermath of the 9/11 terror attacks.[108] None of these developments were strictly about the exegesis of ideas, yet they left indelible

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[105]Milton R. Konvitz. 1966. "Privacy and the Law: A Philosophical Prelude." *Law and Contemporary Problems* 31: 272-280; Ruth Gavison. 1980. "Privacy and the Limits of Law." *Yale Law Journal* 89 (3): 421-471; Ferdinand David Shoeman (ed). *Philosophical Dimensions of Privacy: An Anthology.* Cambridge: Cambridge University Press, 1984; Sissela Bok. *Secrets: On the Ethics of Concealment and Revelation.* New York: Pantheon Books, 1985; Glenn Negley. "Philosophical Views on the Value of Privacy." *Law & Contemporary Problems* 31 (1): 319-325; Ralph F. Gaebler. 1992. "Is There a Natural Law Right to Privacy?" *American Journal of Jurisprudence* 37: 319-336; Jed Rubenfeld. 1989. "The Right of Privacy." *Harvard Law Review* 102 (4): 737-807.

[106]See Etzioni (1999) for a communitarian defense of privacy.

[107]For a summary of this literature, see Part I of Solove (2002).

[108]G. Edward White. *The Constitution and the New Deal.* Cambridge: Harvard University Press, 2002; Kasper (2005); Igo (2018).

marks on the logic of privacy. In one of the most comprehensive conceptualizations of privacy in the recent academic literature, Daniel Solove thus makes a pivot from ideas to specific practices and situations. Rooting his argument in the writings of thinkers like Charles Sanders Peirce, William James, John Dewey, Josiah Royce, and George Herbert Mead, he proposes that privacy scholars adopt a pragmatist position that:

> *"focuses on the palpable consequences of ideas rather than on their correspondence to an ultimate reality; urges philosophers to become more ensconced in the problems of everyday life; adapts theory to respond to flux and change rather than seeking to isolate fixed and immutable general principles; and emphasizes the importance of the concrete, historical, and factual circumstances of life."*[109]

Instead of beginning the study of privacy with abstract principles, Solove begins with "problems in experience" that require us to understand the fault lines and stakes of particular conflicts, the marks that such conflicts leave on the logic of privacy, and the practices they encourage or foreclose.[110]

This focus on specific situations and everyday life is also at the heart of a second perspective on privacy that has emerged out of anthropological studies and social psychology, and is now arguably the most prominent perspective in the sociological literature on privacy.[111] It moves from the world of ideas into the human psyche and from general principles to social interactions, treating the demand for privacy as the expression of a basic need for seclusion and solitude that leads people to withdraw selectively from social relationships for a set period of time.[112] This does not mean that privacy is unaffected by society writ large.[113] Cultural traditions directly shape dynamics of social interaction and affect expectations of privacy and the management of social obligations.[114] They can function as safety valves that offer partial seclusion from social settings without permanently destroying social relations. As Barry Schwartz has argued, demands for privacy can therefore be understood as a "dissociation ritual" that "presupposes (and sustains) the social relation;"[115] and Robert Merton has suggested that "limits upon full visibility of behavior are

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[109]Solove (2002), p. 1091.

[110]Solove (2002), pp. 1127 and 1129.

[111]Kasper (2007).

[112]Barry Schwartz. "The Social Psychology of Privacy." *American Journal of Sociology* 73:6 (1968): 741–52. Pastalan, Leon A. "Privacy as a Behavioral Concept." *Social Science* 45:2 (1970): 93–97.

[113]Alan P. Bates. 1964. "Privacy — A Useful Concept?" *Social Forces* 42 (4): 429-434.

[114]Moore (1984); Solove (2002).

[115]Schwartz (1968).

functionally required for the effective operation of a society."[116] Or, put more bluntly: There is no privacy on a desert island. The desire and need for privacy only arises in the context of social relations and as a result of the pressures that those relations – and the performance of social roles in public – exert on the individual.[117] It presupposes "a feasible alternative to privacy, namely where actions or words can be either withheld or disclosed, where a space can be inviolate or intruded upon" by peers, companies, or governments.[118] In the words of Georg Simmel's grandson Arnold, "privacy which seems to have to do with the individual by himself, is not a psychological concept at all, but a sociological one."[119]

Indeed, selective withdrawal and the ability to exercise "control over knowledge about one self" are essential aspects of managing friendships, intimate and professional relationships, and trust networks.[120] Intimacy simply could not exist "unless people [have] the opportunity for privacy. Excluding outsiders and resenting their uninvited intrusions are essential parts of having an intimate relationship," according to Robert Gerstein.[121] This is because the knowledge we share during a relationship between two or more people is necessarily partial. As Georg Simmel once observed, "whatever we say, as long as it goes beyond mere interjection and minimal communication, is never an immediate and faithful presentation of what really occurs in us." It is instead "only a section", stylized "by selection and arrangement."[122] But what is considered "private" is relationally specific, since different standards apply to casual acquaintances, colleagues, siblings, romantic partners, and so forth.[123] The need for privacy is also situationally specific. A contentious Thanksgiving dinner may prompt a temporary retreat into seclusion, if only to prevent the burning of proverbial bridges and to protect familial relationships in the long run. Crucially, the ability to satisfy this desire for privacy depends at least in part on the cooperation of others. Their decisions and behavior can influence whether, when, where, and how a temporary retreat is possible and which types of knowledge are shielded from the community at large.[124]

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[116]Robert K. Merton. *Social Theory and Social Structure.* New York: Free Press, 1968. p. 399.

[117]On public performances, see: Erving Goffman. *The Presentation of Self in Everyday Life.* London: Allen Lane, 1959.

[118]Edward Shils (1966), p. 281.

[119]Quote in Day (1985), p. 13.

[120]Charles Fried. 1968. "Privacy." *Yale Law Journal* 77 (3), pp. 482-483.

[121]Robert S. Gerstein. 1978. "Intimacy and Privacy." *Ethics* 89 (1): 81.

[122]Georg Simmel. "The Secret and the Secret Society." Pp. 311-312 in *The Sociology of Georg Simmel*, edited by Kurt H. Wolff. Glencoe: The Free Press, 1950.

[123]Zick Rubin, Charles T. Hill, Letitia Anne Peplau, and Christine Dunkel-Schetter. 1980. "Self-Disclosure in Dating Couples: Sex Roles and the Ethic of Openness." *Journal of Marriage and the Family* 42 (2): 305-317.

[124]Day (1985), pp. 11-12.

This is why the 80,000 prison inmates who find themselves in solitary confinement in the U.S. have very little chance for privacy even if they strongly desire it: Their ability to step outside the surveillance infrastructure of the modern carceral system and to hide from the gaze of prison guards is severely curtailed by CCTV cameras, motion sensors, regular inspections, and the spatial layout of their cells. "Total institutions," to use Erving Goffman's term once again, are total in their denial of invisibility and solitude.[125] Thus, the desire for privacy is social in a double sense: It presupposes the existence of social relationships as well as the cooperation or acquiescence of third parties.

This second perspective can readily account for change over time and variation across societies. For example, small tribal communities might engender different needs for solitude than metropolitan life, and societies that place a greater emphasis on the nuclear family might cultivate different privacy expectations than societies where child-rearing and labor are communally organized.[126] Such is the argument of Charles Taylor, who observes that in clan-based societies there was often "no space, not just physically but psycho-socially, to withdraw into the privacy of one's own self-estimate."[127] It was only with the retreat of the community that the nuclear family, and the individual within it, could come to desire and pursue privacy. Urban residents "became surrounded by streams of unknown strangers" while their new-found anonymity "allowed for new possibilities in self-creation."[128] As societies grew in size and social density, as the so-called "cult of the individual" replaced more commununitarian forms of social organization and selfhood, and as those duly constituted individuals were required or incentivized to share more personal data during the course of their daily lives, the social significance of privacy also increased.[129]

When the exposure of personal data has tangible consequences, expectations of privacy can also shift. For example, the invention of photographic film in 1885 and its adoption

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[125] Erving Goffman. *Asylums: Essays on the Social Situation of Mental Patients and other Inmates.* New York: Anchor Books, 1961. This is one reason why Foucault uses the example of the panoptic prison to illustrate the ubiquity of power: There is no privacy without a reorganization of the routines and spatial layouts that would allow for a temporary reprieve from being watched and examined. See: Michel Foucault. *Discipline and Punish: The Birth of the Prison.* London: Vintage, 1995.

[126] Moore (1984). Also see Merton (1986, p. 399): Different forms of social organization result in different "functionally optimum [degrees] of visibility."

[127] Charles Taylor. *Philosophical Papers: Volume 2, Philosophy and the Human Sciences.* Cambridge: Cambridge University Press, 1985. pp. 261-262.

[128] Haggerty and Ericson (2000), p. 619.

[129] For a discussion of the social significance of the "dynamic density" of a society, see: Emile Durkheim. *The Division of Labor in Society.* New York: Free Press, 2014. For a discussion of sociometrics, see Simmel (1950). For a discussion of implicit norms of interpersonal conduct, see Elias (2000).

by yellow press journalists sparked concerns about visibility and a concurrent desire among American elites to avoid "the toll extracted for public interest from private eminence."[130] As the circulation of tabloid newspapers increased, so did a sense of informational vulnerability.[131] More recently, the rise of electronic databases during the 1970s increased the capacity for information collection and information sharing and also led to a re-calibration of the expectations of, and desires for, informational privacy in everyday life.[132]

This helps to explains why popular attitudes towards privacy and social valuations of privacy have shifted considerably over time.[133] The degree to which people consider privacy as something that matters in their personal lives, that takes precedence over competing goals of transparency or public visibility, and that shapes people's behavior when they find themselves in data-rich environments is highly malleable.[134] The substantive focus of privacy concerns is similarly fluid. Consider the example of Social Security Numbers. As Sarah Igo has shown, most Americans did not initially think of their SSN as "private information".[135] When the system was first introduced, its purpose was precisely to ensure the identification and traceability of individuals, thereby guaranteeing access to social security programs after the Great Depression. SSNs were published in newspapers, broadcast on the radio, and sometimes even tattooed onto the forearms of welfare recipients. As a "beneficent technology of citizenship,"[136] they were instrumental in the legitimation of early welfare claims. Only later were they recast as valuable personal information that had to be shielded from view and protected against exposure. Similar attitudinal shifts occurred in the postwar decades, when computerized databases and data processing became more prevalent and led to a re-assessment of informational privacy.[137] And they can be

[130] "Privacy." *The New York Times*, 5/9/1929.

[131] Lepore (2013).

[132] James Rule, Douglas McAdam, Linda Stearns, and David Uglow. *The Politics of Privacy: Planning for Personal Data Systems as Powerful Technologies.* New York: Elsevier, 1980. Also see Westin (1981).

[133] Bates (1964), p. 429; Westin (1981); Christena E. Nippert-Eng. *Islands of Privacy.* Chicago: The University of Chicago Press, 2010; Igo (2018).

[134] Bernhard Debatin, Jennette P. Lovejoy, Ann-Kathrin Horn, and Brittany N. Hughes. 2009. "Facebook and Online Privacy: Attitudes, Behaviors, and Unintended Consequences." *Journal of Computer-Mediated Communication* 15 (1): 83-108; Tobias Dienlin and Sabine Trepte. 2015. "Is the Privacy Paradox a Relic of the Past? An In-Depth Analysis of Privacy Attitudes and Privacy Behaviors." *European Journal of Social Psychology* 45 (3): 285-297.

[135] Igo (2018)

[136] Igo (2018), p. 98.

[137] Louis Harris and Alan F. Westin. *The Dimensions of Privacy: A National Opinion Research Survey of Attitudes Toward Privacy.* New York: Garland Publishing, 1981. Also see: Spiros Simitis. 1987. "Reviewing Privacy in an Information Society." *University of Pennsylvania Law*

observed today, when the rise of social media platforms and state-sponsored digital surveillance have once again shaped popular attitudes towards, and the public's valuation of, privacy.[138]

But despite the conceptual leverage they provide, the social-psychological framework and the empirical focus on attitudes are poorly suited to explain the diffusion of privacy across different domains of public discourse and the institutionalization of privacy in the legal and political domains. First, their focus lies squarely on situational relationship management and psychological pressures rather than on institutional practice. This makes it less useful for examining what are arguably the most consequential theaters for the articulation and contestation of privacy, since corporations and governments often have "the greatest ability to access others and potentially invade privacy."[139] To grasp privacy sociologically therefore requires not just an analysis of the situational management of exposure and withdrawal but a study of "the consequences of (changes in) privacy for the organization and functioning of society."[140]

Second, communications and media scholars who often focus on the study of privacy attitudes tend to be most interested in the psychological impact of technological change and the gaps between dispositions and practice. Do people living under conditions of "dataism" exhibit different attitudes than prior generations?[141] And do they act in ways that are at odds with their attitudinal profiles and their stated valuation of personal privacy?[142] There, too, are good questions. But they cannot shed light on the stakes of attitudinal shifts, the dynamics of struggles over privacy and informational power, and the uneven landscape of legibility that often results from the selective institutionalization of privacy. To address these (explicitly sociological) issues directly, we need different conceptual scaffolds.

Review 135 (3): 707–746.

[138] Bernard E. Harcourt. "Digital Security in the Expository Society: Spectacle, Surveillance, and Exhibition in the Neoliberal Age of Big Data." Public Law & Legal Theory Working Group Paper, 2014. Also see Chapter 8 in Igo (2018) and Alastair R. Beresford, Dorothea Kübler, and Sören Preibusch. 2012. "Unwillingness to Pay for Privacy: A Field Experiment." *Economics Letters* 117 (1): 25-27.

[139] Denise Anthony, Celeste Campos-Castillo, and Christine Horne. "Toward a Sociology of Privacy." *Annual Review of Sociology* 43 (2017), p. 259. Also see: James B. Rule. *Privacy in Peril*. Oxford: Oxford University Press, 2009; Frank Pasquale. *The Black Box Society*. Cambridge: Harvard University Press, 2015;. Julie E. Cohen. *Between Truth and Power: The Legal Constructions of Informational Capitalism*. Oxford: Oxford University Press, 2019.

[140] Anthony et al. (2017), p. 263.

[141] Westin 1967; Yuval Noah Harari. 2017. "Dataism is Our New God." *New Perspectives Quarterly* 34 (2): 36-43.

[142] Grace Ng-Kruelle, Paul Swatman, Felix Hampe, and Douglas Rebne. 2003. "Price of Convenience: Dynamics of Adoption Attitudes and Privacy Sensitivity Over Time." Working Paper; Rule (2007).

Privacy as contestation

Obituaries to privacy have appeared in the United States for more than a century. In 1902, the *Washington Times* opined that the twentieth century should be seen as the "age of publicity", in which exposure and visibility would displace any "right of privacy to the individual".[143] In 1970, *Newsweek* devoted an entire cover story to answer the question "Is Privacy Dead?"[144] In 1993, the *New York Times* was even more assertive in asking its readers, "Who killed privacy?"[145] And Scott McNealy, the CEO of Sun Microsystems, declared to reporters in 1999 that "you have zero privacy anyway. Get over it!"[146] Common to all such takes is a view of privacy as a reflection of technological and social circumstance. As technologies evolve – and as the dynamic density of American society increases –, so does the (im)possibility of having privacy in the first place. The former dictate the latter. But consider the context of McNealy's statement. In the late 1990s, political pressure was increasing to implement a stricter regulatory framework for consumer privacy in the United States. The Bureau of Consumer Protection had thrown its weight behind the effort, and U.S. government officials were concerned that lax consumer privacy protections were harming American economic interests abroad. In response to such pressures, various companies had organized the so-called "Online Privacy Alliance".[147] Founded in 1998, it opposed Congressional action, pushed for industry self-regulation, and aimed to present the extraction of consumer data as a *fait accompli* that could not be reversed even if legislators desired to do so. In this political context, the argument that consumers had "zero privacy anyway" appears less like a factual claim and more like an attempt at strategic agenda-setting. It serves as a reminder that power is exercised not just through coercion or executive action but also through the shaping of political agendas and, even less visibly, through the molding of popular perceptions and preferences.[148] And it highlights what I consider a central implication of thinking about privacy a political logic: It is a product of political contestation that does not simply reflect technological and social circumstance in an unmediated manner. This perspective also suggests the significance of the counterfactual: Without the agency of particular groups and organizations, privacy could have taken on a very different form.

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[143] "The Era of Publicity - the Twentieth Century." *The Washington Times* 7/31/1902.

[144] "Is Privacy Dead?" *Newsweek* 07/27/1970

[145] Roger Rosenblatt. "Who Killed Privacy?" *The New York Times* 01/31/1993.

[146] Polly Sprenger. "Sun on privacy: 'Get over it'." *WIRED Magazine*, 01/26/1999. Available at https://www.wired.com/1999/01/sun-on-privacy-get-over-it/.

[147] Members included hardware and software manufacturers like Microsoft, Apple, and Dell; telecommunications providers like AT&T and Verizon; e-commerce platforms like Ebay; and digital services providers like Intuit.

[148] Steven Lukes. *Power: A Radical View (2nd Edition).* New York: Palgrave Macmillan, 2005.

Different constituencies and interest groups habitually disagree about what privacy entails, why it matters, and how it should be enforced. This is in part because privacy and legibility are never absolute. "Individuals want to keep things private from some people but not others," as Daniel Solove has written, and ordinarily desire "selective disclosure" rather than total non-disclosure.[149] Institutional actors also tend to focus on some types of information and on specific populations, instead of indiscriminately vacuuming up data. (Even contemporary dragnet surveillance systems are deliberately selective, for example when they focus on foreign communications and when they screen data streams for particular names, addresses, or keywords to trigger permanent storage and analysis.) But disagreement is also due to competing political, economic, and legal priorities and the balancing of privacy claims against other social goods and legal rights.[150] During World War I, the Post Office Department weighed mail privacy against political pressures to implement a censorship program that would screen incoming foreign mail for seditious content. Similarly, health officials have argued since the nineteenth century (and continuing during the COVID-19 pandemic) that infectious disease management requires interventions that may be "autocratic" and "paternal in character" and infringe upon the privacy of individuals.[151] In fact, such disagreements are among the few constants than run through the history of privacy in the Western world.[152] As Cristena Nippert-Eng has argued, there is "endless potential for categorical conflict" over the contours of privacy and the content of privacy claims. "How private is a person's cellphone data?" she asks. "More private than facial biometric data? Less private than intimate letters?[153] Such contests are an essential component of world-making, i.e. the organization of perceptions of the social world and, through the incorporation of those perceptions into institutional practices, of the social world itself.[154] But because different groups often disagree about desirable forms of social order, this is are not just an epistemological exercise but an occasion for political struggle and mobilization.[155]

Such disagreements are "essentially political", that is, they ordinarily play out in the political arena and reflect competing agendas of different interest groups and

[149]Solove (2007), p. 1108; Kenneth L. Karst. 1966. "The Files: Legal Controls Over the Accuracy and Accessibility of Stored Personal Data." *Law and Contemporary Problems* 31 (2), p. 342.

[150]Etzioni (1999). Anthony et al. (2017)

[151]Quoted on p. 6 of: Amy L. Fairchild, Ronald Bayer, and James Colgrove. *Searching Eyes: Privacy, the State, and Disease Surveillance in America.* Berkeley: The University of California Press, 2007.

[152]Flaherty (1972); Geuss (2013); Vincent (2016), p. 5.

[153]Nippert-Eng (2010), p. 4.

[154]Bourdieu (1989), p. 22.

[155]Sheila Jasanoff. "Ordering Knowledge, Ordering Society." Pp. 13-45 in: *States of Knowledge: The Co-Production of Science and Social Order.* London: Routledge, 2004.

the comparative power they wield in the political and juridical domains.[156] The successful articulation of claims about the social world thus requires a position of dominance that allows organizations of groups of actors to turn those claims from mere statements into consequential interventions – which is why the process of world-making tends to reflect and settle struggles over the exercise of symbolic power in society. The manifestations of privacy in a given time and place therefore tend to reflect local power dynamics, for example when one group manages to impose its view upon others, when exceptions are carved out to balance competing claims, when specific issues are pushed outside the scope of privacy, and when the definitional boundaries expand to accommodate multiple influential visions of privacy. Connecting privacy to contestation thus highlights the fact that claims about the substance and scope of privacy are also claims about power. The key difference between the titular character of the movie *The Truman Show* – whose entire life is broadcast to the world, unbeknownst to him – and a person who decides to stream their life online is not primarily the degree of their visibility but their ability to carve out spaces of invisibility and to determine the nature and boundaries of observation.

Linking privacy to constellations of power also helps to explain why increases in surveillance are often the "default position" of institutional actors that leads to expanding data collection architectures over time.[157] Policy solutions and strategic initiatives tend to skew towards data collection and data sharing in ways that reflect the vested interests of state organizations and private companies.[158] Debbie Kasper has called this the "ratchet effect" of surveillance: If data collection is relatively cheap and straightforward, and if governments or corporate entities rely on the information thus generated or anticipate its future use, the exercise of informational power is likely to increase and unlikely to decrease without significant political pressure or clear legal constraints.[159] The inverse – expansions of privacy claims and successful efforts to anchor the logic of privacy more firmly in the law – is thus most likely when political mobilization aligns with public opinion and the legislative agenda of key interest groups, echoing Derrick Bell's observation that one of the key determinants of racial progress in the United States was whether specific initiatives were acceptable to White power brokers.[160]

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[156] James Waldo, Herbert S. Lin, and Lynette I. Millett (eds). *Engaging Privacy and Information Technology in a Digital Age*. Washington: The National Academic Press, 2007. p. 2.

[157] Peter P. Swire. 2003. "The System of Foreign Intelligence Surveillance Law." *George Washington Law Review* 72: 1306-1372.

[158] Priscilla M. Regan. *Legislating Privacy: Technology, Social Values, and Public Policy*. Chapel Hill: UNC Press, 1995. p. xiv.

[159] Kasper (2007), p. 169.

[160] Derrick Bell. *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform*. Oxford: Oxford University Press, 2004.

This focus on contestation frames privacy as a precarious collective and institutional achievement rather than a preordained social or technological fact. Yet it does not imply the irrelevance of technology or macrosocial circumstance, for two reasons. First, circumstance matters for the articulation of claims and grievances. Organizing a privacy campaign around telecommunications data only makes sense in a world where telecommunication technologies are a routine feature of everyday life and concerns about the misuse of such technologies have become prominent. Similarly, drawing attention to privacy violations by the state presupposes a minimum level of state capacity to collect personal information and to police sexuality. There is, in 2022, no debate about the privacy of unarticulated thoughts because their extraction is technologically impossible. Yet as neural imagining technologies and brain implants improve, this is likely to change, just as the mass adoption of film photography around the turn of the twentieth century occasioned new conflicts over the privacy of a person's physical likeness. Technological shifts can turn purely speculative ideas into concrete parts of our lifeworld.[161]

Circumstance matters politically as well. Struggles among different groups and constituencies do not happen in a void. They occur among actors who are embedded into society and history and respond to the exigencies and questions of their time.[162] Tenement advocates pushed for greater privacy in city life only *after* the growth of U.S. cities had created a large class of underserved urban residents, mainly immigrants. Census officials wrestled with privacy once it had become organizationally and technologically feasible to enumerate an entire population, to do it reliably, and to tally those counts on automated tabulating machines – and, it should be added, once it became clear that popular mistrust in the census threatened the veracity of those tabulations as people deliberately misreported their personal data. More recently, the surveillance capabilities of states and corporations have elevated debates about privacy and sparked a re-assessment of the informational privacy of consumers and citizens.[163] Each of these episodes occurred during "punctuated equilibria," when technological or political conditions had become sufficiently destabilized to make prior approaches seem inadequate.[164] And in each case, new logics of privacy emerged to settle conflicts and to confront the changed landscape into which governmental or corporate organizations are embedded. Dynamics of contestation are contingent, but they are not arbitrary.

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[161]Edmund Husserl. 1999. *Cartesian Meditations: An Introduction to Phenomenology.* Dordrecht: Kluwer Academic Publishers.

[162]Helen Nissenbaum. 2010. *Privacy in Context: Technology, Policy, and the Integrity of Social Life.* Redwood City: Stanford University Press.

[163]Steven L. Nock. *The Costs of Privacy: Surveillance and Reputation in America.* New York: De Gruyter, 1993. Haggerty and Ericson (2000). Zuboff (2018).

[164]Peters et al. (2005), p. 1289.

Privacy as cause

The logic of privacy is not just a *product* of contestation in the political domain. It also affects individual preferences, bureaucratic practice, corporate strategy, and the social order more generally.[165] Conceptions of privacy can shape individual and collective behavior by conditioning how people share information, what information they share, when and to whom they grant selective access, and why they object to some forms of publicity and legibility while accepting or even pursuing others.[166] They can lead to greater conformity but also invite what Michel Foucault has called "counter-conduct" – a struggle against prevailing relations of power and the norms that sustain them.[167] Some of these effects manifest themselves in quotidian interactions and information exchanges when people adjust their behavior in response to implicit social norms.[168] But shifts in popular attitudes can also have downstream consequences for corporate and governmental practice. It is no coincidence that the computer manufacturer Apple launched a nationwide ad campaign with the slogan "*Privacy. That's iPhone.*" in 2020 while its competitors were criticized for the exploitation of user data; and it does not come as a surprise that governments began to re-assess clandestine dragnet intelligence collection only after public opinion had been sensitized to the precariousness of informational privacy in the twenty-first century.[169]

Especially when they are codified into laws or administrative regulations, privacy claims can also impose constraints and requirements on institutional actors, who may confront mandates to collect only certain types of information, to collect information only about certain populations, to delete personal data after a predetermined period of time, to obtain courts warrants or user consent prior to data collection or targeted

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[165]This model of difference-making is how social scientists commonly think about causation. Some focus on the transformative potential of specific events, while other scholars emphasize generative mechanisms that link causes and effects, or treat those effects as the logical or probabilistic consequences of antecedent causes. See, e.g.: Sewell (1996). John H. Goldthorpe. 2001. "Causation, Statistics, and Sociology." *European Sociological Review* 17 (1): 1-20. Iddo Tavory and Stefan Timmermans. 2013. "A Pragmatist Approach to Causality in Ethnography." *American Journal of Sociology* 119 (3): 682-714. James Mahoney. 2000. "Strategies of Causal Inference in Small-N Analysis." *Sociological Methods & Research* 28 (4): 387-424.

[166]Waldo et al. (2007).

[167]Michel Foucault. *Security, Territory, Population: Lectures at the Collège de France 1977–1978.* New York: Macmillan, 2007. p. 201. Also see p. 34 in: Ian Hacking. *The Social Construction of What?* Cambridge: Harvard University Press, 1999.

[168]Goffman (1961). Anthony et al. (2017).

[169]David Lyon. *Surveillance After Snowden.* London: Wiley & Sons, 2015. Zygmunt Bauman, Didier Bigo, Paulo Esteves, Elspeth Guild, Vivienne Jabri, David Lyon, and Rob BJ Walker. 2014. "After Snowden: Rethinking the Impact of Surveillance." *International Political Sociology* 8 (2): 121-144.

tracking, and so forth.[170] In that sense, privacy is akin to an "institutional logic" that reflects past priorities and conditions future conduct, because institutions ordinarily "embody certain principles and assumptions which may constrain later options"[171] Some of these constraints impose restrictions that limit the discretionary power of state employees or corporate strategists.[172] But privacy requirements can also mandate certain interventions, thereby imposing active responsibilities on institutions and officials. Ruth Gavison argues that privacy claims should therefore not be understood as demands to be let alone, since "the typical privacy claim is not a claim for non-interference by the state at all. It is a claim for state interference in the form of legal protection against other individuals."[173] This is a key reason why privacy and transparency "are just as important structural elements [...] as the distribution and delimitation of authority," especially once they have been formalized and codified.[174]

When the logic of privacy intersects directly with the functioning of governments or markets, it affects the social order more generally.[175] Because the allocation of privacy "is a clear measure of one's status and power in any given situation," privacy norms often differ for different social groups.[176] Immigrants ordinarily enjoy less privacy at the border than citizens; those who access the welfare system or the medical system have less privacy than the wealthy and the healthy; populations in heavily policed neighborhoods find themselves under special scrutiny and subjected to enhanced surveillance regimes.[177] In that sense, the logic of privacy constitutes a form of social control that facilitates the exercise of power by some groups over others; that justifies the selective commodification of data and thus shores up the organizational principles and business models of informational capitalism; and that affects how social and informational inequality becomes manifest.[178] A shift in the institutional logic of

[170]Sarah A. Seo. 2016. "The New Public." *Yale Law Journal* 125: 1616–1671; Shoshana Zuboff. *The Age of Surveillance Capitalism.* New York: Public Affairs, 2019.

[171]Cloutier and Langley (2013), p. 361; Michael Lounsbury. 2007. "A Tale of Two Cities: Competing Logics and Practice Variation in the Professionalizing of Mutual Funds." *Academy of Management Journal* 50: 289-307; Peters et al. (2015), p. 1288.

[172]Arthur L. Stinchcombe. 1963. "Institutions of Privacy in the Determination of Police Administrative Practice." *American Journal of Sociology* 69 (2): 150-160.

[173]Ruth Gavison. 1980. "Privacy and the Limits of Law." *Yale Law Journal* 89, p. 422.

[174]Rose Laub Coser. 1961. "Insulation from Observability and Types of Social Conformity." *American Sociological Review* 26 (1). p. 29.

[175]Foucault (1995).

[176]Nippert-Eng (2010), p. 164

[177]Goffman (1961); Flavin (2008); Simone Browne. *Dark Matters.* Durham: Duke University Press, 2015; Eubanks (2017). Also see: Carol Warren and Barbara Laslett. 1977. "Privacy and Secrecy: A Conceptual Comparison." *Journal of Social Issues* 33 (3): 43-51.

[178]Neocleous (2002); Kasper (2007); Anthony et al. (2017); Cohen (2019).

privacy thus has implications for the conduct and treatment of entire populations. Precisely because privacy is "a scarce social commodity" that structures access to spaces and information in highly selective ways, and because is frequently balanced against other rights and responsibilities, it can reinforce status divisions.[179]

Those reconstituted or reinforced social hierarchies ultimately have the potential to spawn new or altered conceptions of privacy, thereby completing a causal "loop" that connects political logics, institutional practices, and social structures.[180] The logic of privacy does not merely express a particular vision *of* the world but enables specific ways of being *in* the world, which then become the basis for interpretive and political struggles over the substance and scope of privacy. Strictly speaking, this produces "not self-reinforcing loops but Möbius strips" that look slightly different with each iteration.[181] Especially during periods of change and upheaval, when the fundamentals of social hierarchies and institutional practices are less settled, such reconceptualizations of privacy – what it is and is not; to whom it pertains; by whom it is enforced – can reorient collective and institutional action and, by doing so, shift the terrain on which struggles about privacy occur in the first place.[182]

Privacy as entanglement

Treating privacy as an logic of social life allows us to see its emergence as a result of contestation between and within organizations, and it enables us to identify the effects it has in the social world for the conduct of individuals and the social order more generally. But there is a third implication as well. Because it does not take shape in a sociopolitical void, privacy is necessarily entangled with other systems of belief. It tends to incorporate the explicit and implicit norms and ideologies that permeate the social environments where logics of privacy take shape. In that sense it resembles what Michael Freeden has called a "thin-centered ideology": It does not appear in pure unencumbered form but is often infused with other ideologies and hitched to other political programs.[183] The organization of data collection and the distribution

[179]Schwartz (1968), p. 744.

[180]Ian Hacking. 2010. "Inaugural Lecture: Chair of Philosophy and History of Scientific Concepts at the Collège de France, 16 January 2001." *Economy and Society* 31 (1): 1–14. Hacking initially developed his theory in relation to human-on-human classification but later admitted that "I am not dogmatic about humans." We can find evidence for looping effects between humans and non-human kinds, between the domain of culture and the domain of institutions, and so forth.

[181]Theodore Porter. 2012. "Thin Description: Surface and Depth in Science and Science Studies." *Osiris* 27 (1): 226.

[182]Ivan Ermakoff. 2015. "The structure of contingency." *American Journal of Sociology* 121(1): 64-125; Neil Fligstein and Doug McAdam. *A Theory of Fields.* Oxford: Oxford University Press, 2015.

[183]Michael Freeden. *Ideologies and Political Theory: A Conceptual Approach.* Oxford: Clarendon, 1996.

of legibility is inseparable from the material and ideological organization of society and the distribution of power in society.

In that regard, the logic of privacy resembles other logics of social life. Michel Foucault has shown that techniques of governmentality incorporated not just a particular conception of the state – with the management of populations as its raison d'état – but also reflected a parallel conception of the market as a site of population management through economic interdependence.[184] Evelyn Fox Keller and Steven Shapin have demonstrated that norms of scientific practice became inextricably tied to theories of gender and social status in the wake of the Scientific Revolution.[185] Recent histories of the United States have emphasized a tight connection between racist ideologies and economic thinking: the former emerged partially as a justification for the latter, to provide pseudo-biological legitimacy to an economic system that required the exploitation of slave labor in the agricultural sector.[186] And as Bernard Harcourt and David Lyon have argued, many actuarial assessments have turned quantified risk into a thinly veiled proxy for race because the datasets that form the basis for such assessments are often patterned by racial inequality.[187]

The logic of privacy is also a logic of social hierarchy, and it offers solutions to the problem of social order.[188] The most well-known example of this is the entanglement of privacy and gender norms. Historically, conceptions of domestic privacy in the United States touched not just on the organization of space within the household – for example, by designating bedrooms as "private" spaces – but on the organization of social roles within the family. The privacy of the home was distinguished from civic engagement and designated as a sphere where feminine virtues could supposedly be realized.[189] Autonomy, political speech, and contemplative thought were widely coded as masculine domains, while women were more likely to be confined to the home and

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[184]Foucault (2007).

[185]Evelyn Fox Keller. *Reflections on Science and Gender*. New Haven: Yale University Press, 1985. Steven Shapin. 1988. "The House of Experiment in Seventeenth-Century England." *Isis* 79 (3): 373-404.

[186]Karen E. Fields and Barbara J. Fields. *Racecraft: The Soul of Inequality in American Life*. New York: Verso, 2014.

[187]David Lyon (ed). *Surveillance as Social Sorting: Privacy, Risk, and Digital Discrimination*. New York: Routledge, 2003. Bernard E. Harcourt. 2015. "Risk as a Proxy for Race." *Federal Sentencing Reporter* 27 (4): 237-243.

[188]See Jasanoff (2004), p. 29.

[189]David H. Flaherty. *Privacy in Colonial New England, 1630-1776*. Richmond: University of Virginia Press, 1972. Karen V. Hansen. "Rediscovering the Social: Visiting Practices in Antebellum New England and the Limits of the Public/Private Dichotomy." In: *Public and Private in Thought and Practice*, edited by Jeff A. Weintraub and Krishan Kumar. Chicago: University of Chicago Press, 1997.

compelled into silence.[190] Mapped onto social roles, the language of privacy spoke not just to the physical access and flows of information but also implied judgments about worth and moral virtue. When privacy norms began to change in the seventeenth and eighteenth centuries, it led not just to a redrawing of the contours of privacy but, as Cecile Jagodzinski has argued, to a "new consciousness" of the female self.[191] Much closer to the present day, the expansion of privacy rights during the 1960s embraced a highly particular conception of womanhood, protecting "not privacy writ large, but marital, heterosexual, and reproductive privacy" for those with relatively high social status.[192] When the Supreme Court first recognized access the contraception as a matter of privacy, it did so explicitly with reference to marital status.[193]

Other entanglement are less studied but no less consequential. Before the Emancipation Proclamation was passed in 1862, black slaves enjoyed very little of the privacy that was concurrently afforded to white Americans. The plantation instead resembled a total institution, where life was lived according to the will and whims of the white master.[194] Even a slave's name – an immaterial yet deeply personal possession – was generally bestowed upon them by their owner and often consisted of nothing but a first name. There was no privacy for the enslaved because, from the perspective of the slave-owning class, there was no independent self to be protected and hence no relationship between self and society to be defined. To be enslaved in the United States was to *be* private property but not to *deserve* privacy. Such historical entanglements of privacy have sometimes been carried into the present, although their precise manifestations are necessarily different. Non-white communities continue to be subjected to quotidian surveillance that limits their informational or bodily self-determination and renders them uniquely visible to the gaze of the state.[195] For example, the concentration of police resources and CCTV camera systems in minority-majority neighborhoods translates not just into a higher probability for arrests (compared to populations in other neighborhoods with the same behavioral histories) but also contributes to the accumulation of personal data in government databases.[196] Within this system, visibility becomes the norm while invisibility is often taken as a sign of potential

[190] Jagodzinski (1999). Patricia Meyer Spacks. *Privacy: Concealing the Eighteenth-Century Self.* Chicago: The University of Chicago Press, 2003.

[191] Jagodzinski (1999), p. 1.

[192] Igo (2018), p. 157.

[193] Griswold v. Connecticut, 381 U.S. 479

[194] Goffman (1961)

[195] Browne (2015).

[196] Gary T. Marx. 2007. "The Engineering of Social Control: Policing and Technology." *Policing* 1 (1): 46–56. Sklansky (2013). David Lazer and Jason Radford. 2017. "Data Ex Machina: Introduction to Big Data." *Annual Review of Sociology* 43: 19–39. Sarah Brayne. 2017. "Big Data Surveillance. The Case of Policing." *American Sociological Review* 82 (5): 977–1008.

illegality or unreliability.[197]

The result is a system of racialized and enforced visibility – what Anita Allen calls the "Black Opticon" – that traps racialized groups "between regimes of invisibility and spectacular hypervisibility," between "calculated visibility and strategic invisibility."[198] This is especially the case when race is compounded by class, as in the context of welfare administration.[199] Instead of making eligibility primarily conditional on certain minimum thresholds of neediness – like household income –, the data conditionality of welfare access in the twenty-first century adds a second criterion: Eligibility requires the sharing of personal data, which can be used to construct profiles for each individual recipient and aggregate tabulations for specific subgroups and allows government agencies to monitor compliance with the tenets of so-called "workfare" regimes.[200] The politics of knowledge and the exercise of coercive power are therefore "deeply entangled in a politics of the private and in who gets to lay claim to privacy and subjectivity."[201] Privacy was, and continues to be, applied unequally to individuals and populations who deviate from the assumed "normal" and from the majority.[202] Rebecca Wexler has referred to this selective recognition of privacy and the uneven exercise of informational power as instances of "privacy asymmetries" that are a routine feature of many systems of monitoring and examination, historically as well as in the twenty-first century.[203]

Such entanglements connect privacy to existing ideologies and also render it intelligible within the bounds of social and political discourse, since the semantics of privacy are tied into larger semiotic contexts and ideologies. To demand the close tracking of

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[197] Bernard E. Harcourt. 2014. "Digital Security in the Expository Society: Spectacle, Surveillance, and Exhibition in the Neoliberal Age of Big Data." Public Law & Legal Theory Working Paper 14-404; Virginia Eubanks. *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor*. New York: St. Martin's Press, 2017.

[198] Anita L. Allen. "Dismantling the Black Opticon: Race Equity and Online Privacy and Data Protection Reform." Yale Law Journal, Forthcoming (2022); Britt Rusert. *Fugitive Science: Empiricism and Freedom in early African American Culture*. New York: N.Y.U. Press, 2017. p. 26. Also see Benjamin (2019).

[199] Eubanks (2017).

[200] Del Roy Fletcher and Sharon Wright. 2018. "A Hand Up or a Slap Down? Criminalising Benefit Claimants in Britain Via Strategies of Surveillance, Sanctions and Deterrence." *Critical Social Policy* 38 (2): 323-344.

[201] Benjamin (2019), p. 83.

[202] Tiffany C. Li. 2022. "Privacy As/And Civil Rights." *Berkeley Technology Law Journal* (forthcoming).

[203] Rebecca Wexler. 2021. "Privacy Asymmetries: Access to Data in Criminal Defense Investigations." *UCLA Law Review* 68: 212-287. In Wexler's study, the focus is on the selective disclosure of personal data to prosecutors in the criminal-legal system to prove guilt, and the concurrent prevention of such disclosures to defense attorneys or civil society organizations.

welfare claimants is to allude to the alleged lack of personal responsibility and rampant welfare fraud among the poor. To speak of privacy against the state invokes concerns about government overreach and links it to theories of limited governance. And to frame informational privacy as a question of consent reflects not just the concrete challenges of operationalizing privacy in the context of the digital economy but also incorporates a more basic conception of market participants as autonomous and agentic individuals. Informed consent is cast as the expression of honest preference rather than a practical necessity of the twenty-first century information economy. It turns the "inability to keep information private" into a true choice.[204] Entanglement also makes it possible to express other ideologies through the language of privacy, partially severing connections to their respective histories and to prior discourses. Privacy becomes a seemingly value-neutral vehicle, unburdened by history and prejudice. Like the re-coding of racist prejudice into legal language or genetic theory, it strips away unpalatable connotations and can help to bestow new legitimacy on old ideas.[205] In many instances, the entanglement of privacy thus reflects prevailing conceptions of the social order through "differential levels of access, treatment and mobility."[206]

It is possible to conceive of situations where entanglement subverts rather than affirms existing hierarchies, for example when it connects privacy with dissidence and empowers insurgent groups against hegemonic institutions.[207] But the possibilities for turning logics of privacy from a liberal right into a tool of liberation often face considerable political and strategic obstacles, especially when privacy norms are already embedded in bureaucratic practices, technological infrastructures, and business models.[208] It is perhaps more likely, as Frank Pasquale and Guy Stuart have argued, that resistance results in reformulations of the logic of privacy that can accommodate a larger array of critiques without abandoning the basic principles of social and economic order that are already encoded within it.[209]

Let us recap. While privacy is commonly understood as a legal right, a personal attitude, or a desire for temporary solitude, I have set out a view of privacy as a political logic. The reason for this shift is straightforward: Because the logic of privacy

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[204]Kasper (2007).

[205]Ian Haney Lopez. *White by Law: The Legal Construction of Race*. New York: NYU Press, 1997. Fields and Fields (2014).

[206]Haggerty and Ericson (2000), p. 618.

[207]Scott Skinner-Thompson. *Privacy at the Margins*. Cambridge: Cambridge University Press, 2020.

[208]Laura Huey. 2010. "A social movement for privacy/against surveillance? Some difficulties in engendering mass resistance in a land of Twitter and tweets." *Case Western Reserve Journal of International Law* 42: 699–709

[209]Guy Stuart. *Discriminating Risk: The US Mortgage Lending Industry in the Twentieth Century*. Ithaca: Cornell University Press, 2003. Frank Pasquale. *The Black Box Society*. Cambridge: Harvard University Press, 2015.

is often most consequential in the context of governmental or corporate practice, it pays to focus on its institutional life – that is, on the incorporation of specific logics of privacy into the perceived mission and the quotidian practices of organizations, into the law, and into the material and technological infrastructure of everyday life. This requires, first, an awareness of the processes through which privacy is constituted as a recognizable entity with legal, political, or economic significance; second, a focus on the specific manifestations of privacy in different settings; and, third, an analysis of the concrete strategies of world-making through which privacy is connected to other ideas or separated from them, internally constituted as a coherent and meaningful concept and externally demarcated against things that are "not privacy". But perhaps most importantly, seeing privacy as a political logic allows us to grasp it as distinctly social rather than inherently anti-social and draws attention to the wider significance of privacy in modern society. It reflects struggles about the exercise of power and temporarily settles those struggles when it is institutionalized and thus made durable. It affects the behavior of individuals and shapes the distribution of burdens and benefits in society through selective visibility and the use of exceptions. And it remains entangled with other systems of belief and thus offers not just a perspective on the management of personal information but also an answer to the question of social order.

This should cast at least some doubt on fatalistic accounts that proclaim the death of privacy and explain it as the necessary consequence of digitization. But it also complicates emancipatory interpretations that regard the right to privacy as a powerful antidote to government surveillance or data commodification. Because logics of privacy are often balanced against other institutional aims, because they routinely make room for exceptions, because they can impose steep costs for transgressive behavior through formal sanctions or greater inconvenience, and because they remain deeply entangled with other socio-political ideologies, privacy often facilitates and legitimates the exercise of power by dominant authorities. To realize the emancipatory potential of privacy might not require "more" of it – as if there was a finite quantity of privacy to be had in the world – but a different kind of privacy that reconceptualizes the relationship between self and society and resists the juxtaposition of privacy against law and order, security, convenience, or profit. This is true today, but it was also true during the Progressive Era. In the decades between 1870 and 1930, the logic of privacy was first constituted as a distinctly legal and political logic and was codified through legislation, juridical precedent, and regulatory intervention. This is where the origins of the privacy architecture of the United States lie, and it's where the next chapters will focus.

Chapter 3:

A Wire-Fence Society

U.S. Public Discourse and the Diffusion of Privacy

The transformations of American society between the middle of the nineteenth century and the early decades of the twentieth were vast and disparate. Transcontinental railroad lines cut the time it took to travel from New York City to San Francisco from multiple months to several days.[1] Cities expanded, fueled in large part by waves of immigration that quadrupled the number of foreign-born residents in the United States between 1850 and 1920.[2] Newspaper circulation skyrocketed; the illiteracy rate halved; and the number of private telephone landlines increased more than thirty-fold.[3] The Postal Service added thousands of miles of mail delivery routes and hundreds of thousands of postal employees.[4] Credit reporting agencies like R. G.

[1]David Haward Bain. *Empire Express: Building the First Transcontinental Railroad.* New York: Penguin, 2000.

[2]Campbell Gibson and Kay Jung. 2006. "Historical Census Statistics on the Foreign-Born Population of the United States: 1850-2000." U.S. Bureau of the Census Population Division, Working Paper 81.

[3]William A. Dill. *Growth of Newspapers in the U.S.: A Study of the Number of Newspapers, of the Number of Subscribers, and of the total Annual Output of the Periodical Press, from 1704 to 1925, with Comment on Coincident Social and Economic Conditions.* Lawrence: Bulletin of the Department of Journalism of the University of Kansas, 1928; Claude S. Fischer. 1987. "The Revolution in Rural Telephony, 1900-1920." *Journal of Social History* 21 (1): 5-26; Milton Mueller. 1993. "Universal Service in Telephone History: A Reconstruction." *Telecommunications Policy* 17 (5): 352-369. Literacy rate calculations are based on full-count census microdata, available through IPUMS: Steven Ruggles, Catherine A. Fitch, Ronald Goeken, J. David Hacker, Matt A. Nelson, Evan Roberts, Megan Schouweiler, and Matthew Sobek. IPUMS Ancestry Full Count Data: Version 3.0 [dataset]. Minneapolis: IPUMS, 2021.

[4]Louise Payson Latimer. *Your Washington and Mine.* Charles Scribner's Sons, 1924, p. 166.

Dun & Company pioneered alphanumeric credit rating systems that decoupled the assessment of financial solvency from interpersonal relations and hearsay to produce a set class of quantifiable financial facts.[5] Bureaus of Health and Labor Statistics were established in most U.S. states, the Census Bureau found a permanent home in the federal Department of Commerce, and the size of bureaucratic apparatuses increased across all levels of government as a thinly-staffed state "of courts and parties" was replaced by administrative systems with increased regulatory ambition and capacity.[6] Disparate as they were, these trends converged in one specific sense: They turned the United States into an "increasingly knowing society" – a nation were information about people and populations was collected more frequently, travelled more easily, and carried greater practical significance than at any previous time in American history.[7]

Did privacy still exist in such a society? This was the question posed by the *Chicago Daily Tribune* to its readers in the summer of 1902. In a two-column article, the newspaper's editors answered in the negative: Privacy was unobtainable for many Americans because "tab is kept on [them] from cradle to grave."[8] At first glance, this seemed especially true for those who rose "into the scope of the public eye by reason of [their] wealth or business or philanthropy or interest in politics." With circa 20,000 newspapers in print circulation in the United States, prominent persons could easily become the targets of tabloid coverage and tavern gossip to such an extent that their personal lives turned into a kind of "public property", open to examination and judgment by legions of pundits and readers.[9] The gap that separated social elites from those "who do not seek office, who are not so rich that they cannot be ignored, and who are not engaged in occupations that bring them conspicuously into view" was seemingly defined not just by inequalities of wealth or influence but also by the possibility of escaping the gaze of an inquisitive public.[10]

But as soon as one began to scrutinize the finer details of social life, argued the *Daily Tribune*, one had to recognize that "the veil of privacy" was precariously thin

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[5] Lendol Calder. *Financing the American Dream: A Cultural History of Consumer Credit*. Princeton: Princeton University Press, 1999; Dan Bouk. *How Our Days Became Numbered: Risk and the Rise of the Statistical Individual*. Chicago: University of Chicago Press, 2015.

[6] Stephen Skowronek. *Building a new American State: The Expansion of National Administrative Capacities, 1877-1920*. Cambridge: Cambridge University Press, 1982.

[7] Sarah Igo. *The Known Citizen*. Cambridge: Harvard University Press, 2018. p. 16.

[8] "No Such Thing as Private Citizen." *The Chicago Daily Tribune*, 07/27/1902.

[9] *The Chicago Daily Tribune* 07/27/1902; Alexander J. Field, "Newspapers and Periodicals: Number and Circulation By Type, 1850-1967." In: *Historical statistics of the United States: Earliest Times to the Present, Millennial ed.*. New York: Cambridge University Press, 2006, 4:1055. Also see: James L. Crouthamel. *Bennett's New York Herald and the Rise of the Popular Press*. Syracuse, NY: Syracuse University Press, 1989.

[10] *The Chicago Daily Tribune* 07/27/1902.

regardless of social or economic status. To illustrate its point, the newspaper recounted the life-course of a typical urbanite during the early twentieth century. Having just existed the womb, this person was immediately entered into municipal birth records. Health officials began to demand immunization against smallpox and the measles. The Department of Education sought proof of such vaccinations and also kept track of the young person's progress through the public school system. Degree in hand, employers began to ask for references; and landlords and life insurance agents could demand financial records. If this person rose to a position of affluence, financial institutions came calling with credit offers, made conditional on a background check. If financial harship befell them, pawn brokers recorded in-kind deposits and sometimes forwarded the information to the police department's stolen property unit. City clerks scrutinized family histories before issuing marriage licenses. Public prominence and notoriety could attract the attention of photographers and yellow press writers who reported salacious stories about the excesses of the rich and the crimes of the poor. Neighbors could try to steal a glance through the apartment windows. Once a year their doctor might examine their health and personal habits; and once a decade a federal enumerator would appear with a freshly printed census schedule. And when this person had drawn their final breath after a lifetime of examinations, the Health Department would once again appear by their bedside to duly record the moment and cause of death — the final data point of a life lived "in the glare of the calcium".[11]

One might assume that the standout feature of this passage is the editors' claim about the impossibility of personal privacy in the modern United States. But this is not the case. History is littered with premature declarations of privacy's death – some as old as the 1900s, and many as recent as the 2020s – that express pervasive anxieties about emerging social and technological realities but risk losing sight of the perpetual dance between privacy and informational power.[12] One hardly exists without the other, since the collection of personal data is never absolute and since the desire for privacy tends to co-exist with a parallel desire to be known, seen, and recognized. As Christena Nippert-Eng puts it, we are "trying to live both as a member of a variety of social units [...] and as an individual – a unique, individuated self."[13] Privacy is also highly malleable. It tends to function as a "seedbed for social thought" that evolves with shifts in social custom and social organization, rather than being a static idea with self-evident meaning and application.[14] While specific interpretations of privacy may wax and wane, the logic of privacy itself has proved highly durable, outlasting many dire predictions about universal legibility and the inescapable reach of contemporary

[11] *The Chicago Daily Tribune* 07/27/1902

[12] See, for example: Jerry M. Rosenberg. *The Death of Privacy.* New York: Random House, 1969.

[13] Christena Nippert-Eng. *Islands of Privacy.* Chicago: The University of Chicago Press, 2010. p. 6.

[14] Igo (2018), p. 16.

surveillance architectures.[15]

Instead, what is remarkable about the *Daily Tribune's* article is the sheer breadth of phenomena and actors that the editors considered to be relevant to this matter. The collection of standardized vital statistics, financial records, and employment data fit under the umbrella of privacy, as did the inquisitive reporting of the tabloid press. Threats to privacy involved public-sector officials and sworn officers from law enforcement agencies; landlords; insurance agents and bank tellers; doctors and photographers; and impertinent neigbors. In short, the applicability of privacy to the problems of modern life was broad and its conceptual umbrella roomy. Not only did it mean different things in different cultures,[16] it also subsumed a multitude of specialized conversations about visibility and informational power in one particular time and place. This chapter traces this diffusion of privacy discourses in the closing decades of the nineteenth century. It demonstrates that the substantive meaning of privacy remained relatively stable but that the language of privacy was applied to an increasing range of social and political problems, from the social questions posed by urbanization to the rise of modern telecommunications. Privacy evolved from a cultural trope that was predomiantly oriented towards family relatives and nearby observers into a discursive object that spoke more generally to the circulation of data and the visibility of people in the modern United States.

The longue durée of privacy

Capacious understandings of privacy ring familiar from the vantage point of the twenty-first century. The language of privacy has now become embedded into discussions of contraception and abortion rights, national security, census enumeration and national ID projects, social norms and personal space in American suburbs, marketing campaigns and market research, social media platforms, geo-location data, genetic information, and so forth. Indeed, the best contemporary studies treat multidimensionality as a central constitutive feature of privacy.[17] Attempting to nail down

[15]Daniel Solove. *Understanding Privacy.* Cambridge: Harvard University Press, 2008; Scott Skinner-Thompson. 2016. "Performative Privacy." *U.C. Davis Law Review* 50: 1673-1740; Carissa Véliz. *Privacy Is Power: Why and How You Should Take Back Control of Your Data.* London: Bantam Press, 2020.

[16]Barrington Moore. *Privacy: Studies in Social and Cultural History.* London: Routledge, 1984; David Vincent. *Privacy: A Short History.* London: Polity, 2016.

[17]Daniel J. Solove. 2002. "Conceptualizing Privacy." *California Law Review* 90: 1087-1155; Vincent (2016); Helen Nissenbaum. *Privacy in Context: Technology, Policy, and the Integrity of Social Life.* Redwood City: Stanford University Press, 2010; Igo (2018); Sjoerd Keulen and Ronald Kroeze. "Privacy From a Historical Perspective." Pp. 21-56 in: *The Handbook of Privacy Studies: An Interdisciplinary Introduction*, edited by Bart van der Sloot and Aviva de Groot. Amsterdan: Amsterdam University Press, 2018.

a single but comprehensive conception is usually futile because the concept of privacy has infused so many different legal, social, cultural, and political discussions and become linked to a multitude of specialized languages. Privacy is "difficult to define" precisely because "it is exasperatingly vague and evanescent" and because it has the "protean capacity to be all things" to all observers.[18] As Daniel Solove has argued against the backdrop of a half-century of active legal and political discourse, privacy is less a concept with definitive content than a manifestation of what Ludwig Wittgenstein has called "family resemblances": Instead of having a shared essence, different articulations of privacy draw from a pool "of similar elements" that are tied together and applied in dynamic and contextually specific ways.[19]

But around the turn of the twentieth century, such a protean conception of privacy was a relatively novel perspective. Far from signaling the death of privacy, it hinted at the birth of a new way of thinking about visibility and informational power that was closely tied to politics, the law, and the socio-technological realities of the Progressive Era. Just a few decades earlier, discussions would hardly have touched on bureaucratic administration and the collection of personal data. Instead, "a life of privacy and seclusion" commonly implied a voluntary retreat "from every scene of gaiety" and "the pleasures of social life."[20] Americans who encountered the language of privacy before the final decades of the nineteenth century would have usually done so in articles, serialized romance novels, or other works of literary fiction that mentioned the "privacy of the domestic circle" and the "conspicuous sphere of domestic privacy";[21] the privacy of apartments and summer retreats;[22] and the privacy of bathrooms and boudoirs.[23]

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[18] Arthur R. Miller. *The Assault on Privacy: Computers Data Banks and Dossiers.* Ann Arbor: The University of Michigan Press, 1971. p. 190; Tom Gerety. 1977. "Redefining Privacy." *Harvard Civil Rights-Civil Liberties Law Review* 12, p. 234.

[19] Solove (2002), pp. 1091-1093. Also see: Nicholas Griffin. 1974. "Wittgenstein, Universals and Family Resemblances." *Canadian Journal of Philosophy* 3 (4): 635-651. For a related discussion of privacy as a contextually specific set of claims about informational access and information sharing, see Nissenbaum (2010).

[20] "Life of Theobald Wolfe Tone, and the Condition of Ireland." *North American Review*, April 1827: 321-345; Albert Brisbane. *A Concise Exposition of the Doctrine of Association, or Plan for a Re-Organization of Society: Which Will Secure to the Human Race, Individually and Collectively, Their Happiness and Elevation.* New York: J. S. Redfield, 1843; Cornelius Mathews. *The Various Writings of Cornelius Mathews.* New York: Harper & Brothers, 1863.

[21] Maria Susanna Cummins. *Mabel Vaughan.* Boston: John P. Jewett and Co., 1857; "Political Portraits No. XVII. Theodore Sedgwick." *US Democratic Review*, February 1840: 129-153.

[22] Charles Fenno Hoffman. *Wild Scenes in the Forest and Prairie: With Sketches of American Life.* New York: William H. Colyer, 1843; Effie Afton. *Eventide: A Series of Tales and Poems.* Boston: Fetridge and Co., 1854; Maturin Murray Ballou. *The Heart's Secret; Or, the Fortunes of a Soldier: a Story of Love and the Low Latitudes.* Boston, 1852. Mary Ashley Townsend. *The Brother Clerks: A Tale of New-Orleans.* New York: Derby and Jackson, 1857.

[23] Edgar Allan Poe. *The Works of Edgar Allan Poe — Volume 2.* Oxford: Benediction Classics, 2011.

They would have read that privacy implied solitude and reflective contemplation; enabled the flourishing of artistic and romantic sensibilities; and allowed for the development of one's moral faculties and the true realization of one's character that were otherwise overshadowed by "the glare of public life".[24] They would also have learned that women in particular deserved to be enveloped in a veil of privacy "like the white drapery of the Veiled Lady" and thereby protected against the world of politics and sinful temptation.[25]

During this ealier period of American history, privacy was to be found in private *spaces*: The family home offered greater privacy than the taproom; the bedroom was a space to which one could retreat while guests occupied the parlor. Among commonly traversed spaces, the family home was particularly protected against intrusions and observations by architectural means as well as cultural customs.[26] The spatial layout of houses and apartments – especially those of the white middle-class – allowed for the subdivision of residential space in ways that were conducive to the selective management of visibility: Porches were easily accessible and open to visual inspection by neighbors and passerby; parlors and living rooms provided spaces were occasional guests could be entertained; yet those who desired to escape social situations had the option of retreating into personal studies or bedrooms. Each of these spaces was also enclosed in a cultural sense. To enter a home uninvited was widely considered an affront; and an unauthorized intrusion into a bedroom constituted a grave faux-pas in many social circles. As the *Atlantic Monthly* argued in 1859, a person could thus find privacy simply by moving into a different space and by closing doors and drawing curtains, and thereby shield themselves against the pressures of social obligations and the "idle curiosity" that drove members of one's social circle to ask prodding questions about "personal appearance" or "even most sacred feelings".[27]

To be clear, this association between privacy and domesticity was not always realized in practice and belied by "the large intermediate areas of communal interaction

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[24]Robert Montgomery Bird. *The Hawks of Hawk-Hollow, Volume 2: A Tradition of Pennsylvania.* Philadelphia: Carey, Lea & Blanchard, 1835; Catharine Maria Sedgwick. *Clarence; or, A Tale of Our Own Times.* New Hork: J.C. Derby, 1853; Theodore S. Fay (ed.). *Crayon Sketches, by an Amateur. Volume 1.* New York, 1833; James D. Knowles. "Memoir of Roger Williams, the Founder of the State of Rhode Island." *New England Magazine*, March 1834.

[25]Nathaniel Hawthorne. *The Blithedale Romance.* Boston: Ticknor, Reed, and Fields, 1852; Emerson Bennett. *Viola; or, Adventures in the Far South-west.* Philadelphia: T. B. Peterson and Brothers, 1852; John Turvill Adams. *The Knight of the Golden Melice A Historical Romance.* New York: Derby and Jackson, 1857.

[26]For a corresponding account of bourgeois domestic privacy in Europe, see: Richard Sennett. *The Fall of Public Man.* New York: Knopf, 1977.

[27]"The Professor at the Breakfast-Table." *Atlantic Monthly*, December 1859: 751-770; Henry T. Tuckerman. "New England Philosophy." *US Democratic Review*, January 1845. For a discussion of privacy as a tool of relationship management, see Moore (1984) and Schwartz (1968).

that filled the days of working people."[28] In tenement districts, scarcity of space and the daytime use of kitchens and living rooms for small-scale industrial production often blurred the distinction between the domestic realm and the social world at large.[29] The lived experiences of Black women and farmers also remained at odds with public/private dichotomies that were predicated on white and middle-class conceptions of intimacy, femininity, and the nuclear family.[30] In that sense, the equating of domesticity and privacy was an ideological construct rather than a factual description of lived experiences in a diverse and multiracial society. But like other such constructs, it was a powerful factor in U.S. public discourse nonetheless.[31] Indeed, the valuation of domestic privacy came to occupy an increasingly central role in public discourse during the nineteenth century. This was partially due to shifts in residential life. Puritan settlements in the American colonies had been organized around the church, with ecclesiastical figures as the spiritual as well as political and cultural leaders of the community.[32] But by the early nineteenth century, populations who lived in towns and cities (most of whom had immigrated to the United States after the colonial period and did not necessarily share the Puritans' religious zeal) were less tightly bound by ties of faith. Their basic organizational structure was usually the family, with the head of the patriarchal household as the primary authority of everyday life and each home as a proverbial castle unto itself – in the cultural imagination, if not always in practice. Lodgers and servants were also less likely to be found living in these households than in prior centuries, so that the spatial boundaries of the home increasingly coincided with the genealogical boundaries of the family.[33]

In this cultural environment, domesticity did not just allude to a clearly demarcated physical space but to a moral space as well: As the fundamental unit of society, the family was also the locus of personal development and spiritual uplift. In the cultural imagination of the nineteenth century, individuals were often "made" – to

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[28]Karen V. Hansen. "Rediscovering the Social: Visiting Practices in Antebellum New England and the Limits of the Public/Private Dichotomy." In: *Public and Private in Thought and Practice*, edited by Jeff A. Weintraub and Krishan Kumar. Chicago: University of Chicago Press, 1997. p. 270.

[29]Roy Lubove. *The Progressives and the Slums: Tenement House Reform in New York City, 1890-1917*. Pittsburgh: University of Pittsburgh Press, 1963.

[30]Karen Lystra. *Searching the Heart: Women, Men, and Romantic Love in Nineteenth-Century America*. Oxford: Oxford University Press, 1992.

[31]Indeed, as Karl Mannheim has argued, a key function of ideologies is to obscure the gap between conceptions of society and the actually existing order of society. See: Karl Mannheim. *Ideology and Utopia*. London: Routledge, 1964; Stuart Hall. "The Hinterland of Science: Ideology and the Sociology of Knowledge." Pp. 9-32 in: *On Ideology, Volume III*. London: Routledge, 2007.

[32]David H. Flaherty. *Privacy in Colonial New England, 1630-1776*. Richmond: University of Virginia Press, 1972.

[33]Flaherty (1972).

use Ian Hacking's formulation – within the confines of the home and the seclusion it provided.[34] This is why the social valuation of privacy during this earlier period was directly linked to the flourishing of the human soul: Freed from the observation and judgment of one's peers, a person could pursue familial care and seek moral and cultural refinement through deliberate introspection. The abolitionist writer and women's rights campaigner Lydia Maria Child captured this idealization of privacy in her classical novel *Philothea*, in which a "simple-hearted maiden" withdrew from public life "to keep her within the privacy of domestic life; for it was her own chosen home. She loved to prepare her grandfather's frugal repast of bread and grapes, and wild honey; to take care of his garments; [and] to copy his manuscripts."[35] While some communities of faith – most famously described by Max Weber in *The Protestant Ethic* – pursued moral virtue and personal salvation by keeping a watchful eye over "the sin of one's neighbor," the so-called "private individual" of American public discourse during the eighteenth and early nineteenth centuries tended to cultivate moral virtue through introspection and a retreat from public life.[36] Henry David Thoreau's 1845 secluded residence at Walden Pond was the most famous enactment of this creed, but not the only one.[37] Across the United States, writers and poets embraced a conception of individual personhood that emphasized the autonomous development of the human mind over the influence of social environments and treated solitude as an important prerequisite for the cultivation of one's conscience. In his aptly titled epic poem *The Recluse*, William Wordsworth captured such sentiments in great detail, writing:

> *Of the individual Mind that keeps her own*
> *Inviolate retirement, subject there*
> *To Conscience only, and the law supreme*
> *Of that Intelligence which governs all*
> *I sing: —"fit audience let me find though few!"*[38]

The general association of privacy with seclusion was not a uniquely American phe-

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[34]Ian Hacking. 2007. "Kinds of People: Moving Targets." *Proceedings of the British Academy* 151: 285–318.

[35]Lydia Maria Child. *Philothea: A Grecian Romance.* New York: C.S. Francis & Co., 1851.

[36]Max Weber. *The Protestant Ethic and the Spirit of Capitalism.* London: Routledge Classics, 2005. p. 75.

[37]See p. 303 in Henry David Thoreau. *The Portable Thoreau*, edited by Jeffrey S. Cramer. New York: Penguin, 2012; David Rosen and Aaron Santesso. 2011. "Inviolate Personality and the Literary Roots of the Right to Privacy." *Law and Literature* 23 (1): 1–25.

[38]William Wordsworth. "Prospectus to The Recluse." Vol. 2, p. 38, ll.19–23 in: *The Poems*, edited by John O. Hayden. New York: Penguin Books, 1977. Also quoted in Rosen and Santesso (2011), p. 15. Wordsworth began working on *The Recluse* in 1798 and continued to do so until his death in 1850. The passage quoted here was likely written between 1798 and 1800 and appears in early published editions of the poem.

nomenon. As historians of early-modern Europe have shown, the experience of privacy had long been linked to solitary reading and prayer – both of which tended to occur in secluded spaces and behind closed doors.[39] But in the United States, conversations about privacy fused with existing cultural currents to produce a spiritually charged conception of solitude and seclusion. In the cultural imagination of the early nineteenth century, the path to privacy ran through idealist notions of the human self rather than materialist conceptions of private property. Even those who did not subscribe to the overt mysticism of transcendentalist thinkers – preferring, perhaps, the "frontier individualism" that took hold in the Western United States during the first half of the nineteenth century – would have found recognizable elements in the celebration of introspection and self-reliance.[40]

Occasionally, the language of privacy would have carried connotations of secrecy rather than mere seclusion. In William Gilmore Simms' novel *Beauchampe*, for example, the eponymous title character was accused of having "forced yourself upon my privacy [...] to fathom my secrets" and made to "bear the penalty of forbidden knowledge."[41] Yet such affronts were usually committed by members of a person's social circle rather than by any organized authority or by someone acting in an official capacity. Concerns about interference by distant others – for example, the opening of sealed letters during mail transit – were most commonly motivated by a desire to guard against theft rather than by fears of surveillance and unauthorized exposure. In the words of David Seipp, Americans who raised the topic of privacy did not have "postmasters" or "telegraph clerks" in mind until the end of the nineteenth century.[42] The "perennial foes" of privacy were "the eavesdropper and the gossip-monger" who could inflict their harm only in close physical proximity and through direct personal interaction.[43] Quite literally, one had to stand "within the drip from the eaves of a house" to intrude on a person's privacy.[44] In short, the logic of privacy structured social and spatial relations within individual families and social circles; yet it rarely spoke to the routine collection and dissemination of personal data by officials, publishers, or unacquainted strangers.

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[39]Diana Webb. *Privacy and Solitude in the Middle Ages*. London: Hambledon Continuum, 2007; Bruce Redford. *The Converse of the Pen: Acts of Intimacy in the Eighteenth-Century Familiar Letter*. Chicago: The University of Chicago Press, 1986; Cecile M. Jagodzinski. *Privacy and Print: Reading and Writing in Seventeenth-Century England*. Richmond: University of Virginia Press, 1999; Jessica Martin and Alec Ryrie (eds). *Private and Domestic Devotion in Early Modern Britain*. Farnham: Ashgate, 2012.

[40]Samuel Bazzi, Martin Fiszbein, and Mesay Gebresilasse. 2020. "Frontier Culture: The Roots and Persistence of 'Rugged Individualism' in the United States." *Econometrica* 88 (6): 2239-2369.

[41]William Gilmore Simms. *Beauchampe, Volume 2*. Philadelphia: Lea and Blanchard, 1842.

[42]David J. Seipp. 1978. "The Right to Privacy in American History." Harvard University Program on Information Resources Policy Publication P-78-3, p. 16.

[43]Seipp (1978), p. 2.

[44]Seipp (1978), p. 2.

There was usually no need for it: standardized vital statistics did not yet exist in most U.S. states; the federal Census had no permanent home in the bureaucratic apparatus of Washington, DC; tabloid media had not yet established themselves; and a majority of Americans lived a rural life in small family units.

Processes of discursive transformation

But as lived experience evolves, so does the language we use to describe it. Words allow us to grasp a changing world but also impose latent conceptions of the natural, social, or moral order of a place or a people. Indeed, the power of the word lies precisely in the intermingling of the descriptive with the ascriptive.[45] This is why evolving terminologies, far from being reducible to strictly linguistic phenomena, can signal underlying shifts in social organization and the social significance of ideas. Before examining up close how privacy became integrated into institutional practice and encoded in specific pieces of legislation, it is therefore instructive to take a bird's-eye view. By tracing public discourse across multiple decades, we can perhaps grasp the logic of privacy with greater precision and begin to identify the contours and stakes of privacy debates around the turn of the twentieth century. Such a *longue durée* approach can point us towards the evolving (and perhaps unexpected) theaters where privacy and informational power were contested in the modern United States and thereby guard against the conflation of "familiarity with permanence."[46] It can also shed light on the genealogy of a public discourse. The protean conception of privacy embraced by the *Daily Tribune* in 1902 did not simply arise out of thin air. But what connections did it retain to earlier notions of familial privacy, and what pivots did it require? Just as the development of social and political institutions is subject to path dependencies that constrain future possibilities on the basis of prior arrangements, the development of discursive objects can import pre-existing cultural values and political commitments or, alternatively, reshape the cultural terrain.[47]

One approach to the study of linguistic change is to focus on etymology: How did the

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[45] Claude Lévi-Strauss. *Structural Anthropology.* New York: Basic Books, 1963; Alix Rule, Jean-Philippe Cointet, and Peter S. Bearman. 2015. "Lexical Shifts, Substantive Changes, and Continuity in State of the Union Discourse, 1790-2014." *Proceedings of the National Academy of Sciences of the United States of America* 112 (35): 10837–10844. Also see: Charles Sanders Peirce. *Collected Papers of Charles Sanders Peirce, Volumes I and II: Principles of Philosophy and Elements of Logic*, edited by Charles Hartshorne, Paul Weiss, and Arthur W Burks. Cambridge: Harvard University Press, 1932. Pp. 302ff.

[46] Bathsheba Demuth. "On the Uses of History for Staying Alive." *The Point Magazine*, 07/12/2020. Available at: https://thepointmag.com/examined-life/on-the-uses-of-history-for-staying-alive/. Accessed 01/08/2022.

[47] Paul Pierson. 2000. "Increasing Returns, Path Dependence, and the Study of Politics." *American Political Science Review* 94 (2): 251-267.

Latin *privatus* evolve into the French *privauté* and the Old English *privatie* and from there into the recognizably modern term *privacy* – and what did each of these terms mean in its own time?[48] Interesting as such an etyomology may be from a sociological viewpoint (since the evolution of language is never divorced from the migration of people and the shifting fortunes of empires and nation-states), our concern is slightly different. The focus here is on the public life of privacy as a discursive "object":[49] How was it used to comprehend and contest the social dilemmas of the United States during a period of social and technological transformation; what connotations linked it to other ideas and ideologies; and how did these features evolve over the course of several decades? The latter question is particularly intriguing, because the vocabulary of public discourse can change in multiple ways. Change can come from the invention of new terms or the adaptation of existing ones to new socio-political circumstance. It can be swift or gradual. Words can acquire new meaning, or they can infuse emerging debates without shedding older social and moral connotations. The central aim of this chapter is to identify the process through which privacy evolved into the capacious object of public discourse that informed the *Daily Tribune's* argument at the turn of the twentieth century. If there was a decisive break with the past, we would then need to identify the cultural conditions that enabled such a break and the communities that proselytized a reimagined idea.[50] If, on the other hand, privacy discourses in the twentieth century remained wedded to earlier periods of American history, then the task is to understand the entanglements of the emerging urban and information-rich society with the moral imaginaries and cultural norms of prior decades.

Let us clarify the processes that *could* be at play. Discourse sometimes evolves through vocabulary expansion, whereby new terms enter common use and either replace existing ones or are applied to hitherto unnamed phenomena. The conflict that was fought in the muddy trenches of Verdun and Ypres was generally known as "the Great War" until 1941 but as "World War I" thereafter.[51] From the vantage point of the early 1940s – when the United States had joined the Allied forces and turned the fight against fascism into a military conflict of global proportions – the years between 1914 and 1918 appeared less like a singular "Great" battle and more like the first of several episodes of industrialized warfare that could be sequentially numbered. Geopolitical

[48] See, for example: Mette Birkedal Bruun. 2018. "Privacy in Early Modern Christianity and Beyond: Traces and Approaches." *Annali istituto storico italo-germanico/Jahrbuch des italienisch-deutschen historischen Instituts in Trient* 44 (2): 33–54. The ancient distinction between *publicus* and *privatus* also appears on p. 30 of Amy Russell's *The Politics of Public Space in Republican Rome*. Cambridge: Cambridge University Press, 2015.

[49] Rule, Cointet, and Bearman (2015).

[50] Bruno Latour. *The Pasteurization of France*. Cambridge: Harvard University Press, 1993.

[51] Jean-Baptiste Michel, et al. 2011. "Quantitative Analysis of Culture Using Millions of Digitized Books." *Science* 331 (6014): 176–182.

disruption led to lexical invention as existing designations were cast aside for new ones that reordered the past in light of the present.[52] Technological innovations can have a similar effect. When computer scientists developed protocols for the reliable transmission of data parcels between computers in the mid-1970s, they described the resulting network of networks by shortening the unwieldy "inter-network" into the now-familiar term "internet".[53] In the decades that followed, the proliferation of digital communications sparked a cascade of similar creations that gave us terms like "email" and "website".[54] Although they were forged from the raw material that the existing vocabulary provided, none of them had properly existed before the computational age. Their history is the history of a distinct socio-technological period.

