THE END OF PRIVACY:
9/11 AND THE ASCENDANCY OF THE SURVEILLANCE STATE

Richard M. Abrams

Let me put my cards on the table: I think Osama bin Laden won the war. Yes, the U.S. military assassinated bin Laden in May 2011—a little less than a decade after the "9/11" attacks on the Twin Towers in Manhattan and the Pentagon in the nation's capital. But bin Laden and al-Qaeda succeeded on that September day in transforming America into a radically different nation than before, putting it on a self-destructive path from which it seems unlikely to diverge in the foreseeable future.

The airline hijackings and suicide attacks on September 11, 2001, not only led to the deaths of over 3,000 people but left millions of Americans in shock. When in shock, generally the best course is to take things slowly in order to avoid counterproductive overreaction. But there were too many political and media opportunities at stake for that to happen: "9/11 changed everything" became a popular mantra endlessly promoted by politicians with partisan agendas. And the media, which thrive on drama, made it a daily preface to commonplace reportage. Repeat something often enough, it takes on the sound of truth.

It was a bipartisan phenomenon. Democrats feared appearing weak or indifferent to the hideous assault on U.S territory. Politicians in both parties vied with each other for leadership in the response, underwriting a broad environment of fear. George W. Bush's handlers declared him to be "a wartime president," claiming for him extraordinary powers immune even from judicial review, ostensibly in defense of "national security."

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Bush claimed to be "commander in chief" not merely of the military but of the American people, giving a fillip to an already growing trend toward the militarization of American society. No one of authority in government and few in the mainstream media challenged him. The way was clear for him to launch a catastrophically wrong-headed ground and air invasion of Iraq, a non-participant in the 9/11 attacks, which resulted in the deaths of many more thousands of Americans than died on 9/11 plus hundreds of thousands of Iraqis—all without any lasting foreign policy gains. But the way was also cleared for the ascendancy of the Surveillance State.

Alongside war in Iraq, the Bush Administration unleashed another series of misbegotten "national security" measures—headlined by the so-called Patriot Act (2001)—eviscerating constitutional protections of personal rights as well as property rights. Retreating before opportunistic politicians and a fearful populace, the U.S. Supreme Court ratified nearly all of the authoritarian measures rushed through Congress during the first months following 9/11. When the Supreme Court later began making gestures to restrain the government's authoritarian drift, Congress in 2008 reacted by reinforcing the government's virtually unfettered powers of surveillance, incarceration, and even assassination.

Post-9/11 America is now a country whose government can and does assassinate its own citizens as well as other people in other people's countries. Post-9/11 America permits the President, on his own self-proclaimed authority fortified by information secretly offered by the country's security agencies, to designate any individual as an "illegal enemy combatant" who could claim no rights whatever to defend him/herself. The government arrests and detains American citizens as well as foreigners whom our armed forces and various secret services (*i.e.*, NSA, CIA, FBI)—plus private agencies contracted for the work by those services—find, capture, or target with rocket-armed drones anywhere in the world; and hold indefinitely those captured without charges, without trial, and without access to lawyers, relatives, friends, or the media, often under loathsome conditions.

Hundreds of such prisoners have languished, some for more than a decade, in the extra-territorial military base at Guantánamo Bay, Cuba, a disgrace condemned even by friendly nations abroad and by President Barack Obama who nevertheless failed to do much about it. We know that many of the "detainees" have been tortured, more than one has died from maltreatment during captivity, and despite the plain violation of international law, despite almost certain violation of American law, and despite some expressions of disapproval by a few U.S. officials, no one has been punished for such transgressions, and probably no one ever will be. Our political leaders—at least those filling seats in Congress and state legislatures—have yielded and contributed to fear-mongering bordering on hysteria by refusing to permit the transfer of Guantánamo prisoners to facilities in the United States on the absurd grounds that this would pose a threat to "homeland security." On top of it all, the Trump administration weighed in with an executive order on January 31, 2018, revoking an Obama-era order that had

called for winding down of the Guantánamo prison camp, and declaiming "detention operations at the U.S. Naval Station Guantánamo Bay… legal, safe, humane, and conducted consistent with United States and international law."

