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What Must We Hide: The Ethics of Privacy and the Ethos of Disclosure

Anita L. Allen

University of Pennsylvania Carey Law School

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LECTURE
ST. THOMAS UNIVERSITY SCHOOL OF LAW
FALL 2012 DISTINGUISHED SPEAKER SERIES
WHAT MUST WE HIDE: THE ETHICS OF
PRIVACY AND THE ETHOS OF DISCLOSURE

ANITA L. ALLEN^{*}

I. INTRODUCTION

We live in an era of personal revelation. We are preoccupied by seeking, gathering, and disclosing information about others and ourselves. In the age of revelation, individuals and enterprises are fond of ferreting out what is buried away. We are fond of broadcasting what we know, think, do, and feel; and we are motivated by business and pleasure because we care about friendship, kinship, health, wealth, education, politics, justice, and culture. A lot of this has to do with technology, of course. We live at a historical moment characterized by the wide availability of multiple modes of communication and stored data, easily and frequently accessed. Our communications are capable of disclosing breadths and depths of personal, personally identifiable, and sensitive information to many people rapidly. In this era of revelation—dominated by portable electronics, internet social media, reality television, and traditional talk radio—many of us are losing our sense of privacy, our taste for privacy, and our willingness to respect privacy. Is this set of losses a bad thing? If it is a bad thing, what can be done about it?

My reflections on these questions begin with a series of diverse examples from the past several years. The examples illustrate the emergent ethos of our revelatory era. The first and second examples portray voluntary self-revelation for amusement and monetary gain; a third and fourth example depict revelations concerning others, motivated by a desire for amusement in one case and geopolitical justice in another.

Former Congressman Anthony Weiner was a Democratic member of the United States House of Representatives elected by the people of New

^{*} Anita L. Allen, J.D., Ph.D., is the Henry R. Silverman Professor of Law and Professor of Philosophy at the University of Pennsylvania. This lecture reflects her recent work, including her book *Unpopular Privacy, What Must We Hide*.

York.¹ Congressman Weiner sent sexually suggestive images of himself as attachments to Twitter messages to young women, ages twenty-one and seventeen, he did not even know.² When knowledge of his “sexting” conduct became public in 2011, he was forced to resign from office under pressure from fellow Democrats. There was no obvious, objectively urgent need for Congressman Weiner’s messages. We have to assume he was simply amusing himself in an especially risky and presumptuous manner. He cared little for the privacy of his body and sexual urges, so little that he risked the grave consequences of their exposure to strangers whom he had no reason to trust.³

When Joyce Maynard was only eighteen years old, she had an intimate affair with famed writer J. D. Salinger. He was fifty-three years old. For a short while, the mismatched lovers lived together in his New Hampshire hideaway where his fame and genius seduced her. In 2006, Maynard announced she would sell the fourteen unpublished love letters that the reclusive Salinger wrote to her between April 25, 1972, and August 17, 1973. Sotheby’s auction house agreed to manage the sale. Maynard knew how greatly Salinger valued his privacy and that he would be offended by her decision; but, she said that the letters were her property and, moreover, that she needed money to send her children to college. Her own privacy no longer mattered to her since she had already published *At Home in the World*, a memoir of the fascinating, scandalous affair.⁴ Was it ethical for Maynard to exploit the law and further offend and embarrass a former lover for profit? It is not self-evident that ethics allow a person in Maynard’s position this particular freedom.

My next example, like the Congressman Weiner example, involves

1. Jennifer Preston, *Weiner Says He Sent Private Messages to Girl*, N.Y. TIMES, June 10, 2011, at A17, available at 2011 WLNR 11683951.

2. *Id.*; Ashley Parker & Michael Barbaro, *Rep. Weiner’s Pattern: Political Admirers Became Online Pursuits*, N.Y. TIMES, June 12, 2011, at A7, available at 2011 WLNR 11725834.

3. Michael Barbaro & Ashley Parker, *A Pattern of Making Politics Personal Several Online Admirers Describe Questionable Advances by Lawmaker*, INT’L HERALD TRIB., June 10, 2011, at 5, available at 2011 WLNR 11516714; Brian Stelter, *Upending Anonymity, These Days the Web Unmasks Everyone*, N.Y. TIMES (June 20, 2011), <http://www.nytimes.com/2011/06/21/us/21anonymity.html>.

4. JOYCE MAYNARD, *AT HOME IN THE WORLD* (1999). On a webpage devoted to her book, Maynard writes:

For more than four decades I had lived with a deep and abiding need to please others. Since the age of eighteen, I had been haunted by the fear of J. D. Salinger’s disapproval and wrath. And I wasn’t wrong that my decision to break a long-held silence concerning a literary icon’s role in my life would bring terrible wrath and disapproval upon me.