Other terms have much longer histories. They evolve through the adaptation of the existing vocabulary rather than the invention of new terms, sometimes breaking decisively with earlier discourses and occasionally importing their unspoken connotations into a later period. The term "computer" was once applied to people – often female and underpaid in comparison to male "engineers" – who could separate advanced calculations into manageable parts and solve them with pen and paper.[55] But with the advent of electromechanical calculating machines in the 1950s and 1960s, it gradually became decoupled from the concept of manual labor and was instead invoked to describe the work of machines. A similar process of semantic change also explains how "gay" became disconnected from conversations about joyfulness and linked to sexual orientation.[56] In both cases, shifts in technological capacities and cultural norms compelled linguistic shifts as new meanings were grafted onto existing terms,

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[52] One can make a homotypic argument about the emergence of "war on terror" rhetoric after 2001, which signalled that the wars in Afghanistan and Iraq were qualitatively and morally different from prior overseas military engagements by the United States. See: Lee Jarvis. *Times of Terror: Discourse, Temporality and the War on Terror*. New York: Palgrave Macmillan, 2009.

[53] Vincent Cerf, Yogen Dalal, and Carl Sunshine. "Specification of Internet Transmission Control Program." Network Working Group, December 1974. Archived at: https://datatracker.ietf.org/doc/html/rfc675. Accessed 11/12/2021.

[54] "email, n.2." OED Online, Oxford University Press, December 2021, www.oed.com/view/Entry/60701. Accessed 13 December 2021; "website, n." OED Online, Oxford University Press, December 2021, www.oed.com/view/Entry/253976. Accessed 13 December 2021.

[55] Lorraine Daston. 2017. "Calculation and the Division of Labor, 1750-1950." *Bulletin of the German Historical Institute* 62: 9–30.

[56] William L. Hamilton, Jure Leskovec, and Dan Jurafsky. 2016. "Cultural Shift or Linguistic Drift? Comparing Two Computational Measures of Semantic Change." Pp. 2116-2121 in: *Proceedings of the 2016 Conference on Empirical Methods in Natural Language Processing*. Austin, Texas: Association for Computational Linguistics; Derry Tanti Wijaya and Reyyan Yeniterzi. 2011. "Understanding Semantic Change of Words over Centuries." Pp. 34-40 in: *Proceedings of the 2011 International Workshop on DETecting and Exploiting Cultural DiversiTy on the Social Web - DETECT* Glasgow, Scotland, UK: ACM Press.

usually relegating their earlier connotations to the dustbin of discursive history.

However, not all objects of political discourse lose their pre-existing meaning. Reformers who confronted the Social Question during the late nineteenth century through the establishment of "public welfare" programs drew on century-old discursive traditions in economics and theology about the material "welfare of nations" and the "spiritual welfare" of souls, and applied them to the social problems of the Industrial Revolution.[57] In the 1960s and 1970s, the emergence of "Hispanic" as a category of ethno-racial classification resulted from a similar concept transfer. The term had long existed as a marker of *geographic* origin, although it was rarely used during the first half of the twentieth century. Then, a coalition of Census officials, civil rights advocates, and Latin American media organizations worked to define and popularize a Hispanic *identity* category that united diverse cultural communities under a shared conceptual roof, reasoning by way of analogy to convince them of the term's cultural value and political efficacy.[58] Each of these terms evolved when they were applied to new problems and introduced into new contexts.[59] They became more capacious, acquiring new connotations or new use cases without necessarily losing their original ones, and thereby serve as a reminder that language does not generally follow the rule to have "one form for one meaning, and one meaning for one form."[60] Concepts that were once tightly bounded can become roomy.[61]

As we will see below, privacy falls into this latter category. Its constitution as an object of public discourse around the turn of the twentieth century produced neither

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[57]See, for example: John Shute Duncan. *Collections relative to systematic relief of the poor, at different periods, and in different countries: with observations on charity, its proper objects and conduct, and its influence on the welfare of nations.* London: R. Cruttwell, 1815; *The Soul's Welfare: A Magazine for the People.* London: Houlston & Stoneman, 1850.

[58]G. Cristina Mora. 2014. "Cross-Field Effects and Ethnic Classification The Institutionalization of Hispanic Panethnicity, 1965 to 1990." *American Sociological Review* 79 (2): 183–210.

[59]John Haiman. *Natural Syntax: Iconicity and Erosion.* Cambridge: Cambridge University Press, 1985; Bodo Winter, Graham Thompson, and Matthias Urban. 2014. "Cognitive Factors Motivating The Evolution Of Word Meanings: Evidence From Corpora, Behavioral Data And Encyclopedic Network Structure." Pp. 353-360 in: *Evolution of Language: Proceedings of the 10th International Conference (EVOLANG10)*; William L. Hamilton, Jure Leskovec, and Dan Jurafsky. 2016. "Diachronic Word Embeddings Reveal Statistical Laws of Semantic Change." arXiv preprint arXiv:1605.09096.

[60]Paul J. Hopper and Elizabeth Closs Traugott. *Grammaticalization.* Cambridge: Cambridge University Press, 2003. P. 78, quoting from: Dwight Bolinger. *Meaning and Form.* New York: Longman, 1977. For a discussion of *polysemy*, i.e. the co-existence of multiple meanings, see: Ann Copestake and Ted Briscoe. 1995. "Semi-Productive Polysemy and Sense Extension." *Journal of Semantics* 12: 15-67.

[61]For a discussion of the argument that semantic change precedes polysemy, see Hopper and Traugott (2003) and Hamilton et al. (2016).

a sudden shift in meaning nor the abandonment of the concept's pre-existing spatial and moral undertones. Instead, the terminology of privacy was transposed onto the spatial realities of the urban metropolis, introduced into new debates about the collection of personal data, and thereby refashioned as an expansive logic of social life. It remained wedded to moral sensibilities and gender norms that predated the Industrial Revolution and the Progressive Era but were applied, sometimes with great fervor, to the emerging social realities of the twentieth century. At a time when many Americans and American institutions were "searching for order," as Robert Wiebe argues in his social history of the Progressive Era, the language of privacy offered a set of templates for the structuring of social relations – not just within families and small social circles but, increasingly, between individuals, bureaucratic organizations, and society writ large.[62]

Computational social science and the study of discursive trends

Although we commonly grasp the meaning of a term intuitively or through the force of habit, it can be difficult to measure.[63] More often than not, the study of discursive objects is the study of semantic nuances and subtle shifts, which explains why scholars have historically relied on the close reading of emblematic texts.[64] But what if the goal is to track the evolution of public discourse over multiple decades and across thousands of documents at once? One strategy focuses on so-called word embeddings.[65] At its core, this approach aims to identify latent patterns by reducing the dimensionality of written text: We begin with a large corpus and process it in such a way that relevant information about each word is contained in a single word-specific vector, so that words can be compared to each other simply by comparing their respective vector representations. Those interested in the technical details will find them in the methodological coda at the end of this book, but two ideas behind this approach are relatively straightforward: First, it is possible to study the evolution of everyday

[62]Robert H. Wiebe. *The Search for Order, 1877-1920*. New York: Macmillan, 1967.

[63]Robert Wuthnow. *Meaning and Moral Order: Explorations in Cultural Analysis*. Berkeley: University of California Press, 1987; Orlando Patterson. 2014. "Making Sense of Culture." *Annual Review of Sociology* 40: 1–30.

[64]Richard Biernacki. *Reinventing Evidence in Social Inquiry: Decoding Facts and Variables*. New York: Palgrave Macmillan, 2012; Thomas S. Eberle. "Qualitative Cultural Sociology." Pp. 237-254 in: *The Sage Handbook of Cultural Sociology*, edited by David Inglis and Anna-Mari Almila. London: SAGE Publishing, 2016.

[65]Yoav Goldberg. *Neural Network Methods for Natural Language Processing*. Williston: Morgan & Claypool, 2017. Pp. 90-95; Austin C. Kozlowski, Matt Taddy, and James A. Evans. 2019. "The Geometry of Culture: Analyzing the Meanings of Class Through Word Embeddings." *American Sociological Review* 84 (5): 905-949; Pedro Rodriguez and Arthur Spirling. 2021. "Word Embeddings: What Works, What Doesn't, and How to Tell the Difference for Applied Research." *The Journal of Politics* 84 (1): 101-115.

language by identifying general patterns in large datasets. Any individual mention of privacy matters less than the total aggregate, because public discourse is itself a conglomeration. It includes a myriad of idiosyncratic speech acts that might seduce us into one interpretation of political culture or another, yet there is no guarantee that any single instance captures something meaningful about the larger phenomenon under study. But view public discourse from a distance, and signals begin to appear: Accumulations around certain topics or shifts over time; rising and ebbing tides of prominence or ruptures in the meaning of a word. These are the patterns we seek to identify. Strictly speaking, a change in "public discourse" therefore implies a change in the distribution of semantics and themes across many individual utterances. It has micro-level foundations with macro-level significance.

Of course this approach can carry a cost. If we stray too far from the text, we risk losing sight of the nuances and subtleties that often characterize the meaning of terms, capture their moral and ideological connotations, and explain their political efficacy.[66] Niklas Luhmann referred to this as the *Anschlussfähigkeit* – literally, the connectability – of interpersonal communication: Discursive objects become integrated into existing traditions and social systems when they are linked in quite specific ways to existing codes.[67] For this reason, I also draw a random sample of 500 newspaper articles from each decade. I perform a close reading on these original sources to ground computationally-drived truths in specific historical texts and to interpret the social significance of observed trends in light of these texts.[68]

The second idea behind word embeddings is the importance of context. (On this point, advocates of close reading and computational social scientists tend to agree, even if they do not see eye to eye otherwise.) The meaning of any discursive object is not immanent in language itself – as if it were passed down from the heavens and fixed throughout time and place – but depends the wider webs of social and cultural signifiers into which a term is embedded.[69] This is because each individual word appears within

[66] Clifford Geertz. *The Interpretation of Cultures*. New York: Basic Books, 1973. See, for example, p. 5.

[67] Niklas Luhmann. *Soziale Systeme: Grundriss einer allgemeinen Theorie*. Frankfurt: Suhrkamp, 1987. Consider one example: When recycling first emerged as a strategy of combatting plastic waste, it was tied to a very specific interpretation of "responsibility" that held individual consumers rather than corporate manufacturers of plastic packaging responsible for dealing with waste. It was precisely this one-sided interpretation of an abstract term that turned it into a potent political weapon endorsed by the business-friendly group "Keep America Beautiful". See: Samantha MacBride. *Recycling Reconsidered: The Present Failure and Future Promise of Environmental Action in the United States*. Cambridge: MIT Press, 2013.

[68] For a discussion of interpretive approaches, see, for example: Andrew Abbott. *Methods of Discovery: Heuristics for the Social Sciences*. New York: W. W. Norton, 2004.

[69] Ferdinand de Saussure. *Course in General Linguistics*. New York: Columbia University Press, 1916; Paul DiMaggio. 1997. "Culture and Cognition." *Annual Review of Sociology* 23 (1): 263–287.

specific sentences and paragraphs that convey additional information about its usage and link it to other ideas and concepts. Given a sufficiently large corpus of text and sufficient computational power, we can determine the embedding space of any given word in the dictionary and thereby discover its meaning and usage inductively without having strong prior convictions about the meaning it *should* have.[70] We can also trace the evolution of words over time by comparing their embedding spaces across multiple decades.

To investigate the meaning of a discursive object like privacy, we specifically identify words that are most similar to it, and may therefore offer clues as to the meaning of privacy itself. In technical terms, we are looking for words with similar embedding spaces. This so-called semantic "neighborhood" offers a unique glimpse at the likely meaning of a word by capturing its usage across a large number of texts relative to the usage of closely related terms.[71] These patterns are unobservable to a casual reader, since words that share a common meaning do not necessarily appear next to each other on the printed page. Yet they become apparent when we compare the vector representations of different words by their cosine similarity scores. These scores are pervasive in computational text analysis and plagiarism detection because establish a quantitative measure of relative similarity by measuring the angle between two vectors in a multidimensional space: The closer a cosine similarity measure is to 1, the more alike two terms are.[72] Different operationalizations of this method exist, but the one used here is a so-called Continuous Bag of Words (CBOW) model that predicts a current word from a window of surrounding context words. We are interested in these predicted words because they can point towards the meaning of privacy itself.

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[70] Assume, for example, that we know absolutely nothing about the word *pitcher*. By looking at the words and sentences that surround each of its appearances in a body of text, we might be able to determine that it tends to be used in two distinct contexts, one related to baseball and another one related to tableware. If *pitcher* appears alongside words like *umpire*, *fastball*, *catcher*, and *strike*, it is probably in reference to the former. If it appears alongside *pour*, *drink*, *serve*, or *water*, it probably refers to the latter. At this stage we still wouldn't know whether a *pitcher* is a person, an object, or an abstract concept. But if we are able to identify words with most similar embedding spaces, we might be able to conclude that the meaning of *pitcher* resembles the meaning of *player* and *carafe*, with one referring to a person throwing baseballs and the other referring to a container used for holding drinks. We have learned something important about *how* a word is used and the *what* it means purely by considering the contexts into which it is embedded, but without diving into the etymology and cultural history of the word itself.

[71] William L. Hamilton, Jure Leskovec, and Dan Jurafsky. 2016. "Cultural Shift or Linguistic Drift? Comparing Two Computational Measures of Semantic Change." Pp. 2116-2121 in: *Proceedings of the 2016 Conference on Empirical Methods in Natural Language Processing.* Austin: Association for Computational Linguistics.

[72] Jiawei Han, Jian Pei, and Micheline Kamber. *Data Mining: Concepts and Techniques.* Amsterdam: Elsevier, 2011. Diametrically opposed vectors would have a cosine similarity of -1, and orthogonal vectors would have a similarity of 0.

The same approach can also shed light on latent discursive biases. Say that we suspect privacy to be a gendered concept that was specifically wedded to discussions about the social roles and rights of women. It is possible to estimate the extent of such gender bias by comparing the semantic neighborhood of the term privacy to the semantic neighborhoods of explicitly gendered words like wife, husband, father, mother, masculine, feminine, and so forth. Using the vector representation of each term, and using cosine similarity scores to measure their relative dissimilarity, the embedding bias of privacy is then equal to the dissimilarity between privacy and the average of all female-coded words, minus the dissimilarity between privacy and the average of all male-coded words.[73] If the value is positive, privacy is more closely associated with female-coded words than with male-coded ones.[74]

These models can inductively uncover latent patterns, but they are not entirely unsupervised. We must still make methodological choices about the appropriate number of model iterations, the size of the context window, and so forth. We must also confront a perennial challenge of working with digitized historical texts: The misrecognition of letters. Especially in sources from the nineteenth century, the quality of the ink and paper can be such that scanners struggle to identify words correctly through optical character recognition. Text data is quite sensitive to such misspellings.[75] A human reader would probably be able to recognize that *republic*, *republlc*, and *repoblic* are three instances of the same word (two of them misspelled, obviously), but a computer would consider them three separate words despite most of the characters being spelled correctly. A useful rule of thumb is that a character misrecognition probability of 2% will lead to 10-20% of words being misspelled.[76] There are two possible ways to address this. Using a combination of spellchecker software and a prediction algorithm, it is possible to identify misspelled words and replace them with the most-likely substitutions based on sentence context.[77] In a second step, we can then manually correct common (and commonly misrecognized) words that slipped through the predictive correction. This is the data science equivalent of the quip that, should one be tasked with cutting down a tree in six hours, one should spent four

[73]Nikhil Garg, Londa Schiebinger, Dan Jurafsky, and James Zou. 2018. "Word Embeddings Quantify 100 Years of Gender and Ethnic Stereotypes." *Proceedings of the National Academy of Sciences* 115 (16): E3635-E3644.

[74]The same approach can also be used to identify biases along other dimensions like class or race.

[75]Edwin Klijn. 2008. "The Current State-Of-Art in Newspaper Digitization." *D-Lib Magazine* 14 (2). Available at: https://dlib.org/dlib/january08/klijn/01klijn.html. Accessed 01//13/2022.

[76]Ismet Zeki Yalniz and Raghavan Manmatha. 2011. "A Fast Alignment Scheme for Automatic OCR Evaluation of Books." Pp. 754-758 in: *2011 International Conference on Document Analysis and Recognition*. Beijing, China: IEEE.

[77]Yifei Hu, Xiaonan Jing, Youlim Ko, and Julia Taylor Rayz. 2020. "Misspelling Correction with Pre-trained Contextual Language Model." Pp. 144-149 in: *2020 IEEE 19th International Conference on Cognitive Informatics & Cognitive Computing*. Beijing, China: IEEE.

hours sharpening the axe.[78] Much of the required work goes into pre-processing data and validating tools.

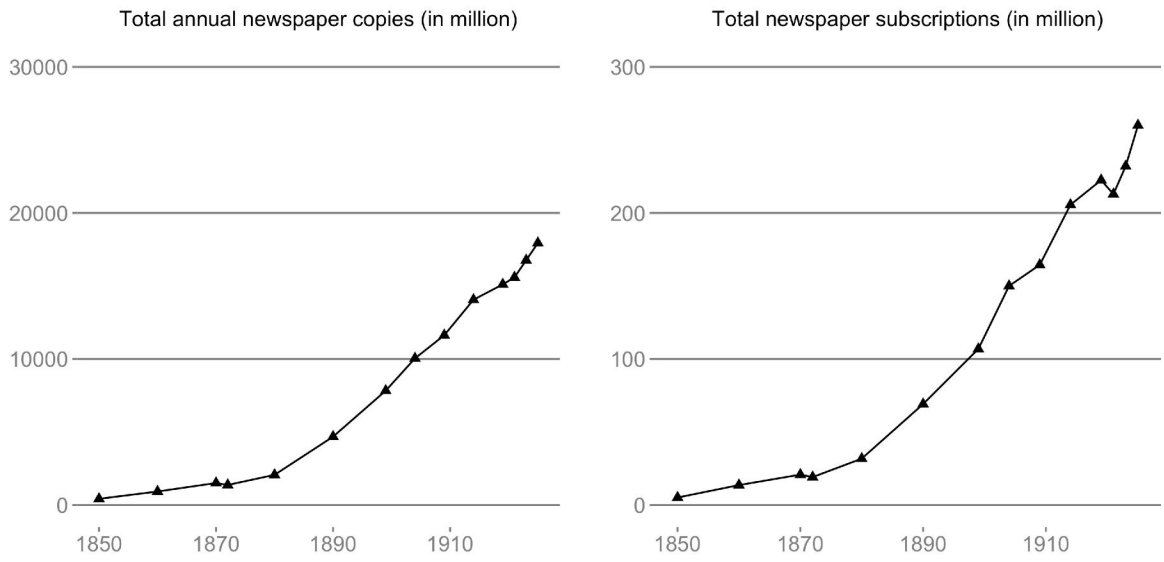

Figure 3.1: *Total annual U.S. newspaper subscriptions and circulation.*

Of course any truly *public* discourse in the United States played out across many different forums and thousands of miles. During the early decades of the American republic, it would also have relied heavily on the transmission of ideas through pamphlets, personal letters, and the spoken word.[79] Since newspapers were relatively scarce in the eighteenth century, everyday discourses were rarely preserved for posterity and the historical record overwhelmingly reflects discourses among the country's political elite.[80] However, advances in printing technology and the expansion of postal delivery routes contributed to a steep increase in newspaper production and circulation

[78] Josiah Strong. *The Times and Young Men.* New York: The Baker and Taylor Company, 1901. Pp. 123-124.

[79] Homer L. Calkin. 1940. "Pamphlets and Public Opinion During the American Revolution." *The Pennsylvania Magazine of History and Biography* 64 (1): 22-42; John R. Howe. *Language and Political Meaning in Revolutionary America.* Amherst: University of Massachusetts Press, 2004; Michael Warner. *The Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America.* Cambridge: Harvard University Press, 2009.

[80] Recent research has brought the tools of computational social science and social network analysis to bear on the study of early modern letters, mapping out alliances and discursive evolution from interpersonal exchanges. See: Dan Edelstein, Paula Findlen, Giovanna Ceserani, Caroline Winterer, and Nicole Coleman. 2017. "Historical Research in a Digital Age: Reflections from the Mapping the Republic of Letters Project." *The American Historical Review* 122 (2): 400-424.

during the second half of the nineteenth century.[81] In the decades between the Civil War and the Great Depression, U.S. newspaper subscriptions and newspaper circulation increased more than tenfold. At the turn of the twentieth century, around 20,000 publications distributed close to eight billion annual paper copies to fulfill more than 100 million subscriptions, according to historical census data.[82] These copies reached a substantial percentage of the American populace through local distribution networks – not just coastal elites –, although newspaper readership was heavily stratified by race: In 1870, up to 80 percent of the Black population aged 14 and older were illiterate due to their being denied access to basic education.[83]

For the first time in American history, it made sense to speak of a media-rich society. As the Republic of Letters gave way to publishers with national reach, an increasing number of local newspapers, and the bully pulpit of tabloid media organizations, the printed word came to occupy an ever more central role in public discourse and political debates. For a growing percentage of Americans, news and opinions from the world beyond their towns and villages began to arrive in the mail, in printed form, and on a regular schedule. It is therefore only appropriate to begin the study of privacy by considering how it was discussed in the American press. The Library of Congress has built a vast repository of historical newspaper content dating back to the nation's founding in collaboration with the National Endowment for the Humanities and local libraries across the United States. This database includes major national publications like the *Chicago Tribune* or the *Los Angeles Times* as well as regional and local papers from most U.S. states. It continues to grow as libraries scan and upload their archived newspaper collections but already includes close to 2.5 million newspaper issues with more than 19 million total pages of text.[84] When the goal is to capture American public discourse during the late nineteenth and early twentieth centuries, these data are a good place to start. We can also supplement them with records from the Corpus of Historical American English (COHA), which includes content from historical newspapers as well as magazines and literary fiction – around 20 million words per decade, on average.[85] This is too small for a computational analysis of relatively rare terms like privacy, since the dataset includes "only" 752

[81] Rodger Streitmatter. *Mightier than the Sword: How the News Media Have Shaped American History*. London: Routledge, 2018.

[82] Dill 1908.

[83] National Center for Education Statistics. *120 Years of American Education: A Statistical Portrait*, edited by Tom Snyder. Washington, DC: U.S. Department of Education, 1993.

[84] Around 13.7 million pages date from the years between 1870 and 1920.

[85] Mark Davies. 2012. "Expanding Horizons in Historical Linguistics with the 400-million Word Corpus of Historical American English." *Corpora* 7 (2): 121-157. Data for the COHA database were originally collected by Project Gutenberg and the *Making of America* project at Cornell University. It takes a village.

relevant entries between 1870 and 1920. But it can still provide us with insightful qualitative data and gives us access to weekly magazines that were widely read around the turn of the twentieth century.

The meaning of privacy

The term privacy appeared 82,094 times in newspapers between 1870 and 1920 with gradually increasing prominence. It was printed on 0.7% of all archived pages in the 1870s, and on 1% in the 1900s. This was on par with other relatively specialized but politically salient terms. For example, mentions of "Greenback" – a reference to the U.S. dollar and the political party that had advocated for an abandonment of the gold standard – appeared on 0.5% of all pages during the first decade of the twentieth century; and the term "taxation" appeared on 4%. Some mentions of privacy were in flashy political cartoons, like the one printed in 1920 in the *Richmond Times-Dispatch* from Virginia. Commenting on Warren G. Harding's presidential campaign, it proclaimed:

> *And this shall be his great endeavor*
> *To start in shaking hands at dawn;*
> *His privacy is gone forever*
> *Where visitors track up his lawn;*
> *And where he once knew easy picking*
> *Where life was placid and serene,*
> *Ten thousand cameras stark clicking*
> *Each time his features grace the scene.*[86]

The language of privacy also appeared in lead articles about mail privacy or telephone surveillance; in reprinted speeches and court opinions about the right to privacy; or in opinion pieces about the emerging "era of publicity." It showed up in classified ads that promised privacy in mail-banking or proclaimed the benefits of window-blinds manufactured by a company in Minnesota. And many mentions were simply woven into the text itself, appearing in articles that were not primarily *about* privacy but touched *on* privacy as they discussed topics as varied as home life, yellow press journalism, photography, the Knights of Columbus, marriage, and corporate regulation.

But what did it *mean* to have privacy during different decades? We can begin the study of the meaning of a discursive object by considering its semantic "neighborhood", that is, the list of terms with similar word embedding spaces. Words that co-occur on this list do not necessarily appear alongside each other in the *same* newspaper articles. Instead, they are used in *similar* texts. Computational linguists refer to this as "distributional similarity" and commonly use it as an approximation of semantic

[86] Grantland Rice. "We Have With Us Today." *Richmond Times-Dispatch*, 07/18/1920.

similarity, in part due to the difficulty of measuring semantics directly in a large linguistic corpus.[87] Two distributionally similar terms are not always exact synonyms – although this is true in many instances – but they share membership in the same semantic "family".[88] Table 3.1 shows the twenty most similar terms for each decade and highlights salient characteristics of American privacy discourse that carried over from the early nineteenth century into the 1870s and beyond: Privacy was closely tied to "seclusion" and "solitude," and it could allude to a person's "retirement" from social interactions and public settings into an "inner" or "innermost" realm – a so-called "sanctum" or "sanctuary" that guarded people against the eyes and ears of nearby others or created room for "unmolested" and tête-à-tête" conversations about personal and "confidential" matters.

Figure 3.2: *The Richmond Times-Dispatch, 07/18/1920.*

Several aspects stand out from the semantic neighborhood and shed light on the

[87] Julie Weeds and David Weir. 2005. "Co-occurrence Retrieval: A Flexible Framework For Lexical Distributional Similarity." *Computational Linguistics* 31 (4): 439-475. See p. 442 for a definition: Two terms "are distributionally similar if they appear in similar contexts."

[88] Ludwig Wittgenstein. *The Blue and Brown Books.* London: Basil Blackwell, 1958. pp. 16-17; Ludwig Wittgenstein. *Philosophical Investigations, 4th Edition*, edited by Joachim Schulte. London: Wiley-Blackwell, 2009, pp. 66-67. Wittgenstein writes that families are best understood as "a complicated network of similarities overlapping and cross-crossing" (p. 66).

meaning of privacy as a discursive object. First, behind the ordered list of semantically similar terms loomed a conceptual division of social life into a public realm in which people interacted with others, exchanged ideas, engaged in politics and commerce, observed and submitted themselves to observation; and a private realm dominated by contemplative thought, family life, and personal pleasure. Decades later, Erving Goffman would embrace a similar perspective – and a similarly bifurcated view of social life – by distinguishing a "back stage" and a "front stage" of social action.[89] Beginning from the premise that the "presentation of self" in everyday life is always a carefully managed performance, Goffman suggests that a person could be one version of themselves in public, and quite another in private. As he writes, the "back stage" is where the dramaturgy of social life ceases, where the performer "can relax; he can drop his front, forgo speaking in his lines, and step out of character."[90] It offers the possibility of retreating – albeit in a partial and temporary manner –, of making oneself invisible to a social audience and inscrutable to casual observers. This is why Barrington Moore considers privacy to be a "socially created need."[91] Without the pressure to perform social roles and endure social observations, "there would be no need" for privacy.

Second, the social valuation of "absolute" and "sacred" privacy tended to co-exist alongside a valuation of publicity and a recognition of the precariousness of private life. On the one hand, privacy was a distinctly valued social good rather than simply a descriptive label. It was considered a "luxury" – since the ability to retreat from communal spaces into private rooms was not a given – that circumscribed an "inviolable" and indispensable part of a person's lived experience.[92] Writing in *Scriber's* in 1876, one writer thus observed that "we all like privacy sometimes, if for no other end than to have the temptation to talk and to look about us removed."[93] Indeed, as Barry Schwartz has suggested, without the possibility of retreating onto the back stage of social life, social obligations can become overbearing and durable social relations become impossible.[94] On the other hand, privacy was constantly under threat, given the omnipresent potential for "invasion" and "intrusion" by inquisitive and "uninvited" others, and therefore required some form of protection. The case for privacy was partly a case for the *defense* of privacy against unauthorized attempts to render people visible, audible, and legible to outside observers. Complete seclusion could also turn

[89]Erving Goffman. *The Presentation of Self in Everyday Life*. New York: Doubleday, 1959.

[90]Goffman (1952), p. 112.

[91]Moore (1984), p. 73.

[92]For a distinction between individualistic conceptions of privacy and privacy as a social good, see: Debbie V. S. Kasper. 2007. "Privacy as a Social Good." *Social Thought & Research* 28: 165-189.

[93]Clarence Chatham Cook. "Beds and Tables, Stools and Candlesticks." *Scribners*, January 1876: 342-357.

[94]Schwartz (1968).

into a kind of prison, given the concurrent desire for "publicity", "openness", and social exchange. This is why the management of privacy was commonly a matter of managing "access" rather than ensuring perfect "solitude": Doors which could be "locked" and "soundproof" walls offered "confidentiality" and perhaps even "secrecy" to those who had chosen to seclude themselves, but without confining any individual permanently to the "bedroom" or the "boudoir".

1870s		1880s		1890s		1900s		1910s	
Term	Similarity	Term	Similarity	Term	Similarity	Term	Similarity	Term	Similarity
seclude	0.659	intrude	0.654	strict	0.607	strict	0.628	absolute	0.614
intrude	0.597	sanctity	0.616	secrecy	0.604	seclude	0.591	seclude	0.612
secrecy	0.579	seclude	0.592	publicity	0.573	absolute	0.589	strict	0.561
sanctity	0.576	comfort	0.554	seclude	0.569	publicity	0.575	inviolable	0.481
retirement	0.568	secrecy	0.554	absolute	0.564	comfort	0.551	sanctity	0.477
publicity	0.551	bedchamber	0.543	intrude	0.551	intrude	0.519	leisurely	0.465
obtrude	0.514	invade	0.541	attendant	0.550	assure	0.517	comfort	0.461
sanctuary	0.513	obtrude	0.539	obtrude	0.539	uninvited	0.513	boudoir	0.449
quietude	0.508	apartment	0.527	comfort	0.524	sanctity	0.499	leisure	0.443
sacred	0.507	publicity	0.520	boudoir	0.514	secrecy	0.485	quietude	0.439
invade	0.501	ostentation	0.516	sleeping	0.511	admittance	0.483	openness	0.436
decorum	0.496	private	0.507	inviolable	0.509	confidential	0.477	intrude	0.435
inviolability	0.493	teteatete	0.504	sanctity	0.506	ensure	0.476	neatness	0.430
indelicacy	0.490	decorum	0.496	compartment	0.504	boudoir	0.469	soundproof	0.429
retire	0.488	impertinent	0.492	invade	0.493	access	0.469	mainfloor	0.428
restraint	0.482	incompatible	0.492	utmost	0.474	inconvenient	0.456	solitude	0.427
unmolested	0.481	etiquette	0.486	innermost	0.472	locked	0.450	obtrusive	0.423
infelicity	0.476	homelike	0.482	bedchamber	0.466	utmost	0.449	invade	0.422
private	0.475	privileged	0.476	confidential	0.463	stuffy	0.448	detention	0.418
inner	0.454	boudoir	0.473	luxury	0.461	nouns	0.442	confidence	0.417

Table 3.1: *Semantic neighborhoods of the term "privacy", by decade. Similarity is measured as the cosine similarity between word-specific embedding vectors.*

The challenge, then, was not to sever the links between the two domains of social life but to control the flow of people and information from one to the other. Already in the nineteenth and early twentieth centuries, the logic of privacy aimed to protect what Ruth Gavison has called lives of "limited access" rather than lives of complete invisibily. It was shaped by concerns over "the extent to which we are known to others, the extent to which others have physical access to use, and the extent to which we are the subject of others' attention."[95] But who should be allowed to observe whom, when, and under what conditions? The logic of privacy offered an answer by positing a set of norms – often encased in informal rules of "etiquette" and "decorum" and the social stigmatization of "indelicate" and "infelicitous" behavior rather than any formalized legal code, according to the semantic neighborhood shown in Table 3.1 – that governed access to the inner sanctum of a person's life, and allowed a person to live "unmolested" in "quietude" and perhaps in "secrecy". Unlike other social and political liberties, it promised neither freedom from fear nor freedom from want but the possibility of evading observation and social interaction for a finite amount of time

[95]Ruth Gavison. 1980. "Privacy and the Limits of Law." *Yale Law Journal* 89 (3): p. 423.

and in specific social settings.

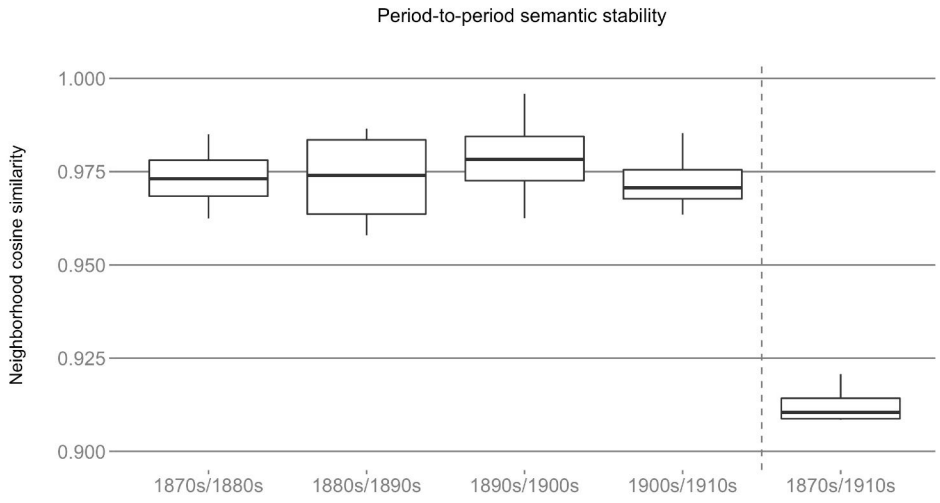

Figure 3.3: *Semantic stability over time, based on decade-to-decade comparisons of semantic neighborhoods. Cosine similarity scores are shown for vector lengths 5 to 20.*

This interpretation of privacy survived across five decades of societal and technological evolution. It is possible to quantify this stability by calculating second-order cosine similarity scores that compare the semantic neighborhoods of privacy during successive decades.[96] The more similar two semantic neighborhoods are, the closer the resulting cosine similarity score will be to 1. There are no hard thresholds for what constitutes a "stable" word meaning, but values around 0.9 are commonly considered appropriate.[97] Figure 3.3 shows that cosine similarity scores for each pair of successive decades are all above 0.95. Even comparing decades at opposing ends of the time window – the 1870s and the 1910s – shows a relatively high degree of semantic stability, with a cosine similarity score above 0.9. While terms like "gay" and "computer" went through a significant semantic transformation that saw them largely shed their old meanings and acquire entirely new ones, there was no comparable semantic pivot with privacy. It carried a relatively stable meaning that would have been evident to most authors and

[96] I compute these cosine similarity scores for all vector lengths between 5 and 20 – i.e. considering between 5 and 20 of the most semantically similar terms – which is why Figure 3.3 shows a series of box plots rather than specific point estimates.

[97] Maria Antoniak and David Mimno. 2018. "Evaluating the Stability of Embedding-Based Word Similarities." *Transactions of the Association for Computational Linguistics* 6: 107–119. We can determine appropriate values in part by looking at the meaning of terms that are unlikely to change their meaning, e.g. "mother" and "father". Doing so corroborates the adequacy of 0.9 as an indicator of high semantic stability.

their audiences during the late nineteenth and early twentieth centuries, and thereby offered a durable conceptual framework for thinking about the relationships between individuals and the social environments into which they were embedded.

New social problems

The focus so far has squarely been on the study of meaning. But discursive objects are not just defined by their semantics. It also matters how they are *used*: What are the thematic contexts in which they appear – also known as "discursive categories" – and the networks of ideas to which they become attached?[98] Each thematic context hints at a conversation or a family of interrelated conversations that problematize specific issues as matters of public concern and offer a glimpse at the discursive preoccupations of a given time and place. We can study them by retreating one step from the semantic neighborhoods above. Instead of using embedding spaces instrumentally to identify most-similar terms, we can look directly at the words that appeared alongside privacy on the printed page, shown in Table 3.2. They can be obtained by extracting each text fragment that includes a mention of privacy and captures the immediate sentences in which it was embedded, also called an n-gram. The data presented below are based on the study of 21-grams, that is, text fragments which include the ten words to the left and right of the term privacy. But the exact size of the fragment does not matter: Using 11-grams or 15-grams centered on "privacy" produces very similar results.[99] We then group these fragments by decade, count how frequently any word appears in the resulting list, and compute the co-occurrence odds, which is the probability of an event occurring – which, in this case, is the co-occurrence of privacy with term X –, divided by the probability of the event not occurring.[100]

In every decade between the 1870s and the 1910s, privacy appeared most frequently in texts about physical space, and particularly about domestic space. There was the privacy of the home, the house, the room, the chamber, and the office. Each of these co-occurring terms represented a physical location that offered temporary refuge from the wider world, its social obligations, and the gaze of inquisitive neighbors and relatives.[101] A person might desire privacy at home after a day's work; or a married couple might retreat to their bedroom to gain privacy vis-à-vis their children.

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[98] Rule, Cointet, and Bearman (2015), p. 10839.

[99] N-grams exclude common stopwords; see the methodological appendix for a detailed description of data cleaning and pre-processing workflows.

[100] If the term *privacy* appears 1000 times in a given dataset and the term *room* co-occurs with it 100 times, the co-occurrence odds for *room* are equal to 0.1/0.9. This list is also called a "bag of words"-approach because it reduces the dataset to an unordered heap of text, without any heed paid to word order or the rules of syntax.

[101] Barry Schwartz. 1968. "The Social Psychology of Privacy." *American Journal of Sociology* 73 (6): 741-752.

1870s		1880s		1890s		1900s		1910s	
Term	Odds	Term	Odds	Term	Odds	Term	Odds	Term	Odds
man	0.160	loan	0.189	home	0.426	home	0.296	home	0.292
room	0.107	room	0.135	cure	0.174	cure	0.219	room	0.145
home	0.097	man	0.128	woman	0.162	room	0.152	woman	0.140
public	0.087	home	0.119	perfect	0.124	woman	0.130	cure	0.133
intrude	0.070	company	0.092	room	0.116	strict	0.111	loan	0.129
house	0.069	guarantee	0.089	consultation	0.111	absolute	0.101	treatment	0.107
day	0.066	value	0.088	relief	0.101	rate	0.083	absolute	0.083
family	0.063	reasonable	0.088	confidential	0.097	treatment	0.082	box	0.080
place	0.059	advance	0.088	mail	0.087	wine	0.078	man	0.070
sacred	0.055	rate	0.086	case	0.082	man	0.075	strict	0.064
life	0.054	promptness	0.086	physician	0.081	loan	0.069	case	0.056
time	0.053	cash	0.086	lady	0.074	office	0.065	right	0.054
state	0.046	article	0.077	man	0.069	private	0.064	company	0.054
invade	0.046	storage	0.075	private	0.063	confidence	0.052	medical	0.052
lady	0.043	silverware	0.074	treatment	0.063	floor	0.050	examination	0.051
city	0.041	public	0.070	attention	0.058	street	0.050	office	0.051
comfort	0.038	house	0.069	convenience	0.058	guard	0.049	trouble	0.051
secure	0.038	diamond	0.066	traveler	0.056	painless	0.049	bank	0.051
business	0.037	time	0.065	insure	0.056	case	0.047	assure	0.051
door	0.036	family	0.063	care	0.054	letter	0.047	pay	0.050
word	0.035	lady	0.061	state	0.053	day	0.046	telephone	0.049
woman	0.035	life	0.055	strict	0.051	doctor	0.045	house	0.048
open	0.034	intrude	0.052	confinement	0.051	time	0.044	time	0.045
private	0.034	place	0.051	female	0.050	assure	0.043	day	0.043
care	0.033	woman	0.044	family	0.050	hotel	0.042	special	0.041
faithful	0.033	private	0.043	address	0.049	secure	0.042	prescription	0.039
service	0.033	day	0.040	loan	0.049	service	0.041	service	0.037
people	0.032	mail	0.040	time	0.046	guarantee	0.041	hair	0.036
party	0.032	secure	0.039	car	0.045	trial	0.038	floor	0.036
friend	0.032	perfect	0.038	doctor	0.045	professional	0.036	family	0.036
desire	0.032	comfort	0.037	disease	0.045	family	0.035	money	0.035
domestic	0.031	address	0.035	city	0.043	house	0.035	question	0.033
night	0.031	invade	0.035	absolute	0.043	examination	0.034	public	0.033
retire	0.030	office	0.034	house	0.041	open	0.033	world	0.033
country	0.030	fee	0.033	adopt	0.041	city	0.033	trial	0.033
hotel	0.028	president	0.031	comfort	0.041	life	0.033	place	0.032
lock	0.028	consultation	0.031	rate	0.040	pierce	0.032	amount	0.031
right	0.027	strict	0.031	require	0.040	comfort	0.032	work	0.031
world	0.026	open	0.031	day	0.039	telephone	0.031	lady	0.031
street	0.025	people	0.029	desire	0.039	physician	0.031	jewelry	0.031
chamber	0.025	night	0.029	aid	0.038	car	0.031	president	0.030
letter	0.025	order	0.029	hospital	0.038	term	0.031	doctor	0.029
strict	0.025	confidential	0.028	disorder	0.036	perfect	0.031	hemorrhoid	0.029
contract	0.025	desire	0.028	avoid	0.035	relief	0.030	advice	0.029
wife	0.024	state	0.028	place	0.033	work	0.030	porch	0.029
paper	0.024	hotel	0.028	secure	0.033	insure	0.030	paper	0.029
hand	0.024	present	0.027	sympathy	0.033	public	0.030	guarantee	0.029
secret	0.023	world	0.027	funeral	0.033	confidential	0.030	rate	0.028
name	0.023	west	0.027	letter	0.032	package	0.030	open	0.028
young	0.023	door	0.027	north	0.032	hold	0.029	rectal	0.028

Table 3.2: *Words that appeared in historical newspapers alongside the term "privacy", grouped by decade and ranked (from top to bottom) by their co-occurrence odds.*

This close entanglement between privacy and space is among the most long-standing features of privacy discourse, dating back (in the United States) to the colonial period. Especially among the American middle class, the privacy of the home had featured as an aspiration and a marker of social status since the eighteenth century, since one salient difference between the homes of the poor and better-situated social strata was the sub-division of residential space and the earmarking of certain rooms as "private".[102] But such spatial approaches also survived into the late nineteenth and early twentieth centuries. Writing in 1890 in *Scribner's* magazine under the pseudonym Octave Thanet, the American essayist Alice French captured this spatial focus when she argued that "privacy is a distinctly modern product, one of the luxuries of civilization" that presupposed a shift from communal living arrangements towards spatially sub-divided family homes as the primary mode of residential life. The "addition of sleeping-rooms, and afterward of withdrawing-rooms" made it possible to "escape from the noise and publicity of the outer hall" and "segregate" parents from children and residents from guests.[103] When Americans newspapers discussed privacy during this period, they often did so with reference to the architectural means and social customs that could protect certain spaces against intrusion.

During a period when threats to privacy often stemmed from the actions of nearby observers, restricting direct access and eliminating sightlines still functioned as key strategies for the protection of personal privacy in everyday life.[104] This is why the doors that regulated access to homes or bedrooms were among the most widely used tools for privacy management.[105] They constituted physical barriers as well as social-psychological ones, because they separated the home from the world beyond it and granted *selective* access to a person's domestic circle and intimate life. As Georg Simmel once noted in his essays on the modern metropolis, "precisely because [the door] can also be opened, its closure provides the feeling of a stronger isolation against everything outside." The wall was mute, "but the door speaks."[106] The literary critic Richard Grant Write thus admitted, in an 1879 essay published in the *Atlantic Monthly*, feeling "some shyness and hesitation" whenever he crossed another person's

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[102]Karen V. Hansen. "Rediscovering the Social: Visiting Practices in Antebellum New England and the Limits of the Public/Private Dichotomy." In: *Public and Private in Thought and Practice*, edited by Jeff A. Weintraub and Krishan Kumar. Chicago: University of Chicago Press, 1997.

[103]Octave Thanet. "Under Five Shillings." *Scribner's* July 1890: 68-80.

[104]See Seipp (1978), pp. 2 and 16.

[105]For a discussion of the social function of privacy, also see pp. 24-65 in: Alan F. Westin. *Privacy and Freedom.* New York: Athenum, 1967.

[106]Georg Simmel. 1994. "Bridge and Door." *Theory, Culture & Society* 11: 5–10. Also see: Robin Evans. "Figures, Doors, and Passages." Pp. 55-92 in *Translations from Drawing to Building and Other Essays.* London: Architectural Association Publications, 1997.

doorstep "as if I were intruding upon household privacy."[107] And to at least one writer, the possibility of privacy itself depended directly on the possibility of "[shutting] off" each room "from every other room by a closed door."[108] The opposite was true as well: Doors could shield those outside a "private" room from sexual intercourse or other morally charged behaviors that were practiced on the inside. In a 1905 edition of *Good Housekeeping*, for example, an anonymous writer advised parents to inflict corporal punishment on their children only "in the privacy of [the child's] own room, and not even hinted at before other children".[109] Physical pain and feelings of guilt sufficed as punishment; and they were not to be supplemented with public ridicule by the child's peers. Spatial privacy thus implied protection against exposure and observation in a dual sense: Through the restriction of access to those who had retreated into a private space, and also by preventing sounds and sights from leaking out.

Yet the accelerating growth of cities since the middle of the nineteenth century had also focused discussions on the possibility and social valuation of privacy in distinctly *urban* spaces. In 1850, only around 3.5 million Americans lived in towns and cities. In 1870, around 10 million did. And by 1920, the United States had become a majority-urban society with more than 54 million living in cities, according to U.S. Census data (Figure 3.4).[110] This changed not just the distribution of people across the vast expanses of the North American continent but the experience of residential life itself. While prior generations of writers and readers had treated the privacy of relatively isolated homes as a de-facto description of lived experience, such isolation was slipping out of grasp for many urban residents and was often unavailable to immigrants who had left rural communities in Germany or Hungary but found themselves in the crowded tenements of New York's Lower East Side. As the *Washington Times* reminded its readers soon after the turn of the twentieth century,

> *"Our fathers might live in a country farmhouse a mile away from their nearest neighbor and if they chose to locate their pigsty hinder their parlor window, it concerned no one but themselves. We live in fourteen story apartments where whole communities use the same entrance and elevator and it is a matter of public concern how the housewife cooks her dinner and hangs her clothes out to dry."*[111]

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[107] Richard Grant White. "London Streets." *Atlantic Monthly*, February 1879: 230-242.

[108] Ellen Adair. "Wives Here and Abroad Contrasted." The Hattiesburg News, 02/04/1915.

[109] "Baby Talk: The Breaking of Baby's Will." *Good Housekeeping*, April 1905: 439-441.

[110] "Census data" generally refers to full-count microdata files made available through IPUMS-USA. Steven Ruggles, Sarah Flood, Sophia Foster, Ronald Goeken, Jose Pacas, Megan Schouweiler and Matthew Sobek. IPUMS USA: Version 11.0 [dataset]. Minneapolis, MN: IPUMS, 2021. Also see: James G. Gimpel, Nathan Lovin, Bryant Moy, and Andrew Reeves. 2020. "The Urban–Rural Gulf in American Political Behavior." *Political Behavior* 42 (4): 1343-1368.

[111] "The Era of Publicity - the Twentieth Century." *The Washington Times*, 07/31/1902.

This was a common perspective. As the editor of the *Pierre Weekly Free Press* remarked, "the privacy of the home is something denied the most of us through the present social conditions."[112] The average American women, for example, had "no retirement whatever from her husband, save when he is away from the house, and none from her children at any time."[113] Or as the *Washington Herald* put it in 1914, "we are all too prone fairly to overwhelm each other with our presence and to leave each other too little opportunity to be and to act alone."[114] While some writers welcomed urban life insofar as it offered an escape from small-town communities "in which everybody's life is very carefully inspected and registered by a small circle of neighbors," many newspapers therfore regarded the American city as the harbinger of increased exposure.[115] A person living in an urban apartment may not have gossiped with neighbors they encountered only in passing, but they were still subjected to the casual gaze of a community that was often orders of magnitude larger than in a small town.

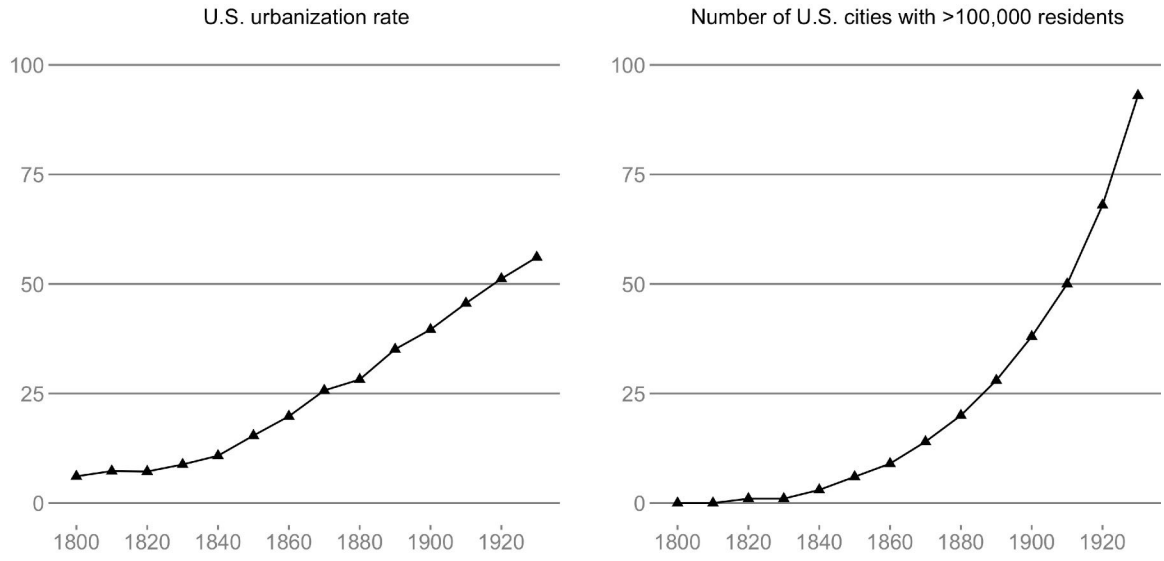

Figure 3.4: *U.S. urbanization trends, 1800-1930.*

This shift had two tangible and counterveiling impacts on privacy discourse in the United States. First, it strengthened the argument – only too familiar to a twenty-first

[112]"Privacy in the Home is Scarcely Possible." *Pierre Weekly Free Press* 5/8/1913.

[113]"Privacy in the Home is Scarcely Possible." *Pierre Weekly Free Press* 5/8/1913.

[114]"Etiquette on Privacy in Life." *The Washington Herald.* 6/21/1914.

[115]Edward Everett Hale. "The Congestion of Cities." *Forum* 4 (January 1880), p. 530.

century audience – that privacy had turned into an anachronism that was less valued than in the past and less attainable in practice. In the view of the *Washington Times*, the shift in residential life was a major reason why publicity had become "a necessary condition of existence" in the modern United States.[116] "To live in a crowd has become a habit," the magazine *Galaxy* similarly noted in 1876, as a growing number of Americans could no longer find "that secluded nook in the country profitable to mind and body" but opted "to live in communication with the public."[117] This embrace of publicity as a condition of everyday life struck many writers as a distinctly American phenomenon. Foreign correspondents and writers who had travelled abroad routinely used their column inches to report on the cultural sensibilities of the French or the British, comparing them to those one might encounter in the United States and noting that the European "love for privacy" was difficult to grasp for the average American.[118] In 1881, the *Atlantic Monthly* published one such essay that focused on the American approach to privacy. It argued:

> *"Privacy is one of those things for which we Americans seem to have an 'imperfect sympathy.' We regard publicity as a sort of duty. We take delight in the reflection of ourselves in the public mirror. Self-exposure seems to us to be a matter of pride. We build our houses so that our neighbors can easily look in at the windows. We lay out our grounds and arrange our flower-beds and shrubbery expressly to be seen from the street. Our sentiment of privacy is symbolized by the open wire fence."*[119]

More than a century before *Time* magazine devoted a 1997 cover story to the alleged "Death of Privacy" due to the increasing prevalence of electronic databases, the analogy of the open wire fence already suggested that the social valuation of privacy existed in concert with a desire for visibility and exposure in an increasingly modern and urban society.[120] While the French *flâneur* – the archetypical person who strolled through the streets and arcades of Paris, made famous by the writings of the philosopher Walter Benjamin – sought to find sovereignty "based in anonymity" by disappearing into a crowd and hiding in the hubbub of the modern city, the American urbanite seemed to welcome exposure through proximity and heightened social interactions.[121]

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[116] *The Washington Times*, 07/31/1902.

[117] Albert Rhodes. "Woman's Occupations." *Galaxy*, January 1876: 45-56.

[118] The Hattiesburg News, 02/04/1915.

[119] John Durand. "French Domestic Life and its Lessons." *Atlantic Monthly*, August 1881: 164-179. For a similar discussion about the relative valuation of residential privacy in the U.S. and the U.K., also see: E. W. Baylor. "After London Types." *The Washington Post*, 01/19/1896; Frances Marshall. "Work and Play in the Household." *The Washington Herald*, 06/21/1914.

[120] "The Death of Privacy." *Time*, 10/15/1997.

[121] Walter Benjamin. *Charles Baudelaire: A Lyric Poet in the Era of High Capitalism*. London: Verso, 1983. Also see p. 5 in: Keith Tester (ed.) *The Flâneur*. London: Routledge, 1994.

Daniel J. Boorstin has referred to this as the "social narcissism" of the United States. "We have now fallen in love with our own image," Boorstin wrote, "with images of our making, which turn out to be images of ourselves."[122] Even ecclesiastical authorities felt compelled to weigh in on the matter, treating the shift from privacy towards publicity as a deeply spiritual transformation that promised to contain "the great evil among men [...] secrecy and deceit."[123] Writing in a 1913 edition of the *Atlanta Georgian*, the Reverend John White of Atlanta's Second Baptist Church observed that:

> *"The basic religious conviction that Deity sees, hears, and knows is at work day and night to justify the increasing passion of humanity to see, hear, and know. The Christian assurance that 'nothing is secret that shall not be made manifest; neither anything hid that shall not be known and publish itself abroad' is the moral sanction of publicity as the consumation of the highest civilization."*[124]

He concluded: "The cry of life is 'Light! More Light! More light everywhere!" But in the eyes of other observers, the social valuation of publicity was more than an individual desire or a spiritual attainment. It was grounded in the practical realities and administrative necessities of urbanization and industrialization. As the *Washington Times* argued in the same 1902 article that discussed the disappearance of rural farmhouses, publicity had become a distinctly social need that was "more important to the community than the right of privacy [is] to the individual." In language that is reminiscent of Adam Smith's and Émile Durkheim's writings on the division of labor and the rise of so-called "organic solidarity" as a consequence of social differentiation and interconnectedness, the newspaper continued:[125]

> *"Society is now an organism and all the atoms composing it are interdependent. The position that any atom or individual shall occupy in the social mass or community depends not only upon his own abilities and worth but upon the appreciation that the rest of the mass or community has of that worth and these abilities."*[126]

The management of a diverse populace and an increasingly interdependent society seemed to require a significant expansion of administrative knowledge about individuals

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[122] Daniel J. Boorstin. *The Image: A Guide to Pseudo-Events in America.* New York: Vintage, 1992, p. 257.

[123] "The Dictograph." Atlanta Georgian, 06/23/1913.

[124] "The Dictograph." Atlanta Georgian, 06/23/1913.

[125] See pp. 9-21 in: Adam Smith. *The Wealth of Nations.* New York: Bantam Classics, 2003. Also see pp. 149ff in: Emile Durkheim. *The Division of Labor in Society.* New York: The Free Press, 1984.

[126] "The Era of Publicity - the Twentieth Century." *The Washington Times*, 07/31/1902.

and populations.[127] When the U.S. public health advocate John Hurty launched a passionate plea, at the 1909 conference of the American Medical Association, for increased census data collection and an expanded system of vital statistics as the necessary "bookkeeping of humanity", his speech reflected not just the preoccupations of a single individual but captured a way of thinking about the task of population management that had, by the turn of the twentieth century, diffused into public discourse and discussions of privacy.[128] Like the need for privacy, the need for publicity was also a "socially created need" –, made salient by the demands of an increasingly urbanized and bureaucratized society.[129]

The second discursive trend pointed to the opposite direction. The increasing urbanization of American residential life also sparked conversations about the tactics that could secure domestic privacy for the next generation – for middle-class apartment dwellers as well as millions of immigrants who occupied densely populated tenement districts. Each essay and article that embraced publicity as a default mode of modern life could thus be balanced against another one that lamented the gradual disappearance of quieter rural homes and familial privacy. The author Robert Louis Stevenson, most famous for novels like *Treasure Island* and *Strange Case of Dr Jekyll and Mr Hyde*, captured such sentiments in a travel memoir about his honeymoon trip up California's Napa Valley in 1880. Keen to experience the region's fresh air after a spell of bronchitis, Stevenson and his wife Fanny Vandegrift had taken up residence in an abandoned mining camp nestled into the Mayacamas Mountains of Northern California, where they "kept the house for kitchen and bedroom, and used the platform as our summer parlor. The sense of privacy [...] was complete."[130] The challenge, however, was to secure an analogous sense of domestic privacy during a period of urbanization and increasing social density.[131] As one magazine writer noted in 1883, "city life should be as much sheltered and keep as much privacy as it can; else it becomes broken and purposeless and unsatisfactory, and at the mercy of idlers and of the thousand demands of every-day life which of necessity assail it."[132] But given the increased proximity to kin and neighbors, it required special precautions and the careful management of social relations within the home. The writer Frances Marshall thus cautioned her

[127] See pp. 104ff in: Michel Foucault. *Security, Territory, Population: Lectures at the Collège de France, 1977-1978*. New York: Picador, 2007.

[128] John N. Hurty. 1910. "The Bookkeeping of Humanity." *Journal of the American Medical Association* 55 (14): 1157-1160. See Chapter 1 for a discussion of Hurty's intervention.

[129] Moore (1984), p. 73.

[130] Robert Louis Stevenson. *The Silverado Squatters. Sketches from a California Mountain*. London: Chatto & Windus, Piccadilly, 1883.

[131] On the concept of "social density", see: Dietrich Rueschemeyer. 1982. "On Durkheim's Explanation of Division of Labor." *American Journal of Sociology* 88 (3): 579-589.

[132] "Contributor's Club." *Atlantic Monthly*, September 1883: 419-430.

fellow city-dwellers that "no matter how much you love your children, you should never let them intrude upon your privacy" while lamenting that crowded conditions threatened the privacy of husbands and heads of family by the "everlasting intrusion of things feminine."[133]

By the late nineteenth century, securing "the privacy and quiet of home" amidst the bustling city had become a widely recognized and discussed challenge of the advancing urban age.[134] It explains the persistently high co-occurrence odds of spatial terms like "home" and "room" shown in Table 3.2 above (which were higher in the 1900s and 1910s than in the 1870s and 1880s): The modal experience of home like continued to evolve as the United States evolved into a majority-urban society, yet preoccupations with the privacy of domestic life remained a constant theme in American public discourse. American newspapers built on older conceptions of privacy as the enjoyment of private *space* within the confines of the family home, but increasingly mapped such spatial and familial perspectives onto emerging social realities. The result was an explicit tension between the embrace of publicity and exposure as core aspects of modern urban life and concurrent attempts to protect familial privacy despite the increase in social and spatial density. In the "increasingly knowing society" of the late nineteenth century, one did not exist without the other.[135]

Privacy, morality, and gender norms

Like discourses of prior decades – which had posited a close connection between the enjoyment of privacy and the development of a virtuous character – this defense of urban privacy also carried overt moral connotations. One writer noted in a 1889 edition of *Scribner's* that the "adornment of domestic life" and the "removal from immoral tendencies" were like flip sides of the same coin, the former directly enabling the latter.[136] In a similar vein the *Bossier Banner*, a newspaper from Louisiana, argued in 1884 that "the home and its daily life are intended to be the nucleus and source of all inward happiness and higher development of character."[137] But the uplift provided by the physical and social space of the family home was widely considered to be endangered by the overcrowding of apartments, the buzz of city life, and the itinerant lifestyle of urban residents. Thus the *Bossier Banner* continued,

> *"one of the saddest features of our modern life is the tendency which it creates to shatter and scatter these precious home jewels. Fierce and*

[133]Frances Marshall. "Work and Play in the Household." *The Washington Herald*, 06/21/1914.

[134]George Iles. "Hotel-keeping - Present and Future." *Century*, August 1885: 577-587.

[135]Igo (2018), p. 16.

[136]W. A. Linn. "Building and Loan Associations." *Scribners*, June 1889: 700-712.

[137]*The Bossier Banner*, 05/15/1884.

destructive excitements and the constant friction of outward business and social activity are slowly consuming the sanctity and the sweetness of the retirement and the privacy of home."

While the right to personal property was "stoutly defended against all forms of attack from without", life within the home was "gradually crumbling to ruin from the deadly influences which are permitted to spring up and grow inside the inclosure." To writers such as this one, and to the audiences they attracted, the case for privacy was often a profoundly conservative one. It analogized privacy and domesticity, and linked domesticity to a sense of moral purity that appeared to be under siege by the forces of modernity. City life seemed particularly ripe with temptation and threatened to undermine the family home as the stable center of a person's lived existence. "In the great ocean of humanity that floods our cities, thousands upon thousands have no home, no family ties, no hallowed recollections to render near the family fireside," noted the *Kenosha Telegraph* from Wisconin in 1882. It argued:

"A true family ought to be abiding; ought to endure while the nation exists. It reposes upon love and religion; it is nurtured by traditions of honor and virtue; and the symbol of its permanence is the home owned and transmitted from generation to generation. The poor and the laboring classes of our great cities have no homes. Hired rooms which are changed from year to year are not homes. The operative's cottage, without yard or garden, without flowers or privacy, is not a home."[138]

This idolization of the home as the sanctum of privacy as well as moral purity was especially applied to the role of women. Private spaces had long been gendered spaces, dating back to the organization of domestic life and the distribution of household responsibilities during the Colonial Era.[139] The language of privacy had also been overtly gendered. As shown in Tabl3 3.2 above, mentions of privacy frequently appeared alongside markers of sex and gender, although the privacy of "ladies" during the 1870s and 1880s gave way to the privacy of "women" during the 1900s and 1910s. But more than that, privacy had historically been gender-*biased* with its narrow emphasis on female privacy and sensibility. As the implied "sacred privacy of women", the gendering of domesticity still carried over into discourses of the late nineteenth

[138]The Kenosha Telegraph, 09/15/1882

[139]Richard Sennett. *The Fall of Public Man.* New York: Knopf, 1977. Patricia M. Spacks. *Privacy: Concealing the Eighteenth-Century Self.* Chicago: The University of Chicago Press, 2003. Also see: David H. Flaherty. *Privacy in Colonial New England, 1630-1776.* Richmond: University of Virginia Press, 1972. Karen V. Hansen. "Rediscovering the Social: Visiting Practices in Antebellum New England and the Limits of the Public/Private Dichotomy." In: *Public and Private in Thought and Practice*, edited by Jeff A. Weintraub and Krishan Kumar. Chicago: University of Chicago Press, 1997.

and early twentieth century.[140] In the political discourse of the late nineteenth century, women featured both as precarious creatures in need of shelter and protections and as potential intruders into physical and social spaces that were commonly reserved for men only. Viewed from the perspective of wives and daughters, privacy was therefore often more about limiting their access to male-dominated spaces and public life under the guise of moral worth and spiritial refinement than it was about limiting their unwanted exposure to outside observers. At a time when labor force participation rates among women – especially unmarried women – were gradually increasing and calls for women's public representation and voting rights grew louder, privacy proffered a logic that could be drawn upon to defend the marginalization of women and their confinement to the domestic realm.[141] As the social reformer Thomas Wentworth Higginson wrote in a 1881 essay in defense of women's education and literacy, "the opinion dies hard that [the woman] is best off when least visible."[142]

But in the closing years of the nineteenth century, the language of privacy was applied to the lived experience of women *and* men. We can capture this subtle shift in part by considering the gender association of privacy discourses and their so-called embedding bias. These measures capture the semantic distance of privacy, in a multidimensional word embedding space, to an explicitly gendered list of vocabulary words like woman, man, wife, husband, female, male, and the like. Higher association scores indicate a greater cosine similarity of privacy and such gendered language, while a positive embedding bias suggests that privacy was predominanty associated with discussions of femininity and female gender norms. The data, shown in Figure 3.5, indicate an increased *association* of privacy with gendered words (either male or female) in the closing decades of the nineteenth century, coupled with a decreasing gender *bias*. In other words, privacy remained gendered by was no longer coded female by default. It was still common to find arguments such as the one published in the *Bossier Banner* in 1884 that the home was a "woman's kingdom" and should be "the choice garden spot of the soul, the nursery of every virtue, public and private, and the earthly paradise of affection and refined enjoyment."[143] But if multiple generations and sexes lived together under one roof, privacy mattered not only for wives and daughters but also for "the men of the family" who had "no chance to escape from the persistence

[140] Thomas Wentworth Higginson. *Women and the Alphabet*. Boston and New York: Houghton Mifflin Company, 1881.

[141] David A. Cotter, Joan M. Hermsen, and Reeve Vanneman. 2001. "Women's Work and Women Working: The Demand for Female Labor." *Gender and Society* 15 (3): 429-452; Mignon Duffy. 2007. "Doing the Dirty Work: Gender, Race, and Reproductive Labor in Historical Perspective." *Gender & Society* 21 (3): 313-336.

[142] Higginson (1881).

[143] *The Bossier Banner*, 05/15/1884.

Figure 3.5: *Association of privacy with gender categories (left) and female/male embedding bias (right). Positive numbers in the right panel indicate a stronger association with female-coded words like wife, woman, daughter, female, or feminine.*

of feminine society."[144] William Conant Church, who rose to fame as an enterprising journalist before co-founding both the National Rifle Association and the Metropolitan Museum of Art in New York, made liberal use of this approach in a contribution to *Scribner's* that criticized suffragette activists.[145] Condemning competition for the audience's attention as "an insolence which is only worse in a woman than in a man", he argued that political speeches by women constituted a double affront: They forced women out of the domestic realm for which they seemed to be predestined, and they forced female agitation upon an unsuspecting (male) audience that had to consume it in public.

Three things stand out from these observations. First, while the language of privacy remained closely tied to the organization of physical space and the moralizing undertones that such debates had long carried, it was increasingly applied to the unique experience of urban life. The growth of cities elevated concerns about the possibility of privacy in the American city, which were expressed in part by grafting older conceptions of moral purity onto the social realities of the 1880s and 1890s. Second, privacy could offer protection against public exposure and unwanted social

[144]Frances Marshall. "Work and Play in the Household." *The Washington Herald*, 06/21/1914.

[145]William Conant Church. "The Right Not to Vote." *Scribners*, November 1871: 73-85.

obligations – a social "safety valve", in the words of Barrington Moore – but it could also justify gender discrimination and the exclusion of women from certain spheres of social life.[146] While it gradually lost its gender bias and was instead applied to the lived experiences of women *and* men, the case for privacy was often premised upon deeply patriarchical norms and customs. It may have aimed at liberating Americans from the gaze of peers and neighbors, yet it was often the antithesis of female liberation. And even as it was understood through a functionalist lens – what data collection was required to ensure the functioning of industry and the organization of cities? –, privacy remained tied to narratives about the moral uplift of individuals and the spiritual state of American society. Before privacy was a distinctly legal concept or a logic of political organization, it already incorporated long-standing moral and theological imaginaries. Third, the quest for privacy was intimately bound up with the desire for publicity, with each conditioning the other by helping to define what information about individuals should be known or was allowed to circulate freely, and what was better kept close to the chest and secured against undue exposure. Indeed, it is difficult to imagine one without the other. The concept of privacy presupposes a desire and potential for exposure.

Privacy and personal data

Talk of privacy also began to change in a more overt manner: It infused debates that focused on the collection of personal data rather than the organization of physical space. This process of conceptual "broadening" is well-known to linguists, who have shown that a single discursive object can take on contextually specific significance.[147] A discursive object can become broad not just by becoming more polysemous, but also by being applied across a wider number of thematic contexts. A classic example of this is the evolution of American privacy jurisprudence in the 1960s and 1970s: Grass-roots legal activism and a series of landmark decisions by the U.S. Supreme Court began to tie privacy into emerging conversations about contraception and abortion, thereby strengthening the legal meaning of privacy as an implicit constitutional right but also broadening the range of disputes to which it could be applied.[148]

Instead of merely looking for synonyms to distinguish multiple meanings of privacy, we can therefore also probe for context clues to distinguish its different thematic applications in U.S. public discourse. One way to capture shifting applications is to

[146] Barrington Moore. *Privacy: Studies in Social and Cultural History.* London: Routledge, 1984.

[147] Copestake and Briscoe (1995). One example is the dual use of the term newspaper: It can describe both a physical object and an organization that produces journalistic content (as in, "he was the newspaper's editor").

[148] See, for example: Caroline Danielson. 1999. "The Gender of Privacy and the Embodied Self: Examining the Origins of the Right to Privacy in U.S. Law." *Feminist Studies* 25 (2): 311–344; Solove (2002); Vincent (2016); Igo (2018).

track how co-occuring terms evolved over time. If the language of privacy migrated into new thematic contexts, we would expect that the sentences into which mentions of privacy were embedded also changed. We can again estimate such interdecadal trends by comparing the embedding spaces of successive decades. Cosine similarity scores, shown in Figure 3.6 based on a widening window that includes between 5 and 20 of the top co-occurring terms, suggest a clear temporality: The thematic contexts of privacy discussions shifted in the closing decades of the nineteenth century but settled after 1900. Cosine similarity scores for each pair of decades in the nineteenth century are comparatively low, between 0.5 and 0.7. In contrast, scores for paired decades in the twentieth century are much higher – depending on the decade and the number of context words included, they range from 0.85 to 0.98. After 1900 – when the *Daily Tribune* article that opened this chapter was published – there was relatively little change in the vocabulary surrounding mentions of privacy. The thematic contours had been largely established.

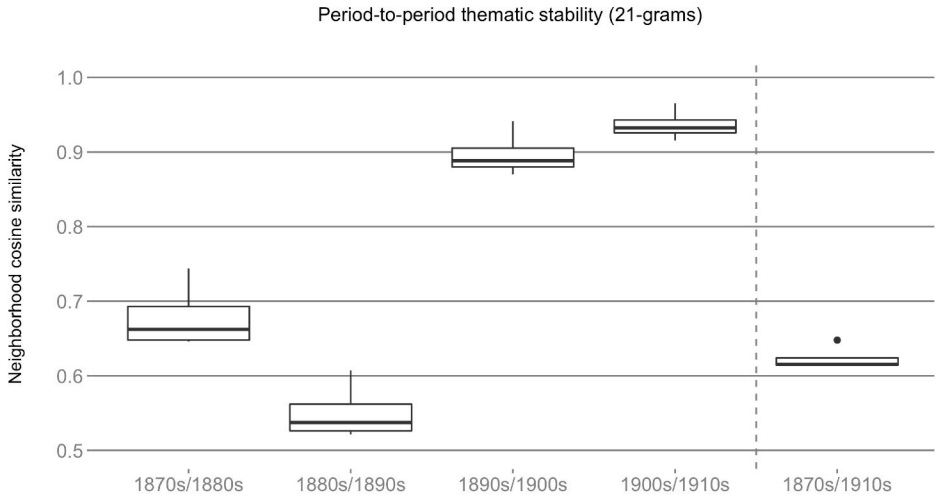

Figure 3.6: *Decade-to-decade comparison of the embedding space of the term "privacy", using cosine similarity scores to compare time periods. Embedding space cutoffs are arbitrary; shown here are combined results for spaces that include the top-5 to top-20 co-occurring terms for each period.*

Network visualizations of co-occurrences corroborate this claim. Figure 3.7 shows the top co-occurring terms for "privacy" during each decade between the 1870s and the 1910s as network vertices, with co-occurrence odds *among* these terms as edges. Vertices that are shown in spatial proximity in these two-dimensional network visualizations tend to co-occur alongside each other – and in discussions of privacy – in the high-dimensional corpus of historical newspaper data. The network visualizations suggest a gradual transition from discussions that were predominantly concerned

with the organization of physical space and social relations within the family towards a diverse set of discursive categories that still touched on physical space but also included conversations about medical treatments, financial data, examinations, letters and packages, and the telephone. During the 1870s in particular, privacy was almost always tied to discussions of specific places – the home, the room, the house, the chamber – and to terms that indicate the daily routines of the household. A lady might "retire" into her room during the night. A person might prefer the privacy offered by the "domestic" realm over the "public" life. Privacy might be "invaded" by visitors or protected by the "door" and the "lock". But during the following decades, the language of privacy also began to appear in text fragments about loans, hospitals, physicians, cures, treatments, and travelers. In the 1910s, seven of the twenty most frequently co-occurring terms listed in Table 3.2 referred to medical examinations or financial transactions, including "cure", "examination", "loan", and "treatment" (in the 1870s, none of the top-twenty co-occurring terms fell into these categories). These terms do not signal concerns about intrusive family members, nor do they locate privacy squarely within the physical space of the household. Instead, they draw attention to observations *beyond* the home and to the informational visibility of people more generally.[149]

One major source of such mentions were classified advertisements. The digitized newspapers collected by the Library of Congress include all text that was printed on a given page, including advertisements that were often interspersed throughout articles and sometimes adorned with additional illustrations. Their prominence in American newspapers increased considerably in the closing decades of the nineteenth century as the economics of journalism in the United States shifted. Faced with stiff competition for print circulation, many publishers dropped the price-per-issue of newspapers and partially shifted revenue generation from readers to advertisers, who were willing to pay for the ability to piggy-back off the publishers' distribution system. As a result, the market for classified ads expanded at a rapid pace – total advertising volume increased more than 50 percent between 1890 and 1900 alone.[150] Starting in the 1880s, and continuing through the 1920s, such advertisements made increasingly liberal use of the language of privacy to sell anything from home loans

[149] We can confirm the increasing salience of these discursive applications with linear regression models that test the association between time period (measured in years) and logged co-occurrence odds for each word that appeared in newspapers alongside privacy. Such models can give a sense of aggregate trends by assessing the magnitude of coefficients and their statistical significance. Regression results corroborate a key argument of this chapter: Discussions about families, doors, and chambers declined in prominence while discussions about doctors, examinations, treatments, banks, and also about the telephone became more salient between 1870 and 1920.

[150] See p. 132 in: Karin Becker. "Photo-Journalism and the Tabloid Press." Pp. 130-152 in: *Journalism and Popular Culture*, edited by Peter Dahlgren and Colin Sparks. London: SAGE Publishing, 1992.