Meanwhile, great numbers of innocent Americans have become targets of virtually unlimited daily surveillance. With or without a court-issued warrant, government agencies and private corporations or individual snoops contracted for the work can mine and store any personal electronic communications, including telephone calls whether completed or not, often with the cooperation of major media corporations (*e.g.*, ATT, Verizon). Moreover, any American now can be advised by means of a "National Security Letter" (NSL) that s/he is under investigation for some transgression related to what some agency unilaterally defines as "terrorism" and at the same time be warned that telling anyone about the letter could constitute a criminal act.

Theoretically, the Foreign Intelligence Surveillance Court is supposed to control such clandestine activity. The FISC was created in 1978 in order to check CIA and NSA excesses. But Congress amended the Foreign Intelligence Surveillance Act late in 2001 and again in 2008 to give the agencies greater freedom. It consists of judges appointed by Chief Justice Roberts of the U.S. Supreme Court, who seems to have found few except Republicans qualified for the FISC. We know now from unauthorized leaks that the FISC has been mostly passive, rejecting almost none of the thousands of requests for intrusive surveillance. There is no avenue for appealing its decisions. Congress ostensibly provides another layer of oversight, but membership of its intelligence committees is limited to loyalists carefully selected by congressional leaders in collaboration with the government's intelligence agencies.

For the past decade, concerned scholars and investigative journalists had begun to sound the alarm about the rise of an unprecedentedly powerful Surveillance State; then in July 2013 Edward Snowden—computer whiz and former contract employee of a company working for the once super-secret National Security Agency—revealed to the world that the U.S. government had intercepted and stored millions of telephone and online communications. Snowden's revelations led to a series of stories in *The Guardian* and *The Washington Post* that exposed in considerable detail secret internet surveillance programs such as Prism, XKeyscore, Stormbrew, Muscular, and Tempora (a British program), as well as the interception of U.S. and foreign communications including those of the top leaders of our closest allies.

Responses by U.S. government officials have not been reassuring. In the wake of the Snowden revelations Lt. General James Clapper, the director of national intelligence, lied under oath in statements before Congress when asked a straightforward question on whether intelligence agencies have kept "data of any kind" on millions of Americans. Later claiming both "forgetfulness" and the excuse that he had offered "the least untruthful reply" he could in a public forum, Clapper managed to avoid any punishment. It is sadly ironic that daring individuals who broke the law in order to reveal how their government has repeatedly broken the law are the ones who face dire prosecution.

For both legal and technological reasons, there is now virtually no means of personal communication—through the internet, phone calls, texts, e-mails, and to some extent even word-of-mouth—that remain securely beyond the ears and eyes of government; or for that matter, the eyes and ears of any private investigator or business corporation. There is also every reason to believe that even our hard-copy private mail will be opened or otherwise viewed by government agents or "out-sourced" private contractors without our knowledge and also without a court issued warrant. Although the number of abuses causing personal tragedies for innocent people so far is apparently low, we know that they have happened, and anyone with any knowledge of history surely knows that when the law opens the door to abuse, tragedies will pile up sooner or later.

In a sense, 9/11 has indeed changed everything. For all practical purposes, the country's response to 9/11 has gutted the U.S. Constitution's Fourth Amendment concerning unreasonable search, and the Fifth Amendment concerning the protection of a person's liberty and property by means of judicial due process. It is no longer hyperbolic to refer to the current state of law and personal privacy in America as something out of George Orwell's *1984* or Franz Kafka's *The Trial*.

Brief History of Privacy Rights

"To be more safe," wrote Alexander Hamilton in Federalist Paper 18, "[people] at length become willing to run the risk of being less free." Does this insight explain our weak response to the post-9/11 ascendancy of the Surveillance State? Not entirely. A brief history lesson is in order here: privacy has never been a strong American suit. The idea that privacy should be included in constitutional provisions protecting individual liberty emerged very late in U.S. history. There was one lonely case decided by the U.S. Supreme Court in 1886 that referred to personal privacy as a "sacred right" of free people. In that case, the Court declared:

> The very essence of constitutional liberty and security is affected by all invasions ... [by] the government and its employees of the sanctity of a man's home and of the privacies of life. It is not the breaking of his doors, and rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property.