Joyce Maynard, *At Home in the World*, http://www.joycemaynard.com/Joyce_Maynard/B_At_Home_in_the_World.html (last visited Oct. 9, 2012).

contemporary communications technologies. In 2010, a talented young musician named Tyler Clementi was a freshman at Rutgers University, the state university of New Jersey. He asked his roommate, Dharun Ravi, to let him have their room for the night for a date. Ravi consented, but decided to pull a prank on Clementi. He switched on a webcam in their dormitory room, webcasting Clementi's same-sex intimacies all over the Internet. When Clementi learned what had been done to him, the distraught, gay youth bid farewell to his friends online and then committed suicide. On September 22, 2010, the teenager leapt to his death off of New York City's George Washington Bridge. In my view, the ethics of Congressman Weiner's and Joyce Maynard's revelations are somewhat debatable, but the ethics of Ravi's are not. Ravi's thoughtless advantage taking was unethical; and, as moral luck would have it, it also had a devastating outcome compounding the sense of its wrongfulness. Ravi was convicted of the New Jersey crimes of "bias intimidation" and criminal privacy invasion.⁵

My final example is WikiLeaks. WikiLeaks describes itself as "a non-profit media organization dedicated to bringing important news and information to the public." It does this by providing a "secure and anonymous way for independent sources around the world to leak information to its journalists."⁶ While a member of the United States armed forces on active duty, then twenty-two year old Private Bradley Manning provided WikiLeaks with sensitive United States Government documents without authority, including field reports from wars in Iraq and Afghanistan, classified State Department diplomatic cables, records concerning Guantanamo Bay detainees, and videos of United States military missions.⁷ Manning was arrested in 2010 and tried in 2011.⁸ The sensitive documents he handed over to Wikileaks were published by WikiLeaks and then republished by major mainstream media and social media alike. Many people were appalled that such a thing could occur. But strikingly, many were not appalled either because they failed to recognize any legitimate expectations of privacy, confidentiality or

5. Kate Zernike, *Jury Finds Spying in Rutgers Dorm Was a Hate Crime*, N.Y. TIMES (Mar. 17, 2012), <http://www.nytimes.com/2012/03/17/yregion/defendant-guilty-in-rutgers-case.html?pagewanted=all>; see also N.J. STAT. § 2C:16-1 (2008) (criminalizing bias intimidation based upon a person's sexual orientation); N.J. STAT. § 2C:14-9(c) (2004).

6. *Main*, WIKILEAKS.FDN (last visited Oct. 9, 2012), <http://wikileaks.fdn.fr>.

7. Charlie Savage, *Private Accused of Leaks Offers Partial Guilty Plea*, N.Y. TIMES (Nov. 9, 2012), <http://www.nytimes.com/2012/11/09/us/army-private-in-wikileaks-case-offers-partial-guilty-plea.html>.

8. David Dishneau, *U.S. Army private offers lesser plea in WikiLeaks case*, OKLAHOMAN, Nov. 12, 2012, at 8A, available at 2012 WLNR 24084251.

security, or because they believed the social good of disclosure far outweighed any embarrassment to diplomats and nations.

What is the social good at issue? According to WikiLeaks, it publishes “material of ethical, political and historical significance while keeping the identity of [its] sources anonymous, thus providing a universal way for the revealing of suppressed and censored injustices.”⁹ Julian Assange defends his group’s approach to forced government accountability—“shining the light on the secret crimes of the powerful.”¹⁰ Some link the “Arab Spring” pro-democracy movements afoot in North Africa to distrust and disgust fueled by WikiLeaks.¹¹ Nonetheless, some professors of foreign relations initially said they would not incorporate information revealed by WikiLeaks into their university courses because it was acquired and published unethically.

In the age of revelation, sensitive information will come to light whether it ought to or not. Whether it is our love lives or political strategies, all will come to light. For better or worse, everything from furtive street crimes to genomes will come to light.¹²

II. THE VALUE OF PRIVACY

The four examples with which I began raise concerns about the value of privacy. They show that some people especially do not value their own privacy, and some do not value the privacy of others. Philosophically, these examples say something about the positive ethics of informational privacy.¹³ By informational privacy, I mean conditions of limited access to and limited disclosure of personal data. In situations in which people actually want privacy protected, allowing individuals to control personal information about themselves has been an important way to achieve desired

9. *Id.*

10. Charlie Osborne & Zack Whittaker, *Assange: U.S. ‘witch hunt’ against Wikileaks must end*, ZDNET.COM (Aug. 19, 2012), <http://www.zdnet.com/assange-u-s-witch-hunt-against-wikileaks-must-end-7000002832>; Julian Assange, N.Y. TIMES, http://topics.nytimes.com/op/reference/timestopics/people/a/julian_p_assange/index.html (last updated Aug. 19, 2012).

11. State Department Press Releases & Documents, *Internet Freedom: Promoting Human Rights in the Digital Age - A Panel Discussion*, FED. INFO. & NEWS DISPATCH, INC., May 3, 2011, available at 2011 WLNR 8610506.

12. Cf. PRIVACY AND PROGRESS IN WHOLE GENOME SEQUENCING, REPORT OF THE PRESIDENTIAL COMMISSION FOR THE STUDY OF BIOETHICAL ISSUES 27 (2012), available at <http://www.bioethics.gov/cms/sites/default/files/PrivacyProgress508.pdf>.