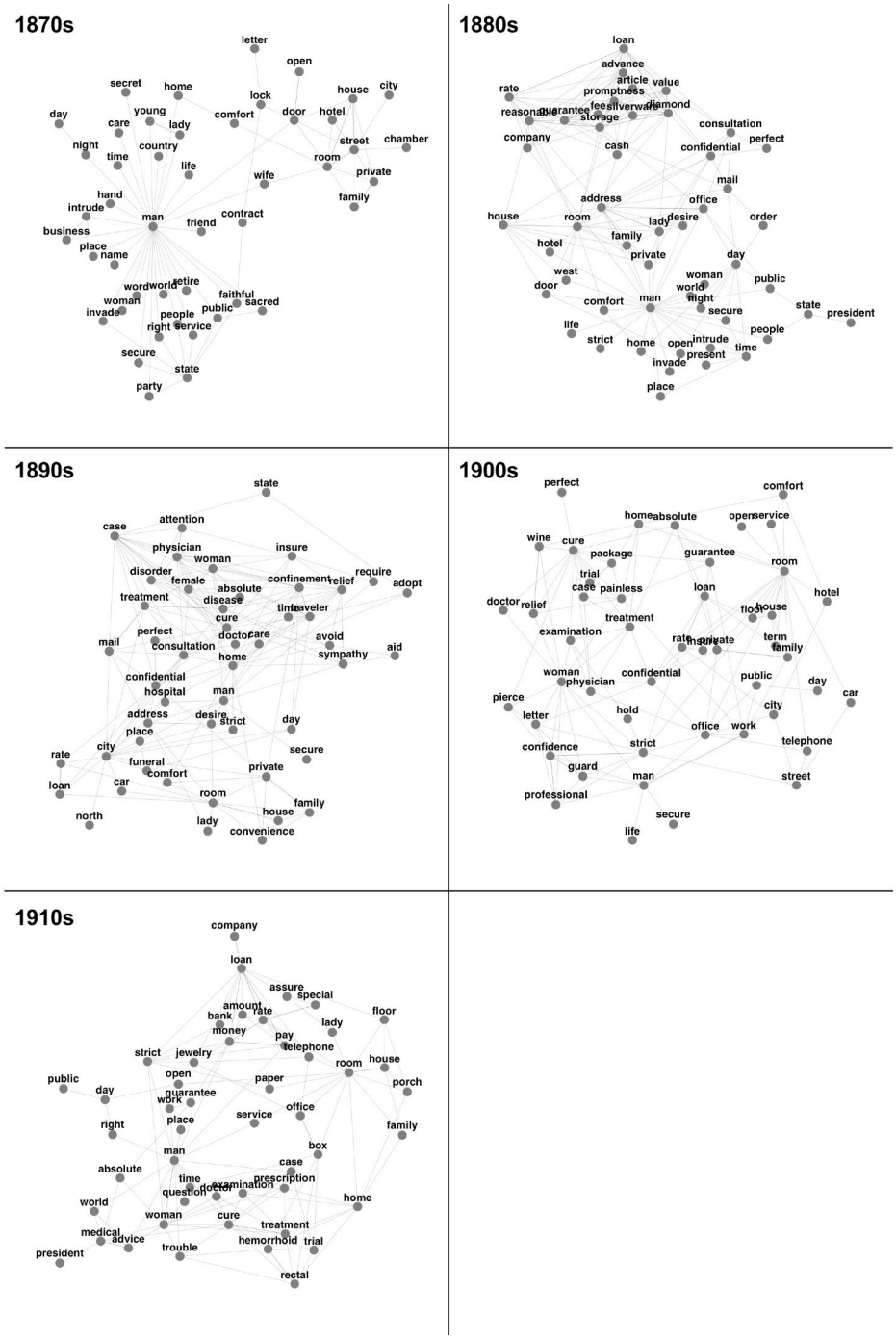

Figure 3.7: *Word co-occurrence networks by decade, showing co-occurrence patterns among top-50 terms that co-occured with the term "privacy". Edges for co-occurrence odds <0.1 are omitted to improve legibility of the graphs. Network visualizations depict thematic contexts – rather than semantic neighborhoods – of privacy discussions in U.S. newspapers.*

and mailboxes to miracle cures and tinctures that could be taken in "the privacy of the doctor's office" to address a wide range of ailments, including socially stigmatized venereal diseases, female wrinkles, and male baldness. A doctor in San Francisco offered to cure "the liquor habit" while also promising "strictest privacy" about an addiction that was widely regarded as a sign of irresponsible and amoral behavior by nineteenth-century temperance campaigners.[151] A real estate developer in the "most ideal residential section of Brooklyn" advertised "all of the privacy of the one-family house" but the conveniences of a larger apartment building.[152] Union Pacific Railroad ran advertisements in newspapers around the country to sell "excursions to California and Oregon" with the comfort and "utmost privacy" of partitioned railcars.[153] And banks across the United States began to emphasize the "strict confidentiality" and "privacy" of their financial transactions and credit offerings, suggesting that "business privacy is an essential element of success both for the small organization and the larger undertaking."[154] These classified ads presented readers with a vision of privacy that extended beyond the household and the peculiarities of residential life. It spoke more generally to personalized data and linked the experience of privacy to interactions with an increasingly professionalized medical establishment, routine medical concerns (for example about hemorrhoids), and an emerging credit-based economy.[155]

It is tempting to dismiss advertisements as data noise, since they do not fall into the category of public discourse as it is commonly understood: They do not craft an argument, and they do not appeal directly to the faculties of reason. But they nonetheless offer an important signal. Framing one's products or services in terms of privacy – for example, to drive the sale of mailboxes or window blinds by promising greater privacy rather than protection from adverse weather conditions, or to build a medical practice by promising confidential examinations rather than successful cures – only made sense if the audience was already attuned to such claims. They could not stretch the imagination of readers too far or require great conceptual leaps, since people do not endlessly generate new meanings but tend to invoke "shared meanings from the cultural resources available to them," as Orlando Patterson has argued.[156] Advertisements in particular appeal to a shared cultural stock of ideas and ideologies and maintain rather than subvert it.[157] They are lagging indicators that privacy

[151]The San Francisco Call, 09/27/1903.

[152]New York Tribune, 02/27/1910.

[153]The Conservative, 11/22/1900.

[154]New York Tribune, 01/13/1903.

[155]Andrew Abbott. 1991. "The Order of Professionalization: An Empirical Analysis." *Work and Occupations* 18 (4): 355-384; Jonathan Levy. *Freaks of Fortune*. Cambridge: Harvard University Press, 2012.

[156]Patterson (2014), p. 7.

[157]On the topic of "meaning maintenance", see: David Heise. "Understanding Social Interaction

Figure 3.8: *Classified advertisements, taken from the New York Tribune (12/09/1911; top left), the St. Johnsbury Caledonian (09/11/1912; bottom left), the Clarksburg Daily Telegram (09/10/1914; top right), and The Jeffersonian (09/01/1910; center right), The Chattanooga News (05/17/1918; bottom right).*

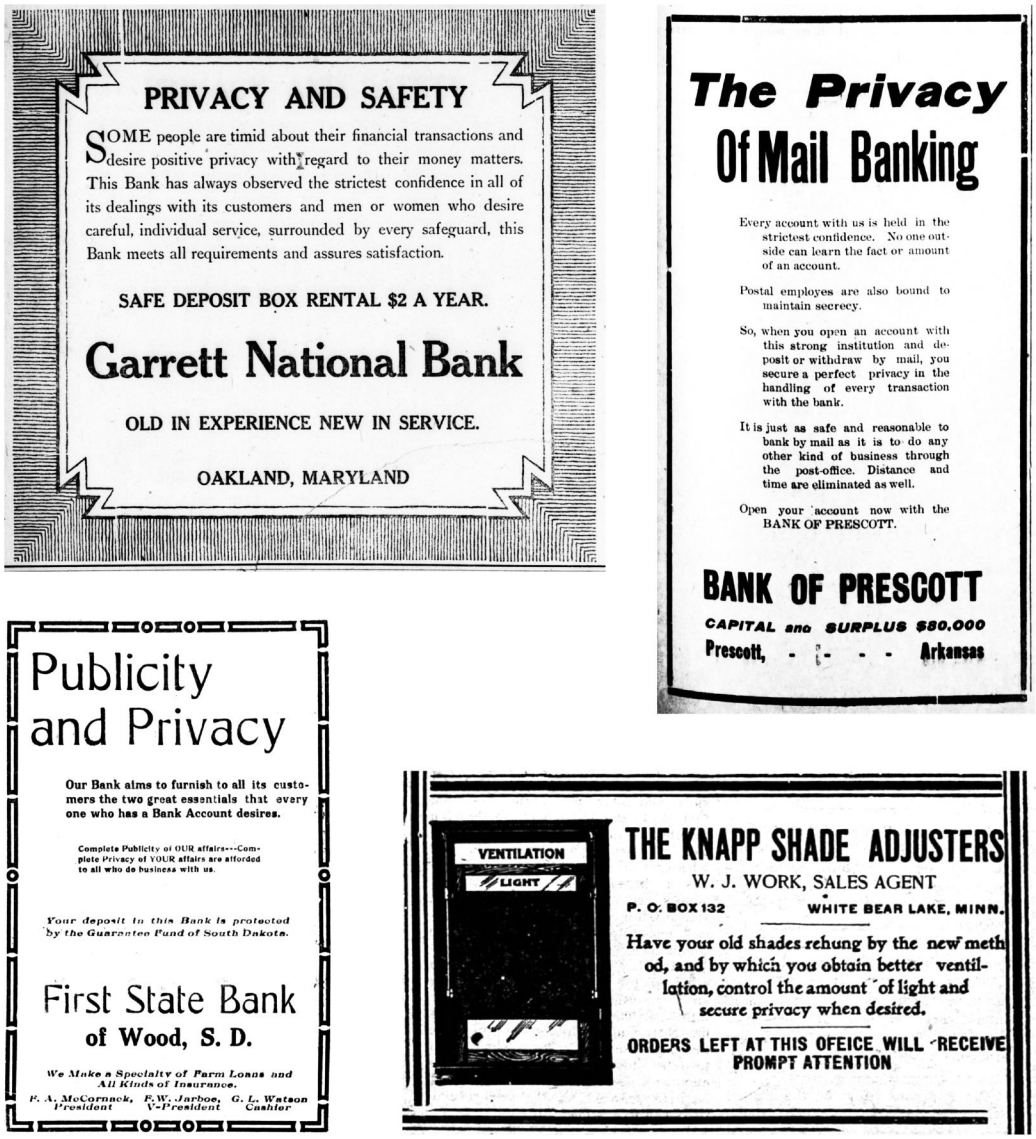

Figure 3.9: *Classified advertisements, taken from the Oakland Republican (01/29/1920; top left), the Prescott Daily News (09/23/1912; top right), the St. Paul and Minneapolis Appeal (07/12/1913; bottom left); the Mellette County Pioneer (03/16/1917; bottom right).*

had begun to acquire an informational connotation that was widely understood by American newspaper subscribers and consumers.[158]

Newspaper advertisements also highlight the close connection between privacy and the emerging consumer economy in the United States. By 1890, a growing number of U.S. retail businesses relied on mail-order catalogues and classified ads to expand their customer base, gradually integrating regional markets and turning participation in consumer capitalism from a hyper-local affair into something that was mediated by mass media and the postal system. In Chicago, for example, Richard W. Sears and Alvah C. Roebuck built a local jewelry business into a powerful retail machine that sold anything from from household goods and kitchen appliances to bicycles, cars, and groceries and generated $750,000 in annual sales by 1895 (equal to around $23 million today) – the Sears Corporation. As classified ads evolved into a medium through which businesses could reach potential customers across increasing distances, the logic of privacy could sometimes function as a sales pitch as businesses competed with each other over their ability to protect a customer's mail, medical records, financial data, or reputation. Far from being phenomena germane to the twenty-first century, the collection of personal data by private entities (like the tabloid press) and the appropriation of privacy as a sales proposition (as in classified ads) have roots that reach back across the decades to an earlier period of American economic development. Privacy may not have had any tangible material benefits for the majority of Americans, as the *Atlantic Monthly* noted in 1900, but it could certainly benefit entrepreneurs who correctly read the prevailing cultural currents and pitched their services accordingly.

A concurrent second shift in the thematic application of privacy elevated discussions of interpersonal communications and explains the presence of terms like "letter" and "telephone" in the list of top co-occurring terms during the 1900s and 1910s (Table 3.2). During the late nineteenth century, the rise of new technologies like the telegraph and the telephone transformed how – and how easily – Americans could communicate across longer distances. They changed how people thought about time and space, facilitated the spread of news, and disseminated stock and commodity prices. But they also sparked concerns about the control that people could exercise over electronic

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with Affect Control Theory." Pp. 17-40 in: *New Directions in Sociological Theory*, edited by J. Berger and M. Zelditch. Boulder: Rowman & Littlefield, 2002.

[158]The twenty-first century equivalent to such advertisements is Apple's nationwide American ad campaign from 2019. Headlined "Privacy: That's iPhone", the multimedia campaign aimed to capture latent consumer concerns about digital privacy at a time when several of the company's competitors were struggling with negative media coverage about the use and misuse of consumer data. The substantive promise of the campaign – using an iPhone will give you greater control over the collection and sharing of your personal data – was less interesting that its strategic bet: That users already cared about personal privacy to such an extent that it could affect their purchasing habits and positively shape their views of the company.

messages that traveled dozens or – in some cases – thousands of miles before arriving at their intended recipients. While privacy discourse during the first half of the nineteenth century had predominantly focused on the actions of nearby observers like peers, neighbors, and family members and on intrusions into physical spaces, the discussions that began to emerge amidst such changes tied the logic of privacy to the technological realities of the modern United States. As Edwin L. Goodkin, founding editor of *The Nation*, noted in 1890, "as long as gossip was oral, it spread, as regarded any one individual, over a very small area, and was confined to the immediate circle of his acquaintances."[159] As a result, privacy and liberty had hitherto been only "slightly affected" by leaked communications. But the farther afield personal data and interpersonal communications could travel, the greater the potential for serious invasions of privacy.

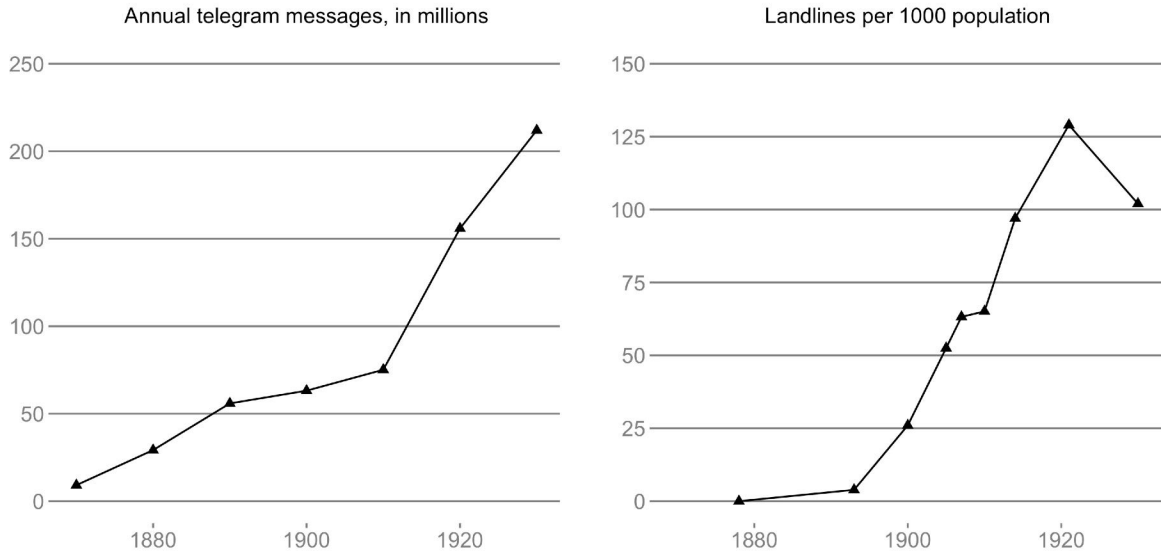

Figure 3.10: *Telegram and telephone profileration. Note the dip in telephone landlines during the Great Depression in 1930.*

Telegraph lines had enabled the near-instantaneous transmission of messages across large distances since the 1840s. Already in 1853, twenty different companies operated more than 23,000 miles of telegraph wires in the United States.[160] By 1861, teams working from opposing sides of the continent for the Pacific Telegraph Company and

[159]Edwin Lawrence Goodkin. Scribner's Magazine 66, August 1890.

[160]Richard B. Du Boff. 1980. "Business Demand and the Development of the Telegraph in the United States, 1844–1860." *Business History Review* 54 (4): 459–479.

the Overland Telegraph Company had bridged the last remaining gap in telegraph coverage between Nevada and Nebraska, thereby completing the first transcontinental telegraph line. Over the following decades, adoption of the telegraph by individuals and businesses proceeded rapidly. In 1870, just over 9 million telegrams were sent annually in the United States. By 1900, that number had increased to more than 63 million (Figure 3.10).[161] But even as the network of telegraph stations and the so-called "singing wires" continued to expand, another technological innovation appeared on the horizon and, soon enough, in households across America. Invented in 1876, the telephone allowed for direct communications with distant interlocutors, without having to rely on telegraph operators and without having to worry about delayed postal delivery. The number of telephone lines in the United States doubled between 1884 and 1893 to 266,000, with rural regions outpacing cities in adoption for personal use. It then increased sevenfold again during the next decade. By the late 1920s, almost half of American households had acquired a telephone and the American Telephone and Telegraph Company – better known today as AT&T – had established itself as a powerful monopolist and one of the first modern corporations in the United States.[162]

Almost as soon as the telegraph and the telephone gained a foothold in the United States, newspapers across the country highlighted the dangers for personal privacy that came with the transmission of personal information and interpersonal exchanges by wire. Already in 1870, the *New York Times* noted that remote communications were vulnerable to wire-tapping by government authorities, editorializing that "it is difficult to imagine how a more complete system of government surveillance could be established" and recommending that international cables be severed, "rather than have the privacy of dispatches hence invaded even by official eyes."[163] There was a specific precedent for such concerns. In 1861, Lincoln's administration had ordered the seizure of telegrams in many American cities – especially those located along the frontier between the Union and the Confederacy – to suppress the spread of treasonous information and guard military secrets during the Civil War.[164] But attempts to use telegraphic data for political ends also carried over into peacetime

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[161] Data on telegraph communications comes from: U.S. Bureau of the Census. *Historical Statistics of the United States: Colonial Times to 1970, Bicentennial Edition*. Washington: Government Printing Office, 1976. Also see: David Hochfelder. *The Telegraph in America, 1832-1920*. Baltimore: Johns Hopkins University Press, 2012.

[162] Estimates of U.S. telephone landlines come from the 1902 Census of Telephones, Fischer (1987) and Mueller (1993). For an early history of the U.S. telephone industry and the rise of the modern telecommunications corporation, see: Nooba R. Danielian. *AT&T: The Story of Industrial Conquest*. New York: Vanguard Press, 1939.

[163] "The Explanation About the French Cable." New York Times, 02/02/1870.

[164] Alvin F. Harlow. *Old Wires and New Waves: The History of the Telegraph, Telephone, and Wireless*. New York: D. Appleton-Century Company, 1936. See pp. 264-265 for wartime censorship and surveillance of the telegraph system.

administration. Members of the House of Representatives demanded access to personal telegraph messages during the impeachment trials of President Andrew Johnson in 1968 and of Secretary of War William Belknap in 1876 and used such messages in investigations of electoral fraud during the contested 1876 presidential election that had pitted the Democratic candidate Samuel Tilden against the Republican Rutherford B. Hayes. Amidst accusations of electoral fraud and bribery, Congress had established a bipartisan commission to probe specifically for irregularities in Oregon and Louisiana. One of the claims the commission sought to investigate – fanned by the publication of several articles in the *New York Tribune* – was whether Democratic party officials had used code-language telegrams to promise bribes and extract favors from state election officials. But to get access to such telegrams, it needed the cooperation of Western Union, the operator of telegraph networks in Oregon. Despite accusations that the seizure of such telegrams represented "an outrage upon private life and liberty" and a violation of the U.S. Constitution, Congressional representatives thus demanded access to Western Union's records and argued that such access was instrumental for the prevention of corruption. In the words of Kentucky Representative James P. Knott, the "new-fangled sentimentality about the sanctity of telegraphic messages" needed not prevent the investigation of potential crimes and the uncovering of political rot.[165]

The debates of 1876 sparked particular outrage in the American press. Across the country – from New York and Baltimore to Chicago and Detroit –, newspapers noted that "every person using the telegraph to communicate about his private affairs, assumes that a telegram is as free from exposure as a letter" and speculated that government attempts to seize telegraph messages would be "repulsive to the people in general" and violate the "most cherished" right "of the people to secrecy and privacy in inter-communication".[166] Quite simply, surveillance of the telegraph constituted "an outrage upon the liberties of the citizen which no plea of public necessity can justify."[167] As the *Baltimore Sun* wrote in its daily editorial, "the world simply cannot afford to have the privacy of the telegraph violated."[168] The experience of wartime telegraphic surveillance and the political events of the mid-1870s helped to sensitize pundits and political observers to the privacy of communications data. It also illustrated to a contemporary audience that threats to privacy and personal liberty stemmed not just

[165] James Brooks (NY). Congressional Globe. 40th Congress, 2nd Session, Part 3. May 25, 1968. p. 2579; "Trial of Andrew Johnson." Congressional Globe. 40th Congress, 2nd Session, Supplement. April 2, 1868. pp. 89-92; James Procter Knott (KY). Congressional Record, House. 44th Congress, 2nd Session. December 21, 1876. pp. 356-358. For additional comments by Rep. Knott on telegraphic privacy, see the debate of January 12, 1877 (p. 602).

[166] "The Investigating Committees. The New York Times, 12/13/1876; The New York Sun, 12/13/1876; Detroit Free Press, 12/13/1876.

[167] "Secrets of the Telegraph. The New York Times, 06/24/1876.

[168] Baltimore Sun, 12/13/1876.

THE SAN FRANCISCO CALL, SUNDAY, JANUARY 1, 1899. 3

THERE ARE PURCHASABLE SPIES IN MANY HOUSEHOLDS

Telephone Company Has a Gigantic System of Espionage.

Every Conversation at the Disposal of the Talker's Business or Social Rivals.

Organized Betrayal of Its Customers Carried on for Pay.

The Most Confidential Messages Leaked Directly Into the Office of the Examiner.

ESTATES IN PROBATE.

Three Wills Placed on File With the County Clerk.

Lieutenant Price Laid Up.

The Insane Cause Litigation.

Figure 3.11: *The San Francisco Call, 01/01/1899.*

from the actions of peers and nearby persons who could listen into conversations or unseal a personal letter. Violations of privacy could also be committed by public authorities, most notably the American state.

These developments helped to turn a conversation that had originally been concerned with the impact of a specific act of Congress into a more general scuffle about the possibility of privacy in an increasingly information-rich society during a period of technological change and state expansion. Even during the 1860s, laws against the wire-tapping of telegraphs had been relatively scarce and "widely regarded as obsolete", according to an 1866 report published in the *New York Times*. But during the following decades, concerns about the targeted and systematic monitoring of interpersonal communications became more widespread – as indicated by the increasing appearance of the terminology of privacy in texts about the telephone, shown above in Table 3.2.[169] As the union publication *The Telegrapher* noted in 1877,

> *"If the privacy of communicating by telegraph is to be invaded on every pretext, letters and every other mode of communication are liable to the same treatment. If private communications are thus to be proclaimed upon the house tops, if the privilege of interchange of thought is to be abridged, the liberties of the people are endangered. The secrecy of the telegraph wire must remain inviolate. It is now the great medium of communication in all matters of pressing importance. But its value lies largely in the fact of the privacy of messages."*[170]

By the late nineteenth and early twentieth centuries, the telegraph as well as the telephone were regarded as powerful emerging technologies that facilitated unprecedented levels of communication and long-distance commerce but which could also be powerfully abused. The Reverend White, quoted earlier with his spiritual defense of publicity in city life, noted that the telephone was nothing less than "the electric symbol of the new age, [...] in which the perils of privacy will be matched by the powers of publicity."[171] The *San Francisco Call* similarly noted the close link between long-distance communication and informational privacy. In an illustrated full-page article published in 1899 (Figure 3.11), the newspaper warned its readers that there were now "purchasable spies in many households" as telephone companies implemented a "gigantic system of espionage" and leaked private conversations to state prosecutors.[172] American society had become "so dependent upon modern methods of inter-communication, the mail, the telegraph, and the telephone" and so accustomed

[169] "Administration of the Telegraph." New York Times, 12/31/1866.

[170] "Congress and the Western Union Telegraph Company." The Telegrapher 13, 1/6/1877.

[171] "The Dictograph." Atlanta Georgian, 06/23/1913.

[172] "There Are Purchasable Spies in Many Households." *San Francisco Call* January 1 1899, p. 1.

to sharing personal information and business data over the wire, that any violation of telecommunications privacy seemed to carry a special significance. As the editors continued, "so general is the public confidence in the privacy of [the telephone] that it is safe to say that violation of that privacy is a more serious offense than the opening of letters unlawfully." In 1911, the *Hawaiian Star* found even more drastic words to express a similar sentiment:

> *"Many of life's dramas are enacted [...] through the medium of the automatic telephone. Its psychology is unique, intimate, and intricate. It defies the staunchest ethics of privacy and delicacy, and opens up vistas of auditory democracy hitherto undreamed of in conventional philosophy. [...] It tears off the disguise of hypocrisy and brazenly bares to public view the sacred secrets of the soul! [...] It reverts like a boomerang into that privacy for the assurance of which it was instituted and approved!"*[173]

To be sure, concerns about unauthorized access to personal communications were not unique to the late nineteenth century. Far from it. In ancient Babylonia, clay tablets had been carved with sticks before being wrapped into another layer of clay and baked to form a physical seal and hide the message within.[174] In seventeenth century Europe, the nobility and the clergy replaced clay seals with wax but retained a similar preoccupation with the sanctity of their personal letters. And in 1770, the American revolutionary leader John Adams complained about the growing attention paid to his personal affairs. "I am under no moral or other obligation to publish to the world," he wrote, "how much my expences or my incomes amount to yearly. There are times when and persons to whom, I am not obliged to tell what are my principles and opinions in politicks or religion."[175] What was therefore distinct about the privacy debates of the late nineteenth and early twentieth century was not the concern about personal communications *per se* but the social and technological context in which these debates played out, as well as the grouping of spatial access and informational access under the same conceptual umbrella. The privacy of bedrooms, letters, medical and financial records, and intimate conversations did not necessarily have to be grouped together – they were, after all, highly varied phenomena that could have been problematized by drawing on the language of libel and theft. And yet they became linked, understood as instances of the same thing – privacy – and thereby folded into a shared conceptual framework. This expansive interpretation of privacy differed significantly in its scope

[173] "Society." The Hawaiian Star, 10/03/1911.

[174] Recipients had to break the outer layer to retrieve it. See: Frederick S. Lane. *American Privacy: The 400-year History Of Our Most Contested Right.* Boston: Beacon Press, 2009.

[175] *Diary of John Adams, Vol. 1.* 08/20/1770. Massachusetts Historical Society. http://www.masshist.org/publications/adams-papers/view?id=ADMS-01-01-02-0014-0005-0003. Accessed January 10, 2021.

and reach from the familial privacy debates of earlier decades. Even as it remained wedded to older conceptions of family life and individual morality, it began to account for a wider range of social experiences and emerging technologies that characterized the tumultuous decades around the turn of the twentieth century in the United States.

The diffusion of privacy

Social science frequently draws attention to the constitutive power of the spoken and written word, which orders social realities even as it describes them, and, through the naming and grouping of social problems, begins to contest them. In a very real sense, discursive objects like privacy shape the space of cultural and political possibility and facilitate the exercise of symbolic power.[176] This is one reason why the implicit connotations and explicit applications of privacy matter – sociologically, but also politically. In that regard, the decades between 1870 and 1920 were a transformative period. As this chapter has shown, privacy diffused across a wide range of thematic contexts without shedding its original meaning and its moral connotations, and thereby evolved from a relatively narrow concept into a broad discursive object. By framing new struggles and socio-technological realities in terms of privacy, writers and pundits succeeded in linking such struggles to older moral frameworks, framed disparate developments as homotypical theaters where privacy in modern life was at stake, and helped to stretch the concept of privacy far beyond the historical focus on family life and domestic space. Unlike other discursive objects, privacy did not undergo a fundamental semantic change. But it was tied into an increasingly diverse set of debates about the conditions and social problems of American society and infused with specialized knowledge and political claims about the promise and perils of urbanization, technological innovation, and the visibility of individuals to society writ large. When the *Chicago Daily Tribune* published its swansong to privacy in 1902, its editors wrote into a public discourse that had already begun to develop an expansive view of privacy in ways that would have been quite unimaginable during the early nineteenth century. While the language of privacy had a long and morally charged history, this approach did not.

Let us end on a word of caution. Historical analyses that compare two successive periods can fall prey to a totalizing logic that posits a radical break between "premodern" and "modern" logics of social organization, and they risk subsuming diverse trends into a single narrative.[177] But the "new era" described by many newspapers around the turn

[176] Pierre Bourdieu. 1989. "Social Space and Symbolic Power." *Sociological Theory* 7 (1): 14-25; Hacking (2007).

[177] For example, two of the most influential histories of the Progressive Era – Richard Hofstadter's *The Age of Reform* and Robert Wiebe's *The Search for Order* – attempt to uncover a guiding spirit in the decades between 1880 and 1920, anchored in the sensibilities and collective interests of the middle class. For Hofstadter, social reform was a reactionary response to social upheaval.

of twentieth century remained a complicated and often contradictory patchwork of lived experiences rather than a coherent social development. The logic of privacy that emerged from this cauldron was similarly complex. Its contours and content reflected the social positions, interests, and ideologies of different groups and the exigencies of different organizations. Within the "seedbed for social thought" it provided, different sprigs could germinate.[178] They grew roots and stretched towards the light in ways that were often unpredictable, sometimes shriveling under the glare and sometimes blossoming into legal or political paradigms. To map out the uneven institutionalization of the political logic of privacy is the aim of the subsequent chapters.

For Wiebe, it was the taming of history through bureaucratic rule. And for both authors, it contributed to a distinct break with the past. See: Richard Hofstadter. *The Age of Reform*. New York: Vintage Books, 1955. Robert H. Wiebe. *The Search for Order, 1877-1920*. New York: Hill and Wang, 1967.

[178]Igo (2018), p. 16.

Chapter 4:

The Politics of the Near and Far

Political Mobilization and the Regulation of Urban Privacy

On the evening of April 12, 1901, around 1200 guests crowded into two buildings on the Columbia University campus in New York City.[1] The illustrious crowd included the American inventor Thomas Edison, the German ambassador Baron Theodor von Holleben, and the university's president Seth Low, who had all made the trip to Morningside Heights for one specific purpose: To witness in person the wonders of the electric age.[2] The university, in collaboration with the American Institute of Electrical Engineers, had staged a public demonstration of thirty-two experiments that included a generator patented by Nikola Tesla, mercury-filled gas lights that vastly outshone the dim incandescant bulbs commonly used at the time, a tram with an electric motor that obtained its current from a wire running above the carriage, and an early fax machine that on this particular night failed three repeated attempts to transmit an image electronically to a laboratory in Chicago but soon proved its worth as a new technology of long-distance information transfer. Upon seeing the technological marvels of the new age in action, an "expression of delight" spread across the audience's faces. Before their eyes were technologies that would have been unimaginable merely a decade or two before but now promised to transform New York and the lives of the city's inhabitants. Streets and billboards could be brightly lit; the volume of information exchange could expand; and the pace of commerce could quicken.[3]

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[1] "The Institute Conversazione." Electrical World and Engineer 37 (16), 04/20/1901.

[2] "Marvelous Electrical Inventions Displayed; Attractions at a 'Conversazione' at Columbia University". The New York Times. 04/13/1901. p. 2.

[3] On the transformative social and economic impact of electrification, see: Warren D. Devine. 1983. "From Shafts to Wires: Historical Perspective on Electrification." *The Journal of Economic History*

But as consequential as electrification was to the making of the modern city, the lives of millions of residents were soon changed by a very different kind of innovation. Earlier that same day and 150 miles from the Columbia campus, the representatives of the 124th State Legislature had assembled in Albany to vote for the passage of the Tenement House Act of 1901. The law was one of the first comprehensive attempts to regulate inner-city housing in the United States and to improve the terrible living conditions for millions of immigrants who crowded into tenement buildings across the state, but especially in New York City. It mandated improved ventilation and fire safeguards and – in a move that reflected years of agitation by social reform groups – the law also aimed to improve privacy in urban life. Its paragraphs reorganized the internal layout of apartments to protect bedrooms against sudden intrusions, rearranged the layout of exterior windows, rebalanced private residential space against public hallways, and forced developers to provide residents with private bathrooms in most units. In the stilted language common to legislative acts, the law translated general talk *about* privacy into the regulation *of* privacy in city life, and thereby folded privacy into the realm of distinctly politicized issues that were considered fit for official intervention. It treated privacy not simply as discursive object but as a regulatory object that could be – and was – encoded into the laws of the United States, built into the material environment of the modern city, and thus endowed with a new kind of permanence.

As the previous chapter has shown, the increasing breadth of privacy discourses – that is, their diffusion into new domains of public and political discourse and their intermingling with a large array of discussions about urban space and personal information – is one central aspect of the transformation of privacy into a "political logic" in the decades around the turn of the twentieth century. Although the language of privacy is much older, the the capacious concept that is familiar to a twenty-first century audience began to take shape at this particular historical moment and amidst the social and technological transformations of the Progressive Era.[4] The language of privacy was applied to the emerging social realities of the American city and used to comprehend and contest the legibility of Americans in an information-rich society shaped by the forces of technological innovation and mass media. This meant paying greater attention to the actions of distant others and institutional actors. Conceptions of privacy expanded beyond blood relatives and social acquaintances and factored in a basic truth of social organization in the United States: The cultural veneration of American individualism notwithstanding, each person was deeply embedded into

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43 (2): 347-372; Mark Granovetter and Patrick McGuire. 1998. "The Making of an Industry: Electricity in the United States." *The Sociological Review* 46 (1): 147-173.

[4]For the longer history of privacy, see: Hannah Arendt. *The Human Condition.* Chicago: The University of Chicago Press, 1958; Barrington Moore. *Privacy: Studies in Social and Cultural History.* London: Routledge, 1984; David Vincent. *Privacy: A Short History.* London: Polity, 2016.

urban communities, communications networks, and bureaucratic infrastructures. In late nineteenth-century America, the management of physical and informational access was no longer a simple family matter.

Still, the gradual broadening of privacy as a discursive object is only half the picture. Diffusion is not the same as institutionalization; yet both were important features of the emergence of privacy as a political logic around the turn of the twentieth century. Privacy became broad, but through legislation like the 1901 Tenement House Act it also became "sticky", in the words of Jeannette Colyvas and Stefan Jonsson.[5] Social reformers and charitable organizations mobilized the power of civil society and the expanding American state to address the social questions of the industrial era and helped to translate vague concerns *about* privacy in the modern United States into targeted campaigns *for* privacy.[6] Such campaigns aimed in part to make the enjoyment of privacy – or, rather, the enjoyment of a particular middle-class conception of privacy – less contingent on chance and the whims of life by anchoring it in legislation and regulation. Through such efforts, privacy was gradually insulated against perpetual contestation and thereby turned into a self-reproducing element of governance and jurisprudence that could shape social exchange and the exercise of informational power without "substantial recurrent mobilization".[7] It became a durable feature of the legislative and regulatory landscape in the United States.

Contemporary studies of privacy and surveillance pay relatively little attention to this initial institutionalization and the prolonged struggles that often accompanied it. Their focus tends to be on a more recent historical period when privacy and informational power have already become institutionalized, encoded in legislation and regulatory frameworks, integrated into jurisprudence, and ingrained in what David Lyon has called "cultures of surveillance".[8] But there is an analytical cost to this presentist focus: It can make the exercise of informational power – and the limits placed upon it – appear as straightforward facts of modern society that warrant no

[5]Jeannette A. Colyvas and Stefan Jonsson. 2011. "Ubiquity and Legitimacy: Disentangling Diffusion and Institutionalization." *Sociological Theory* 29 (1): 27-53.

[6]Yet the Progressive Era was also a period of political retrenchment and dashed hopes, when politicians and White communities worked to curb the impact of the Thirtheenth Amendment through the establishment of Jim Crow laws and undo the modest gains experienced by Black Americans during the Reconstruction era. The continued salience of the "color line", as W.E.B. DuBois called it, was reflected in the practices of personal data collection and the highly uneven landscape of legibility that resulted from them during the first two decades of the twentieth century. The next chapter will address this directly. See: W. E. B. Du Bois. *The Philadelphia Negro*. New York: Cosimo Classics, 2007.

[7]Colyvas and Jonsson (2011), pp. 38-39.

[8]David Lyon. *The Culture of Surveillance: Watching as a Way of Life*. Hoboken: Wiley & Sons, 2018.

sociological explanation. *Of course* it is de-facto impossible to make oneself invisible online, as Janet Vertesi once tried to do in a remarkable autoethnographic experiment, given the ubiquity of cookies and tracking devices.[9] *Of course* the expansion of the intelligence apparatus after 9/11 imperiled the privacy of American citizens, given the vast repertoire of dragnet surveillance tools available to the National Security Agency.[10] The balance of privacy and informational power appears almost impervious to fundamental challenges, and especially to social mobilization and collective action from below. This is one reason why scholars who study informational power in the contemporary world rarely consider the role of social movements even if they recognize surveillance as a "political battlefield".[11] With the exception of studies that examine grassroots mobilization over the legal right to privacy during the 1960s and 1970s and situate these campaigns within broader movements for women's rights and LGBT rights, the struggles they trace tend to be among stakeholders in an already-institutionalized privacy architecture that do not count as "a fully fledged social movement."[12] Too often, the history of privacy is therefore a history without actors and agency: Things happen, yet it remains unclear which groups or individuals shape the contours of privacy and explain why specific versions of privacy are written into legislation or consecrated by the American legal system.

This chapter situates the institutionalization of privacy in the context of collective action and political mobilization. It makes three interlocking claims. First, it shows that social reformers and charitable organizations folded a defense of urban privacy into a broader struggle to reshape the American city, with a particular focus on improving the living conditions of tenement residents. Far from welcoming a new "era of publicity," such campaigns drew a direct link from privacy to moral uplift and good citizenship: Without privacy, no possibility of retreating from the front stage of public life – and no possibility of moral refinement either.[13] Alongside health and fire safety, privacy gradually emerged as a third pillar of the tenement

[9]Janet Vertesi. "My Experiment Opting Out of Big Data Made Me Look Like a Criminal." *Time Magazine* 05/2014. Available at: time.com/83200/privacy-internet-big-data-opt-out/. Accessed 10/20/2020.

[10]Zygmunt Bauman, Didier Bigo, Paulo Esteves, Elspeth Guild, Vivienne Jabri, David Lyon, and Rob BJ Walker. "After Snowden: Rethinking the Impact of Surveillance." *International Political Sociology* 8 (2): 121-144.

[11]Laura Huey. 2009. "A Social Movement for Privacy/Against Surveillance: Some Difficulties in Engendering Mass Resistance in a Land of Twitter and Tweets." *Case Western Reserve Journal of International Law* 42: 699-710. For a recent exception, see: Scott Skinner-Thompson. *Privacy at the Margins*. Cambridge: Cambridge University Press, 2020.

[12]David Lyon. *Surveillance Studies: An Overview*. Cambridge: Polity, 2007. p. 173. For a discussion of stakeholders, see Huey (2009) and Kevin D. Haggerty and Richard V. Ericson (eds). *The New Politics of Surveillance and Visibility*. Toronto: University of Toronto Press, 2006. p. 6.

[13]"The Era of Publicity - the Twentieth Century." *The Washington Times*, 07/31/1902.

reform agenda and an object of political mobilization. Second, the chapter shows that reformers' ability to effect legislative change depended on the emergence of political coalitions that could overcome resistance from real estate developers and exploit favorable political opportunity structures. I make this argument by focusing on one specific place, where campaigns for urban privacy came to a head just before the turn of the twentieth century: New York City. Social reformers like Jacob Riis and Lawrence Veiller succeeded in generating popular and institutional support for their tenement reform agenda, created a temporary alliance with the gubernatorial office and the state assembly to circumvent municipal resistance to legislative change, and successfully pushed for the passage of the 1901 Tenement House Act. As one of the first comprehensive tenement laws in U.S. history – and as a model law that was soon exported to and adapted by municipal governments and state legislatures across the country –, the law helped to translate informal privacy norms into formal legislation, backed by the enforcement apparatus of the newly created Tenement House Department. Third, I trace the impact of the 1901 law during the subsequent two decades to determine the degree to which it reshaped urban space and the experience of urban privacy. By forcing changes in the layout of buildings and apartments, the law helped to encode a progressive middle-class conception of familial urban privacy into the material environment. This conception was sometimes at odds with the preferences of working-class communities, and it fell short of tackling one of the key determinants of urban privacy: the overcrowding of entire neighborhoods that forced multigenerational families into small apartments and borders into impromptu sublets. But precisely because of this complex history, the campaigns for urban privacy and their specific culmination in New York City can serve as a useful case study of the dynamics and contingencies of institutionalization that helped to turn the logic of privacy into a durable political logic.

A sociology of (urban) space

Urban space is not a neutral medium.[14] Many forces shape the organization of space within buildings and across cities, some of them physical: The load-bearing properties of modern steel and steel-reinforced concrete partly account for the burgeoning of high-rise construction in American cities during the 1900s and 1910s and the resulting densification of the inner city.[15] But the layout of buildings and cities also reflects a wide array of cultural, political, and economic forces. Social scientists tend to draw particular attention to the link between financial interests and urban space. During the Industrial Revolution, workers were concentrated in "slums at the edge of the city,"

[14]Henri Lefebvre. *The Production of Space*. Oxford: Blackwell, 1991. p. 308

[15]Larry R. Ford. *Cities and Buildings: Skyscrapers, Skid Rows and Suburbs*. Baltimore: The Johns Hopkins University Press, 2005; Roberta Moudry. *The American Skyscraper: Cultural Histories*. Cambridge: Cambridge University Press, 2005.

from where they could march to the daily tune of the factory whistle straight onto the shop floor. The spatial concentration of workers near centers of production helped to "quicken the pace of commerce" and contained rather than eradicated poverty and disease among the working class.[16] As productive capacity followed the increasingly mobile flows of capital around the globe during the twentieth century, workers dispersed and cities morphed into centers of consumption – a shift that was heralded in part by the emergence of strip malls and superstores.[17] The construction of inner-city highway systems during the 1960s and 1970s and the displacement of low-income communities in the twenty-first century likewise illustrate the effects that corporate power and speculative finance can have on city planning, the organization of urban space, and the distribution of people within cities.[18] During each historical period, the material reality of the modern city was contingent on the economic organization of society.

Urban spaces also reflect the cultural norms of American society and the racialization and gendering of residential space.[19] Encoded in municipal laws, channelled through capital investments, and embedded in the housing preferences of urban residents, these forces continue to shape where different groups cluster, which spaces they traverse, and how their neighborhoods are constructed. For example, the distinction between the inner city and the suburbs is both a racialized distinction – insofar as decades of redlining and restrictive Homeowners Association policies rendered entire neighborhoods de-facto inaccessible to Black renters and homeowners, forcing them instead into underserviced and overpoliced parts of the urban core – and also a gendered distinction, at least during certain parts of the workday. Given the prevalence of the

[16]Lefebvre (1991), p. 316; Nicholas Fyfe. *Images Of The Street: Planning, Identity And Control In Public Space*. London: Routledge, 1998. p. 2; Friedrich Engels. *The Condition of the Working Class in England*. London: Penguin Classics, 1987.

[17]David Harvey. 1974. "Class-Monopoly Rent, Finance Capital and the Urban Revolution." *Regional Studies* 8 (3-4): 239-255; Sharon Zukin. *Landscapes of Power: From Detroit to Disney World*. Berkeley: University of California Press, 1991; Neil Brenner and Nik Theodore. 2002. "Cities And The Geographies Of 'Actually Existing Neoliberalism'." *Antipode* 34 (3): 349-379; David Harvey. 2003. "The Right to the City." *International Journal of Urban and Regional Research* 27 (4): 939-941; Saskia Sassen (ed). *Deciphering the Global: Its Scales, Spaces and Subjects*. London: Routledge, 2013.

[18]Nathaniel R. Walker. 2016. "American Crossroads: General Motors' Midcentury Campaign to Promote Modernist Urban Design in Hometown USA." *Buildings & Landscapes: Journal of the Vernacular Architecture Forum* 23 (2): 89-115; Neil Smith. *The New Urban Frontier: Gentrification and the Revanchist City*. London: Routledge, 1996.

[19]Douglas S. Massey. 1990. "American Apartheid: Segregation and the Making of the Underclass." *American Journal of Sociology* 96(2): 329-357; Sharon Zukin. *Landscapes of Power: From Detroit to Disney World*. Berkeley: University of California Press, 1991; Angelina Grigoryeva and Martin Ruef. 2015. "The Historical Demography of Racial Segregation." *American Sociological Review* 80(4): 814-842; Richard Rothstein. *The Color of Law: A Forgotten History of How Our Government Segregated America*. New York: Liveright Publishing, 2017.

patriarchal single-earner family, men have tended to "[produce] goods in the public sphere downtown, and middle-class women reproduced labor in the private sphere of the home in the outer zones."[20] Behind the facade of each building, and behind the layout that arranges such buildings into campuses, neighborhoods, districts, and cities, thus lies a rich array of political and cultural forces that shape how different populations experience residential and professional life; encode social customs into material form; and structure social relations.[21] As Gwendolyn Wright has written, homes are architectural chronicles of American society that capture latent norms and cultural preoccupations in material form.[22]

The reciprocal is true as well: Just as cultural norms shape space, the organization of space allows for the enactment of specific social relations and the reinforcement of social norms. The construction of functional spaces is an architectural endeavor but also an act of world-making that illustrates the entanglement of the material domain with the semiotic.[23] The production of space encodes aesthetic preferences, economic realities, and "messages" about the social order all at once.[24] This is why Michel Foucault drew attention to the tight coupling of architecture and the exercise of disciplinary power, positing that the arrangement of space in the factory and the panoptic prison was in itself a technology of power that allowed for the supervision of workers and inmates and thereby facilitated the production of docile bodies.[25] And it illustrates the point made by the social historian Viviana Zelizer that the rise of dedicated children's rooms in nineteenth-century bourgeois homes reflected a shift from economic towards moral valuations of childhood but also created spaces where

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[20]Daphne Spain. 2014. "Gender and Urban Space." *Annual Review of Sociology* 40: 583. Also see: Catharine R. Stimpson, Elsa Dixler, Martha J. Nelson, and Kathryn B. Yatrakis (eds). *Women and the American City.* Chicago: University of Chicago Press, 1981; Elaine T. May. *Homeward Bound: American Families in the Cold War Era.* New York: Basic Books, 2008; Paula Lupkin. *Manhood Factories: YMCA Architecture and the Making of Modern Urban Culture.* Minneapolis: The University of Minnesota Press, 2010.

[21]Robin Evans. "Figures, Doors, and Passages." Pp. 55-92 in *Translations from Drawing to Building and Other Essays.* London: Architectural Association Publications, 1997.

[22]Gwendolyn Wright. *Building the Dream: A Social History of Housing in America.* Cambridge: MIT Press, 1983. Also see p. 4 in: David P. Handlin. *The American Home: Architecture and Society, 1815-1915.* Boston: Little, Brown, 1979; Gunther Barth. *City People: The Rise of Modern City Culture in Nineteenth-Century America.* Oxford: Oxford University Press, 1982.

[23]Pierre Bourdieu. 1989. "Social Space and Symbolic Power." *Sociological Theory* 7 (1): 14-25 (see p. 22 for a discussion of "world-making"); Pierre Bourdieu. *The Logic of Practice.* Redwood City: Stanford University Press, 1990. Also see Cloutier and Langley (2013, p. 361), who argue that"the way in which cultural logics "manifest themselves in material objects has been largely overlooked."

[24]Lefebvre (1992), p. 131.

[25]Michel Foucault. *Discipline and Punish.* New York: Vintage Books, 1995. Also See: Michel Foucault. 1986. "Of Other Spaces." *Diacritics* 16 (1): 22-27; Helga Tawil-Souri. 2011. "Qalandia Checkpoint as Space and Nonplace." *Space and Culture* 14 (1): 4-26.

the children thus reconstituted could act out their alleged innocence through play.[26] As Thomas Gieryn has suggested, the built environment therefore has a power sui generis, "apart from powerful people or organizations who occupy" it, to shape social relations and human action through spatial arrangements, architectural forms, and the "symbolic meanings of place."[27] Or, in the succinct words of Robert Park, "in making the city man has remade himself."[28]

This is one reason why struggles over individual rights and social inequality routinely intersect with claims about access to, exclusion from, or movement through the natural landscape and the built environment.[29] Physical space, as Henri Lefebvre – perhaps the foremost theoretician of the social production of space – writes, is "both a field of action (. . .) and a basis of action."[30] This is true in a very practical sense: Space shapes the dynamics of collective action. The layout of roads and bridges can facilitate or impede coordination among social movement participants; the design of sidewalks and transportation systems can improve social integration or erect obstacles to meaningful participation in civic and cultural life.[31] But it is also true in a strategic sense. Many

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[26]Viviana A. Zelizer. *Pricing the Priceless Child. The Changing Social Value of Children*. New York: Basic Books, 1985.

[27]Thomas F Gieryn. 2000. "A Space for Place in Sociology." *Annual Review of Sociology* 26: 475.

[28]Robert Park. *On Social Control and Collective Behavior*. Chicago: The University of Chicago Press, 1967. p. 3.

[29]Karl Marx. *Capital: Volume 1: A Critique of Political Economy*. London: Penguin Classics, 1992 [1867]. p. 877; Zoe Trodd. "In Possession of Space." Pp. 223-244 in *Representing Segregation: Toward an Aesthetics of Living Jim Crow, and Other Forms of Racial Division*, edited by Brian Norman and Piper Kendrix Williams. New York: SUNY Press, 2012; Robert Doyle Bullard, Glenn Steve Johnson, and Angel O. Torres (eds). *Highway Robbery: Transportation Racism and New Routes to Equity*. Cambridge: South End Press, 2004.

[30]Lefebvre (1992), p. 191.

[31]Roger V. Gould. *Insurgent Identities: Class, Community, and Protest in Paris from 1848 to the Commune*. Chicago: The University of Chicago Press, 1995; Dingxin Zhao. 1998. "Ecologies of Social Movements: Student Mobilization During the 1989 Prodemocracy Movement in Beijing." *American Journal of Sociology* 103 (6): 1493-1529; Mario L. Small and Laura Adler. 2019. "The Role of Space in the Formation of Social Ties." *Annual Review of Sociology* 45: 111-132; Jane Jacobs. *The Death and Life of Great American Cities*. New York: Vintage, 1992; Bess Williamson. 2012. "The People's Sidewalks: Designing Berkeley's Wheelchair Route, 1970–1974." *Boom: A Journal of California* 2 (1): 49-52. For a discussion of space and civic life, see in particular: Jürgen Habermas. *The Structural Transformation Of The Public Sphere*. Cambridge: MIT Press, 1991; Walter Benjamin. 1995. "Paris: Capital of the Nineteenth Century." In: *Metropolis: Centre and Symbol of Our Times*, edited by P. Kasnitz. London: Macmillan, 1995; Walter Benjamin. *The Arcades Project*. Cambridge: Harvard University Press, 1999. Habermas specifically emphasizes the significance of the coffee house in liberal society, which appears in his writings not just as a communal space where dialogue can happen but as the physical manifestation of abstract commitments to civic culture. To Benjamin, the Parisian arcades were not just spaces to be traversed by the *flaneur* but reflected a broader commitment to public life, while the Haussmann boulevards that were

social movements – from working-class resistance against the enclosure of the commons to campaigns against racially segregated lunch-counters and contemporary fights over transgender bathrooms – are at least in part oriented towards the ability "to lay claim to certain types of space and the power to shape space."[32] As Lefebvre has argued, "new social relations demand a new space, and vice-versa."[33]

Privacy and the spatial organization of social life

Privacy occupies an important position within this wide array of socio-cultural forces, because pivacy claims are frequently claims about space – from the layout of rooms within an apartment to the spatial structure of a neighborhood or a city. Encoded in the material environment are statements about the authority to traverse and access certain spaces, the privacy-protecting or visibility-enhancing aims of individuals or organizations, and the rules that govern interactions and cohabitation in shared spaces. The built environment encases people and things, yet it also encases a "moral and political order."[34]

As the previous chapter has already shown, this is most obvious in the context of domestic life. From homes in colonial America to suburban neighborhoods of the twenty-first century, the careful placement of doors and the use of hedges, picket fences, screened-in porches, and curtained living room windows reflects particular conceptions of familial privacy that shield the nuclear family against the eyes and ears of others without entirely divorcing it from the surrounding community.[35] Each of these architectural features admits "certain acts to the realm of the visible" while keeping others hidden from view.[36] Sexual intimacy and personal hygiene are particularly shielded, and thereby preserve a sense of unobservable intimacy that makes "eros

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constructed during the 1850s and 1860s did not merely showcase the city's architectural splendor or accelerate its commerce but also facilitated the policing of an unruly working class during the reign of Napoleon III.

[32]Sarah Deutsch. *Women and the City: Gender, Space, and Power in Boston, 1870–1940*. Oxford: Oxford University Press, 2000. p. 6.

[33]Lefebvre (1991), p. 59. Also see p. 386: The city and the urban sphere "are [...] the setting of struggle; they are also, however, the stakes of that struggle."

[34]Lefebvre (1991), p. 317.

[35]David H. Flaherty. *Privacy in Colonial New England, 1630-1776*. New York: Columbia University Press, 1967; Karen V. Hansen: "Rediscovering the Social: Visiting Practices in Antebellum New England and the Limits of the Public/Private Dichotomy." Pp. 268-302 in *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy*, edited by Jeff Weintraub and Krishan Kumar. Chicago: The University of Chicago Press, 1997; Sarah E. Igo. *The Known Citizen: A History of Privacy in Modern America*. Cambridge: Harvard University Press, 2018. See Igo (2018) in particular for a discussion of postwar suburban privacy.

[36]Lefebvre (1991), p. 99.

disappear" from the public-facing representation of the family.[37] In Robin Evans' words, the hiding of such practices behind doors and curtains reflects the proclivities and preferences of a society "that finds carnality distasteful" and therefore tends to envelop the carnal desires and bodily functions in material enclosures and unwritten privacy norms.[38] "To enter is to see," writes Beatriz Colomina, and to prevent visual inspection often requires the denial of spatial access – which is one reason why the negotiation of spatial layouts is often also a negotiation of publicity and privacy.[39] The domestic home in particular therefore presents an architectural solution to the tension between what Sarah Stage has called the "inescapable propinquity" of residential communities and the concurrent and continued veneration of the private middle-class family.[40]

This tension is particularly acute in cities. For much of American history, a majority of the country's population had lived a relatively isolated experience. Outside of a few major cities – which were also less densely populated during the early 1800s than they were during the 1900s –, the typical family resided in smaller towns. Many immigrants who arrived from overseas during the second half of the nineteenth century had a similarly rural background, having left villages in Western Ireland, Bohemia, or the Palatinate to seek a better future in the United States. Privacy was often a scarce commodity in such communities, where people tended to be well-known to their neighbors and knew them well in turn. (This is still the case today: I grew up in a village in Germany's Rhine valley, where a sign in a neighbor's front-yard proudly proclaimed that "The Good Lord knows everything, but the neighborhood knows more.") But as Kevin Haggerty and Richard Ericson have argued, "the mass movements of individuals into cities ruptured these long-standing neighbourly and familial bonds" as urban residents "became surrounded by streams of unknown strangers."[41] On the one hand, this created new possibilities for self-expression. Walter Benjamin described the so-called *flâneur* as a creature of nineteenth-century urbanization who vanishes amidst the crowd and uses this new-found anonymity for casual observation and exploration of the urban landscape.[42] Georg Simmel similarly observed that the modern city "grants

[37]Lefebvre (1991), p. 315. Also see p. 320 for a discussion of the meso-spatial confinement of sexual activity to red-light districts, where the public/private boundary is often blurred in complex and unexpected ways.

[38]Evans (1997), p. 88.

[39]Beatriz Colomina. *Privacy and Publicity: Modern Architecture As Mass Media.* Cambridge: MIT Press, 1996, p. 5.

[40]Sarah Stage. "The Greening of Suburbia." *American Quarterly* 37 (5): 749-754.

[41]Kevin D. Haggerty and Richard V. Ericson. 2000. "The Surveillant Assemblage." *British Journal of Sociology.* 51(4), p. 619.

[42]Walter Benjamin. *Charles Baudelaire: A Lyric Poet in the Era of High Capitalism.* London: Verso, 1983; Keith Tester (ed.) *The Flâneur.* London: Routledge, 1994.

to the individual a kind and an amount of personal freedom which has no analogy whatsoever under other conditions."[43] For Simmel, the immersion in metropolitan life and the experience of transient urban relations had the potential to be disorienting yet also allowed a person to "maintain the independence and individuality of his existence against the sovereign powers of society" to a degree that would have been impossible in smaller rural hamlets.[44] The modern individual was at least partly a product of the modern city.[45] But on the other hand, the city also creates new possibilities for neighborly observation and institutional surveillance. The ability to gaze casually into neighborhood windows or to eavesdrop on conversations in adjacent apartments sits at one end of a surveillance continuum that extends at the other end to highly institutionalized uses of police patrols and checkpoints (in the twentieth century) as well as closed-circuit cameras and automated license plate scanners (in the twenty-first century).[46]

Methodological considerations

In this chapter, I study the processes of political mobilization that elevated the fight for privacy in city life into a pillar of the tenement reform agenda; trace the incorporation of privacy norms into specific pieces of legislation; and document how such legislation reshaped urban space and thereby encoded a specific conception of privacy into the built environment of the American City. I proceed in three stages: First, I offer an account of the tenement reform movement, showing that the demands of Progressive Era advocates went beyond improved sanitation and fire safety by foregrounding residential privacy as a key aspect of moral uplift and good citizenship. Second, I focus on the specific political dynamics and opportunity structures of New York City during the 1890s. I show that social reformers built a temporary coalition with the state government to overcome municipal resistance and opposition to tenement reform from real estate developers. Third, I document the impact of legislative action on the organization of urban space, showing that the legislative valuation of privacy reshaped the microspatial possibilities for personal and familial privacy within tenement homes but without addressing the mesospatial problem of overcrowding.

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[43] Georg Simmel. "The Metropolis and Mental Life" in *The Sociology of Georg Simmel* New York: The Free Press, 1950. p. 416.

[44] Simmel (1950), p. 11.

[45] See Haggerty and Ericson (2000), pp. 619-620 for a discussion of the "darker side of these possibilities for self-creation."

[46] Haggerty and Ericson (2000); Steven L. Nock. *The Costs of Privacy: Surveillance and Reputation in America.* New York: De Gruyter, 1993; David Lyon (ed). *Surveillance as Social Sorting: Privacy, Risk, and Digital Discrimination.* New York: Routledge, 2003; Christena Nippert-Eng. *Islands of Privacy.* Chicago: The University of Chicago Press, 2010; Simone Browne. *Dark Matters: On the Surveillance of Blackness.* Durham: Duke University Press, 2015; Sarah Brayne. 2017. "Big Data Surveillance. The Case of Policing." *American Sociological Review* 82(5): 977–1008.

In order to perform my analyses and construct my argument, I rely on qualitative and quantitative historical data about the social reform movement, the 1901 Tenement House Act (the campaigns leading up to its passage, the law itself, and its subsequent implementation and enforcement), and urban planning in New York City. I examine the incorporation of privacy concerns into the agenda of the social reform movement and of charitable organizations by analyzing the writings of prominent Progressive Era reform advocates and politicians like Jacob Riis, Lawrence Veiller, Theodore Roosevelt, and Ernest Flagg. I also draw extensively on the proceedings of the National Conference on Social Welfare. First convened in 1874, and then annually after 1878, the conference was one of the largest gatherings of social reformers in the United States and brought together charitable organizations, social reform advocates, and welfare providers from most states and many of the country's major cities.[47] By the 1880s, it had become the primary nationwide forum where questions of urban reform and poposed solutions were discussed. Speeches, discussions, and question-and-answer sessions at each meeting were transcribed and collected into annual publications, which are now available in digitized form through the University of Michigan.[48] The length of these annual proceedings varied by year but generally falls between 200 and 600 pages. I analyze all records between 1874 and 1930 and identify 86 relevant discussions of privacy, and 40 additional discussions of confidentiality.[49] I analyze these through a close reading. For each conversation, I identify (1) why a speaker considered privacy to be relevant to discussions of social reform, (2) whether they considered privacy to be under threat, (3) reasons for the precarious state of urban privacy, if stated, and (4) proposed remedies, if stated. I supplement these data with records from the *New York Times* – the city's paper of record – and the trade publication *Real Estate Record and Builders Guide*, which was one of the primary specialist venues for urban planners, developers, architects, and housing advocates interested in construction and housing policy in New York. I build a dataset that includes all articles mentioning "privacy" and "tenement" in either publication between 1867 and 1923 – a total of 126 articles.

I then focus specifically on the drafting and passage of the 1901 Tenement House Act, on the assumption that legal codification is an important mechanism through which abstract norms are anchored in institutional practices and thus come to have a lasting effect on the social world.[50] Specifically, I analyze the reports produced by the 1884

[47]Frank J. Bruno 1948. *Trends in Social Work*. New York: Columbia University Press.

[48]The entire collection can be accessed at https://quod.lib.umich.edu/n/ncosw/.

[49]My total dataset includes 394 discussions about privacy, confidentiality and publicity, and also about the use of personal data and photographs by charitable organizations. Social reformers repeatedly discussed the need to safeguard the informational privacy of the people they served, especially for children, and proposed solutions that ranged from anonymizing documents to restricting access to welfare databases. I return to the theme of informational privacy in subsequent chapters.

[50]Ian Haney Lopez. *White by Law: The Legal Construction of Race, 10th Anniversary Edition*. New

Legislative Commission on Tenement Housing, the 1894 Tenement House Committee of the Charity Organization Society of New York City, and the 1900 New York State Tenement House Commission, as well as the annual reports published by the New York City Department of Tenements and the personal memoirs of two protagonists: Lawrence Veiller – who worked in the municipal administration in New York City before becoming a leading force behind the 1900 Commission – and then-governor Theodore Roosevelt. Reports from the Department of Tenements include two types of data: First, they preserve a detailed record of civic and legislative initiatives relating to tenement reform in New York City and the State of New York. Second, they include summaries and cross-tabulations of surveys performed by state and municipal authorities about the conditions of tenement life, both before the passage of the 1901 law and in its aftermath. The post-law surveys are particularly relevant, since they make it possible to track the actual impact of legislative intervention on tenement construction in New York City during the first two decades of the twentieth century. They include near-annual data on the number of apartments built each year with access to private bathrooms, as well as estimates of the average number of families living on each floor. I digitize these data to construct a time series that covers each year following the passage of the 1901 law, up to and including 1917. Finally, I supplement these data with additional materials from the New York Public Library – including a dataset I assembled of 234 building floorplans submitted for permitting purposes to the municipal government of New York City between 1901 and 1920 – and with tract- and ward-level population data from the U.S. Bureau of the Census. Taken together, these data allow me to estimate the effect of the 1901 law on apartment layouts and the average residential density of tenement neighborhoods. I discuss specific calculations in the analysis below and also include a detailed methodological section in the appendix.

Tenement housing and the social reform movement

During the late nineteenth and early twentieth centuries, the United States evolved into an increasingly urban society. In 1850, only 10% of Americans lived in neighborhoods classified as "urban" by the Census Bureau. By 1870, that number crossed 25%. And in 1920, American society became majority-urban, with one out of every two Americans residing in cities. The number of cities increased, and so did the size of the nation's largest metropolitan areas (Fig. 4.1). New York City surpassed one million residents in the 1870s; Chicago and Philadelphia followed in 1890. Much of this growth was driven by successive waves of immigration that brought millions of new residents to the United States each decade (Fig. 4.2). Having arrived largely by boat, these immigrants tended to settle in cheap tenement neighborhoods in Boston,

York: NYU Press, 2006; Richard Rothstein. *The Color of Law: A forgotten History of How Our Government Segregated America.* New York: Liveright Publishing, 2017.

Baltimore, Philadelphia, and New York – cities that were close to the nation's ports and already had sizeable immigrant communities where newcomers could find a bed and perhaps a job. As a result, tenements expanded rapidly during the latter half of the nineteenth century. In the 1860s, roughly 15,000 buildings in New York City were classified as tenements.[51] By 1900, the city housed 2.4 million people in 82,562 tenement homes.[52]

Initially, the construction of such tenements was largely unregulated, and many buildings were scarcely more than haphazardly erected wooden dwellings. But starting in the 1860s, municipal and state authorities began to regulate the construction of new tenements through a series of laws and ordinances (Table 4.1).[53]

In the remainder of this section, I examine the history of tenement reform and trace the gradual embrace of urban privacy as a third pillar of tenement reform. Alongside concerns about sanitation and fire safety, it offered a logic through which the social ills of the industrial era could be understood and helped to define a set of specific concerns that could be addressed through legislative action.

Early tenements were commonly erected on 25-feet lots without indoor bathrooms or courtyards that would allow light and air to reach the lower floors.[54] Their layouts tended to resemble that of a simple railroad carriage – hence their nickname, "railroad buildings": A central corridor ran down the center of each floor, with rooms on either side that were arranged like pearls on a string, and with shared kitchens located at

[51]Definitions of tenements evolved over time, but generally indicated multi-story and multi-unit buildings where someone could rent an apartment or an individual room. Section 2 of the 1901 Tenement House Act has the most comprehensive definition: "A tenement house is any house or building, or portion thereof, which is rented, leased, let or hired out, to be occupied, or is occupied as the home or residence of three families or more living independently of each other, and doing their cooking upon the premises, or by more than two families upon any floor, so living and cooking, but having a common right in the halls, stairways, yards, water-closets or privies, or some of them." Note that the law does not distinguish between working-class tenements and so-called "apartment houses" occupied by the middle class.

[52]Robert W. DeForest and Lawrence Veiller (eds). *The Tenement House Problem: Including the Report of the New York State Tenement House Commission of 1900. Volume 1.* New York: MacMillan, 1903. pp. 192ff.

[53]For a short overview, see: Robert W. DeForest. 1914. "A Brief History of the Housing Movement in America." *The Annals of the American Academy of Political and Social Science* 51 (1): 8-16. For a longer personal history of tenement reform, see: Lawrence Veiller. 1979. "The Reminiscences of Lawrence Veiller." New York Times Oral History Program and Columbia University Oral History Collection, Part IV (1-219). Available in microfilm at: https://dx.doi.org/10.7916/d8-a82h-x016. Accessed 03/13/2020.

[54]Robert W. DeForest and Lawrence Veiller (eds). *The Tenement House Problem: Including the Report of the New York State Tenement House Commission of 1900. Volume 1.* New York: MacMillan, 1903; Roy Lubove. *The Progressives and the Slums: Tenement House Reform in New York City, 1890-1917.* Pittsburgh: University of Pittsburgh Press, 1963.

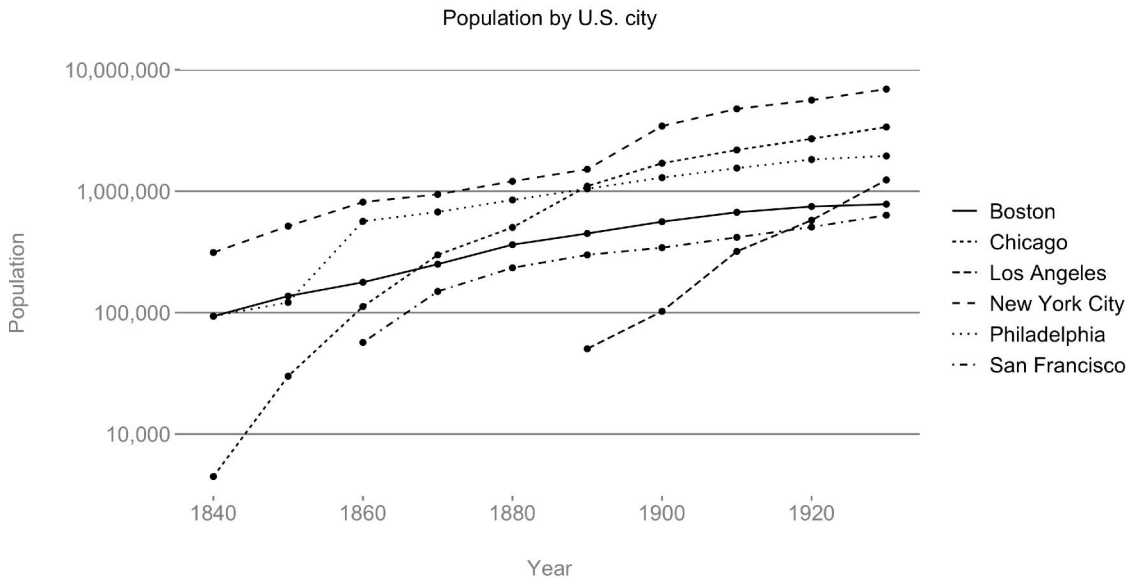

Figure 4.1: *Population of major U.S. cities (with y-axis in log scale). Source: U.S. Bureau of the Census/IPUMS USA*

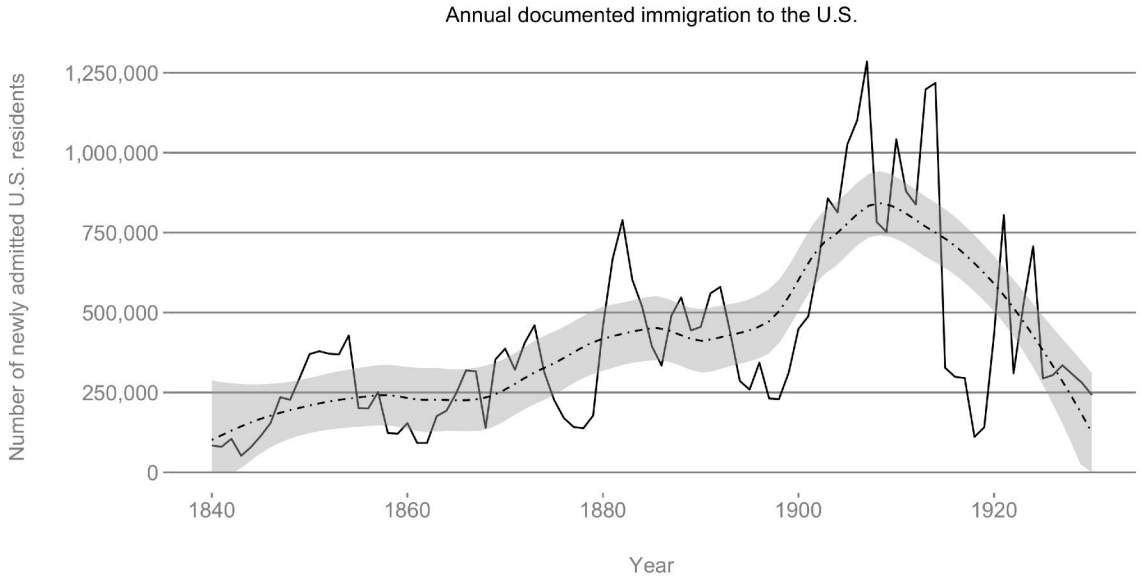

Figure 4.2: *Annual number of newly documented U.S. permanent residents; shown with local polynomial regression trendline and standard error bands. Source: U.S. Department of Homeland Security.*

both ends of the building. This layout allowed developers and building owners to cram multiple families or groups of lodgers and boarders onto each floor, but it also resulted in rooms that were dark, damp, and without access to air circulation. The architect Ernest Flagg, who emerged in the late nineteenth century as a central figute of the so-called "model tenement" movement that advocated for architectural solutions to the squalor of tenement life, observed about these narrow railroad buildings:

> *"[T]he greatest evil which ever befell New York City was the division of the blocks into lots of 25 x 100 feet. So true is this, that no other disaster can for a moment be compared with it. Fires, pestilence, and financial troubles are as nothing in comparison; for from this division has arisen the New York system of tenement-houses, the worst curse which ever afflicted any great community."*[55]

Efforts to improve tenement living conditions began in the middle of the nineteenth century. The New York state legislature established a first tenement commission in 1857 and tasked it with conducting a study of the social and sanitary conditions in New York City tenements, yet its work did not spark any legislative action. The first tenement law was not passed until 1867, and was then amended and expanded in in 1879 and 1887. The 1879 law was particularly significant: Also known as the "old law", it mandated that any newly constructed tenements contained small interior air shafts through which fresh air and light could reach the lower floors. The most immediate consequence of this law was the emergence of so-called "dumbbell tenements" (named after their ground plan, which vaguely resembled a dumbbell weight when viewed from above), which became the dominant type among newly erected tenements (Fig. 4.3). But the narrow air shafts frequently turned into receptacles for trash, thereby negating their original purpose and undermining the intended improvements in air quality. The influx of immigrants into tenement districts also continued, thereby worsening the overcrowding of buildings and apartments. Given the scale of the social question, the scope of the 1879 law thus fell far short of the demands of a growing social reform movement that emphasized not just the tangible health benefits of tenement reform but cast the fight against overcrowding as a moral crusade that could protect the decency and privacy of city residents. As the tenement reform advocate Lawrence Veiller noted, the dumbbell model offered somewhat greater fire-proofing and ventilation and "more privacy of halls" but did too little to address "the evils of our present tenement house system."[56]

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[55]Ernest Flagg. 1894. "The New York Tenement House Evil and Its Cure." Scriber's Magazine 16, p. 108. The model tenement movement was predicated on the idea that private investment could, with the right motivation and under the right circumstances, help to alleviate the ills of the tenement through "investment philanthropy; that is, a philanthropy made seductive by co-ordination with a reasonable commercial dividend." See Gould (1900), p. 390.