In concluding his majority opinion in *Boyd v. United States* Justice Bradley asserted: "Any compulsory discovery [by the state]… is contrary to the principles of a free government. It is abhorrent to the instincts … of an American." Maybe so, but those "instincts" did not gain much attention either in Justice Bradley's time, or for more than half a century thereafter.

Government and its employees were never the sole violators. In 1890, Louis Brandeis and his then law partner Samuel Warren published what was to become a "classic" article on the right to privacy. The article targeted the new journalistic practices of reporting on people's private lives. The authors complained: "To satisfy a prurient taste, the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip which can only be procured by intrusions upon the domestic circle."

What inspired the article actually had nothing to do with sexual gossip. The two attorneys were incensed merely by an item in the *Saturday Evening Gazette* of Boston that described a breakfast party that Warren had put on for his daughter's wedding. There was nothing scandalous or inaccurate about the article; what bothered Warren and Brandeis was the simple fact that a totally private party by a non-public figure had become game for strangers and gossipers. The right to privacy, they insisted, "implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all." The authors worried more generally that new technology like photography, coupled with scandal-mongering journalism, was making it more and more possible for individuals to suffer outrageous intrusions upon their privacy, in both business and domestic affairs; and they predicted that if the law did not change to prevent such intrusions, soon it would be possible, as they put it, for all that "is whispered in the closet [to] be proclaimed from the housetops."

But no court or legislature took up the challenge to define a protected private space for American citizens, even after Brandeis himself ascended to the Supreme Court. The *Boyd* case had arisen at a time when Americans, and the law, tended to define "liberty" in terms of property rights; the Court's decision in the case forbade invasion of a man's financial records in search of incriminating evidence, because it violated the man's "indefeasible right of personal security, personal liberty, and private property." There remained little acknowledgment of a right to privacy in the sense of personal space that is protected from public or private invasion.

And so it remained. In 1928, Associate Justice Brandeis wrote a stinging dissent against a majority opinion that validated the unwarranted use of wiretapping of a man's private telephone to gain a criminal conviction. The court majority pretended—in the notorious *Olmstead* case—that modern technology had changed nothing, and that there was no Fourth Amendment violation against unreasonable search since the police had not physically invaded the accused's home. Brandeis sought in vain to invoke the Founding Fathers who, in his words, counseled "as against the Government, the right to be let alone… [is] the most comprehensive of rights and the right most valued by civilized men." He warned further that "the progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. *Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home."* [Italics added]

Over time a number of cases came before the courts in which the judges referred to "a right to privacy" but usually found that right narrowly limited by other priorities. In 1949, for example, the U.S. Supreme Court declined to overturn a criminal conviction of a man for violating a state's law against abortion, even though the critical evidence had been illegally obtained and was excludable under federal rules, but not excludable under the rules of many states. Justice Frankfurter, arguing for the Court majority, affirmed that "the security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society." Nevertheless, deferring to an increasingly anachronistic theory of "Federalism," Justice Frankfurter declined to "second guess" the state's judgment that excluding such evidence from a trial was not the best way to discipline a rogue police force.

The most significant change regarding privacy awaited the Court's growing sensitivity to police abuse of African-Americans and other minorities. In the 1961 *Mapp v. Ohio* case, the Court belatedly reversed its 1949 deference to state law, striking a blow for Fourth Amendment rights against unreasonable search. Later in the decade, the Court explicitly overturned *Olmstead*. "The Fourth Amendment," said the Court, "protects people, not places." That government agents had not physically invaded the accused's private space did not satisfy new thinking about the Constitution's requirements against unreasonable search.

But that was just a blip in Fourth Amendment history. Very soon afterward, a series of decisions exposed private citizens to various warrantless intrusions by government as well as to public revelations in the private sector of their behavior, their casual comments, and even their thoughts. Most telling was the development of the new doctrine that intrusion can be legitimate when an individual does not have a reasonable expectation that his or her privacy might be secure against governmental or private monitoring. In 1979, in a crucial case, the Supreme Court upheld the right of police, in order to obtain a conviction, to scour telephone records without a warrant, declaring that the defendants in the case had "no legitimate expectation of privacy" over their call data. That view had already extended to media reportage of "anything newsworthy"—which was anything about an individual that the public might find interesting. Given the technical ability of hackers to break into any "secure" account, public or private, it is clear that no individual can ever have a reasonable expectation of securing his/her privacy.