13. See *infra* Part II. In addition to *informational privacy*, we commonly speak of *physical privacy* (e.g., rights to seclusion at home, bodily integrity); *decisional privacy* (e.g., abortion rights, right to die, right to marry); *proprietary privacy* (e.g., celebrity rights in voice, name, and likeness); *associational privacy* (e.g., exclusive club membership); and *intellectual privacy* (e.g., freedom to think about, read about and discuss ideas). *Id.*

forms of limited access. A discussion of the ethics of informational privacy would be expected to address questions about when to restrict publication of intimate facts and when to require confidentiality.¹⁴ Most of the foundational work on the ethics of privacy in the United States has been produced since the 1960s when scholars began to worry about the impact of computing and data banking.¹⁵

A good deal of the early work elevates privacy to the status of one of the great values of enlightened civilization. However, some of the technology theorists who write about privacy today are dismissive of privacy. They find it annoying and that it has irrelevant value. They see it as a dead, unwanted value about as useful and interesting as our great grandmothers' yellowed linens. An Internet policy colleague of mine at the University of Pennsylvania bemoans that conversations about Internet policy always seem to "devolve" into discussions of privacy. Yet, the overwhelming majority of academic philosophers who write about privacy, myself included, write in praise of it.¹⁶ I caution against privacy perils and excesses, but make the case for its perpetuation in my work.¹⁷

So what can be said in favor of privacy and its protection? Let me list the values, good, and ends that I, and other like-minded scholars, relate to privacy:¹⁸

- Self-expression: Opportunities for privacy allow individuals to better express their true personalities and values.
- Good Reputation: Privacy helps preserve reputations.
- Repose: Privacy may enable tranquility and relaxation.

14. See generally ANITA L. ALLEN, UNPOPULAR PRIVACY: WHAT MUST WE HIDE 3 (2011) (discussing a case in which doctor-patient confidentiality was breached when a physician petitioned the state to unseal his patient's adoption records).

15. See Anita L. Allen, *Privacy*, in THE OXFORD HANDBOOK OF PRACTICAL ETHICS (2005).

16. See, e.g., JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY (1997) (looking at the development of privacy in the United States over the last century and how concepts of privacy have played a fundamental role in a broad range of studies); ANNABELLE LEVER, ON PRIVACY (2012) (discussing how privacy enables individuals to shut the world out and that the way in which privacy is protected is fundamentally a public matter); ADAM D. MOORE, PRIVACY RIGHTS: MORAL AND LEGAL FOUNDATIONS (2010) (discussing individuals' rights to control access to their own bodies, specific places, and personal information); BEATE ROSSLER, THE VALUE OF PRIVACY (2005) (expressing the view that privacy is worth protecting and should be normatively respected and analyzing why individuals value privacy).

17. See, e.g., ANITA L. ALLEN, WHY PRIVACY ISN'T EVERYTHING (2003) (discussing how, why, and to whom individuals are accountable for their personal lives and stressing that individuals have varieties of accountability and a variety of people to whom they are expected to answer).

18. See ANITA L. ALLEN, PRIVACY LAW AND SOCIETY 7-9 (2007).

- Intellectual Life: Privacy may enhance creativity and reflection, which may be good for an individual's own sake, but which can lead to useful cultural products and inventions.
- Intimacy and Formality: Opportunities for privacy are thought to enable individuals to keep some people at a distance, so that they can enjoy intense intimate relationships with others.
- Preferences and Traditions: Privacy allows the individual or groups of like-minded individuals the ability to plan undertakings and live in accord with preferences and traditions.
- Civility: Privacy norms sustain civility by condemning behaviors that offend courtesy, honor, and appropriateness.
- Human Dignity: Philosophers have said that respect for privacy is, in many ways, respect for human dignity itself.
- Limited Government: Privacy rights against government demand that state power is limited and unobtrusive, as liberal democracy requires.
- Toleration: Privacy rights demand that government tolerate differences among individuals and groups.
- Autonomy: An aspect of liberty, privacy fosters the development and exercise of autonomy.
- Individualism: Privacy fosters individualism, and it is not fairly condemned as a purely individualistic value at odds with ideals of a cooperative, efficient democratic community.

Anyone who makes the case for privacy must contend with the case against it and against the rights protecting it. Indeed, not all philosophers emphasize the good of privacy. A few have emphasized values, good, and ends that properly limit personal privacy:

- National Security: Privacy interferes with national security measures.
- Law Enforcement: Privacy interferes with effective and efficient law enforcement.
- Public Health: Privacy hampers effective and efficient public health protection, e.g., it burdens the delivery of routine medical care and health research.
- Public Right to Know: Privacy rights chill free speech and a free press. Privacy keeps information the public has a right to

know in private or government hands.

- Administrative Costs: Privacy rights enable individuals to bring trivial lawsuits involving little more than hurt feelings to court, thereby taking up time judges could devote to more serious personal injury cases.
- Selfish Individualism: Privacy is unduly individualistic.
- Inefficiency: Privacy protection practices are inefficient for business.
- Excess of Protections: The United States has too many privacy laws. Privacy rights can keep socially valuable information out of the hands of people who could use and learn from it.
- Privacy Rights Should be Limited: The law should provide a remedy only against intrusions and publications that are “highly offensive.” The law should protect only “reasonable expectations of privacy” and bar state interference only if it is wholly irrational or “unduly burdensome.”