[56]Lawrence Veiller. *Tenement House Reform in New York, 1834-1900. Prepared for the Tenement*

Table 4.1: New York Tenement Reform Timeline

1846	First report on tenement conditions submitted to the NYC Board of Aldermen; focus on sanitary issues and "health nuisances"
1856	NY state legislature appoints first investigative commission to study tenement housing; report but no legislative action follows
1867	Tenement House Law law enacted, mandating fire escapes, minimum room sizes, and sewer connections of shared outdoor privies
1877	"Model tenement" movement emerges in Brooklyn and aims to use architectural changes to improve sanitary and moral conditions
1879	Tenement Reform Law ("Old Law") amends the 1867 law and establishes minimum requirements for windows and air circulation; "dumbbell tenements" emerge as the dominant model of construction
1884	Legislative Commission established to study tenement housing
1887	Tenement Reform Law is amended based on the Commission's report; privies are mandated inside buildings
1890	Jacob Riis publishes "How the Other Half Lives: Studies Among the Tenements of New York"
1894	State legislature establishes investigative commission to conduct a comprehensive citywide survey of tenement conditions; report but no legislative action follows in 1895
1898	Tenement House Committee of the Charity Organization Society of New York City is formed to document tenement conditions and shape evisions to the New York City building code
1899	Tenement House Committee publishes two-volume report on urban living conditions in New York City
February 1900	Tenement-House Exhibition organized by Lawrence Veiller
April 1900	Gov. Roosevelt establishes Tenement House Commission under Robert W. DeForest and Lawrence Veiller to investigate health conditions and moral consequences of tenement life
February 1901	Commission's report sent to the state legislature; new tenement legislation drafted
April 1901	Tenement House Act ("New Law") passed by NY state legislature; mandating larger courtyards, private bathrooms, specific window placements, lower residential density, and removal of direct bedroom access from public hallways

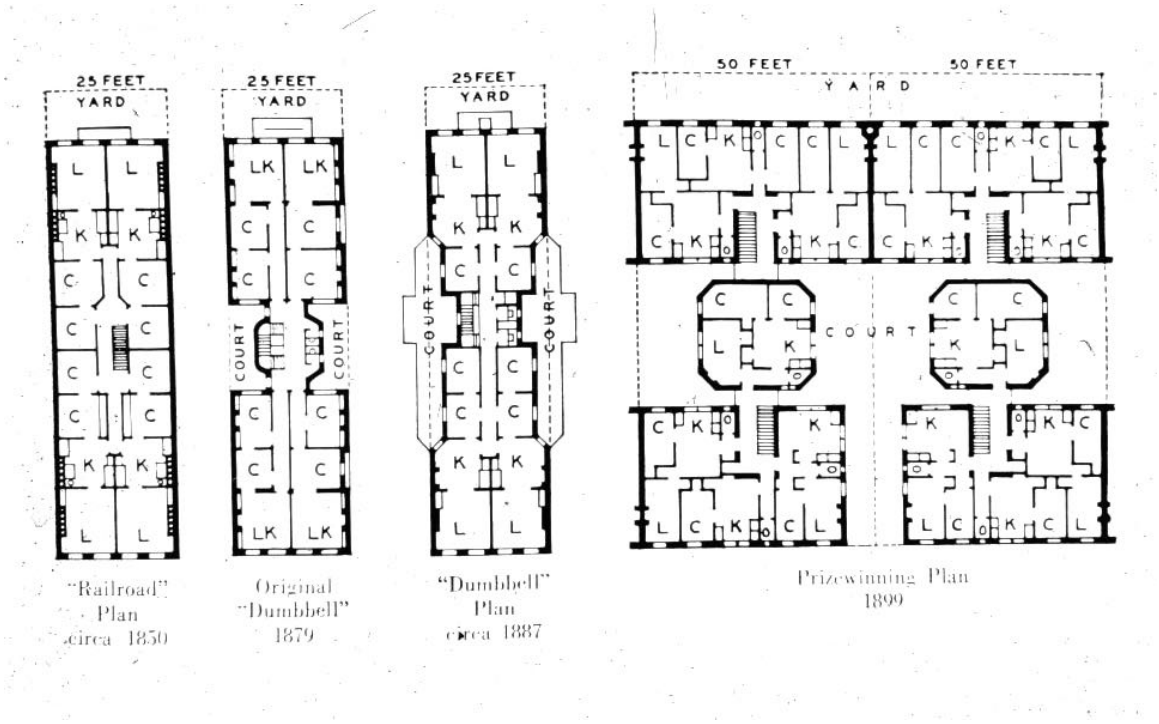

Figure 4.3: *Evolution of a typical New York City tenement building, 1850-1900. Letters indicate chambers/bedrooms (C), living rooms/parlors (L), and kitchens (K). Sources: New York Public Library, Columbia University.*

Figure 4.4: *Typical New York City tenements around the turn of the twentieth century. Source: Library of Congress.*

The Proceedings of the National Conference on Social Welfare offer a window into this expansive conception of the "tenement house problem" in the closing decades of the nineteenth century.[57] In 1885, one speaker appeared before the plenary to outline first principles that could govern campaigns to improve the "accommodations of workingmen." "It is well to remember," he argued, "that the government considerations should be: first, domestic privacy, the foundation of morality, second, sanitary condition, the mainspring of health; third, comfort, convenience, attractiveness."[58] Not all social reformers and charitable organizations endorsed such a morality-first approach to tenement reform. Public health advocates tended to focus primarily on the fight against infectious diseases and pushed for legislation that would improveme air circulation and eliminate cesspools.[59] Their concern was with the "abominable smells" and "kennel-stagnant refuse waters" that threatened the physical health of tenement residents and helped to explain the persistently high infectious disease mortality in U.S. cities.[60] Yet concerns about the link between tenement life and moral decay held considerable sway during the 1880s and 1890s – although they remain commonly "overshadowed" in academic works by discussions of sanitation and hygiene.[61] As the *New York Times* suggested in an 1894 article, the relative success or failure of tenement legislation could serve as "a propitious indication of progress toward a higher morality."[62] In 1890, James G. Schonfarber of Baltimore (who had become a central figure in the city's Knights of Labor movement) summarized this perspective when he argued at the National Conference on Social Welfare that:

> *"There are thousands of men who work hard, when they can secure employment, compelled to live in one or two rooms, with their families herded together like cattle; that children are born, live, and die in these narrow*

House Commission of 1900. New York: The Evening Post Job Printing House, 1900. p. 28.

[57]Lawrence Veiller. "The Tenement House Problem." *New York Times* 07/01/1899

[58]"Report of Committee on Charity Organization". P. 371 in: National Conference on Social Welfare. 1885. *Official Proceedings of the Annual Meeting 1885.* Boston: Geo. H. Ellis, 1885.

[59]Margaret Garb. 2003. "Health, Morality, and Housing: the 'Tenement Problem' in Chicago." *American Journal of Public Health* 93 (9): 1420-1430. Also see chapters 2-3 in: Russ Lopez. *Building American Public Health: Urban Planning, Architecture, and the Quest for Better Health in the United States.* New York: Palgrave Macmillan, 2012.

[60]Lopez (2012), p. 17. For an analysis of infectious disease mortality rates, see: Andrew Noymer and Beth Jarosz. 2008. "Causes of Death in Nineteenth-Century New England: The Dominance of Infectious Disease." *Social History of Medicine* 21 (3): 573-578; Philipp Ager, James J. Feigenbaum, Casper Worm Hansen, and Hui Ren Tan. 2020. "How the Other Half Died: Immigration and Mortality in US Cities." National Bureau of Economic Research Working Paper No. w27480.

[61]Robin Evans. "Rookeries and Model Dwellings." Pp. 93-117 in *Translations from Drawing to Building and Other Essays.* London: Architectural Association Publications, 1997. See Evans for a thorough account of tenement reform efforts in Victorian England.

[62]"The Tenement Question." *New York Times*, 12/30/1894.

> *homes, where there can be no privacy, and where only by the most earnest efforts can children be saved from moral death. Remember, ladies and gentlemen, we are not speaking of paupers, but of hard-working men and their families."*[63]

Others echoed this sentiment, linking the "privacy of our chamber" to protection against crime and temptation and treating the "lack of family privacy, and promiscuous toilet arrangements" as architectural features that "[invited] moral temptation" and led tenement residents to "suffer from mortal disease as well as moral decay."[64] To this group of social reform advocates, the case for privacy was intimately bound up with the protection of family life and moral innocence amidst the crowded conditions of urban life and the crime and prostitution of the inner city. In 1915, James H. Tufts, the Chair of the Philosophy Department at the University of Chicago, summed up this position as follows: "The lack of privacy, decency, comfort, and resources in which great multitudes of our city children are now brought up is a far stronger menace to family life than any ethical – or unethical – theory or any frequency of divorce."[65] The "dignity of the individual, the security of the threshold, [and] the right of privacy" therefore appeared as interlocking ideals of American citizenship that highlighted the unique stakes of urban reform around the turn of the twentieth century.[66] If the American family was forced to "[herd] together from morning to night in almost barbaric fashion," suffering "vulgar intrusion" and showing "no respect for each other's individuality," the argument went, one could scarcely expect that immigrants would grow into good citizens, or children into upstanding adults.[67] Grosvenor Atterbury, an urban planner who was active in the model tenement movement, went even further: At stake in the struggle for tenement reform was nothing less than "the cultivation of national sentiment — of the American idea as exemplified in our great patriots."[68] To the extent that architecture mapped the "moral condition of the family" and the cultural ideals of the country onto the layout of individual buildings and entire cities, the struggle over urban space was not really about space itself, but about the capacity of spatial experiences – and of urban residential life in particular – to preduce certain

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[63] "Charity from the Standpoint of the Knights of Labor." P. 60 in: National Conference on Social Welfare. 1890. *Official Proceedings of the Annual Meeting 1890*. Boston: Geo. H. Ellis, 1890.

[64] "Crime." P. 413 in: National Conference on Social Welfare. 1885. *Official Proceedings of the Annual Meeting 1885*. Boston: Geo. H. Ellis, 1885; "Health and Profit." *New York Times* 11/29/1896. Quoted in *Scientific American* Supplement 1093, 12/12/1896, p. 17471.

[65] James Hayden Tufts. "The Ethics of the Family." P. 36 in: National Conference on Social Welfare. 1915. *Official Proceedings of the Annual Meeting 1915*. Boston: George H. Ellis, 1915.

[66] "The Right to Privacy." *The Forest Republican* 12/05/1906.

[67] "Etiquette on Privacy in Life." *The Washington Herald*, 06/21/1914.

[68] Grosvenor Atterbury. 1907. "The Phipps Model Tenement Houses." *Charities and the Commons* 17, p. 57.

kinds of people and families.[69] Viewed through this lens, the tenement problem was not just a question of insufficient hygiene and sanitation but "an evil thing from every standpoint, social, industrial and hygienic" – and "one of the worst features" of this problem was "the demoralizing lack of privacy."[70]

One of the most prominent advocates of this expansive framing of the tenement problem was Jacob Riis. Born in a small coastal town in Denmark, Riis had emigrated to the United States in 1870 at age 21 after experiencing unemployment and a rejected marriage proposal. He arrived in New York and settled into a tenement apartment on the Lower East Side, finding work as a carpenter. After drifting through Philadelphia, Pittsburgh, and Chicago, he returned to the city and embarked on a career as a newspaper journalist, first as an editor at the *Brooklyn News* and then as a police reporter assigned to the Lower East Side for the *New York Tribune*.[71] Riis' career shift came during a transformative period for the American newspaper industry. Tabloid publications challenged the dominance of legacy publishers with articles that drove a hard editorial line and prioneered the so-called "muckraking" style of investigative journalism.[72] The invention of photographic film, flash photography, and portable "Kodak" cameras during the 1880s also meant that journalistic media did not solely have to rely on the written word but could gather portraits and documentary photographs outside of carefully lit studio settings. Riis leaned into this emerging news ecosystem and began to document life in New York's tenement districts. Armed with a camera and a portable flash, and often accompanied by other reporters and social reformers with whom he had made contact, he spend weeks touring New York's tenements to interview residents and photographically document their lives. His first comprehensive illustrated report was published in February 1888 in the *New York Sun*, but his breakthrough came one year later. In 1889, an eighteen-page reportage by Riis appeared in *Scribner's* magazine under the title "How the Other Half Lives". The following year, he republished the article as a standalone book, adding seventeen additional halftone prints of his photographs.[73]

His publications and public speeches established Riis' reputation as a prominent social reform advocate who linked health outcomes to the moral consequences of poverty

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[69] Evans (1997), p. 101.

[70] Theodore Roosevelt. "A Judicial Experience." *Outlook*, 03/13/1909, p. 564; Sophonisba P. Breckinridge and Edith Abbott. 1911. "Housing Conditions in Chicago." *American Journal of Sociology* 16 (4): 433-468. For a discussion of the politics of bedrooms, see: Elizabeth C. Cromley. 1991. "A History of American Beds and Bedrooms." *Perspectives in Vernacular Architecture* 4: 177-186.

[71] Alexander Alland. *Jacob A. Riis: Photographer and Citizen.* Millerton: Aperture, 1993. pp. 21-22.

[72] Louis Filler. *The Muckrakers.* Redwood City: Stanford University Press, 1993. Also see Chapters 7-8 in: Doris Kearns Goodwin. *The Bully Pulpit: Theodore Roosevelt, William Howard Taft, and the Golden Age of Journalism.* New York: Simon and Schuster, 2013.

[73] A sequel followed in 1892 under the title *Children of the Poor.*

and overcrowding and highlighted the importance of urban privacy as a core element of tenement reform. Riis pointed out that common definitions of tenements focused on the number of stories per building or the number of families residing on each floor. But these definitions missed what, to him, set apart the quarters of the immigrant working-class from the middle-class apartment buildings that had begun to appear in Manhattan in the late nineteenth century: The absence of privacy was "the chief curse of the tenement" and the distinguishing feature of New York's tenement life.[74] At night "there is scarce a room in all the [Lower East Side] district that has not one or more [lodgers], some above half a score, sleeping on cots, or on the floor. It is idle to speak of privacy in these 'homes.' "[75]

Privacy in city life

Social reform advocates focused their defense of privacy on two specific aspects of tenement life: the layouts of individual apartments and the overcrowding of neighborhoods. These two critiques operated at different spatial scales – one was focused on microspatial arrangements within buildings; the other was focused on the mesospatial concentration of people within a given area – and they offered different remedies to perceived social ills. Together, they can help us to grasp the scope of reform ambitions and the specific demands that were thrust into the court of public opinion and placed before legislators.

The first set of concerns focused on apartment and building layouts. Raiload tenements had walk-through bedrooms, so that any resident hoping to reach a room at the far end of the apartment (or exit the apartment in the reverse direction) first had to pass through a series of additional rooms. Some of these rooms were also directly accessible from hallways, with no foyer or kitchen to separate the spaces dedicated to intimate life from public halls and staircases. Such tenements offered "absolutely no privacy," according to Thomas Gorman, since "someone could stand on one side of the apartment [and look] into the dining room."[76] Indeed, the management of privacy was often about the management of movement and sight-lines. As the architectural critic Robin Evans has written, a "compartmentalized building" is characterized by "the movement through it, because movement [is] the only remaining thing that could give it any coherence."[77]

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[74]Jacob Riis. *How the Other Half Lives*. New York: Charles Scribner's Sons, 1890. p. 159.

[75]Riis (1890), p. 133. In a sign that Riis' benevolent intentions did not free him from racial prejudice, the passage continues with a pejorative comparison: The term privacy "carries no more meaning" in tenements that "would a lecture on social ethics to an audience of Hottentots."

[76]Thomas J. Gorman. *Growing Up Working Class: Hidden Injuries and the Development of Angry White Men and Women*. New York: Palgrave Macmillan, 2017. p. 48.

[77]Evans (1997), p. 78.

This sentiment was frequently expressed – in appeared at the National Conference on Social Welfare as well as in the pages of the *New York Times* or the *Real Estate Record and Builders Guide*, the trade publication of architects and building contractors in New York City. As long as the bedroom was "next to the parlor and having no door between, but only an archway, and both bedrooms being continually used as a passageway between the parlor, and the dining-room, kitchen and bathrooms", the *Guide* proclaimed that there could be "no privacy whatsoever."[78] The *New York Times* likewise opined in one 1894 article that the "flimsy partitions" of these railroad buildings made "privacy out of the question, and the turmoil in one family is common property of, and a most dangerous infliction upon, the rest."[79] Sexual intercourse, the beating of children, and the routine practices of everyday life could all be seen and heard from adjacent rooms and sometimes from communal areas as well. The dumbbell design of the late 1870s offered little improvement. It retained the scarcity of spatial sub-divisions, and the narrow airshafts it introduced presented yet another challenge to familial privacy: The distance between the windows that had by law to be placed in the walls of the airshaft to improve circulation was "so slight that domestic privacy is destroyed."[80] Indeed, a New York Tenement Commission observed in 1900 that through these shafts a person could easily hear "the sounds that occur in the rooms every other family in the building, and often in these narrow shafts the windows of one apartment look directly into the windows another apartment not more than five feet away."[81] The authors concluded that these conditions had "led numerous cases grave immorality."[82]

Social reformers proposed a variety of different measures to remedy this architectural and regulatory shortcoming. They suggested that tenement construction could take as its model the emerging middle-class apartment in which "the dining room and kitchen, together with the pantry" were grouped together at one end of the apartment while

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[78] "The Effect of the New Tenement House Law on Flats." *Real Estate Record and Builders Guide* 69, 02/01/1902. p. 202.

[79] "The Tenement Question." *New York Times*, 12/30/1894.

[80] Lawrence Veiller. "The Tenement House Problem." *New York Times* 07/01/1899. Also see: "Housing Reform in Chicago." P. 358 in: National Conference on Social Welfare. 1902. *Official Proceedings of the Annual Meeting 1902.* Boston: George H. Ellis, 1902.

[81] Robert W. DeForest and Lawrence Veiller (eds). *The Tenement House Problem: Including the Report of the New York State Tenement House Commission of 1900. Volume 1.* New York: MacMillan, 1903. p. 14.

[82] The architect Ernest Flagg offered a similar critique in 1900, writing that "perhaps the worst feature of this vicious type of dwelling is that there can be no privacy; for the family, for all the bedrooms have windows opening upon the narrow light wells, and when the houses are built side by side, each bedroom window is directly opposite to and only about 4 feet distant from another bedroom window in the adjoining house." See: Ernest Flagg. "A Profitable Tenement House." *Real Estate Record and Builders Guide* 66, 05/19/1900. p. 865.

"[throwing] the family bedrooms all to the rear, giving them far better light and air as well as greater privacy."[83] They proposed to introduce one toilet per family – instead of having a shared toilet between adjacent apartments, or one toilet per tenement floor – and to make this toilet accessible directly from the kitchen and the parlor, so that a person did not have to pass through another person's bedroom whenever nature called.[84] The introduction of such private bathroom facilities threatened to impose additional costs on developers who not only had to budget floorspace but also had to run additional fresh- and wastepaper pipes through a building. Yet to progressively-minded reformers like Mary Ellen Richmond – who emerged as a prominent figure in the charitable organization movement in Philadelphia before taking over as a director of the Russell Sage Foundation –, re-locating toilets into individual apartments and making additional "provisions for privacy, such as inside locks [in bathrooms]" were important steps towards "health and decency" in tenement life.[85] As Roy Lubove has argued, there was a pervasive belief among social reformers of the 1890s that "a private bathroom [...] and a grass-filled court would make model citizens out of juvenile delinquents and drunkards"[86] because they were placed, through architectural means, within the "self-contained territory" of the home and the cultural bosom of the family.[87]

Each of these proposals aimed to reinforce the cultural distinction between public and private through architectural means, to enclose the family apartment as the physical manifestation of domestic life, and to partition space within each apartment so that personal hygiene and sexual activity could proceed without any direct observers.[88] Such measures could, according to National Conference on Social Welfare chairman Hugh F. Fox, "give a privacy which is generally appreciated by the tenant" and protect standards of decency even in crowded urban settings.[89]

The second set of concerns focused on the concentration and distribution of people

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[83] "The House Hunter." *Real Estate Record and Builders Guide* 58, 11/29/1896. p. 793.

[84] "The Effect of the New Tenement House Law on Flats." *Real Estate Record and Builders Guide* 69, 02/01/1902. p. 204; "The Sanitary Reformation." *Real Estate Record and Builders Guide* 75, 02/11/1905. p. 301.

[85] Mary E. Richmond. "How Social Workers Can Aid Housing Reform." P. 327 in: National Conference on Social Welfare. 1911. *Official Proceedings of the Annual Meeting 1911.* Boston: George H. Ellis, 1911. Also see: "How to Build Tenements." *New York Times*, 10/12/1900.

[86] Lubove (1963), p. 174.

[87] Evans (1997), pp. 108-109.

[88] For a discussion of privacy and sexuality, see: James Ford. "Bad Housing and Ill Health." P. 240 in: National Conference on Social Welfare. 1919. *Official Proceedings of the Annual Meeting 1919.* Boston: George H. Ellis, 1919.

[89] "Centralizing Tendencies in Administration." P. 163 in: National Conference on Social Welfare. 1900. *Official Proceedings of the Annual Meeting 1900.* Boston: George H. Ellis, 1900.

across entire streets and neighborhoods. Jacob Riis had already identified overcrowding as a core problem of tenements, arguing in 1890 that "the nineteenth century drift of the population to the cities is sending ever-increasing multitudes to crowd them. The fifteen thousand tenant houses that were the despair of the sanitarian in the past generation have swelled into thirty-seven thousand." Where once two families had lived, "ten moved in."[90] This concern – which was less about the organization and subdivision of space in individual apartments than about the total number of people who resided in a given part of the city – was echoed by other social reformers during this time. Elgin Gould, a statistician and social reformer who had served in the Department of Labor and the Bureau of Labor Statistics before becoming involved in tenement reform efforts in New York City, observed that "in the general herding process every member of the family, from earliest childhood, becomes an easy prey to the forces which drag down."[91] He drew a direct connection between the protection of the single family home – which Gould regarded as the "character unit of society" – against the corrosive influences of urban society and tenement life, and the ability to prevent "social degeneration and decay."[92] Appearing at the annual meeting of the National Conference on Social Welfare in 1895, the Reverend Malcolm Dana from New York likewise proclaimed that "the overcrowding of the population [...] has confessedly evil effects of various and menacing kinds. All the privacy and sacredness that belong to home life are simply impossible in the tenements of the more densely populated wards of our cities."[93] The "herding together of such vast numbers of people" did not just enable infectious diseases to spread quickly among the urban poor but "[engendered] a train of evils" and "perversions" that undermined privacy in urban life and seemed to threatened the moral fabric of urban society.[94] Reform advocates who took this meso-spatial perspective focused on de-densification and the development of the suburbs, where free-standing single-family homes offered "prospects of greater privacy."[95] Newspapers also fueled this narrative, advertising new housing developments by emphasizing the privacy they ensured.[96]

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[90]Riis (1890), p. 2.

[91]Gould (1900), p. 381.

[92]Gould (1900), p. 378. Also see: Tenement House Committee Report of 1894 Report, p. 70.

[93]"Remedial Work in Behalf of our Youth." P. 235 in: National Conference on Social Welfare. 1895. *Official Proceedings of the Annual Meeting 1890*. Boston: Geo. H. Ellis, 1895.

[94]Lawrence Veiller. 1905. "The Housing Problem in American Cities." *The Annals of the American Academy of Political and Social Science* 25 (2): p. 252. Also see: James Ford. "Bad Housing and Ill Health." P. 240 in: National Conference on Social Welfare. 1919. *Official Proceedings of the Annual Meeting 1919*. Boston: George H. Ellis, 1919.

[95]"Joseph A. Farley's 108th St Residences." *Real Estate Record and Builders Guide* 64, 09/02/1899. p. 336. Also see an untitled article on p. 437 of *Real Estate Record and Builders Guide* 74, 08/27/1904.

[96]See, for example: "Hurley Heights Goes On the Market." *The Arizona Republican*, 5/3/1914;

These two priorities reflected conditions of residential life in New York City tenements, but they also betrayed a distinctly middle-class conception of what an ideal family home should entail, and of the standards of decency and propriety that ought to proliferate within such a home. Many social reformers came from relatively privileged backgrounds – the architect Ernest Flagg had studied at the École des Beaux-Artes in Paris; New York's first Tenement House Commissioner Robert W. DeForest had served as a trustee and executive officer of multiple companies before entering municipal politics; and model tenement advocate Alfred T. White was sufficiently wealthy to bequeath $15 million to his daughter upon his death in 1921 – and they often regarded their work "both as a civic duty and a religious calling."[97] Not surprisingly, their political programs also encoded the "tastes, prejudices, and worldview" of the upper social strata.[98] Bleecker Marquette, an Ivy League-educated social reform advocate who served as Executive Secretary of the Better Housing League, captured this latent class dimension of social reform ideology when he juxtaposed the lives of the urban middle-class against the modal experience of tenement life:

> *"At the end of his day your average man [. . .] sits down to a good dinner, reads, plays cards, dances, goes to the theater, or listens to music until he is sleepy and goes to bed in a clean warm bed in a clean fresh room. Your slum-dweller, at the end of his day, hangs from a strap in a car packed to suffocation, makes his dreary way from the crowded car past the garbage cans and refuse of the crowded street into the friction and discontent of his crowded home [. . .] All the conditions surrounding your slum-dweller have made for discomfort of body and discontent of soul. He has no peace and no privacy, he has not even elbow-room night and day. He sees no beauty and has no repose. His neighbor's wash shuts out his small patch of sky, and he must close such insufficient windows as his room may have if he would not hear his neighbors quarrels."*[99]

Unlike Adolphe Quetelet's *l'homme moyen* – the personification of population-level statistical averages, made popular by Quetelet's academic writings and army surveys in nineteenth-century France – the "average man" cited by Marquette was a class-specific ideal type that captured the cultural ideas and norms of social intercourse of a

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"Million Dollar Front Yards of New York Mansions." *The Sun*, 7/12/1914. Also see: Larry Millett. *Lost Twin Cities*. St. Paul: Minnesota Historical Society Press, 1992.

[97]Zachary J. Violette. *The Decorated Tenement: How Immigrant Builders and Architects Transformed the Slum in the Gilded Age*. Minneapolis: University of Minnesota Press, 2019. p. 12; "Alfred T. White, Brooklyn Philanthropist, Leaves $15,000,000 Estate to Daughter". *New York Times*, 02/20/1921.

[98]Violette (2019), p. 12

[99]Bleecker Marquette. "The Human Side of Housing." P. 346 in: National Conference on Social Welfare. *Official Proceedings of the Annual Meeting 1923*. Boston: George H. Ellis, 1923.

bourgeois stratum of American society.[100] Rituals of bodily cleaning and clothing and expectations of sociability and solitude all helped to "distinguish upper, middle, and lower class living."[101] This was partially due to practical constraints, since crowded homes and tenement apartments provided fewer opportunities for retreat and thereby blurred the spatial separation of the "front stage" and the "back stage" of domestic life.[102] It is noteworthy, for example, that Erving Goffman's distinction between these two spheres analogizes them to the "upstairs" and the "downstairs" of the home – an impossible luxury in tenement buildings that routinely crammed four apartments and families (plus additional boarders) onto a single floor. The social reformer Lawrence Veiller – himself the son of a factory owner from New Jersey – was well-aware of this, arguing in 1911 to an audience with similar class pedigree that "the vulgarity, the sordidness, the cheapness of life where there is neither privacy nor sunlight" was all the more apparent since it violated "the standards of decency you and I know of in our homes."[103] Such standards suggested a preoccupation with moral uplift, propriety, respectability, and spiritual development – "nostalgic notions" that were rooted in a social valuation of a person's mental life rather than their material security, and derived from the example of the single-family home that many such reformers had been accustomed to during their own upbringing.[104]

Throughout the late nineteenth and early twentieth centuries, campaigns for privacy in temenent life were thus infused with "romantic notions of the home [...] as a haven from the apparent evils of the industrial city" that reflected local conditions as well as the cultural and class-specific imaginaries of social reform advocates.[105] As Zachary Violette has argued, "the specter of the tenement increasingly haunted well-established Americans with horror real and imagined."[106] Housing reformers were genuinely appalled by the conditions in the city's tenements, which at least some of them had come to experience first-hand during excursions with various charitable organizations or municipal bodies. Yet they also tended to deflect blame "for the problems of inequality from structural economic and social factors and onto inanimate objects and the poor themselves," and their priorities and proposed solutions were occasionally at

[100] Adolphe Quetelet. *Physique Sociale, ou Essai sur le Développement des Facultés de l'Homme*, Vol. 2. Brussels: C. Muquardt, 1869.

[101] Debbie V. S. Kasper. 2007. "Privacy as a Social Good." *Social Thought & Research* 28: 165-189.

[102] Erving Goffman. *The Presentation of Self in Everyday Life.* New York: Anchor Books, 1959. p. 123.

[103] Lawrence Veiller. "Housing, Health, and Recreation." Proceedings of the National Conference on Social Welfare 1911, p. 316. Lefebvre (1991, p. 314) echoed a similar sentiment when he argued that privacy "will come only with the advent of the bourgeoisie."

[104] Violette (2019), p. 60.

[105] Violette (2019), p. 8.

[106] Violette (2019), p. 9.

odds with the customs and preferences of tenement residents – what Robin Evans has referred to as an "obvious alienation between reformers and unredeemed" that resulted from attempts by middle-class advocates and architects to mold poorer immigrant communities in their image.[107] Tenants often relied on the additional income that could be made from taking in boarders or from running a small family workshop out of one's apartment, even if this blurred the boundaries of the family and the home. Individual bedrooms were also unknown to many tenement residents, and especially to immigrants who had recently arrived from rural communities overseas.[108] For at least some recently arrived immigrants, the conditions of tenement life were thus preferable over realistic alternatives. For example, a move to outer boroughs likely implied a serious income loss in the absence of a transportation infrastructure that would have allowed workers to commute daily into inner city production sites.[109] As Roy Lubove has argued, "the best interests of the immigrant and the community, as the housing reformer defined them, did not always coincide with the immigrant's definition of those same interests."[110] A calculus borne of economic necessity also tended to be "antithetical to middle-class notions of domesticity," in part because it challenged the sharp distinction between protected private homes and the public life of the street and the social valuation of the single-family domicile.[111] But when social reformers articulated a theory of urban privacy, it remained firmly anchored in such middle-class notions. And when they began to campaign explicitly for the encoding of privacy norms in state and municipal laws, their aim was to secure the enjoyment of a particular version of privacy through the twin forces of legislative action and executive intervention. Their view was directly informed by the empirical realities of poverty and the abysmal conditions in many tenement buildings, but it necessarily remained a partial "view from somewhere"[112] – in this case, a view from the vantage point of class privilege.

Political mobilization and political opportunity structures

The sections above have documented the incorporation of privacy claims – moralizing and class-specific as they were – into the tenement reform agenda, as well as the two-pronged focus on microspatial apartment layouts and mesospatial distributions of people in the inner city. But how were the concerns of the social reform movement

[107]Violette (2019), p. 13; Evans (1997), pp. 111-112.

[108]Violette (2019), pp. 67 and 73.

[109]Lubove (1963), p. 96

[110]Lubove (1963), p. 97.

[111]Violette (2019), p. 67.

[112]Patricia Hill Collins. *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*. New York: Routledge, 2002.

and the muckracking energy of writers like Jacob Riis translated into targeted political campaigns and, ultimately, legislative action? As Table 4.1 illustrates, decades of social reform agitation and several investigative commissions had often resulted in no legislation at all, and amendments that did pass had been severely limited in their scope. In this section, I explore the interplay of personal leadership and political opportunity structures that allowed social reformers to build a political coalition able to blunt attacks by the developers' lobby and willing to pass the 1901 Tenement House Act. I focus on two players in particular: Lawrence Veiller and Theodore Roosevelt. They were not the only relevant actors during this period of political mobilization and legislative action, yet they proved to be key advocates for the cause of tenement reform and key decision-makers endowed with institutional knowledge as well as institutional influence. Their converging trajectories help to shed light on the process through which the abstract logic of privacy found its way from the bully pulpit of social reformers into the language of the law.

Lawrence Veiller had been raised in an Episcopalian household but came to embrace a secular political outlook as an adult: To him, civic responsibility rather than religious faith sat at the center of American public life.[113] After graduating from the City College of New York in 1890, Veiller sought to put this principle into action by joining New York's Charity Organization Society and, later, the city's Buildings Department. He was put to work in the agency's plans division, which was tasked with reviewing the blueprints submitted by developers for new tenement construction. The work gave him first-hand knowledge of the politics of urban development in New York City, and also exposed him to the unique (and uniquely squalid) conditions encountered by tenement residents in some of the city's most densely populated neighborhoods. Reflecting on these conditions in 1905, he assessed them in broad terms: The "change from agricultural to industrial life" had resulted not only in new threats to public health but in "physical and moral degradation" that threatened the development of a modern urban personality and the fabric of American society.[114] The only path forward, argued Veiller, was a re-introduction of the single-family residential experience into the American city, achieved through residential decentralization and the development of the suburbs.[115] Such efforts had already appeared in New York City during the late 1870s, when architects like Alfred T. White developed so-called "model tenements" on relatively cheap land in Brooklyn.[116] But Veiller imagined a much more ambitious

[113]Lubove (1963), p. 130.

[114]Veiller (1905), pp. 248 and 251.

[115]Veiller (1905), p. 263. Also see Lubove (1963), pp. 131ff.

[116]Robert H. Bremner. 1958. "The Big Flat: History of a New York Tenement House." *The American Historical Review* 64 (1): 54-62; Joanna Merwood-Salisbury. 2019. "Architecture as Model and Standard: Modern Liberalism and Tenement House Reform in New York City at the Turn of the Twentieth Century." *Architectural Theory Review* 23 (3): 345-362. Reform-oriented architects had

transformation of the city that involved the relocation of hundreds of thousands tenement residents to outer boroughs, from where they could commute into inner-city factories and workshops while enjoying a relatively quiet home life that avoided "the changed relation of the sexes, the absence of privacy, the intrusion of strangers upon the family life, the use in common of facilities of living where propriety and decency demand their restriction to a single family, [and] the constant sight and sound of debasing influences from which escape is impossible."[117]

Unlike Riis, who had build his career and influence on public advocacy and remained skeptical that the cause of tenement reform could be advanced through existing government institutions, Veiller was directly attuned to the "technicalities of the political process," partially due to his work within the municipal bureaucracy.[118] He was also intent on building alliances with the city and state leadership that could counter the political power of land developers and their influence within Veiller's own agency, the Buildings Department. As he argued,

> *"It is obvious that the remedy for the conditions lies with the proper regulation by the state of the conditions under which [such types of buildings]tenement buildings] may be constructed and operated. The directions effort should take, therefore, are toward legislative control and municipal regulation, and this is so in every large city."*[119]

Veiller received a chance to put this approach into practice just before the turn of the century. In 1894, the state legislature had bowed to pressure from the social reform movement to establish an investigative commission that conducted a thorough survey of New York City tenements. When the commission published its two-volume report in January 1895, it received extensive newspaper coverage and helped to galvanize public support for the cause of tenement reform.[120] The commission's recommendations

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sought to use the tools of their trade for a socially impactful purpose since at least the middle of the nineteenth century. In 1857, for example, the city inspector George W. Morton proposed that New York City establish an architectural college with the specific mission of helping to mold newly arrived immigrants into reputable American citizens. See p. 17 in: Richard Plunz. *History of Housing in New York City.* New York: Columbia University Press, 1990. Also see p. 109 in Evans (1997).

[117] Veiller (1905), p. 253. For a discussion of suburbanization as a remedy to the "social question", also see pp. 215ff in Violette (2019).

[118] Lubove (1963), p. 137.

[119] Veiller (1905), p. 257.

[120] "Tenement Reform." New York Times, 01/18/1895; "For Better Tenements." New York Times, 01/18/1895; "The Homes of the People." New York Times, 02/01/1895; "The Tenement House Bill." New York Times, 03/25/1895. For a text of the report, see: New York Legislature. *Report of the Tenement House Committee as Aluthorized by Chapter 479 of the Laws of 1894, Transmitted to the Legislature January 17, 1895.* Albany: James B. Lyon, State Printer, 1895.

ultimately did little to change the layout of New York tenements, which continued to resemble the so-called "dumbbell" model that dated back to the 1870s. But social reformers received another chance in 1898: A new charter for Greater New York City had stipulated that a municipal commission be established to revise the city's building code. Convinced that such a commission would be subjected to extensive lobbying from New York City developers, Veiller appeared at the annual meeting of the Charity Organization Society (COS) in April 1898 to propose the establishment of an independent tenement society that could "present united opposition to bad legislation arising either at Albany or in the Municipal Assembly and affecting the tenement house question."[121] The idea of an independent society was voted down, but in December 1898 the COS endorsed the creation of a subsidiary tenement house committee. Veiller became its secretary and executive officer.[122]

Over the next two years, Veiller pursued a three-pronged approach to galvanize support for tenement reform and to expand the ambitions of such reform efforts beyond the limited recommendations made by the 1894 commission. First, he directly attacked the work of the Building Code Commission in writing and at municipal hearings.[123] The commission included representatives of the city's building lobby but "no representative of the tenement house interest," Veiller proclaimed, and its reports had almost entirely ignored recommendations offered by the Charity Organization Society and advocates from the Model Tenement movement.[124] When the building code was nonetheless passed by the Municipal Assembly – a vote that Veiller attributed to the continued influence of the building lobby in Tammany Hall –, he turned his focus towards public advocacy. Support for tenement reform was already high in New York, but Veiller sought to use the power of the spectacle to galvanize it further and secure in the

[121]Lilian Brandt. *The Charity Organization Society of the City of New York, 1882-1907: Twenty-Fifth Annual Report for the Year Ending September Thirtieth, Nineteen Hundred and Seven.* New York: Charity Organization Society, 1907. p. 45. For developer attempts to shape municipal policy and codes, see: Adolph Bloch. 1909. "History of Tenement House Legislation." *Real Estate Record and Builders Guide* 84 (July 21 1909), p. 227.

[122]Roy Lubove. 1961. "Lawrence Veiller and the New York State Tenement House Commission of 1900." *The Mississippi Valley Historical Review* 47 (4): 659-677.

[123]Lubove (1961), p. 667. For a report of such meetings, see: "Building Code Attacked." New York Times, 09/10/1899.

[124]New York Legislature. *Report of the Special Committee of the Assembly appointed to Investigate the Public Offices and Departments of the City of New York and of the Counties Therein Included, Transmitted to the New York State Legislature January 15, 1900.* Albany: James B. Lyon, State Printer, 1900. p. 3457.

court of public opinion a victory that had remained elusive in City Hall.[125] The result was a Tenement House Exhibition, held in February 1900 at the Sherry Building at Thirty-eighth Street and Fifth Avenue. The 10,000 visitors who attended the exhibition during its month-long run were treated to photographs created by Jacob Riis as well as maps and statistical graphs that illustrated "the close relations between bad housing, bad health, bad morals, and bad citizenship."[126] One of the attendees was the state's governor himself, Theodore Roosevelt. For Veiller – who had become convinced that developer resistance in New York City was likely to stall municipal initiatives, and that the best path towards "restrictive legislation" and "the application of state power to enforce justive" ran through the gubernatorial office – this offered an opportunity to pursue the third prong of his strategy and gather political support at the state level.[127]

Roosevelt was no stranger to the problem of urban reform: He had served as a state assemblyman from 1882 to 1884, running on an anti-corruption agenda that promised to challenge the centralization of power in New York's mayoral office and to fight tax evasion by American industrialists. But he had also become involved in tenement reform, using his influence to push for the eradication of unlicensed cigar manufacturing in residential buildings. Roosevelt had originally been opposed to state legislation on the issue, but changed his position after touring the city's tenements in 1882. As he later observed in his autobiography,

> *"I have always remembered one room in which two families were living. There were several children, three men, and two women in the room. The tobacco was stowed about everywhere, alongside the foul bedding, and in a corner where there were scraps of food. The men, women, and children in this room worked by day and far on into the evening, and they slept and ate there. There were Bohemians, unable to speak English, except that one of the children knew enough to act as interpreter."*[128]

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[125]For developer resistance to tenement reform (and threats to developer profits), see: "The Tenement Houses." *New York Times*, 04/11/1901. Also see p. 69 in: Andrew S. Dolkart. *Biography of a Tenement House in New York City: An Architectural History of 97 Orchard Street.* Charlottesville: University of Virginia Press, 2006.

[126]Lawrence Veiller. 1979. "The Reminiscences of Lawrence Veiller." New York Times Oral History Program and Columbia University Oral History Collection, Part IV (1-219). Available in microfilm at: https://dx.doi.org/10.7916/d8-a82h-x016 (Accessed March 13, 2020). pp. 15-16; Elgin R. L. Gould. 1900. "The Housing Problem in Great Cities." *Quarterly Review of Economics* 14: 378-393. The exhibition attracted significant public attention and commentary, with Gould calling it "a noteworthy event in metropolitan sociological history." See: Also see Lubove (1961), pp. 668-669.

[127]Lubove (1963), pp. 125-129.

[128]Theodore Roosevelt. *Theodore Roosevelt: An Autobiography.* New York: The Macmillan Company, 1913. p. 80.

The experience also helped to convince Roosevelt that progressive reformers could not rely solely on the courts to advance the cause of urban reform. After New York's then-governor Grover Cleveland had signed the cigar-manufacturing bill into law, the Court of Appeals had stepped in to declare it an unconstitutional infringement of the state upon the private home. Roosevelt disagreed. As he later wrote, "the courts were not necessarily the best judges of what should be done to better social and industrial conditions," since judges "knew nothing whatever of tenement-house conditions; they knew nothing whatever of the needs, or of the life and labor, of three-fourths of their fellow-citizens in great cities."[129] If the American state were to mobilize its powers to better the conditions for the immigrant working-class, the initiative had to come from the legislature and the executive.

After a temporary break from politics – during which he tried his hand as a cattle rancher in North Dakota – and a failed mayoral campaign, Roosevelt returned to New York politics as the city's Police Commissioner from 1895 to 1897. He forged a close connection with the office of mayor William Strong during these years, particularly when it came to the enforcement of laws that aimed the curb the allegedly immoral influence of gambling, prostitution, and Sunday liquor sales.[130] Roosevelt's concerns as police commissioner also extended to the city's squalid tenements, which he regarded as incompatible with the "exacting duties of American citizenship."[131] This concern with "things that were wrong, pitifully and dreadfully wrong, with the tenement homes and the tenement lives of our wage-workers" drew Roosevelt into the orbit of social reformers like Jacob Riis during the mid-1890s.[132] He would later write that the two men "looked at life and its problems from substantially the same standpoint. Our ideals and principles and purposes, and our beliefs as to the methods necessary to realize them, were alike."[133] In particular, both believed in the need to uplift the material as well as spiritual wellbeing of the working masses, and in the power of government to do so.

As Police Commissioner, Roosevelt was also a member *ex officio* of the Metropolitan Board of Health. Starting soon after its founding in 1866, and continuing into the twentieth century, the Board conducted regular excursions into the city's tenement

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[129]Roosevelt (1913), p. 81.

[130]Lubove (1963), p. 124.

[131]Roosevelt (1913), p. 80.

[132]Roosevelt (1913), p. 174. In his autobiography, Roosevelt referred to Riis as "the man who was closest to me throughout my two years in the Police Department." For a discussion of the two men's relationship, see pp. 203-217 in: Doris Kearns Goodwin. *The Bully Pulpit: Theodore Roosevelt, William Howard Taft, and the Golden Age of Journalism.* New York: Simon and Schuster, 2013.

[133]Roosevelt (1913), p. 174. For a description of the relationship between Riis and Roosevelt from Riis' perspective, see Chapter XIII in: Jacob Riis. *The Making of an American.* New York: The Macmillan Company, 1901.

districts to assess local conditions and identify so-called "public health nuisances" like overflowing cesspools and blocked fire escapes. Roosevelt joined some of these excusions – partly at the personal urging of Jacob Riis, who had recognized the importance of getting city officials to see tenement conditions with their own eyes –, and they highlighted to him the "gasping misery of the little children" and the lack of "decency and comfort" afforded to the city's working class.[134] The excursions strengthened Roosevelt's impression that the misery of the masses was inextricably linked to graft and corruption at the top. They "taught [him] that not a few of the worst tenement-houses were owned by wealthy individuals, who hired the best and most expensive lawyers to persuade the courts that it was 'unconstitutional' to insist on the betterment of conditions."[135] These elites used the power of the law and their influence in City Hall to thwart "movements against unrighteousness" and "for industrial fair play and decency", and thus prevented work that was "in the interest of those men, women, and children on whose behalf we should be at liberty to employ freely every governmental agency."[136]

Roosevelt left New York politics in the late 1890s, serving as Assistant Secretary of the Navy and then as Colonel of the so-called "Rough Riders" regiment during the Spanish-American war. Upon returning to the United States, he was recruited by Republican party bosses to contest the next gubernatorial election in New York, which he won by a narrow margin in 1898. By the time Roosevelt arrived in the New York State Executive Mansion and attended the Tenement House Exhibition during the spring of 1900, his politics were already shaped by forces that would help to open up a political opportunity for tenement reform at the turn of the century: He had taken a personal interest in tenement reform as a central element of the progressive politics upon which he sought to build his political career; he had experienced the obstacles to legislative action put forth by real estate developers and sanctioned by the state's court system; and he had began to build an alternative political base by forging close personal and institutional alliances with the social reform movement in New York City.

In the spring of 1900, a constellation of factors thus converged and paved the way for the appointment of a dedicated state tenement commission and the drafting of a new tenement law that was considerably more ambitious than earlier reform efforts. It brought together individual leadership and public resonance (which had both developed over a prolonged period) with a temporary opening in the opportunity

[134]Roosevelt (1913), pp. 199-200. As he later wrote, "it is one thing to listen in perfunctory fashion to tales of overcrowded tenements, and it is quite another actually to see what that overcrowding means."

[135]Roosevelt (1913), p. 200.

[136]Roosevelt (1913), p. 201.

structure of New York politics.[137] Veiller and Robert DeForest – a lawyer who had served as president of the New York Charity Organization Society since 1888 – had helped to elevate the cause of tenement reform among social reform organizations and the New York City public and had mapped out a strategy that could counter the influence of the developers' lobby over the municipal assembly by appealing directly to the state government in Albany. They now encountered a governor who was not only receptive to the cause of tenement reform but who was also committed to the use of executive power and willing to whip the state legislature to implement a progressive political agenda.

Governor Roosevelt was sympathetic to Veiller's expansive vision. As he had told the social reformer during the Tenement House Exhibition, "every wretched tenement that a city allows to exist revenges itself on the city by being a hotbed of disease and pauperism" and a disease that "[eats] at the body social and the body politic."[138] But the next hurdle in Albany was to convince a reluctant state legislature to adopt a similar stance and appoint a commission that could make the required recommendations for legislative action. Veiller and DeForest had decided to bypass the Board of Aldermen in New York and instead drafted legislation that would appropriate state funding to the study of tenement conditions. City politicians and developers did not openly oppose such a measure – since it was thought to be highly popular among New York's population – but exerted pressure on state legislators behind the scenes, stalling the bill's progress.[139] Roosevelt finally intervened and used his influence in Republican Party politics to persuade the chairman of the relevant legislative committee in Albany to advance the bill. Yet it soon encountered another hurdle: Under New York law, local measures passed by the state legislature had to be sent to the cities to which they pertained before being returned to Albany and put up for a vote in the state assembly. Municipal politicians in New York planned to use this procedural quirk to their advantage, delaying consideration of the bill until the legislature adjourned and thereby killing it. It would then have to be re-introduced during the following legislative session, with equally uncertain outcomes. Veiller responded to this scenario

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[137] Peter K. Eisinger. 1973. "The Conditions of Protest Behavior in American Cities." *American Political Science Review* 67 (1): 11-28; Doug McAdam. *Political Process and the Development of Black Insurgency, 1930-1970*. Chicago: The University of Chicago Press, 1999; Marshall Ganz. 2000. "Resources and Resourcefulness: Strategic Capacity in the Unionization of California Agriculture, 1959-1966." *American Journal of Sociology* 105 (4): 1003-1062; Pamela Oliver and Hank Johnston. 2000. "What a Good Idea! Ideologies and Frames in Social Movement Research." *Mobilization: An International Quarterly* 5 (1): 37-54; David S. Meyer and Debra C. Minkoff. 2004. "Conceptualizing Political Opportunity." *Social Forces* 82 (4): 1457-1492; Marshall Ganz and Elizabeth McKenna. "Bringing Leadership Back In." Pp. 185-202 in: *The Wiley Blackwell Companion to Social Movements*. Hoboken: Blackwell Publishing, 2018.

[138] Veiller (1979), p. 20.

[139] Veiller (1979), pp. 21-22.

by re-writing the scope of the bill: Instead of having it pertain only two New York City, the revised version covered all "cities of the first class" (of which there were only two: New York City and Buffalo), thereby turning it into a state measure and eliminating the need for municipal consideration and the possibility of municipal stalling tactics.[140] The bill passed, and the state's Tenement House Commission came into existence under their chairmanship of Robert DeForest.

Between June 1900 and February 1901, the Commission went to work. It compiled a detailed overview of past tenement reform attempts as well as a survey of contemporary tenement conditions. It also organized conferences, public forums, and walking tours of tenement districts for New York City journalists as a form of direct outeach and public relations work.[141] By the spring of 1901, the Commission was ready to publish its report. Veiller was tasked with translating its recommendations into a legislative document, which he did by April 1901. The bill passed speedily through a sympathetic legislature, was adopted without amendments, and signed into law by Theodore Roosevelt's successor as New York governor – and close political ally – Benjamin Odell Jr.[142]

The scope of the law reflected the ambitions of the tenement reform movement to a greater degree than previous legislation in 1867 and 1879. Instead of focusing solely on air circulation and fire safety, the provisions included in the 1901 law aimed more generally to contain the deleterious effects of tenement life on the physical *as well as* the moral constitution of residents, and to protect privacy in urban life alongside access to fresh air and safe building egress routes. Section 2 led with a conceptual distinction between "public" halls and staircases on the one hand, and private apartments on the other hand – a distinction that echoed the larger public/private dichotomy and a preoccupation with the privacy of the family home. Sections 59 and 62 addressed concerns about narrow air shafts and interior courtyards, mandating minimum dimensions for each (with extra clauses added that made the width of courtyards contingent on the overall height of a building). Sections 60 and 68 regulated the placement and layout of windows, specifying that "no window except

[140] Veiller (1979), p. 24. One lesson Veiller took from this legislative maneuvering: "getting legislation passed to which there was opposition was very much like warfare and needed generalship."

[141] Veiller (1979), p. 28. The Commission received more than 4700 comments on tenement reform from the public and from housing experts.

[142] Odell Jr. was at the time a so-called "boss" in the state's Republican Party, and could command the allegiance of the Republican-dominated state legislature with relative ease and ample promises of political favors. For a detailed historical discussion of "boss rule" politics, see: James A. Kehl. *Boss Rule in the Gilded Age: Matt Quay of Pennsylvania.* Pittsburgh: University of Pittsburgh Press, 1981. Developers resisted the 1901 law even after its passage, forming a Tenement House Committee within the United Real Estate Owners' Association in July 1901 to challenge (unsuccessfully) the constitutionality of the Tenement House Act.

windows of water closet compartments, bathrooms or halls shall open upon any offset or recess less than six feet in its least dimension." Section 95 mandated the inclusion of "a separate water-closet in a separate compartment within each apartment" for all newly erected tenements, and Section 100 specified that "no tenement house shall be used for a lodging house." All of these provisions reflected concerns about the organization of space within buildings and the consequences of such organization on the visibility of individuals and the privacy of entire families. But the most explicit defense of urban privacy came in Section 75, aptly titled "Privacy". It mandated that "in every apartment of three or more rooms in a tenement house hereafter erected, access to every living room and bedroom and to at least one water closet compartment shall be had without passing through any bedroom." In one sentence, it spelled an end to the railroad and dumbbell layouts that had dominated in New York City since the middle of the nineteenth century. Future construction plans would more closely resemble miniaturized versions of middle class apartment buildings: Upon entering an apartment, a person would not face a string of interconnected walk-through rooms but a small foyer or parlor from which doors led into adjacent chambers (Fig. 4.4). As had been the case in some model tenements of the 1870s and 1880s, multiple rooms were increasingly grouped together into little apartments that could be accessed through a single front door, while doors between public hallways and private bedrooms began to disappear. One social reformer summed up the advantages of such layouts as follows: "Each apartment is entered from a short private hall. No bed-rooms open into each other or into the living rooms, thus securing complete family privacy."[143]

In the following decade, the New York law was adapted and adopted by cities across the United States. Boston, Cleveland, Jersey City, Syracuse, and Kansas City all established commissions to develop municipal legislation modelled on the New York state law. The Civic League in Yonkers took a page out of Veiller's playbook, staging its own tenement exihibition (with Veiller as an invited speaker) and pushing for the adoption of a similar law. Pittsburgh saw similar political mobilization. Baltimore, St. Louis, Chicago, Buffalo, and Hartford launched studies of local tenement conditions based on New York's example. San Francisco, Portland, Philadelphia, Washington DC and New Orleans saw the establishment of citizen-led commissions. By 1912, 38 cities had housing associations focused on tenement reform that were often advised by representatives from the New York Tenement House Committee.[144] Kentucky passed a state law based on Veiller's recommendations in 1910; followed by Massachusetts in 1912, Indiana and Pennsylvania in 1913, California and Minnesota in 1917, and Iowa in 1919. And by 1920, 20 cities had housing codes that implemented new tenement housing codes, while 20 more had amended existing ordinances despite resistance from

[143]W. Alexander Johnson. 1885. "Report of Committee on Charity Organization." Proceedings of the National Conference on Social Welfare 1885, p. 370.

[144]Lubove (1963), pp. 143-144.

Figure 4.5: *Building floor plans submitted after the passage of the 1901 Tenement House Act that mirror layouts common in middle-class apartments. Source: New York Public Library.*

local developers.[145]

In the wake of the 1901 law's passage, conversations about privacy also remained a regular fixture in the social reform community. Lawrence Veiller continued to advocate for solutions to the tenement problem that addressed sanitary concerns alongside the "perverted citizenship" of immigrant residents that he understood to stem from a lack of privacy and the unmediated exposure to the social ills of the city.[146] Others echoed these concerns. Two years after the passage of the Tenement House Act, the Commissioner of Public Charities in New York City appeared at the annual National Conference on Social Welfare to applaud buildings that were "so constructed as to afford opportunity for reasonable privacy."[147] Instead of accepting "the old-fashioned, open dormitory, with its long rows of beds" as a given, he urged a continued focus on the sub-division of residential space to protect private spaces for families and single lodgers "according to their habits, capacities, occupations and tastes." Yet there was also a sentiment that the 1901 law only constituted a first step towards addressing the "darker aspects of city life" and, specifically, the "crowds in the streets" and

[145]Lubove (1963), p. 146.

[146]Lawrence Veiller. "Housing, Health, and Recreation." Proceedings of the National Conference on Social Welfare 1911, p. 316. Lefebvre (1991, p. 314.

[147]Homer Folks. 1903. "Disease and Dependence." Proceedings of the National Conference on Social Welfare 1903, p. 338.

"the lack of privacy in the tenement house."[148] The problems of "depression, lowered vitality and irritability, due to house gloom, to noise, to lack of privacy and the general wretchedness of slum living" continued to produce "many a mental wreck," in the words of one social reform advocate.[149] Privacy was still "sacrificed" in overcrowded neighborhoods, where multiple families kept on living in close proximity to each other and multiple generations often lived and slept in a single room.[150] Or, as another attendee of the National Conference on Social Welfare noted: Immigrants arriving in American cities "have less privacy than they have ever enjoyed and they have more discomfort, dirt and demoralization than they are used to. This is their first acquaintance with what America means."[151]

As Veiller had already argued in the 1890s, the ultimate solution seemed to be a thinning-out of the inner city rather than merely a rearrangement of walls and windows. As long as "the proximity of the neighbors compels man to withdraw into his conscience for privacy," familial privacy appeared scarce in the American city. Helen Hutchinson of the Young Women's Christian Association summed up this sentiment in 1922, arguing that overcrowding turned "the smallest happenings [into] great events. [...] The individual is lost in the group."[152] While "both physical and moral disease may be somewhat lessened by subdiving our houses and so giving each family a certain degree of privacy," the long-term ambitions of many social reform advocates pointed towards the development of suburbs and outer boroughs, where cheaper land allowed for the construction of single-family homes and apartment buildings that had "none of the ordinary disadvantages of flats because the rooms are spacious, the surroundings are pleasant, and the occupation of a whole floor gives the tenant a sense of privacy not to be obtained in a better populated building."[153] Yet this mesospatial reorganization of urban space and redistribution of people was largely unaddressed by the 1901 law, which had only marginally reduced the percentage of each lot that could be occupied by buildings, and had made no provisions to substantially reduce the number of

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[148] Jane Addams. "Neighborhood Improvement." Proceedings of the National Conference on Social Welfare 1904, p. 475.

[149] Albion F. Bacon. 1918. "Housing – Its Relation to Social Work." Proceedings of the National Conference on Social Welfare, p.198.

[150] Octavia Hill Association of Philadelphia. "Housing Conditions in Philadelphia." Proceedings of the National Conference on Social Welfare 1906, p. 370.

[151] Ms. Balch. "Minutes and Discussions." Proceedings of the National Conference on Social Welfare 1906, p. 593. For additional discussions, see the following non-exhaustive selection: Pp. 241, 316, and 327 of the 1911 Proceedings; pp. 69, 112, 154 and 333 of the 1914 Proceedings; pp. 240ff of the 1918 Proceedings; pp. 332-335 of the 1921 Proceedings; and p. 296 of the 1922 Proceedings.

[152] Proceedings of the National Conference on Social Welfare 1922, p. 296.

[153] John Ihlder. "Extent of the Housing Shortage in the United States." Proceedings of the National Conference on Social Welfare 1921, p. 335; *Real Estate Record and Builders Guide* 27, 08/27/1904, p. 437.

families living on each floor.

Assessing legislative impact

It is one thing to pass a law, yet quite another to ensure that its provisions are enforced by street-level bureaucrats.[154] Absent a functioning enforcement apparatus and a corps of officials able and willing to hold stakeholders accountable, a law's provisions are aspirational at best, and the long-term impact of political mobilization can dissipate.[155] In this final section, I therefore assess the impact of the 1901 Tenement House Act on New York City's urban environment. I focus on the two areas of concern identified by social reform advocates in the years and decades leading up to the law's passage: the microspatial organization of space within individual apartments and buildings, and the mesospatial concentration of people in specific tenement districts.

Within a decade of the adoption of the 1901 Tenement House Act, almost 30,000 buildings were erected in accordance with the law's provisions (Fig. 4.6). Their permitting and construction was supervised by the newly created Department of Tenements under the leadership of Robert DeForest. The relationship between this department and Tammany Hall continued to be strained,[156] yet DeForest relied on a growing number of inspectors and administrators to ensure, for example, that building floorplans used on construction sites matched the plans that had been submitted for approval to the city. After 1902, inspectors could rely on so-called "I-Cards" to certify compliance – these were preprinted forms that allowed building inspectors to check off each construction and retrofitting requirement of the 1901 law, starting with an inspection of the roof and ending in the cellar.[157]

A key enforcement issue was the inclusion of private toilet facilities for each apartment, since this complicated building layouts and increased costs for developers.[158] Toilets can thus serve as a useful indicator that helps to establish a lower-bound estimate of enforcement efficacy and of the scope of microspatial changes. Annual reports from

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[154]Michael Lipsky. *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*. New York: Russell Sage Foundation, 1980; Vincent Dubois. *The Bureaucrat and the Poor: Encounters in French Welfare Offices*. London: Routledge, 2016.

[155]For a discussion of the enforcement challenge, see: Robert Baldwin, Martin Cave, and Martin Lodge. *Understanding Regulation: Theory, Strategy, and Practice*. Oxford: Oxford University Press, 2011; Bettina Lange. "Sociology of Regulation." Pp. 93-108 in: *Research Handbook on the Sociology of Law*, edited by Jiří Přibáň. Cheltenham: Edward Elgar Publishing, 2020.

[156]Letter of Robert DeForest to Jane Addams, 11/25/1903. Jane Addams Project Digital Archives.

[157]Dolkart (2006), p. 84.

[158]The required underground sewage infrastructure had been available since the late-nineteenth century in almost all tenement districts, so the required changes were primarily above ground changes in layouts and piping.

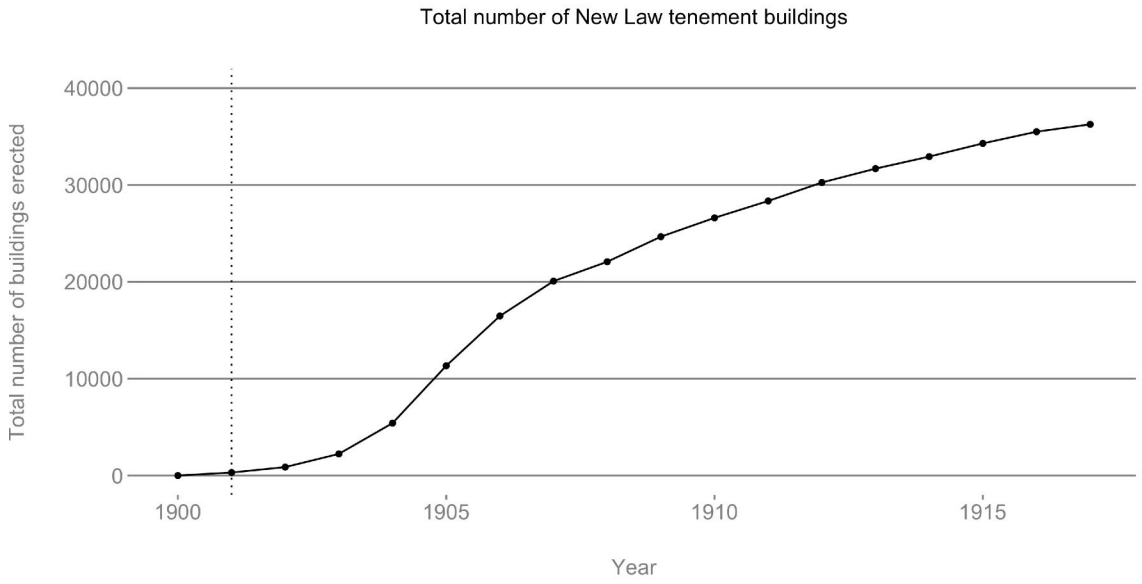

Figure 4.6: *Total number of tenement buildings constructed under the authority of New York's 1901 tenement law – the so-called "New Law" tenements. Source: New York Department of Tenements.*

the Department of Tenements indicate that, prior to 1901, only a minority of newly constructed apartments in New York City had private toilet facilities. (The city did not keep regular statistics prior to the 1901 law and did not conduct comprehensive studies of toilet facilities during irregular tenement surveys, making it impossible to establish trends for previous decades.) But the percentage of newly constructed bathrooms jumped immediately after the 1901. By 1910, private bathrooms had become nearly ubiquitous in newly built tenements (Fig. 4.7). The necessary sanitation infrastructure had already been in place in much of New York since the late nineteenth century, so the sudden increase was not simply a result of better wastewater infrastructure. Instead, it realized the 1901 law's privacy mandate by democratizing access to private bathrooms. On New York's Lower East Side, the change was so remarkable that families would visit on weekends merely to marvel at the construction of courtyards and bathrooms, which were unfamiliar to many tenement residents.[159] What had begun as a set of claims about urban privacy became, through the construction of the built environment, an actual experience for a growing number of Americans.

But the ambition of many social reformers – including Veiller himself – went beyond microspatial changes in building layouts. The aim was to replace the "promiscuity in

[159]New York Department of Tenements. 1904. *Annual Report*, p. xvi

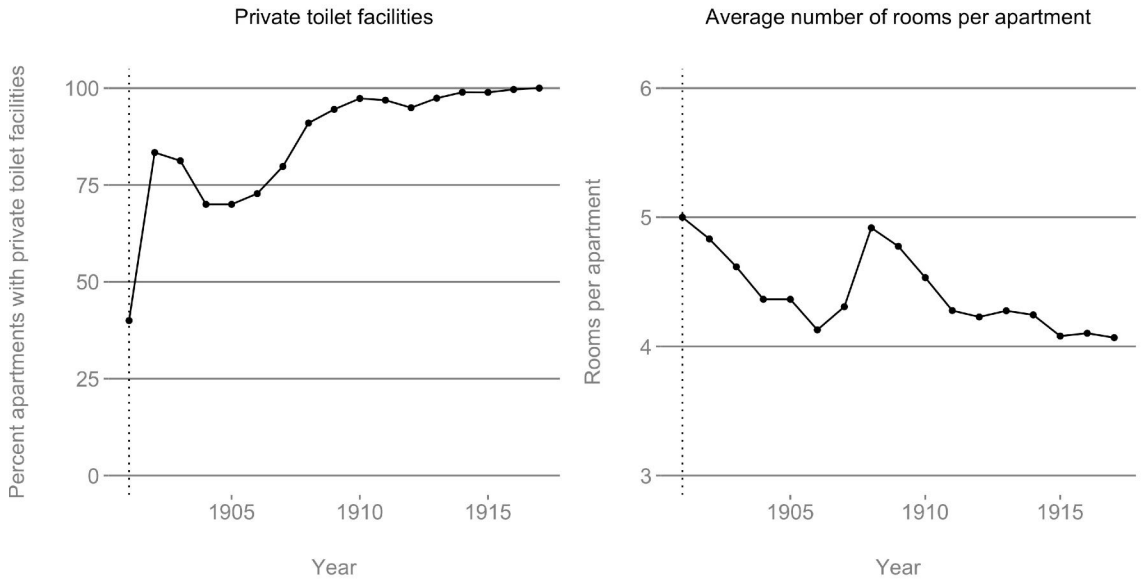

Figure 4.7: *Percentage of newly constructed tenement apartments with internal private toilets (left); average number of rooms per newly constructed tenement apartment (right). Source: New York Department of Tenements*

human beehives" with "the privacy of the single-family detached home," as the Model Tenement advocate Elgin R. L. Gould put it in 1900.[160] This, of course, required the de-densification of the city and the movement of tenement residents from the urban core to outer boroughs. The 1901 law largely sidestepped this issue, as did other municipal building and zoning codes. In fact, the densest tenement districts on the Lower East Side remained dense after 1900 as high levels of immigration brought over 750,000 people to the United States, many of them through New York's Ellis Island. According to data collected by the 1894 Tenement House Committee and published in its 1895 report, densely populated wards on the Lower East Side had between 500 and 900 residents per acre, with the densest blocks having up to 1000 (Fig. 4.8). Using ward-level population counts from the U.S. Bureau of the Census, we can estimate how these areas evolved during subsequent decades. Micro-level counts with ward identifiers are not publicly available for all years, but we can compare 1895 estimates to census counts from 1910 and 1930. In 1910 – nine years after the comprehensive tenement reform bill had been passed –, the five densest wards continued to house between 150,000 and 221,000 residents per square kilometer, or between 607 and 894 residents per acre. But twenty years later, the numbers had declined significantly. In 1930, those

[160]Gould (1900), p. 380. Also quoted in Lubove (1963), p. 110.

same wards housed between 97,000 and 115,000 residents per square kilometer, or between 393 and 465 residents per acre (Fig. 4.9). The timing of this de-densification of the inner city – a trend that was not unique to New York City but was repeated in other U.S. cities – requires an explanation that is beyond the scope of this argument. Scholars have linked it to expansions of urban transportation infrastructure, policies and public investment programs that encouraged the development of residential areas in the urban periphery, and changes in the net influx of immigrants after World War I.[161] But it suggests that the institutionalization of privacy as a legal and regulatory requirement had no immediate effect on overcrowding, despite the widespread appeal of the suburban home as a privacy-preserving alternative that was thought to be conducive to the personal and moral development of future American citizens.

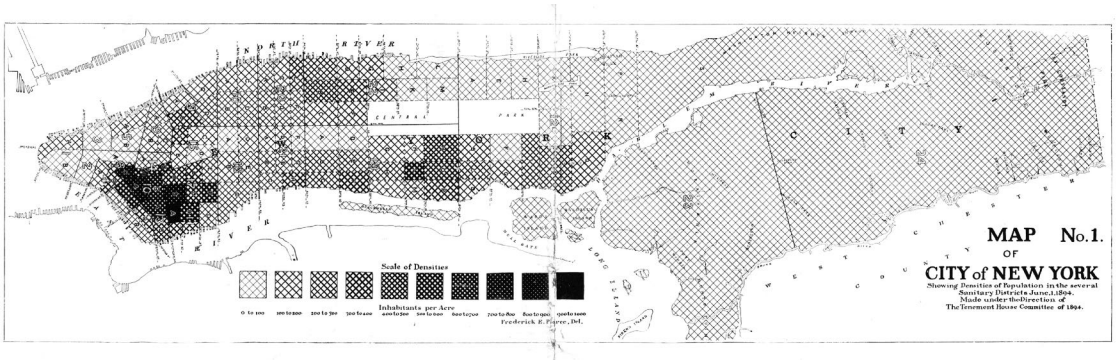

Figure 4.8: *Ward-specific density estimates from the New York Tenement House Committee, published 1895. Source: Library of Congress.*

Density estimates based on census microdata are one way of measuring the distributon

[161] Sam B. Warner Jr. *Streetcar Suburbs: The Process of Growth in Boston (1870-1900)*. Cambridge: Harvard University Press, 1962; Lubove (1963), p. 111; Daniel Little. *New Contributions to the Philosophy of History*. Dortdrecht: Springer Netherlands, 2009. p. 110; Jason Barr and Teddy Ort. "Population Density across the City: The Case of 1900 Manhattan." Working Paper. Newark: Rutgers University, 2013; Shlomo Angel and Patrick Lamson-Hall. "The Rise and Fall of Manhattan's Densities, 1800-2010." Marron Institute of Urban Management Working Paper 18. New York: New York University, 2014. For example, the New York boroughs of Brooklyn and Queens grew during the 1910s and 1920s along an expanding network of subways, which were heavily subsidized by the city to keep fares affordable for a working-class ridership. In Boston, an extension of trolley networks into the communities of Roxbury and Newton changed the local demographics and fueled an increase in local population size. Whereas only affluent elites had been able to afford the horses and carriages that were necessary to access the inner city in the absence of a public transportation infrastructure, the arrival of the trolley enabled factory workers to live in the urban periphery but work in inner-city industries. As Little (2010, p. 109) writes, transportation therefore "creates the pathways through which people, goods, and ideas flow within and across societies – and these movements themselves have consequences. [It] has deep effects on social development, including the pattern and pace of the extension of settlement."

Figure 4.9: *Population counts per square kilometer by Census ward, 1910 and 1930. Source: U.S.Bureau of the Census, IPUMS NHGIS.*

of populations across cities and changes in population density over time.[162] But they are not without critics: Census counts capture the number of people living in each enumeration district, but they do not account for the amount of total available living space. An increase in the average number of floors per building or a decrease in built-up space (for example, when streets were razed in lower Manhattan to make room for large-scale bridge or road construction projects) can significantly affect total available living space, but without also affecting total population counts. To confirm that the 1901 law did not have an immediate effect on overcrowding, I therefore also calculate a different indicator: Floor area per person, or FAPP.[163] I include a detailed description of FAPP calculations in the methodological coda. They largely corroborate the conclusion reached above: While the 1901 law led to a reorganization of space within individual buildings and sparked changes that improved the conditions

[162]Gergely Baics and Leah Meisterlin. 2016. "Zoning Before Zoning: land use and density in mid-nineteenth-century New York City." *Annals of the American Association of Geographers* 106 (5): 1152-1175. Also see Barr and Ort (2013) and Angel and Lamson-Hall (2014). Some of these studies combine census counts with fire insurance maps, which are only available for specific years and therefore usually unsuitable for longitudinal studies. For an approach that combines census data with satellite imagery, see: Myrtho Joseph, Lei Wang, and Fahui Wang. 2012. "Using Landsat Imagery and Census Data for Urban Population Density Modeling in Port-au-Prince, Haiti." *GIScience & Remote Sensing* 49 (2): 228-250.

[163]See Angel and Lamson-Hall (2014).

of possibility for urban privacy, it did not comprehensively address the mesospatial problem of overcrowding that social reformers had identified as a parallel threat to privacy. FAPP in Manhattan increased from 125 square feet in 1904 to 155 square feet in 1916. But in Brooklyn, which experienced a significant population increase between 1900 and 1920, FAPP decreased from around 170 square feet to around 120 square feet on average (Fig. 4.10). Populations were slightly re-balanced across boroughs, but the net density of inner-city life did not change significantly in the wake of the 1901 law. While the tenement reform movement was able to exploit the opportunity structure of New York municipal and state politics to pursue legislation that anchored the logic of urban privacy – with all the moralizing and middle-class undertones it carried – in the regulatory landscape of New York City and the material landscape of the Lower East Side, the victory was partial at best. The logic of privacy could supplement, but not replace, the logic of economic necessity. It was becoming a fixture in American politics and legislative debates around the turn of the twentieth century, but the promises it entailed also remained elusive for many Americans.

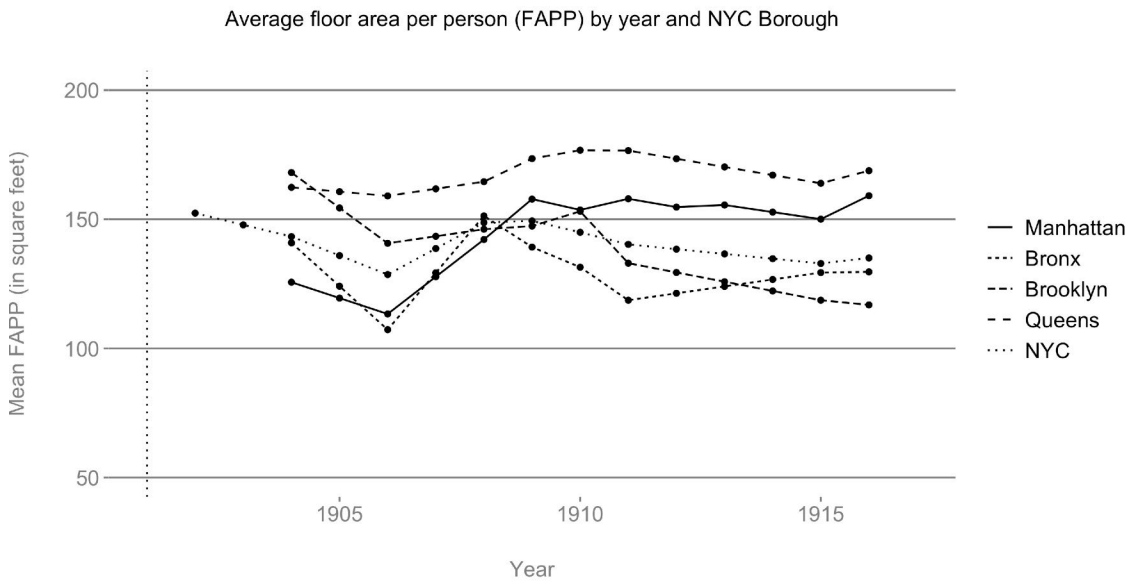

Figure 4.10: *Average floor area per person (FAPP) by year and New York City Borough. Calculated by the author on the basis of data from the New York Public Library, New York Department of Tenements, and US Bureau of the Census.*

Encoding privacy in political agendas and urban space

Embedded in the architecture of buildings and the organization of urban space lurk a myriad physical and social forces to which the built environment is exposed, and which

act upon it.[164] Social and cultural norms are among these; the logic of residential and familial privacy in particular. This is because the division of spaces – and the organization by architectural means of human movement through such spaces – both reflect common understandings of the contours and limits of privacy, and also establish conditions of possibility for the realization of privacy. In an ideological sense, the logic of privacy is frequently bound up with conceptions of personal decency, gender norms, and appropriate familial relations.[165] But in a material sense, it is therefore also encoded in the objects, spaces, and infrastructures that make everyday life possible. Indeed, as William Sewell has argued, culture and semiotics "only have the power to impose lasting transformations" when they are "somehow built into the world."[166] Quite tangibly, the logic of privacy was written into legislative interventions built and the architecture of the family home.