On a different front, after 1965 the Court began slowly to treat matters having to do with Americans' private choices regarding life style—including parenthood and sexual behavior—as concerns beyond the reach of the state. One might have presumed that sexual matters, for example, would be *ipso facto* private. Not so for many Americans, whose puritanical insecurities regarding sex inclined them to use the state to pry, spy, and deny.

The case that is usually cited as establishing privacy at a higher level among the Constitution's protections is *Griswold v. Conn*ecticut (1965). In *Griswold*, the Court

extended the privacy consideration to include choices by private persons that conflicted with a community's moral sensibilities embodied in law. In that case, the Court's 7-2 majority ruled that no state could lawfully prevent a married person from buying and using contraceptives. Laws against contraceptives were (are) based on a religious view that sexual intercourse is sinful even within marriage unless with the intention of producing a child. The Court decided that such state action intruded upon private behavior within the scope of personal liberty protected by the First, Fourth, and Fifth Amendments. Although the Constitution does not mention "privacy" specifically, the Court majority found that privacy lay within the "penumbra" of the protections guaranteeing personal liberty. A *New York Times* editorial at the time observed: "The Supreme Court's 7-2 decision invalidating Connecticut's birth-control law is a milestone in the judiciary's march toward enlarged guardianship of the nation's freedoms. It establishes a new 'right to privacy.'"

Griswold was followed by a decision in 1972—this time extending to unmarried persons the right to buy and use contraceptives, even though part of the argument in *Griswold* was that the state cannot interfere with privacy sanctified in marriage: "The right of privacy," said Justice William Brennan, "[includes] the decision whether to bear or beget a child." And that right, the Court majority decided, was a personal one independent of marriage. The phrasing Brennan chose, though seemingly innocuous at the time the opinion was issued, clearly aimed at the next big issue to come before the Court; namely, the right of women to choose to beget, that is, to produce a child, or to have a legal abortion.

Roe v. Wade (1973) picked up on the word "beget." The majority opinion in the case, written by Justice Harry Blackmun and for which he would long be remembered, was a complex and troubling one. Blackmun based the opinion on the newly developing doctrine of the Right to Privacy, arguing that the right to choose an abortion was a private matter between a woman and her physician. Some liberals have argued that the "equal protection" clause of the Constitution would have more effectively protected a woman's right to terminate a pregnancy, within certain limits, since women, not men, bear children, nurse them, and nearly always bear the responsibility for caring for them, while no law imposes similar burdens on men. But the fact remains that *Roe v. Wade* extended the scope of a constitutional right to privacy.

On the same principle, the Court reversed an earlier decision that had upheld state laws against consensual sodomy (*Lawrence v. Texas*, 2003). "The fact a State's governing majority has traditionally viewed a particular practice as immoral," declared the Court's majority, "is not a sufficient reason for upholding a law prohibiting the practice." What's more, the decision asserted, private consensual behavior by adults is "a form of 'liberty' protected by due process." That may represent the high-water mark of Americans' "right to be left alone;" although a recent federal district court judge's opinion that would validate polygamy may take the principle another step further.

Social & Technological Changes Inimical to Privacy

Remarkably, just as the nation's judiciary was enlarging the "right to be left alone," Americans generally moved more or less voluntarily—in some cases, one might say, with giddy abandon—to surrender their personal privacy. For profit and exhibitionist thrills, celebrities as well as sad sacks in quest of their "fifteen minutes of fame" expose to prurient public inspection the most intimate details of their lives, those of their families, their bodies and their souls. First video and more recently internet-based platforms have provided ready and inexpensive means for such exhibitionism. Indeed, technological developments have made it possible for both government and commercial interests to intrude upon the privacy of that minority of innocent Americans for whom privacy still retains some value. At the same time, the courts, reversing direction, began progressively to enlarge the prerogatives of both the state and private employers to intrude upon individuals' privacy.