III. THE LURE OF FREE SPEECH

Why not reveal? Why not disclose? Why hide anything? Courts have been asked to support ideals of anonymous Internet speech that would allow bold, even cruel, speech to reign free and immunize speakers from exposure and even liability. In a high-profile federal district court case from the United States District Court for the District of Connecticut, *Doe I and Doe II v. Individuals, whose true names are unknown*,¹⁹ the plaintiffs were two female students at Yale Law School. The two students were targets of defamatory, threatening, and harassing statements posted on AutoAdmit.com from 2005 to 2007.

AutoAdmit is an Internet discussion board that, in the mid-2000s, drew between 800,000 and one million visitors per month. Participants posted and reviewed comments about universities and law schools. A photograph of one of the plaintiffs was published on AutoAdmit without her permission. An anonymous commentator encouraged others to “[r]ate this HUGE breasted cheerful big tit girl from YLS.” In two months, nearly two hundred threads about the women were posted. One post stated that

19. *Doe I v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008); see also Anita L. Allen, *Symposium: Privacy Jurisprudence as an Instrument of Social Change First Amendment Privacy and the Battle for Progressively Liberal Social Change*, 14 U. PA. J. CONST. L. 885, 913 (2012) (discussing the *Individuals* case).

plaintiff fantasized about being raped by her father, that she enjoyed having sex while family members watched, that she encouraged others to punch her in the stomach while seven months pregnant, that she had a sexually transmitted disease, that she had abused heroin, and a poster said that she “hope[s] she gets raped and dies.”²⁰

After plaintiffs filed a lawsuit, many posts were published discussing the lawsuit. The Yale women brought federal copyright claims and state law claims for libel, invasion of privacy, and emotional distress against unknown individuals using thirty-nine different pseudonymous names. In the course of the suit, and here is where the free speech issues arise, the plaintiffs issued a subpoena *duces tecum* to Internet service provider AT&T for information relating to the identity of the person assigned to the Internet Protocol (“IP”) address from which an individual posted comments about one of the plaintiffs. AT&T sent a letter to the person whose Internet account corresponded with the IP address, and he filed a motion to quash disclosure of his identity and a motion to proceed anonymously in the suit.

The court held the plaintiffs were entitled to disclosure of the poster’s identity. The court stated that the protection afforded anonymous speech by the First Amendment of the United States Constitution extends to speech on the Internet, as cyberlibertarians prefer to think, but that this right is not absolute and does not protect speech that otherwise would be unprotected. Libel is not protected speech. The plaintiffs established a prima facie case of libel against the poster through evidence tending to show that the poster’s discussion of her alleged sexual behavior in a message that clearly identified her by name harmed her reputation.

As for the allegation that he should be able to proceed anonymously as “John Doe” out of regard for his free speech rights and reputation, the court also held against the poster. The rule of procedure requiring parties to a lawsuit to identify themselves protects the public’s legitimate interest in knowing all of the facts involved, including the identities of the parties. The risk that an Internet user might be exposed to ridicule or lose employment upon disclosure of his identity was not grounds to allow him to proceed anonymously.

The lawsuit settled out of court.²¹ I believe the district court came to

20. *Individuals*, 561 F. Supp. 2d at 251.

21. *Yale Online Slur Lawsuit Settled*, NEWSTIMES.COM (Oct. 22, 2009), <http://www.newstimes.com/news/article/Yale-online-slur-lawsuit-settled-185825.php>.

A lawyer for two former Yale University law students says they have settled their lawsuit against several people they accused of posting sexually harassing and threatening messages about them on an Internet site. San Francisco attorney Ashok Ramani told the Hartford Courant on Wednesday that the two women settled with “a

the right decision with respect to both issues—forcing AT&T to hand over the name of the person behind the IP address of the AutoAdmit poster and forcing the poster to litigate under his real name. Free speech ideals should not give persons *carte blanche* to defame others and invade their privacy. But in the age of revelation, we not only have to concern ourselves with free speech being used to justify disclosures about others, but we also need to concern ourselves with free speech seeming to give persons *carte blanche* to make disclosures about themselves.

IV. VOLUNTARY SELF-DISCLOSURE

One has to be especially intrigued by the voluntary self-disclosure that characterizes our era, which is why I began with the Congressman Weiner incident and the Maynard-Salinger affair. Congressman Weiner exposed himself. Maynard exposed Salinger, but after she had made an industry of exposing herself. We make disclosures about ourselves and do not imagine anyone having ethical grounds to object to our doing so. Fun, popular social media, like Facebook and Twitter, make personal disclosures easy and nearly irresistible. Is there an ethics problem with self-disclosure? Is there any reason to be reserved, private, secret, or contained offline?

Television programs are one semi-authentic personally revealing reality show after another. The World Wide Web is a site of exhibitionism and voyeurism. Videos of everything are posted on the Web—childbirth, breast cancer surgery, professional events, and social events, like your granddad's seventieth birthday. Youtube is an amazing resource; but, some of its content are videos posted by people who think every forgettable moment of fun should be filmed, uploaded, and shared.

My teenagers have iPhones that keep them connected to the world and accountable to family and friends. They expect me always to have my smart phone close at hand, turned on, and fully charged. They expect me to answer their text messages immediately—"But I texted you, Mom" and "Why didn't you answer my text?!" They are baffled and disappointed if I do not go along. Today, a mom who does not text and video chat is worse than a mom who does not cook. So, I oblige.