But how does such an institutionalization happen? Or, in other words, how does the logic of privacy evolve beyond a widely diffused discursive object into an durable feature of social organization? The historical struggle over privacy in city life during the Progressive Era suggests a set of answers. First, the logic of privacy was incorporated into the larger political agenda of the tenement reform movement and thereby affirmed as an appropriate and significant object of political struggle. Seen such expansive fashion, the so-called "tenement problem" was not simply a problem of insufficient sanitation and high fire risk but a moral challenge. To many social reformers, a lack of privacy implied a lack of decency and personal development, and thereby constituted an affront against moral sensibilities as well as the ideals of American citizenship. Such framing and frame resonance matter, as scholars of social movements know well, because they can make a relatively specialized debate appear intelligible in light of overarching concerns, cultural tropes, and political preferences.[167]

Second, the ability to implement the tenement reform agenda and to encode the logic of privacy in formal legislation depended directly on the ability of social reformers to build political coalitions with legislative and executive power brokers and thereby overcome local resistance from real estate developers. The institutionalization of privacy was achieved through organizational leadership and exploits of the political opportunity structure – in this case, in New York during the 1890s. Political mobilization is often a prolonged process that requires grassroots engagement and popular support as well as

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[164] Lefebvre (1991), pp. 92-93.

[165] Evans (1997), p. 109.

[166] William H. Sewell. *Logics of History: Social Theory and Social Transformation.* Chicago: The University of Chicago Press, 2005, p. 361

[167] Oliver and Johnston (2000); Irene Bloemraad, Fabiana Silva, and Kim Voss. 2016. "Rights, Economics, or Family? Frame Resonance, Political Ideology, and the Immigrant Rights Movement." *Social Forces* 94 (4): 1647-1674.

strategic leadership, and its outcomes depend at least partly on cracks in the existing power structure.[168] The struggle for privacy in urban life was no exception.

Third, the legislative institutionalization of privacy had a direct and discernible effect on the organization of urban space at the micro-spatial scale. Channelled through tenement regulation, the emphasis on urban privacy drove a reorganization of building layouts, an architectural separation of bedrooms from communal spaces, and a decisive shift towards private bathrooms. None of these changes can be explained merely as the effects or byproducts of sanitary reform or fire safety. Instead, they baked cultural notions of the spatial privacy of the family into the built environment of America's growing cities. As David Brain has argued, architecture and urban planning can – and in this case did – give concrete form to abstract public/private distinctions.[169] But such form-giving was necessarily a selective endeavor. The vision of privacy that was encoded in the 1901 Tenement House Act reaffirmed a perspective on family life and individual privacy that reflected the lived experience and preferences of the upper social strata of American society. It also sidestepped one of the factors that social reform advocates had identified as a key impediment to urban privacy: the overcrowding of entire neighborhoods. Despite the relatively ambitious nature – compared to prior legislation – of the 1901 law, it had little impact on the amount of space to which each family, or each individual within a family, could lay claim. While tenement residents and journalists frequently praised the privacy-enhancing qualities of free-standing multi-family homes or single-family row-houses that were constructed across Brooklyn, Queens, and the Bronx during the 1910s and 1920s, moving out of the inner city still depended on the ability to access labor markets despite an increased distance to workshops and factories.

Foucault has referred to the twentieth century as the "epoch of the near and far, of the side-by-side, of the dispersed" – a century of space.[170] Yet how people live side-by-side, how near or far they commonly are from each other, and how concentrated or dispersed they can be – all of these depend in part on informal privacy norms, the institutionalization of those norms through legislative action, and the dynamic political mobilization that connects the former to the latter. The (social) production of urban space and private spaces is a material achievement, but it is also a process of strategic framing and collective action.

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[168] McAdam (1999); Ganz (2000).

[169] David Brain. 1997. "From Public Housing to Private Communities: The Discipline of Design and the Materialization of the Public/Private Distinction in the Built Environment." In: *Public and Private in Thought and Practice*, edited by Jeff A. Weintraub and Krishan Kumar. Chicago: University of Chicago Press.

[170] Foucault (1986), p. 22.

Chapter 5:

The Right to Privacy

Legal Institutionalization and the Emergence of a State-Centric Right

Near the main entrance of the U.C. Berkeley Law School is a quote by the American jurist Oliver Wendell Holmes Jr. Fastened to the building's exterior in big letters, it proclaims:

> *"When I think thus of the law, I see a princess mightier than she who wrought at Bayeux, eternally weaving into her web dim figures of the ever-lengthening past – figures too dim to be noticed by the idle, too symbolic to be interpreted except by her pupils, but to the discerning eye disclosing every painful step and every world-shaking contest by which mankind has worked and fought its way from savage isolation to organic social life."*

The quote dates back to a speech given by Holmes – then a justice at the Supreme Judicial Court of Massachusetts – at a dinner of the Suffolk Bar Association in 1885.[1] In the speech, he reminded the audience that "the abstraction called the law" was more than a set of ideas that could be debated on their intellectual merits. First, it had an "overruling power" when wielded by legal experts. Holmes thought of this power as something that was exercised "in the court house" when "the timid and overborne gain heart" and punishment is inflicted upon "the wretch" who defied the commands of the law.[2] Today, sociologists link the interpretation of the law not just to the adjudication of guilt and innocence but to the symbolic power of world-making. As Pierre Bourdieu has written, the technical expertise of legal professionals "consists essentially in the socially recognized capacity to interpret a corpus of texts sanctifying

[1] "Oliver Wendell Holmes, the Jurist." *The American Law Review* 36 (1902), p. 718.

[2] "Oliver Wendell Holmes, the Jurist." *The American Law Review* 36 (1902), p. 719.

a correct or legitimized vision of the social world."[3] The canonization of legal concepts, the settling of legal meaning, and the production of legal genealogies are powerful practices in part because they insulate the social order against various challenges and thereby contribute to its reproduction and legitimation. Second, Holmes argued the law reflects not just the principles of legal doctrine but "the lives of all men that have been."[4] Contained in the law are the residues of prior struggles, the prejudices and preoccupations of a given society, and the fingerprints of those who interpret and consecrate it.[5] Law and society are thus doubly linked: The interpretation of law reflects the organization of society – the prominence of social customs, the structure of social relations, and the status of specific communities of legal experts – but also helps to sustain that organization over time.

American privacy law is no exception. It, too, contains "dim figures of the ever-lengthening past" – to use Holmes' term – that explain the meaning of the right to privacy at any given moment and its evolution over time, and that give legal structure to the relationship between rights-bearing individuals and society writ large. In the twenty-first century, for example, widespread user tracking and the aggregation of personal data have put privacy at the center of political and legal debates about "surveillance capitalism."[6] Indeed, if a person was struck by a case of historical amnesia that wiped out all knowledge of the pre-digital past, they could be forgiven for thinking that privacy law was born primarily from the "world-shaking" disruption brought

[3]Pierre Bourdieu. 1986. "The Force of Law: Toward a Sociology of the Judicial Field." *Hastings Law Journal* 38, p. 817.

[4]"Oliver Wendell Holmes, the Jurist" (1902), p. 718.

[5]Steven Lukes and Andrew Scull (eds.). *Durkheim and the Law*. London: Palgrave Macmillan, 2013. pp. 54-61; 150-163; Max Rheinstein (ed). *Max Weber on Law in Economy and Society*. New York: Simon and Schuster, 1967. pp. 11-20, 322ff, 338ff.

[6]Julie E. Cohen. 2013. "What Privacy Is For." *Harvard Law Review* 126 (7): 1904-1933; Frank Pasquale. 2012. "Privacy, Antitrust, and Power." *George Mason Law Review* 20 (4): 1009-1024; Sebastian Sevignani. 2013. "The Commodification of Privacy on the Internet." *Science and Public Policy* 40 (6): 733-739; Sami Coll. 2014. "Power, Knowledge, and the Subjects of Privacy: Understanding Privacy as the Ally of Surveillance." *Information, Communication & Society* 17 (10): 1250-1263; Mikella Hurley and Julius Adebayo. 2016. "Credit Scoring in the Era of Big Data." *Yale Journal of Law & Techology* 18: 148-216; Marion Fourcade and Kieran Healy. 2017. "Seeing Like a Market." *Socio-Economic Review* 15 (1): 9–29; Dan Bouk. 2017. "The History and Political Economy of Personal Data Over the Last Two Centuries in Three Acts." *Osiris* 32 (1): 85–106; Nick Srnicek. *Platform Capitalism*. Cambridge: Polity Press, 2017; Shoshana Zuboff. *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*. New York: Public Affairs, 2019; Jathan Sadowski. 2019. "When Data is Capital: Datafication, Accumulation, and Extraction." *Big Data & Society* 6 (1): 1-12; Jathan Sadowski. *Too Smart: How Digital Capitalism is Extracting Data, Controlling Our Lives, and Taking Over the World*. Cambridge: MIT Press, 2020; Ari Ezra Waldman. *Industry Unbound: The Inside Story of Privacy, Data, and Corporate Power*. Cambridge: Cambridge University Press, 2021.

by the internet economy and the commodification of personal data.[7] But this recent development notwithstanding, and despite the potential for privacy violations by market entities, the legal "right to privacy" has historically conditioned the ability of *government officials* to examine the intimate spheres of personal life.[8] For much of the twentieth century, the right to privacy implied a defense against an overbearing and inquisitive American state.

In this chapter, I turn to the early history of American privacy jurisprudence to trace the legal institutionalization of the "right to privacy" and to explain the dominance of constitutionally-grounded and state-centric interpretations of privacy. This outcome was not foreordained. To the contrary: In the first two decades of the twentieth century, the logic of privacy was frequently invoked to address legal disputes about the unauthorized use of photographs by yellow press journalists, the use of a person's name by advertising agencies and playwrights, and telephone eavesdropping by landlords. But the subsequent institutionalization of privacy as a legal right preserved few traces of this expansive early history. Instead, privacy was increasingly tied to constitutional amendments and used to adjudicate the limits of state power, while privacy violations by non-state actors were narrowly circumscribed and conceptually defanged.[9]

Socio-legal scholars advance two main arguments to explain the "domain formation" and the "settling" of meaning that are commonly regarded as key elements of legal institutionalization.[10] First, they emphasize the formative impact of prominent legal experts and thus treat legal institutionalization as the consequence of elite interventions

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[7]The term "world-shaking" is quoted from Holmes' speech. See Oliver Wendell Holmes, the Jurist" (1902), p. 718.

[8]William M. Beaney. 1966. "The Right to Privacy and American Law." *Law and Contemporary Problems* 31: 253-271; Daniel J. Solove. 2002. "Conceptualizing Privacy." *California Law Review* 90 (4): 1087–1155; David A. Sklansky. 2014. "Too Much Information: How Not to Think About Privacy and The Fourth Amendment." *California Law Review* 102 (5): 1069-1122. For relevant "landmark" legal decisions, see: *Griswold v. Connecticut* (1965), *Katz v. United States* (1967), *Eisenstadt v. Baird* (1971), *Roe v. Wade* (1972), *Lawrence v. Texas* (2003), *United States v. Jones* (2012), *Carpenter v. United States* (2018).

[9]William L. Prosser. 1960. "Privacy." *California Law Review* 48 (3): 383-423; Diane L. Zimmerman. 1983. "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort." *Cornell Law Review* 68 (3): 291-367; Lawrence M. Friedman. 2002. "Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History." *Hofstra Law Review* 30 (4): 1039-1132; James Q. Whitman. 2004. "The Two Western Cultures of Privacy: Dignity Versus Liberty." *Yale Law Journal* 113: 1151-1221; Danielle K. Citron. 2009. "Cyber Civil Rights." *Boston University Law Review* 89: 61-125; Neil. M. Richards and Daniel J. Solove. 2010. "Prosser's Privacy Law: A Mixed Legacy." *California Law Review* 98 (6): 1887-1924.

[10]Valerie Jenness. 2007. "The Emergence, Content, and Institutionalization of Hate Crime Law: How a Diverse Policy Community Produced a Modern Legal Fact." *Annual Review of Law and Social Science* 3: 141-160; Scott Phillips and Ryken Grattet. 2000. "Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law." *Law & Society Review* 34 (3): 567-606.

that shape the interpretation and canonization of abstract principles.[11] Studies in this tradition tend to focus on the publication of a *Harvard Law Review* essay by Samuel Warren and Louis Brandeis in 1890, Brandeis' dissenting opinion in the Supreme Court's 1928 *Olmstead v. United States* decision, and a series of legal handbooks on tort law – written by William Prosser, then the Dean of the U.C. Berkeley Law School – as "milestones" that focused legal discourse and cemented a distinction between narrow privacy torts on the one hand and state-centric, constitutionally grounded privacy rights on the other.[12] Second, scholars treat state-centric privacy jurisprudence as a product of the postwar decades, when shifts in sexual norms, social movement activism, and growing concerns about computational data processing by the American government contributed to the recognition of privacy as a constitutional right.[13] Like the first perspective, this approach also places considerable emphasis on important milestones of legal development – for example, the Supreme Court's explicit recognition of a right to privacy in *Griswold v. Connecticut* –, although scholars who focus on the postwar decades tend to see those milestones as indicators of extra-judicial pressures and macrosocial realignments.

Yet neither perspective captures the process through which the right to privacy was first institutionalized as a state-centric right. The first approach misconstrues the contributions of individual scholars to the early evolution of privacy jurisprudence, especially since studies published before the middle of the twentieth century only find a tenuous impact of Warren and Brandeis' essay over American jurisprudence.[14] The second approach focuses on a period too close to the present, when the right to privacy had already become conceptually tied to the problem of state power. The debates of the 1960s were not primarily about *whether* a right to privacy protected citizens against government intrusion but focused on the specific domains of life that were to

[11] Tom Gerety. 1977. "Redefining Privacy." *Harvard Civil Rights-Civil Liberties Law Review* 12 (2): 233-296; Dorothy J. Glancy. 1979. "The Invention of the Right to Privacy." *Arizona Law Review* 21 (1): 1–39; Zimmerman (1983); Irwin P. Kramer. 1990. "The Birth of Privacy Law: A Century Since Warren and Brandeis." *Catholic University Law Review* 39 (3): 703-724; Benjamin Bratman. 2001. "Brandeis and Warren's The Right to Privacy and the Birth of the Right to Privacy." *Tennessee Law Review* 69: 623-652.

[12] Richards and Solove (2010); Vernon V. Palmer. 2011. "Three Milestones in the History of Privacy in the United States." *Tulane European and Civil Law Forum* 26: 67-97.

[13] Beaney (1966); Patricia Boling. *Privacy and the Politics of Intimate Life.* Ithaca: Cornell University Press, 1996; David A. Sklansky. 2008. "One Train May Hide Another: Katz, Stonewall, and the Secret Subtext of Criminal Procedure." *U.C. Davis Law Review* 41 (3): 875-934; Sarah Igo. *The Known Citizen.* Cambridge: Harvard University Press, 2018; Danielle K. Citron. 2019. "Sexual Privacy." *Yale Law Journal* 128: 1870–1960.

[14] Harvard Law Review Association. 1929. "The Right to Privacy Today." *Harvard Law Review* 43 (2): 297-302; Roy Moreland. 1931. "The Right of Privacy To-Day." *Kentucky Law Journal* 19 (2): 101-138.

be protected, and on the legal justifications for doing so.[15] More generally, the focus on landmark cases in each of the two approaches also risks obscuring developments that galvanized legal thought and judicial practice even if they were ultimately abandoned and written out of the canon of legal precedent. It thereby hinders the study of law as "an arena of conflict within which alternative social visions contended, bargained, and survived" and "a more rigorous analysis of socio-legal field dynamics" during the process of legal institutionalization.[16]

The argument of this chapter differs from both approaches by framing legal institutionalization as a multi-stage process of domain formation and meaning-making: New concepts can enter the legal field through exogenous actors, spawn competing schools of thought as meaning is contested within the legal field, and become settled when one such school becomes consecrated and alternative interpretations are marginalized. Precisely because the introduction of new concepts into the legal imagination and the settling of their distinctly legal meaning depend on cooperation and contestation among multiple stake-holders within and around the legal field, legal institutionalization cannot be reduced to a handful of landmark decisions. In particular, I show that the articulation of a state-centric approach to privacy stood at the end of three periods of legal institutionalization. Before the turn of the twentieth century, during a period of *initial judicialization*, the leading exponents of a right to privacy were not judges and legal scholars but journalists, who highlighted the intrusive potential of mass media and tabloid photography, articulated concerns about the privacy of personal communications, and helped to introduce the language of privacy into the domain of the law. Between 1900 and 1920, during a period of *intra-legal competition*, privacy began to diffuse into American jurisprudence as judges drew on a multitude of sources and legal traditions to defend and contest privacy as a legally enforceable right but without establishing the primacy of any single approach. And after 1920, during a period of *judicial consolidation*, constitutional interpretations and state-centric applications of the right to privacy became dominant as legal professionals and the Supreme Court adapted the language of privacy and selectively mobilized the power of law to confront the growing reach of the American state. Across these three periods, legal meaning became settled and constitutional approaches to privacy became consecrated.[17] The "modern legal fact" of privacy still bears the marks of this

[15]Debbie V. S. Kasper. 2005. "The Evolution (or Devolution) of Privacy." *Sociological Forum* 20 (1): 69-92; Sarah A. Seo. 2015. "The New Public." *Yale Law Journal* 125: 1616-1671. Until the Supreme Court's 1965 *Griswold* decision, judges had repeatedly opted for a proceduralist interpretation of the Fourth Amendment. See *Mapp v. Ohio* (1961).

[16]Hendrik Hartog. 1985. "Pigs and Positivism." *Wisconsin Law Review* 1985 (4); pp. 934-935; Marian Burchardt, Zeynep Yanasmayan, and Matthias Koenig. 2019. "The Judicial Politics of Burqa Bans in Belgium and Spain: Socio-legal Field Dynamics and the Standardization of Justificatory Repertoires." *Law & Social Inquiry* 44 (2), p. 4.

[17]Peter L. Berger and Thomas Luckmann. *The Social Construction of Reality: A Treatise in the*

disjointed legal history and the judicial and interpretive struggles it sparked.[18]

Legal institutionalization and the role of legal elites

Where and when does the legal history of privacy in the United States begin? The most common starting point is a single essay, written by Samuel Warren and Louis Brandeis and published in 1890 in the *Harvard Law Review*. Both authors had graduated from Harvard Law School in 1877, where they had competed with each other for the highest grade point average in their class (Brandeis came first; Warren second). After graduation, they had gone into private practice, co-founded a law firm in Boston, and penned the essay that has now become recognized as a founding document of American privacy jurisprudence and as one of the most-cited law review articles of all time.[19] It is hard to overstate its centrality to legal histories of privacy, which recognize Warren and Brandeis' contribution as a landmark that "gave birth to" American privacy jurisprudence, added "nothing less than [...] a chapter to our law," laid "the foundation of American privacy law", and marked the "inception" of the right to privacy.[20]

The doctrinal aim of the original essay was this: To protect the "inviolate personality" of the individual and "the sacred precincts of private and domestic life" against undue intrustions and thereby "meet the wants of an ever changing society" in a way that neither libel law nor property rights and copyright could.[21] In particular, Warren and Brandeis proposed that "social and domestic relations be guarded from ruthless publicity" by advertisers and the tabloid press through new legal remedies.[22] Since 1870, annual newspaper circulation in the United States had nearly doubled. Publishers exploited advancements in printing technology and relied on the expanding network of postal routes to deliver the printed word to subscribers while seeking to expand their audience with a combination of lurid crime stories, campaigns against municipal corruption, and tabloid coverage that highlighted the immoralities of the poor and the luxuries of the rich. In 1890, Warren and Brandeis argued that the boom of tabloid newspapers and news photography had created a set of conditions

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Sociology of Knowledge. New York: Anchor Books, 1966; Mary Douglas. *How Institutions Think*. Syracuse: Syracuse University Press, 1986; Phillips and Grattet (2000); Neil Fligstein and Doug McAdam. *A Theory of Fields*. Oxford: Oxford University Press, 2015; Burchardt er al. (2019).

[18] Jenness (2007).

[19] Fred R. Shapiro and Michelle Pearse. 2012. "The Most-Cited Law Review Articles of All Time." *Michigan Law Review* 110 (8): 1483-1520.

[20] Glancy (1979), p. 1; Neil M. Richards. 2010. "The Puzzle of Brandeis, Privacy, and Speech." *Vanderbilt Law Review* 63 (5): 1295–1352; Palmer (2011), p. 70; Kramer (1990); Bratman (2001).

[21] Samuel D. Warren and Louis D. Brandeis. 1890. "The Right to Privacy." *Harvard Law Review* 4 (5): 193–220.

[22] Warren and Brandeis (1980), p. 214.

that threatened hitherto impossible intrusions into the inviolate spheres of personal life and the broadcasting of personal data to a mass audience.

But as acutely as the authors may have observed shifting economic realities and technological possibilities in the publishing industry during the 1870s and 1880s, their essay also sprung from a more personal perspective.[23] Both authors were integrated into the upper strata of New England society and aware of the public interest that social status and ostentatious displays of privilege could generate. In 1883, at age 31, Warren had experienced this first-hand during his wedding to Miss Mabel Bayard. The Bayard family had sent its sons to governors' mansions and the U.S. Senate since the late seventeenth century, while its daughters had maintained the family's social station by marrying lawyers, politicians, and financiers. At the time of the wedding, Thomas F. Bayard, Mabel's father, was exploring a possible run for the presidency after serving several terms as a U.S. Senator and as the Senate's president *pro tempore*.[24] Warren's entry into holy matrimony was simultaneously an introduction into one of the most influential political families in the United States. The wedding ceremony, held at the Church of the Ascension in Washington, DC, was attended by diplomats from Russia, Denmark, Argentina, Portugal, and Spain, as well as several members of the House of Representatives and the U.S. Senate, who cheered on the couple and later gathered in the Bayard residence for an elaborate reception that even attracted the attention of the *New York Times*.[25]

In the emerging tabloid landscape of the late nineteenth century, Samuel and Mabel Warren were tantalizing targets. Newspaper journalists shadowed the church service and the wedding reception. When the couple purchased an expensive painting upon their return to Boston, the local press speculated about their finances. When they hosted elaborate breakfasts and lavish dinners, the gossip column of the *Boston Globe* and the *Saturday Evening Gazette* supplied their readers with summaries of the events. And when they left Boston to attend to family business, their involuntary entourage sometimes included enterprising journalists, who followed Samuel and Mabel Warren to family funerals and weddings and dutifully reported on travel schedules, burial rites, and family relations within the Bayard clan.[26] By 1890, Samuel Warren had enough. Motivated at least in part by his "deep-seated abhorrence of the invasions of

[23]Kramer (1990); Amy Gajda. 2008. "What If Samuel D. Warren Hadn't Married A Senator's Daughter?: Uncovering The Press Coverage That Led To The Right To Privacy." Illinois Public Law and Legal Theory Research Paper Series, Research Paper No. 07-06.

[24]His presidential hopes never materialized, but Thomas Bayard went on to serve as U.S. Secretary of State and as ambassador to the U.K.

[25]"The Washington Society World: Marriage of Senator Bayard's Daughter - A Reception and Two Banquets." *New York Times*, Jan. 26, 1883, p. 1.

[26]Prosser (1960); Gajda (2008); Amy Gajda. *The First Amendment Bubble: How Privacy and Paparazzi Threaten a Free Press.* Cambridge: Harvard University Press, 2015.

social privacy" that he had witnessed, and aggravated by several quarrels with the Boston press over their tabloid columns, he approached Louis Brandeis with the idea for a legal essay that would break new conceptual ground while offering tangible relief from involuntary publicity.[27] Published in the *Harvard Law Review* under the simple title "The Right to Privacy", the essay sought to bring American legal thought into alignment with the emergent realities of "instantaneous photographs and newspaper enterprise" and the "numerous mechanical devices [which] threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' " To protect individuals "from being dragged into an undesirable and undesired publicity," Warren and Brandeis proposed a right "to be let alone."[28]

By the 1920s, Brandeis had ascended to the U.S. Supreme Court as the first Jewish justice in the court's history.[29] He had also begun to tie the right to privacy to the Fourth and Fifth Amendments and pushed for the application of privacy law to disputes over the exercise of state power. In his dissent to the Supreme Court's 1928 decision in *Olmstead v. United States*, Brandeis advocated for an expansive reading of constitutional amendments and the subsumption of the right to privacy under their enlarged umbrella. He suggested that the passage of time had "[brought] into existence new conditions and purposes" that required a reassessment of legal doctrine, and argued that "the makers of our Constitution conferred, as against the Government, the right to be let alone."[30] The argument failed in 1928. Yet in the eyes of many legal historians, the *Olmstead* dissent marks the advent of privacy claims against the American state in the federal judiciary.[31] As another Supreme Court justice – Felix Frankfurter – would later argue, the expansive reading of the Fourth Amendment proposed by Brandeis was "an indispensable need for a democratic society" and "consistently and carefully respected" by courts and Congress.[32]

American privacy law was then re-structured again through the work of William Prosser, who authored the standard hornbook on American tort law and served as the

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[27]Don R. Pember. *Privacy and the Press: The Law, the Mass Media, and the First Amendment.* Seattle: University of Washington Press, 1972; Ken Gormley. 1992. "One Hundred Years of Privacy." *Wisconsin Law Review* 1992: 1335-1441.

[28]Warren and Brandeis (1890), pp. 195 and 214.

[29]Samuel Warren had died by suicide in 1910.

[30]Olmstead v. United States, 277 U.S. 438.

[31]Prosser (1960); Edward Shils. 1966. "Privacy: Its Constitution and Vicissitudes." *Law and Contemporary Problems* 31 (2): 281-306; Daniel J. Solove, Marc Rotenberg, and Paul M. Schwartz. *Privacy, Information, and Technology.* New York: Aspen Publishers, 2006; Richards and Solove (2010).

[32]Harris v. United States, 331 U.S. 145. For a comprehensive list of Congressional acts that regulate the search and seizure of personal papers based on the Fourth Amendment, see the Appendix to Davis v. United States, 328 U.S. 582.

dean of the UC Berkeley School of Law from 1948 to 1961. Prosser was deeply skeptical of the ambitious language about "inviolate personalities" that characterized the work of Warren and Brandeis and disapproved of the "prodogious breadth" of privacy jurisprudence during the early twentieth century.[33] To prevent it from "swallowing up and engulfing the whole law of public defamation," Prosser aimed to impose order upon an unruly legal field by confining privacy claims against private persons and non-state entities to four narrowly defined torts.[34] Starting in 1941 and continuing through a series of publications until his death in 1972, he proposed to restrict such claims to intrusions into a person's private affairs, the disclosure of personal information, the depiction of a person in a false or misleading light, and the appropriation of a person's likeness. The handbooks had the intended effect: By constructing a set of relatively narrow and rigid categories – and by invoking property rights rather than personality-based language – Prosser "stripped privacy law of any guiding concept to shape its future development" and helped to ensure that it languished in "a doctrinal backwater" of American jurisprudence.[35] Even as the right to privacy was recognized by the Supreme Court as an important element of due process and a possible guardrail against executive overreach, Prosser's work curbed its significance as a tool for managing social relationships and informational access more generally.

So goes the conventional story about early American privacy jurisprudence. Underlying the focus on exalted legal scholars is a view of legal institutionalization as an elite project: Such elites can assert a "monopoly of the right to determine the law" and decisively shape the content of legal doctrine because they occupy key positions within the legal field and because this field is "relatively independent of external determinations and pressures."[36] Their interventions therefore determine the evolution of jurisprudence "from the top down", as Elizabeth Mertz has argued, by shaping common interpretations of the law and displacing local forms of legal reasoning.[37] They also anchor communities of legal thought, which can disseminate their ideas to a wider audience, elevate their influence, and ensure the subsequent consecration of individual thinkers as canonical figures.[38]

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[33]Palmer (2011), p. 82.

[34]Prosser (1960), p. 401.

[35]Richards and Solove (2010), pp. 1890 and 1894; Harry Kalven Jr. 1966. "Privacy in Tort Law: Were Warren and Brandeis Wrong?" *Law & Contemporary Problems* 31 (2): 326-341.

[36]Bourdieu (1986), pp. 816-817; Yves Dezalay and Mikael Rask Madsen. 2012. "The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law." *Annual Review of Law and Social Science* 8: 433-452.

[37]Elizabeth Mertz. 1994. "A New Social Constructionism for Sociolegal Studies." *Law and Society Review* 28 (5), p. 1251.

[38]Robert K. Merton. *The Sociology of Science: Theoretical and Empirical Investigations.* Chicago: The University of Chicago Press, 1979; Bruno Latour. *The Pasteurization of France.* Cambridge:

Of course such legal elites are not unemcumbered by professional hierarchies, nor are they free from extra-judicial influences.[39] Warren and Brandeis had an intellectual interest in privacy law but also a highly personal one that was shaped by their experiences with the tabloid press. As Neil Richards and Daniel Solove have therefore suggested, their *Harvard Law Review* essay was part of a "broader legal strategy employed by late nineteenth-century elites to protect their reputations from the masses in the face of disruptive social and technological change."[40] The timing and thrust of their argument are inseparable from the technologies of a mass media society, the interests of a privileged social circle, and the discussions that occurred within the rather small world of elite legal scholars. Indeed, the 1890 article resonated more strongly among Warren and Brandeis' peers. In the years after its publication, law review editors and legal scholars across the United States engaged in a debate about the merits of legal arguments rooted in "inviolate personalities" and the alleged inadequacies of libel law.[41] But despite the commentary it sparked, the essay had no significant effect on American jurisprudence. It was mentioned in a handful of legal opinions written during the 1890s and 1900s but only came to be regarded as a seminal contribution to American legal thought during the second half of the twentieth century.[42] The relative prominence afforded to Warren and Brandeis is partly an artifact of legal histories that were written during this later time, when the essay had become canonized despite having had only a tenuous hold on juridical practice during earlier decades. As Sarah Igo has suggested in her history of privacy in the United States, a preoccupation with the interventions of prominent scholars is therefore a poor guide "to what was happening to privacy at the turn of the twentieth century."[43] Essays like one published in 1890 in the *Harvard Law Review* tend to reflect the unique social positions and professional interests of their authors, rather than the

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Harvard University Press, 1993.

[39]Martin Shapiro. *Courts: A Comparative and Political Analysis*. Chicago: University of Chicago Press, 1981; Jeffrey A. Segal and Harold J. Spaeth. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press, 2002; Solove, Rotenberg, and Schwartz (2006); Gajda (2008).

[40]Richards and Solove (2010), p. 1892.

[41]"The Right to Privacy." *Green Bag* 6 (11): 498-501; Augustus N. Hand. "Schuler against Curtis and the Right to Privacy." *The American Law Register and Review* 45 (12); 745-759; "Editorial." *Harvard Law Review* 5 (3): 146-148; "Notes." *Central Law Journal* 32 (1891): 69-78; Elbridge L. Adams. 1901. "Right to Privacy: Relation to the Law of Libel." *American Law Review* 39 (1901), pp. 41ff; "Notes." *Kentucky Law Journal* 4 (3), pp. 97ff; "The Law of Privacy." *Columbia Law Review* 12 (1911), pp. 716ff.

[42]Herbert Spencer Hadley. 1894. "Right to Privacy." *Northwestern Law Review* 3 (1): 1-21; Harvard Law Review Association (1929); Moreland (1931).

[43]Igo (2018), p. 40

practical realities of legal interpretation on the ground.[44] While it serves as the "usual starting point" for studies of privacy law in the United States, it is not really the most pertinent one.[45]

Legal institutionalization and macrosocial circumstance

Not all legal historians anchor their writings on the actions of individual legal scholars. A second approach treats the law as an indicator of prevalent cultural and political values and as a resource that can be strategically deployed by social movements.[46] It is less concerned with the legal arguments of any single individual than with the macrosocial contexts and "conditions of possibility" into which schools of legal reasoning are embedded.[47] This approach has treated shifts in the governance of private spaces and personal data as reflections of larger socio-technological transformations of American society that elevated the salience of the private automobile as a status symbol and an essential piece of personal property;[48] increased the government's reliance on computational databases and new surveillance technologies;[49] and spawned social movements in the pursuit of sexual liberation and gender equality.[50] Caught in these shifting currents, the Supreme Court reaffirmed that personal communications fell under the privacy protections of the Fourth Amendment, applied the logic of privacy to disputes about sexual self-determination, and thereby brought privacy jurisprudence into line with demands for gender equality and "pervasive concerns in

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[44]Pember (1972); Glancy (1979).

[45]Beaney (1966), p. 253; Meagan Richardson. *The Right to Privacy: Origins and Influence of a Nineteenth-Century Idea.* Cambridge: Cambridge University Press, 2017.

[46]John D. McCarthy and Mayer N. Zald. 1977. "Resource Mobilization and Social Movements: A Partial Theory." *American Journal of Sociology* 82 (6): 1212–1241; Frances K. Zemans. 1983. "Legal Mobilization: the Neglected Role of Law in the Political System." *American Political Science Review* 77 (3): 690–703; Emile Durkheim. *The Division of Labor in Society.* New York: Free Press, 1984; Morton J. Horwitz. *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy.* Oxford: Oxford University Press, 1992; Terence C. Halliday and Lucien Karpik (eds). *Lawyers and the Rise of Western Political Liberalism Europe and North America from the Eighteenth to Twentieth Centuries.* Oxford: Clarendon Press, 1998; William Wiecek. *The Lost World of Classical Legal Thought.* Oxford: Oxford University Press, 2001; Ian Haney Lopez. *White by Law: The Legal Construction of Race, 10th Anniversary Edition.* New York: N.Y.U. Press, 2006; Michael McCann. 2006. "Law and Social Movements: Contemporary Perspectives." *Annual Review of Law and Social Science* 2: 17-38.

[47]Amy Allen. 2003. "Foucault and Enlightenment: A Critical Reappraisal." *Constellations* 10 (2), p. 192; Michel Foucault. *The Order of Things.* London: Routledge, 2002.

[48]Seo (2015).

[49]Shils (1966); James B. Rule, Doug McAdam, Linda Stearns, and David Uglow. 1983. "Documentary Identification and Mass Surveillance in the United States." *Social Problems* 31(2): 222-234.

[50]Igo (2018).

the 1960s about homosexuality and its policing".[51] Consequential Supreme Court decisions like *Griswold v. Connecticut* in 1965 and *Katz v. United States* in 1967 thus marked the "first step in a broader recalibration of privacy in American society" and added "a new facet of constitutional meaning" after decades of relative juridical stagnation.[52]

This perspective understands privacy norms to be products of social development with culturally and contextually specific meaning.[53] It also draws attention to the gendered and racialized connotations of such norms in the United States, which inextricably fused debates about the scope and substance of privacy claims to larger discussions of the American social order and the legally sanctioned domination that sustains it.[54] And it highlights the importance of extra-judicial actors. Because many social movements exhibit a "rights consciousness" – an understanding of formal rights as key ingredients and resources in the restructuring of social relations and power dynamics – activists may decide to pursue change through the courts and to articulate grievances in explicitly legal terms.[55] In those instances, the evolution of legal concepts is not reducible to landmark interventions by legal elites but is significantly shaped by grassroots pressure that shifts the space of legal possibility.

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[51]Sklansky (2008), p. 875.

[52]Igo (2018), p.160; Robert G. Dixon. 1965. "The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?" *Michigan Law Review* 64 (2), p. 197.

[53]Barrington Moore. *Privacy: Studies in Social and Cultural History.* London: Routledge, 1984. p. 268; Shils (1966), p. 287; Kasper (2005); Cohen (2013); Igo (2018). For historical perspectives on the entanglement of privacy and social organization, see Arendt's (1958) argument that the cultural salience of the private sphere in the nineteenth century reflected the increasing division of labor, which reduced social relations to technical interdependence and leveled social difference, or writings by Sennett (1974) and Shils (1966) that root the growing valuation of private life in the psychological anxieties of the industrial era, the decline of religiosity, and the growth of cities that "put families and individuals into the presence of others and lay them open to the possibility of observation."

[54]Louise Marie Roth. 1999. "The Right to Privacy is Political: Power, the Boundary Between Public and Private, and Sexual Harassment." *Law & Social Inquiry* 24 (1): 45-71; Simone Browne. *Dark Matters: On the Surveillance of Blackness.* Durham: Duke University Press, 2015; Citron (2019), p. 1905.

[55]Charles R. Epp. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective.* Chicago: The University of Chicago Press, 1998; William N. Eskridge. 2002. "Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century." *Michigan Law Review* 100 (8): 2062-2407; Patricia Ewick and Susan S. Silbey. *The Common Place of Law: Stories from Everyday Life.* Chicago: The University of Chicago Press, 1998; Anna-Maria Marshall. 2003. "Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment." *Law & Social Inquiry* 28 (3): 659–690; Jack M. Balkin. 2005. "How Social Movements Change (Or Fail to Change) the Constitution: The Case of the New Departure." *Suffolk University Law Review* 39 (1): 27-66; McCann (2006), p. 22.

Yet this second perspective cannot adequately explain the institutionalization of the right to privacy as a state-centric right for two reasons. One reason is empirical: The focus on the latter half of the twentieth century is too recent. State-centric approaches to privacy were already apparent in the U.S. Supreme Court's 1914 decision in *Weeks v. United States* (which held that the warrantless search of a person's residence was unconstitutional) and in the court's 1932 insistence in *United States v. Lefkowitz et al.* (which considered the use of evidence obtained through warrantless searches) "to safeguard the right of privacy" through a liberal interpretation of the Fourth Amendment. A crucial phase of legal development thus occurred well before the rise of computational data processing and the sexual revolution. The debates of the 1960s were predominantly about the scope of privacy claims within the state-centric tradition and the legal justification of those claims, not about an initial pivot from the sphere of social relations and mass media towards the informational privacy of citizens against the American state.

The second shortcoming is conceptual: The postwar perspective under-appreciates the processual nature of legal institutionalization. It asserts that new judicial interpretations of privacy became institutionalized because they reflected an emerging societal consensus. But just because an idea resonates widely does not mean that it is anchored in legal discourse or the routines of judicial practice.[56] Instead, social scientists commonly understand institutionalization as a complex process marked by contestation among different groups and periods of repetition and habituation that fall between transformative events.[57] Such processes of institutionalization integrate new interpretive schemes "into existing modes of reproduction" and thereby ensure their recognition as natural, appropriate, or legitimate.[58] They are marked by repeated experiences and routine practices that contribute to the creation of a shared reality, the internalization of meaning, and the recognition of specific interpretations of the

[56]Ryken Grattet, Valerie Jenness, and Theodore R. Curry. 1998. "The Homogenization and Differentiation of Hate Crime Law in the United States, 1978 to 1995: Innovation and Diffusion in the Criminalization of Bigotry." *American Sociological Review* 63 (2): 286–307; Jeannette A. Colyvas and Stefan Jonsson. 2011. "Ubiquity and Legitimacy: Disentangling Diffusion and Institutionalization." *Sociological Theory* 29 (1): 27-53.

[57]Thomas B. Lawrence, Monika I. Winn, and P. Devereaux Jennings. 2001. "The Temporal Dynamics of Institutionalization." *Academy of Management Review* 26: 624-644; Fligstein and McAdam (2015); Eun Song. 2020. "Divided We Stand: How Contestation Can Facilitate Institutionalization." *Journal of Management Studies* 57 (4): 837-866; William H. Sewell. 1996. "Historical Events as Transformations of Structures: Inventing Revolution at the Bastille." *Theory and Society* 25 (6): 841–881; Stephen R. Barley. "Coalface Institutionalism." Pp. 490-515 in *The SAGE Handbook of Organizational Institutionalism*, edited by Royston Greenwood, Christine Oliver, Roy Suddaby, and Kersin Sahlin. Thousand Oaks: SAGE Publishing, 2008.

[58]Colyvas and Jonson (2011), p. 39.

world as factual representations thereof.[59]

This processual framework can illuminate dynamics of institutionalization across contexts and time periods. For example, Neil Fligstein and Doug McAdam use a multi-stage model to explain the institutionalization of governance norms in markets. Building on the so-called "field theory" of Pierre Bourdieu, they argue that exogenous shocks can lessen the acceptance of formerly hegemonic ideas and facilitate the migration of novel concepts across professional and cultural boundaries into proximate domains of social life. Such shocks are followed by a period of ambiguity during which different groups wrestle for interpretive control, since there is no agreed-upon authority that can sanctify a "correct or legitimized vision of the social world."[60] The eventual emergence of such authorities can then result in the consecration and institutionalization of new perspectives. A processual logic is also appliccable to the specific problem of legal institutionalization. For example, scholars who seek to understand why some injurious experiences become legal disputes while others don't have identified a multi-stage transformation of grievances that leads from the "naming" of an experience (i.e. its recognition as noteworthy and deleterious) to "blaming" (i.e. the assigning of responsibility to some third-party agent) and "claiming" (i.e. demands for a legal remedy).[61] Crucially, each of those stages can transform the content and framing of a dispute in consequential ways. The eventual outcome is the product of a longitudinal *process*, not a straightforward response to the initial experience. Such an account of legal institutionalization can identify the contributions of different constituencies to the evolution of legal concepts, recover struggles over legal meaning and judicial decision-making that are obscured by a focus on landmark cases, and thereby demonstrate the distinct legal "career" of the right to privacy in American jurisprudence.[62]

Methodological considerations

The remainder of this chapter identifies two schools of legal thought about the right to privacy and traces the legal institutionalization of this right across three phases of judicial meaning-making between the late nineteenth century and the 1920s.[63] It was

[59] Berger and Luckmann (1966).

[60] Bourdieu (1986), p. 817; Fligstein and McAdam (2015).

[61] William L. F. Felstiner, Richard L. Abel, and Austin Sarat. 1980. "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming." *Law and Society Review* 15 (3/4): 631-654. Unlike work by Fligstein and McAdam, this study is rooted in social psychology rather than field theory.

[62] Phillips and Grattet (2000).

[63] As ideal-typical constructs, such phases are meaningful groupings that impose distinctions and order on the continuum of social experience, but they are also heuristic devices that serve a distinct analytical purpose.

stripped of ambiguous or competing interpretations and integrated into the routine operations of American jurisprudence. It evolved from a relatively capacious idea into a clearly defined and tightly bounded legal concept or, as Valerie Jenness puts it, a "modern legal fact".[64] The end result was the growing dominance of one school of thought and the gradual disappearance of another: Concerns about governmental overreach during the Prohibition Era and the involvement of federal courts and the U.S. Supreme Court helped to elevate an interpretation of privacy that was grounded in constitutional law and applied to the exercise of state power. By the late 1920s, the logic of privacy commonly implied a claim of citizens against the American state, while claims of consumers against market entities fell by the proverbial wayside – to be resurrected only a century later during the digital era.

Making such an argument requires evidence of shifts in American jurisprudence over time and across a considerable number of cases. To document such shifts, and to identify schools of legal thought, I begin by constructing a network of legal citations. Such citations were a central ingredient of judicial decision-making in American jurisprudence during the early twentieth century (they remain so today), because judges who affirmed or dismissed alleged privacy violations as viable legal grievances did not push into a conceptual void. Through the citation of precedent, they linked the right to privacy to an existing repertoire of legal concepts and cases, and thus rendered it intelligible in the specialized language of the law. This makes it possible to examine a specific right as part of a larger body of case law and a longer genealogy of juridical decision-making by studying patterns of legal citations. This is not a novel approach in itself: Scholars have long applied the tools of social network analysis to the study of citation patterns, usually to examine the emergence of scientific schools of thought, the diffusion of new and innovative ideas across scientific subfields, and the formation of scientific communities.[65] It is less common to study legal history and processes of legal institutionalization in this manner, yet the logic behind this approach is relatively straightforward: If a judge's opinion cites another opinion that pre-dates it, the two cases have a direct connection. If two opinions cite the same precedent, they have an indirect connection. Mapping such direct and indirect connections for a large number of cases – and coding each case by its year of adjudication – yields a network of legal citations that can be sliced into different periods and reveals aggregate clusters and trends. These are the patterns we seek to identify here.

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[64] Jenness (2007).

[65] Norman P. Hummon and Patrick Dereian. 1989. "Connectivity in a Citation Network: The Development of DNA Theory." *Social Networks* 11 (1): 39-63; Evelien Otte and Ronald Rousseau. 2002. "Social Network Analysis: A Powerful Strategy, Also for the Information Sciences." *Journal of Information Science* 28 (6): 441-453; Linda S. Marion, Eugene Garfield, Lowell L. Hargens, Leah A. Lievrouw, Howard D. White, and Concepción S. Wilson. 2003. "Social Network Analysis and Citation Network Analysis: Complementary Approaches to the Study of Scientific Communication." *Proceedings of the American Society for Information Science and Technology* 40 (1): 486-487.

I focus specifically on the period between 1870 and 1930. This timeframe matters for several reasons. First, legal histories of privacy are commonly anchored in this period, with a specific focus on Warren and Brandeis' essay in 1890 and several highly publicized court cases between 1893 and 1905. Second, this was a period of far-reaching social and institutional transformation in the United States, when the capacity to collect and analyze personal data and the actual collection of such data increased considerably.[66] Third, the idea of privacy first emerged as a salient topic of political discourse during the late nineteenth century.[67] As previous chapters have already shown, it expanded beyond the confines of families and social circles and was applied more generally to comprehend and contest the visibility of individuals in the modern United States. Focusing on the decades before and after the turn of the century thus makes it possible to dissect the evolution of privacy jurisprudence in its early stages and during a period of significant social and political change in the United States.

During this period, American state and federal courts adjudicated a total of 146 cases that discussed the right to privacy in a substantive manner, for example by linking it into the existing body of case law, rooting it in legal doctrine, affirming its legal meaning, contemplating its scope and applicability, or dismissing it altogether. In the Methodological Coda I document the process used to construct this dataset from the Lexis Uni archive of historical legal materials and also discuss the methodology of citation network analysis – which I use for the purpose of pattern detection rather than as a tool of causal explanation –, including the computation of network parameters like centrality scores. I use these 146 cases as the initial basis for a citation network that also includes any other case, constitutional amendment, statute, legislative act, or law review essay that was cited as precedent for the right to privacy by judges in their written opinions. Implicit in this approach is a recognition of the importance of precedent in American jurisprudence. Such precedents "are used as tools to justify a certain result as well as serving as the determinants of a particular decision" – that is, judicial practice requires that judges position their decisions in relation to the existing body of caselaw.[68] Lower-court judges thus tend to be oriented towards the "casuistry of concrete situations": Instead of approaching disputes as instantiations of general legal principles, they focus on the articulation of retrospective genealogies that connect contemporary disputes to prior judicial traditions and thereby present the piecemeal articulation of justice as the "principled interpretation of unanimously accepted texts."[69] The total network is composed of 677 cases or statutes and 1099

[66]Robert H. Wiebe. *The Search for Order, 1877-1920.* New York: Hill and Wang, 1966; Seo (2015); Igo (2018).

[67]Shils (1966); David J. Seipp. *The Right to Privacy in American History.* Harvard University Program on Information Resources Policy Publication P-78-3, 1978; Palmer (2011).

[68]Bourdieu (1986), p. 832.

[69]Bourdieu (1986), pp. 824 and 818.

citation ties.

In a second step, I supplement this network analysis with a qualitative examination of historical legal opinions, law review essays, and newspaper articles. For each of the 146 cases in the original dataset, I identify their year of adjudication and their thematic focus. I also record whether privacy claims in each dispute were directed against government agencies or private companies, and whence judges derived a distinct "right to privacy", if explicitly stated. I also perform a close reading to analyze all articles that mention the "right to privacy" in 395 issues of 15 prominent law reviews and law journals, including the *Harvard Law Review*, the *Yale Law Journal*, the *Columbia Law Review*, and the *American Law Review*. This data, which comes from the Hein Online database of legal periodicals, allows me to examine discursive contributions from legal scholars alongside judges' opinions. Finally, I rely on digitized newspapers to situate legal debates about privacy within a wider social environment. I identify 3001 articles from the "Chronicling America" collection (introduced in Chapter 3) that discussed the "right to privacy" between 1870 and 1930, stratify the dataset by decade, and sample 100 articles from each decade for the same qualitative analysis.

Two staggered schools of legal thought

Let us now turn to legal history and processes of legal institutionalization, beginning with a macroscopic overview of six decades of legal evolution and two distinct schools of legal thought. Fig. 5.1 offers a first glimpse. It depicts 1099 citation links in their entirety, and also split up into three successive periods. In this network representation, each case or statute appears as a node (with the original dataset of 146 privacy cases shown in black) and each citation link between two cases, or between a case and a statute or legislative document, appears as a tie. The citation network has two primary clusters – that is, groups of nodes marked by dense intra-cluster ties and comparatively scarce outbound ties – that represent two distinct schools of legal thought. Coexisting alongside these two clusters are multiple isolated nodes; these represent cases that mention the "right to privacy" in passing but do not link it to established legal precedent. We can quantify the community structure of this citation network using modularity scores, which measure the ratio of the total number of ties within a cluster to the total number of ties in the entire network. The modularity of the total citation network is $Q=0.7$, which is towards the upper bound of modularity scores for empirically observed social networks.[70] However, modularity scores for individual periods are lower and suggest that legal discourse *within* each period was less fragmented than legal discourse *across* multiple periods. One exception is the period between 1900 and 1920, which has a modularity score similar to the

[70] Mark E. Newman. 2006. "Modularity and Community Structure in Networks." *Proceedings of the National Academy of Sciences* 103 (23): 8577-8582.

overall network (*Q=0.69*). Judicial discourses during this interim period were more fragmented than during preceding and subsequent periods.

The two clusters differ along several dimensions. First, they capture different thematic foci. The legal opinions that discussed the right to privacy pertained to a wide range of issues, ranging from the relatively evident (like the unauthorized use of a person's imagine by newspaper publishers or the warrantless search of a person's luggage by police officers) to the relatively obscure (like privacy claims of the deceased against the living, specifically in the context of funeral homes and cemetery management). But there is a clear difference in the distribution of such issues across the two clusters. Cases in the bottom cluster of each network predominantly adjudicated disputes about emerging mass media and technologies like film photography. Some of these cases generated considerable attention and nationwide media coverage. *Roberson v. Rochester Folding Co.* (171 N.Y. 538), *Schuyler v. Curtis* (147 N.Y. 434), and *Pavesich v. New England Life Insurance Co.* (122 Ga. 190) all dealt with the unauthorized use of photographs, and all turned into moments of heightened attention when the question of privacy rose to the fore not only of expert legal discourse but of U.S. public discourse more generally. As the *New York Tribune* declared in the wake of the *Roberson* decision in 1902, "it is intolerable that a woman [...] should be at the mercy of every advertiser who can beg, borrow or steal her photograph. This is a great evil and is not the less real because it has only recently been discovered."[71] The paper continued: "New conditions have prepared the way for it, and new remedies are needed." Given this dual concern with new intrusions into the intimate spheres of life and the need for new kinds of legal remedies, it does not surprise that the bottom cluster also includes Warren and Brandeis' 1890 essay, which became an occasional reference in disputes about photography and newspaper publishing. In contrast, cases in the top cluster primarily addressed the privacy of the home and personal data. This cluster includes cases like *United States v. Kaplan* (286 F. 963), *Missouri v. Owens* (302 Mo. 348), and *State ex rel. King v. District Court* (70 Mont. 191) – which dealt with police searches for illicit liquor during the Prohibition Era – as well as the Supreme Court's 1887 decision in *Boyd v. United States* (116 U.S. 616), which held that unreasonable searches and the compulsory production of personal documents were prohibited by the Fourth Amendment. The concern in such cases was not about the broadcasting of a person's words of visual likeness but about the procedures through which organized authorities could obtain access to personal documents, and also about the limits that should be imposed on the exercise of informational power.

Second, the two clusters identify different targets of privacy disputes. Cases in the bottom cluster focused on alleged violations by tabloid newspapers, book publishers,

[71] "The Right to Privacy." *New York Tribune*, 06/29/1902.

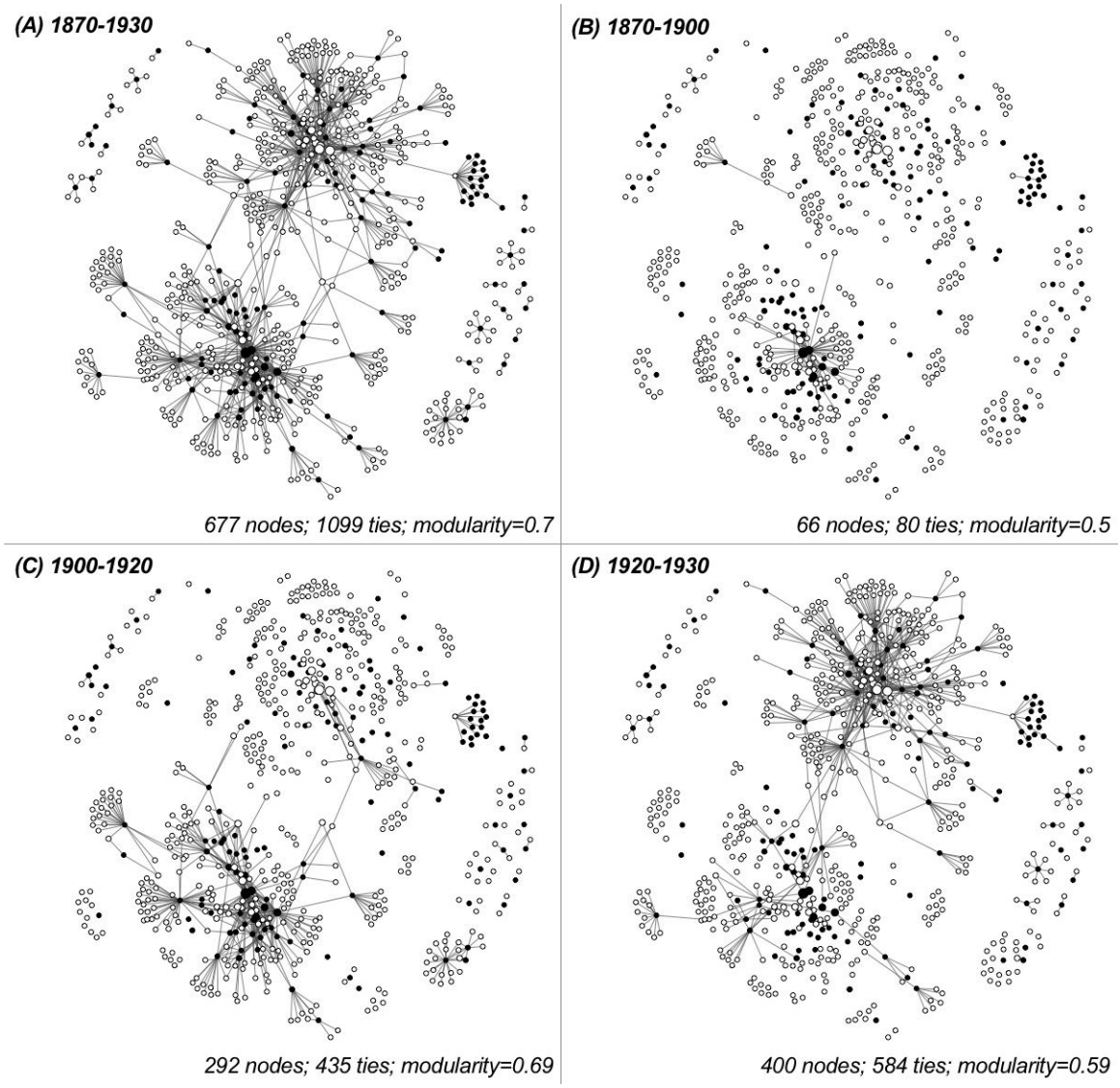

Figure 5.1: *Legal citation network of 146 state and federal cases that discussed the Right to Privacy ("egos", nodes shown with black filling) and 531 cases, statutes, laws, and publications that were cited as precedent ("alters", nodes shown without filling), 1870-1930. Network ties represent citation links, mapped with the Fruchterman-Reingold algorithm in the iGraph R package. The citation network for the entire 1870-1930 time span is depicted in Fig. 1A. Separate networks for each period of legal institutionalization are shown in Figs. 1B, 1C, and 1D. Source: LexisUni.*

advertising agencies, and theater companies.[72] Cases in the top cluster focused instead on privacy violations by the state, from local police forces and federal law enforcement to the Internal Revenue Service, the Bureau of Prohibition, and the Census Bureau. Third, privacy disputes in the bottom cluster came almost exclusively from State Supreme Courts and State Courts of Appeal, whereas disputes in the top cluster were more likely to be adjudicated at the federal level and before the U.S. Supreme Court. Six percent of cases in the bottom cluster were federal, compared to fifteen percent in the top cluster. Fourth, the two clusters capture staggered periods of legal evolution. The bottom cluster is mainly populated by privacy disputes from the 1900s and 1910s, which often cited English common law and American jurisprudence from the 1870 and 1880s as precedents. The most central nodes in this cluster are cases like *Schuyler v. Curtis* and *Roberson v. Rochester Folding Co.* Both cases were controversial within American jurisprudence – *Schuyler* because it endorsed a limited right to privacy until death, and *Roberson* because it denied the existence of such a right – and both became important reference points for other judges and examples of the fragmented state of privacy jurisprudence after the turn of the twentieth century. In contrast, the top cluster includes privacy jurisprudence from the 1910s and 1920s that referenced more recent case law and constitutional amendments rather than nineteenth-century common law. The most central nodes in this cluster, measured by their eigenvector centrality scores, are cases about searches for illicit liquor by local law enforcement and the Bureau of Prohibition (like *State v. Aime*, 62 Utah 476), police raids on private apartments (like *Weeks v. United States*, 232 U.S. 383), and searches for drugs and weapons (like *People v. Jakira*, 193 N.Y. 306). Such cases rooted privacy claims in constitutional amendments and suggest a pivot of legal reasoning from case law precedent towards legal doctrine.

Discrepancies in the two clusters' median date of adjudication already suggest that the legal institutionalization of the right to privacy had a distinct temporality: Different claims were made – and different interpretations, critiques, and justifications were articulated – at different moments. We can get a better sense of these dynamics by mapping the distribution of different modes of legal reasoning along a time continuum. In Fig. 5.2, I identify the thematic focus of the dispute ("issue"); the origin from which judges derived the right to privacy, if explicitly mentioned ("origin"); and the entity that was alleged to have violated this right ("target") for each of the 146 cases that specifically addressed the right to privacy between 1870 and 1930. The results are arranged by median year of adjudication for each row, which is indicated by a dashed line. (More recent modes of legal reasoning are thus located towards the bottom of each panel.) One observation that stands out from this figure is the scarcity of

[72]The exception are several cases about the use of so-called "rogue gallery" photographs by local police agencies, which tended to cite prior cases about the illicit use of photographs by advertisers and publishers rather than cases that specifically addressed privacy violations by the police.

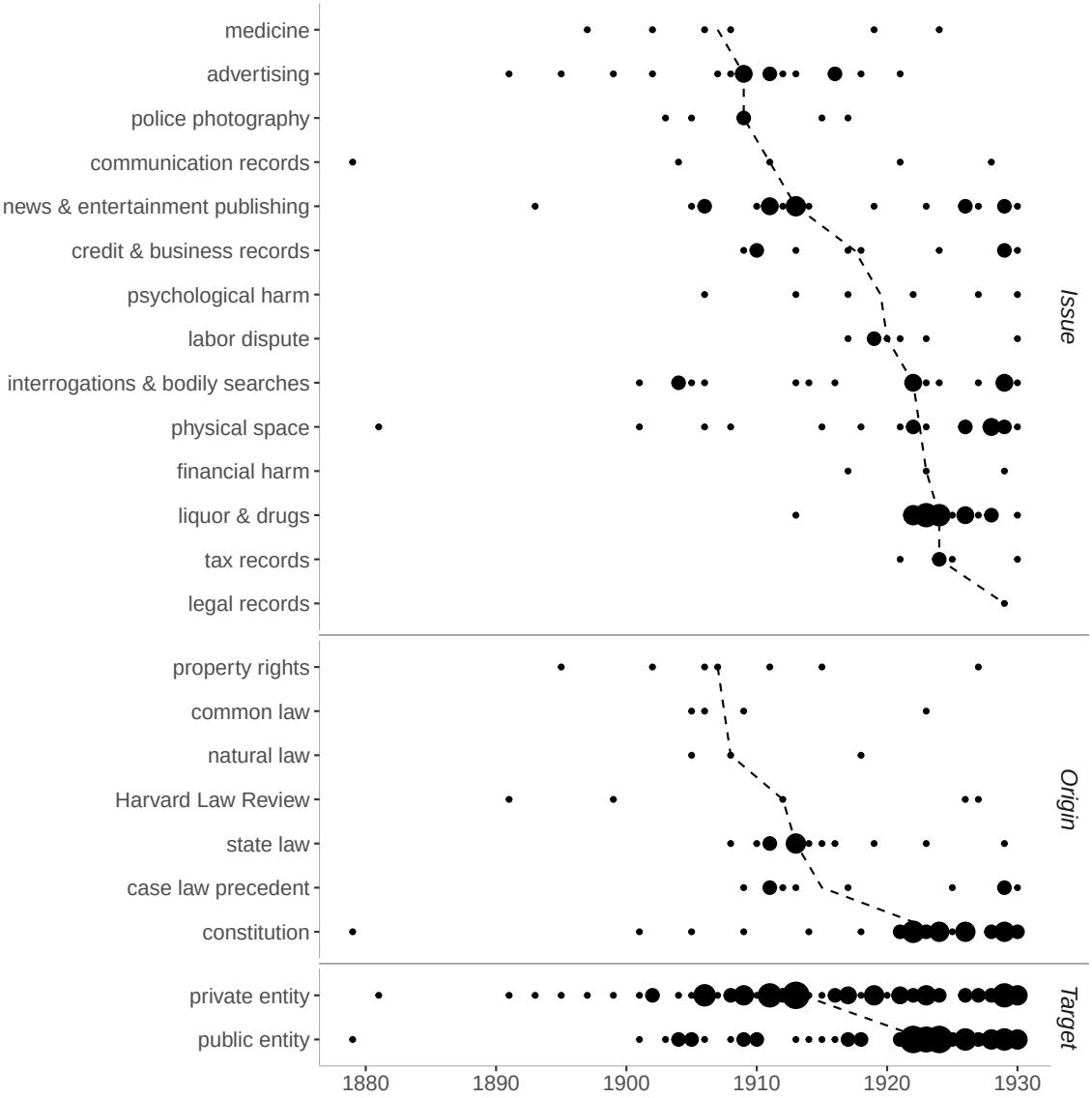

Figure 5.2: *Thematic contexts of Right to Privacy lawsuits ("Issue"), legal doctrines and texts that were cited to establish an origin of the Right to Privacy ("Origin"), and targets of Right to Privacy disputes ("Target"), shown by year of adjudication. Dots are sized to reflect the number of cases per year. Dashed lines indicate the median year of adjudication for each category. Source: Lexis Uni.*

privacy jurisprudence until the end of the nineteenth century and the subsequent proliferation of privacy cases during the early twentieth century. There were only seven cases discussing the right to privacy in the decades prior to 1900, but 26 cases in the decade between 1900 and 1909 and another 38 cases in the decade between 1910 and 1919. But this increase in the number of cases is just one side of the historical story. Another is the shift of privacy jurisprudence towards new issues and the reliance on new modes of legal reasoning. During the first two decades of the twentieth century, the right to privacy was most commonly discussed in cases that focused on the use of photographs and the publication of personal information in newspapers and advertisements. Such cases drew on established legal doctrines – natural law, common law, and property rights – to assess whether a distinct right to privacy existed and whether a violation of such a right had occurred. After 1920, alleged violations by government organizations became increasingly central and searches of private residences, luggage, and cars – often conducted to enforce Prohibition laws after the passage of the Eighteenth Amendment in 1919 – emerged as salient topics of legal dispute. These two approaches were separated by a decade of juridical development. The median date of cases that alleged privacy violations by private entities (N=80) occurred in 1913, while the median year of cases that alleged violations by the state (N=66) occurred in 1923. Cases about the use of personal data without consent by publishers and advertising agencies (N=39) were concentrated in the 1910s, while cases about police interrogations (N=18), anti-liquor raids (N=24), and apartment searches (N=18) occurred primarily in the 1920s.

How the existence of a right to privacy was established or contested also evolved as judges settled on a constitutional interpretation of privacy in the 1920s instead of deriving it from natural law or property rights. Rooted in the Fourth Amendment (the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures), the Fifth Amendment (the right against self-incrimination), and the Fourteenth Amendment (the right to due process), privacy was folded into an existing set of constitutional principles and the legal precedents that had already developed around them. The median date of such constitutional justifications (mentioned in N=33 cases) occurred 17 years after the median date of the property-based justifications (N=7).[73] By 1930, constitutionalism had come to dominate over alternative legal doctrines; and grievances against private actors had become overshadowed by grievances against the state. Cases against private entities persisted at the state level after 1920 but disappeared almost entirely from federal jurisprudence.

[73]Several cases in the 1910s also referenced civil rights bills passed by state legislatures and suggest that juridical developments were directly affected by the elevated significance of privacy in the political domain. I return to this point in the analysis and discussion below.

Table 5.1: Eigenvector centrality by period

C_i	Node	Year	Description
	Before 1900		
1.00	Schuyler v. Curtis	1895	advertising
0.52	Corliss v. E. W. Walker Co.	1893	publishing
0.43	Atkinson v. Doherty	1899	advertising
0.36	Mackenzie v. Mineral Springs Co.	1891	advertising
0.32	Marks v. Jaffa	1893	publishing
0.30	Prince Albert v. Strange	1849	English common law
0.30	Pollard v. Photographic Co.	1888	English common law
0.20	Brandreth v. Lance	1839	libel
0.20	Dixon v. Holden	1869	property claims
0.19	Warren and Brandeis/HLR	1890	law review essay
	1900-1920		
1.00	Roberson v. Rochester Folding Box Co.	1902	advertising
0.85	Pavesich v. New England Life Insurance Co.	1905	publishing
0.57	Edison v. Edison Polyform and Manuf. Co.	1907	advertising
0.51	Atkinson v. Doherty	1899	advertising
0.51	Schuyler v. Curtis	1895	advertising
0.48	Henry v. Cherry and Webb	1909	advertising
0.46	Corliss v. E. W. Walker Co.	1893	publishing
0.45	Klug v. Sheriffs	1906	property claims
0.45	Miller v. Gillespie	1917	police photography
0.42	Riddle v. MacFadden	1911	advertising
	After 1920		
1.00	State v. Aime	1923	liquor production
1.00	People v. Mayen	1922	personal papers seized
0.96	Hall v. Commonwealth	1924	liquor searches
0.89	State of Missouri v. Owens	1924	liquor searches
0.89	Weeks v. United States	1914	personal papers seized
0.89	4th Amendment		Constitutional law
0.86	Boyd v. United States	1886	personal papers seized
0.82	Gouled v. United States	1921	personal papers seized
0.77	Morse v. Commonwealth	1908	admissibility of evidence
0.74	Owens v. State of Mississippi	1923	admissibility of evidence

Data shown in Table 5.1 corroborate these findings. The table lists the top ten nodes for three different periods – based on their eigenvector centrality, a common measure of network centrality that measures the transitive influence of a node – and it illustrates the shift from privacy disputes about the publication of photographs or details from a person's intimate life towards disputes about the exercise of state power, as well as the concurrent pivot from common law precedent towards constitutional jurisprudence.[74]

Three periods of legal institutionalization

Legal citation networks and longitudinal analyses offer a macroscopic perspective on the uneven development of American privacy jurisprudence; they highlight the staggered emergence of two distinct schools of legal reasoning and the shift towards state-centric and constitutional interpretations of privacy during the 1920s. I now dissect this development in greater detail by delineating three periods of legal institutionalization. Before 1900, during the period of *initial judicialization*, the language of privacy entered American jurisprudence sporadically and without significant effects on caselaw decisions, pushed in part by concurrent discussions in the media about the social impact of emerging technologies. Between 1900 and 1920, during a period of *intra-legal competition*, judges relied on a multitude of legal doctrines and applied the right to privacy to a wide variety of legal disputes, but without agreeing on the existence of such a right, its proper scope, or its legal foundations. After 1920, during a period of *judicial consolidation*, the right to privacy became more deeply anchored in American jurisprudence, closely tied to constitutional law, and increasingly applied to the actions of state officials.

Initial judicialization, 1870-1900

Before the 1870s, references to privacy tended to appear in serialized non-fiction stories and novels. To invoke privacy was to draw a conceptual circle around domestic life and to structure the social and gender relations within the home.[75] Women in particular were relegated to the so-called privacy of the home on the assumption that isolation from the temptations and vices of communal life would protect their moral innocence and allow them to act as the moral center of the family and for the family's children.[76]

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[74]For example, the concept of eigenvector centrality is at the heart of Google's search algorithm. Also called PageRank, it assigns higher scores to websites that are connected through hyperlinks to other highly ranked websites. Similarly, nodes with a high eigenvector centrality are connected to other nodes that also have high eigenvector scores. See the Methdological Coda for details.

[75]David H. Flaherty. *Privacy in Colonial New England*. Charlottesville: University Press of Virginia, 1972; David Vincent. *Privacy: A Short History*. London: Polity, 2016.

[76]Karen V. Hansen. "Rediscovering the Social: Visiting Practices in Antebellum New England and the Limits of the Public/Private Dichotomy." In: *Public and Private in Thought and Practice*, edited by Jeff Weintraub and Krishan Kumar. Chicago: The University of Chicago Press, 1997.

This was a conception of privacy among peers and members of familial units that still had little to say about the relationship between individuals, governments, markets, and society writ large. But as Chapter 3 has shown, the language of privacy was increasingly adapted by journalists and applied to new technologies and mass media in the waning decades of the nineteenth century.[77] Connotations of domestic life and social roles did not disappear, yet they were supplemented with informational interpretations of privacy: To be truly private implied to be secure against undue exposure in one's home but also in one's physical likeness and one's written and spoken communications.

The expansion of tabloid media circulation, instant photography, and classified ads had a particular effect on the quanities of daily information that the average American could consume and on the size of the audience that a newspaper or an advertising agency could reliably reach. Upstart publishers like Joseph Pulitzer and William Randolph Hearst aimed to expand the circulation of the *New York World* or the *San Francisco Examiner* and eat into the market-share of legacy papers through sensationalist and highly personalized coverage that often focused on crime, corruption, and morality tales and combined original reporting with a strong editorial voice.[78] By the 1890s, they had established so-called "yellow press" journalism as an economically viable model – it had taken only two years for the *New York World* to eclipse all other papers in the city in daily circulation – and had also attracted the ire of competing publishers. Questions of journalistic ethics soon became wrapped up in this competition, and the issue of privacy began to take center stage in discussions of the American press. Legacy publishers used their editorial power to lament the inquisitive nature of taloid coverage and the violations of personal privacy committed by yellow press reporters in pursuit of lurid tales and scoops. Writing in the *Atlantic Monthly*, the journalist and abolitionist reformer Benjamin Sanborn thus criticized the "slanderous character of the modern newspaper" and "its entire disregard of privacy and the right of individuals to be respected in their withdrawal from public notice."[79] Sanborn conceded that "error and slander" were not unique to the late nineteenth century – after all, newspapers had long sought to break stories about the lives of prominent persons, and those persons had likewise tried to shield themselves from observation and public scrutiny –, yet suggested that "we have made error and slander more public by our inventions." This was especially true for persons who occupied public office or had otherwise established themselves as prominent citizens, and who could neither "retreat within the privacy of the average citizen"[80] nor enjoy themselves in public "without becoming subject to

[77]Seipp (1978); Igo (2018.

[78]Paul Collins. *The Murder of the Century: The Gilded Age Crime That Scandalized a City & Sparked the Tabloid Wars*. New York: Broadway, 2011.

[79]Franklin Benjamin Sanborn. "Journalism and Journalists." *Atlantic Monthly*, July 1874: 55-66.

[80]"Vanderbilt's Privacy". *Chicago Daily Tribune*, 3/3/1884.

the criticism of the Press."[81]

What had changed, according to Sanborn, was not the journalistic desire for scoops and revealing information but the technologies that could be deployed by tabloid journalists and the ability to disseminate the information thus obtained.[82] An editorial in the *Martinsburg Daily Gazette* from West Virginia likewise noted that "side by side" with the social valuation of privacy "goes on an increasing invasion of privacy by the newspapers, so that it almost becomes necessary to ask each stranger at a private gathering, 'Are you a reporter?', and each new visitor at one's door, 'Are you an interviewer?' "[83] And in the *The Herald and News* from South Carolina, the editorial board opined that the proliferation of newspapers had entrenched "everybody's right to anybody's privacy" as American society was flooded with "triviality, gossip, and scandal" by yellow press journalists and newspaper photographers who used "deception" and "blackmail" to extract personal data and intimate confessions from their subjects to further their "vulgar and sordid business."[84] The prevailing attitude was perhaps best summed by in 1892 by the *Irish Standard*, which wrote:

> *"It is scarely possible to take up a newspaper without finding in it invasions of the sacred right to privacy [. . .] Not only the private affairs of persons holding public relations are pried into and falsely published forth, but those of persons who have no public functions whatever. This tendency is a most deplorable one, and unless it is checked it will bring about a deterioration of public sentiment, and cause deserving persons to shun public relations of every sort."*[85]

But if personal privacy could be invaded by the pen, it was most certainly threatened by the camera and the telegraph. The invention of flexible photographic film during the mid-1880s by George Eastman – who would go on to co-found the Eastman Kodak Company – allowed photographers to leave their controlled studio settings and venture into the streets. Instead of asking clients to sit still for prolonged periods in front of a Daguerreotype camera, an emerging class of professional photographers could use portable cameras and rapid exposures to document the lives of individuals and the social conditions of the Progressive Era on the fly. The most famous publication from this first wave of American photojournalism was Jacob Riis' *How the Other Half Lives*, published in 1890. Armed with a detective camera, Riis had spent weeks in the tenement slums of New York to document the squalid conditions and poverty experienced by millions

[81] "A Wrong Done and Not Repaired". *New York Times*, 11/10/1870.

[82] Until the middle of the nineteeth century, personal data tended to stay relatively local, and privacy violations were usually committed and punished within the community. See Seipp (1978), p. 3.

[83] "The Decrease of Privacy." Martinsburg Daily Gazette, 05/31/1887

[84] "America and the Right of Privacy." The Herald and News, 11/30/1909.