A key decision in 1967 seemingly bent the twig in the growth of privacy law. In his sole appearance as an attorney before the U.S. Supreme Court—between his defeat for the presidency in 1960 and his election in 1968—Richard Nixon represented the Hill family in a suit for invasion of privacy against Time, Inc. *Life Magazine*, a Time publication, had published a story that identified the Hills as the family a Broadway play, "The Desperate Hours," was actually about. The photo-story claimed that the play was a true and accurate account of the imprisonment of the family in their own home by a couple of escaped convicts. Actually, the play fictionalized the story in a few important ways, including depictions of violence and threats of sexual molestation directed at the captives' teenage daughter. The event, massively covered by the press at the time, had occurred several years before the play appeared, and in the meantime the Hills had remained adamant in refusing any publicity or providing any details of their ordeal, including whether their daughter had in fact been threatened or molested. They claimed that Time, Inc., caused them severe mental anguish by representing the play as accurate and by identifying them by name, going so far as to film scenes from inside the Hills' one-time home. Nixon, and the Hills, lost their case.

It is a remarkable paradox, requiring close attention to historical context, that some of the Court's fiercest defenders of personal liberty—namely, William Douglas, Hugo Black, and William Brennan—made up part of the 5-4 majority ruling against the Hills. Initially, the justices leaned toward vindicating the Hills. But the justices had only recently established an important precedent for freedom of the press in a libel case filed by Alabama law enforcement officers against the *New York Times*. It might well have been possible for the Court to distinguish between charges of libel by government against a national newspaper and complaints by a private person not involving libel against a national magazine. But in 1967, supersensitive to efforts by racist officials in the South to silence the press by bringing repeated libel suits against their critics,

Justices Black, Douglas, and Brennan found in the Hill case that freedom of the press trumped claims of privacy rights.

Elsewhere in the private sector, some of the assaults upon privacy came as an unintended consequence of the campaigns against "sexual harassment." The Civil Rights Act of 1964 outlawed injurious discrimination on the basis of sex. In pursuit of criteria by which to measure violations of the Act's provisions, a series of court decisions invited litigation that shredded the privacy not only of alleged violators but of third parties who might have had a relationship with the accused. By defining "harassment" and "hostile working environment" as forms of "discrimination," and by making employers liable for violations by employees, the decisions provoked employers to set up intrusive mechanisms for monitoring and constricting their employees' personal behavior on the job and in some cases off the job as well. University administrations as well as business corporations won the right to peek into the computer files as well as into the folder files of all employees, and to use what they found—even off-hand memos expressing momentary complaints—in order to discipline or to discharge. Essentially, as the law developed, employees could expect no privacy of any kind while on the job, with the possible exception of when they visited a toilet.

Even a company's written pledge not to monitor e-mail is no guarantee of privacy. In a 1990s case involving the Pillsbury Company, the company broke such a promise without warning. A Pennsylvania district court upheld the company's right to so monitor its employees' behavior, ruling that Pillsbury's "interest in preventing inappropriate and unprofessional comments... over its e-mail system outweighs any privacy interest the employee may have in those comments." As the legal scholar Jeffrey Rosen remarked in wonderment, "That just can't be right."

In general, modern technology, especially computers, made privacy, for those who valued it, almost entirely elusive. By the end of the twentieth century, hundreds of thousands of medical records of private physicians and hospitals wound up in the files of insurance companies. Firms such as the Medical Information Bureau (MIB) built data banks of such information for sale to insurance companies, government agencies, and others for whom medical histories can be of importance for reducing risks and promoting sales. In exchange for computer billing and other record-keeping and electronic services, thousands of physicians gave the (now defunct) Physicians Computer Network, once an affiliate of IBM, access to the personal medical records of their patients. Such companies claim to have coded their files to protect the privacy of patients. Nevertheless, increasing numbers of patients with medical histories, dire diagnoses (even those that prove to be mistaken), and genetic profiles indicating long-term health risks found it difficult or impossible to buy medical, life, and disability insurance, and faced employment difficulties as well.