But it is not just teenagers who have embraced the ethos of revelation. Earlier this year, I was visiting a museum with my brother. He is fifty years old and a lawyer. While we were in the museum, he took a minute to update his status on Facebook. He let hundreds of "friends" and

handful of folks" out of the more than 30 anonymous authors they sued and the case is over. Terms of the deal were not disclosed.

Id. The plaintiffs were identified in this news account as Heide Iravani and Brittan Heller. *Id.*

acquaintances know where he was and what he was doing. Far from home, he used the popular social networking application, Foursquare, to figure out if anyone he knew might be in the museum too. If you think, “Well, of course he did,” then you have embraced and normalized the ethos I am problematizing.

In the age of revelation many of us make disclosures about other people and feel ethically fine about it. In the age of revelation, there is an emerging bias towards “nothing-is-sacred” disclosure, toward knowing, and toward finding out. The WikiLeaks diplomatic cable disclosure was illustrative. WikiLeaks took the concept of “government watchdog” to a whole new level.

A case involving nursing students who posted images of themselves on Facebook raises an interesting set of questions about whether voluntary self-disclosures offend personal or professional ethics.²² Doyle Byrnes was a nursing student at Johnson County Community College. In 2010, she was expelled from nursing school for what college administrators viewed as inappropriate conduct on Facebook. Byrnes apologized for her conduct but felt expulsion was not called for. So, she sued to get back into school. The Kansas federal district court judge that heard her case sided with her. On January 19, 2011, Judge Eric Melgren issued a preliminary injunction ordering not only that Byrnes be reinstated, but also that she be allowed to make up missed assignments and exams.²³

What had Byrnes done to get herself expelled in the first place? On November 10, 2010, she participated in a clinical course on obstetrics and gynecology at Olathe Medical Center in Olathe, Kansas. As part of the course she examined fresh placenta from recently delivered pregnancies. Byrnes and three other nursing students (witnesses Chrystie North, Jamie Vande Brake, and Danielle Thompson) wanted to photograph themselves examining the placenta to post on Facebook. They obtained permission from the course supervisor, Defendant Amber Delphia, to photograph themselves examining a placenta specimen derived from a recent birth. Permission was granted on the condition that no identifying marks be present in the photograph.

It was not until after class that Delphia asked the students what they intended to do with the photographs. One of the women responded that they were going to post them on Facebook, to which they said Delphia replied, “Oh, you girls.” When it came to the attention of the college that

22. *Byrnes v. Johnson Cnty Comm. Coll.*, Civ. Action No. 10-2690-EFM-DJW, 2011 WL 166715 (Dist. Kan. Jan. 19, 2011).

23. *Id.* at *5.

photographs of the nursing students with placenta were posted on Facebook, the girls were expelled.

The judge enjoined Byrnes' expulsion for several reasons. First, he noted that the conduct in question may have been inappropriate or offensive to the nursing college, but it did not violate any clear policy or disciplinary rule. Second, since photographs are meant to be shared, granting permission to photograph was in effect granting permission to share—face-to-face, on Facebook, or anywhere presumably. Moreover, by only saying, "Oh, you girls," as was alleged, Delphia missed an opportunity to object on school policy, legal, or ethical grounds to posting images with placenta and instead gave the students the impression that it would be alright to post.

The judge did not buy the arguments that someone might be able to figure out the identity of the patient, from whom the placenta was donated, from information about the day and time of the picture. This is not a case of likely re-identification. So, the ethical failing is not so much a breach of patient confidentiality or invasion of patient privacy, but rather, it is a lack of professional dignity and respect for patients that is of concern.

We are curious, inquisitive, and accountable. It is perhaps because I have children about the same age as those involved in the Rutgers tragedy that I can so easily understand Dharun Ravi's point of view. At the time, Ravi did not think that he was doing anything seriously wrong when he activated a webcam to spy on his roommate Clementi. After all, it was Ravi's dorm room, too; webcams exist and everyone knows it; the camera only revealed what was true; he was really "making out" with another dude; and it is his own fault if he gets pranked.

Clearly, there has been a shift in ethos, invisible to youth who have known no other way to live and discernable to anyone who was already an adult in the 1980s. A shift in ethos is not necessarily a problem for ethics. But let us consider whether this one is a problem for ethics. One can readily comprehend the ethical concerns raised by WikiLeaks and cyber-bullying. However, the privacy-related ethical concerns raised by voluntary self-disclosure are not as readily comprehended. I believe there are reasons to think that you may be doing something unethical when you are just revealing facts about yourself to others. But I have to go back in time 200 years, or even 2000 years, to explain them.

V. WHY KEEP YOUR MOUTH SHUT

Consider the entry in John Adams' diary dated Monday, August 20, 1770.²⁴ Adams was a patriot of the American Revolution and an eventual United States President. In Adams' view, privacies of concealment, secrecy, and reserve are both moral virtues and moral duties. Worldly wisdom dictates that we protect ourselves from "damage, danger, and confusion" by generally keeping "our sentiments, actions, desires, and resolutions" to ourselves. Revelations to enemies and indiscreet friends alike risk "loss, disgrace, or mortification." On occasion, though, virtue and duty run in the other direction: "the cause of religion, of government, of liberty, the interest of the present age and of posterity, render it a necessary duty for a man to make known his sentiments and intentions boldly and publicly."²⁵

Adams' take is modern. Privacy aligns, not with raw preference, but with prudent self-interest. The good of privacy is contingent. Sometimes we ought to go public when we might prefer to hide; sometimes we ought to hide when we might prefer to go public. The important thing is that privacy, like information sharing, has a place in free society. Our moral interests include freedom from judgment, freedom to don masks, freedom to build and maintain reputations, and freedom to and from intimacy.²⁶ What must we hide? Adams' diary points to a general answer: hide the things where disclosure would lead to danger, disgrace, and dishonor.