[85] "The Right to Privacy." *The Irish Standard*, 02/06/1892.

of recent immigrants. But for each project that put photography into the service of social reform and political advocacy, there were myriad others who trained their cameras on prominent citizens or used them to document vice and crime among the American working class. New communication technologies sparked analogous debates, already discussed in Chapter 3. As the magazine *Telegrapher* concluded as early as 1877, "if the privacy of communicating by telegraph is to be invaded on every pretext, [...] the liberties of the people are endangered."[86] Such concerns – about the precarious nature of privacy in an increasingly interconnected and information-rich society – were still conspicuously absent from American jurisprudence. But as the *Atlantic Monthly* argued, the American legal system had to "concern itself with the privacy of the individual" in light of the sweeping social and technological changes of the late nineteenth century.[87] As Edwin Lawrence Goodkin, founding editor of *The Nation*, argued in 1880, "the press has no longer anything to fear from legal restriction of any kind [...] while the community has a good deal to fear from what may be called excessive publicity, or rather from the loss by individuals of the right of privacy."[88]

When judges and legal scholars used the language of privacy before 1900, it was primarily in reference to such concerns and in an acknowledgment of prevalent social norms, rather than in reference to judicial precedent or legal doctrine. When the Michigan Supreme Court affirmed a woman's "legal right to the privacy of her apartment" in 1881 — the first recognition of such a right in American jurisprudence —, the ruling was rooted in arguments about womanhood and moral innocence.[89] This should not come as a surprise, given the close association of privacy and moralized conceptions of gender and the family. But invoking privacy also gave judges a language through which they could capture emerging social anxieties far beyond the confines of domestic life, especially once those anxieties had evolved into prominent topics of public discourse. As one judge acknowledged, the salience of privacy claims was a sign of the times rather than the product of deliberate legal reasoning. "The present age [...] may be said to be marked with a characteristic of publicity," another legal scholar wrote in the journal *Green Bag*, "yet this very condition holds within itself the germs of a right of privacy, the returning swing for balance."[90] This right was "unmentioned in the legal tomes" and "based upon no ancient or modern statute." It had instead been pushed into the legal consciousness as Americans began to wrestle

[86] "Congress and the Western Union Telegraph Company." *Telegrapher*, 1/6/1877.

[87] Glancy (1979), p. 6.

[88] Edwin Lawrence Goodkin. "Libel and its Legal Remedy." *Atlantic Monthly*, December 1880: 729-739.

[89] 46 Mich. 160. See: Caroline Danielson. 1999. "The Gender of Privacy and the Embodied Self: Examining the Origins of the Right to Privacy in U.S. Law." *Feminist Studies* 25 (2): 311-344.

[90] Archibald McClean. 1903. "The Right of Privacy". *Green Bag* 15(10): 494-497.

with the social realities and the "new conditions of life."[91]

Before the right to privacy gained a foothold in the nation's courtrooms and parliamentary chambers, extra-legal debates had already established the logic of privacy as a way of comprehending social relations within the home and nascent concerns about modern life beyond the home, launched debates about the proper relationship between self and society during the Industrial Era, and thus spawned both a set of arguments about the significance of privacy and an audience that was attuned to them. There was not yet a developed judicial discourse about the legal justification of a right to privacy or about the scope of disputes to which it could be applied. But there was an opening for such debates and a constituency of scholars and judges who could contest them. Jürgen Habermas has posited that there is no public discourse without a *Publikum*, that is, an audience that is familiar with the basic terms of a debate and invested in its outcome.[92] The late nineteenth century had seen the emergence of such an audience within American jurisprudence as older conceptions of familial privacy were re-articulated in legal language and adapted to the socio-technological questions that imposed themselves with greater urgency.

Intra-legal competition, 1900-1920

Judicial discussions of privacy remained relatively rare until 1900 despite increasing journalistic attention and the publication of Warren and Brandeis' *Harvard Law Review* essay in 1890. When judges mentioned the right to privacy before the turn of the century, it was often to dismiss it as a figment of the legal imagination or to curtail its proposed application.[93] This changed between 1900 and 1920. As one lawyer argued in 1909, the right to privacy "has of late years grown out of the unredressed residue of the law into a recognized right."[94] But this growth did not follow a singular path. Instead, the first two decades of the twentieth century saw a blossoming of competing approaches that aimed to establish a more solid legal footing for the right to privacy by grounding it in natural law, common law, evolving precedent, and state-level legislation, and by applying it to the actions of advertising agencies and newspaper publishers as well as the conduct of state officials. Without a widely recognized authority that could consecrate particular legal genealogies as "correct", judges sought to seize control over the legal meaning of privacy in a series of prolonged interpretive struggles in which the common denominator was often a

[91] "Editorial" (1894). *Harvard Law Review* 7(3): 177-182. Also see: "Inviolability of Telegraphic Correspondence" (1879). *American Law Register* 27(2): 65-78.

[92] Jürgen Habermas. *The Structural Transformation of the Public Sphere*. Cambridge: The MIT Press, 1991. p. 39.

[93] See, for example, *Atkinson v. John E. Doherty* & Co, 121 Mich. 372 and *Schuyler v. Curtis*, 147 N.Y. 434.

[94] 81 Ohio St. 142

conflict of opinion about the scope and substance of the right to privacy.[95]

It was not uncommon during this period for judges to frame privacy as yet another form of property: In addition to controlling material possessions, a person could also exercise control over immaterial properties like one's speech or image. Thus, one Missouri court opined in 1911 that "if it can be established that a person has a property right in his picture", those who "now deny the existence of a legal right of privacy would freely concede a remedy to restrain its invasion, for all agree that equity will forbid an interference with one's right of property."[96] Indeed, as the Wisconsin Supreme Court argued in *Klug v. Sheriffs*, "many [recent decisions] turn upon property rights or breach of trust, contract, or confidence" to carve out space for a right to privacy.[97] Linking privacy and property was a deliberate legal strategy as well as a conceptual intervention: At a time when the judicial foothold of the right to privacy was tenuous, it allowed judges to establish grounds for legal recognition by way of analogy. The same analogous reasoning also connected the right to privacy to libel law: Alleged invasions of privacy by journalists, photographers, and advertisers were repeatedly framed by state courts as matters of libel, which provided remedies for material and reputational damage as a result of slanderous publicity.

Before arguments about basic rights and inviolate personalities separated privacy from the legal genealogy of property rights or libel law, judges recognized the seizure of immaterial possessions and the infliction of psychological harm as actionable offenses, and bootstrapped the rhetoric of privacy to those earlier case law traditions. As the Michigan Supreme Court put it in 1899, it was through such bootstrapping in lower courts – not through any single intervention from above – that "this law of privacy seems to have gained a foothold" in American jurisprudence.[98]

Yet case law precedent had long coexisted in American jurisprudence with an emphasis on legal doctrine. The natural law tradition was particularly strong in the nineteenth century and became a common doctrinal reference point for privacy discussions in the early twentieth century.[99] Tasked with adjudicating a dispute over the unauthorized use of a person's image in an advertisement for life insurance, the Georgia Supreme

[95]See *Harvard Law Review* 24 (8), pp. 667-682.

[96]134 S.W. 1076

[97]129 Wisc. 468

[98]121 Mich. 372

[99]Roscoe Pound. *Law and Morals*. Chapel Hill: The University of North Carolina Press, 1924; William P. Sternberg. 1938. "Natural Law in American Jurisprudence." *Notre Dame Laywer* 13 (2): 89-100; Brendan F. Brown. 1939. "Natural Law and the Law-Making Function in American Jurisprudence." *Notre Dame Law Review* 15 (1): 9-25; Benjamin F. Wright. *American Interpretations of Natural Law: A Study in the History of Political Thought*. New York: Russell and Russell, 1962; Horwitz (1992).

Court argued that "each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature." A right to privacy "is therefore derived from natural law."[100] While the social and technological conditions of modern society might have rendered concerns about privacy more acute, the judges ruled that an affirmative reading of the right to privacy did not hinge on any such changes. As the Kentucky Court of Appeals found in *Brents v. Morgan*, "the doctrine of the right of privacy, while modern in every sense, is older than generally recognized in the opinions of the courts which we have read."[101] In 1908, judges of the Indiana Court of Appeals even drew on treatises about ancient law to highlight the long history of the right to privacy. They argued that such a right was "well recognized," "derived from natural law," and already "embraced in the Roman conception of justice."[102] By 1918, this approach had become sufficiently common to warrant the assertion, in Vol. 21 of the comprehensive legal guide *Ruling Case Law*, that the right to privacy "is considered as a natural and an absolute or pure right springing from the instincts of nature."[103]

In other rulings, the right to privacy was folded into common law rather than natural law. Summarizing *Pavesich v. New England*, the Supreme Court of Rhode Island noted the judges' assertion that "the principle of the right of privacy was well developed in the Roman law, and from there was carried into the common law, where it appears in various places."[104] And while the majority opinion in *Schuyler v. Curtis* – one of the most widely cited precedents during the 1910s – embraced a limited conception of privacy, one judge pushed for a more expansive interpretation of the common law tradition. Castigating his colleagues for a failure to move beyond the tight constraints of precedent, he argued that "it would be a reproach to equitable jurisprudence, if equity were powerless to extend the application of the principles of common law, or of natural justice, in remedying a wrong, which, in the progress of civilization, has been made possible as the result of new social, or commercial conditions." Even without any established case law precedent, the twin traditions of natural law and common provided parallel templates that were selectively invoked by judges to anchor the right to privacy more firmly in American jurisprudence and ground it more explicitly in established legal doctrine.

Growing intra- and extra-judicial support for the right to privacy also sparked legislative action. After the New York Supreme Court had declined to recognize the right in

[100] 122 Ga. 190

[101] 221 Ky. 765

[102] 42 Ind. App. 3

[103] William M. McKinney (ed). *Ruling Case Law* 21. Northport: Edward Thompson Co, 1918.

[104] 30 R.I. 13. Hofstadter and Horwitz (1964) make a similar argument, tracing privacy claims back to Jewish legal traditions.

Roberson v. Rochester, which concerned the use of a woman's image in advertising materials for a flour company, public outrage and sustained critical newspaper coverage compelled state legislators to pass New York's first Civil Rights Law in 1903. Sections 50 and 51 established an explicit right to privacy that forbade the use of "the name, portrait or picture of any living person" for advertising without prior consent." Indeed, as one legal scholar argued, "the legislature is now the only resort for citizens whose modesty and privacy may at any time be intruded upon or who may awake any morning to discover that their physical attractiveness or mental superiority has brought their face before the great world of buyers as an advertising medium."[105] But the passage of the New York law also opened up an alternative legal genealogy. For the first time, courts could refer not just to general legal principles or case law precedent but treat the right to privacy as "solely the creation of statute" with "no existence independent of the statute."[106]

While it became less common for courts to reject the right to privacy outright after the criticism that followed the *Roberson v. Rochester* decision in 1902 and after the passage of the New York law in 1903,[107] judges still drew on competing legal genealogies to justify and circumscribe such a right. They also continued to discuss the right to privacy across a wide range of legal disputes. More than two thirds of privacy cases between 1900 and 1920 dealt with alleged violations by non-state actors as judges adjudicated disputes over the use of photographs in advertising, the unauthorized publication of personal information in newspapers and in reviews of theater plays, eavesdropping into telephone and telegraph communications, the sharing of medical and business records, access to inheritance and divorce documents, burial practices, and access by landlords to private apartments. But amidst these cases were occasional disputes over the power of the state, in which the government generally prevailed. In Washington State, prison authorities had begun to circulate photographs of recently released inmates to local police departments to facilitate the arrest of potential recidivists. When an inmate sued and alleged that such "rogue gallery" photographs violated his right to privacy, the state's Supreme Court sided with the government.[108] In Michigan, courts likewise held that state agencies had considerable authority to determine which types of personal information the government needed to collect to protect law and order.[109] And in Massachusetts, the Supreme Court ruled that business owners could be compelled to report employee wages to the state's labor

[105]"Editorial" (1902). *The American Law Register* 50(11): 669-678.

[106]71 Misc. 199

[107]For an exception, see *Owen v. Partridge* (40 Misc. 425)

[108]86 Wash. 615

[109]196 Mich. 423

administration, since wage information should not be considered a private matter.[110] While some courts questioned an excessive deference to the executive, the successful application of privacy claims to the problem of state power remained a relatively rare phenomenon.[111]

Yet the emergence of such cases signals that judicial interpretations of privacy had begun to deform under the weight of two decades of intra-legal contestation: Moving beyond the "restricted beginnings" of privacy as a logic of domestic life and towards "a general right of protection from others," American jurists had first adapted the language of privacy raise claims against advertisers and publishers (especially when such claims concerned the unauthorized use of one's likeness or the publication of embarrassing personal information).[112] But courts had also begun to articulate a second school of legal reasoning that centered on disputes over the informational rights of citizens against an expanding and increasingly inquisitive American state.[113] Despite sharing a common ancestry, these two approaches presented different visions of the "others" against whose inquests the rights-bearing individual had to be protected. Yet it was still far from certain in 1920 that the right to privacy would eventually be consecrated as a state-centric constitutional right.

Judicial consolidation, after 1920

By the 1920s, technologies that had sparked initial debates about the privacy of personal communications were well-established.[114] One in eight Americans already had a personal telephone landline, and there would soon be one in almost every household. Newspaper circulation continued to increase but the media landscape of the United States became more settled.[115] Yet society had begun to change in other ways. The bureaucratic apparatus of the United States had grown considerably; and Congress had begun to debate the legality of warrantless searches of personal luggage, cars, and apartments after the passage of the Espionage Act in 1917 and the

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[110] 231 Mass. 99

[111] 29 Mont. 363; 168 N.Y. 89

[112] Richardson (2017), p. 10.

[113] Colin Koopman. *How We Became Our Data: A Genealogy of the Informational Person.* Chicago: The University of Chicago Press, 2019.

[114] William Adelbert Dill. *Growth of Newspapers in the U.S.: A Study of the Number of Newspapers, of the Number of Subscribers, and of the total Annual Output of the Periodical Press, from 1704 to 1925, with Comment on Coincident Social and Economic Conditions.* Lawrence: Bulletin of the Department of Journalism of the University of Kansas, 1928; Milton Mueller. 1993. "Universal Service in Telephone History: A Reconstruction." *Telecommunications Policy* 17 (5): 352-69; Alexander J. Field. "Newspapers and Periodicals: Number and Circulation By Type, 1850-1967," in *Historical Statistics of the United States: Earliest Times to the Present*, edited by Susan B. Carter. New York: Cambridge University Press, 2006.

[115] Dill (1928); Robert Thompson. *Wiring a Continent.* Princeton: Princeton University Press, 1947.

prohibition of "intoxicating liquors" through the Eighteenth Amendment in 1919.[116]

Partially as a response to the government's growing capacity to survey and surveil, and partially in reaction to the expansion of executive authority during World War I that had put anti-war activists into the crosshairs of U.S. law enforcement, Pogressive Era reformers began to reconsider their "prewar faith in a benevolent state."[117] As the Chicago Daily Tribune opined in 1925, the most significant threats to privacy now stemmed from the overreach of zealous officials and the access they had to standardized databases. If a police officer "sees you in an automobile," the paper argued,

> *"All he needs is the license number to find out if you are the owner. He can learn, too, if you have given a mortgage on it. He can search the records and see what real estate you own and how much the mortgages on it are. He can find out how much real estate and personal taxes you pay and what you claim your personal property is worth. He can ascertain where and when you were born, what schools you attended, to whom and by whom you were married, when and why you were divorced, the time, place and cause of your death, the name of the doctor who attended you, the undertaker who buried you and the cemetery that received you. He can learn if there are any suits or judgments for or against you. He can learn what licenses you have taken out and what they cost you. And now he can find out how much income tax you pay."*[118]

The first signs of a conceptual pivot towards the American government as a potential threat to personal privacy appeared in state constitutions.[119] Washington and Arizona became the first states to write privacy protections into their respective constitutions, emphasizing that the "private affairs" of citizens were to be secure against government

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[116] Wiebe (1966); Stephen Skowronek. *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920.* Cambridge: Cambridge University Press, 1982; Daniel Carpenter. *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928.* Princeton: Princeton University Press, 2002; Brian Balogh. *A Government Out Of Sight: The Mystery of National Authority in Nineteenth-Century America.* Cambridge: Cambridge University Press, 2009. For contemporaneous discussions of government searches during the Prohibition Era, see (for example): Andrew Alexander Bruce. 1906. "Arbitrary Searches and Seizures as Applied to Modern Industry." *The Green Bag* 18 (5), p. 300; "Liquor Purchased Before August 1." *The Ogden Standard*, 09/11/1917; "Drys' Get Hard Jolt in Action by House." *Omaha Daily Bee*, 08/17/1921.

[117] David A. Rabban. *Free Speech In Its Forgotten Years.* Cambridge: Cambridge University Press, 1997. p. 4.

[118] "Privacy." *Chicago Daily Tribune*, 9/27/25.

[119] Charles W. Johnson and Scott P. Beetham. 2007. "The Origin of Article I, Section 7 of the Washington State Constitution." *Seattle University Law Review* 31: 431-467.

interference "without authority of law".[120] Such protections did not simply expand upon existing legislation – such as New York's 1903 Civil Rights Law – but specifically shifted the focus of privacy claims from any "firm or corporation" towards government officials, and from the use of "the name, portrait or picture of any living person" without prior consent to the collection of personal data without prior court authorization. In a society that was "searching for order" during the early decades of the twentieth century, as Robert Wiebe put it, privacy became tied up in such larger cultural and political debates about the proper relationship between the American state and its citizenry.[121]

The American legal field had also evolved since the turn of the century. The strong doctrinal emphasis on natural law and common law was replaced in the 1920s by a greater reliance on constitutional arguments.[122] In the wake of World War I and during the Prohibition Era, questions about the limits of state power and the legal remedies against state overreach rose to the forefront of legal debates, and scholars began to consider constitutional guardrails that would prevent undue interference of public officials in the so-called "private spheres" of personal life.[123] While judges had previously struggled to coalesce around a distinct right to privacy "on the ground of the lack of precedents," as one observer noted in the *Yale Law Journal*, the constitutional revolution within American jurisprudence and the increasing focus on intrusions by government officials into private lives gave judges a new language and logic through which the "right to be let alone" could be approached.[124]

Amidst such changes, privacy jurisprudence began to shift away from cases against private-sector organizations like advertisers and from disputes over the use of photographs and the publication of intimate personal details towards cases against government agencies and disputes over the collection of financial records and the searching of homes, cars, or luggage. While fewer than one third of court cases about the right to privacy had addressed potential violations by the state in the period between 1900

[120]See Art. 2, Para. 8 of the Arizona State Constitution. Several other states have since added an explicit recognition of a right to privacy to their respective constitutions, including Alaska (1972), California (1972), Florida (1978), Hawaii (1978), Illinois (1970), Louisiana (1974), Montana (1972), New Hampshire (2018), and South Carolina (1971).

[121]Wiebe (1966).

[122]Howritz (1992); Wiecek (2001); Aziz Rana. 2015. "Constitutionalism and the Foundations of the Security State." *California Law Review* 103 (2): 335-385.

[123]Rabban (1997); Raymond Geuss. *Public Goods, Private Goods*. Princeton: Princeton University Press, 2001; G. Edward White. *The Constitution and the New Deal*. Cambridge: Harvard University Press, 2002; William J. Novak. 2008. "The Myth of the 'Weak' American State." *The American Historical Review* 113 (3): 752-772.

[124]Henry T. Terry. 1915. "Constitutionality of Statutes Forbidding Advertising Signs on Property." *Yale Law Journal* 24 (1): 1-11. Also see *Brents v. Morgan* (299 S.W. 967).

and 1920, two thirds of cases between 1920 and 1930 dealt with the use and abuse of state power. Such disputes were increasingly framed by constitutional arguments rather than natural law or case law precedent, in federal courts as well as lower state courts. Searches that resulted from the enforcement of Prohibition Era liquor laws were found to be an "invasion of the rights of privacy", a potential "invasion of the right of privacy which the constitutional provision against unreasonable search [...] protects," an "offense against the constitution", and "contrary to the principles of a free government."[125] As the Mississippi Court of Appeals argued in 1926, "enforcement of the law against the liquor evil is highly desirable, but in doing so we must not [...] permit unlawful searches of private premises, and thereby destroy the sacred constitutional right of privacy of the home."[126] This growing focus on the state did not necessarily imply tighter restrictions on the power of the executive. Some judges warned that search warrants were "executed in a manner that showed complete disregard of defendant's right to privacy."[127], observed a "startling increase in illegal searches and seizures" (171 Ark. 882), and issued a reminder of "the constitutional provision against unreasonable search and exemption of an accused from being a witness against himself."[128] But in other instances, the increasingly state-centric jurisprudence facilitated the continued exercise of state power. Judges suggested that officials were not "attempting an entrance which will in any way affect the right of privacy" when they enforced the disclosure of tax and business records, and they argued that the probable cause requirements, narrowly written warrants, and the state's duty to ensure the protection of law and order provided sufficient justification for assertive interventions by government officials.[129] In those cases, the state-centric privacy jurisprudence and the expanding power of the federal state were opposing sides of the same coin as judges tied privacy jurisprudence to constitutional protections while simultaneously re-balancing private rights against executive authority.

But the limited scope of privacy claims should not detract from the significance of the underlying juridical shift: When Louis Brandeis penned his 1928 dissent to the Supreme Court's *Olmstead* decision, state-centric approaches to privacy had already crowded out claims against non-state entities; and constitutional arguments had already begun to dominate intra-legal discussions of privacy as a fundamental legal right. This rise of state-centric interpretations was not due to any single precedent established by the U.S. Supreme Court, as may be expected if legal institutionalization was a predominantly

[125]See, for example: *People v. Mayen* (188 Ca. 237), *State v. Owens* (259 S.W. 100), *People v. Wren* (210 P. 60), *People v. Jakira* (118 Misc. 303), *People v. Bishop* (225 Ill. App. 610), *Schwartz v. United States* (294 Fed. 528), *State v. Gardner* (249 P. 574).

[126]141 Miss. 192

[127]196 Wisc. 435. Also see *State ex rel. King v. District Court* (70 MT 191).

[128]202 Wisc. 184

[129]See *Warner v. Gregory* (203 Wisc. 65) and *Goodman v. State* (158 Miss. 269).

top-down process wherein federal justices imposed a selective interpretation of privacy claims on lower courts. The primary reference points throughout the 1920s (as measured by their eigenvector centrality scores) were state court decisions and the constitutional tradition itself rather than any single landmark decision by federal judges. When the Supreme Court explicitly considered the question of privacy vis-à-vis the American state, as in Brandeis' 1928 *Olmstead* dissent or in the Court's 1932 *Lefkowitz et al.* ruling that invoked the Fourth Amendment as a means of saveguarding the right to privacy, the constitutional and state-centric tradition had already begun to displace earlier and more varied perspectives on privacy in American jurisprudence. Indeed, Supreme Court justices tended to lean heavily on rulings from various state courts, which had already contributed to the constitutionalization of privacy jurisprudence in the absence of clear federal precedent. The Supreme Court helped to reaffirm a state-centric and constitutional interpretation of privacy, but it did not inaugurate this shift in American legal reasoning.[130] By 1930, however, the constitutional tradition had not only crowded out earlier schools of legal reasoning but had also been consecrated by federal courts. The legal meaning of the right to privacy had become settled; and alternative genealogies had started to recede from judicial discourse and the American legal imagination.

Privacy and American jurisprudence

This chapter has traced the remarkable evolution of the right to privacy in U.S. jurisprudence: Having gained an initial foothold as a way of contesting the power of non-state actors and the unauthorized use of personal images in market settings just before the turn of the twentieth century, it was ultimately consecrated as a decidedly state-centric right in the 1920s. The legal history of privacy in the United States is also a history of abandoned alternatives and selective genealogizing.

Specifically, the rise of the right to privacy as a state-centric constitutional right came at the end of three periods of legal institutionalization. The language of privacy was first judicialized when judges and legal scholars drew on existing cultural and discursive traditions – which had long invoked privacy to structure social and domestic relations – but adapted those traditions to the emerging technological realities of the late nineteenth century and applied the logic of privacy to disputes far beyond the confines of the home. Once the language of privacy had been judicialized, i.e. introduced into the American legal imagination, judges engaged in a prolonged series of interpretive struggles about the legal genealogy and scope of a distinct "right to privacy". During this second phase of legal institutionalization, competing schools of thought developed in state courts but without any single approach achieving discursive dominance.

[130] See, for example: *Harris v. United States* (331 U.S. 145), *United States v. Lefkowitz et al.* (285 U.S. 452), *Griswold v. Connecticut* (381 U.S. 479).

Third, the right to privacy was consolidated as a state-centric constitutional right amidst larger shifts in the political and legal landscape of the United States, and this perspective was ultimately consecrated by the federal judiciary and the U.S. Supreme Court.

This processual account identifies successive phases of legal institutionalization and leverages them to challenge prevailing narratives about the legal evolution of the right to privacy. It also draws attention to the macrosocial settings into which intra-judicial debates were embedded; and it identifies the various constituencies that were involved in the judicialization of privacy and the settling of legal meaning, including journalists, social reform advocates, state and federal judges, and legal scholars. Yet it does not explain *why* their struggles produced particular outcomes. For example, could the right to privacy have been entrenched as a property-based right if the Supreme Court had asserted its interpretive monopoly at an earlier stage? And would privacy jurisprudence during the 1920s have followed a different course without the experience of World War I, which led to increasing government surveillance and helped to turn American progressives into staunch defenders of constitutional rights?[131] Taking the idea of path dependence seriously may suggest as much, since the sequence of events matters for the production of social outcomes.[132] Each phase of institutionalization is conditioned – though not exhaustively determined – by prior developments. To paraphrase Karl Marx, courts make their own law, but they do not make it just as they please.[133] But this is a question for future studies. One potentially fruitful approach is to focus on what Ivan Ermakoff has called the "structure of contingency": What are the important junctures within a longitudinal process of legal institutionalization that elicit breaks in social relations, reorient discursive frameworks, and thereby shift the space of legal possibility in a decisive manner?[134]

Existing legal histories tend to ignore intra-judicial contestation, focusing instead on landmark interventions by prominent scholars during the first half of the twentieth century or on cultural shifts during the 1960s. In a general sense, they under-appreciate the significance of the legal field as an arena of interpretive struggles and of legal institutionalization as the settling of such struggles through the imposition of conceptual order and interpretive authority. More specifically, they misconstrue the importance of elite scholars and misidentify the period when state-centric interpretations of privacy

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[131]Rabban (1997), p. 299.

[132]Sewell (1996); James Mahoney. 2000. "Path Dependence in Historical Sociology." *Theory and Society* 29 (4): 507-548.

[133]Karl Marx. *Capital: A Critique of Political Economy, Volume 1*. New York: Penguin Classics, 1976. Also see Felstiner et al. (1980), p. 633.

[134]Ivan Ermakoff. 2015. "The Structure of Contingency." *American Journal of Sociology* 121 (1): 64-125.

were first anchored in American jurisprudence. The contributions of legal elites are best understood as moments of consecration rather than moments of inception: They impose conceptual order by inscribing retrospective coherence into disjointed juridical traditions and by writing competing schools of thought out of legal genealogies.[135] Studies of the 1960s and 1970s are too recent to capture these interpretive struggles. Yet they can still shed light on the subsumption of reproductive rights and sexual intercourse under the umbrella of privacy and the entanglement of privacy claims with questions of gender, sexual orientation, and social class.[136] Postwar privacy jurisprudence also begs a question that has thus far received little scholarly attention. While several European countries began to pass comprehensive privacy laws in the 1970s that aimed in part to curb the informational power of corporations – such as the French *Loi Informatique et Libertés* and the German *Bundesdatenschutzgesetz* – American privacy jurisprudence remained conspicuously silent about the commodification of personal data. Was this simply indicative of trends in corporate governance during the neoliberal era or a direct consequence of Prosser's re-construction of privacy torts?

The findings of this chapter also connect to two adjacent strands of socio-legal and socio-historical scholarship. First, the processual account of legal institutionalization sheds light on the varied foundations upon which American jurisprudence has historically been based – what Hendrik Hartog has referred to as the "implicit pluralism of American law" –, but which are partially obscured by a narrow focus on landmark decisions and by the increasing significance of the Constitution as a seemingly creedal document.[137] Since the early twentieth century. American political culture and jurisprudence have been strongly oriented towards the Constitution as an "American creed" that organizes social relations and national identity on the basis of fundamental rights and through the careful balancing of private, state, and federal interests.[138] But when the right to privacy entered the legal field in the United States, it was initially anchored in two diverging schools of legal thought that drew on different case law precedents and doctrinal reference points. References to natural law or common law then became increasingly scarce amidst the constitutional pivot of the 1920s. The legal institutionalization of the right to privacy thus appears as one part "of a long historical process of constitutional elevation that began during World War I" and

[135]Walter Benjamin. "Theses on the Philosophy of History." Pp. 255-263 in *Critical Theory and Society: A Reader*, edited by Stephen Eric Bronner and Douglas MacKay Kellner. London: Routledge, 1989; Andrew Abbott. 2005. "The Historicality of Individuals." *Social Science History* 29 (1): 1-13; Robert Gordon. *Taming the Past: Law in History and History in Law.* Cambridge: Cambridge University Press, 2017.

[136]Igo (2018), p. 157.

[137]Hartog (1985), p. 935.

[138]Gunnar Myrdal. *An American Dilemma: The Negro Problem and Modern Democracy.* New York: Harper & Bros, 1944. p. xlvi; Rana (2015).

reshaped the legal and political landscape of the United States.[139]

Second, the increasing entanglement of privacy with the problem of state power – what Clifford Geertz has referred to as the embedding of emerging beliefs in existing webs of meaning – highlights the "second-order effects" that can result from the settling of legal meaning: The legal codification of the right to privacy selectively enabled and foreclosed new techniques of political and economic governance.[140] As it became divorced from property law, closely tethered to constitutional law, and applied to disputes about the expansion of the state's executive power, questions about the informational autonomy and integrity of market participants receded into the background. From the perspective of the law, markets were increasingly understood through the logic of reciprocal economic exchange rather than the logic of rights. Perturbations to these exchanges could then be expressed in the language of damages and redistributive payments. The shift towards state-centric privacy claims (which were rooted in arguments about individual rights and inviolate personalities, not in claims about financial or reputational damage) thus formed one element of the growing categorical distinction between "the state" and "the economy" during the early twentieth century.[141] By making privacy claims and rules of information extraction conditional on the target of privacy disputes, it reinforced the demarcation of a transactional and self-regulating market from the domain of state power.

Finally, there is a methodological point to be taken from this chapter. Institutionalization and the "ideological concretion" of abstract concepts like privacy are studied across multiple branches of social science.[142] Sociologists care about them, and so do political scientists, legal historians, and anthropologists. Yet it is not always clear how we can study such processes, especially when the focus is on the not-so-recent past and interviews with stakeholders or decision-makers are out of the question. Legal historians have generally solved this challenge by turning towards landmark cases and law review essays. But if, as Holmes argued, the law reflects "the lives of all men that have been," we can rightfully ask: Which facts and whose perspectives are excluded from these sources? In many ways, landmark opinions and essays published in elite journals are evidence of a particular outcome that results from the process of institutionalization and the fight for interpretive monopoly within the legal field, rather than evidence of the process and the struggle themselves.[143] I hope to persuade the

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[139]Rana (2015), p. 380.

[140]Clifford Geertz. *The Interpretation of Cultures*. New York: Basic Books, 973; Denise Anthony, Celeste Campos-Castillo, and Christine Horne. 2017. "Toward a Sociology of Privacy." *Annual Review of Sociology* 43, p. 262.

[141]Timothy Mitchell. 1990. "Everyday Metaphors of Power." *Theory & Society* 19: 545-577.

[142]Geuss (2001); Denise Anthony, Celeste Campos-Castillo, and Christine Horne. 2017. "Toward a Sociology of Privacy." *Annual Review of Sociology* 43: 249–269.

[143]See, for example, the introduction to Michel Foucault. *Archaeology of Knowledge*. London:

reader that a network analysis of legal citations can be combined with close qualitative readings of historical text to produce processual accounts that identify consequential shifts in meaning and social practice without glossing over the complex struggles that produced them. Unlike analyses that focus exclusively on the contributions of legal elites, this approach also makes it possible to identify disagreements and abandoned judicial developments that are otherwise written out of legal history and excluded from the genealogy of legal precedent.

Routledge, 2013.

Chapter 6:

Bookkeepers of Humanity

Bureaucratic Rule and the Limits of Informational Power

This project opened with an intergenerational story about the production of state knowledge: In the closing decades of the nineteenth century, and continuing into the twentieth, the capacity of the U.S. government to count, measure, and trace individuals and populations increased considerably. Until that time, state power had largely been exercised through courts and parties at the local and regional levels.[1] Instead of building up a federal bureaucratic infrastructure, the United States had often relied on the devolution of power to individual states and on pork-barrel spending and patronage appointments that rewarded local loyalties. Even the most daring logistical endeavor of the federal government – the decennial census – was administered in relatively ad-hoc fashion through locally recruited enumerators and district marshals.[2] In 1861, the federal government employed just 5,837 people, excluding the U.S. Postal Service. But ten years later it had tripled in size.[3] Federal and state bureaucracies expanded as the old American state of courts and parties was replaced by a modern administrative state, capable of responding to the emerging social question through bureaucratic means. Many Americans would scarcely have encountered a government employee before the late nineteenth century, with the possible exception of postal carriers and a decennial census enumerator. But as the number of officials grew and populations became more concentrated in metropolitan areas, the points of contact

[1]Stephen Skowronek. *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920.* Cambridge: Cambridge University Press, 1982

[2]The Bureau of the Census was formally established in 1840, but it did not become a permanent institution until 1902.

[3]Daniel A. Farber. 2018. "Lincoln, Presidential Power, and the Rule of Law." *Northwestern University Law Review* 113 (3): 667-700.

between citizens and representatives of the American state increased, and the collection of statistical and personal data took on greater significance. For the first time, it allowed government officials to assemble a recurring and comprehensive "stock tally of the nation," as one newspaper put it. "The first necessity is to know what we have and where it is."[4]

Indeed, the collection of statistical and personal data is a long-standing feature of state development and an essential component of state power.[5] Modern nation-states are defined not just by their ability to claim a monopoly of the legitimate use of physical force – as Max Weber famously put it – but also by the governmentalization of knowledge and the monopolization of symbolic power.[6] Contemporary surveillance systems illustrate this tight coupling of state power and state knowledge. They can easily appear as all-encompassing endeavors that reveal the state's monopoly over the collection of data and the production of official knowledge, with limits imposed only by the technological capacity to analyze incredible amounts of data in real time or to store them for later retrieval.[7] When advances in information retrieval and processing have occurred – like the widespread intruction of electronic databases in the 1970s or the proliferation of digital communications in the 2000s –, state-sponsored data collection has repeatedly filled the space created by new technologies, resulting in a gradually increasing and increasingly intrusive system of population monitoring.[8] It thus comes as no surprise that one of the most widely cited analogies for the power

[4]"Scrapbook Concerning Legislation for the 14th Census 1917-1919." USNA Record P-128.

[5]James Scott. *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*. New Haven: Yale University Press, 1998; Alain Desrosières. *The Politics of Large Numbers: A History of Statistical Reasoning*. Cambridge: Harvard University Press, 1998; John Torpey. *The Invention of the Passport: Surveillance, Citizenship and the State*. Cambridge: Cambridge University Press, 2000; Wendy N. Espeland and Mitchell L. Stevens. 2008. "A Sociology of Quantification." *European Journal of Sociology* 49 (3): 401–436; Michel Foucault. *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979*. New York: Picador, 2008; Mara Loveman. *National Colors: Racial Classification and the State in Latin America*. Oxford: Oxford University Press, 2014; Rebecca J. Emigh, Dylan Riley, and Patricia Ahmed. *Antecedents of Censuses from Medieval to Nation States: How Societies and States Count*. New York: Palgrave Macmillan, 2016.

[6]Max Weber. "Politics as a Vocation." Pp. 77-128 in: *From Max Weber: Essays in Sociology*, edited by H. H. Gerth and C. Wright Mills. London: Routledge, 1948; Mara Loveman. 2005. "The Modern State and the Primitive Accumulation of Symbolic Power." *American Journal of Sociology* 110 (6): 1651-1683; Michel Foucault, Michel. *Security, Territory, Population: Lectures at the Collège de France, 1977-78*. New York: Picador, 2007; Pierre Bourdieu. *On the State: Lectures at the Collège de France, 1989 - 1992*. New York: Polity, 2015.

[7]Kevin D. Haggerty and Richard V. Ericson. 2000. "The Surveillant Assemblage." *British Journal of Sociology* 51 (4): 605–622; David Lyon. *The Culture of Surveillance: Watching As A Way of Life*. Cambridge: Polity Press, 2018.

[8]Peter P. Swire. 2003. "The System of Foreign Intelligence Surveillance Law." *George Washington Law Review* 72: 1306-1372; Debbie V. S. Kasper. 2007. "Privacy as a Social Good." *Social Thought & Research* 28: 165-189.

of modern nation-states is George Orwell's novel *Nineteen Eighty-Four*, in which the fictional government of Oceania has implemented a totalitatian system of tracking and examination.[9] In such a world, the only real limits are technological feasibility and institutional capacity.

But this argument comes with a caveat. As Gary Marx has suggested, surveillance systems are never as absolute as they could be, given the state of technology, the level of administrative development, and the amount of information that can circulate. He observes:

> *"Even if surveillance by definition always involves the quest for information, considered concretely, the way it is gathered and the specific goal and content vary enormously within and across societies."*[10]

Studies that draw attention to the disproportionate monitoring of nonwhite and immigrant communities – the so-called "Black Opticon" of the United States – or examine the enhanced monitoring of welfare recipients explicitly recognize this uneveness of state knowledge production and serve as a reminder that the distribution of legibility across populations can mirror the distribution of social status and symbolic capital in society.[11] Understanding "a given form [of surveillance] in its context and its relation to the culture and social structure in question [and] to reach moral conclusions" may therefore require analyzing "variation across settings" and the partiality of surveillance systems rather than the total amount of information collection in a given time and place.[12] To be sure, the amount of personal information that is "potentially knowable" to the state and practically collected by the state has increased over time with urbanization, growing social density and social differentiation, new means of distance communications, and so forth.[13] But government organization do not usually surveil indiscriminately. They target specific types of information or specific populations, and they do not store and analyze all data but focus on specific bits of information that are relevant to the execution of a political program or the management of populations.

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[9]George Orwell. *Nineteen Eighty-Four*. New York: Signet Classics, 1961.

[10]Gary T. Marx. 2002. "What's New About the 'New Surveillance'? Classifying for Change and Continuity." *Surveillance & Society* 1 (1), p. 17.

[11]Julia Angwin. *Dragnet Nation: A Quest for Privacy, Security, and Freedom in a World of Relentless Surveillance*. New York: Times Books, 2014; Simone Browne. *Dark Matters: On the Surveillance of Blackness*. Durham: Duke University Press, 2015; Ruha Benjamin. *Race After Technology: Abolitionist Tools For the New Jim Code*. London: Polity, 2019; Adriana C. Nuñez. 2020. "Collateral Subjects: The Normalization of Surveillance for Mexican Americans on the Border." *Sociology of Race and Ethnicity* 6 (4): 548-561; Anita L. Allen. "Dismantling the Black Opticon: Race Equity and Online Privacy and Data Protection Reform." Yale Law Journal, Forthcoming (2022).

[12]Marx (2002)l p. 17.

[13]Marx (2002), p. 23.

Marx refers to this as "surveillance slack" – a measure of the selectivity of state efforts to render populations legible.[14] In the United States, the scope of government data collection and monitoring efforts is also curteilled by regulatory frameworks and codified privacy rights – as the previous chapter has shown – and by the conviction that the legitimacy of the state depends at least in part on its forebearance, that is, on the willigness of bureaucratic officials to impose limits on themselves even when they are not formally imposed from the outside.[15] One does not have to buy into Henry David Thoreau's adage that the "government is best which governs least" to recognize a gap between the potential reach of a surveillance apparatus and the lesser extent to which surveillance systems are implemented and legitimated.[16]

In this chapter, I examine the surveillance slack of the American state around the turn of the twentieth century. Specifically, I focus on postal administration and public health administration to investigate how the logic of privacy was anchored in institutional practices, shaped the exercise of informational power, and legitimated the uneven accumulation of statistical and personal data. I demonstrate that the institutionalization of privacy as a durable element of bureaucratic administration was shaped by external pressures on government agencies to collect more data or new types of data – for example, to fight the spread of infectious diseases or to curtail the dissemination of sexual explicit materials through the mail – as well as the internal institutional logics of specific organizations. When confronted with calls for the expanded exercise of informational power, officials drew on a patchwork of legal and administrative standards through which the scope of privacy claims could be defined and the legitimacy of enumeration and monitoring could be defended. Such standards are "ubiquitous but underappreciated tools for regulating and organizing social life in modernity" that "lurk in the background" of public administration and jurisprudence because they establish a set of seemingly objective benchmarks through which competing claims can be resolved.[17] Recovering them from the historical record makes it possible to recognize the egalitarian promises of bureaucratic rule and standardized data as "effects of the state" that mask the stratifying nature of state power and the ideological connotations of the state's epistemic project.[18] And it suggests that the "world-making" capacity of modern states depends on the recasting

[14]Marx (2002), pp. 22ff.

[15]Steven Levitsky and Daniel Ziblatt. *How Democracies Die.* New York: Broadway Books, 2018.

[16]Henry David Thoreau. *Civil Disobedience, and Other Essays.* Mineola: Dover Publications, 1993; Marx (2002), p. 22.

[17]Stefan Timmermans and Steven Epstein. 2010. "A World of Standards but not a Standard World: Toward a Sociology of Standards and Standardization." *Annual Review of Sociology* 36: 69–89.

[18]Timothy Mitchell. 1991. "The Limits of the State: Beyond Statist Approaches and Their Critics." *The American Political Science Review* 85(1): 77-96.

of selective monitoring as an appropriate response to the predicaments of statecraft.[19]

This combination of push and pull factors resulted in epistemic regimes – the rules and practices of information accumulation that became routinized across time and place and embedded in regulatory frameworks – that were organizationally specific and decidedly uneven in their application.[20] They differed in the types of data that were considered appropriate targets; in the tactics through which officials collected such data; in the groups on whom the gaze of the state was focused; and in the utilization of such data by government officials. They were neither collapsible into a single federal framework, nor did they sum to a blanket system of population surveillance. Instead, the coexistence of multiple epistemic regimes highlights an understudied dimension of the "many-handedness" of the American state, the uneven development of state organizations, and the stratification of American society: The quest for statistical and personal data by government officials imposed an topography of legibility that rendered some populations — and some types of information — uniquely legible to the bureaucratic state.[21]

The epistemic project of the state

The "epistemic project of modern statecraft" is a central element of state power and the production of state knowledge.[22] By routinely collecting data about individuals and populations, governments can produce tailor-made policies, surveil people, and manage populations.[23] Indeed, rulers and elected government government officials have relied on general censuses and targeted monitoring since antiquity, although their

[19]Pierre Bourdieu. 1989. "Social Space and Symbolic Power." *Sociological Theory* 7 (1): p. 22.

[20]Jeannette A. Colyvas and Stefan Jonsson. 2011. "Ubiquity and Legitimacy: Disentangling Diffusion and Institutionalization." *Sociological Theory* 29 (1): 27-53.

[21]Kimberly J. Morgan and Ann Shola Orloff. "The Many Hands of the State." Pp. 1-32 in: *The Many Hands of the State: Theorizing Political Authority and Social Control*, edited by Kimberly J. Morgan and Ann Shola Orloff. Cambridge: Cambridge University Press, 2017.

[22]Lawrence Quill. *Secrets and Democracy.* New York: Palgrave Macmillan, 2014. p. 10; Espeland and Stevens (2008); Foucault (2008); Marion Fourcade and Jeffrey Gordon. 2020. "Learning Like a State: Statecraft in the Digital Age." *Journal of Law and Political Economy* 1 (1): 78-108; Francisca Grommé and Stephan Scheel. 2020. "Doing Statistics, Enacting the Nation: The Performative Powers of Categories." *Nations and Nationalism* 26 (3): 576-593. For a non-Western perspective, also see: Timothy Longman. "Identity Cards, Ethnic Self-Perception, and Genocide in Rwanda." Pp. 345–357 in: *Documenting Individual Identity: The Development of State Practices in the Modern World*, edited by Jane Caplan and John Torpey. Princeton: Princeton University Press, 2001.

[23]James B. Rule, Doug McAdam, Linda Stearns, and David Uglow. 1983. "Documentary Identification and Mass Surveillance in the United States." *Social Problems* 31 (2): 222-234; Scott (1998); Colin Koopman. *How We Became Our Data: A Genealogy of the Informational Person.* Chicago: The University of Chicago Press, 2019.

routine use has more recent origins.[24] Especially since the 1700s, attempts to improve the governance of territories and people through the creation of new administrative offices and the collection of statistical data have introduced new techniques of rule, initially cheered on by scientists like Adolphe Quetelet and political philosophers like Jeremy Bentham and Johann Gottlieb Fichte, who saw such initiatives as an essential step towards rational, efficient, and bureaucratic rule.[25] These were aspirational projects at first, but they have "long since become routine fact."[26] In the United States, for example, scientific data management and targeted monitoring were already essential to the maintenance of the slave economy, increasing plantation productivity and facilitating the suppression of slave revolts and the hunt for slaves that had escaped their captivity.[27]

Such techniques of monitoring and enumeration make it possible to govern at a distance without relying on local knowledge;[28] they facilitate the mapping and subsequent organization of territory through administrative, physical, economic, and cultural infrastructures;[29] they turn the populations that inhabit such territory into objects of targeted governmental intervention and classification;[30] and they allow for the

[24]Michel Foucault. *The Order of Things: An Archaeology of the Human Sciences*. London: Routledge, 1966; Margo J. Anderson. *The American Census: A Social History*. New Haven: Yale University Press, 1988; Ian Hacking. *The Taming of Chance*. Cambridge: Cambridge University Press, 1990; Kevin Donnelly. *Adolphe Quetelet, Social Physics and the Average Men of Science, 1796–1874*. Pittsburgh: University of Pittsburgh Press, 2015. The bible makes mention of two ancient censuses, one taken by King David (2 Samuel 24:1-8) and the other by the Roman emperor Caesar Augustus (Luke 2:1). Likewise, there is evidence that Chinese rulers decreed multiple comprehensive censuses during the 7th and 8th centuries AD. See: Patricia B. Ebrey, Anne Walthall, and James B. Palais. *East Asia: A Cultural, Social, and Political History*. Boston: Houghton Mifflin, 2006.

[25]Hacking (1990); Koopman (2019), pp. 28-30.

[26]Koopman (2019), p. 28.

[27]Browne (2015); Caitlin Rosenthal. *Accounting for Slavery*. Cambridge: Harvard University Press, 2018. See Browne's discussion of the "Book of Negroes" for an example of data collection in the service of emancipation.

[28]Patricia C. Cohen. *A Calculating People: The Spread of Numeracy in Early America*. Chicago: The University of Chicago Press, 1982; Scott (1998); Sarah E. Igo. *The Averaged American: Surveys, Citizens, and the Making of a Mass Public*. Cambridge: Harvard University Press, 2007; Marion Fourcade. 2016. "Ordinalization: Lewis A. Coser Memorial Award for Theoretical Agenda Setting 2014." *Sociological Theory* 34 (3): 175–195.

[29]Desrosières (1998); Michael Biggs. 1999. "Putting the State On the Map: Cartography, Territory, and European State Formation." *Comparative Studies in Society and History* 41 (2): 374-405; Adam Tooze. *Statistics and the German State, 1900-1945: The Making of Modern Economic Knowledge*. Cambridge: Cambridge University Press, 2001; Henri Lefebvre. "Space and the State." Pp. 84-100 in: *State/Space: A Reader*, edited by Neil Brenner, Bob Jessop, Martin Jones, and Gordon Macleod. Malden: Blackwell Publishing, 2003

[30]Melissa Nobles. *Shades of Citizenship: Race and the Census in Modern Politics*. Redwood City: Stanford University Press, 2000; David Kertzer and Dominique Arel (eds). *Census and Identity: The*

re-casting of politically charged decisions as products of rational deliberation and objective judgment.[31] The result has been the gradual emergence of societies "ever more defined by statistics and graphical representations of them" and of central authorities eager to expand their epistemic reach alongside their coercive powers.[32]

Yet populations and individuals become *legible* to the bureaucratic eye rather than merely *measurable* through quantitative data only when large caches of data are brought to bear on specific problems of governance and when the collection and use of such data are integrated into the routines of bureaucratic practice. Means of producing state knowledge are tools "to construct and constitute the groups they ostensibly describe", thereby to impose cognitive as well as political order.[33] They turbo-charges the exercise of symbolic power and facilitate not only the efficient enforcement of government policy but also the formation of formal categories, informal group identities, and national communities.[34] By defining markers of likeness and difference across an entire population, statistical enumeration helps to justify the rule of one people over another or the disparate treatment of different social and racial groups within any given society.[35] The political significance of data collection therefore stems not primarily from the production of accurate measurements but from the incorporation of the results thus obtained into the routines of bureaucratic rule – for example, through the combination of disparate data streams within a single organizational setting, the dissemination of data across multiple agencies, and the

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Politics of Race, Ethnicity, and Language in National Censuses. Cambridge: Cambridge University Press, 2002; Nikolas Rose, Pat O'Malley, and Mariana Valverde. 2006. "Governmentality." *Annual Review of Law and Social Science* 2: 83-104; Foucault (2007); G. Cristina Mora. 2014. "Cross-Field Effects and Ethnic Classification The Institutionalization of Hispanic Panethnicity, 1965 to 1990." *American Sociological Review* 79 (2): 183–210; Loveman (2014).

[31]Theodore M. Porter. *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life*. Princeton: Princeton University Press, 1995; Wendy N. Espeland. *The Struggle for Water: Politics, Rationality and Identity in the American Southwest*. Chicago: The University of Chicago Press, 1998; Jenna Burrell and Marion Fourcade. 2021. "The Society of Algorithms." *Annual Review of Sociology* 47: 213-237.

[32]Espeland and Stevens (2008), p. 424; William Alonso and Paul Starr (eds). *The Politics of Numbers*. New York: Russell Sage Foundation, 1987; Haggerty and Ericson (2000); Angwin (2014).

[33]Ian Hacking. 2007. "Kinds of People: Moving Targets." *Proceedings of the British Academy* 151 (1): p. 294; Timothy Mitchell. 1990. "Everyday Metaphors of Power." *Theory and Society* 19 (5): 545–577; Rogers Brubaker. 2009. "Ethnicity, Race, and Nationalism." *Annual Review of Sociology* 35: 21-42.

[34]Loveman (2005), p. 1658; Nobles (2000); Mora (2014); Grommé and Scheel (2020).

[35]Alonson and Starr (1987); William Petersen. *Ethnicity Counts*. New Brunswick: Transaction Books, 1997; Geoffrey Bowker and Susan L. Star. *Sorting Things Out: Classification and Its Consequences*. Cambridge: MIT Press, 1999; Margot Canaday. *The Straight State: Sexuality and Citizenship in Twentieth-Century America*. Princeton: Princeton University Press, 2009.

integration of standardized metrics into existing processes of decision-making.[36]

This is why scholars have increasingly focused on the institutionalization of data-driven governance: the integration of such efforts "into a social order, [their] reproduction without substantial recurrent mobilization, and [their] invulnerability to contestation."[37] This literature charts surveillance efforts that isolate individuals from the collective through personalized tracking and scoring while simultaneously sorting them into population-level patterns and distributions.[38] But more importantly, it pivots from general questions about quantification and measurement to the institutional life of big data by examining how the collection and use of large-scale databases shapes administrative priorities and the decision-making of state officials, and how the exercise of informational power plays out in specific domains of administrative jurisdiction and over specific sub-sections of the general population.[39] Many of these studies focus on the epistemic project of the state in the capillaries of power during the twenty-first century, although the implications of such studies extend beyond the "information societies" and "actuarialism" of the present day.[40] They examine the routinized use of big data in the criminal-legal system and the U.S. welfare administration and demonstrate the impact of surveillance regimes on the life courses of individuals and the distribution of (dis)advantage across an entire population.[41]

Studies of government surveillance in the twenty-first century ordinarily present a totalizing view that considers surveillance to be culturally hegemonic and "ubiquitous

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[36]Lyon (2018); Koopman (2019); Kelly Hannah-Moffat. 2019 "Algorithmic Risk Governance: Big Data Analytics, Race and Information Activism in Criminal Justice Debates." *Theoretical Criminology* 23 (4): 453-470; Andrew Whelan. 2020. " 'Ask for More Time': Big Data Chronopolitics in the Australian Welfare Bureaucracy." *Critical Sociology* 46 (6): 867-880.

[37]Colyvas and Jonsson (2011), p. 38.

[38]David Lyon (ed). *Surveillance as Social Sorting: Privacy, Risk, and Digital Discrimination.* New York: Routledge, 2003; James B. Rule. *Privacy in Peril.* Oxford: Oxford University Press, 2009; Virginia Eubanks. *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor.* New York: St. Martin's Press, 2018.

[39]John Fiske. 1998. "Surveilling the City: Whiteness, the Black Man and Democratic Totalitarianism." *Theory, Culture & Society* 15 (2): 67–88; John Gilliom. *Overseers of the Poor: Surveillance, Resistance, and the Limits of Privacy.* Chicago: The University of Chicago Press, 2001; Gary T. Marx. *Windows Into the Soul: Surveillance and Society in an Age of High Technology.* Chicago: The University of Chicago Press, 2016; Sarah Brayne. 2017. "Big Data Surveillance: The Case of Policing." *American Sociological Review* 82 (5): 977-1008; Eubanks (2018); Fourcade and Gordon (2020).

[40]David Lyon (ed). *Theorizing Surveillance.* London: Routledge, 2006; Gil R. Elyassi, Johann Koehler, and Jonathan Simon. "Actuarial Justice at a Quarter Century." Pp. 194-206 in *The Handbook of Social Control*, edited by Mathieu Deflem. Hoboken: John Wiley & Sons, 2019.

[41]Gilliom (2001); Bernard E. Harcourt. "Against Prediction: Sentencing, Policing, and Punishing in an Actuarial Age." University of Chicago Public Law Working Paper 94 (2005); Angwin (2014); Brayne (2017); Eubanks (2018).

in modern societies" and treats the epistemic reach of the state as a *fait accompli*.[42] Their key political problematic is the possibility of resistance against an institutionally entrenched surveillance regime, not the struggle over the contours of legibility and the limits of legitimacy that unfolds concurrently with the development of the American state's bureaucratic apparatus.[43] But although the collection of statistical data is often naturalized as a prerequisite of public administration and individualized tracking has become a widely accepted "way of life," the legitimacy of government efforts to count and monitor people is not a given.[44] Conflicts "over the boundaries and nature of state involvement in particular areas of social life" are a common feature of state development.[45] This is especially true when surveillance efforts target specific communities and when social norms and legal frameworks circumscribe a realm of privacy against the state.[46]

In the next section, I therefore conceptualize legibility as a problematic of state development. I focus on three inter-related aspects: First, legibility is central to the exercise of state power when mass enumeration and targeted surveillance are seen as important techniques of bureaucratic rule. Second, this legibility is distributed unevenly because state agencies selectively focus on certain types of information and specific populations. Third, institutionalizing the state's epistemic project is not merely a matter of organizational or technological capacity but also requires the legitimation of uneven data collection as a necessary and expedient exercise of state power that is compatible with demands for privacy *against* the state.

Privacy and state legitimacy

Mass enumeration and targeted surveillance serve an important political function: They facilitate the "conduct of conduct" by tracking individuals and turning populations from largely unknown entities into aggregates that can be divided into categories, distributed along ordered scales, and thus rendered legible to the bureaucratic eye.[47] But because the collection of data by government organizations is often targeted,

[42]Haggerty and Ericson (2000); Lyon (2018).

[43]Gilliom (2001); Gary T. Marx. 2003. "A Tack in the Shoe: Neutralizing and Resisting the New Surveillance." *Journal of Social Issues* 59 (2): 369-390; Scott Skinner-Thompson. *Privacy at the Margins*. Cambridge: Cambridge University Press, 2020. Marx (2002) discusses struggles over legitimacy, but does so in a way that is focused on the political position of elites rather than practices of enumeration: If surveillance efforts are seen as benign or benevolent, citizens may be more willing to accept the authority of those who implemented them.

[44]Bourdieu (2015); Lyon (2018).

[45]Loveman (2005), p. 1658

[46]Denise Anthony, Celeste Campos-Castillo, and Christine Horne. 2017. "Toward a Sociology of Privacy." *Annual Review of Sociology* 43: 249–269.

[47]Foucault (2007), p. 289.

legibility is not evenly distributed throughout society. This is in part due to the types of data that states collect. Studies of state knowledge frequently focus on the census, yet the universalist ambitions that undergird census-taking co-exist with a wide range of specialized initiatives aimed at aggregating particular types of information about specific communities.[48] Border screenings of immigrants, the use of automated license plate readers, or the monitoring of welfare recipients result in datasets that are more layered than a census schedule but also limited to specific administrative contexts or population subsets[49] Disparities in legibility also reflect the heterogeneity of the American state, which resembles a many-handed array of bureaucratic organizations rather than a unified political entity.[50] Within this fragmented apparatus, the collection of personalized data is intimately linked to the exigencies of street-level administration and the institutional logics of specific organizations. Depending on the larger political culture into which those organizations are embedded, the eyes of the state can also be trained onto different social phenomena and social groups. Demographic tables functioned as "beneficent technologies of citizenship" that enabled the American government to deliver welfare services in the wake of the Civil War and during the turmoil of the Great Depression but also helped to enable colonial domination by the British, apartheid rule by Afrikaner nationalists, and the enforcement of slavery and miscegenation laws in the United States.[51]

Seen from afar, mass enumeration and targeted surveillance thus produce a complex topography of legibility rather than the blanket accumulation of demographic and behavioral data. This topography is defined not just by the *amount* of data that can be accessed and utilized by central authorities but by the *distribution* of legibility across different populations, the *selectivity* with which some types of data are appropriated by the state, and their targeted *utilization* by government officials. In the best case, it may reflect a focus on urgent social needs and result in an efficient allocation of government

[48] Anderson (1988); Charles Hirschman, Richard Alba, and Reynolds Farley. 2000. "The Meaning and Measurement of Race in the US Census: Glimpses Into the Future." *Demography* 37 (3): 381-393; Mora (2014); Loveman (2014).

[49] Fiske (1998); Browne (2015); Marx (2016); Lyon (2018).

[50] Wiebe (1966), p. 287; Skowronek (1982); Theda Skocpol. 1992. "State Formation and Social Policy in the United States." *American Behavioral Scientist* 35 (4-5): 559-584; William J. Novak. 2015. "Beyond Max Weber: The Need for a Democratic (Not Aristocratic) Theory of the Modern State." *The Tocqueville Review/La revue Tocqueville* 36 (1): 43-91; Morgan and Orloff (2017).

[51] Igo (2018), p. 98; Bernard Cohn. *Colonialism and Its Forms of Knowledge: The British in India.* Princeton: Princeton University Press, 1996; Sean Redding. *Sorcery and Sovereignty: Taxation, Power, and Rebellion in South Africa, 1880-1963.* Athens: Ohio University Press, 2006; Shane Landrum. 2010. "Registering Race, Policing Citizenship: Delayed Birth Registration and the Virginia Racial Integrity Act, 1924-1975." Working Paper Presented at the 2010 Policy History Conference (Columbus, OH); Diane M. Nelson. *Who Counts? The Mathematics of Death and Life After Genocide.* Durham: Duke University Press, 2015; Rosenthal (2018).

attention. But disparities in legibility can also have a stratifying effect and lead to persistent forms of disadvantage when they map on differences in vulnerability and are incorporated into indices of deviance or deservingness. Legibility then contributes to the production of what Loïc Wacquant has termed "negative sociodicy", that is, an informational justification "for the misfortune of the precariat at the bottom of the social scale."[52] Hence the epistemic project of the state is not simply a matter of establishing "political sovereignty over an entire society" but of specifying the contours of legibility across a considerable range of socio-political settings.[53]

This epistemic project presupposes a certain level of transportation infrastructure, technological development, and organizational capacity.[54] Making statistical features legible to the state requires the accumulation of standardized data that "enables the specific phenomena of population to be quantified", as well as of organizational infrastructures capable of generating and analyzing such data.[55] Administrative decision-making on the basis of personalized rather than statistical data likewise depends on the ability to track individuals across space and time. The expansion of bureaucratic power therefore implies not only the development of the means of information *dissemination* that allow for coordinated action across multiple administrative units but also presupposes a corresponding development of the means of information *aggregation* and information *processing*.[56] This is one reason why legibility and organizational development are co-constitutive: The implementation of policy necessitates a relatively comprehensive body of state knowledge whose utilization in turn presupposes a relatively sophisticated administrative infrastructure.[57] Studies of American political development rarely recognize this fact. Michael Mann acknowledges that bureaucratic organizations store "a massive amount of information about all of us," but this is commonly seen as an ancillary feature of organizational capacity and thus denied standing as an independent object of inquiry.[58] For example, two important scholars of the historical development of the American state – Steven

[52]Loïc Wacquant. 2014. "Marginality, Ethnicity and Penality in the Neoliberal City: An Analytic Cartography." *Ethnic & Racial Studies* 37 (10): p. 1702.

[53]Stephen J. Collier. 2009. "Topologies of Power: Foucault's Analysis of Political Government Beyond 'Governmentality'." *Theory, Culture & Society* 26 (6): p. 79.

[54]Max Weber. *Economy and Society, Volume 1.* Berkeley: University of California Press, 1978a; Anderson (1988); David Lyon (ed). *Theorizing Surveillance.* London: Routledge, 2006.

[55]Foucault (2007), p. 104; Porter (1995), Desrosières (1998); Scott (1998).

[56]Max Weber. *Economy and Society, Volume 2.*. Berkeley: University of California Press, 1978b, p. 973.

[57]Anderson (1988); Alain Desrosières. "Managing the Economy." Pp. 553-564 in: *The Cambridge History of Science, Vol. 7*, edited by Theodore M. Porter and Dorothy Ross. Cambridge: Cambridge University Press, 2003.

[58]Michael Mann. 1984. "The Autonomous Power of the State: Its Origins, Mechanisms, and Results." *European Journal of Sociology* 25 (2): p. 189.

Skowronek and Brian Balogh – discuss the production of state knowledge primarily as a means of administrative book-keeping – not as an instrumental part of the state's infrastructural power – or focus on the increasing visibility of state power to the American populace, but without a corresponding discussion of the shifting visibility of that populace to the bureaucratic state.[59]

But to enumerate and surveil for prolonged periods of time – and to focus such efforts on specific populations and specific types of information –, bureaucratic organizations must not only solve the problem of accurate measurement but also the problem of legitimacy. Mass enumeration and targeted surveillance can appear apolitical if the state's authority is taken for granted and if they conform to prevalent cultural norms and expectations.[60] But such a (mis)recognition of state power is necessarily incomplete as long as the state's monopoly over the exercise of symbolic power is less than absolute. Socio-legal norms and expectations of institutional forbearance can impose limits on the conduct of state officials, especially when certain types of information are considered to be part of an "inviolate" domain of privacy.[61] A selective focus on specific types of information and populations or a sudden shift in the state's data collection efforts can also lead to struggles over the legitimacy of enumeration and targeted surveillance.

The ability of government agencies to manage populations through statistical and personal information therefore hinges in part on their ability to present the accumulation and bureaucratic re-deployment of such information as appropriate means and ends of state power that remain compatible with the standards of legal-rational legitimacy.[62] Such legitimacy renders the exercise of power sustainable by establishing a realm of the permissible, within which claims to power are generally recognized as valid and insulated from ongoing political struggles and administrative conduct is thought to be limited by the law and guided by the technical expertise of officials.[63]

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[59]Skowronek (1982), p. 188; Balogh, Brian. *A Government Out Of Sight: The Mystery of National Authority in Nineteenth-Century America*. Cambridge: Cambridge University Press, 2009.

[60]Pierre Bourdieu. 1994. "Rethinking the State: Genesis and Structure of the Bureaucratic Field." *Sociological Theory* 12 (1): 1–18; Loveman (2005); Lyon (2006).

[61]Edward Shils. 1966. "Privacy: Its Constitution and Vicissitudes." *Law and Contemporary Problems* 31, p. 282; Barrington Moore. *Privacy: Studies in Social and Cultural History*. London: Routledge, 1984; Gary G. Hamilton and John R. Sutton. 1989. "The Problem of Control in the Weak State: Domination in the United States, 1880-1920." *Theory and Society* 18 (1): 1-46; Kasper (2007); Anthony et al. (2017); Igo (2018).

[62]Weber (1978a), pp. 212-226.

[63]Weber (1978a), p. 214; Roger Friedland and Robert R. Alford. "Bringing Society Back In: Symbols, Practices, and Institutional Contradictions." Pp. 232-263 in: *The New Institutionalism in Organizational Analysis*, edited by Walter W. Powell and Paul J. DiMaggio. Chicago: The University of Chicago Press, 1991; Mark C. Suchman. 1995. "Managing Legitimacy: Strategic and Institutional Approaches." *Academy of Management Review* 20 (3): p. 574.

This is given additional relevance in the United States because limited governance features as a central element of the political imagination despite ostensible displays of administrative strength.[64]

Yet the limits of this realm of legitimacy are highly malleable. Privacy norms can fluctuate over time, and they also commonly compete with other political imperatives.[65] Sarah Seo has shown that the automobile was originally considered a public space – akin to buses and trains –, but became legally and politically reconstituted as a private domain that could not be searched by government agents without a warrant.[66] Social security numbers followed a similar arc, evolving from widely shared and publicly displayed identity markers into closely guarded information.[67] More recently, discussions about the large-scale collection of telecommunications data have not simply updated pre-existing norms in light of new technological realities but restructured the state's epistemic project around an assumed trade-off between informational privacy and national security.[68] And in the 2020s, campaigns against abortion rights turn in part on re-drawing the boundaries of privacy so that female bodies and reproductive decision-making are no longer considered private or family matters but legitimate areas for government intervention that can be policed and punished accordingly. Privacy norms can also differ across social groups. Even the initial inclusion of marital and reproductive issues under the umbrella category of privacy during the 1960s and 1970s – and thus their shielding from the eyes of the American state – protected (heterosexual) privacy within the nuclear family rather than sexual intimacy more generally.[69] The vilification of Nonwhite communities as hotspots of crime and deviance similarly shapes the scope of surveillance programs that are considered appropriate and acceptable and thereby conditions how those communities can become legible to the American state.[70]

As a result, struggles over mass enumeration and targeted surveillance are also struggles over the contours of privacy and the standards according to which the logic of privacy

[64]Bertrand Badie and Pierre Birnbaum. *The Sociology of the State*. Chicago: University of Chicago Press, 1983; William J. Novak. 2008. "The Myth of the 'Weak' American State." *The American Historical Review* 113 (3): 752-772; Levitsky and Ziblatt (2018).

[65]Moore (1984); Kasper (2007); Igo (2018).

[66]Sarah A. Seo. 2015. "The New Public." *Yale Law Journal* 125: 1616-1671.

[67]Igo (2018).

[68]Daniel J. Solove and Paul M. Schwartz. *Privacy, Law Enforcement, and National Security*. New York: Wolters Kluwer, 2020.

[69]Canaday (2009); Anthony et al. (2017); Igo (2018), p. 157.

[70]Fiske (1998); Browne (2015); Brayne (2017); Ruha Benjamin. *Race After Technology: Abolitionist Tools For the New Jim Code*. London: Polity, 2019; Sabrina Alimahomed-Wilson. 2019. "When the FBI Knocks: Racialized State Surveillance of Muslims." *Critical Sociology* 45 (6): 871-887.

can be weighed against competing priorities.[71] Such standards establish a set of seemingly general criteria against which the demands of interest groups and the conduct of government officials can be judged; they specify how diverse norms and political commitments – to national security, public health, sexual self-determination, law and order, limited governance, due process, and so forth – are to be made commensurate with the logic of privacy, and thus establish a set of seemingly general principles through which idiosyncratic circumstances can be managed. The greater their degree of formalization and their entrenchment in institutional practices, the more significant their downstream effects can be. Because standards pre-structure the terrain of cultural and political struggle, they can regulate and organize social life and the state's epistemic project far beyond their original genesis and contribute to considerable path dependencies in American statecraft.[72] And while they frequently carry the appeal of depoliticized judgment and the symbolic power of objectivity – especially when they are expressed in technical language or codified as legal doctrine – they are better understood as contested and contestable objects that mask the uneven treatment of different populations and the stratifying nature of state power.[73] Recovering the multiplicity and contingency of such standards and the contingency of privacy claims during critical periods of state formation can therefore help to highlight their role as "effects of the state" that reflect the moral visions and developmental histories of specific bureaucratic agencies and the political force fields within which they operate.[74]

Bureaucratic rule during the Progressive Era

Sociological studies of privacy and surveillance have increased with the proliferation of digital tracking, yet the pursuit of legibility by government officials predates any recognizably modern computer. The analysis of archival data and the tools of historical sociology can shed light on this *longue durée* and refocus scholarly attention on earlier socio-political struggles and the initial routinization of information collection by the state. The decades between 1870 and 1920 are a particularly appropriate historical period to study. While the earlier "state of courts and parties" had depended on local patronage networks and incremental judicial decision-making to interface with the American populace and exercise its power, an emerging system of bureaucratic governance relied to a much greater extent on the collection, analysis, and use of

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[71] Nils Brunsson and Bengt Jacobsson (eds). *A World of Standards.* Oxford: Oxford University Press, 2000; Timmermans and Epstein (2010), p. 71.

[72] Pierson (2000); Timmermans and Epstein (2010).

[73] Bowker and Star (1999); Judith Treas. "Age in Standards and Standards for Age." Pp. 65-94 in: *Standards and their Stories*, edited by Martha Lampland and Susan Leigh Star. Ithaca: Cornell University Press, 2009.

[74] Mitchell (1991).

personal and demographic data at scale.[75] Government agencies began to gather standardized data about public health, demographic trends, and economic productivity for the first time in American history; and enumeration efforts became more tightly integrated into administrative routines.[76] Figure 6.1 illustrates the expansion of state-level infrastructures and databases that turned the monitoring of populations across considerable distances into a practical reality of American governance.[77] Boards of Health began to be established in U.S. states and major cities especially after the 1870s; Bureaus of Labor Statistics appeared in an increasing number of states in the 1890s; police departments began to rely on photographic evidence, physiological measurements known as "Bertillon records", and fingerprints to track arrestees, convicted criminals, and Black sex workers; and municipalities standardized the recording and reporting of basic vital statistics through databases on births, deaths, marriages, and divorces especially after 1900.[78] Over the course of several decades before and after the turn of the century, the vision of the American state – that is, the ability to "see" through the distinct lens of the state and with the specific aim of improving its statecraft – increased considerably across all levels of government. The so-called "new American state" that replaced the "state of courts on parties" was not just numerically bigger and administratively more complex, but integrated official and comprehensive state knowledge much more deeply into the routines of bureaucratic rule.[79]

At the same time, government agencies began to wrestle with questions about the limits of state knowledge. Their growing capacity to count and manage large populations across great distances collided with disputes about the privacy of space, information, and communication, which had evolved into prominent themes of American political and legal discourse since the end of the Civil War.[80] What should an enlarged state know about its citizens, and how should it exercise its informational power? Attempts to answer these questions pushed the logic of privacy into the halls of Congress and

[75]Skowronek (1982), pp. 24-27.

[76]Howard D. Kramer. 1947. "The Beginnings of the Public Health Movement in the United States." *Bulletin of the History of Medicine* 21: 352-376; David J. Seipp. 1978. *The Right to Privacy in American History.* Harvard University Program on Information Resources Policy Publication P-78-3; Anderson (1988); Igo (2007); Heather L. Brumberg, Donna Dozor, and Sergio D. Golombek. 2012. "History of the Birth Certificate: From Inception to the Future of Electronic Data." *Journal of Perinatology* 32 (6): 407–411.

[77]For a contemporaneous account of this transformation, see: "No Privacy in City Life". *Los Angeles Times*, 10 August 1902.

[78]For a specific discussion of the tracking of Black sex workers using Bertillon records, see: Freda L. Fair. 2017. "Surveilling Social Difference: Black Women's 'Alley Work' in Industrializing Minneapolis." *Surveillance & Society* 15 (5): 655-675.

[79]For a discussion of the "new American state" (but without a focus on state knowledge), see Skowronek (1982).

[80]Seipp (1978); Solove (2002); Igo (2018);

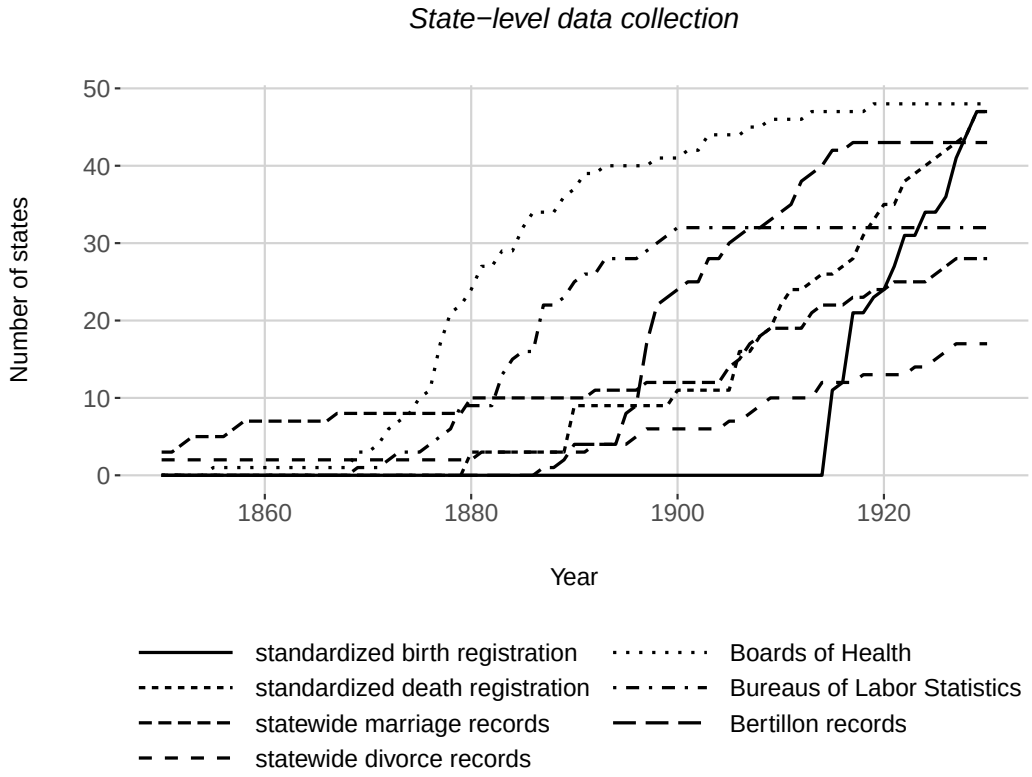

Figure 6.1: *Proliferation of databases and bureaucratic organizations tasked with the collection of labor and vital statistics by year. Sources: State Boards of Health; U.S. Marine Hospital Service; U.S. Public Health Service; U.S. Department of Health and Human Services; U.S. Department of Labor.*

the regulations that govern the work of countless agents of the American state. Such struggles over privacy and legibility are informative for several reasons. They make it possible to compare epistemic regimes across the splintered field of agencies that collectively constitute the bureaucratic state. They also produce claims about the legitimacy of data accumulation that can be excavated from archival records and studied empirically. This is because privacy norms can affect the exercise of power and the organization of society when they are brought to bear on specific techniques of governance.[81] They allow individuals and organizations to structure the selective exchange of information and to institutionalize the rules for such an exchange through formal legislation and informal custom. Political and legal developments during the Progressive Era also cast a long shadow over the institutional landscape of American governance in the twentieth century.[82] Focusing on the early twentieth century can therefore help to illuminate the epistemic dimension of American state development and the legitimation of the state's epistemic project more generally.