Inevitably, computer hackers found ways to break into the records of medical, financial, and government data banks, exposing credit cards, bank accounts, and all

kinds of personal data to theft and abuse. There were no safe havens for any purposes related to privacy. As one *New York Times* reporter summed it up, following revelation of a massive break-in to a major bank's records:

> If a person has held a job, held a lease, obtained a driver's license, carried a credit card, been fingerprinted, taken a drug test, gone to court, or simply received mail—odds are that those and many other of his or her recordable details are now stored in one or more consumer data bases and available for sale. Beyond fraud artists, the buyers might be landlords, prospective employers, or other customers of Choice-Point, Lexis-Nexis and other big data brokers that offer one-stop shopping for clients seeking background data on tens of millions of individuals throughout the country.

Simply using the internet subjects the user to gross intrusions into his or her private life. Private business firms and the government can follow "cookies" to track internet traffic, and search backward to discover a user's name, address, bank card and social security numbers, and virtually everything else they might seek to know, including credit and purchasing histories, income, and employment records. Similar technology permits access to any and all litigation or police records whether or not an arrest or indictment was involved. For a fee, private "detective" agencies offer their computer skills for such access. Since certain computer software makes it possible to retrieve virtually anything ever entered onto a hard disc, attempts to delete content short of physically destroying the disc is futile.

Although some states forbade recording of telephone conversations without the permission of both parties, legislators in 37 states and the federal government permit corporations to record conversations secretly. The courts, moreover, have found that a citizen protected against secret recordings in his or her home state loses that protection when conversing with someone in a state that privileges them. Privacy holds no trump cards.

Corporate actions to reassure their "valued customers" about their "Privacy Policy" seem little short of rank cynicism. For example, Macy's—a division of Federated Department Stores that holds several giant retail chains—offers (in minute print) the following in its legally required notification of its "privacy" policy: "We collect personally identifiable information about you," such as "Information obtained online, including from 'cookies' (small pieces of data stored by your internet browser on your computer) or other technology that may be used... to help us track your website usage." Moreover, "We... share all of the information described" with all subsidiaries, affiliates, service providers, joint marketing companies, as well as to financial services, such as those offering insurance and investment products, and we may provide information to nonfinancial services affiliates... offering consumer products." This, after the same

notice led off by stating how much the company valued its customers' privacy! All credit card, banking, and insurance companies issue nearly identical oxymoronic statements. Any individual who does not like it will find no financial agency to do business with.

Slip away for a weekend to a secret holiday retreat, or for a romantic rendezvous? Computer chips placed in private as well as rental cars, along with the emplacement of Global Positioning Systems to provide driving instructions, can record everything a driver does, from speed to routes and destinations chosen. Nor could anyone expect privacy to be respected when simply walking in the street or trying on clothes in department store changing rooms. In response to (and contributing to) public concerns over street crime, officials in many cities began installing surveillance cameras in the streets. Storekeepers did the same to prevent shoplifting. Touted as ways of deterring crime and catching criminals, the cameras also caught innocent individuals in sometimes embarrassing postures, gestures, or acts. Although authorities and proprietors promised to hold the surveillance tapes exclusively for official use, inevitably they found their way to hawkers of salacious videos. Where there is money to be made, entrepreneurs will find a way, whether through back alleys or otherwise. For a few dollars, voyeurs can purchase video recordings of or online access to lovers grappling in cars, couples engaged in arguments, women struggling with winds to keep skirts down or undressing in changing rooms, victims of traffic accidents, even muggings. Targets of such peeping have no redress.

In short, the erosion of legally protected privacy was well underway before the twentieth century ended, and now is all but complete. Justice Louis Brandeis' worst nightmares came to be fully realized by the 1990s. That was when some final barriers to the government's ability to breach an individual's defense against unwanted intrusions came crashing down.