But a distinctly different rationale for self-concealment is suggested by the book of Matthew in the New Testament of the Christian Bible. We should hide the things where disclosure leads to approval and admiration. The righteousness of pious acts such as giving to the poor, praying, and fasting is undermined by intentionally seeking public notice. Through modesty and reserve we are taking God alone into confidence. Thus:

[Concerning Almsgiving]

So whenever you give alms, do not sound a trumpet before you, as the hypocrites do But when you give alms, do not let your left hand know what your right hand is doing, so that your alms may be done in secret; and your Father who sees in secret will reward you.²⁷

24. See ANITA L. ALLEN, UNPOPULAR PRIVACY: WHAT MUST WE HIDE? 195 (2011) (discussing Adams' diary entry).

25. Diary Entry by John Adams (Aug. 20, 1770), in JOHN ADAMS DIARY, PAPER BOOK NO. 15 Vol. 3 (1961), available at <http://www.masshist.org/digitaladams/aea/cfm/doc.cfm?id=D15>.

26. Anita L. Allen, *Driven into Society: Philosophies of Surveillance Take to the Streets of New York*, 1 AMSTERDAM L.F. 4 (2009), available at <http://ojs.uvu.vu.nl/alf/article/view/92/166>.

27. *Matthew* 6:2–12 (New Revised Standard).

[Concerning Prayer]

[A]nd whenever you pray, do not be like the hypocrites; for they love to stand and pray . . . at the street corners, so that they may be seen by others. . . they have received their reward. But whenever you pray, go into your room and shut the door and pray to your Father who is in secret; and your Father who sees in secret will reward you.²⁸

[Concerning Fasting]

And when you fast, do not look dismal, like the hypocrites But when you fast, anoint your head and wash your face, that your fasting may be seen not by men but by your Father who is in secret; and your Father who sees in secret will reward you.²⁹

There is a ready secular rendering of the message in this passage. Keeping your goodness to yourself makes you really good. Virtue is its own reward. Do not be a show off. Ancient and early American texts offer a way of thinking about privacy that the buzz of continuous networking threatens to drown out. Status updating on Facebook and Twitter risks offending the ethics of Adams and the ethics of Matthew. The status update such as “I am giving a lecture in Paris” reads like a brag; and it is also an “all clear” message to house thieves and rivals in romance.

VI. PRIVACY LAW

Does anyone care about all data giveaways and data collection that have come to characterize daily life? Is there anything to be done about it? I believe there are moral duties of privacy—duties to ourselves and duties to others. I believe there are also moral rights of privacy.

The right to privacy means it is wrong to do what Rutgers freshman Ravi did to his roommate Clementi. The moral right to privacy may mean that Maynard should not have published Salinger’s letters to her during his lifetime. As it happens, the law sided with Maynard, but not with Ravi.

Americans have a legal right to privacy. It is enshrined in the United States Constitution, our common law, and in acts of Congress. For the right to privacy, all Americans owe a debt of gratitude to United States Supreme Court Justice Louis D. Brandeis, who was a key architect of the American right to privacy.

In law school at Harvard, Justice Brandeis formed a friendship with classmate Samuel D. Warren. Together they founded a successful law partnership. They remained close even after Warren—a wealthy, upper

28. *Matthew* 6:1–6 (New Revised Standard).

29. *Matthew* 6:16–23 (New Revised Standard).

crust Bostonian, married to a snobby anti-semitic senator's daughter—was called away from the bar to take over his family's business. Warren was annoyed by all the attention the popular tabloid press paid to his extravagant life. So he convinced the brilliant Justice Brandeis to write an article, to be published under both of their names, calling for the creation of a new legal right against so-called "yellow journalism." Their article, simply titled, "The Right to Privacy," was published in the Harvard Law Review in the winter of 1890.³⁰

The right to privacy that Warren and Justice Brandeis conceived would deter and redress publication in newspapers of gossip and photographs that "invaded the sacred precincts of private and domestic life" and thereby injured "inviolable personality." A rhetorical tour de force, the article inspired the bar and the judiciary. Today, you may very well be entitled to a lawsuit to recover for your hurt feelings and lost dignity if, in a highly offensive manner, someone intrudes into your seclusion, publishes embarrassing private facts, places you in a false light, or uses your name or photo without your consent. In this way, Ravi clearly violated Clementi's common law privacy rights to have his intimate sex life kept secret.

Justice Brandeis was appointed to the U.S. Supreme Court in 1916 and remained there until 1939. During his tenure, Justice Brandeis did for constitutional law what "attorney" Brandeis had done for personal injury law. As a Supreme Court Justice, he laid the groundwork for a rich, express jurisprudence of privacy, starting with his famous dissent in a Fourth Amendment wiretapping case. In *Olmstead v. United States*,³¹ Justice Brandeis described the right to be let alone as "the most comprehensive of rights and the right most valued by civilized men." Today, the right to privacy is well understood as a constitutional value in interpretations of the First, Third, Fourth, Fifth, and Fourteenth Amendments.