I focus on two organizations – the Public Health Service and the Post Office Department – that represent important but organizationally distinct sites of legal and political struggle over the state's epistemic project. Using archival data collected from the U.S. National Archives in Washington, DC and College Park, MA, from state archives in Massachussets, from municipal archives in San Francisco and New York City, and from the public health archive at U.C. Berkeley, I show that the institutionalization of privacy and informational power – their encoding in administrative regulations and bureaucratic routines – resulted from the interplay of external pressures and internal institutional logics.[83] This is why contours of privacy and surveillance bear the imprints of specific organizational settings as well as the macrosocial and political contexts into which state organizations are embedded.

Health officials embraced and expanded the standardized collection of vital statistics especially during the early twentieth century, aiming to create comprehensive and accurate tallies of births, deaths, and diseases in the United States and leveraging their connections with the Census Bureau and local law enforcement agencies to do so. But persistently high infectious disease mortality and frequent outbreaks of smallpox or yellow fever epidemics in cities also resulted in targeted "sentinel

[81] Kasper (2007), p. 166; Anthony et al. (2017), p. 262.

[82] Robert H. Wiebe. *The Search for Order, 1877-1920.* New York: Hill and Wang, 1966; Skowronek (1982); Paul Pierson. 2000. "Increasing Returns, Path Dependence, and the Study of Politics." *American Political Science Review* 94 (2): 251-267; Stephen Skowronek and Karen Orren. 2016. "Pathways to the Present: Political Development in America." Pp. 27-47 in: *The Oxford Handbook of American Political Development*, edited by Richard Valelly, Suzanne Mettler, and Robert Lieberman. Oxford: Oxford University Press, 2016.

[83] A description of the archival research that informs this chapter is included in the Methodological Coda.

surveillance" campaigns, the subordination of concerns about medical privacy to the dataist imperative and in a repackaging of racial bias in enumeration as scientifically informed infectious disease management. While Black populations were under-counted in nationwide statistics until the late 1920s, the expansion of local health surveillance repeatedly put minority neighborhoods into the crosshairs of health inspectors. Postal officials faced a different political landscape: Anti-vice campaigns during the late nineteenth century and the wartime environment of World War I led to calls for large-scale mail surveillance to screen out sexually explicit materials and potentially treasonous content. But the Post Office also had a strong and expanding institutional commitment to the privacy of the mail. The result, in this case, was a system of governance by exception. The Postal Inspection Service implemented a two-tiered system of postal screening that protected only some types of mailed matter and enabled the screening of postcards, packages, and foreign mail for sexually explicit and politically radical communications. In different settings and in different ways, these developments anchored uneven practices of data collection in administrative routines and selectively institutionalized privacy claims of citizens against the American state.

Vital statistics and sentinel surveillance

I first document how the uneven accumulation and use of statistical and personal data was anchored in institutional practices by focusing on the epistemic regimes of the Public Health Service and the Post Office Department (Table 6.1). For much of American history, public health administration was organizationally underdeveloped, unevenly funded, and focused on ports of entry.[84] But most major cities had established dedicated public health agencies by the end of the nineteenth century.[85] The number of State Boards of Health also increased from a mere three in 1870 to twenty-five in 1880 and forty-eight in 1920. Federally, the National Quarantine Act of 1878 established a short-lived National Board of Health, which was soon superseded by the Public Health and Marine Hospital Service (in 1902) and the Public Health Service (in 1912) as the emphasis shifted from health screenings at ports of entry towards nationwide public health administration.

As the size of public health organizations grew, so did the scope of initiatives that aimed to generate reliable data about the distribution of births and deaths in the

[84]George W. Morton. *Laws and Ordinances Relative to the Preservation of Public Health.* New York: Edmund Jones and Co, 1860; Samuel W. Abbott. *Past and Present Condition of Public Hygiene and State Medicine in the United States.* Boston: Wright and Potter, 1900.

[85]Marine Hospital Service, *Public Health Reports*, Vol. XVI, Part II, No. 27 to 52. Washington: Government Printing Office, 1902. p. 2956. Also see Smillie (1943) and Jason Waterman and William Fowler. *Municipal Ordinances, Rules, and Regulations Pertaining to Public Health, 1917-1919. Supplement No. 40 to the Public Health Reports.* Washington: Government Printing Office, 1921.

Table 6.1: Epistemic regimes

	Public Health Service	Post Office Department
What data is collected?	Vital statistics, infectious disease records	Morally objectionable and politically radical communications
How is data collected?	Inspections of homes; infectious disease reporting; municipal record-keeping	Screenings of postcards, foreign mail, and merchandise
Who is targeted for data collection?	Everyone (basic statistics); urban communities; minorities	Senders and recipients of 'fraudulent' mail; recipients of foreign mail during WWI
Who has access to data?	Health officials; law enforcement; other state/federal agencies	Postal inspectors; law enforcement
Standards of legitimacy	Scientificity of enumeration; urgency of disease containment; primacy of public good	Privacy of sealed letters; risks to public morals and national security

United States.[86] Attempts to develop annual death statistics were bundled at the Committee on Vital Statistics, established in 1879 by the National Board of Health. Yet they were initially hampered by poor record-keeping, as many municipal records were idiosyncratic, incomplete, or entirely missing. During the first year of the Committee's operation, it could only obtain death records for twelve cities. Starting in 1880, federal health officials thus worked with the Bureau of the Census to disseminate standardized registration forms to local governments and physicians. Census officials also aided in compiling reports and bulletins that could be circulated to federal and state governments and thus help to bring about greater uniformity of knowledge about public health conditions across the United States. By 1900, eleven U.S. states reported at least 90 percent of their deaths to the federal bureaucracy through standardized death certificates. Two decades later, 34 states did. But despite the increase in standardization and coverage, vital statistics were not evenly collected. Until the late 1920s, Black deaths were more likely to be uncounted by federal authorities, since Southern states with high percentages of Black residents had not yet joined the Death Registration Area (Figure 6.2). In 1910, for example, the U.S. government produced reliable death statistics for 58 percent of the country's White population but only 18 percent of the Black population.

The enumeration of births followed. States were urged by the Committee on Vital Statistics, the Census Bureau, and the American Public Health Association to adopt standardized birth registration forms, but initial implementation was slow.[87] Even in 1908, only half of all births in the United States appeared in federal databases, and the accuracy of recorded data was often dubious.[88] But public health authorities began to organize local audits in collaboration with the Census Bureau and the newly established Children's Bureau to ensure that cities maintained complete and accurate birth records. These audits were generally successful in ensuring compliance and accuracy. By 1928, an estimated 94.4 percent of Americans lived in Birth Registration Area where at least 90 percent of births were recorded.[89]

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[86] "The Organization of the Civil Registration System of the United States." International Institute for Vital Registration and Statistics Technical Paper 8. Also see: Robert D. Leigh. *Federal Health Administration in the United States*. New York: Harper Publishing, 1927; Richard H. Shryock. 1937. "The Early American Public Health Movement." *American Journal of Public Health* 27 (10): 965-971.

[87] Brumberg et al. 2021; Koopman (2019), pp. 35-65.

[88] Robert E. Chaddock. 1911. "Sources of Information Upon the Public Health Movement." *Annals of the American Academy of Political and Social Science* 37 (2): 63-66. Also see: U.S. Bureau of the Census. *Legal Importance of Registration of Births and Deaths*. Washington: Government Printing Office, 1906; U.S. Bureau of the Census. *Birth Statistics for the Registration Area of the United States, First Annual Report*. Washington: Government Printing Office, 1917.

[89] U.S. Bureau of the Census. *Birth, Stillbirth, and Infant Mortality Statistics for the Birth Registration Area of the United States, Thirteenth Annual Report, 1927*. Washington: Government Printing

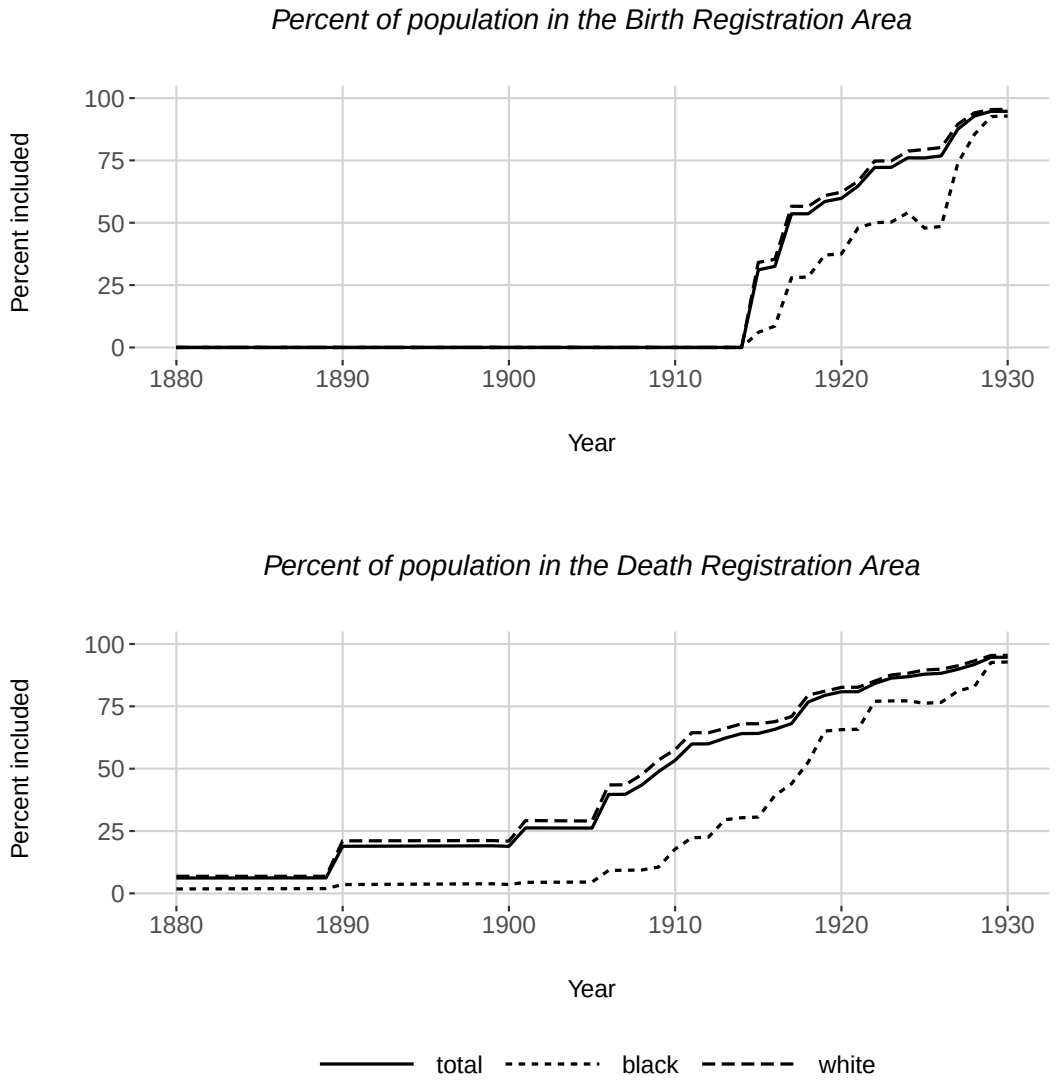

Figure 6.2: *Percentage of the U.S. population, by race, that was included in the Birth Registration Area and Death Registration Area. Population counts are log-interpolated for intercensal years. Populations coded as "other" are excluded because of changing Census Bureau definitions. Source: Bureau of the Census, 1931 Statistical Abstract.*

Disseminated through a network of bureaucratic agencies, medical associations, scientific publications, and annual conferences, such records could be used by a variety of agencies and increase the uniformity of knowledge about public health and demographic trends. Officials reasoned that they would help to determine "the right to attend school, to enter certain occupations, to vote, to marry, to hold or to dispose of property, to employment by the state or country in military of civil service; responsibility for crime or misdemeanor; exemption from military or jury duty; qualifications or disqualifications for certain public offices."[90] In the 1920s, for example, Virginia's registrar of statistics Walter A. Plecker turned vital statistics into a key tool for the enforcement of the 1924 Racial Integrity Act, which had outlawed interracial marriage.[91] Around the same time, the Children's Bureau also expanded its utilization of vital statistics to enforce prohibitions against child labor and to combat regional disparities in the juvenile justice system.[92] As instruments of efficient and empirically informed governance, vital statistics promised to enable the "conduct of conduct" far beyond the realm of public health and in pursuit of different political agendas.[93]

Alongside the collection of nationwide statistics, health officials also focused on local outbreaks of infectious diseases, which claimed around 600,000 lives annually at the turn of the twentieth century.[94] Innkeepers near major ports had reported suspected cases of smallpox and cholera since the eighteenth century. But dedicated "sentinel surveillance" regimes proliferated in the late nineteenth century as a growing number of states mandated infectious disease reporting by physicians.[95] By 1901, every state had adopted reporting requirements for smallpox and cholera, and several states also

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Office, 1930. Also see Koopman (2019), pp. 48-57.

[90]Hurty (1910), pp. 1157-1158. For a discussion of the use of public health data in education, see: Central File Box 5, "Interdepartmental Social Hygiene Board." USNA Record NC-34 30. For intra-bureaucratic deliberations about the utility of public health data, see: Central File Box 2, "National Board of Health: Minutes of Meetings." USNA Record PI-141 1.

[91]Municipalities in Virginia were ordered to include racial identification markers on all birth certificates, thereby to facilitate the enforcement of the "one-drop role" and to prevent violations of the color line by mixed-race residents and indigenous Virginians. See: Philip Reilly and Margery Shaw. 1983. "The Virginia Racial Integrity Act Revisited: The Plecker-Laughlin Correspondence: 1928–1930." *American Journal of Medical Genetics* 16 (4): 483-492. Also see Landrum (2010).

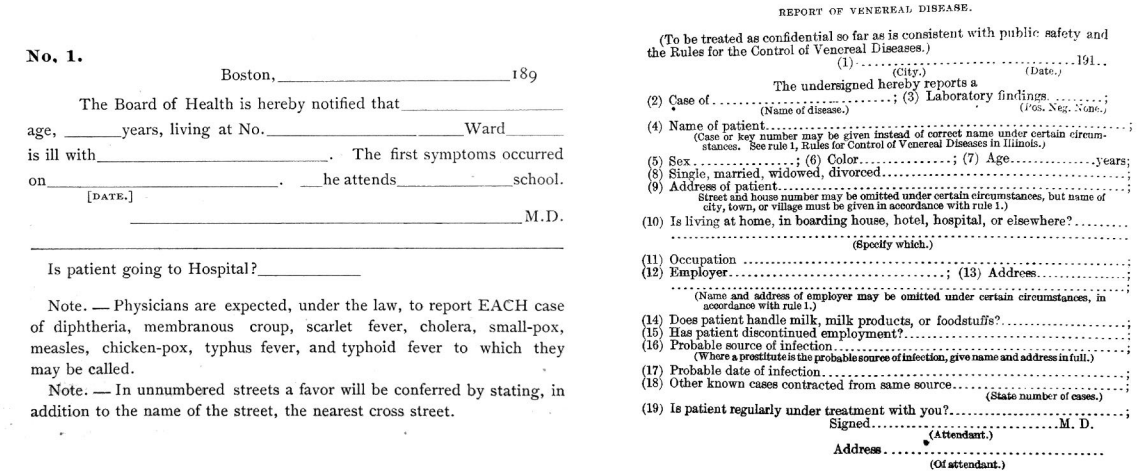
[92]James J. Davis and Grace Abbott. *Juvenile-Court Standards: Report of the Committee Appointed by the Children's Bureau, August, 1921, to Formulate Juvenile-Court Standards.* Washington DC: Government Printing Office, 1923. Also see Pearson (2015).

[93]Foucault (2007), p. 389

[94]Gregory L. Armstrong, Laura A. Conn, and Robert W. Pinner. 1999. "Trends in Infectious Disease Mortality in the United States During the 20th Century." *Journal of the American Medical Association* 281 (1): 61-66.

[95]Wilson Smillie. 1952. "The Basis of Communicable Disease Control." *Public Health Reports* 67 (3): 289-292. John W. Kerr and Aristides A. Moll. *Public Health Bulletin 54: Organization, Powers, and Duties of Health Authorities.* Washington: Government Printing Office, 1912.

required that reports be made about outbreaks of diphtheria, scarlet fever, typhoid fever, yellow fever, and several venereal diseases. In some cities, physicians could meet their legal obligations by collating local case counts before forwarding summaries to state authorities. In others, primary care doctors were provided with questionnaires that allowed them to mark the type of disease, add the patient's name, address, and employer, and forward the information to the nearest Board of Health (Figure 3).[96]



No. 1.

Boston,_____189

The Board of Health is hereby notified that_____

age, _____years, living at No._____Ward_____

is ill with_____. The first symptoms occurred

on_____. __he attends_____school.

[DATE.]

_____M.D.

Is patient going to Hospital?_____

Note. — Physicians are expected, under the law, to report EACH case of diphtheria, membranous croup, scarlet fever, cholera, small-pox, measles, chicken-pox, typhus fever, and typhoid fever to which they may be called.

Note. — In unnumbered streets a favor will be conferred by stating, in addition to the name of the street, the nearest cross street.

REPORT OF VENEREAL DISEASE.

(To be treated as confidential so far as is consistent with public safety and the Rules for the Control of Vencreal Diseases.)

(1) .....191..
(City.) (Date.)

The undersigned hereby reports a

(2) Case of .....; (3) Laboratory findings .....;
(Name of disease.) (Pos. Neg. None.)

(4) Name of patient.....;
(Case or key number may be given instead of correct name under certain circumstances. See rule 1, Rules for Control of Venereal Diseases in Illinois.)

(5) Sex .....; (6) Color.....; (7) Age.....years;
(8) Single, married, widowed, divorced.....;
(9) Address of patient.....;
Street and house number may be omitted under certain circumstances, but name of city, town, or village must be given in accordance with rule 1.)

(10) Is living at home, in boarding house, hotel, hospital, or elsewhere?.....
(Specify which.)

(11) Occupation .....;
(12) Employer.....; (13) Address.....;
(Name and address of employer may be omitted under certain circumstances, in accordance with rule 1.)

(14) Does patient handle milk, milk products, or foodstuffs?.....;
(15) Has patient discontinued employment?.....;
(16) Probable source of infection.....;
(Where a prostitute is the probable source of infection, give name and address in full.)

(17) Probable date of infection.....;
(18) Other known cases contracted from same source.....;
(State number of cases.)

(19) Is patient regularly under treatment with you?.....;
Signed.....M. D.
(Attendant.)
Address.....
(Of attendant.)

Figure 6.3: *Official forms for the reporting of infectious diseases. Left: Massachusetts Board of Health, 1896. "To The Physicians of Boston." Massachusetts Historical Society, Box 1896. Right: Public Health Service. "Venereal Disease Legislation." United States National Archives Entry NC-34 10, Central File Box 240.*

Finally, municipal officials embraced their mandate as a "sanitary police" that could investigate and contain local outbreaks directly. In Boston, public health initiatives were originally run out of the city's police department, which conducted "a thorough and systematic examination of the whole city," quarantined infectious disease patients, and instituted a public warning system by placing red flags on their homes.[97] Similar developments played out across the United States.[98] In New York City, a municipal Sanitary Committee recommended "the establishment of a thoroughly organized medical police" as a matter of urgent necessity.[99] Public health work by civic associations

[96] Central File Box 240, "Venereal Diseases". USNA Record NC-34 10. Also see: Interdepartmental Social Hygiene Board, Box 5. USNA Record NC-34 30.

[97] Henry G. Clark, "Superiority of sanitary measures over quarantines: an address delivered before the Suffolk District Medical Society at its third anniversary meeting, Boston, April 24, 1852." *City of Boston: Sanitary Visitation, October 30, 1865.*

[98] See Kerr and Moll (1912), pp. 22, 28, 35-39, 41, and 398-403.

[99] Council of Hygiene and Public Health of the Citizens' Association of New York, *Report on Epidemic Cholera.* New York: Sanford, Harroun & Co, 1865. p. 31.

was to be supplemented with the "systematic sanitary inquiry and inspection in every street, block, [and] tenant-house."[100] Health officials made periodic visits to tenement buildings and more than two thousand sworn officers of the city's law enforcement apparatus were tasked with enforcing health statutes through inspection, quarantine, fines, and forcible removal.[101] By 1900, the New York City Board of Health conducted close to 200,000 inspections per year, took executive action in tens of thousands of cases, and forcibly vacated hundreds of tenements for health-related reasons.[102]

While there was considerable local variation in sentinel surveillance – which was not centrally coordinated but run by municipal officials, sometimes with guidance from state authorities and physicians employed by the federal Public Health Service –, it frequently placed minority populations at the center of the state's quest for public health data.[103] In Los Angeles, enforcement of health ordinances was often centered on Mexican workers who resided in nearby railroad camps, while health authorities in Baltimore focused sanitary inspections on so-called "lung blocks" in the city's predominantly Black neighborhoods.[104] In San Francisco, health inspectors attempted to identify the source of a 1901 bubonic plague outbreak by setting up perimeter checkpoints around the city's Chinatown neighborhood, visited local pharmacies to track down infected patients through their medicine purchases, combed through 14,117 rooms, and put around 14,000 Chinese immigrants under quarantine.[105] And in New York City, health officials dispatched inspection and vaccination teams specifically to the city's immigrant districts, along with police escorts that could lend coercive power to the city's health surveillance efforts.[106]

Through a combination of nationwide vital statistics collection, legally mandated sentinel surveillance, and direct community intervention by local officials and law

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[100] Council of Hygiene and Public Health, p. 33.

[101] Council of Hygiene and Public Health, *Laws and Ordinances Relative to the Preservation of Public Health.* New York: Edmund Jones and Co, 1860; The Citizens Association of New York. *The Public Health: The Basis of Sanitary Reform.* The Metropolitan Board of Health, 1866. pp. 13-19.

[102] Abbott (1900), pp. 55-56; Stephen Smith, *The City That Was.* New York: Frank Allaben, 1911. James A. Tobey. *Public Health Law.* Baltimore: The Williams & Wilkins Co, 1926. pp. 31-43.

[103] Central File Box 679, "Indiana Board of Health Records". USNA Record NC-34 10.

[104] Guenter Risse. *Plague, Fear, and Politics in San Francisco's Chinatown.* Baltimore: The Johns Hopkins University Press, 2012. pp. 110-130 and 148-155.

[105] *San Francisco Municipal Reports for the Fiscal Year 1901-1902.* San Francisco: Commercial Publishing Co., 1902. p. 491; *Public Health Reports*, Vol. XVI, Part II, p. 2837. Vernon Link. "A History of Plague in the United States of America." *Public Health Monograph* 26, Publication 392. Washington: Government Printing Office, 1955. pp. 3-4.

[106] Colgrove (2006), pp. 21-23. Also see: William Bennet and William Dillingham. "Abstracts of Reports of the Immigration Commission", Vol. 1-2. Washington: Government Printing Office, 1911. pp. 20-35.

enforcement, mass enumeration and targeted monitoring became crucial aspects of the expanding public health apparatus in the United States. The information thus obtained was not simply utilized for the protection of public health but began to circulate through the bureaucratic apparatus as different agencies drew on vital statistics to aid a multitude of political and administrative agendas. It also remained decidedly uneven despite the increasing standardization of enumerative methods and the expansion of administrative capacities across all levels of government. While Black populations were less likely to be included in standardized national statistics before 1930, Black and immigrant communities were more likely to be targeted through local surveillance campaigns.

The sanctity of the seal and the defense of public morals

By the middle of the nineteenth century, postal delivery routes functioned as the central nervous system of an emerging nation and the facilitator of its commerce.[107] The sanctity of the sealed letter was anchored in the logic of this system since its inception. When the Continental Congress established the precursor to the U.S. Postal Service in 1782, its members included a provision against any attempts to "open, detain, delay, secrete, embezzle, or destroy" mailed matter.[108] Initially, these prohibitions were largely aspirational, since letters tended to travel through the hands of multiple local officials, messengers, innkeepers, and acquaintances of recipients who rarely had to fear consequences for mail tampering. But in the late nineteenth century, tightened postal regulations and persistent enforcement by the courts lent greater weight to the sanctity of the seal.[109] Postal officials also changed the design of mail boxes to prevent mail tampering, introduced sealable envelopes, and levied increasing fines for violations of the seal (Figure 4).[110]

Yet the Post Office's institutional commitment to the privacy of written communications existed alongside persistent efforts to "suppress public nuisances" and defend

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[107] Richard R. John. *Spreading the News: The American Postal System from Franklin to Morse*. Cambridge: Harvard University Press, 1998; Winifred Gallagher. *How the Post Office Created America: A History*. New York: Penguin, 2016; Devin Leonard. *Neither Snow Nor Rain: A History of the United States Postal Service*. New York: Grove Press, 2016.

[108] Gaillard Hunt (editor). *Journals from the Continental Congress 1774-1789* Volume 23. Washington: Government Printing Office, 1914. p. 671. Also see: Anuj C. Desai. 2007. "Wiretapping before the Wires: The Post Office and the Rebirth of Communications Privacy." *Stanford Law Review* 60: 553-594.

[109] Seipp (1978); Gallagher (2016).

[110] J. Holbrook, *Ten Years Among the Mail Bags*. Philadelphia: H. Cowperthwait & Co, 1855; Scrapbook of Circulars, Notices, Instructions, Regulations, and Newspaper Clippings, 1823 - 1871. USNA Record PI-168 27; Records Relating to Postal Devices for City Delivery, 12/1908 - 8/1911. USNA Record ID 194389; Records Relating to Post Office Boxes (Lockboxes), 1894-1934. Box 2. USNA Record PI-168 174.

Figure 6.4: *Newspaper advertisements that invoked concerns about postal privacy. Left: Privacy of the Mail Box. The Chattanooga News, May 17, 1918. Right: The Privacy of Mail Banking. St. Johnsbury Caledonian, September 11, 1912. Source: Library of Congress.*

"public morals" through the inspection of mailed matter.[111] This was especially true after a series of laws criminalized the distribution by mail of sexually explicit publications in the 1870s, of lottery tickets in the 1890s, and (in some states) of contraceptive materials in the 1900s.[112] Such prohibitions had initially been advocated by non-governmental organizations like the Young Men's Christian Association and the New York Society for the Suppression of Vice, which campaigned for the defense of Victorian sexual norms during the second half of the nineteenth century. But they also became a central part of the mission of the expanding Postal Inspection Service. The agency employed less than fifty inspectors when the first so-called "Comstock law" came into force in 1873. By the end of the century, it employed 100. And before the onset of World War I, close to 400 inspectors pursued investigations of pornography and financial fraud, often in collaboration with local law enforcement agencies. One of the main advocates of anti-vice legislation, Anthony Comstock, was also appointed as the agency's lead investigator of anti-obscenity cases. Within a year, he had opened hundreds of cases and ordered 55 arrests for the illicit distribution of sexually explicit pictures.[113]

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[111] Records of the Inspection Office at New York, 4/27/1907 - 10/7/1908. USNA Record PI-168 240.

[112] Records of the Inspection Office at New York, 4/27/1907 - 10/7/1908. Box 2. For an overview of birth control legislation, see: Jacob C. Ruppenthal, "Criminal Statutes on Birth Control." *Journal of Criminal Law and Criminology* 10: 48-61.

[113] Anthony Comstock. *Frauds Exposed. Or, How the People are Deceived and Robbed, and Youth*

Yet in order to police mailed matter, postal inspectors needed to know its contents. They initially focused on mail that was not protected by the seal, screening postcards and other unsealed mail and referring suspected offenders to the police. The Postal Inspection Service pursued indictments for "sending obscene matters through the mail" and facilitated arrests for circulating "filthy pictures and circulars."[114] In Colorado and Kansas, postal inspectors worked directly with local police departments and school districts to obtain handwriting samples that could be used to track down the originators of postcards.[115] And in Philadelphia, they stopped one recipient of sexually explicit postcards when he arrived to retrieve his sealed mail from the local post office. Forced to open it, he was found to be running a match-making service that connected unmarried women to potential suitors.[116] When police raids uncovered sexually explicit photographs in New York and New Jersey, postal officials also took it upon themselves to track mail that was addressed to, or sent by, the suspected offenders.[117] By 1910, officials estimated that the fight against pornography and sexual promiscuity resulted in hundreds of mail tracing requests and investigations per year.[118]

Additionally, postal inspectors investigated several thousand cases annually of fraudulent mail use by people who "[preyed] on the gullible" by promising imaginary profits from oil wells, by selling dubious medical cures, weight-loss potions, and false teeth, and by circulating forged lottery tickets.[119] They also expanded their screening efforts beyond postcards. The privacy of the mail was waived for some categories of merchandise, including packages sent from abroad. Once a sender or recipient had been added to the Postal Inspection Service's list of suspicious addresses, future shipments of foreign mail could be intercepted and examined before they cleared U.S.

Corrupted. New York: J. Howard Brown, 1880. p. 391. Also see: Heywood Broun and Margaret Leech. *Anthony Comstock: Roundsman of the Lord*. New York: The Literary Guild of America, 1927.

[114]Records of the Inspection Office at New York, 4/27/1907 - 10/7/1908. Box 1, Documents 55-57, 156, 288, and 293; Records of the Inspection Office at Philadelphia, 1896-1909. Box 16, Documents 200, 230, 232, 459, 888, and 969. USNA Record PI-168 239.

[115]Records of the Inspection Office at Denver, 12/20/1879 - 5/8/1907. Box 11. USNA Record PI-168 238.

[116]Records of the Inspection Office at Philadelphia, 1896-1909. Box 13. Document 603. USNA Record PI-168 239.

[117]Records of the Inspection Office at New York, 4/27/1907 - 10/7/1908. Box 1, Documents 596. Also see documents 606 and 609.

[118]Post Office Department. Identification Notices 1899-1910. USNA Record A1 270. Also see: James C. N. Paul and Murray L. Schwartz. 1957. "Obscenity in the Mails: A Comment on Some Problems of Federal Censorship." *University of Pennsylvania Law Review* 106: 214-253.

[119]Publicity Materials Concerning Postal Crimes and Mail Frauds, 1931-1945. Box 1. USNA Record UD-173.

customs.[120] And during World War I, the Post Office acted on orders of the newly established Censorship Board and the Department of Defense to implement mass screenings of foreign mail for seditious materials. President Roosevelt and his Attorney General Charles Bonaparte had approached Congress as early as 1908 with requests for legislation that would have criminalized such content. The authority to impound letters and packages that were deemed to undermine the military readiness of the United States was ultimately granted to the Postmaster General by the Espionage Act of 1917. A day after the law's passage, the Post Office informed all local postmasters to maintain "close watch" on any mail that may undermine the American war effort.[121] Postal officials began to build out a system of screening points at major ports capable of handling large volumes of foreign mail, maintained a database of suspicious foreign addresses against which all incoming mail could be compared, and began to open letters and packages that were sent to and from the United States' wartime enemies. In 1918, the fifty officials at the Censorship Office in San Francisco opened 37,095 pieces of mail in a span of merely two weeks.[122]

Censorship offices were decommissioned towards the end of the war, but officials continued to screen large financial and securities transfers to and from Germany. Publications with anarchist or socialist tendencies – as well as packages thought to contain such publications – also continued to be seized as concerns grow over socialist revolutions in Germany and Italy and the success of the Bolshevik revolution in Russia.[123] As was the case with earlier anti-vice campaigns, the tiered system of postal surveillance that distinguished between acceptable and dangerous mailed matter – a distinction that was infused with moral connotations of sexual and ideological deviance and resulted in the differential application of mail privacy to each tier – outlasted the particular circumstances of wartime administration and became folded into the routine operations of the Post Office.

Privacy and the limits of informational power

Mass enumeration and targeted surveillance became routine elements of public administration in the United States around the turn of the twentieth century, yet informal privacy norms and formal legislation still imposed limits on the state's epistemic project. Medical information was commonly considered a private matter, especially

[120] Records of the Inspection Office at New York, 4/27/1907 - 10/7/1908. Box 1, Document 583.

[121] Quoted in Cappozolla (2008), p. 151.

[122] Records of the Censorship Board, 1917 - 1918. Box 3, February 2018. USNA Record PI-168 17. Because the legal frameworks were relatively vague, local officials had considerable leeway to decide how wartime censorship would be operationalized and what actions would be taken.

[123] Records of the Censorship Board, Box 2, September 1918. Also see: Morris E. Cohn. 1932. "The Censorship of Radical Materials by the Post Office." *Washington University Law Review* 17 (2): 95-119.

when it involved socially stigmatized venereal diseases.[124] Homes and apartments were also understood to be private spaces into which police officials and health bureaucrats ought not intrude.[125] On these grounds, citizens initiatives in Ohio and Iowa opposed the expansion of public health agencies as an infringement of privacy and personal liberty.[126] Congressional delegates objected to the inclusion of medical questions in the 1890 Census as "unwarranted and unconstitutional."[127] Immigrant leaders spoke against health surveillance campaigns that targeted foreign-born populations for room-to-room searches by police officers and health officials.[128] And across the country, newspapers condemned the disclosure of medical information as an "invasion of the confidential relation of the physician to his patients", "the most tyrannical thing that the government has undertaken", and a violation of "the right of privacy guaranteed by the common law from time immemorial."[129]

The same was true for written communications, which had emerged as a central theme of American privacy debates during the late nineteenth century. When postcards were first introduced in the United States in the 1870s, newspapers were quick to point out that such postcards carried a price-tag that wasn't covered by the postage itself: They did "not secure that privacy to mail communications to which we have been accustomed," which seemed to limit their use to matters "where such publicity as they occasion will not be a matter of much concern."[130] While Americans had long harbored concerned about thieves who opened mail in transit to steal cash or checks that had been enclosed in envelopes, such conversations hint at the gradual rise of another set of concerns: Prying eyes could violate the privacy of the mail as much as long fingers, and could inflict immaterial and reputational harm that was at least in principle on par with the financial harm suffered from theft.[131] As the editorial board of the *Detroit Free Press* argued, "the right of the people to secrecy and privacy in

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[124] "The Right to Privacy in Nineteenth Century America." *Harvard Law Review* 94 (8): 1892-1910.

[125] Amy L. Fairchild, Ronald Bayer, and James Colgrove. *Searching Eyes: Privacy, the State, and Disease Surveillance in America*. Berkeley: The University of California Press, 2007; Igo (2018).

[126] Kramer (1947).

[127] 21 Cong. Rec. 5158 (May 22, 1890).

[128] Joan Trauner. 1978. "The Chinese as Medical Scapegoats in San Francisco, 1870-1905." *California History* 57 (1): 70-87; Charles McClain. 1988. "Of Medicine, Race, and American Law: The Bubonic Plague Outbreak of 1900." *Law & Social Inquiry* 13 (3): 447-513; Howard Markel. *Quarantine! East European Jewish Immigrants and the New York City Epidemics of 1892*. Baltimore: Johns Hopkins University Press, 1999; Natalia Molina. *Fit to be Citizens? Public Health and Race in Los Angeles, 1879-1939*. Berkeley: University of California Press, 2006; Risse (2012).

[129] "Doctors Will Not Reply." *New York Times*, May 29, 1890; "Debts, Disease and the Census." *Chicago Tribune*, May 28, 1890; "A Vicious Measure." *Montpelier Examiner*, 20 March 1903.

[130] "Notice." *Elk County Advocate*, 4/24/1873.

[131] Seipp (1978).

inter-communication is one of the most cherished rights."[132] Other newspapers also echoed calls to protect the mail "from all espionage" and proposed that "the privacy of the mails should be guarded as sacredly as the freedom of the press, the habeas corpus act, or trial by jury."[133] Such concerns were widespread enough that Charles Emory Smith, Postmaster General of the United States from 1898 to 1902, contacted newspaper editors across the country at the beginning of the Spanish-American war to convey a straightforward message:

> *"All reports indicating that postoffice inspectors or other officials have been detailed or authorized to open letters within the mails are untrue and misleading. The privacy of the mails at no time nor under any condition or circumstances will be invaded during the war. All mail properly addressed and upon which sufficient postage is paid will be delivered to the addresses as expeditiously and scrupulously as it ever has been."*[134]

But while Smith's intervention may have calmed the waters temporarily, it did not put an end to concerns about mail privacy in the United States. In the wake of the anti-czarist revolution in Russia in 1905, one newspaper argued that "Personal Liberty dead. Censorship of the Press. Privacy of Mails Unknown." were three hallmarks of revolutionary Russia that stood diametrically opposed to the ideals of republicanism and the principles of American government.[135] Years later, the *Evening World* was less sanguine about the state of civil liberties in the United States but similarly committed to the ideals of mail privacy, arguing in a front-page editorial that:

> *"Censorship of mails in this country has already been carried too far. Yet year by year, here a little and there a litte, it is being extended upon one pretense or another. Sometimes the extension is by law, sometimes it is by order of the Postmaster-General; sometimes by presumption of local postmasters. All of it is wrong. [. . .] We have censorship that is none the less despotic because petty and puritanical."*[136]

Even relatively inconsequential violations of mail privacy sparked concern. Around Christmastime, the Post Office Department ordinarily received letters from children addressed to Santa Claus – several dozen per day. In the nineteenth century, some of these letters had always been handed to local newspapers, who would reprint them for

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[132] Quoted in Seipp (1978), p. 40. Also see: "Congress and the Western Union Telegraph Company." *The Telegrapher*, 1/6/1877.

[133] "A Serious Charge." *Clinch Valley News*, 08/23/1912; "The Honor of the Post Office." *The Evening World*. 03/03/1913; "Writing – By the Card." *The New York Times*, 07/10/1872.

[134] "Privacy of the Mail Not Invaded". *The San Francisco Call*, 06/11/1898.

[135] "Passing of Autocracy Looked Upon as Advent of Great Nation." *Deming Graphic*, 12/15/1905.

[136] "The Honor of the Post Office." *The Evening World*. 03/03/1913

a bit of added seasonal entertainment. But postal officials put a stop to this practice, fearing that "laxity in observing the privacy of the mails" would eventually spark public outrage and that local officials would erroneously infer that "letters of a more personal character might be treated in a similar manner."[137]

Given such expectations of privacy *against the state*, how did state agencies defend mass enumeration and targeted surveillance as legitimate techniques of bureaucratic rule? And what impact did the struggle for legibility have on the logic of privacy and its institutionalization within the U.S. bureaucratic apparatus?

Scientific reason and the primacy of the public good

When Boards of Health were established in the United States in the second half of the nineteenth century, physicians and health bureaucrats argued that the collection of vital statistics and sentinel surveillance reflected the imperatives of modern immunological science and good governance. Disease and demographic trends were increasingly seen as predictable and patterned phenomena that could be tracked over time and managed on the basis of previously collected data. Knowing the nation's "vital latitude and longitude" would thus make it possible to improve general health conditions and facilitate the eradication of "low ideas of cleanliness".[138] Vital statistics could also aid the work of other government agencies and contribute to the enforcement of laws against child labor by the Children's Bureau and of laws against interracial marriage by municipal authorities, budgetary planning by the U.S.Treasury, and attempts to boost the nation's economic productivity. But perhaps the most urgent need for reliable public health data stemmed from the fight against infectious diseases. In 1900, tuberculosis ranked among the most common causes of death in the United States, and about one in forty urban residents died from infectious diseases. Mortality due to smallpox, tuberculosis, yellow fever, or influenza was generally high, but especially so in urban areas and among the country's Nonwhite populations.[139] Combatting the outbreaks of such diseases in densely populated neighborhoods became a key concern of local health authorities, especially as advances in immunological science identified poor sanitary conditions due to overcrowding or insufficient sewage infrastructure as

[137] "Letters to Santa Claus." *The Evening Times*, 12/18/1900.

[138] John N. Hurty, "The Bookkeeping of Humanity." *Journal of the American Medical Association* 55 (14): 1157-1160. Also see: U.S. Bureau of the Census, *Registration of Births and Deaths: Drafts of Laws and Forms of Certificates & Information for Local Officers, Pamphlet 104*. Washington: Government Printing Office, 1903.

[139] Armstrong et al. (1999); James J. Feigenbaum, Christopher Muller, and Elizabeth Wrigley-Field. 2019. "Regional and Racial Inequality in Infectious Disease Mortality in US Cities, 1900–1948." *Demography* 56 (4): 1371-1388; Mary R. Jackman and Kimberlee A. Shauman. 2019. "The Toll of Inequality: Excess African American Deaths in the United States Over the Twentieth Century." *DuBois Review* 16 (2): 291-340.

drivers of infections.[140] According to U.S. Surgeon General Walter Wyman, reducing infectious disease mortality required "modern methods of sanitation" that utilized the full repertoire of medical knowledge and the full capacity of the state.[141] Although the resulting sanitary measures were "sometimes autocratic,"[142] as the prominent physician Hermann Biggs conceded, the significance of infectious diseases as a leading cause of death superseded concerns about medical privacy and justified measures which may have seemed excessive and arbitrary "if they were not plainly designed for the public good, and evidently beneficent in their effects."[143]

Arguments about the scientific necessity and beneficial impact of public health initiatives went hand in hand with an emphasis on their legality. Officials and social reformers relied on the legal doctrine of *salus populi suprema lex esto* to argue that the state's "sacred" responsibility to protect the well-being of its population legitimated a resolute fight against germs and filth – even if it resulted in the seizure of private property, forced entry into private homes, the mandatory reporting of personal medical data, and the establishment of Boards of Health that were "clothed with extraordinary power"[144] The focus on *salus populi* anchored defenses of sentinel surveillance not just in the exigencies of public health administration and the language of immunological science but in an emerging theory of the American state as the guarantor of the public's wellbeing (Wiebe 1966; Skowronek 1982; White 2002). Courts across the United States frequently affirmed such expansive readings of the state's public health powers.[145] As one New York court ruled, *salus populi* implied that local health authorities retained "absolute control over persons and property, so far as the public health

[140] "National Board of Health: Minutes of Meetings." Box 2. USNA Record PI-141.1; Central File Box 167, "Records of the Board on Interstate Quarantine." USNA Record NC-34 10; Central File Box 679, "Indiana Board of Health Records." USNA Record NC-34 10. Also see Kramer (1948) and Molina (2006).

[141] "The Scourge of the Century." *Lincoln County Leader*, May 11, 1900. Also see Risse (2012) pp. 118 and 143.

[142] Quoted in Fairchild et al. (2007), p. 6. Also see: Samuel Osgood, *Health and the higher culture: A discourse delivered before the American Public Health Association in Philadelphia by Samuel Osgood*. New York: E.P. Dutton and Company, 1878. p. 4.

[143] Fairchild et al. (2007), p. 6.

[144] Council of Hygiene and Public Health, p. 44; Abbott (1900), p. 19. A broad interpretation of the *salus populi* doctrine was first affirmed by the Supreme Court in *Gibbons v. Ogden* (1824), which held that health inspections and mandatory quarantine fell within the scope of the U.S. government's power to regulate interstate commerce.

[145] See: Seavey v Preble, 64 Me. 120 (1874); Labrie v Manchester, 59 NH 120 (1879); Farmington v Jones, 36 NH 271 (1858); Inhabitants of Kennebunk v Inhabitants of Alfred, 19 Me 221 (1841). For decisions about a physician's duty to report infectious diseases to local authorities, see: State v Peirce, 87 Vt. 144 (1913); Michigan v Brady, 90 Mich. 490 (1892); Michigan v Shurly, 131 Mich. 177 (1902); Johnson v District of Columbia, 27 App. DC 259 (1906); Chicago v Craig, 172 Ill. App. 126 (1912); Pennsylvania v Evans, 59 Pa. Super 607 (1915).

was concerned."[146] When judges objected to the scope and targeting of public health interventions, it was usually on narrow procedural grounds and still affirmed that health officials had "full power to isolate individuals suspected of having the disease and should otherwise be shown great deference" during public health emergencies.[147]

But the Public Health Service's defense of local surveillance campaigns also reflected the systemic racism of American society and the segregated provision of healthcare during the early twentieth century.[148] Inspectors and physicians described immigrant neighborhoods and Nonwhite communities as a "moral purgatory", a "stagnant pool of human immorality and crime", and a breeding ground for disease that had to be closely surveilled and managed.[149] As one Los Angeles official noted in response to an outbreak of typhoid fever, "every individual hailing from Mexico should be regarded as potentially pathogenic."[150] Health inspectors in San Francisco warned their superiors that the city's Chinatown district had to be placed under regular surveillance because it was "defiled by Mongolian filth or disease", populated with "smelly immigrants", and spread "contaminating vapors just like swamps poisoned the air".[151] And physicians in Baltimore argued that the city's Black population was composed of the "infected, the reckless, and the apathetic", and thus in need of greater surveillance to contain outbreaks of smallpox and tuberculosis.[152] When public health agencies focused local surveillance campaigns on populations that were seen as likely carriers of disease, their assessment of epidemiological facts – and their defense of a disproportionate focus on minority communities during public health emergencies – was often infused with scientifically dubious or overtly racist logic. Such institutionalized racism encountered relatively little resistance from courts and federal health officials, especially when it

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[146] *Metropolitan Bd. of Health v. Heister*, 37 N.Y. 661 (1868).

[147] McClain (1988), p. 510; John Fabian Witt. *American Contagions: Epidemics and the Law from Smallpox to COVID-19*. New Haven: Yale University Press, 2020.

[148] W. Michael Byrd and Linda A. Clayton. 2001. "Race, Medicine, and Health Care in the United States: A Historical Survey." *Journal of the National Medical Association* 93 (3) Suppl: 11S; Susan Craddock. *City Of Plagues: Disease, Poverty, And Deviance In San Francisco*. Minneapolis: The University of Minnesota Press, 2004; Nancy Bristow. *American Pandemic: The Lost Worlds of the 1918 Influenza Epidemic*. Oxford: Oxford University Press, 2012; Elizabeth Schlabach. 2019. "The Influenza Epidemic and Jim Crow Public Health Policies and Practices in Chicago, 1917–1921." *The Journal of African American History* 104 (1): 31–58.

[149] "Report of Special Committee on the Condition of the Chinese Quarter." *San Francisco Board of Supervisors Municipal Reports* San Francisco: W. M. Hinton and Co, 1885. p. 208. Also see Trauner (1978), p. 75; Risse (2012), p. 71; and Garb (2003).

[150] Quoted in Molina (2006), p. 63.

[151] "Report of Special Committee on the Condition of the Chinese Quarter," p. 208; Otis Gibson. *The Chinese in America*. Cincinnati: Hitcock and Walden, 1877. Also see Craddock (2004) and Risse (2012), p. 68.

[152] Quoted in Roberts (2009), p. 148.

was masked by the language of immunological science and administrative necessity.[153] In those instances, appeals to the technical expertise of local officials and the urgency of infectious disease containment hid the racialized thinking that tended to undergird the surveying and surveillance of different parts of the American populace.

Moral policing and routinized exceptions

While health officials prioritized the state's fight against infectious diseases over the privacy of medical information, the privacy of written communications remained deeply anchored in the institutional logic of the postal service. Legal protections of mail privacy even increased during the Progressive Era.[154] As the Postmaster General reminded his clerks in several circulars, they were "expected to use extraordinary vigilance in guarding the mails under their charge"[155] and had no legal authority "to open under any pretext a sealed letter while in the mails."[156] By the early twentieth century, postal regulations had incorporated an entire section on mail privacy, which outlawed the opening of letters without legal warrants "not even though [they] may contain improper or criminal matter".[157] Outreach campaigns also reminded the American public that mail carriers were prevented from opening mail, and that inspections of the mail were forbidden "except for the most urgent official cause."[158]

Yet the postal mission was not limited to the facilitation of commerce and communication. In the eyes of the Postal Inspection Service, it also included the protection of the nation's social and moral fabric through the eradication of mail fraud. In internal memos as well as congressional testimony, officials argued that, without such safeguards, dangerous content could "reach many a noble boy and girl, and utterly degrade them" under "the sanctity of the seal, and the secrecy of the mails."[159] To facilitate the fight against obscenities and other illicit materials, they proposed that the defense of mail privacy be made conditional on exceptions for certain classes of mailed matter. Drawing on older legal precedents that had established a distinc-

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[153] One exception occurred during the 1900 outbreak of the bubonic plague in San Francisco, when a local judge ruled that health surveillance programs in the city's Chinatown districts were not based on scientific reasoning. See *Wong Wai v. Williamson*, 103 Fed. Rep. 1 (1900) and *Jew Ho v. Williamson*, 103 Fed. Rep. 10 (1900).

[154] "The Right to Privacy in Nineteenth Century America." *Harvard Law Review* 94 (8): 1892-1910.

[155] Scrapbook of Circulars, Notices, Instructions, Regulations, and Newspaper Clippings, 1823 - 1871. USNA Record PI-168 27.

[156] Postal Bulletins, 1916.

[157] Postal Bulletins, 1916. Also see Section 522 of the Postal Laws and Regulations of 1916 and Order 10142 of the Postmaster General.

[158] "Privacy of the Mail Not Invaded." *The San Francisco Call*, 6/11/1898. "A Serious Charge." *Clinch Valley News*, 8/23/1912. "Plays in With Cliques." *The Tacoma Times*, 12/26/1916.

[159] Records of the Inspection Office at New York, 4/27/1907 - 10/7/1908. Box 1, Documents 55-57.

tion between "letters and sealed packages" and matter that "is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in condition to lie examined," the office of the Postmaster General pushed for the examination of journalistic publications and postcards, which had accounted for a growing percentage of postal deliveries since the late nineteenth century.[160] Backed by campaigns against vice and sexual indecency, officials also appeared before congressional committees and (successfully) lobbied for legislative changes that affirmed the legality of postcard monitoring and grouped the circulation of "indecent, filthy, and disgusting" materials under the general category of mail fraud.[161] And during World War I, Postmaster General Albert S. Burleson asked Congress and the White House for wartime exceptions that legalized the screening of incoming and outgoing international mail and decreed the establishment of a dedicated Censorship Board at the Post Office Department.[162]

This two-tiered approach – which distinguished the protected class of sealed domestic letters from unprotected mail like postcards, merchandise, and international shipments – turned the general principle of postal privacy into an increasingly negative space: It was defined as much by what it *was* as it was defined by what it *was not*. Far from being anomalies in an otherwise integrated regulatory landscape, the unexceptional use of exceptions began to constitute one of the Post Office Department's most "quotidian ways of exercising power."[163] By articulating a demarcation between protected and unprotected mail and a set of bureaucratic practices appropriate to each category, it reconstituted policing of the mail as a legitimate technique of bureaucratic rule. And by focusing on specific types of content that were deemed to be sexually deviant, too radical, or treasonous, the Postal Inspection Service embraced not just a set of practical distinctions but a hierarchy of morally and politically acceptable communication in the United States. Taken together, these approaches helped to legitimate the moral policing of mailed matter as a core element of its organizational mission: For postal inspectors, building a national community depended not only on open avenues of communication and commerce but on the state's ability to contain moral and ideological threats through the monitoring of information.

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[160] Ex parte Jackson. 96 U.S. 727 (1878); Abrams v. United States. 250 U.S. 616 (1919). Also see Postal Laws and Regulations of 1887, Section 508.

[161] Records of the Inspection Office at New York, 4/27/1907 - 10/7/1908. Box 2.

[162] Records of the Censorship Board, 1917-1918. Box 3. USNA Record PI-168 17.

[163] William J. Novak, Stephen W. Sawyer, and James T. Sparrow. "Democratic States of Unexception: Toward a New Genealogy of the American Political." Pp. 229-257 in *The Many Hands of the State: Theorizing Political Authority and Social Control*, edited by Kimberly J. Morgan and Ann Shola Orloff. Cambridge: Cambridge University Press, 2018. See p. 232.

Uneven legibility and the selective institutionalization of privacy

Common legal interpretations of privacy tend to emphasize the universality of protections regardless of race, class, and creed. Yet historical studies have long documented the uneven visibility of different populations and, specifically, the targeted monitoring of poor and nonwhite communities. This chapter has bridged this apparent gap by showing the emergence of a system of conditionalities and routinized exceptions that made popular and institutional commitments to privacy compatible with the exercise of informational power and the policing of public health and moral order by the bureaucratic state. Public health officials combined the standardized tabulation of basic vital statistics with targeted local campaigns that focused on the collection of infectious disease data and repeatedly singled out minority communities – leaving them under-counted as well as over-surveilled –; and postal officials implemented systematic mail screening programs based on categorical distinctions among different tiers of mail and the identification of mail that was deemed objectionable on moral and political grounds. The expanding collection of statistical and personal data by government agencies that emerged around the turn of the twentieth century thus resulted in an uneven topography of legibility rather than a blanket system of population surveillance.

The routine use of enumeration and surveillance by government officials was partly a reflection of increased organizational and technological capacity, yet it still depended on the perception of data accumulation as a legitimate exercise of state power – especially given public attitudes towards privacy; the re-interpretation of privacy rights in a state-centric manner, as shown in Chapter 5; and the privacy protections that already existed in administrative rules and regulations, for example for the Post Office Department. While decennial censuses can appear almost "as natural features of the social landscape" that spark struggles about the "specific mechanisms and techniques the state employs to get the job done" but not about the imperative of enumeration itself, the legitimacy of targeted enumeration and surveillance was hardly a given.[164] The emergence of new surveillance architectures was accompanied by contestation over the legitimacy of data collection by state and non-state actors. Instead of juxtaposing a bygone "golden age" of privacy and the alleged "death of privacy" in the twentieth century,[165] we can gain significant analytical purchase by uncovering such struggles and by charting the legal, political, and cultural production of privacy claims in specific institutional and socio-historical settings, the respective techniques that such claims subsequently enable or foreclose, and the legal and administrative standards that help to legitimate uneven and targeted surveillance.

To defend the selective focus on certain types of information and on specific communi-

[164]Loveman (2005), p. 1658.

[165]Shils (1966), p. 292; A. Michael Froomkin. 1999. "The Death of Privacy." *Stanford Law Review* 52 (5): 1461-1543.

ties, state officials emphasized the scientific merits, practical urgency, and beneficial impact of data collection and monitoring as seemingly apolitical standards according to which enumeration and surveillance could be assessed by legislators, judges, and the American public. Yet behind the veneer of objectivity, such standards also incorporated racial prejudice, moral judgments about sexuality and political radicalism, and ideological commitments to expansive state power; and they directly conditioned the distribution of legibility across a diverse social body and across different types of information. This complicates the constitutional-juridical story about privacy claims against the American state from the previous chapter: While legal professionals embraced state-centric understandings of privacy especially in the wake of the 1917 Espionage Act and during the Prohibition era – when concerns about government overreach became more acute and sparked a re-assessment of state power especially among progressively-minded social reformers –, the institutionalization of privacy suggests a more complicated story. Calls for privacy *against* the state were met by campaigns for assertive interventions *by* the state to police public morals and national security and to protect public health during a period of persistently high infectious disease mortality. In public health administration – which had historically been interwoven with local law enforcement agencies and tasked with disease eradication through community-level policing and targeted health surveillance campaigns –, such external pressures accorded with the internal priorities of health officials and the *salus populi* framework under which Bureaus of Health had long operated. In the postal service, moments of external political pressure ran at least partly counter to the agency's institutional commitment to the privacy of the mail and pitted the Postal Inspection Service and its longtime lead investigator Anthony Comstock against the Postmaster General's office. The selective encoding and enforcement of privacy claims reflected these organizationally specific dynamics, leading to the prioritization of public health over privacy in the former case and to a "governance by exception" model in the latter.

Some of these features of institutionalization were limited to a specific era of American institutional development and political history. The Sedition Act of 1918 – which had supplemented the 1917 Espionage Act by imposing considerable restrictions on speech – was repealed in 1920. The comprehensiveness of vital statistics increased. Improvements in sanitation and medical care also lowered the number of deaths from infectious diseases between the 1920s and the 1940s and reduced the bureaucratic imperative to conduct aggressive surveillance campaigns. But other aspects of the epistemic regimes that first emerged during this period of American state development survived long into the twentieth century. They illustrate the path dependencies of socio-political arrangements and connect the present findings to sociological studies of institutionalization and organizational logics more generally.[166] For example, the basic architecture of the 1917 Espionage Act remained in place until 1969, when the Supreme

[166]Pierson (2000); Skowronek and Orren (2016).

Court tightened the scope of permissible state efforts to censor and punish inflammatory speech. The *salus populi* doctrine has survived even longer, although it has come under increased scrutiny during the COVID-19 pandemic. And a disproportionate impact on minority communities continues to characterize data collection across many administrative domains.[167] Such examples illustrate the significance of early institutionalization as a crucial period of organizational development, when historically contingent standards of governance are translated into legal language and encoded in the institutional logics of bureaucratic agencies. This encoding means that they cannot be "easily interrupted or extinguished," thus becoming durable over time even if political and technological circumstances evolve.[168]

The production and legitimation of state knowledge in the present is still shaped by prior organizational histories. For example, increased surveillance capabilities may suggest the death of privacy for anyone who is caught in the signal intelligence dragnet. But this is not quite true. More accurately, legislation like the 2001 Patriot Act and the embrace of "big data" by different government agencies have changed the standards according to which data collection efforts have subsequently been assessed: The protection of informational privacy is often weighed against national security in a zero-sum game – and against public health, in the case of the COVID-19 pandemic –; and the permissibility of data collection is frequently made conditional on a categorical distinction between citizens and foreigners and, within the United States, on probabilistic risk assessments. A focus on such standards of bureaucratic legitimacy can unmask the moral connotations of the state's epistemic project, highlight the stratifying power of legibility, and demonstrate that the settled struggles of prior periods can enable or foreclose the use of specific techniques of governance in the present.

This has several implications for future work. The historical developments covered in this chapter illustrate the disjointed evolution of American political institutions during the early twentieth century and the stratifying nature of the state's epistemic project.[169] These inequalities of governance are an understudied aspect of American state development. But they should not be. The patterned and partial legibility of populations can stratify the exercise of state power; it has historically contributed to the reproduction of disadvantage across time and its concentration in particular communities; and it has emerged as a significant axis of inequality in the United States over the course of the last century.[170] Scholars who study the uneven development

[167]Fiske (1998); Browne (2015); Eubanks (2018); Alimahomed-Wilson (2019).

[168]Colyvas and Jonsson (2011), p. 44; Elisabeth S. Clemens and James M. Cook. 1999. "Politics and Institutionalism: Explaining Durability and Change." *Annual Review of Sociology* 25 (1): 441-466.

[169]Skowronek (1982); Lyon (2003).

[170]Fiske (1998); Harcourt (2005); Browne (2015).

of American political institutions can therefore scrutinize the ways in which such unevenness is reflected in the state's epistemic project, and they can investigate how efforts to accumulate and analyze large caches of data are themselves a contributing factor to the development of new administrative practices and new inter-organizational coalitions. This is especially relevant because the pursuit of legibility often requires the cooperation of multiple agencies, and because data points can travel and resurface in different – and seemingly independent – administrative domains. Indeed, the most troublesome scenarios for informational privacy often arise when disparate data points are combined into rich behavioral profiles, when such profiles are used far beyond the contexts and situations whence they originated, and when scores and indices "follow people around" over many months or years.

Sociological studies of inequality should also problematize legibility as a potential dimension of inclusion and exclusion, especially when it maps onto existing social and racial hierarchies, leads to locally concentrated surveillance efforts, and casts a long informational shadow that may help explain why (dis)advantage persists over time. Recall, for example, W.E.B. DuBois' discussions of life "within the veil": The relative invisibility of the Black experience within White America provided psychological respite and cultural autonomy despite the structural racism of American society but also contributed to the marginalization of Black political claims and to a pervasive ignorance about the realities of post-Reconstruction Era racism.[171] More recently, the selective surveillance of nonwhite communities has leveraged legibility as a tool of domination rather than empowerment and illustrates the additive nature of inequality and the significance of informational feedback loops: Low social and economic status can lead to greater surveillance, which can in turn compound exclusion through unfavorable scoring and classification.[172] Indeed, one of the pernicious features of informational power in the present is the tendency to over-police marginalized communities for penal reasons, coupled with the under-counting of those communities for the purposes of political representation. This highlights that privacy and surveillance are not primarily individual-level experiences but have significant second-order effects "for the organization and functioning of society" – and, one should add, for the reinforcement of social hierarchies and spatially concentrated disadvantage across time.[173]

[171]W. E. B. DuBois. *The Souls of Black Folk.* New York: Dover Publications, 1994 [1903].

[172]Browne 2015.

[173]Anthony et al. (2017), p. 263.

Conclusion

Historical Study and Contemporary Struggle

The history of privacy is commonly told with two distinctly different temporalities. One group of scholars traces a relatively unbroken line from the present into the distant past, as if to see the ultimate origins of "our most contested right" more clearly by following Ariadne's thread deep into the historical record.[1] The logic of privacy appears in this history as a long-standing feature of social organization that has shaped spatial access and the relationships between individuals and their surrounding communities since the decline of ecclesiastical authority and the rise of liberal individualism in the seventeenth century. Medieval prayer practices, Renaissance era diary-writing, nineteenth century social reform advocacy, and opposition to census enumeration and electronic tracking in the twentieth century appear as temporally staggered variations on a common theme: In different times, they gave concrete shape to an abtract idea and practical significance to the distinction between the "public" and "private" parts of the individual self. In this telling, the history of privacy remains inextricably linked to the legacy of the Enlightenment, to the "cult of the individual" and the gradual internalization of carnal desires and moral virtue, and to the interdependence of society and the bureaucratization of administrative affairs.[2] It is part of the "civilizing process" of Western society – to use a term coined by Norbert Elias to describe the internal pacification of society and the internalization of constraints since the seventeenth century –, and it remains tightly coupled to increasing social differentiation on the one hand and an increasing centralization of power in the hands of the modern officialdom

[1]Barrington Moore. *Privacy: Studies in Social and Cultural History.* London: Routledge, 1984; Cecile M. Jagodzinski. *Privacy and Print: Reading and Writing in Seventeenth-Century England.* Richmond: University of Virginia Press, 1999; Frederick S. Lane. 2009. *American Privacy: The 400-year History Of Our Most Contested Right.* Boston: Beacon Press, 2009; David Vincent. *Privacy: A Short History.* London: Polity, 2016

[2]Emile Durkheim. *The Division of Labor in Society.* New York: Free Press, 1964; Norbert Elias. *The Civilizing Process: Sociogenetic and Psychogenetic Investigations.* Oxford: Blackwell Publishing, 2000.

on the other hand.[3]

This is a perspective with intuitive historical and theoretical appeal. The language of privacy has appeared in the United States since the founding days of the American republic, and in English sources for longer than that. Charles Dickens wrote about visitation customs and the sacred privacy of the bedroom in the 1840s (Fig. 7.1); and U.S. writers regularly alluded to the privacy of "closets", "abodes", and "bedrooms" in the closing decades of the eighteenth century and the early nineteenth century.[4] Regents and rulers have also long insisted that so-called *arcana imperii* – diplomatic secrets of state that were considered essential to the art of governance and could be discussed only in the "privacy" of parliamentary offices or executive residences – had to be closely guarded.[5] The American politician Thomas Mann Randolph framed privacy as an issue of political significance as early as 1806, writing that "privacy of debate on certain occasions is not only consistent with the spirit of popular government, but is demanded by its most essential principles."[6] In short, the logic of privacy seems to have a history that dates back farther than any period discussed in the preceeding chapters. It appears as a *sine qua non* of liberal societies and as a lens through which we can discern the unique conditions of modern social organization.

A second strand of historical inquiry focuses specifically on the United States and on a period much closer to the present. It emphasizes the rising legal prominence and social significance of privacy in recent decades, anchoring its chronology in specific political and technological inflection points like the Supreme Court's 1965 *Griswold v. Connecticut* decision or the appearance of electronic databases and information processing in the 1970s.[7] Studies in this tradition suggest that discussions of privacy became more prominent in recent decades (Fig. 7.2), that conceptions of privacy became considerably enlarged during this period, and that the stakes of privacy debates

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[3]Elias (2000), in particular Chapter 4.

[4]James Fennimore Cooper. *The Last of the Mohicans: A Narrative of 1757.* Chicago: Scott, Foresman & Co, 1899; Lydia Maria Child. *The Rebels; or, Boston before the Revolution.* Boston: Phillips, Sampson & Co, 1825.

[5]Mark Neocleous. 2002. "Privacy, Secrecy, Idiocy." *Social Research* 69 (1): 85–110.

[6]"Letter of Mr. T. M. Randolph to His Constituents." *The Enquirer*, 04/24/1806.

[7]Robert G. Dixon. 1965. "The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?" *Michigan Law Review* 64 (2): 197-218; Alan F. Westin. 1967. *Privacy and Freedom.* New York: Athenum, 1967; James B. Rule, Doug McAdam, Linda Stearns, and David Uglow. 1983. "Documentary Identification and Mass Surveillance in the United States." *Social Problems* 31(2): 222-234; Calvin C. Gotlieb. "Privacy: A Concept Whose Time Has Come and Gone." Pp. 156-171 in: *Computers, Surveillance, and Privacy*, edited by Lyon, David and Elia Zureik. Minneapolis: The University of Minnesota Press, 1996; David Lyon (ed). *Surveillance as Social Sorting: Privacy, Risk, and Digital Discrimination.* New York: Routledge, 2003; James Waldo, Herbert S. Lin, and Lynette I. Millett (eds). *Engaging Privacy and Information Technology in a Digital Age.* Washington: The National Academic Press, 2007.

Figure 7.1: *Sir John Chester receiving Gabriel Varden: " 'My good fellow,' he added, when the door was opened, 'how come you to intrude yourself in this extraordinary manner upon the privacy of a gentleman?' " Source: Charles Dickens' Barnaby Rudge, serialized and illustrated in Master Humphrey's Clock in 1841.*

increased significantly with the introduction of electronic records and the prospect of landmark interventions by the U.S. Supreme Court.

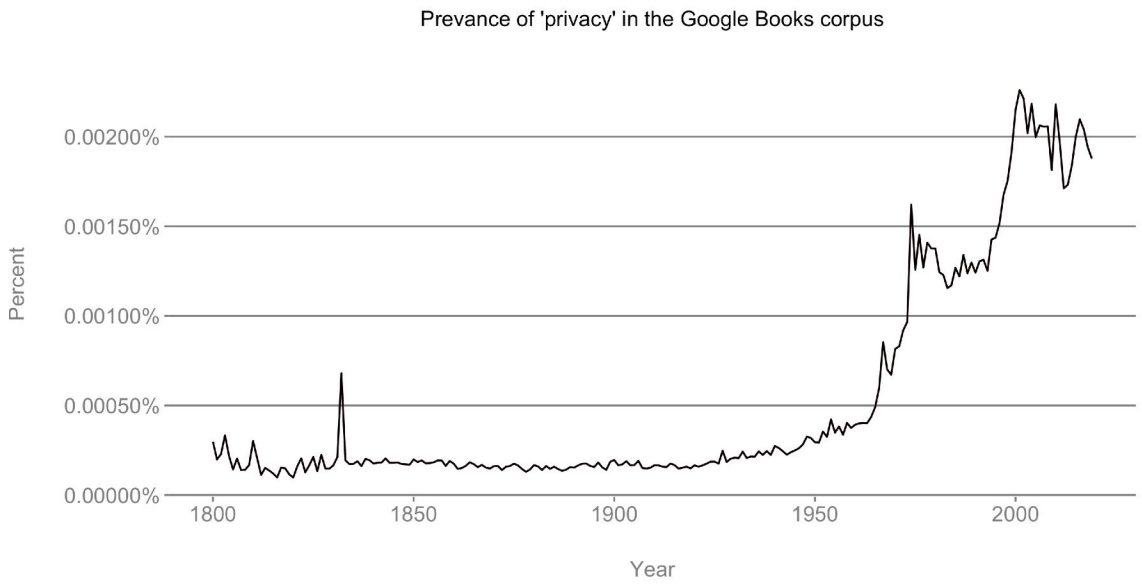

Figure 7.2: *Prevalence of the term "privacy" in the Google Books American English corpus, 1800-2019.*

This is a history not just *about* informational privacy but written *within* the computational age; not just *about* privacy as an expansive legal right but written *within* the modern civil rights era. It looks towards the recent past to better understand the present: The emphasis on electronic record-keeping foreshadows debates about digital "data doubles" of the twenty-first century and the informational power of data-hungry states and data-extractive industries; the defense of sexual and reproductive self-determination as matters of personal privacy reflects a faith in constitutional jurisprudence as a crucial element in the struggle for greater equality that may have been hard to imagine before during the first half of the twentieth century and which may once again seem questionable in the 2020s.[8] Within this second tradition, the period before World War II appears almost as a prelude that is screened out of many research agendas and reduced to a footnote in the anthology of social and technological development: A distant age that is too disconnected from the seemingly irreversible

[8]Kevin D. Haggerty and Richard V. Ericson. 2000. "The Surveillant Assemblage." *British Journal of Sociology* 51 (4): 605-622. On data doubles, also see: Deborah Lupton. 2014. "Self-Tracking Cultures: Towards a Sociology of Personal Informatics." Pp. 77-86 in: *Proceedings of the 26th Australian Computer-Human Interaction Conference on Designing Futures: The Future of Design.* Sydney, Australia.

realities of the computational age and the civil rights era to teach us much about the substance and social significance of privacy. It serves as a reminder that the re-telling of history is necessarily an exercise in selection that gives voice to a partially reconstructed past and frequently seeks refractions of the present and projections of the future in the memories of the has-been.[9]

Yet both of these temporalities miss or misconstrue essential aspects of the history of privacy in the United States, and in doing so fall short of capturing the social production and appreciating the societal significance of a seemingly anti-social idea. On the one hand, a focus on unbroken 400-year histories removes us too far from the "middle range" of social life and the idiosyncrasies of specific theaters where the substance and scope of privacy is generally contested.[10] It is relatively uncontroversial to assert that the language of privacy has a long and varied history. As Chapter 3 has shown in particular, the language of privacy was commonly applied to matters of familial relations and middle-class domesticity before the middle of the nineteenth century while remaining almost entirely absent from law and politics. The "privacy" of diplomatic information was the exception that proves the rule, illustrating just how limited political conceptions of privacy were: They spoke to privileged information circulating among a small political elite but remained disconnected from the routine production of state knowledge and the administrative use of individual- or population-level data. But precisely because the substance and scope of privacy claims are not self-evident, it pays analytical dividends to focus on the constitution of privacy in specific social and institutional settings and thereby to problematize the *thingness* of privacy itself: How was it tied together as a minimally coherent concept, how were disparate and substantively different discussions subsumed under the conceptual umbrella it provided; how was it linked to existing ideologies and to specialized discourses about law and statecraft; and how did these linkages affect institutional practice and the exercise of informational power? To answer these questions – and thus to situate privacy firmly *within* a given society – is to trade the search for timeless essences for the study of an emerging political logic that articulated "concerns about modern life and social organization" during a distinct historical period.[11] On the other hand, a focus that remains too close to the present is ill-suited to explain the initial

[9]Friedrich Nietzsche. "On the Uses and Disadvantages of History for Life." Pp. 57-125 in: *Untimely Meditations*, edited by Daniel Breazeale. Cambridge: Cambridge University Press, 1997; Michel-Rolph Trouillot. *Silencing the Past: Power and the Production of History.* Boston: Beacon Press, 2015. For an alternative discussion of Leopold von Ranke's conception of historical inquiry as the study of "how things really were," see: Geoffrey C. Bowker. *Memory Practices in the Sciences.* Cambridge: MIT Press, 2006.

[10]Robert K. Merton. "On Sociological Theories of the Middle Range." Pp. 39–72 in: *Classical Sociological Theory*, edited by Craig Calhoun. Walden: Blackwell Publishing, 2007.

[11]Sarah E. Igo. *The Known Citizen: A History of Privacy in Modern America.* Cambridge: Harvard University Press, 2018, p. 11.

institutionalization of privacy in the United States and the lasting entanglements between privacy and various moral and political imaginaries. Because existing memory begets future imagination, an overly presentist analysis also risks under-valuing the malleability of privacy and informational power and the multitude of discursive, legal and political strategies through which the logic of privacy is comprehended, challenged, and balanced against other state interests. Predictions about the great emancipatory potential or imminent death of privacy often tell us little about the future, but they almost always reveal a stunted understanding of the past.

This project has foregrounded an interstitial timeframe – prior to the computational era, yet still measured in decades rather than centuries – to trace the gradual diffusion and uneven institutionalization of privacy. As I have argued, privacy evolved into a capacious and institutionalized political logic around the turn of the twentieth century. It permeated varied and previously disconnected domains of public discourse; it re-articulated existing moral imaginaries and social norms in spatial and informational terms; it was tied into a whole network of ideologies and expert knowledges about gender roles, sexual propriety, infectious diseases, urbanization, and jurisprudence; and it was gradually and selectively codified and encoded as a durable feature of social life and governance in the United States. It no longer spoke exclusively to the roles and responsibilities of family members and nearby observers but helped to structure how individuals and and entire communities interfaced with American institutions and the expanding American state.

I developed this argument by focusing on diffusion and institutionalization in several distinct theaters of world-making, where conceptions of the social order were articulated, challenged, consecrated, and baked into routine institutional practices. Chapter 3 tracked the evolution of privacy discourse in the United States using computational text analyses as well as close readings of historical newspaper content. I has demonstrated that the meaning of privacy remained remarkably stable during a fifty-year period after 1870 – unlike the meaning of terms like "gay", which have moved from the cultural domain into explicitly political discourses by shedding some of their old connotations and acquiring new meanings – but that the language of privacy was applied to a gradually widening array of issues and social problems. It no longer touched merely on the organization of space and social relations within the isolated family home but became linked to the social realities of the Industrial Age and the Progressive Era. But even as American writers and pundits invoked the language of privacy to contest emerging social realities and new social problems, it also remained wedded to existing moral imaginaries. The case for privacy was often a conservative case insofar as it aimed to protect idealized notions of womanhood and middle-class domesticity in a more urbanized and more media-saturated society.