Enter Monica Lewinsky. Using his unlimited resources and giving free rein to his partisan and ideological zeal, Independent Counsel Kenneth Starr went on an unconstrained fishing expedition among the personal belongings of a woman neither suspected nor accused of any crime or misdemeanor. Starr's object was to find incriminating material on then President of the United States, Bill Clinton. In the process, he successfully established precedents for trampling on the privacy rights of several third parties. His intrusions included subpoenaing Monica Lewinsky's diaries as well as bookstore records to discover Lewinsky's reading habits. He had Lewinsky's computer seized, from which he gleaned drafts of letters that she herself had never sent and had sought to erase. He made use of illegally obtained tape recordings, and released them to the public. He also presented in his written report private matters concerning several other innocent persons who had been merely associated with Lewinsky. All these things he presented to Congress, including numerous other intimate matters that had been revealed in the once-assumed-to-be secret proceedings before a grand jury. Equally heedless of privacy rights but eager to tarnish Clinton's reputation for political

purposes, an extraordinarily partisan Congress promptly put all the material given to it by Starr online.

Why were people not outraged by such a disregard for centuries of Anglo-American law and tradition regarding the sanctity of a person's integrity—to say nothing of the fulsome exposure of grand jury testimony? One reason, of course, lay in the enthusiasm with which the media lapped up the opportunity to spread salacious tales. But equally important, one has to note the general demise of Americans' *sense of privacy*.

In July 1980 *Time Magazine* reported: "The American's home may still be his castle, but, given the drift of things, it is easy to imagine that a peering, leering crowd is gathering at the window.... On talk shows like Phil Donahue's, ordinary people regularly recount stories of emotional disturbance, marital discord, incest... vasectomies... hysterectomies." That was in 1980. *Time*'s editors had scarcely seen anything yet! They hadn't seen the likes of Maury Povich, Jennie Jones, Ricki Lake, or Rosie O'Donnell, whose midday televised circuses featured troubled people airing family fights and infidelities, or revealing "secrets" usually of a sexual nature that they had kept from husbands, wives, children, boyfriends, girlfriends, mothers and fathers—all of it before live, roaring, participating audiences. Nor were TV audiences as yet privileged to peep in on simulated small claims court proceedings where real family and neighborhood spats came to be aired and exposed to the often sarcastic barbs of an impatient, condescending judge. These were the modern equivalents of public hangings, bear baiting, and cock fights that Americans had long banned as gestures toward a higher level of civil society.

One writer remarked: "In the 1980s, too much of America lost the fear of shame that used to police behavior... [I]t became fashionable to respect people for putting up with shame provided they were paid well to do so." The death of shame in America may be epitomized by the publication of a pseudo-novel in 2003 by Stephen Glass, a journalist who was fired by *The New Republic* for inventing numerous stories, including a fraudulent smear of a public figure that claimed the man to be a lecher and wife-beater. Plainly unembarrassed by his exposure as a serial fraud and liar, Glass found little difficulty getting a publisher *and a movie contract* for his autobiographical "novel," *The Fabulist*, whose main character, "Stephen Glass," is a serial fraud and liar.

By the turn of the century, so-called reality programming on television had made fashionable public humiliation and embarrassment for money. Although it got its name only in 2000, it had its origins in the 1970s. That was when the Loud family (aptly named) permitted a television crew to enter their home to record more or less continuously for many months everything the entire family did and said at home, including their arguments, their fights, as well as their moments of intimate discussions, confessions, and desires. In 1983, several of the family were re-interviewed on TV, some of whom complained about "the horrid psychic damage" they suffered from the TV exposure—which evidently did not deter them from returning to the medium for another go at "horrid psychic damage."

Tell-all autobiographies by movie stars, or has-been movie stars, routinely include graphic details about their sexual escapades with other celebrities, often dozens of them. In 1995, the ex-wife of West Virginia's Governor Gaston Caperton wrote a novel based on her personal life, detailing her sexual relations with her husband. In 1997, a best-selling novelist published a memoir relating her long incestuous affair with her own father. Two decades later, these kinds of confessions hardly shock a generation raised on reality shows and social media.

So, now, what are the odds that such a society as ours will rise up in great indignation over how its government has been employing modern technological abilities to monitor virtually everything we do all of the time? Does anyone really care about the sweeping assault on privacy? Perhaps the answer to that question lies in the dawning concerns among billionaires and mega-corporations that their own interests at some point may be threatened.

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