The right to privacy is also recognized by federal statutes, for example: the Privacy Act of 1974,³² the Family Education and Right to Privacy Act,³³ and the Electronic Communications Privacy Protection Act,³⁴ which protects phone calls, email, and some web traffic. The Children's Online Privacy Protection Act is a remarkable statute because it

30. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

31. *Olmstead v. United States*, 277 U.S. 438 (1928).

32. Privacy Act of 1974, 5 U.S.C. § 552a (2010).

33. Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (2010).

34. Electronic Communications Privacy Protection Act of 1986, 18 U.S.C. §§ 2510–2522 (2002).

actually limits the ability of one class of Americans, children under thirteen, to engage in acts of voluntary self-disclosure.³⁵ Website operators are not permitted to collect or retain childrens' personal data.

VII. PRIVACY ETHICS

The law can only do so much. An ethic of privacy is needed to complement (dare I say, counteract?) the ethos of revelation. Such an ethic would include the general rule that “felt immorality does not automatically warrant denying someone informational privacy.”

Consider the facts of a recent lawsuit, *Yath v. Fairview Clinic*.³⁶ Candace Yath brought the suit against a medical facility and members of her family. A member of Yath's husband's extended family happened to work at a clinic where she was tested for sexually transmitted diseases, and saw Yath at the clinic. The curious relative accessed Yath's electronic medical record and then told another family member, resulting in someone setting up an insulting MySpace page. The offensive page depicted Yath as a dirty adulteress: “Rotten Candy.” Was this a bald exercise of free speech? Yes. Was this a bald invasion of privacy and breach of medical confidentiality? Yes, too.

In the era of revelation, we need an ethic that includes a general rule against needlessly sacrificing privacy in the name of protecting speech, and, by the way, property. A striking example of the latter is the webcam scandal that rocked the Philadelphia, Pennsylvania suburb of Lower Merion in 2009. On November 11, 2009, Lindy Matsko, an Assistant Principal at Harriton High School (“HHS”), approached fifteen-year-old Blake Robbins, then a sophomore, and informed him that school administrators believed that he was “engaged in improper behavior in his home.”³⁷ Matsko cited as evidence an image taken from the webcam of Robbins' school-issued MacIntosh laptop computer.³⁸ Matsko believed the images captured implicated Robbins in illegal drug usage.³⁹ Robbins, however, claimed at one television interview that the images showed him

35. Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6506 (1998).

36. *Yath v. Fairview Clinics*, 767 N.W.2d 34, 38 (Minn. Ct. App. 2009).

37. Class Action Complaint at 6, *Robbins v. Lower Merion Sch. Dist.*, No. 10-cv-00665-JD (E.D. Pa. Feb. 16, 2010) [hereinafter Robbins Complaint].

38. Ballard Spahr LLP, *Report of Independent Investigation Regarding the Monitoring of Student Laptop Computers by the Lower Merion School District* (May 3, 2010), http://lmsd.org/documents/news/100503_ballard_spahr_report.pdf.

39. Vince Lattanzio, *WebcamGate Teen: “I Hope They're Not Watching Me,”* NBCPHILADELPHIA.COM, <http://www.nbcphiladelphia.com/news/tech/WebcamGate-Teen-I-Hope-Theyre-Not-Watching-Me-84826357.html> (last visited Feb. 22, 2010) [hereinafter NBC Philadelphia, Blake Robbins Interview].

consuming Mike & Ike candy, which school administrators only mistook for drugs.⁴⁰ Prior to this incident, neither Robbins' parents nor any other high school parent or student in the Lower Merion School District were aware of the School District's ability to capture screenshots and webcam images from the student's school-issued laptops using so-called "Theft Track" software. But the school could capture webcam shots "of anyone or anything appearing in front of the camera at the time of activation" taken from "any location in which the [school-issued] computer was kept," including the student's home.⁴¹

In a statement to a newspaper after Robbins filed a lawsuit claiming privacy intrusions prohibited by state and federal law, a school district official, Connie DiMedio, confirmed that the School District did not disclose the Theft Track remote activation feature to teachers or students "for obvious reasons" since "[i]t involved computer security, and that is all it was being used for."⁴² On October 11, 2010, the Lower Merion School Board voted unanimously to settle Robbins' and another invasion of privacy lawsuit that resulted from its webcam spying for a total of \$610,000. The school agreed never again to use tracking software on student-issued laptops without the consent of students and their parents.⁴³

How can a society enthralled by technology-aided revelatory communication give privacy its ethical due? The question is imperative as social media and social networking continue to take flight, as cloud computing becomes the norm for storing our documents and mementos, and as advances in genomics and neuroimaging create volumes of biomedical data which potentially reveal us to ourselves and others as never before.

To ask the questions I am raising is not to deny that there is value in freedom of speech, sociality, and community. I have noted in one of my papers⁴⁴ that "[t]he 17th century British philosopher John Locke began

40. Jeff Schreiber, *Two Mike & Ikes and One Motion*, AMERICASRIGHTS.COM, <http://americasright.com/?p=3237> (last visited April 5, 2010); see also NBC Philadelphia, Blake Robbins Interview, *supra* note 39.