But as the logic of privacy became broader, it also became more durable. The remaining empirical chapters have analyzed the gradual and selective institutionalization of the logic of privacy in different domains of world-making, highlighting historical

contingencies and identifying consequences of this institutionalization for the exercise of informational power. Chapter 4 charted the integration of privacy claims into the political agenda of Progressive Era social reform movements, the politicization of mundane spaces within the urban home, the codification of privacy claims through legislation, and their encoding in the built environment of the modern American city. It showed that the efficacy of reform advocates in New York depended on their ability to exploit favorable political opportunity structures, but it also highlighted the limits of such reform efforts. First, they engendered legislative action that addressed familial privacy within tenement apartments but largely bracketed the larger question of overcrowding among the urban poor; and it imposed middle-class notions of domestic life onto a diverse immigration population that did not necessarily share such notions or the political concerns they sparked. Chapter 5 then turned towards jurisprudence – treating America's courtrooms as sites where symbolic power is particularly concentrated and the social order is challenged and reaffirmed to lasting effect – and examined the legal institutionalization of a distinct "right to privacy." Using a network analysis of legal citations, it documented the staggered emergence of two distinct schools of legal thought and identified several phases of legal meaning-making and domain-formation that gave rise to privacy as a "fact" of the modern legal imagination in the United States:[12] The language of privacy was pushed from newspapers and magazine pages into the legal field before attracting the attention of exalted scholars; judges then engaged in a prolonged series of interpretive struggles as they worked to make privacy intelligible as a distinctly legal right by linking it to existing genealogies of case law and to different legal doctrines; and the "right to privacy" was consecrated as a constitutionally-grounded and state-centric right amidst a larger re-assessment of federal power and through the increasing involvement of federal courts. The story of the initial legal institutionalization of privacy is a story of a constitutional pivot and of abandoned alternatives. Finally, Chapter 6 has examined the intersection of privacy and bureaucratic rule through a study of the Post Office Department and the Public Health Service, showing how external pressures and internal institutional commitments led to organizationally-specific epistemic regimes that structured and legitimated the routine collection of personal data by the American state. These regimes resulted in an uneven landscape of legibility that left some types of information and some populations uniquely exposed to the bureaucratic apparatus. They were characterized by the perpetual balancing of privacy claims against competing political imperatives and by the routine use of exceptions as a technique of administrative power.

By the 1920s, the logic of privacy had widely diffused and been firmly anchored in the

[12]Valerie Jenness. 2007. "The Emergence, Content, and Institutionalization of Hate Crime Law: How a Diverse Policy Community Produced a Modern Legal Fact." *Annual Review of Law and Social Science* 3: 141-160.

legislative and regulatory infrastructure of the United States. It spoke to new social questions and emerging debates about the power of the expanding American state, but it also remained directly entangled with gendered and racialized conceptions of the social order and with distinctly middle-class perspectives on domesticity. Indeed, the logic of privacy proved powerful precisely because it could be invoked by different constituencies, serve different political ends, and be made compatible with the epistemic project of the expanding "new American state".[13]

Implicit in this approach is an analytical shift away from the search for common essences towards processes of diffusion and institutionalization that can be empirically studied in specific and clearly bounded historical settings, or what Robert Merton has referred to as the "middle range" of sociological inquiry.[14] It focuses on specific theaters where contests over the substance, scope, and implementation of privacy played out; and it generates statements that are "close enough to observed data to be incorporated in propositions that permit empirical testing" and that "deal with delimited aspects of social phenomena."[15] Its ultimate output is not definitional certitude or a singular theory of privacy, but a series of bounded conclusions about the diffusion and institutionalization of privacy as a political logic that remain attuned to the "concrete, historical, and factual circumstances of life" and the exigencies of specific situations and institutional circumstance.[16] It offers multiple partial explanations and leans heavily on the identification of specific processes through which empirically observed outcomes are realized.[17] It moves between the micro and the macro, for example when treating discourse as the macro-level manifestation of individual speech acts or when identifying the network structure of American jurisprudence from the analysis of individual judicial decisions. And it makes use of detailed descriptions of historical patterns and trends, yet embeds these descriptions into partially generalized conceptual frameworks. In the remainder of this concluding discussion, I use this approach to ask: What can we learn about the present by framing privacy as a historically contingent and contextually specific political logic?

From the vantage point of the twenty-first century, it may appear almost inevitable

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[13]Stephen Skowronek. *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*. Cambridge: Cambridge University Press, 1982.

[14]Robert K. Merton. "On Sociological Theories of the Middle Range." Pp. 39–72 in: *Classical Sociological Theory*, edited by Craig Calhoun. Walden: Blackwell Publishing, 2007. Also see: Harrison White. *Identity and Control: How Social Formations Emerge*. Princeton: Princeton University Press, 2008.

[15]Merton (2007), p. 39.

[16]Daniel J. Solove. "Conceptualizing Privacy." *California Law Review* 90.4 (2002), p. 1091.

[17]Peter Hedström and Lars Udehn. "Analytical Sociology and Theories of the Middle Range." Pp. 3-25 in: *The Oxford Handbook of Analytical Sociology*, edited by Peter Bearman and Peter Hedström. Oxford: Oxford University Press, 2011.

– given the general arc of technological progress and the coalitions that defend the exercise and expansion of informational power – that privacy legislation tends to encode "symbols of compliance" but offers few substantive protections;[18] that the legally sanctioned and politically accepted surveillance powers of the American state expands over time;[19] and that U.S. consumers will accept the epistemic bargain of trading personal data for platform access.[20] Yet contained within each of these seemingly inevitable arrangements is also a century of political, legal, and economic struggles that have given rise to the particular world we now inhabit. Consider what the journalist James Bamford wrote about the establishment of the nation's first cypher bureau — the predecessor to the National Security Agency (NSA) — in the wake of World War I:

> *"On July 1, 1920, a slim balding man in his early thirties moved into a four-story townhouse at 141 East 37th Street in Manhattan. This was the birth of the Black Chamber, the NSA's earliest predecessor, and it would be hidden in the nondescript brownstone. But its chief, Herbert O. Yardley, had a problem. To gather intelligence for Woodrow Wilson's government, he needed access to the telegrams entering, leaving, and passing through the country, but because of an early version of the Radio Communications Act, such access was illegal. With the shake of a hand, however, Yardley convinced Newcomb Carlton, the president of Western Union, to grant the Black Chamber secret access on a daily basis to the private messages passing over his wires – the Internet of the day."*[21]

It is through such acts – through countless handshakes, lobbying efforts, and judicial decisions – that conditionalities and exceptions to informational privacy are institutionalized and a particular imbalance between national security and privacy takes shape. I posit that we can better understand the arrangements of the present and the conditions of political and legal possibility for the future by turning one eye towards the past, towards the sedimentations of prior conflicts that now appear as taken-for-granted arrangements, and towards the historically contingent standards by which the exercise of informational power is assessed and the national security interests of the American state are differently balanced against the informational privacy of citizens and non-citizens. We can similarly historicize the collection of

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[18] Ari Ezra Waldman. 2019. "Privacy Law's False Promise." *Washington University Law Review* 97: 773-834.

[19] Priscilla M. Regan. *Legislating Privacy: Technology, Social Values, and Public Policy.* Chapel Hill: UNC Press, 1995.

[20] Julie E. Cohen. *Between Truth and Power: The Legal Constructions of Informational Capitalism.* Oxford: Oxford University Press, 2019.

[21] James Bamford. "They Know Much More Than You Think." *The New York Review of Books*, 08/15/2013.

personal data in the digital economy. Consumer scoring is often considered a hallmark of informational capitalism in the twenty-first century, yet a contributer to *Hunt's Merchant Magazine* wrote about personalized credit ratings as early as 1853, lamenting that "[go] where you may to purchase goods, a character has preceded you, either for your benefit or your destruction."[22] The establishment of a national and increasingly credit-based economy in the United States during the late nineteenth century was contingent on the ability to assess the credit-worthiness of consumers – work that was accomplished by more than thirty credit bureaus who scrutinized financial records and helped to turn consumers into "informational persons" that were defined by and treated in accordance with personalized and quantified measures of worthiness, responsibility, and long-term value.[23] The *valued* consumer has long been a *visible* consumer. But as Chapter 5 has shown, a key part of the legal institutionalization of the right to privacy was precisely the marginalization of consumer claims against private entities. Such claims were confined to a relatively narrow set of torts between the 1920s and William Prosser's re-categorization of the tort law landscape during the middle of the twentieth century; while increasingly expansive interpretations of the right to privacy codified claims of informational self-determination and bodily integrity against the expanding American state.[24] Against this historical backdrop, it becomes possible to recognize that the digital economy of the twenty-first century derives its unique characteristics not primarily from the *aspiration* to create personalized profiles and longitudinal measures of consumer behavior – which have a much longer history – but from the specific techniques through which such profiles are assembled and through which "behavioral surplus value" can be extracted, as well as from the legal constructions that envelop the computational age and have paved the way for the rise of informational capitalism.[25]

Rather than focusing on the net *amount* of surveillance to grasp what is "new" about the "new surveillance" of the twenty-first century, it therfore pays to focus on the institutionalization of privacy and informational power in specific domains, on the

[22]George Hudson. 1853. "Traits of Trade – Laudable and Iniquitous." *The Merchants Magazine and Commercial Review* 29: p. 52. Also cited in: Josh Lauer. 2008. "From Rumor to Written Record: Credit Reporting and the Invention of Financial Identity in Nineteenth-Century America." *Technology and Culture* 49 (2): 301-324.

[23]Colin Koopman. *How We Became Our Data: A Genealogy of the Informational Person.* Chicago: The University of Chicago Press, 2019. Also see: Lendol Calder. *Financing the American Dream: A Cultural History of Consumer Credit.* Princeton: Princeton University Press, 1999; Josh Lauer. 2008. "From Rumor to Written Record: Credit Reporting and the Invention of Financial Identity in Nineteenth-Century America." *Technology and Culture* 49 (2): 301-324.

[24]Samantha Barbas. 2011. "Saving Privacy From History." *DePaul Law Review* 61: 973-1048.

[25]Shoshana Zuboff. *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power.* New York: Public Affairs, 2019; Julie E. Cohen. *Between Truth and Power: The Legal Constructions of Informational Capitalism.* Oxford: Oxford University Press, 2019.

selectivity that often characterizes the appropriation and commodification of personal data, and on the strategies through which the exercise of informational power is balanced against competing social and political goods and made compatible with expectations of institutional forbearance.[26] This means, above all else, to treat the logic of privacy as both an object and the outcome of contestation in the political domain, rather than as something that waxes and wanes in lockstep with technological development and the epistemic ambitions of state and non-state actors.

This is the opposite conclusion to the one reached by Howard Kirk, the fictional protagonist of Malcolm Bradbury's 1975 novel *The History Man*. The fictional Mr. Kirk finishes a treatise about privacy by claiming that "sociological and psychological understanding is now giving us a total view of man, and democratic society is giving us total access to everything. There's nothing that's not confrontable. There are no concealments any longer, no mysterious dark places of the soul. We're all right there in front of the entire audience of the universe."[27] Yet his treatise generally reads less like a product of the twentieth century than a premonition of the twenty-first. Despite the prominent place that the concept of privacy now occupies in the public domain, we often appear to stand, in Howard Kirk's resigned assessment, "nude and available" before society — eager to be seen yet unwilling to be exposed. But I would like to think that Mr. Kirk is wrong on three counts. First, he is wrong to believe that the advance of science and technology has made privacy impossible, like an antiquated idea that once served its purpose but no longer fits with the spirit of the digital age. This is not to deny that shifts in the technological capacity to collect, analyze, or disseminate specific types of information have undeniable effects on the scope and substance of privacy claims. The combination of disparate data points into comprehensive behavioral profiles and the dissemination of data across organizational boundaries and – especially on digital platforms that operate globally – across multiple jurisdictions now poses a greater challenge to privacy advocates than the disclosure of any individual data point and also complicates attempts to operationalize privacy as informed user consent.[28] In recent years, technologies like genotyping and genetic sequencing have also moved from being aspirational endeavors to being widely available and relatively cheap technologies, raising new questions about types of information – like genetic data – that have historically been difficult to collect and analyze.[29] Likewise, advances in data-matching techniques and computational

[26]Gary T. Marx. 2002. "What's New About the 'New Surveillance'? Classifying for Change and Continuity." *Surveillance & Society* 1 (1): 9-29; Debbie V. S. Kasper. 2007. "Privacy as a Social Good." *Social Thought & Research* 28: 165-189; Julie E Cohen. 2013. "What Privacy Is For." *Harvard Law Review* 126 (7): 1904-1933.

[27]Malcolm Bradbury. *The History Man*. London: Picador Classic, 2017.

[28]Solove (2002), p. 1109.

[29]Lawrence O. Gostin. 1995. "Genetic Privacy." *Journal of Law, Medicine & Ethics* 23 (4): 320-330.

processing have increased the likelihood of re-identification of individuals in ostensibly anonymous datasets, requiring new safeguards to protect informational privacy over time.[30] But strictly speaking, each of these examples illustrates the malleability of privacy claims and governance regimes and the shifting practices of data collection rather than a unidirectional journey into "total surveillance."[31] They draw attention to the asymmetric worries about the risks of state coercion and the ramifications of corporate data commodification as well as to questions of equitable data use and informationally enabled and informationally justified discrimination.

Second, Mr. Kirk is wrong to place so much of his faith in the power of concealment. The desire for privacy has long co-existed with a concurrent desire for publicity, informational legibility, and database inclusion, since being visible can be a source of privilege as well as deprivation.[32] It has allowed American citizens and consumers to access an expanding array of government services and economic opportunities, and it has allowed individuals and communities to be seen by being counted. Especially for individuals and communities which have historically "dropped from sight", as the playwright Bertolt Brecht wrote in 1928 in The Ballad of Mack the Knife, increased visibility can beget recognition and increased political clout. To evade detection does not always imply greater liberty and self-actualization. In fact, the argument for privacy is often not an argument in favor of more total concealment but an argument about the agency and power to decide when, where, and under what conditions data is collected and shared. Each privacy protection is also subject to counter-mobilization and retrenchment. The decades-long fight against abortion rights in the United States has hinged in part on the legal challenges to the expansive interpretations of privacy of the 1960s and 1970s, using the right to privacy as a wedge issue to erode civil rights more generally. Legislation and judicial precedent can partially insulate privacy against such attacks, yet the power of concealment remains an object of political struggle.

While social movements have historically mattered a great deal to the institutionalization of privacy – campaigns for tenement reform and urban privacy in the 1890s as well

[30]Bradley Malin and Latanya Sweeney. 2004. "How (Not) to Protect Genomic Data Privacy in a Distributed Network: Using Trail Re-identification to Evaluate and Design Anonymity Protection Systems." *Journal of Biomedical Informatics* 37 (3): 179-192; Aditi Ramachandran, Lisa Singh, Edward Porter, and Frank Nagle. 2012. "Exploring Re-identification Risks in Public Domains." Pp. 35-42 in: *2012 Tenth Annual International Conference on Privacy, Security and Trust.* Paris, France: IEEE.

[31]Reginald Whitaker. *The End of Privacy: How Total Surveillance is Becoming a Reality.* New York: New Press, 1998. Also see Regan (1995) for a discussion of the unintended consequences of legislation: Efforts to prohibit the use of polygraph examinations led to a reliance on evaluation metrics that are arguably even less scientifically validated.

[32]Rob Aitken. 2017. "All Data Is Credit Data: Constituting the Unbanked." *Competition & Change* 21 (4): 274–300; Igo (2018).

as women's rights campaigns in the 1960s and 1970s –, organizing political struggles around privacy also remains practically difficult and strategically fraught. For starters, there is rarely an obvious material benefit to the cultivation of privacy, which has often made the defense of privacy "the most difficult of tasks," according to an article penned by the writer Walter Lionel George in a 1918 issue of *Harper's* magazine.[33] Privacy differs markedly in this regard from its distant conceptual cousin, the right to personal property. One might assume that the two remained tightly coupled, since property (and specifically real estate) could provide the means to withdraw into solitude and invisibility, hidden behind doors and walls and hedges. But not only has the defense of privacy historically been less focused on ownership claims, it has also been also untethered from the logic of accumulation. Privacy can be protected but not accumulated like material assets, and its defense generally turns on the management of access rather than the assertion of absolute control over physical spaces or immaterial possessions.[34] This is the other reason why the logic of privacy often dwells in the uncanny valley of info-politics: It is often too closely intertwined with the exercise of informational power to provide grounds for structural realignments, yet also remains too distant from many lived experiences to spark strong attachments and to engender significant mobilization.[35] Indeed, the case *for* privacy is not necessarily a case *about* privacy, and the defense for other social goods (like access to abortion or patient rights in the healthcare system) does not need to be conditional on a successful enlargement of privacy claims.[36] As Daniel Solove has suggested, there is now a real risk of tasking the logic of privacy "with doing work beyond its capabilities," and in so doing to erect political platforms on a perennially shifting foundation.[37]

Some privacy skeptics also highlight the liberal-constitutional roots of privacy claims as yet another limiting factor that forecloses the possibility of a more radical critique and curtails the emancipatory potential of privacy. My argument here is slightly

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[33]Walter Lionel George. "The Gentlest Art." *Harper's* 1918 (11): 864-871.

[34]The *Atlantic Monthly* aptly captured this sentiment in a 1900 article that ruminated on the forces of capitalism in a small New England town. "A real estate agent lately asked me if I did not wish to improve my property," the author reported, and "it appeared that his idea of improvement was to cut away the trees in the garden and build a house there, for some new neighbor to stare in at my windows [...] to make comfort, privacy, refined enjoyment, everything in short, subservient to getting an income from every available scrap of property." See: John Fiske. "The Story of a New England Town." *The Atlantic Monthly*, 12/1900: 722.

[35]Laura Huey. 2009. "A Social Movement for Privacy/Against Surveillance-Some Difficulties in Engendering Mass Resistance in a Land of Twitter and Tweets." *Case Western Reserve Journal of International Law* 42 : 699-709.

[36]Mary Ziegler. *Beyond Abortion: Roe v. Wade and the Battle for Privacy.* Cambridge: Harvard University Press, 2018.

[37]Daniel J. Solove. 2012. "Introduction: Privacy Self-Management and the Consent Dilemma." *Harvard Law Review* 126 (1): p. 1880.

different. It is true that the case for privacy is ordinarily tied to liberal conceptions that split the individual self into distinctly "public" and "private" parts.[38] Indeed, the privacy campaigns of the 1960s and 1970s politicized the personal precisely to reinforce this conceptual split and to push government towards self-restraint in the regulation of the (female) body, specifically in the context of sexual and reproductive rights. But more importantly, the case for privacy has always been a selectively argued case, unevenly realized for different social and racial groups and subject to considerable exceptions: Citizens generally enjoy far greater privacy protections than non-citizens; and unmarried women and LGBT communities have historically had to contend with disproportionate state involvement in their sexual lives and reproductive decision-making.[39] Privacy excludes even as it offers protection, and we should be clear about its emancipatory potential.

Third, Mr. Kirk is wrong about the relationship between privacy and social science. The postwar development of survey research is indeed linked to the collection and commodification of personal data. But the best social science is neither champion nor undertaker. In this particular project, it has allowed us to track the diffusion and institutionalization of privacy as a political logic in the United States and to identify the consequences of these two processes across a multitude of domains: the incorporation of privacy claims into political platforms and legislative acts and the imposition of middle-class conceptions of familial privacy onto working-class communities in the inner city; the rising dominance of state-centric interpretations of the right to privacy and the concurrent marginalization of claims against non-state actors within the American judiciary; and the system of exceptions and conditionalities that facilitated the exercise of information power by the bureaucratic state but also led to a highly uneven landscape of legibility in the United States. In short, the tools and theories of social science have allowed us to rediscover privacy as a quintessentially social construct, with all the possibilities and pitfalls this implies. And the have enabled us, through empirical study and historical inquiry, to develop a nascent language that makes sense of the relationship between self and society in the modern world.

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[38] Neocleous (2002).

[39] Carol A. Chase. 1999. "Privacy Takes a Back Seat: Putting the Automobile Exception Back on Track After Several Wrong Turns." *Boston College Law Review* 41: 71-102; Louise Amoore. 2014. "Security and the Claim to Privacy." *International Political Sociology* 8 (1): 108-112; Ioanna Tourkochoriti. 2014. "The Transatlantic Flow of Data and the National Security Exception in the European Data Privacy Regulation: In Search For Legal Protection Against Surveillance." *University of Pennsylvania Journal of International Law* 36: 459-524; Gina R. Bohannon. 2018. "Cell Phones and the Border Search Exception: Circuits Split over the Line between Sovereignty and Privacy." *Maryland Law Review* 78: 563-603.

Methodological Coda

Each of the preceding empirical chapters has already introduced the data and methods that undergird this project. In this methodological coda, I expand on these points and discuss my analytical approach. I also discuss methodological and practical choices I had to make during the course of the research, e.g. those related to data collection, data cleaning, and computational model selection.

Analytical sociology of the middle range

This project focuses on the middle-range of social life and on the study of diffusion and institutionalization in specific and bounded historical contexts. This imposes some analytical constraints. First, diffusion and institutionalization have distinct temporalities, that is, they unfold over prolonged periods of time – sometimes in a gradual manner, and at other times through through distinct phases or sequential ruptures and realignments.[1] Studying these temporalities requires prioritizing dynamics of change over static before/after comparisons, and thus demands an emphasis on processes and sequences of events. For example, ideas and cognitive frames often disseminate through repetition and habituation, which gradually align individuals and institutions with emerging cultural schemas and new ways of exercising power.[2] Ideas can also be transposed across professional fields – infusing existing communities of thought or leading to the formation of new coalitions – as people forge connections and react to prior events or discursive trends.[3] And processes of institutionalization can have a distinct periodicity that leads from the initial articulation of an idea or a

[1]William H. Sewell. "Three Temporalities: Toward an Eventful Sociology." Pp. 245-280 in: *The Historic Turn in the Human Sciences*, edited by Terrence J McDonald. Ann Arbor: University of Michigan Press, 1996.

[2]William H. Sewell. 1996. "Historical Events as Transformations of Structures: Inventing Revolution at the Bastille." *Theory and Society* 25 (6): 841–881. Eugene Weber. *Peasants into Frenchmen: The Modernization of Rural France, 1870-1914*. Redwood City: Stanford University Press, 1976. Also see Abbott (1995), pp. 873ff.

[3]Neil Fligstein and Doug McAdam. *A Theory of Fields*. Oxford: Oxford University Press, 2015.

category to its popularization and eventual sedimentation.[4] As Norbert Elias once wrote, the social world does not merely go through a process – it is a process.[5]

These dynamics are highly contingent.[6] The possibility and pace of diffusion and institutionalization depend on the durability of existing structures, the degree to which ideas or political claims are protected against challenges through codification, the relative power of challengers and incumbents, the network structures that facilitate the spread of information, and so forth.[7] This means that particular conceptions of privacy tend to emerge from contingent and interconnected developments in a rather piecemeal fashion.[8] And it indicates a second constraint: To study privacy as a political logic is to study its situationally specific constitution, paying particular attention to the "boundedness, continuity, plasticity, and complexity" of particular processes of diffusion and institutionalization.[9] Instead of looking for global "paradigm shifts" that dislodge formerly hegemonic ideas or for "epistemes" that provide overarching structure to knowledge and power during a given period, we can look for specific manifestations in specific places and highlight the incorporation of local contingencies into an abstract political logic.[10]

Privacy is always contextual, as Helen Nissenbaum has written.[11] For example, the

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[4]G. Cristina Mora. 2014. "Cross-Field Effects and Ethnic Classification: The Institutionalization of Hispanic Panethnicity, 1965 to 1990." *American Sociological Review* 79 (2): 183–210. Also see: Andrew Abbott. *The System of Professions: An Essay on the Division of Expert Labor*. University of Chicago Press, 1988.

[5]Norbert Elias. *What Is Sociology?* New York: Columbia University Press, 1978. p. 118. Also see: Johan Goudsblom. *Sociology in the Balance*. New York: Columbia University Press, 1977.

[6]Peter Hall. "Aligning Ontology and Methodology in Comparative Politics." Pp. 373-404 in: *Comparative Historical Analysis in the Social Sciences*, edited by J. Mahoney and D. Rueshemeyer. Cambridge: Cambridge University Press, 2003.

[7]Charles Tilly. 1995. "To Explain Political Processes." *American Journal of Sociology* 100 (6): 1594-1610; Karen Barkey. "Historical Sociology." Pp. 712-732 in: *The Oxford Handbook of Analytical Sociology*, edited by Peter Bearman and Peter Hedström. Oxford: Oxford University Press, 2011; Jeannette A. Colyvas and Stefan Jonsson. 2011. "Ubiquity and Legitimacy: Disentangling Diffusion and Institutionalization." *Sociological Theory* 29 (1): 27-53; Fligstein and McAdam (2015).

[8]Marshall Sahlins. *Islands of History*. Chicago: The University of Chicago Press, 1985. On the contextuality of change, also see: Richard Biernacki. *The Fabrication of Labor: Germany and Britain, 1640-1914*. Berkeley: University of California Press, 1995.

[9]Tilly (1995), p.1605.

[10]Thomas Kuhn. *The Structure of Scientific Revolutions*. Chicago: The University of Chicago Press, 1962; Helen Nissenbaum. 2004. "Privacy as Contextual Integrity." *Washington Law Review* 79: 119-158; Michel Foucault. *The Archaeology of Knowledge*. London: Routledge, 2013. For a discussion of institutional pluralism, see: Charlotte Cloutier and Ann Langley. 2013. "The Logic of Institutional Logics: Insights from French Pragmatist Sociology." *Journal of Management Inquiry* 22 (4): 360-380.

[11]Nissenbaum (2004).

incorporation of privacy claims into bureaucratic practices involves mobilizing the "systems of cultural elements" of specific organizations, since American state and society form an administrative and cultural patchwork rather than a unified whole.[12] Likewise, the encoding of such claims into legislation or judicial decision-making is conditional on local power dynamics (like the ability to secure a parliamentary majority for a certain bill) and the structure of the American legal field. Studying this institutionalization therefore involves tracing the specific opportunity structures, "logics of practice", or "institutional logics" that shape the conduct of corporate or governmental organizations, street-level bureaucrats, judges, journalists, and social reform advocates.[13]

Third, the approach of this research project requires the study of discourses – but not *only* of discourses. The constitution of privacy as a political logic involves discursive framing as well as concerted practices to stabilize, popularize, and legitimate particular visions of privacy and the self/society relationship.[14] Discourses render privacy intelligible in relation to existing cultural tropes, political norms, ideologies, or classificatory schemas. They allow connections to be made between hitherto disconnected ideas; they define boundaries and exceptions; and thereby help to rationalize a thing like privacy as a meaningful aspect of American governance, jurisprudence, and society.[15] Specific practices then help to explain the dynamics of diffusion and institutionalization. The presence or absence of social movement campaigns matters; and so does the decision-making of legislators and legal professionals. Especially when practices are

[12]Roger Friedland and Robert R. Alford. "Bringing Society Back In: Symbols, Practices and Institutional Contradictions." Pp. 232-263 in *The New Institutionalism in Organizational Analysis*, edited by W. W. Powell and P. J. DiMaggio. Chicago: The University of Chicago Press, 1991; Heather A. Haveman and Gillian Gualtieri. "Institutional Logics". *The SAGE Handbook of Organizational Institutionalism*. London: SAGE Publications, 2017. p. 2; Daniel Carpenter. *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928*. Princeton: Princeton University Press, 2002.

[13]Arthur L. Stinchcombe. "Social Structure and Organizations". Pp. 142-193 in: *Handbook of Organizations*, edited by J. March. Chicago: Rand-McNally, 1965; Pierre Bourdieu. *The Logic of Practice*. Redwood City: Stanford University Press, 1992.

[14]Ian Hacking. *The Social Construction of What?* Cambridge: Harvard University Press, 1999. p. 44; Sheila Jasanoff. "Ordering Knowledge, Ordering Society." Pp. 13-45 in: *States of Knowledge: The Co-Production of Science and Social Order*. London: Routledge, 2004. Also see: Thomas F. Gieryn. 1983. "Boundary-Work and the Demarcation of Science From Non-Science." *American Sociological Review* 48(6): 781-795.

[15]On agenda-shaping power, see: Matthew A. Crenson. *The Un-Politics of Air Pollution: A Study of Non-Decisionmaking in the Cities*. Baltimore: Johns Hopkins University Press, 1971. On the power of analogy, see Mora (2014). On the transposition of ideas across fields, see: Mark S. Granovetter. 1973. "The Strength of Weak Ties." *American Journal of Sociology* 78(6): 1360–1380; Gemma Edwards. 2014. "Infectious Innovations? The Diffusion of Tactical Innovation in Social Movement Networks, the Case of Suffragette Militancy." *Social Movement Studies* 13 (1): 48–69.

routinized at the organizational level or carry a lot of political and legal weight, their effects can become manifest at scale. They shape the exercise of informational power and the scope and durability of privacy claims for considerable parts of the American populace.

Empirically, I focus on four sites of world-making, that is, on four domains of social life where conceptions of society and the social order are challenged and reproduced: public discourse, political mobilization and legislative action, jurisprudence, and bureaucratic rule.[16] Each of the four empirical chapters covers one domain. This also means that each chapter covers a distinct empirical terrain, with little overlap between them. But it allows me to focus on situationally and organizationally specific processes of diffusion and institutionalization, to trace its emergence as a political logic across multiple domains, to highlights its protean manifestations in the world, and thus to piece together the collective *thingness* of privacy, carefully and gradually, from the historical record.

Historical sociology comes in many flavors, and this project is closest in spirit to what Damon Mayrl and Nicholas Hoover Wilson call the "analytic architecture" of the "sociologist as historian."[17] It relies extensively on primary source materials that speak to each of the four domains listed above, which I collected from several archives and digital data repositories. (The structure of each chapter is also characteristic of this approach: The reader will have noticed that each chapter begins by layout out a conceptual framework, before pivoting to the empirical study of a particular domain or a particular set of cases.) Below, I discuss the data used in each chapter and the methodological approaches I employed. For convenience, I also list all datasets in Table M.1.

Chapter 3: The Wire Fence Society

I use historical newspaper and magazine data to analyze changes in U.S. privacy discourse between 1870 and 1920. These data come from two primary repositories of digitized historical text: The *Chronicling America* (CA) collection maintained by the Library of Congress, and the Corpus of Historical American English (COHA) compiled by Mark Davies at Brigham Young University.[18]

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[16] I borrow the term "world-making" from Ian Hacking and Pierre Bourdieu, who saw the symbolic power of naming as one aspect of the political power to create social order. Pierre Bourdieu. 1986. "The Force of Law : Toward a Sociology of the Juridical Field." *Hastings Law Journal* 38: 805–853; Nelson Goodman. *Ways of Worldmaking*. Indianapolis: Hackett Publishing Co, 1978.

[17] Damon Mayrl and Nicholas Hoover Wilson. 2020. "What Do Historical Sociologists Do All Day? Analytic Architectures in Historical Sociology." *American Journal of Sociology* 125 (5): 1345–1394.

[18] Chronicling America historic American newspapers. Washington, D.C.: Library of Congress, 2007. Web: https://lccn.loc.gov/2007618519; Mark Davies. 2010. The Corpus of Historical American

Table M.1: Primary datasets and sources

Chapter	Data source
Ch. 3: A Wire-Fence Society	Chronicling America Collection (via Library of Congress)
	Congressional Record (via LoC)
	Corpus of Historical American English (via Brigham Young University)
	Historical statistics of the United States (via U.S. Census Bureau, IPUMS USA)
Ch. 4: The Politics of the Near and Far	Proceedings of the Annual Conference on Social Welfare (via University of Michigan)
	N.Y. Department of Tenements reports and reports of legislative commissions (online and via N.Y. Public Library)
	Tenement floor plans (via N.Y.P.L.)
	N.Y. shapefiles and demographic data (via NHGIS/IPUMS)
	(Auto)biographies of key protagonists
	Content from the N.Y. Times and the Real Estate Record and Builders Guide
Ch. 5: The Right to Privacy	Historical legal opinions (via Lexis Academic)
	Archives of U.S. law reviews/journals (via Hein Online)
	Chronicling America Collection (via LoC)
Ch. 6: Bookkeepers of Humanity	Historical census microdata (via U.S. Census Bureau, IPUMS)
	Records from Public Health Service and Post Office Department (via U.S. National Archives)
	State/municipal public health records (via city/state historical societies and Berkeley Public Health Library)

CA is a large database of historical newspaper content published between 1777 and 1963, with the bulk of the digitized content published between 1840 and 1925. It is produced by the National Digital Newspaper Program (NDNP), a joint project of the Library of Congress and the National Endowment for the Humanities. NDNP contracts with local libraries across the United States to digitize newspaper content from local collections and make it machine-readable through optical character recognition; new batches of files are added to the repository on an ongoing basis as libraries scan and process more of their holdings. At the time of this writing, the CA collection includes around 2.5 million newspaper editions with more than 19 million total pages of text, of which around 13.7 million come from the years between 1870 and 1920. The data is organized by page (not by article) and can be downloaded in batches or through an API. The number of pages, pooled by decade, varies between 921,000 (for the 1870s) and 4.9 million (for the 1910s). I select for my analysis all pages that contain the term "privacy" and were originally published between 1870 and 1920, which results in decadal datasets that vary between 6,159 pages for the 1870s and 32,707 pages for the 1910s (Table M.2). These pages come from local, regional, and national publications in 46 U.S. states.

Table M.2: Chronicling America Dataset

Decade	Total pages	Pages mentioning "privacy"
1870s	920,922	6,159
1880s	1,384,109	10,145
1890s	2,563,801	23,552
1900s	3,980,107	37,610
1910s	4,865,237	32,707

One challenge of working with these data is the uneven quality of optical character recognition (OCR). Decay due to advanced age, poor paper quality, and bleached ink result in less than optimal OCR results especially for newspaper content published in the nineteenth century, with often has misrecognized characters that result in the mispelling of individual words or unintelligible ASCII character sequences. Global text accuracy is highly sensitive to such local misspellings.[19] A character-level

English (COHA). Available online at https://www.english-corpora.org/coha/.

[19]Ismet Zeki Yalniz and Raghavan Manmatha. 2011. "A Fast Alignment Scheme for Automatic OCR Evaluation of Books." Pp. 754-758 in: *2011 International Conference on Document Analysis and Recognition*. Beijing, China: IEEE.

misrecognition rate of 2% can result in 10-20% of words being misspelled.[20] This is a perennial challenge when working with digitized historical data: Scholars who analyze historical newspaper data have to wrestle with it as well as scholars who seek to match records across U.S. Censuses or other surveys.[21] I address it in two ways. First, I manually correct 289 relatively common misspellings – "rrivacy" becomes "privacy", "privato" becomes "private", "intrud" becomes "intrude", "cvre" becomes "cure", and so forth. I developed this list of mispellings iteratively over several dozen runs of my models, identifying misspellings that occur frequently in the dataset and returning to the original scanned (pre-OCR) image files to find the correct word. Second, I use a combination of a spellchecker and a word prediction algorithm to make additional improvements. The spellchecker is a standard off-the-shelf solution that identifies words not included in standard English dictionaries. The word prediction algorithm – based on a pre-trained Bayesian Additive Regression Trees (BART) model compiled by Google and made available to researchers as a Python package – then takes a given amount of text as input and replaces all words that have been marked as "misspelled" with most-likely substitutes, given the surrounding context words. Using this automated approach results in a marginal increase in the size of the useful vocabulary, between 2% and 5% depending on the decade. I then follow standard data cleaning and pre-processing practices, removing stopwords and some parts of speech like modal verbs (would, could), auxiliary verbs (may, must), adverbs (even, apart, away, first, also, strictly, thereby), conjunctions (though, until, yet, either), prepositions (without, upon, per, like), pronouns (hers, his, theirs), and numbers. I also run a bi-gram detection model; lemmatize all words in the dataset using the WordNet lemmatizer in Python; and tokenize the text so that each word in a sentence is a separate token. This step is required for many computational text analysis models, including the ones I describe below.

I rely on two primary models to analyze the CA data: A Word2Vec model that uses word embeddings to identify most similar words and can aid the study of semantic stability and change, as well as the identification of latent biases like gender bias;[22]

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[20]Ravi Illango. "Using NLP (BERT) to improve OCR accuracy." Available at: https://www.statestitle.com/resource/using-nlp-bert-to-improve-ocr-accuracy/. Accessed 01/20/2022.

[21]Edwin Klijn. 2008. "The Current State-of-art in Newspaper Digitization." *D-Lib Magazine* 14 (1/2). Available at: https://www.dlib.org/dlib/january08/klijn/01klijn.html. Accessed 05/11/2022; James J. Feigenbaum. 2016. "Automated Census Record Linking: A Machine Learning Approach." Working Paper.

[22]Long Ma and Yanqing Zhang. 2015. "Using Word2Vec to Process Big Text Data." Pp. 2895-2897 in: *IEEE International Conference on Big Data (Big Data) 2015* Santa Clara, USA; Kenneth W. Church. 2017. "Word2Vec." *Natural Language Engineering* 23 (1): 155-162; Austin C. Kozlowski, Matt Taddy, and James A. Evans. 2019. "The Geometry of Culture: Analyzing the Meanings of Class Through Word Embeddings." *American Sociological Review* 84 (5): 905-949; Marc-Etienne

and an ngram-based word co-occurrence model that can shed light on the thematic contexts in which a given "discursive object" appears on the printed page.[23] Word2Vec models have a relatively straightforward architecture: The "embeddings" they produce are coefficients derived from a neural network model that represent some hypothetical characteristics of a given word and allow that word to be located in a multidimensional space. Many natural language models have a similar first and intermediate layers and then feed coefficients into a subsequent prediction layer. Their first layer includes the original text, often in an unstructured bag-of-words format. The second layer includes the word-specific neighborhood vectors for each word in this corpus (which act as inductively derived weights to reduce the model's loss function), calculated from an analysis of word-specific embedding spaces. The third layer uses these coefficients/vectors to make predictions about specific words in a documents or a specific document in a corpus. Shallow word embedding models like Word2Vec skip this final step and analyze the second layer directly, instead of using it to generate predictions about unknown text.

This approach allows for the inductive discovery of distributional similarities that function in practice as a proxy for semantic similarity.[24] For example, a Word2Vec model may be able to identify "king" and "monarch" or "cargo" and "freight" as similar terms because their embedding neighorhoods resemble each other, even if these terms never occur alongside each other on the printed page. (In fact, we would not expect similar terms to appear in close proximity. To write about a "monarch-king" is as redundant as it is to speak about "chai tea".) Specifically, I implement a Continuous Bag-of-Words Model (CBOW) that predicts words from a window of surrounding context words. Two advantages of this model – compared to an alternative so-called skip-gram model – are that it is computationally less demanding and more reliable with frequent words. Because I care most about prominent words, this choice is appropriate.

Word embedding models are often presented as "unsupervised" approaches to computational text analysis because they do not require datasets that have been pre-labeled

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Brunet, Colleen Alkalay-Houlihan, Ashton Anderson, and Richard Zemel. 2019. "Understanding the Origins of Bias in Word Embeddings." Pp. 803-811 in: *International Conference on Machine Learning 2019*. Long Beach, USA.

[23]Derry Tanti Wijaya and Reyyan Yeniterzi. 2011. "Understanding Semantic Change Of Words Over Centuries." Pp. 35-40 in: *Proceedings of the 2011 International Workshop on DETecting and Exploiting Cultural diversiTy on the Social Web*. Glasgow, Scotland; Alix Rule, Jean-Philippe Cointet, and Peter S. Bearman. 2015. "Lexical Shifts, Substantive Changes, and Continuity in State of the Union Discourse, 1790-2014." *Proceedings of the National Academy of Sciences of the United States of America* 112 (35): 10837–10844.

[24]Julie Weeds and David Weir. 2005. "Co-occurrence Retrieval: A Flexible Framework for Lexical Distributional Similarity." *Computational Linguistics* 31 (4): 439-475.

(e.g. training datasets) or the a priori specification of dictionaries. Instead, these models "discover" hidden patterns that are invisible to the human observer.[25] But researchers must still provide several model parameters, including the vector size (what is the dimensionality of the model?); the window size (how large is the context window from which the CBOW model makes its predictions?); the minimum word count (how often does a word have to appear in the dataset to be considered by the model?); and the number of modelling epochs (how many iterations of the model are run?). As of this writing, there are no universally agreed standards or thresholds. Quantitative researchers working with regression models have specific sample sizes and p-values that are widely accepted as indicators of good scientific practice.[26] Researchers working with computational text analysis ordinarily make their decisions in a more context-dependent manner after testing different model specifications. Embedding distances between words can sometimes be highly sensitive to such specifications,[27] although other studies indicate that results are "generally robust" to minor variations in model parameters.[28] Prior word also suggests that a goldilocks zone exists for some of these parameters. For example, model outputs have been found to stabilize for window sizes >8 and vector size >50, and that significant increases in either of these values leads to an increase in computational costs without improving model fit.[29] In one recently published guide to applied science, Pedro Rodriguez and Arthur Spirling thus recommend avoiding low-dimensional models and window sizes below 5.[30]

I implement models with vector size 100, window size 10, minimum word count 20, and 50 epochs. I arrived at these specifications after testing hundreds of alternative specifications, summarized in Table M.3. I find that these parameters produce stable results while being computationally manageable. For example, running 20 or more epochs of the Word2Vec model produces outputs that are consistent across successive sets of runs; and setting the minimum word count at 20 results in a corpus size that

[25]Thomas Hofmann. 2001. "Unsupervised Learning by Probabilistic Latent Semantic Analysis." *Machine Learning* 42 (1): 177-196.

[26]For a heterodox take, see: Blakeley B. McShane, David Gal, Andrew Gelman, Christian Robert, and Jennifer L. Tackett. 2019. "Abandon Statistical Significance." *The American Statistician* 73: 235-245.

[27]Maria Antoniak and David Mimno. 2018. "Evaluating the Stability of Embedding-Based Word Similarities." *Transactions of the Association for Computational Linguistics* 6: 107-119.

[28]Pedro L. Rodriguez and Arthur Spirling. 2022. "Word Embeddings: What Works, What Doesn't, and How to Tell the Difference for Applied Research." *The Journal of Politics* 84 (1): 84 (1): 101-115.

[29]Rodrigo Pasti, Fabrício G. Vilasbôas, Isabela R. Roque, and Leandro N. de Castro. 2019. "A Sensitivity and Performance Analysis of Word2Vec Applied to Emotion State Classification Using a Deep Neural Architecture." Pp. 199-206 in: *International Symposium on Distributed Computing and Artificial Intelligence 2019*. Avila, Spain.

[30]Rodriguez and Spirling (2022).

varies between 10 million and 90 million words per decade and takes between 10 and 90 minutes per decade to process computationally.

Table M.3: Examined Word2Vec/Ngram parameter space

Model parameter	Results	Comments
CBOW model dimensions (50/100/150/200)	Stable for n >= 100	Longer vectors become computationally demanding
CBOW window size (5/10/15/20)	Stable for sizes 10-15	
Minimum number of CBOW word occurrences (10/20/30/40)	Mispelled words too frequent for n < 10	n > 20 significantly reduces vocabulary size
CBOW model epochs (10/20/30/40/50/75/100)	Stable for n >= 20	
Ngram window size (11/15/21)	Stable	

The second set of models uses word co-occurrences rather than word embeddings. One way to conceptualize co-occurrence models is to treat them as a shallower version of word embedding models: Instead of using directly observable patterns in a corpus of text to generate word-specific neighborhood vector (the so-called "second layer" in the description above), they analyze first-layer patterns directly. Specifically, I extract from the CA corpus all text n-grams that include the term "privacy". In Chapter 3, I report results obtained from the analysis of 21-grams, i.e. text fragments centered on "privacy" that also include the ten words immediately to the left and the right. These n-grams are constructed after completing the pre-processing described above and do not include any stopwords or removed parts of speech. I then group the 21-grams by decade and calculate the co-occurrence odds for each word in the resulting reduced dataset, that is, the probability of this word co-occuring alongside the term "privacy" divided by the probability of it not co-occurring. For example, if there are 1000 21-grams centered on "privacy", and 100 of these also include the term "room", then the co-occurrence odds of "room" are equal to 0.1/0.9. This approach treats each 21-gram as an unstructured bag of words, i.e. syntax does not matter. It can help to identify the specific thematic contexts in which a term of interest appeared in the original documents. The results presented in Chapter 3 are robust to changes in ngram size. Using 11-grams or 15-grams does not significantly affect them.

I use cosine similarity scores to compare embedding neighborhoods and vectors of co-occurring terms across time. Essentially, these similarity scores measure the angle

between two vectors in a high-dimensional space. Diametrically opposed vectors thus have a cosine similarity of -1; orthogonal vectors have a similarity of 0; and similar vectors have a cosine similarity approaching 1.[31] Again, there are no hard rules for what meets the threshold of "similarity" but cosine values above 0.9 are frequently considered appropriate.[32] These values tend to be derived empirically, e.g. by comparing the vectors of words that we know to be synonymous or of words that we know to be unrelated, or my comparing vectors of words that have a highly stable meaning (such as "mother") over time.

There is yet another way to estimate the fluidity of thematic contexts – independent of cosine similarity scores – and to validate the findings presented above. This second approach makes use of probabilistic topic models that infer the most likely theme of any given text or document by analyzing local and global word distributions.[33] In technical terms, each "topic" refers to the specialized probability distribution over a given set of words. For example, a topic that a trained analyst might consider to be about national security would assign high probabilities to words such as "deterrence", "defense", "diplomacy", or "terrorism".[34] Conversely, a topic that substantively refers to education might be more likely to include terms like "school," "teacher," "student," or "test."[35] It is possible to estimate the prevalence of topics within documents by comparing the distribution of words within each document to the distribution of words across the entire dataset. Similarly, it is possible to chart the prevalence of topics over time. This latter approach builds on so-called Latent Dirichlet Allocation (LDA) models but specifically models time alongside word distibutions in a "Topics over Time" model. I do not include these results in Chapter 3 but report them here as a validation exercise.

Topic models generally require documents to have a certain minimum length, although

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[31] Jiawei Han, Jian Pei, and Micheline Kamber. *Data Mining: Concepts and Techniques.* Amsterdam: Elsevier, 2011.

[32] Antoniak and Mimno (2018).

[33] David M. Blei, Andrew Y. Ng, and Michael I. Jordan. 2003. "Latent Dirichlet Allocation." *The Journal of Machine Learning Research* 3: 993-1022; Wijaya and Yeniterzi (2011); Daniel A. McFarland, Daniel Ramage, Jason Chuang, Jeffrey Heer, Christopher D. Manning, and Daniel Jurafsky. 2013. "Differentiating Language Usage through Topic Models." *Poetics* 41 (6): 607–625; Paul DiMaggio, Manish Nag, and David Blei. 2013. "Exploiting Affinities Between Topic Modeling and the Sociological Perspective on Culture: Application to Newspaper Coverage of U.S. Government Arts Funding." *Poetics* 41 (6): 570-606.

[34] John W. Mohr, Robin Wagner-Pacifici, Ronald L. Breiger, and Petko Bogdanov. 2013. "Graphing the Grammar of Motives in National Security Strategies: Cultural Interpretation, Automated Text Analysis and the Drama of Global Politics." *Poetics* 41 (6): 670–700.

[35] Kevin M. Quinn, Burt L. Monroe, Michael Colaresi, Michael H. Crespin, and Dragomir R. Radev. 2010. "How to Analyze Political Attention With Minimal Assumptions and Costs." *American Journal of Political Science* 54 (1): 209-228.

some scholars have recently applied them to very short text fragments like 140-character tweets.[36] One possible approach is thus to consider each newspaper article (or each newspaper page, since this is the standard format of the *Chronicling America* dataset) to be a "document". But this is somewhat misleading. Just because an article mentions "privacy" does not mean that it is entirely *about* privacy. Often, analyzing the nuances of public discourse requires a focus on the immediate embedding of a word rather than the much wider text in which it appears.[37] I therefore adopt an alternative approach and treat each *year* as a document. This document contains all words that appeared in the privacy ngrams of that year, that is, all words that were printed in close proximity to the term privacy.[38] The model then attempts to identify characteristic topics for each year by comparing its specific distribution of words to the distribution of words in the remainder of the corpus of ngrams. The number of these topics needs to be specified manually. In this case, the most fitting number of topics is four. I validate this number using several common fit indicators, including the held-out likelihood, the semantic coherence, and the exclusivity of the 4-topic model.

The first step is to understand what each of the four topics is *about*. We can do this by looking at the most probable words within it, shown in Table M.4. Topic 1 – which I will refer to as "postal and financial records" – includes common words like "perfect", "guarantee", and "lady" but also has a more specialized vocabulary that consists of "mail", "loan", "confidential", "rate", "reasonable" and "consultation". Topic 2 includes terms like "home" and "room" but also refers to "cure", "relief", "street", "office", and physician". Broadly speaking, it captures specific sites where privacy was desired and where it could be realized, but not exclusively those related to the home. Topic 3 shares some of this vocabulary, but also includes terms like "medical", "examination", "painless", and "telephone". If topic 2 captures multiple sites, like the doctor's office, then topic 3 captures practices that could threaten the confidentiality of personal data and communications, such as the medical examination and the telephone call. Topic 4 is more specifically about familial privacy. It includes terms like "home", "room", "house", "man", "woman", "family, and"place". Collectively, these topics capture a privacy discourse that was held together by common threads – an emphasis on the home being the most prominent one – but also branched off into several nuanced

[36]Elias Jónsson and Jake Stolee. 2015. "An Evaluation of Topic Modelling Techniques for Twitter." University of Toronto Working Paper.

[37]William L. Hamilton, Jure Leskovec, and Dan Jurafsky. 2016. "Cultural Shift or Linguistic Drift? Comparing Two Computational Measures of Semantic Change." Pp. 2116-2121 in: *Proceedings of the 2016 Conference on Empirical Methods in Natural Language Processing.* Austin, Texas: Association for Computational Linguistics; Derry Tanti Wijaya and Reyyan Yeniterzi. 2011. "Understanding Semantic Change of Words over Centuries." Pp. 34-40 in: *Proceedings of the 2011 International Workshop on DETecting and Exploiting Cultural DiversiTy on the Social Web - DETECT* Glasgow, Scotland.

[38]Wijaya and Yeniterzi (2011).

Topic 1: postal and financial records	Topic 2: privacy beyond the home	Topic 3: personal examinations	Topic 4: familial privacy
perfect	home	home	home
consultation	cure	cure	room
loan	woman	woman	man
mail	strict	loan	box
regard	relief	room	house
verbal	room	treatment	new
room	free	absolute	time
confidential	wine	free	public
good	private	write	family
rate	treatment	case	day
address	physician	cent	trouble
guarantee	absolute	strict	place
free	rate	medical	great
man	call	assure	woman
lady	case	know	free
promptness	man	way	come
diamond	insure	examination	find
company	office	painless	way
reasonable	treat	man	know
advance	street	telephone	old

Table M.4: *Top words per topic.*

directions. If privacy mattered in the home, perhaps it also mattered in spaces beyond the home? If one's relatives could threaten domestic privacy, perhaps the same could be said of other groups? And if social gossip could expose a person's intimate life, then perhaps one should also worry about tabloid media and the use of the telephone?

When we consider the relative prevalence of each topic over time – shown in Figure M.1 – we can see that the most prominent thematic context during the 1870s and 1880s was familial privacy. But during the following decades, discussions of privacy outside the family home and the privacy of personal data assumed greater significance. They did not entirely replace the privacy of personal and domestic space – indeed, the terminology of "homes" is present in several models – but suggest a greater diversity towards the end of the nineteenth century as the language of privacy permeated a succession of debates about intimate personal data and telecommunications. In the 1900s, privacy returned to questions of spatiality – a lasting feature of U.S. privacy discourse, as shown in Chapter 3 –, although a deep dive into the textual record has already suggested that such concerns had become closely tied to *urban* privacy rather than to the idealized vision of the rural single-family home and had expanded beyond the realm of the family and the social circle.

I supplement these computational analyses with a qualitative analysis of CA data as well as COHA data. The COHA dataset is a genre-balanced repository of historical text with very high OCR quality, and it has the advantage of including not just newspaper data but also digitized contents from magazines and works of literary fiction. The COHA corpus is small enough that I can compile all 752 articles that discuss "privacy" into a single dataset. For each article, I record basic publication details (year of

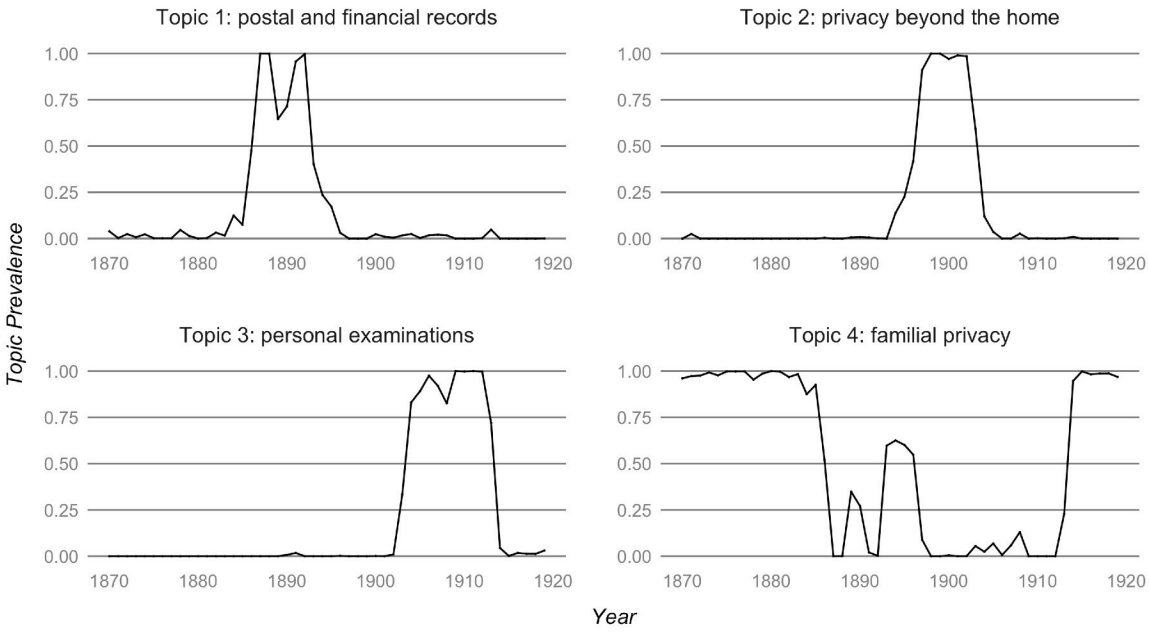

Figure M.1: *Topic prevalence over time.*

publication, author, venue), the sentence(s) including the term "privacy", and a brief characterization of the substantive nature of the discussion. Did privacy appear in an article about urban life, for example, or was it invoked to discuss the telephone? I also build a similar qualitative dataset by sampling 500 newspaper articles from the CA corpus for each decade between 1870 and 1920. The quotes and qualitative descriptions presented in Chapter 3 are drawn from these supplementary datasets.

Chapter 4: The Politics of the Near and Far

I construct several datasets from archival and digitized records to study the application of the logic of privacy to the problem of tenement reform and its selective codification into state law. First, I use the conference proceedings from the National Conference on Social Welfare, made available by the University of Michigan.[39] The name of the conference changed several times during its early years, for simplicity's sake I use the "National Conference" moniker throughout this project. The proceedings include speeches given to the assembled delegates as well as special keynote addresses and question and answer sessions. They run between 200 and 600 pages per year; and I analyze all records between 1874 and 1930. As discussed in Chapter 4, I analyze these records through a close reading that identifies (1) why a speaker considered privacy to be relevant to discussions of social reform, (2) whether they considered privacy to be

[39]The entire collection can be accessed at https://quod.lib.umich.edu/n/ncosw/.

under threat, (3) reasons for the precarious state of urban privacy, if stated, and (4) proposed remedies, if stated.

I then use a variety of additional archival records and published documents, including 126 articles concerning tenement reform pulled from the archive of the *New York Times* and published in the trade publication *Real Estate Record and Builders Guide*, reports produced by successive legislative commissions on tenement reform in New York, the near-annual reports published by the Department of Tenements from 1901 to 1917, and the personal memoirs of protagonists in New York politics and tenement reform, including Theodore Roosevelt and Lawrence Veiller.

To estimate residential density by census ward, I use historical census microdata and area shapefiles provided through IPUMS.[40] Calculating density is a straightforward endeavor: Knowing the number of persons living in a given ward and the total area of that ward allows me to compute persons per area unit. This measure is problematic for several reasons – discussed in Chapter 4 –, so I also compute an alternative estimate of residential density: Average floor area per person (FAPP).[41]

FAPP is influenced by five major variables: L, the average size of the building lot; B, the average percentage of the lot occupied by a building; H, the average percentage of the building given to walls and hallways rather than private apartments; A, the average number of one-family apartments per floor within a building; and P, the average number of persons per family. Given these variables, FAPP is then calculated as:

$$\frac{L * B * H}{A * P}$$

I rely primarily on reports from the Department of Tenements to approximate FAPP for different New York City Boroughs and different years.[42] These reports allow me to estimate FAPP, conditional on a few basic assumptions. First, reports from the Department of Tenements list the number of building permits for post-1901 tenements by lot width and borough. Since lot depths were standardized to 100 feet in New

[40] Steven Manson, Jonathan Schroeder, David Van Riper, Tracy Kugler, and Steven Ruggles. IPUMS National Historical Geographic Information System: Version 16.0 [dataset]. Minneapolis, MN: IPUMS. 2021. http://doi.org/10.18128/D050.V16.0

[41] Jason Barr and Teddy Ort. "Population Density across the City: The Case of 1900 Manhattan." Working Paper. Newark: Rutgers University, 2013; Shlomo Angel and Patrick Lamson-Hall. "The Rise and Fall of Manhattan's Densities, 1800-2010." Marron Institute of Urban Management Working Paper 14. New York: New York University, 2014.

[42] Floor areas for many buildings in New York City are also available from the PLUTO (Primary Land Use Tax Lot Output) database. However, this database doesn't accurately capture tenements built before the 1920s, which were often torn down during subsequent decades.

York, lot area in square feet can be roughly estimated by multiplying lot width by 100. This yields a distribution of lot sizes for each New York City borough. Second, tenement officials did not keep detailed statistics on the percentage of each lot that was occupied by a building or the total rentable floor area per lot. But we can roughly approximate it by taking advantage of several data points and basic knowledge of New York tenement construction: Tenement officials occasionally sampled buildings from each borough to estimate B. Their data indicate that buildings on average covered 73% of lots in Manhattan and around 65% in the outer boroughs. Developers were also constrained by the 1901 law, which prohibited buildings from occupying more than 75% of any given lot. These rules were occasionally relaxed, yet they suggest that lot coverage should lie close to 75% as developers attempted to maximize floorspace without violating state law. In my calculations, I thus use Department of Tenement estimates of lot size coverage. Third, data on the expected percentage of building space lost to public hallways, staircases, and static elements can be derived from a sample of twenty tenement floor plans published by the New York City Public Library. I use image processing software to calculate the total area of rentable floor space for each building and average the results (Fig. M.2). I also estimate rentable floor space independently by comparing 1903 Department of Tenements statistics on "rentable areas per floor" for different buildings against the total floor area of those buildings. Both methods of calculation indicate that walls, hallways, and other non-rentable spaces in tenements built after the passage of New York's 1901 tenement law account for 20 percent of total floor space. Fourth, data on the number of apartments per floor per year per borough is available from Department of Tenement reports. Fifth, data on family size is available from historical census microdata for each New York City borough. Because the Census was only conducted once per decade, I interpolate average family sizes for intercensal years. Together, these data allow me to estimate the average floor area per person for most years between 1901 and 1917 and for each New York City borough.

Chapter 5: The Right to Privacy

I employ two complementary analytical strategies to retrace the institutionalization of the right to privacy in U.S. jurisprudence. First, I construct a legal citation network to identify longitudinal trends and schools of legal thought.[43] This allows me to

[43]On the use of citation networks as analytical tools, see: Norman P. Hummon and Patrick Dereian. 1989. "Connectivity in a Citation Network: The Development of DNA Theory." *Social Networks* 11 (1): 39-63; Evelien Otte and Ronald Rousseau. 2002. "Social Network Analysis: A Powerful Strategy, Also for the Information Sciences." *Journal of Information Science* 28 (6): 441-453; Linda S. Marion, Eugene Garfield, Lowell L. Hargens, Leah A. Lievrouw, Howard D. White, and Concepción S. Wilson. 2003. "Social Network Analysis and Citation Network Analysis: Complementary Approaches to the Study of Scientific Communication." *Proceedings of the American Society for Information Science and Technology* 40 (1): 486-487.

Figure M.2: *Total rentable floor area: Lot size, minus unbuilt area, minus spaces dedicated to walls, hallways, and staircases. Dividing the total rentable floor area by the number of apartments and the number of persons per apartment yields FAPP, the floor area per person.*

understand the right to privacy as part of a genealogy of case law; and it enables me to identify commonalities in juridical interpretation through shared precedents. I begin with a dataset of 1025 state and federal cases that discussed privacy in majority opinions, concurring opinions, or dissenting opinions between 1870 and 1930, aggregated from the LexisUni database of digitized historical legal records. This dataset includes cases from the U.S. Supreme Court, Circuit Courts, State Supreme Courts, and State Courts of Appeal about the right to privacy as well as other cases in which judges invoked the idea of privacy without explicitly framing it as a topic of judicial concern. I thus restrict my analysis to 146 cases that directly engage with the right to privacy (sometimes also called the "right of privacy"). Judges occasionally included extended quotes about privacy jurisprudence from existing opinions, instead of providing their own formulations. I include these cases in the dataset if quoted passages directly contribute to judges' legal reasoning. Replicating the analyses without these cases results in networks that are smaller and less dense, but the exclusion has no impact on the network's bipartite structure or the thematic distribution of cases across the two main clusters. To my knowledge, this is the most comprehensive compilation of legal opinions about the early decades of American privacy jurisprudence. I use the term "legal opinions" as a shorthand for this truncated dataset of 146 cases.

I then map out a citation network that includes all 146 cases ("egos") as well as any other case, constitutional amendment, statute, legislative act, or law review essay that was cited as precedent for the right to privacy by judges in their written opinions ("alters"). The language of egos and alters is commonplace in social network analysis, where "ego" refers to focal nodes in a network and "alters" refers to any additional nodes that are directly connected to such egos. I exclude cases that were cited only for procedural reasons, for example to establish rules of evidence, legal standing, or jurisdiction. The resulting network is a useful heuristic device that allows me to identify aggregate patterns and to specify links between emerging ideas about privacy and established legal precedents. It is composed of 677 nodes – 146 egos and 531 alters – and 1099 citation ties. I then calculate two network parameters, modularity and eigenvector centrality. Modularity Q is a commonly used measure of global network clustering, defined as the as the ratio of the total number of ties within a cluster to the total number of ties in the entire network. I obtain modularity scores through a two-step process that first uses a random walk algorithm to identify multiple clusters within a larger network, and then takes the assigned cluster membership of each node to calculate Q.[44] Eigenvector centrality scores are calculated for each node within a network, with higher scores indicating that a node is connected to other influential nodes. (The logic of eigenvector centrality also underlies Google's PageRank search

[44]Gabor Csardi and Tamas Nepusz. 2006. "The igraph Software Package for Complex Network Research." *InterJournal, complex systems* 1695 (5): 1-9.

algorithm.) Simply put, eigenvalue centrality allows researchers to identify the most important nodes in any given network.[45] With λ as the graph's eigenvalue and $a_{k,i}$ equal to 1 if node k is connected to node i, and 0 otherwise, the eigenvector centrality C_i of node i is given by:

$$C_i = \frac{1}{\lambda} \sum_k a_{k,i} C_k$$

In a second analytical step, I supplement this formal network analysis with a qualitative examination of historical legal opinions, law review essays, and newspaper articles. For each node in the network, I record the year of adjudication and thematic context. For example, the decision in *Roberson v. Rochester Folding Box Co.* (171 N.Y. 538) is coded as "1902" (the year it was adjudicated) and as "advertising" (to identify the thematic context of the dispute). I developed the thematic coding scheme through an iterative process. First, I coded all 146 egos as well as 100 additional alters to obtain an initial list of 34 thematic categories. After merging categories that closely resembled each other – like "advertising" and "marketing" – I recoded each case and all additional alters based on a final 18-category coding scheme. I also replicate my analysis using the granular initial coding scheme and find no substantive differences. For example, cases coded as "advertising" have the same median year of adjudication as cases coded that I had originally coded as "marketing". This suggests that the findings discussed in Chapter 6 are robust to the merging of similar coding categories.

For each of the 146 egos in the network, I also record two additional qualitative data points. I note whether privacy claims in each dispute were directed against public entities (i.e. government agencies or law enforcement) or against private companies (e.g. advertising agencies, publishers, or private-sector employers), and I also identify whence judges derived a distinct "right to privacy", if possible. Because judges did not always explicitly state what they considered to be the ultimate origin of privacy claims, it was sometimes impossible to determine unambiguously whether they considered the right to privacy to be a product of common law, natural law, case law precedent, Constitutional law, or derived from some other legal document. For example, in *Frewen v. Page* (238 Mass. 499), a Massachussets court found that innkeepers had to respect the "right to privacy" of their patrons and could not intude into their rooms unaccounced. Yet the court's opinion gave no indication as to the origin of such a right or its legal justification. In total, I was able to identify a stated origin in 78 of the 146 cases. Judges may have omitted references to the origins of the right to privacy from the remaining 68 cases because they were hesitant to commit to any particular school of thought, because they considered the question of ultimate origins

[45] Phillip Bonacich. 2007. "Some Unique Properties of Eigenvector Centrality." *Social Networks* 29 (4): 555-564.

to be insignificant to their legal reasoning, or because they assumed such origins to be self-evident. The following analysis is agnostic to these different possibilities. In a supplementary analysis, I also restrict the citation network's egos to the subset of 78 cases that include a statement of origin. This truncated network is necessarily smaller than the network graphs presented in Chapter 6, yet it has the same bipartite structure and the same distribution of state-centric and business-centric cases across clusters.

Finally, I use a qualitative approach to analyze essays about privacy jurisprudence from 395 issues of 15 prominent law reviews and law journals. Included in the dataset are the *American Law Review, American Lawyer, Central Law Journal, Columbia Law Review, Green Bag, Harvard Law Review, Kentucky Law Journal, Medico-Legal Journal, Michigan Law Journal, Minnesota Law Review, Northwestern Law Review, The American Law Register and Review, The American Law Register, Virginia Law Register, Western Reserve Law Journal,* and *Yale Law Journal.* This data, which comes from the Hein Online database of legal periodicals, allows me to examine discursive contributions from legal scholars alongside judges' opinions. The selection of legal periodicals was negotiated with the data provider, which usually prohibits bulk downloads of historical text but agreed to provide a customized dataset of fifteen periodicals. Hein Online staff compiled an initial list of available titles. I then performed an exploratory analysis of 87 law review articles to identify fifteen periodicals that may have published relevant articles during the period of interest and obtained the full digitized archives. In my analysis, I identify each essay in the full dataset that mentions a "right to privacy" or "right of privacy" and perform an in-depth/qualitative reading, recording summaries of the arguments in a separate dataset. Finally, I rely on digitized newspapers from the "Chronicling America" collection of the Library of Congress to situate legal debates about privacy within a wider social environment. I identify 3001 articles that discussed the "right to privacy" between 1870 and 1930, stratify the dataset by decade, and sample 100 articles from each decade for the same qualitative analysis.

Chapter 7: Bookkeepers of Humanity

I focus on two organizations to study the incorporation of privacy into the bureaucratic apparatus of the American state, the Public Health Service and the Post Office Department. The selection of these two cases is informed by prior scholarship on privacy and informational power,[46] and also by the analysis of U.S. privacy discourse in Chapter

[46]David J. Seipp *The Right to Privacy in American History.* Harvard University Program on Information Resources Policy Publication P-78-3, 1978; Amy L. Fairchild, Ronald Bayer, and James Colgrove. *Searching Eyes: Privacy, the State, and Disease Surveillance in America.* Berkeley: The University of California Press, 2007; Sarah Igo. *The Known Citizen.* Cambridge: Harvard University Press, 2018; Colin Koopman. *How We Became Our Data: A Genealogy of the Informational Person.*

3. This analysis showed that the language of privacy regularly appeared in discussions of interpersonal communications, and also in the contexts of medical examinations. The two organizations are similar insofar as they each have a home within the federal administrative apparatus as well as many local offices and administrative bodies. They are present in communities across the United States, personified by postmasters, postal inspectors, members of Boards of Health, surgeons, and so forth. In their respective ways, they each illustrate the "infrastructural power" of the American state to penetrate society.[47] But the two organizations also differ in their developmental histories – the U.S. Postal Service was founded in 1775, but a federal public health apparatus did not exist prior to the Public Health Act of 1879 –, in their substantive areas of focus and expertise, in their techniques of bureaucratic administration, and in their institutional logics. These differences provide comparative analytical leverage, and they allow me to study the institutionalization of privacy in two distinct (and distinctly different) settings.[48]

I also collected data on the U.S. Census Bureau, but I do not include it as an independent case for two reasons. First, the collection of census data and the production of census categories are among the most well-documented aspects of the state's epistemic project in the United States.[49] Second, the Census Bureau's elevated role within the federal apparatus meant that agencies like the Public Health Service regularly drew on the expertise of census officials and the automated Hollerith tabulating machines that the Census Bureau had begun to acquire for the 1890 census count. In practice, it functioned less like a separate organizational entity than a resource base for other organizations and a central clearinghouse for population data.

Chapter 7 draws primarily on archival records housed at the U.S. National Archives, the Library of Congress in Washington, DC, the California Historical Society in San Francisco, the Massachusetts Historical Society in Boston, the New York Public Library, and the Public Health Library at U.C. Berkeley. I collected these data over a period of several years and multiple visits, including several months spent in the U.S. National Archives in Washington, DC (which houses records related to

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Chicago: The University of Chicago Press, 2019.

[47] Michael Mann. 1984. "The Autonomous Power of the State: Its Origins, Mechanisms, and Results." *European Journal of Sociology* 25 (2): 185-213.

[48] Andrew Abbott. "What Do Cases Do? Some Notes on Activity In." Pp. 53-82 in: *What Is A Case?: Exploring the Foundations of Social Inquiry*, edited by Charles Ragin and Howard Becker. Cambridge: Cambridge University Press, 1992.

[49] Margo J. Anderson. *The American Census: A Social History.* New Haven: Yale University Press, 1988; Charles Hirschman, Richard Alba, and Reynolds Farley. 2000. "The Meaning and Measurement of Race in the US Census: Glimpses Into the Future." *Demography* 37 (3): 381-393; Mora (2014); Rebecca J. Emigh, Dylan Riley, and Patricia Ahmed. *Antecedents of Censuses from Medieval to Nation States: How Societies and States Count.* New York: Palgrave Macmillan, 2016.

postal administration) and College Park, MD (which houses historical public health documents and records from the U.S. Bureau of the Census.) and shorter stints at archives in Boston, New York, Berkeley, and San Francisco. Such records allow me to build what Damon Mayrl and Nicholas Hoover Wilson refer to as a "positive empirical case" that can be analyzed with reference to a middle-range conceptual framework.[50]

For each organization, I identified and examined materials relating to the period between 1870 and 1930. They include daily reports from the Postal Inspection Service and weekly bulletins from the Public Health Service, regulatory missives like the Postal Laws and Regulations, internal pamphlets like the Post Office Bulletin, internal memos, summaries of regulatory changes in the Federal Register, and congressional debates pertaining to informational privacy and bureaucratic conduct that were published in the Congressional Record. I initially aspired to track the amount of examined archival material in linear feet but quickly discovered the futility of this effort: Some boxes arrived half-empty, which others were filled with dozens or hundreds of documents or thick annual compilations. For example, the National Archive maintains a collection of field reports from the Postal Inspection Service that run to several thousand pages per year. In their totality, these documents preserve a record of intra-governmental deliberations and decisions, although archival collections also include occasional letters and petitions sent by citizens to legislators or bureaucratic agencies. I analyze these data qualitatively, using extensive memos to record initial observations for specific documents and synthesizing those memos to identify common themes and case-specific differences.[51]

To situate governmental agencies in a wider socio-political environment and to analyze historical struggles over privacy and state power, I also draw on newspaper records from the aforementioned *Chronicling America* collection. For each decade between 1870 and 1930, I re-use the sample of 500 newspaper articles that mention the term "privacy" (drawn from the CA dataset) for a qualitative content analysis. I focus this analysis on specific data collection efforts by government officials and citizens' initiatives against such efforts, and also on general claims about the nature and legitimacy of state power that link those specific struggles into wider webs of cultural meaning (Geertz 1973). Finally, I rely on scholarly publications from the early twentieth century – especially in the field of public health – for additional details and to corroborate archival data.

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[50] Mayrl and Wilson (2020), p. 1372.

[51] Lora Bex Lempert. "Asking Questions of the Data: Memo Writing in the Grounded Theory Tradition." Pp. 245-264 in: *The SAGE Handbook of Grounded Theory*, edited by Anthony Bryant and Kathy Charmaz. Los Angeles: SAGE Publications, 2007.

Mixed methods in historical sociology

It has become increasingly common to refer to studies that combine different types of data and multiple methodological approaches as "mixed methods" scholarship.[52] This project fits broadly within this tradition. It combines qualitative archival data with census microdata, government statistics, large corpora of text, and even some building floorplans; and it analyzes these data using a combination of computational text analysis, citation network analysis, close reading, and standardized coding of quantitative data. This approach is sometimes presented as a "pragmatic" one, presumably to sidestep the old fault line between qualitative and quantitative work and to distinguish it from the implied dogmatism of single-method researchers. A more charitable reading would suggest that methodological pluralism merely mirrors the disciplinary pluralism of contemporary sociology – let a thousand flowers bloom. And a more critical reading would suggest that mixed methods is built on shaky epistemological foundations, since some modes of inquiry may simply be incommensurable with each other.[53] I would like to think that the methodological choices I made are not just pragmatic (insofar as I have tried to tailor data collection and methods to specific research questions, instead of attempting to apply a single method to study all questions) but is also principled: They recognize the social world as a place with multiple temporalities, complex interactions between micro-level decisions and patterned macro-level manifestations, and dynamics of change that are situationally specific.[54] My hope is that, by examining this world through several lenses that are at least minimally compatible with each other, we can improve existing answers to old questions, generate new questions, and wring greater insight from the historical record.

[52]Mario L. Small. 2011. "How to Conduct a Mixed Methods Study: Recent Trends in a Rapidly Growing Literature." *Annual Review of Sociology* 37: 57-86; Lisa D. Pearce. 2012. "Mixed Methods Inquiry in Sociology." *American Behavioral Scientist* 56 (6): 829-848.

[53]Yvonna S. Lincoln and Egon G. Guba. "Paradigmatic Controversies, Contradictions, and Emerging Confluences." Pp. 163-188 in: *Handbook of Qualitative Research, Second Edition*, edited by Norman K. Denzin and Yvonna S. Lincoln. Thousand Oaks: SAGE, 2000.

[54]Barkey (2011).

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