41. Robbins Complaint, *supra* note 37, at 6, 7.

42. Dan Hardy & Bonnie Clark, *Student Claims School Spied on Him Via Computer Webcam*, PHILA. INQUIRER, Feb. 19, 2010, at A01.

43. John P. Martin, "Lower Merion District's Laptop Saga Ends with \$610,000 Settlement," PHILA. INQUIRER, (Oct. 12, 2010), available at http://www.philly.com/philly/news/0101012_Lower_Merion_district_s_laptop_saga_ends_with_610_000_settlement.html; Settlement Order filed October 15, 2010 at 1–2, Robbins. v. Lower Merion School District, No. 10-cv-00665-JD (E.D. Pa. Feb. 16, 2010).

44. Allen, *supra* note 26, at 35.

Chapter VII of the *Second Treatise on Government*⁴⁵ with an intriguing notion of human solitude. We are not meant to live alone.” To the contrary,

“[G]od having made man such a creature, that in his own judgment, it was not good for him to be alone, put him under strong obligations of necessity, convenience, and inclination, to drive him into society, as well as fitted him with understanding and language to continue and enjoy it.”⁴⁶

Locke did not go so far though as to expressly endorse a social contract, which leaves us “utterly exposed, transparent, [and] accountable to the individuals and institutions of which civil society is constituted.”⁴⁷ Indeed,

the first U.S. state court to recogni[z]e a common law right to privacy (the Georgia Supreme Court, in *Pavesich v.[.] New England Life Insurance Company* in 1905)⁴⁸ appealed to a Lockean notion of the social contract and the laws of nature, arguing that freedom to choose seclusion from the watchful eye of society is a natural right we enter the social contract to secure. If we are to be watched and made public, it must be by our free choice that we are watched and made public.⁴⁹

The eighteenth-century French philosopher Jean Jacques Rousseau’s fabled account of the emergence of civil society from a state of nature emphasized the primacy of aloneness and privacy. According to Rousseau, the original human inclination was to dwell mostly alone. In part one of the *Discourse on the Origin of Inequality*, Rousseau describes natural man and woman in a “natural state as . . . solitary, unselfconscious animal[s], [each] ‘a free being, whose heart is at ease and whose body is in health.’”⁵⁰ The crowding of the earth led to neighborhoods of hut dwellers. “Eventually: ‘in consequence of seeing each other often, they could not do without seeing each other constantly.’”⁵¹ The community obliterated solitude and in its place developed “[i]ntimacy, language, culture, and morality.”⁵² The lack of solitude spawned the need for privacy. The community lifestyle created the inner need for sanctuary, secrecy, and control. But the quest for privacy—for reputation, for repose from continual

45. JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* (1690), available at <http://www.constitution.org/jl/2ndtr07.htm>.

46. *Id.* at § 77.

47. Allen, *supra* note 26, at 35.

48. *Pavesich v. New England Life Ins. Co.*, 69 L.R.A. 101 (Ga. 1905).

49. Allen, *supra* note 26, at 35.

50. *Id.* at 36.

51. *Id.*

52. *Id.*

judgment, and esteem—can get out of hand when coupled with a desire for accumulating property or power over others. As the primitive civilization Rousseau imagined matured, infected with *amour-propre* it “became the interest of men to appear what they really were not.” To conceal secret jealousy, ambition, and competition, humankind put on “the mask of benevolence.”⁵³

Privacy can be a “Machivellian,” even antisocial, asset-enabling immorality, “manipulation, seduction, assassination, and coup.” But it does not have to be. It can be a bit of sanctuary from judgment and for repose, as Rousseau suggests. Privacy can be of a piece with Adamsonian, Aristotelian, and Christian virtue: prudence, modesty, humility, and reserve.

VIII. INDIFFERENCE TO PRIVACY

Without a doubt, in the era of revelation, some of us are indifferent to our own privacy. We may be unwisely indifferent to our own privacy because we are young, or because we are busy, or because we are unfamiliar with the risks of data collection, sharing, and storage that come with the mysterious technology we enjoy. In March 2011, the European Union announced that it would seek measures to require social networking sites to take down and destroy pages. In the era of revelation, we are beginning to see that we can be harmed by the habit of self-disclosure. There must be a right to forget and be forgotten.

There are things we must hide. We must hide what is necessary to preserve our common dignity and separate virtues.⁵⁴ We must hide what is necessary to keep ourselves safe from harm. We must hide what our roles and responsibilities and professions dictate that we hide as matters of efficacy, beneficence, or contract; and we must hide, notwithstanding all of technology’s attractions, what good relationships and reputations—now and in our distant and uncertain futures—renders it prudent to hide. Telling us exactly what and why we hide—this is the work of a comprehensive ethic of privacy in an era of revelation.⁵⁵

53. *Id.*

54. See Anita L. Allen, *The Duty to Protect One’s Own Privacy*, 65 ALA. L. REV. (forthcoming 2013).

55. See generally Anita L. Allen, UNPOPULAR PRIVACY, WHAT MUST WE HIDE (2011) (discussing what and why individuals hide in the context of privacy).